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Thurston Enterprises, Inc. v. Safeguard Business Systems, Inc. Appellant's Brief Dckt. 45092

IN THE SUPREME COURT OF THE STATE OF IDAHO

THURSTON ENTERPRISES, INC., an Idaho corporation, Plaintiff-Respondent, vs. SAFEGUARD BUSINESS SYSTEMS, INC., a Delaware corporation, Defendant-Appellant.	Supreme Court Docket No. 45092-2017 Ada County No. CV-OC-2014-16400

APPELLANT'S BRIEF

Appeal from the District Court of the Fourth Judicial District for Ada County
Honorable Steven Hippler, District Judge, Presiding

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STATEMENT OF THE CASE

This case involves an action by Respondent Thurston Enterprises, Inc. ("Thurston") for breach of contract, breach of good faith and fair dealing, and fraud against Appellant Safeguard Business Systems, Inc. ("SBS"). This appeal seeks to correct legal errors that resulted in a trial prejudiced against SBS and a $6.8 million judgment—much of it for punitive damages on a breach of contract—that is not supported by the evidence.

SBS is a Dallas-based company engaged in selling products to small businesses through a nationwide network of 260+ distributors who are given: (i) the right to use "Safeguard" trademarks and intellectual property, (ii) a broad range of business support and resources, (iii) commissions of 30-35% on completed sales, and (iv) an exclusive right to commissions on sales of certain defined products to new accounts first established as a direct result of the distributor's efforts (*i.e.*, "account protection"). In 2013, an affiliate of SBS acquired two companies in the Pacific Northwest that historically made sales in Idaho to some organizations also previously served in small part by Thurston, an existing Safeguard distributor. SBS sought to negotiate a resolution with Thurston as to account protection rights in the relatively few overlapping organizations. The parties reached a partial resolution (which Thurston now claims was fraudulently induced by an omission it knew about), then Thurston stopped negotiating and brought suit. Due to an erroneously broad interpretation of "account protection" by the District Court, Thurston obtained a verdict not only for the *gross profits* on the acquired businesses' sales but also a duplicative "two-thirds" destruction of Thurston's entire value as a going concern. With speculative future losses for 8+ years and punitive damages added on top, Thurston ended up with a $6.8 million judgment despite never having lost a single dollar of its own historical sales and, in fact, doing better and earning *more* after the acquisitions than before. [*See* R. 19598.] This Court should reverse the legal errors that facilitated such a disproportionate result.

COURSE OF PROCEEDINGS

On August 26, 2014, a different Safeguard distributor in Idaho, T3 Enterprises, Inc. ("T3"), initiated this suit alleging contract and various tort claims. [R. 56.] Thurston joined by way of amended complaint in September 2014 [R. 273] and, together, the two Plaintiffs asserted seventeen (17) claims against eleven (11) defendants. Due to an arbitration clause in T3's contract, the District Court severed T3's claims against SBS for arbitration[1] and allowed Thurston's claims (as well as T3's claims against other defendants) to proceed in court. [R. 994.]

For two years thereafter, Thurston's attorneys engaged in excessive discovery that included more than six hundred (600) document requests and thirty (30) days of depositions. [*See* R. 10262 (¶ 14), 10273-77 (¶¶ 34-38).] Notwithstanding that effort, all but five claims against two defendants—SBS and its indirect parent, Deluxe Corporation ("Deluxe")—were eventually dismissed. Along the way, the District Court made key legal errors challenged here, including: (i) on March 24, 2016, rejecting attorney-client privilege for internal communications by SBS's in-house counsel [R. 2219-27]; (ii) on September 21, 2016, allowing Thurston to seek punitive damages for breach of contract [R. 5752-78]; and, (iii) on October 21, 2016, ruling that SBS breached Thurston's right to account protection as a matter of law. [R. 5791-5833.]

On October 28, 2016, Thurston filed a Fourth Amended Complaint with three claims against SBS (Count 1 for breach of contract; Count 2 for good faith-fair dealing; Count 12 for fraudulent inducement), and two tortious interference claims against Deluxe. [R. 6062-79.]

Beginning on November 29, 2016, the District Court held a three-week jury trial of the claims [*see* R. 44-47] where, at the outset—before opening arguments—the jury was instructed that SBS violated Thurston's account protection rights. [Tr. Vol. I at 156:22:157:8; R. 9087.]

[1] SBS separately appeals an arbitration award in favor of T3 (see Docket No. 45093-2017).

The jury went on to exonerate Deluxe in full, but held SBS liable on all counts, awarding $1.6 million in compensatory damages and an additional $4.75 million in punitive damages (more than $3 million supported only by breach of contract damages). [*See generally* R. 9128-38.]

On January 13, 2017, after reducing the punitive award slightly to comply with I.C. § 6-1604(3)'s statutory cap [*see* R. 9139-41], the District Court entered judgment for Thurston and dismissed Deluxe with prejudice. [R. 9143.] SBS timely sought post-judgment relief ("<u>JNOV</u>") [R. 9145-87] while Thurston requested $2.5 million more in "multiplied" fees and costs. [R. 9663-10165.] On March 24, 2017, all grounds for JNOV were denied on the basis that, although the District Court did not necessarily agree with all aspects of the verdict, it would allow the jury to infer certain losses (such as a destruction of Thurston's business and fraud the District Court acknowledged Thurston knew about) while reaffirming its contract and punitive damage rulings. [*See* R. 12718-37.] On May 5, 2017, the District Court awarded $758,593.74 in fees and costs to Thurston [R. 12907-32] and entered a final judgment of $6,792,649.74. [R. 12934-36.] SBS timely appealed on May 5, 2017 (amended August 16, 2017). [R. 12998-13122, 13630-13829].

STATEMENT OF FACTS

For much of its 62-year history, SBS's network of 260+ nationwide distributors have acted as commissioned sales agents[2] that solicit small businesses to purchase low-volume orders of paper products (*e.g.*, checks, envelopes, and forms) by way of bank referral and other traditional sales methods. [*See* Tr. Vol, I at 1089:20-1090:20.] Thurston Enterprises, Inc., an Idaho corporation owned by Roger Thurston ("<u>Mr. Thurston</u>"), has operated pursuant to that model since 1987 under an Interim Regional Distributor Agreement (the "<u>Interim Distributor</u>

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[2] Once a customer places an order with a distributor, SBS handles all other aspects of a sale—*e.g.*, invoicing, shipping, collecting payment, guarantees, returns—and a commission is remitted to the distributor. [*See* Tr. Vol. I at 498:6-22, 501:9-502:11, Tr. Vol. II at 1537:2-1538:9.]

Agreement”). [*See* Ex. 8; Tr. Vol. II at 1763:15-1764:8.] Indeed, as Mr. Thurston testified, his company has around 4,000 accounts that each order $200 of product per year. [*See* Tr. Vol. II 1768:24-1769:9.] The Interim Distributor Agreement—which had a 5-year term that was never renewed [*see* Ex. 8 at 8.6 (¶ 7(A))]—gave Thurston a right to use Safeguard trademarks and solicit the order of defined products in return for a 30-35% commission on sales, as well as thirty-six (36) months of “account protection” (*i.e.*, a right to exclusive commissions) in regard to new accounts that Thurston was the first to successfully establish. [*See* Ex. 8 at 8.3 (¶ 3).]

The right of account protection is the central issue in this dispute. In general, it means that if a distributor makes a sale to the account of another, SBS will pay any commission due on that sale to the protected distributor (unofficially termed a “rotation”). [*See* Tr. Vol. I at 896:19-897:1; R. 5477-79.] The right originated in the 1970s when there was typically only one billing point for each small business customer and only one product category sold. [*See* Tr. Vol. I at 1084:14-1085:7; R. 5459-60, 5462-66.] Over time, it came to apply to larger organizations by protecting the commissions a distributor earned on the specific products it was first to successfully solicit from specific billing contacts within an organization. [*See* R. 5506-07; 5514-15, 5519-22, 5525-26.] Never has it applied to entire organizations by name alone since there may be multiple departments or locations with different billers (or different states and countries). As such, a distributor with protection as to one billing point in an organization (*e.g.*, the pediatrics department of St. Luke’s Hospital) is not entitled to commissions for sales by others to different billing points (*e.g.*, the oncology department) or on sales of uniquely different products altogether. [*See, e.g.*, Tr. Vol. I at 590:14-591:7, 1117:19-1118:3 (Thurston/T3 sold to different St. Luke’s offices without claiming account protection).] Rather, the account protection right is specific to billing contacts and products, as determined by matching biller name, telephone, and ship-to address. [*See* Tr. Vol. I at 589:21-590:7, 1092:9-1093:3; R. 5464, 5496, 5506-07.]

Rather recently, SBS was faced with surviving a worldwide recession right at a time of significant changes in the industry. [Tr. Vol. I at 508:11-509:25, Tr. Vol. II at 2003:1-2004:16.] In order to adapt and preserve itself for all stakeholders, including the distributor network, SBS embarked on a series of "business acquisitions and mergers" (the "BAM" program) to increase sales and innovate. [Tr. Vol. I at 507:16-508:10, 510:1-511:2, 844:14-845:14, Tr. Vol. II at 2004:17-2005:6, 2006:17-2007:4.] Since 2008, SBS had acquired over sixty (60) independent manufacturers/distributors across the country through the BAM program [Tr. Vol. I at 297:15-18, 848:10-12], with SBS successfully resolving all account protection issues along the way by negotiation. [*See, e.g.*, Tr. Vol. I at 370:20-372:23.] That is, until this case.

In 2013, Safeguard Acquisitions Inc. ("SAI") purchased two large well-established companies in the Pacific Northwest: (i) Form Systems Inc. d/b/a DocuSource ("DocuSource") (on April 30, 2013) and (ii) Idaho Business Forms ("IBF") (on August 27, 2013). [*See* Tr. Vol. I at 251:13-20; 254:6-13.] Those two companies had long operated in some of the same areas of Idaho as Thurston (and elsewhere nationwide), but were focused on high-volume accounts and offered unique products/services not previously offered in the Safeguard network (certainly not by Thurston), such as medical ID bands, W-2 processing, drop shipping, and warehousing. [*See* Tr. Vol. I at 522:20-524:18, Tr. Vol. II at 1221:7-1223:12, 1225:15-19, 1228:2-23, 1230:2-1232:16, 1915:15-1916:5, 1923:3-1925:9.] As with all such acquisitions, due diligence was done under strict confidentiality terms [*see* Tr. Vol. I at 303:2-12] that allowed SBS to, among other things, conduct a preliminary "scrub" to estimate potential account protection overlaps with existing distributors. [Tr. Vol. I at 309:3-21, 337:12-338:4.] The legal department analyzed that risk [Tr. Vol. I at 1133:21-1134:10] and SBS elected to move forward based on the fact it had always been able to negotiate reasonable resolutions in the past [*see* Tr. Vol. I at 371:8-21, 519:6-18, 531:18-533:10, 846:25-848:15; *see also* Ex. 48 at 48.9, 544:19-545:3] by offering to buy, share, or swap accounts with distributors in the way that best served the end customers. [Tr. Vol. I at 384:6-17, 594:2-595:3, 1093:7-1097:10.] In that process, the sales of one distributor were not shared with others because: (i) sales data is confidential [Tr. Vol. I at 955:25-956:3, 1045:23-1046:13; Tr. Vol. II at 1240:11-17] and (ii) a distributor's account protection rights are valued based on the historical sales made by *that distributor itself*, not that amount plus sales others might be capable of making to the same organization. [*See* Tr. Vol. I at 1096:18-1097:1.]

Soon after the DocuSource/IBF acquisitions, SBS's General Counsel (Michael Dunlap) contacted Roger Thurston to inform him and start the process of account protection resolution, as he had many times. [Tr. Vol. I at 855:4-9, 862:11-25; 1097:22-1098:6; Ex. 68 at 68.2.] Mr. Thurston was understandably concerned how the IBF acquisition, in particular, could affect his business since both companies are based in Boise. Nevertheless, as a sophisticated businessman, he agreed to engage in an "arm's length" negotiation. [Tr. Vol. II at 1871:16-20, 1874:3-7.]

In the meantime, DocuSource and IBF continued servicing their same historical accounts as always, only doing so as Safeguard-affiliated outlets.[3] [Tr. Vol. II at 1242:15-23, 1935:25-1936:11.] Some of their ongoing sales after acquisition were to the same overall organizations for which Thurston had account-level protection for its own billing contacts as to traditional products [*see* Tr. Vol. II at 1937:20-1938:13], but, due to the different billing contacts and products involved, there was effectively no direct head-to-head competition. [Tr. Vol. I at 960:8-22, Tr. Vol. II at 1991:23-1992:10.] Indeed, there was ***no evidence*** at trial that Thurston lost a single dollar of its historical sales due to the acquisitions. [*See* Tr. Vol. II at 1624:9-13.] Rather,

[3] Although owned by a Safeguard affiliate (SAI), IBF was staffed and operated by a different company, KMMR, which in May 2015 purchased IBF and began operating it as an independent contract distributor. [*See* Tr. Vol. II at 1234:5-1235:5, 1934:5-8.] DocuSource did the same until transitioned to its current owner, Inspired Results. [Tr. Vol. II at 1987:12-17, 2018:16-20.]

everyone continued taking orders from their own billing contacts the same as before and, in fact, Thurston increased its profits doing so. [Tr. Vol. II at 1895:17-25, 1897:25-1898:18; *see also* R. 19598.] In addition, the organizational overlap was not particularly large, with the amount of Thurston's business theoretically impacted being 99[4] out of 4,000 claimed overlaps.

From February to May 2014, Dunlap (SBS's General Counsel) exchanged emails and phone calls with Mr. Thurston regarding organizations identified as overlapping based on post-acquisition sales by IBF, to determine which could be resolved by purchasing account protection rights. [Tr. Vol. I at 865:14-866:7; Exs. 1036-1078.] In doing so, Dunlap did not provide any information on the pre- or post-acquisition dollar amount of sales by IBF and, conversely, did not provide IBF with Thurston's sales figures. [Tr. Vol. I at 901:15-25, 955:21-956:3, 973:18-21, 1045:23-1046:13; Tr. Vol. II at 1240:11-17, 1827:13-18.] In some instances, the difference was somewhat substantial due to IBF's greater size and focus – such as $158,000 that IBF sold to its contact at Omnipure in 2012 as compared to the $100 Thurston sold to its own contact there. [Tr. Vol. II at 1804:18-1805:13, 1870:15-17.] At the same time, SBS did not pay commissions to Thurston on the sales being made by DocuSource/IBF to overlapping organizations, despite recognizing a potential risk the account protection right could be construed so broadly. [*See* Tr. Vol. I at 873:8-874:8; 881:24-882:25.] Rather, until the District Court's summary judgment ruling—which SBS maintains was incorrect—SBS viewed the right as legally and historically narrower [*see* R. 5392, 5399-5403, 5409-14] and hoped to negotiate a mutually-agreeable resolution with Thurston as it had in connection with 60+ prior acquisitions.

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[4] Thurston's expert, Robert Taylor, initially claimed 116 overlaps. [R. 3726-27 (identifying 113 with IBF), R. 3832 (3 with DocuSource).] He later acknowledged being incorrect as to at least 17 of those [*see* R. 3704 (¶ 16)], leaving 99 claimed overlaps.

The contemporaneous emails reflect that, although Mr. Thurston was not given the dollar amounts of IBF's sales, he was well aware that IBF was continuing to make sales to overlapping organizations. [*See* Tr. Vol. II at 1873:17-23; Ex. 244 (Mr. Thurston writing to Dunlap at the time: "[s]ince the client list we have been going through is based on sales ***since August 27th*** [the exact date of IBF's acquisition] …") (emphasis added).] At trial, however, Mr. Thurston claimed he "assumed" there were no ongoing sales by DocuSource/IBF because he was not receiving commissions for those sales [Tr. Vol. II at 1825:23-1826:12, 1828:24-1829:5], although stating as well that he requested details on the amount of the very sales he claimed not to know about and that Dunlap simply obfuscated as to his ability to provide that information. [*See* Tr. Vol. II at 1818:8-1819:3, 1829:6-9; *but see id.* at 1874:14-1875:8.] Even more revealing is the fact that Mr. Thurston negotiated an amount significantly higher than his company's sales in regard to at least one organization [*see* Tr. Vol. II at 1877:12-13 ($27,000 for Norco)] on the basis that, in his words at the time, "IBF pretty much has touched almost everything else there and there really isn't much left for my office." [Ex. 240; Tr. Vol. II at 1875:15-1878:10, 1808:13-16.]

Regardless, both sides fully concur that ***no*** dollar figures for IBF's pre- or post-acquisition sales were provided to Thurston. [Tr. Vol. II at 1796:10-23, 1827:13-18; *see also* Tr. Vol. I at 901:15-25.] Nonetheless, on March 6, 2014, Thurston agreed to sell any account protection rights it had to nine organizations[5] for $32,600 and executed a document

[5] Thurston did not agree to sell its rights to other organizations identified by Dunlap for negotiation. [Tr. Vol. II at 1825:20-25.] Dunlap indicated he would get IBF to transfer its customer files for the non-sold organizations to Thurston, but later found out from IBF's managers those accounts had special circumstances (*e.g.*, W-2 processing, medical ID bands, contractual arrangements Thurston could not assume or fulfill). [*See* Tr. Vol. II at 1251:10-1252:6.] Either way, no file transfer was made a part of the March 2014 agreement and, as a result, the District Court correctly dismissed Thurston's claim for breach of contract in that regard. [R. 5826-28.] That dismissal was not appealed and is now final.

acknowledging that was a "resolution" of all account protection as to those organizations. [Ex. 1063.] Thurston knowingly valued that sale based on its own sales figures. [Tr. Vol. II at 1870:3-14, 1873:17-1874:2, 1885:14-20.] Yet, the contention made late in the suit [*see* R. 2307 (June 13, 2016)] is that Thurston was defrauded because it would have demanded hundreds of thousands more had it known the specific dollar amounts of IBF's sales. [Tr. Vol. II at 1830:4-1831:2.]

After the March 2014 agreement, Dunlap engaged with Mr. Thurston to discuss additional organizations identified as overlapping based, again, on the known ongoing sales by IBF. [*See* Ex. 308.] In that second round of negotiations, Mr. Thurston requested in writing for the first time that, "going forward," he receive the dollar amounts for sales being made by IBF to the organizations at issue, which Dunlap provided. [*See* Exs. 309, 311; Tr. Vol. I at 1127:20-1128:4, Tr. Vol. II at 1886:15-1889:1.] Emails and calls were exchanged through June 2014 until Mr. Thurston stopped responding and later appeared in T3's suit (in September 2014).

Additional facts relevant to highlight are: (i) for purposes of the future damages awarded, it is undisputed that DocuSource ceased all business in Idaho by October 2015—well prior to trial—when its Idaho representative resigned [Tr. Vol. II at 1992:11-1993:19, 2018:24-2019:16; *see also* R. 3834-60]; (ii) Thurston remained a distributor during trial (as it does today) [Tr. Vol. II at 1751:1-3]; and (iii) Thurston's own profits continually grew each year after the acquisitions. [*See* R. 19598, Ex. 1086, Tr. Vol. II at 1895:17-25, 1897:25-1898:18.]

ISSUES PRESENTED ON APPEAL

1. Whether the District Court's account protection ruling was an error that mandates reversal of the judgment for Thurston.

2. Whether the District Court's ruling on SBS's attorney-client privilege was an error that mandates reversal of the judgment for Thurston.

3. Whether the District Court erred in denying post-judgment relief that there was not substantial "clear and convincing" evidence of fraud, and should dismiss the claim in full.

4. Whether the District Court erred in denying post-judgment relief that there is not a "pricing" (or product cost) guarantee in the contract, and should dismiss the claim in full.

5. Whether the District Court erred as to the good faith-fair dealing claim, and should dismiss the claim in full, due to: (a) not granting SBS's summary judgment on the claim; (b) allowing Thurston to submit an undisclosed damages theory at trial; or (c) denying post-judgment relief that there was insufficient evidence to support the claim.

6. Whether, in the circumstances of this case, the District Court erred in sustaining an award of punitive damages for breach of contract, and should strike all such damages.

7. Whether the District Court erred in denying post-judgment relief that sought to eliminate the future losses for 8+ years, and should strike the damages awarded for future losses.

8. Whether the attorneys' fees awarded by the District Court should be remanded for reduction of all amounts related to any errors overturned by this appeal.

9. Whether SBS should be granted its costs and attorneys' fees on appeal.

STANDARDS OF REVIEW

Issues 1 and 5(a) involve summary judgment rulings, for which the standard of review is the same as applied by the trial court on a motion for summary judgment. *Lettunich v. Key Bank Nat'l Ass'n*, 141 Idaho 362, 366, 109 P.3d 1104, 1108 (2005). However, "[w]hen questions of law are presented, this Court exercises free review and is not bound by findings of the district court but is free to draw its own conclusions from the evidence presented." *Id.*

Discovery and evidentiary matters—such as for Issues 2 and 5(b)—are subject to a trial court's sound discretion. To determine an abuse of discretion, this Court considers whether the trial court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion and consistently with legal standards; and (3) reached its decision by an exercise of reason. *See Perry v. Magic Valley Reg'l Med. Ctr.*, 134 Idaho 46, 51, 995 P.2d 816, 821 (2000). Evidentiary matters are further subject to a requirement that the error must have affected a party's substantial right. *Id*.

Issues 3, 5(c), 6, and 7 all involve the trial court's JNOV rulings under I.R.C.P. 50(b), for which the standard of review is *de novo*. *See Schwan's Sales Enters., Inc. v. Idaho Transp. Dept.*, 142 Idaho 826, 830, 136 P.3d 297, 301 (2006). This Court thus determines whether there was "substantial" evidence upon which the jury could have based its verdict. *Id.* To be substantial, evidence must be "of sufficient quality and probative value that reasonable minds could arrive at the same conclusion as did the jury." *Id.* All reasonable conclusions are drawn in the light most favorable to Thurston; however, evidence or inferences not grounded in "established fact nor undisputable common experience" are insufficient. *See id.* at 831.

ARGUMENT

I. THE DISTRICT COURT'S ACCOUNT PROTECTION RULING WAS AN ERROR THAT PREJUDICED THE ENTIRE TRIAL AND MANDATES FULL REVERSAL.

Prior to trial, the District Court ruled that SBS breached the account protection right as a matter of law. [*See* R. 5808-14.] That was erroneous and requires full reversal of Thurston's judgment because account protection is central to all claims and the jury was instructed at the outset of trial that SBS violated Thurston's rights. [*See* R. 9087.]

In this instance, this Court has free review over the District Court's summary judgment ruling because it was based on a determination that the contract language is not ambiguous. *See Swanson v. Beco Constr. Co., Inc.*, 145 Idaho 59, 62, 175 P.3d 748, 751 (2007) ("free review" over ambiguity). In Idaho, a contract is ambiguous when there are at least "two different reasonable interpretations," *id*., and two types of ambiguity may exist: patent and latent. Patent ambiguity arises from the language itself whereas latent ambiguity occurs when language clear on its face loses that clarity when applied to the facts. *See Knipe Land Co. v. Robertson*, 151 Idaho 449, 455, 259 P.3d 595, 601 (2011). To determine patent ambiguity, words are given their established definitions in common usage or settled legal meaning. *Buku Properties, LLC v. Clark*, 153 Idaho 828, 832, 291 P.3d 1027, 1031 (2012). Latent ambiguity is shown by extrinsic evidence; such as when a contract refers to a "pump" and there are two pumps to which it could apply. *See Williams v. Idaho Potato Starch Co.*, 73 Idaho 13, 20, 245 P.2d 1045, 1049 (1952).

Here, the District Court's grant of summary judgment was erroneous because SBS's interpretation of account protection as product- and account-specific was a reasonable reading (if not the only reading) and, otherwise, there are patent and latent ambiguities.

A. A Product-Specific Interpretation is Supported by the Plain Language.

In the summary judgment briefing, Thurston argued "account protection" means that once it made a sale of any product to an organization by name then "any and all" sales thereafter to the entire organization require commissions to be paid to Thurston. [*See, e.g.*, R. 17722-23 (sealed).] In essence, Thurston argued it could solicit the sale of a single envelope from one biller in an entity like St. Luke's Hospital and sit back to receive commissions on all sales to the entire hospital system by others even if Thurston did not offer the products (*e.g.*, medical ID bands) or have the capabilities demanded by the customer (*e.g.*, warehousing/drop shipping). In response, SBS argued that account protection—as a matter of plain language and historical practice—applies only to the specific products a distributor is first to successfully solicit from a particular account. [*See* R. 5399-5404, 5410-14.] The District Court rejected SBS's interpretation as not reasonable on the grounds that it "inserts provisions into the [contract] which are not there." [R. 5812.] However, it is only Thurston's interpretation which does that.

In most relevant part, the Interim Distributor Agreement states:

> … you [Thurston] shall have the exclusive right to the commissions generated on sales of Safeguard Systems to any customer … whose first order of Safeguard Systems is directly a result of your efforts and credited to you …. This exclusive right to commissions applies to all new and repeat Safeguard Systems sales to each such customer until this Agreement is terminated (see paragraph 7).

[Ex. 8 at 8.3 (¶3) *combined with* 8.13.] The District Court ruled a product-specific interpretation was not possible because the language refers to "sales of Safeguard Systems without any additional modifiers" [R. 5812], yet overlooked that Safeguard Systems is a defined term [*see* Ex. 8 at 8.3 (defining as "*<u>those</u>* products and services defined in the Addenda attached hereto") (emphasis added)], and a modifier is already implied by "directly as a result of your efforts." The word "those" in the definition of Safeguard Systems is a determiner[6] far more limited than the phrasing Thurston prefers. When using the definition, the plain language then states:

> … you shall have the exclusive right to the commissions generated on sales of [*those* products and services defined in the Addenda[7] attached hereto] to any customer … whose first order of [*those* products and services defined in the Addenda attached hereto] is directly a result of your efforts and credited to you …

Accordingly, the right of account protection is specific to the "commissions generated on sales of *<u>those</u>* products … to any customer … whose first order of *<u>those</u>* products … *<u>is directly a result of your efforts</u>*." SBS's interpretation of the right as product-specific was entirely reasonable.

B. A Customer-Specific Interpretation is Reasonable on a Latent Basis.

SBS also submitted summary judgment evidence establishing that, at the time account protection was conceived, the accounts (*i.e.*, "customers") were small businesses with a single billing point. [*See* R. 5400-04 (citing exhibits found at R. 5453-5528).] That evidence pertains to several aspects of the contract, including the generic undefined term *customer* in the account

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[6] A determiner is "a word (as an article, possessive, demonstrative, or quantifier) that makes specific the denotation of a noun phrase." MERRIAM-WEBSTER'S, at 340.

[7] There is also ambiguity about the products defined by the "Addenda" (see, *infra*, Part C below).

protection clause, which is commonly defined as simply: "one that purchases a commodity or service." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 308 (11th ed. 2009). That can be patently ambiguous, but is certainly latently ambiguous when applied to the facts because it could refer to a single billing point in an organization or the entire organization itself. As such, it was a fact issue for the jury to determine what the language meant at the time of contracting. *See Bakker v. Thunder Spring-Wareham, LLC*, 141 Idaho 185, 190, 108 P.3d 332, 337 (2005).

C. There is Ambiguity as to Whether Account Protection Applies to the Specialized Products and Services Sold by DocuSource/IBF.

Finally, there was a fact issue as to whether the unique customized products/services sold by DocuSource and IBF were "Safeguard Systems" under the Addenda attached to the contract. To be clear, neither company was a contract distributor at the time (the District Court deemed them "company-owned" [*see* R. 5816]) and a substantial portion of the allegedly infringing sales involved products/services developed by them long before acquisition, which, in some instances, included customer contracts that Thurston could not assume or fulfill. However, the District Court ruled that everything sold by DocuSource/IBF instantly became a "Safeguard System" upon acquisition[8] (although *only as of* acquisition to give Thurston priority even if a first sale to an organization was, in reality, not made by Thurston) due to the language of Addendum No. 8, Addendum No. 9, or an "Expanded Products Acknowledgment" attached to the contract. [*See* R. 5810-12.] But the language of those Addenda does not unambiguously support that conclusion.

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[8] The District Court's order suggested SBS "conceded at oral argument" that all products were "Safeguard Systems" for purposes of Thurston's contract. [*See* R. 5812.] No such concession was made. The record shows counsel was stating that IBF's W-2 processing was a Safeguard System for purposes of ***IBF's*** contract, not Thurston's contract. [*See* Tr. Vol. III at 365:15-367:2 (stating it was "*a specific service that is specific only to IBF*") (emphasis added).]

First, Addendum No. 8—which covers "sourced products"—applies only to those products that are "not manufactured or offered by Safeguard" and are generally "made available for sale by Safeguard through Distributors to the small business marketplace." [Ex. 8 at 8.22.] The specialized products/services developed by IBF in particular (*e.g.*, medical ID bands and W-2 processing) are the opposite of what Addendum No. 8 covers. Once IBF was acquired, the specialized products it developed and sold: (i) were therefore "manufactured [and] offered" by Safeguard as opposed to being sourced from outside vendors and (ii) were not generally available for sale by all "Distributors to the small business marketplace." To the contrary, only IBF—which was deemed *not a distributor* by the court [R. 5618]—sold those products/services.

The District Court also failed to recognize an inherent ambiguity with Addendum No. 9—which applies to certain W-2 processing—such that it was not appropriate to rule that, as a matter of law, it applied to the "outsourced" electronic W-2 processing developed by IBF. [*See* Tr. Vol. II at 1221:21-1222:10.] First, Addendum No. 9 is dated as of 1990 [Ex. 8 at 8.24] and, thus, must be referring to a paper product that existed at that time. There is no indication in the language it was intended to apply to other W-2 products or services. Nevertheless, even if the language could be construed to apply more broadly, that only creates a latent ambiguity as to which W-2 processing systems are covered. Thurston submitted *no evidence* in that regard. Further, even if all W-2 processing everywhere was covered by Addendum No. 9, account protection applies when the first sale of a specific product "is directly a result of your efforts." Thurston never sold W-2 processing [*see* R. 5471 (1499:18-22)], nor had any capability to handle the high-volume service provided by IBF. Accordingly, Thurston could never have the first sale of W-2 services, which is necessary to establish account protection for W-2s.

Lastly, the "Expanded Products Acknowledgment" attached to Thurston's contract does even less because it does not define any product/service to which it applies. [*See* Ex. 8 at 8.26.] It is, in reality, merely a generalized notice issued in 2004 that SBS intended to designate additional products in the future for distributors to sale. The District Court construed that to mean that any product sold by SBS or any distributor thereafter would be a "Safeguard System" for purposes of Thurston's contract. [*See* R. 5812.] But such a vague statement of prospective intent is inadequate to have the broad legal meaning given by the District Court. *See Alexander v. Stibal*, 161 Idaho 253, 260, 385 P.3d 431, 438 (2016) ("An agreement that is so vague, indefinite and uncertain that the intent of the parties cannot be ascertained is unenforceable."). Further, as with Addendum No. 8, the Expanded Products Acknowledgement could apply only to products generally made available for all "distributors" to sell. That did not occur with the unique products/services developed and sold by IBF, who, again, was not a contract distributor at all.

Therefore, several reasons exist as to why the District Court erred in ruling that account protection—the central issue in the case—unambiguously applied in the way preferred by Thurston. This Court should reverse and vacate the entire judgment for Thurston.

II. THE DISTRICT COURT ERRED BY OVERRULING SBS'S ATTORNEY-CLIENT PRIVILEGE, WHICH REQUIRES VACATING THE AWARD IN FULL.

The District Court also made an incorrect ruling on attorney-client privilege that forced SBS to disclose privileged documents which, to the prejudice of SBS, were relied on by Thurston at trial. Under Idaho law, that error independently requires vacating the full judgment.

The threshold question for this issue is whether the District Court committed legal error in its order of March 24, 2016 as to attorney-client privilege [*see* R. 2219-28], which is the same for the separate appeal of T3's arbitration award as well. [*See* R. 13634 (second bullet).] Accordingly, the argument in subsection A below is identical to that in the contemporaneously-filed brief for T3's appeal (see pp. 19-24 of that brief). The briefs differ in that subsection B below addresses the impact on Thurston's trial judgment.

A. As a Matter of Idaho Law, the District Court Erred in Overruling SBS's Assertion of Attorney-Client Privilege.

In the discovery phase of the District Court proceeding (months prior to the arbitration hearings), T3 and Thurston jointly challenged SBS's assertion of attorney-client privilege over a few hundred emails that were redacted or withheld in full. In response, SBS's trial counsel conducted a second-level review of its privilege log and, for various reasons, withdrew privilege as to all but forty-one (41) documents, which was about 90% of what was initially logged. [*See* R. 1863-67, 10272 (¶ 31) (explaining reasons for de-designation).] That left in dispute internal communications to or from Michael Dunlap, SBS's General Counsel, involving his efforts to resolve account protection with T3/Thurston. The District Court reviewed those 41 documents *in camera* and rejected privilege for nearly all on the basis that they concerned "factual matters and business advice about the cross-over customers made in Dunlap's capacity as corporate secretary rather than purely legal issues." [R. 2226.] As demonstrated below, the District Court erred as to the legal standard of attorney-client privilege and materially prejudiced SBS. Specifically, Exhibits 157, 245, 266-70, 326-30, 336, 338, 352, 356-60, 362 (the "<u>Privileged Documents</u>") were ordered produced and used by T3/Thurston in both the trial and arbitration.

The standard of review is "abuse of discretion" with the additional requirement that any error must have affected a substantial right. *See Perry v. Magic Valley Reg'l Med. Ctr.*, 134 Idaho 46, 50-51, 995 P.2d 816, 820-21 (2000). In regard to attorney-client privilege specifically, the conclusion that a substantial right was impacted by improper disclosure is virtually automatic. *See, e.g.*, *Frontier Refining, Inc. v. Gorman-Rupp Co., Inc.*, 136 F.3d 695, 706 (10th Cir. 1998) ("There is too great a risk that a jury would accord significant or undue weight to the testimony and admissions of a party's own lawyers."). Indeed, this Court has stated the prejudicial effect of such an error "is obvious." *State v. Iwakiri*, 106 Idaho 618, 621, 682 P.2d 571, 574 (1984) (ruling erroneous disclosure mandated reversal of criminal conviction).

The applicable legal standard for attorney-client privilege in Idaho is established by the rule of evidence that provides a party with a right to not disclose "confidential communications made for the purpose of facilitating the rendition of professional legal services to the client." I.R.E. 502(b). The District Court identified that rule as controlling [R. 2220], but proceeded to water it down in two ways—(i) by creating a presumption against in-house attorneys and (ii) by construing the privilege to encompass only "purely legal matters"—then misapplied that weakened standard to Dunlap's internal communications about account protection matters.

First, there is no presumption against in-house attorneys. I.R.E. 502(b) does not distinguish between inside or outside counsel and refers only to a "lawyer." Yet, the District Court unilaterally declared the standard "stricter" for an in-house counsel; so much so that it would ***presume*** their communications are ***not*** for a legal purpose. [*See* R. 2221.] That was incorrect. Nothing in I.R.E. 502 creates a presumption and the majority of courts nationwide recognize a "lawyer's status as in-house counsel does not dilute the privilege." *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 758 (D.C. Cir. 2014); *see also, e.g., United States v. Rowe*, 96 F.3d 1294, 1296 (9th Cir. 1996) ("In determining the existence of a privilege, no attempt is made to distinguish between inside and outside counsel."). Indeed, this Court has not applied a presumption against in-house attorneys in prior cases. *See, e.g., Kirk v. Ford Motor Co.*, 141 Idaho 697, 704, 116 P.3d 27, 34 (2005) (applying privilege to in-house counsel without bias).

Second, the District Court erred by construing the privilege to cover only "purely legal matters" (and doing so inconsistently between the parties). [R. 2226.] I.R.E. 502(b) states it applies to any communication made to "*facilitate* … legal services." That is much broader than the District Court allowed and, indeed, the entire reason for the privilege is to encourage "full and frank communication" between lawyer and client, *see Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981), as also reflected in the comments of the Idaho State Bar Evidence Committee:

> The rule is intended to provide the privilege to *all* communications between the attorney and client, *and to others necessary to the communication process* or the rendition of professional legal services ….

M. CLARK, REPORT OF THE IDAHO STATE BAR EVIDENCE COMMITTEE, C502, p.6 re Subsection (b) (Dec. 16, 1983, Supp. 1985) (emphasis added). That goal necessarily requires discussing facts and business matters related to legal services and, as such, courts routinely apply the privilege to "counseling and planning" and "business decision-making" when an attorney is involved due to his or her "knowledge and discretion in the law." *See United States v. Chen*, 99 F.3d 1495, 1501-02 (9th Cir. 1996).[9] Further, communications about negotiations a lawyer engages in with a third party inherently entail the discussion of non-privileged facts, but the lawyer-client communication nevertheless remains privileged. *See Studiengesellschaft v. Novamont*, No. 77 Civ. 4722, 1980 U.S. Dist. LEXIS 15042 at *5 (S.D.N.Y. Nov. 17, 1980) (ruling privilege applies to internal communications regarding attorney negotiations if dispute is "essentially a legal one involving rights and duties under … [a] contract.").[10] Thus, contrary to

[9] *See also Willnerd*, 2010 WL 5391270 at *3 ("Open communication assists lawyers in rendering legal advice, not only to represent their clients in ongoing litigation, but also to prevent litigation by advising clients to conform their conduct to the law and by addressing legal concerns that may inhibit clients from engaging in otherwise lawful and socially beneficial activities.").

[10] *See id.* at *5-6 (privilege applied because attorney-negotiator's "purpose was to resolve an essentially legal dispute, in circumstances marked by legal uncertainty. In those circumstances, his actions were informed by his legal expertise. That his goal may have been to make the most financially favorable deal possible for his client does not alter these facts."); *see also Boss Mfg. Co. v. Hugo Boss AG*, No. 97 CIV. 8495, 1999 WL 47324 SHS MHD, at *2 (S.D.N.Y. Feb. 1, 1999) (privilege applied to internal discussion of commercial matters because "fundamental consideration animating the discussions and counsel's involvement in those discussions was the need to protect the legal interests of Hugo Boss").

the District Court's view, the communication of even purely *non*-legal matters is protected if the overall purpose involves a legal service. I.R.E. 502(b); *Willnerd v. Sybase, Inc.*, No. 1:09-cv-500-BLW, 2010 WL 5391270 at *3 (D. Idaho Dec. 22, 2010) (the "communication[] of facts are privileged even if the original facts are not"). Notably, the District Court recognized as much when ruling T3/Thurston's attorney agreements were not discoverable [*see* R. 2225 (noting parties can be compelled to testify as to facts "but the communication [between lawyer and client] itself remains privileged")], yet applied a different standard for SBS's privilege. It is hard to reconcile the District Court's about-face on that legal point as anything less than arbitrary.

Compared to the proper legal standard, it is clear the District Court abused its discretion in ordering the Privileged Documents produced because they are all confidential internal communications between lawyer and client representatives made in the overall context[11] of a legal service being provided by SBS's General Counsel, Michael Dunlap [*see* R. 1875-76 (¶ 5)], regardless of whether they encompassed factual or business matters. For example:

- Exhibit 245 is an email between SBS's lawyer, Dunlap, and SBS employees specifically concerning his "account protection resolution work." [*See also* Ex. 269 (referring to "IBF account protection"), Ex. 157 (containing statements from Dunlap about "honor[ing] account protection").]
- Exhibit 266 is an email between Dunlap and IBF's post-acquisition manager, Tressa McLaughlin—at a time when IBF was an affiliate of SBS—concerning details of accounts Dunlap was addressing with T3. [*See also* Ex. 269 (continuation of same); Ex. 352 (Dunlap giving input on same to client).]
- Exhibit 327 is an email from Dunlap to SBS's President, J.J. Sorrenti, speaking of a "risk" in account protection interpretation he identified from his past negotiations. [*See also* Ex. 267 (Dunlap noting he was "represent[ing] his client"); Ex. 336 (Dunlap reporting thoughts to Sorrenti about negotiations

[11] *See In re Lidoderm Antitrust Litig.*, No. 14-md-02521-WHO, 2015 WL 7566741 at *3 (N.D. Cal. Nov. 25, 2015) (report by attorney of settlement negotiations protected when, "considered as a whole and in context," it was made in connection with a legal purpose).

with T3), Ex. 330 (same); Exs. 358, 360 (Sorrenti requesting Dunlap's review of draft communication regarding account protection).]

Certainly a few of the Privileged Documents could be interpreted to contain unflattering comments that T3/Thurston will no doubt seek to highlight [*see, e.g.*, Ex. 357 (Sorrenti expressing frustration with T3 negotiations, stating: "… She's not impressing me [and] she should be trying."); Ex. 359 (Dunlap asserting "… she doesn't have an or else")], but they all occurred within the context of efforts to resolve account protection and, thus, fall within the realm of "full and frank" discussion. Indeed, T3 and Thurston have consistently stressed that Dunlap's efforts were nothing less than an attempt to address rights and duties under their contracts [*see* Tr. Vol. I at 888:20-890:1] or to "avoid litigation" [*see* R. 4437 (Thurston Decl., ¶ 14)], which directly resulted in the Privileged Documents. [*See, e.g.*, Tr. Vol. II at 1282:2-15 (testimony regarding Exhibit 327), 1302:23-1304:21 (testimony regarding Exhibit 359).]

As a result, the District Court's characterization of Dunlap as acting in a business role in regard to the Privileged Documents, due to his secondary title of corporate secretary, was not an "exercise of reason." In-house attorneys often hold such a title, but only for record-keeping purposes. *See Amalgamated Bank v. Yahoo! Inc.*, 132 A.3d 752, 790 n.38 (Del. Ch. 2016) (discussing duties of corporate secretary). It was not rational for the District Court to conclude that Dunlap's negotiations with T3/Thurston about account protection, and subsequent internal communications, were done as a corporate secretary rather than a lawyer. Providing a legal service was Dunlap's primary function. As expected of in-house counsel, his role in pre-acquisition due diligence was to assess the *legal risks* [*see* Ex. 48 at 48.9; Tr. Vol. I at 467:16-18, 1133:21-1134:10; Tr. Vol. II at 2014:19-2015:5] and then try to address those legal risks by negotiating directly with T3/Thurston. [*See* Tr. Vol. I at 371:8-21, 416:7-10.] The written agreements that resulted from those negotiations, each executed by T3 and Thurston, expressly state they were a "resolution" of account protection issues. [*See* Ex. 1009, 1063.]

Accepting the District Court's reasoning would effectively negate the ability of in-house lawyers to counsel their clients on a day-to-day basis, creating a loophole that undermines the established law and public policy favoring full and frank internal discussions between lawyers and clients. The District Court abused its discretion. This Court should: (i) reverse the District Court's order of March 24, 2016; (ii) require T3/Thurston and their counsel to return or destroy all privileged information; and (iii) vacate both the arbitration award and trial judgment.

B. Vacatur is Necessary Because the Privileged Documents Were Used at Trial.

Thurston's trial judgment should be vacated because the District Court's error as to attorney-client privilege affected a substantial right of SBS. The Privileged Documents were relied upon for a large portion of Thurston's witness examinations and closing argument. [*See, e.g.*, Tr. Vol. I at 879-884, 979-986, 994-98, 1030-36, Tr. Vol. II at 1276-87, 1289-91, 1296-1309, 2256, 2258-61, 2267-68.] The District Court's error thus materially prejudiced SBS's right to a fair trial. *See Iwakiri*, 106 Idaho at 621; *Frontier Refining*, 136 F.3d at 706.

III. THERE IS NOT SUBSTANTIAL "CLEAR AND CONVINCING" EVIDENCE OF FRAUD.

As reflected in the Statement of Facts, Thurston's case largely centered on whether it was fraudulently induced to sell certain account protection rights (as measured by a broad concept of account protection) in March 2014, based on the assertion that Thurston was not aware IBF was making post-acquisition sales to the nine overlapping organizations. The jury found for Thurston and awarded rescissionary-type relief of $442,400 in "gross profits" on sales IBF made to its own contacts within the nine organizations (and 8-12 years of presumed future losses)[12] [see Tr.

[12] In essence, Thurston was allowed to rescind the March 2014 agreement to receive a broad measure of past and future contract damages for those organizations as well.

Vol. II at 1505:20-1507:17], plus $1,327,200 in punitive damages ($1,769,600 total). Yet, as highlighted previously, there is contemporaneous written proof that, before entering into the March 2014 agreement, Thurston was fully aware IBF was still selling to all nine organizations.

SBS accordingly moved for post-judgment relief. In its order, the District Court denied relief on the basis that it was "reasonable for the jury to infer Mr. Thurston did not know IBF had made anything more than an ***insignificant sale*** of a Safeguard product to the eight [sic] protected accounts prior to the March 2014 agreement." [R. 12733 (emphasis added).] As such, while acknowledging Thurston was aware of post-acquisition sales by IBF to each of the organizations in some amount ("insignificant" or otherwise), the District Court allowed the jury to still infer fraud based on Thurston not knowing the *specific dollar amount* of the sales. That was erroneous because the fraud claim in this instance does not turn on knowledge of the specific dollar amounts. The individuals on both sides of the negotiation—Michael Dunlap and Roger Thurston—agreed that ***no*** dollar amounts for IBF's sales were disclosed prior to the March 2014 agreement. [Tr. Vol. I at 973:18-21, Tr. Vol. II at 1827:13-18; *see also* Tr. Vol. II at 1796:10-23, 1820:6-11.] As such, there can be no claim that Thurston was misled into relying on incorrect dollar amounts provided by Dunlap. Rather, a fraud could exist here only based on an omission of the fact that there were ***any*** overlapping post-acquisition sales since, if Thurston knew of even "insignificant" sales at the time, then it also knew specific dollar figures for those sales existed and were not being provided. The District Court accordingly erred in its analysis.

The standard of review for denial of JNOV was stated previously. Further, to prove fraud, a plaintiff must establish nine separate elements of the claim by "clear and convincing evidence," including the "hearer's ignorance of the falsity of the statement." *Country Cove Dev., Inc. v. May*, 143 Idaho 595, 600, 150 P.3d 288, 293 (2006). In this instance, that means there must be clear and convincing proof that Thurston "did not … know of the omission." [*See* R. 9101.]

At trial, Mr. Thurston never once testified he thought there were only "insignificant" post-acquisition sales made to the nine overlapping organizations. Rather, he testified that he "assumed" *no sales* at all to the organizations were being made by IBF because he did not receive commissions on those sales (*i.e.*, "rotation notices"). [Tr. Vol. II at 1829:19-21; *see also id.* at 1825:23-1826:12, 1828:24-1829:5.] Yet, emails written by Mr. Thurston at the time flatly contradict his trial testimony, which should render his later assertions at trial insufficient to support a fraud verdict. *See, e.g.*, *Hall v. Hall*, 116 Idaho 483, 488, 777 P.2d 255, 260 (1989) (Bistline, J., concurring) (noting that "oral testimony, wholly unsupported by any documentation or other witness, is the weakest kind of evidence known in the law" and is "not substantial evidence, and a far cry from clear and convincing"); *see also New England Merchants Nat'l Bank v. Rosenfield*, 679 F.2d 467, 473 (5th Cir. 1982) (courts not "required to accept, as credible, unsupported self-serving testimony that flies in the teeth of unimpeachable contradictory evidence and universal experience"). Specifically, on February 27, 2014, prior to the March 2014 agreement, Mr. Thurston confirmed he was fully aware of post-acquisition sales by IBF to each of the nine organizations at issue, writing: "Since the client list we have been going through is *based on sales since August 27th* …" [Ex. 244], which was the exact date of the IBF acquisition. [Tr. Vol. I at 254:6-13.] Clearly Mr. Thurston was aware of post-acquisition sales to *each* of the organizations that were being negotiated consistent with the following illustration:

- Organization A – IBF has made [*$ omitted*] in sales since Aug. 27th.
- Organization B – IBF has made [*$ omitted*] in sales since Aug. 27th.
- *…. and so on for all organizations identified for negotiation.*

[*See also* Tr. Vol. II at 1873:17-1874:2 (Thurston admitting he knew IBF was "placing orders").] The dollar amounts that filled in the "[*$ omitted*]" blanks as to each organization in the illustration above were not material to Thurston or it would have refused to execute the March

2014 agreement until receiving that information. Instead, Thurston entered into the agreement knowing there were post-acquisitions sales it lacked the dollar amounts for and, thus, knowingly choosing to rely instead on its own sales figures. [Tr. Vol. II at 1870:3-14, 1885:14-20.] In doing so, Thurston accepted a risk the "[*$ omitted*]" figures could be anywhere from $1.00 to $1,000,000, particularly since Mr. Thurston testified he was very knowledgeable of IBF and its business activities from before the acquisition. [*See* Tr. Vol. II at 1786:5-9, *see also* Ex. 68; Tr. Vol. I at 1113:24-1114:15, Tr. Vol. II at 1794:12-17.] Thurston was aware of the omission.

Therefore, the District Court's analysis was incorrect. JNOV should have been granted because the District Court concluded that Mr. Thurston was aware of sales by IBF—in *any* amount—to each of the nine organizations after August 27th, 2013, and before the March 2014 agreement. This Court should direct judgment for SBS as to the fraud claim (and its $1,769,600 in compensatory/punitive damages) regardless of whether a new trial is ordered.

IV. THERE IS NO "PRICING" (OR PRODUCT COST) GUARANTEE IN THE CONTRACT.

An additional breach of contract alleged by Thurston—which informally has been labeled as the "pricing" claim—is based on Paragraph 1 of the contract, which states:

> You [Thurston] shall have the right in your territory to act as our sales distributor (representative) to solicit the sale of those products and services defined in the Addenda attached hereto ("Safeguard Systems") *in accordance with the price schedules published by Safeguard and on the terms and conditions set by Safeguard from time to time*.

[Ex. 8 at 8.3 (¶ 1) (emphasis added).] Thurston claimed the italicized portion above creates a "most favored nation"-type of guarantee that it would receive the same "base prices" (or product cost) as all other distributors nationwide—most operating in very different market conditions—and that the provision was breached because IBF got volume-based discounts. To be clear, the notion of "product cost" or "pricing" is misleading since a distributor *pays nothing* for Safeguard products. [Tr. Vol. I 1534:13-1535:21; 1717:12-1718:17.] They merely solicit orders in return for a commission on completed sales [*see* Tr. Vol. II at 1537:2-1538:9] such that any differences in "base price" (an accounting term) generally only increase or lower the 30-35% commission rate. In response to Thurston's motion for summary judgment on this claim, SBS argued the plain language does not provide any such guarantee. [R. 5415-16.] The District Court denied Thurston's motion, but on grounds different than that urged by SBS: *i.e.*, that Paragraph 1 was ambiguous because, although it did not "expressly" require uniform prices for all distributors, the "terms and conditions" referenced could and no evidence on those was offered. [R. 5814.]

The claim thus proceeded to trial where Thurston still failed to offer evidence on any "terms and conditions" and, further, Mr. Thurston admitted the "price schedules" in Paragraph 1 means *retail prices* paid by customers, not product costs for distributors. [Tr. Vol. II at 1860:23-1861:24.] As such, SBS moved for directed verdict. The District Court agreed there was no evidence requiring uniformity, but refused to dismiss on the generalized notion that the court felt "historically … there was 'a price'" all distributors received [Tr. Vol. II at 2099:17-2100:4], despite Thurston having acknowledged it received favorable discounted "prices" for product. [*See* Tr. Vol. II at 1862:14-21.] The claim went to the jury who, already instructed that SBS breached account protection, ruled in favor of Thurston on this claim as well. [R. 9129-30.]

After trial, SBS moved for post-judgment relief arguing the contract language unambiguously does not guarantee any uniformity of price, and there was no evidence of other "terms and conditions" doing so either. [R. 9172-75.] In its order, the District Court denied relief on the basis that Mr. Thurston testified the contract requires a uniform "base price" for all distributors (or that, otherwise, the jury could have resolved any ambiguity against SBS as drafter). [R. 12730-31.] In doing so, the District Court erred because Mr. Thurston's subjective beliefs are extrinsic to the contract and the evidence failed to show any "terms and conditions set by Safeguard" outside the contract that created any kind of ambiguity for a jury to resolve.

A. The Plain Language of the Contract Makes No Reference to Uniformity in Product Cost for All of SBS's Nationwide Distributor Network.

The District Court first erred in denying JNOV based on the contract's plain language. Paragraph 1 does not refer to other distributors in a manner that would create uniformity across a nationwide network and places no obligation on SBS. The provision merely states what *Thurston* has a right to do: solicit orders in accordance with SBS's retail price schedules for customers and other policies. It does not require SBS to set a policy, prohibit other distributors from negotiating better terms in their contracts, or require SBS to ensure distributors do not get volume discounts. Importantly, as noted above, Mr. Thurston also admitted the term "price schedules" refers to *retail prices* paid by customers. [Tr. Vol. II at 1860:23-1861:24.] Paragraph 1 thus does not even address the very thing Thurston claims must be uniform: product costs or base prices for distributors. The plain language unambiguously does not provide any such guarantee.

B. There Was No Evidence of Any "Terms and Conditions" Set by SBS That Guarantee a Uniform Product Cost for all Distributors.

Given that Paragraph 1's plain language does not address product costs, the other "terms and conditions" referred to in the provision are irrelevant. Nevertheless, to the extent such a reference alone creates ambiguity, it would only be a latent ambiguity as to what the other "terms and conditions" state. As the District Court noted on directed verdict, however, there was no evidence at trial (or otherwise) of any terms and conditions set by SBS that guaranteed all 260+ nationwide distributors would have uniformity as to product costs. [Tr. Vol. II at 2098:23-2099:20]. The only evidence at trial in fact proved the opposite. Testimony established that: (i) SBS has a "flex pricing" policy allowing distributors to raise or lower retail prices as they see fit in order to make a sale, with the "base price" adjusting to assist [Tr. Vol. II at 1562:1-9, 1600:10-14, 1716:7-21]; and (ii) distributors that reach a certain level of sales can receive high-volume discounts. [Tr. Vol. II at 2031:10-2032:4; *see also id.* at 1862:14-21 (Thurston received discounts).] If anything, the other "terms and conditions" guarantee *no uniformity*.

In its post-judgment order, the District Court ignored that evidence and relied instead on the oral testimony of T3 and Thurston that they personally believed their contracts required uniform base prices nationwide. [R. 12730-31.] The District Court erred in doing so because their testimony was extrinsic to the contract and did not address the purported latent ambiguity—*i.e.*, what other "terms and conditions" set by SBS state. Their personal beliefs about what Paragraph 1 means was impermissible parol evidence that cannot support a verdict.

As a result, regardless of whether this Court reverses the judgment otherwise, it should rule as a matter of law there is no guarantee of uniform product cost as alleged by Thurston. A reversal on this ground eliminates $156,628 in damages. [*See* R. 9130 (Question 4).]

V. THE GOOD FAITH-FAIR DEALING CLAIM IS NOT SUPPORTABLE.

A substantial portion of the judgment—approximately $2.1 million in compensatory and related punitive damages—is derived from an allegation in Thurston's petition that, due to the express breaches of contract, its business was destroyed. To avoid a prohibition on consequential damages,[13] however, that allegation was couched in terms of a breach of good faith-fair dealing (hereinafter, "GFFD"). No such breach exists. It is a fiction cobbled together from non-Idaho law. Thurston indisputably continued to operate after 2013 and made more profit than before.

Given the tenuous nature of the GFFD claim, SBS sought to dismiss it at several stages: summary judgment, directed verdict, and JNOV. Indeed, it was so haphazard that Thurston's

[13] *See Silver Creek Computs., Inc. v. Petra, Inc.*, 136 Idaho 879, 884–85, 42 P.3d 672, 677–78 (2002) ("Consequential damages are not recoverable unless specifically within the contemplation of the parties at time of contracting.") (citation omitted).

attorneys were allowed (over SBS's objection) to entirely shift damage theories midway through trial and begin asserting the express breaches did not actually destroy Thurston's business, but only transformed it into a *non*-Safeguard distributorship (which are generally worth two-thirds less than a Safeguard distributorship). The District Court thus erred in three ways: (a) failing to grant summary judgment; (b) allowing Thurston to submit an undisclosed theory of damages to the jury; and (c) denying post-judgment relief under that new theory. Regardless of whether this Court reverses Thurston's entire judgment, the District Court's errors should be corrected by dismissing the GFFD claim, which eliminates $532,431 in contract damages and $1,597,293 in punitive damages (to otherwise bring punitive damages under I.C. § 6-1604(3)'s statutory cap).

A. The GFFD Claim Should Have Been Dismissed on Summary Judgment.

In Idaho, GFFD is implied in every contract, but cannot be used in a way inconsistent with an express term of the contract. *Idaho First Nat'l Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266, 287-89, 824 P.2d 841, 862-64 (1991).

In its motion for summary judgment, SBS argued the GFFD claim was duplicative of the other contract breaches alleged and contrary to express terms of the contract. [*See* R. 3449-50.] Thurston responded that the claim was based on an obligation of SBS to stop others from breaching its account protection rights. [*See* R. 4764-66.] That is nonsensical because the account protection right exists solely between SBS and its distributors such that only SBS could breach the right. Such a response thus did no more than demonstrate the claim was, at best, a duplicative one for unpled and unrecoverable consequential damages. *See Idaho First Nat'l Bank*, 121 Idaho at 289 (prohibition of consequential damages applies to GFFD). The District Court avoided that by going beyond the briefings to itself characterize the alleged GFFD breach as occurring by way of SBS's "*own solicitation*—through DocuSource and IBF—of Thurston's protected accounts," which the District Court said the contract was silent about such that a GFFD claim could independently exist. [R. 5816-17 (citing *Camp Creek Hosp. Inns, Inc. v. Sheraton Franchise Corp.*, 139 F.3d 1396 (11th Cir. 1998)).] The District Court erred in that regard.

First, the *Camp Creek* case—a federal decision applying Massachusetts law to a circumstance where a franchisor purchased and operated a hotel near its franchisee—is not applicable because there were no express contract breaches at issue. *See* 139 F.3d at 1403 ("Camp Creek does not contend that Sheraton violated any express term of the License Agreement by establishing and operating the Gateway Hotel.") Here, Thurston alleged its harm arose not from competition by SBS—which, again, there is no evidence that Thurston lost a single dollar of sales as a result of the acquisitions—but by not stopping others from breaching Thurston's account protection right (as broadly conceived). [R. 6063 (¶¶ 215-18).] The same basis was alleged for express breach of contract [*see* R. 6062 (¶ 212) (petition alleging SBS "breached the Thurston RDA by (1) failing to take action to prohibit other distributors from selling to Thurston Enterprises' protected customers ….)], which again is nonsensical because only SBS can breach account protection by not paying commissions. Unlike *Camp Creek*, the GFFD was entirely duplicative and should have been dismissed as a matter of law.

Further, the District Court erred in its interpretation of the contract language. Paragraph 2 of the Interim Distributor Agreement states SBS had a right to appoint "additional persons" to solicit sales in Thurston's territory. [*See* Ex. 8 at 8.3 (¶ 2).] However, the District Court, without legal support, misconstrued that to mean SBS could appoint only "*other distributors*" (meaning contract distributors) [*see* R. 5816 (emphasis in original)] in a way excluding DocuSource/IBF since they were affiliate-owned at the time. As a matter of law, DocuSource/IBF were "persons" legally distinct from SBS no less than Thurston Enterprises Inc. is legally distinct from Roger Thurston. *See* BLACK'S LAW DICTIONARY 1178 (8th ed. 2004) (a "person" is "[a]n entity (such as a corporation) that is recognized by law as having the rights and duties of a human being.").

Under the plain language of Paragraph 2, SBS was allowed to appoint DocuSource/IBF—or any other legally distinct "person"—to solicit sales in Idaho.

As a result, there could be no GFFD claim on the basis upon which the District Court ruled in its October 21, 2016, order. Summary judgment should have been granted for SBS.

B. The District Court Erred by Allowing Thurston to Submit a Last-Minute Undisclosed Theory of Damages to the Jury.

Throughout the case, Thurston claimed its remedy for a breach of GFFD was the right to force SBS to purchase the distributorship at full current value—*i.e.*, damages of $798,647. [*See, e.g.*, R. 3703 (¶ 13), 3714, 3718, 3722.] That was the only damages theory Thurston disclosed in response to SBS's discovery requests on damages [*see id.*] and the only theory Thurston's expert, Robert Taylor, testified about at trial. [Tr. Vol. II at 1515:2-4, 1618:14-1619:18.] As a result, SBS prepared to defend against the forced sale theory and moved to dismiss it on directed verdict. [*See* R. 9018-20; *see also* Tr. Vol. II at 1906:23-1907:5.] During trial, however, the District Court expressed skepticism that Thurston's business had lost all value and warned a "forced sale" remedy would be rejected. [*See* Tr. Vol. I at 1401:5-1404:15, Tr. Vol. II at 2097:18-2098:21.] Thurston thus invented a brand new theory mid-way through trial that the express contract breaches did not destroy its business, but instead transformed it into a *non*-Safeguard distributor causing a two-thirds depreciation in value (or loss of $532,431 instead of $798,647). SBS orally objected to the undisclosed damages theory, but was overruled from the bench on the basis that there was evidence to support such an argument. [*See* Tr. Vol. II at 2187:5-2188:21.] The District Court erred because, regardless of whether evidence could support an argument, the theory of damages was never disclosed prior to trial and should therefore have been excluded. *See* I.R.C.P. 26(e)(3).

The decision to allow a new theory of damages during trial is reviewed for abuse of discretion. Although no Idaho decision appears to specifically address such a late shift in damages theory, many courts have found it inherently prejudices the right to a fair trial. *See, e.g.*, *Apple, Inc. v. Samsung Elecs. Co., Ltd.*, No. 11-CV-01846-LHK, 2013 WL 6001902, at *2 (N.D. Cal. Nov. 12, 2013) (disclosure of new damages theory in patent case just prior to trial prejudicial).[14] This Court should rule in accord. SBS's trial counsel had no idea Mr. Thurston's testimony on direct examination about the value of non-Safeguard distributorships he purchased over the years was apparently being solicited for a secret fallback "two-thirds" devaluation theory. The only theory ever disclosed was a forced sale measure. [*See, e.g.*, R. 3703 (¶ 13), 3714, 3718, 3722.] That unfairly deprived SBS of an opportunity to rebut the new theory, or even anticipate the testimony on past purchases was relevant to anything beyond customary witness background.

The District Court thus abused its discretion and, in the process, impaired SBS's substantial rights. The GFFD claim and its damages should be eliminated for this reason alone.

C. Even Under the New Undisclosed Damages Theory, There Was Not Substantial Evidence to Support the Claim.

After trial, SBS moved for JNOV on the basis that the evidence was insufficient to support the GFFD claim. The District Court denied relief, ruling: (1) the jury could infer Thurston was transformed into a non-Safeguard distributorship based on other express contract breaches; and (2) Mr. Thurston's self-serving conclusory opinion his business was worth $0 was sufficient to award a $532,431 loss in "marketability." [R. 12721-26.] Both were error.

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[14] *See also Design Strategy, Inc. v. Davis*, 469 F.3d 284, 298 (2d Cir. 2006) (affirming exclusion of lost profits theory first disclosed in pre-trial order); *IPPV Enters., LLC v. Echostar Commc'ns, Corp.*, 191 F. Supp. 2d 530, 572 (D. Del. 2002) (failure to disclose damages theory prejudicial).

First, there are several benefits beyond account protection that come with being a Safeguard distributor such that it was not possible for a jury to reasonably conclude Thurston was transformed into a *non*-Safeguard distributor. Roger Thurston specifically identified SBS's back-office support and residual commissions as one of a "number of different" benefits. [*See, e.g.*, Tr. Vol. II at 1760:7-22.] SBS's back-office support is quite substantial since it allows distributors to act as commissioned sales agents while SBS handles all product sourcing, invoicing, shipping, fulfillment, payment, collections, returns (as well as marketing and others). [*See* Tr. Vol. I at 498:6-22, 501:9-502:11, Tr. Vol. II at 1537:2-1538:9.] Further, Thurston indisputably continued receiving all the back-office and other support that every Safeguard distributor does; so much so that Thurston *increased* its profits every year after 2013. [*See* Tr. Vol. II at 1897:20-1899:24; Ex. 1086.] In reality, the only Safeguard benefit one could potentially infer Thurston lost relates to its extremely broad concept of account protection, and only then in regard to 1.9% of Thurston's accounts that its expert specifically identified as being affected on a go-forward basis.[15] [*See* R. 19599-19601 (illustrating).] There was no evidence of account protection (or anything else) being lost as to the other 98.1% of Thurston's accounts that were unaffected and, indisputably, Thurston was paid all commissions owed for its own sales, even to overlapping organizations. [*See* Tr. Vol. II at 1623:14-1624:8 (Taylor stating $45,529 was sales made by Thurston to "the accounts that IBF is selling to as well").]

In denying post-judgment relief, the District Court stated it was "not altogether persuaded" Thurston lost any value [*see* R. 12726], but nevertheless ruled the jury could get there by "[d]rawing ***<u>all</u>*** inferences" from the evidence of other contract breaches. [R. 12725.]

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[15] Of the approximately 4,000 protected accounts Mr. Thurston claims, Taylor identified 77 as impacted for GFFD damages specifically. [*See* Ex. 535 (77 accounts); Tr. Vol. II at 1508:18-1512:14 (Taylor testifying as to process for creating exhibit); *see also* R. 19599 (illustrating).]

That was erroneous because, first, the GFFD damages in that instance are explicitly nothing more than prohibited consequential damages for the express contract breaches and, furthermore, only ***reasonable*** inferences can support a verdict. *See Schwan's*, 142 Idaho at 830. Inferences not grounded in the evidence or common sense are insufficient. *See id.* at 830-31.[16] Concluding that Thurston was transformed into a non-Safeguard distributor based on a loss of account protection as to 1.9% of its accounts, when that loss is fully compensated by contract damages (plus punitive damages on top) to bring Thurston back to 100%+ status, defies reason and reality. [*See* R. 19599-19603 (illustrating).] JNOV should have been granted.

In any case, there was not "substantial evidence" that Thurston's business experienced a loss in "marketability"; certainly not enough to sustain $532,431 in damages. Thurston's damages expert, Taylor, was unable to identify any loss in marketability. [*See* Tr. Vol. II at 1624:24-1625:16.] The only thing Thurston pointed to for support then—and upon which the District Court improperly relied—was Mr. Thurston's self-serving unsupported statement that his business was worth "zero" [Tr. Vol. II at 1854:7-11], which was entirely conclusory. The District Court nevertheless justified reliance on that testimony by noting Mr. Thurston was "competent" to give a value opinion pursuant to the Property Owner's Rule. [R. 12725.] But, while an owner is always *competent* to give such an opinion, there still must be a reasoned analysis of objective data in support of the opinion or else it is speculative. Numerous jurisdictions reject the conclusory opinions of a property owner no less than an actual expert[17]

[16] *See also Owen v. Burcham*, 100 Idaho 441, 448, 599 P.2d 1012, 1019 (1979) ("It is well established that an inference would be unreasonable if it would permit a jury to base its verdict on mere speculation and conjecture."); 88 C.J.S. *Trial* § 554 (West 2018) (inferences "must be based on facts and not on other inferences and [] inferences cannot be based on mere conjecture, but must be based on facts legally proved, and must be reasonable") (citations omitted).

[17] *See, e.g.*, *Nat. Gas Pipeline Co. v. Justiss*, 397 S.W.3d 150, 159 (Tex. 2012) ("Thus, as with expert testimony, property valuations may not be based solely on a property owner's *ipse dixit*.

because, otherwise, a plaintiff can generate fictional losses by its own testimony. That would upend damages law for business disputes, real estate matters, and condemnation proceedings. Not even the most highly qualified valuation expert's opinion is sufficient when conclusory, *see, e.g., Bromley v. Garey*, 132 Idaho 807, 811, 979 P.2d 1165, 1169 (1999) ("Expert opinion must be based upon a proper factual foundation."); likewise, there is no good reason to accept a biased plaintiff's unsupported opinion either. As a result, this Court should rule in accord with the vast majority of jurisdictions that, as a matter of law, although an owner is "competent" to give an opinion on value (unlike other lay witnesses), their opinion still must be supported by a reasoned analysis of objective fact or it is insufficient to support a verdict. *See, e.g., United States v. 10,031.98 Acres*, 850 F.2d 634, 637 (10th Cir. 1988) ("There must be a basis for the landowner's valuation, and when the landowner's own testimony shows that his valuation has no probative value, the district court may determine that the landowner's testimony alone is insufficient to support a jury verdict.")

Here, there was no factual basis or reasoned analysis for Mr. Thurston's opinion that his distributorship was worth $0. Indeed, he admitted he never attempted to sell the business [Tr. Vol. II at 1854:7-8] and, thus, had no idea if there were potential buyers (which would include SBS, IBF, or others) or what they may pay for the business. The only evidence as to

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An owner may not simply echo the phrase 'market value' and state a number to substantiate his diminished value claim; he must provide the factual basis on which his opinion rests"); *see also King v. Ames*, 179 F.3d 370, 376 (5th Cir. 1999) ("[A]n owner is competent to give his opinion on the value of his property … [but] such testimony cannot be based on naked conjecture or solely speculative factors."); *United States v. Sowards*, 370 F.2d 87, 92 (10th Cir. 1966) ("[T]he owner's qualification to testify does not change the 'market value' concept and permit him to substitute a 'value to me' standard for the accepted rule."); *Airline Constr. Inc. v. Barr*, 807 S.W.2d 247, 256 (Tenn. Ct. App. 1990) ("There must be some evidence, apart from mere ownership, that this 'value' is a product of reasoned analysis.").

marketability came from SBS's President, J.J. Sorrenti, who testified *under oath* that, outside of suit, SBS (a sophisticated entity that regularly purchases distributorships) would buy Thurston's business for $798,646. [*See* Tr. Vol. II at 2038:4-10.][18] Thurston's damages expert similarly testified the *current* ongoing value of the business—based on objective "financial data available to [him] at that time." [Tr. Vol. II at 1504:21-1505:15]—was $798,646. Roger Thurston's contradictory opinion of $0 had no such objective data for support. The District Court thus erred in relying on Mr. Thurston's speculation to sustain a $532,431 loss in marketability.[19]

As such, for all the reasons discussed above, the fictional and otherwise duplicative GFFD claim (with $2,129,724 in damages) should be eliminated once and for all by this Court.

VI. PUNITIVE DAMAGES FOR BREACH OF CONTRACT ARE INAPPROPRIATE IN THIS CASE.

Even at its broadest notion, the breach of account protection rights in this case involve up to $500,000 in past and future commissions on sales by DocuSource/IBF [*see* R. 9128 (jury verdict)], which those companies made to their own billing contacts in an exceedingly small percentage of overlapping organizations. The judgment ballooned to $6.8 million in large part because the District Court allowed the jury to award punitive damages for breach of contract

[18] SBS stands behind that testimony. In fact, SBS began negotiating directly with Mr. Thurston for such a purchase prior to trial, but all discussions were shut down by Thurston's attorneys who quickly asserted a $900,000 "attorney's lien" on the business. [R. 12410-13.]

[19] The Pennsylvania case relied upon by the District Court to deny JNOV [*see* R. 12723-24 (citing *Windsor v. N.J. Nat'l Bank*, 793 F. Supp. 589, 588-89 (E.D. Pa. 1992))] is off-point for that reason as well. In *Windsor*, the existence of loss was irrefutable fact because the business at issue was worth between $7-8 million before the breach and *actually sold* after for $2.00. *See* 793 F. Supp. at 597. The only question was whether the testimony as to the *cause* of that loss was sufficient for the jury to pick any number between the two extremes. The issue here is far different because there was no "substantial evidence" of a loss in value. As such, the case of *Williams v. Bone,* 74 Idaho 185, 189, 259 P.2d 810, 812 (1953), provides the controlling standard, which is that a jury may not infer a loss without evidence in support.

(three times past and future commissions, plus three times the duplicative GFFD claim). The District Court erred because the evidence was not sufficient under this Court's punitive damages law or, otherwise, the law should be fine-tuned to prevent such awards.

A. The Evidence Does Not Support Punitive Damages Under Current Law.

SBS first challenges the District Court's post-judgment ruling finding sufficient evidence to award punitive damages for breach of contract. The standard of review for JNOV was outlined previously. In regard to punitive damages generally, this Court has stressed they are "not favored in the law," "should be awarded only in the most unusual and compelling circumstances," and require clear and convincing proof of "an extreme deviation from reasonable standards of conduct" done with an "extremely harmful state of mind." *See Cheney v. Palos Verdes Inv. Corp.*, 104 Idaho 897, 905, 665 P.2d 661, 669 (1983); *see also Hoglan v. First Sec. Bank of Idaho, N.A.*, 120 Idaho 682, 687, 819 P.2d 100, 105 (1991) (rejecting punitive damages when, although breach caused great frustration, no company policy of acting "maliciously, intentionally, or willfully"). While there is no "blanket prohibition" against punitive damages for breach of contract, this Court cautions they are not to be awarded for "ordinary" breaches and require instead "some element of outrage normally present in the commission of crimes or intentional torts." *Gen. Auto Parts Co., Inc. v. Genuine Parts Co.*, 132 Idaho 849, 853-544, 979 P.2d 1207, 1211-12 (1999); The relevant factors to consider include:

> (1) [T]he presence of expert testimony [as to whether the conduct was "an extreme deviation from reasonable standards of conduct"]; (2) whether the unreasonable conduct actually caused harm to the plaintiff; (3) whether there is a special relationship between the parties, as in the *Garnett* insured-insurer relationship; (4) proof of a continuing course of oppressive conduct; and (5) proof of the actor's knowledge of the likely consequences of the conduct.

Cuddy Mountain Concrete Inc. v. Citadel Constr., Inc., 121 Idaho 220, 229–30, 824 P.2d 151, 160–61 (Ct. App. 1992) (clarification added to first factor).

In its post-judgment order, the District Court declared there was "compelling evidence as to all of [the *Cuddy Mountain*] factors." [R. 12736.] Yet, the evidence cited in the order applies, at best, only to the fifth factor – that SBS knew from its pre-acquisition due diligence (or "scrub lists") there would be account protection issues with Thurston. [*See id.*] That is certainly true, but such knowledge alone is not sufficient because SBS was willing and offered to pay Thurston what it viewed as equivalent to actual damages for a breach—*i.e.*, three times the annual commissions of Thurston for its <u>*own*</u> sales [Tr. Vol. I at 1116:12-1117:11 (Dunlap explaining amounts offered were "three times … annual commissions for the prior year"); *see also* Ex. 237 at 237.1—and even a reasonable amount more if necessary to reach a resolution. [*Compare* Tr. Vol. I at 1122:24-1123:7 (SBS agreeing to purchase Thurston's rights in Norco for $27,000); *with id.* at 1106:3-1108:1, Ex. 1014 (SBS not agreeing to T3's demand of $600,000).] Further, until this lawsuit, SBS had always reached mutually-agreeable resolutions with distributors on that valuation basis. A history of successfully resolving potential disputes by negotiation does not equate to knowledge of any particularly adverse "likely consequences" for Thurston, nor could it reasonably be construed as "a continuing course of oppressive conduct."

Moreover, there was no evidence at trial of at least three other *Cuddy Mountain* factors: (1) no expert testimony that SBS's actions were an "extreme deviation from reasonable standards of conduct" (and they were not); (2) no evidence Thurston suffered harm beyond ordinary contract damages;[20] and (3) no "insured-insurer" relationship existing between the parties.[21]

[20] *See, e.g.*, *Crandall v. Hartford Cas. Ins. Co.*, No. CV 10-00127-REB, 2012 WL 851102, at *4 (D. Idaho Mar. 12, 2012) ("Here, it cannot be said that Hartford Casualty's allegedly unreasonable conduct actually caused harm to Plaintiff, above and beyond the harm imposed by [] denial of the claim itself.").

[21] There is no "special relationship" between a franchisor and franchisee. *See e.g.*, *Eichman v. Fotomat Corp.*, 880 F.2d 149, 170 (9th Cir. 1989).

The lack of additional harm beyond contract damages is particularly noteworthy because the undisputed evidence shows that Thurston's own profits continually *increased* after the acquisitions such that its purported damages are, in reality, additional money that would not otherwise exist. Indeed, if the acquisitions had not occurred, then DocuSource/IBF would have continued operating as competitors in Idaho making sales to their own long-established billing contacts with no restriction against directly soliciting Thurston's billing contacts in an attempt to lure that business away. After being acquired, they were prevented from doing that [*see, e.g.*, Tr. Vol. II at 1242:15-23, 1244:1-15 (testimony of IBF's manager)] and, consequently, there was no evidence at trial that Thurston lost a single dollar of its historical sales. [*See* Tr. Vol. II at 1624:9-13.] The only theoretical "harm" is a potential entitlement to commissions on sales DocuSource/IBF made to their own long-established contacts at overlapping organizations for largely unique products and services not offered by Thurston. If the Interim Distributor Agreement can be read so broadly as to entitle Thurston to $500,000 for work it never was engaged on, never bid on, or had the capability to perform (a key factor in any customer agreeing to purchase), then those are contract damages Thurston is fortunate to receive. Multiplying that fortuitous result—plus a duplicative GFFD claim—by three makes no sense in the circumstances. Idaho law requires far more egregious "harm" to justify punitive damages for breach of contract. *See Eddins Constr., Inc. v. Bernard*, 119 Idaho 340, 806 P.2d 433 (Idaho 1991) (denying punitive damages where withholding payment did not result in "substantial loss occasioned by the delay in payment"); *cf. Myers v. Workmen's Auto Ins. Co.*, 95 P.3d 977, 984 (Idaho 2004) (upholding punitive damages where breach of duty to defend caused suspension of insured's driving privileges).[22]

[22] *See also United States v. Safeco Ins. Co. of Am.*, No. 3:14-CV-00190-BLW, 2016 WL 901608, at *6 (D. Idaho Mar. 9, 2016) (noting ordinary contract "damages [were the] expected results of Knife River's breach of the Subcontract and, therefore, are insufficient to warrant punitive damages"); *Guenther v. Old Republic Nat'l Title Ins. Co.*, No. 1:12-CV-00237-REB, 2013 WL

Simply put, the alleged breach of contract here does not rise to the level of "crime or intentional tort" as required by this Court's jurisprudence. In denying post-judgment relief, however, the District Court substantially lowered that bar by declaring a party to a contract "may not—without exposing itself to punitive damages—avoid the consequences of [its] breach by means of concealment, oppression, intimidation, or despotism." [R. 12737.] No existing law was cited for that proposition and none articulating the standard in such a way appears to exist. Such a lowered threshold is unworkable as well. Parties dispute the terms of contracts for a variety of reasons and, if one side thinks its rights are violated, they can take a range of actions that include immediately filing suit and seeking discovery of anything it believes was concealed. The District Court's new standard is too subjective as well; no defendant could be sure when disputing a breach is punitive since the other side always views a breach as outrageous and unreasonable, *see, e.g.*, *Miller Brewing Co. v. Best Beers of Bloomington, Inc.*, 608 N.E.2d 975, 983–84 (Ind. 1993) (noting "breaches of contract 'will almost invariably be regarded by the complaining party as oppressive if not outright fraudulent'"), and would need only to convince a jury of laypersons as much. That strongly distorts all contract principles. The fact that SBS sought to negotiate a resolution on the basis of its narrower view of account protection (three times commissions Thurston earned by its *own* sales to correspond with 36-months of account protection) without paying the broad damages later asserted in litigation is not itself a crime or tort. *See Carroll v. United Steelworkers of Am.*, 107 Idaho 717, 719, 692 P.2d 361, 363 (1984) ("Mere nonfeasance, even if it amounts to a willful neglect to perform the contract, is insufficient to establish a duty in

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5424004, at *6 (D. Idaho Sept. 26, 2013) (fact that plaintiffs were "frustrated," and believed their claim was "handled poorly from the outset and that its ultimate denial was manifestly improper … cannot justify a claim for punitive damages; otherwise, punitive damages claims would 'piggy-back' upon each and every bad faith claim").

tort."). Further, to the extent there is fraudulent inducement with the March 2014 settlement—which SBS maintains is entirely lacking in proof—then any punitive damages available under I.C. § 6-1604(1)'s "fraud" language should be limited to the supposed harm of that independent tort [*see* R. 9132 (awarding $442,400)] and not extrapolated to any contract breaches. *See White v. Unigard Mut. Ins. Co.*, 112 Idaho 94, 97, 730 P.2d 1014, 1017 (1986) (noting independent tort is severable basis for punitive damages). Otherwise, this Court's higher threshold for punitive damages on a breach of contract specifically would be meaningless.

Given the circumstances of this case, this Court should foreclose punitive damages on the contract claims. If the underlying contract claims are not reversed, that eliminates $3,080,871 in punitive damages supported under I.C. § 6-1604(3) only by piggybacking on contract damages.

B. Alternatively, Idaho Law Should be Modified to Prohibit Punitive Damages From Being Awarded for Breach of a Commercial Contract.

If, technically, there was sufficient evidence for punitive damages under current Idaho law, the recovery of *$6.8 million* here—where there is no evidence Thurston suffered any loss to its historical commissions—should spur this Court to re-examine the law altogether.

Idaho is one of very few states that currently allow punitive damages to be awarded for a breach of contract.[23] The vast majority have a bright-line rule prohibiting their award absent a statute, independent tort, or "special relationship,"[24] with the rationale being that the goal of contract remedies is to compensate a promisee for its expectation loss; not compel a promisor to

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[23] The others are: Mississippi; New Mexico; Rhode Island; South Carolina; Tennessee; Vermont.

[24] *See* JOHN J. KIRCHER & CHRISTINE M. WISEMAN, 1 PUNITIVE DAMAGES: LAW AND PRAC. 2D § 5:7 (2017) (noting prohibition against punitive damages for breach of contract "is followed in almost every jurisdiction in which the matter has been considered and resolved judicially or legislatively"); RESTATEMENT (SECOND) OF CONTRACTS § 355 (West 2018) ("Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable.").

perform or punish them for failing to do so. *See Strum v. Exxon Co.*, 15 F.3d 327, 330 (4th Cir. 1994). That principle has been expressed by this Court as well. *See Anderson v. Gailey*, 100 Idaho 796, 801, 606 P.2d 90, 95 (1980) ("We have long held in Idaho that the purpose of awarding damages for breach of contract is to fully recompense the non-breaching party for its losses sustained because of the breach, not to punish the breaching party."). A minor trend of judicially extending punitive damages to commercial contract breaches began in the 1970s-80s, where Idaho was one of six states to do so.[25] In the 1990s, however, all but Idaho and one other state had uniformly retreated back.[26] The reasons stated include: (1) confusion and uncertainty as to the applicable standards and need for predictability in commercial affairs;[27] (2) not wanting to discourage defendants from resorting to courts for business disputes;[28] (3) protecting

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[25] *See Boise Dodge, Inc. v. Clark*, 92 Idaho 902, 907, 453 P.2d 551, 556 (1969) (relying on past dicta to rule that "punitive damages may be assessed in contract actions where there is fraud, malice, oppression or other sufficient reason," in suit involving odometer rolled back 7,000 miles). The others to expand were California, Hawaii, Indiana, Montana, and Vermont. *See Nicholson v. United Pac. Ins. Co.*, 710 P.2d 1342, 1348 (Mont. 1985); *Seaman's Direct Buying Serv., Inc. v. Standard Oil Co.*, 686 P.2d 1158, 1167 (Cal. 1984); *Hibschman Pontiac, Inc. v. Batchelor*, 362 N.E.2d 845, 848 (Ind. 1977); *Clarendon Mobile Home Sales, Inc. v. Fitzgerald*, 381 A.2d 1063, 1065 (Vt. 1977); *Dold v. Outrigger Hotel*, 501 P.2d 368, 372 (Haw. 1972).

[26] *See Francis v. Lee Enters., Inc.*, 971 P.2d 707, 714 (Haw. 1999) (abrogating *Dold* to require independent tort); *Freeman & Mills, Inc. v. Belcher Oil Co.*, 900 P.2d 669, 679-80 (Cal. 1995) (overruling *Seaman's* to require independent tort); *Miller Brewing Co. v. Best Beers of Bloomington, Inc.*, 608 N.E.2d 975, 983–84 (Ind. 1993) (requiring independent tort); *Story v. City of Bozeman*, 791 P.2d 767, 774–76 (Mont. 1990) (limiting to "special relationship").

[27] *Freeman*, 900 P.2d at 680; *see also Francis*, 971 P.2d at 707, 714 ("Predictability in contractual relations enables parties to estimate the financial risks and rewards of doing business and thereby encourages commercial activity.").

[28] *See Miller*, 608 N.E.2d at 983–84 (rejecting punitive damages absent proof of an independent tort in part because the "public interest cannot be served by any policy that deters resort to the courts for the determination of bona fide business disputes").

economically-beneficial "efficient breaches";[29] and (4) preventing the award of excessive damages.[30] Most, if not all, of those concerns are present here.

__First__, determining when oppressive or outrageous conduct occurs with the breach of a commercial contract—short of a "crime or intentional tort"—is, as other courts have found, subject to the whims of varying factfinders.[31] It is near impossible for a contracting party to know exactly when an alleged breach may cross into the punitive realm. In SBS's case, when the allegations pertaining to fraudulent inducement are limited to that matter alone—as it properly should be given fraud is an independent tort allowing punitive damages—there is nothing left but an ordinary breach of contract. *__Second__*, under the District Court's significantly lowered bar in particular, no one with a contract in Idaho could dispute an alleged breach without fear of punitive damages, which deters defendants from resorting to Idaho courts for a determination of their rights or even engaging in discussion with the other side to avoid being labeled oppressive and fraudulent (as Thurston consistently has branded SBS, even now,[32] for defending itself).

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[29] *See Francis*, 971 P.2d at 716; *Miller*, 608 N.E.2d at 984; *Story*, 791 P.2d at 774.

[30] *Freeman*, 900 P.2d at 679-80; *see also Story*, 791 P.2d at 772 ("This great disparity between contract and tort damages is symptomatic of a common problem in the use of the bad faith tort in contract litigation; the 'tort tail' has begun to wag the 'contract dog.'").

[31] *See, e.g.*, *Francis*, 971 P.2d at 716 (noting standards "require judges and juries to make impossible distinctions between 'intentional' breaches that justify the award of compensatory damages and 'wilful, wanton, or reckless' breaches that justify the award of tort damages"); *see also Story*, 791 P.2d at 774 ("Instead of concentrating on pertinent issues such as offer, acceptance, breach, and mistake, the jury is faced with evidence of moral wrongdoing and punitive damages—evidence that may be misleading and inflammatory in contract litigation.").

[32] [*See, e.g.*, Thurston's Reply to Consolidate Appeals, filed in this Court June 27, 2017, at 3-4 (asserting SBS seeks to "bleed [Plaintiffs] to death with years of litigation that they cannot afford" and "drag it out, make it as expensive as possible, raise every conceivable issue, when all this case is really about is Safeguard's intentional deceitful conduct to get out of its admitted contractual obligation to pay commissions"); *see also* R. 12414 (Mulcahy LLP press release).]

Thurston had a right to stop negotiating and bring suit, but the fact that SBS did not immediately capitulate—and does not now on appeal—should not be a factor warranting punitive damages. ***Third***, there are legitimate economic reasons for the acquisitions at issue that bring "efficient breach"[33] into play. Due to the changes in the industry, it is possible SBS would not exist today without making efforts to grow and innovate; which benefits no one (especially the distributors relying on SBS's continued health). Notably, SBS has not allowed a single distributor to fail or go out of business since it began the acquisitions in 2008. [Tr. Vol. II at 2038:1-3.] ***Finally***, it is hard not to view the $6.8 million awarded here, on top of Thurston's ever-increasing profits, as anything but "excessive" damages in the circumstances.

For these reasons, this Court should reject punitive damages for breach of a commercial contract. A party is made whole by compensatory damages; which is all they can reasonably expect from a private contract. That rule aligns well with the policy in Idaho barring parties from agreeing to damages on the front end that would deter a breach or punish a party, *see Melaleuca, Inc. v. Foeller*, 155 Idaho 920, 927, 318 P.3d 910, 917 (2014) (excessive liquidated damages "void and unenforceable"), and provides more predictability for companies doing business across state lines in the Pacific Northwest. A shift to the majority rule is entirely within this Court's power as well. Section 6-1604 of the Idaho Code merely sets the standards of proof for "any action seeking recovery of punitive damages" (or "civil actions in which punitive damages are permitted") and, thus, leaves it to the common law and other statutes to decide when they are available. The impetus that drove expansion—bad faith consumer cases and insurance denial—are now addressed by statute and tort. *See, e.g.*, I.C § 48-608(1) (punitive damages in consumer

[33] SBS offered to pay three times Thurston's own historical commissions, and was willing to pay a reasonable amount more for resolution. [Tr. Vol. I at 1116:12-1117:11; Ex. 237 at 237.1.]

protection act); *White v. Unigard Mut. Ins. Co.*, 112 Idaho 94, 100, 730 P.2d 1014, 1020 (1986) (recognizing bad faith tort due to "non-commercial" aspects of insurance contracts).

Given the inconsistent outcome that results from applying I.C. § 6-1604's tort-focused labels here, this Court should adopt the majority rule and reject punitive damages in this case.

VII. THE DISTRICT COURT ERRED IN SUSTAINING FUTURE DAMAGES FOR 8+ YEARS.

SBS separately challenges the future damages awarded for account protection, which are supported only by the calculations of Thurston's expert, Robert Taylor. For those damages, Taylor used a business valuation metric of "one times annual sales" by DocuSource/IBF in 2014 (hereinafter "<u>1xAS</u>") to estimate future commissions that would be owed to Thurston if DocuSource/IBF continued sales to their own billing contacts in overlapping organizations. For several reasons, the 1xAS metric—a valuation metric willing buyers use for acquisition purposes—was not an appropriate substitute for an analysis of reasonably certain lost profits, including that it: (i) compensates a 36-month right of account protection with *8+ years* of future commissions; (ii) fails to account for historical account attrition rates [*see* Tr. Vol. I at 456:14-23, Tr. Vol. II at 1896:17-25; Ex. 99 at 99.28]; and (iii) ignores the at-will nature of the parties' relationship. SBS moved to exclude Taylor's testimony prior to trial and, after trial, for post-judgment relief. The District Court denied, stating: "Taylor's estimation of future damages was supported by a reliable metric based on sound assumptions and his calculations were supported by the evidence." [R. 12729.] Respectfully, SBS disagrees and asks this Court to reverse.

The standard of review for JNOV was stated previously. In regard to future damages, Idaho law provides they must be established with "reasonable certainty" and that "awards based upon speculation and conjecture will not be allowed." *Inland Grp. of Cos., Inc. v. Providence Wash. Ins. Co.*, 133 Idaho 249, 257, 985 P.2d 674, 682 (1999). In particular, the failure to consider known limiting factors renders an expert opinion deficient, including a failure to consider how the term of a contract restricts future damages. *See, e.g.*, *Hummer v. Evans*, 129 Idaho 274, 280, 923 P.2d 981, 987 (1996) (approving damages up to stated term of employment agreement, but no longer as plaintiff's continued employment after the contract term was not "reasonably certain"). Taylor's calculations violate these legal principles.

First, as to the amount of time into the future the 1xAS metric compensates, the District Court incorrectly asserted that Taylor said it covers only three years consistent with a 36-month account protection right. [*See* R. 12729.] However, there is no such testimony at the cite provided by the District Court (or identified by Thurston in opposition). [*See id.*; *see also* R. 12463.] To the contrary, Taylor clearly testified, based on calculations he did on the stand, that the 1xAS metric compensates for 8+ years of future commissions *when applying a discount rate*. [Tr. Vol. II at 1578:14-1579:24 ("… I think about eight years, I think you get most of the way there.").] The 1xAS metric can be viewed as roughly equating three years of commissions only by ignoring a discount rate. The District Court erred in doing so because a discount rate is legally required, *see, e.g.*, *Watkins Co., LLC v. Storms*, 152 Idaho 531, 539, 272 P.3d 503, 511 (2012) ("To prove the present value of damages, a party must first show future losses and then discount the future damages to the present value by using a discount rate"), and the only evidence on the appropriate rate was 30%-35%, as agreed by Taylor. [*See* Tr. Vol. II at 1576:14-24; 1587:7-13.]

Second, the evidence of historical attrition rates (35% for IBF and 26% for Thurston [*see* Tr. Vol. I at 456:14-23, Tr. Vol. II at 1896:17-25; Ex. 99 at 99.28]) is an important limiting factor because the routine and expected loss of accounts over time—by both sides (and, indeed, IBF has since lost substantial portions of its business that were used by Taylor to calculate future damages)—naturally diminishes any potential overlapping sales subject to Thurston's account protection, while the gain of new accounts is irrelevant since there is no account protection at issue with new accounts. [*See* R. 19606 (illustrating).] In denying relief, the District Court relied solely on Taylor's testimony that attrition, in general, was a "risk" factored into the 1xAS metric. [*See* R. 12728.] However, the review does not stop there. An expert's statement that his analysis is appropriate is not sufficient if it fails to hold up to commonsense scrutiny. *See Coombs v. Curnow*, 148 Idaho 129, 140–41, 219 P.3d 453, 464–65 (2009) ("… a court must evaluate the expert's ability to explain pertinent scientific principles and to apply those principles to the formulation of his or her opinion. Admissibility, therefore, depends on the validity of the expert's reasoning and methodology, rather than his or her ultimate conclusion.").[34] In this instance, while it is true an attrition rate would be factored into a valuation metric used by a hypothetical willing buyer, that is far different from how the dual attrition rates at issue here (35% for IBF and 26% for Thurston) interact for purposes of future damages related specifically to account protection. Indeed, Taylor agreed a vanishing amount of accounts in overlapping organizations due to natural attrition was mathematically "impeccable," but then offered only what he termed a "riddle" as to why he did not do that math for his calculations of future damages in this case, rhetorically asking: why would a buyer ever purchase a business if the customers would be lost by attrition? [*See* Tr. Vol. II at 1593:20-1595:5.] That response amply demonstrates that Taylor was relying on a faulty assumption that future damages in this case are conception the same as a market valuation by a willing buyer. The two are far different. For purposes of valuing a company to purchase, a willing buyer certainly can expect that accounts

[34] *See also Pac. Gas & Elec. Co. v. Zuckerman*, 189 Cal. App. 3d 1113, 1135–36 (Ct. App. 1987) ("Where an expert bases his conclusion upon assumptions which are not supported by the record, upon matters which are not reasonably relied upon other experts, or upon factors which are speculative, remote or conjectural, then his conclusion has no evidentiary value. … In those circumstances the expert's opinion cannot rise to the dignity of substantial evidence. … When a trial court has accepted an expert's ultimate conclusion without critical consideration of his reasoning and it appears the conclusion was based upon improper or unwarranted matters, then the judgment must be reversed for lack of substantial evidence.") (citations omitted).

lost by attrition will be replaced by new accounts, but the same is not true for future damages as to account protection because "*new" accounts gained by IBF to replace those it loses are not subject to Thurston's account protection*. As a result, the accounts in overlapping organizations lost by attrition are irreplaceable for the purposes of future damages. Taylor's testimony thus illustrates precisely why his use of business valuation metric of 1xAS was a completely inadequate substitute for an analysis of future losses: it was a shortcut full of internal gaps that resulted in overstated damages which fail to meet the "reasonably certain" standard.[35] The District Court should not have accepted Taylor's conclusory assurances that the 1xAS metric was appropriate, because commonsense dictates it is not when considering how the attrition rates at issue here fundamentally restrict the possibility of future damages for account protection.

Finally, the District Court erred in ruling the Interim Distributor Agreement was not terminable at-will such that it also makes 8+ years of future losses speculative. Taylor admitted he did not consider termination and that his "calculations assume an ongoing distributorship." [Tr. Vol. II at 1595:6-11.] But the 1987 contract at issue plainly has a 5-year term which, indisputably, was not renewed as required by Paragraph 7(E). [*See* Ex. 8 at 8.6 (¶ 7(A)), 8.7 (¶ 7(E)).] As a result, the contract expired in 1992. [*Id.*] The fact that the parties voluntarily continued operating after 1992 merely makes their relationship one of successive performances—*i.e.*, per each order submitted by Thurston and accepted by SBS—for an indefinite time period which, as a matter of law, "remains in force at the will of the parties." *See Cox v. City of Pocatello*, 77 Idaho 225, 232, 291 P.2d 282, 286 (1955); *see also* I.C. § 28-2-309 ("Where the contract provides for successive performances but is indefinite in duration it is valid

[35] *See, e.g.*, *Bromley v. Gary*, 132 Idaho 807, 979 P.2d 1165 (1999) (testimony of shotgun repair expert concerning possible causes of misfiring properly excluded where expert never performed internal examination of weapon).

for a reasonable time but unless otherwise agreed may be terminated at any time by either party."). The District Court disregarded the unambiguous 5-year term of the contract to rule that the parties' relationship could be terminated only under the "conditions" in Paragraph 7(C). [*See* R. 12728-29.] That was erroneous because those conditions had no legal effect once the contract expired in 1992. As a matter of law, either side could choose, at will, to not submit or accept further orders at any time after 1992. The future losses offered by Taylor were thus speculative. *See Hummer*, 129 Idaho at 280 (rejecting losses beyond term of employment contract as not "reasonably certain"); *Van v. Portneuf Med. Ctr.*, 147 Idaho 552, 561, 212 P.3d 982, 991 (2009) (at-will employee may be discharged at any time for any reason without incurring liability).

Accordingly, this Court should eliminate all future damages for breach of account protection, which are $263,357[36] (plus $790,071 in punitive damages).

In the alternative, future losses related to DocuSource sales must be eliminated at a minimum due to the lack of factual support for any future damages in that regard. The undisputed evidence at trial was that DocuSource ceased all sales in Idaho in 2015 once its representative for that area resigned (with no plans to ever replace him). [*See* Tr. Vol. II at 1992:11-1993:19, 2018:24-2019:16.] That was confirmed by Taylor's expert report [*see* R. 6858], yet he still offered the jury 8+ years of future losses based on "assumed" DocuSource sales [*see* Tr. Vol. II at 1504:6-20, 1595:6-11], which were awarded in the amount of $21,488.[37]

[36] The past damages offered by Taylor were $231,169. [*See* Tr. Vol. II at 1500:13-17 ($168,107 for IBF plus $63,062 as to DocuSource).] The difference between the jury's total of $494,526 [*see* R. 9128] and $231,169 is equal to the minimum future damages awarded ($263,357).

[37] The future losses Taylor offered as to IBF were $241,869. [Tr. Vol. II at 1504:6-20.] When applied to the jury's award most favorably to Thurston—*i.e.*, the $263,357 future amount includes $241,869 for IBF—then the difference ($21,488) represents DocuSource future sales.

That figure, plus three times in punitive damages (+$64,464), must be eliminated due to a lack of evidence supporting Taylor's assumption of future DocuSource sales.

VIII. THE ATTORNEYS' FEES AWARDED BY THE DISTRICT COURT SHOULD BE REDUCED.

SBS challenges the attorneys' fees awarded by the District Court in that, to the extent the judgment for Thurston is modified in any part based on the issues presented in this appeal, then the fee award should be remanded for equivalent reduction.

IX. SBS IS ENTITLED TO AN AWARD OF COSTS AND ATTORNEYS' FEES ON APPEAL.

SBS requests an award of costs under I.A.R. 40. In addition, in accordance with I.A.R. 41, SBS requests an award of attorneys' fees under I.C. 12-120(3). The Interim Distributor Agreement involved the commercial sale of products and, as both parties agree, was not for personal or household purposes. [*See* R. 10146 (Thurston asserting "commercial transaction").] SBS therefore is entitled to an award of attorneys' fees for the matters raised in this appeal.

CONCLUSION

Based on the foregoing, SBS requests this Court:

1. Reverse the District Court's grant of summary judgment on breach of account protection (Count 1) [*see* R. 5833] and vacate the judgment for Thurston;

2. Reverse the District Court's overruling of SBS's attorney-client privilege [R. 2227] and order: (a) Thurston and its counsel to return and/or destroy all privileged information disclosed to them; and (b) vacate the judgment for Thurston;

3. Dismiss the fraudulent inducement claim (Count 12) [R. 6079] and strike all damages ($442,400 compensatory/$1,327,200 punitive) from the judgment;

4. Dismiss the "pricing schedule" claim and strike all damages ($156,628) [R. 9129-30] from the judgment;

5. Dismiss the GFFD claim (Count 2) [R. 6063] and strike all damages ($532,431 compensatory/$1,597,293 punitive) from the judgment;

6. If not otherwise dismissed, strike all punitive damages supported only by breach of contract ($3,080,871) from the judgment;

7. If not otherwise dismissed, strike all damages for future losses ($263,357 compensatory/$790,071 punitive)—or, alternatively, future losses as to DocuSource alone ($21,488 compensatory/$64,464 punitive)—from the judgment;

8. Remand the District Court's order awarding attorneys' fees to Thurston [*see* R. 12931] for elimination of all fees related to claims or issues reversed by this appeal; and

9. Award SBS its costs and attorneys' fees on appeal.

DATED THIS 8th day of March, 2018

HAWLEY TROXELL ENNIS & HAWLEY LLP

By ______________________

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of March, 2018, I caused to be served a true copy of the foregoing APPELLANT'S BRIEF by the method indicated below, and addressed to each of the following:

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