5-29-2018

Dickinson Frozen Foods, Inc. v. J.R. Simplot Company Appellant's Brief Dckt. 45580

IN THE SUPREME COURT OF THE STATE OF IDAHO

DICKINSON FROZEN FOODS, INC., an Idaho Corporation, Plaintiff/Appellant, vs. J.R. SIMPLOT COMPANY, a Nevada corporation; THOMPSON COBURN, LLP, a Missouri Limited liability partnership; YARMUTH WILSDON, PLLC, a Washington professional limited liability company; MARK McKELLAR, an individual; JOHN DOE I-X, unknown individuals and entities, Defendants/Respondents.	Supreme Court Case No. 45580 Ada County No. CV01-17-03836 **APPELLANT'S BRIEF** I.A.R. 35(a)

APPELLANT'S BRIEF

An appeal taken from the District Court in the Fourth Judicial District, Ada County.

The Honorable Lynn Norton, District Judge presiding.

Kim J. Trout
3778 N. Plantation River Dr., Ste. 101
Boise, ID 83703
Attorney for Appellant Dickinson Frozen Foods

Trudy Hanson Fouser
121 N. 9th St., Ste. 600
Boise, ID 83702
Attorney for Respondents J.R. Simplot Co., Mark McKellar

John Janis
537 West Bannock St., #200
PO Box Boise, Idaho 83701
Attorney for Respondent Yarmuth Wilsdon, PLLC & Thompson Coburn, LLP

Bradley S. Keller
Bynres, Keller & Cromwell, LLP
1000 Second Ave. #3800
Seattle, WA 98104
Attorney for Respondent Yarmuth Wilsdon, PLLC

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Bradley S. Keller
Bynres, Keller & Cromwell, LLP
1000 Second Ave. #3800
Seattle, WA 98104
Attorney for Respondent Yarmuth Wilsdon, PLLC

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CONCISE STATEMENT OF THE CASE

a. The Nature of The Case:

This case involves defamation per se, breach of contract, and the litigation privilege defense.

b. Party Designations/Abbreviations:

i. Dickinson Frozen Foods ("DFF"), Appellant.

ii. J.R. Simplot Company ("Simplot"), Respondent.

iii. Mark McKellar ("McKellar"), Respondent.

iv. Yarmuth Wilsdon, PLLC ("Yarmuth"), Respondent.

v. Thompson Coburn, LLP ("Thompson"), Respondent.

c. Concise Statement of Facts:

This case is the by-product of a derivative action filed in 2016 in the Washington Western Federal District Court. That case (the "Washington federal litigation") was filed by Simplot.

Simplot was a fifty percent (50%) member of two joint venture businesses: (1) Pasco Processing, LLC; and (2) Gem State Processing, LLC.[1] In late 2016, Simplot became dissatisfied with the joint businesses and filed the Washington federal derivative litigation against its co-members, Washington Potato Company ("WPC") (the then other 50% member of Pasco) and Oregon Potato Company ("OPC") (the other 50% member of Gem State). Simplot also named Frank Tiegs as a party in the lawsuit, as Mr. Tiegs is the principal owner of WPC and OPC. Simplot claimed that its two co-members, through Tiegs, had mismanaged the businesses and had breached their operating agreements. Simplot then chose to make several defamatory per se statements about DFF and its food safety practices.[2] Simplot sought to advance its claims both as direct claims, on behalf of itself, and as

[1] Simplot is still a member of Gem State Processing, LLC, but in 2017, by judicial declaration of the United States District Court for the Eastern District of Washington, Washington Potato Company acquired Simplot's 50% ownership interest in Pasco Processing, LLC.

[2] DFF is a frozen foods processor and distributor, with two facilities in Idaho. DFF was not a named party in the Washington federal litigation, and there were no claims against DFF in the litigation. (R., vol. 1, p. 15).

derivative claims, on behalf of the joint ventures. However, the Washington federal court ruled that the claims were derivative claims. (R., vol. 1, p. 928).

Yarmuth later admitted that the Respondents had made the defamatory statements about DFF to attack Tiegs's character in the Washington federal litigation. After filing the defamatory statements in Court, Simplot published them (*i.e.*, emailed a copy) to an uninterested third-party, Northwest Farm Credit Services, PCA. Simplot and the other Respondents did all this knowing that DFF was not a named party in the federal litigation and, more importantly, that DFF was not involved in the Pasco and Gem State derivative member-disputes. Simplot (through McKellar) also later admitted that it was not even sure if the DFF statements were true, and that the content of the statements, *i.e.*, the alleged poor food safety practices and violations, did not matter at all to Simplot's derivative claims in the federal litigation. (R., vol. 1, p. 403; pp. 1235-1239, 72:9-10, 147:4-19, 150:10-151:14).

The Washington federal court eventually dismissed Simplot's federal lawsuit due to lack of subject matter (complete diversity) jurisdiction. Simplot then immediately refiled its claims in Washington state court, but without the defamatory statements about DFF. By this time, copies of the federal pleadings had already been republished online in several leading Idaho newspapers.

d. Concise Procedural History:

On March 3, 2017, DFF filed this case against Respondents, stating two causes of action: (1) defamation per se for the statements made in the Washington federal litigation and subsequently published to a third-party; and (2) breach of a non-disclosure agreement. Simplot and the other Respondents soon filed motions to dismiss the defamation per se claim. In the interim, DFF filed a motion for partial summary judgment and a motion to amend its pleadings, but these motions were never argued because the Court had already granted the dismissal motions. Simplot then moved for partial summary judgment on the breach of contract claim, and the Court granted the motion. DFF timely filed a motion for reconsideration, but the Court denied the motion. In connection with its reconsideration

motion, DFF filed a second motion to amend its pleadings, to cure its alleged pleading deficiencies. The Court denied the motion. Finally, the Court granted McKellar's, Thompson's, and Simplot's memoranda of costs and fees under Idaho Code § 12-120(3) and I.R.C.P. 54.

There are several smaller items of procedural history, *e.g.*, motion for protective orders, motion to seal portions of the record, etc. These items are not relevant to the issues presented on appeal and will, as a matter of course, be revisited in the District Court if DFF succeeds on appeal.

ISSUES PRESENTED ON APPEAL

a. The District Court erred by dismissing DFF's case without first allowing DFF an opportunity to amend its pleadings.

b. The District Court erred by finding that Respondents' defamatory statements about DFF were privileged as a matter of law.

c. The District Court err by granting Respondents' motion for summary judgment on the breach of the non-disclosure agreement.

d. The District Court err by awarding Respondents their attorney fees and costs under Idaho Code 12-120(3) and Rule 54(d).

e. The Supreme Court should award DFF its fees and costs on appeal.

STANDARDS OF REVIEW ON APPEAL

Review of Orders on Amend Pleadings: "A court's decision to allow the amendment of pleadings is reviewed for an abuse of discretion. When determining whether a trial court has abused its discretion, this Court asks: (1) whether the court correctly perceived the issue as one of discretion; (2) whether it acted within the outer boundaries of that discretion and consistently with any applicable legal standards; and (3) whether it reached its decision by an exercise of reason." *Hayward v. Valley Vista Care Corp.*, 136 Idaho 342, 345, 33 P.3d 816, 819 (2001).

Review of Orders on Motions to Dismiss: "When this Court reviews an order dismissing an action pursuant to I.R.C.P. 12(b)(6), we apply the same standard of review we apply to a motion for summary judgment. [The Supreme] Court reviews an appeal from an order of summary judgment de novo, and this Court's standard of review is the same as the standard used by the trial court in ruling on a motion for summary judgment." *Syringa Networks, Ltd. Liab. Co. v. Idaho Dep't of Admin.,* 159 Idaho 813, 823, 367 P.3d 208, 218 (2016) (internal citations omitted). "A 12(b)(6) motion looks only at the pleadings to determine whether a claim for relief has been stated. On review of a dismissal [the Supreme] Court determines whether the non-movant has alleged sufficient facts in support of his claim, which if true, would entitle him to relief. In doing so, the Court draws all reasonable inferences in favor of the non-moving party." *Savage v. Scandit Inc.*, No. 45143, 2018 Ida. LEXIS 108, at *5 (2018).

Review of Questions of Law: "[The Supreme] Court reviews questions of law de novo." *Fields v. State,* 154 Idaho 347, 349, 298 P.3d 241, 243 (2013).

Review of Awards of Attorney Fees and Costs: "Awarding attorney fees and costs is within the discretion of the trial court and subject to review for an abuse of discretion." *Magleby v. Garn*, 154 Idaho 194, 196, 296 P.3d 400, 402 (2013).

LEGAL ARGUMENTS: OVERVIEW

For procedural reasons alone, this Court must remand the entire case back to the District Court because DFF did not get a chance to amend its pleadings before dismissal. DFF's proposed amendments, if proven, would have stated triable claims. However, this result, *i.e.*, a technical remand based on procedural errors, will not give DFF its full appellate relief. As evidenced in the record, the District Court was determined to dismiss the case based on the Respondents' abstract assertion of an absolute ligation privilege—regardless of any new facts in DFF's proposed amended complaint. As set out below, this Court should decide the litigation privilege question de novo on appeal and should find that the privilege does not entitle Respondents to a Rule 12 dismissal. In the alternative, the Court

should remand the case with instructions on the limits and the proper application of the litigation privilege in relation to dismissal and to proposed amendments. It is important to clarify and reaffirm the correct litigation privilege principles for the remand. "The 'law of the case' means that, on reversal of judgment and remand of case to trial court for a new trial, the case comes on for trial the same in all respects as if it had never been tried, subject to the condition that it must be tried in the light of and in consonance with rules of law as announced by appellate court in the particular case." *Creem v. Nw. Mut. Fire Ass'n,* 58 Idaho 349, 351, 74 P.2d 702, 702 (1937).

In the following argument sections, DFF discusses the District Court's procedural dismissal errors, including its failure to allow amendments before dismissal. DFF then discusses the District Court's legal errors in its litigation privilege analysis, including a request for this Court to review the matter de novo on appeal. DFF also discusses the District Court's errors in awarding attorney fees under the commercial transaction prong of Idaho Code § 12-120(3). Finally, DFF discusses the basis for which DFF should be awarded fees and costs on appeal.

SECTION ONE: AMENDED PLEADINGS

1. The District Court Erred by Not Allowing Amendments to the Complaint:

The District Court erred by not allowing DFF the required opportunity to amend its pleadings. This error is subject to appellate review under a three-pronged abuse of discretion test: "When this Court reviews an exercise of discretion by a trial court, it asks (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason." *Everhart v. Wash. Cty. Rd. & Bridge Dep't*, 130 Idaho 273, 275, 939 P.2d 849, 851 (1997). The District Court abused its discretion under the second prong of this test because it failed to apply the correct legal standards for allowing amendments before dismissal. Also, the District Court abused its discretion under the third

prong of the test because it did not exercise a reasoned choice when it found that the defamatory statements were reasonably related to the derivative claims in the federal litigation. To better understand this argument, DFF explains, below, the nature of its original pleadings and proposed amendments. This explanation is also important to understanding the later arguments about the litigation privilege and why the privilege does not apply to the Respondents' defamatory per se statements.

a. The Content of DFF's Original Complaint:

In its original complaint, DFF made two separate claims for relief: (1) defamation per se; (2) breach of contract. (R., vol. 1, pp. 22-24). Both claims have their origins in Simplot's statements and conduct in the Washington federal litigation (Case No. 2:16-CV-01851-RSM). (R., vol. 1, p. 17). In the federal litigation, Simplot wrongfully attacked DFF's food safety reputation by making several patently false allegations, *e.g.*, that DFF had a "widespread disregard for safety laws and standards" (R., vol. 1, p. 17), that "OSHA cited and fined DFF again for willful violations of safety laws" (R., vol. 1, pp. 17-18), that an internal (and confidential) company audit revealed additional food safety violations (R., vol. 1, p. 18), and that DFF had "poor food safety practices" (R., vol. 1, p. 18). Simplot later repeated these allegations against DFF in its amended federal pleadings. (R., vol. 1, pp. 19-20). After citing to these defamatory statements, DFF alleged in its' complaint that the statements were neither "relevant nor material" to Simplot's relief in the Washington federal litigation and asked for substantial damages based on the defamatory per se statements. (R., vol. 1, pp. 17-21). In its second cause of action, DFF claimed that Simplot had breached a mutual non-disclosure agreement by attaching one of DFF's confidential food safety audit reports to its federal pleadings. (R., vol. 1, pp. 23-24).

DFF did not attach a copy of the Washington federal pleadings in its original complaint (R., vol. 1, pp. 14-45), because DFF did not expect, at the time, that it would soon have to argue the matter in a protracted Rule 12 dispute. As written, DFF's original complaint fully complied with Idaho's

established notice pleading standards for making a defamation per se claim. If the Court had recognized this fact, it would have allowed the claim to proceed with discovery,[3] which DFF believes would have yielded an abundance of evidence supporting the defamation claim, and which would have further disclosed Simplot's extreme deviation from reasonable standards of litigation conduct.

b. The Content of DFF's First Amended Complaint:

On April 26, 2017, DFF moved to amend its original complaint. By this time, DFF learned that Mark McKellar, President of the North American Food Group, (on behalf of Simplot) had admitted in a Washington Rule 30(b)(6) deposition that he had no personal knowledge to support the verified DFF statements which he made in the Washington federal litigation. (R., vol. 1, p. 934; p. 403; pp. 1237-1238, ln. 151:2-14). McKellar had also admitted that he knew the DFF statements would be damaging to DFF (R., vol. 1, p. 934; p. 1235, 72:2-14), and that the statements did not matter to the outcome of Simplot's Washington federal derivative claims—as the alleged conduct by DFF had not harmed Simplot. (R., vol. 1, p. 934; p. 403; pp. 1237-1238, ln. 151:2-14). DFF also added new exhibits, including copies of two prominent Idaho news articles about the Washington federal litigation. (R., vol. 1, pp. 796, 801, 934). Finally, DFF pointed out that the Washington federal litigation had since been dismissed due to lack of subject matter jurisdiction. (R., vol. 1, p. 934). DFF later explained the significance of the dismissal in terms of the "reasonable relation" standard of the litigation privilege. (R., vol. 1, pp. 955, 958-959, 1361-1362, 1370-1372, 1389, 1393-1395).[4]

On June 12, 2017, the District Court granted the Respondents' motions to dismiss and at the same time denied DFF's motion to amend its pleadings. (R., vol. 1, p. 1354).

[3] See TR., p. 180, ln. 25, p. 181, ln. 1-19, where DFF points out the irony of not getting a chance to conduct discovery because there are no filed answers and no filed affirmative defenses.

[4] In these citations, DFF explains that the Washington federal litigation was dismissed for lack of subject matter jurisdiction, because the claims against Pasco and Gem State were all derivative claims (which destroyed complete diversity of the parties). This finding about the derivative nature of the claims highlights the fact that the DFF statements had no relation to the Washington federal litigation under the "reasonable relation" standards of the litigation privilege.

c. The Content of DFF's Proposed Second Amended Complaint:

On June 22, 2017, DFF filed a second proposed amended complaint (styled a "first amended complaint" because the Court had denied the first attempted amendments). In its memorandum decision, the District Court had used a legally invalid party-relationships as the basis for its litigation privilege analysis. Specifically, the District Court found that because Simplot had brought claims against Tiegs as the owner of WPC and OPC in the Washington federal litigation, and that because Tiegs is currently the President DFF, that therefore the defamatory statements about DFF must have been reasonably related to the federal claims via the Tiegs/DFF relationship. The Court explained:

> "Therefore, from only the language in the Complaint, the Court can determine that the Washington Litigation was brought by Simplot against a Defendant in the Washington Litigation—Frank Tiegs—and two businesses he owned. The Washington Litigation was filed as means for a "business divorce" between Simplot and Frank Tiegs. The Complaint also makes clear that Frank Tiegs is the president of and an affiliate of Dickinson Frozen Foods, the Plaintiff in this action. Because the statements in the Washington Complaint and Amended Complaint were reasonably related to Frank Tiegs's business operations, which include DFF, the Court finds that statements were reasonably related to the Washington Litigation. Therefore, the Court finds Plaintiff's defamation per se claims are barred by the litigation privilege."

(R., vol. 1, pp. 1351-1352). To address the legal errors made in this relationships analysis, DFF filed another proposed amended complaint which contained a detailed discussion of each of the Washington federal litigation claims, coupled with a factual discussion of why the defamatory statements about DFF were not "reasonably related" to any of the federal derivative claims. (R., vol. 1, pp. 1389-1387). Of course, DFF did not believe this kind of preemptive legal analysis was necessary for its pleadings, but it did so to help clarify that the relationship between Tiegs and DFF was completely unrelated to the federal derivative claims. Moreover, DFF put additional facts into its proposed amended complaint about the impropriety of Respondent's third-party publications, and about Respondents' unwarranted

(*i.e.*, illegitimate) use of the defamatory DFF statements as prohibited character evidence. DFF considered these later additions necessary due to some additional comments in the District Court's memorandum decision, wherein it stated:

> "Without facts sufficient to find that NFCS was an uninterested non-party of the Washington Litigation, the Court cannot find the NFCS was wholly unconnected from the Washington Litigation. Thus, the Court does not find the Plaintiff presented facts sufficient to overcome the presumption that the statements were made as part of a communication made in the course of litigation for the reasonable representation and advocacy in the Washington Litigation. Therefore, publication of the Complaint and Amended Complaint to NCFS is presumed barred by the litigation privilege."

(R., vol. 1, p. 1350). The proposed amendments explained that Northwest Farm Credit Services was only remotely connected to one of the Washington federal litigants (through a Pasco term-loan) and that the publication itself was not done "in connection" with the federal litigation—because NFCS was not a party to the litigation, and because the publication did nothing to advance Simplot's derivative interests in the federal litigation. (R., vol. 1, pp. 1397-1398). Moreover, DFF explained that Respondents' use of the defamatory statements was illegitimate due to their reckless pleadings style (*i.e.*, statements made without knowledge or belief of their truthfulness, and with knowledge they would cause harm), and due to an admitted lack of substantive impact on the outcome of the Washington federal litigation. (R., vol. 1, pp. 1398-1399).

DFF also filed a motion for reconsideration in conjunction with its second proposed amended complaint. (R., vol. 1, pp. 1358-1384).[5] DFF asked for reconsideration of the dismissal based on the District Court's failure to conduct a proper litigation privilege analysis, *i.e.*, its failure to analyze whether the defamatory statements about DFF were "reasonably related" to the substance of the

[5] DFF will address the substantive errors of the Court's litigation privilege relationships analysis in later sections of this brief. However, it should be noted here that prior to dismissal, DFF had already pointed out to the District Court the error of conflating DFF and Tiegs, and the error of assuming that DFF had a substantive relation to any of the Washington federal derivative claims. (See diagram, R., vol. 1, pp. 1263-1265).

federal derivative claims. (R., vol. 1, pp. 1370-1371).[6] Following the hearing, the District Court denied both the motion to amend and the motion for reconsideration. (R., vol. 1, pp. 2038-2045).

d. The Court Erred by Not Allowing DFF's Proposed Amendments:

The record shows that DFF had fully complied with Idaho's minimal notice pleading standards and that a Rule 12 dismissal was improper. The District Court should have realized that the contents of DFF's proposed amended complaints, if proven, would give DFF a viable claim for defamation per se and would render the litigation privilege defense a moot point.

In *Savage v. Scandit Inc.*, No. 45143, 2018 Ida. LEXIS 108 (May 1, 2018), this Court confirmed that Rule 12 dismissal is not proper if the pleadings contain facts which, if proven, would constitute a triable claim. In that case, Savage claimed that her employer, Scandit, had breached the Idaho Wage Claim Act by withholding certain commissions and bonuses. Scandit responded by saying that these items were not yet earned at the time Savage had filed her complaint. Scandit then filed a Rule 12(b)(6) motion to dismiss, and the District Court granted the motion. On appeal, this Court reversed and remanded. The Court noted the key question in such cases is "…whether the non-movant has alleged sufficient facts in support of his claim, which if true, would entitle him to relief. In doing so, the Court draws all reasonable inferences in favor of the non-moving party." *Id.,* at p. *5. The Court found that the allegations stated in Savage's complaint, i.e., that she had already earned the wage items, together with reasonable inferences in Savage's favor, were enough to defeat Scandit's dismissal motion. The Court also found that the question of whether Savage would ultimately prevail on her wage claims was

[6] DFF argued at its reconsideration hearing that the District Court had failed to conduct a proper comparative analysis. (TR., vol. 1, p. 138, ln. 7-25). DFF noted that the Court had originally asked the right question in connection with the issue, *i.e.*, whether the litigation privilege required the Court to analyze the content of the Washington federal pleadings, but that Simplot had misled the Court in its answer to that question. (TR., vol. 1, p. 139, ln. 18-25, p. 140, ln. 1-24). Specifically, Simplot told the Court: "I think based on the allegations of the verified complaint, you don't need to consider the complaint in Washington." (See TR., vol. 1, p. 17, ln. 19-25, p. 18, ln. 1-25, p. 19, ln. 1-13). As seen later in this brief, a correct litigation privilege analysis requires the Court to compare the defamatory statements to the litigation claims (*i.e.*, the derivative claims) from litigation in which the statements are made (i.e., the Washington federal litigation). Also seen later in this brief, Simplot eventually admits that a proper litigation privilege analysis focuses on claims, not relationships.

immaterial in a dismissal context: "While Scandit may be able to show later that the deal was not formally booked or that there were contingencies that prevented the booking, for purposes of a motion to dismiss pursuant to Idaho Rule of Civil Procedure 12(b)(6) Savage has stated a claim under the Idaho Wage Claim Act." *Id.,* at p. *10. Finally, the Court found that Savage's proposed amendments were not futile "…Because the amended complaint contained facts alleging the commission was due and owing at the time Savage sought leave to amend." *Id.,* at p. *13.

In this case, the District Court committed the same reversible errors as did the trial Court in *Savage v. Scandit.* For instance, the District Court did not draw any inferences from the original (or amended) pleadings in DFF's favor. The Court ignored the substance of these pleadings and latched onto Respondents' flawed arguments that the amendments were futile:

> "As part of the motion, the Plaintiff filed a Second Proposed Amended Complaint with attachments for a length of 224 pages. However, Plaintiff does not specifically address the proposed changes or how these changes would influence the Court's analysis of the application of the litigation privilege. In the Motion for Reconsideration, the Court determined that, even considering Plaintiff's Second Proposed Amended Complaint, the litigation privilege applies and acts as an absolute bar to the defamation claims raised by the Plaintiff."

(Emphasis added.) (R., vol. 1, p. 2045). This statement about DFF's pleadings is not true. As already discussed, one of the alleged defects in the original DFF complaint was a lack of anticipatory discussion, and refutation, of the litigation privilege defense. Early in the case, DFF objected to this absurd notion that it was supposed to somehow anticipate a defense not asserted in any filed answer, and then successfully refute the defense in its complaint. (R., vol. 1, pp. 395-396). Nevertheless, DFF did so in its amendments to address the Court's comments. (R., vol. 1, pp. 1389-1397). As seen in the amendments, DFF spent almost ten pages going over the details of the Washington federal derivative claims, the content of the defamatory statements, and the reasons why the statements were not reasonably related to the factual and legal substance of the derivative claims. Moreover, DFF argued extensively in its motion for reconsideration that the Court had erred by not performing a detailed

comparison of the derivative claims and the defamatory statements, and that it was legally impossible for the Court to sustain a litigation privilege defense without such an analysis. (R., vol. 1, pp. 1370-1371). The District Court ignored all this simply gave in to Simplot's misleading arguments.[7] DFF then spent another ten pages in its reply brief showing that each of the key Idaho cases on litigation privilege performed the appropriately detailed comparative legal analysis. (R., vol. 1, pp. 1911-1920). Finally, DFF had attached copies of the Washington federal pleadings and other materials to its amended pleadings to help facilitate the correct comparative privilege analysis. (R., vol. 1, pp. 1406-1611). The District Court erred by finding that these new allegations, if proven, would not have impacted the Court's analysis of the litigation privilege under normal Rule 12 dismissal standards.

Even without the benefit of the holdings in *Savage v. Scandit*, the District Court was provided by DFF with substantial briefing on similar Idaho dismissal standards, as seen in the following cases: *Markstaller v. Markstaller*, 326 P.2d 994, 997, 80 Idaho 129, 134-135 (1958) (a trial court abuses its discretion by dismissing a complaint if the complaint is capable of amendments); *Clark v. Olsen*, 110 Idaho 323, 325, 715 P.2d 993, 995 (1986) (the purpose of a complaint is to inform, and a complaint need only contain a concise statement of facts); *Clark v. Olsen*, 110 Idaho 323, 326, 715 P.2d 993, 996 (1986) (issue formulation is for discovery, and pleadings do not carry the burden of complete factual revelation); *Crews v. Ellis*, 531 So. 2d 1372, 1377, 1988 Fla. App. LEXIS 4393, *15, 13 Fla. L. Weekly 2247 (1988) (it is error to dismiss a complaint when additional factual development is possible). (See R., vol. 1, pp. 1366-1367); (See also R., vol. 1, pp. 1364-1366*,* where DFF provides the District Court with persuasive federal authorities on the need to permit amendments before granting a Rule 12 dismissal). The District Court chose to disregard all of this relevant, applicable authority.

[7] *See,* Footnote 5 above.

Finally, the District Court erred by not drawing the reasonable inferences from the pleadings in DFF's favor. As the non-movant, DFF was entitled to reasonable inferences—even in its proposed amendments. (See Savage v. Scandit, at p. *13, where the Court notes that amendments must be allowed if they contain facts which would constitute a claim, if later proven.). At a minimum, DFF was entitled to have the District Court draw the following reasonable inferences from the facts alleged in its second proposed amendment complaint:

i. That the Washington federal claims were wholly derivative claims (R., vol. 1, p. 1392);
ii. That the Washington federal claims were limited in relevance and scope to the Pasco and Gem State member disputes, and that the defamatory statements about DFF's food safety practices were not at all related to the derivative claims. (R., vol. 1, p. 1393);
iii. That the statements about DFF food's safety practices were not pertinent, material, or reasonably related to the substance of the Washington federal claims. (R., vol. 1, p. 1395);
iv. That DFF was not legally responsible (either by itself or via Tiegs) for the acts and omissions complained of in the Washington federal claims. (R., vol. 1, pp. 1395-1396);
v. That Respondents' decision to remove the statements about DFF's food safety practices in their subsequent Washington litigation was a tacit admission that the statements were not reasonably related to the Washington federal claims. (R., vol. 1, p. 1397);
vi. That Respondents knew, or should have known, the falsity of their statements about DFF's food safety practices. (R., vol. 1, p. 1394);
vii. That Respondents' publication of the defamatory statements to NFCS was not connected to the Washington federal litigation, nor did it materially advance Simplot's derivative claims on behalf of Pasco or Gem State. (R., vol. 1, p. 1397);
viii. That NFCS was wholly uninterested in the outcome of the Washington federal litigation. (R., vol. 1, p. 1397).
ix. That Respondents were using the statements about DFF's food safety practices as prohibited character evidence against Tiegs. (R., vol. 1, p. 1398);
x. That Respondents, through McKellar, admitted that they lacked any specific knowledge of whether the statements about DFF were true at the time they were made, that the statements

did not matter to the outcome of Simplot's federal derivative claims, and that the statements would cause damage to DFF's business reputation. (R., vol. 1, pp. 1398-1399);

xi. That Yarmuth and Thompson acted outside the scope of legitimate representation by pleading and publishing the statements about DFF's food safety practices. (R., vol. 1, p. 1399);

xii. That Respondents were simply trying to harass Tiegs through DFF. (R., vol. 1, p. 1399; see also R., vol. 1, pp. 103, 107, 114, 1381).

The District Court should have drawn these and other reasonable inferences from the pleadings and amended pleadings. Doing so would have provided the Court with a correct legal model for analyzing the litigation privilege, *i.e.*, analyzing whether the defamatory statements were reasonably related to the federal derivative claims. The District Court skipped this whole analysis and applied an incorrect relationships analysis based on the affiliate connections between DFF and Tiegs.[8] Even when Simplot later abandoned and denounced this faulty relationship analysis,[9] the District Court still upheld and applied the analysis its order on reconsideration.[10] This error warrants a remand of the case.

The Court's dismissal order was procedurally objectionable because the litigation privilege defense was asserted in a Rule 12 context. Some jurisdictions do not allow the assertion of the litigation privilege in a motion to dismiss. See for instance, *Stevens v. Helming*, 2012 Conn. Super. LEXIS 438, *8, 2012 WL 695609 (Conn. Super. Ct. Feb. 10, 2012). As Corpus Juris Secundum explains:

> "A motion to dismiss may test the actionable character of the words alleged in a defamation complaint, but if the communication in question is capable of a defamatory meaning, the motion must be denied, with any doubt being resolved in the plaintiff's favor. The action should

[8] See R., vol. 1, p. 1351.

[9] Simplot says in opposition to reconsideration: "Under Idaho law, the application of the litigation privilege/immunity does not include an evaluation of a person or entity's relationship to the subject lawsuit, but rather analyzes whether the alleged defamatory statements are 'reasonably related' to the subject litigation." (R., vol. 1, p. 1843). In so many words, Simplot is denouncing the Court's earlier arguments that the relationship of DFF to Tiegs (who was a named party in the federal lawsuit) is enough to meet the reasonable relationship test.

[10] The Court's reconsideration order states: "In looking at the Washington Litigation Complaint and Amended Complaint, it is clear that the five statements Plaintiff alleged were defamatory were included as part of the pleading to demonstrate concerns with Tiegs' companies and affiliate companies…a review of the entirety of the paragraphs related to DFF in the Washington Litigation, show that these statements are clearly related as evidence of poor business practices of Tiegs and his affiliate companies... These claims, although not directly related to DFF, are all based on the business and management practices of Tiegs and his affiliate companies" (R., vol. 1, p. 2030-2031).

> be dismissed [only] if the communication cannot reasonably be considered to be defamatory…If the words used are susceptible of more than one meaning, one of which is the libelous meaning ascribed to them in the complaint, the motion should be denied."

See 53 C.J.S. Libel and Slander; Injurious Falsehood § 228); (See also R., vol. 1, p. 1351). As seen in the record, Respondents were not using their Rule 12 Motions to test the actionable character of the defamatory statements at-issue; rather, they were using the motions to cover their defamatory statements based on a faulty assertion of the litigation privilege. (See Respondents' motions, R., vol. 1, pp. 68-80, 134-274, 327-364). Corpus Juris Secundum continues:

> "While there is authority that the issue of privilege may be raised by and determined on a motion to dismiss it has also been said that an affirmative defense of privilege does not lend itself to a motion to dismiss filed prior to the answer or a similar procedure for making preliminary objections. The recognized procedure is to plead the privilege as an affirmative defense and thereafter move for summary judgment…".

See 53 C.J.S. Libel and Slander; Injurious Falsehood § 227; see also *Fariello v. Gavin*, 873 So. 2d 1243 (Fla. Dist. Ct. App. 2004). At the trial level, Respondents did not file any answers or affirmative defenses. Simplot later misled the Court on the need to do so, stating that it did not have to file an affirmative defense because "…for the purposes of the motion, there is no reason to look at the facts. They can be truthful, they can be horrendous, it doesn't matter." (TR., vol. 1, p. 21, ln. 23-25; see also TR., vol. 1, p. 18, ln. 19-25, p. 19, ln. 1-25, p. 20, ln. 1-25, p. 21, 1-22). The District Court erred by accepting these arguments and by entertaining motions to dismiss without any pleaded affirmative defense on the matter. The Court should have found that DFF's pleadings (original and amended) stated valid claims for relief. The Court should have then denied the dismissal motions and required Respondents to plead and prove their privilege defenses—either on summary judgment or at trial. For all these reasons, this Court should vacate the District Court's dismissal order and remand the case with instructions to allow amendments and for the claims to proceed on their merits.

SECTION TWO: THE LITIGATION PRIVILEGE

1. The District Court Erred in Its Litigation Privilege Analysis:

The District Court erred in its litigation privilege analysis.[11] To the extent this analysis involves a pure question of law, this Court should review the issue de novo on appeal. "The courts will determine, as a matter of law, whether the matter pleaded was in fact pertinent or material." *Carpenter v. Grimes Pass Placer Mining Co.,* 19 Idaho 384, 393-394, 114 P. 42, 45 (1911). See also *Gough v. Tribune-Journal Co.*, 75 Idaho 502, 508, 275 P.2d 663, 666 (1954) ("If the [defamatory] language used is plain and unambiguous, it is a question of law for the court to determine whether it is libelous per se."). To the extent the issue involves mixed questions of law and fact, or to the extent it involves a discretionary application of legal standards, this Court should exercise free review over the questions of law under those standards. See *State v. Wavrick*, 123 Idaho 83, 86, 844 P.2d 712, 714 (Ct. App. 1992) ("On appeal, when faced with mixed questions of law and fact, we defer to facts found upon substantial evidence, but we freely review the application of law to those facts."); *Bedke v. City of Oakley (In re SRBA)*, 149 Idaho 532, 537, 237 P.3d 1, 6 (2010) ("[The Supreme] Court freely reviews conclusions of law.").

a. History and Analysis of the Idaho Litigation Privilege:

As shown in Section One, above, the District Court's amendment errors happened in large part due to its threshold errors in analyzing and applying the litigation privilege. To better understand this point, it is necessary for DFF to briefly trace the history of the Idaho litigation privilege—its limits and its applications—followed by a discussion of the District Court's specific legal errors.

In its very first response to Simplot's dismissal motion, DFF gave a historical overview of Idaho's litigation privilege standards, citing to *Carpenter v. Grimes, Dayton v. Drumheller, Richeson v. Kessler,* and *Taylor v. McNichols*, and explaining not only the gradual shift in the Court's terminology, but also

[11] See footnote 4, above, where DFF explains that Simplot had purposefully misled the District Court on the need to perform a comparative analysis between the Washington federal litigation and the defamatory statements.

the synonymous nature of the shifting terminology. (R., vol. 1, pp. 395-396). To do so, DFF cited to a comprehensive American Law Reports Article on the topic which explains that the terms 'pertinent,' 'material,' 'relevant,' and 'reasonably related' all pointed to the same general legal question: "Is [the] particular defamatory matter so related to the case that as a matter of public policy it should be deemed absolutely privileged." (*Id.,* citing to 38 A.L.R. 3d 272 (1971)). In its subsequent briefing, DFF used the terms "pertinent or material" and "reasonably related" both conjunctively and synonymously, sometimes discussing precedents for each test separately and sometimes discussing them together. (e.g., R., vol. 1, pp. 956, 1269-1270, 1371-1372, 1376, 1761-1762, 1912-1920). Idaho's two most recent cases on litigation privilege, *Weitz* and *Taylor,* both cite to *Carpenter v. Grimes* (which used a 'pertinent or material' standard) as the basis for the 'reasonable relation' standard. Neither *Weitz* nor *Taylor* over-rule *Carpenter v. Grimes*—a fact which DFF pointed out to the District Court. (R., vol. 1, p. 1912).

In its motion for reconsideration, DFF provided the District Court with a detailed historical analysis of the litigation privilege—both in terms of the evolution of the Idaho case standards, and in terms of a proper application of those standards when analyzing the litigation privilege at trial. (R., vol. 1, pp. 1911-1919). The following table summarizes the key points from that historical analysis, which illustrates how the District Court erred by analyzing the Tiegs/DFF affiliate relationship instead of analyzing the connection between the defamatory statements and the federal litigation claims:

(table continued to next page)

Summary of Idaho Litigation Privilege Case Law:	
1.	**Case:** *Carpenter v. Grimes Pass Placer Mining Co.*, 19 Idaho 384, 114 P. 42 (1911).[12] **Standards:** "We are satisfied that the ends of justice and the public good can be best served by allowing litigants to freely plead any pertinent or material matter in a judicial proceeding to which they are parties, holding them accountable only for defamatory matter which is neither pertinent nor material to the subject under inquiry. They cannot be allowed to avail themselves of the protection of the courts to assail and besmirch the reputation of their adversaries, or to there find protection and thence sally forth in the guise of a pleading to assassinate character and belie virtue. The privilege must be exercised in good faith. The courts will determine, as a matter of law, whether the matter pleaded was in fact pertinent or material." *Id.,* at p. 45.[13] **Application:** "Turning, now, to the complaint and examining the language that was set up by the defendant in the original action which is alleged to have been defamatory, we find that the plaintiff in the original action sued for the recovery of a money judgment for labor performed and material furnished and moneys advanced. The two separate defenses and counterclaims complained of were both pertinent and material, in that the defendant sought to offset and counterclaim any judgment that the plaintiff might recover, and to obtain a judgment against the plaintiff for the value of the goods and property that plaintiff had converted and appropriated. It was a proper subject of counterclaim and setoff…the allegations were proper and pertinent, and constituted matters of defense and counterclaim to the appellant's causes of action." *Id.,* at pp. 45-46 (emphasis added).

[12] Respondents argued below that because *Richeson v. Kessler* partially overruled *Dayton v. Drumheller,* that *Carpenter v. Grimes* is no longer good law. (R., vol. 1, p. 1842). That argument is incorrect. As explained above, *Richeson* did not expressly overrule the 'pertinent or material' test. Rather, it was limited to overruling the 'express malice' elements set out in *Dayton.*

[13] In addition, the *Carpenter* Court cited to the *Union Mutual Life Ins. Co. v. Thomas* standard, which says: "It is perhaps not necessary that [the statement(s)] be in all cases material to the issues presented by the pleadings, but it must be legitimately related thereto, or so pertinent to the subject of the controversy that it may, in the course of the trial, become the subject of inquiry." *Carpenter,* 19 Idaho 384, 393, 114 P. 42, 45 (Idaho 1911) (internal citations omitted). This *Carpenter* standard is very similar to the American Law Reports standard, cited earlier.

The *Carpenter* standard is also similar to the 'reasonable relation' standard cited in more recent Idaho cases. The standard does not require strict legal relevance, but it does require at least some reasonable or legitimate relation to the subject matter of the lawsuit. As stated in a persuasive New York case, the standard requires: "…enough appearance of connection with the case so that a reasonable man might think it relevant." *Seltzer v. Fields*, 20 A.D.2d 60, 63, 244 N.Y.S.2d 792, 796 (N.Y. App. Div. 1st Dep't Dec. 12, 1963). Thus, even though the Court's "pertinent or material" terminology has changed with time, the significance of the standard has not fundamentally changed.

2.	**Case:** *Dayton v. Drumheller*, 32 Idaho 283, 182 P. 102 (1919). **Standards:** "Respondent does not seek to question the rule hitherto established in this court [in *Carpenter*] that libelous matters used in a judicial proceeding, in order to be protected by this privilege must be pertinent or have relation to the subject of the inquiry." *Id.,* at p. 287. **Application:** "…the defamatory matter set forth in the affidavit and relied upon as a basis for recovery in the present action cannot be regarded as pertinent or having any legitimate relation to the application for a new trial, which was the subject at issue in which the words were used." "…the defamatory matter could have no possible legal bearing upon the application for a new trial, and hence was neither pertinent nor had any legitimate relation to the subject then at issue before the court." *Id.,* at p. 288-289 (emphasis added).
3.	**Case:** *Richeson v. Kessler*, 73 Idaho 548, 255 P.2d 707 (1953). **Standards:** "With certain exceptions, unimportant here, defamatory matter published in the due course of a judicial proceeding, having some reasonable relation to the cause, is absolutely privileged and will not support a civil action for defamation although made maliciously and with knowledge of its falsity." *Id.,* at p. 551-552 (emphasis added). **Application:** "…the letter was written with reference and relation to the subject matter of the cause being litigated; and was, in effect, an objection or counter-showing to the subject matter of the brief. Hence the publication complained of was in the course of, connected with, and related to the judicial proceeding." *Id.,* at p. 551 (emphasis added).
4.	**Case:** *Weitz v. Green*, 148 Idaho 851, 230 P.3d 743 (2010). **Standards:** "If the defamatory statement was made in the course of a proceeding and had a reasonable relation to the cause of action of that proceeding, that statement may not be used as the basis for a civil action for defamation." *Id.,* at p. 862. **Application:** "As the finding of slander of title in this case was premised upon a statement made in the complaint, a necessary first step in litigation, where such statement was related to the underlying claim against Respondents, that statement is deemed immune." *Id.,* at p. 863 (emphasis added).

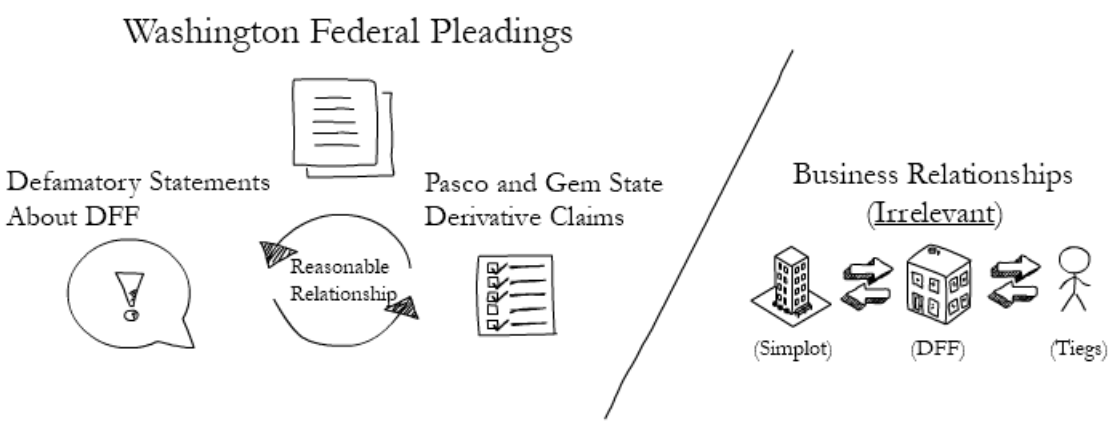
5.	**Case:** *Taylor v. McNichols*, 149 Idaho 826, 243 P.3d 642 (2010) **Standards:** "…the litigation privilege does not provide attorneys with blanket immunity against all claims raised against them, merely because they are acting as an attorney in litigation. However, where attorneys are being sued by the opponent of their client in a current or former lawsuit, and that suit arises out of the attorneys' legitimate representation of that client pursuant to that litigation, the privilege does apply." "…Application of the litigation privilege varies across jurisdictions, but the common thread found throughout is the idea that an attorney acting within the law, in a legitimate effort to zealously advance the interests of his client, shall be protected from civil claims arising due to that zealous representation." "…[Other] courts have come to a general agreement that the litigation privilege protects attorneys from all civil suits which are raised against them by a party adverse to their clients, as a result of their representation of their clients, provided attorneys do not act beyond the scope of that representation for their own purposes. For Idaho, the litigation privilege is an absolute privilege, which only applies when a specific condition precedent is met, namely, that an attorney is acting within the scope of his employment, and not solely for his personal interests." "…as a general rule, where an attorney is sued by the current or former adversary of his client, as a result of actions or communications that the attorney has taken or made in the course of his representation of his client in the course of litigation, the action is presumed to be barred by the litigation privilege. An exception to this general rule would occur where the plaintiff pleads facts sufficient to show that the attorney has engaged in independent acts, that is to say acts outside the scope of his representation of his client's interests, or has acted solely for his own interests and not his client's." *Id.,* at pp. 839-841 (emphasis added). **Application:** "…Reed fails to allege that Respondents were acting outside the scope of their employment or solely for their own benefit. Therefore, these claims are also barred by the litigation privilege." *Id.,* at p. 844.

These Idaho cases have a common theme, viz., that a trial Court can only perform a litigation privilege analysis by examining the contents of the defamatory statements to see if the statements are connected (i.e., pertinent, material, or reasonably related) to the content of the legal claims in litigation. As seen in these cases, there is a reason for conducting this specific comparative analysis—it tests whether the defamatory statements are wholly superfluous to the claims and, thus, an act of bad faith by the litigant. In our case, the District Court willfully ignored this analysis and irrelevantly considered

whether DFF had a business relationship to Tiegs or to Simplot. (R., vol. 1, pp. 1351-1352) (TR., vol. 1, p. 170, ln. 8-25, p. 171, ln. 1-25, p. 172, ln. 1-25, p. 173, ln. 1-21).

On appeal, this Court should find that the Idaho litigation privilege only protects defamatory statements which are pertinent, material, or reasonably related to actual, legally asserted claims. In common parlance, this standard requires a factual connection between the defamatory statements and the litigation claims which evokes a sufficient reason for making the statements in the litigation. As seen in the history of Idaho case law, the Court always focuses its litigation privilege analysis on the substance of the litigation claims—not on any personal/third-party relationships outside of those claims, as seen in the following illustration and record-admission by Simplot:

Reasonable Relationship Illustration:



Simplot finally admits in opposition to reconsideration: "Under Idaho law, the application of the litigation privilege/ immunity does not include an evaluation of a person or entity's relationship to the subject lawsuit, but rather analyzes whether the alleged defamatory statements are 'reasonably related' to the subject litigation." (R., vol. 1, p. 1843).

This Idaho rule is consistent with persuasive case law. See *Taylor v. Iowa Park Gin Co.,* 199 S.W. 853, 855 (Tex. Civ. App. 1917) ("In order that matter alleged in a pleading may be privileged, it need

not be in every case material to the issues presented by the pleadings. It must, however, be legitimately related thereto, or so pertinent to the subject of the controversy that it may become the subject of inquiry in the course of the trial."); *Russell v. Clark*, 620 S.W.2d 865, 869 (Tex. App. 1981) ("An attorney at law is absolutely privileged to publish defamatory matter…if it has some relation to the proceeding."); *Silberg v. Anderson*, 50 Cal. 3d 205, 219-20, 266 Cal. Rptr. 638, 647, 786 P.2d 365, 374 (1990) ("The requirement that the communication be in furtherance of the objects of the litigation is, in essence, simply part of the requirement that the communication be connected with, or have some logical relation to, the action, i.e., that it not be extraneous to the action. A good example of an application of the principle is found in the cases holding that a statement made in a judicial proceeding is not privileged unless it has some reasonable relevancy to the subject matter of the action."); *Bradley v. Hartford Accident & Indem. Co.,* 30 Cal. App. 3d 818, 826, 106 Cal. Rptr. 718, 723 (1973) ("…the above consideration all the more compels the conclusion that in determining whether or not the defamatory publication should be accorded an absolute privilege, special emphasis must be laid on the requirement that it be made in furtherance of the litigation and to promote the interest of justice.").

On appeal, this Court should find that the District Court failed to perform a proper litigation privilege analysis because it failed to compare the defamatory statements about DFF with the substance of the derivative claims in the Washington federal litigation.

In addition, the Court should find that the litigation privilege does not extend to illegitimate litigation tactics. Though the term "illegitimate" is not defined in *Taylor v. McNichols*, the Court should adopt a similar standard to those found in the Preamble to the Idaho Rules of Professional Conduct: "A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures

only for legitimate purposes and not to harass or intimidate others. Idaho R. Prof. Conduct, "Preamble: A Lawyer's Responsibilities."[14] (emphasis added)

In sum, this Court should reemphasize one of the central holdings from *Taylor v. McNichols,* that the Idaho litigation privilege is not without limits, and that the privilege is subject to the following minimum requirements: (1) it only applies to defamatory statements which are reasonably related to the content of actual litigation claims; (2) it only applies to statements which further the client's interests; and (3) it only applies to legitimate or good faith litigation statements.

b. The District Court Failed to Perform a Correct Litigation Privilege Analysis, and the Supreme Court Should Review the Matter De Novo:

This Court should find that the District Court failed to perform the correct litigation privilege analysis, and the Court should now review the matter de novo on appeal. As evidenced in the record, the District Court reached its incorrect legal conclusions by reference to the Tiegs/DFF affiliate relationship. (R., vol. 1, pp. 1351-1352, 2031, 2045; TR., vol. 1, p. 15, ln. 17-25, p. 16, ln. 1-14). This legally flawed relationship analysis violated the Idaho litigation privilege standards (*i.e.*, it failed to analyze the defamatory statements in relation to the actual Washington federal derivative claims). The Supreme Court is now entitled to perform this analysis de novo using the correct litigation privilege standards. "When presented with an issue that raises only a question of law, this Court is not bound by the findings of the trial court, but is free to draw its own conclusions from the evidence presented." *Clark v. St. Paul Prop. & Liab. Ins. Cos.*, 102 Idaho 756, 757, 639 P.2d 454, 455 (1981).[15] Doing this analysis

[14] DFF recognizes that the Rules of Prof. Conduct are not designed to be a basis for civil liability. See "Preamble," Comment 19. However, the Rule's use of the term "legitimate" adapts well to the principle already stated in *Taylor* that conduct must be legitimate in order to receive protection from the litigation privilege.

[15] In the *Clark* case, the Supreme Court reminded the parties that it was free to "draw [its] own conclusions" as to contract ambiguity on appeal, as that question of ambiguity was a question of law. *Id.,* at p. 455. Here, the Court is entitled to decide the question of whether the statements about DFF were "reasonably related" to the derivative claims in the Washington federal litigation as a matter of law.

shows that the defamatory statements about DFF had no reasonable relation to the Pasco and Gem State member claims. (See First Amended Complaint, R. vol. 1, pp. 1389-1398).

In connection with its privilege analysis, this Court must remember that Senior Judge Ricardo Martinez of the Washington Federal Court eventually dismissed Simplot's federal claims—recognizing that all but two of the "direct" claims were really just copies of the "derivative" claims, and that the real parties-in-interest for the claims were Pasco and Gem State. (R., vol. 1, pp. 505-514).[16] This decision about the nature of the claims by Judge Martinez is critical because it shows that DFF's food safety practices (as a non-member of Pasco and Gem State) had nothing to do with the internal Pasco and Gem State member disputes in the federal litigation.

The Court should also keep in mind Idaho derivative case law, which defines a "derivative" claim as one which is brought to enforce a corporate right or to remedy a particular corporate wrong: "A stockholder's derivative action is an action brought by one or more stockholders of a corporation to enforce a corporate right or remedy a wrong to the corporation in cases where the corporation, because it is controlled by the wrongdoers or for other reasons fails and refuses to take appropriate action for its own protection." *McCann v. McCann*, 138 Idaho 228, 233, 61 P.3d 585, 590 (2002) (internal citations omitted). See also *Kugler v. Nelson*, 160 Idaho 408, 413, 374 P.3d 571, 576 (2016). Under these standards, Simplot's claims were really Pasco's and Gem State's claims, and the substance of the claims was limited to the fiduciary and contractual duties *within* Pasco and Gem State. The claims did not extend to third-party supplier safety relationships; or, in DFF's case, they did not extend to third-party non-suppliers who just so happened to be owned (but not managed) by one of the litigants.

[16] The only exception was for Counts III and IV, *i.e.* Simplot's records requests, which Judge Martinez found to be direct claims and not derivative claims.

Of course, Respondents avoided this entire derivative analysis—even when asked to perform the analysis at hearing.[17] Instead, Respondents continually revert to their flawed party-relationships analysis. For instance, Yarmuth argued: "One of the central allegations in the Washington Litigation is that Tiegs and his entities mismanaged and abused fiduciary and other duties regarding certain joint ventures that they undertook with Simplot, resulting in enormous harm to Simplot. The complaint filed by Simplot in the Washington Litigation details this mismanagement, and as a part of doing so, quotes from government reports and certain government-issued press releases discussing failures by Tiegs' entities to comply with various federal health and workplace safety standards. The Washington complaint also quotes from and attaches one government report and press release, as well as an audit report prepared by NSF International…related to DFF because it is an entity that Tiegs controlled and which Tiegs concedes is one of his affiliates. These materials are thus relevant to the overall claims of mismanagement by Tiegs and his entities." (R., vol. 1, p. 138, emphasis added; see also Rob Lang's admission, p. 1236, 147:11). Unfortunately, the District Court adopted Respondents' evasive and irrelevant relationships analysis and thus did not ever perform a correct litigation privilege analysis.

DFF tried to correct the flawed factual basis for the Court's party-relationships analysis. In one affidavit, DFF explained: "Contrary to Simplot's assertions in the Verified Complaint...Pasco Processing, National Frozen Foods Corporation, and Gem State each have their own plant managers, production managers, testing labs, quality control personnel, and environmental safety personnel...Similarly, Dickinson Frozen Foods, Inc., which has two plants, each have their own plant managers, production managers, quality control personnel, and environmental safety personnel. [Frank

[17] See TR., vol. 1, p. 131, ln. 17-20, where DFF points out that Respondents failed to engage in any actual claims analyses—relying instead on catchphrases and conclusory arguments. See also TR., vol. 1, p. 146, ln. 1, where Yarmuth refers to the issue as "…the order regarding the derivative thing." Perhaps this is because Simplot had already admitted in its federal pleadings that DFF was not a relevant "affiliate" in the federal litigation. (R.,vol. 1, p. 170, ln. 19-21).

Tiegs does] not oversee the day-to-day operations at any of DFF's facilities." (R., vol. 1, p. 1107). The Court refused to consider any of this new information in its privilege analyses.[18]

In sum, the derivative nature of the Washington federal litigation claims isolated the claims—in terms of materiality, pertinence, relevance, and reasonable relation—from the defamatory statements about DFF's food safety practices. There is no evidence in the record to the contrary. This Court should find, as a matter of law, that there was no reasonable relation between the federal litigation claims and the defamatory statements. At most, there was only an unreasonable (and illegitimate) relation between the claims and the statements, *i.e.*, a desire to attack Tiegs's character by attacking the independent character of DFF. (R., vol. 1, p. 141). This attack on a third-party's safety reputation was defamatory per-se. See *Blaine Larsen Processing, Inc. v. Hapco Farms, Inc.,* 2000 U.S. Dist. LEXIS 22870, *38, 2000 WL 35539979 (D. Idaho Aug. 9, 2000) (attack on an Idaho potato-industry member's reputation for quality is defamatory per se under Idaho law); See also *Nichols v. Kanaley*, 2017 Ida. App. Unpub. LEXIS 116, *5-6 (attack on business reputation is libelous per se). This Court should find that the District Court's privilege analysis was erroroneus, and that Respondents' use of the defamatory statements about DFF was not at all related to the federal litigation derivative claims.

c. The District Court Erred in Its Publication and Waiver Analyses:

The District Court erred in its third-party publication analysis by finding that the publication to Northwest Farm Credit Services (NFCS) was done "in connection" with the Washington federal litigation. To be more precise, the District Court erred by finding that DFF had failed to show that NFCS was "wholly unconnected" with the federal litigation, and so therefore the publication was presumed to be valid. (R., vol. 1, p. 1350). That is not the legally correct publication analysis. The relevant persuasive case law does not put any burdens on DFF to show a total lack of connection of

[18] DFF is not aware of any instance where the District Court recognizes DFF's independent management and operations, and the impact those facts have on the flawed affiliate relationships analysis.

the third-party to the judicial proceedings. "[Proponents have] the burden of establishing the preliminary facts on which they base their affirmative defense of the litigation privilege." *Edwards v. Centex Real Estate Corp.*, 53 Cal. App. 4th 15, 37, 61 Cal. Rptr. 2d 518, 532 (1997).

The District Court erred by discounting the importance of the publication to NFCS, which had the effect of waiving or nullifying the litigation privilege. (TR., vol. 1, p. 31, ln. 14-20; p. 35, ln. 12-25, p. 36, ln. 1-25, p. 37, ln. 1-8). See *Spencer v. Spencer*, 479 N.W.2d 293, 295–96 (Iowa 1991) (while a defamatory pleading is privileged, that pleading cannot be a basis for dissemination of defamatory statements to the public or third parties); *Messina v. Krakower,* 439 F.3d 755 (D.C. Cir. 2006) (the litigation privilege has been held to be inapplicable when a defamatory statement is published to persons not having an interest in or connection to the litigation); *Schulman v. Anderson Russell Kill & Olick, P.C.,* 117 Misc. 2d 162, 458 N.Y.S.2d 448 (Sup. Ct. 1982) (privilege does not apply to letters from law firm to unconnected third-party); *Simpson Strong-Tie Co. v. Stewart, Estes & Donnell,* 232 S.W.3d 18, 26–27 (Tenn. 2007) (publications to recipients who are unconnected to the litigation will not be privileged).

Moreover, the District Court erred by focusing exclusively on the relationship between the third-party recipient and the litigation (*i.e.*, on NFCS's relationship to the parties in the federal litigation), as opposed to focusing on the connection between the act of publication and the litigation (*i.e.*, whether publication was done in connection with, or in furtherance of, the claims in the litigation). As seen in the trial-level briefing, Respondents relied heavily, and incorrectly, on the case *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 567 S.E.2d 881 (Ct. App. 2002), to justify their publication to NFCS. (See R., vol. 1, pp. 145, 375). However, *Pond Place Partners* involves the publication (*i.e.* the filing) of a lis pendens notice in a real estate dispute. There, the Court found that the notice was published in connection with the proceedings "…only [because] plaintiff [plead] a cause of action which involve[d] or affect[ed] title to, or any interest in or a lien upon, specifically described real property." *Pond Place*

Partners, Inc. v. Poole, 567 S.E.2d 881, 895, 351 S.C. 1, 27 (S.C. Ct. App. 2002). In other words, the publication bore a legally sufficient connection to the substantive proceedings. Under these standards, Respondents' publication of the pleadings to NFCS was not privileged because the publication had absolutely no connection to the federal derivative proceedings. It was wholly extraneous and unnecessary, and it did nothing to advance Simplot's interests in the derivative litigation. See also *Seltzer v. Field*s, 20 A.D.2d 60, 244 N.Y.S.2d 792 (1963), aff'd, 14 N.Y.2d 624, 198 N.E.2d 368 (1964) (Communications unconnected with judicial proceeding are not cloaked with absolute privilege); *Sodergren v. Johns Hopkins Univ. Applied Physics Lab.*, 138 Md. App. 686, 773 A.2d 592 (2001) (the 'absolute judicial privilege' from defamation is not unlimited, and if a litigant publishes an otherwise privileged statement to a third party, the privilege will not attach unless the statement was made to further a purpose falling within the public interest underlying the privilege). There is no evidence in the record to show that Respondents' publication to NFCS was done "in connection" with the Washington federal litigation, or that it was done to advance Simplot's interests in the derivative litigation.

Finally, the District Court erred in its privilege waiver analysis by stating: "…whether litigation privilege applies to the publication to NCFS is a legal question to be decided by this Court. Thus, the issue of waiver is not included in the Court's litigation privilege analysis. Once a litigation privilege is found to apply, it is an absolute privilege." (R., vol. 1. P. 2032). This erroneous conclusion is at odds with persuasive case law, which says that even an absolute privilege can be overcome. See *Milford Power Ltd. P'ship by Milford Power Assocs. v. New England Power Co.*, 918 F. Supp. 471, 486 (D. Mass. 1996) ("The privilege cannot, however, be 'exploited' as an opportunity to defame with immunity and can be lost by unnecessary or unreasonable publication to one for whom the occasion is not privileged."); *Bender v. Smith Barney, Harris Upham & Co.*, 901 F. Supp. 863, 871, 1994 U.S. Dist. LEXIS 20706, *20 (D.N.J. 1994) ("The purposeful dissemination of defamatory allegations contained in a pleading, for purposes of obtaining publicity of the allegation, causes the otherwise privileged allegations to lose

their protected status when published."); *Feldman v. 1100 Park Lane Assocs.*, 160 Cal. App. 4th 1467, 1496, 74 Cal. Rptr. 3d 1, 24 (2008) ("The litigation privilege has never shielded one from all liability). The District Court should have found that DFF's waiver allegations, if proven, would negate the litigation privilege and Respondents' ability to use the privilege in a Rule 12 dismissal.

d. The District Court Erred in Its Findings on Legitimate Representation:

The District Court erred in findings on the issue of legitimate representation. (R., vol. 1, p. 2035). In support of its dismissal motion, Yarmuth admitted that the Respondents were trying to use the statements about DFF to impugn Tiegs's character: "The issues related to DFF are relevant to the Washington Litigation because DFF is an entity under Tiegs' control, and Simplot alleges that similar poor management and unsafe operational practices occurred with respect to the Tiegs entities that were managing and operating the parties' joint ventures that are the subject of the Washington Litigation." (R., vol. 1, p. 141). It is clear from this admission that Respondents sought to use the statements about DFF as prohibited character evidence.[19] Rule 404(b) says that such character evidence "… is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Respondents were not entitled to make allegations about DFF's safety practices to show that similar poor management or unsafe operational practices were happening at Pasco and Gem State—especially since Tiegs does not personally manage or operate the DFF facilities. (R., vol. 1, p. 402). See also *United States v. McCourt*, 925 F.2d 1229, 1236, 1991

[19] The fact that Tiegs is the DFF company president does not allow Respondents to freely associate DFF's actions with those of Tiegs. See *Hall v. Harris,* where the Alabama Supreme Court refused to hold a company vice-president liable for the company where his duties were strictly administrative. (*Hall v. Harris*, 504 So. 2d 271, 274, 1987 Ala. LEXIS 4193, *9 (Ala. Feb. 27, 1987)). See also *Pace v. Garcia* ("General corporation law is clear that personal liability for a corporation's acts cannot be imposed on a person merely because he is an officer…rather, personal liability is imposed only when the officer is alleged to have taken part in the illegal act initially giving rise to the corporation's liability." *Pace v. Garcia*, 631 F. Supp. 1417, 1419, 1986 U.S. Dist. LEXIS 27261, *4 (W.D. Tex. 1986)). Respondents did not raise any facts or claims in the federal litigation which would impute the alleged DFF food safety violations to Tiegs or to the joint ventures.

See also the statement of Rob Lang, lead counsel for Simplot, who stated that the purpose of the DFF statements was to show "behavior." (R., vol. 1, p. 1236, 147:11).

U.S. App. LEXIS 2782, *20 (9th Cir. Cal. 1991) ("Neither Rule 404(b) nor its underlying purpose would be served by permitting [a litigant] to present prior misconduct of a third party to show propensity.").

The fact that Respondents attempted to use prohibited character evidence against Tiegs shows they were acting outside the scope of legitimate representation. See *Taylor,* 149 Idaho 826, 839, 243 P.3d 642, 655 (2010).[20] [21] Persuasive case law confirms: "Zealous advocacy…is an advocate's duty to use legal procedure for the fullest benefit of the client's cause, but it is also a duty not to abuse legal procedure." *Reed v. Baltimore Life Ins. Co.,* 127 Md. App. 536, 552-553, 733 A.2d 1106, 1114-1115 (Md. Ct. Spec. App. 1999). As the Supreme Court of West Virginia explains: "We believe such exceptions to an absolute litigation privilege [*e.g.* malicious use of process] arising from conduct occurring during the litigation process are reasonable accommodations which preserve an attorney's duty of zealous advocacy while providing a deterrent to intentional conduct which is unrelated to legitimate litigation tactics and which harms an opposing party." *Clark v. Druckman*, 218 W. Va. 427, 433, 624 S.E.2d 864, 870, 2005 W. Va. LEXIS 151, *18 (W. Va. 2005) (cited in *Taylor v. McNichols,* emphasis added). See also, *Sacotte Constr., Inc. v. Nat'l Fire & Marine Ins. Co.,* 143 Wash. App. 410, 418, 177 P.3d 1147, 1151

[20] The Taylor Court notes that "traditional safeguards" are in place to otherwise protect litigants against frivolous litigation tactics. *Id.* at 243. DFF was not a party to the federal litigation, and so it could not avail itself of any of these safeguards. DFF's only option for redress was to file an Idaho civil suit for defamation.

[21] The Court should not assume that the DFF statements were made accidentally or by oversight. Yarmuth Wilsdon's lead counsel in the federal litigation, Jeremy Roller, graduated from Yale law school and practices in the areas of complex civil and commercial litigation. He has represented companies such as Direct TV, Getty Images, and Microsoft Corp. (See http://www.yarmuth.com/attorneys/jeremy-roller/). Further, Thompson Coburn's lead counsel, Rob Lang, is a commercial litigator who focuses on preventing and resolving "business divorces" and who has done previous litigation for a multi-billion-dollar food processing company. The firm's web bio for Mr. Lang says: "…Litigation can be a chess match or a street fight: Rob has the skills and experience to navigate either approach." (See http://www.thompsoncoburn.com/people/rob-lang). In the Washington federal litigation, Respondents ignored the "chess" litigation approach, where rules and decorum tend to prevail. Instead, Respondents opted for the "street fight" litigation approach by pleading irrelevant and defamatory third-party character evidence. As shown above, this was a prohibited litigation tactic, and so it is not covered under the "legitimate representation" test of *Taylor v. McNichols.*

(2008) ("Vigorous advocacy is not contingent on lawyers being free to pursue litigation tactics that they cannot justify as legitimate.").

If *Taylor v. McNichols* stands for anything, it stands for the rule that the Idaho litigation privilege is not unlimited, and that the requirements of "legitimate representation" must constrain an attorney's use of the privilege. To hold otherwise is to sanction the kind of street fight tactics as illustrated by the Respondents' character attacks. On appeal, this Court need only uphold the already clear rules from *Taylor v. McNichols*—that the privilege does not apply to the attorney's "…independent acts, that is to say acts outside the scope of his representation of his client's interests." *Taylor,* at p. 841. The Court should find that Respondents' intentional use of the DFF statements as prohibited third-party character evidence was not legitimate representation, and thus is not protected by any privilege.

e. The District Court Erred in Its Applications of the Litigation Privilege to Statements Made Against Innocent Third-Parties:

The District Court erred in its application of the litigation privilege to defamatory statements made against innocent third-parties. In its trial briefing, DFF argued extensively that the privilege does not apply in such cases unless the statements are reasonably related to the claims in litigation. (R., vol. 1, p. 394 fn. 2, 956-958). The District Court simiply ignored these arguments. On appeal, this Court should find that the privilege does not extend to defaming innocent third parties.

Respondents' leading case below, *Anderson v. Hartley*, 222 Iowa 921, 270 N.W. 460 (Iowa 1936), did not support their position on third-party defamation, because that case requires the defamatory statements to be pertinent, relevant, and material to the claims in litigation. In that case, W.J. Anderson ("W.J.") owned certain real-estate which he leased to Mr. and Mrs. Kaus. Soon afterward, W.J. transferred the lease to his wife, Mary J. Anderson ("M.J."). About a year later, M.J., the wife, filed a landlord's attachment proceeding ("Case No. 1") to collect on past-due rent. She then levied on some of the Kraus' cattle. Hartley, who also had an interest in the cattle, filed an intervention in Case No. 1

to assert his lien priority status. In his petition, Hartley accused W.J. (M.J.'s husband and a non-party to Case No. 1) of assigning the lease to M.J. to defraud his investors. W.J. then filed a separate action for defamation (Case No. 2) because of the statements about defrauding creditors. The trial court denied W.J.'s petition, and he appealed. On appeal, the Iowa Supreme Court noted that the intervention petition was legal and that the alleged defamation in Case No. 1 was therefore part of a valid judicial proceeding. But the Court went on to explain: "…the [defamatory] allegation, if established, was both relevant and pertinent to the issues involved in [Case No. 1]":

> "The statements in the petition of intervention that plaintiff made an assignment of the lease to his wife for the purpose of defrauding the intervenor is not complained of or denied by plaintiff herein. If the lease was assigned by plaintiff to his wife for the purpose of defrauding the intervenor, and if the mortgages held by the intervenor were, in fact, prior and superior to the landlord's lien, and were wrongfully procured to be released by the plaintiff, the statements complained of in the petition of intervention became and were relevant, pertinent and material to defendant's rights in that action, because plaintiff's wife, as holder of the lease, stood in the shoes of her husband, the plaintiff herein."

Id., at p. 924 (emphasis added). In other words, Hartley's statements about W.J. (a non-party) in Case No. 1 were relevant, pertinent, and material to the outcome of Case No. 1 because, if true, they would have supported Hartley's lien priority defense. In contrast, Respondents statements about DFF safety practices in the federal litigation had no relevance to the derivative claims and had no possible effect on the claims' outcome. The statements were simply Respondents' attempt to attack Tiegs's character by using an unrelated entities' character evidence. This act by Respondents would be tantamount to Hartley (in the Iowa case) making fraudulent lease allegations against W.J.'s separate business interests, in matters wholly unconnected to litigation (i.e. unconnected to the Kaus' lease assignment). There is no indication that the Hartley Court would have found such statements "pertinent, relevant, and material" to the claims in the litigation. The holdings of *Anderson v. Hartley* do not support Respondents' arguments, and the District Court's abstract conclusion that the privilege extends to acts against third parties (without a reasonable relationship analysis) was erroneous. (R., vol. 1, p. 1350).

This Court in *Taylor v. McNichols* held that the litigation privilege applied narrowly to situations "…where attorneys are being sued by the opponent of their client in a current or former lawsuit, and that suit arises out of the attorneys' legitimate representation of that client pursuant to that litigation, the privilege does apply." *Id.,* at p. 839, 842-843 (emphasis added). The *Taylor* Court also held: "If an attorney engages in tortious interference with a third-party's interest out of a personal desire to harm, separate entirely from his desire to advance his client's interests, that attorney's conduct is not properly adjudged as occurring in the course of his representation of his client's interests." *Id.,* at pp. 840-841. To-date, none of the cited Idaho litigation privilege cases have expressly applied the privilege to defamatory statements made against third parties (i.e., non-opponents in current or former litigation). This appears to be a novel issue on appeal, and the Court should find that the privilege does not extend to defamatory statements against a third party unless there is a reasonable relation between the statements and the content of the litigation claims. At a minimum, this Court should find that the District Court erred by not engaging in this kind of comparative analysis on the issue. (See R., vol. 1, p. 1350).

SECTION 3: SUMMARY JUDGMENT

1. The District Court Erred in Its Summary Judgment Analysis:

The District Court erred in granting Simplot's motion for summary judgment on Count 2 of the original complaint, *i.e.*, breach of the non-disclosure agreement. (R., vol. 1, pp. 2093-2102). Specifically, the Court erred by finding that the language of the agreement was unambiguous "on its face" while at the same time embracing Simplot's use of parol evidence about the limited meaning of the agreement. (R., vol. 1, pp. 2098-2100). The standard of review of this issue on appeal is free review, applying the same standard used by the District Court when deciding the motion:

> "In an appeal from an order granting summary judgment, this Court's standard of review is the same as the standard used by the district court in ruling on a motion for summary judgment. Summary judgment is appropriate if the pleadings, affidavits, and discovery documents

> on file with the court, read in a light most favorable to the nonmoving party, demonstrate no material issue of fact such that the moving party is entitled to a judgment as a matter of law. In making this determination all allegations of fact in the record and all reasonable inferences from the record are construed in the light most favorable to the party opposing the motion. When a jury is to be the finder of fact, summary judgment is not proper if conflicting inferences could be drawn from the record and reasonable people might reach different conclusions."

Thomas v. Med. Ctr. Physicians, P.A., 138 Idaho 200, 205, 61 P.3d 557, 562 (2002).

This Court should reverse the decision on summary judgment because there were several material factual disputes, including: (1) the intended scope of the term "business relationship," as stated in the non-disclosure agreement (R., vol. 1. p. 1940); and (2) the intended purpose of the non-disclosure agreement (R., vol. 1. pp. 1940-1942). Also, Simplot's declarant, Tom Clark, gives an explanation about the scope of the non-disclosure agreement which is directly at odds with the plain language of the agreement. (R., vol. 1, pp. 383-385; See also chart, R., vol. 1. p. 1940). Specifically, Clark says that the non-disclosure agreement was limited to a three-month potato shreds deal, which testimony goes against Helen Stone's testimony that the non-disclosure agreement was valid for a period of three years, and that DFF only released its confidential food safety report to Simplot because Tom Clark had earlier signed a non-disclosure agreement. (R., vol. 1. pp. 1944-1946). The Court need not resolve these factual disputes on appeal; it only need recognize the disputes and draw any reasonable inferences from the disputes in favor of DFF's position, *i.e.*, that the non-disclosure agreement covered the parties' ongoing business relationship and that Simplot's public disclosure of the food safety report took place within the time frame covered by the agreement. (R., vol. 1. p. 1940).

2. The District Court Erred in Its Legal Constructions of the Agreement:

Ultimately, the District Court based its decision on a finding that the non-disclosure agreement was unambiguous, and that the agreement was limited to protecting information received by Simplot during the parties' preliminary discussions about their business relationship. (R., vol. 1, p. 2099). The Court went on to hold "…had DFF meant for the non-disclosure agreement to cover all information

sent to or received by Simplot within a three-year period as part of a consulting working relationship, the language should have reflected this requirement." (R., vol. 1, p. 2100). Yet, the Court disregarded the plain fact that the agreement does contain an express three-year obligation of confidentiality (R., vol. 1, p. 1951), and that the agreement's recipient (i.e., Simplot) had a duty to keep any confidential information it had received a secret until DFF: (1) made a written demand for the information: or (2) the agreement was terminated. (R., vol. 1, p. 1952). This explanatory language, when compared with the language relied on by the District Court, at a minimum, creates an ambiguity in the agreement and provides a reasonable alternative view that the confidentiality requirements would continue even after the formation of the proposed business agreement, as explained in the Helen Stone Declaration. (R., vol. 1. pp. 1944-1946). Idaho case law says: "Ambiguity results when reasonable minds might differ or be uncertain as to its meaning." *McKay v. Boise Project Bd. of Control*, 141 Idaho 463, 469, 111 P.3d 148, 154 (2005). In this sense, a jury could have rejected the District Court's limited reading of the agreement considering the agreement's own expansive confidentiality language. The District Court erred by construing only part of the agreement's language: "In determining the intent of the parties, [the] Court must view the contract as a whole." *Shawver v. Huckleberry Estates, L.L.C.*, 140 Idaho 354, 361, 93 P.3d 685, 692 (2004). This Court should find that the District Court erred in its legal conclusions on ambiguity and should remand the breach of the non-disclosure claim.

SECTION 4: ATTORNEY FEES AND COSTS

1. The District Court Erred in Awarding Respondents Attorney Fees and Costs:

The District Court erred in awarding Respondents' their attorney fees and costs under Idaho Code § 12-120(3) and Rule 54(d). (R., vol. 1, pp. 2109-2112, 2231-2234). The standard of review on awards of fees and costs authorized by statute is the abuse of discretion standard, discussed previously. See also *Magleby v. Garn*, 154 Idaho 194, 196, 296 P.3d 400, 402 (2013). In our case, the District Court abused its discretion under the second prong of this test because it did not apply the correct legal

standards for commercial transaction fees under Idaho Code § 12-120(3). The District Court also abused its discretion under the third prong of the test because it did not exercise a reasoned choice in finding that their defamation per se claim was based on a commercial transaction.

a. The District Court Erred in Its Prevailing Party Analysis:

The District Court awarded Respondents McKellar, Simplot, and Thompson their fees and costs under the "commercial" transaction prong of Idaho Code § 12-120(3)—finding that Respondents prevailed on their litigation privilege defense theory. (R., vol. 1, pp. 2109-2112, 2231-2234). But as already shown, the Court failed to perform a proper litigation privilege analysis, *i.e.*, a claims analysis, and so the Court's prevailing party analysis was also in error, and its awards of fees and costs must be vacated on appeal. Importantly, the District Court found that fees were not warranted under any other statute, *e.g.*, Idaho Code § 12-121. (R., vol. 1, pp. 2108-2109, 2229-2231), and DFF does not challenge those conclusions on appeal. Also, Respondents did not allege any other basis for fees (R., vol. 1, pp. 1620-1628, 1659-1675, 2125-2136), and they do not cross-appeal the issue. If the Court reverses the District Court's Rule 12 dismissal findings or its litigation privilege findings, it should also reverse the District Court's fees and costs awards to Respondents.

b. The Court Erred in Its' Commercial Transaction Analysis:

In the alternative, if this Court finds that Respondents did prevail on their litigation privilege defense theory, and if the Court ultimately finds that the dismissal and/or summary judgment orders were proper, the Court should still decline to award attorney fees under Idaho Code § 12-120(3).

Specifically, this Court should find that the District Court erred in finding that there was an underlying commercial transaction between DFF and any of the Respondents due to the parties' general business relationships. The District Court said: "A commercial transaction was the gravamen of Plaintiff's Count One and finds that, without the business relationship/continuing commercial transactions between DFF/Simplot, the defamation claim would not have arisen." (R., vol. 1, p. 2234).

This statement is simply not true; it ignores the fact that the defamation claim arose exclusively from the Respondents' defamatory attacks in the federal litigation. Whether DFF and Simplot had a general commercial relationship outside of the federal litigation is irrelevant. The District Court overlooks the requirement of a specific commercial transaction as the basis of the § 12-120(3) recovery. The following list of cases illustrates this concept and the need for an underlying commercial transaction:

- "There must be a commercial transaction between the parties for attorney fees to be awarded." *Great Plains Equip. v. Nw. Pipeline Corp.*, 136 Idaho 466, 471, 36 P.3d 218, 223 (2001) (emphasis added);

- "The award of attorney's fees is not warranted every time a commercial transaction is remotely connected with the case. Rather, the test is whether the commercial transaction comprises the gravamen of the lawsuit. Attorney's fees are not appropriate under I.C. § 12-120(3) unless the commercial transaction is integral to the claim, and constitutes the basis upon which the party is attempting to recover. To hold otherwise would be to convert the award of attorney's fees from an exceptional remedy justified only by statutory authority to a matter of right in virtually every lawsuit filed." *Brower v. E.I. DuPont de Nemours & Co.*, 117 Idaho 780, 784, 792 P.2d 345, 349 (1990) (emphasis added); See also *Ag Servs. of Am. v. Kechter*, 137 Idaho 62, 67, 44 P.3d 1117, 1122 (2002), *Spence v. Howell*, 126 Idaho 763, 776, 890 P.2d 714, 727 (1995).

As seen in the record, there was no such underlying commercial transaction. Simplot made defamatory statements without any commercial involvement from DFF, *i.e.*, outside its general relationship with DFF, in order to attack Tiegs in the Washington federal litigation. (R., vol. 1, pp. 1393-1394). The District Court failed to explain how this unwarranted attack against DFF's business reputation was somehow based in the general DFF/Simplot relationship. Rather, the Court relied on another vague relationship analysis (with encouragement from Respondents) about the parties' general business connections. For instance, the District Court adopts the recent test in *Simono v. Turner House,* 160 Idaho 788, 379 P.3d 1058 (2016), which asks whether the defamation "…would not have arisen absent the claimed commercial transaction." (R., vol. 1, p. 2210). The Court then explained: "DFF voluntarily sent Simplot the audit report as part of an ongoing business relationship. Here, but for the alleged business relationship between DFF and Simplot, DFF would not have sent Simplot a copy of

the NSF audit, which serves as a factual basis for the defamation claim" (R., vol. 1, p. 2111). This conclusion is erroneous for two reasons: (1) the food safety audit report was not at the center of the defamation claim (instead, the report was only at the center of the second claim for breach of non-disclosure agreement); and (2) the other defamatory statements about DFF's food safety standards and OSHA violations had nothing whatsoever to do with the DFF/Simplot general business relationship. DFF was not seeking recovery based on any of the specific terms or conditions in the safety report. Simplot could have sued the Washington federal defendants without any mention of the food safety report,[22] as the report was not related to any of the federal derivative claims. Thus, the report was not the "basis" of any claims or counterclaims—it was simply part of Simplot's ammunition against Tiegs in the Washington federal litigation.

On closer examination, the holdings in *Simono v. Turner House* fully support the need for a commercial transaction which forms the basis of a party's litigation recovery. In that case, the Court held that TVNA's fees award against Turner House was based in the terms of the parties' commercial rental agreement. When an injured tenant sued Turner House, Turner House sued TVNA under a third-party indemnification clause in the rental agreement. The Court found that even though the tenant's lawsuit sounded in tort, that the Turner House-TVNA suit (the indemnification suit) sounded in a commercial transaction, i.e., the clause in the commercial rental agreement. The Court found that the indemnification claim would not have arisen "but for" the commercial rental agreement clause. In sum, the Court found that there was a commercial transaction at the center of the lawsuit. *Id.,* at p. 793. Importantly, the injured tenant in *Simono* was not a party to the rental agreement, and there is no

[22] As alleged in the proposed amended pleadings, Simplot eventually amended its pleadings to remove all reference to the food safety report, which shows that the report was not essential, or even reasonably related, to their derivative claims against WPC and OPC. (R., vol. 1., p. 1397).

indication that she—the tenant—was awarded any fees under Section § 12-120(3) because of the peripheral transaction between the other parties. *Id.* Like the injured tenant, DFF was not a party to the commercial transactions which gave rise to the Washington federal litigation, and DFF is not trying to use its general business relationship with Simplot as a recovery basis in this litigation. The District Court misapplied the holdings in *Simono v. Turner House* to sanction Simplot's behavior in using an irrelevant safety report to attack Tiegs's reputation in the federal litigation, thereby harming DFF's business reputation. The Court further erred by awarding legal fees and costs against DFF for trying to defend itself against the tortious attack.[23] The Court's primary basis for awarding the fees and costs was that the attack used instruments which were commercial in nature. That conclusion is not consistent with *Simono* or the commercial-transaction test generally.

As to Thompson, the only attorney-Respondent who sought to recover its fees and costs, the District Court erred by finding that it too had a commercial transaction with DFF by using yet another strained relationship analysis: "Thompson is only alleged as Defendant in this case by acting within an attorney-client relationship in the Washington litigation. This attorney-client relationship is in itself a commercial transaction. Plaintiff's defamation claim stems from Thompson's actions as a part of this commercial relationship, alleging defamation based on the (1) filing and (2) publication to an interested party of a Complaint and Amended Complaint. Therefore, the defamation claims against Thompson would not have arisen but for the attorney-client relationship between Thompson and Simplot." (R., vol. 1, p. 2112). For the reasons stated above, the District Court erred by finding that this irrelevant business relationship between Thompson and Simplot was enough to trigger an award of Section § 12-120(3) fees against DFF.

[23] DFF can only speculate what additional reputational attacks it might have suffered had it not filed its Idaho defamation and breach of contract claims. For reasons not relevant on this appeal, DFF explained to the District Court, at length, that it could not have intervened in the Washington federal litigation to protect itself against these attacks, and that DFF believed that an Idaho lawsuit was its only available option for seeking protection. (R., vol. 1, pp. 1280-1283).

In sum, DFF's defamation claim in this case was based on Respondents' defamatory pleading attacks—not on its general business relationships. The Court erred by holding otherwise. (R., vol. 1, p. 2234). To the extent Respondents (specifically, only Simplot) was entitled to commercial transaction fees for the breach of non-disclosure agreement claim, Simplot waived those fees as set out below.

c. The District Court Erred by Not Apportioning Simplot's Attorney Fees:

The District Court erred by not apportioning Simplot's attorney fees award between its separate defense of the defamation per se claim and its defense of the breach of non-disclosure claim. (R., vol. 1, pp. 2231-2234). Among other things, DFF objected to Simplot's fees award because Simplot had lumped all its alleged fees for both defenses into a single fees request. (R., vol. 1, pp. 2220-2222). While Simplot may have had a legitimate commercial basis for defending against Count II, breach of the non-disclosure agreement—Simplot failed to identify which fees it incurred for this narrow defense. Arguably, Simplot spent very little time in defending the breach of the non-disclosure issue. (See R., vol. 1, p. 1645-1654, which constitutes just nine pages out of a 2,220-page record). Even if the Court finds on appeal that Simplot correctly prevailed on its partial summary judgment for Count II, breach of the non-disclosure agreement, the Court should not award Simplot its fees for that defense due to lack of apportionment in the record. Put more simply—there is no way for this Court to tell how much of the total McKellar/Simplot fees were spent on that defense. Idaho case law is clear: "Where fees were not apportioned between a claim that qualifies under I.C. § 12-120(3) and one that does not, no fees are to be awarded." *Rockefeller v. Grabow*, 136 Idaho 637, 645, 39 P.3d 577, 585 (2001).

To DFF's knowledge, Simplot was the only litigant to seek fees for its defense of the breach of non-disclosure agreement claim, and so this argument only applies to Simplot.

d. The District Court Erred in Awarding Prevailing Party Costs:

For the above reasons, the Court erred in awarding any prevailing party costs as a matter of right. Specifically, the Court erred in awarding Thompson its filing fee costs (R., vol. 1, p. 2106), and

in awarding Simplot its filing fee costs (R., vol. 1, p. 2228). Neither party should have prevailed in its litigation privilege defense and/or its breach of non-disclosure agreement defense.

Of note, the District Court denied all requests of discretionary costs, and DFF does not challenge these rulings on appeal. (R., vol. 1, pp. 2107-2108, 2228-2229).

SECTION 5: ATTORNEY FEES ON APPEAL

1. DFF is Entitled to Attorney Fees on Appeal:

DFF is entitled to attorney fees and costs on appeal in the event of any frivolous or unfounded defenses on appeal. See I.A.R. 35(a)(5) and I.A.R. 40, 41.

Idaho follows what is known as the "American Rule" for attorney fees which holds that "no fee awards are available absent contractual or statutory authority." *Sopatyk v. Lemhi County*, 151 Idaho 809, 819, 264 P.3d 916, 926 (2011). If Respondents attempt to further perpetuate the District Court's legal errors on the litigation privilege, or otherwise, this Court should award DFF its fees under Idaho Code § 12-121. This fees statute applies to cases on appeal. See *Minich v. Gem State Developers*, 99 Idaho 911, 591 P.2d 1078, 1979 (1979). Respondents' continued claim to an unfettered litigation privilege defense is clearly at odds with established case law, and any further defense or argument on the matter on appeal would be frivolous, unreasonable, and without foundation. See *Berkshire Invs., LLC v. Taylor*, 153 Idaho 73, 87, 278 P.3d 943, 957 (2012).

Should DFF prevail on appeal, it seeks an award of costs consistent with I.A.R. 40.

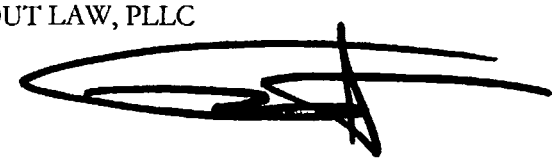
CONCLUSION

This Court has an important decision to make on appeal. By accepting and applying DFF's analyses, the Court is signaling its willingness to uphold *Taylor v. McNichols* and its prophylactic statements that the Idaho litigation privilege is not unlimited, and the privilege only protects legitimate representation. By accepting Respondents' anticipated arguments, this Court will be signaling a retreat from *Taylor v. McNichols*, thereby putting all Idaho litigants at risk of the same kind of defamatory

attacks that DFF suffered in the Washington federal litigation. Idaho case law is clear—the litigation privilege must be used in good faith. The underlying trial record is also clear—Simplot and the other Respondents did not conduct themselves in good faith, as there was no reasonable relation between the DFF defamatory statements and the federal derivative claims. The Court should reach this same conclusion on appeal, reversing the District Court's dismissal order, its summary judgment order, and its fees and costs awards—so that DFF's viable claims can proceed on their real merits.

Dated May 29, 2018.

TROUT LAW, PLLC



Kim J. Trout Attorney for Plaintiff/Appellant

ADDENDUM 1:
LITIGATION PRIVILEGE ANALYSIS TABLES

Table 1.1—Defamatory Statement No. 1 re: OSHA Violation	
Defamatory Statement No. 1:	**Federal Derivative Claims:**
Statement No. 1: That "…on or about December 1, 2015, in yet another incident, OSHA cited Dickinson Frozen Foods ("DFF"), another Tiegs Affiliate located in Sugar City, Idaho, for a serious release of anhydrous ammonia" (R., vol. 1, pp. 1459-1460). **Reasonable Relation Analysis:** Do the DFF pleadings show a reasonable relation between the alleged 2015 anhydrous ammonia incident, and: 1. Breach of Section 5.1 of the WPC Operating Agreement? (**Answer: No.**); 2. Breach of Section 5.1 of the OPC Operating Agreement? (**Answer: No.**); 3. Violation by WPC of the Washington Limited Liability Company Act's Record Disclosure Requirements? (**Answer: No.**); 4. Violation by OPC of the Washington Limited Liability Company Act's Record Disclosure Requirements? (**Answer: No.**); 5. Breach of Fiduciary Duty by WPC and Tiegs in mismanaging Pasco? (**Answer: No.**); 6. Breach of Fiduciary Duty by WPC and Tiegs in mismanaging Pasco? (**Answer: No.**); 7. Unjust enrichment of WPC, OPC, or Tiegs? (**Answer: No.**); 8. Resolution of the alleged deadlock between the WPC and OPC members? (**Answer: No.**); 9. Breach of the Management Services Agreement by WPC? (**Answer: No.**);	**<u>Washington Federal Litigation Claims:</u>** 1. **Count I:** Breach of the Pasco Operating Agreement by WPC. Simplot alleged that WPC failed to adequately manage the day-to-day operations of Pasco in violation of Section 5.1 of the Pasco Operating Agreement, and that WPC failed to maintain and provide to Simplot all required Pasco books and records in violation of Sections 5.1(a) and 7.3 of the Operating Agreement. (R., vol. 1, p. 1476). 2. **Count II:** Breach of the Gem State Operating Agreement by OPC. Simplot alleged that OPC failed to adequately manage the day-to-day operations of Gem State in violation of Section 5.1 of the Gem State Operating Agreement, and that WPC failed to maintain and provide to Simplot all required Gem State books and records in violation of Sections 7.3 of the Gem State Operating Agreement. (R., vol. 1, pp. 1476-1477). 3. **Count III:** Violation of the Washington Limited Liability Company Act's Records Disclosure Requirements by WPC. Simplot alleged that it was entitled under R.C.W. 25.15.136 to a writ compelling WPC to produce Pasco's books and records. (R., vol. 1, p. 1477). 4. **Count IV:** Violation of the Washington Limited Liability Company Act's Records Disclosure Requirements by OPC. Simplot alleged that it was entitled under R.C.W. 25.15.136 to a writ compelling OPC to produce Gem State's books and records. (R., vol. 1, p. 1477).

10. Need for appointing receivers for Pasco and Gem State? (**Answer: No.**); (See R., vol. 1, pp. **Conclusion:** The DFF pleadings do not show a reasonable relation between the alleged 2015 anhydrous ammonia incident and the Washington federal litigation claims. The alleged anhydrous ammonia incident is a purely internal concern for DFF and did not impact the internal derivative claims of Pasco or Gem State.	5. **Count V:** Breach of Fiduciary Duty by WPC and Tiegs. Simplot alleged that WPC and Tiegs (as an officer of WPC) breached their fiduciary duties of care in managing Pasco: (1) through self-dealing with Tiegs affiliates; (2) through concealing material facts; and (3), through grossly negligent, reckless, and willful mismanagement and operation of Pasco. (R., vol. 1, p. 1478). 6. **Count VI:** Breach of Fiduciary Duty by OPC. Simplot alleged that OPC breached its fiduciary duties of care in managing Gem State: (1) through self-dealing with Tiegs affiliates; (2) through concealing material facts; and (3), through grossly negligent, reckless, and willful mismanagement and operation of Gem State. (R., vol. 1, pp. 1479-1480). 7. **Count VII:** Unjust Enrichment by WPC, OPC, and Tiegs. Simplot alleged that WPC, OPC, and Tiegs wrongfully received monies and benefits, to Simplot's detriment. (R., vol. 1, p. 1480).[1] 8. **Count VIII:** Declaratory Judgment against WPC and OPC: Simplot alleged that there was no deadlock between the joint venture members and that WPC and OPC had to comply with records demands; Simplot also alleged that certain remedies in the joint venture operating agreements were not available to WPC and OPC. (R., vol. 1, pp. 1480-1481). 9. **Count IX:** Breach of the Pasco

[1] Simplot had summarized the content of its first eight claims, i.e., its "direct" claims, in its federal pleadings as: (1) That WPC, OPC, and Tiegs mismanaged Pasco and Gem State to the point where the companies were failing financially. ("Exhibit A," ¶ 7); and, (2), that WPC, OPC, and Tiegs caused significant supply chain disruptions, poor employee morale, and enhanced worker safety and food safety/quality issues within Pasco and Gem State. (R., vol. 1, p. 1409).

	Operating Agreement by WPC. Simplot alleged an identical claim to that set out in Count I for breach of the Pasco Operating Agreement, except derivatively on Pasco's behalf. (R., vol. 1, p. 1482).[2] 10. **Count X:** Breach of the Gem State Operating Agreement by OPC. Simplot alleged an identical claim to that set out in Count II for breach of the Gem State Operating Agreement, except derivatively on Gem State's behalf. (R., vol. 1, p. 1483). 11. **Count XI:** Breach of Fiduciary Duty by WPC and Tiegs. Simplot alleged an identical claim to that set out in Count V for breach of fiduciary duties, except derivatively on Pasco's behalf. (R., vol. 1, pp. 1483-1484). 12. **Count XII:** Breach of Fiduciary Duty by OPC. Simplot alleged an identical claim to that set out in Count VI for breach of fiduciary duties, except derivatively on Gem State's behalf. (R., vol. 1, pp. 1484-1485). 13. **Count XIII:** Unjust Enrichment by WPC, OPC, and Tiegs. Simplot alleged an identical claim to that set out in Count VII for unjust enrichment, except derivatively on both Pasco and Gem State's behalves. (R., vol. 1, p. 1485). 14. **Count XIV**: Breach of the Pasco MSA by WPC. Simplot alleged that WPC had breached Pasco's Management Services Agreement ("MSA") by failing to adequately manage and operate Pasco. (R., vol. 1, p. 1485).

[2] In addition to its alleged "direct" claims, as seen in counts one through eight of the complaint, Simplot made textually identical "derivative" claims against WPC, OPC, and/or Tiegs in counts nine through thirteen of the complaint.

	15. **Count XV:** Appointment of Receiver for Pasco and Gem State. Simplot alleged that based on the alleged fiduciary and contractual breaches by WPC, OPC, and Tiegs, that the Court should appoint a receiver to prevent further deterioration to Pasco and Gem State. (R., vol. 1, p. 1486).[3]

[3] These "derivative" claims were identical in substance to the alleged "direct" claims, except for the addition of an MSA violation claim (Count XIV) and a claim to appoint a receiver (Count XV).

Table 1.2—Defamatory Statement No. 2 re: Widespread Practices	
Defamatory Statement No. 2:	**Federal Derivative Claims:**
Statement No. 2: That DFF's violation was part of a "…widespread disregard for safety laws and standards." (R., vol. 1, pp. 1459-1460). **Reasonable Relation Analysis:** Do the DFF pleadings show a reasonable relation between the alleged widespread disregard of safety standards, and: 1. Breach of Section 5.1 of the WPC Operating Agreement? (**Answer: No.**); 2. Breach of Section 5.1 of the OPC Operating Agreement? (**Answer: No.**); 3. Violation by WPC of the Washington Limited Liability Company Act's Record Disclosure Requirements? (**Answer: No.**); 4. Violation by OPC of the Washington Limited Liability Company Act's Record Disclosure Requirements? (**Answer: No.**); 5. Breach of Fiduciary Duty by WPC and Tiegs in mismanaging Pasco? (**Answer: No.**); 6. Breach of Fiduciary Duty by WPC and Tiegs in mismanaging Pasco? (**Answer: No.**); 7. Unjust enrichment of WPC, OPC, or Tiegs? (**Answer: No.**); 8. Resolution of the alleged deadlock between the WPC and OPC members? (**Answer: No.**); 9. Breach of the Management Services Agreement by WPC? (**Answer: No.**); 10. Need for appointing receivers for Pasco and Gem State? (**Answer: No.**);	**<u>Washington Federal Litigation Claims:</u>** 1. **Count I:** Breach of the Pasco Operating Agreement by WPC. Simplot alleged that WPC failed to adequately manage the day-to-day operations of Pasco in violation of Section 5.1 of the Pasco Operating Agreement, and that WPC failed to maintain and provide to Simplot all required Pasco books and records in violation of Sections 5.1(a) and 7.3 of the Operating Agreement. (R., vol. 1, p. 1476). 2. **Count II:** Breach of the Gem State Operating Agreement by OPC. Simplot alleged that OPC failed to adequately manage the day-to-day operations of Gem State in violation of Section 5.1 of the Gem State Operating Agreement, and that WPC failed to maintain and provide to Simplot all required Gem State books and records in violation of Sections 7.3 of the Gem State Operating Agreement. (R., vol. 1, pp. 1476-1477). 3. **Count III:** Violation of the Washington Limited Liability Company Act's Records Disclosure Requirements by WPC. Simplot alleged that it was entitled under R.C.W. 25.15.136 to a writ compelling WPC to produce Pasco's books and records. (R., vol. 1, p. 1477). 4. **Count IV:** Violation of the Washington Limited Liability Company Act's Records Disclosure Requirements by OPC. Simplot alleged that it was entitled under R.C.W. 25.15.136 to a writ compelling OPC to produce Gem State's books and records. (R., vol. 1, p. 1477).

(See R., vol. 1, pp. **Conclusion:** The DFF pleadings do not show a reasonable relation between the alleged widespread disregard of safety standards and the Washington federal litigation claims. The allegation that DFF was somehow part of a wider chain of food safety issues which directly affected Pasco's and Gem State's internal safety affairs is not supported by the record.	5. **Count V:** Breach of Fiduciary Duty by WPC and Tiegs. Simplot alleged that WPC and Tiegs (as an officer of WPC) breached their fiduciary duties of care in managing Pasco: (1) through self-dealing with Tiegs affiliates; (2) through concealing material facts; and (3), through grossly negligent, reckless, and willful mismanagement and operation of Pasco. (R., vol. 1, p. 1478). 6. **Count VI:** Breach of Fiduciary Duty by OPC. Simplot alleged that OPC breached its fiduciary duties of care in managing Gem State: (1) through self-dealing with Tiegs affiliates; (2) through concealing material facts; and (3), through grossly negligent, reckless, and willful mismanagement and operation of Gem State. (R., vol. 1, pp. 1479-1480). 7. **Count VII:** Unjust Enrichment by WPC, OPC, and Tiegs. Simplot alleged that WPC, OPC, and Tiegs wrongfully received monies and benefits, to Simplot's detriment. (R., vol. 1, p. 1480).[4] 8. **Count VIII:** Declaratory Judgment against WPC and OPC: Simplot alleged that there was no deadlock between the joint venture members and that WPC and OPC had to comply with records demands; Simplot also alleged that certain remedies in the joint venture operating agreements were not available to WPC and OPC. (R., vol. 1, pp. 1480-1481). 9. **Count IX:** Breach of the Pasco

[4] Simplot had summarized the content of its first eight claims, i.e., its "direct" claims, in its federal pleadings as: (1) That WPC, OPC, and Tiegs mismanaged Pasco and Gem State to the point where the companies were failing financially. ("Exhibit A," ¶ 7); and, (2), that WPC, OPC, and Tiegs caused significant supply chain disruptions, poor employee morale, and enhanced worker safety and food safety/quality issues within Pasco and Gem State. (R., vol. 1, p. 1409).

	Operating Agreement by WPC. Simplot alleged an identical claim to that set out in Count I for breach of the Pasco Operating Agreement, except derivatively on Pasco's behalf. (R., vol. 1, p. 1482).[5] 10. **Count X:** Breach of the Gem State Operating Agreement by OPC. Simplot alleged an identical claim to that set out in Count II for breach of the Gem State Operating Agreement, except derivatively on Gem State's behalf. (R., vol. 1, p. 1483). 11. **Count XI:** Breach of Fiduciary Duty by WPC and Tiegs. Simplot alleged an identical claim to that set out in Count V for breach of fiduciary duties, except derivatively on Pasco's behalf. (R., vol. 1, pp. 1483-1484). 12. **Count XII:** Breach of Fiduciary Duty by OPC. Simplot alleged an identical claim to that set out in Count VI for breach of fiduciary duties, except derivatively on Gem State's behalf. (R., vol. 1, pp. 1484-1485). 13. **Count XIII:** Unjust Enrichment by WPC, OPC, and Tiegs. Simplot alleged an identical claim to that set out in Count VII for unjust enrichment, except derivatively on both Pasco and Gem State's behalves. (R., vol. 1, p. 1485). 14. **Count XIV**: Breach of the Pasco MSA by WPC. Simplot alleged that WPC had breached Pasco's Management Services Agreement ("MSA") by failing to adequately manage and operate Pasco. (R., vol. 1, p. 1485).

[5] In addition to its alleged "direct" claims, as seen in counts one through eight of the complaint, Simplot made textually identical "derivative" claims against WPC, OPC, and/or Tiegs in counts nine through thirteen of the complaint.

	15. **Count XV:** Appointment of Receiver for Pasco and Gem State. Simplot alleged that based on the alleged fiduciary and contractual breaches by WPC, OPC, and Tiegs, that the Court should appoint a receiver to prevent further deterioration to Pasco and Gem State. (R., vol. 1, p. 1486).[6]

[6] These "derivative" claims were identical in substance to the alleged "direct" claims, except for the addition of an MSA violation claim (Count XIV) and a claim to appoint a receiver (Count XV).

Table 1.3—Defamatory Statement No. 3 re: OSHA Violation	
Defamatory Statement No. 3:	**Federal Derivative Claims:**
Statement No. 3: That on "…May 25, 2016, OSHA cited and fined DFF again for willful violations of employee safety laws." (R., vol. 1, p. 1461). **Reasonable Relation Analysis:** Do the DFF pleadings show a reasonable relation between the alleged May 25, 2016 OSHA incident, and: 11. Breach of Section 5.1 of the WPC Operating Agreement? (**Answer: No.**); 12. Breach of Section 5.1 of the OPC Operating Agreement? (**Answer: No.**); 13. Violation by WPC of the Washington Limited Liability Company Act's Record Disclosure Requirements? (**Answer: No.**); 14. Violation by OPC of the Washington Limited Liability Company Act's Record Disclosure Requirements? (**Answer: No.**); 15. Breach of Fiduciary Duty by WPC and Tiegs in mismanaging Pasco? (**Answer: No.**); 16. Breach of Fiduciary Duty by WPC and Tiegs in mismanaging Pasco? (**Answer: No.**); 17. Unjust enrichment of WPC, OPC, or Tiegs? (**Answer: No.**); 18. Resolution of the alleged deadlock between the WPC and OPC members? (**Answer: No.**); 19. Breach of the Management Services Agreement by WPC? (**Answer: No.**); 20. Need for appointing receivers for Pasco and Gem State? (**Answer: No.**); (See R., vol. 1, pp. **Conclusion:** The DFF pleadings do not show a reasonable relation between the alleged May 25, 2016 OSHA incident and the Washington federal litigation claims. The alleged incident was an internal concern for DFF and did not impact the internal derivative claims of Pasco or Gem State.	**Washington Federal Litigation Claims:** 16. **Count I:** Breach of the Pasco Operating Agreement by WPC. Simplot alleged that WPC failed to adequately manage the day-to-day operations of Pasco in violation of Section 5.1 of the Pasco Operating Agreement, and that WPC failed to maintain and provide to Simplot all required Pasco books and records in violation of Sections 5.1(a) and 7.3 of the Operating Agreement. (R., vol. 1, p. 1476). 17. **Count II:** Breach of the Gem State Operating Agreement by OPC. Simplot alleged that OPC failed to adequately manage the day-to-day operations of Gem State in violation of Section 5.1 of the Gem State Operating Agreement, and that WPC failed to maintain and provide to Simplot all required Gem State books and records in violation of Sections 7.3 of the Gem State Operating Agreement. (R., vol. 1, pp. 1476-1477). 18. **Count III:** Violation of the Washington Limited Liability Company Act's Records Disclosure Requirements by WPC. Simplot alleged that it was entitled under R.C.W. 25.15.136 to a writ compelling WPC to produce Pasco's books and records. (R., vol. 1, p. 1477). 19. **Count IV:** Violation of the Washington Limited Liability Company Act's Records Disclosure Requirements by OPC. Simplot alleged that it was entitled under R.C.W. 25.15.136 to a writ compelling OPC to produce Gem State's books and records. (R., vol. 1, p. 1477). 20. **Count V:** Breach of Fiduciary Duty by WPC and Tiegs. Simplot alleged that WPC and Tiegs (as an officer of WPC) breached their fiduciary duties of care in managing Pasco: (1) through self-dealing with Tiegs affiliates; (2) through concealing material facts; and (3), through grossly negligent, reckless, and willful mismanagement and operation of Pasco. (R., vol. 1, p. 1478). 21. **Count VI:** Breach of Fiduciary Duty by OPC. Simplot alleged that OPC breached its fiduciary duties of care in managing Gem State: (1) through self-dealing with Tiegs

	affiliates; (2) through concealing material facts; and (3), through grossly negligent, reckless, and willful mismanagement and operation of Gem State. (R., vol. 1, pp. 1479-1480). 22. **Count VII:** Unjust Enrichment by WPC, OPC, and Tiegs. Simplot alleged that WPC, OPC, and Tiegs wrongfully received monies and benefits, to Simplot's detriment. (R., vol. 1, p. 1480).[7] 23. **Count VIII:** Declaratory Judgment against WPC and OPC: Simplot alleged that there was no deadlock between the joint venture members and that WPC and OPC had to comply with records demands; Simplot also alleged that certain remedies in the joint venture operating agreements were not available to WPC and OPC. (R., vol. 1, pp. 1480-1481). 24. **Count IX:** Breach of the Pasco Operating Agreement by WPC. Simplot alleged an identical claim to that set out in Count I for breach of the Pasco Operating Agreement, except derivatively on Pasco's behalf. (R., vol. 1, p. 1482).[8] 25. **Count X:** Breach of the Gem State Operating Agreement by OPC. Simplot alleged an identical claim to that set out in Count II for breach of the Gem State Operating Agreement, except derivatively on Gem State's behalf. (R., vol. 1, p. 1483). 26. **Count XI:** Breach of Fiduciary Duty by WPC and Tiegs. Simplot alleged an identical claim to that set out in Count V for breach of fiduciary duties, except derivatively on Pasco's behalf. (R., vol. 1, pp. 1483-1484). 27. **Count XII:** Breach of Fiduciary Duty by OPC. Simplot alleged an identical claim to that set out in Count VI for breach of fiduciary duties, except derivatively on Gem State's

[7] Simplot had summarized the content of its first eight claims, i.e., its "direct" claims, in its federal pleadings as: (1) That WPC, OPC, and Tiegs mismanaged Pasco and Gem State to the point where the companies were failing financially. ("Exhibit A," ¶ 7); and, (2), that WPC, OPC, and Tiegs caused significant supply chain disruptions, poor employee morale, and enhanced worker safety and food safety/quality issues within Pasco and Gem State. (R., vol. 1, p. 1409).

[8] In addition to its alleged "direct" claims, as seen in counts one through eight of the complaint, Simplot made textually identical "derivative" claims against WPC, OPC, and/or Tiegs in counts nine through thirteen of the complaint.

	behalf. (R., vol. 1, pp. 1484-1485). 28. **Count XIII:** Unjust Enrichment by WPC, OPC, and Tiegs. Simplot alleged an identical claim to that set out in Count VII for unjust enrichment, except derivatively on both Pasco and Gem State's behalves. (R., vol. 1, p. 1485). 29. **Count XIV**: Breach of the Pasco MSA by WPC. Simplot alleged that WPC had breached Pasco's Management Services Agreement ("MSA") by failing to adequately manage and operate Pasco. (R., vol. 1, p. 1485). 30. **Count XV:** Appointment of Receiver for Pasco and Gem State. Simplot alleged that based on the alleged fiduciary and contractual breaches by WPC, OPC, and Tiegs, that the Court should appoint a receiver to prevent further deterioration to Pasco and Gem State. (R., vol. 1, p. 1486).[9]

[9] These "derivative" claims were identical in substance to the alleged "direct" claims, except for the addition of an MSA violation claim (Count XIV) and a claim to appoint a receiver (Count XV).

Table 1.4—Defamatory Statement No. 4 re: OSHA Violation	
Defamatory Statement No. 4:	**Federal Derivative Claims:**
Statement No. 4: That on "…May 31, 2016, OSHA cited and fined DFF again for willful violations of safety laws, including but not limited to, those found by OSHA through its investigation of the December 2015 incident." (R., vol. 1, p. 1461). **Reasonable Relation Analysis:** Do the DFF pleadings show a reasonable relation between the alleged May 31, 2016 OSHA incident, and: 21. Breach of Section 5.1 of the WPC Operating Agreement? (**Answer: No.**); 22. Breach of Section 5.1 of the OPC Operating Agreement? (**Answer: No.**); 23. Violation by WPC of the Washington Limited Liability Company Act's Record Disclosure Requirements? (**Answer: No.**); 24. Violation by OPC of the Washington Limited Liability Company Act's Record Disclosure Requirements? (**Answer: No.**); 25. Breach of Fiduciary Duty by WPC and Tiegs in mismanaging Pasco? (**Answer: No.**); 26. Breach of Fiduciary Duty by WPC and Tiegs in mismanaging Pasco? (**Answer: No.**); 27. Unjust enrichment of WPC, OPC, or Tiegs? (**Answer: No.**); 28. Resolution of the alleged deadlock between the WPC and OPC members? (**Answer: No.**); 29. Breach of the Management Services Agreement by WPC? (**Answer: No.**); 30. Need for appointing receivers for Pasco and Gem State? (**Answer: No.**); (See R., vol. 1, pp. **Conclusion:** The DFF pleadings do not show a reasonable relation between the alleged May 31, 2016 OSHA incident and the Washington federal litigation claims. The alleged incident was an internal concern for DFF and did not impact the internal derivative claims of Pasco or Gem	**Washington Federal Litigation Claims:** 31. **Count I:** Breach of the Pasco Operating Agreement by WPC. Simplot alleged that WPC failed to adequately manage the day-to-day operations of Pasco in violation of Section 5.1 of the Pasco Operating Agreement, and that WPC failed to maintain and provide to Simplot all required Pasco books and records in violation of Sections 5.1(a) and 7.3 of the Operating Agreement. (R., vol. 1, p. 1476). 32. **Count II:** Breach of the Gem State Operating Agreement by OPC. Simplot alleged that OPC failed to adequately manage the day-to-day operations of Gem State in violation of Section 5.1 of the Gem State Operating Agreement, and that WPC failed to maintain and provide to Simplot all required Gem State books and records in violation of Sections 7.3 of the Gem State Operating Agreement. (R., vol. 1, pp. 1476-1477). 33. **Count III:** Violation of the Washington Limited Liability Company Act's Records Disclosure Requirements by WPC. Simplot alleged that it was entitled under R.C.W. 25.15.136 to a writ compelling WPC to produce Pasco's books and records. (R., vol. 1, p. 1477). 34. **Count IV:** Violation of the Washington Limited Liability Company Act's Records Disclosure Requirements by OPC. Simplot alleged that it was entitled under R.C.W. 25.15.136 to a writ compelling OPC to produce Gem State's books and records. (R., vol. 1, p. 1477). 35. **Count V:** Breach of Fiduciary Duty by WPC and Tiegs. Simplot alleged that WPC and Tiegs (as an officer of WPC) breached their fiduciary duties of care in managing Pasco: (1) through self-dealing with Tiegs affiliates; (2) through concealing material facts; and (3), through grossly negligent, reckless, and willful mismanagement and operation of Pasco. (R., vol. 1, p. 1478). 36. **Count VI:** Breach of Fiduciary Duty by OPC. Simplot alleged that OPC breached its fiduciary duties of care in managing Gem State: (1) through self-dealing with Tiegs

State.	affiliates; (2) through concealing material facts; and (3), through grossly negligent, reckless, and willful mismanagement and operation of Gem State. (R., vol. 1, pp. 1479-1480). 37. **Count VII:** Unjust Enrichment by WPC, OPC, and Tiegs. Simplot alleged that WPC, OPC, and Tiegs wrongfully received monies and benefits, to Simplot's detriment. (R., vol. 1, p. 1480).[10] 38. **Count VIII:** Declaratory Judgment against WPC and OPC: Simplot alleged that there was no deadlock between the joint venture members and that WPC and OPC had to comply with records demands; Simplot also alleged that certain remedies in the joint venture operating agreements were not available to WPC and OPC. (R., vol. 1, pp. 1480-1481). 39. **Count IX:** Breach of the Pasco Operating Agreement by WPC. Simplot alleged an identical claim to that set out in Count I for breach of the Pasco Operating Agreement, except derivatively on Pasco's behalf. (R., vol. 1, p. 1482).[11] 40. **Count X:** Breach of the Gem State Operating Agreement by OPC. Simplot alleged an identical claim to that set out in Count II for breach of the Gem State Operating Agreement, except derivatively on Gem State's behalf. (R., vol. 1, p. 1483). 41. **Count XI:** Breach of Fiduciary Duty by WPC and Tiegs. Simplot alleged an identical claim to that set out in Count V for breach of fiduciary duties, except derivatively on Pasco's behalf. (R., vol. 1, pp. 1483-1484). 42. **Count XII:** Breach of Fiduciary Duty by OPC. Simplot alleged an identical claim to that set out in Count VI for breach of fiduciary duties, except derivatively on Gem State's

[10] Simplot had summarized the content of its first eight claims, i.e., its "direct" claims, in its federal pleadings as: (1) That WPC, OPC, and Tiegs mismanaged Pasco and Gem State to the point where the companies were failing financially. ("Exhibit A," ¶ 7); and, (2), that WPC, OPC, and Tiegs caused significant supply chain disruptions, poor employee morale, and enhanced worker safety and food safety/quality issues within Pasco and Gem State. (R., vol. 1, p. 1409).

[11] In addition to its alleged "direct" claims, as seen in counts one through eight of the complaint, Simplot made textually identical "derivative" claims against WPC, OPC, and/or Tiegs in counts nine through thirteen of the complaint.

	behalf. (R., vol. 1, pp. 1484-1485). 43. **Count XIII:** Unjust Enrichment by WPC, OPC, and Tiegs. Simplot alleged an identical claim to that set out in Count VII for unjust enrichment, except derivatively on both Pasco and Gem State's behalves. (R., vol. 1, p. 1485). 44. **Count XIV**: Breach of the Pasco MSA by WPC. Simplot alleged that WPC had breached Pasco's Management Services Agreement ("MSA") by failing to adequately manage and operate Pasco. (R., vol. 1, p. 1485). 45. **Count XV:** Appointment of Receiver for Pasco and Gem State. Simplot alleged that based on the alleged fiduciary and contractual breaches by WPC, OPC, and Tiegs, that the Court should appoint a receiver to prevent further deterioration to Pasco and Gem State. (R., vol. 1, p. 1486).[12]

[12] These "derivative" claims were identical in substance to the alleged "direct" claims, except for the addition of an MSA violation claim (Count XIV) and a claim to appoint a receiver (Count XV).

Table 1.5—Defamatory Statement No. 5 re: Food Safety Report	
Defamatory Statement No. 5:	**Federal Derivative Claims:**
Statement No. 5: That on "…June 13, 2016, NSF International Food Safety LLC ("NSF") audited DFF's Sugar City, Idaho facility and cited DFF for a major violation of the FSSC 22000 Food Safety Management System ("FSSC 22000"), another safety and quality certification program in the food industry, after observing DFF's repeated failure to provide hot water in its plant's restrooms. Although Simplot, Gem State and Pasco do not have any direct or indirect ownership interest in DFF or this facility, this incident further evidences Defendants' poor food safety practices." (R., vol. 1, p. 1461). **Reasonable Relation Analysis:** Do the DFF pleadings show a reasonable relation between the food safety report and: 31. Breach of Section 5.1 of the WPC Operating Agreement? (**Answer: No.**); 32. Breach of Section 5.1 of the OPC Operating Agreement? (**Answer: No.**); 33. Violation by WPC of the Washington Limited Liability Company Act's Record Disclosure Requirements? (**Answer: No.**); 34. Violation by OPC of the Washington Limited Liability Company Act's Record Disclosure Requirements? (**Answer: No.**); 35. Breach of Fiduciary Duty by WPC and Tiegs in mismanaging Pasco? (**Answer: No.**); 36. Breach of Fiduciary Duty by WPC and Tiegs in mismanaging Pasco? (**Answer: No.**); 37. Unjust enrichment of WPC, OPC, or Tiegs? (**Answer: No.**); 38. Resolution of the alleged deadlock between the WPC and OPC members? (**Answer: No.**); 39. Breach of the Management Services Agreement by WPC? (**Answer: No.**); 40. Need for appointing receivers for Pasco and Gem State? (**Answer: No.**); (See R., vol. 1, pp.	**<u>Washington Federal Litigation Claims:</u>** 46. **Count I:** Breach of the Pasco Operating Agreement by WPC. Simplot alleged that WPC failed to adequately manage the day-to-day operations of Pasco in violation of Section 5.1 of the Pasco Operating Agreement, and that WPC failed to maintain and provide to Simplot all required Pasco books and records in violation of Sections 5.1(a) and 7.3 of the Operating Agreement. (R., vol. 1, p. 1476). 47. **Count II:** Breach of the Gem State Operating Agreement by OPC. Simplot alleged that OPC failed to adequately manage the day-to-day operations of Gem State in violation of Section 5.1 of the Gem State Operating Agreement, and that WPC failed to maintain and provide to Simplot all required Gem State books and records in violation of Sections 7.3 of the Gem State Operating Agreement. (R., vol. 1, pp. 1476-1477). 48. **Count III:** Violation of the Washington Limited Liability Company Act's Records Disclosure Requirements by WPC. Simplot alleged that it was entitled under R.C.W. 25.15.136 to a writ compelling WPC to produce Pasco's books and records. (R., vol. 1, p. 1477). 49. **Count IV:** Violation of the Washington Limited Liability Company Act's Records Disclosure Requirements by OPC. Simplot alleged that it was entitled under R.C.W. 25.15.136 to a writ compelling OPC to produce Gem State's books and records. (R., vol. 1, p. 1477). 50. **Count V:** Breach of Fiduciary Duty by WPC and Tiegs. Simplot alleged that WPC and Tiegs (as an officer of WPC) breached their fiduciary duties of care in managing Pasco: (1) through self-dealing with Tiegs affiliates; (2) through concealing material facts; and (3), through grossly negligent, reckless, and willful mismanagement and operation of Pasco. (R., vol. 1, p. 1478). 51. **Count VI:** Breach of Fiduciary Duty by OPC. Simplot alleged that OPC breached its fiduciary duties of care in managing Gem State: (1) through self-dealing with Tiegs

Conclusion: The DFF pleadings do not show a reasonable relation between the report and the derivative claims. The contents of the safety audit report had nothing to do the content of the federal derivative claims. The contents of the report, even if proven, were internal affairs for DFF and did not impact Pasco or Gem State.	affiliates; (2) through concealing material facts; and (3), through grossly negligent, reckless, and willful mismanagement and operation of Gem State. (R., vol. 1, pp. 1479-1480). 52. **Count VII:** Unjust Enrichment by WPC, OPC, and Tiegs. Simplot alleged that WPC, OPC, and Tiegs wrongfully received monies and benefits, to Simplot's detriment. (R., vol. 1, p. 1480).[13] 53. **Count VIII:** Declaratory Judgment against WPC and OPC: Simplot alleged that there was no deadlock between the joint venture members and that WPC and OPC had to comply with records demands; Simplot also alleged that certain remedies in the joint venture operating agreements were not available to WPC and OPC. (R., vol. 1, pp. 1480-1481). 54. **Count IX:** Breach of the Pasco Operating Agreement by WPC. Simplot alleged an identical claim to that set out in Count I for breach of the Pasco Operating Agreement, except derivatively on Pasco's behalf. (R., vol. 1, p. 1482).[14] 55. **Count X:** Breach of the Gem State Operating Agreement by OPC. Simplot alleged an identical claim to that set out in Count II for breach of the Gem State Operating Agreement, except derivatively on Gem State's behalf. (R., vol. 1, p. 1483). 56. **Count XI:** Breach of Fiduciary Duty by WPC and Tiegs. Simplot alleged an identical claim to that set out in Count V for breach of fiduciary duties, except derivatively on Pasco's behalf. (R., vol. 1, pp. 1483-1484). 57. **Count XII:** Breach of Fiduciary Duty by OPC. Simplot alleged an identical claim to that set out in Count VI for breach of fiduciary duties, except derivatively on Gem State's

[13] Simplot had summarized the content of its first eight claims, i.e., its "direct" claims, in its federal pleadings as: (1) That WPC, OPC, and Tiegs mismanaged Pasco and Gem State to the point where the companies were failing financially. ("Exhibit A," ¶ 7); and, (2), that WPC, OPC, and Tiegs caused significant supply chain disruptions, poor employee morale, and enhanced worker safety and food safety/quality issues within Pasco and Gem State. (R., vol. 1, p. 1409).

[14] In addition to its alleged "direct" claims, as seen in counts one through eight of the complaint, Simplot made textually identical "derivative" claims against WPC, OPC, and/or Tiegs in counts nine through thirteen of the complaint.

	behalf. (R., vol. 1, pp. 1484-1485). 58. **Count XIII:** Unjust Enrichment by WPC, OPC, and Tiegs. Simplot alleged an identical claim to that set out in Count VII for unjust enrichment, except derivatively on both Pasco and Gem State's behalves. (R., vol. 1, p. 1485). 59. **Count XIV**: Breach of the Pasco MSA by WPC. Simplot alleged that WPC had breached Pasco's Management Services Agreement ("MSA") by failing to adequately manage and operate Pasco. (R., vol. 1, p. 1485). 60. **Count XV:** Appointment of Receiver for Pasco and Gem State. Simplot alleged that based on the alleged fiduciary and contractual breaches by WPC, OPC, and Tiegs, that the Court should appoint a receiver to prevent further deterioration to Pasco and Gem State. (R., vol. 1, p. 1486).[15]

[15] These "derivative" claims were identical in substance to the alleged "direct" claims, except for the addition of an MSA violation claim (Count XIV) and a claim to appoint a receiver (Count XV).