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Thurston Enterprises, Inc. v. Safeguard Business Systems, Inc. Respondent'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 Case No. 45092-2017 Ada County Case No. CV-OC-1416400

RESPONDENT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
FOR ADA COUNTY
HONORABLE STEVEN HIPPLER PRESIDING

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STATEMENT OF THE CASE

Roger Thurston spent his entire career, over three decades, building a customer base for Safeguard Business Systems, Inc. ("Safeguard") in Idaho. Thurston committed himself to Safeguard because he knew that for every customer he brought into the Safeguard fold, he would have the exclusive right to commissions for Safeguard products and services to that customer. This contractual right, known as "Account Protection," is unambiguous and is the backbone of the business. This right and the value of his business was taken from Thurston.

Safeguard, a franchisor, acquired two new distributors in Idaho in 2013. These company-owned operations were not only allowed, but were told to sell to Thurston Enterprises, Inc.'s ("Thurston") customers in conscious disregard of its contractual rights. Safeguard intentionally and systematically violated Thurston's contractual rights for years without paying the commissions that were owed. The breach of the Account Protection provision gave rise to a legal right to both past and future lost commissions. Safeguard also breached the pricing schedule provision by offering its company owned distributors much lower product prices than Thurston.

However, this was not simply a breach of contract. Safeguard engaged in malicious, fraudulent and oppressive conduct, the hallmarks of punitive damages. Safeguard concealed and misrepresented the violations. This gave rise to a viable fraud claim. Safeguard then used its economic superiority and the information asymmetry to try to intimidate Thurston into selling his contractual rights for pennies on the dollar. There was substantial evidence for the jury's finding that Safeguard's actions were so egregious that it merited the maximum punitive damages allowed under Idaho law.

In its appellant brief, Safeguard repeats the same arguments that were correctly rejected by the District Court. The District Court carefully evaluated Safeguard's extensive defense of the case including its (1) attempts to assert definitions of Account Protection that contradicted both the evidence and the unambiguous language of the Agreement; (2) attempts to cover up damaging evidence with the attorney-client privilege despite there being no legal grounds to do so; and (3) attempts to attack the damages theories on spurious legal and factual grounds. The District Court's well-reasoned opinions explain why Safeguard's arguments lack merit and the extensive record and transcripts establish a basis for all of the District Court's rulings. Those rulings should be affirmed and Thurston should be awarded attorneys' fees for the appeal.

STATEMENT OF FACTS

Safeguard distributors own and operate independent businesses – franchises – through which they exclusively solicit orders for Safeguard products and services, some of which carry the Safeguard trademarks. *See* Ex. 6. Safeguard products and services are collectively referred to as "Safeguard Systems". Ex. 8 at 8.3. Safeguard Systems include printed products, checks, forms, apparel, promotional products, marketing and web services, computer software and employee tax reporting services Ex. 6 at 6.7. As Safeguard distributors are contractually prohibited from representing non-Safeguard Systems, their livelihood is dependent upon their ability to sell Safeguard Systems. Ex. 8 at 8.6.

On June 1, 1987, Roger Thurston became a Safeguard distributor (and franchisee) pursuant to a Regional Distributor Agreement ("Thurston Distributor Agreement" or "Agreement"). Ex. 8 at 8.1. With Safeguard's consent, Roger Thurston subsequently assigned

the Agreement to Thurston Enterprises. Tr. Vol. II at 1763:15-1764:10. For the next 30 years, because of the contractual protections, Thurston invested his time, money and effort building the Safeguard brand in Idaho. Tr. Vol. II at 1754:19-1763:14, 1768:1-1769:12, 1900:5-25.

The Agreement granted Thurston the "exclusive" right to the commissions on all sales of Safeguard Systems to a customer where Thurston makes the first order of Safeguard Systems to the customer. Ex. 8 at 8.13 (Attachment B grants "the exclusive right to the commissions on sales of Safeguard Systems to: (i) each customer in [its] sales [territory] whose first order of Safeguard Systems is directly a result of [Thurston's] efforts and credited to [him]..."). These Account Protection protections have always applied to the customers or accounts ("Protected Customers") and not the products sold. Tr. Vol. II at 1359:18-1360:12. Indeed, Safeguard's Open Territory Policy states that regardless of product, distributors "are not allowed to solicit orders from the protected account of another Distributor." Ex. 385 at 385.28.

Safeguard utilizes the Safeguard Information Systems, which includes a database of all Safeguard distributor sales activities, customer information, order history, sales activity and commission payments. Tr. Vol. I at 894:12-895:19, Vol. II at 1754:5-18. Distributors are able to run prospective customers through the Safeguard Information Systems in order to learn whether the prospect has already been assigned to another Safeguard distributor. Ex. 145, Tr. Vol. I at 894:12-895:19, Vol. II at 1357:20-1360:12. If the prospect already purchases through another Safeguard distributor, then the searching distributor is prohibited from soliciting or selling any Safeguard Systems to that customer. Ex. 145, Tr. Vol. II at 1357:20-1360:12. Safeguard performs this task often within minutes. Tr. Vol. I at 894:12-895:19.

Safeguard's standard practice is that if a sale is made to a Safeguard distributor's Protected Customer, Safeguard will issue a rotation notice. Exhs. 422, 426, Tr. Vol. I at 894:12-897:4, Tr. Vol. II at 1639:8-1645:3. The rotation notice indicates to both the infringing and receiving party that commissions are being rotated such that an infringing party does not receive commissions and the commissions go to the distributor who has Account Protection over that Protected Customer. Exhs. 422, 426, Tr. Vol. II at 1640:11-1642:1.

These Account Protection rights provide an incentive to Safeguard distributors to invest significant ongoing time, effort and money in developing customer relationships and expanding the amount of Safeguard Systems sold to those customers. Tr. Vol. II at 1361:16-1362:23. The Account Protection rights also provide the Safeguard distributor with the financial ability to retire. Tr. Vol. II at 1363:7-1364:5. After Thurston retired or the Agreement otherwise terminated, he had the right to post-termination payments "on all repeat sales of Safeguard Systems to customers from whom [Thurston was] entitled to receive commissions [e.g., Protected Customers] while this Agreement was still in effect." Ex. 8 at 8.8-8.9. Ultimately, the value of the distributorship is built upon the right to Account Protection. *See e.g.* Ex. 18.

Deluxe Corporation ("Deluxe") is one of the two largest check printers in the United States with annual revenues of approximately $1.8 billion dollars. Tr. Vol. I at 711:9-13. Deluxe purchased Safeguard in 2004. Ex. 2. After being acquired by Deluxe, Safeguard discontinued all manufacturing operations. Instead, all Safeguard Systems are manufactured or offered by Deluxe or other third party vendors. Many of these third party vendors agree not to compete with Deluxe and pay rebates in order to be categorized as a "Preferred Supplier". Exhs. 14, 58, 60. Under its

distributor agreements, however, Safeguard cannot force a distributor to source Safeguard Systems from Deluxe or a Preferred Supplier. *See* Ex. 8. The Business Acquisitions and Merger ("BAM") Program was designed, in part, to work around this problem.

Beginning in 2008, Safeguard launched the BAM Program to acquire independent non-Safeguard affiliated distributors. Ex. 371, Tr. Vol. I at 272:21-24. The BAM Program has four primary objectives: (1) increase Safeguard's revenue and profits by acquiring distributors; (2) increase the sales of Deluxe manufactured products to Safeguard distributors thereby increasing Deluxe's revenues and profits ("insourcing"); (3) expand Deluxe's manufacturing capabilities by acquiring new product lines that can be marketed across Deluxe and Safeguard's various sales channels; and (4) where Deluxe does not manufacturer a product, maximize the amount of orders sent to Preferred Suppliers. Tr. Vol. I at 741:3-743:24; Exhs. 30 at 30.3, 57. By owning the distributor, Safeguard can ensure that it is insourcing from Deluxe. *See e.g.* Ex. 30 at 30.9-10.

To accomplish the financial goals of the BAM Program, Safeguard looked into acquiring DocuSource and IBF, two non-Safeguard distributors in the Pacific Northwest. *See* Exhs. 28-29, 30 at 30.4, 31-32, 41, 81. DocuSource and IBF were always competitors of Thurston in the same relevant geographic market in Idaho and historically have sold a full line of non-Safeguard products and services that compete directly with Safeguard Systems. Tr. Vol. II at 1784:15-18. As part of the due diligence process, Safeguard reviewed all aspects of DocuSource and IBF's businesses. *See* Exhs. 24, 42 at 42.7-11, 99. Deluxe and Safeguard performed a "fit analysis" for both DocuSource and IBF which compared the companies' top suppliers to Deluxe's manufacturing capabilities in order to determine the companies' "potential insource

performance." Exhs. 40 (note that Project Diamond refers to DocuSource), 57, 63, 85, 86, 106.[1] They also found that the acquisitions would increase rebates, in particular from a Preferred Supplier, Wright Business Graphics. Exhs. 27, 33, 56, 60, Tr. Vol. II at 2039:13-2040:24.

Safeguard also gathered customer lists in every conceivable format to perform a "customer scrub". Exhs. 24, 54 at 54.24-70, 84, 88-90. Through this scrub, Safeguard knew that a multitude of DocuSource and IBF's customers were shared with Thurston. Exhs. 47 at 47.10, 76-79, 166, 171, 205, 207, 216. Safeguard prepared multiple worksheets detailing IBF and DocuSource sales to these Protected Customers. *See* Exhs. 76, 77, 79, 166, 171, 204, 206, 207, 216, 232, 233. These lists often also identified who had greater historical sales. *See e.g.* Ex. 78. Where IBF or DocuSource had greater sales than the affected Safeguard distributor, the scrub sheet noted that the Safeguard distributor would be forced to either sell or share the account. *Id.*

Safeguard knew that by acquiring DocuSource and IBF hundreds of thousands of dollars of Account Protection violations would ensue. *See e.g.* Exhs. 50 at 50.7, 101 at 101.11 ("There is an above normal number of account protection issues"); 109 at 109.3, 157, Tr. Vol. I at 1140:4-1141:7. Knowing that its acquisitions result in Account Protection violations, Safeguard routinely sets aside an arbitrary amount of money for a so called "mitigation budget". *See* Exhs. 42 at 42.1, 42.16, 99 at 99.18. The budget is set around 1% of the gross revenues of the acquired entity despite the fact that Account Protection violations often represent upwards of 10% or more

[1] For IBF, they found that the "Fit Analysis reflects insourcing opportunities of 23%" or approximately $1.45 million. Exhs. 102 (revenue of $6.3 million), 122 (23% rate), Tr. Vol. I at 757:28-759:16. Similarly, for DocuSource, out of approximately $18 million in revenue, it was estimated that $4.2 million was a match for Deluxe's internal capabilities. Ex. 49 at 49.7.

of gross revenues. Tr. Vol. I at 1162:25-1163:7. Safeguard does not actually pay the affected distributors these amounts. Ex. 42 at 42.1 ("We fully expect to underspend here").

The financial benefits of the BAM Program are extensive.[2] Safeguard was willing to steamroll its "legacy" (Safeguard's term) distributors' contractual rights if that was what it took to meet Deluxe and Safeguard's ambitious financial goals.[3] Meeting these goals would ensure that its executives earned their bonuses. Tr. Vol. I at 301:21-302:19. As such, on April 30, 2013, after reviewing the documents and fully aware of the Account Protection violation issues, Deluxe and Safeguard's entire management teams agreed to acquire DocuSource for $6.7 million. Exhs. 25-26, 47, 48, 54. Similarly, on August 27, 2013, they acquired IBF's customer list and other assets for $2.2 million dollars. Exhs. 83, 102, 105, 114.

After the acquisition, Safeguard positioned both IBF and DocuSource as company-owned distributors in competition with Thurston. Former IBF employee, Tressa McLaughlin created a staffing agency, KMMR, LLC to manage IBF under Safeguard's direction. Exhs. 119, 121; Tr. Vol. II at 1206:11-1208:1. Similarly, DocuSource was guided by Amy Tiller-Shumway, a then Safeguard employee. Tr. Vol. II at 1984:15-1985:5. Thereafter, IBF and DocuSource solicited orders of Safeguard Systems from all of their historical customers regardless of whether

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[2] The revenue growth from the BAM Program has gone from approximately $5 million in 2009 to over $300 million through 2016. Ex. 20 at 20.4; *see also* Ex. 19 at 19.5-8. Safeguard praises it as being one of the most successful strategies in company history and it has resulted in record growth. *See* Exhs. 19, 30, 111 at 111.8, 264, 317, 371.

[3] *See* Ex. 38 at 38.2 ("We simply have to get Docusource closed NOW...If this does not happen, we have NO shot at making what Deluxe committed for revenue for the year let alone SBS and SG."); *see also* Exhs. 32 at 32.2, 34, 35, 37, 45, 73, 93, 94, Tr. Vol. I at 721:6-25, 744:10-747:11.

Thurston or any other Safeguard distributor had Account Protection over that customer. Tr. Vol. II at 1212:6-1213:3. They were told to do so by Safeguard. Tr. Vol. II at 1267:14-1268:3.

These new Safeguard sales agents solicited Thurston's customers, with Safeguard's knowledge, and were directed by Safeguard to send those orders to Deluxe manufacturing plants or otherwise Preferred Suppliers. Tr. Vol. I at 648:24-650:8. To this end, Safeguard's leadership held monthly meetings with IBF and DocuSource to ensure that they hit their insourcing targets. Exhs. 136, 137, 140, 141, 144, 210-12, 372-75, 379, Tr. Vol. I at 644:8-647:17, 652:15-653:22, Vol. II at 1311:23-1313:14. To provide the company-owned distributors an advantage in the marketplace, they received base prices on Safeguard Systems significantly below the base prices Thurston was provided. Tr. Vol. II at 1210:24-1211:3, 1462:13-1466:21; 1502:22-1503:13.

The sales to Thurston's customers caused customer confusion as Thurston's customers no longer know from whom they were supposed to order. Ex. 245, Tr. Vol. II at 1367:3-1368:8. These were sales Thurston could have made as there was not a single product or service that IBF or DocuSource sold that Thurston could not also sell. Tr. Vol. II at 1752:2-14, 1830:1-3. This customer confusion was compounded in October 2013, when Safeguard circulated a solicitation letter to all of IBF's historical customers, including Thurston's Protected Customers. Exhs. 152, 153, Tr. Vol. II at 1213:11-1214:23. The letter stated that IBF was now a part of Safeguard and directed Thurston's customers to place orders with IBF going forward. Exhs. 152, 174-75, 178.

To deal with any potential fallout from Account Protection violations implicated by the BAM Program, Safeguard approved "resolution efforts", which were entrusted to Safeguard's General Counsel Michael Dunlap. Ex. 101 at 101.11. Dunlap, like Safeguard as a whole, was

aware that these acquisitions were causing rampant Account Protection violations. *See e.g.* Exhs. 157, 163, 245, 282, 330, 332. He conceded that Safeguard simply didn't care that these violations were occurring. *See* Ex. 176 at 176.1. Safeguard executives just decided to "make the decision [to breach the Agreement] and move on" because the distributors didn't have an "or else," meaning attorneys to push back with. *See* Exhs. 359, 357 (to "hell [with] both of them").

Safeguard's "resolution efforts" consisted of concealing and misrepresenting the extent of the violations to Safeguard distributors. Pursuant to this plan, Thurston was initially given no details about the common customers revealed by Safeguard's scrub process and was not even told the name of the acquired companies. *See* Exhs. 68, 76-79, 147-149. Dunlap eventually revealed the names as he began his negotiations designed to get Thurston to sell the cross-over accounts for nominal amounts. Exhs. 224, 226. When Thurston asked which of his Protected Customers IBF or DocuSource has previously sold to, Dunlap misrepresented the list of accounts, instead providing limited subsets of names he wanted to negotiate.[4] Unbeknownst to Thurston, Dunlap had chosen this limited subset of accounts because they were some of the largest customers for IBF in its sale of Safeguard Systems. *See e.g.* Exhs. 226 at 226.2, 229, 253.

For decades, Thurston had received rotation notices and the commissions whenever

[4] *Compare* Ex. 231.1 (Dunlap on February 18, 2014 giving a subset of affected accounts and noting that "These are the most recent potential matches"), Ex. 240 (Software Outfitters, among others, missing from list), Tr. Vol. II at 1797:3-1798:25, 1823:13-1824:19 (Dunlap stated he didn't have the full customer list when Thurston inquired) *with* Ex. 101 at 101.11 (Dunlap noting that as of August 2013, the "potential account protection issues have been identified"), Ex. 217 (Dunlap noted on January 28, 2014 that "all the account protection work for the 4 bases [Thurston, Teply, Empey, Schob] is complete"); Ex. 254 at 254.2 (in February 2014 Dunlap had a document showing Software Outfitters as a customer IBF sold to).

another Safeguard distributor sold to one of his Protected Customers. Tr. Vol. II at 1828:24-1829:5. Thurston had no reason to believe that this practice (which complied with the Account Protection rights) had changed. *Id.* Indeed, Dunlap told Thurston that Safeguard was expecting that IBF would lose out on 25% of its previous sales to make him think that Safeguard was complying with its obligations. Tr. Vol. II at 1827:19-1828:7.

Thurston did know that IBF had sold to some of his customers in the past prior to the acquisition. *See* Ex. 199. When Thurston inquired as to whether Safeguard had IBF's historical sales data, Dunlap falsely claimed he did not. Ex. 244, Tr. Vol. II at 1818:8-1819:9, 1823:2-1824:22, 1827:13-1829:21. Dunlap prevaricated by stating that he had problems accessing the data. Tr. Vol. II at 1797:10-1798:2, 1829:2-16. Thurston was not aware that not only did Safeguard have this historical data, but that Safeguard was keeping detailed and updated monthly logs evidencing the sales that IBF and DocuSource sales agents were making to Thurston's Protected Customers. Exhs. 203, 204, 209, 254, 274, 276, 280, 283, 323, 326, 353, 377, Tr. Vol. II at 1824:14-1825:7. Thurston never received the full list of Protected Customers that Safeguard was selling to nor did he receive commissions on these sales. Tr. Vol. I at 874:4-12, 1131:4-16.

If Safeguard had complied with its contractual obligations, Thurston would have known of the sales IBF and DocuSource were making and thus the true value of the cross-over accounts. This was Safeguard's intent of course. Safeguard knew by concealing the violations, it could get the distributor to sell the accounts for a much lower value. Ultimately, Thurston agreed to sell 9 of his Protected Customers for the sum of $32,600 based on the value of Safeguard's sales to those customers, which he thought was just his. Tr. Vol. II at 1827:6-12, 1830:4-6. On March 6,

2014, Dunlap memorialized the parties understanding in a letter. Ex. 1061. Later in discovery, Thurston would learn that the true value of these accounts was $475,000. Tr. Vol. II at 1505:22-1507:17; 1830:18-1831:2. Had Thurston known this, he certainly would not have sold the accounts for $32,600. Tr. Vol. II at 1829:15-1831:2.

When Dunlap came back to negotiate as to other accounts, Thurston began to realize that Safeguard was not interested in working with him so much as getting him to relinquish his contractual rights and capitulate as to all of the cross-over accounts. *See e.g.* Ex. 342. The "negotiations" would continue and for 18 months, Dunlap stalled, misrepresented and concealed the Account Protection violations – all while continuing to cajole Thurston to sell or share the accounts. In the meantime, Safeguard allowed, directed and facilitated DocuSource and IBF sales agents to solicit and obtain orders for hundreds of thousands of dollars of sales of Safeguard Systems to Thurston's Protected Customers (e.g. a de facto sharing prior to obtaining Thurston's agreement). Tr. Vol. II at 1267:14-1268:3. Eventually, Thurston had no choice but to file this lawsuit. Tr. Vol. II at 1847:24-1852:2.

ADDITIONAL ISSUES PRESENTED ON APPEAL

1. Whether Idaho Code sections 12-120(3) and/or 12-121 entitle Thurston to attorneys' fees on appeal.

STANDARD OF REVIEW

"When reviewing a trial court's ruling on a summary judgment motion, [this Court] employ[s] the same standard properly employed by the district court when originally ruling on the motion." *Student Loan Fund of Idaho, Inc. v. Duerner*, 131 Idaho 45, 49, 951 P.2d 1272,

1276 (1997). Summary judgment is proper if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." I.R.C.P. 56(a).

Rulings on discovery or evidentiary matters are subject to a court's sound discretion. *Westby v. Schaefer*, 157 Idaho 616, 621, 338 P.3d 1220, 1225 (2014); *Vendelin v. Costco Wholesale Corp.*, 140 Idaho 416, 428, 95 P.3d 34, 46 (2004). "Error is disregarded unless the ruling is a manifest abuse of the trial court's discretion and affects a substantial right of the party." *Perry v. Magic Valley Reg'l Med. Ctr.*, 134 Idaho 46, 51, 995 P.2d 816, 821 (2000).

"In determining whether a directed verdict or judgment n.o.v. should have been granted, the appellate court applies the same standard as does the trial court which passed on the motion originally." *Smith v. Mitton*, 140 Idaho 893, 897, 104 P.3d 367, 371 (2004). Therefore, the Court "must determine whether, admitting the truth of the adverse evidence and drawing every legitimate inference most favorably to the opposing party, there exists substantial evidence to justify submitting the case to the jury." *Id.*

ARGUMENT

I. THE DISTRICT COURT CORRECTLY RULED ON ACCOUNT PROTECTION

The District Court correctly found on summary judgment that Safeguard had breached the Account Protection provisions of the Thurston Distributor Agreement. The Account Protection provisions include the following language:

> Section 3, "Account Protection Rights" states: "…you shall have the exclusive right to the commissions generated on sales of Safeguard Systems to any customer listed on Attachment B. This exclusive right to commissions applies to all new and repeat Safeguard Systems sales to each customer until this Agreement is terminated."

> Attachment B states: "You shall have the exclusive right to the commissions on sales of Safeguard Systems to: (i) each customer in your sales territory described in Attachment A whose first order of Safeguard Systems is directly a result of your efforts and credited to you[.]
>
> ****
>
> In addition, your exclusive right to commissions on sales of Safeguard Systems to any customer shall expire if that customer has not purchased any Safeguard System and paid in full for such purchase, within thirty-six (36) months after the invoice date of such customer's last prior purchase of any Safeguard System.

Ex. 8 at 8.3, 8.13; R. 5809-10. The District Court concluded that as a matter of law, this language was unambiguous.[5] R. 5811, 5813. Safeguard contractually promised that, if Thurston solicited an order with a customer for a Safeguard Systems product or service, then Thurston was entitled to – and would receive – the exclusive right to commissions generated from *all* sales to that customer for the next 36 months. *Id.* Safeguard conceded this later in the proceedings. *See e.g.* Tr. Vol. I at 781:10-782:22, Vol. II at 1973:21-1976:8, 1978:18-1980:21 (agreeing that past commissions on all sales to the Protected Customers were due to Thurston and Teply).

Safeguard's proposed "product specific" theory suggests that the Account Protection provisions of the Agreement only give Thurston an exclusive right to commissions on product lines that Thurston has first sold to a customer.[6] However, no such distinction exists in the Account Protection provisions. As the District Court found, Thurston's exclusive right to commissions on all sales of Safeguard Systems was not qualified:

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[5] The arbitrators in the Teply case came to the same conclusion. *See* R. 8117, 8130 at ¶¶ 7, 75.

[6] Thurston was capable of selling every service and product IBF did and in fact did sell nearly every service and product IBF did. R.4432-33.

> The [Agreement] references – on several occasions – simply sales of Safeguard Systems without any additional modifiers, i.e., ("you shall have the exclusive right to commissions generated on sales of Safeguard Systems"; "This exclusive right to commissions applies to all new and repeat Safeguard Systems sales"; "your exclusive right to commissions on sales of Safeguard Systems to any customer shall expire if that customer has not purchased any Safeguard System"). Nothing in the [Agreement] limits the right to commissions by product [] sold

R. 5812-13.

Safeguard's "product specific" interpretation was also inconsistent with the language of the provision. Safeguard's interpretation ignores the words "exclusive," "all," "new," and "repeat," as used in the phrase: "This exclusive right to commissions applies to all new and repeat Safeguard Systems sales to each customer until this Agreement is terminated […]" Ex. 8 at 8.3. First, Thurston is to receive the "exclusive right to commissions" for that "customer" regardless of whether the Safeguard product or service is a "repeat" sale, e.g. a product or service the customer previously purchased from Thurston, or a "new" product or service that Thurston never sold to that customer. Second, Thurston's exclusive right to commissions "applies to **all** new and repeat Safeguard Systems sales". *Id* (emphasis added); *see also* Tr., Vol. III at 352:8-14. Combined, these words make clear that Thurston's exclusive right to commissions applied to all Safeguard Systems and was not limited to certain products.

Safeguard's interpretation would have defeated the purpose of the provision, which was to incentivize distributors to get new customers with the "carrot" of having the opportunity to sell the full scope of Safeguard Systems. R. 4434; *see also First Sec. Bank of Idaho, N.A. v. Murphy*, 131 Idaho 787, 791, 964 P.2d 654, 658 (1998) ("In interpreting any provision of a contract, the entire agreement must be viewed as a whole to ascertain the mutual intent of the

parties at the time their contract was made.") Indeed, the attachment to the distributor agreements provides that the distributor have customer rights without regard to product. *See e.g.* Ex. 387 at 387.5-64. And if there was any doubt, the Agreement had to be construed against Safeguard. *See Big Butte Ranch v. Grasmick*, 91 Idaho 6, 9, 415 P.2d 48, 51 (1966).

Safeguard argues that Account Protection rights become product specific if you replace "Safeguard Systems" with the phrase "those products or services defined in the Addenda". In so doing, however, as the District Court found, Safeguard is "insert[ing] provisions into the [Agreement] that are not there.' R. 5812. Further, the use of the word "those" only clarifies that the products and services must be identified in the Addenda to constitute Safeguard Systems. The products and services defined in Addenda include every Safeguard product and service. Ex. 8 at 8.22; R.4432-33. Thus, the use of the defined collective term "Safeguard Systems" makes clear that commissions on all products and services are encompassed by the exclusive right.

Safeguard also argues that the addendums do not include every Safeguard product and service. However, as found by the District Court, the language of the addendums, particularly addendum no. 8[7], "clearly incorporate current and future products that are offered through Safeguard or its Preferred Suppliers, including Deluxe." Order, p. 22; *see also* Vol III, Tr. 308:24-315:11 (describing addendum). Safeguard conceded this. Vol III, Tr. 353:23-354:12; 365:15-366:20 (Safeguard's counsel was unable to identify a single product or service that did

[7] Addendum No. 8 for "Sourced or Brokerage Products" applies to products "not manufactured or offered by Safeguard" which was every product as Safeguard had discontinued manufacturing by this time. Ex. 8 at 8.22; R.4432-33. Further, the Expanded Product Acknowledgement provided that distributors "may solicit orders" for any Safeguard products. Ex. 8 at 8.26.

not fall under "Safeguard Systems" as defined in Thurston's addenda and conceded that "I don't believe it's at issue"). There was no dispute in connection with the Motion for Summary Judgment. Vol. III, Tr. 308:24-309:5. Thus, not only does Safeguard's argument lack merit, it was waived. *See Kolar v. Cassia Cty. Idaho*, 142 Idaho 346, 350, 127 P.3d 962, 966 (2005).

The Court could decide that the Account Protection provisions of the Thurston Distributor Agreement were breached on account of the language being unambiguous. *See Miller v. Estate of Prater*, 141 Idaho 208, 212, 108 P.3d 355, 359 (2005). In so doing the Court did not need to consider extrinsic evidence. *See Howard v. Perry*, 141 Idaho 139, 141, 106 P.3d 465, 467 (2005). Thus, the District Court's ruling should be affirmed.

Safeguard's remaining argument is that the word "customer" was ambiguous on a latent basis and thus summary judgment was not proper. However, Safeguard did not argue to the District Court that the term "customer" was ambiguous. *See* R. 5410-5415, R, 5808-14. Instead, Safeguard simply stated in the fact section that it started selling to businesses with different departments. *See* R. 5401, 5413-14. Now, Safeguard argues that "customer" should have been defined as only a portion or department of a business entity (e.g. the pediatrics department of St. Luke's Hospital). Consequently, that argument is waived. *Kolar*, 142 Idaho at 350.

The argument also lacks merit. The word "customer" is unambiguous by its plain language. The fact that the word "customer" is repeatedly used rather than a subcategory such as department or billing point or billing contact evidences that "customer" encompasses the entire business. *See e.g. Mattheis by Vowinkel v. Heritage Mut. Ins. Co.*, 487 N.W.2d 52, 54 (Ct. App. 1992) (concluding that "customer" is not ambiguous and that "[a] term is not ambiguous merely

because it is general enough to encompass more than one option.") Further, it was undisputed that in the vast majority of instances, Safeguard was, through IBF and DocuSource, selling to the same exact customer. *See e.g.* Exhs. 534-535. Thus, Safeguard's "customer" interpretation argument went to the amount of damages not whether there was liability in the first place.

Even if parol evidence was considered, there was not sufficient evidence to establish a triable issue of fact. *See Corbridge v. Clark Equip. Co.*, 112 Idaho 85, 87, 730 P.2d 1005, 1007 (1986) (a "mere scintilla of evidence" is insufficient). Safeguard presented no parol evidence, meaning evidence of prior or contemporaneous discussions in 1987 which would have clarified any perceived latent ambiguity in the Agreement. *See Knipe Land Co. v. Robertson*, 151 Idaho 449, 455, 259 P.3d 595, 601 (2011) ("Where the facts in existence reveal a latent ambiguity in a contract, the court seeks to determine what the intent of the parties was at the time they entered into the contract.") *Simons v. Simons*, 134 Idaho 824, 828, 11 P.3d 20, 24 (2000).

All Safeguard provided at the summary judgment level, was self-serving testimony from Safeguard executives, who were not around when the Agreement was executed. Safeguard's "made for litigation" interpretations were disingenuous and contradicted by Safeguard's rotation notices, customer scrub activities[8] and admissions in deposition.[9] As the District Court found,

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[8] *See* R. 4435-36, 4484-4669 (Thurston's rotation notices); R. 17735, 17772-73, 17789 at p. 350:10-19 (historical practice at Safeguard was to rotate commissions on sales of all Safeguard Systems); R. 17737, R. 17923-58 (Safeguard kept detailed and updated logs evidencing their breach (sales to that customer) without regard to product).

[9] Safeguard's general counsel Michael Dunlap himself admitted that Thurston had the exclusive right to solicit and sell Safeguard Systems to his customers (R. 17735, 17772-73, 17784-86 at pp. 159:24-161:18), Thurston cannot be forced to share his customers (R. 17784-86 at 159:24-160:8,

although the nature of Safeguard's business developed, "Safeguard cannot reasonably argue that *its own* post-contract conduct creates a latent ambiguity in the contract language." R. 5813; *see also Mind & Motion Utah Inv., LLC v. Celtic Bank Corp.*, 367 P.3d 994, 1005 (Utah 2016). Safeguard's other factual arguments (*see* pp. 14-15), made without citation, should be disregarded. *See Harris v. Dep't of Health & Welfare*, 123 Idaho 295, 298, 847 P.2d 1156, 1159 (1992). For these reasons, the District Court's ruling should be affirmed.

II. THE DISTRICT COURT CORRECTLY RULED ON ATTORNEY-CLIENT PRIVILEGE

In response to Safeguard concealing documents in discovery through the improper use of the attorney-client privilege designation, Thurston filed a motion to compel the production of the withheld documents. After the motion was filed, Safeguard and parent company Deluxe withdrew their claim of privilege as to hundreds of documents. R. 1863-1871, 13129-13269. They maintained a privilege as to only 41 documents. R. 2219 at fn. 2. After an in-camera review, the District Court held that 35 of those 41 documents had to be produced. R. 2226-27.

Safeguard argues that 21 trial exhibits fall under the attorney-client privilege, shouldn't have been produced and that they prejudiced Safeguard at the trial. However, only seven of the exhibits Safeguard discusses were subject to the District Court's order.[10] Safeguard voluntarily produced the other 14 exhibits and therefore those exhibits cannot be subject to this appeal.

161:12-18) and that Safeguard distributors cannot solicit orders "that are the subject of the account protection rights of another Safeguard distributor" (R. 17778 at p. 36:13-25).

[10] Trial Exhibits 157, 245, 267, 327, 336, 352, 356 were produced pursuant to the District Court's Order. This can be verified by comparing the bates numbers on the exhibits as compared to the bates numbers identified in the District Court's Order. R. 2226-27. Trial Exhibits 266, 268-270, 326, 328-330, 338, 357-360 and 362 were not subject to the Order.

A. Safeguard Waived the Right to Appeal on Privilege Grounds

To maintain its privilege objection, Safeguard was required to object to the admission of the seven exhibits at issue at trial. *See Kirk v. Ford Motor Co.,* 141 Idaho 697, 701, 116 P.3d 27, 31 (2005) ("[T]he moving party is required to continue to object as the evidence is presented".) Not only did Safeguard not object, Safeguard stipulated to the admission of all seven exhibits. Vol. I, Tr. 228:9-230:4. Safeguard thereby waived any previous objection. *State v. Gray*, 129 Idaho 784, 794, 932 P.2d 907, 917 (Ct. App. 1997) ("Agreeing to the admission of evidence… is a waiver of the prior objection.")[11]

B. The District Court Did Not Abuse its Discretion in Ordering Production

Idaho Rules of Civil Procedure 26(b)(1) permits discovery over any relevant matter that is not privileged. "The trial court has broad discretion in determining whether or not to grant a motion to compel." *Nightengale v. Timmel*, 151 Idaho 347, 351, 256 P.3d 755, 759 (2011). A decision "will only be reversed where there has been a clear abuse of discretion." *Quigley v. Kemp*, 162 Idaho 408, 410, 398 P.3d 141, 143 (2017)

Rules of Evidence 502(b) describes the attorney-client privilege as "a privilege to refuse to disclose and to prevent any other person from disclosing [1] confidential communications [2] made for the purpose of facilitating the rendition of professional legal services to the client. I.R.E. 502(b). "The burden of showing information is privileged, and therefore exempt from

[11] Safeguard also waived any claim of privilege as to Safeguard's General Counsel Michael Dunlap's communications based on its discovery productions. *See* I.R.E. 510, *PaineWebber Grp., Inc. v. Zinsmeyer Trusts P'ship*, 187 F.3d 988, 992 (8th Cir. 1999). Safeguard withdrew the privilege as to 90% of Dunlap's communications and of the 21 exhibits Safeguard contends fall under the attorney-client privilege, Safeguard voluntarily produced 14 of them.

discovery, is on the party asserting the privilege." *Kirk*, 141 Idaho at 704. With regard to in-house counsel communications, they are generally not presumed to be made for the purpose of providing legal advice, rather than business advice. *Dewitt v. Walgreen Co*., No. 4:11–cv–00263–BLW, 2012 WL 3837764, at *3 (D. Idaho Sept. 4, 2012), *citing United States v. Chevron Texaco Corp.*, 241 F. Supp. 2d 1065, 1076 (N.D. Cal. 2002). This presumption does not vitiate the attorney-client privilege. Instead, it aligns with the attorney-client privilege in general, as the "privilege impedes the truth-finding process and must be strictly construed". *Id.* at *2.

The District Court was very familiar with Dunlap's role from the parties' voluminous briefing throughout the case. R. 2226. In this context, the District Court made the factual finding that Dunlap "was extensively involved in business aspects of [Safeguard], including monitoring cross-over customer sales and commissions and corresponding with [Teply and Thurston] regarding the extent of [Teply and Thurston's] cross-over customers." R. 2226. Similarly, Dunlap testified that he was not acting in a legal role when he was communicating with Teply (or Thurston) regarding cross-over customers. Tr. Vol. I at 887:13-18, 892:3-11. Indeed, Dunlap's responsibilities at issue were historically handled by Safeguard's business development and regional support managers. Tr. Vol. II at 1792:12-1794:2, 2032:5-2033:6.

None of the seven exhibits at issue implicate the attorney-client privilege as defined in I.R.E. 502(b). Many of the exhibits simply represent facts being communicated. Exhibit 327 contains an email from McLaughlin to Dunlap wherein she identifies the amount of sales to certain cross-over customers. Dunlap then forwards the email to Sorrenti and notes that Teply may request all commissions paid to IBF on her cross-over customers just like another

distributor, the Strongs were claiming. Exhibit 336 contains emails between Michael Dunlap and JJ Sorrenti wherein they discuss the fact that Dawn Teply is not interested in sharing her customers or selling them but wants the sales info on IBF's sales to those customers. Exhibit 352 contains an email from Dunlap to JJ Sorrenti where he complains that McLaughlin is not being responsive to his requests. Exhibit 356 contains communications from Teply where she refuses to schedule a meeting until Safeguard shows a commitment to resolve Account Protection issues.

Communications consisting of purely factual information, without any legal advice, or not for the purpose of facilitating legal services, are not privileged. *See In re Grand Jury Proceedings*, 616 F.3d at 1182 ("when an attorney conveys to his client facts acquired from other persons or sources, those facts are not privileged."); *Dewitt*, 2012 WL 3837764 at *3. Dunlap's communications with regard to Teply or McLaughlin's inquiries regarding cross-over customer sales and commissions are factual in nature. Dunlap was not providing legal services.

The other exhibits are also not privileged. Exhibit 157 contains an email from Dunlap to Safeguard employee Amy Tiller-Shumway. Dunlap tells Tiller-Shumway that she can "tell Distributor Accounting that if there is a conflict with legacy distributors, the rule applies and it rotates to the legacy distributor". Ex. 157. This repeats the business policy in place at Safeguard Distributor Accounting of rotating commissions (regardless of product) to the party who first made a sale to that account. *Id.* Exhibit 245 regards an email from Safeguard non-legal employee Michelle Popelka to Dunlap with the note that she thought Dunlap was the one resolving issues with the cross-over accounts. Exhibit 267 contains communications between Sorrenti and Dunlap where they disagree on whether McLaughlin needs to transfer customer files to T3 and decide to

set up a meeting. None of the emails contain a request for legal advice and Dunlap is resolving the conflicts with regard to cross-over customers rather the analyzing what the Account Protection policy should be or any legal considerations. *Compare Ford*, 141 Idaho at 704 (the "Suspension Orders contained legal advice and recommendations related to pending litigation.")

Safeguard argues broadly that because Dunlap was a lawyer, these communications were done in the overall context of providing a legal service. However, "[t]he mere fact that an attorney was involved in a communication does not automatically render the communication subject to the attorney-client privilege," *In re Grand Jury Proceedings*, 616 F.3d 1172, 1182 (10th Cir. 2010). "[R]ather, the 'communication between a lawyer and client must relate to legal advice or strategy sought by the client'". *Id.*; *United States v. Chen*, 99 F.3d 1495, 1501 (9th Cir. 1996) ("The privilege applies only when legal advice is sought 'from a professional legal advisor in his capacity as such.'").Where a lawyer, such as Dunlap, tenders advice regarding a business decision, "the non-legal aspects of the decision are not protected simply because legal considerations also are involved." *Adams v. United States*, 2008 U.S. Dist. LEXIS 53533, *3-4 (D. Idaho July 3, 2008); *Cedillo v. Farmers Ins. Co.*, 163 Idaho 131, 408 P.3d 886, 896 (2017) (Burdick, C.J., dissenting) ("quasi-fiduciary tasks of investigating and evaluating or processing the claim" were not privileged, only counsel's evaluation as to potential liability).[12]

In Re Human Tissue Products Liability Litigation, 255 F.R.D. 151, 161 (D. N.J. 2008) is

[12] *Chevron Texaco Corp.*, 241 F. Supp. 2d at 1076 ("Corporations may not conduct their business affairs in private simply by staffing a transaction with attorneys.")*; see also Oasis Int'l Waters, Inc. v. United States*, 110 Fed. Cl. 87, 98 (2013) (privilege "does not apply when an attorney acts as a client's business or economic advisor").

illustrative. There, the court found that documents relating to the lawyers' tasks on that assignment pertained to business matters, rather than legal services because: (1) "none of the documents appear to contain any legal research or analysis"; and (2) the work could have as easily been performed by non-lawyers. The same can be said for Dunlap's role here. As Dunlap's concern has to do with his negotiations with the parties as to who would service which customers, rather than any legal issues, the documents have no privilege ramifications.

C. The Seven Exhibits Did Not Have a Prejudicial Effect

"[W]hen appealing from an evidentiary ruling reviewed for abuse of discretion, the appellant must demonstrate both the trial court's abuse of discretion and that the error affected a substantial right." *Hurtado v. Land O'Lakes, Inc.*, 153 Idaho 13, 18, 278 P.3d 415, 420 (2012). Even if some of the seven documents at issue were privileged, any error was harmless. The exhibits at issue largely regard Teply and not Thurston. None of the exhibits were dispositive of any issue of liability nor were they evidence of fraudulent and oppressive conduct, upon which the punitive damages were awarded. Thurston introduced over 300 exhibits into evidence. The other exhibits more than presented grounds upon which the jury's verdict lies. Therefore, any error is harmless. *See e.g. Naccarato v. Vill. of Priest River*, 68 Idaho 368, 372, 195 P.2d 370, 373 (1948) ("Error, if any, in admitting irrelevant or improper testimony is harmless where the fact which is intended to be proved thereby is fully shown by other evidence…")

III. SUBSTANTIAL EVIDENCE SUPPORTED THE FRAUD VERDICT

The District Court correctly denied Safeguard's motion for judgment notwithstanding the verdict as to the fraud claim. Thurston provided substantial evidence for that claim including:

- Thurston did not have access to the data showing IBF's or DocuSource's historical sales to Thurston's Protected Customers, although Thurston repeatedly asked Dunlap for that information. Tr. Vol. I at 973:11-21; 1130:23-1131:3; Vol. II at 1823:2-1824:22.

- Thurston never received a rotation notice showing that IBF or DocuSource had sold to Thurston's Protected Customers. R. 12733, Tr. Vol. II at 1828:24-1829:5.

- Dunlap had told Thurston that IBF would lose 25% of its sales and consequently, Thurston thought that IBF and DocuSource refrained from selling to those Protected Customers after acquisition. Tr. Vol. I at 1827:19-1828:7.

- On March 6, 2014, Thurston sold his Account Protection rights to Bench Sewer District, Buck's Bags, Inc., Ennis Furniture Co., Idaho Independent Bank, Norco, Omnipure Filter Co., St. Alphonsus Medical Group Family Practice, St. Alphonsus Medical Group Occupational Medicine, and Treasure Valley Steel for $32,600. Tr. Vol. II at 1830:4-6; 1883:22-1884:10; Ex. 1036.

- Thurston agreed to the $32,600 sale price after receiving information from Dunlap on the sales of Safeguard products and services to those accounts over the past 12 months and past 36 months. Tr. Vol. II at 1506:6-22, 1818:8-1819:9; 1824:23-1825:7; 1827:6-18. Thurston understood this to be all the sales to those customers based on (a) his request that Dunlap provide him with information relating to sales to his Protected Customers and (b) Safeguard's contractual obligation as prior practice to provide Thurston with rotation notices. Tr. Vol. I at 894:12-897:4; Vol. II at 1357:20-1360:12; 1639:8-1645:3; 1827:6-1829:5.

- Thurston later learned through discovery in this case that the figures that Dunlap provided to him did not include IBF's and DocuSource's sales to his Protected Customers. Tr. Vol. II at 1824:23-1825:7; 1828:8-1829:21.

- Had Dunlap/Safeguard disclosed the amount of IBF and DocuSource sales to those Protected Customers, Thurston would not have entered into the March 6, 2014 agreement. Tr. Vol. II at 1829:15-1831:2.

Thurston's testimony as to his interactions with Safeguard was substantially corroborated by not only Dunlap and Teply's testimony but documentary evidence. Exhs. 180, 231, 236, 238-242, 244; Tr. Vol. I, 894:12-897:4, 973:11-21; 1130:23-1131:3, Vol. II at 1357:20-1360:12, 1639:8-1645:3. The District Court previously found this evidence was sufficient to defeat Safeguard's

Motion for Summary Judgment on Thurston's fraud in the inducement claim. R. 5825-33.

Safeguard presents one piece of evidence which it believes shows that Thurston's testimony was disingenuous. However, a jury's interpretation of evidence and weighing of credibility is not subject to appeal. *See Schwan's Sales Enterprises, Inc. v. Idaho Transp. Dep't*, 142 Idaho 826, 830, 136 P.3d 297, 301 (2006) ("The judge is not an extra juror, though; there is no weighing of evidence or passing on the credibility of witnesses"); *Coombs v. Curnow*, 148 Idaho 129, 136, 219 P.3d 453, 461 (2009) ("The jury's weighing of conflicting, admitted opinions will not be second-guessed on appeal.") And the showing of contradictory evidence does not establish that there is not substantial evidence for the verdict. *See Stephens v. Stearns*, 106 Idaho 249, 253, 678 P.2d 41, 45 (1984) ("'Substantial' evidence is not…synonymous with uncontradicted evidence."). "Where there is conflicting evidence, [the Court is] required to construe all of the evidence in favor of the jury verdict". *Watson v. Navistar Int'l Transp. Corp.*, 121 Idaho 643, 661, 827 P.2d 656, 674 (1992).

There are additional reasons to reject Safeguard's arguments. Safeguard argues that Exhibit 244 shows that Thurston knew Safeguard was concealing sales made by IBF to Thurston's accounts when he entered into the March 6, 2014 Agreement. However, the list of cross-over customers had been provided to Thurston going back to October 15, 2013, less than 2 months after IBF was acquired. *See* Ex. 180. Thus, Thurston rightfully concluded that the list of accounts Dunlap was negotiating was based on IBF having sold to the accounts in the past. Tr. Vol. II at 1823:16-1824:7. Indeed, Dunlap prepared the customer list based on information he received about "potential sales" from McLaughlin and Jamie McCormick. *See* Exhs. 223, 234.

The agreement Dunlap drafted also suggested that IBF hadn't made sales but that it was going to service those customers in the future. *See* Ex. 256 at 256.4. As the District Court found, "[w]hen read in context with the rest of his testimony… Safeguard's citations do not establish that Mr. Thurston knew that IBF was selling Safeguard products to his protected accounts or that he knew Safeguard was failing to disclose such sales." R. 12733.

Further, the most Safeguard can argue is that Exhibit 244 shows Thurston knew about some nominal sales. However, the fraud claim turns not only on Safeguard's failure to disclose that sales were occurring but the amount thereof. This was a legally obligated disclosure per the Thurston Distributor Agreement. *See* R. 5830 ("as a matter of law, that Safeguard had a duty to disclose to Thurston all infringing sales information on the nine accounts at issue…") The concealing of hundreds of thousands of dollars in sales (and derivative commissions) is grounds for fraud. It is undisputed that sales data provided to Thurston did not include IBF's and DocuSource's sales to those Protected Customers. Tr. Vol. I at 973:9-974:6, Tr. Vol. II at 1827:6-1829:21. Nor did Thurston know that Safeguard was concealing the sales that IBF had made, let alone hundreds of thousands of dollars of sales. *See* Tr. Vol. I at 974:3-5, Tr. Vol. II at 1804:18-1806:8, 1812:15-20, 1814:1-6, 1878:6-17, 1880:16-25.

It was not even a possible inference that Thurston knew about the hundreds of thousands of dollars of sales. Thurston only based the sales price on his own sales because the sales made by IBF were concealed from him.[13] Had he known the actual sales, he would have never sold the

[13] When asked "Did you have any IBF information that shows sales amounts or commissions or net profits or gross profits or anything relating to the sales by IBF and the eight or nine

accounts for pennies on the dollar. *See e.g.* Tr. Vol. II at 1804:18-1806:8 (Thurston would not have sold an Omnipure account worth $158,690 for $300 had he any idea of IBF's sales); 1829:24 ("That would have changed everything"). For these reasons, the District Court correctly found that there was substantial evidence for the verdict. R. 12733-34.

IV. SUBSTANTIAL EVIDENCE SUPPORTED A BREACH OF THE PRICING SCHEDULE CLAUSE

There was substantial evidence for the jury's finding of liability as to Safeguard's breach of the pricing schedule clause in the Thurston Distributor Agreement. It was undisputed that Deluxe and Safeguard offered IBF and DocuSource pricing approximately 40% less than what was offered to Thurston on laser checks and envelopes. Tr. Vol. II at 1462:13-1466:21; 1502:22-1503:13. These were for the same products in the same quantities.[14] *Id*. Not only did this make IBF and DocuSource more competitive in the market but the higher base prices offered to Thurston cut into his commissions. Thurston's commissions were based on the difference between the retail price (what was charged to the customer) and the base price (or cost to the distributor). *See* Tr. Vol. II at 1554:18-1555:3, 1967:15-18. There was also evidence that IBF did not have to pay the source fees that Thurston was charged. Tr. Vol. I at 1973:7-15; Vol. II at 1467:20-1468:11; 1503:10-13. Thus, the jury correctly rendered a verdict against Safeguard.

Safeguard argues that the pricing schedule clause was unambiguous and consequently

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McLaughlin people to those nine customer accounts?" Thurston responded definitively, "No, I did not." Tr. Vol. II at 1827:13-18.

[14] Safeguard's evidence as to flex pricing was irrelevant as Thurston's expert Robert Taylor compared products sold at the same list or selling price. *See* Tr. Vol. II at 1462:13-1464:15. The evidence of volume discounts was irrelevant as Taylor looked at the same product quantities. *Id.*

there was not substantial evidence to support the verdict. Safeguards fails to connect this argument to the standards for post-judgment relief and explain why the argument was not waived. As noted by the District Court, Safeguard previously took the position that the interpretation of the provision was a factual dispute. R. 12730. Consequently, it was "an issue for the trier of fact to ascertain the meaning of the provision" and "the jury was appropriately instructed that the terms of the provision were in dispute and given the rules of contract interpretation so as to ascertain the parties' intent." R. 12730. The jury rejected Safeguard's interpretation that the clause either had no effect or only regarded retail prices. The jury's finding was consistent with Idaho law which required the jury to construe the pricing schedule clause against Safeguard. *See* IDJI 6.08.3

To the extent Safeguard's argument is considered, it lacks merit. That clause read:

> You 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 thereto ("Safeguard Systems") in accordance with the price scheduled published by Safeguard and on the terms and conditions set by Safeguard from time to time.

Ex. 8 at 8.3. The clause affirmatively sets forth that Thurston possesses the "right" to sell Safeguard Systems at the price schedules Safeguard publishes to other distributors.

Safeguard contends that either the language has no effect or only regards retail prices. Under the latter interpretation, the phrase "in accordance with the price schedules published by Safeguard" would be completely superfluous. This is inconsistent with hornbook law on contract interpretation. *Pauma Band of Luiseno Mission Indians of Pauma & Yuima Reservation v. California*, 813 F.3d 1155, 1175 (9th Cir. 2015) (it is a "canon of contract interpretation" to

"prefer[] interpretations that do not render terms 'superfluous, useless or inexplicable'"); *Saint Alphonsus Reg'l Med. Ctr. v. Raney*, 413 P.3d 742, 745 (2018) (noting as to statutory interpretation, "that the Court must give effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant.") Nor does the clause, by its language, unambiguously only regard retail prices. It does not mention the word "retail".

The clause "in accordance with the price schedules published by Safeguard" could reference the base and/or retail prices offered by Safeguard. The District Court correctly found that the clause was ambiguous with regard to the Motion for Summary Judgment, Motion for a Directed Verdict and Motion for Post-Judgment Relief. R. 5814, 12730-31, Tr. Vol. II at 2099:17-2100:4. Where contractual language is ambiguous, the parties can look to parol evidence to understand its meaning. *See Steel Farms, Inc. v. Croft & Reed, Inc.*, 154 Idaho 259, 266, 297 P.3d 222, 229 (2012) ("Parol evidence may be considered to aid a trial court in determining the intent of the drafter of a document if an ambiguity exists.")

Thurston was the only person who testified who was around at the time the Agreement was entered into in 1987. Thurston testified that he considered the intent of the pricing schedule clause to be that he received the same price schedules other distributors received including the same cost basis (or base price)[15] as other distributors. *See e.g.* Tr. Vol. II at 1769:10-1772:6, 1862:7-9. This was permissible parol evidence. *See Stone v. Bradshaw*, 64 Idaho 152, 159, 128 P.2d 844, 847 (1942) (holding that oral testimony may be "admitted for the purpose of

[15] Contrary to Safeguard's arguments, Thurston did not admit that the phrase "price schedules" refers solely to retail prices. *See* Tr. Vol. II at 1769:10-1772:6, 1860:23-1862:9.

ascertaining not only the meaning of the words used, but the intention of the parties as expressed in the writing"); *Knipe Land Co.*, 151 Idaho at 455. Thurston's understanding was logical because Thurston did not have territorial exclusivity and if another distributor (like IBF) received preferential pricing, Thurston could easily be put out of business. Thurston's testimony was also corroborated by Dawn Teply and the parties' course of dealing. *See e.g.* Tr. Vol. II at 1708:16-1709:7, 1769:10-1770:24 (following set price schedules for 29 and a half years); 2099:20-23 (District Court noting that the evidence showed that prior to IBF distributors "got the same price"). This testimony and the Agreement itself provided substantial evidence for liability.

V. THERE WAS SUBSTANTIAL EVIDENCE SUPPORTING A BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

A. The Court Correctly Denied Safeguard's Motion for Summary Judgment

A violation of the implied covenant of good faith and fair dealing ("GFFD") occurs when an action by one party violates, qualifies, or significantly impairs any benefit or right of the other party under the contract, whether express or implied. *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 243, 108 P.3d 390, 389 (2005). "The covenant simply requires that the parties perform in good faith the obligations imposed by their agreement." *Id.*

Safeguard's main argument at the summary judgment stage was that Idaho law did not recognize such a legal claim outside of first-party insurance cases. R. 3449-50, 5815. This was incorrect in that "[g]ood faith and fair dealing are implied obligations of every contract." *Luzar v. Western Surety*, 107 Idaho 693, 696, 692 P.2d 337, 340 (1984). Now, Safeguard argues that Thurston's allegations as to the GFFD claim are duplicative of the allegations within the breach

of contract claim. This argument was not made to the District Court at the summary judgment stage. *See* R. 3449-50, 5815. Thus, the argument was waived. *Kirkman v. Stoker*, 134 Idaho 541, 544, 6 P.3d 397, 400 (2000); *Kolar*, 142 Idaho at 350.

Despite the fact that Safeguard did not make the argument, the District Court's order made clear why the claims are not duplicative:

> Thurston's breach of contract claim is based on Safeguard's violation of the express provisions of his RDA – namely, the account protection and pricing provisions. Its breach of implied covenant claim is based on Safeguard's own solicitation – through DocuSource and IBF – of Thurston's protected accounts and sales to those accounts without Thurston's knowledge and thereafter concealing the solicitation and sales from Thurston.

R. 5816. When Safeguard directed[16] IBF and DocuSource to sell to Thurston's Protected Customers without rotating the commissions and at product prices below what Safeguard had given Thurston, Safeguard not only became liable for the commissions that should have been paid and preferential pricing damages, but also for the diminution in value to Thurston's distributorship. Thurston's Agreement gave him the right to sell or assign his contractual rights to someone else. *See* Ex. 8 at 8.7-8. The value of these contractual rights was significantly impaired when Safeguard refused to honor the contractual terms.

Safeguard's argument that this implied covenant contradicts its contractual right to appoint distributors is unavailing. Safeguard's obligation not to solicit, through DocuSource and IBF, Thurston's Protected Customers conforms to the terms of the Agreement rather than

[16] In addition to owning IBF and DocuSource, Safeguard "handle[s] all product sourcing, invoicing, shipping, fulfillment, payment, collections and returns". App. Brief p. 33; *see also* Tr. Vol. I at 498:6-22, 501:9-502:11, Tr. Vol. II at 1537:2-1539:9. Thus it controlled whether IBF and DocuSource were soliciting and making sales to Thurston's Protected Customers.

contradicts them. Indeed, Dunlap admitted that Safeguard, prior to the IBF and DocuSource acquisitions, understood the Agreement to mean that Thurston has the exclusive right to solicit and sell to its customers. R. 17784-86 at pp. 159:24-161:18; R. 17778 at p. 36:13-25. In evaluating this argument, the District Court correctly held the following:

> Thurston's right to solicit sales in his geographical area was designated as non-exclusive under the [Agreement]. Safeguard reserved the right to 'appoint additional persons to solicit sales of Safeguard Systems' inside Thurston's territory. Therefore, Thurston agreed to the risk that Safeguard may appoint others to compete with it. However, in exercising this right under the [Agreement], Safeguard had an obligation to act in good faith. Thus, while Safeguard's appointment of *other distributors* may not constitute a breach of the contract or the implied covenant, a jury may find that Safeguard's own direct competition with Thurston - through company-owned distributors which solicited sales in Thurston's territories at product prices and source fees significantly lower than what Safeguard makes available to Thurston – significantly impaired Thurston's earnings and ability to compete. Since the worth of Thurston's business is grounded in its customer base, such conduct by Safeguard would have – and did have, according to Thurston's expert – a deleterious effect on the value of the business.

R. 5816-17.[17] The District Court's finding conformed to Thurston's briefing and the evidence Thurston provided. R. 4740-4745, 5816. The District Court did not err in denying the Motion.

B. The Lost Business Value Damages Were Disclosed and Safeguard Did Not Object

Thurston joined the case in the Amended Complaint and from the very beginning sought damages for "business devaluation suffered by Thurston Enterprises" as a "result of [Safeguard's] breach of its duty of good faith and fair dealing". R. 324 at ¶ 213; *see also* R. 280 at ¶ 18 ("As a result of the conduct of the defendants, the [Safeguard] distributorship businesses

[17] *See also Creek Hosp. Inns. Inc. v. Sheraton Franchise Corp.*, 139 F.3d 1396, 1404 (11th Cir. 1998); *Vylene Enterprises, Inc. v. Naugles*, 90 F.3d 1472 (9th Cir. 1996); *Bruno Int'l Ltd. v. Vicor Corp.*, No. CV 14-10037-DPW, 2015 WL 5447652, at *8 (D. Mass. Sept. 16, 2015).

of T3 Enterprises and Thurston Enterprises have suffered severe damage.") The legal theory from complaint[18] to verdict was that Safeguard's actions impaired the distributorship's value.

Safeguard's arguments are both factually and legally distinguishable. In the Federal Court cases Safeguard cites to, the parties had failed to disclose legal theories and/or evidence pursuant to disclosure and discovery obligations. There is no such showing here. Thurston never contended that Taylor's testimony was the only piece of evidence that would be provided with regard to the lost business value theory of damages nor was there any discovery or expert disclosure obligation that Thurston failed to respond to. Indeed, the District Court recognized that Thurston's expert Robert Taylor was only providing testimony as to the valuation of Thurston's distributorship prior to the harm but not to the devaluation. R. 3703 (¶ 13), 3722, Tr. Vol. I, 1402:20-1403:8; Tr. Vol. II at 1515:2-4, 1618:14-1619:18.

Thurston provided the jury additional evidence upon which to calculate the devaluation of Thurston's distributorship including the value of a non-Safeguard distributor. Safeguard did not object to the evidence at issue when it was admitted and instead stipulated to it. Vol. I, Tr. 228:9-230:4 (stipulating to admitting exhibit 23). As Safeguard did not object to the evidence and there was no new legal theory there can be no prejudice or abuse of discretion.

C. There Was Substantial Evidence for the Jury's Verdict

Testimony and documentary evidence was provided to establish the value of Thurston's

[18] *See also* R. 1049-1125 at ¶¶ 5, 18, 19, 65, 66, 152, 177, 178, 222 (Second Amended Complaint); R. 2235-2310 at ¶¶ 5, 18, 19, 58, 149, 174, 175, 219 (Third Amended Complaint); R. 6006-83 at ¶¶ 5, 18, 19, 58, 149, 174, 175, 219 (Fourth Amended Complaint).

distributorship unharmed ($798,646), valueless ($0)[19] and reduced to the value of a non-Safeguard distributorship ($266,216). These data points, backed by testimony and exhibits, provided substantial evidence upon which the jury could determine the devaluation.

"The goal of awarding damages for the market value of a lost asset is 'to make sure the defendant's tort or contract breach does not leave the plaintiff with assets or net worth less than that to which she is entitled.'" *Schonfeld v. Hilliard*, 218 F.3d 164, 177 (2d Cir. 2000). Diminution in value of a business can be shown where a plaintiff simply states the value of the business and lets the jury decide as to the amount of the diminution. *See Windsor Shirt Co. v. New Jersey Nat'l Bank*, 793 F.Supp 589 (E.D. Pa. 1992), aff'd, 989 F.2d 490 (3d. Cir. 1993); *Aardvark Art, Inc. v. Lehigh/Steck-Warlick, Inc.*, 212 Ill.App.3d 492; 572 N.E.2d 472 (1991). These decisions are in alignment with this Court, which has held that it is for "the jury [to] make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly." *Smith*, 140 Idaho at 900.

Here, Taylor testified that a distributorship in the Safeguard network is valued at one times annual sales or revenues. *See* Tr. Vol. II at 1482:2-15, 1484:6-16; 1504:21-1505:15, 1582:1-5. This was an oft repeated valuation metric for a multitude of customer base asset sales including ones that Thurston had sold or bought. *See* Tr. Vol. II at 1754:19- 1757:23; 1759:14-17. Safeguard President J.J. Sorrenti confirmed this valuation metric in testimony and emails. Tr. Vol. II at 2041:1-2042:18; Ex. 536. Thus, prior to Safeguard's contractual violations, Thurston's

[19] Thurston provided this evidence in the alternative but the jury found that the distributorship was devalued to the level of a non-Safeguard distributorship.

distributorship would have been valued at one times annual sales ($798,646). Tr. Vol. II at 1618:14-16. This testimony and exhibit alone provides substantial evidence for the jury's verdict.

However, Thurston's evidence is significantly more than was present in the cases where the jury's diminution of value damages were upheld. Thurston also provided evidence that without the Safeguard contractual benefits, the value of an independent distributorship is approximately one third the annual sales or revenue or one times gross profit (gross profit typically being around 33%). Tr. Vol. II at 1471:19-1473:15; 1482:2-13; 1618:14-16, 1757:24-1760:6, 1760:10-22. Safeguard Vice President of Franchise Development Scott Sutton testified to the accuracy of this valuation metric. *See* Tr. Vol. I at 323:18-325:4, Ex. 23 at 23.4 (valuation metric was "generally backed by historical industry deal terms"). Sorrenti additionally confirmed that the valuation metrics differ between independent distributors and those in the Safeguard network. Tr. Vol. II at 1582:1-1583:9. This evidence allowed the jury to find that Thurston lost at least two thirds of the value of his distributorship ($532,431).

There was sufficient evidence for the damages in Safeguard documents and the testimony of Safeguard executives alone. Nonetheless, Safeguard challenges the admission of Thurston's testimony on foundational grounds. However, the foundation for the opinion only goes to the weight of the testimony, "it does not disqualify the owner's opinion" *Hurtado,* 153 Idaho at 21. "An owner is competent to testify to the value of a going business without any further qualification." *Pocatello Auto Color, Inc. v. Akzo Coatings, Inc.*, 127 Idaho 41, 43, 896 P.2d 949, 951 (1995). Regardless, Thurston did have a proper factual foundation; the selling prices of the non-Safeguard businesses he himself had bought and then owned. Tr. Vol. II at 1757:24-1760:6.

These past sales were the best evidence of valuation. *See e.g. Schonfeld*, 218 F.3d at 178 ("it is well-established that a recent sale price for the subject asset, negotiated by parties at arm's length, is the 'best evidence' of its market value"). Indeed, Safeguard did not object to his testimony and conceded that "Thurston was a long-time sophisticated distributor who bought several other distributorships and knew how to value accounts." R. 9177.

Safeguard also argues that Thurston hadn't lost every contractual benefit and consequently the jury verdict "defies reason and reality". This argument is irrelevant to a determination of the JNOV motion and is also inaccurate. As Thurston and Taylor testified, the value of the distributorship is largely based on the customer base and contractual protections thereof. *See* Tr. Vol. II, 1482:2-13; 1618:14-16, 1760:10-22, Ex. 18. The jury found that by putting a company owned distributor into the market, giving that distributor pricing advantage in violation of the Agreement and failing to honor Account Protection, Thurston's distributorship was seriously devalued. Indeed, no buyer would be interested in taking an assignment of a contract whose key terms aren't going to be honored.[20] *See e.g. Schonfeld*, 218 F.3d at 178.

For these reasons, the District Court's denial of Safeguard's Motion should be affirmed.

VI. PUNITIVE DAMAGES WERE APPROPRIATELY AWARDED BY THE JURY

A. There Was Substantial Evidence for the Jury's Verdict

Safeguard argues that the consideration of punitive damages is limited to five factors set forth in *Cuddy Mountain Concrete, Inc. v. Citadel Constr., Inc.,* 121 Idaho 220, 229-30, 824 P.2d

[20] Safeguard contends that it offered to buy Thurston's business but that too is inaccurate. Safeguard never offered to settle the matter for more than 2% of what the actual damages were. *See* R. 12835-37.

151, 160-61 (Ct. App. 1992).[21] In turn, Safeguard argues that the District Court's statement that a party to a contract "may not – without exposing itself to punitive damages – avoid the consequences of breach by means of concealment, oppression, intimidation, or despotism" is not consistent with Idaho law. R. 12737. However, Safeguard's interpretation is a misreading of *Cuddy Mountain* and Idaho law. The *Cuddy Mountain* court also considered fraud and oppression. 121 Idaho at 227-230. And Thurston presented evidence on nearly every factor.

As set forth in detail in motion practice and the District Court's orders[22], this Court, going back over a hundred years, has considered not only the factors in *Cuddy Mountain* but whether the defendant's conduct is fraudulent, malicious or oppressive (a bad act and a bad state of mind) in deciding whether punitive damages are appropriate. *See Unfried v. Libert*, 20 Idaho 708, 119 P. 885, 891 (1911) (wherein this Court stated that "[w]e think the general rule recognized by the weight of authority is that exemplary or plenary damages may be allowed where the injury complained of is attended by acts of the wrongdoer which show willful malice, fraud, or gross negligence."); *Gunter v. Murphy's Lounge*, 141 Idaho 16, 29, 105 P.3d 676, 689-690 (2005);

[21] "In addition to oppressive behavior in a business context, there are other factors which play a determinative role in deciding whether there is substantial evidence of an extreme deviation from standards of reasonable conduct: (1) the presence of expert testimony; (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."

[22] R. 12735-37(Order on Post-Judgment Relief); R. 5769-73 (Order on Motion to Amend Complaint); R. 15868-79 (Thurston's Motion for Leave to Amend Complaint to Add Prayer for Punitive Damages); R. 3346-54 (Thurston's Reply).

Myers v. Workmen's Auto Ins. Co., 140 Idaho 495, 503, 95 P.3d 977, 985 (2004).[23]

This Court has applied this caselaw to breach of contract cases holding that punitive damages are appropriate where the defendant engages in malicious, fraudulent or oppressive conduct associated with the breach. *See* ***Hall v. Farmers Alliance Mut. Ins. Co.***, 145 Idaho 313, 320, 179 P.3d 276, 283 (2008); *Gunter*, 141 Idaho at 29-30. Indeed, this Court has warned that there is no "blanket prohibition" against punitive damages in contract claims. *Myers*, 140 Idaho at 502-503. "[N]umerous situations arise where the breaking of a promise may be an extreme deviation from standards of reasonable conduct, and, when done with knowledge of its likely effects, may be grounds for an award of punitive damages." *Id.*; *Davis v. Gage*, 106 Idaho 735, 739, 682 P.2d 1282, 1286 (Ct. App. 1984); *Linscott v. Rainier Nat'l Life Ins. Co.*, 100 Idaho 854, 860, 606 P.2d 958, 964 (1989).

Here, punitive damages were appropriate in that Safeguard willfully breached the Agreement with a conscious disregard for Thurston's contractual rights and then fraudulently concealed and misrepresented the contractual breaches. *See* R. 12735-37. Using its economic power and taking advantage of the information asymmetry, Safeguard then oppressively attempted (and succeeded[24]) in getting Thurston to relinquish his contractual rights to his accounts. *Id.* Safeguard's behavior was more egregious in light of its special relationship with

[23] *See also* Idaho Code 6-1604 ("any action seeking recovery of punitive damages, the claimant must prove, by clear and convincing evidence, oppressive, fraudulent, malicious or outrageous conduct by the party against whom the claim for punitive damages is asserted.")
[24] The jury found Safeguard committed fraud with regard to the March 6, 2014 agreement.

Thurston (franchisor/franchisee[25]) and the fact that it committed the same acts across the country.

At trial, Thurston provided substantial evidence of the following

- Safeguard acquired DocuSource and IBF knowing that they would sell to Thurston's accounts and that this would result in breaching Thurston's Account Protection rights. Tr. Vol. I at 302:20-303:12, 395:23-396:16, 463:10-465:5, 469:16-470:5, 562:14-572:2; 857:14-862:10, Vol. II at 1962:19- 1964:14.

- Safeguard set an arbitrary Account Protection mitigation budget that was generally 1/10th of the actual liability and nonetheless expected to underspend. Tr. Vol. I at 1140:4-8, 1162:25-1163:7, Ex. 42 at 42.1. The structure of the BAM Program relied on concealing the Account Protection violations and not paying the commissions. Tr. Vol. I at 300:4-301:20, 368:1-371:7, 1130:23-1131:16.

- Safeguard's President, JJ Sorrenti testified that he agreed to close the IBF deal despite above normal Account Protection violations. Tr. Vol. I at 870:19-872:9, 1133:18-1137:3, 1138:6-1141:14; Vol. II at 2014:12-2017:11, 2049:2-16.

- Safeguard was going to keep selling to Thurston's Protected Customers and there was no expectation of being able to resolve these Account Protection conflicts in any reasonable amount of time. Tr. Vol. I at 872:20-876:5.

- Safeguard had a contractual duty to rotate the commissions to Thurston on all sales of any Safeguard Systems to his accounts by other distributors, along with a written rotation notice of what was sold to his Protected Customer and by whom. *See* Exhs. 8, 422, 426; Tr. Vol. II at 1828:24-1829:5.

- Despite its prior practice, duty and knowledge, Safeguard did not disclose the sales to Thurston. Tr. Vol. I at 882:3-25, Vol. II at 1867:19-24, 1828:24-1829:21. As stated by the District Court, the "only reasonable inference to be drawn from the evidence is that Safeguard concealed the information in order to coerce or dupe Thurston – its own long-time distributor – to sell its protected accounts well below their market value." R. 12734.

- Safeguard tasked Dunlap with "mitigating" the Account Protection violations by strong arming Thurston into relinquishing his contractual rights. Tr. Vol. I at

[25] A franchisee relies on the franchisor, an entity with "vastly superior bargaining power" and financial resources. *Ins. Co. of the West v. Gibson Tile Co.*, 134 P.3d 698, 702 (Nev. 2006). In such a situation, "there is a need to 'protect the weak from the insults of the stronger' that is not adequately met by ordinary contract damages'". *Id.*

370:20-371:21, 377:21-380:10, 531:6-533:10, 872:20-874:12. When attempting to negotiate with Thurston, the jury heard that Michael Dunlap, over a period of 18 months, consistently misrepresented and/or concealed the extent of Account Protection violations, despite receiving DocuSource and IBF's monthly reports showing infringing sales. Tr. Vol. I at 863:16-864:17, 944:5-947:23, 1130:23-1131:10, 1170:1-23, Vol. II at 1827:13-1829:21.

- Safeguard executives, including Sorrenti, were aware that Account Protection was unresolved (Tr. Vol. I at 874:13-875:11), approved of Dunlap's actions (Tr. Vol. I at 385:8-17) and made the decision to continue to violate Thurston's Account Protection rights. *See* Tr. Vol. I at 985:13-986:7, 994:20-998:13, 1003:19-1006:4.

- When Thurston would not capitulate, Safeguard refused to pay Thurston the commissions he was entitled to receive for DocuSource and IBF's sales to his Protected Customers thereby compelling Thurston to file suit. Tr. Vol. I at 869:5-870:18, 874:7-12, 1131:11-16, Ex. 199.

The evidence showed that Safeguard engaged in willful, deliberate, fraudulent and oppressive actions in addition to simply breaching the Thurston Distributor Agreement. This more than presented adequate grounds for punitive damages under Idaho law.[26]

Safeguard's efforts, through Dunlap, to strong-arm Thurston into selling his accounts for

[26] *See e.g. Hall*, 145 Idaho at 319 (delay in payment and possible misrepresentation as to damages to residence sufficed for punitive damages); *Davis*, 106 Idaho at 738-39 (breach of non-compete covenant done with malice sufficed for punitive damages); *Harwood v. Talbert*, 136 Idaho 672, 679-680, 39 P.3d 612, 619-620 (2001) (punitive damages appropriate where a party clearly disregarded existing easement); *Myers*, 140 Idaho at 504 (the court found substantial evidence to support punitive damages where the defendant acted "in an unreasonable manner and with no regard for the consequences of the breach of the contractual relationship."); *Cuddy Mountain*, 121 Idaho at 227 (termination of contract in disregard of other party's contractual rights and fraudulent behavior sufficed for punitive damages); *Edmark Motors v. Twin Cities Toyota*, 111 Idaho 846, 850, 727 P.2d 1274, 1278 (Ct. App. 1986) (fraudulent concealment of mechanical problems in car entitled plaintiff to punitive damages); *Burks v. Bailey*, 518 B.R. 594 (D. Idaho 2014) (repeated violations of the non-compete provision with numerous clients justified punitive damages); *Griff, Inc. v. Curry Bean Co.*, 138 Idaho 315, 321, 63 P.3d 441, 447 (2003) (deliberate concealment in order to deprive a seller of the benefit of a bargain justified punitive damages).

nominal amounts when they were worth exponentially more were oppressive. *See e.g. Weinstein v. Prudential Prop. & Cas. Ins. Co.*, 149 Idaho 299, 338-339, 233 P.3d 1221, 1260-61 (2010) (punitive damages appropriate where Liberty Mutual repeatedly refused requests to pay medical bills and pressured the policyholder to settle the claims for less than they were entitled). Contrary to Safeguard's arguments the negotiations were not in good faith, they were founded upon fraud. It was only by concealing the contractual violations and misrepresenting the accounts affected and sales thereto, that these negotiations were undertaken.

Nor was this an isolated incident or a minor problem[27] as Safeguard represents. Safeguard had many other distributors complaining about Dunlap and Safeguard's violation of Account Protection rights prior to the IBF and DocuSource acquisitions. Exhs. 199, 200, Tr. Vol. I at 302:17-303:12, 534:22-540:6; 1147:13-1149:15; 1155:2-1158:13, 1162:2-1165:3. The BAM Program is built on the foundation of Account Protection violations. *See e.g.* Ex. 75, Tr. Vol. I at 301:21-302:19, Vol. II at 1311:2-1313:15, 1162:22-24 (Safeguard President: "there have been account protection overlaps in every transaction"). Indeed, the association representing the entire Safeguard distributorship base sued Safeguard for its rampant violations of Account Protection across the country. *United Safeguard Distributors Ass'n, Inc. v. Safeguard Bus. Sys., Inc.*, 145 F. Supp. 3d 932, 950 (C.D. Cal. 2015) (dismissed on standing grounds).

Critically, the most Safeguard can show is that there was conflicting evidence.

[27] IBF was a much larger distributor and made hundreds of thousands of dollars of sales to Thurston's Protected Customers including many of his largest customers. *Compare* R. 9128 (Verdict Form Question No. 1 finding $494,526 in account protection damages) to Tr. Vol. II at 1505:3-6 (Thurston's 12 month sales were $798,000).

Safeguard's factual arguments do not show that there was not substantial evidence for the jury's verdict. The jury, who sat through a 3 week trial, listened to Safeguard executives' testimony and saw this same evidence. The jury judged Safeguard's credibility. They handed down a verdict with the maximum punitive damages allowed under Idaho law. That fact is telling. *See Williams v. Bone*, 74 Idaho 185, 189-90, 259 P.2d 810, 813 (1953) ("Where the evidence is conflicting, and where it may be said that if one theory of the case is correct there may be ground for the imposition of exemplary damages, the matter is properly submitted to the jury in order that it may be determined whether or not one theory is true or the other.")

B. Punitive Damages are Appropriate for Malicious, Oppressive and Fraudulent Behavior and Breach of Contract Claims Should Not Be Exempted

As this Court has previously stated, "[i]t is not the nature of the case, whether tort or contract, that controls the issue of punitive damages." *Myers*, 140 Idaho at 503; *Todd v. Sullivan Const. LLC*, 146 Idaho 118, 123, 191 P.3d 196, 201 (2008). "The issue revolves around whether the plaintiff is able to establish the requisite 'intersection of two factors: a bad act and a bad state of mind." *Id.* Nonetheless, Safeguard wants to give parties, like itself, the right to engage in malicious, fraudulent and oppressive conduct without fear of repercussions.

The Idaho Legislature has considered the issue of punitive damages multiple times and unlike other states has not exempted breach of contract claims from punitive damages. *See e.g.* California Civil Code § 3294. The Legislature had done this despite the fact that Idaho has allowed for punitive damages for breach of contract claims for over 50 years. *See e.g. Boise Dodge, Inc. v. Clark*, 92 Idaho 902, 907, 453 P.2d 551, 556 (1969); *Linscott*, 100 Idaho at 861. In

1987, Idaho's Legislature passed tort reform legislation which included a statute governing the pleading of punitive damages. *See* 1987 Idaho Laws Ch. 276, § 1, p. 571. Therein, the Legislature required that a party seek leave to amend the pleading to include a prayer for relief seeking punitive damages. *Id.* In 2003, the Idaho Legislature again revised Idaho law on punitive damages. *See* 2003 Idaho Laws Ch. 122 (H.B. 92). Idaho Code 6-1604 was amended to require that in "any action seeking recovery of punitive damages, the claimant must prove, by clear and convincing evidence, oppressive, fraudulent, malicious or outrageous conduct by the party against whom the claim for punitive damages is asserted." Rather than limit the type of claims that give rise to punitive damages, the Legislature choose to limit the potential liability any party may face through capping punitive damages. *See* Idaho Code 6-1604(3).

As this Court has previously held with regard to punitive damages, "[a] judge or jury should not be hampered with strictly construed schemes or rules which inappropriately require the forcing of many-faceted fact patterns into neat pigeonholes or compartments." *Cheney v. Palos Verdes Investment Corporation*, 104 Idaho 897, 905, 665 P.2d 661, 669 (1983), *superseded by statute on other grounds as stated in Cummings v Stephens*, 157 Idaho 348, 336 P.3d 281 (2014). Regardless of the claim, the "justification for punitive damages must be that the defendant acted with an extremely harmful state of mind, whether that state be termed 'malice, oppression, fraud". *Id.* at 905. The Idaho Legislature has chosen not to curtail its citizens' right to punitive damages for a breach of contract. That decision should be respected.

Safeguard attempts to paint Idaho as an outlier. However, that is not accurate. Many states allow for punitive damages when a breach of contract is accompanied by malicious,

fraudulent or oppressive conduct including at least Arkansas, Connecticut, Delaware, District of Columbia, Mississippi, New Mexico, South Carolina, Vermont and Wyoming.[28] Further, other jurisdictions allow for punitive damages for breach of contract where the defendant's actions would also constitute a tort (e.g. fraud) including Alaska, Arizona, Florida, Illinois, Iowa, Kansas, Minnesota, Missouri, New Jersey, North Carolina, North Dakota, Oklahoma, South Dakota, and West Virginia.[29] New Hampshire specifically allows exemplary damages of three times damages when a party fails to pay owed commissions. N.H. Rev. Stat. § 339-E:3.

Safeguard's policy arguments are also unavailing. The standard in Idaho is not uncertain for businesses. Certainly, here, Safeguard knew its possible damages, it budgeted for it. *See* Ex. 538 at 10:38:40-10:40:34. Safeguard made the decision whether it wanted to disclose the breach

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[28] *See e.g. Dews v. Halliburton Indus., Inc.*, 708 S.W.2d 67, 71-72 (Ark. 1986); *Aurora Loan Servs., LLC v. Hirsch*, 170 Conn. App. 439, 455 (2017); *E.I. du Pont de Nemours and Co. v. Pressman*, 679 A.2d 436, 445 (Del. 1996); *Sere v. Grp. Hospitalization, Inc.*, 443 A.2d 33, 37 (D.C. 1982); *Sessoms v. Allstate Ins. Co.*, 634 So.2d 516, 519 (Miss. 1993); *Bogle v. Summit Inv. Co., LLC*, 107 P.3d 520, 530 (N.M. Ct. App. 2005); *Lister v. NationsBank of Del., N.A.*, 329 S.C. 133, 142 (Ct. App. 1997); *Villeneuve v. Beane*, 933 A.2d 1139, 1142 (Vt. 2007); *U.S. ex rel. Farmers Home Admin. v. Redland*, 695 P.2d 1031, 1039 (Wyo. 1985).

[29] *Great W. Sav. Bank v. George W. Easley*, 778 P.2d 569, 580 (Alaska 1989); *In re Marriage of Benge*, 726 P.2d 1088, 1093 (Ariz. Ct. App. 1986); *Ferguson Trasnp., Inc. v. N. Am. Van Lines, Inc.*, 687 So.2d 821, 822-23 (Fla. 1997); *Bank of Illinois in Mt. Vernon v. Bill's King City Stationery, Inc.*, 198 Ill.App.3d 434, 437 (1990); *Wilson v. Vanden Berg*, 687 N.W.2d 575, 586 (Iowa 2004); *Plains Res., Inc. v. Gable*, 235 Kan. 580, 593–94 (Kan. 1984); *Minn.-Iowa Television Co. v. Watonwan T.V. Improvement Assoc.*, 294 N.W.2d 297, 309 (Minn. 1980); *Ladeas v. Carter*, 845 S.W.2d 45, 52 (Mo. Ct. App. 1992); *Unifoil Corp. v. Cheque Printers & Encoders*, 622 F.Supp. 268, 272-73 (D.N.J. 1985); *Shore v. Farmer*, 351 N.C. 166, 170 (1999); *Pioneer Fuels, Inc. v. Montana-Dakota Utilities Co.*, 474 N.W.2d 706, 710 (N.D. 1991); *Woods Petroleum Corp. v. Delhi Gas Pipeline Corp.*, 700 P.2d 1023, 1027 (Okla. Ct. App. 1980); *Grynberg v. Citation Oil & Gas Corp.*, 573 N.W.2d 493, 500 (S.D. 1997); *Hayseeds, Inc. v. State Farm Fire & Cas.*, 177 W.Va. 323, 330 (W. Va. 1986).

or conceal it. It chose the latter. *See e.g.* R. 12734 ("The jury heard evidence that Dunlap deliberately concealed sales of Safeguard products made by IBF despite knowing full well that Safeguard was required to disclose them, at least by issuing rotation notices.") There is also not unlimited liability. Punitive damages are capped in Idaho and nationally they are only awarded in rare instances.[30]

Safeguard also argues that Idaho law deters an efficient breach. However, this was not an efficient breach. In an efficient breach, the breaching party compensates the non breaching party (e.g. pays Thurston his commissions). This was an opportunistic breach which has no societal economic justification.[31] Nor is efficient breach theory applicable where a party engages in fraud to cover up the breach.[32] As the District Court correctly held, "a party may breach a contract if it determines doing so is in its own economic interest, if it is prepared to accept responsibility for the breach." R. 12736-37. "It may not –without exposing itself to punitive damages – avoid the consequences of the breach by means of concealment, oppression, intimidation, or despotism…

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[30] In 2005, the most recent year studied by the U.S. Department of Justice (DOJ), punitive damages were awarded in only 8% of contract cases. U.S. Department of Justice, Bureau of Justice Statistics, "Punitive Damage Awards in State Courts, 2005," NCJ 233094 (March 2011) at Table 5, found at https://www.bjs.gov/content/pub/pdf/pdasc05.pdf.

[31] In an opportunistic breach, the breaching party gains at the expense of the nonbreaching party "either because the nonbreaching party fails to detect the breach or because the nonbreaching party cannot afford to bring suit to enforce his rights." William S. Dodge, *The Case for Punitive Damages in Contracts*, 48 DUKE L. J. 629, 655 (1999)." "As Judge [Richard] Posner recognized, when a promisor breaches opportunistically, 'we might as well throw the book at the promisor. . . Such conduct has no economic justification and ought simply to be deterred.'" *Id.* at 632.

[32] There is no "economic or other justification for such misrepresentations." John A. Sebert, Jr., *Punitive and Nonpecuniary Damages in Actions Based Upon Contract: Toward Achieving the Objective of Full Compensation*, 33 UCLA L. REV. 1565, 1603 (1986).

this is precisely what Safeguard did." R. 12737.

The purpose of punitive damages in a contract action is deterrence. *Davis*, 106 Idaho at 738; *see also Harwood*, 136 Idaho at 679-680 ("an assessment of punitive damages takes away the incentive for engaging in bad conduct by making such conduct unprofitable.") *Boise Dodge*, 92 Idaho 902, is instructive. There, this Court stressed the importance of deterring "calculated commercial fraud in broad disregard of the rights" of plaintiffs (and in that case consumers):

> [T]hose who deliberately and cooly engage in a far-flung fraudulent scheme, systematically conducted for profit, are very much more likely to pause and consider the consequences if they have to pay more than the actual loss suffered by an individual plaintiff. An occasional award of compensatory damages against such parties would have little deterrent effect. A judgment simply for compensatory damages would require the offendor to do no more than return the money which he had taken from the plaintiff. In the calculation of his expected profits, the wrongdoer is likely to allow for a certain amount of money which will have to be returned to those victims who object too vigorously, and he will be perfectly content to bear the additional cost of litigation as the price for continuing his illicit business. **It stands to reason that the chances of deterring him are materially increased by subjecting him to the payment of punitive damages.**

Id. at 909 (emphasis added) (*citing to Walker v. Sheldon*, 10 N.Y.2d 401 (N.Y. 1961)).

This case is a perfect example of the necessity of punitive damages to deter a defendant from continuing to engage in egregious conduct. Safeguard knowingly and with a conscious disregard for dozens of distributors' contractual rights engaged in sales to those distributors' customers. It set aside some money for the potential liability and proceeded to conceal the violations as to all affected distributors. It then sent its general counsel to try to get distributors to relinquish their accounts for pennies on the dollars. Across the country, over 20 BAM acquisitions have resulted in the Account Protection rights of most of Safeguard's 300

distributors being violated. Tr. Vol. I at 1162:2-24. Thurston is their standard-bearer.

Paying compensatory damages will not deter Safeguard. It came out ahead as to most of these distributors. To simply award compensatory damages for the few distributors who had the resolve to fight back against this illicit conduct, is insufficient. *See* Ex. 538 at 12:33:20-12:34:34 (Deluxe's CFO testifying that Account Protection exposure of $4 million "would not be a significant financial risk"); Tr. Vol. I at 1162:25-1163:10 (Safeguard's CEO testifying that he would not consider $4 million in Account Protection violations on a yearly basis to be a large number). To Safeguard and Deluxe the damages are a drop in the bucket and pale in comparison to the hundreds of millions they have made off the BAM Program. The only thing that makes a company like Safeguard think twice before it commits such actions is punitive damages. That is why they exist and that is why they should continue to exist in Idaho.

VII. THURSTON'S FUTURE DAMAGES WERE SUPPORTED BY SUBSTANTIAL EVIDENCE

Thurston's damages expert Robert Taylor provided substantial evidence of future lost commissions based on the previous sales made by IBF and DocuSource to Thurston's Protected Customers. Tr. Vol. I at 1469:3-1471:18, 1503:22-1504:20, 1589:11-25. Taylor then applied Safeguard's own valuation metric of one times annual sales to obtain the present market value of the future stream of commissions from these accounts. *Id.* Taylor testified at length about the use of the metric, that it is an acceptable means in his profession of calculating such damages, and he pointed out that Safeguard itself utilizes the metric. Tr. Vol. II at 1468:25-1476:17. This more than meets the standards set forth by this Court for prospective loss. *See Saint Alphonsus Diversified Care*, *Inc. v. MRI Associates, LLP*, 157 Idaho 106, 116, 334 P.3d 780, 790 (2014)

("the law does not require accurate proof with any degree of mathematical certainty […] Any claim of damages for prospective loss contains an element of uncertainty, but that fact is not fatal to recovery.")[33] Safeguard provided no evidence to contradict or counter these findings. Thus, the jury had substantial evidence upon which to make its findings as to future lost commissions.

Safeguard argues that this valuation metric compensates Thurston for rotated commissions for eight or more years into the future and therefore the metric is faulty. However, that is inaccurate. Thurston's valuation metric took into account future risks and uncertainties. Tr. Vol. II at 1474:19-1476:17, 1482:2-15; 1586:20-1591:13, R. 12728. Sales can always fluctuate and these risks were factored into the one times revenue multiple. *Id.* The multiple is lower than it would otherwise be to account for the risk that future sales and commissions will fluctuate and may even decline. *Id.* Thus, the calculation does not assume that commissions will be paid on all these accounts for any number of years in particular.

Safeguard tries to convert these market value damages into a future lost profits analysis; a different form of damages. However, even if viewed under such a lens, one times annual revenues equates to approximately three years of commissions. Tr. Vol. II at 1471:19-1473:10. This comports with the three year protection on accounts that Thurston had pursuant to the Thurston Distributor Agreement. Ex. 8 at 8.3, 8.13. And even if it did not, Thurston was entitled to damages beyond three years. Thurston's Account Protection provisions remains applicable

[33] *See also Smith*, 140 Idaho at 900 ("[T]he jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly."); *Estate of Curtis v. Costco Wholesale Corp.*, No. 2:13-CV-00074-REB, 2015 WL 1246267, at *8 (D. Idaho Mar. 18, 2015) ("The fact that contract damages 'are not capable of exact proof does not preclude their availability as a matter of law.'")

beyond three years as long as Thurston continued to make sales of some Safeguard Systems to those customers. Ex. 8.3, 8.13. Thus, as the District Court noted, "Thurston's right to commissions might continue into perpetuity." R. 12728. Consequently, even if construed as lost profits damages there was no showing that as a matter of law, the damages were in error.

Safeguard next argues that the future damages do not account for a purported[34] customer attrition rate of 35% and therefore the testimony/evidence therefor was not admissible or substantial. Safeguard's argument is a red herring. If there was simply a customer attrition rate of 35%, then there would barely be an IBF business at all after a few years and nobody would ever buy a business in the Safeguard network. *See* Tr. Vol. II at 1593:3-1595:5 (Taylor testifying that if there weren't future benefits, the metric would not be one times revenue). Just because IBF is losing customers or sales does not mean that it is not simultaneously gaining customers and sales to Thurston's accounts. *See* Ex. 99 at 99.28 (for IBF, the amount of customers went from 1922 in 2011 to 1900 in 2012 despite having a purported 72.6% retention rate).

Future damages are to put a party in the same place as if the contract been performed going forward. *See Anderson v. Gailey*, 100 Idaho 796, 801, 606 P.2d 90, 95 (1980). The evidence showed that IBF and DocuSource were continuing to sell to Thurston's accounts and that while they may have lost some accounts they would have just as likely increased the amount of sales to Thurston's Protected Customers and/or started selling to additional Protected Customers of Thurston's. Had Safeguard performed according to the Agreement, the exact amount of commissions to be rotated would have been known. It is only because of its repeated

[34] Safeguard's testimony does not authenticate the attrition rate. *See* Tr. Vol. I at 456:14-23.

breaches and refusal to abide by the Agreement that Thurston was forced to value the future lost commissions. As the U.S. Supreme Court has noted, "[t]he wrongdoer is not entitled to complain that [damages] cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise." *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563, 51 S. Ct. 248, 250–51 (1931).

Safeguard next argues that even if future lost commissions are given for IBF, that they should not have been given for future DocuSource sales. However, Taylor and Deluxe's Director of Finance Robert Kirlin provided a substantial amount of evidence showing that for multiple years DocuSource has repeatedly violated and concealed the violation of Thurston's Account Protection rights. Tr. Vol. II at 1482:16-1484:1; 1500:13-23; 1974:19-1977:23; 1979:20-1980:1. Safeguard provided self-serving testimony from DocuSource's President Amy Tiller-Shumway claiming that DocuSource was no longer doing business in Idaho. However, Tiller-Shumway's credibility was in dispute and DocuSource could still have been making sales from its offices outside of Idaho. Indeed, no other Safeguard employee testified that DocuSource had stopped selling to Thurston's Protected Customers (DocuSource still is).

Safeguard also argues that future damages cannot be had since the distributorship could be terminated at any time and in that circumstance Thurston was entitled to less commissions. However, Paragraph 7(C) of the Thurston Distributor Agreement restricts Safeguard from terminating the agreement unless certain conditions are met and there was no evidence at trial these conditions existed. Tr. Ex. 8 at 8.6-7, R. 12729.

Safeguard's newest argument is that the distributor agreement was terminated in 1992.

However, that argument was never made to the District Court and therefore is waived. Indeed, Safeguard contended that it was not terminated. R. 9169 ("None of this is to suggest Thurston's agreement would be terminated by either party in the future"). Further, there was no evidence for the proposition that the contract terminated or expired in 1992. Thurston renewed the Agreement multiple times. Indeed, Safeguard and Thurston continued to enter into addendums to the Agreement thereafter. Ex. 8 at 8.22-23, 8.25-26, 8.23-33. For example, in a 2004 addendum, the parties stated that "Distributor and Safeguard acknowledge that all terms of the [Regional Distributor] Agreement remain in effect". Ex. 8 at 8.26; *see also* 8.32-33. Thus, there was no evidentiary basis for using the termination provision to limit Thurston's future damages.

Regardless, as the District Court noted, damages would have been appropriate as "terminating Thurston's distributorship agreement to avoid paying account protection rights would likely trigger potentially liability and recovery of the same damages for breach of the implied covenant of good faith and fair dealing." R. 12729. For these reasons, there was substantial evidence to support the jury's verdict as to future damages.

VIII. THURSTON IS ENTITLED TO ATTORNEYS' FEES AND COSTS FOR THE APPEAL

Thurston respectfully requests an award of costs under I.A.R. 40 and an award of attorneys' fees under Idaho Code Section 12-120(3). Thurston should also be awarded its attorneys' fees as Safeguard brought the appeal unreasonably and without foundation. Idaho Code Section 12-121 allows an award of attorney fees to a prevailing party where "the action was pursued, defended, or brought frivolously, unreasonably, or without foundation." *Idaho Military Historical Soc'y v. Maslen*, 156 Idaho 624, 633, 329 P.3d 1072, 1081 (2014). Attorneys'

fees under Section 12-121 are appropriate here in that Safeguard "has failed to show that the district court incorrectly applied well-established law." *Snider v. Arnold*, 153 Idaho 641, 645-646, 289 P.3d 43, 47-48 (2012).

CONCLUSION

Thurston respectfully requests that the District Court's orders be affirmed and that Thurston be awarded attorneys' fees and costs for the appeal.

DATED this 3rd day of May, 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of May, 2018, I caused a true and correct copy of the foregoing **RESPONDENT'S BRIEF** to be served by the method indicated below, and addressed to the following:

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