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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

OPENING 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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III. STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is an appeal from the Amended Judgment entered by the Fourth Judicial District Court in and for Ada County, Idaho (the "District Court"), Case No. CV OC 1219536, consolidated with Case No. CV OC 1406615. The Amended Judgment is in the amount of $2,929,383.31, and the District Court entered it on February 24, 2017. R Vol. I, p. 6101.

B. COURSE OF PROCEEDINGS IN THE DISTRICT COURT, AND DISPOSITION

On October 25, 2012, Appellant KDN Management Inc. ("KDN") commenced Case No. CV OC 1219536 by filing a complaint asserting a claim for breach of contract, and related claims, against Appellee WinCo Foods, LLC d/b/a WinCo Foods ("WinCo") and WinCo Holdings, Inc. R Vol. I, p. 35. KDN sought repayment on three invoices for concrete repair work performed, in the amount of $340,667.50, plus interest an attorney fees. R Vol. I, p. 45–46. On December 7, 2012, WinCo answered and counterclaimed against KDN, asserting that KDN had overbilled WinCo in the amount of approximately $769,000 for the concrete repair work WinCo performed. R Vol. I, p. 50, 68.

On April 18, 2013, the District Court entered an order dismissing KDN's claims against WinCo with prejudice. R Vol. I, p. 107. On February 7, 2014, WinCo moved for summary judgment against KDN on its claims. R Vol. I, p. 152. KDN did not oppose that motion. R Vol. I, p. 779.

On April 1, 2014, WinCo commenced Case No. CV OC 1406615, asserting claims against Kym D. Nelson ("Nelson"), SealSource International, LLC ("SealSource"), and KD3 Flooring LLC ("KD3").[1] R Vol. I, p. 843. Specifically, WinCo asserted a fraud claim against Nelson arising from her alleged participation in intentionally overbilling WinCo on three invoices. R Vol. I, p. 850. WinCo asserted a claim for breach of contract and related claims, as well as a claim for violation of the Idaho Consumer Protection Act, against Nelson, SealSource, and KD3, for overbilling. R Vol. I, p. 851–52. The District Court consolidated Case No. CV OC 1219536 into Case No. CV OC 1406615. R Vol. I, p. 1179.

On May 5, 2015, WinCo filed an Amended Complaint against the Nelson Parties. R Vol. I, p. 1370. WinCo retained its previously-asserted claims, but also added an alter ego claim, against all the Nelson Parties. R Vol. I, p. 1381–83. On October 14, 2015, WinCo filed a Second Amended Complaint, seeking an increased amount of damages and adding a second claim for fraud and a fraudulent transfer claim, against Nelson. R Vol. I, p. 2666, 2675, 2680–81.

Although the case had been scheduled as a jury trial since its inception, and despite WinCo's prior stipulation to a jury trial and the Nelson Parties' motion, pursuant to Idaho Rule of Civil Procedure 39(b), for a jury trial, on November 20, 2015, the District Court scheduled a bench trial. R Vol. I, p. 22. The bench trial occurred on May 31, June 1–2, 6–9, and 21–22, 2016. R Vol. I, p. 28–30. On October 5, 2016, the District Court entered Findings of Fact and

[1] This brief refers to KDN, Nelson, SealSource, and KD3 collectively as the "Nelson Parties."

Conclusions of Law. R Vol. I, p. 5003. On October 14, 2016, the District Court entered judgment in favor of WinCo, and against each of the Nelson Parties, in the principal amount of $903,724.50. R Vol. I, p. 5063. On February 2, 2014, after granting WinCo's motion for attorney fees and costs, the District Court entered an Amended Judgment in favor of WinCo, and against each of the Nelson Parties, in the principal amount of $2,929,383.31. R Vol. I, p. 6071, 6101. Also on February 24, 2017, the District Court denied the Nelson Parties' previously-filed motion for relief pursuant to Idaho Rule of Civil Procedure 59. R Vol. I, p. 6071. The Nelson Parties filed their notice of appeal on April 7, 2017. R Vol. I, p. 6104.

C. STATEMENT OF FACTS

1. The Parties

KDN was a Utah corporation that was incorporated in Utah on February 18, 2010. R Vol. I, p. 5007; Tr Vol. II, p. 2230 L. 178–p. 2231, L. 10 & Ex. 91. From February 18, 2010, until KDN's cessation, Nelson was KDN's sole shareholder and one of two directors. R Vol. I, p. 5007; Tr Vol. I, p. 1058 L. 11–16; Vol. II, p. 1344 L. 13–17. KDN was an s-corporation. Tr Vol. II, p. 1344 L. 10–12. On or about April 26, 2010, KDN received, from the Internal Revenue Service, notice of its acceptance as an s-corporation. Tr Vol. II, p. 2228, L. 7–18 & Ex. 515. Nelson intended that KDN conduct business, and that it interface with WinCo, under the trade name "KD Concrete Design." Tr Vol. II, p. 1355, L. 21–24.

KD3 is a Utah limited liability company formed in 2006. R Vol. I, p. 5007; Tr Vol. II, p. 1626, L. 15–p. 1627, L. 6 & Ex. 100; p. 2136 L. 7–9. From the date of KD3's creation through 2009 and 2010, Nelson was one of several members of KD3 and its sole manager. R Vol. I, p.

1007; Tr Vol. II, p. 1627, L. 7–p. 1629, L. 20 & Ex. 100. KD3 is a labor company—it furnishes labor for concrete sealant and repair. Tr Vol. II, p. 1638, L. 17–22; p. 2098, L. 8–10; p. 2135, L. 13–20.

SealSource is a Utah limited liability company formed in 2002. R Vol. I, p. 5007. During 2010 and the majority of 2011, Nelson was a minority member of SealSource, and she was not a manager of SealSource. Tr Vol. I, p. 1144, L. 23– p. 1145, L. 3. SealSource is a distributor of concrete sealant and color materials used to protect and repair concrete. Tr Vol. II, p. 1648, L. 22–p. 1649, L. 5.

WinCo is in the business of "the sale of grocery items." R Vol. I, p. 5006; Tr Vol. I, p. 726, L. 2–5. Although it is headquartered in Boise, Idaho, it has "operating stores and distribution centers in Washington, Oregon, California, Idaho, Nevada, Utah, Arizona, [and] Texas." R Vol. I, p. 5006; Tr Vol. I, p. 726, L. 11–14. It has 16,000 employees working in 107 stores. R Vol. I, p. 5006; Tr Vol. I, p. 722, L. 17–22.

Although not parties to this proceeding, certain individuals performed key roles for WinCo. Tom Little ("Little") was a WinCo maintenance engineer stationed at WinCo's corporate headquarters from 2007 to 2011. Tr Vol. I, p. 775, L. 14–22. In that capacity, Little supervised the maintenance of all WinCo stores and was responsible for approving invoices from contractors who had performed maintenance work at WinCo stores, where those invoices were under $50,000. Tr Vol. I, p. 776, L. 20– p. 777, L. 7. If an invoice was in excess of $50,000, Little would ask certain individuals in management to approve and sign the invoice. R Vol. I, p. 5016. One of those individuals was David Van Etten ("Van Etten"). Tr Vol. I, p. 777, L. 8–17.

Finally, beginning in and around 2006, Jim Douty ("Douty") served as a WinCo maintenance supervisor in WinCo's Boise, Idaho division. R. Vol. I, p. 5010; Tr Vol. I, p. 851, L. 12–p. 852, L. 8. In that capacity, Douty supervised the maintenance of all WinCo stores within his sphere of responsibility, including floor maintenance. Tr Vol. I, p. 853, L. 1–17.

2. The Business Relationship Between WinCo and the Nelson Parties

There was some history between Nelson and WinCo prior to the transactions that gave rise to this litigation. Specifically, prior to 2009, SealSource "suppl[ied] cleaning supplies, floor supplies to the [WinCo] stores." R Vol. I, p. 5007; Tr Vol. I, p. 783, L. 1–2.

As that relationship progressed, WinCo and Nelson discussed whether Nelson's then-business—either SealSource or KD3—could perform joint repair work at WinCo stores. R Vol. I, p. 5010; Tr Vol. I, p. 783, L. 3–13. Beginning in approximately September 2008, KD3 began seeking to obtain concrete joint repair work from WinCo by submitting a proposal, in its name, to WinCo. R Vol. I, p. 5010; Tr Vol. I, p. 783, L. 114– p. 785, L. 9 & Ex. 49; p. 1090, L. 24–p. 1091, L. 12 & Ex. 41. Although it did not do so initially, KD3 later directed proposals to Little specifically. R Vol. I, p. 5011; Tr Vol. I, p. 785, L. 10–25 & Ex. 42. However, in December 2009, Nelson informed WinCo that she intended to form KDN as the entity that would actually enter into the contract with WinCo for joint repair work. Tr Vol. I, p. 1074, L. 15–21. Furthermore, on or about January 21, 2010, Nelson again informed WinCo—specifically, Little—that KDN would be formed to enter into any contract with WinCo for joint repair work. Tr Vol. I, p. 1099, L. 17–p. 1100, L. 2. Negotiations proceeded, aimed at forming an agreement whereby KDN would perform joint repair services, as a general contractor, for WinCo stores. Tr

Vol 1, p. 1350, L. 10–p. 1354, L. 6. Those negotiations involved discussions regarding price, identification of the stores that would receive joint repair work, and a start date. *Id.*; R Vol. I, p. 5011-12.

Given those variables, Nelson deemed that an agreement had been reached when KDN actually commenced work actually commenced on a particular store. Tr Vol. II, p. 2112, L. 11–p. 2113, L. 2. Nelson's belief that an agreement as reached was supported by the fact that WinCo retained the ability throughout the project to pull any store that it had previously identified as needing work. Tr Vol. I, p. 803, L. 2–9; Tr Vol. II, p. 2267, p. 8–25. And as of February 10, 2010, KDN still awaited a start date for work on any store. Tr Vol. I, p. 796, L. 2–15 & Ex. 56. As noted above, Nelson formed KDN as a Utah corporation on February 18, 2010. R Vol. 1, p. 5014; Tr Vol. II, p. 1289, L. 21–23, Ex. 91. On February 16, 2010, KDN ordered material needed to perform the joint repair work. Tr Vol. I, p. 1107, L. 3–23 & Ex. 57. KDN commenced work on a WinCo store thereafter. Critically, prior to February 18, 2010—the date of its formation—KDN had performed no work of any kind on any WinCo store and received no payment from WinCo. Tr Vol. II, p. 1355, L. 15–18; p. 1355, L. 25–p. 1356, L. 1–3.

Critically, KDN's contract with WinCo initially pertained to concrete joint repair work on only one store. KDN was required to obtain approval from WinCo to perform work on any additional store. Tr Vol. II, p. 2184, L. 4–p. 2185, L. 14 & Ex. 629. At most, WinCo's initial arrangement with KDN was for work on three stores, all of them in the Portland, Oregon area. Tr Vol. II, p. 2241, L. 10–18 & Ex. 626. That work was to be a trial period (the "Trial Period"). WinCo would retain KDN for additional stores in WinCo's Portland, Oregon, area and agree as

to terms (including identification of stores) at that time (the "Portland Agreement"), if WinCo was satisfied with KDN's work during the Trial Period. R Vol. I, p. 5012. The Trial Period evolved into the Portland Agreement, which encompassed KDN's work on additional stores in the Portland, Oregon, area. R Vol. I, p. 5015; Tr Vol. II, p. 2358, L. 8–11. In turn, the Portland Agreement evolved into another, new and separate, agreement by which KDN would perform joint repair work for WinCo stores in WinCo's Boise, Idaho area (the "Boise Agreement"). Tr Vol. II, p. 2267, L. 8–13. KDN had not yet finalized the terms of the Boise Agreement even by May 3, 2010. Tr Vol. I, p. 871, L. 5– p. 872, L. 9 & Ex. 586.

The testimony at trial was undisputed that WinCo did not believe that it ever contracted with Nelson personally. Little believed that WinCo had contracted with "KD Concrete," which he understood was a business entity and not Nelson personally. R Vol. I, p. 5012; Tr Vol. I, p. 817, L. 5–13. He also did not believe that WinCo had contracted with either SealSource or KD3. Tr Vol. I, p. 816, L. 5–23. Little specifically referred to the business entity with which he dealt as "KD Concrete Design." Tr Vol. I, p. 829, L. 4–8 & Ex. 646. In fact, in a declaration filed in this case in October 2013, Little referred to both "KD Concrete Design, Inc." and "KDN" as the party with which WinCo had contracted, betraying his knowledge of both KDN's name and its status as a corporation. Tr Vol. I, p. 822, L. 21–p. 924, L. 25 & Ex. 578. That designation could not have been accidental: although Little "wrote . . . out" the declaration "to a certain point," WinCo's counsel "rewrote [the declaration] for [Little] to proofread and sign." Tr Vol. I, p. 825, L. 1–19.

For his part, Douty believed that WinCo had contracted with KD Concrete, which he understood was a division of SealSource. Tr Vol. I, p. 866, L. 2–8. Douty understood that KD Concrete was a separate business entity. Tr Vol. I, p. 876, L. 25–p. 877, L. 20. Douty cannot recollect why he believed KD Concrete was a division of SealSource, other than he "assumed that that was [Nelson's] company and that she hired out the labor." Tr Vol. I, p. 866, L. 11– p. 867, L. 10 & Ex. 73. Although Douty saw emails referring to "KD3 Concrete Design," he simply assumed that that designation referred to KD Concrete because "the name of the entity doing the floor repair wasn't terribly material" to him, and that he "assume[d] that [KD Concrete] was the company that was coming in to do the joint repair." Tr Vol. I, p. 875, L. 7–p. 876, L. 11 & Ex. 593 and 517.

Finally, Van Etten reviewed discovery responses issued by WinCo in this case. Those discovery responses either admit, or do not dispute, that KDN entered into a contract with WinCo to perform the concrete joint repair work at issue in this case. Tr Vol. I, p. 754, L. 20–p. 758, L. 1. Van Etten was also aware of the decision by WinCo to assert a counterclaim against KDN, specifically, for breach of contract. Tr Vol. I, p. 751, L. 21–p. 752, L. 3.

The takeaway is that *nobody* with boots on the ground at WinCo thought that WinCo had contracted with Nelson personally. *All* of them believed that WinCo had contracted with at least a business entity affiliated with Nelson. Little's declaration testimony indicates that he knew the name of the entity was KDN, and that it was a corporation.

3. KDN's Post-Trial Period Disclosure of Its Principal Status to WinCo

After the inception of the Trial Period, but before the Portland Agreement and certainly before the Boise Agreement, Nelson and KDN continued to disclose KDN as the entity performing the work and Nelson's principal.

On March 26, 2010, Nelson sent an email to Little asking if WinCo needed a tax identification number to facilitate payment for the joint repair work on the WinCo stores. Tr Vol. I, p. 1108, L. 7 – p. 1109, L. 4 & Ex. 65. On April 16, 2010, either Nelson or Karen Thompson ("Thompson"), an individual that performed work for KDN, sent an email to Marci Foster ("Foster"), of WinCo, from an email address denominated "kdnconcrete@gmail.com" and with a footer identifying "KD Concrete Design." Tr Vol. I, p. 742, L. 1–p. 743, L. 3. In that email, Nelson or Thompson asked Foster if WinCo required a W-9 form so that KDN's invoices (issued under the name "KD Concrete Design") could be paid. Tr Vol. I, p. 741, L. 15–p. 743, L. 12 & Ex. 500. In that email, Nelson or Thompson stated that "[w]e are a new contractor doing work for WinCo." Tr Vol. I, p. 743, L. 6–12. Foster forwarded that email to Little and to Van Etten and asked them to confirm if "either of [them] know what this vendor is doing for us and if their invoices should be going through us or a General Contractor." Tr Vol. I, p. 741, L. 15–p. 743, L. 12 & Ex. 500. KDN then received a letter, on WinCo letterhead, from Marcia Kaiser ("Kaiser"), of WinCo, requesting the return of a completed W-9 form requesting a taxpayer identification number and certification. Tr Vol. II, p. 2246, L. 16–p. 2247, L. 19 & Ex. 501. KDN returned, to WinCo (via Kaiser), a completed W-9 form identifying KDN and furnishing KDN's tax identification number. R Vol. I, p. 5014; Tr Vol. I, p. 911, L. 5– p. 912, L. 5 & Ex.

688; Tr Vol. II, p. 2247, L. 21–25, p. 2255, L. 7–12. Also, on April 30, 2010, Nelson sent WinCo (via Kaiser) a copy of KDN's articles of incorporation. Tr Vol. II, p. 2260, L. 14–24. In connection with the furnishing of the W-9, Nelson, along with Thompson, again informed Little in April 2010 that "KD Concrete is KDN Management, Inc." Tr Vol. II, p. 2298, L. 7–p. 2299, L. 1.

Although WinCo's policy and practice is to issue one payment without a signed, completed W-9 form on file, that is an exception limited to one payment; WinCo will not pay more than one invoice without a signed, completed W-9 form on file. R Vol. I, p. 5014. In fact, WinCo made substantial payments to KD Concrete following April 30, 2010. Tr Vol. I, p. 912, L. 20–p. 913, L.13. Therefore, at least by April 30, 2010, WinCo must have had KDN's signed W-9—identifying "KDN Management Inc."—on file. R Vol. I, p. 5014.

These post-Trial Period disclosures make clear that, at the barest minimum, WinCo knew it was dealing with KDN prior to entering into the Portland Agreement and, certainly, the Boise Agreement.[2]

4. The Nelson Parties' Separateness and KDN's Operations as an S-Corporation

Out of each of the Nelson Parties, KDN was the entity that received and accounted for payment from WinCo for joint repair work and deposited those payments in a KDN bank

[2] At least one additional disclosure occurred. On or about July 27, 2010, KDN paid WinCo—via a check labeled "KDN Management Inc."—$4,883.00, with a memo line referencing that the funds were for "damaged produce," which involved produce allegedly compromised by the joint repair work at a WinCo store in Boise. Tr Vol. II, p. 2268, L. 1–19 & Ex. 642.

account. Tr Vol. II, p. 2005, L. 23–25; p. 2014, L. 9–p. 2016, L. 7 & Ex. 545. As noted above, KDN was an s-corporation—a key fact in analyzing its operations and its financial relationship with the other Nelson Parties.[3]

For starters, and for the Court's context, the Nelson Parties were a lot more separate than the District Court's decision suggests. KD3, KDN, and SealSource were each separately organized in Utah. Tr Vol. II, p. 1808, L. 11–15 & Exs. 91, 93, 100, 689, 559, 562, 681, 690, and 691. KD3, KDN, SealSource, and Nelson each had separate bank accounts. Tr Vol. II, p. 1624, L. 21–25; p. 1918, L. 16–21; p. 1213, L. 13–15 & Exs. 193, 194, 115. KD3, KDN, and SealSource also had separate bookkeepers. Tr Vol. II, p. 1805, L. 22–25; p. 1807, L. 1–5. They also each maintained separate QuickBooks files. Tr Vol. II, p. 1623, L. 9–19; p. 1625, L. 1–8; p. 1809, L. 4–21. They also utilized separate accountants or tax preparers. Tr Vol. II, p. 1807, L. 6–p. 1808, L. 1. KD3 and SealSource also utilized separate credit cards. Tr Vol. II, p. 1939, L. 11–17.

KD3, KDN and SealSource each filed separate tax returns. Tr Vol. II, p. 1808, L. 2–8 & Exs. 203, 204, 205, 375, 377, 379, 382, 383, 385, 387, 540, 541, 542, 543, 544, 545, 546, 547,

[3] At trial, WinCo offered the testimony of Karen Ginnett, CPA ("Ginnett") to render a conclusion that corporate formalities were not respected between Ms. Nelson and the Nelson Entities. By her own admission, Ginnett analyzed the books and records of the Nelson Entities at a higher standard than even an IRS audit. Tr Vol. II, p. 1791, L. 24–25; p. 1087, L. 1–8. Other than generally referring to "accounting standards" and "IRS standards," Ginnett could not articulate the applicable standard of review she relied upon when rendering her opinions. Tr Vol. II, p. 1793, L. 14–22. Ginnett is not a licensed CPA in the state of Utah. Tr Vol. II, p. 1797, L. 19–20. Ginnett had never analyzed an entity relative to veil piercing or alter ego claims, Tr Vol. II, p. 1799, L. 7–12, nor had she testified in any case that involved veil piercing or alter ego claims before, Tr Vol. II, p. 1979, L. 9–23.

548, 549, 550, 551, 552, 553, 554, 555, 564, 565, 566, 567, 568, 569, 566, and 567. Nelson also filed her own personal tax returns. Critically, because all three of the Nelson Party entities—KD3, SealSource, and most importantly KDN, which was an s-corporation—were pass-through entities, Nelson paid the income taxes for the entities on her personal tax return. Tr Vol. II, p. 1917, L. 22–25; p. 1918, L. 1–4; p. 1920, L. 9–16; p. 2019, L. 3–10 & Exs. 568, 569, 570.

When WinCo issued a check to "KD Concrete Design," it would be deposited into KDN's bank account. Tr Vol. II, p. 2005, L. 23–25; p. 2014, L. 9– p. 2016, L. 7 & Ex. 545. Nelson did not transfer funds from KDN to any personal accounts. Tr Vol. II, p. 1911, L. 20–23. Rather, because KDN was organized as an s-corporation, Nelson understood that all income flowed to her personally, and that she was responsible to pay the tax obligation for income to KDN. Tr Vol. II, p. 1344, L. 18–p. 1345, L. 6. Based on the advice of her accountant, Mark Whittaker ("Whittaker"), Nelson understood that she could utilize KDN's funds for personal expenses so long as such payments were categorized as distributions. Tr Vol. II, p. 2039, L. 5–p. 2040, L. 7. And Nelson and Whittaker attempted to properly book those expenses as distributions. Tr Vol. II, p. 2036, L. 24–p .2038, L. 7. Whittaker advised Nelson on how to categorize these expenses and expressed no concern to Nelson over how they were being booked in KDN's records. Tr Vol. II, p. 2040, L. 1–p. 2041, L. 9; p. 2042, L. 3–16; p. 2042, L. 22– p. 2043, L. 2. If Whittaker questioned whether something was really a business expense, he would inquire further to see if there was a "reasonable explanation." Tr Vol. II, p. 2063, L. 7–p. 1360, L. 15. He did advise the characterization of certain expenses, where appropriate, as shareholder distributions. Tr Vol. II, p. 2064, L. 7–p. 2065, L. 15. Whittaker deemed Nelson "entitled" to

use KDN's money in this way because Nelson had already paid taxes on those funds. Tr Vol. II, p. 2068, L. 14–p. 2070, L. 18; p. 2071, L. 15-22.

Joel Christensen ("Christensen") served for periods of time as bookkeeper for KD3 and SealSource.[4] Tr Vol. II, p. 1618, L. 22–p. 1619, L. 1. Christensen characterized himself as "pretty conservative" with respect to the classification of expenses as business or personal, and he "lean[ed] towards the personal expense side if there was any question." Tr Vol. II, p. 1645, L. 13–22. According to Christensen, Nelson relied upon him "as the accountant to help her understand the accounting side and properly classify expenses and revenues and follow those rules." Tr Vol. II, p. 1621, L. 14–19. Christensen advised KD3 and Sealsource regarding general business expenses, accounting for travel expenses and vehicle business expenses. Tr Vol. II, p. 1640, L. 12–p. 1642, L. 19. He recollects "times where we went back and forth to make sure" that expenses would be classified correctly. Tr Vol. II, p. 1645, L. 4–9.

KDN finished its work for WinCo in August 2010. Tr Vol. II, p. 2269, L. 23-25 – p. 2270, L. 1-4. WinCo first asserted that KDN had overbilled WinCo on approximately May 4, 2012, nearly two years later. Tr. Vol. II, p. 1529, L. 8-24 & Ex. 421. WinCo did not assert any legal claim against KDN, of any kind, until December 7, 2012. Tr Vol. II, p. 1344, L. 5-9. By that time, Nelson—having heard no formal grievances from WinCo—had utilized virtually all of

[4] Christensen worked with SealSource for a "short stint" in 2009, left, and returned in late 2011. He worked there until April 2014. Tr Vol. II, p. 1619, L. 22–p. 1620, L. 6. During the time Christensen was not at SealSource, Jane Marriott, and then Corby Van Valkenburg, served as SealSource's internal accountants. Tr Vol. II, p. 1647, L. 23–p. 1648, L. 6.

KDN's funds. Tr Vol. II, p. 1916, L. 15-19. KDN ceased business in 2012. Tr Vol. II, p. 1916, L. 15-19.

5. The Scheduling of a Bench Trial Rather Than a Jury Trial

On November 3, 2015, the Nelson Parties filed an answer to WinCo's Second Amended Complaint. R Vol. I, p. 3232. That answer concluded with a section entitled "Reliance Upon Jury Trial Demand," and stating that "[t]he Nelson Parties hereby rely upon all prior demands for jury trial submitted by any party to this lawsuit." R Vol. I, p. 3245.

On January 2, 2013, the District Court held a scheduling conference. R Vol. I, p. 4. Following that hearing, on January 9, 2013, the District Court scheduled a five-day jury trial, to begin on December 9, 2013. R Vol. I, p. 4. Dispelling any doubt, the District Court set the case for jury trial an additional *four* times: on August 22, 2013, November 13, 2014, April 9, 2015, and November 20, 2015. R Vol. I, p. 7, 13, 15, 22. Critically, on November 12, 2014—a day prior to setting the case for jury trial for the third time—WinCo and the Nelson Parties filed a Stipulation for Scheduling and Planning, signed by counsel for both sides. There, WinCo and the Nelson Parties stipulated to a "12 Person Jury Trial."[5]

On August 14, 2015, during a hearing, the District Court and WinCo's counsel discussed WinCo's theory and suggested procedure for proving the Nelson Parties' liability. There, the following exchange between WinCo and the District Court occurred:

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[5] This stipulation was inadvertently omitted from the record on appeal. Concurrently with this brief, the Nelson Parties file a motion to augment the record with this stipulation and supply it to WinCo for use in its response brief.

THE COURT: The way it would work is the court would submit the issue to the jury on an advisory basis as it relates to the piercing—

MS. MARTINSON: Correct.

THE COURT: —and incorporate the jury's findings into its finding and conclusions as to piercing. And in order to do that, we would have to submit the issue of KDN's liability at the same time, wouldn't we?

MS. MARTINSON: Yes, I would agree with you on that one.

Tr Vol. I, p. 122, L. 9–18. At the same hearing, WinCo asked the Court if it should prepare jury instructions. Tr Vol. I, p. 147, L1–2.

During a November 20, 2015, hearing, the Nelson Parties, WinCo, and the District Court engaged in a lengthy discussion scheduling trial, as well as discussing the District Court's procedures and preferences for how to conduct a jury trial, particularly where WinCo asserted both legal and equitable claims. Tr Vol. I, p. 341, L. 22–p. 344, L. 14. The following exchange occurred:

MR. JOHNSON: All right. May I also ask the Court's routine on equitable remedies like alter ego?

THE COURT: Right.

MR. JOHNSON: Will the Court have the jury determine the facts relative to that and the Court then use those facts to determine the remedy or will the Court be the finder of fact as well.

THE COURT: So the Supreme Court in Idaho has indicated on equitable issues that those are court issues, obviously. But the Court can use advisory findings by the jury to use as part of its findings.

My practice is generally to use the jury is [sic] an advisory fact finder.

Now, it's not a rule that's set in stone and, certainly, if there's a—I'll look at that issue, but that's my general preference. And we can talk about that as we bet [sic] closer.

Tr Vol. I, p. 343, L. 21–p. 344, L. 14. At no time did WinCo raise any issue regarding the convening of a jury trial. Tr Vol. I, p. 343, L. 21–p. 344, L. 14.

On April 4, 2016, WinCo filed an objection to jury trial. R Vol. I, p. 3929. There, it argued that because no written jury demand had been filed, there could be no jury trial on WinCo's claims. Rather, WinCo's claims would be tried to the District Court. R Vol, I, p. 3929. According to the District Court's docket, that filing marks the first time in the course of the case—since October 2012—that WinCo had ever stated any inclination to have any kind of trial other than a jury trial. R Vol. I, p. 3–25. On April 29, 2016, the Nelson Parties filed a response to WinCo's objection. R Vol. I, p. 3947. Also on April 29, 2016, the Nelson Parties filed a motion seeking a jury trial pursuant to Idaho Rule of Civil Procedure 39(b). R Vol. I, p. 3953.

At a hearing held on May 5, 2016, the District Court conceded that it "was under the assumption that it was going to be a jury trial" and had "been for some long time." Tr Vol. I, p. 350, L. 2–4. WinCo's counsel observed that on March 25, 2016, the District Court's staff had sent an email asking the parties whether the case would be tried to a jury or to the District Court. Tr Vol. I, p. 352, L. 13–16. At a separate hearing on March 30, 2016, WinCo's counsel "indicated that he thought that a jury trial would be acceptable to WinCo as well." Tr Vol. I, p. 372, L. 3–6. The District Court was unable to locate the aforementioned stipulation by WinCo to a jury trial, and—ostensibly owing to the oppressive length and complexity of the case, neither WinCo nor the Nelson Parties could point the District Court to that stipulation either. Tr Vol. I, p. 370, L. 21–p. 371, L. 3. The Court granted WinCo's objection to the jury trial and denied the Nelson Parties' Rule 39(b) motion on the ground that, without a demand or a stipulation, "there are a lot of issues in this case that are equitable in nature" that "in large measure predominat[e] here." Tr Vol. I, p. 372, L. 15–p. 373, L. 16.

IV. ISSUES PRESENTED ON APPEAL

1. Did the District Court commit an error or law or abuse its discretion by deeming the Nelson Parties to have waived their right to a jury trial or, alternatively, by denying the Nelson Parties' motion for a jury trial, brought pursuant to Idaho Rule of Civil Procedure 39(b)?

2. Did the District Court erroneously impose personal liability upon Nelson, either on the ground that KDN constitutes an undisclosed principal or pursuant to Idaho Code § 30-1-204, for all WinCo stores at issue?

3. Did the District Court base its determination that the Nelson Parties are each alter egos of one another upon erroneous principles of law?

V. ATTORNEY FEES ON APPEAL

The Nelson Parties do not claim attorney fees on appeal.

VI. ARGUMENT

The District Court misapplied key legal principles that incorrectly altered the result at trial. For the following reasons, the Court should reverse the District Court on the following three grounds.

A. THE DISTRICT COURT ABUSED ITS DISCRETION BY DEEMING THE NELSON PARTIES TO HAVE WAIVED THEIR RIGHT TO A JURY TRIAL OR, ALTERNATIVELY, BY DECLINING TO CONVENE A JURY TRIAL PURSUANT TO IDAHO RULE OF CIVIL PROCEDURE 39(b).

This Court will review the District Court's refusal to order a jury trial pursuant to Idaho Rule of Civil Procedure 39(b) for abuse of discretion. *See City of Pocatello v. Anderton*, 106 Idaho 370, 373, 679 P.2d 647, 650 (1984). "This Court's test to determine whether a trial court has abused its discretion consists of three parts: '(1) whether the lower court rightly perceived

the issue as one of discretion; (2) whether the court acted within the outer boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by an exercise of reason.'" *Goodspeed v. Shippen*, 154 Idaho 866, 869–70, 303 P.3d 225, 228–29 (2013) (quoting *Schmechel v. Dillé*, 148 Idaho 176, 179, 219 P.3d 1192, 1195 (2009)). The Court reviews questions of law de novo. *See State v. Schulz*, 151 Idaho 863, 865, 264 P.3d 970, 972 (2011).

As the following sections demonstrate, the District Court acted inconsistent with legal standards when it failed to recognize WinCo's stipulation to a jury trial. In the context of the Nelson Parties' Rule 39(b) motion, it also failed to appreciate governing Idaho law specifying that Rule 39(b) requests for jury trial are to be liberally granted, and it failed to appreciate the unique reality that the District Court and every party to this case anticipated a jury trial for over three years—owing, at least in part, to WinCo's own stipulation. The District Court's decision denied the Nelson Parties of their right to a jury trial. This Court should therefore reverse the District Court's refusal to convene a jury trial and remand to the District Court for proceedings consistent with that reversal, including a jury trial.

1. The District Court Scheduled a Jury Trial Numerous Times Based on WinCo's Apparent Initial Stipulation and Explicit Subsequent Stipulation.

The Court correctly observed that there is no written jury demand filed prior to the Nelson Parties' November 3, 2015, statement of "reliance." But there was, of necessity, a stipulation. "A party waives a jury trial unless its demand is properly served and filed." *See* Idaho R. Civ. P. 38(d). "When a jury trial has been demanded under Rule 38, the action must be

designated on the register of actions as a jury action." Idaho R. Civ. P. 39(a). In other words, in a civil case, a jury trial must be demanded, and a demand results in the action being designated as a jury action on the register of actions. It follows that if the action is designated as a jury action on the register of actions, there *must* have been either a demand or a stipulation to a jury trial.

The District Court docket evidences this stipulation. On January 2, 2013, the District Court held a scheduling conference. R Vol. I, p. 4. The outcome of that scheduling conference was not reduced to a written order, perhaps contributing to some confusion. But a week thereafter, the District Court scheduled a five-day jury trial, to begin on December 9, 2013. R Vol. I, p. 4. The scheduling conference plainly resulted in a stipulation to a jury trial. The case was *again* set for a jury trial on August 22, 2013. R Vol. I, p. 7.

Dispelling any doubt, on November 12, 2014, WinCo and the Nelson Parties *did* file an express, written stipulation to the convening of a "12 Person Jury Trial."[6] Based ostensibly on at least that stipulation (if not an earlier stipulation), the District Court set the case for jury trial an additional *three* times: November 13, 2014, April 9, 2015, and November 20, 2015. R Vol. I, p. 13, 15, 22. WinCo never objected. R Vol. I, p. 3–25.

Furthermore, at no fewer than three hearings—August 14, 2015, November 20, 2015, and March 30, 2016—the parties discussed the convening of a jury trial with the Court, including its procedures and preferences for trying legal and equitable claims together. In fact, the March 30,

[6] Again, concurrently with this brief, the Nelson Parties move to supplement the appellate record with this stipulation.

2016, hearing was predated, by five days, by an email from the District Court's staff asking the parties whether the case was to be tried to a jury or to the District Court. On March 30, 2016, WinCo did not object to a jury trial, but rather stated its belief that a jury trial was likely acceptable to WinCo.[7]

That is why the Nelson Parties "relied" on the notion of a prior jury demand when they filed their response to WinCo's Second Amended Complaint—they thought, based on three years of litigation aimed at a jury trial, that the case was to be tried to a jury. In any event, but particularly in this context, there is no material distinction between "demanding" a jury trial and "relying" upon a prior demand for—or the prior scheduling of—a jury trial. A jury demand must be in writing, "which may be included in a pleading," and served "no later than 14 days after the last pleading directed to the issue is served." *See* Idaho R. Civ. P. 39(b)(1). The Nelson Parties clearly did that: in their answer to WinCo's Second Amended Complaint, they stated, in writing, that they desired, expected, and anticipated a jury trial. R Vol. I, p. 3245. "Demand" is not a magic word. *See Lutz v. Glendale Union High Sch.*, 403 F.3d 1061, 1065 (9th Cir. 2005) (noting that the requirement is simply that "the jury demand be sufficiently clear to alert a careful reader that a jury trial is requested on an issue," and that "[t]his approach allows a great deal of flexibility in how the request is made"); *see also id.* (although a request "certainly could have

[7] Specifically, the District Court stated that it had "looked at the transcript of [the March 25, 2016] hearing" and observed that WinCo's counsel "indicated that he thought that a jury trial would be acceptable to WinCo as well." The District Court then discounted WinCo's admission by stating that it recognized "that he's not been lead counsel in this case and certainly hasn't been the decision-maker on those kind of important issues, fundamental issues."

been clearer, [it] did provide sufficient notice to the court and opposing counsel that [the plaintiff] wanted a jury trial"). The Nelson Parties plainly expressed their intent that all issues triable to a jury be so tried. They certainly did not offer "a voluntarily, intentional relinquishment of a known right or advantage" sufficient to qualify as a waiver, and WinCo certainly did not "act[] in reasonable reliance upon [such waiver] and . . . thereby . . . altered [its] position to [its] detriment." *See Margaret H. Wayne Trust v. Lipsky*, 123 Idaho 253, 256, 846 P.2d 904, 907.

WinCo stipulated to a jury trial—either expressly or by its conduct of this case for three years. The Nelson Parties were entitled to rely upon WinCo's express or implied stipulation.

2. Even If There Was No Express Stipulation to Try the Case to a Jury, the District Court Abused Its Discretion by Denying the Nelson Parties' Rule 39(b) Motion.

Even leaving aside WinCo's stipulation, these circumstances are precisely the kind of reason why Idaho Rule of Civil Procedure 39(b) exists. Although "[i]ssues on which a jury trial is not properly demanded are to be tried by the court . . . the court may, on motion, order a jury trial on any issue for which a jury might have been demanded." Idaho R. Civ. P. 39(b). "It is *essential* that, upon a request for a trial of issues by a jury, even after the time for demand for a jury has elapsed, that the trial court *liberally* exercise its discretion in this regard to carry out the designed purpose of the Idaho Rules of Civil Procedure." *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). One of the designed purposes of the Idaho Rules of Civil Procedures is to preserve the right to a jury trial: "[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). Courts construing the federal equivalent of Idaho's Rule 39(b) observe that Rule 39(b) motions "should be granted when the parties opposing the motion fail to present 'strong and compelling reasons' in support of their opposition." *See, e.g.*, *AMF Tuboscope, Inc. v. Cunningham*, 352 F.2d 150, 155 (10th Cir. 1965).[8] More narrowly constrained applications of Rule 39(b):

> seem to place the emphasis in the wrong place. Technical insistence upon imposing a penalty for default by denying a jury trial is not in the spirit of the rules. The rules do not limit the court's discretion in ordering a jury in cases in which there would have been a right to jury trial. The court ought to approach each application under Rule 39(b) with an open mind and an eye to the factual situation in that particular case, rather than with a fixed policy against granting the application or even a preconceived notion that applications of this kind are usually to be denied.

See 9 C. Wright & A. Miller, *Fed. Practice & Procedure* § 2334, at 115–116 (1971) (footnotes omitted). Courts should consider several factors in assessing a Rule 39(b) motion, including "whether the issues are more appropriate for determination by a jury or a judge," "any prejudice that granting a jury trial would cause the opposing party," "the timing of the motion," and "any effect a jury trial would have on the court's docket and the orderly administration of justice."

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[8] *See also Kitchen v. Chippewa Valley Schs.*, 825 F.2d 1004, 1013 (6th Cir. 1987) (a court's discretion "should be exercised in favor of granting a jury trial in the absence of strong and compelling reasons to the contrary" (internal quotation marks omitted)); *Parrott v. Wilson*, 707 F.2d 1262, 1267 (11th Cir. 1983) ("In this circuit, the general rule governing belated jury requests under Rule 39(b) is that the trial court should grant a jury trial in the absence of strong and compelling reasons to the contrary." (internal quotation marks omitted)); *United States v. Unum, Inc.*, 658 F.2d 300, 303 (5th Cir. 1981) ("A motion for trial by jury submitted under Rule 39(b) should be favorably received unless there are persuasive reasons to deny it."); *Littlefield v. Fort Dodge Messenger*, 614 F.2d 581, 585 (8th Cir. 1980) ("[J]ury trials out to be liberally granted when no prejudice results.").

See Malbon v. Penn. Millers Mut. Ins. Co., 636 F.2d 936, 940 & n.11 (4th Cir. 1980); *see also Daniel Int'l Corp. v. Fishchbach & Moore, Inc.*, 916 F.2d 1061, 1064 (5th Cir. 1990) (same).

At least one court has already balanced these factors in almost the exact environment this appeal presents. In *Pinemont v. Belk*, 722 F.2d 232 (5th Cir. 1984), the Fifth Circuit Court of Appeals reviewed a district court's denial of a Rule 39(b) motion where both the defendant and the Court believed that the case was to be tried to a jury and had prepared accordingly, only to learn at the pretrial conference that the plaintiff desired a bench trial and that no demand had actually been filed. *See id.* at 235–38. Specifically, the Fifth Circuit observed that although the defendant could have perhaps more closely scrutinized the pleadings, the fact that "the district court had apparently been led to believe"—by the plaintiff, no less—"that the case was to be tried by a jury" was of "prime importance." *See id.* at 238. Because the court was already planning on a jury trial, granting the Rule 39(b) motion "would not have unduly affected the court's administration of its business." Deeming that case to be "uniquely characterized" by misleading statements from the plaintiff, the defendant's "good faith, and the district court's readiness up until a week before trial to try this case to a jury," the Fifth Circuit concluded that the district court abused its discretion by denying the Rule 39(b) motion. *See id.*

That is exactly what happened here. Regardless of whether a formal written demand for a jury trial was ever filed, both WinCo and the Nelson Parties litigated this case for over three years expecting to reach a jury trial. The Court expected a jury trial, too, and had calendared one five times. With those expectations squarely in place, WinCo cannot possibly have been prejudiced by trying its case to a jury, as it had always planned to do. And the Court's

administration would have sustained no impact, as it had scheduled a jury trial from the beginning of the case, including in November 2016. The timing of the Nelson Parties' Rule 39(b) motion was more than fair. The Nelson Parties filed it immediately after WinCo stated, for the first time in over three years, that it didn't want a jury trial after all. And although the claims at issue contained some equitable claims (like alter ego and unjust enrichment), the majority of them—including WinCo's central claim—were legal in nature (breach of contract, personal liability, fraud, and violation of Idaho's Consumer Protection Act). The parties even discussed with the Court, on November 20, 2015, procedures for trying both legal and equitable claims.

The rule is that a District Court should grant a Rule 39(b) motion unless there is a persuasive reason not to. Here, not only was there no such reason, but WinCo, the Nelson Parties, *and* the Court anticipated a jury trial until WinCo reneged on its stipulation at the eleventh hour. Even if there was no demand and no stipulation, the District Court still should have convened a jury trial pursuant to Rule 39(b), and it abused its discretion by failing to do so. This Court should vacate the judgment and remand to the District Court for a jury trial.

B. THE DISTRICT COURT'S DETERMINATION THAT NELSON IS PERSONALLY LIABLE IS BASED ON LEGAL ERROR.

The District Court determined that Nelson was personally liable under the Trial Period, the Portland Agreement, and the Boise Agreement pursuant to theories of undisclosed principal and pre-incorporation liability. That determination is premised upon a fundamental misunderstanding of the facts surrounding, and the difference between, the three contracts. "Formation of a contract is generally a question of fact for the trier of fact to resolve." *Inland*

Title Co. v. Comstock, 116 Idaho 701, 702, 779 P.2d 15, 16 (1989). "Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous." Idaho R. Civ. P. 52(a)(7). "[A] factual finding will not be deemed clearly erroneous unless, after reviewing the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made." *County of Canyon v. Wilkerson*, 123 Idaho 377, 381–82, 848 P.2d 435, 439–40 (Ct. App. 1993). "[C]lear error will not be deemed to exist if the findings are supported by substantial and competent, though competing, evidence." *Id.* at 382, 848 P.2d at 440.

However, to the extent the District Court misconstrued or misapplied legal principles, this Court reviews that misconstruction or misapplication de novo. *See Schulz*, 151 Idaho at 865, 264 P.3d at 972. Here, the District Court's error was not so much in its facts, but in how it failed to appreciate how legal principles of contract formation govern and apply those facts. As the following sections demonstrate, the District Court erroneously applied those principles, and this Court should reverse that determination.

1. The District Court's Definition of the "Contract" Between WinCo and KDN Is Contrary to Idaho Law Regarding an Indefinite Quantities Contract.

The District Court missed the key distinction between the Trial Period, the Portland Agreement, and the Boise Agreement. They are different, and that difference has legal implications.

Basic contract principles govern this issue. "Formation of a valid contract requires that there be a meeting of the minds as evidenced by a manifestation of mutual intent to contract. This manifestation takes the form of an offer and acceptance." *P.O. Ventures, Inc. v. Loucks*

Family Irrevocable Trust, 144 Idaho 233, 238, 159 P.3d 870, 875 (2007) (internal quotation marks omitted). An enforceable contract also requires consideration, or "action by the promisee which is bargained for and given in exchange for the promise." *See Day v. Mortgage Ins. Corp.*, 91 Idaho 605, 607, 428 P.2d 524, 526 (1967). "[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)).

The District Court found that the Trial Period, the Portland Agreement, and the Boise Agreement were all one indefinite quantities contract, but that finding ignores these basic contract principles. The Trial Period permitted KDN to perform concrete joint repair work on at most three—and only three—WinCo stores. WinCo could pull any store from KDN's worklist. In other words, WinCo's promise was illusory until KDN actually commenced work. Just as Nelson testified, there was *no* agreement with WinCo until work actually started. And it is undisputed that that Trial Period work was intended to see how KDN would work out as a contractor. WinCo not only reserved the right to not permit KDN to work on additional stores, but WinCo had not yet even identified additional stores requiring concrete joint repair. The Portland Agreement followed only when KDN satisfactorily completed work on the three stores

the Trial Period contemplated, and WinCo elected to have KDN proceed with other, to-be-determined stores. The Boise Agreement did not follow until after the Portland Agreement.

The District Court misapprehended, as a matter of law, what an indefinite quantities contract is. 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 incorrectly defined an indefinite quantities contract's enforceability. 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 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). In other words, parties may have an indefinite quantities contract, but only the portion of the contract that the parties have agreed to is actually enforceable—or, put differently, is actually a "contract."

With these principles in place, there were, at least, three contracts between KDN and WinCo: the Trial Period, the Portland Agreement, and the Boise Agreement. By definition and operation of law, the Trial Period did not start until WinCo's promise to permit KDN to perform work became irrevocable, and that did not occur until KDN started work. And most certainly, the Portland Agreement did not arise until KDN completed the Trial Period and WinCo authorized it to work on other stores. The same goes for the Boise Agreement. The District Court's contrary characterization of the KDN-WinCo contract fails to conform to established contract principles.

2. The District Court's Determination that Nelson Is Liable to WinCo Under the Agreement Pursuant to an Undisclosed Principal Theory Is Premised Upon Legal Error.

An agent will not be held liable on a contract if he discloses to the other contracting party that (1) the agent is acting for a principal and (2) the principal's identity. *See Agrisource, Inc. v. Johnson*, 156 Idaho 903, 908, 322 P.3d 815, 820 (2014). The District Court found that Nelson "presented no evidence that she clearly and affirmatively disclosed to WinCo at or prior to January of 2010 that she was acting as an agent for a yet-to-be-formed corporation named "KDN Management, Inc. d/b/a KD Concrete Design," or even "KDN." R Vol. I, p. 5034. But that finding runs contrary to the principles articulated above.

Although KDN was not formed as of January 2010, it *was* formed on February 18, 2010, prior to commencing any work for WinCo. As explained above, WinCo could have pulled out of the Trial Period right up to the day upon which KDN started work. Up until that day, any contract was illusory, meaning it lacked consideration—there was, therefore, no contract. It was

undisputed at trial that KDN commenced work after February 18, 2010. Therefore, KDN was properly formed prior to entering into the Trial Period. The District Court's characterization of KDN as a "yet to be formed corporation," as of the effective date of the Trial Period, violates these basic contract principles. It is certainly inaccurate as to the Portland Agreement and the Boise Agreement.

Moreover, Nelson disclosed all she needed to disclose regarding her fully-formed principal. Even leaving aside Nelson's insistence that she disclosed KDN's precise name and corporate identity on two occasions, she indisputably disclosed the name "KD Concrete," that it was the name of a business entity separate from her, and that it was a corporation. Even Little identified "KD Concrete Design, Inc.," and "KDN," in his written, attorney-reviewed testimony. Douty also testified that he knew WinCo had contracted with a business entity, not with Nelson personally. WinCo admitted that it registered "KD Concrete" in its accounts payable software. And when WinCo subsequently received a W-9 listing "KDN Management Inc.," or issued a check to "KDN Management Inc.," it never protested that it had no idea who, or what, "KDN Management Inc." was. Without question, WinCo knew that it was dealing with a corporation, not Nelson personally. That is, quite literally, the *only* evidence on the record on that subject.

Where WinCo knew that was contracting with a corporation, and not Nelson personally, whether it knew it was contracting with "KD Concrete" or "KDN Management Inc." is legally irrelevant. In *Nadeau Painting Specialist, Ltd. v. Dalcor Property Management, Inc.*, No. 03-06-00060-CV, 2008 WL 2777724 (Tex. Ct. App. 2008 July 18, 2008) (unpublished), the plaintiff claimed that the defendant agent was personally liable on a contract because it made only a

partial disclosure of its principal. *See id.* at *8. The plaintiff admitted that "sufficient evidence exists of its knowledge that [the defendant] was representing the limited partnerships . . . [but] conten[ded] that [the defendant] never disclosed the *legal names* of the limited partnerships." *Id.* The court rejected the plaintiff's argument. It observed that the defendant disclosed its "agency status" and that "each of its four principals would be responsible for payment." *Id.* at *8–9. The court then held that "there is legally and factually sufficient evidence that [the plaintiff] had agreed to look solely to the limited partnerships for payment." *Id.* at *9. In other words, the point of the disclosure rule is to not to catch agents in technicalities; rather, it is to ensure that a party contracting with an agent receives the contract it intended. Requiring agents to disclose the exact legal name of their principal is "out-of-step with modern commercial realities." *Id.* at *9 n.9.

Idaho law does not distinguish between disclosing a business entity agent by its registered name versus the name under which it does business, and WinCo offered no evidence that the difference between "KDN" and "KD Concrete" mattered to it one whit. In fact, all the evidence presented at trial was to the contrary. Even assuming that Nelson disclosed "KD Concrete" rather than "KDN Management Inc.," WinCo knew that it was dealing with a corporation that was Nelson's principal, not Nelson herself.

In any event, and at a minimum, there was no dispute at trial that Nelson disclosed KDN, by name, when she returned the W-9 form—especially given that WinCo would not have paid KDN anything beyond its first payment without a completed W-9 form on file. That occurred prior to commencement of the Portland Agreement, and certainly prior to the commencement of

the Boise Agreement. Given that the Trial Period, the Portland Agreement, and the Boise Agreement constitute two separate agreements, the District Court should have, at a minimum, cabined Nelson's personal liability under any undisclosed principal theory to the stores encompassed by the Trial Period, or, at most, the Portland 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"). In no way could Nelson's personal liability encompass the Boise Agreement; WinCo plainly knew that it had contracted with KDN, a corporation, prior to entering into the Boise Agreement.

The Court should reverse the District Court's determination that Nelson is liable to WinCo on an undisclosed principal theory. Alternatively, and at a minimum, it should cabin Nelson's liability under that theory to the stores encompassed by the Trial Period or, at most, the Portland Agreement.

3. The District Court's Determination that Nelson Is Liable to WinCo Pursuant to a Pre-Incorporation Liability Theory Is Premised Upon Legal Error.

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).

The District Court concluded that Nelson was personally liable (under, ostensibly, both the Trial Period and the Agreement) because she "contracted on behalf of KDN prior to its incorporation." R Vol. I, p. 5039. But again, the District Court's characterization of the Trial Period, the Portland Agreement, and the Boise Agreement ignores principles of contract law. The Trial Period did not commence until KDN started working. KDN was indisputably incorporated prior to that date. And KDN was plainly incorporated before embarking on the Portland Agreement and, certainly, the Boise Agreement.

The Court should reverse the District Court's determination that Nelson is liable to WinCo pursuant to Idaho Code § 30-1-204. Alternatively, and at a minimum, it should cabin Nelson's liability under that theory to the stores encompassed by the Trial Period or, at most, the Portland Agreement—certainly not the Boise Agreement.

C. THE DISTRICT COURT ABUSED ITS DISCRETION BY DETERMINING THAT THE NELSON PARTIES ARE EACH ALTER EGOS OF ONE ANOTHER.

"[I]ssues of alter ego and veil-piercing claims are equitable decisions." *Wandering Trails, LLC v. Big Bite Excavation, Inc.*, 156 Idaho 586, 591, 329 P.3d 368, 371 (2014). "In these cases, the trial court is responsible for determining factual issues that exist with respect to this equitable remedy and for fashioning the equitable remedy." *Id.* "This Court reviews the district court's rulings on equitable remedies for an abuse of discretion." *Climax, LLC v. Snake River Oncology of E. Idaho, PLLC*, 149 Idaho 791, 794, 241 P.3d 964, 967. Again, an abuse of discretion inquiry asks: "(1) whether the lower court rightly perceived the issue as one of discretion; (2) whether the court acted within the outer boundaries of such discretion and

consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by an exercise of reason." *Goodspeed*, 154 Idaho at 869–70, 303 P.3d at 228–29 (internal quotation marks omitted). The Court reviews questions of law de novo. *See Schulz*, 151 Idaho at 863, 264 P.3d at 972. It reviews findings of fact for clear error. *See* Idaho R. Civ. P. 52(a)(7). Here, the District Court failed to appreciate principles of Utah law, as well as laws governing pass-through entities, and fashioned its equitable remedy based on those erroneous legal principles. This Court should reverse the District Court's alter ego determination.

Utah law governs whether any of the Nelson Parties are alter egos of one another. *See* Restatement (Second) of Conflicts § 307 (1971) ("The local law of the state of incorporation will be applied to determine the existence and extent of a shareholder's liability to the corporation for assessments or contributions and to its creditors for corporate debts."); 17 William Meade Fletcher et al., *Fletcher Cyclopedia of the Law of Private Corps.* § 8326 (rev. ed. 2006) ("[L]iability of a shareholder for corporate debts and the extent and character of that liability are to be determined by the law of the incorporating state . . . ."). KDN is a Utah corporation, and KD3 and SealSource are Utah limited liability companies. Utah law therefore governs the Court's alter ego analysis.[9]

[9] Idaho's alter ego test is not materially different than Utah's. *See Hayhurst v. Boyd*, 50 Idaho 752, 761, 300 P. 895, 898 (1931).

Utah law makes it difficult to pierce the corporate veil. Presumptively, Utah limited liability companies and corporations are entities separate and distinct from their members or shareholders. *See* Utah Code Ann. § 48-3a-104(1) ("A limited liability company is an entity distinct from its member or members."); Utah Code Ann. § 16-10a-622(2) ("Unless otherwise provided in the articles of incorporation, a shareholder or subscriber for shares of a corporation is not personally liable for the acts or debts of the corporation solely by reason of the ownership of the corporation's shares."). Therefore, Utah courts authorize piercing a corporate veil only "reluctantly and cautiously." *See Colman v. Colman*, 743 P.2d 782, 786 (Utah Ct. App. 1987). Specifically, Utah courts are "extraordinarily reluctant to lift the veil in contract cases, such as this one, where the creditor has willingly transacted business with the corporation." *See d'Elia v. Rice Dev., Inc.*, 2006 UT App 416, ¶ 28, 147 P.3d 515 (internal quotation marks omitted).

That backdrop informs Utah's two requirements for piercing a corporate veil:

> (1) [s]uch a unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, but the corporation is, instead, the alter ego of one or a few individuals; and (2) if observed, the corporate form would sanction a fraud, promote injustice, or result in an inequity.

Envirotech Corp. v. Callahan, 872 P.2d 487, 500 (Utah Ct. App. 1994). The second prong is defined as the "fairness prong," and to satisfy it, WinCo "cannot merely show difficulty in satisfying debt. . . . Instead, [WinCo] must provide evidence of bad faith." *See d'Elia*, 2006 UT App 416, ¶ 30 (citations and internal quotation marks omitted).

This is, above all, a contract case. The trial evidence clearly and unambiguously indicates that WinCo knew it was contracting with a business entity, not an individual.

Requiring WinCo to collect against a business entity, and not Nelson personally, cannot violate its expectations. *See Ottens v. McNeil*, 2010 UT App 237, ¶ 39, 239 P.3d 308 ("[W]e see no injustice where Ottens was aware that the corporation had some involvement long before trial."). Moreover, the trial evidence clearly and unambiguously indicates that each of the Nelson Parties made required state filings, maintained separate bank accounts, filed separate tax returns, and maintained separate accounting records.

The District Court based its determination of alter ego on its finding 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. But as a matter of Utah law, the movement of money among various parties is, in and of itself, insufficient to support a determination of alter ego. In *Jones & Trevor Marketing, Inc. v. Lowry*, 2012 UT 39, 284 P.3d 630, the Utah Supreme Court held that "merely 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." *See id.* ¶ 27. A single question looms over WinCo's alter ego claim and the District Court's analysis of that claim: "Why did KDN spend all the money WinCo paid it, when KDN knew that it was liable to WinCo?" That question presumes that KDN (or Nelson) knew KDN was liable to WinCo, and that KDN had no right to spend income it had received from WinCo. Neither presumption is supported by any trial evidence.

1. Neither KDN Nor Nelson Knew of Its Liability to WinCo.

There is no trial evidence supporting any determination that Nelson knew that KDN, or any other Nelson Party, had any liability to WinCo. Indeed, the District Court's own findings contradict such a determination. The District Court itself found that "Ms. Nelson has no personal knowledge regarding the accuracy of the measurements." R Vol. I, p. 5021. The most that can be said about Nelson is that she did not know whether the linear foot measurements were accurate. That may have been an example of poor business management, and it may result in a breach of contract, but it is a far cry from *knowing* that measurements were inaccurate, such KDN or Nelson could have expected WinCo to come knocking. Furthermore, *knowing* whether KDN's linear feet measurements were inaccurate would form the basis of a fraud claim. *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"). But WinCo did not bring a fraud claim alleging intentional overcharging on all WinCo stores. The only liability that KDN or Nelson could possibly have *known* about, based on the Court's findings, was liability arising from the Overbilling Fraud and the Weber Fraud, for a total of $25,042 in damages. Indeed, those are the only fraud claims WinCo brought. This is exactly why Utah's alter ego test requires a failure to adhere to corporate formalities to "sanction a fraud, promote injustice, or result in an inequity" for alter ego liability to attach. Without such fraud, injustice, or inequity, every breach of contract by a business entity would result in the personal liability of every principal of that entity. The corporate veil would disappear.

Furthermore, the trial evidence is clear WinCo did not raise overbilling concerns until May 4, 2012, when WinCo responded to KDN's demand letter "in part by alleging that [KDN] had overbilled WinCo." Prior to that time, KDN had demanded that WinCo pay KDN $344,167.50. Consider that: until May 4, 2012, KDN thought WinCo owed *it* money, not the other way around. By the time KDN brought suit against WinCo in October 2012, KDN had already spent the money WinCo had paid it. None of the trial facts—including the District Court's own findings—support any suggestion that KDN and Nelson frittered away WinCo's payments as fast as they could before WinCo demanded reimbursement, knowing they had overbilled WinCo. Indeed, the opposite is true.

2. Because KDN Was an S-Corporation, Nelson Was Justified in Utilizing Its Funds for Personal Use.

As a matter of law, it was not improper for Nelson to use WinCo's payments to KDN for her own use. Nelson was KDN's sole shareholder, and KDN was an s-corporation. Where an entity is an s-corporation, its income "is treated as the personal income of the individual stockholder." *See United States v. Rouhani*, 106 F. Supp. 3d 1227, 1230 (M.D. Fla. 2015) (forfeiture case). Further, "in 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." *See Commercial Cabinet, Inc. v. Quint*, 2003 WL 22962070, at *2 (Mich. Ct. App.

Dec. 16, 2003) (unpublished disposition). As a matter of law, all things being equal, Nelson was fully authorized to draw as much of KDN's funds as she wished, so long as it didn't defraud anyone. And, as explained above, it didn't.

The District Court discounted this principal on the ground that the stockholder of an s-corporation "must withdraw the corporate income in the form of a salary and distribution and subsequently use the withdrawn funds for personal items." R Vol. I, p. 5050. "Treating the S-corporation as a personal piggy bank and classifying personal expenses as corporate expenses presents a vastly different scenario." *Id.* The two cases the District Court cited for this proposition are inapposite here. Although in *United States v. Rouhani*, 106 F. Supp. 3d 1227, the court stated that the sole shareholder of an s-corporation "was entitled to take a salary and distributions" from the s-corporation, it did not speak to what amounts were appropriate for such salary or distributions, whether those amounts would have mattered in its analysis, or whether the manner in which the salary and distributions were accounted for was material. *See id.* at 1230. Moreover, in *Rouhani*, the defendant was the sole shareholder of a company that employed forty-eight employees, and the defendant "determined whether and to what extent [the corporation] would pay its employees bonuses." *See id.* at 1229. The sole shareholder "purchased a number of homes for his family members with distributions from [the corporation] and continued to pay the tax and insurance costs on those properties," his family members "lived in the houses rent free," and the sole shareholder and his wife—and the corporation—"gave a $25,650.00 gift to [the shareholder's] church." *See id.* Strikingly, the court found no alter ego under these facts, even though the sole shareholder used the corporation, in the District Court's

parlance, as his "personal piggy bank." *Politte v. United States*, 2012 WL 965996 (S.D. Cal. Mar. 21, 2012) (unpublished), was a tax refund case. *See id.* at *1. The s-corporation "operated between six and ten Midas franchise shops in the San Diego area." *See id.* The two plaintiffs were not the sole shareholders; they owned 74% of the s-corporation's issued and outstanding shares. *See id.*

In contrast to those cases, KDN was a single-shareholder s-corporation. Although Nelson sought to generate additional business for KDN, it essentially did one job: the WinCo job. That work concluded in August 2010. WinCo did not even begin to discover the purported overstatements—which, as explained above, with the exception of three stores, the District Court found were mere breaches of contract and not frauds—until November 2011, and it did not actually assert a claim against KDN for overpayment until late 2012. During that time, Nelson continued to keep money in KDN's bank account, even though it was in a business development phase and not actually doing additional concrete projects. Critically, Nelson also paid taxes on the income she received from KDN. The District Court rejected the significance of KDN as an s-corporation because it saw a distinction between Nelson causing KDN to pay personal expenses and Nelson causing KDN to distribute money to her personal account, and then paying personal expenses. But from WinCo's perspective, there is no difference—Nelson could have caused KDN to make herself a $1 million distribution in August 2010, and WinCo's concern would have been satisfied. None of these factors was present in either the *Rouhani* or *Politte* cases. And WinCo's and the District Court's point, if approved, would mean that a single-shareholder s-corporation must wait until the statute of limitations on *all* potential liabilities has

expired before distributing *any* money—otherwise, the distribution is tantamount to the shareholder taking money from the s-corporation with pending liabilities. *That* is an inequitable and unrealistic outcome.

Assume all of the Court's findings regarding Nelson's "siphoning" are true: Nelson drew funds from KDN to pay for the birthday parties of nieces and nephews, personal foreign exotic travel, elaborate family vacations, cars, personal credit card payoffs, personal gifts, and house payments. As a matter of law, she was allowed to. She did it before WinCo articulated even a single concern about KDN's billing. The District Court too readily discounted this important point.

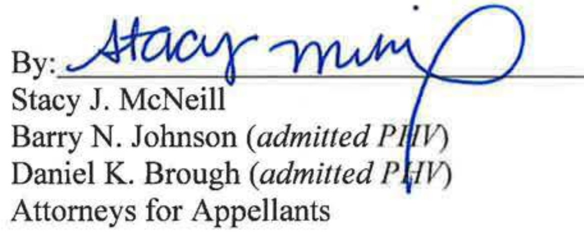
The Court should reverse the District Court's determination of alter ego as against Nelson. It should reverse that determination as against KD3 and SealSource for the same reasons.

VI. CONCLUSION

The Nelson Parties were entitled to a jury trial, and both WinCo and the Court expected one. Even leaving aside that enormous deprivation, the District Court's determinations of Nelson's personal liability and the Nelson Parties' alter ego ignored key principles of law. For these reasons, reasons, the Court should vacate the District Court's judgment and reverse for further proceedings consistent with the Nelson Parties' arguments, including jury trial.

DATED this 30th day of October, 2017.

BENNETT TUELLER JOHNSON & DEERE

By: 

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CERTIFICATE OF MAILING AND ELECTRONIC DELIVERY

I certify that on the 30th day of October, 2017, I caused an original bound version and six bound copies of the foregoing **OPENING 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 October 30, 2017.

I also certify that on the 30th day of October, 2017, I caused the foregoing **OPENING 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 30th day of October, 2017, I caused two copies of the foregoing **OPENING 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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