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IN THE SUPREME COURT OF THE STATE OF IDAHO

DRUG TESTING COMPLIANCE GROUP, LLC,

Plaintiff-Respondent,

vs.

DOT COMPLIANCE SERVICE, JEFF MINERT, DAVID MINERT and RYAN BUNNELL,

Defendant-Appellants.

Case No. 43458-2015

RECEIVED
IDAHO SUPREME COURT
COURT OF APPEALS

RESPONDENT'S BRIEF

Appeal from the District Court of the
Fourth Judicial District for Ada County

Honorable Richard D. Greenwood, District Judge, Presiding

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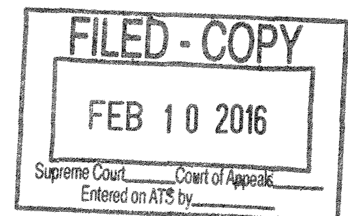

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C. STATEMENT OF THE CASE

Respondent Drug Testing Compliant Group, LLC ("DTC Group") is a business that directly competed with DOT Compliance Service ("DOT") for the sale of products and services to certain drivers registered with the U.S. Department of Transportation. Mr. David Crossett is the President of DTC Group. DTC Group opened for business July 8, 2013. Reporter's Transcript ("Tr."), 159; 9.

DTC Group was sued by DOT on July 11, 2013 ("Canyon County Litigation") for allegedly interfering with certain non-complete agreements of former employees of DOT.

A Settlement Agreement was entered in the Canyon County Litigation on July 11, 2014. Defendant's Exhibit 500.

The claims brought by DTC Group in this case are based on acts that took place following the execution of the referenced Settlement Agreement. Some of the evidence that was introduced and admitted during the trial of the case pertained to actions taken by the Dave and Jeff Minert[1] prior to the execution of the Settlement Agreement. This evidence established that Dave and Jeff Minert entered that Settlement Agreement in bad faith, and thereafter engaged in a course of conduct similar to the course of conduct taken prior to July 11, 2014, and in violation of the Settlement Agreement. They didn't miss a beat. Appellants also continued to instruct and/or condone DOT staff interfering with DTC Group's customer contracts and disparaging

[1] Jeff Minert is the son of David ("Dave") Minert.

DTC Group, far more than merely "informing" the customer they had a three day right to cancel as alleged in Appellant's Brief.

The Appellants' Brief presents this appeal as involving simple but material "legal errors" allegedly made by the District Court. As set forth below, the Jury was presented with a markedly different picture than that which Appellants are attempting to paint for this Court, and the District Court made no error warranting reversal of the Jury verdicts.

This appeal addresses two claims brought by DTC Group in the underlying litigation: tortious interference with a contract and breach of the covenant of good faith and fair dealing related to the referenced Settlement Agreement.

With respect to the tortious interference with contracts claim, evidence was presented at trial that DOT staff were instructed by the Minerts and/or Bunnell, to steal contracted sales from DTC Group customers, to do anything it took to put DTC Group out of business, and in many instances DOT staff (including Bunnell) made defamatory remarks to DTC Group contracted customers so that the customers would cancel with DTC Group, which again was encouraged and/or condoned by the Minerts and Bunnell.

Underlying the claim for breach of the covenant of good faith and fair dealing, Appellants Dave Minert and Jeff Minert breached the non-disparagement clause in the Settlement Agreement. Substantial evidence was presented to the Jury from which they could easily infer that David and Jeff Minert were deceptive, dishonest and calculating, and in fact took several measures in bad faith entering into and after signing the Settlement Agreement to put

DTC Group in harm's way, and out of business, most of which evidence was tellingly, again, not referenced anywhere in Appellants' opening Brief.

Contrary to the representations made by Appellants, this case was not always about the Idaho Telephone Solicitation Act ("the Act"). DOT knew customers contracted with DTC Group and intentionally interfered with those contracts *before they even knew* the Act existed. Only after this case was pending for months did DOT add the affirmative defense "excusing" their admitted interference with DTC Group contracts. R. 000135.

D. ISSUES PRESENTED ON APPEAL BY APPELLANTS

1. Whether the District Court erred in denying the motion for directed verdict on DTC Group's claim for tortious interference with a contract.

2. Whether the District Court erred in denying the Appellants' JNOV motion on DTC Group's claim for breach of the implied covenant of good faith and fair dealing.

3. Whether the District Court erred by failing to instruct the jury on the Idaho Telephone Solicitation Act and by misstating the law on tortious interference with contracts.

4. Whether the District Court erred in excluding the FBI recording.

5. Whether the District Court erred in awarding DTC Group attorney fees and denying Appellants' motion for attorney fees.

E. ADDITIONAL ISSUES PRESENTED ON APPEAL

Whether Respondent is entitled to an award of attorney fees on appeal.

F. ARGUMENT

Based on the facts and arguments set forth below, the Jury verdicts in this case should be affirmed and DTC Group should be awarded its attorney fees and costs incurred in defending this appeal.

1. APPELLANTS' ISSUE 1: Whether the District Court erred in denying the motion for directed verdict on DTC Group's claim for tortious interference with a contract.

In their motion for directed verdict presented at the close of DTC Group's case at trial, Appellants argued that because the Act gives the customer a three day right to cancel, that even if DOT had wrongfully interfered with DTC Group's contracts with its customers, because the customer terminates the contract but doesn't breach the contract, there can be no claim of intentional interference with a contract. Tr., 416; 1 – 16.[2]

The District Court did not err in denying Appellant's motion for a directed verdict on DTC Group's claim for tortious interference with a contract.

---

[2] Note that the District Court had previously held, in ruling on Appellants' Motion for Summary Judgment, that the Act was not a defense to DTC Group's intentional interference with contract claims. In continuing to pursue the Act as a defense at trial, Appellants asserted that they were making a distinct argument than that which was made on summary judgment. Specifically, counsel represented that in the Motion for Summary Judgment, Appellants asserted that the contracts were void and one could not interfere with a void contract. At trial, Appellants asserted that because customer did not breach its contract with DTC Group (because it was terminable at-will by the customer for three days) that DTC Group could not support an intentional interference with contract claim. Tr., 417; 3 – 19. In sum, Appellants assert that if there is no breach there can be no interference.

(a) Standard of Review

"When reviewing a decision to grant or deny a motion for a directed verdict, this Court applies the same standard the trial court applied when originally ruling on the motion. *Weinstein v. Prudential Prop. & Cas. Ins. Co.*, 149 Idaho 299, 315, 233 P.3d 1221, 1237 (2010) (citation omitted). This Court exercises free review and does not defer to the findings of the trial court. *Todd v. Sullivan Constr. LLC*, 146 Idaho 118, 124, 191 P.3d 196, 202 (2008).

In conducting this review, [this Court] determines whether there was sufficient evidence to justify submitting the claim to the jury, viewing as true all adverse evidence and drawing every legitimate inference in favor of the party opposing the motion for a directed verdict.' *Id.*

"[W]here a non-moving party produces sufficient evidence from which reasonable minds could find in its favor, a motion for directed verdict should be denied." *Lawton v. City of Pocatello*, 126 Idaho 454, 458, 886 P.2d 330, 334 (1994) (citation omitted). This Court exercises free review over questions of law. *Armstrong v. Farmers Ins. Co. of Idaho*, 147 Idaho 67, 69, 205 P.3d 1203, 1205 (2009)." *Enriquez v. Idaho Power*, 152 Idaho 562, 565, 272 P.3d 534, 537 (2012).

Given the evidence that had been presented to the District Court during DTC Group's case, and given the District Court's familiarity with the applicable law, the District Court properly denied the Appellants' Motion for a Directed Verdict, as there was sufficient evidence from which the Jury could find Appellant's liable for tortious interference with DTC Group's contracts.

(b) Notwithstanding a Customer's three-day right to cancel, a party to a contract can maintain an interference claim against a third party even if the contract subject of the claim is terminable at-will.

DOT argues that because DTC Group wasn't registered with the Idaho Attorney General ("AG") under the Act, DTC Group is essentially stripped of its right to bring a cause of action against any third party interfering with its contracts, and, that Appellants' interference is excused because the contracts in which DTC Group had with its customers were not valid. Appellants raised a similar argument in its pre-trial Motion for Summary Judgment, which the District Court denied.

(1) The Act

The Idaho Telephone Solicitation Act, I.C. § 48-1001 et seq., requires telephone solicitors to register with the AG. *See* I.C. § 48-1004. Idaho Code § 48-1007(2) provides in pertinent part that "[i]f a telephone solicitor violates any applicable provision of this chapter, any contract of sale or purchase is null and void and unenforceable."

The Act also provides that the solicitor must provide the customer three days in which to cancel their purchase. *See* I.C. § 48-1004.

(2) Appellants' Pre-Trial Motion for Summary Judgment

In their Motion for Summary Judgment filed in December of 2014, Appellants argued that because "DTC is in violation of the Idaho Telephone Solicitation Act, it has no ability to enter into any binding contracts, and any purported purchase contract it claims to have are "null

and void." If it is unable to enter into or enforce contracts, it suffers no losses, as a matter of law…" R. 0001000.

In ruling on Appellants' Motion for Summary Judgment, the District Court found:

> … I don't think you need to get to the distinction between void, voidable, enforceable. The statute used the language 'enforceable and void' which indicates to the reader, clearly, that in an action to enforce it is unenforceable. So the language of the statute itself dictates that there is something there to enforce or not enforce.

Tr., 53:7 – 53:14.

The District Court went on to hold:

> I don't see the Telephone Solicitation Act as being directed toward competitors. It gives right to someone who is solicited as a customer … But I don't believe one can go as far as to say that it gives anybody off the street the right to come in and [declare] void and existing contract … it's the customer's ability to declare it void and not enforceable … I don't believe that the defendants in this case have standing to raise that issue, certainly not in the context of this case.

Tr., 68;23 – 64; 20.

Finally, in ruling on DOT Compliance's Motion for Summary Judgment, the District Court held:

> So what we have is someone says, 'I will perform this service,' someone who says, 'I want that service,' 'Here is the price.' I pay the price, and now I have a transaction. I have a payment for a promised service. That's a contract.
>
> The person who is doing the paying, absolutely, apparently under the statute, would have the right to cancel that contract and withdraw. No question. That is their right. That doesn't mean some outside party has the right to come in and attempt to get that contract cancelled …

Tr., 71; 24 – 72; 11.

(3) Applicable Case Law Regarding Terminable At-Will Contracts

The case law that pertains to this case, as recognized by the District Court, is set forth in a long line of Idaho Supreme Court cases. For example, in *Barlow v. International Harvester Co.*, 95 Idaho 881, 894, 522 P.2d 1102, 1115 (1974), the Court held that whether some aspect of a contract:

> Rendered the contract unenforceable in an action brought by one of the parties to the contract is irrelevant to the question of whether the plaintiffs established a prima facie case of tort of interference with a contract. Protection is extended against unjustifiable interference with contracts even though the contract is voidable or unenforceable in an adversary proceeding.

Id., citing *Mitchell v. Aldrich,* 163 A.2d 833, 836 (Vt. 1960); W.L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 129, p. 932 (4th ed. 1971).

The Court in *Barlow* went on to quote the Kansas case of *Jackson v. O'Neill*, 317 P. 440, 443 (1957):

> The trouble with plaintiff's contention is that he was not a party to the contract. Such a contention might have been important if one of the parties to the contract had refused to perform. The weakness of plaintiff's argument is that the contract was not subject to collateral attack by him or any other third party. The contract was valid for all purposes except as a basis for an action to enforce it.

Id. at 894, 522 P.2d at 1115.

DOT's claim that DTC Group cannot assert a claim for interference with contract because a customer cannot breach their contract with DTC Group is without merit.[3] The subject contracts could have and likely would have been performed but for the wrongful interference of DOT, which interference caused DTC Group substantial damages.

Moreover, the first requirement of the tort of interference with a contract is the existence of a contract that would entitle a party to that contract to recover damages for its breach. *Idaho First Nat'l Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266, 286, 824 P.2d 841, 861 (1991).

In this case, if DTC Group did not perform, the customer with whom it contracted could recover damages for DTC Group's breach. The elements of contract are satisfied when the DTC Group customer agrees to accept the offer to purchase and pays for the products and services sold by DTC Group. *See* IDJI 6.01.11.1 (competent parties, lawful purpose, valid consideration, mutual agreement to essential terms). There is not dispute that the customer has the right to cancel its contract with DTC Group within three days of entering into it, but that does not speak to the issue or support Appellants' claim that the Act excuses their intentional interference with that contract.

---

[3] *See e.g. Id.*, footnote 3 the issue of voidability because of noncompliance may still be the subject matter of an action for interference with contract. W.L. PROSSER, HANDBOOK OF LAW OF TORTS § 129, p. 932 (4th ed. 1971. Moreover, the contract was fully performed on one side when [one of the parties], received consideration for his promise to perform.

(c) Appellants' <u>intentional and often defamatory interference</u> with DTC's contracts cannot be condoned by this Court or excused under a *consumer* protection statute.

Appellants attempt to convince this Court that the <u>only</u> statement DOT agents *ever* made to DTC Group contracted customers pertained to their three day right to cancel, without more. *See* Appellant's brief, pg. 17. This representation is not supported by the record in this case.

DOT Compliance did not dispute that it was its policy to interfere with (or "take") contracts DTC Group, even if those contracts were performed and paid for.

Mr. Crossett testified that DTC Group staff have been told by customers cancelling their contracts that they were told DTC Group was going out of business soon, that DTC Group didn't know what they were doing, that if they (the customer) signed up with DTC Group they would fail their safety audit, that DTC Group was being investigated by the FBI, that DTC Group was made up of former DOT employees who "stole" ideas from DOT, that DTC Group isn't certified to do business in certain states, that DTC Group is a "scam", and so on. Tr., 236; 6 – 18. Mr. Crossett testified that these customers were clearly contacted by someone at DOT who gave them extremely negative information about DTC Group, which caused them to become very angry and call back to DTC Group and cancel. Tr., 237; 6 – 17; see also Tr., 164; 18 – 23; Tr., 165; 8 – 19.

Far from simply "notifying" the customer of their right to cancel (as DOT would have this Court believe), these DOT sales people say anything to take a contract from DTC Group.

Katie Smith, who at the time of trial had been an employee of DOT for over two years testified as follows:

> Q: And are you familiar with the policies and procedures of DOT Compliance as it pertains to sales calls?
>
> A: Yes.
>
> Q: If a customer is contacted by – if a customer has contracted with DTC Group and [DOT] across them, it's the policy of DOT Compliance that you can try to get that sale from the customer, correct.
>
> A: Yes.
>
> Q: And it's also the policy of DOT Compliance that you can instruct the customer to go to the bank and get their charges back?
>
> A: Yes.

Tr., 401; 20 – 402; 11.

Ms. Smith went on to testify:

> Q: Okay. But just to reiterate, you – notwithstanding the fact that they have paid DTC Group –
>
> A. No.
>
> Q. -- you will try get the sale or send them to their bank and get the sale.
>
> A. Correct.

Tr., 407;14 – 20.

With respect to the charge backs referenced in Ms. Smith's testimony, Mr. Crossett testified that about six months into operating the business that DTC Group started getting "charge backs," which is when a customer goes to their bank, alleges fraud or some type of

wrongdoing on the part of the seller. Tr., 167; 8 – 17. Based on the several conversations he had with customers that had charged back fees paid to DTC Group, Mr. Crossett testified it was his opinion that the customers were being sent directly to the bank as a mechanism to cancel their contract with DTC Group, by DOT. Tr. 172; 6-8. This occurred prior to and after the execution of the Settlement Agreement, as was confirmed by Ms. Smith of DOT in her referenced testimony.

DOT employees have gone so far as to place DTC Group contracted customers on a phone call to DTC Group, and "assist" them with cancelling their contract with DTC Group, often confronting the DTC Group employee when they attempted to talk with the customer. Tr., 243; 1 – 20. For example, Exhibit 1 Track 4 was played during the examination of Ryan Bunnell (DOT's sales manager). It is a phone recording of Ryan Bunnell who has a customer ("Robert") who contracted with DTC Group on the line. Mr. Bunnell is speaking with a DTC employee (who is also named Ryan but designated on the script as DTC):

DTC — Hello. My name is Ryan and what I'm going to do is I'm going to make sure that I've got your number here and I've got this 208 number that I'm getting a phone call from, and I'll make sure that one of those two phone numbers will get called from my President. His name is David Crossett. And I want to make sure that you are taken care of as a client. Okay? And I want to make sure that you get the most information filled in completely, okay?

Ryan — Actually, he's asking you to cancel. He's asking you to cancel the charge that you made on his credit card. What does it matter?

DTC — The only person that I can deal with - - that deals with that in our company is the President, which is why I'm going to give that number, okay?

Ryan — No. If you deal with the fact that he gave you his credit card information and now he wants to cancel it ... Hey, Robert, all you got to do is call your

credit card company, Robert, and have them cancel.

DTC	All I can tell you…
Ryan	There's absolutely nothing that DTC Group can do.

Exhibit 1, Track 4, Phone call between Ryan (of DOT) and DTC Group

Mr. Bunnell's credibility also had to have been questioned by the Jury. Mr. Bunnell, who is again the sales manager at DOT and trained under Dave and Jeff Minert, monitors and supervises all sales staff at DOT. Tr., 586; 6 – 9.[4] Mr. Bunnell testified on direct examination, in response to the question "what is your personal policy about making disparaging comments about DTC Group or any competitor," Mr. Bunnell responded "I think it is despicable. I don't say anything about competitors, whether it be DTC or Foley or whoever." Tr., 582; 17 – 22.

DTC Group played the following track involving Bunnell:

Ryan	Hello.
Allen	Good morning.
Ryan	Good morning. How are you?
Allen	I'm fine.
Ryan	Good, good. Hey, my name is Ryan with Dot Compliance Service. I just had a few federal compliance questions to go over with you about the DOT application.
Allen	Sure. Go ahead.

…

[4] Jeff Minert is the President of DOT and Dave Minert handles the operations of DOT. Tr., 614; 24 – 615;16.

Allen	I was just saying, there was just a lady from - - her name was Cherie - - and she called from…
Ryan	DTC Group?
Allen	Yeah, regarding there's an interview that's been scheduled for tomorrow at 9:00 a.m. for…
Ryan	So did you pay them?
Allen	Yes.
Ryan	Okay. If I were you, you should cancel with them immediately because the biggest problem with them is they just raised their prices like 40% on everything for absolutely no reason, and they're an **inexperienced company**. The interview that they schedule to do that driver qualification file, **they don't do the driver qualification file very well**. We actually do the driver qualification files - - we're the ones that kind of started the interview. We've been in business for over 20 years. They've been I business for like a year.
Allen	Okay, so I guess now I'm - - I have to admit Ryan, I'm confused. So who is…
Ryan	DTC Group is a company.
Allen	Okay, I understand.
Ryan	And my company is DOT Compliance Service, and what we do is all the same kind of - - we actually do a lot more than them. **They just do drug testing and somewhat driver files here and there.** It just depends on who they're talking to, but most of the time they help people with driver files. **They're not very good at 'em. Haven't been doing them for very long**. They just raised their prices by 40%. Quality, for the same kind of service, but better from us. It's even cheaper. If you pay, I'm guessing what? A hundred and eighty something?
Allen	Yeah, that's right.
Ryan	Yeah.
Allen	Okay, tell you what Ryan. It seems like I've got to do a little research here. Is there a good number to call you back at?
Ryan	Yeah.

Allen	What is your number?
Ryan	It's 866.
Allen	Okay.
Ryan	389.
Allen	Okay.
Ryan	9342.
Allen	Okay.
Ryan	Extension 116.
Allen	Alright. Give me a little bit. I've got to obviously do some research. I'm naïve, so give me a little bit and I'll give you a call back.
Ryan	Okay.
Allen	Alright?
Ryan	What I would do really quick is - - it's Jeff, right?
Allen	It's Allen, actually.
Ryan	Allen. I'm sorry. I thought I heard Jeff before. **Yeah, I would just call them up, tell them: "Hey I want to cancel really quick; I don't need your guys service."** Tell them: "I've already got it taken care of; I don't need you guys for this." And just cancel with them. **I would do that right away so that they'll give you your money back.**
Allen	Alright. Thanks Ryan.
Ryan	Alright. Sure. Bye.

Exhibit 1, Track 1, Phone call between Ryan (of DOT Compliance) and "Allen" a DTC Group contracted customer (emphasis added).

Apparently Mr. Bunnell's "policy" about making disparaging comments about DTC Group changed from the time he was recently making customer sales calls to the trial date. After

the two call recordings were played for Mr. Bunnell, he was asked how many times he had got on a call with DTC Group and a customer, to which he replied "I can only recall those two times", referring to the recordings that were played for the jury. Tr., 580; 12 – 16. Mr. Bunnell's testimony came across as plainly contrived.

These are the types of calls that persisted even after the Canyon County Litigation was "resolved" via the Settlement Agreement. Again, DTC Group was only provided three calls that correlated with its cancellations and chargebacks for a specified time period, which totaled approximately 600, and the call recordings provided were fairly "benign" compared to those calls described by Mr. Crossett during trial.

(d) Appellants only recently learned of the Act and should not be allowed to avoid liability for its blatant interference with DTC Group's contract based on its provisions.

Following entering into the Settlement Agreement in this case, on August 8, 2014 (10 days before DTC Group filed its Verified Complaint in this litigation), DOT Compliance took the position with the AG that the Act didn't apply to DOT or that it was exempt from the provisions of the Act. R. 000156; Tr., 558; 10 – 559; 5.

In briefing filed on Appellant's Motion for Summary Judgment, it was revealed that DOT had not registered with the AG under the Act, and resisted getting registered. DOT went so far as to submit an opinion letter from their trial attorney Ms. Shannahan, who asserted that "the business of DOT Compliance does not appear to be the type of business targeted by the Act.

DOT Compliance is not a typical telephone solicitor targeting Idaho residents. Even if the Company could be seen as a telephone solicitor, they appear to be exempt." *Id.*

In that same letter, counsel states, "[t]rucking companies always need these services within days. DOT Compliance therefore cannot give their customers a three-day right of cancellation as required of typical solicitors under the Act. DOT Compliance performs the services on the contract on the date of the purchase, which is crucial to the customer." R. 000157.[5] DOT went on to affirm that "[i]f DOT had to issue a three day right of cancellation, it would have to refund the cost of services *already performed*, making it impossible to serve the needs of their customers and stay in business." *Id.* (italics emphasis in original).

On August 26, 2014, only approximately two weeks after DOT (through counsel) submitted the letter to the AG claiming DOT wasn't covered by the Act or was exempt, and prior to getting a response from the AG on its claim of non-coverage or exemption, Dave Minert sent a letter to the AG "reporting" DTC Group. *See* Exhibit 30, which states in relevant part:

> I am writing to make you aware that a company located in Meridian, Idaho, is conducting a telemarketing service in violation of the Idaho Telephone Solicitation Act. The company involved is named Drug Testing Compliance Group (DTC) … they use high pressure sales techniques to get people to sign up with their service. Their prices are the highest in the industry and when a

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[5] This is consistent with the testimony offered by Mr. Crossett at trial: Many of the products and services provided to customers under contract with DTC Group were provided on the same day as payment was received, as [the customers] want all that is required of them by the Department of Transportation immediately in place so that they are in compliance with the applicable regulations. Tr., 172; 12 – 25.

> client realizes that and calls them back to cancel their sale, DTC salespeople tell them that they have a no cancellation policy…

Mr. Minert then asks the AG to follow up with DTC Group to verify his allegations and make sure it registers under the Act. Again, Mr. Minert wrote this letter to the AG at the same time he took the position that DOT is exempt from the Act. Tr., 565; 17 – 20. DTC Group has the same business model as DOT.

Mr. Minert's letter begs the question, if Appellants weren't aware of the Act prior to August of 2014, or believed they were exempt under the Act, what was Appellants' justification for intentionally interfering with DTC Group's contracts? Appellant did not reference the Act until they filed their Motion for Summary Judgment in December of 2014. R.000004.

The fact that Appellants didn't reveal to this Court that they (for a period of years) weren't aware of the Act and/or didn't believe the Act applied to DOT, or that they had reported DTC Group to the AG before they confirmed whether the Act applied (post Settlement Agreement), is consistent with Appellants' course of conduct.

2. APPELLANTS' ISSUE 2: Whether the District Court erred in denying the JNOV motion on DTC Group's claim for breach of the implied covenant of good faith and fair dealing.

(a) Standard of Review

On appeal, this Court applies the same standard as the trial court in ruling on a JNOV motion. *Pocatello Auto Color, Inc. v. Akzo Coatings, Inc.*, 127 Idaho 41, 45, 896 P.2d 949, 953 (1995). Where the evidence conflicts, the Court must construe the evidence in favor of the jury verdict. *Lanham v. Idaho Power Co.*, 130 Idaho 486, 495, 943 P.2d 912, 921 (1997).

"When a trial court decides a motion for a judgment notwithstanding the verdict, it cannot weigh the evidence or pass on the credibility of witnesses. It must simply determine whether reasonable minds could have reached the same conclusion as the jury when the evidence and all reasonable inferences that can be drawn therefrom are considered in the light most favorable to the nonmoving party." *Mosell Equities, LLC v. Berryhill & Company, Inc.*, 154 Idaho 269, 275, 297 P.3d 232, 238 (2013), citing *O'Shea v. High Mark Development, LLC*, 153 Idaho 119, 121, 280 P.3d 146, 148 (2012).

"The sufficiency of the evidence to support a verdict must be based on the jury instructions." *Id.*, citing *Bolognese v. Forte*, 153 Idaho 857, 867, n. 6, 292 P.3d 248, 258, n. 6 (2012).

The verdict of a jury can only be set aside on appeal for want of substantial evidence to support that particular verdict, and not because the verdict may seem inconsistent with another verdict. *Barlow* at 890, 522 P.2d at 1111.

(b) The District Court did not err when it denied Appellants' JNOV motion on DTC Group's claim for breach of the implied covenant of good faith and fair dealing.

Reasonable minds could have reached the same conclusion as the Jury in this case, that Appellants Dave and Jeff Minert breached the covenant of good faith and fair dealing regarding their failure to perform in good faith their obligations under the Settlement Agreement.

The covenant requires "that the parties perform in good faith the obligations imposed by their agreement," and a violation of the covenant occurs only when "either party ... violates,

nullifies or significantly impairs any benefit of the contract...." *Idaho First Natl. Bank v. Bliss Valley Foods*, 121 Idaho 266, 288, 824 P.2d 841, 863 (1991) (citations omitted).

The evidence presented at trial overwhelmingly established that the acts of Dave and Jeff Minert nullified and/or significantly impaired DTC Group's benefit under the Settlement Agreement.

(1) The jury could have reasonably concluded that Dave and Jeff Minert entered the Settlement Agreement in bad faith.

As a point of clarification, DTC Group did not claim that DOT's owners and managers Dave and Jeff Minert defamed DTC Group, or breached the Settlement Agreement with DTC Group, when they reported DTC Group to the Department of Justice on claims of criminal price fixing. Rather, the Minerts' course of conduct prior to and following the execution of the Settlement Agreement makes it clear that they entered the Settlement Agreement in bad faith, with no intention of ever complying with its terms after its execution.[6]

The Settlement Agreement in the Canyon County Litigation was prepared in June of 2014. Mr. Crossett of DTC Group would not sign it when it was originally presented to him

[6] For example, prior to entering into the Settlement Agreement, DOT took the deposition of Mr. Crossett of DTC Group. Tr., 160; 23. During that deposition DOT's counsel asked Mr. Crossett about how DTC Group started its business, categorized its employees and how certain employees were paid. Tr., 161; 18 – 21. Nobody at DTC Group knew this information. Tr., 162; 8 – 9. Mr. Crossett was later contacted by the Idaho Department of Labor with notice that he was going to be audited regarding how DTC Group categorized its employees based on an "anonymous" accusation. Tr., 162; 13 – 17. Appellants have a "record" of reporting DTC Group to various governmental agencies.

because he wasn't convinced that DOT's slanderous and interfering tactics would stop, as DTC Group sales staff were still receiving disparaging calls from customers who had been contacted by DOT. Tr., 176; 2 – 15. After receiving calls from customer's yelling at him and calling him names one Friday in June, Mr. Crossett called Dave Minert and said "this has got to stop" and Mr. Minert proposed a meeting for the following Monday. Tr., 178; 6 – 12.

During that meeting the parties, including Dave and Jeff Minert and Mr. Crossett agreed to "bury the hatchet." Tr., 179, 11 – 15; Tr., 436; 9 – 25 (Dave and Jeff Minert own and manage DOT). Mr. Crossett brought to the Minerts' attention the disparaging calls, they said they would look into it, and Mr. Crossett encouraged them to "just compete", to not get "dirty", to stop stealing contracted sales and that they could charge what they wanted, i.e. higher rates if they so choose. Tr., 183; 21 – 184; 2. Mr. Crossett believed what Dave and Jeff Minert told him about respecting each other's contracts and that they would address the ongoing disparagement, so following this meeting, Mr. Crossett proceeded to sign the Settlement Agreement. Tr., 183; 10 – 184; 15. [7]

Dave Minert disingenuously testified that he was "flabbergasted" by what Mr. Crossett had said at the meeting (i.e. let's leave each other alone if we learn there is a paid contract in place we leave it alone and we can charge whatever we choose to), to the point that he contacted

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[7] Section 4 of Settlement Agreement states: "The parties will not disparage each other in their communications with third parties relating to the character, reputation, profession, business practices, operations, services, facilities, present plan, or conduct of another party and shall not cause, encourage, or suggest disparaging statements to be made by a third party regarding a party." Tr., 308; 12 – 21.

his attorney who then contacted the Department of Justice, which agency then conducted a full-blown grand jury investigation of Mr. Crossett for criminal price fixing. Tr., 191; 1 – 3.

On July 10, 2014, *after* Minert initiated the Department of Justice investigation, one day *after* Dave and Jeff Minert signed the Settlement Agreement in the Canyon County case, and one day before they knew Mr. Crossett was going to and did sign the Settlement Agreement, the Minerts asked to, and did again meet with Mr. Crossett. Tr., 185; 22 – 186; 3.

Note, again, the Minert's reporting of Mr. Crossett to the Department of Justice is not the basis of DTC Group's defamation claim in this litigation. It is simply relevant to evaluate Dave and Jeff Minerts' continued actions.

(2) The Jury could have reasonably concluded that Dave and Jeff Minert wrongfully attempted to "implicate" Mr. Crossett for criminal price fixing.

The stated purpose of the July 10, 2014, meeting by Dave Minert was to "talk about what the relationship looks like, how we can compete going forward. Maybe we could just put some more detail around that." Tr., 186; 11 – 15. Dave Minert testified that the FBI asked that he set up meeting with Mr. Crossett so that he could "more fully explain his proposal." Tr., 485; 13 – 17.

At the meeting, Mr. Crossett testified that statements were made about pricing or "making" the market, and became very uncomfortable … it just got "weird" in Mr. Crossett's opinion. Tr., 186, 24 – 187; 14. The FBI had set up two monitoring devises in the Minerts' office for the meeting. Tr., 485; 22 – 23. Dave Minert testified in great detail – almost to the

point of embellishing - about what was discussed in the meeting, specifically about several statements made by Mr. Crossett. Tr., 486; 13 – 489; 16.

As noted above, the day following the FBI recorded meeting, Mr. Crossett signed the Settlement Agreement. Plaintiff's Exhibit 30.

Following the July 10, 2014 meeting, Mr. Crossett was contacted by both Jeff and Dave Minert. They had drafted a document that purportedly "memorialized" the parties' agreement and instructed Mr. Crossett to sign it. Tr., 489; 23 – 25. Dave Minert testified that the FBI had suggested they put something in writing, and that he has "a practice that I hate to just proceed with oral agreements. I told him that I would be more comfortable if we put this in writing." Tr., 490; 1-4. When asked why the FBI wanted something in writing, Dave Minert responded "it would be further evidence of his (referring to Mr. Crossett's) conspiracy." Tr., 490; 5 – 9.

Mr. Crossett refused to sign the writing drafted by Dave or Jeff Minert, as he testified that it contained terms that were "not at all" what they had discussed, including agreed to price ranges. Tr., 188; 2 – 190; 14. Dave Minert nor Jeff Minert offered testimony during the trial regarding the document purportedly containing terms they believed were agreed upon by they and Mr. Crossett.

Given the gravity of the testimony, and appreciating the credibility of the respective witnesses, which came through during their testimony, and taking everything they say Mr. Crossett said as true, it would reasonable for the Jury to infer that the Minerts were attempting to implicate Mr. Crossett and DTC Group in their actions subsequent to their reporting Mr. Crossett and DTC to the FBI (i.e. subsequent to their signing of the Settlement Agreement),

notwithstanding the Minerts' testimony that that they were at all times simply "cooperating" with the Department of Justice and/or FBI.

(3) The Jury could have reasonably concluded that Dave and Jeff Minert continued to instruct the DOT sales staff to defame DTC Group and/or take all DTC Group's contracted sales.

During and following the execution of the Settlement Agreement, cancellations and chargebacks at DTC Group increased substantially. Tr., 193; 2 – 194; 2. The derogatory calls that sales people at DTC Group became so bad that those sales people quite … they were called "nasty, dirty, horrible" names, and sales were lost. Tr., 15; 4 – 17. As set forth above, prior to signing the Settlement Agreement Mr. Crossett expressed his concerns to Dave and Jeff Minert that the DOT staff was disparaging DTC Group to its customers, and causing customers to cancel and chargeback DTC sales, and they assured Mr. Crossett they would address his concerns. They did not.

These "non-natural" cancellations continued to occur when contracted customers called back to DTC Group after DOT contacted them, gave them false information about DTC Group and encouraged them to call DTC Group back and cancel. Tr., 231; 24 – 232; 2. Prior to filing this litigation, cancellations constituted upwards of 20 percent of all DTC Group's sales, while natural cancellations range should range anywhere from 8 to 10 percent of total sales at the high end. Tr., 234; 11 – 233; 24.

Based on Mr. Crossett's review of business records, phone recordings and conversations with cancelling customers, he opined that upwards of half of DTC Group's total cancellations

were caused by DOT giving DTC Group's contracted customers negative information about DTC Group and telling them to cancel their contract with DTC Group or go to their bank and get their money back. Tr., 236; 6 – 238; 8.

As set forth above, testimony of DOT employees confirmed that even as of the date of trial it was DOT policy to take contracted sales away from DTC Group by having the contacted customers call back to DTC Group and terminate their contract, or go to their bank and obtain a chargeback. Again, these cancellations and chargebacks occurred during and following the drafting and execution of the Settlement Agreement, during the same time frame that Dave and Jeff Minert owned and operated DOT, and during the same time frame the Settlement Agreement was executed when they assured Mr. Crossett they would address his concerns.

Mr. Crossett believed he had no choice but to file this lawsuit, and that due to Dave and Jeff Minerts' obvious breach of the Settlement Agreement, it was the last option he had to attempting to save DTC Group. Tr., 197; 10 – 11.

(4) The Jury could have reasonably concluded that Dave and Jeff Minert wrongly withheld evidence that likely established their liability in this litigation.

Shortly after it initiated this litigation, DTC Group continually requested from DOT and its service provider 8x8, approximately 600 call recordings which correlated to DTC Groups cancelled sales and chargebacks during a specified time frame. DOT refused to produce the recordings claiming they contained proprietary information, moved to quash the subpoena to 8x8, and then after they learned that 8x8 erased to requested recordings, DOT took the position

that "they really wished that they had given [DTC Group] those calls because it was going to help their [DOT's] case." Tr., p. 251; 5 – 252; 15.

As mentioned above, DOT did produce approximately 20 calls during the course of the litigation, claiming confidentiality on the remaining calls. All but 3 of the 20 calls were voice mail messages and other non-requested recordings. The 3 calls that were "useful" evidenced defamation on the part of DOT. Tr. 197; 5 – 202; 19. One can only speculated as to what DTC Group would have come across if all of the requested calls had been produced by DOT.[8]

At the close of evidence at trial, DTC Group made a motion for a spoliation instruction. The District Court denied the motion, however, stated the following:

> I do believe - - and I will say for the record in case someone wants to look at it on appeal - - that I believe that the defendants in this case violated their duty of preservation as required by the rules of discovery and that one might even - - had the telephone recording system been maintained by defendants without backup, I would characterize it as reckless. And it's close to that here. They were on notice from very early in this case that those telephone calls were being requested and they were important to this case. And leaving telephone calls knowingly in the hands of a third party takes no responsibility for maintaining them or backing them up - - that's all the evidence that I have - - that they are recorded … customers of that particular company, at least according to the company, are made well aware that they don't do backups, that they don't preserve them. The information is left there at the risk of the customer, that is, the person they are recording for.
>
> And with that knowledge in this case, it's inexplicable to me that other than the hope that something fortuitous might happen, that

[8] Mr. Crossett testified: "All I know is we asked for [the call recordings] for almost a year and didn't get them and now they are gone and everyone is okay with us having them. That's what I know." Tr., 320; 17 – 20.

> the defendants did not download and preserve the telephone conversations in this case.

Tr., 702; 13 – 703; 17.

Counsel for DOT stated over and over during trial that DTC Group "has no evidence", it "has no calls" inferring that DTC Group could therefore not corroborate any claim against David or Jeff Minert.

Even in this appeal Appellants assert DTC Group "conceded" that it had "no phone recordings in which Dave Minert or Jeff Minert actually defamed DTC Group to a customer.[9] Appellants' Brief, p. 29. This is a very bold assertion given the fact that the requested call recordings were deliberately not produced by Appellants. This line of argument appeared to work against Appellants during trial.

During his cross-examination, Dave Minert was completely evasive and/or non-responsive in this testimony about why the requested calls were not produced. *See e.g.*, Tr., 570; 1 – 572;16.

(5) The Jury could have reasonably concluded that Dave and Jeff Minert acted in bad faith with respect to abiding by the Settlement Agreement.

The Jury of course made inferences with respect to the above stated facts and the Appellants' clearly disingenuous course of conduct. The Jury also evaluated the credibility of

[9] DTC Group never asserted that Dave or Jeff Minert themselves actually made customer calls.

the witnesses, including whether a witness was insidious in their testimony and/or course of conduct.

Jury Instruction No. 2 specifically states:

> ... evidence consists of the testimony of any witnesses, the exhibits offered and received, and any stipulated or admitted facts." "There is no magical formula by which one may evaluate testimony. You bring with you to this courtroom all of the experience and background of your lives. In your everyday affairs you determine for yourselves who you believe, what you believe, and how much weighty you attach to what you are told. The same considerations that you apply in your everyday dealings in making these decisions are the considerations which you should apply in your deliberations.

Appellants – after repeatedly stating "there is no evidence" - look past the fact that evidence may be either direct or circumstantial. Circumstantial evidence indirectly proves the fact, by proving one or more facts from which the fact at issue may be inferred. The law makes no distinction between direct and circumstantial evidence as to the degree of proof required; each is accepted as a reasonable method of proof and each is respected for such convincing force as it may carry. *See* IDJI 1.24.2.

Appellants admitted through nearly every witness that was asked about the subject, that it was DOT policy to get customers to cancel their contract with DTC Group and sign with them. Dave and Jeff Minert have both managed DOT Compliance, which included supervision of the sales staff.[10]

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[10] Colby Porter, a former employee of DOT, testified that he witnessed on several occasions, Dave Minert telling the sales staff to put DTC out of business, if there is any way to get a DTC

Evidence of the Appellants' course of conduct supports the Jury verdict that Appellants violated the covenant of good faith and fair dealing with respect to the Settlement Agreement, significantly impaired DTC Group's benefit under that contract, and that Dave and Jeff Minert had some involvement with DOT staff disparaging DTC Group.

Following Dave Minert's "report" that led to the Department of Justice investigation (which is not subject of DTC Group's breach claim), Minert also "reported" DTC Group to the AG before he knew whether the Act was applicable to their businesses and while he argued the Act did not apply to their businesses, claiming that DTC Group was not registered under the Act, used "high pressure sales tactics", and that the AG should investigate them.

As principals of and for DOT Compliance, Dave and Jeff Minert are liable for their own actions and the actions of their agents. *See* Jury Instruction No. 23. Those agents have repeatedly defamed DTC Group to their contracted customers.

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sale, get it, take it, just put them out of business. Tr., 366; 7 – 368; 19. Mr. Porter also testified that Dave Minert offered to pay him "enough money to hold [him] over for" two months if he didn't go to work for DTC. Tr., 377; 16 – 378; 6. When asked if he was instructed to deal with DTC Group in a factual or unbiased way, Mr. Porter's answer was "no." Tr., 391; 16 – 20. Tessa Cousins, another former employee of DOT received a handwritten note from Dave Minert in her final paycheck that stated she "should think twice before answering questions that would make [her] worthy to enter the LDS temple" to which she took offense. Tr., 398; 18 – 25. After Ms. Cousins went to work for DTC, she and other employee witnessed Dave Minert in the parking lot of DTC taking pictures of the DTC office, which frightened them and they locked the doors. Tr., 399; 1 – 20.

Put simply, the Jury found that DOT (through its employees), and Dave Minert and Jeff Minert breached the covenant of good faith and fair dealing, and they had substantial evidence on which they could base that finding.[11]

3. APPELLATE ISSUE 3: Whether the District Court erred by failing to instruct the jury on the Idaho Telephone Solicitation Act and by misstating the law on tortious interference with contracts.

The Jury Instructions pertaining to DTC's interference with contract claim correctly set forth Idaho law and the District Court did not err when it refused to instruct the Jury on the Act.

(a) Standard of Review

"The standard of review for issues concerning jury instructions is limited to a determination of whether the instructions, as a whole, fairly and adequately present the issues and state the law. When the instructions, taken as a whole, do not mislead or prejudice a party, an erroneous instruction does not constitute reversible error." *Silver Creek Computers, Inc. v. Petra, Inc.*, 136 Idaho 879, 882, 42 P.3d 672, 675 (2002) (citing *Howell v. Eastern Idaho R.R., Inc.*, 135 Idaho 733, 24 P.3d 50 (2001)).

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[11] There were also several instances throughout the trial when Dave Minert offered very inconsistent testimony. For example, Mr. Minert testified that he only learned of DTC Group commencing operations in July of 2013 when one of his sales persons was on a call and the person told them that they had purchased the services from another vendor, specifically from a sales person named "Crystal" (a former DOT employee). Tr., 441;4 – 12. Tessa Cousins testified that when she received her final paycheck from DOT, which was prior to DTC Group opening for business, that Dave Minert had inserted a note that said "extra money for her legal defense" establishing that he knew about DTC Group well before it opened for business. Tr., 397; 15 – 20.

The instructions offered in this case by the District Court on DTC Group's intentional interference with a contract claim were correct, were not misleading or erroneous.

(b) Applicable Law supports a finding that the correct Jury instruction was given.

Similar to the argument set forth on the first issue raised by Appellants', Idaho law provides that because a contract may be unenforceable in an action brought by one of the parties is irrelevant to the question of interference by a third party. *See Barlow, supra.* If a contract is terminable at the will of a party to the contract and that party terminates the contract, that party has not breached the contract but has only exercised their right to terminate. That is a separate and distinct inquiry from a third party interfering with the contractual relationship and inducing that party to terminate when they otherwise would not.

Appellants rely on the case of *Wesco v. Ernest*, 149 Idaho 881, 243 P.3d 1069 (2010) to support their proposition that there can be no claim for interference with a contact if the interference does not cause one of the parties to breach the subject contract. The Court in *Wesco* clearly focused on the actions taken by the employees, versus focusing on the actions taken by the party against who the claims of tortious interference were aimed. That Court simply found that because the employees didn't breach their employment agreements, there was no interference claim. *Id.* at 895, 243 P.2d at 1083.[12]

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[12] Alternatively, this Court appears to have made some distinction between employment contracts, where employees are at-will employees and can terminate their employment for any reason without breaching their employment contracts, and other contracts. *See e.g., Idaho First National Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266, 286, 824 P.2d, 841, 861 (1991)(Idaho

Appellants ignore the clear holding in *Wesco* that "[o]ne who intentionally interferes with the performance of a contract (except in a contract to marry) between another and a third person by inducing or otherwise **causing the third person not to perform the contact**, is subject to liability. *Id.*, citing RESTATEMENT (SECOND) OF TORTS § 766 (1979) (emphasis added). The Court in *Wesco* went on to hold that "[l]iability may arise for **tortious interference with contract even where the contract is terminable at will** because, until it has been terminated by one party, the contract is valid and subsisting and a defendant may not properly interference with it. *Id.*, cmt. g (1979)(emphasis added).

Appellants' proposition is - if a contract is terminable at will, one can *never* assert a claim of intentional interference with a contract, because terminating the contract is not breaching the contract. Such a holding would be contrary to an entire body of sustained Idaho case law. [13]

In this case, based on the intentional interference by Appellants, DTC Group customers terminate their contracts with DTC Group and DTC Group suffers damages; that is, Appellants cause the customer not to perform the contract. Given the position of the parties, and the fact the contract at issue could be terminated by the customer, the District Court gave the only proper jury instruction by modifying IDJI 4.70 to read DTC must prove that the Appellants intentionally interfered with the contract, causing a breach or termination.

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law does not recognize a claim for tortious interference with contractual relations where plaintiff alleges contractual interference with at-will employees).

[13] Appellant's cite Restatement (Second) of Torts § 768 for the proposition that because a customer cancels a contract that is terminable at will, there is not breach, and the competitor is free to obtain an advantage by causing the termination. However, the quote is taken out of context and does not address damages that result from the interference and resulting termination.

(c) An Instruction pertaining to the Act is irrelevant to the intentional interference with a contract claim and would confuse the Jury.

In discussing the Jury instructions at the close of evidence, the District Court stated that providing the Jury with the provisions of the Act would be confusing; that there is no question that the customer has three days to cancel without consequence, "but that does not render the contract void ab initio, nor does it provide a safe haven or shelter or defense to a party who interferes with an existing contractual relationship." Tr., 647; 4 – 23. There is no dispute that this Court has held that one can still assert an interference claim even if a contract is terminable at will, so "terminating a contract and breaching it, I guess is two ways of, in this case, describing it." Tr., 660; 9 – 12.

The Act is not relevant to DTC Group's claim of intentional interference with a contract. Nor did the District Court misstate the law on tortious interference. The instruction given to the jury by the District Court is entirely consistent with Idaho law.

4. APPELLANT ISSUE 4: Whether the District Court erred in excluding the FBI recording.

Appellants asserted that they needed to introduce the FBI recording of the parties July 10, 2014, meeting so that they could "impeach" Mr. Crossett's testimony regarding what was said during that meeting. Appellants take the position that during trial Mr. Crossett "insists that he

did not propose any price fixing." Appellants' Brief, p. 34. This was a red herring argument by Appellants and upon review of Mr. Crossett's testimony he made no such allegation.[14]

David and Jeff Minert were in the July 10, 2014 meeting and the earlier June 2014 meeting and testified, at length, as to what was said in those meetings by Mr. Crossett, rendering the recording unnecessary, as well as irrelevant.

The District Court was correct in ruling that this attempt for impeachment was on a collateral issue not relevant to any pending claim. Again, DTC Group is *not* asserting that Appellants' report to the Department of Justice was a breach of the non-disparagement clause in the Settlement Agreement; Appellants attempt to "prove up" a criminal claim against Mr. Crossett was and is merely an effort bring in what they perceived as "bad facts" that weren't relevant to any issue before the jury.

Moreover, counsel for DOT asked Mr. Crossett whether he made several statements that were obviously quotes that she took from the FBI video, and he answered whether he made specific statements and also testified that he didn't recall making certain statements. Tr., 624; 5 - 11. Counsel for DOT wanted to "impeach" Mr. Crossett on the on his testimony that he didn't recall certain statements. *Id.* The Court correctly held that "[i]t's not a prior inconsistent statement if he doesn't - - if he says he doesn't remember, he doesn't disagree with you that the statement may have been made." Tr., 624; 15 – 18. Again, both Dave Minert and Jeff Minert had the opportunity to describe their meeting with Mr. Crossett that was videoed and recorded.

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[14] When asked he believed calling the FBI was a breach of the Settlement Agreement, Mr. Crossett answer "no." Tr., 14 – 16. It is unclear why Appellants are focusing on this point.

The Jury was free to evaluate the evidence, testimony, the credibility of the witnesses, and reach their own conclusion with respect to the course of conduct of the parties and whether Appellants at all times after entering the Settlement Agreement, were acting in good faith and in compliance with that agreement.

There was substantial evidence to support the jury's verdict that David and Jeff Minert breached the covenant of good faith and fair dealing.

5. APPELLANTS' ISSUE 5: Whether the District Court erred in awarding DTC Group attorney fees and denying Appellants' motion for attorney fees.

DTC was awarded attorney fees and costs in the underlying case under the attorney fee provision in the Settlement Agreement, and under I.C. § 12-120 (3).

(a) Attorney Fees and Costs Under the Settlement Agreement.

The attorney fee provision in the Settlement Agreement reads as follows: "[i]n any action brought to enforce any provision of this Agreement, including but not limited to actions for breach of Sections 4 and 5 of this Agreement, the prevailing Party (or Parties) shall be entitled to an award of its (or their) reasonable attorney fees and costs."

Section 4 of the Settlement Agreement contains the non-disparagement provision.

The Jury found that Dave and Jeff Minert breached the Settlement Agreement. R. 000329. The Jury found that DOT Compliance, Dave and Jeff Minert Breached the Covenant of Good Faith and Fair Dealing related to the Settlement Agreement. R. 000333.[15]

Appellants assert that the "District Court acknowledged, the verdict was based on the FBI call – and act that is not governed by the Settlement Agreement and, in fact, occurred prior to the execution of the Settlement Agreement." Appellants' Brief, p. 40. With all due respect to the District Court, it was not involved in Jury deliberations so it could not know how the Jury reasonably reached the conclusion that it did; finding Dave and Jeff Minert liable under the covenant of good faith and fair dealing.

There was actually a myriad of facts from which the Jury could infer that Dave and Jeff Minert significantly impaired DTC Group's benefit under the Settlement Agreement, for example, instructing and/or condoning DOT staff to interfere with DTC Group's contracts, defaming DTC Group, reporting DTC Group to the AG, etc. Simply because the District Court referenced the "FBI call" during a ruling from the bench does not defeat the attorney fee award under the Settlement Agreement.

Because DTC Group prevailed on both of its claims related to the Settlement Agreement, and is entitled an award of their attorney fees and costs.

[15] There is nothing in the Settlement Agreement that says that in order to be found the prevailing party the Jury has award damages – it just says, to the effect of – "we promise not to disparage each other and if one of us does disparage the other, and is found to have disparaged the other, the we have to pay attorneys fees and costs."

(b) Attorney Fees and Costs under I.C. § 12-120 (3).

Appellants assert that DTC Group "lost the vast majority of its claims" (Appellants' Brief, 39) and that its claim for tortious interference with a contract did not arise out of a commercial transaction between the parties.

(1) I.C. § 12-120 (3) applies to DTC Group's tortious interference with a contract claim.

Appellants cite *Syringa Networks, LLC v. Idaho Dep't of Admin.*, 155 Idaho 55, 66 (2013) and *Thirsty's LLC v. Tolerico*, 143 Idaho 48, 51 (2006) to support their argument that there can be no attorney fee award under I.C. § 12-120 (3) unless there is a transaction between the parties and in no instance in a claim for tortious interference with a contract. Appellant's reliance on this case is misplaced and incorrect.

The holding in *Thirsty's, supra*, is no longer good law. In that case the court held that tortious interference with a contract was an action in tort, thus the prevailing party is not entitled to fees under I.C. § 12-120 (3). In *Syringa, supra*, is factually distinguishable because it did not allege any commercial transaction between it and the party from which it sought an attorney fee award.

As a preliminary matter, the categorical rule against awarding attorney fees under I.C. § 12-120 (3) no longer applies in Idaho. *Blimka v. My Web Wholesaler, LLC*, 143 Idaho 723, 728-729, 152 P.3d 594, 599-600 (2007). I.C. § 12-120 (3) "does not require that there be a contract between the parties before the statute is applied; the statute only requires that there be a commercial transaction." *City of McCall v. Buxton*, 146 Idaho 656, 201 P.3d 629 (2009).

It is difficult to imagine how Appellants can argue that their intentionally "inserting" themselves in contracts between DTC Group and its customer, then literally stealing those customers and contracts and causing DTC Group substantial damage due to the loss of those commercial contracts, is not a commercial transaction within the meaning of I.C. § 12-120 (3), because it certainly is. DTC Group sued Appellants for "transacting" with its customers and interfering with contracts with its customers; DOT entered transactions with DTC Group contracted customers for a commercial purpose. As set forth below, DTC Group prevailed on its claims and is now seeking fees from that party that has caused it commercial damages.

DOT cannot be heard to argue that it operates a business for a commercial purpose, that it interjects itself into a commercial transactions (contracts) between DTC Group and its contracted customers, and that the gravamen of DTC Groups claim falls outside of I.C. § 12-120 (3).

(2) DTC Group is the prevailing party.

Appellants take the position that DTC Group isn't the prevailing party because the Court dismissed DTC Group's count of unfair competition on summary judgment, and because the Court did not include an instruction for the claim of interference with prospective economic advantage before the Jury. This line of argument doesn't get Appellants out of their attorney fee award and the District Court was correct in not apportioning fees.

In determining which party is the prevailing party for an attorney fee award the inquiry is not "who succeeded on more individual claims, but rather who succeeded on the main issue of the action based on the outcome of the litigation..." *Hobson Fabricating Corp. v. SE/Z Construction, LLC*, 154 Idaho 45, 294 P.3d 171, 176 (2012). Appellants assert that because a

couple of DTC Group's causes of action were dismissed, that *Appellants* are the prevailing party. This argument is frivolous and ignores the outcome of the trial on the merits of the central causes of action in the case which were breach of contract/breach of the covenant of good faith and fair dealing and tortious interference with contracts.

In any event, when "examining the totality of the respective claims between the parties", because DTC Group is the overall prevailing party, the District Court properly exercised its discretion and awarded DTC Group the attorney fees and costs requested in its motion. *See e.g., Isreal v. Leachman,* 139 Idaho 24, 25, 72 P.3d 864, 865 (2003) and *Sun Valley Shopping Center, Inc. v. Idaho Power*, 119 Idaho 87, 803 P.2d 993 (1991).

G. RESPONDENT IS ENTITLED TO ATTORNEY FEES ON APPEAL

Because Idaho no longer limits attorney fee awards under Idaho Code § 12-120 (3) to claims brought in contract and because the categorical rule against awarding attorney fees under Idaho Code § 12-120 (3) in tort actions no longer applies in Idaho, DTC Group was entitled to an award of attorney fees on appeal. *Soignier v. Fletcher*, 151 Idaho 322, 326 256 P.3d 730, 734 (2011), *citing Blimka v. My Web Wholesaler, LLC*, 143 Idaho 723, 728-29, 152 P.3d 594, 599-600 (2007).

The transactions at issue in this case are commercial in nature and an award of fees and costs under Idaho Code § 12-120 (3) is appropriate.

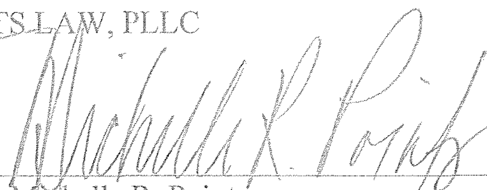
H. CONCLUSION

Appellants' tactics worked. DTC Group is now dissolved and out of business. DTC Group's trial "theme", which Appellants referenced in their opening Brief - that Appellants are

doing everything they can to put DTC Group out of business - came to fruition. Appellants have misconstrued what transpired at trial and omitted material facts for this Court's consideration. In sum, the District Court got it right, and Jury had more than ample evidence to reach the unanimous Verdicts they rendered at the close of trial, and should be affirmed. DTC Group should also be awarded its attorney fees and costs incurred in defending this appeal.

RESPECTFULLY SUBMITTED this 10th day of February, 2016.

POINTS LAW, PLLC

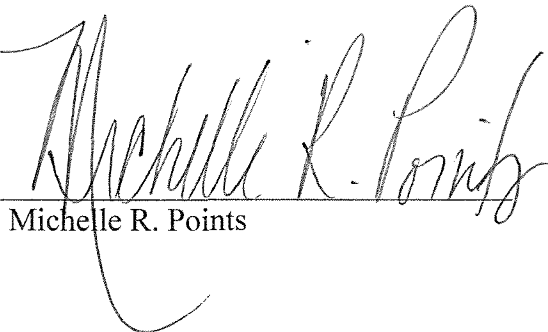


By: ______________________
Michelle R. Points
Attorneys for Plaintiff/Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of February, 2016, the foregoing was served as follows:

Merlyn W. Clark D. John Ashby HAWLEY TROXELL ENNIS & HAWLEY LLP 877 Main Street, Suite 1000 P.O. Box 1617 Boise, ID 83701-1617 *Attorneys for Defendants/Appellants*	☐ ☒ ☐ ☐ ☐	U. S. Mail Hand Delivered Overnight Mail Facsimile E-mail



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Michelle R. Points