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Dickinson Frozen Foods, Inc. v. J.R. Simplot Company Respondent's Brief 3 Dckt. 45580

IN THE SUPREME COURT FOR THE STATE OF IDAHO

DICKINSON FROZEN FOODS, INC., an Idaho corporation, Plaintiff/Appellant, v. 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 1-X, unknown individuals and entities, Defendants/Respondents.	Supreme Court No. 45580 Ada County Case No. CV01-17-03836

RESPONDENT'S BRIEF

Appeal from the District Court of the Fourth Judicial District for Ada County
Honorable Lynn Norton, District Judge Presiding

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I. STATEMENT OF THE CASE

There are multiple Respondents in this case (Yarmuth Wilsdon, PLLC "Yarmuth," Thompson Coburn, LLP "Thompson," and J. R. Simplot Company and its Food Group President, Mark McKellar, collectively "Simplot"). This Respondent's Brief is filed only on behalf of Simplot, but because there are multiple respondents in this appeal, and to avoid burdening the Court with excessive and duplicative briefing, Simplot incorporates by reference briefs filed by the Yarmuth and Thompson respondents. The arguments made by those respondents, and the legal authority cited, apply equally to Simplot's position. This brief will address facts and legal arguments that are unique to Simplot.

A. Nature of Case

Appellant Dickinson Frozen Foods ("DFF") has framed this appeal as one involving defamation and breach of contract. Simplot reframes this appeal as one primarily centered on an absolute litigation privilege apparent on the face of the complaint, and interpretation of an unambiguous contract drafted by DFF. Any analysis of the nature of this case must begin by examining the true import of the trial court's critical rulings on motions to dismiss and summary judgment involving these two issues. The trial court reviewed the issues thoroughly, correctly analyzed the law as applied to these issues, and used a reasoned analysis to make the relevant rulings. DFF cannot ignore the court's solid legal reasoning by citing irrelevant case law, and facts that do not change the legal analysis. Settled Idaho (and national) precedent mandates an absolute litigation privilege for statements made during litigation. The meaning of "absolute" would be changed irrevocably to "qualified" if DFF's assertions were accepted by the Court. This Court should strongly resist this plea, because to accept DFF's arguments would eliminate the **absolute** nature of the litigation privilege.

DFF also alleged breach of a nondisclosure agreement ("NDA") between DFF and Simplot, when the plain language of the agreement, which DFF drafted, would not apply to the challenged disclosure. Along with rulings the lower court made on motions to amend the pleadings and on attorney fees and costs, DFF has failed in its burden to demonstrate reversible error on appeal, and the trial court rulings should be affirmed.

B. Course of Proceedings

Simplot includes here an outline of proceedings relevant to the issues involving Simplot. In addition, DFF did not include references to the Clerk's Record in its brief statement of the Course of Proceedings, so, for the Court's ease of reference, appropriate record citations are included here.

On March 3, 2017, DFF filed a Verified Complaint and Demand for Jury Trial naming Simplot and McKellar as defendants. R. p 14-46. Simplot filed a Notice of Appearance on March 16, 2017, R. p. 60-61, then on March 29, 2017, filed a Motion to Dismiss Pursuant to Rule 12(b)(6), or, Alternatively, Motion for Partial Judgment on the Pleadings Pursuant to Rule 12 (c). R. pp. 68-69. Simplot contended that, as a matter of law, an absolute litigation privilege barred any cause of action for defamation. DFF then filed a Motion for Partial Summary Judgment on March 30, 2017, arguing that the litigation privilege did not apply or was waived. R. pp. 100-118. On April 26, 2017, DFF filed a Motion for Leave to Amend the Complaint. R. p. 754. After further briefing and argument, in a Memorandum Decision dated June 12, 2017, the trial court granted Simplot's Motion to Dismiss the defamation action. R. p. 1344-1355. The court ruled that the Motion to Amend was moot because of the legal rulings contained in the Memorandum Decision. R. p. 1354. The court then entered judgment dismissing Count One as to all defendants. R. p. 1356.

DFF filed a Motion for Reconsideration on June 22, 2017. R. pp. 1358-1359. DFF also filed a Second Motion to Amend Complaint and Demand for Jury Trial. R. p. 1385.

On June 26, 2017, Simplot filed a Motion for Summary Judgment on Count II of DFF's complaint seeking to dismiss the only remaining count, an allegation of breach of the NDA. R. pp. 1645-1647. After briefing on the various motions, on August 18, 2017, the trial court issued a Memorandum Decision and Order Denying the Motion for Reconsideration as to the defamation count (R. pp. 2026-2037), a Memorandum Decision and Order Denying the Second Motion for Leave to Amend the Complaint (R. pp. 2038-2046), and a Memorandum Decision and Order Granting Defendant Simplot's Motion for Summary Judgment, Count II (R. pp. 2093-2102).

A final judgment was filed on November 8, 2017. R. p. 2117. DFF's Notice of Appeal was filed on November 20, 2017. R. pp. 2119-2125.

Following all of these decisions, which completely disposed of the case, the trial court also issued a Memorandum Decision and Order Granting Fees and Denying in Part Costs-McKellar and Thompson, R. pp. 2103-2116, and a Memorandum Decision and Order Granting in Part Fees and Costs, awarding fees and some costs to Simplot, filed February 16, 2018. R. pp. 2226-2238.

C. Statement of Facts

Facts relating to the litigation privilege

Simplot and DFF developed an ongoing business relationship. Simplot had developed a number of relationships with organizations owned by Frank Tiegs, including DFF and those organizations eventually named as both plaintiffs and defendants in subsequent litigation. On December 2, 2016, in the U.S. District Court for Western District of Washington ("Washington litigation"), Simplot filed a lawsuit against food processing and distribution companies (all Tiegs affiliates like DFF) seeking to dissolve the business relationships, R. pp. 1407-1443, and filed an

Amended Complaint on January 19, 2017. R. pp. 155-201. (This has been referred to by the parties and the trial court as a "business divorce.") In the Washington litigation plaintiffs included Pasco Processing, LLC, a Washington limited liability company ("Pasco") and Gem State Processing, LLC, a Washington limited liability company ("Gem State"), and the defendants were Washington Potato Company, a Washington corporation ("WPC"), Oregon Potato Company, a Washington corporation ("OPC") and Frank Tiegs, an individual citizen of Washington ("Tiegs"). *Id*. The complaint detailed a number of issues Simplot had identified with these and other Tiegs affiliates, including DFF.

Prior to the "business divorce,"[1] Simplot had entered into numerous business relationships with OPC and WPC, Tiegs-owned companies. R. pp. 156-7.

In the complex Washington litigation Simplot requested the appointment of a third-party receiver for Pasco and Gem State (companies jointly owned by Simplot and OPC/Tiegs and WPC/Tiegs). R. pp. 198 and 1487. As part of the Washington "business divorce" litigation, Tiegs' affiliate food processing companies were discussed in the context of Simplot's request for, and as evidentiary support favoring, the appointment of a third-party receiver for the food processing companies, Pasco and Gem State. R. pp. 155-198, ¶¶2, 3, 22-27 and 31-35. DFF's business operations were discussed in the complaints in this context. *Id.,* ¶¶22-27 and 31-35. Like Pasco and Gem State, Tiegs is/was also involved in DFF's food processing business. *Id.,* ¶¶1-2, 17.

In its brief, DFF alleges that "Simplot (through McKellar) also later admitted that he was not even sure if the DFF statements were true, and that the content of the statements, i.e., the alleged poor safety practices and violations, did not matter at all to Simplot's derivative claims in the

[1] Although the phrase "business divorce" does not accurately describe the nature of the Washington litigation, it is used herein as shorthand to reference the claims and allegations raised in that action.

federal litigation." Appellant's Brief p. 8. DFF raised this issue in the trial court in an attempt to characterize McKellar's testimony as an admission of perjury, which DFF contended would eliminate the absolute litigation privilege. DFF has repeatedly mischaracterized McKellar's statements. McKellar testified that the DFF statements in the Washington complaint were included as evidence of "a pattern of bad behavior." R. p. 402, pp. 1234-1241. McKellar continually indicated that the DFF allegations were included in the Washington complaint as allegations of poor safety management practices by Tiegs affiliates. McKellar verified the allegations in the complaint as representative of Simplot, indicating that Simplot would produce evidence to prove the allegations by conducting discovery and developing the proof, through McKellar or other Simplot witnesses. During his testimony, McKellar indicated that others had more direct knowledge of the facts supporting the allegations, which is a far cry from saying that he did not believe they were true. See, e.g., R. p. 1237. In addition, because the allegation was an assertion of a pattern of behavior, as support for the allegation that a third party receiver was needed, it was clearly relevant to the claims made. DFF's assertions in its brief are incorrect. Nevertheless, these "fact" assertions are irrelevant to the legal issues, as the trial court recognized.[2]

Facts relating to the alleged breach of contract

In the Washington litigation, Simplot's Complaint and Amended Complaint included and attached an audit report prepared by NSF International ("NSF)," (an organization that develops food safety standards), addressing food safety at DFF . *Id*., ¶¶25, 27, 33 and 35.

[2] While McKellar did not know specific details of the reasons for DFF's poor safety practices, his testimony did not rise to the level of admitting a lack of relevance or "perjury" as DFF alleged. But the trial court did not have to decide that issue, stating: "Regardless of whether McKellar committed perjury, this claim is not a valid civil claim on which the Plaintiff can recover." R. p. 1352. That was a sound legal ruling addressed in the litigation privilege briefing submitted by Respondents. McKellar (and through him Simplot) is protected from a defamation claim based on the absolute litigation privilege for his actions in verifying the Washington complaint, based on the arguments contained in the Yarmuth brief and adopted here by reference. This factual allegation does not change that analysis.

In the summer of 2014, Simplot experienced a temporary supply shortage of potato shreds. R. pp. 384, ¶2. In an effort to fill the temporary shortage, Simplot began working with frozen food processors in the region, including DFF. *Id*. On August 15, 2014, Simplot's Brand Manager, Tom Clark, traveled to Sugar City, Idaho, to visit the DFF processing facility. *Id*., ¶3. The purpose of Mr. Clark's facility visit was to evaluate and assess the quality of the potato shreds that DFF could provide to Simplot to fulfill Simplot's temporary, approximately three-month shortage of potato shreds. *Id*. at ¶2.

Upon Mr. Clark's arrival at the Sugar City facility, he met with Helen Stone, DFF's Quality Assurance Manager, and Ms. Stone asked that prior to entering into the DFF processing facility, Clark sign a NDA. *Id.* at ¶2. Tom Clark signed the requested NDA on behalf of Simplot. *Id.* at ¶4. The NDA applied, by its own terms, to a "proposed business relationship." *Id.* at ¶5. The discussions relating to a "proposed business relationship" between DFF and Simplot covered by the August 15, 2014 Non-Disclosure Agreement ended in 2014. *Id.* at ¶6.

In June of 2016, two years after the "proposed business relationship" discussions covered by the NDA had ended, NSF prepared a report for DFF. R. pp. 209-245. The disclosure of this report, by attaching it to the Washington complaint, became the subject of DFF's allegation of a breach of the NDA agreement in this action. The NDA was attached as Exhibit A to the Washington complaint. R. pp. 28-29. By its terms, the NDA was entered into "for the purpose of protecting and preserving confidential and/or proprietary nature of information to be disclosed or made available by DFF, to Recipient under this Agreement **in connection with a proposed business relationship** . . ." R. p. 28. It also stated "The parties agree to use the Confidential Information received pursuant to this Agreement solely for the purpose of engaging in discussions relating to a **possible vendor relationship**." *Id.*

II. ADDITIONAL ISSUES PRESENTED ON APPEAL

Simplot adopts Respondent Yarmuth's Counterstatement of Issues Presented on Appeal, paragraphs 1 and 2. Simplot also restates DFF's additional issues and adds its own:

- The trial court did not err in ruling that the terms of the contract are unambiguous and do not apply to the disclosure at issue.
- The trial court did not err in awarding attorney fees and costs under Idaho Code § 12-120(3) and I.R.C.P. 54(d).
- Pursuant to Idaho Code § 12-120(3), Idaho Code § 12-121 and I.A.R. 40 and 41, Simplot should be awarded its fees and costs on appeal and DFF's request for attorney fees and costs should be denied.

III. STANDARDS OF REVIEW

There are several issues raised by DFF in this appeal, each with a corresponding appropriate standard of review. To prevent duplication of effort, Simplot accepts respondents Yarmuth and Thompson's iteration of the standards of review. Additional standards of review are noted below for those issues unique to Simplot.

Ambiguity of A Contract

When reviewing the dismissal of Count II for breach of contract, the Court will review whether the NDA was ambiguous. The determination of whether a contract is ambiguous is a question of law. *Pocatello Hospital, LLC v. Quail Ridge Med. In'r, LLC,* 156 Idaho 709, 712, 330 P.3d 1067 (2014); *Shawver v. Huckleberry Estates, L.L.C.,* 140 Idaho 354, 361, 93 P.3d 685 692 (2004). When the language of a contract is clear and unambiguous, the interpretation and legal effect of the contract are questions of law. *State v. Barnett*, 133 Idaho 231, 234, 985 P.2d 111, 114 (1999).

This question of law may be freely reviewed by this Court. *Brown v. Greenheart*, 157 Idaho 156, 166, 335 P.3d 1, 11 (2014).

Motion to Amend Complaint

A motion to amend a complaint is reviewed for abuse of discretion. This Court set out and re-articulated the review standard recently:

> When this Court reviews an alleged abuse of discretion by a trial court the sequence of inquiry requires consideration of four essentials. Whether the trial court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason. See *Hull*, 163 Idaho at ___, 409 P.3d at 830. This discretionary standard has frequently been cited as a "multi-tiered inquiry," e.g., *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989) or even as a "three prong" standard, see *Blackmore v. Re/Max Tri-Cities, LLC*, 149 Idaho 558, 563, 237 P.3d 655, 660 (2010), which judges and lawyers alike can likely recite by heart. It appears to have originated in *Assocs. Nw., Inc. v. Beets*, 112 Idaho 603, 605, 733 P.2d 824, 826 (Ct. App. 1987), based upon language taken from the Idaho Appellate Handbook, Standards of Appellate Review in State and Federal Courts, § 3.4, (Idaho Law Foundation, Inc., 1985). We take this occasion to clarify that even though this test has been enumerated in three subparts for over thirty years, it is actually a four-part standard, requiring trial courts to do the four things set forth above in exercising their discretion. By making this correction we are not altering the substance of the test; we simply take this opportunity to clarify what has previously been a compound second sentence -- which actually requires two separate things, that a trial judge act both 1) within the boundaries of her or his discretion; and 2) consistently with the legal standards applicable to the specific choices available to the judge.

Lunneborg v. My Fun Life, Docket No. 45200 (Idaho Supreme Court June 28, 2018).

If an opposing party has a complete defense to the claim, making such an amendment futile, it is not an abuse of discretion for the trial court to deny the motion to file the amended complaint. *Hayward v. Valley Vista Care Corp.,* 136 Idaho 342, 345-46, 33 P.3d 816, 819-20 (2001).

Review of Attorney Fees and Costs

Decisions of the trial court on whether to award attorney fees and costs are reviewed by this Court under an abuse of discretion standard. *Ballard v. Kerr*, 160 Idaho 674, 378 P.3d 464 (2016). The party disputing the award has the burden of showing the abuse of discretion. *Id*. The standard set forth above as articulated in *Lunneborg v. My Fun Life,* Docket No. 45200 (Idaho Supreme Court June 28, 2018) applies to these discretionary trial court decisions.

IV. ARGUMENT

A. The Trial Court Correctly Applied the Litigation Privilege.

1. Simplot Adopts and Incorporates Briefing Filed by the Other Respondents.

Simplot incorporates by reference the briefing of the law firm defendants on the issue of the litigation privilege against defamation. The "defamation" alleged against Simplot and McKellar occurred within the context of the Washington litigation. Statements made in the course of litigation, including allegations in a complaint, verification of that complaint, and sharing of that complaint, are absolutely privileged. The argument and authorities provided to the Court by the other respondents applies equally to Simplot.

B. The Trial Court Correctly Found the Nondisclosure Agreement to be Unambiguous, and Correctly Granted Summary Judgment.

1. The plain language of the NDA is unambiguous.

The issue framed by summary judgment on Count II, the breach of contract count, called for contract interpretation. It is undisputed that DFF and Simplot entered into a NDA. The trial court's summary judgment decision applied standard principles of contract interpretation to examine the NDA, and the trial court reached the measured and well-reasoned legal conclusion that the NDA was unambiguous and did not apply to the alleged conduct identified as a "breach." *Shawver v. Huckleberry Estates, L.L.C.*, 140 Idaho 354, 361, 93 P.3d 685, 692 (2004) ("When the

language of a contract is clear and unambiguous, its interpretation and legal effect are questions of law.").

The trial court engaged in a three step analysis of the contract interpretation issue. The trial court's analysis was sound, and consistent with Idaho law.

First, the trial court ruled on that it would not consider evidence that both parties submitted, where each asserted that the other party's evidence was "parol evidence" concerning the **intent** of the NDA contract.[3] R. pp. 2096-2097. This Court should likewise analyze this issue without considering parol evidence, unless and until the Court finds the contract to be ambiguous.[4]

After deferring consideration of that parol evidence, the trial court examined the four corners of the agreement to determine whether there was any ambiguity. R. p. 2097-2099.

Once that analysis was complete, and the unambiguous contractual terms determined, the trial court sought to determine whether a breach was alleged. The trial court examined the disclosure of the NSF report, and determined that disclosure did not breach the plain terms of the NDA contract. Without a breach, summary judgment was appropriate. R. p. 2099.

The trial court did not err in deciding that the NDA is plain and unambiguous, and applies only to prevent disclosure of information provided during negotiation of "a" "proposed" or "possible" business relationship. The disclosure of the NSF report did not fall within that contractual scope because DFF did not provide the NSF report to Simplot as part of the confidential information disclosed during negotiation of the proposed business relationship. The NSF report

[3] This ruling is consistent with Idaho law. Our courts do not consider extrinsic evidence unless and until the contract is first deemed ambiguous. *Brown v. Greenheart*, 157 Idaho 156, 166, 335 P.3d 1, 11 (2014); *Howard v. Perry*, 141 Idaho 139, 141, 106 P.3d 465, 467 (2005). In this case, the trial court did not reach the issue of interpreting the contract using parol evidence, because the court found the language to be unambiguous. R. pp. 2096-2097.

[4] As noted in the previous footnote, the trial court did not reach the issue of interpreting an ambiguous contract using parol evidence. In the event the Court reaches this point, (which Simplot contends should not happen) the case should be remanded to the trial court for such an analysis.

did not fall within the unambiguous definition of "Confidential Information" covered by the NDA. As discussed below in greater detail, the plain language of the NDA reveals that the contract applies only to "a proposed business relationship," and applies to confidential information that DFF provided to potential customers while engaging in discussions relating to a possible vendor relationship. The plain language of the NDA does not support DFF's proposed interpretation, i.e., that the NDA applied to any and all exchanges of information between DFF and Simplot for three years.

It is undisputed that the NDA was executed by Simplot in 2014 when it was engaged in discussions with DFF about a possible vendor relationship in which DFF would provide potato shreds to Simplot. During Mr. Clark's discussion with Ms. Stone about the possible vendor relationship for the supply of potato shreds, DFF did not provide Simplot any "Confidential Information" relevant to the issue on appeal.[5]

Since we must start the analysis by examining the language of the contract, a copy of the contract is included in this record in multiple locations. For ease of reference, Simplot will refer to the copy attached to the Declaration of Tom Clark (see R. p. 388-389). The contract states its purpose, that it was entered into: "for the purpose of protecting and preserving the confidential and/or proprietary nature of information to be disclosed or made available by DFF, to Recipient under this Agreement in connection with a proposed business relationship between Recipient and DFF." R. p. 388. This language clearly means that the confidentiality obligation applies only to information disclosed or made available in connection with a proposed business relationship between Simplot and DFF. The contract is specifically limited by its own unambiguous terms.

[5] DFF argues that the trial court considered Simplot's "parol evidence" on this point. Appellant's Brief p. 39-40. However, the trial court specifically stated that it would not consider either Mr. Clark's interpretation of the NDA, nor DFF representative Helen Stone's interpretation of the NDA, until and unless it found the NDA to be ambiguous. R. pp. 2096-2097.

This reading is further confirmed by additional language that reads: "the parties agree to use the Confidential Information received pursuant to this Agreement solely for the purpose of engaging in discussions relating to a possible vendor relationship." *Id*. If confidential information was provided to Simplot as part of the negotiation process, then that information would be held confidential and not disclosed for the period designated, and would not be used for any other purpose than negotiation of a vendor agreement. The Agreement is totally silent with respect to information that may be shared in the future, outside of these negotiations, wholly apart from the single anticipated or proposed business relationship. The Agreement is totally silent on what the confidentiality provisions would be if the parties entered into an actual vendor relationship, except to protect the information already provided. The NDA simply does not apply to information provided or obtained outside the negotiation of a proposed vendor relationship.

In presenting the issue on appeal to this Court, DFF does not specifically address the plain language of the NDA and its interpretation, thus bypassing any analysis of the trial court's decision on a lack of ambiguity. Instead, DFF attempts to encourage this Court to find that there are ambiguities based upon the way DFF would like the Court to interpret the contract.[6] The Court should turn away from that proposed method of analysis, and use the correct analysis used by the trial court here.

The trial court began its analysis of this issue by examining the plain language of the contract itself, to discern whether there were multiple possible interpretations and thus ambiguity. The court stated:

[6] In this argument, DFF encourages the Court to consider its own proffered parol evidence, the affidavit of Helen Stone. Appellant's Brief, p. 40. As stated above, the Court should not consider any parol evidence unless an ambiguity is identified. As clearly articulated in this brief, there is not a second reasonable interpretation of the NDA that would lead to a determination of ambiguity, and Stone's extrinsic evidence cannot be used to vary the plain meaning of the contract.

> The unambiguous, plain language of a contract is controlling. *Cont'l Nat'l Am. Group v. Allied Mut. Ins. Co.*, 95 Idaho 251, 253, 506 P.2d 478, 480 (1973). Whether a contract is ambiguous is a question of law. S*ee e.g.*, *Howard v. Perry,* 141 Idaho 139, 142, 106 P.3d 465, 468 (2005). For a contract term to be ambiguous, there must be at least two different reasonable interpretations. *Armstrong v. Farmers Ins. Co. of Idaho*, 143 Idaho 135, 139 P.3d 737 (2006). "A contract is not rendered ambiguous on its face because one of the parties thought that the words used had some meaning that differed from the ordinary meaning of those words*." Swanson v. Beco Const. Co.*, 145 Idaho 59, 63, 175 P.3d 748, 752 (2007).

R. p. 2098.

In examining the language of the contract, the trial court correctly found that the language was unambiguous. The NDA itself was drafted with a specific limited purpose and scope, and to have limited effect, by its own language. The NDA was not an expansive three year agreement to protect all information received in the course of any business dealings between the parties. The NDA's stated purpose limited its application. It was solely "for the purpose of protecting and preserving . . . (confidential information) disclosed . . . in connection with a proposed business relationship . . . ." R. p. 388. It was clear on the face of the agreement itself that it was intended to serve a limited purpose: to allow for investigation and exploration of a possible business relationship, while protecting the confidentiality of business practices and processes shared during those negotiations.

Well-settled principles of contract interpretation support the trial court's view of the language of this agreement. One of the arguments DFF made below, and continues to make, is to focus primarily on the language in the NDA which refers to a three year period of confidentiality. The trial court did not fall into the trap of examining only one provision of the contract. The NDA does refer to a three year period. It specifies a length of time during which any information shared during the process of negotiating a proposed business relationship would be kept confidential. The

language does not say what DFF contends: that any information shared for a three year period would also be confidential. In fact, the agreement's language specifically limits the type of "Confidential Information" that will be subject to the three year limitation. It states that Simplot agrees to keep information provided "for a period of three (3) years from receipt of the Confidential Information hereunder . . . ."[7] "Hereunder" specifically limits the scope of the three year period to information provided under the terms and definitions provided in the agreement. The three year period is thus specifically limited to Confidential Information (a term of art defined by the NDA) shared within the context of, and under the purpose defined in, the NDA. There is no indication from the language that disclosures of information obtained outside of the proposed business relationship negotiations, or obtained for other purposes, would be covered for a three year period.

The trial court properly looked at the agreement as a whole, as the court was required to do in determining ambiguity. *Brown v. Perkins*, 129 Idaho 189, 193, 923 P.2d 434, 438 (1996)(citing *City of Chubbuck v. City of Pocatello*, 127 Idaho 198, 201, 899 P.2d 411, 414 (1995).

In this case, the trial court had to examine the three year term against the scope of the confidentiality clause itself. The plain language of the provision required Simplot to avoid sharing "Confidential Information" provided in furtherance of the proposed business relationship for three years. The trial court would have committed error if it had blindly applied a three year time frame to protect ALL information shared between the parties that was not shared in connection with a "proposed business relationship," because to do so would have required the trial court to ignore

[7] BusinessDictionary.com defines "hereunder" as a term used in legal documents to refer to the terms and guidelines of the arrangement which are outlined in the following parts of the document." http://www.businessdictionary.com/definition/hereunder.html. The Cambridge Dictionary defines "hereunder" as meaning "further on in this document" or "according to the terms of this document." https://dictionary.cambridge.org/dictionary/english/hereunder. Merriam-Webster defines "hereunder as "under or in accordance with this writing or document." https://www.merriam-webster.com/dictionary/hereunder. All of these definitions are consistent with the trial court's interpretation that the three year term only referred to disclosures of documents that were provided in connection with the "proposed business relationship" negotiations.

other language of the NDA that specifically limited the scope of the agreement to "Confidential Information" shared in negotiating a future agreement. The trial court did not err in interpreting the contract so as to give effect to the entire contract. *Frizzell v. DeYoung*, 163 Idaho 473, 415 P.3d 341, 345–46 (2018); *Cristo Viene Pentecostal Church v. Paz,* 144 Idaho 304, 308, 160 P.3d 743, 747 (2007); *Bondy v. Levy*, 121 Idaho 993, 996, 829 P.2d 1342, 1345 (1992); *Brown v. Perkins*, 129 Idaho at 193, 923 P.2d at 438 (citing *City of Chubbuck v. City of Pocatello*, 127 Idaho 198, 201, 899 P.2d 411, 414 (1995)).

In this case, the trial court also correctly examined the actual language of the contract, not simply an interpretation offered by either side. The trial court looked at the face of the document and gave the words or phrases used their established definitions in common use or settled legal meanings. *Pinehaven Planning Bd. v. Brooks*, 138 Idaho 826, 70 P.3d 664 (2003). Key to the trial court's determination was the contract's use of the word "a"[8] before "proposed business relationship," and the use of the words "proposed" and "possible" when referencing the intended scope of the NDA. While the use of the word "a" may seem trivial to some, in contract interpretation (as in statutory interpretation) this one letter word can be critical. The word "a" can be used to refer to "one," or as the trial court stated "a single possible vendor relationship." R. p. 2099. It may refer to a one-time event or relationship, not a continuing course or multiple

[8] The trial court cited dictionary definitions for "proposed" and "possible," but did not cite dictionary definitions of "a," perhaps because it was so obvious. Nevertheless, dictionaries define the common meaning of the word "a" to mean singular or sole, affirming the court's conclusion. See Dictionary.com definition ("a" indefinite article "a certain; a particular: *one at a time; two of a kind"* "one (used before plural nouns that are preceded by a quantifier singular in form):*a hundred men* (compare *hundreds of men*); *a dozen times*(compare *dozens of times*)." one (used before a noun expressing quantity):*a yard of ribbon; a score of times.")* http://www.dictionary.com/browse/a?s=t Also see the definition in Merriam-Webster: "used as a function word before singular nouns"… to denote a particular type or instance https://www.merriam-webster.com/dictionary/a. Also see The American Heritage Dictionary of the English Language, published by Houghton Mifflin Co. in 1970, where the definition is: "Indefinite article functioning as an adjective. Used before nouns and noun phrases that denote a single, but unspecified person or thing."

relationships. The NDA did not use the terms "any" "many" "ongoing" or "all" to refer to the scope of the relationship at issue, or in any way refer to multiple potential vendor contracts. Thus the NDA did not refer to an ongoing relationship. Instead, as the trial court pointed out, the interpretation of the plain language must give effect to the actual language, and even though it consists of a single letter, the significance of the word "a" cannot be overlooked or discounted. This is especially true when the NDA is viewed as a whole and the word "a" is interpreted in conjunction with the other language of the agreement.

The same is true with respect to the prospective language used to describe the scope of the confidentiality agreement. Use of the terms "possible"[9] or "potential," must, of necessity, refer to an anticipated relationship, not a past or present relationship. The trial court ruled that to give effect to the actual language of the contract, the agreement could not apply "to information gleaned after the parties entered into a formal business relationship." R. p. 2099. This was a correct interpretation of the plain language of the NDA, giving effect to the whole and the language used to determine the parties' intent. *Hoffman v. Bd. of Local Improvement Dist. No. 1101,* 163 Idaho 464, 415 P. 3d 332 (2016) *citing J.R. Simplot Co. v. Bosen*, 144 Idaho 611, 614, 167 P.3d 748, 751 (2006)(look at language as a whole, circumstances, objective, and purposes); *Opportunity, L.L.C. v. Ossewarde*, 136 Idaho 602, 607, 38 P.3d 1258, 1263 (2002)(look at language to determine parties' intent at time of contracting). Because courts lack "the roving power to rewrite contracts," *Shawver v. Huckleberry Estates, L.L.C.*, 140 Idaho 354, 362, 93 P.3d 685, 693 (2004), this Court, following the trial court's lead, must give effect to the express provisions of the

[9] The trial court correctly noted that Merriam-Webster defines propose as "to form or put forward a plan or intention" and defines "possible" as "being something that may or may not occur" or "having an indicated potential." See R. p. 2099, notes 25 and 26.

language used by the parties. *Fletcher v. Lone Mountain Rd. Ass'n*, 162 Idaho 347, 353, 396 P.3d 1229, 1235 (2017).[10]

The trial court here looked at the contract as a whole to give effect to every part of the language.

> The second is the interpretative principle of *verba cum effectu sunt accipienda*—that if possible, every word and every provision is to be given effect—because if the language about arising out of and relating to employment did not limit the scope of the arbitration agreement to those situations, it would have no purpose. *See, e.g.*, *United States v. Butler*, 297 U.S. 1, 65, 56 S.Ct. 312, 80 L.Ed. 477 (1936) ("These words cannot be meaningless, else they would not have been used."); *Sturges v. Crowinshield*, 17 U.S. (4 Wheat.) 122, 202 (1819) ("It would be dangerous in the extreme, to infer from extrinsic circumstances, that a case for which the words of an instrument expressly provide, shall be exempted from its operation."); *Quirrion v. Sherman*, 109 Nev. 62, 846 P.2d 1051, 1053 (1993) ("It is a well-established principle of contract law ... that where two interpretations of a contract provision are possible, a court will prefer the interpretation which gives meaning to both provisions rather than an interpretation which renders one of the provisions meaningless.").

United States ex rel. Welch v. My Left Foot Children's Therapy, LLC, 871 F.3d 791, 797–98 (9th Cir. 2017). *See also Steel Farms, Inc. v. Croft & Reed, Inc.,* 154 Idaho 259, 266, 297 P.3d 222, 229 (2012); *Wright v. Village of Wilder,* 63 Idaho 122, 125, 117 P.2d 1002, 1003 (1941). This principle applies most clearly to rebut DFF's arguments that only the three-year term should be

[10] It is not unusual that these parties would enter into such a contract of limited scope. These types of information-sharing agreements are often used during sensitive negotiations, where confidential information is shared, but the proposed business relationship may not materialize. See examples in *CQ, Inc. v. TXU Mining Company* 565 F.3d 268 (5th Cir. 2009); *Glycobiosciences, Inc v. Innocutis Holdings, LLC*, 189 F.Supp.3d 61(D.C.C. 2016); *CardiAQ Valve Technologies, Inc. v. Neovasc Inc*., CA N. 14-cv-12405-ADB, (D.Mass. 2016); *Steakley v. Round One Investments, L.P*., 01-09-00022-CV, (Ct. App. Tex. 2012); *Qa3 Financial Corp. v. Financial Network Investment Corp.,* 8:12CV5 (D.Neb. 2014). While these reported decisions all addressed claims other than breach of the nondisclosure agreement and its interpretation, they provide examples of this common business practice of protecting information during the pendency of negotiations for a future relationship. It is understandable that parties would want a contractual nondisclosure obligation during business negotiations, to protect trade secrets in the event the relationship does not materialize into an actual contractual relationship. The NDA here thus protected only information disclosed as part of that business negotiation process.

considered. This Court must give effect to the entire agreement. This includes giving full effect to the word "a" to denote a single relationship, and the words "proposed" and "possible" to denote the intended future contractual agreements, and even the word "hereunder" contained in the three-year clause. Those words would be rendered meaningless if the NDA were interpreted to apply to all disclosures for three years, regardless of whether the disclosures were in connection with the "proposed" and "possible" scope of the NDA. The principle of *verba cum effectu sunt accipienda* requires that each word be given meaning. This Court, and the trial court, could do that only if it limited the scope of the NDA, by applying the three-year term only to limit nondisclosure solely to information gained in connection with "a" "proposed" or "possible" relationship, and not all disclosures made during multiple business transactions over the course of three years.

In this case, the trial court found the NDA to be unambiguous, and determined the parties' intent from the unambiguous language:

> The use of the article "a" before possible vendor relationship means a single possible vendor relationship. Based on the plain meaning of the terms proposed and possible when referring to the business relationship between DFF and Simplot, the Court finds the nondisclosure agreement applies to any information gained in the process of forming an agreement but does not apply to any information gleaned after the parties entered into a formal business relationship and/or contract. It also does not apply to subsequent proposed or possible business ventures. By entering into a formal agreement, which both parties agree occurred in August 2014, the parties were no longer in discussions or exchanging information on a possible or proposed vendor relationship. Instead, at the time the formal agreement was complete, the vendor relationship had become actual and accepted.

R. p. 2099.[11] As a matter of law, this court should reach the same conclusion.[12]

2. Based on the correct interpretation of the unambiguous contract, the trial court correctly found there was no breach.

The trial court, after looking at the four corners of the agreement and finding it unambiguous, ruled that the undisputed facts did not allege a breach of the contract.

> Because the disclosure of the NSF Audit report as a part of the Washington Litigation was made approximately two years after Simplot and DFF had entered into a formal business agreement for the sale of frozen potato shreds, the Court does not find the disclosure was part of "a proposed" or "possible" business agreement. The report at issue did not exist at the time the parties were involved in discussions of a proposed or possible relationship and was not even generated until after the formal business agreement was in place.

R. p. 2099. The trial court noted that there could not be an allegation that the disclosure of the NSF Audit Report in 2016 related to forming a proposed business relationship in 2014, so there was no possibility of interpreting the language to apply to the disclosure. The court concluded:

> Thus, based on the plain language, the Court finds the disclosure in the Washington Litigation was not a breach of the terms of the August 15, 2014 non-disclosure agreement. The business relationship between DFF and Simplot had long-since been formed and the non-disclosure agreement does not apply to the formal vendor agreement or fully realized business relationship.

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[11] *Hap Taylor & Sons, Inc. v. Summerwind Partners, LLC*, 157 Idaho 600, 610, 338 P.3d 1204, 1214 (2014); *Boise Mode, Ltd. Liab. Co. v. Donahoe Pace & Partners Ltd*., 154 Idaho 99, 108, 294 P.3d 1111, 1120 (2013) (citing *Shawver v. Huckleberry Estates, LLC*, 140 Idaho 354, 361, 93 P.3d 685, 692 (2004)(meaning and legal effect must be determined from words of unambiguous contract).

[12] The trial court also included in its decision a discussion of the principle of contract construction which requires the court to construe the language against the drafter. R. p. 2100. Simplot believes that this court should rule as a matter of law that the contract is unambiguous. However, in the event the Court disagrees, and must construe any ambiguity, the trial court correctly cited the rule that the contract must be construed against the drafter, which was DFF. *J. R. Simplot Co. v. Bosen*, 144 Idaho 611, 616, 167 P.3d 748, 753 (2006) citing *Big Butte Ranch, Inc. v. Grasmick*, 91 Idaho 6, 9, 415 P.2d 48, 51 (1966). As the trial court noted, it is undisputed that the contract language was drafted by DFF, by way of a form contract that DFF presented for the Simplot representative's signature at the time of the first due diligence visit during the food supply contract development stage. R. p. 2100. As the trial court noted: "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 continuing working relationship, the language should have reflected this requirement." *Id.*

R. p. 2099. This conclusion flows naturally from the interpretation of the contract itself. The "proposed business relationship" covered by the August 15, 2014 NDA involved DFF providing Simplot with potato shreds to fill a temporary supply shortage. It was undisputed that negotiations between DFF and Simplot for a "proposed business relationship" between Dickinson Frozen Foods and Simplot covered by the August 15, 2014 Non-Disclosure Agreement ended in 2014. R. p. 384, ¶6. The NSF report did not even exist at the time of those negotiations. Thus, the NDA simply, as a matter of law, did not apply to or cover any alleged disclosure of the content of a June of 2016 NSF International report for Dickinson Frozen Foods, a document which was given to Simplot two years after the parties entered into the business relationship. No error has been demonstrated in the court's application of the unambiguous contract to the undisputed facts surrounding this disclosure. As a matter of law, this Court should find that no breach occurred and affirm the trial court's decision.

C. The Trial Court Properly Denied the Motion to Amend as Futile.

DFF sought to amend its complaint twice, seeking to blunt the trial court's analysis of the litigation privilege by adding "new facts" that DFF apparently thought would make a difference in the court's analysis. Simplot endorses and incorporates by reference the arguments included in Respondent Yarmuth's briefing on this appeal. The trial court correctly noted that the proposed amendments would be futile, and consistent with Idaho law, denied the proposed amendments. The proposed amendments added nothing to the legal question presented through the application of the litigation privilege. Here, DFF's cause of action for defamation remained the same in both proposed amendments. The new allegations, and more detailed explanations of the facts, did not change the application of the absolute litigation privilege/immunity to the cause of action for defamation.

Idaho law is settled: if the claim being added is invalid, or additional factual allegations do not change the legal analysis, the amendment would be futile, and a court does not abuse its discretion by recognizing that futility and refusing the amendment. In this case, Simplot was protected by an **absolute** privilege, and could not be sued for statements made in a pleading during litigation in the Washington case. Any amendment would have been futile.

> Additionally, under the precedent laid out by this Court, the district court clearly did not abuse its discretion in denying Pandrea's motion to amend. This Court has made it clear that while a **motion to amend a complaint should be liberally granted, that liberality may be constrained** in the face of bad faith or dilatory conduct by the moving party, prejudice to the opposing party, or **the claim to be added being invalid**. See *Smith v. Great Basin Grain Co.*, 98 Idaho 266, 272, 561 P.2d 1299, 1305 (1977); *Hessing v. Drake*, 90 Idaho 67, 71-72, 408 P.2d 180, 182 (1965); *Black Canyon Racquetball Club, Inc. v. Idaho First Nat'l Bank, N.A.*, 119 Idaho 171, 175, 804 P.2d 900, 904 (1991).

Pandrea v. Barrett, 160 Idaho 165, 369 P.3d 943 (2016). A proposed amendment which would not entitle the party to the relief claimed is properly refused. *Bissett v. State*, 111 Idaho 865, 869, 727 P.2d 1293, 1297 (Ct. App. 1986). *See also Taylor v. McNichols*, 149 Idaho 826, 243 P.3d 642 (2010)(amendment properly denied based on futility); *Eagle Equity Fund, LLC v. TitleOne Corp.*, 161 Idaho 355, 386 P.3d 496, (2016)("A court is not required to permit the amendment of a complaint where such amendment would be futile.") It is not an abuse of discretion for the trial court to deny a motion to file an amended complaint under those circumstances.

In this case, consistent with *Lunneborg*, infra, the trial court

> (1) correctly perceived the issue as one of discretion: "The decision to grant or deny a motion to amend is left to the sound discretion of the trial court." R. p. 2040.
>
> (2) acted within the outer boundaries of its discretion: The trial court examined all of the proposed amendments to determine their impact on the absolute litigation privilege analysis. R. pp. 2014-2045.

> (3) acted consistently with the legal standards applicable to the specific choices available to it: "Because the Court does not find Plaintiff set forth any valid claims that would survive a summary dismissal" i.e., amendment would be futile. R. p. 2045; and
>
> (4) reached its decision by the exercise of reason. R. pp. 2038-2045.

No abuse of discretion has been demonstrated, and the trial court's decision should be affirmed.

D. The Trial Court Did Not Err in its Rulings on Attorney Fees.

Following entry of judgment in favor of Simplot on both counts, Simplot filed a memorandum of costs that included a request for attorney fees. While DFF indicates in its briefing that it challenges the award of costs, no argument is included as to that award in its brief, so any challenge to the award of costs is waived.[13] The only costs awarded to Simplot were costs as a matter of right of $68, and the same amount to McKellar.

DFF first argues that Simplot was not the prevailing party in the court below. This is clearly a specious argument, since all of DFF's claims were dismissed. What DFF is really saying is that it hopes to prevail on those claims in this Court. That decision awaits, but this does not demonstrate error in the trial court's ruling on prevailing party.

The trial court awarded attorney fees to Simplot under Idaho Code § 12-120(3). That section states:

> In any civil action to recover on an open account, account stated, note, bill, negotiable instrument, guaranty, or contract relating to the purchase or sale of goods, wares, merchandise, or services and in any commercial transaction unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney's fee . . . . The term "commercial transaction" is defined to mean all transactions except transactions for personal or household purposes.

[13] Simplot requested $68 in costs as of right, $2,363.08 in discretionary costs, and $31,168 in attorney fees. R. p. 2135-2136. The trial court awarded $30,573 in attorney fees after determining that a reasonable hourly rate was charged, that the hours charged were reasonable to defend this type of action and eliminating duplicative billing entries. R. p. 2237.

DFF concedes that Count II of the Complaint, for breach of the NDA, was based on a commercial transaction. Respondent's Brief, p. 46 ("Simplot may have had a legitimate commercial basis for defending against Count II, breach of the non-disclosure agreement . . .") DFF tries to defeat the award of fees by characterizing Count II, and Simplot's defense, as a "narrow defense"[14] that would not justify an award of fees. While DFF contends that the claim for fees should have been denied based on the lack of apportionment of fees to defense of this claim, the trial court had no trouble determining apportionment based on the information submitted by Simplot. The court stated:

> With regards to Plaintiff's arguments that Simplot failed to meet its burden by setting forth the amounts claimed in defense of Count Two, the Court finds this is a question of reasonability based on an evaluation of the time sheet submitted on hours billed . . . .

R. p. 2232. The trial court thus did not see any issue with apportionment (should that be required) based on the detailed information submitted by Simplot. Apportionment was not required because the trial court ruled that Count I was also based in a commercial transaction, but in the event this Court disagrees with that ruling (as fully articulated in the briefing of the other Respondents and incorporated here by reference).

DFF also argues that the trial court erred in awarding fees for defense of Count I (Defamation) under Idaho Code § 12-120(3). The merits of this argument are covered by Respondent Thompson, and Simplot incorporates that argument by reference.[15] However, in

[14] It is difficult to discern why DFF insists this was a "narrow defense" as the only reference DFF makes is to "nine pages" of a 2,220 page record, but those nine pages refer only to Simplot's Motion for Summary Judgment, without acknowledging the research and drafting necessitated by the motion, nor the affidavits, DFF's response, Simplot's reply memorandum, and oral argument on this issue. Nor does it include disputes over the filing of an answer or discovery motions for protective order that occurred after Count I had been dismissed. See, e.g., pleadings located at R. pp. 1648-1654, 1741, 1744, 1747, 1852, 1885, 1938, 1944, 1955, 1989, 2022, 2024, 2067, 2075, 2083-2102 (Memorandum Decision finally granting summary judgement on Count II).

[15] Simplot asserts that the trial court's ruling on this issue was legally correct:

> Allegations based in tort do not prohibit fee awards under Idaho Code section 12-120(3). *Stevens v. Eyer*, 161 Idaho 407, 410-11, 387 P.3d 75, 78-79 (2016), reh'g denied (Oct. 6, 2016). "Even though fees are

addition, as to Simplot, the trial court correctly ruled that any objection to attorney fees claimed by Simplot on this ground was untimely, and waived, because DFF did not file a motion for reconsideration from an earlier ruling on that point, and it thus became the law of the case. DFF's Motion to Disallow filed on December 8, 2017 did not meet a deadline for a motion to reconsider, which would have to be filed by November 22, 2017. The trial court was within its discretion to refuse to revisit that ruling through an untimely objection.

The trial court carefully considered the claim for attorney fees, and DFF has not shown any abuse of discretion in the award of fees. In fact, the trial court spent considerable time analyzing each individual time entry, and awarded fees only when the amounts charged were demonstrated as relevant and necessary to defend the action. The court did not award the entire amount claimed, but instead reduced the fee request where duplication or unnecessary effort was found. The court exercised its discretion wisely, and within the bounds of the legal authorities cited (in particular Idaho Code § 12-120(3)). The award should be affirmed.

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available in cases involving a tort claim, a commercial transaction between the parties to the lawsuit must form the basis of the claim." *Printcraft Press, Inc. v. Sunnyside Park Utilities, Inc.,* 153 Idaho 440, 461, 283 P.3d 757, 778 (2012). Therefore, "as long as a commercial transaction is at the center of the lawsuit, the prevailing party may be entitled to attorney fees claims that are fundamentally related to the commercial transaction yet sound in tort." *Reynolds v. Trout Jones Gledhill Fuhrman, P.A.,* 154 Idaho 21, 26-27, 293 P.3d 645, 650-51 (2013)(citations omitted). "[W]hether a party can recover attorney fees under Idaho Code section 12–120(3) depends on whether the gravamen of a claim is a commercial transaction. *Sims v. Jacobson*, 157 Idaho 980, 985, 342 P.3d 907, 912 (2015). "A gravamen is 'the material or significant part of a grievance or complaint.'" *Id.* (quoting Merriam Webster's Collegiate Dictionary 509 (10th ed.1993)). Recent Idaho Supreme Court decisions further clarify this "gravamen" language, stating party is entitled to attorney fees under section 12-120(3) where the claim would not have arisen absent the claimed commercial transaction." *Simono v. House*, 160 Idaho 788, 793, 379 P.3d 1058, 1063 (2016) (*citing H-D Transp. v. Pogue*, 160 Idaho 428, 436, 374 P.3d 591, 599 (2016)) (internal quotations omitted)… The Court finds the gravamen on the defamation claim was fundamentally related to a business relationship/commercial transaction between DFF and Simplot…. Thus, the Court finds [Defendants] are entitled to an award of attorney fees pursuant to §12-120(3) for prevailing on the defamation claim.
R. pp. 2110-2111.

E. Simplot is Entitled to Attorney Fees Pursuant to Idaho Code § 12-120(3).

For the same legal reasons noted in Section IV.D, Simplot is entitled to attorney fees for this appeal under Idaho Code § 12-120(3). It should be undisputed that this type of commercial dispute claim is subject to attorney fees for the prevailing party under Idaho Code § 12-120(3), and attorney fees for the appeal should be awarded on that basis.

F. DFF is Not Entitled to Attorney Fees and Costs for this Appeal.

DFF makes the ludicrous argument that it is entitled to attorney fees on appeal based upon Idaho Code § 12-121, on the grounds that this is a frivolous defense of an appeal. Fees are awarded under that statute only when the court finds that the action was "brought, pursued or defended frivolously, unreasonably, or without foundation." Idaho Rule of Civil Procedure 54(e)(2). Simplot prevailed on all claims in the court below, is merely responding to DFF's attempts to rehash the same issues, and Simplot has abundant legal authority for the arguments being made. It is DFF who is continuing to pursue arguments that have no basis in fact or law, and if any party is awarded fees under Idaho Code § 12-121, it should be Simplot. Simplot objects to any award to DFF on these grounds.

V. CONCLUSION

The trial court spent a lot of time examining, considering and researching the issues presented in this case. The trial court issued several well-reasoned and well-supported decisions. The legal analysis was flawless, and in many instances applied settled Idaho law. DFF has attempted, on this appeal, to rehash all of the arguments that were soundly rejected by the trial court's excellent analysis. There is no reason to overturn any of the trial court's decisions, and those decisions should be affirmed.

DATED this 25th day of July, 2018.

GJORDING FOUSER, PLLC

By Bobbi K. Dominick
Bobbi K. Dominick – Of the Firm
Attorneys for Respondents J. R. Simplot Company and Mark McKellar

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of July, 2018, a true and correct copy of the foregoing was served on the following by the manner indicated:

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