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IN THE SUPREME COURT OF THE STATE OF IDAHO

WINCO FOODS LLC, a Delaware limited liability company d/b/a WINCO FOODS, Appellee, vs. KDN MANAGEMENT INC., a Utah corporation d/b/a KD CONCRETE DESIGN, KYM D. NELSON, an individual, KD3 FLOORING LLC, a Utah limited liability company, and SEALSOURCE INTERNATIONAL, LLC, a Utah limited liability company, Appellants.	Supreme Court No. 45010-2017

REPLY BRIEF OF APPELLANTS KDN MANAGEMENT INC., KYM D. NELSON, KD3 FLOORING LLC, AND SEALSOURCE INTERNATIONAL, LLC

Appeal from the District Court of the Fourth Judicial District
of the State of Idaho in and for the County of Ada

Honorable Steven J. Hippler, District Judge, presiding

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Appellants KDN Management Inc. ("KDN"), Kym D. Nelson ("Nelson"), KD3 Flooring LLC ("KD3"), and SealSource International, LLC ("SealSource" and, collectively, the "Nelson Parties"), by and through counsel and pursuant to Idaho Rule of Appellate Procedure 34, submit this Reply Brief, which replies to the Response Brief (the "Response") filed by Appellee WinCo Foods, LLC ("WinCo").

ARGUMENT

WinCo's insistence, in its Response, that the District Court properly declined to convene a jury trial, despite WinCo's stipulation and despite the years that the District Court scheduled the case for jury trial, is legally and factually misplaced. As the following sections demonstrate, the District Court either committed legal error or abused its discretion by failing to convene a jury trial or, alternatively, abused its discretion by denying the Nelson Parties' Rule 39 Motion.[1] For these reasons, this Court should reverse the District Court's decision, vacate the judgment, and remand this case to the District Court for further proceedings, including a jury trial.

Alternatively, contrary to WinCo's Response, the Nelson Parties do not challenge the District Court's findings of fact regarding Nelson's personal liability and the Nelson Parties' alter ego liability. They challenge the District Court's articulation and application of governing law. As the Nelson Parties previously explained, the Court should reverse and vacate Nelson's personal liability, as well as each of the Nelson Parties' liability as alter egos of one another. But at a minimum, viewed through the proper legal lenses, this Court should remand with

[1] Capitalized terms not otherwise defined herein carry the same meaning as defined in the Nelson Parties' opening brief.

instructions for the District Court to reduce Nelson's personal liability by $641,350.00, and to eliminate her alter ego liability.

A. WINCO CANNOT DEPART FROM ITS OWN STIPULATION, RELIED UPON BY ALL PARTIES AND THE COURT FOR YEARS, TO A JURY TRIAL, AND THE DISTRICT COURT IMPROPERLY DENIED THE NELSON PARTIES THEIR RIGHT TO A JURY TRIAL.

"The Idaho constitution guarantees the right to a jury trial in cases arising at common law." *Rudd v. Rudd*, 105 Idaho 112, 115–16, 666 P.2d 639, 642–43 (Idaho 1983); *see* Idaho Const. art. 1, § 7. The right to a jury trial in a civil case is "construed to apply as it existed at the date of the adoption of the constitution." *Blue Note, Inc. v. Hopper*, 85 Idaho 152, 157, 377 P.2d 373, 376 (1962). In other words, it merely "preserves the right to a trial by jury in cases at common law." *Rudd*, 105 Idaho at 116, 666 P.2d at 643. But this Court has observed that Article 1, Section 7 of the Idaho Constitution exists because its framers "recognized that the jury system is the single most important guardian of the people's right to be protected from oppressive and overreaching government." *David Steed & Assocs., Inc. v. Young*, 115 Idaho 247, 248, 766 P.2d 717, 718 (1988).

WinCo asserted claims arising at common law—specifically, claims for breach of contract and fraud. R Vol. I, p. 851–52, 1381–83. Those claims incorporated numerous legal issues. Assuming the satisfaction of any required conditions precedent, the Nelson Parties were entitled to a jury trial on those claims. Even so, "on motion or on its own," the District Court could convene an advisory jury. *See* Idaho R. Civ. P. 39(c)(1). With the parties' stipulation, it could try any case to a jury. *See id.* 39(c)(2).

Here, WinCo did exactly that: it stipulated to a jury trial. But WinCo's featured argument on appeal is, apparently, that it was not bound by its own stipulation. For the following numerous reasons—and for the simple sake of refusing to create precedent that a party's long relied-upon stipulations don't matter—this Court should reject WinCo's argument. Alternatively, this Court should conclude that the District Court abused its discretion by denying the Nelson Parties' Rule 39(b) Motion. Either way, the Court should vacate the District Court's judgment and remand this case to the District Court for the jury trial to which the Nelson Parties were entitled.

1. WinCo Should Be Bound by Its Undisputed Stipulation to a Jury Trial.

WinCo does not dispute that its counsel's—its *current* counsel's—signature on the November 12, 2014, Stipulation for Scheduling and Planning constitutes WinCo's stipulation to try this case as a "12 Person Jury Trial." Aug P. 001–Aug P. 005. Rather, WinCo simply argues that because neither party "demanded" a jury trial, it can step away from its stipulation at any time. That is incorrect. The following sections explain that stipulations—generally, as well as specifically regarding jury trials—are binding.

a. General Principles of Idaho Contract Law Require WinCo to Adhere to Its Stipulation to a Jury Trial.

The concept of adhering to stipulations is engrained in Idaho law. "A stipulation is a contract and its enforceability is determined by contract principles." *Guzman v. Piercy*, 155 Idaho 928, 936, 318 P.3d 918, 926 (2013) (internal quotation marks omitted). The "primary objective when interpreting a contract is to discover the mutual intent of the parties at the time

the contract is made." *Straub v. Smith*, 145 Idaho 65, 69, 175 P.3d 754, 758 (2007). "If possible, the intent of the parties should be ascertained from the language of the agreement as the best indication of their intent." *Id.* (internal quotation marks omitted). A contract must "reflect[] a meeting of the minds," embody "a distinct understanding common to both parties," and "be specific enough to show that the parties shared a mutual intent." *Gulf Chem. Employees Fed. Credit Union v. Williams*, 107 Idaho 890, 893, 693 P.2d 1092, 1095 (1984). "In the absence of ambiguity, the document must be construed in its plain, ordinary and proper sense, according to the meaning derived from the plain wording of the instrument." *Jim & Maryann Plane Family Trust v.* Skinner, 157 Idaho 927, 342 P.3d 639, 645–46 (2014) (internal quotation marks omitted). As long ago as 1925, this Court recognized that "[s]tipulations between attorneys relating to conduct of cases should be kept in good faith, and enforced when fair, reasonable, and proper, unless good cause is shown to the contrary." *Stewart Wholesale Co. v. Dist. Court*, 41 Idaho 572, 240 P. 597, 600 (1925).

Here, WinCo's stipulation is simple and clear: on November 12, 2014, its counsel checked a box on a form entitled "Stipulation for Scheduling and Planning" indicating a "12 Person Jury Trial," and caused it to be filed with the District Court. Aug P. 001–Aug P. 005. It bears emphasis that the document itself is captioned as a "Stipulation." Aug P. 001. The document itself bespeaks a single purpose: to memorialize agreements between the parties regarding the schedule that would govern the case. Aug P. 001–Aug P. 005.

WinCo's stipulation plainly wasn't accidental. WinCo, via counsel, implicitly affirmed its stipulation on no fewer than three occasions subsequent to its written stipulation.[2] On August 14, 2015, WinCo's counsel "agree[d]" with the District Court that WinCo's alter ego claims would be "submit[ted] . . . to the jury on an advisory basis," and that the District Court would "incorporate the jury's findings into its finding and conclusions." KDN's liability would be submitted "at the same time" to the jury. Tr Vol. I, p. 122, L. 9–18. On November 20, 2015, in the context of a discussion among WinCo, the Nelson Parties, and the District Court, the District Court indicated that it would "use advisory findings by the jury . . . as part of its findings." Tr Vol. I, p. 343, L. 21–p. 344, L. 14. And on March 20, 2016, WinCo's counsel—who signed the stipulation on WinCo's behalf—"indicated that he thought that a jury trial would be acceptable to WinCo as well." Tr Vol. I, p. 372, L. 3–6. In fact, WinCo did not question the convening of a jury trial until April 4, 2016, less than two months before trial was set to begin, but more than two *years* after the District Court had first scheduled a jury trial. R Vol. I, p. 4, 3929. WinCo actively pursued a jury trial until it perceived some strategic advantage in seeking a bench trial—at which point it abandoned its prior, written, executed stipulation.

The Nelson Parties relied upon the fact that a jury trial had been scheduled since the beginning of the case. WinCo amended its complaint on May 5, 2015. R Vol. I, p. 1370. That amendment added claims against the Nelson Parties and, therefore, authorized a new demand for a jury trial. R Vol. I, p. 1370. The Nelson Parties did not respond to that amended complaint

[2] Of course, as the Nelson Parties previously explained, this case was *always* slated to be resolved via a jury trial.

and did not request a jury trial. *See generally* R. There would have been no reason for them to do so: WinCo had already stipulated to a jury trial. Had the Nelson Parties known that WinCo reserved the right to withdraw its stipulation at its discretion, they could have demanded a jury trial. Applying the universally accepted contractual principles of Idaho law that govern stipulations, and particularly given that the Nelson Parties relied upon WinCo's stipulation, to their detriment, WinCo should not be permitted to withdraw its stipulation. *See Smith v. Boise Kenworth Sales, Inc.*, 102 Idaho 63, 67, 625 P.2d 417, 421 (1981) ("A promise which the promisor should reasonably expect to induce action or forbearance on the part of a promise or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise" (internal quotation marks omitted)); *Profits Plus Capital Mgmt., LLC v. Podesta*, 156 Idaho 873, 891, 332 P.3d 785, 804 (2014) ("Promissory estoppel is . . . a substitute for consideration . . . ." (internal quotation marks omitted).

Pursuant to these universally accepted principles, the District Court should have held WinCo to its stipulation to a jury trial.

b. Stipulations to a Jury Trial Are Enforceable in the Absence of a Jury Demand.

Idaho Rule of Civil Procedure 39(c)(2) provides that, "[i]n an action not triable of right by a jury, the court, on motion or on its own . . . may, *with the parties' consent*, try an issue by a jury whose verdict has the same effect as if a jury trial had been a matter of right." *See* Idaho R. Civ. P. 39(c)(2) (emphasis added). Whether a party has a jury trial as a matter of right turns on whether such a right existed at the time the Idaho Constitution was adopted. *See Anderson v. Whipple*, 71 Idaho 112, 120, 227 P.2d 351, 355 (1951). Such a right did not, and does not now,

exist for equitable claims. *See id.* Nevertheless, WinCo consented, via stipulation, to try at least those claims for which there was not otherwise a jury trial right—including its claims for unjust enrichment and alter ego. It does not matter whether the Nelson Parties demanded a trial by jury for those claims or not, or whether Rule 39(c)(2) constitutes a basis for curing a failure to demand a jury trial with a stipulation. The Nelson Parties wouldn't have been entitled to a jury trial on WinCo's equitable claims in any event. But WinCo nevertheless stipulated to a jury trial on those claims, and the District Court proceeded for *years* on that assumption. WinCo cannot lead the District Court to so readily turn its back on that stipulation. *See Hildebrand v. Bd. of Trustees of Mich. State Univ.*, 607 F.2d 705, 711 (6th Cir. 1979) (noting that Federal Rule of Civil Procedure 39(c) "permits both sides to stipulate to a jury trial," and although a district court does not have to accept that stipulation, once it does, "it does not have unbridled discretion to change its mind"). Indeed, parties can *waive* a previously-demanded jury trial with a stipulation. *See* Idaho R. Civ. P. 38(d) ("A proper demand may be withdrawn only if the parties consent."). It makes no sense whatsoever that they cannot *obtain* a jury trial by stipulation.

In fact, stipulations to a jury trial are commonly enforced. In *AMF Tuboscope, Inc. v. Cunningham*, 352 F.2d 150 (10th Cir. 1965), the parties agreed "by stipulation" to a jury trial. *See id.* at 155. The presiding judge in the district court approved the stipulation and set the case for jury trial. *See id.* But "on the eve of trial to a jury, the court . . . vacated its order and the setting of the case on the jury docket and denied a jury trial." *Id.* The Tenth Circuit reversed, concluding that the district court "abused [its] discretion, if discretion [it] had under the existing circumstances, in denying a jury trial." *Id.*; *see McKinney v. Gannett Co., Inc.*, 817 F.2d 659,

673–74 (10th Cir. 1987) (recognizing that *Cunningham* dealt with a circumstance where a district court "had reinstated the [jury trial] right on stipulation of the parties"); *see also Thompson v. Parkes*, 963 F.2d 885, 889–90 (6th Cir. 1992) (enforcing two stipulations to a jury trial contained in "pretrial orders"); *RDO Fin. Servs. Co. v. Powell*, 191 F. Supp. 2d 811, 814 (N.D. Tex. 2002) (enforcing a stipulation to a jury trial against a party who later claimed that the opposing party had waived its right to a jury trial).

In this long-running case, the Nelson Parties had changed counsel by the time WinCo sought to eliminate the jury trial. But WinCo had the same counsel—indeed, the same counsel that executed the November 12, 2014, stipulation on its behalf. It was *WinCo*, and not the Nelson Parties, that sought to escape that prior stipulation. The District Court should not have permitted WinCo to do so.

2. Even if WinCo Is Not Bound to Its Stipulation, the District Court Abused Its Discretion by Denying the Nelson Parties' Rule 39(b) Motion.

Portions of WinCo's argument are correct, as far as they go: whether to convene a jury trial pursuant to Idaho Rule of Civil Procedure 39(b) motion is committed to the district court's sound discretion, and the Idaho Supreme Court has never reversed a district court's denial of a Rule 39(b) motion. But the fact that this Court has never reversed such a denial does not mean that all such motions should be denied; this Court simply exercises proper deference to district courts' sound discretion in this matter. And this case contains two key facts that *no* Idaho appellate decision—certainly not any decision WinCo cites—has addressed: the party seeking to

avoid a jury trial *actually stipulated, in writing*, to a jury trial, and the district court proceeded to a jury trial for *over two years* after stipulation.

WinCo argues that the Nelson Parties' citation to federal decisions ignores Idaho's purportedly differing standard with respect to Rule 39(b) motions. That is false. *Idaho* law requires district courts to "*liberally* exercise [their] discretion [to convene jury trials] upon request] to carry out the designed purpose of the Idaho Rules of Civil procedure." *See R.E.W. Constr. Co. v. Dist. Court of the Third Judicial Dist.*, 88 Idaho 426, 443, 400 P.2d 390, 401 (1965) (emphasis added). And *Idaho* law provides that "[t]he right of trial by jury as declared by the Constitution or as provided by a statute of the state of Idaho is preserved to the parties inviolate." *See* Idaho R. Civ. P. 38(a). WinCo points to several decisions indicating that a district court cannot grant a Rule 39(b) motion where the only proffered basis is "oversight." *See Krussman v. Omaha Woodmen Life Ins. Soc'y*, 2 F.R.D. 3 (D. Idaho 1941); *see also Pac. Fisheries Corp. v. HIH Cas. & Gen. Ins., Ltd.*, 239 F.3d 1000, 1002 (9th Cir. 2001); *Chandler Supply Co. v. GAF Corp.*, 650 F.2d 983, 987 (9th Cir. 1980). Leaving aside the irony that WinCo doesn't cite any Idaho state cases for that proposition (just as WinCo chides the Nelson Parties), those decisions do not teach that Idaho applies a "different" standard to Rule 39(b) motions. And the case before the Court is not a circumstance of inadvertence. WinCo stipulated to a jury trial and then conveniently forgot about that stipulation. The Nelson Parties' "assumption" was not an assumption at all, but based on the District Court's docket, which had contained jury trial setting since January 2013, over three and a half years prior to the date upon which WinCo started the process of wiggling out of its own stipulation.

WinCo unsuccessfully seeks to distinguish *Pinemont v. Belk*, 722 F.2d 232 (5th Cir. 1984). Contrary to WinCo's argument, it was WinCo that caused confusion: the presiding judge and the Nelson Parties' counsel both changed since the date of its stipulation to a jury trial, but WinCo's counsel remained the same. Yet it was *WinCo* that sought to avoid a jury trial *without ever once noting to the District Court that WinCo had stipulated to a jury trial.* The District Court itself recognized the importance of a stipulation—it had its clerk review the file to locate such a stipulation, without success. Tr Vol. I, p. 359 L. 11 17. Its error was not ignoring WinCo's stipulation, but rather failing to appreciate that the record contained such a stipulation in the first place. Of course, WinCo did not point out that it had previously stipulated to a jury trial.

WinCo is correct that an amended complaint can trigger an effective jury demand only if it adds new issues. But that explains why it is so inequitable to deprive the Nelson Parties of a jury trial. As explained above, the Nelson Parties relied upon WinCo's stipulation.

For all of the foregoing reasons, the District Court abused its discretion in refusing to convene a jury trial pursuant to Rule 39(b).

B. THIS COURT SHOULD REVERSE THE DISTRICT COURT ON ALTERNATIVE BASES.

The fact that the Nelson Parties were deprived of a jury trial, despite WinCo's undisputed stipulation, is reason enough for this Court to reverse the District Court, vacate the judgment, and remand. But in the alternative, this Court should reverse the District Court on other bases, none of which WinCo persuasively addresses. In this Reply Brief, the Nelson Parties do not restate

those arguments here, but rather point out the glaring inconsistencies in WinCo's arguments and the District Court's analysis of Nelson's personal liability. This Court should reverse the District Court's determinations of Nelson's personal liability in their entirety, but at a minimum, it should reduce her liability by the amount of damages attributed to the Boise Agreement. It should also reverse the District Court's determination of alter ego for all Nelson Parties, but at a minimum, for Nelson personally.[3]

1. This Court Should Reverse the District Court's Finding of Nelson's Personal Liability Pursuant to the Undisclosed Principle Rule.

In its Response, WinCo characterizes the Nelson Parties' argument as a disguised attack on the District Court's findings of fact subject to clear error review. That is incorrect.

The District Court went astray regarding its definition of an indefinite-services contract. It correctly recognized that, with such a contract, "the buyer must be obligated to purchase a minimum quantity in order for the agreement to be enforceable," and "without an obligatory minimum quantity, the buyer would be allowed to order nothing, rendering its obligations illusory and, therefore, unenforceable." R Vol. I, p. 5034 (quoting *Torncello v. United States*, 681 F.2d 756, 761 (Cl. Ct. 1982)). But the District Court ignored the rule that if an indefinite-quantities contract includes a guaranteed minimum quantity, the "proper remedy" is to enforce the guaranteed minimum quantity provision and "to sever the unenforceable provision"—the

[3] Although WinCo refers, at nearly every chance it gets, to the District Court's imposition of adverse inferences as sanctions for discovery violations, the Nelson Parties do not challenge the District Court's ruling in that regard, and it confines its arguments to legal errors rather than challenges to factual determinations. The District Court's resolution of the discovery issues in this case is immaterial to the Nelson Parties' appeal.

illusory promise to purchase an indefinite amount of goods in the future. *See United Services Auto. Ass'n v. Pells*, No. 51969-7-I, 2004 WL 792666, at *2 (Wash. Ct. App. April 12, 2004); *see also Cummings-Reed v. United Health Group*, No. 2:15-CV-02359-JAM-AC, 2016 WL 1734873, at *5 (E.D. Cal. May 2, 2016). The parties then become legally obligated or accountable to each other for future purchases only upon the "contemporaneous exchange of consideration"—meaning, in this circumstance, new and definite promises to buy and sell. *Cf. TMC Worldwide, L.P. v. Gray*, 178 S.W.3d 29, 37 (Tex. Ct. App. 2005).

The Nelson Parties do not challenge, and do not need to challenge, the District Court's findings. The District Court itself found as follows:

> 37. In addition, WinCo and Ms. Nelson, orally agreed no later than January of 2010 that KD Concrete would perform the work on three "test stores" in WinCo's Portland Division pursuant to the agreed-upon terms and, if WinCo was satisfied with the work, KD Concrete could continue the work in WinCo's other stores under the same terms on an as-needed basis.

R Vol. I, p. 5012. The District Court also found:

> 41. The first time Ms. Nelson disclosed KDN's existence to WinCo was on or about April 30, 2010, when she sent a W-9 tax form to WinCo's billing department disclosing the name of the entity: "KDN Management, Inc. /dba KD Concrete Design."

R Vol. I, p. 5014. Finally, the District Court found as follows:

> 52. On May 4, 2010, Ms. Nelson provided Mr. Douty with a proposed joint repair schedule for the Boise Division stores that needed work. . . .
>
> 53. Between mid-May and November 2010, and pursuant to KDN's authorization, D&B completed work at sixteen Boise Division stores, to wit: #16, #50, #43, #8, #2, #45, #29, #68, #70, #27, #48, #30, #42, #6, #11 and #1.

R Vol. I, p. 5015–16.

The Boise Agreement must constitute an agreement separate from the Trial Period and the Portland Agreement. Otherwise, key Idaho rules regarding contract formation would be violated. "[T]o be enforceable, an agreement must be sufficiently definite and certain in its terms and requirements so that it can be determined what acts are to be performed and when performance is complete." *Bajrektarevic v. Lighthouse Home Loans, Inc.*, 143 Idaho 890, 892, 155 P.3d 691, 693 (2006) (internal quotation marks omitted). "[A] reservation to either party of an unlimited right to determine the nature and extent of his performance renders his obligation too indefinite for legal enforcement, making it, as it is termed, merely illusory." *Thomas v. Cate*, 78 Idaho 29, 32, 296 P.2d 1033, 1034 (1956) (quoting *Corthell v. Summit Thread Co.*, 167 A. 79, 81 (Me. 1933)).

Given that the Boise Agreement was entered into after April 30, 2010, when even the District Court found that Nelson had furnished notice of KDN's existence and status, the District Court, at a minimum, should have reduced Nelson's personal liability under the undisclosed principal by at least the amount of the payment delivered in connection with the Boise Agreement. *See Crosse v. Callis*, 282 A.2d 86, 91 (Md. Ct. App. 1971) (holding that even though a disclosure was "not made until after one contract had been entered into, the disclosure would be operative as to further contracts if fully made before such new contracts are consummated"). Although this Court should entirely reverse the District Court's decision as set forth in the Nelson Parties' opening brief, it should *at least* reduce the amount of Nelson's

personal liability by the amount of payments made pursuant to the Boise Agreement. Based on the District Court's findings, that reduction should be $641,350.00.[4]

2. This Court Should Reverse the District Court's Finding of Pre-Incorporation Liability Pursuant to Idaho Code § 30-1-204.

Again, WinCo's Response couches the Nelson Parties' argument as factual, but it is, in fact, legal. The District Court found that "[o]n February 18, 2010, Ms. Nelson incorporated KDN . . . ." R Vol. I, p. 5014. Idaho Code § 30-1-204 states that "[a]ll persons purporting to act as or on behalf of a corporation, when there was no incorporation under this chapter, are jointly and severally liable for liabilities created while so acting." "[L]iabilities," as used in I.C. § 30-1-204, arise when a contract is executed—meaning when the parties become "legally obligated or accountable," not when the contract is breached. *See Liability*, Black's Law Dictionary (10th ed. 2014); *see e.g., Silvers v. R & F Capital Corp.*, 858 P.2d 895, 897 (Or. App. 1993).

As explained *supra*, as a matter of law, the Boise Agreement had to be a separate agreement. There was no agreement regarding work on Boise stores until May 2010—well after KDN's incorporation. Again, although this Court should entirely reverse the District Court's decision as set forth in the Nelson Parties' opening brief, it should *at least* reduce the amount of Nelson's personal liability by the amount of payments made pursuant to the Boise Agreement. Again, that reduction should be in the amount of $641,350.00.

[4] The Nelson Parties compute that amount by taking the list of the stores comprising the Boise Agreement, R Vol. I, p. 5015–16, subtracting those for which the District Court already granted an offset, and adding the District Court's computation of the overcharges for each store, R Vol. I, p. 5019–20.

3. This Court Should Reverse the District Court's Determination that Each of the Nelson Parties Are Alter Egos of One Another.

The District Court found that "assets were meticulously siphoned off by Ms. Nelson and her other two companies, knowing KDN had a potential outstanding significant liability to WinCo." R Vol. I, p. 5051. That finding contains two elements: Nelson's alleged "meticulous siphoning" of assets, and her alleged knowledge of liability to WinCo. Each element is not based in law.

Regarding Nelson's alleged knowledge, WinCo's Response does not meaningfully reconcile two competing realities: how can the Nelson Parties *know* of their potential liability to WinCo, even though WinCo never asserted a fraud claim against any of the Nelson Parties covering all of the WinCo stores upon which work was performed? Indeed, the District Court's own finding—which the Nelson Parties do not challenge—was that "Ms. Nelson has no personal knowledge regarding the accuracy of the measurements" of the WinCo stores. R Vol. I, p. 5021. The District Court's findings—one that Nelson knew of liability, but another that she didn't know of inaccurate measurements—conflict. And knowledge of falsity would form the basis of a fraud claim, which WinCo did not assert. *See April Beguesse, Inc. v. Rammell*, 156 Idaho 500, 509, 328 P.3d 480, 489 (2014) (outlining elements of a claim for fraud, including "the speaker's knowledge of [a factual statement's] falsity"). Fraud, injustice, or inequity is a key component of a Utah alter ego analysis. *Envirotech Corp. v. Callahan*, 872 P.2d 487, 500 (Utah Ct. App. 1994). Without it, a mere withdrawal of funds by shareholders does not support an alter ego finding as a matter of law. *See Jones & Trevor Marketing, Inc. v. Lowry*, 2012 UT 39, ¶ 27,

284 P.3d 630 ("[M]erely demonstrating that shareholders withdrew funds from corporate accounts is an insufficient basis on which to pierce the corporate veil absent additional evidence that the withdrawals were not legitimate or that the company failed to properly account for the withdrawals.")

Regarding the withdrawals themselves, WinCo does not meaningfully address the reality that KDN was an s-corporation, the income of which is, for all intents and purposes, Nelson's income. *See United States v. Rouhani*, 106 F. Supp. 3d 1227, 1230 (M.D. Fla. 2015) (forfeiture case) (s-corporation income "is treated as the personal income of the individual stockholder"). "[I]n a Subchapter S corporation the shareholders may withdraw as much as the corporation's retained earnings account contains. . . . [I]t is not unusual for a Subchapter S corporation to make payments to family members or for family-owned vehicles. The relevant inquiry is whether those payments are charged to a shareholder's account and whether the shareholder is entitled to withdraw the amount, through his or her account, from the corporation." *Commercial Cabinet, Inc. v. Quint*, 2003 WL 22962070, at *2 (Mich. Ct. App. Dec. 16, 2003) (unpublished disposition).

The District Court itself found that WinCo did not assert any grievance regarding any billing until at least November 2011—over a year after KDN finished work in Boise. R Vol. I, p. 5016–57 (findings of fact 53, 61–63). Therefore, its sole material basis for its alter ego determination is that Nelson compensated herself via an s-corporation (which she is allowed to do), for a job completed a year previously, having no knowledge of any inaccurate measurements. As a matter of Utah law, that does not amount to alter ego. Given that Nelson is

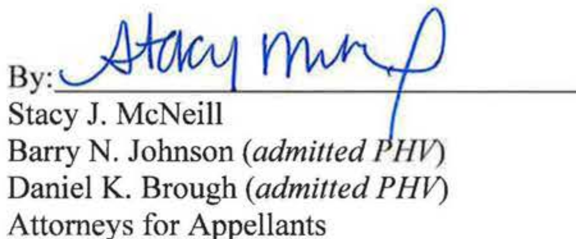
the connective tissue joining each of the Nelson Parties, he Court should reverse the District Court's determination of alter ego in its entirety. At a minimum, it should reverse that determination as it pertains to Nelson.

CONCLUSION

WinCo fails to explain why it should be released from its long-relied-upon stipulation to a jury trial. The Court should reverse, vacate, and remand on that basis alone. Alternatively, the Court should reverse and remand with instructions for the District Court to eliminate Nelson's personal liability or, at a minimum, reduce it by $641,350.00.

DATED this 7th day of February, 2018.

BENNETT TUELLER JOHNSON & DEERE



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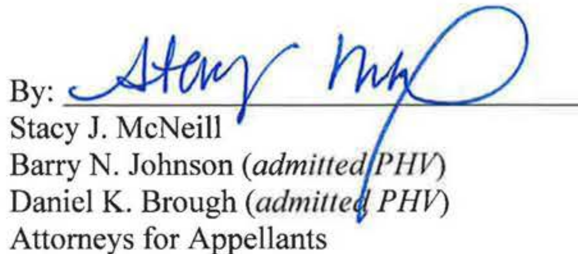
CERTIFICATE OF MAILING AND ELECTRONIC DELIVERY

I certify that on the 7th day of February, 2018, I caused an original bound version and six bound copies of the foregoing **REPLY BRIEF OF APPELLANTS KDN MANAGEMENT INC., KYM D. NELSON, KD3 FLOORING LLC, AND SEALSOURCE INTERNATIONAL, LLC** to be mailed to the Idaho Supreme Court, at 451 W. State Street, Boise, Idaho, 83702, via U.S. Mail, first class postage prepaid. Pursuant to Idaho Rule of Civil Procedure 20, filing of the foregoing is deemed complete upon mailing on February 7, 2018.

I also certify that on the 7th day of February, 2018, I caused the foregoing **REPLY BRIEF OF APPELLANTS KDN MANAGEMENT INC., KYM D. NELSON, KD3 FLOORING LLC, AND SEALSOURCE INTERNATIONAL, LLC** to be electronically submitted to the Idaho Supreme Court at sctbriefs@idcourts.net. A certification pursuant to Idaho Rule of Appellate Procedure 34.1 is filed separately.

BENNETT TUELLER JOHNSON & DEERE



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CERTIFICATE OF SERVICE

I certify that on the 7th day of February, 2018, I caused two copies of the foregoing **REPLY BRIEF OF APPELLANTS KDN MANAGEMENT INC., KYM D. NELSON, KD3 FLOORING LLC, AND SEALSOURCE INTERNATIONAL, LLC** to be served via U.S. Mail, first class postage prepaid, upon the following:

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