12-27-2017

KDN Management, Inc. v. Winco Foods, LLC Respondent's Brief Dckt. 45010

IN THE SUPREME COURT OF THE STATE OF IDAHO

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, Plaintiffs/Appellants, vs. WINCO FOODS LLC, a Delaware limited liability company d/b/a WINCO FOODS, Defendant/Appellee.	Supreme Court No. 45010-2017

APPELLEE'S RESPONSE BRIEF

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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I. STATEMENT OF THE CASE

This appeal arises out of the trial and judgment entered by the District Court, Fourth Judicial District, Ada County, Steven Hippler presiding.

A. NATURE OF THE CASE[1]

WinCo Foods, LLC ("WinCo") obtained a $2,929,383.31 Amended Judgment (CR 6101-03) against KDN Management Inc. ("KDN"), Kymberlee Nelson ("Ms. Nelson"), SealSource International, LLC ("SealSource"), and KD3 Flooring LLC ("KD3") (collectively, referred to as the "Nelson Parties"). The basis of liability was the Nelson Parties' purposeful overcharging for floor joint replacement work performed in multiple WinCo stores.

To secure the Amended Judgment, WinCo pursued claims against the Nelson Parties for more than four years of litigation that included: (1) repeated orders from the District Court sanctioning the Nelson Parties for their discovery abuses; (2) KDN's filing of a groundless bankruptcy petition for the sole purpose of causing delay; (3) a two-day spoliation hearing resulting in adverse inferences and sanctions against the Nelson Parties; and (4) a nine-day court trial. CR 5032-33.

Relevant to this appeal, the District Court decided two issues: (1) the Nelson Parties waived their right to a jury trial, and in the District Court's discretion there was no reason to undue that waiver; and (2) for a number of reasons, the Nelson Parties were jointly and severally liable for the Amended Judgment.

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[1] The Clerk's Record on Appeal contains two parts. Part 1 contains the pleadings that are part of the record on appeal and Part 2 contains the trial exhibits. Part 1 is not paginated but contains 6185 pages. It will be cited as "CR" and then the page number. Part 2 of the Clerk's Record, is also not paginated and contains 2969 pages of trial exhibits. It will be referred to by trial exhibit number and cited as "Ex. __." The Transcript of the Proceedings is divided into two volumes and consecutively paginated from 1-2636. It will be cited as "Tr. Vol. __, p. __."

As to the jury trial issue, the District Court held that the Nelson Parties failed to comply with the requirements of Idaho Rule of Civil Procedure 38(b), and thus they waived their right to a jury trial pursuant to Rule 38(d). *See* Tr. Vol. I, pp. 348:2-8, 371:24-25. The Nelson Parties thereafter moved the District Court to excuse their waiver and to order a jury trial under Rule 39(b) (CR 3953-56), and the District Court appropriately exercised its discretion under the applicable standards denying the Nelson Parties' motion. Tr. Vol. I, pp. 370:21-373:16.

As to joint and several liability, the District Court concluded that the Nelson Parties were liable to WinCo for $2,929,383.31. CR 5033-37.[2] The District Court held that Ms. Nelson was individually liable for the Amended Judgment under two theories: (1) undisclosed principal; and (2) pre-incorporation liability. CR 5037-39. And, that Ms. Nelson, KD3 and SealSource were liable for the Amended Judgment under an alter ego/veil piercing theory. CR 5047-51. The Nelson Parties do not challenge KDN's liability, but rather argue only that Ms. Nelson, KD3, and SealSource should not also be liable. In other words, the Nelson Parties seek to push off all liability onto KDN—an undisclosed shell company with no assets.

B. FACTUAL BACKGROUND

The factual record is extensive and complex, and includes testimony from a two-day evidentiary hearing and a nine-day court trial. The District Court absorbed the voluminous testimony and exhibits presented and prepared a detailed 53-page Findings of Fact and Conclusions of Law (the "District Court Findings"). In general, findings of fact "must not be set

[2] The District Court held that "WinCo is entitled to judgment against KDN for breach of contract in the amount of $1,005,055" (CR 5037), but it offset that amount by $102,637.50 to address the invoices that WinCo did not pay once it learned of the Nelson Parties' overbilling practices. CR 5052-55. Judgment was therefore initially entered in the amount of $903,724.50. CR 5055, 5063-65. After the District Court addressed attorney's fees and costs and interest, it entered an Amended Judgment in the amount of $2,929,383.31. CR 6101-03.

aside unless clearly erroneous." Idaho R. Civ. P. 52(a)(7). Yet The Nelson Parties rarely cite to the District Court Findings, instead rely on self-serving testimony from their own witnesses, frequently in contradiction to the District Court Findings. Deference to the trier of fact is always critical, but it is especially so in this case because the Nelson Parties' witnesses were not credible and the District Court applied adverse inferences as a sanction against them. CR 5007-09.

The Nelson Parties' factual background relies heavily on the testimony of Ms. Nelson to establish the key facts of the case. *See*, *e.g.*, Op. Br. at 8. The Nelson Parties also refer to what Ms. Nelson "believed" or what she "deemed" to have occurred to support its factual record. *See*, *e.g.*, Op. Br. at 9. The Nelson Parties, however, ignore that the District Court specifically found that Ms. Nelson was not credible. The District Court stated at CR 5007:

> This Court found that Ms. Nelson and her testimony wholly lacked credibility and Ms. Nelson manipulated the truth—to put it charitably—to best suit her interest at any given time. But a few examples include:
>
> (1) Ms. Nelson falsely testified that she does not refer to KD3 as a division of SealSource when, in fact, the documentary evidence showed that she did on multiple occasions; (2) Ms. Nelson supplied an affidavit on March 5, 2014 in this action wherein she falsely testified that WinCo was KDN's only source of revenue, that she billed WinCo based on the measurements set forth in D&B's billing; (3) Ms. Nelson falsely represented to potential clients that Karen Thompson was president of KD3 when she was not; (4) Ms. Nelson falsely certified on an application to PetSmart that KD3 performed work at 27 WinCo stores at $100,000 per store where, now, she contends that KDN—not KD3—did the work; (5) Ms. Nelson repeatedly testified that certain expenses were business and not personal, yet was repeatedly contradicted by the evidence and common sense; (6) Ms. Nelson falsely testified about her relationship with John Weber; and (7) Ms. Nelson submitted false testimony that she had diligently searched for responsive documents where it was clearly evident that she had not.

Additionally, the Nelson Parties were sanctioned by the District Court three times throughout the course of the case for continuous violations of their discovery obligations and the

District Court's orders. CR 1979, 2571-72, 3445, 5031. After a two-day evidentiary hearing, the District Court found that the Nelson Parties were "derelict in fulfilling their obligations to collect, preserve, and produce information" and that the "loss and/or destruction of evidence was accompanied by a culpable state of mind." CR 5032. Ms. Nelson in particular "appear[ed] to have intentionally destroyed potentially critical evidence." *Id.*

1. The Parties' Backgrounds.

a. WinCo.

WinCo owns and operates over 100 grocery stores throughout the western part of the country, including Oregon, Washington, and Idaho. CR 5006. WinCo is headquartered in Boise, Idaho, and is employee owned, meaning every employee participates in an employee stock ownership program. Tr. Vol. I, p. 727:4-13. WinCo stores have exposed concrete floors, making floor maintenance an issue of "extreme importance to WinCo." Tr. Vol. I, p. 730:16-25.

In the relevant time period for this dispute, WinCo stores operated in three divisions based on geography: the "Portland Division," the "Boise Division" and the "Ontario [California] Division." CR 5010. *Id.* Each division had a separate maintenance supervisor: John Weber for the Portland Division and Jim Douty for the Boise Division. *Id.* Mr. Weber and Mr. Douty reported to Tom Little, maintenance engineer for all stores. CR 5011.

b. The Nelson Parties.

In 2002, Ms. Nelson co-founded SealSource, a distributor of flooring supplies, including SL75, a product manufactured by Versaflex, Inc. ("Versaflex"), her previous employer. Tr. Vol. I, pp. 1077:11-1078:22; CR 5007, 5010. Since 2002, she was an owner, member, and employee of SealSource with express authority to act as its agent. CR 2007.

In 2006, Ms. Nelson co-founded KD3, which she advertised as the "labor division" of SealSource, primarily performing floor maintenance services for SealSource clients. Tr. Vol. II.,

pp. 1230:4-1234:9. From the date of formation to present, Ms. Nelson was an owner, member and manager of KD3, with authority to act as its agent. CR 5007.

On February 18, 2010, Ms. Nelson caused KDN to be incorporated as a Utah corporation with $250 in capitalization. CR 5007; Ex. 91. In October 2012, a couple of weeks before KDN filed suit against WinCo, KDN registered the assumed business name of "KD Concrete Design." CR 5007. Since KDN's formation, Ms. Nelson was the president and sole owner. *Id.* KDN is identified as a "holding company" on its tax returns. *Id.* After forming KDN, Ms. Nelson began listing KDN as the owner of KD3, as opposed to herself personally, in order to reap a tax benefit. CR 5028. Ms. Nelson continued to list KDN as the owner of KD3 until 2014.[3]

In sum, Ms. Nelson owned, operated, and controlled KDN, SealSource, and KD3.

2. The Agreement Between WinCo and the Nelson Parties.

In approximately 2006, through Ms. Nelson's personal relationship with John Weber, a WinCo employee, WinCo became a client of SealSource, purchasing certain flooring materials. Tr. Vol. I, p. 1085. Mr. Weber began using SealSource products "behind [WinCo's] back," meaning without WinCo's knowledge or approval. CR 5013. He also provided Ms. Nelson with WinCo's confidential corporate financial information to help her solicit business from WinCo. *Id.* As part of their mutually beneficial relationship, Mr. Weber began working for KD3 and SealSource on the side as a "certified installer," receiving compensation for work performed by him and his son. Tr. Vol. I, pp. 1131:13-1138:7. His wife was also offered kick-backs from

[3] After WinCo threatened to bring alter-ego/veil piercing theories against the Nelson Parties, Ms. Nelson asked her accountant whether KDN was "judgment proof." CR 5028; Ex. 103. The accountant informed her that KDN was the 100 percent owner of KD3. *Id.* Thereafter, Ms. Nelson instructed her accountant to amend KDN's and KD3's tax returns to show Ms. Nelson as the owner of KD3, not KDN. CR 5029; Tr. Vol. II, pp. 403:7-17, 2050:22-25. However, Ms. Nelson never amended her personal returns, thereby improperly retaining the tax benefit realized. CR 5029; Tr. Vol. II, pp. 2057:24-2058:12.

Ms. Nelson for work that Ms. Nelson hoped to obtain from WinCo. CR 5013. Eventually, Mr. Weber's behavior escalated beyond mere violations of corporate policy to actively "colluding" with Ms. Nelson to defraud WinCo. CR 5042. Mr. Weber was terminated for "gross misconduct for dishonesty" in 2011. Tr. Vol. I, pp. 737:10-25, 902:9-13; CR 5013.

In 2008, Ms. Nelson first began communicating with Mr. Weber about having KD3 perform the concrete joint removal and replacement work at WinCo stores. CR 5010. Ms. Nelson planned on using SL75 as the replacement joint fill material. *Id.* Ms. Nelson reached out to her contacts at Versaflex to get an estimate on the amount of material she would need for a typical WinCo store. *Id.* Versaflex responded by providing an estimate of 9,000 linear feet of joints in an 80,000 square foot store. *Id.*; Ex. 39.

In September 2008, Ms. Nelson submitted her first proposal to WinCo for concrete joint removal and replacement work. CR 5010; Ex. 41. The proposal was on KD3 letterhead and transmitted from Ms. Nelson's SealSource e-mail account to Mr. Weber. *Id.* The proposal outlined the general terms of the deal: (1) removal and cleaning of current joint material; (2) installation of SL75; (3) price of $5.50 per linear foot; and (4) five-year material warranty. *Id.* The proposal also included an estimate of 10,000 linear feet per store. *Id.* Because the amount of the proposed work exceeded Mr. Weber's contracting authority, Mr. Weber facilitated contact between Ms. Nelson and Mr. Little, who had authority to approve the amount of the proposed work. Ms. Nelson submitted three separate proposals to Mr. Little in January, September, and October 2009 respectively. CR 5011; Exs. 42, 46, 49. Each follow-up proposal was on KD3 letterhead, and two of the three proposals (including the last one in October) were sent from Ms. Nelson's SealSource e-mail address. *Id.*

In December 2009, Mr. Little (with persuasion of Ms. Nelson's close friend and WinCo's employee, Mr. Weber) and Ms. Nelson agreed to the general terms of the October proposal,

everything except the price, which was still being negotiated. CR 5011. Ms. Nelson claimed that the work would be performed by "KD Concrete Design" (an entity that did not exist) but all she ever told Mr. Little was that "KD Concrete" (also a non-existent entity) was to perform the work. CR 5011-12. On December 15, 2009, Ms. Nelson jubilantly informed Versaflex that she "sealed the deal with WinCo." Ex. 52.

In January 2010, the parties finalized the agreement on price at $5.00 per linear foot, thereby cementing a valid and enforceable contract between WinCo and "KD Concrete." Tr. Vol. I, pp. 1105:23-1106:9; CR 5012. The parties further agreed that "KD Concrete would perform work on three 'test stores'" in the Portland Division, and if WinCo was satisfied with the work, "KD Concrete could continue to work in other stores on an as-needed basis." CR 5012.

In February 2010, Ms. Nelson contacted Brad Van Dam, president of D&B Industrial Floor Coating, Inc. ("D&B Industrial"), about having his company subcontract the work for WinCo. CR 5014. Mr. Van Dam, on behalf of D&B Industrial, agreed to perform the work at $2.35 per linear foot. *Id.*; Ex. 5. KD3 (not KDN or KD Concrete) entered into a contract with D&B Industrial for the WinCo joint repair work, and D&B submitted invoices to KD3. Tr. Vol. I, pp. 1114:20-1121:21; Exs. 62, 70. On or before February 16, 2010, Ms. Nelson facilitated D&B Industrial's ordering of 300 gallons of SL75 for the work at WinCo stores. CR 5014; Ex. 57. In no uncertain terms, Ms. Nelson admitted that ***at least*** by February 16, 2010, an agreement had been reached between WinCo and "KD Concrete," a non-existent entity. Tr. Vol. I, p. 1107:9-15.

Contrary to the Nelson Parties' contention in the Opening Brief, the District Court found that the first time Ms. Nelson could have disclosed KDN to WinCo was on April 30, 2010. *Compare* CR 5014 ("[a]t no time at or before the time of the WinCo Contract, did Ms. Nelson

ever disclose to WinCo representatives, orally or in writing, that the WinCo Contract was with 'KDN Management, Inc.,' 'KDN,' or even that she was representing a soon-to-be-formed corporation") *with* Op. Br. at 8 ("in December 2009, Nelson informed WinCo that she intended to form KDN as the entity that would actually enter into the contract with WinCo").[4]

3. The Breach and the Fraud.

D&B Industrial began work on the first WinCo stores in late February 2010. Tr. Vol. I, p. 1117:15-23. By March 26, 2010, D&B Industrial had completed at least two stores, and had scheduled work at ten additional WinCo stores in the Portland Division. CR 5015; *see also* CR 5001-02 (Proposed Trial Exhibit 214).[5] In April or May 2010, Mr. Weber recommended to Mr. Douty, the Boise Division maintenance manager, that he should contact Ms. Nelson about having "KD Concrete" perform joint replacement work in the Boise Division stores. CR 5015; Tr. Vol. I, pp. 856:25-859:6; Ex. 73. Mr. Douty, an equal of Mr. Weber, similarly did not have authority to negotiate a new agreement on behalf of WinCo. CR 5015; Tr. Vol. I, pp. 888:24 - 889:1. Rather, he merely had the ability to authorize "KD Concrete" to continue its work at additional WinCo stores in the Boise Division pursuant to the terms of the contract already in place between KD Concrete and WinCo. CR 5015; Tr. Vol. I, p. 889:5-10.

[4] The Nelson Parties rely heavily on a declaration that Mr. Little signed in October 2013, referencing KDN as the contracting entity, to support its position that Ms. Nelson disclosed KDN prior to the time of contracting. Op. Br. at 10. The District Court, however, addressed this declaration, finding that Mr. Little's explanation that the reference to KDN in the declaration was a proofreading error was "credible" and that he "was not made aware of KDN's existence at or before the time of contracting with WinCo in January 2010." CR 5012.

[5] On June 15, 2016, after seven days of trial, the Nelson Parties produced documents responsive to WinCo's 2012 discovery requests "without giving any reasonable explanation why the document[s] could not have been searched for and discovered much sooner." CR 5009. WinCo submitted some of those documents to the District Court for consideration after trial as "Proposed Trial Exhibits." The Nelson Parties did not object to their admission. *Id.*

Between April and November of 2010, "KD Concrete" billed WinCo a total of $2,530,110.50. At first, the invoices appeared in line with the estimates provided by Ms. Nelson in her early proposals. For example, the first five invoices submitted in mid-April 2010 all referred to approximately 10,000-12,000 linear feet of work (between $50,000 and $60,000). Ex. 3. Over time the invoice creeped up to over 16,000 linear feet of work ($80,000). *Id.* By November, some invoices reached over 25,000 linear feet of work ($125,000), at which point WinCo began to question the legitimacy of the charges. CR 5017; Tr. Vol I., p. 734:18-20.

In late 2010, WinCo was actively building new stores with a 97,000 square foot footprint, larger than stores previously constructed. CR 5017; Tr. Vol. I, p. 733:8-16. David Van Etten, WinCo's Vice President of Construction, knew that the new store footprint contained only 17,500 linear feet of concrete control joints. *Id.* When presented with the last three invoices from KD Concrete for over 22,000 linear feet worth of joint replacement per store, he became concerned because those stores were older and had smaller footprints than the new stores. CR 5017; Tr. Vol. I, p. 733:2-16. Mr. Van Etten contacted Ms. Nelson and requested additional information to support the invoices. CR 5017; Tr. Vol. I, pp. 733:20-734:17. She in turn contacted Mr. Van Dam at D&B Industrial and asked him to fabricate backup invoices to "show more material" for the stores at issue. CR 5017; Ex. 89.

Despite Ms. Nelson's attempt to throw WinCo off the scent of her deceit, ultimately WinCo pursued its suspicions and hired a Boise architecture firm to measure the linear feet of control joints in the last three stores in which D&B Industrial preformed work. Tr. Vol. I, p. 933:9-20. The results were profound. KD Concrete overbilled WinCo by roughly 15,000 linear feet in Store No. 1 ($75,000), 12,000 linear feet for Store No. 6 ($60,000), and 20,000 for Store No. 11 ($100,000). CR 5020; Tr. Vol. II, pp. 2420:7-2422:12; Ex. 3. These results prompted WinCo to measure the linear concrete control joints at all stores where KD Concrete

performed work. Again the results were alarming. For 26 WinCo stores, KD Concrete overbilled WinCo by roughly 200,000 linear feet (approximately $1,000,000). CR 5020; Ex. 9.

In addition to the overbilling, the District Court found clear and convincing evidence that Ms. Nelson intentionally manipulated invoices. CR 5041. Not satisfied with her over 100 percent mark-up on D&B Industrial's costs (paying D&B Industrial $2.35 per linear foot and charging WinCo $5.00), Ms. Nelson wanted more. There were two types of additional fraud. First, Ms. Nelson would receive invoices from D&B Industrial for a specific number of linear feet of work performed and then she would send WinCo an invoice for a larger amount of linear feet. CR 5022; Ex. 5. Second, Mr. Weber asked Ms. Nelson to submit invoices to WinCo from KD Concrete for work performed by his brother, presumably because WinCo would not approve the work due to the direct conflict of hiring family members as outside vendors. CR 5024; Tr. Vol. I, pp. 1170:12-1174:1; Ex. 4. And of course, Ms. Nelson would upcharge those invoices to make some extra money for herself. CR 5024; Ex. 4. In no uncertain terms, Ms. Nelson used the joint replacement program to intentionally defraud WinCo.

4. The Relationship Between the Nelson Parties.

Ms. Nelson is the central character in a complex web of interrelated entities and comingled corporate and personal finances. As noted above, Ms. Nelson had complete control over SealSource, KD3, and KDN. She exercised that control without regard to even the most rudimentary corporate formalities, and used all three companies as her own personal piggy banks. Some of the most egregious examples include:

- Ms. Nelson knowingly and intentionally reported KD3's income on KDN's tax returns in order to receive a tax benefit. CR 5028; Tr. Vol. I, p. 933:9-20.
- Ms. Nelson used KDN's funds to pay for personal expenses, such as paying for a remodel of her basement, her sister's credit card bills, a TiVo subscription, the

dentist, and a house for her sister. CR 5026-27; Tr. Vol. II, pp. 1341:1-10, 1336:16-18, 2055:6-11, 2042:3-9.

- Ms. Nelson classified personal expenses paid by KDN as business expenses, instead of distributions, thereby improperly gaining a tax benefit. CR 5028; Tr. Vol. II, pp. 1612:22-8, 1739:22-1741:22.
- KD3, SealSource, and KDN regularly paid for each other's expenses, such as KD3 paying for SealSource's payroll, SealSource paying for KDN's lawyer, and KDN paying for SealSource business travel. CR 5029-30; Tr. Vol. II, pp. 1766:16-1782:19.
- There was no tracking or recording of the payments between KD3, SealSource, and KDN. CR 5030; Tr. Vol. II, p. 1788:5-20.
- Ms. Nelson used KD3 and SealSource's funds to repeatedly pay for personal expenses, such as a remodel for her sister's house, landscaping services for Ms. Nelson's personal residence, and Ms. Nelson's personal credit card bills. CR 5030; Tr. Vol. II, pp. 1245:24-1247:4, 1254:18-25; 1255:16-21, 1755:9-1756:3.

These are but a few of the examples of Ms. Nelson's conduct supporting WinCo's veil piercing/alter ego theories. As the District Court noted, "[t]here was ***overwhelming evidence*** supporting the veil-piercing/alter ego presented at trial in the documentary evidence and in the testimony and cross examination of witnesses" that is "too voluminous to recite." CR 5025 (emphasis added). Moreover, the District Court found that "the full extent of the relationship between KDN and KD3 in the accounting records is unknown because Ms. Nelson directed the intentional merging of accounts in mid-2014, well after assertions of veil piercing and alter-ego were made." CR 5028. Therefore, the District Court inferred that there was "an even greater degree of financial connection between the two companies" than was evidenced at trial. *Id.*

C. PROCEDURAL HISTORY

1. KDN's Complaint and WinCo's Counterclaim and WinCo's Lawsuit Against Ms. Nelson, SealSource and KD3.

In October 2012, KDN filed suit against WinCo claiming it had not been paid for the last three invoices. CR 35-46. On December 7, WinCo asserted counterclaims against KDN for wrongfully collecting nearly $1,000,000 for the overstated work. CR 50-69. On February 13,

2013, WinCo filed a Motion for Judgment on the Pleadings, requesting the District Court dismiss KDN's complaint because KDN failed to register as a contractor in Idaho. CR 77-79. The District Court granted WinCo's motion and dismissed KDN's complaint. CR 101-06, 107-09.

On April 1, 2014, WinCo filed a separate action against Ms. Nelson individually, and her two other business entities, SealSource and KD3. CR 843-53. WinCo's claims included fraud against Ms. Nelson and breach of contract against Ms. Nelson, SealSource, and KD3. *Id.* On July 28, 2014, the District Court consolidated both actions. CR 1179-80. The Nelson Parties filed a "Joint Answer" to WinCo's complaint on August 25, 2014. CR 1251-62. Thereafter, through written discovery in the consolidated cases, WinCo discovered evidence to support an alter ego/veil piercing theories of liability against the Nelson Parties and it therefore filed an Amended Complaint on May 5, 2015. CR 1370-84.

2. WinCo Files—and the Court Grants—a Motion to Compel Leading to Discovery That Supports the Filing of a Second Amended Complaint.

On May 15, 2015, due to the Nelson Parties' repeated refusal to fully engage in discovery, WinCo filed a Motion to Compel Discovery and Sanctions. CR 1385-88, 1698-1720. After briefing and argument, on June 17, 2015, the District Court granted WinCo's motion and ordered the Nelson Parties to, among other things: (1) produce correspondence, tax records, invoices, and QuickBooks® files; (2) quit interfering in third party discovery; (3) to identify their banks, bank accounts, and credit card accounts; and (4) provide a list of relevant devices so WinCo could have the devices collected and imaged. CR 2018-23.

The Nelson Parties partially complied with the District Court's order, which provided WinCo sufficient evidence to support additional factual allegations and claims against the Nelson Parties—all arising out of the overcharging of the work performed for WinCo as described in WinCo's original Answer and Counterclaim and WinCo's original Complaint. Therefore, on

July 31, 2015, WinCo filed a Motion for Leave to File First Amended Answer and Counterclaim and Second Amended Complaint. CR 2046-49; CR 2090-2100.

3. The Nelson Parties Do Not Fully Comply With the Court's Discovery Order, Instead Choosing to File a Bad Faith Bankruptcy to Further Delay.

Also on July 31, 2015, WinCo moved the District Court for the imposition of sanctions against the Nelson Parties for a variety of discovery violations, including, making false representations as to the existence and location of evidence and for failure to fully comply with the District Court's June 17, 2015 Order on WinCo's Motion to Compel. CR 1995-98, 1999-2013. On August 13, 2015, the day before the scheduled hearing on WinCo's motions, KDN filed a petition under Chapter 7 of the Bankruptcy Code in the District of Utah, Case No. 15-27545 (the "KDN Bankruptcy") seeking to stay all the proceedings. CR 2304-31, CR 2332-33.

On October 13, 2015, the bankruptcy court entered an order dismissing the KDN Bankruptcy. CR 3111-12. The court said that the substance and timing of the bankruptcy filing "serves no purpose" except to "forestall the going forward of the lawsuit in the Idaho litigation." CR 3226. The bankruptcy court noted the "pending motions for sanctions" in the Idaho case and described the filing as "forum shopping" (CR 3228) by an "asset-less and inactive corporate entity to shield other entities and Ms. Nelson from state court litigation" and "not an appropriate use of the Bankruptcy Code." CR 3227. The bankruptcy court held that there was "not a legitimate reason" for the filing and dismissed the case "for cause." CR 3229.

Thereafter, on September 3, 2015, the District Court issued a Memorandum Decision finding that the Nelson Parties failed, and without substantial justification, to comply with the Court's Order on WinCo's Motion to Compel. CR 2567-74. The District Court noted the significant deficiencies including "a pattern of intentional delay." CR 2569. It noted concerns about "some spoliation of evidence." CR 2571. And it awarded WinCo fees and costs

associated with bringing its motion. CR 2572. The District Court considered "more severe sanctions set forth within 37(b)" but did not believe such sanctions were warranted "***yet.***" *Id*. (emphasis added). The Court did issue a harsh warning: "The Nelson Parties and their attorneys are put on notice, however that further attempts to delay or otherwise avoid their discovery obligations will result in more significant sanctions, including, but not limited to, possible striking of the defenses and entry of default in favor of WinCo." CR 2572 n.3.

4. WinCo Pushes Forward With Its Claims Against the Nelson Parties.

On October 9, 2015, the District Court granted WinCo's July 31, 2015 Motion to Amend (CR 2662-65), and on October 14, WinCo filed its Second Amended Complaint. CR 2666-82. On November 3, the Nelson Parties filed an Answer to WinCo's Second Amended Complaint. CR 3232-47. That Answer, filed approximately three years into the litigation, was the first pleading in either of the consolidated cases to reference a jury demand. That pleading read: "[t]he Nelson Parties hereby rely upon prior demands for jury trial submitted by any party to this lawsuit." CR 3245.

Although the deadline to file dispositive motions had long expired, on March 2, 2016, the Nelson Parties filed a Motion for Summary Judgment. CR 3489. Because the Nelson Parties' motion was untimely, WinCo moved to strike the motion. CR 3769-71. At a March 30, 2016 hearing on the Nelson Parties' motion and WinCo's motion to strike, the District Court asked counsel whether the case was going to proceed as a court trial or a jury trial.[6] At that time, unsure whether a proper jury demand had been made, the parties indicated they believed it was a jury trial but would need to review the record. Tr. Vol. I, pp. 371:21-372:14.[7]

[6] On March 25, 2016, the District Court's staff attorney asked counsel to "advise whether this is going to be a bench trial or a jury trial." The email, which the Nelson Parties did not include in the record, was inadvertently not sent to local counsel who was WinCo's only counsel at the hearing. Tr. Vol. I, p. 352:13-21.

One day later, after WinCo had an opportunity to review the pleadings in the consolidated cases, which confirmed that no proper jury demand had ever been made, WinCo filed an Objection to Jury Trial. CR 3929-33. The Nelson Parties filed a Response to WinCo's Objection, CR 3947-52, and at the same time filed a Motion for Jury Trial under Idaho Rule of Civil Procedure 39(b). CR 3953-56. WinCo filed a Reply in Support of Objection to Jury Trial and Response to the Nelson Parties' Motion for Jury Trial. CR 4155-62. Thereafter, the District Court heard oral argument on the objection and motion. Tr. Vol. I, pp. 347-359; 370-73.

After considering the pleadings and the parties written and oral arguments on this issue, the District Court concluded as follows:

> Rule 39 provides, "39(b): Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court."
>
> The court then has discretion to grant relief from the failure to ask for jury trial. …
>
> The court recognizes that there are number, in fact, there are lot of issues in this case that are equitable in nature; there are lot of issues in this case that relate to potential alleged misconduct that perhaps don't go directly to cause of action, some of the discovery and spoliation issues etcetera, there are number of motions in limine in that regard. Because of all of those issues as well as the fact that equitable issues are in large measure predominating here, the lack of specific demand for jury trial, I'm going to deny the motion to Rule 39(b) for jury trial. We'll proceed with a court trial. Tr. Vol. I, pp. 371:4-8; 372:15-373:1.

[7] The Nelson Parties did not include the transcript of the hearing in the Transcript on Appeal. The District Court, however, had access to the transcript and considered it. Tr. Vol. I, p. 372:3-14.

5. The Case Proceeds to a Pre-Trial Spoliation and Sanction Hearing and a Nine-Day Court Trial That Occurs Over Multiple Settings.

On May 6 and May 11, 2016, the District Court held an evidentiary hearing on WinCo's motion for sanctions against the Nelson Parties for spoliation of evidence.[8] CR 5006. The District Court found that as a direct result of Ms. Nelson's unwillingness to conduct a timely and reasonable search and failure to timely notify key custodians of their preservation obligation, certain information was lost, including: "[c]ritical documents about the work actually performed on WinCo stores' floors"; a laptop that "suspiciously went missing as of April 2014"; and "[a]pproximately 45,000 to 70,000 e-mails from Ms. Nelson's computer damaged by a virus in February 2015, the day before her first deposition." CR 5008-09. The District Court also found that "Ms. Nelson, or other agents of KDN, KD3 and SealSource, intentionally changed or deleted relevant evidence," including: "[d]eleting at least eight entries in the KDN QuickBooks®, all of which represent investment by KDN in KD3 and ownership by KDN of KD3"; "[m]erging the 'Distributions: KDN Management' account with the 'Distributions: Kym Nelson' account in KD3's QuickBooks"; and "[p]ermanently deleting at least 64 e-mails related to WinCo, John Weber, or D&B." CR 5009.

A court trial was then held over nine days between May 31 and June 22. CR 5005. Seven days into the trial, it was discovered that the Nelson Parties failed to search a highly relevant server for responsive emails. Therefore, it was not until after the trial that the Nelson Parties produced approximately 5,000 additional emails, some of which the District Court described as "highly relevant to issues litigated." CR 5032-33. On October 5, 2016, after four years of litigation, the District Court entered its Findings of Fact and Conclusions of Law. CR 5003-56.

[8] The District Court held over its decision on that hearing and incorporated its decision into its Findings and Conclusions after trial. CR 5006.

The District Court found that "an enforceable contract existed between WinCo and Kym Nelson, acting on behalf of an undisclosed and yet to be formed corporation−KDN−as of January of 2010." CR 5034. The Court found that KDN breached the contract by overcharging WinCo for concrete joint repair and replacement work performed by $1,005,055. CR 5035. The District Court concluded that Ms. Nelson was personally liable under both an undisclosed principal theory and pre-incorporation liability. CR 5037. The Court also found that Ms. Nelson had committed two acts of fraud. CR 5040-43. Finally, the District Court concluded that Ms. Nelson, SealSource, and KD3 were jointly and severally liable for KDN's breach of contract under WinCo's alter-ego/veil piercing theories because they were so "intertwined in their interest and ownership" that "their separate personalities no longer existed." CR 5047-51.

The District Court entered Judgment on October 14, 2016 in the amount of $903,724.50. CR 5055; CR 5063-65. After the District Court addressed attorney's fees, costs and interest, it entered an Amended Judgment in the amount of $2,929,383.31. CR 6101-03. The Nelson Parties filed a timely Notice of Appeal. CR 6104-13.

II. ISSUES PRESENTED ON APPEAL

1. Where the District Court perceived the issue as discretionary, acted within the boundaries of its discretion and consistent with the relevant legal standards, and reached its decision by an exercise of reason, did the District Court abuse its discretion in denying the Nelson Parties' motion for jury trial made under Idaho Rule of Civil Procedure 39(b)?

2. Is there substantial and competent evidence to support the District Court's finding that there was a single contract between KD Concrete and WinCo as of January 2010?

3. Is there substantial and competent evidence to support the District Court's finding that the Nelson Parties were the alter egos of KDN and each other?

III. ATTORNEY'S FEES ON APPEAL

WinCo requests its reasonable attorney's fees associated with responding to the Nelson Parties' appeal. The trial court awarded WinCo reasonable attorney's fees under Idaho Code § 12-120(3). "When a party prevails at both trial and on appeal, and that party received an award of attorney fees under Idaho Code section 12-120(3) at the trial level and the award is affirmed on appeal, that party is also entitled to an award of attorney fees for the appeal pursuant to Idaho Code section 12-120(3)." *Idaho Transp. Dep't v. Ascorp, Inc.*, 159 Idaho 138, 142, 357 P.3d 863 (2015). WinCo is also entitled to attorney's fees under Idaho Code § 12-121 because the Nelson Parties' arguments on appeal are frivolous, unreasonable, and without foundation.

IV. ARGUMENT

A. STANDARD OF REVIEW

This Court reviews a District Court's decision to order a court trial after the failure to make a proper demand under an abuse of discretion standard. *City of Pocatello v. Anderton*, 106 Idaho 370, 373, 679 P.2d 647 (1984). The standard of review of a court's findings of fact is set forth in Idaho Rule of Civil Procedure 52(a), which provides:

> In an action tried on the facts without a jury . . . Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.

"In determining whether a finding is clearly erroneous this Court does not weigh the evidence as the district court did. The Court inquires whether the findings of fact are supported by substantial and competent evidence." *Opportunity, L.L.C. v. Ossewarde*, 136 Idaho 602, 605, 38 P.3d 1258 (2002) (citation omitted). "This Court will not substitute its view of the facts for the view of the district judge." *Id.* "Evidence is regarded as substantial if a reasonable trier of fact would accept it and rely upon it in determining whether a disputed point of fact had been

proven." *Id.* On review, this Court "liberally construe[s] a trial court findings 'in favor of the judgment entered.'" *Harris, Inc. v. Foxhollow Const. & Trucking, Inc.*, 151 Idaho 761, 768, 264 P.3d 400 (2011).

B. THIS CASE APPROPRIATELY PROCEEDED TO A COURT TRIAL AFTER THE NELSON PARTIES WAIVED A JURY TRIAL AND THE DISTRICT COURT EXERCISED ITS DISCRETION TO DENY THE NELSON PARTIES' RULE 39(B) MOTION

1. The District Court Correctly Concluded the Nelson Parties Waived a Jury Trial Because the Pleadings Demonstrate There was no Proper Demand.

"A party waives a jury trial unless its demand is properly served and filed." Idaho R. Civ. P. 38(d). A proper demand is made only by "serving the other parties with a written demand, which may be included in a pleading, no later than 14 days after the last pleading directed to the issue is served." Idaho R. Civ. P. 38(b)(1).[9] As the District Court appropriately said, what matters is the "state of the pleadings," and the state of the pleadings indicated that "there was no demand for a jury trial." Tr. Vol. I, p. 373:2-4; *Pocatello*, 106 Idaho at 372-73, 679 P.2d at 649-50 (stating that the failure to make a timely demand under Rule 38(b) constitutes a waiver). The record reflects that the Nelson Parties did not serve upon WinCo "a demand therefor in writing at any time after the commencement of the action and not later than fourteen (14) days after service of the last pleading directed to such issue." Idaho R. Civ. P. 38(b).

- October 2012: KDN filed a Complaint against WinCo. CR 35-46. The Complaint did not contain a demand for a jury trial, nor was demand made within 14 days.
- December 2012: WinCo filed WinCo Foods, LLC's Answer and Counterclaims against KDN. CR 50-69. The Answer and Counterclaims did not contain a demand for a jury trial, nor was demand made within 14 days.

[9] The Nelson Parties' citation to the general "waiver" standard is not applicable here. *See* Op. Br. at 24 (citing *Margaret H. Wayne Trust v. Lipsky*, 123 Idaho 253, 256, 846 P.2d 904 (1993)). The elements of waiver, including reasonable reliance and the alteration of a position to a person's detriment, are inapplicable to a waiver of a jury trial by the plain language of Rule 38.

- January 2013: KDN filed Reply to WinCo Foods, LLC's Counterclaim. CR 70-76. The Reply did not contain a demand for a jury trial, nor was demand made within 14 days.
- April 2014: WinCo filed a Complaint against the Nelson Parties. CR 843-53. The Complaint did not contain a demand for a jury trial, nor was demand made within 14 days.
- August 2014: The Nelson Parties filed Defendants' Joint Answer. CR 1251-62. The Joint Answer did not contain a demand for a jury trial, nor was demand made within 14 days.
- May 2015: WinCo filed a First Amended Complaint. CR 1370-84. The First Amended Complaint did not contain a demand for a jury trial, nor was demand made within 14 days.
- October 2015: WinCo filed a Second Amended Complaint. CR 2666-82. The Second Amended Complaint did not contain a demand for a jury trial, nor was demand made within 14 days.
- November 2015: The Nelson Parties filed an Answer to the Second Amended Complaint. CR 3232-47. The Answer references a jury trial for the first time, stating "[t]he Nelson Parties hereby rely upon prior demands for jury trial submitted by any party to this lawsuit." CR 3245.

This Court should affirm the District Court's conclusion that under the plain language of Rule 38(d), the Nelson Parties waived any right they may have had to a jury.

2. The Nelson Parties' Reliance on the Second Amended Answer Does Not Undo Their Waiver.

The Nelson Parties argue that the Second Amended Answer, filed in November of 2015, somehow revived their right to demand a jury trial. They point to the language: "[t]he Nelson Parties hereby rely upon prior demands for jury trial submitted by any party to this lawsuit" (CR 3245) and argue that "there is no material distinction between 'demanding' a jury trial and 'relying' upon a prior demand." Op. Br. at 23.[10] But it makes no difference whether the Nelson

[10] The Nelson Parties also argue that because this case was at one point mistakenly designated as a jury action, there must have been a demand. Op. Br. at 22. That argument must be rejected as a logical fallacy commonly referred to as affirming the consequent.

Parties used the word "relying," "demanding," or some other word, because whatever they expressed in their Second Amended Complaint could not undo their previous waiver.

This is because WinCo's Second Amended Complaint did not raise any "additional wholly distinct issues for trial." *See Hayden Lake Fire Prot. Dist. v. Alcorn*, 141 Idaho 388, 397-98, 111 P.3d 73 (2005), *overruled on other grounds by Farber v. Idaho State Ins. Fund*, 152 Idaho 495, 272 P.3d 467 (2012) (holding that an amended complaint, filed after the case was certified as a class action, and expanding the factual allegations as well as the legal claims did not revive the right to demand a jury); *Farmers Nat'l Bank v. Shirey*, 126 Idaho 63, 71, 878 P.2d 762 (1994) (holding that when an amended pleading raises "no additional wholly distinct issues for trial" and instead only asserts "additional claims arising out of the transaction set forth in the original pleading," the right to demand a jury trial is not revived).

The underlying facts alleged in WinCo's Answer and Counterclaims (CR 50-69) and its original Complaint (CR 843-53) remained basically the same through the filing of WinCo's First Amended Complaint (CR 1370-84) and Second Amended Complaint (CR 2666-82). Indeed, the transaction or occurrence that formed the basis of each of WinCo's pleadings in this case was the overcharging by the Nelson Parties with regard to joint replacement work in WinCo's stores. WinCo's original Answer and Counterclaims (CR 50-69) and Complaint (CR 843-53) "attempted to [] set forth," the conduct, transactions, or occurrences that forms the basis of WinCo's Second Amended Complaint. *Hayden Lake Fire Prot. Dist.*, 141 Idaho at 397-98; *Farmers Nat'l Bank*, 126 Idaho at 71 ("inclusion of new theories based on the original transaction does not revive right to demand jury trial"). Because WinCo did not present any new triable issues, the Nelson Parties' right to demand a jury trial was in no way revived.

Finally, even if the Second Amended Complaint raised a new issue triable by jury, any such right is limited to the new issue only—not to "all issues so triable." *Pocatello*, 106 Idaho

at 372-73 (stating that an amended pleading raising a new issue revives the right to demand only as to that new issue); *see also Allen Steel Supply Co. v. Bradley*, 89 Idaho 29, 39, 402 P.2d 394, (1965) (citing 2B Barron & Holtzoff, *Federal Practice and Procedure* § 878 at 52 (1961); *Lehman v. Bair*, 85 Idaho 59, 62-63, 375 P.2d 714 (1962)).

While the Nelson Parties fail to identify any new triable issues raised in the Second Amended Complaint (CR 2666-82) or their Answer to the Second Amended Complaint (CR 3232-47), they cannot dispute that the issues they have raised on appeal were either put at issue by WinCo long before the Second Amended Complaint, or are not issues triable to a jury. Indeed, WinCo put the personal liability of Ms. Nelson directly at issue in its Complaint filed in April 2014. CR 845, ¶ 13 ("Defendant Kym D. Nelson was acting personally and was also acting on behalf of KDN, SealSource, and/or KD3"). And WinCo's alter ego/veil piercing theories of liability are not triable to a jury. *Wandering Trails, LLC v. Big Bite Excavation, Inc.*, 156 Idaho 586, 591, 329 P.3d 368 (2014) ("[I]ssues of alter ego and veil-piercing claims are equitable questions" and "the trial court is responsible for determining factual issues that exist with respect to this equitable remedy and for fashioning the equitable remedy.").

3. The Nelson Parties' Mistaken Understanding That There was a Proper Jury Demand Does Not Override the Plain Language of Rule 39(b).

The Nelson Parties augmented the Clerk's Record to include a November 12, 2014 Stipulation for Scheduling and Planning. *See* Exhibit A to Appellants' Corrected Motion to Augment Record on Appeal, dated October 30, 2017 ("Stipulation for Scheduling"). Relying on the Stipulation for Scheduling, the Nelson Parties claim the District Court deprived them of their "right" to a jury. Op. Br. at 21. This argument finds no support in the language of Rule 39(b).

Where there has been no proper jury demand under Rule 38(b), and thus a waiver under Rule 38(d), the District Court, not the parties, must decide whether a case will proceed as a jury

trial consistent with the requirements of Rule 39(b). Idaho R. Civ. P. 39(b) ("But ***the court*** may, ***on motion***, order a jury trial on any issue for which a jury might have been demanded.") (emphasis added). While the Stipulation for Scheduling, dated November 12, 2014, does indicate the parties' understanding that the case may be tried as a "12 Person Jury Trial," it does not indicate that ***a motion*** under Rule 39(b) was presented to the District Court, or that the District Court ***ordered*** a jury trial. Indeed, the District Court specifically addressed this point in ruling on the Nelson Parties' Rule 39(b) motion. Tr. Vol. I, p. 373:14:16 (noting that even as of May 6, 2016, "there had never been . . . a formal consideration by the court under Rule 39 as to whether or not it would, in its discretion, order that a trial by jury be had on some or all of the issues").[11] Because as of November 12, 2014, neither of the two necessary conditions of Rule 39(b) were met—a motion or a court order—the Stipulation for Scheduling cannot control whether this case was to properly proceed as a court or jury trial.

4. When the Nelson Parties put a Rule 39(b) Motion to the District Court, the District Court Exercised its Discretion in Ordering a Court Trial.

The Nelson Parties did ultimately comply with the procedural requirement of Rule 39(b) through the filing of a Motion for Jury Trial, made on April 29, 2016, one month before trial. CR 3953-56. In that two-page motion, unsupported by any declaration or reasoned argument, the Nelson Parties requested the District Court, excuse their waiver, and order a jury trial of all issues so triable. *Id.* The District Court appropriately considered the Nelson Parties' argument, and in an exercise of discretion denied the motion. Tr. Vol. I, pp. 348:2-8, 371:24-25.

[11] The District Court indicated how the issue first came up: "due to the spoliation issues and whether or not that would be something the jury would ultimately decide or I would decide, depending on how it was presented forward; and in looking at that, I came to realize that there wasn't jury trial demand. And so that's how that came up." Tr. Vol. I, p. 350:18-23.

To determine whether the District Court abused its discretion, this Court examines "whether the district court: (1) correctly perceived the issue as discretionary; (2) acted within the outer boundaries of its discretion and consistently with relevant legal standards; and (3) reached its decision by an exercise of reason." *Krinitt v. Idaho Dep't of Fish & Game*, 162 Idaho 425, 398 P.3d 158 (2017) (citing *Swallow v. Emergency Med. of Idaho, P.A.*, 138 Idaho 589, 592, 67 P.3d 68 (2003)). Applying this standard to the circumstances here, the District Court acted within its discretion and its decision should be affirmed.

a. The District Court Correctly Perceived the Issue as Discretionary.

The record on appeal demonstrates the District Court correctly perceived the issue as discretionary. Tr. Vol. I, p. 371:7-8 ("The court then has discretion to grant relief from the failure to ask for a jury trial."); *id.*, p. 371:14-17 (noting that until its decision on the issue, "[t]here had never been . . . a formal consideration by the court under Rule 39 as to whether or not it would, in its discretion, order that a trial by jury be had on some or all of the issues."); *id.*, p. 373:14:16 ("in exercising my discretion, I'm going to deny the motion for Rule 39(b) and proceed with a court trial."). The first element of the abuse of discretion standard is satisfied.

b. The District Court Acted Within the Outer Boundaries of its Discretion.

Idaho appellate courts have described the purpose of the second provision of Rule 39(b) as a "'limited "safety valve" against unduly harsh application of the waiver rule.'" *See Hayden Lake Fire Prot. Dist.*, 141 Idaho at 398 (quoting *Viehweg v. Thompson*, 103 Idaho 265, 269, 647 P.2d 311 (Ct. App. 1982)). Every reported decision that has addressed a Rule 39(b) motion filed after failing to make a proper jury demand has affirmed the denial of the motion. *See, e.g.*, *Pocatello*, 106 Idaho at 372-73 (noting that there was "no reason for their failure to make a timely demand" and affirming district court's decision finding waiver of a jury demand); *Hayden Lake Fire Prot. Dist.*, 141 Idaho at 398 (affirming the denial of a motion for jury trial after

failing to make a timely demand); *Farmers Nat'l Bank*, 126 Idaho at 71-72 (same); *Golden Condor, Inc. v. Bell*, 106 Idaho 280, 283, 678 P.2d 72 (Ct. App. 1984) (same); *Meyer v. Whipple*, 94 Idaho 260, 261, 486 P.2d 271 (1971) (same).

The single Idaho case that the Nelson Parties cite, *REW. Constr. Co. v. Dist. Court of Third Judicial Dist.*, 88 Idaho 426, 439-41, 400 P.2d 390 (1965), does not support reversal. Instead, in that case this Court granted a motion to quash a writ of prohibition challenging as unconstitutional the denial of an untimely made jury trial demand. *Id.* at 443. In other words, it upheld the district court's decision to hold a court trial where a party made a late jury demand waiving its right to trial—the same facts that we have here.

Effectively conceding that Idaho law is entirely unhelpful to their arguments, the Nelson Parties abandon Idaho law in favor of federal law. Op. Br. at 25-27. But there is no reason to look outside of Idaho.[12] This Court should apply the existing, binding precedent, interpreting Idaho Rule of Civil Procedure 39(b). And even if the Court were to consider case law on Federal Rule 39(b), it should consider federal cases applying the same standard that this Court applies to Idaho Rule 39(b) such as the District of Idaho decision of *Krussman v. Omaha Woodmen Life Ins. Soc'y*, 2 F.R.D. 3 (D. Idaho 1941). There the court held that it cannot grant a Rule 39(b) motion if there is no "affidavit or showing upon which the discretion of the Court might be based other than the statement in the motion that the failure to demand trial by jury was the oversight of counsel for the plaintiff." *Id.* at 3.

[12] This Court only considers federal cases when there is no Idaho case on point. *See*, *e.g.*, *Black v. Ameritel Inns, Inc.*, 139 Idaho 511, 515, 81 P.3d 416 (2003) (considering federal case law because "neither Idaho Rule 11(a)(1) nor Idaho case law defines 'promptly'"); *Willis v. Larsen*, 110 Idaho 818, 822, 718 P.2d 1256, 1260 (Ct. App. 1986) (considering federal case law because "[n]o Idaho case addresse[d] the issue"); *State v. Meier*, 149 Idaho 229, 231, 233 P.3d 160 (Ct. App. 2010) (considering Ninth Circuit case law because there was "no Idaho case law dealing with allocation of the burden of proof").

The Ninth Circuit's standard is similar to Idaho's, and thus also persuasive. The Ninth Circuit holds that the trial court's "discretion is narrow," and the trial court must deny a Rule 39(b) motion unless "some cause beyond mere inadvertence" is shown. *Pac. Fisheries Corp. v. HIH Cas. & Gen. Ins., Ltd.*, 239 F.3d 1000, 1002 (9th Cir. 2001) (affirming denial of motion because counsel's misinterpretation of civil rules was nothing more than "mere inadvertence"). Assuming that a jury trial has properly been demanded is "mere inadvertence," and is an insufficient basis for the trial court to grant a Rule 39(b) motion. *Chandler Supply Co. v. GAF Corp.*, 650 F.2d 983, 987 (9th Cir. 1980) (affirming denial because lead counsel assuming demand had been made was not requisite "extenuating circumstances"); *Beckham v. Safeco Ins. Co. of Am.*, 691 F.2d 898, 905 (9th Cir. 1982) (affirming denial when plaintiff argued prior counsel was at fault for waiver).

Here, the District Court rightly denied the Rule 39(b) motion, which had no supporting declaration or other showing in the record that the failure to demand a jury resulted from anything other than counsel's oversight. *See Krussman*, 2 F.R.D. at 3-4. And the Nelson Parties' assumption that someone else had demanded a jury earlier in the proceedings is not a proper basis for granting a Rule 39(b) motion. *See Chandler Supply Corp.*, 650 F.2d at 987; *Beckham*, 691 F.2d at 905. The trial court did not abuse its discretion.

The federal cases cited by the Nelson Parties apply a completely different standard than the standard under Idaho law, and thus need not be considered. Op. Br. at 25-27 (citing federal cases). Wright & Miller recognizes that there is no defining federal standard on the scope of a trial court's discretion to grant or deny a Rule 39(b) motion:

> There is a wide divergence of views on how a court should exercise its discretion to grant relief from the time requirement on a motion under Rule 39(b). It is the rule in a significant number of courts that the court should grant a jury trial in the absence of strong and compelling reasons

> to the contrary. In what appears to be an ever-increasing number of federal courts, the judicial attitude is almost diametrically the opposite. Thus, it has been held that the district court has no discretion to grant a jury trial when there was no timely demand unless there are special circumstances excusing the oversight or default or, as articulated by some courts, unless there are highly exceptional circumstances, or there is a showing of prejudice.

9 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2334 (3d ed. 2017) (internal quotation marks and footnotes omitted). Comparing the standards applied by the various Circuits, it is clear that the Nelson Parties chose to cite from Circuits with the most liberal standard (granting motion absent strong reasons to the contrary), a standard not followed by the Ninth Circuit, the District of Idaho, or most importantly, this Court. *Kitchen v. Chippewa Valley Sch.*, 825 F.2d 1004, 1013 (6th Cir. 1987); *Pinemont Bank v. Belk*, 722 F.2d 232, 236 (5th Cir. 1984); *AMF Tuboscope, Inc. v. Cunningham*, 352 F.2d 150, 155 (10th Cir. 1965).[13]

Finally, in addition to containing an inapplicable standard, the Fifth Circuit case relied on most heavily by the Nelson Parties, is readily distinguishable on its facts. Op. Br. at 26 (citing *Pinemont Bank*, 722 F.2d 232). In *Pinemont Bank*, the court reversed denial of the Rule 39(b) motion because the trial court reasoned only that the jury demand was "[n]ot timely filed." 722 F.2d at 237. Further, in *Pinemont Bank*, the party opposing the motion had caused the confusion before the defendant initially answered (by indicating it accepted a jury trial in a civil cover sheet submitted with its complaint). *Id*. at 238. Here, the District Court articulated specific reasons why it denied the motion, including complexities related to the Nelson Parties' discovery misconduct, spoliation, and the many equitable issues predominating the case.

[13] Appellants cite additional federal cases that do not help their arguments. Op. Br. at 25-27 (citing *Parrott v. Wilson*, 707 F.2d 1262, 1267-68 (11th Cir. 1983) (affirming denial of Rule 39(b) motion); *Littlefield v. Fort Dodge Messenger*, 614 F.2d 581, 585 (8th Cir. 1980) (affirming denial of Rule 39(b) motion); *Malbon v. Pa. Millers Mut. Ins. Co.*, 636 F.2d 936 (4th Cir. 1980) (holding jury trial issue not preserved for appeal)).

Tr. Vol. I, pp. 372:15-373:1. WinCo did not cause the Nelson Parties' waiver. Instead, in the words of the Nelson Parties' counsel, "none of the parties here, the Nelson parties, know why it wasn't demanded." Tr. Vol. I, p. 357:22-23.

In summary, with regard to the second element of the abuse of discretion standard, there can be no legitimate dispute that the District Court acted within the outer boundaries of its discretion and consistent with relevant legal standards.

c. The District Court Reached Its Decision by an Exercise of Reason.

The District Court, intimately familiar with the issues to be tried, including the discovery misconduct and spoliation issues, came to a reasoned conclusion to proceed with a court trial. Tr. Vol. I, pp. 372:15-373:1. And there is nothing to weigh against the District Court's reasons for not excusing the Nelson Parties' waiver. In fact, this Court has held that where "'appellants have given no reason for their failure to make a timely demand . . . , we find no abuse of discretion in denying the request.'" *Hayden Lake Fire Prot. Dist.*, 141 Idaho at 398 (quoting *Pocatello*, 106 Idaho at 373); *see also Golden Condor, Inc.*, 106 Idaho at 283.

What is entirely lacking from the Nelson Parties' argument, both before the District Court and now on appeal, is any reason for their failure to make a proper demand. Before the District Court the Nelson Parties filed two documents: (1) Response to WinCo Foods, LLC's Objection to Jury Trial (CR 3947-52); and (2) Motion for Jury Trial (CR 3953-56). Neither submission provided any reason, let alone a legitimate reason, for the Nelson Parties' failure to make a proper demand. The same can be said for the Nelson Parties' arguments at the hearing on their Motion for Jury Trial. Tr. Vol. I, pp. 347-59, 370-73. There the District Court asked the question directly, and the Nelson Parties answered directly—they had no legitimate reason:

> THE COURT: What is the evidence as to why there was not a jury trial demanded? Isn't that something I need to consider under Rule 39?

> MR JOHNSON: Yeah. Under Rule 39 I think the evidence is that none of the parties here, the Nelson parties, know why it wasn't demanded.

Tr. Vol. I, p. 357:18-23. Nothing has changed on appeal. The Opening Brief makes no attempt to explain the Nelson Parties' failure to make a timely demand. And with no reason for their failure, there is no basis to find an abuse of discretion in the District Court's denial of the Rule 39(b) motion. *Hayden Lake Fire Prot. Dist.*, 141 Idaho at 398, 111 P.3d at 83; *Pocatello*, 106 Idaho at 373; *Golden Condor, Inc.*, 106 Idaho at 283.

C. THE DISTRICT COURT PROPERLY FOUND MS. NELSON PERSONALLY LIABLE FOR DAMAGES ARISING FROM THE WORK PERFORMED.

The entirety of the Nelson Parties' argument for why Ms. Nelson should not be personally liable relies on the false premise that there were three separate and distinct contracts entered into between KDN and WinCo, rather than one contract, as the District Court found. Whether a contract exists between the parties is a question for the trier of fact. *Johnson v. Allied Stores Corp.,* 106 Idaho 363, 369, 679 P.2d 640, 646 (1984). The District Court Findings "must not be set aside unless clearly erroneous." Idaho R. Civ. P. 52(a)(7)). The District Court's findings are not only supported by the factual record, but also the applicable case law. Taking away that false premise, the Nelson Parties' two arguments against holding Ms. Nelson personally liable fail. Ms. Nelson's disclosure of her principal part-way through the performance under a single contract does not absolve her of personal liability for contractual breaches that occurred after disclosure. Similarly, Ms. Nelson's incorporation of KDN ***after*** entering into the contract does not eliminate her personal liability under Idaho Code § 30-1-204.[14]

[14] Now Idaho Code § 30-29-204.

1. There is Substantial and Competent Evidence to Support the District Court's Finding of One Contract.

The record contains sufficient evidence to support District Court's finding that a single contract existed. Specifically, the District Court found that by January 2010, the parties (i.e., "KD Concrete" and WinCo) had agreed to: (a) removal and cleaning of current joint material; (b) the installation of joint sealant, SL 75; (c) price per linear foot; (d) warranty terms; and (e) that KD Concrete would perform the work on three test stores. CR 5012, ¶ 36-37. The parties adopted the remaining the terms of the October 2009 proposal from KD3, which stated in pertinent part that "work to be coordinated with local store management or regional management for maintenance." CR 5012; Ex. 49. The parties further agreed that KD Concrete would perform work on three test stores and, if that went well, WinCo could request work in its additional stores under the same terms on an "as-needed" basis. *Id.* After coming to this agreement with Mr. Little, Ms. Nelson coordinated directly with the maintenance supervisors, Mr. Weber and Mr. Douty, to start work at additional stores. CR 5001-02. In other words, Ms. Nelson did not go back to Mr. Little, the WinCo representative with authority, after the first three stores to enter into a new contract. And as the District Court determined, both Mr. Weber and Mr. Douty did not have authority to enter into the type of contract formed between KD Concrete and WinCo. CR 5015. Thus, there is substantial and component evidence to support the District Court's finding that a single contract existed between KD Concrete and WinCo, even without taking into account the adverse inferences the District Court applied.

The District Court's legal conclusions are similarly supported by the applicable case law. Contrary to the Nelson Parties' unsupported assertions, it is legally permissible (and in this case factually accurate) for a contract to be extended to govern subsequent performance without creating a new contract, whether or not that performance is contemplated at the time of contracting. *See Simper v. Farm Bureau Mut. Ins. Co. of Idaho*, 132 Idaho 471, 474, 974 P.2d

1100 (1999) (continuation of insurance policy was extension of original agreement, as opposed to a new contract); *see also Bishop v. Gosiger, Inc.*, 692 F. Supp. 2d 762, 771 (E.D. Mich. 2010) (a master contract applies to subsequent agreements so long as "the parties' ongoing relationship" remains "essentially unchanged"). As the District Court noted, the contract between KD Concrete and WinCo "falls neatly under the definition of an indefinite-quantities contract" and the subsequent work beyond the first three stores was "not unlike a renewal or extension contract" in which "the contract is extended or renewed to govern subsequent performance without creating a new contract." CR 5035. Thus, a valid contract existed and each breach is a liability under that contract, which under Idaho Code § 30-1-204, relates back to the time the contract was executed.

The Nelson Parties' argument that no contract existed until the physical work started is illogical and contrary to Idaho law. *J.R. Simplot Co. v. State Dep't of Emp't*, 110 Idaho 762, 766, 718 P.2d 1200 (1986) (noting that it is not uncommon for contracts to provide for unilateral termination); *see also Foley v. Munio*, 105 Idaho 309, 311, 669 P.2d 198, 200 (1983) (noting that when a party "renounces his obligation before the time for performance, the promise has, according to the great weight of authority, an option to treat the contract has ended, as far as further performance is concerned, and to maintain an action at once for . . . damages") (internal quotation marks and citation omitted). Their argument also leads to absurd results. Take for example a termination for convenience clause, common in the construction industry. Under the Nelson Parties' theory, the existence of such a clause would always preclude an owner from bringing a claim against a contractor for failing to perform because a contract would have never actually existed if the owner always has the right to terminate.

The cases cited by the Nelson Parties do not support their position.[15] The cases do not involve indefinite quantities contracts. Rather, they relate to severing ***arbitration provisions*** from other parts of an otherwise enforceable contract. In *United Services Auto. Ass'n v. Pells*, No. 51969-7-I, 2004 WL 792666, at *2 (Wash. Ct. App. April 12, 2004), the contract at issue contained in arbitration clause that required both parties to agree to arbitrate disputes only after the dispute occurred. In other words, there was no actual agreement to arbitrate at the time of contracting. *Cummings-Reed v. United Health Group*, No. 2:15-CV-02359-JAM-AC, 2016 WL 1734873, at *3 (E.D. Cal. May 2, 2016), involved an employment agreement, the provisions of which allowed the employer to modify or eliminate the arbitration clause unilaterally after learning of a potential claim, thus essentially giving the employer sole power to dictate dispute resolution procedures. Contrast those situations, where at the time of contracting there was no actual agreement on arbitration, with the case here, where the parties agreed that if KD Concrete performed the work, WinCo would pay the agreed upon amount.

The Nelson Parties also cite *TMC Worldwide, L.P. v. Gray*, 178 S.W.3d 29, 37 (Tex. Ct. App. (Houston) 2005), to support the proposition that Ms. Nelson did not become legally obligated for more than the first three stores until she was paid for each additional store. That case, however, involved a specific Texas statute stating that a covenant not to compete is not enforceable unless accompanied by an "otherwise enforceable agreement at the time the agreement is made." Thus, to enforce the covenant, the plaintiff had to prove "a contemporaneous exchange of consideration between the parties at the time [of] the 'otherwise enforceable agreement.'" *Id.* at 37. Conversely, here there is no statute governing the formation of the contract at issue.

[15] The Nelson Parties previously relied on the same cases in its motion for a new trial. The District Court agreed with WinCo that these cases are "irrelevant." CR 6075.

In sum, this Court should not disrupt the findings of the District Court that a single contract existed between KD Concrete and WinCo as of January 2010, and that subsequent performance in both the Portland and Boise Division were governed by that contract.

2. The District Court Properly Found Ms. Nelson Liable for Failing to Disclose KDN.

The District Court properly found that "Ms. Nelson presented no evidence that she clearly and affirmatively disclosed to WinCo at or prior to January 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.'" CR 5038. Despite this fact, the Nelson Parties assert three arguments for why Ms. Nelson cannot be liable under the undisclosed principal theory because: (a) her disclosure of "KD Concrete" was sufficient; (b) WinCo knew it was contracting with a business entity; and (c) she disclosed KDN part-way through performance. Each of these arguments ignore Idaho law as well as key factual findings made by the District Court.

The Idaho case law related to an agent's liability for failing to disclose a principal is well settled. *Agrisource, Inc. v. Johnson*, 156 Idaho 903, 332 P.3d 815 (2014). In *Agrisource*, the agent, Robert Johnson, set up a new company called Johnson Grain, Inc. *Id.* at 905, 332 P.3d at 818. Mr. Johnson then contracted with Agrisource, who had previous business dealings with Johnson Grain, Inc.'s predecessor company. *Id.* Agrisource made checks out to "Johnson Grain." The question before the Court was the sufficiency of the disclosure of the principal. The district court determined that Mr. Johnson never disclosed the full name of "Johnson Grain, Inc." and, therefore, was personally liable. This Court affirmed, holding that an agent is personally liable on a contract unless the agent "clearly and affirmatively" declares: (1) the agency relationship; and (2) the identity of the principal, including "specificity as to the company's name and corporate existence." *Id*. at 909-10, 332 P.3d at 821-22.

First, Ms. Nelson's disclosure of "KD Concrete" does not eliminate her personal liability because the District Court found that at no time did Ms. Nelson disclose that "KD Concrete" was associated with KDN. CR 5012, 5038. Further, KD Concrete Design did not even exist. It was not until October 11, 2012, a few weeks before KDN filed the initial lawsuit against WinCo, that Ms. Nelson finally registered "KD Concrete Design" as an assumed business name of KDN. Ex. 90. Unlike the agent in *Agrisource*, who as least had a legal entity to disclose, Ms. Nelson's purported disclosure was of a non-existent entity. Under *Agrisource*, she is personally liable.

Second, Ms. Nelson's argument that she cannot be liable because WinCo knew there was some entity involved in the transaction fails as well. Under *Agrisource*, an agent must disclose ***both*** the existing of an agency relationship ***and*** the name of the principal. Indeed, the district court in *Agrisource* noted that Johnson would still be liable, "even if Agrisource knew Johnson was acting as an agent," because "the record was undisputed that Johnson never disclosed to Agrisource that he was acting specifically as Johnson Grain Inc.'s agent." 156 Idaho at 910, 332 P.3d at 822. The Nelson Parties' reliance on *Nadeau Painting Specialist, Ltd. v. Dalcor Property Management, Inc.*, No. 03-06-00060-CV, 2008 WL 2777724 (Tex. Ct. App. (Austin) July 18, 2008), an unpublished Texas state court opinion, is misplaced. Idaho law unambiguously requires disclosure of the principal's specific company name.[16] And the District Court found that "KDN" was not disclosed prior to the time of contracting. CR 5012-13. Therefore, WinCo

[16] Even assuming the District Court should have followed an unreported Texas decision that runs contrary to binding Idaho precedent, that case is distinguishable. In *Nadeau*, the agent affirmatively disclosed "that each of the four principals would be responsible for payment" and even that "three of the identified [p]rincipals were in financial difficulty and that these three [p]rincipals may not be able to make timely payments." *Id*. at *4. Based on those facts, the court found that the contractor had agreed to "look solely to the principals for payment." *Id*. at *9.

could not have implicitly agreed to "look solely" to KDN for damages, because KDN was never disclosed.

Finally, the Nelson Parties' argument that Ms. Nelson cannot be liable for more than the first three stores because she disclosed KDN in April 2010 relies on the three separate contracts theory which, as discussed above, was expressly rejected by the District Court. Idaho law is clear that an agent who discloses the principal after the time of contracting but during performance is still liable for any damages arising from the contract, even for work performed after the disclosure. *See Frontier Dev. Grp., LLC v. Caravella*, 157 Idaho 589, 598, 338 P.3d 1193 (2014), *reh'g denied* (Sept. 25, 2014) ("We have long held that the agent must disclose his agency relationship and principal before or at the time of the contract.").

3. Ms. Nelson is Personally Liable for all Damages Associated With the Contract Under the Pre-Incorporation Theory.

The District Court's finding that a valid contract existed as between "KD Concrete" and WinCo as of January 2010 is sufficient to impose personal liability on Ms. Nelson. 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 all liabilities created while so acting." "Liabilities" arise "when a contract is executed, not when it is breached." CR 5038 (citing the Revised Model Business Corporation Act of 1984; 1A *Fletcher Cyc. Corp.* § 215 (Thomas Reuters 2015); *Sivers v. R & F Capital Corp.*, 858 P.2d 895, 897 (Or. Ct. App. 1993); *Harris v. Looney*, 862 S.W.2d 282, 285 (Ark. Ct. App. 1993); *Zuberi v. Gimberg*, 496 S.E.2d 741, 742 (Ga. Ct. App. 1998)). Therefore, Ms. Nelson is liable for all breaches of the contract, even those that occurred after she incorporated KDN.

4. Even Assuming the District Court's Decision was Based on Legal Error, the Error was Harmless Because the District Court Also Found Ms. Nelson Liable as the Alter-Ego of the Other Nelson Parties.

Ms. Nelson remains personally liable for entire amount of the Amended Judgment even if she was not personally liable under the undisclosed principal and pre-incorporation liability theories discussed above. This is because the District Court also found that all the Nelson Parties, including Ms. Nelson, were jointly and severally responsible for the judgment pursuant to WinCo's alter-ego theories. CR 5052. Therefore, even if the District Court erred in its analysis of the relevant contract principals (which it did not), the error was harmless because Ms. Nelson is still personally liable for the entire Amended Judgment, regardless of whether or not there were multiple contracts or she properly disclosed the existence of KDN. *See* Idaho R. Civ. P. 61. Accordingly, this Court should not disturb the judgment.

D. THE DISTRICT COURT PROPERLY FOUND THAT THE NELSON PARTIES WERE ALTER EGOS OF ONE ANOTHER.

The District Court is to determine the factual issues that exist with respect to alter-ego and veil-piercing claims. *Wandering Trails*, 156 Idaho at 591. Here, the District Court found "overwhelming" evidence that the Nelson Parties were the alter egos of each other. CR 5025. A district court's application of the alter ego doctrine will not be reversed absent clear error. *Commodity Futures Trading Comm'n v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1112 (9th Cir. 1999).

To pierce the corporate veil, two requirements must be met.[17] First, there must be such a unity of interest and ownership that the separate personalities of the corporate and the individual no longer exist. *Colman v. Colman*, 743 P.2d 782, 786-787 (Utah Ct. App. 1987). Second, the observance of the corporate form must sanction a fraud or promote injustice, or an inequitable

[17] The parties and the District Court all agree that Utah law applies to WinCo's veil-piercing and alter ego claims. Op. Br. at 36; CR 5047.

result must follow. *Id.* "The [alter ego] test's second prong is addressed to the conscience of the court, and the circumstances under which it will be met will vary with each case." *Messick v. PHD Trucking Serv., Inc.*, 678 P.2d 791, 794 (Utah 1984).

With respect to the first prong, some of the factors that a court considers includes: (1) undercapitalization of a one-man corporation; (2) failure to observe corporate formalities; (3) siphoning of corporate funds by the dominant stockholder; (4) nonfunctioning of other officers or directors; (5) use of the corporation in promoting fraud; (6) employment of the same attorneys and employees; and (7) failure to maintain arm's-length relationships between related entities. *Jones & Trevor Mktg., Inc. v. Lowry*, 284 P.3d 630, 636 (Utah 2012). These factors "should be viewed as non-exclusive considerations." *Id.* In fact, any one of these factors alone can be sufficient to establish an alter ego claim. *Id.* Here, the District Court found all the above listed factors to be present. CR 5049-50.

With respect to the second prong of the analysis, whether observance of the corporate form would cause an inequitable result, courts may consider several factors, including: (1) the capitalization of the corporate defendants; and (2) the solvency of the corporate defendants. *See Hutchison v. Anderson*, 130 Idaho 936, 941, 950 P.2d 1275 (Ct. App. 1997)[18] (upholding the district court's ruling that inequity would result based on the findings that the defendant corporation was undercapitalized and that any potential recovery against the defendant would be futile); *see also E.E.O.C. v. Burrito Shoppe LLC*, No. CV 05-329-S-LMB, 2008 WL 2397678, at *4 (D. Idaho June 10, 2008) ("Undercapitalization is a consideration when determining this second element and courts consider whether an attempt to collect on a judgment against the corporation would be futile."). It is also not necessary that the lack of separateness by the

[18] As the Nelson Parties acknowledge, "Idaho's alter ego test is not materially different than Utah's." Op. Br. at 36 (citing *Hayhurst v. Boyd*, 50 Idaho 752, 761, 300 P. 895 (1931)).

Nelson Parties have a causal connection to WinCo's injury (even though it does). All that must be present is evidence that the corporation played a role in that fraud or inequitable conduct. *Transamerica Cash Reserve, Inc. v. Dixie Power & Water, Inc.*, 789 P.2d 24, 26 (Utah 1990).

The Nelson Parties do not appear to challenge whether there was a sufficient basis for the District Court to find the first prong of the alter-ego/veil-piercing test satisfied. Instead, the Nelson Parties attack the District Court's application of the second prong of the test, arguing that it is impossible, as a matter of law, for the District Court to disregard the corporate form because: (1) KDN and its representatives were unaware of the pending liability at the time the assets were depleted; and (2) KDN was an S-Corporation, thereby giving Ms. Nelson the right to spend any profits in any manner she chose. Op. Br. at 40. Both arguments lack legal support and ignore key facts that demonstrate why, in this case, it was reasonable and equitable for the District Court to impose liability on all the Nelson Parties.

1. The Nelson Parties' Alleged Lack of Knowledge of Potential Liability to WinCo Does not Preclude a Finding of Alter-Ego/Veil Piercing.

The Nelson Parties ignore the fact that the District Court found by clear and convincing evidence that Ms. Nelson ***committed fraud*** against WinCo. CR 5022-5025. Despite this fact, the Nelson Parties still argue that the Nelson Parties' alleged lack of knowledge of potential liability to WinCo prevents a finding of liability for the breach of contract damages. The focus of the alter-ego/veil piercing analysis, however, is on the relationship between corporation and its owners. *See Gibraltar Sav. v. LDBrinkman Corp.*, 860 F.2d 1275, 1288 (5th Cir. 1988) (noting that alter ego analysis "properly focuses upon the relationship between the corporation and its owners and not upon the relationship between the corporation and the claimant-creditor"). If there existed an improper use of the corporate form, then the question becomes whether an inequitable result followed as a result, regardless of whether the owners intended its conduct to

cause the inequitable result. *See In re JNS Aviation, LLC*, 376 B.R. 500, 528 (Bankr. N.D. Tex. 2007) ("'[T]he focus of veil-piercing analysis is on some inequitable result for the *claimant*, because of abuses of the corporate form' . . . Neither intentional fraud nor intent to defraud need be shown . . .") (quoting *Gibraltar Sav.*, 860 F.2d at 1289).

In addition to the findings of fraud, the District Court also found that the Nelson Parties completely ignored the corporate formalities and through that conduct improperly benefited at WinCo's expense. As a result, allowing them to hide behind KDN's corporate form would "sanction an injustice." CR 5051. As the District Court stated, "this is not a case of a creditor attempting to pierce the corporate veil simply to recover damages." *Id.* Rather, this is a case where the Nelson Parties set up a separate distinct corporate entity, KDN, for the sole purposes of contracting with WinCo, and then bled that entity dry through the "intentional manipulation and diversion of funds." *Id.* In the end, Ms. Nelson "and her entities all received a financial benefit from KDN's overbilling of WinCo." *Id.*

The Nelson Parties argue that they cannot be liable under the alter-ego/veil piercing theory because Ms. Nelson did not have "personal knowledge" that KDN might owe WinCo for the overbillings at the time they depleted all of KDN's assets. Again putting aside the ***clear finding of fraud perpetrated by Ms. Nelson***, the Nelson Parties cite to no authority to support their position. Rather, the direct opposite is true. Satisfying the second prong of the alter-ego/veil piercing test does not, as a matter of law, require a showing of fraud or even bad faith. *See*, *e.g., RRX Indus., Inc. v. Lab-Con, Inc.*, 772 F.2d 543, 546 (9th Cir. 1985) ("A finding of bad faith . . . is not prerequisite to the application of the alter ego doctrine"); *Martin v. Freeman*, 272 P.3d 1182, 1186 (Colo. Ct. App. 2012) (there is no requirement "that a party seeking to pierce the corporate veil must show wrongful intent").

2. KDN's Status as an S-Corporation Does not Preclude a Finding of Alter-Ego/Veil Piercing.

The District Court's finding that Ms. Nelson, SealSource, and KD3 were the alter-egos of KDN despite KDN's status as a subchapter S-corporation is supported by Utah law. Ms. Nelson's use of KDN's funds for personal expenses was not "legitimate" and she failed to properly account for those transactions. The Nelson Parties seem to be making a "no harm, no foul" argument. That is not the case. Ms. Nelson operated her various businesses and specifically KDN in that manner to obtain an illegitimate benefit. The Nelson Parties argue that Ms. Nelson's "siphoning" of KDN's funds to pay for birthday parties, exotic travel, personal expenses, home improvement projects was, a matter of law, permissible. They forget, however, that Ms. Nelson didn't just pay for personal expenses, she classified them as "business expenses" as opposed to shareholder distributions. CR 5026. She also failed to record expenses that KDN paid on behalf of SealSource or KD3 as loans, again referring to them as business expenses. CR 5030. By doing so, she lowered the taxable income for KDN. Had she distributed funds to herself to make those purchases or loaned the money to SealSource or KD3 to pay those expenses, she would have paid tax on those transactions. In other words, Ms. Nelson manipulated the use of KDN's funds in order to reap an improper benefit.

The only case cited by the Nelson Parties actually supports this crucial distinction. As discussed in an unpublished Michigan case, *Commercial Cabinet, Inc. v. Quint*, Case No. 239826, 2003 WL 22962070, at *2 (Mich. Ct. App. Dec. 16, 2003), while it may be typical for shareholders in an S-corporation to pay personal expenses from the corporation, "the relevant inquiry is whether those payments are ***charged to a shareholder's account***." (emphasis added). In *Commercial Cabinet*, the only questionable conduct by the shareholder was taking a withdrawal when there was a potential liability for disputed work. *Id*. at *1. In fact, the court noted that the shareholder "properly drew from her retained earnings." *Id.* Conversely, here the

District Court specifically noted that "the evidence was overwhelming that the withdrawal of KDN's funds by the Nelson Parties were not legitimate ***and were not properly accounted for in KDN's accounting records***." CR 5050 (emphasis added).

In sum, a corporation's status as a subchapter S-corporation does not, as matter of law, immunize its shareholders from alter-ego/veil piercing claims. *See Ferrara v. Oakfield Leasing Inc.*, 904 F. Supp. 2d 249, 268 (E.D.N.Y. 2012) (noting that "[a]lthough [corporation] was a Subchapter S-corporation whose income was taxable to [defendant], the Court agrees that the [d]efendant has cited no authority for the proposition that this sort of tax treatment immunizes shareholders of Subchapter S corporations from veil-piercing when warranted"); *In re Fisher*, No. 03-33161, 2006 WL 1452498, at *9 (Bankr. S.D. Ohio Jan. 20, 2006), *aff'd*, 362 B.R. 871 (S.D. Ohio 2007), *aff'd*, 296 F. App'x 494 (6th Cir. 2008) (finding that the defendant, the sole shareholder of s-corporation, liable as the alter-ego of the corporation because he "frequently commingled" funds, put the corporation's cash into his own account, and paid his own expenses from the commingled funds); *Politte v. U. S.*, No. 07cv1950 AJB (WVG), 2012 WL 965996, at *10 (S.D. Cal. Mar. 21, 2012), *aff'd*, 587 F. App'x 406 (9th Cir. 2014) (piercing corporate veil of S-corporation where shareholders diverted corporate funds to pay for personal expenses).

Finally, the Nelson Parties argue that it should not matter how Ms. Nelson classified expenses because it did not impact WinCo, seemingly to argue against a finding under the second prong of the alter-ego analysis, the inequitable result. The subchapter S-corporation status, however, is a factor that goes to the first prong, whether there was a lack of separateness. Specifically, it relates to the factor of "siphoning of corporate funds by the dominant shareholder." *Jones & Trevor*, 284 P.3d at 636 (internal quotation marks and citation omitted). But even taking into consideration the S-corporation status, and basically ignoring the siphoning off of corporate funds, the District Court still found significant interconnectedness between the

Nelson Parties, such as common employees, nonfunctioning officers, and absence of corporate records. CR 5049. And again, a single factor is sufficient. *Jones & Trevor*, 284 P.3d at 636. Therefore, even assuming Ms. Nelson did properly withdraw her distributions from KDN (which she did not), that would not be sufficient to overturn the District Court's Findings.

V. CONCLUSION

For all of the foregoing reasons, WinCo respectfully requests this Court affirm the Amended Judgment, and award WinCo its attorney's fees and costs on appeal.

DATED this 27th day of December, 2017.

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CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that two bound copies were served on each party via U.S. Mail.

DATED AND CERTIFIED this 27th day of December, 2017.

By *s/A. Dean Bennett*
A. Dean Bennett

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of December, 2017, I caused to be served two true and correct copies of the foregoing by the method indicated below, and addressed to the following:

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