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IN THE SUPREME COURT OF THE STATE OF IDAHO

THURSTON ENTERPRISES, INC., an Idaho corporation,

Plaintiff-Respondent,

vs.

SAFEGUARD BUSINESS SYSTEMS, INC., a Delaware corporation,

Defendant-Appellant.

Supreme Court Docket No. 45092-2017

Ada County No. CV-OC-2014-16400

APPELLANT'S REPLY BRIEF

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

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PRELIMINARY STATEMENT IN REPLY

Thurston's[1] response is more notable for what it omits than anything it says. In particular, Thurston does not deny, attempt to minimize, or even address the indisputable fact it never lost a *single dollar* of its own historical sales due to the acquisitions about which it complains. That is the appropriate context in which to consider what is, in reality, no more than an ordinary contract dispute over how to interpret "account protection." As shown in the reply arguments below, SBS's historically-based narrower interpretation is the reasonable one under the plain language. Thurston cannot show otherwise or that its other claims do not suffer from fatal legal errors.

Instead, all that Thurston offers is a fictional narrative mischaracterizing the BAM program as a scheme by Deluxe (exonerated already) to generate hundreds of millions in profits "at the expense" of legacy distributors. This narrative falls flat given the undisputed fact that Thurston did not lose any previously held business and, to the contrary, stands to gain hundreds of thousands (and potentially millions) more _*only as a result of the conduct about which it now complains*_. At its worst, the picture Thurston depicts is one of a rising tide that lifts all boats. Yet, the fact is the BAM program was not a huge boon of profits for SBS (or Deluxe). [*See* Tr. Vol. II at 2017:12-2018:15 (SBS's President discussing how program failed to meet projections).] Rather, the big numbers Thurston throws around—such as the supposed hundreds of millions "made off the BAM Program" [*see* Respondent's Brief ("Resp. Br.") at 53]—refer to *revenue* alone,[2] a misleading and incomplete part of the accounting equation (which Thurston also improperly uses to measure damages) that ignores the corresponding costs and expenses incurred to generate such revenue and

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[1] All capitalized terms not defined herein are defined in Appellant's Brief.

[2] Thurston, in fact, identifies the figures as "revenue" earlier in its brief [*see* Resp. Br. at 13 n.2] and misstates the evidence at that. The revenue *projections* Thurston cites were far less in regard to the BAM program. [*See e.g.*, Tr. Vol. I at 317:8-13 ($72 million).]

operate a business that allows low-overhead commissioned sales agents like Thurston to succeed for thirty years or more. If anything, the BAM program created more stability for Thurston than profit for SBS because it resulted in a purchase of companies that could otherwise cut into Thurston's historical sales. This explains in large part why Thurston lost no sales of its own after the acquisitions and instead increased its profits. [*See* R. 19598 (graph of commissions).]

Nonetheless, Thurston still seeks to vilify SBS as a malicious corporate actor worthy of the "maximum punitive damages allowed under Idaho law." [Resp. Br. at 7.] Thurston argues such a penalty is warranted because SBS knew there would be account protection issues (impacting, at most, 1.9% of Thurston's 4,000 accounts (or $45,529 in sales))[3] and because it was allegedly "oppressive" for SBS to seek to purchase the small percentage of Thurston's account protection rights affected on the well-understood basis that such rights are worth only so much as a distributor *itself* can earn off them. What Thurston suggests instead—relying on an overly broad interpretation of account protection—is that substantial portions of the DocuSource/IBF business SBS purchased should have been turned over to Thurston for free, even if there were "exclusive" contracts Thurston could not assume, customers that had unique specialized requirements Thurston could not fulfill, or it would have resulted in a loss of customers altogether because they did not want to purchase from Thurston. [*See* Tr. Vol. II at 1920:2-1924:11.][4] Otherwise, Thurston can only be

---

[3] Thurston attempts to grossly overstate the overlap by comparing the jury's total damages for account protection ($494,526) to Thurston's *annual* sales ($798,526). [*See* Resp. Br. at 47 n.27.] The damages awarded by the jury included: (i) *three years* of "gross profits" from 2014-2016, plus (ii) more than *eight years* of speculative future losses. The evidence from Thurston's own expert firmly establishes the overlap on a year-to-year basis was 1.9% of Thurston's 4,000 accounts, where it had an annual sales total of only $45,529. [*See* App. Br. at 33 & n.15 (citing evidence).]

[4] [*See also* Tr. Vol. I at 1053:5-1055:7; Ex. 266 (further discussing customer requirements).]

demanding that SBS should not have made any acquisitions in the first place, leaving 260+ distributors and thousands of employees at risk as the market evolved.

In reality, there was no scheme to harm distributors (or anyone). The acquisitions simply made good economic sense given the changing market and timing. No one could reasonably have anticipated that what occurred here would occur – *i.e.*, an award of "gross profits" on crossover sales to entire organizations by name alone plus excessively speculative future damages for 8+ years, duplicative good faith-fair dealing ("GFFD") damages on top of all that, and then punitive damages multiplying everything by a further factor of three. The parties agreed in their contract to a remedial structure that provides for up to 36 months of account protection and, in the event of a termination, agreed to pay Thurston 50% of commissions on "repeat" sales (which reflect the right is limited to Thurston's sales only) for up to four years after a termination. [*See* Ex. 8 at 8.8-8.9 (¶ 9) (post-termination payments).] If SBS had any idea a potential 1.9% customer overlap (theoretically affecting only $45,529 of Thurston's sales) could somehow be manufactured into a $6.8 million judgment, it certainly never would have done the acquisitions. Notably and ironically, however, all indications are that Thurston would be *worse* off if the acquisitions had not occurred. Clearly, the imposition of punitive damages in this contract case greatly distorts matters.

In the end, this entire suit is founded on a simple contract dispute between two sophisticated commercial parties over how to construe the ambiguous concept of "account protection." As such, there is no legitimate reason to award punitive damages even under current standards of Idaho law, particularly since Thurston shows no special harm to itself and is made more than whole by compensatory damages. The only justification Thurston offers for what can be described as nothing less than a windfall of $6.8 million—far in excess of any contractual expectation Thurston could have ever had—is a mere recitation of the word "deterrence." Yet, as the authorities provide,

deterrence in a commercial context such as this (as opposed to a small insurance or consumer case) really means that businesses will be more wary of entering into contracts at all in Idaho.

Due to the errors discussed in the opening brief and addressed further below, this Court should reverse Thurston's judgment and eliminate specific claims as a matter of law.

REPLY ARGUMENT

I. THE CONTRACT'S ACCOUNT PROTECTION LANGUAGE IS AMBIGUOUS; THE DISTRICT COURT ERRED IN RULING IT WAS BREACHED AS A MATTER OF LAW.

Thurston acknowledges that "account protection" is the central issue for all claims – in fact, the "backbone" of its entire case. [*See* Resp. Br. at 7.] Accordingly, an error by the District Court in its interpretation of the contract requires a full reversal of Thurston's judgment. That is exactly what must occur because Thurston fails to refute the plain language is ambiguous.

At the outset, Thurston incorrectly asserts a broad overall waiver in arguing that SBS "conceded" *at trial* the correctness of Thurston's interpretation of account protection. [*See* Resp. Br. at 19.] That is preposterous given the procedural posture. For a waiver to occur, there must be "a *voluntary*, intentional relinquishment of a known right or advantage." *Pocatello Hosp., LLC v. Quail Ridge Med. Inv'r, LLC*, 156 Idaho 709, 719, 330 P.3d 1067, 1077 (2014) (emphasis added). As part of the District Court's incorrect summary judgment ruling on liability, however, the court ordered that only damages could be contested at trial. [*See* R. 5814-15.] SBS had no choice but to proceed at trial as if the District Court's liability ruling was correct and dispute damages on that theory. SBS thus offered an accountant from its finance department who calculated the proper amount of damages that would result from the District Court's liability ruling. [*See* Tr. Vol. II at 1961:3-22 (testifying approximately $200,000 in commissions would be due for DocuSource/IBF sales to organizations overlapping by name alone).] Thurston's attorney cross-examined that witness in an attempt to paint SBS as a bad actor for not paying that to Thurston prior to trial, to

which the witness appropriately responded that no payment was made because the matter (*i.e.*, the legal interpretation) was disputed. [*See* Tr. Vol. II. at 1975:15-1976:19.] No waiver occurred by that testimony[5] or otherwise, nor could it possibly occur given the District Court's prior ruling.

As a result, Thurston appears to be implying that SBS could not address damages at trial without necessarily waiving its right to appeal the District Court's liability ruling. That is not consistent with Idaho law on preserving error[6] or waiver. Nor would it be a prudent rule to adopt because it would require a defendant in SBS's position—where liability is already determined by a court—to argue to a jury that the court committed legal error, no doubt drawing the immediate ire and admonishment of the judge (if not sanctions). Issue 1 was not waived at trial.

Thurston next offers scant arguments on the merits that fail to show there is no ambiguity.

First, Thurston asserts the phrase "new and repeat … sales" in Paragraph 3 of the Interim Distributor Agreement [Ex. 8 at 8.3 (¶ 3)] means its account protection extended to all sales to a customer even if involving unique products/services that Thurston never sold (or offered) the customer before. [*See* Resp. Br. at 20.][7] That is Thurston's interpretation, but not the only (or

[5] SBS's counsel also objected on the basis that the witness had no authority to answer, which is apparent given the legal conclusion inherent in the question. [*See* Tr. Vol. II at 1975:25-1976:5.]

[6] All that is required is an adverse ruling—such as the District Court's ruling on summary judgment here—to preserve appeal. *See In re Guardianship of Doe*, 157 Idaho 750, 758, 339 P.3d 1154, 1162 (2014) (party not required to seek reconsideration to preserve appeal); *Idaho Power Co. v. Idaho Dep't of Water Res.*, 151 Idaho 266, 279, 255 P.3d 1152, 1165 (2011) ("It is well established that in order for an issue to be raised on appeal, the record must reveal an adverse ruling which forms the basis for an assignment of error.").

[7] Thurston generically asserts it could sell the same products as IBF, but the evidence does not support that claim. The W-2 processing sold by IBF was uniquely developed by that company [*see* Tr. Vol. II at 1221:25-1223:12] and customized items like medical ID bands are not listed in Thurston's cited affidavit. [*See* Resp. Br. at 19 n.6 (citing R. 4432-33).] Further, the ability to sell a particular type of product does not speak to the specialized or *high-volume* requirements demanded by IBF's customers, such as the warehousing and drop shipping necessary for "same day" service. [*See* Tr. Vol. II at 1923:8-18; *see also id.* at 1225:15-19.] Further, even assuming

correct) one. Rather, the phrase "new and repeat" is fully consistent with SBS's product-specific view because the word "new" in that context does not necessarily mean products a distributor has never sold or offered a customer before. While a *repeat* of the original order for a product/service would have the exact same quantity or terms as before, a *new* order for the *identical* product/service would be one with a different quantity or terms. That is the interpretation supported by common definitions. *See* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 834 (11th ed. 2009) (defining "new" as both "the resumption or repetition of a *previous* act or thing" and "from one of the *same category* that has existed previously") (emphasis added).[8] As such, the phrase "new and repeat … sales" is easily limited to only the specific products Thurston was first to sell to a customer and does not include unique specialized products that Thurston never sold or offered to a customer

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Thurston *could* make such specialized sales, the evidence demonstrates Thurston *consciously chose not to* in the past since it operated without a warehouse or inventory (benefiting from low overhead) and relying instead on low-volume sales averaging $200 per year to a broad customer base (4,000). As such, Thurston and DocuSource/IBF were operating in completely different markets, even for the small percentage (1.9%) of overlapping organizations that both had sold to for years prior to the acquisitions. [*See* Ex. 68 (Thurston offering inside information on IBF prior to SBS's acquisition); Tr. Vol. I at 1113:24-1114:15 (Thurston long familiar with IBF's accounts).]

[8] The conjunctive form of the phrase "new *and* repeat" further supports the conclusion that the language is referring to additional sales of the same product/service over which account protection was obtained rather than an entire customer by name. Idaho law interprets "or" as "a disjunctive particle used to express an alternative or to give a choice of one among two or more things," *Phillips v. Gomez*, 162 Idaho 803, 810, 405 P.3d 588, 595 (Idaho 2017), whereas the conjunctive "and" joins items. *See, e.g.*, *In re Brink*, 117 Idaho 55, 57, 785 P.2d 619, 621 (1990) ("The word 'and', as used in 'probable cause to stop and request', is plainly conjunctive. It joins together the words 'stop' and 'request'. The result is that the officer must have probable cause to stop the driver and probable cause to request that the driver submit to a blood alcohol content test."). That establishes the word "new" in "new *and* repeat … sales" is being used in a *complementary* form to emphasize the right applies to additional sales of products for which account protection was obtained, not entirely "new" products/services that Thurston never sold to a customer before.

(such as IBF's W-2 processing or medical ID bands). SBS's interpretation of account protection as product-specific is supported by the plain language. The District Court erred in ruling otherwise.

Thurston's brief goes on to make some odd contentions that are easily dismissed. For example, Thurston asserts its contract applies account protection to entire customers without regard to products sold (despite the defined term of "Safeguard Systems" being based on *product* addenda), yet cites only an "attachment" to a different asset purchase agreement. [*See* Resp. Br. at 21 (citing Ex. 387, which is KMMR's purchase in April 2015).][9] It is only the language in the four corners of *Thurston's contract* that matters, not unrelated extrinsic documents. Even more bizarre is Thurston's contention that the definition of Safeguard Systems should be disregarded as "inserting provisions" into the contract that "are not there." [*See* Resp. Br. at 21.] Contractual definitions are fundamental to determining contract rights. *See Idaho Trust Bank v. Christian*, 154 Idaho 657, 659, 301 P.3d 1275, 1277 (2013) (parties "are free to define in the contract words that are used therein, even if those definitions vary from the normal meanings of the words," and using contract definition to construe rights). It is only when a term is undefined that this Court looks to common usage, such as dictionary definitions. *See Swanson v. Beco Const. Co.*, 145 Idaho 59, 62, 175 P.3d 748, 751 (2007) (using Webster's to determine meaning of "working day" when term not defined in contract). The contract's definition of "Safeguard Systems" must be considered and, when considered, demonstrates ambiguity as to whether the account protection right is product-specific. [*See* App. Br. at 13.] Thurston also contradictorily attempts to sidestep Idaho law in regard to undefined words as well, relying on a Wisconsin case to suggest there is no latent ambiguity with the term "customer." [*See* Resp. Br. at 22 (citing *Mattheis by Vowinkel v. Heritage Mut. Ins.*

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[9] Notably as well, the customer list Thurston cites—pages 5-64 of Exhibit 387—has a column identifying the specific "contact" person for many organizations, which supports SBS's interpretation of the right as limited to specific billing points within larger organizations.

Co., 487 N.W.2d 52 (Wisc. Ct. App. 1992)).] However, *Mattheis* ruled the word "customer" was not ambiguous only in the context of the specific insurance contract it was interpreting in that case because the relevant policy exclusion was not directed at a person's "status" as a purchaser. *Id.* at 53-55 (finding exclusion meant to apply when a customer of the mechanic shop that was insured had their own insurance to cover the wreck of a loaner car, which would include a family member who was not the actual *purchaser* of services). That case has no application here because the term "customer" in the Interim Distributor Agreement plainly is directed at a person's status as a purchaser of Safeguard products. As shown in the evidence SBS submitted at summary judgment [*see* R. 5400-04, 5453-5528], there is a latent ambiguity regarding whether "customer" means an entire organization by name alone or only the specific billing points within an organization.

Lastly, Thurston offers a bevy of unfounded assertions for partial waiver. Thurston claims SBS's trial counsel "conceded" during oral argument on summary judgment that the unique products/services developed and sold by IBF are all "Safeguard Systems" for purposes of Thurston's contract addenda. [*See* Resp. Br. at 21] That contention is debunked in the opening brief. [*See* Appellant's Brief ("App. Br.") at 14 n.8 (noting counsel's colloquy with the District Court was acknowledging only that the products were Safeguard Systems for *IBF's contract*; not Thurston's contract).] In any case, a legal determination of contract language should not be based on such a vague colloquy. The contract language itself controls. Thurston next claims the latent ambiguity with the term "customer" was never raised to the court below. [*See* Resp. Br. at 22.] To the contrary, SBS discussed it in great detail in SBS's summary judgment opposition [*see* R. 5400-02], as fully acknowledged by the District Court's order. [*See* R. 5812 (noting: "Safeguard asserts that the Account Protection described in the RDA is product-specific and *account-specific*, and originated as a methodology to prevent a distributor from losing the commissions on a sale of a particular product to a particular customer") (emphasis added).] Either way, this Court requires

only that an "issue" be raised to the court below, not the exact same legal argument. *See Ada Cty. Highway Dist. v. Brooke View, Inc.*, 162 Idaho 138, 143n.2, 395 P.3d 357, 361 n.2 (2017). Finally, Thurston appears to incorrectly suggest that SBS cannot rely on the testimony of its own executives to show latent ambiguity if those individuals were not present when the contract was executed three decades ago. [*See* Resp. Br. at 23.] Thurston confuses the evidence needed to show a latent ambiguity with establishing intent at the time of contracting. There is no time limitation on demonstrating a latent ambiguity. *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.") (emphasis added); *In re Estate of Kirk*, 127 Idaho 817, 824, 907 P.2d 794, 801 (1995) (after-the-fact extrinsic evidence regarding how documents kept in binder by testator established latent ambiguity). Furthermore, the record fails to show Thurston moved to strike SBS's summary judgment affidavits for lack of personal knowledge or any other evidentiary ground.[10] As such, Thurston waived its evidentiary objections for purposes of this appeal. The testimony SBS submitted regarding what a "customer" means (*i.e.*, specific billing points within an organization) was more than sufficient to demonstrate a fact issue precluding summary judgment.

For all the reasons identified by SBS in its opening brief and above, there is ambiguity regarding the meaning of account protection that required a denial of Thurston's summary judgment. The District Court erred in failing to do so. Thurston's judgment must be reversed.

[10] Further, the testimony SBS offered is admissible through several hearsay exceptions. *See, e.g.*, I.R.E. 803(20) (reputation concerning "general history"); 803(24) ("equivalent circumstantial guarantees of trustworthiness"); 804 (unavailability of person executing contract 30 years ago).

II. THE DISTRICT COURT'S ERROR AS TO ATTORNEY-CLIENT PRIVILEGE STILL REQUIRES VACATING THE JUDGMENT IN FULL.

As to Issue 2, Thurston makes misplaced waiver arguments and offers no legal support for the District Court's ruling on attorney-client privilege. None of Thurston's points have merit, but SBS will nevertheless simplify the review in terms of the documents at issue, as provided below.

A. SBS Limits its Appeal to the Documents Identified by Thurston.

Thurston incorrectly claims that SBS's privilege as to fourteen documents identified in the opening brief were waived by production because only seven match up by Bates label to the District Court's order. [*See* Resp. Br. at 24 n.10 (identifying Exhibits 157, 245, 267, 327, 336, 352, and 356 as matching).] The privilege was not voluntarily waived as Thurston contends (and SBS reserves the right to litigate the matter further on remand or otherwise). In any event, to simplify the review at this point, SBS agrees to limit its arguments on Issue 2 to the seven documents identified by Thurston. Those documents are sufficient to mandate reversal on their own. As such, the term "Privileged Documents" for the opening brief and this reply is hereby redefined to encompass only Exhibits 157, 245, 267, 327, 336, 352, and 356, as identified by Thurston.

B. Attorney-Client Privilege Was Not Waived by Contesting Damages at Trial.

Thurston misstates the case law it cites to argue a waiver occurred as to the seven redefined Privileged Documents on the basis that SBS failed to object to their admission during trial. [*See* Resp. Br. at 25.] In particular, Thurston cites *Kirk v. Ford Motor Co.*, 141 Idaho 697, 116 P.3d 27 (2005), for the proposition that a party "is required to continue to object as the evidence is presented" or else they waive privilege. [*See* Resp. Br. at 25.] That is not what *Kirk* provides. Indeed, the partial quote offered by Thurston refers only to what a party must do to preserve error when a court's ruling on an objection is deferred *after denying a motion in limine*. *See Kirk*, 141 Idaho at 701-02. In that instance, a party must object as evidence is presented so the court can rule or else the objection is waived. That is not what occurred here. Prior to trial, the District Court

fully *overruled* SBS's assertion of privilege without qualification. [*See* R. 2226-27.] *Kirk* provides that no objections at trial are necessary to preserve error in the circumstances present in this case. *See* 141 Idaho at 702. Thurston's selective quotation of *State v. Gray*, 129 Idaho 784, 932 P.2d 907 (Ct. App. 1997), likewise fails because, in context, that case stands for the proposition that evidence a court excludes by granting a motion in limine must still be objected to if nonetheless offered at trial by the other party. *See id.* at 794 ("Agreeing to the admission of evidence *which was previously deemed inadmissible*[11] is a waiver of the prior objection.") (emphasis added). Again, that is not the issue here. The District Court did not sustain SBS's privilege and Thurston nonetheless offer the privileged documents at trial without objection or by stipulation (indeed, Thurston never would have had the documents in that scenario); rather, SBS's privilege was fully *overruled* prior to trial. There was no obligation for SBS to object further at trial and any stipulation to the admission of the documents was knowingly made only in regard to all evidentiary grounds not yet ruled upon by the District Court (*e.g.*, authenticity, relevance, hearsay, etc.). Thurston's proposed requirement that a party repeatedly object after being overruled serves no legitimate purpose other than to delay proceedings and prejudice a party by unnecessarily irritating a trial judge. There is no requirement in Idaho law to do that in order to preserve error.

As a result, there was no waiver by SBS of the right to appeal the District Court's ruling.

C. Thurston Fails to Demonstrate the District Court Could Rely on Federal Cases to Create a Presumption Against In-House Counsel.

As to the substance of the District Court's ruling on attorney-client privilege, there is no dispute by Thurston that I.R.E. 502 does not state a presumption against in-house lawyers (or make any distinction among "lawyers"). Rather, Thurston justifies the District Court's order primarily

[11] The emphasized words are omitted in Thurston's citation. [*See* Resp. Br. at 25.]

on the basis of federal cases. [*See* Resp. Br. at 26.] Idaho law does not support doing so in this instance.

Indeed, it is well recognized that, while district courts in Idaho have discretion in their evidentiary rulings, the power to exercise such discretion does not include altering or disregarding specific rules and standards. In 2009, this Court quoted with approval the following by Judge Burnett regarding the type of "broad discretion" asserted by Thurston:

> The law of evidence is structured by rules, forged by centuries of experience and continually tested against evolving notions of fairness and truth-seeking. Our Supreme Court recently has adopted a detailed and painstakingly drafted formulation of such rules. *See* Idaho Rules of Evidence (effective July 1, 1985). These rules are not mere precatory guides to discretion; they are standards controlling the outcome of evidentiary questions. A trial judge possesses no 'discretionary' authority to alter or to disregard specific standards—particularly in criminal trials, where these standards impart real meaning to an accused's right to a fair trial. Discretion is properly exercised only when a rule of evidence calls for it.

State v. Watkins, 148 Idaho 418, 421, 224 P.3d 485, 488 (2009) (quoting *State v. Maylett*, 108 Idaho 671, 674, 701 P.2d 291, 294 (Ct. App. 1985)). The principle articulated by Judge Burnett should be equally applicable to protect a person's right to a fair trial in a civil case or arbitration. Contrary to the rule of *Watkins*, however, the District Court here improperly modified I.R.E. 502 to overrule SBS's privilege by incorporating a presumption against in-house counsel that is recognized by only a small number of federal district courts. [*See* R. 2221.] Those courts, however, are expressly allowed to do so under Federal Rule of Evidence 501, which provides that:

> The common law – as interpreted by United States courts in the light of reason and experience – governs a claim of privilege unless any of the following provides otherwise: the United States Constitution; a federal statute; or rules prescribed by the Supreme Court … [or state law when it supplies the rule of decision.]"

The Idaho Rules of Evidence do not grant such power to Idaho courts. Thus, the District Court had no authority to rely on federal cases to create a new presumption not stated in I.R.E. 502.[12]

There is no justification for a presumption either. The reason that I.R.E. 502 does not make a distinction between in-house and outside lawyers is because the rule was drafted to incorporate the concepts of protecting attorney-client privilege articulated by I.C. § 9-203, which states:

> There are particular relations in which it is the policy of the law to encourage confidence and to *preserve it inviolate*; therefore … [a]n attorney cannot, without the consent of his client, be examined *as to any communication* made by the client to him, or his advice given thereon in the course of professional employment. The word client used herein shall be deemed to include a person, a corporation or an association.

I.C. § 9-203(2) (emphasis added). Accordingly, I.R.E. 502(5) provides that the privilege applies to *any* confidential communication between lawyer and client regardless of whether it contains facts, so long as it is in "furtherance of the rendition of professional legal services." Notably, I.R.E. 502 does not define "professional legal services," instead leaving it to the Idaho Rules of Professional Conduct ("IRPC"). Under the IRPC, professional legal services includes far more than "pure legal advice," stating in the preamble that "a lawyer performs various functions" before going on to list a few of those as advisor, advocate, negotiator, and evaluator of a client's legal affairs. *See* IRPC, Preamble at [2]. The rendition of professional legal services thus expressly includes communications between lawyer and client that may not appear on their face to be requesting or providing legal advice. The full context of the communication matters and the scope

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[12] An Idaho district court may follow federal cases when interpreting Idaho rules only when the applicable versions contain identical language. *See Wait v. Leavell Cattle, Inc.*, 136 Idaho 792, 796, 41 P.3d 220, 224 (2001) ("The above-quoted language in *Chacon* stated our preference for interpreting the Idaho Rules of Civil Procedure in conformance with the interpretation placed upon the same language in the federal rules. That preference is obviously limited to situations in which our rules and the federal rules contain identical language."). The Idaho Rules of Evidence do not contain a counterpart identical to Federal Rule of Evidence 501.

of privilege is far broader than Thurston (or the District Court) recognized. In particular, a lawyer acting as a negotiator for his or her client—as Dunlap did for SBS in trying to resolve account protection—is expressly rendering a professional legal service.

Accordingly, the District Court abused its discretion by construing I.R.E. 502 to contain a presumption against in-house counsel and limiting the privilege to "pure legal advice."

D. The Record Demonstrates Prejudice Against SBS.

Thurston contends the District Court's error was "harmless" [*see* Resp. Br. at 29], but that is contradicted by Thurston's own actions at trial. Thurston made sure all the Privileged Documents were submitted to the jury and specifically relied on them for the presentation of evidence and closing argument. In particular, Thurston examined SBS's General Counsel, Michael Dunlap, in significant detail on Exhibits 157 and 267 [*see* Tr. Vol. I at 879:7-885:12, 983:2-986:7, 994:13-998:11], and SBS's President, J.J. Sorrenti, in regard to Exhibits 327, 336, and 356. [*See* Tr. Vol. II at 1281:20-1285:8, 1289:17-1291:21, 1296:5-1299:2.] Further, Thurston based a large part of its closing argument on Dunlap's role as a lawyer and legal matters discussed in the Privileged Documents, as reflected by the following sample of statements by Thurston's counsel, highlighting the advice given to SBS by its in-house counsel:

- "And there's only one way around that, you've got to violate the contract. You've got to say we're going to figure another way to get out of it, and it's going to be extra legal, but we're going to use our lawyer, who I referred to as the utility tool, and I said that for this reason: Lawyers represent clients. Lawyers are servants for their master, the client. They don't run the business, they do the dirty work. That's what lawyers do, and that is what Mr. Dunlap did." [Tr. Vol. II at 2237:16-24.]
- "So what does the lawyer [Dunlap] say, he says to his client, Sorrenti, 'She should get together with Dawn ASAP and transfer the files unless the decisions previously made are reversed.' Mr. Sorrenti doesn't miss a beat, 'Since the decision, in essence, is being appealed, can you and I sit down with this data' etcetera." [Tr. Vol. II at 2257:6-12 (quoting Exhibit 267).]

- “So what happens then? Sorrenti is talking to Dunlap who says to him, you know, this is kind of a problem. He says, ‘The risk here is still that Ms. Teply may claim or request all commissions paid to IBF since they became a Safeguard entity, sort of like what the Strongs are claiming.’ ” [Tr. Vol. II at 2258:19-24 (quoting Exhibit 327).]
- “So go to the next one, please. I am mentioning to you this notion that there’s no question that Safeguard knows exactly what its account protection provides for, and here is the perfect proof of it. Remember I told you in September of 2013 Dunlap was trying to set up a meeting with McLaughlin and Dawn and Roger for October 2nd. And these people -- he’s the lawyer, he couldn’t get her to give him the time of day. She wouldn’t make herself available. And so he says to Tiller Shumway at Safeguard, ‘We simply tell distributor accounting that if there is a conflict with the legacy distributors, the rule applies and it rotates to the legacy distributor.’ ” [Tr. Vol. II at 2268:10-22 (quoting Exhibit 157).]

All of the closing statements above were based on privileged information disclosed to Thurston only as a result of the District Court’s attorney-client privilege ruling. This demonstrates sufficient prejudice. Indeed, as this Court has noted, the prejudice caused by erroneous disclosure of attorney-client privilege is “obvious” without undertaking any analysis of whether a jury relied on the information. *See State v. Iwakiri*, 106 Idaho 618, 621, 682 P.2d 571, 574 (1984); *see also Frontier Ref., Inc. v. Gorman-Rupp Co., Inc.*, 136 F.3d 695, 706 (10th Cir. 1998) (finding prejudice in that “[t]here is too great a risk that a jury would accord significant or undue weight to the testimony and admissions of a party’s own lawyers”). Indeed, to speculate the jury here did not place any weight on the Privileged Documents is implausible, particularly since, as Thurston highlights, the jury awarded the *maximum* amount of punitive damages possible against SBS whereas, in contrast, Deluxe was exonerated in full. If anything, Thurston’s own actions demonstrate that Thurston viewed the Privileged Documents as critically important to its case.

Thurston’s citation of *Naccarato v. Vill. of Priest River*, 68 Idaho 368, 195 P.2d 370 (1948), does not change that conclusion. *Naccarato* involved routine evidence that “varied from the pleadings,” not an improper disclosure of the “inviolate” attorney-client privilege. *Id.* at 373; I.C.

§ 9-203(2). Further, the quote from *Naccarato*, offered only in truncated form by Thurston, is cited in full here and described a situation far different from this case: "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 *which was introduced previously or subsequently without objection*." *Id.* (emphasis added to show excerpt that Thurston omits). The Privileged Documents were introduced only after the District Court overruled SBS's privilege. *Naccarato* does not apply.

In sum, the District Court abused its discretion in construing I.R.E. 502, and that error prejudiced SBS because Thurston relied heavily on the Privileged Documents at trial to obtain its judgment. The judgment for Thurston must be reversed and remanded for a new trial.

III. THE FRAUD CLAIM FAILS REGARDLESS OF A DUTY TO DISCLOSE.

As to Issue 3, while Thurston provides a list of bullets that summarize the evidence its attorneys were able to construct for a "fraud" claim [*see* Resp. Br. at 30], that evidence is irrelevant to the legal issue on appeal. The District Court's post-judgment ruling determined, under I.R.C.P. 50(b), that Thurston was aware of post-acquisition sales by IBF to <u>*all nine*</u> organizations in at least a "trivial" or "insignificant" amount.[13] [*See* R. 12733.]

Therefore, the only question is whether the District Court, after making a determination of what the evidence supported, properly concluded the jury could still return a verdict of fraud in favor of Thurston despite Thurston's awareness of any amount of post-acquisition sales by IBF to each of the nine organizations. The issue boils down to whether the District Court employed faulty logic for its legal conclusion when denying JNOV on the fraud claim. Framed in the arguments of

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[13] Thurston certainly knew the sales were far more than "insignificant" as exemplified by the $27,000 it received for Norco when Thurston's own sales to that company were minimal. [*See* Tr. Vol. II at 1872:24-1875:8 (Mr. Thurston stating Dunlap offered $25,000 on Norco and "… with that I thought that he knew more information on what IBF, which he did as far as the product lines, so I figured he was reflecting *what IBF was selling in there* …") (emphasis added).]

the parties' briefs, the point of contention is whether the fraud claim depends on Thurston's awareness of: (a) any sales occurring at all or (b) the specific dollar amount of sales.

Thurston contends it is the latter, asserting SBS had an implied contractual duty to disclose to Thurston the specific dollar amount of ongoing sales by IBF—based on a broad notion of account protection—through a claimed right to receive monthly "rotated" commissions on IBF's post-acquisition sales as they were made. [*See* Resp. Br. at 32 (citing R. 5830).] Notably, that is all moot if the scope of the account protection right is ambiguous (which makes the fraud claim derivative of that error). Nonetheless, the fraud claim still fails on its own because the fact that no rotated commissions were paid *at all*, in any amount, while Thurston knew any sales were occurring to each organization, only reinforces the conclusion that Thurston was aware of the omission upon which it relies. Given the District Court's conclusion that the evidence shows Mr. Thurston knew post-acquisition sales were occurring to *each* of the nine organizations—regardless of a subjective assumption[14] that they were "insignificant" or "trivial"—while also knowing he was not receiving the specific dollar amount of those sales (by rotated commissions or otherwise), establishes that Thurston's decision to enter into the March 2014 agreement on the basis of its own sales figures was not due to fraud. Rather, it was a conscious choice made by Mr. Thurston to forgo the known missing information and value the transaction based on something else.

[14] The evidence reflects, at best, a subjective assumption since both sides agreed Dunlap provided zero information on the amount of IBF's sales. It is further noteworthy that Mr. Thurston touted he was a 30-year veteran of the business who had special "inside information" on IBF [*see* Ex. 68] and was long aware of IBF's operations [*see* Tr. Vol. I at 1113:24-1114:15; Tr. Vol. II at 1786:5-9 (testifying he knew IBF was "in the accounts we have" as well)], and that when Mr. Thurston first requested sales information as to specific customers, only after the March 2014 transaction [*see* Ex. 309.1 (April 2014); *see also* Ex. 310.2 (acknowledging he knew of post-acquisition sales well before then)], the requested information was in fact provided by Dunlap. [*See* Ex. 311.]

Therefore, Thurston's response argument changes nothing. There is no fraud regardless of a duty to disclose. This Court should eliminate the claim and damages ($442,400, plus $1,327,200 in related punitive damages) regardless of whether the judgment is otherwise reversed.

IV. THE "PRICING" CLAIM FAILS AS A MATTER OF LAW.

Thurston misconstrues SBS's appeal as to Issue 4 as well – the so-called "pricing" claim. SBS makes no challenge to a jury finding or determination. The only challenge is to the *District Court's ruling* that the relevant contract provision is ambiguous. Determining ambiguity is a legal matter decided by a court alone, *see Swanson v. Beco Constr. Co., Inc.*, 145 Idaho 59, 62, 175 P.3d 748, 751 (2007) ("free review" over ambiguity), and the plain language of Paragraph 1 does not create any guarantee of uniformity in the way alleged by Thurston.

Thurston's primary contention is that the words "in accordance with the price schedules published by Safeguard …" at the end of Paragraph 1 in the Interim Distributor Agreement could mean Thurston had a right to "sell" products "at the price schedules Safeguard publishes to *other distributors*." [Resp. Br. at 34 (emphasis added).] That explanation outright fails because there is no reference to "other distributors" in the plain language. Furthermore, Paragraph 1 actually states only that Thurston had a right to "solicit the sale" of products at certain retail prices. That is fundamentally different from Thurston's claim of a right to uniform *commission* levels (or "base" prices) after sales are fulfilled by SBS. And, again, as much as Thurston may wish to walk back its testimony now, Mr. Thurston admitted on the stand, under oath, that the "price schedules" in Paragraph 1 are only "suggested retail prices" *for customers*.[15] As the District Court correctly determined at summary judgment, there is no mention of uniformity as to commission rates or

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[15] [Tr. Vol. II at 1861:20-24 ("Q. My question to you is the price schedule that is referenced here, that is [SBS] suggested retail prices for sale to the customer, correct? **A. That is the *suggested retail prices* and any changes you can do through the CMS system.**") (emphasis added).]

"base prices" among distributors in the plain language of the contract. [*See* R. 5814 (District Court stating that, "[w]hile Paragraph 1 does not *expressly* require Safeguard to offer the same price schedules and charge the same source fees to all of its distributors …") (emphasis added).]

Where the District Court's analysis went awry was further offering that the concluding language of Paragraph 1 ("… and on the terms and conditions set by Safeguard from time to time") could create ambiguity as to whether SBS set a requirement of uniformity outside the contract. [*See* R. 5814.] Yet, that language strongly indicates that SBS has complete discretion to modify retail "price schedules" such that Thurston's claim fails. Nevertheless, if such a phrase creates ambiguity, the only type of ambiguity it could possibly create is a latent ambiguity regarding what SBS's other "terms and conditions" stated. As a result, if no latent ambiguity was shown to exist (*i.e.*, if there was no evidence of other relevant terms and conditions), then the analysis goes back to the plain language and the claim must be dismissed for the same reasons discussed before.

Again, there was no evidence at trial that SBS has any general "terms or conditions" requiring it to provide uniform base prices or commission levels. [*See* App. Br. at 27-28.] Thurston's response does not dispute that. [*See generally* Resp. Br. at 33-36.] Consequently, no ambiguity was shown—patent or latent—and the legal review on JNOV never should have considered Mr. Thurston's subjective beliefs regarding the intent behind Paragraph 1. The plain language simply does not provide a pricing guarantee that would support Thurston's claims of being damaged by 40% for all its envelopes and laser check sales to any customer over three years. [*See* Resp. Br. at 33; R. 19613 (illustrating breadth of damages sought).]

Contrary to Thurston's suggestions as well, there is nothing "superfluous" about a plain language reading of Paragraph 1. [*See* Resp. Br. at 34.] SBS can publish *suggested retail prices* for distributors to use (much like a "manufacturer's suggested retail price," or MSRP, at a dealership), have other terms and conditions that give distributors the flexibility to offer lower

retail prices to customers for a compressed commission (*i.e.*, the "flex pricing" program), and at the same time provide discounts for individual situations as appropriate to the business. Further, nothing prevents a distributor, including Thurston, from negotiating better rates than other distributors. As a matter of fact, Mr. Thurston admitted at trial that his company received such favorable special discounts at times [*see* Tr. Vol. II at 1862:14-21], confirming he knew Paragraph 1 was limited to retail prices for customers – not base prices or commissions. Indeed, it is only by reading the language as Thurston proposes that Paragraph 1 becomes nonsensical, because then it would mean SBS agreed, by way of a contract with Thurston, to bar itself nationwide from being able to give discounts to get a new customer in the door or encourage high-volume orders.

The final argument by Thurston—that SBS waived any ability to argue the contract is not ambiguous [*see* Resp. Br. at 34]—is roundly rejected by Idaho law. In its post-judgment order, the District Court did indeed suggest that SBS may be estopped from arguing Paragraph 1 is not ambiguous because SBS's opposition to summary judgment on the issue referred to a "fact dispute." [*See* R. 12730.] To the extent the District Court so ruled, however, that was plain error. SBS plainly opposed Thurston's summary judgment on the substantive basis that:

> … [N]othing in this provision (or in the attached addenda, for that matter) says anything about the price schedules available to [Thurston] tracking with those of every other distributor nationwide. Thus, contrary to [Thurston's] argument, SBS was under no contractual obligation to offer the same pricing schedules to [Thurston] as those of other distributors, and it therefore follows that SBS did not breach Section 1 of the Distributor Agreement.

[R. 5415 (citations omitted).] Although SBS's briefing generally referred to the above as creating a "factual dispute" preventing summary judgment [*id.*], the argument centered on the unambiguous legal effect of the contract's plain language. Further, as a matter of law, estoppel applies only to preclude a party from "advantageously taking one position, then subsequently seeking a second position that is incompatible with the first." *See Liberty Bankers Life Ins. Co. v. Witherspoon,*

Kelley, Davenport & Toole, P.S., 159 Idaho 679, 686-87, 365 P.3d 1033, 1040-41 (2016). There is nothing "incompatible" between SBS's summary judgment and JNOV arguments (both are based on the plain language) and SBS received no "advantage" by referring to a fact dispute at the summary judgment stage. The mere denial of summary judgment left the claim pending. If that created an advantage to anyone, it accrued to Thurston because then there was still an opportunity to prove the claim before SBS moved for its own judgment as a matter of law (as SBS did in its JNOV motion). Accordingly, there was no estoppel of SBS's JNOV argument.

As requested in the opening brief, this Court should eliminate the so-called "pricing" claim and its damages ($156,628) regardless of a reversal of the judgment otherwise.

V. THE GOOD FAITH-FAIR DEALING CLAIM REMAINS DUPLICATIVE AND UNSUPPORTED.

In the opening brief, SBS argued that the GFFD claim should be eliminated on grounds that: (a) the District Court erred in denying summary judgment on the claim, (b) Thurston improperly shifted damage theories halfway through trial, and (c) there is insufficient evidence to support the theory that Thurston was transformed into a non-Safeguard distributor or suffered a two-thirds loss in "marketability." SBS addresses Thurston's responses to each below.

A. Error on the Summary Judgment Ruling Was Not Waived.

Thurston asserts waiver based on a belief that SBS never argued for its own summary judgment that the GFFD claim was duplicative of the express contract claims. [*See* Resp. Br. at 36-37.] However, Thurston takes too broad a view of waiver and too narrow a view of the record. SBS argued in its summary judgment reply that the GFFD claim did not exist because it provides:

> … (1) no additional rights beyond the rights provided for in the parties' contract; and (2) provides no avenue for recovery of any additional damages than what would be recoverable if [Thurston] succeeds on its breach of contract claim.

[R. 5665.] Further, the District Court's order stated:

> … Thurston points out that its breach of implied covenant claim is not based on Safeguard's violation of an express provision of the RDA and, therefore, it can be asserted independently. This Court agrees.

[R. 5815.] The District Court's basis for its ruling is subject to challenge regardless of whether an argument was made in the briefing. Further, this Court requires only a general legal issue to be raised (as it was in SBS's briefing), not the exact same legal arguments. *See Ada Cty. Highway Dist. v. Brooke View, Inc.*, 162 Idaho 138, 143n.2, 395 P.3d 357, 361 n.2 (2017). There is no waiver of the summary judgment argument, which should be dispositive because Thurston offers no response to the point that DocuSource and IBF were separate legal "persons" that SBS was entitled to appoint to make sales in Idaho. [*See generally* Resp. Br. at 37-38 (failing to respond to App. Br. at 30-31).] The GFFD claim should have been dismissed on summary judgment.

B. Thurston Misrepresents its Obligation to Disclose Damage Theories.

In regard to Thurston's change in damage theories at trial, Thurston falsely certifies to this Court that there was no "discovery or expert disclosure obligation that Thurston failed to respond to." [*See* Resp. Br. at 39.] First, SBS requested disclosure of witness testimony as follows:

> INTERROGATORY NO. 3:
>
> Identify each person whom you intend to call as a lay witness in the trial of this action, and provide the factual substance of his or her expected testimony at trial.
>
> [THURSTON'S] RESPONSE TO INTERROGATORY NO. 3:
>
> … The factual substance of their respective expected testimony, to the extent it is known by Plaintiffs at this time, can be derived or ascertained from the Second Amended Complaint and Plaintiffs response to Defendants' Request for Production of Documents. …

[*See* R. 11362.] Nothing in the Second Amended Complaint or documents produced prior to trial disclosed that Mr. Thurston would be testifying his business was transformed into a non-Safeguard distributorship or giving an opinion of $0 in value. In addition, Thurston is well aware that Deluxe's interrogatories specifically requested information on all damage theories as follows:

INTERROGATORY NO. 24:

> Please set forth in detail a complete itemization, specifying the amount and method of computation of actual damages for commercial loss claimed by you, or to which you claim entitlement from Defendant, and identify each document that supports this claim.
>
> ….
>
> [THURSTON'S] AMENDED RESPONSE TO INTERROGATORY NO. 24:
>
> Thurston Enterprises has provided the requested information through its expert disclosures.[16]

Clearly, Thurston had an obligation to disclose "the amount and method of computation of actual damages for commercial loss claimed by you …." Yet, Thurston's expert disclosure contained no reference to the "two-thirds/transformed into non-Safeguard distributor" theory that was first unveiled at trial. [*See, e.g.*, R. 3718 (disclosing only a forced sale theory).] As such, the District Court erred in summarily denying SBS's objection to the new damages theory. The theory should have been barred and the GFFD claim should be eliminated for this reason alone.

C. There is Not Sufficient Evidence to Support a Breach or Damages.

In the opening brief, SBS challenged the District Court's post-judgment ruling that found sufficient evidence for the jury to conclude Thurston was "transformed" into a non-Safeguard distributor. All the evidence, viewed in a way most favorably to Thurston, shows that the most

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[16] This Court has the inherent power to consider any matter that threatens the integrity of its proceedings. *See, e.g.*, *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991); *see also* I.A.R. 11.2(a). Thurston's false certification that it had no obligation to disclose damage theories should not be sanctioned simply because the rules provide interrogatory responses are not filed and, if the Court so requests, SBS can augment the record with all of Thurston's interrogatory responses. Appellate courts in other jurisdictions recognize they can take judicial notice of a document outside the record when its authenticity cannot be disputed. *See, e.g.*, *Brandes Meat Corp. v. Cromer*, 537 N.Y.S.2d 177, 178 (N.Y. App. Div. 1989) ("The Court of Appeals has also recognized a narrow exception, which allows the consideration, on appeal, of reliable documents, the existence and accuracy of which are not disputed, even for the purposes of modifying or reversing the order under review."). Thurston cannot in good faith deny the authenticity of its own discovery responses. [*See* R. 36 (certifying service of interrogatory responses in record).]

Thurston lost was a small portion of its overly broad concept of account protection (*i.e.*, that based on sales made by others to entire organizations) that impacted up to 1.9% of Thurston's accounts.[17] [*See* App. Br. at 33.] If, as Thurston argues, the value of its business is founded entirely on the account protection right, that shows a loss of 1.9% of the business's value, not a loss of 66% (or "two-thirds"). In any case, whatever small loss occurred in terms of account protection (if any) is fully recouped through compensatory damages. Such a recovered loss for breach of an express contract right cannot support a GFFD claim without being duplicative. As explained in *Idaho First Nat. Bank v. Bliss Valley Foods, Inc.*, a GFFD claim:

> … does not result in a cause of action separate from the breach of contract claims, nor does it result in separate contract damages unless such damages specifically relate to the breach of the good faith covenant. To hold otherwise would result in a ***duplication of damages*** awarded for breach of the same contract.

121 Idaho 266, 289, 824 P.2d 841, 864 (1991) (emphasis added). Duplication is what occurs when, as the District Court did, a GFFD claim is sustained on the basis of express contract breaches. [*See* R. 12721 (JNOV order stating GFFD damages were "proximately caused by Safeguard's breaches of the distributor agreement").] Thurston's only response is that SBS's argument "is irrelevant to a determination of the JNOV motion and is also inaccurate," but Thurston provides no law or facts to the contrary. The District Court's error in sustaining the GFFD verdict on the basis of express contract breaches is grounds for elimination of the claim through this appeal.

In addition, there is insufficient evidence to support a loss of two-thirds in "marketability" [*see* R. 12723], which is a separate reason why JNOV should have been granted. To be clear, there was ***no evidence*** the business could not be sold. All Mr. Thurston did was testify he thought the current value was $0 (contrary to his own expert's opinion of $798,647). That is far too speculative to be sufficient evidence. In response, Thurston notes this Court accepts the testimony of a property

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[17] Again, Thurston attempts to far overstate the true overlap. [See, *supra*, page 2 at footnote 3.]

owner that their business is valueless without regard to foundation. [Resp. Br. at 41 (citing *Hurtado v. Land O'Lakes, Inc.*, 153 Idaho 13, 278 P.3d 415 (2012); *Pocatello Auto Color, Inc. v. Akzo Coatings, Inc.*, 127 Idaho 41, 896 P.2d 949 (1995)).] Yet, neither of the cases cited by Thurston involved a property owner claiming a full 100% loss despite overwhelming evidence to the contrary. In *Pocatello*, while this Court did treat a business owner's testimony that her business was worth nothing after a termination without notice as sufficient to support a damage award even when the owner could provide no basis for the opinion, it was highlighted that the rationale for doing so is based on an owner being "presumed, in a way, to be familiar with its value, by reason of inquiries, comparisons, purchases, and sales." 127 Idaho at 43-44 (citing *Beech v. Am. Sur. Co. of New York*, 56 Idaho 159, 51 P.2d 213, 215 (1935)). That strongly indicates the presumption can be rebutted by an owner admitting they made no recent inquiries, comparisons, or such, and that such speculative testimony should be rejected as insufficient, consistent with all the jurisdictions that reject unsupported opinions of a property owner no less than that of qualified experts. [*See* App. Br. at 34-35 n.17 (citing authorities).] That is the rule this Court should follow to ensure the integrity of damage awards or else plaintiffs can be rewarded for making up baseless opinions (without fear of perjury as well, since they are mere "opinions"). When doing so here, Mr. Thurston's speculation that his business was worth $0 fails to hold any weight as evidence.

Further, even if Mr. Thurston's lack of foundation for his opinion as to current value only goes to the weight of evidence, that does not mean I.R.C.P. 50(b)'s requirements are automatically met. There still must be "substantial" evidence upon which a jury could have based its verdict, which means the evidence must be "of <u>sufficient quality</u> and <u>probative value</u> that *reasonable minds* could arrive at the same conclusion as did the jury." *See Schwan's Sales Enters., Inc. v. Idaho Transp. Dept.*, 142 Idaho 826, 830, 136 P.3d 297, 301 (2006) (emphasis added). Evidence that is not grounded in "established fact [or] undisputable common experience" is not sufficient. *Id.* at

831. The undisputed evidence that Thurston continued operating after the acquisitions (as it does to this day) and was paid all commissions due for its own sales, making even more money than before, plus the fact that the alleged breach affects up to only 1.9% of Thurston's accounts, means no reasonable mind could conclude there was a two-third's total loss the business's value.

Thurston further contends that Mr. Thurston had a foundation for his opinion, based on his purchase of non-Safeguard businesses in 2000, 2004, and 2012. [*See* Resp. Br. at 41 (citing testimony).] While that may be sufficient to establish the past value of a non-Safeguard business as approximately two-thirds less than a Safeguard distributorship, it does nothing to support the conclusory opinion that Thurston's business could not be sold (*i.e.*, "marketability"). Mr. Thurston admitted not knowing if there were any potential buyers (which would include SBS) or what they would pay. The opinion was thus no less speculative than a homeowner who bought a house many years ago throwing his or her hands up and saying the house cannot now be sold without ever listing the property or even checking with an active real estate agent to find out. Such speculation should not be presumed support for the $2.1 million in compensatory and punitive damages at issue with this claim.

For the foregoing reasons, this Court should eliminate the GFFD claim as duplicative of express contract breaches and, to the extent it does not fail for that reason, reject the impermissibly speculative testimony of Mr. Thurston as insufficient to establish any damage.

VI. PUNITIVE DAMAGES FOR BREACH OF CONTRACT REMAIN INAPPROPRIATE.

In the opening brief as to Issue 6, SBS put forth two main reasons why the punitive damages for breach of contract (totaling $3,080,871 here) should be fully eliminated from this case: (i) the circumstances are not sufficient to warrant punitive damages under current Idaho law, and, (ii) otherwise, Idaho law should be modified to exclude punitive damages for breach of a commercial

contract in a case like this. [*See* App. Br. at 36-45.] The following two sections reply to the various arguments Thurston offers in response to each.

A. Thurston Improperly Relies on the Fraudulent Inducement Claim.

Thurston's response provides a bulleted list of evidence for punitive damages that each pertain to only one of two things: (i) that SBS knew there would be account protection issues before the acquisitions, and (ii) evidence related to the alleged fraudulent inducement of the March 2014 agreement. [*See* Resp. Br. at 45-46.] Neither is sufficient to support punitive damages here.

As explained in the opening brief, no amount of evidence on the first point can show an extremely harmful state of mind towards Thurston when it lost no sales of its own. [*See* App. Br. at 38-41.] Although Thurston wishes to discount the *Cuddy Mountain* factors now [*see* Resp. Br. at 43], those are the factors upon which the District Court's order was based and this Court has never rejected *Cuddy Mountain's* summarization of factors relevant in a contract case.

The second category of evidence cited by Thurston—that relating to "fraud"—is insufficient as well because it improperly commingles two separate claims for which Thurston sought and was awarded punitive damages. As apparent from its argument, Thurston is relying primarily on evidence pertaining to the alleged fraudulent inducement of the March 2014 agreement—a claim on which it was also awarded "maximum" punitive damages—to further obtain punitive damages on the separate claims for breach of contract, stating:

> Safeguard's efforts, through Dunlap, to strong-arm Thurston into selling his accounts for nominal amounts[18] when they were worth exponentially more were oppressive. … Contrary to Safeguard's arguments the negotiations were not in good faith, they were founded upon fraud. …

[18] The "nominal amount" Thurston refers to is $32,600, which was far greater than three years' worth of commissions Thurston earned on its own sales to the organizations. [*See* App. Br. at 8.]

[Resp. Br. at 46-47.]. Thurston cites no evidence of fraudulent conduct pertaining specifically to the separate breach of contract claims. Nor could any be cited because, once Mr. Thurston asked for details on the amount of sales being made by IBF to certain overlapping organizations—first requested only *after* the March 2014 agreement was concluded [*see* Ex. 309; Tr. Vol. I at 1127:20-1128:4, Tr. Vol. II at 1886:15-1889:1])—such information was freely provided. [*See* Ex. 311.] There has never been an allegation that the sales information provided by Dunlap at that point was "fraudulent" and, not long after, Thurston ended all communications in order to file suit.

Accordingly, there is no independent "fraud" sufficient to support punitive damages on the contract claims. The fraudulent inducement claim stands alone – and on shaky ground at that.[19]

Further, Thurston does not provide legal support for using a standalone fraudulent inducement claim for which punitive damages were awarded (*i.e.*, the remaining $1,327,200 in punitive damages are based on the $442,400 in fraud damages) to further justify awarding additional punitive damages on other contract claims. I.C. § 6-1604(1) requires clear and convincing proof of "oppressive, fraudulent, malicious, or outrageous conduct" in regard to *each* independent "*claim*" for which a party seeks punitive damages. Indeed, this Court has rejected punitive damages for a fraud cause of action when the fraud itself was not outrageous enough, further indicating the flimsy fraudulent inducement claim here is insufficient to use for punitive damages on separate breaches of contract. *See, e.g.*, *Duffin v. Idaho Crop Imp. Ass'n*, 126 Idaho 1002, 1014, 895 P.2d 1195, 1207 (1995) (affirming denial of leave to amend for punitive damages regarding fraudulent failure to disclose); *see also In re Permann*, 174 B.R. 129, 132 (Bankr. D. Idaho 1994) (noting plaintiff introduced no evidence of "willful or malicious conduct on behalf of

[19] As discussed in Issue 3, Thurston's fraud claim hangs by the slimmest thread and should fail on its own lack of merit.

John Permann separate and apart from his alleged fraudulent representations which would rise to the level where punitive damages should be awarded."). As such, Thurston's citation of evidence relating to the alleged fraudulent inducement of the March 2014 agreement is not a sufficient basis upon which to award punitive damages on the separate contract and GFFD claims.

Setting aside the fraudulent inducement matter—as it should be—there is no independent justification given by Thurston for contract-based punitive damages beyond a mere recitation of the terms "malice" and "oppression," tort-focused labels that, as this case amply demonstrates, are not suitable for a commercial contract dispute. This is particularly true when a plaintiff cannot deny it lost no historical profits of its own as a result of the alleged breaches.

B. All the Economic Rationales Disfavor Awarding Punitive Damages for Breach of a Commercial Contract.

In response to SBS's alternative request for Idaho law to be modified, Thurston begins with a faulty assumption of legislative intent. [*See* Resp. Br. at 48-49.] Although the Legislature has not exempted contract cases from punitive damages as a whole, neither has it approved of them for commercial disputes. As a result, it cannot be inferred that the Legislature takes a position one way or the other. Furthermore, it is more noteworthy that the Legislature has affirmatively approved of punitive damages for breach of contract in only one specific type of case: consumer matters. *See* I.C. § 48-608(1). Otherwise, the Legislature has left it to this Court to determine when punitive damages are available. Accordingly, this Court has the power to: (i) determine punitive damage in this case fall outside current legal standards; (ii) fine-tune Idaho law to exempt commercial disputes such as this; or (iii) change course entirely and reject punitive damages for anything but a recognized tort. *See, e.g.*, *Salinas v. Vierstra*, 107 Idaho 984, 990, 695 P.2d 369, 375 (1985) ("While we are cognizant of the importance *stare decisis* plays in the judicial process, we are not hesitant to reverse ourselves when a doctrine, a defense, or a holding in a case, has proven over

time to be unjust or unwise.").[20] SBS argues for the middle ground – to prevent the award of punitive damages in a commercial contract dispute like this case, as most other states have done [*see* App. Br. at 41-42], but especially when, as here, the plaintiff cannot deny it has suffered no extraordinary harm (or historical loss) as a result of the alleged breaches.

Rather, as explained in the opening brief, the majority of supreme courts to consider the issue have rejected punitive damages in commercial contract cases for all the reasonable rationales detailed in the opening brief. That does not mean Idaho is an "outlier" (the pejorative term Thurston uses [*see* Resp. Br. at 50]). SBS certainly did not use that term and makes no such argument. While Idaho is clearly in the minority by not requiring proof of an independent tort, it is not the only state to do so. [*See* App. Br. at 41 & n.23 (SBS listing other states in minority).][21] The real "outlier," in fact, is simply the existence of this case – one in which the maximum punitive damages possible have been awarded for breach of an ambiguous contract between two commercial entities, despite the plaintiff being unable to show any special loss to justify a windfall of nearly $6.8 million (on top of its own ever-increasing profits). SBS could not find and is not aware of any case with substantially similar circumstances in which punitive damages have been awarded or upheld. Thurston apparently is not aware of such a case either, since it carefully avoids addressing the topic of its own profits altogether.

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[20] This Court in *Salinas* further noted: "… The court in the proper performance of its judicial function is required to examine its prior precedents. When precedent is examined in light of modern reality and it is evident that the reason for the precedent no longer exists, the abandonment of the precedent is not a destruction of *stare decisis* but rather a fulfillment of its proper function."

[21] Thurston inflates the number in the minority, however, by: (i) including states that allow punitive damages for an independent tort [Resp. Br. at 50 & n.29] and (ii) mischaracterizing some of the cases it cites otherwise. [*See* Resp. Br. at 50 & n. 28.] In fact, the law review article Thurston relies on identifies far fewer states in the minority. *See* William S. Dodge, *The Case for Punitive Damages in Contracts*, 48 DUKE L.J. 629, 644 (1999) (for example, noting Delaware—a state counted by Thurston—rejects punitive damages for breach of contract due to efficient breach).

There are, however, several practical reasons why punitive damages should not be awarded in a commercial dispute such as this case, as explained by the supreme courts in those states that expanded their own punitive damages law in the 1970s-80s to apply to commercial contract cases and subsequently decided it was more prudent to step back. [*See* App. Br. at 42-43.] Thurston's arguments to ignore those courts' reasoning for doing so are not persuasive.

First, Thurston declares the tort-focused labels of "malice," "fraud," and "oppression" do not create any uncertainty for companies doing business in Idaho, even going so far as to assert that "Safeguard knew its possible damages, it budgeted for it." [Resp. Br. at 50.] That is quite remarkable given Thurston contradictorily criticizes SBS for budgeting only $183,000 and $64,000 to resolve the account protection issues. [*See* Resp. Br. at 12 (record cites).] If anything, those amounts show SBS viewed account protection as based on an affected distributor's own sales rather than the far broader interpretation put forth by Thurston for this litigation. The budget certainly fails to establish that SBS had any idea punitive damages were a possibility.

Next, Thurston asserts the alleged breaches were "opportunistic" and should be punished based on a law review article arguing for such a standard (which no court has adopted).[22] [*See* Resp. Br. at 51 (citing Dodge article).] However, that characterization fails to apply under Thurston's own definition of opportunistic, which is when a "breaching party gains *<u>at the expense of</u>* 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.'" [Resp. Br. at 51 n.31 (emphasis added).] The evidence of Thurston's ever-growing profits shows nothing was gained "at the expense of" Thurston. Thurston did not lose a single dollar of its own profits as a

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[22] Only one court cites the Dodge article, but not for the "opportunistic" breach concept. *See Monahan v. GMAC Mortg. Corp.*, 893 A.2d 298, 315 n.4 (Vt. 2005).

result of the alleged breaches. Further, it is difficult to see how the alleged breaches go "undetected" given that SBS proactively informed Thurston of the acquisitions and overlapping organizations [*see* Tr. Vol. I at 855:4-9, 856:12-19, 862:11-25, 863:22-864:5; 1097:22-1098:6; Ex. 68 at 68.2], which demonstrates SBS did not act opportunistically or oppressively, but rather that this dispute is simply an ordinary one over the scope of account protection. As well, the alleged damages clearly are not so small[23] that no one would bring suit. As a result, the passage Thurston cites from *Boise Dodge, Inc. v. Clark*, 92 Idaho 902, 904-05 453 P.2d 551, 553-54 (1969) (dealing with consumer odometer rollback causing approximately $350 in damages), has no application here and the alleged breaches are not "opportunistic" in any sense of Thurston's proposal.

Thurston's related contention that there is no "societal economic justification" is contrary to reason as well. Virtually every party involved stood to benefit from the acquisitions, including:

- Thurston – in that the purchase of DocuSource/IBF effectively prevented those companies from being able to encroach on Thurston's historical sales made to its own billing contacts (for which no one denies Thurston has account protection), or any other account protection that Thurston gains in the future;
- SBS and Deluxe – in the form of increased revenue and "insourcing" opportunities (which hopefully would translate into profits for shareholders or further re-investment that grows the business for the benefit of all);
- Customers (even those within overlapping organizations) – in that they would have a wider array of products/services available while still being able to buy from whomever they chose to before (*e.g.*, checks and forms from Thurston;

[23] *See* Richard A. Posner, *Common-Law Economic Torts: An Economic and Legal Analysis*, 48 ARIZ. L. REV. 735, 746 (2006) ("If a party to a contract deliberately takes advantage of a gap in the remedial structure that makes compensatory damages an inadequate remedy, then an award of additional damages makes sense to deter opportunistic conduct not otherwise deterred. These cases will be *extremely rare*, and perhaps limited to *very small contracts*, where it just doesn't pay to sue without a boost in expected damages. In the ordinary case, the victim's legitimate interests are fully protected by an award of compensatory damages, whether or not the breach was willful." (emphasis added)).

unique specialized high-volume services like W-2 processing, medical ID bands, warehousing, and drop shipping from IBF); and

- The owners of the acquired companies – in that they were able to cash out on their own work by selling their revenue streams to SBS.

The only real potential net losers are the manufacturers who competed with Deluxe. Doing what Thurston demands, however—trying to dictate to customers who they can and cannot purchase from (even if Thurston could not service them) or paying twice for the acquired revenues—is where the economics of the acquisitions fall apart. Adding in unpredictable tort-focused punitive damages skews everything out of proportion.

The only recognized justification for punitive damages that Thurston offers is "deterrence." [Resp. Br. at 52.] As explained in the opening brief, punitive damages for contract breach certainly do deter defendants from resorting to courts when they dispute a contract's terms (for fear of being deemed "outrageous" or "unreasonable" in their understanding, such as Thurston has done here in regard to "account protection"). [*See* App. Br. at 42-44.] However, Thurston uses the word in the more classical sense of deterring conduct *altogether*. That type of deterrence can make sense for torts where a defendant should be dissuaded from causing physical harm to the general public. However, deterrence in the realm of private commercial contracts means that economically beneficial activities involving a potential breach of contract are deterred, resulting in inefficient outcomes given the nonbreaching party is made entirely whole by compensatory damages. A Harvard Law Review article widely cited by courts explains:

> [I]f injurers are made to pay more than for the harm they cause, wasteful precautions may be taken, product prices may be inappropriately high, and risky but socially beneficial activities may be undesirably curtailed," and ultimately concludes: "… courts should be cautious about awarding punitive damages for breach of contract. This point is worth noting because the law governing the imposition of punitive damages for breach of contract does not restrict their award to cases in which the likelihood of escaping liability for breach is substantial.

A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 873 (1998). Polinsky and Shavell's concern about the legal standards is particularly relevant here, where vague tort labels like "malice," "fraud," and "oppression" (and the District Court's lowered bar in particular) are the standards by which a breach of contract is judged.

Contrary to Thurston's suggestion as well, Judge Posner, formerly of the Seventh Circuit, is highly adverse to punitive damages for breach of contract (even willful breaches), explaining:

> This discussion, however, leaves unanswered the basic question, which is whether punitive damages should *ever* be awarded for a breach of contract. The general rule denying such damages for breach *makes good economic sense*. Quite apart from the fact that many breaches are either efficient or involuntary, many contracts contain an insurance component even when they are not insurance contracts. An example is when by promising performance that may prove beyond the promisor's ability to deliver, the promisor assumes the risk of failure and thus insures the promisee against the consequences of failure. There is no 'wrongdoing' when the risk materializes; the 'breach' is the equivalent to an insured event coming to pass, obligating the insurance company to pay insurance proceeds to the insured.

Richard A. Posner, *Common-Law Economic Torts: An Economic and Legal Analysis*, 48 ARIZ. L. REV. 735, 745-46 (2006) (emphasis added). If, as Thurston insists, there is a substantial premium for Safeguard distributorships due to the account protection and other benefits provided by SBS [*see* Resp. Br. at 10],[24] then Judge Posner's "insurance" analogy applies here.

Simply put, there are no good economic reasons for punitive damages in a commercial contract dispute. This case certainly demonstrates that much. Such damages distort the predictability of contracts and conflict with the compensatory principles that work in harmony. For all the reasons discussed here and in the opening brief, this Court should eliminate the punitive damages awarded for breach of contract ($3,080,871), whether or not modifying Idaho law.

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[24] Further premium exists in the residual commissions *after* a contract ends, which set the absolute outer limit of Thurston's expectation damages. [*See* Ex. 8 at 8.8 (¶ 9(B)) (providing for payment of 50% of commissions on "repeat" sales for 4 years).]

VII. THE FUTURE DAMAGES STILL SUFFER FROM FATAL LEGAL ERRORS.

For Issue 7, SBS challenged the future damages on three grounds: (1) the District Court's improper disregard of a discount rate to sustain damages for 8+ years; (2) the failure of Thurston's expert to consider attrition rates as they apply to account protection; and (3) the at-will nature of the Interim Distributor Agreement. The corresponding paragraphs below address Thurston's arguments as to each category.

First, Thurston asserts the faulty 1xAS ("one times annual sales" or revenue) metric used by its expert, Robert Taylor, equates to only "approximately three years of commissions." [Resp. Br. at 54.] Yet, the testimony cited by Thurston pertained only to a hypothetical of how "multiples" work in business acquisitions. Thurston ignores Taylor's later testimony on the appropriate discount rate and that, when using it, he testified the damages would cover more than *eight years* of future lost commissions.[25] [*See* Tr. Vol. II at 1578:14-1579:24.] The District Court made the same error by ignoring a discount rate altogether. *See Watkins Co., LLC v. Storms*, 152 Idaho 531, 539, 272 P.3d 503, 511 (2012) (discount rate required for future lost profits). Thurston goes on to assert it would be entitled to damages into "perpetuity" anyway by making at least one sale every three years. [Resp. Br. at 55.] That is not logical for two reasons: (i) the contract is terminable at-will (as discussed in the third paragraph below), and (ii) Thurston treats the damages as a complete sale and transfer of its rights as of a date certain. To say Thurston could extend its account protection indefinitely is irrelevant. Three years of commissions is the absolute max the contract could support. The 1xAS metric grossly overcompensates Thurston for 8+ years into the future.

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[25] Thurston seeks to re-characterize the future losses as "market value damages." [Resp. Br. at 54.] There is no explanation as to how that would result in a different analysis, but, either way, Taylor repeatedly referred to the damages he calculated as an estimate of lost "future commissions" [*see, e.g.*, Tr. Vol. II at 1469:19-1470:1], not a loss in business value.

Second, Thurston seeks to nullify Taylor's failure to consider the known attrition rates by speculating that a natural loss of overlapping organizations might not occur if IBF increases its sales to other overlapping organizations. [*See* Resp. Br. at 55-56.] That is even more speculative than Taylor's explanation. Regardless, the fact remains that Taylor acknowledged he did no analysis of the attrition rates at all because "… all I'm doing is using the metric that Safeguard is using …" for acquisition purposes (*i.e.*, 1xAS). [*See* Tr. Vol. II at 1593:3-19.] The failure to do an analysis contributes to the conclusion that Taylor's method was too speculative to sustain.

Finally, in regard to the Interim Distributor Agreement existing on an at-will basis, Thurston claims the "argument" was waived by not being raised to the District Court. That is not correct. SBS plainly argued in its post-judgment brief that "Taylor's opinions regarding future losses fall into the impermissibly speculative category because he ignored known limitations regarding … the terminable nature of the contract at issue." [R. 9167]; *see also Ada Cty. Highway Dist. v. Brooke View, Inc.*, 162 Idaho 138, 143n.2, 395 P.3d 357, 361 n.2 (2017) (only legal issues—not arguments—must be previously raised). The legal issue of the contract's terminable nature was raised. As to the merits, Thurston offers that the Interim Distributor Agreement is not at-will because it was renewed by the addendums, the last of which is dated in 2004 (approximately 10 years prior to the acquisitions) and they stated the contract remained in force at that time. [Resp. Br. at 57.] Acknowledging the contract was still in force in 2004, however, does no more than (at best) push the five-year term to 2009, and then the contract again has an indefinite duration which, as a matter of law, "remains in force at the will of the parties." *See Cox v. City of Pocatello*, 77 Idaho 225, 232, 291 P.2d 282, 286 (1955); *see also* I.C. § 28-2-309. The District Court thus erred in refusing to consider the future damages were excessive by construing the parties' relationship as terminable only under the "conditions" stated in Paragraph 7(C). [*See* R. 12728-29.]

Due to the legal errors with Taylor's approach, future damages must be eliminated in whole ($263,357, plus $790,071 in punitive damages). In the alternative, at least those related to DocuSource alone ($21,488, plus $64,464 in punitive damages) must be eliminated.

As to the alternative relief limited to DocuSource damages alone, Thurston contends the undisputed testimony of DocuSource's manager (Amy Tiller-Shumway) was a matter of credibility which the jury could reject. [Resp. Br. at 56.] That misses the point on appeal. Even if a jury could reject the only evidence on a particular topic and conclude the exact opposite (without a shred of evidence to support the contrary), the issue here is whether Taylor's damage figures had sufficient support to be "evidence" at all. Taylor, as an expert witness, noted an assumption embedded into his calculation of future losses: that DocuSource/IBF sales in Idaho would continue in the future. [*See* Tr. Vol. II at 1504:6-20, 1595:6-11.] That assumption absolutely failed as to DocuSource (even excluding Tiller-Shumway's testimony). Accordingly, Taylor's damages as to DocuSource were impermissibly speculative and, as a matter of law, a jury could not rely on his figures. *See Inland Grp. of Cos., Inc. v. Providence Wash. Ins. Co.*, 133 Idaho 249, 257, 985 P.2d 674, 682 (1999) (stating that "awards based upon speculation and conjecture will not be allowed").

VIII. SBS'S REQUEST TO REDUCE THE FEE AWARD IS UNDISPUTED.

Thurston gave no response to Issue 8. As a result, it can be presumed that Thurston does not oppose the attorneys' fees awarded by the District Court being reduced if any part of Thurston's judgment is modified due to the issues appealed by SBS.

IX. THURSTON IS NOT ENTITLED TO ATTORNEYS' FEES UNDER I.C. § 12-121.

SBS does not dispute that the prevailing party in this appeal is entitled to its attorneys' fees under I.C. § 12-120(3) and its costs pursuant to I.A.R. 40. Yet, Thurston seeks fees under I.C. § 12-121 as well. In regard to that statute, this Court has recently recited:

> An award of attorney fees under [I.C. § 12-121] is not a matter of right to the prevailing party, but is appropriate only when this Court, in its discretion, is left with the abiding belief that the case was brought, pursued, or defended frivolously, unreasonably, or without foundation. … Moreover, when deciding whether attorney fees should be awarded under I.C. § 12–121, the entire course of the litigation must be taken into account and if there is at least one legitimate issue presented, attorney fees may not be awarded even though the losing party has asserted other factual or legal claims that are frivolous, unreasonable, or without foundation. … Such circumstances exist when an appellant has only asked the appellate court to second-guess the trial court by reweighing the evidence or has failed to show that the trial court incorrectly applied well-established law. … Generally, attorney fees will not be awarded where the losing party brought the appeal in good faith and where a genuine issue of law was presented. …

In Re SRBA Case No. 39576 Subcase No. 37-00864, No. 44716, 2018 WL 1124264, at *11 (Idaho Mar. 2, 2018) (citations and editing omitted). Further, an appeal is not frivolous simply because the appellant presents arguments that are ultimately rejected. *See Garner v. Povey*, 151 Idaho 462, 259 P.3d 608, (2011) ("Rather, the question is whether the position adopted was not only incorrect, but so plainly fallacious that it could be deemed frivolous, unreasonable, or without foundation"); *see also Hammer v. City of Sun Valley*, 163 Idaho 439, 414 P.3d 1178, (2016) (denying award of attorney fees under I.C. § 12-121 because law was not settled).

This Court is not being invited to merely "reweigh the evidence." Rather, SBS presents reasonable arguments for each Issue that existing Idaho law was violated, or makes a good faith request for the extension of Idaho law, to vacate the judgment of the District Court. Thurston fails to establish, and the record does not indicate, that SBS brought or pursued this appeal in any form of unreasonable or frivolous manner. Attorney's fees under I.C. § 12-121 are not warranted.

CONCLUSION

SBS requests this Court grant the relief requested in the opening brief and further reject Thurston's requests for attorneys' fees on appeal.

DATED THIS 15th day of June, 2018

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of June, 2018, I caused to be served a true copy of the foregoing APPELLANT'S BRIEF by the method indicated below, and addressed to each of the following:

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