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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

WADSWORTH REESE, PLLC, an Idaho professional corporation; CLARK A. REESE CPA, P.C., an Idaho professional corporation; and WADSWORTH ACCOUNTING CPA, PLLC and Idaho professional limited liability company, *Plaintiffs-Counter Defendants-Respondents* v. SIDDOWAY & COMPANY, PC, an Idaho professional corporation; RANDY SIDDOWAY, an individual, *Defendants-Counterclaimants-Appellants*	Docket No. 46126-2018 Ada County District Court No. CV-OC-2015-21225
SIDDOWAY & COMPANY, PC, an Idaho professional corporation; RANDY SIDDOWAY, an individual, *Counterclaimants-Appellants* v. FREDERICK WADWORTH, an individual, and CLARK A. REEE, and individual, *Counter Defendants-Respondents*	

APPELLANTS' INITIAL BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT FOR ADA COUNTY. THE HONORABLE JASON D. SCOTT, PRESIDING.

Brett W. Hastings, of Hastings Law Group, LLC, residing in Salt Lake City, Utah, *pro hac vice*, and Jennifer Reid Mahoney, of Kaufman Reid PLLC, residing in Boise, Idaho, for Appellants.

Vaughn Fisher, of Fisher Rainey Hudson, residing in Boise, Idaho, for Respondent

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III. STATEMENT OF THE CASE

A. Brief Statement of the Case and Disposition.

This case arises from disputes between the members of a three-member certified public accounting firm known, at one time, as Siddoway, Wadsworth, & Reese, PLLC (**"SWR"** or the **"Company"**).[1]

The three members of SWR are Siddoway & Company, PC, wholly owned by Randy Siddoway (**"Siddoway PC."** or **"Siddoway"**), Clark A. Reese CPA, PC, wholly owned by Clark A. Reese (**"Reese PC"** or **"Reese"**), and Wadsworth Accounting CPA, PLLC, wholly owned by Frederick Wadsworth (**"Wadsworth PC"** or **"Wadsworth")**.

In December 2015, Wadsworth and Reese filed a lawsuit (the **"Complaint"**) against Siddoway PC, Randy Siddoway personally, Dustin Siddoway (**"Dustin"**), a former employee of SWR, and Jeanine Barkan (**"Barkan"**), also a former employee of SWR. (the **"Complaint"**).

The Complaint alleged, in general, that Siddoway, Dustin, and Barkan had conspired together to steal trade secrets and clients of SWR.

The Complaint also included claims by Reese against Siddoway for breach of a certain Asset Sales Agreement, effective January 1, 2014 (the **"Reese Agreement"**). (Ex. 14, Vol. I, p. 73-77.)

The Reese Agreement provided that "Reese PC would pay Siddoway PC $200,000 for the right to a one-third membership interest in [SWR]." (R., Vol. I, p. 250-251.)

[1] During the course of litigation, the name of the company was changed to Wadsworth Reese, PLLC.

The Reese Agreement also contains a mandatory arbitration clause.

Siddoway countersued Wadsworth and Reese, alleging breach by Wadsworth and Reese of Idaho statute, their fiduciary duties, and asserting the right to arbitrate the Reese Agreement dispute against Reese.

The first seven months of litigation dealt primarily with Reese's substantial resistance to arbitration of the Reese Agreement.

Ultimately, in two separate orders, the District Court compelled Reese to arbitrate the Reese Agreement. However, in the second order, the District Court stayed arbitration as to Clark Reese, personally.

The results of the arbitration were that the Reese Agreement was deemed void for failure of a condition subsequent. However, the arbitrator declined to rule as to the ancillary effects of the Reese Agreement becoming void, asserting that once the Reese Agreement was deemed void, his jurisdiction ended.

Following intensive litigation, and substantial discovery, all claims against Dustin and Barkan were dismissed, with prejudice, on summary judgment.

During the course of the litigation, Siddoway objected to Wadsworth's and Reese's use of SWR funds to pay Reese's separate attorney fees and costs related to litigation and arbitration of the Reese Agreement.

On December 30, 2016, the District Court issued an injunction enjoining Reese, Wadsworth, and SWR from expending SWR fund to pay Reese's separate legal fees.

The case proceeded to a four-day bench trial that was held November 9, 10, 13, and 14, 2017.

On March 16, 2018, the District Court issued its final order and Judgment, granting no monetary relief to any of the parties, and dissociating Siddoway PC as a member of SWR, thus rendering Siddoway PC a "transferee" as defined in I.C. § 30-25-102(a)(12).

Under IDAHO R. CIV. P. 59, Siddoway filed a Motion to Alter or Amend the Judgment, which was denied by the District Court.

On May 28, 2018, Siddoway filed a Notice of Appeal, challenging certain findings and conclusions of the District Court.

No cross appeal was filed.

B. Concise Statement of Facts

1) In mid-2012, Reese became an employee of Siddoway PC. (Tr. 51:13–52:13.)

2) At that time, Wadsworth didn't have a professional relationship with either Reese or Siddoway.

3) In October 2013, Steve Harding, one of Siddoway's former partners, passed away while still actively engaged in an accounting practice. Siddoway and the employees of Siddoway PC, including Reese, helped to fill the void. (Tr. 53:21–54:10, 976:8–22.).

4) Siddoway had worked with Harding for about three years ending in 1999, (Tr. 340:6–13), and knew several of Harding's larger clients, (Tr. 342:2–4).

5) Around the same time, in November 2013, Siddoway and Reese began discussing becoming partners or co-owners of an accounting firm, on terms that involved Reese buying a

one-half interest in Siddoway's practice, as Siddoway had an established client base but Reese didn't. (Tr. 56:9–22, 342:10–23, 349:11–350:7, 491:16–22, 620:16–621:13, 1003:12–25.).

6) Siddoway and Reese agreed on a formula to determine an amount Reese would pay Siddoway to become his equal partner, which included taking the prior year's annual collections of Siddoway PC, multiplying that number by a factor of .80, and then splitting the number in half. (Tr. 136:21-140:13).

7) The formula resulted in an amount Reese would pay Siddoway of approximately $200,000. (Tr. 145:1-12).

8) On December 20, 2013, Reese and Siddoway formed SWR.

9) Reese brought with him, to SWR, only two or three clients from his previous employment and five or six clients he developed while employed by Siddoway PC. (Tr. 150:8–22.)

10) Siddoway, by contrast, brought hundreds of clients into SWR, numbering around 450, which Siddoway had obtained through his nearly 20 years of practice. (Tr. 150:23–151:6, 478:3–8.).

11) However, pursuant to their prior agreement and Reese's promise of payment, Reese was admitted to SWR as an equal partner with Siddoway. (Tr. 146:15-24).

12) Wadsworth joined the company in January 2014. (Tr. 57:1–24, 819:22–24.)

13) Prior to the formation of SWR Siddoway told Reese and Wadsworth that he would leave SWR to start a separate business advisory practice within a year or two. (Tr.

293:14-294:14) (Tr. 404:3-25) (Tr. 730:8-731:15) (Tr. 836:8-17) (Tr. 1019:11-20) (R., Vol. I, p. 81, ¶ 22) (R., Vol. I, p. 139, ¶ 22) (R., Vol. I, p. 277, ¶ 31) (R., Vol. I, p. 304, ¶ 31).

14) In early 2014, shortly after its formation, SWR purchased the Harding client base. (Tr. 55:5–7.)

15) SWR had the opportunity to purchase the Harding client base because of the past relationship between Siddoway and Harding.

16) As partners in SWR, Siddoway, Wadsworth, and Reese worked together to integrate the Harding client base into the Company.

17) Siddoway recommended and introduced Reese to many of the Siddoway PC and Harding clients that were transitioned to SWR, (Tr. 404:3–405:17, 409:11–15, 412:8–12), giving Reese the opportunity to service many of them, (Tr. 167:23–168:15), as well as the opportunity to benefit from the resulting revenue to SWR. (Tr. 166:8–12).

18) Based on his interactions with Reese, Siddoway believed the parties had an oral agreement for Reese to pay Siddoway approximately $200,000 to justify Reese's equal partnership in SWR.

19) In approximately May 2014, Reese contended that there was no agreement because he and Siddoway had not completed negotiations.

20) Siddoway and Reese, with the assistance of Wadsworth, discussed the disagreement for several months.

21) Ultimately, on January 28, 2015, the parties signed the Reese Agreement, which had an effective date of January 1, 2014, the date SWR commenced business operations. (Ex. 14, Vol. I, p. 73-77).

22) On January 28, 2015, Reese also signed the associated Promissory Note, promising to pay Siddoway $200,000. (Ex. 14, Vol. I, p. 78-79).

23) The Reese Agreement provides that Reese PC must pay Siddoway PC $200,000 for the right to receive a one-third membership interest in SWR. (R., Vol. I, p. 373) (Ex. 14, Vol. I, p. 73).

24) Reese made payment to Siddoway under the Reese Agreement totaling $28,000, but ceased making payments when the relationship broke down in August 2015.

25) In the summer of 2015, Siddoway's relations with Reese and Wadsworth broke down, causing the parties to begin discussing Reese PC and Wadsworth PC buying Siddoway PC out of SWR. (Tr. 78:20–79:22.)

26) On July 17, 2015, the three accountants signed a letter of intent for that buyout, but the transaction was never consummated.

27) On August 21, 2015, Siddoway announced he was separating from SWR. (Tr. 93:7–22, 95:12–18, 833:5–10.).

28) Soon after Siddoway's separation, Dustin, Barkan, and several other Wadsworth Reese employees also left SWR. (Tr. 95:19–25, 103:7–10.)

29) On August 26, 2015, Dustin formed AnchorPoint Accounting, PLLC, and a number of former SWR clients transitioned to Anchorpoint.

30) In December 2015, Wadsworth and Reese filed the Complaint against Siddoway PC, Randy Siddoway personally, Dustin, and Barkan alleging that they conspired together to steal trade secrets and clients of SWR.

31) The Complaint also included claims by Reese against Siddoway for breach of the Reese Agreement. (Ex. 14, Vol. I, p. 73-77).

32) The initial seven months of litigation were primarily dedicated to Reese's substantial efforts to avoid arbitration of the Reese Agreement.

33) After substantial motion practice, the District Court, in two separate orders, compelled arbitration of the Reese Agreement. (*See* R., Vol. I, p. 146-160 and 241-254).

34) Upon successfully compelling arbitration of the Reese Agreement, Siddoway requested an award of arbitration related litigation attorney fees and costs, which the District Court denied

35) The results of the arbitration were that the Reese Agreement was deemed void for failure of a condition subsequent.

36) However, the arbitrator declined to rule as to the ancillary effects of the Reese Agreement becoming void, asserting that once the Reese Agreement was deemed void, his jurisdiction ended.

37) Following intensive litigation and substantial discovery, all claims against Dustin and Barkan were dismissed, with prejudice, on summary judgment.

38) Plaintiffs'/Appellees' claims against Siddoway for allegedly stealing trade secrets of SWR were also dismissed, with prejudice, on summary judgment.

39) During the course of litigation, Siddoway objected to Wadsworth's and Reese's use of SWR funds to pay Reese's separate attorney fees and costs related to litigation and arbitration of the Reese Agreement.

40) On December 30, 2016, the District Court issued an injunction enjoining Reese, Wadsworth and SWR from expending SWR fund to pay Reese's separate legal fees.

41) The case proceeded to a four-day bench trial that was held November 9, 10, 13, and 14, 2017.

42) The District Court issued its final order and Judgment on March 16, 2018, granting no monetary relief to any of the parties, and dissociating Siddoway PC as member of SWR, thus rendering Siddoway PC a "transferee" as defined in I.C. § 30-25-102(a)(12).

43) Under IDAHO R. CIV. P. 59, Siddoway filed a Motion to Alter or Amend the Judgment, which was denied by the District Court.

44) On May 28, 2018, Siddoway filed a Notice of Appeal, challenging certain judgments and actions of the District Court.

45) No cross appeal was filed.

IV. ISSUES PRESENTED ON APPEAL

The issues presented on appeal are as follows:

I. Did the District Court commit reversible error by declining to award Siddoway arbitration related litigation attorney fees and costs following Siddoway successfully compelling arbitration of the Reese Agreement.

II. Did the District Court commit reversible error by allowing SWR to pay Reese's separate litigation expenses related to litigating and arbitrating the Reese Agreement.

III. Did the District Court commit reversible error by allowing SWR to pay virtually all the litigation expenses of Plaintiffs and Counterclaim Defendants?

IV. Did the District Court commit reversible error by failing to enter judgment in favor of Siddoway in unjust enrichment?

V. Through this appeal, Appellant seeks attorney fees on appeal under the terms of the Reese Agreement and under I.C. § 12-120(3).

V. ARGUMENT

A. The District Court Erred by Declining to Award Siddoway Fees and Costs Related to Arbitration Litigation.

Siddoway asserts that the District Court committed reversible error in declining to award Siddoway PC attorney's fees and costs incurred in successfully compelling arbitration of the controversies and claims arising out of the Reese Agreement (the **"Arbitration Attorney Fees"**).

Following seven months of protracted proceedings in which Reese resisted arbitration of the Reese Agreement (Ex. 14), the District Court, in two separate orders, compelled arbitration of the Reese Agreement. (*See* R., Vol. I, p. 146-160 and 241-254). However, the District Court declined to award to Siddoway his attorneys fees and costs in successfully compelling arbitration of the Reese Agreement (the **"Arbitration Legal Fees"**) asserting that the "prevailing party" could not be determined until all other claims in the litigation had been resolved in a final order

and judgment. Later, in response to Siddoway's renewed request for award of the Arbitration Legal Fees, the District Court held that Siddoway was not a prevailing party.

As established below, Siddoway asserts that the District Court committed reversible error in declining to award Siddoway arbitration related attorney's fees and costs, thus frustrating Siddoway's contractual right to such an award.

1. Award is Appropriate Following Order to Arbitrate.

The plain language of the Reese Agreement, Idaho statute, and Idaho case law, establishes Siddoway's right to an award of the Arbitration Attorney Fees, and that such an award is proper immediately upon successfully compelling arbitration of the Reese Agreement.

a) The Contract Language Mandates the Award.

When a "party bases its claim for attorney fees upon a contract, then the party must . . . identify that portion of the contract upon which the party relies as authority for the awarding of attorney fees. The party must then provide a reasoned argument, supported by case law as necessary, explaining why that ... contractual provision entitles the party to an award of attorney fees in this instance." Wattenbarger v. A.G. Edwards & Sons, Inc., 150 Idaho 308, 324, 246 P.3d 961, 977 (2010) (internal citations omitted).

Siddoway's claim for award of Arbitration Attorney Fees is based upon the express language of the Reese Agreement. (Ex. 14). When interpreting a contract, the court "begins with the document's language. In the absence of ambiguity, the document must be construed in its plain, ordinary and proper sense, according to the meaning derived from the plain wording of the

instrument." Potlatch Educ. Ass'n v. Potlatch Sch. Dist. No. 285, 148 Idaho 630, 633, 226 P.3d 1277, 1280 (2010).

The relevant language of the Reese Agreement states that, should a party "be required to commence legal action to enforce **any of the terms of this Agreement**, the prevailing party **in such litigation** shall be entitled to an award of reasonable attorney's fees and costs from the other party." (Ex. 14, Vol. I, p. 76, ¶ 14 (emphasis added)).

The only terms of the Reese Agreement subject to litigation in the District Court were the Agreement to Arbitrate, established in paragraph 13 of the Reese Agreement, and the associated Attorney's Fees clause in ¶ 14 of the Reese Agreement. (Ex. 14, Vol. I, p. 76, ¶¶ 13-14).

The language of the Reese Agreement is plain. It provides a right to an award of legal fees and costs for legal action "to enforce any of the terms of the Agreement . . . in such litigation." Id. at ¶ 14. The plain language of the Reese Agreement does not, as the District Court suggests, require a party to the Reese Agreement to prevail in litigation on matters outside the Reese Agreement. Nor does it require a party to the Reese Agreement to wait until a final judgment is issued on matters outside the Reese Agreement. To the contrary, the language plainly cabins the analysis to litigation of the "terms of the Agreement" and an award of reasonable attorney's costs and fees "in such litigation." Id.

In this instance, the only terms of the Agreement appropriately litigated in the District Court were the arbitration clause and the associated attorneys fee clause, as initiated by Siddoway's Motion to Compel Arbitration. Accordingly, after the District Court ordered, on two separate occasions, arbitration of the Reese Agreement, litigation over the Reese Agreement in

the District Court was concluded and Siddoway, as the prevailing party, was contractually entitled to an award of attorney's fees and costs related to the arbitration litigation. To his peril, Reese vigorously opposed arbitration of the Reese Agreement, thus requiring seven months of extensive motion practice, multiple hearings on the matter, and the expense of thousands of dollars of legal fees. All the while knowing that should Reese prove unsuccessful in opposing arbitration of the Reese Agreement, he would be liable for Siddoway's Arbitration Legal Fees.

b) Idaho Supreme Court Case Law Establishes the Scope and Timing of the Award.

The award of arbitration related attorneys and fees, immediately following successfully compelling arbitration, is supported by prior holdings of the Idaho Supreme Court.

In a case quite similar to the instant case, after prevailing in compelling arbitration of a contract, a defendant sought legal fees related to compelling arbitration. The district court awarded the defendant "attorney fees incurred in compelling arbitration." Grease Spot, Inc. v. Harnes, 148 Idaho 582, 584, 226 P.3d 524, 526 (2010). In upholding the award of attorney fees, the Idaho Supreme Court stated that it "became apparent that the [defendants] were the 'prevailing party' for purposes of receiving attorney fees once they prevailed in compelling arbitration, thereby terminating consideration of the merits of the action." Id. at 586.

As it relates to the instance case, this holding of the Idaho Supreme Court is compelling in two respects. First, it recognizes, as the "prevailing party," a party who successfully compels an objecting party to arbitration. Second, it recognizes that the court's analysis is cabined to the

litigation over arbitrability because, once the court finds that arbitration is required, it loses jurisdiction to consider any further merits of the contractual dispute.

2. Siddoway is the Prevailing Party in the Arbitration Litigation

In its Order Denying Motion to Alter or Amend Judgment and Request for Attorney Fees, issued on April 16, 2018, the District Court asserts that, even if the court limited its analysis to the arbitration litigation alone, Siddoway was not the "prevailing party" in the arbitration matter because the District Court stayed arbitration as to Clark Reese personally. In so holding, the District Court errs in several respects, as detailed below.

"In determining which party to an action is a prevailing party and entitled to costs, the trial court must, in its sound discretion, consider the . . . result of the action in relation to the relief sought by the respective parties." IDAHO R. CIV. P. 54(d)(1)(B).

a) The Court Lacked Jurisdiction to Re-litigate the Issue.

As an initial matter, Siddoway contends that once the District Court issued its May 10, 2016, Memorandum Decision an Order granting Siddoway's Motion to Compel Arbitration (the **"First Arbitration Order"**), the District Court lacked jurisdiction to re-litigate the issue.

"The doctrine of law of the case has long been a rule in Idaho, . . . is firmly entrenched in Idaho jurisprudence, and has been since almost immediately following statehood." Alumet v. Bear Lake Grazing Co., 119 Idaho 946, 955, 812 P.2d 253, 262 (1991), Justice Bistline, concurring in the result. Under the "law of the case" doctrine, while rulings and holdings of a district court are subject to appellate review, "in the very case in which a ruling or holding is

made it is binding in all further proceedings." Id. Because the District Court had already ruled on the issues raised in Reese PC's Motion to Stay Arbitration, the District Court is bound by the law of the case established in the First Arbitration Order. Accordingly, Reese PC's subsequent Motion to Stay Arbitration and request for evidentiary hearing was rendered *res judicata* and should not have been considered further.

> *Res judicata serves three fundamental purposes: (1) it preserves the acceptability of judicial dispute resolution against the corrosive disrespect that would follow if the same matter were twice litigated to inconsistent results; (2) it serves the public interest in protecting the courts against the burdens of repetitious litigation; and (3) it advances the private interest in repose from the harassment of repetitive claims.*
>
> Ticor Title Co. v. Stanion, 144 Idaho 119, 123, 157 P.3d 613, 617 (2007).

In the First Arbitration Order, the District Court correctly held that if Reese wished to "contend that the Reese agreement is unenforceable . . . then the arbiter may decide that issue for purposes of the arbitration proceeding." (R., Vol. I, p. 157). The District Court further held that it "it would be inappropriate to review the merits of the dispute as such would in many instances emasculate the benefits of arbitration." Id. at 158 (citing Loomis, Inc. v. Cudahy, 104 Idaho 109, 656 P.2d 1359, 1362 (1982)).

It is imperative to note that, in the proceedings leading to issuance of the First Arbitration Order, "each side agreed to waive the right to an evidentiary hearing in favor of allowing the Court to decide the matter on the paper record accumulated before the hearing." (R., Vol. I, p. 151-152). It is also noteworthy that the First Arbitration Order held that Siddoway could

"simply initiate an arbitration proceeding . . . without need for advance judicial permission." Id. at 156, n. 5.

Consistent with the First Arbitration Order, on June 6, 2016, Siddoway filed a Demand for Arbitration with the American Arbitration Association. Inexplicably, in direct contradiction to the First Arbitration Order, on June 20, 2016, Reese PC filed a Motion to Stay Arbitration arguing that for "reasons previously proffered" to the District Court asserting that the "Reese Agreement is void," the court should stay arbitration. Also, despite having previously waived any right to an evidentiary hearing on the matter, Reese PC requested that the Court "conduct an evidentiary hearing to determine the validity of the Reese Agreement."

Over Siddoway's objection, and despite its previous holdings in the First Arbitration Order, the District Court set an evidentiary hearing to determine if the Reese Agreement, as a whole, was void. Thus, requiring Siddoway to file two separate motions for reconsideration and incur further, and substantial, legal fees to argue against Reese PC's improper Motion to Stay Arbitration. After briefing on the two motions to reconsider, the District Court held that "the Court agrees with Siddoway that an evidentiary hearing is not needed to determine the arbitrability . . . of the Reese Agreement the Promissory Note." (R., Vol. I, p. 252). In short, Siddoway prevailed in his position that Reese PC's request for a second hearing on the arbitrability of the Reese Agreement was improper.

In its First Arbitration Order, the District Court ordered arbitration of the Reese Agreement and specifically declined to engage in a determination of whether the Reese Agreement was void. In the First Arbitration Order the District Court correctly held that to do so

would be improper under Idaho law. Reese PC's subsequent Motion to Stay Arbitration was improper in that it asked the District Court to re-litigate the issue. Reese PC' subsequent Motion to Stay Arbitration was also improper in that it requested an evidentiary hearing on the matter, a right Reese PC had previously waived in open court. Accordingly, under the doctrines of *law of the case* and *res judicata*, the District Court erred by considering, in any degree, Reese PC's improper Motion to Stay Arbitration.

b) Reese did not Seek a Stay as to Reese Personally.

Even if Reese PC's subsequent Motion to Stay Arbitration could have been properly considered, the fact that the District Court stayed arbitration as to Clark Reese personally does not destroy Siddoway's status as the "prevailing party" in the arbitration proceedings because neither Reese PC nor Clark Reese personally sought such relief.

As cited previously, under Idaho law, in "determining which party to an action is a prevailing party and entitled to costs, the trial court must, in its sound discretion, consider the . . . result of the action in relation to the relief sought by the respective parties." IDAHO R. CIV. P. 54(d)(1)(B).

The result of the relevant action was that, in two separate orders, the District Court compelled arbitration of disputes arising out of the Reese Agreement.

The relief sought by Reese PC, through its subsequent Motion to Stay Arbitration, was to conduct an evidentiary hearing to determine the validity of the Reese Agreement. The result was

an order of the District Court stating that "the Court agrees with Siddoway that an evidentiary hearing is not needed." (R., Vol. I, p. 252).

Nowhere, in Reese PC's Motion to Stay Arbitration, did Reese PC ask for the District Court to stay arbitration as to Clark Reese personally. More importantly, Clark Reese, himself, made no appearance in the arbitration litigation. The District Court, issued the stay as to Clark Reese, *sua sponte*. To deny Siddoway "prevailing party" status based on relief not requested or argued by either party is inconsistent with the Idaho Rules of Civil Procedure.

The result of the arbitration litigation, in this instance, is that Reese PC was compelled to arbitrate all controversies and claims arising out of the Reese Agreement pursuant to the First Arbitration Order of May 10, 2016 and the Second Arbitration Order of August 9, 2016. Also, the Second Arbitration Order specifically denied Reese PC's request for an evidentiary hearing (the relief Reese PC was seeking), because Reese PC had previously waived any right to a hearing in a prior proceeding. (R., Vol. I, p. 252-253).

The relief granted is consistent with the relief sought by Siddoway in its Motion to Compel Arbitration, in which Siddoway requested an "order compelling arbitration of all claims arising or related to the [Reese] Agreement." Because the result of the arbitration litigation is consistent with the relief sought by Siddoway, it is readily apparent that Siddoway is the prevailing party with respect to the enforcement of the arbitration clause of the Reese Agreement.

c) The District Court's Stay as to Clark Reese Personally is Error.

Even if Reese PC's subsequent Motion to Stay Arbitration could have been properly considered, and even if Clark Reese had appeared in the arbitration litigation to ask for a stay as to himself, the District Court's ruling that Clark Reese never agreed to arbitrate constitutes correctable error because the ruling is contrary to the express terms of the Reese Agreement.

Clark Reese, in his personal capacity, signed specific guarantees to both the Reese Agreement and the Promissory Note. (Ex. 14, Vol. I, p. 77, 79). Each of the specific guarantees were respectively contained in the body of the Reese Agreement and the Promissory Note and were not separate, stand-alone documents. Id.

The specific guaranty in the Reese Agreement references paragraph 10 of the Reese Agreement and extends the benefits and obligations contained in paragraph 10 to Clark Reese, personally. Id. at 77. Accordingly, Clark Reese, personally, is a third-party beneficiary of the Reese Agreement in addition to being a guarantor. As a third-party beneficiary and specific guarantor of the Reese Agreement, Clark Reese is bound to the agreement to arbitrate.

Pursuant to the express terms of the Reese Agreement, Idaho statute, and Idaho case law, Siddoway is entitled to an award of his legal fees and costs related to litigating the arbitrability of the Reese Agreement. The "prevailing party" analysis, for purpose of arbitrability proceedings, is limited to the arbitration litigation only, and does not consider the outcome of the other causes of action that remained in the District Court litigation. Siddoway is the prevailing party because the District Court, in two separate rulings, ordered that the disputes arising out of the Reese

Agreement be arbitrated, consistent with the relief Siddoway requested. Accordingly, Appellant respectfully requests this Court to correct the District Court's error and authorize issuance of an order, in favor of Siddoway, and against Reese in an amount equal to the attorney fees and costs expended in the arbitration litigation, plus the fees and costs incurred in bringing this appeal as to the award of Arbitration Legal Fees.

B. The District Court Erred in Allowing use of Company Funds to Pay Virtually all Plaintiffs' Litigation Expenses.

From the earliest days of this litigation, a major dispute arose as to the propriety of Plaintiffs/Appellees using SWR funds to pay virtually all of Plaintiffs' litigation expenses, including Reese's separate legal expenses of litigating the Reese Agreement dispute between Reese and Siddoway (a contract to which SWR was not a party). Prior to commencement of the bench trial, these legal fees had risen to $208,882.27 (Ex. 1019, Vol. I, p. 747-859) and are likely now more than $300,000.00, virtually all of which have been borne by the Company.

Siddoway contends that the District Court erred in ruling that Plaintiffs/Appellees had a legitimate business reason to justify use of SWR funds to pay Reese's separate litigation expenses related to the Reese Agreement. Additionally, Siddoway contends that the District Court erred by declining to determine whether Plaintiff/Appellee's claims are derivative or direct in nature, and to apportion Plaintiff/Appellee's legal fees and costs accordingly.

1. Payment of Clark Reese's Separate Legal Fees is Not a Legitimate Company Expense.

In its Findings of Fact and Conclusions of Law (the **"FFCL"**), the Court concluded that payment by SWR of Reese's separate litigation and arbitration fees and costs related to the Reese

Agreement were legitimate business expenses of SWR. (R., Vol. I, p. 404, ¶ 24). The Court based its conclusion almost entirely on the testimony of Clark Reese that "Siddoway PC claimed that, in the event of the Reese Agreement's failure, the operating agreement's allocation of a one-third membership interest to Reese PC is ineffectual and Siddoway PC owns that membership interest, plus its own one-third membership interest." Id. (the **"2/3 Ownership Argument"**). The District Court's reasoning appears to be that, because there were disputes between certain Members of the Company, it was legitimate for the Company to pay the legal fees of one member (Reese PC) to resolve the dispute, at the exclusion of the other member (Siddoway Co.). In so concluding the District Court has erred.

a) Plaintiffs' Theory was Invented Late in the Litigation.

The weight of the evidence establishes that Plaintiffs'/Appellee's reasoning, espoused at trial, for SWR's payment of Reese's separate legal fees was concocted very late in the litigation, almost certainly in response to the District Court's Preliminary Injunction, issued on December 30, 2016 enjoining the use of SWR funds to pay Reese's separate legal fees.

At trial Reese testified that, in October 2015, Reese and Wadsworth voted to have SWR pay all attorney's fees and costs of the contemplated litigation, including all of the legal fees for the dispute between Reese and Siddoway "because of Randy's previous claims that he felt like that he was a two-thirds owner." (Tr. Vol. I, p. 129, L. 7-9). However, the overwhelming weight of the evidence establishes that Wadsworth and Reese had never conceived of this argument in October 2015, but concocted it over a year later in an effort to justify their improper decision to

divert tens of thousands of dollars of SWR funds to pay Reese's separate legal fees, thus circumventing Siddoway's rights as a Member.

i) The Theory was not Part of the Reese Agreement Litigation

In his Counterclaims, Siddoway never asserted any cause of action or request for relief under the theory that he owned Reese's Membership Interest. Rather, the cause of action was simply for breach of the Reese Agreement and recovery of damages. (R., Vol. I, p. 91). In short, Siddoway simply wanted Reese to pay the money he had promised to pay.

Plaintiffs' initial Complaint in this matter is similarly devoid of any cause of action or request for relief asking the court to declare that Siddoway is not the 2/3 owner of SWR. (R., Vol. I, p. 52-53).

ii) The Theory was Raised by Siddoway's Counsel a Year into Litigation.

The legal theory that Siddoway PC could be declared a 2/3 Member of SWR was first raised by Siddoway's legal counsel in December 2016, following the Arbitration ruling that the Reese Agreement was void. Of course, this is more than a year following the alleged October 2015 vote which Reese claims was spurred by the 2/3 Ownership Argument attributed to Randy.

Moreover, Siddoway's counsel later observed that any outcome requiring Reese to abandon his 1/3 interest in SWR to Siddoway was not a viable or sufficient remedy. Siddoway's counsel's legal argument was that, under the legal principles involving voided contracts, Reese would have to return to Siddoway the consideration he received under the Reese Agreement.

The consideration Reese received under the Reese Agreement was properly determined by the District Court to be Reese's 1/3 Membership in SWR. Specifically, in its order issued on August 9, 2016, the District Court held, under a summary judgment standard, that the Reese Agreement is basically understandable . . . [and] covers the ground it covers – that Reese PC would pay Siddoway PC $200,000 for the right to a one-third membership interest in [SWR]." (R., Vol. I, p. 250-251.)

However, Siddoway's counsel observed that because Reese's 1/3 Membership Interest in SWR came with voting rights and other rights, which were exercised by Reese for more than four years and, therefore, could not be undone, merely returning the 1/3 Membership Interest to Siddoway would not constitute return of the "consideration." Accordingly, Siddoway's counsel expressly stated that the only way to equitably accomplish a restitution to Randy and Siddoway Co., consistent with the principles of voided contracts or unjust enrichment, is for Reese to pay to Siddoway, in restitution, the amount Reese promised to pay.

iii) Wadsworth and Reese Did Not Raise the Theory at the Preliminary Injunction Hearing.

The improper diversion of Wadsworth Reese funds for payment of Reese's separate legal fees was a point of extreme concern to Siddoway, which Siddoway raised with Reese, Wadsworth, and their legal counsel as early as January 2016. After conclusively establishing that Wadsworth and Reese were diverting Company funds to pay all the legal fees for Reese's separate contact dispute with Siddoway, Siddoway filed a motion to enjoin the improper activity. A hearing on Siddoway's preliminary injunction was held on November 22, 2016. At the hearing

Reese and Wadsworth were given the opportunity to present any and all arguments justifying use of SWR funds to pay Reese's separate legal fees. Wadsworth and Reese provided no justification or reason for such payment. In the words of the District Court, Wadsworth and Reese "did not identify a sound justification – a legitimate business reason – for Wadsworth Reese to cover Reese's legal expenses." (R., Vol. I, p. 263). Accordingly, the District Court enjoined Wadsworth and Reese from doing so. Id.

Wadsworth and Reese's failure at the Preliminary Injunction hearing, and the associated briefing, to mention the 2/3 Ownership Argument, or any other basis to justify use of Company funds to pay Reese's separate legal fees, is glaring. It is readily apparent that if Wadsworth and Reese had discussed and voted, as Reese testified, they would have remembered it and mentioned it to the District Court to avoid being enjoined. The obvious, and reasonable, inference is that Wadsworth and Reese had not conceived of the argument at the time of the hearing, but merely concocted it during the course of litigation (and after the preliminary injunction ruling) in an attempt to justify diversion of tens of thousands of dollars to pay Reese's separate legal bills, and avoid potential liability.

b) Trial Exhibits and Wadsworth's Testimony Evidence Extreme Self-Dealing.

The sole document entered by Plaintiffs to support their claim that they specifically discuss the 2/3 Ownership Argument in October 2015, is an email between Wadsworth and Reese dated October 5, 2015, and entered into evidence at Trial as Exhibit 74. However, an examination of Exhibit 74 does not support Plaintiffs'/Appellees' assertion in the least. In fact,

Exhibit 74 evidences that Wadsworth and Reese knew it was improper for SWR to pay Reese's separate legal fees, and Wadsworth would only agree to do so if he and Reese engaged in an extreme level of self-dealing.

Exhibit 74 reads, in its entirety, as follows:

> *Clark raised the question re: legal fees in his personal/SWR representation against Randy/Dustin et all due to the need to pay Vaughn Fisher a retainer). We discussed that 1) if we will homogenize the SWR clients and all SWR to pay all legal fees and buy out payments to GW/Randy/Harding then SWR would be responsible for Vaughn's fees 100%. Otherwise, SWR will bear the costs of Vaughn at no less than 50%, and probably more (based on an analysis of the total fees to the underlying issues – client issues will be paid by SWR while Clark will pay those fees directly related to his promissory note). Our conclusion is that the initial $7,500 will be charged to the SWR cc, with possible future reimbursement from Clark (see #1 above).*
>
> (Ex. 74, Vol. I, p. 408).

Wadsworth's testimony at trial sheds further light on the improper motives of Wadsworth and Reese in voting to have SWR pay Reese's separate legal fees. When questioned about his reasoning, Wadsworth testified that "I would view all of the legal fees to be appropriately paid by the firm if we considered at some point that if we might be able to change the nature of our partnership relationship." (Tr. 929:12-16). Wadsworth further testified that he would agree to have SWR pay all of Reese's separate legal fees if Reese would sign a non-compete agreement, and vote to have SWR also pay Wadsworth's $125,000.00 outstanding debt to George Wadsworth. In return, Wadsworth would agree to sign a non-compete agree and vote to have SWR pay any debt Reese owed to Siddoway under the Reese Agreement. (Tr. 930:1 - 931:2).

The weight of the evidence shows that, in October 2015, Wadsworth's and Reese's did not vote to have SWR pay all of Reese's separate legal fees because of an alleged claim by

Siddoway that he owned 2/3 of SWR. Rather, the evidence shows, that the agreement was based on the following self-serving and improper motives of Wadsworth and Reese:

1) Wadsworth and Reese would enter into non-compete agreements between themselves. (Tr. 929:5-25) (Ex. 74).
2) Wadsworth and Reese would vote to have the Company assume Wadsworth's $125,000 liability to a third party (George Wadsworth) for Wadsworth's purchase of a client base that he brought to Wadsworth Reese, and for which he received his 1/3 membership interest in the Company. (Tr. 930:1-23) (Ex. 74).
3) Wadsworth and Reese would vote to have the Company assume Reese's liability for payments to Siddoway under the Reese Agreement, and for which Reese received his 1/3 membership interest. (Tr. 930:24 – 931:2) (Ex. 74).
4) All in exchange for Wadsworth and Reese voting to have the Company be "responsible for Vaughn's fees 100%." (Ex. 74).

Notably missing from Exhibit 74 is any mention of the 2/3 Ownership Argument, proffered by Reese at trial.

In summary, Wadsworth and Reese conspired together to have the Company assume up to $445,00.00 of debt the Company had no obligation to pay. Specifically, $125,00 of Wadsworth debt owed to George Wadsworth, up to $200,000 of Reese debt owed to Siddoway, all in exchange for Wadsworth and Reese agreeing to have the Company assume responsibility

to pay $120,000, or more, of Reese's separate legal fees for litigating and arbitrating against Siddoway over the Reese Agreement.

It is readily apparent that such a self-serving arrangement is neither a legitimate expense of the Company nor is it in the best interest of the Company. To the contrary, the arrangement demonstrates an extreme level of improper self-dealing on the part of Wadsworth and Reese, all at Siddoway's expense.

c) Even if True, Plaintiff/Appellee's Theory Does Not Justify Payment by SWR of Reese's Separate Legal Fees.

Even if the District Court's view of the facts was supported by the evidence, it would not justify use of SWR funds to pay Reese's separate legal fees and costs. The District Court provides no legal authority, and Appellant is aware of none, that establishes a presumption that SWR, or any company, for that matter, can appropriately pay one members legal fees, and not the others, when the two members have a dispute amongst themselves to which the company is not a party.

To allow such an occurrence is completely arbitrary and capricious. If the Company had any justification to pay for the costs of the dispute between Reese and Siddoway (to which the Company was not a party), why not pay Siddoway's legal fees instead of Reese's? Or why not fund the litigation equally? Of course, the answer to these questions is that none of the described actions is appropriate, fair, or consistent with Idaho law and the fiduciary duties owed by Wadsworth and Reese to Siddoway.

Idaho case law is clear on the fiduciary duty owed by directors/managers of closely held companies to the other members, particularly minority members. As the Managers, directors, and majority members of SWR, Wadsworth and Reese "are bound to exercise the **utmost** good faith in managing the [company]." McCann v. McCann, 152 Idaho 809, 815, 275 P.3d 824, 830 (2012) (emphasis added). This is especially true in closely held companies, such as SWR, because the majority members "through their ability to elect and control a majority of the directors and to determine the outcome of [member] votes on other matters, have tremendous power to use a great variety of devices or modes of operation to benefit themselves at the expense of minority [members]." Id.

As the Idaho Supreme Court has observed, improper acts of majority members include cutting "off the flow of income to the minority by refusing to declare dividends . . . [while at] the same time, protect[ing] their own income stream from the business by exorbitant salaries and bonuses . . . or by unreasonable payments under contracts between the [company] and majority [members]. Id.

The actions of Reese and Wadsworth, in causing SWR to expend tens of thousands of dollars to pay Reese's separate legal fees, are improper and contrary to well established Idaho law. Such actions constitute both disproportionate distributions to Reese and a breach of the utmost fiduciary duties owed by Reese and Wadsworth to Siddoway. Siddoway is entitled to relief for such actions and the District Court erred by declining to grant such relief.

2. The District Court Erred by Declining to Determine the Nature of this Action.

The Court's FFCL and Judgment fails to address whether this action is a direct action or a derivative action. This determination is critical in determining the propriety of Wadsworth and Reese causing SWR to pay virtually all the legal fees in this matter. As established below, in either case, payment of virtually all the litigation expenses is improper under Idaho law.

a) Derivative Action Requires Wadsworth and Reese to Pay Litigation Fees and Costs.

Siddoway asserts that the Plaintiff's/Appelle's action is a derivative action, as evidenced by Plaintiffs' own pleadings which state "Plaintiffs, including [SWR], are proper parties pursuant to I.C. §§30-6-902, 30-6-903 and by the vote of Reese PC and Wadsworth PLLC." (R., Vol. I, p. 341, ¶ 9). The code sections cited are the derivative action statutes, in force at the time the original Complaint was filed, which have been succeeded by I.C. §§ 30-25-802 to 803.

Under Idaho law, in this derivative action, Reese PC and Wadsworth PC are obligated to pay the legal fees and costs, at their sole expense, until such time as a judgment in the matter is rendered. Only if the "derivative action is successful in whole or in part" may the court "award the plaintiff reasonable expenses, including reasonable attorney's fees and costs, **from the recovery of the limited liability company.**" I.C. § 30-25-806(b). "It is important to highlight the fact that the attorney's fees are deducted from the recovery of the LLC." Prehn v. Hodge, 161 Idaho 321, 385 P.3d 876, 886 (2016). Therefore, Wadsworth and Reese may recover their legal fees and costs only to the extent their derivative action is successful and results in a recovery for SWR.

This characteristic of derivative actions helps to ensure that one side of controversies involving closely held business are not able to use company funds to pay their legal fees while the other side is required to pay its own legal fees out of pocket. Such a circumstance, of course, provides an unfair and critical financial and psychological advantage to the party with control of the company coffers.

In this case, however, Wadsworth and Reese have done just that. They have improperly diverted at least $208,882.27 of SWR funds (*see* Ex. 1019), plus the legal fees and costs for the trial and this appeal, to pay virtually all of the legal fees related to this derivative action, essentially using Siddoway PC's share of Company assets to subsidize Wadsworth's and Reese's litigation against Siddoway and multiple other Defendants. Yet, after over two years of protracted litigation and the expenditure of hundreds of thousands of dollars of Company funds, Wadsworth and Reese failed in every cause of action for alleged damages and, consequently, recovered $0 for the LLC.

The actions of Reese and Wadsworth, in causing SWR to pay virtually all of the costs in this derivative action are improper and contrary to well established Idaho law. Such actions constitute both disproportionate distributions to Reese and Wadsworth and a breach of the utmost fiduciary duties owed by Reese and Wadsworth to Siddoway. Siddoway is entitled to relief for such actions and the District Court erred by declining to grant such relief.

b) <u>Direct Action Requires Division of Legal Fees and Costs Amongst the Plaintiffs/Appellees.</u>

In the alternative, if this Court, or the District Court, on remand, determines that the underlying action is a direct action of Wadsworth, Reese, and SWR, then the legal fees should be equally divided between the named Plaintiffs and Counterclaim Defendants.

It is the prerogative of all plaintiffs to style their complaint as they wish. The original Complaint, the First Amended Complaint, and the Second Amended Complaint all included Reese PC and Wadsworth PC as Plaintiffs. Additionally, Siddoway's Counterclaims named Reese PC, Clark Reese personally, Wadsworth PC, and Wadsworth personally, as Counterclaim Defendants. Yet, Wadsworth and Reese have cause SWR to pay virtually all of the costs of litigation, over Siddoway's consistent objection.

To mandate that SWR must absorb all of the costs of litigation when there are two other Plaintiffs, by the express choice of the Plaintiffs, is arbitrary and capricious. Appellant is aware no legal authority, and can conceive of no argument, that creates a presumption that SWR should bear all the costs of litigation to the exclusion of the other Plaintiffs. If the source of payment of legal fees in this matter is irrelevant, why not have Wadsworth PC or Reese PC pay all the legal fees?

Reese PC and Wadsworth PC affirmatively chose to be Plaintiffs in this case. Reese PC and Wadsworth PC are Counterclaim Defendants in the case. Clark Reese and Frederick Wadsworth, personally, are named Counterclaim Defendants. Yet, neither Reese PC, Wadsworth PC, Clark Reese, nor Frederick Wadsworth has been required to pay any litigation costs to pursue their claims or mount their defenses in this matter.

Siddoway, on the other hand, was forced to absorb all of his legal costs. Such a circumstance is manifestly unjust and contrary to the utmost fiduciary duties owed by Wadsworth and Reese to Siddoway.

Through Exhibit 1019, which was admitted into evidence at trial, Siddoway provided the District Court with sufficient information to divide Plaintiffs' legal fees between them.

The actions of Reese and Wadsworth, in causing SWR to pay virtually all of the attorney fees and costs in this matter are improper, arbitrary, and unjust. Such actions constitute both disproportionate distributions to Reese and Wadsworth and a breach of the utmost fiduciary duties owed by Reese and Wadsworth to Siddoway. Siddoway is entitled to relief for such actions and the District Court erred by declining to grant such relief.

C. The District Court Erred in Denying Siddoway Unjust Enrichment Recovery.

Siddoway contends that the District Court erred by not awarding an amount to Siddoway under the competing unjust enrichment claims between Siddoway and Reese. Siddoway further contends that the District Court erred in calculating the dollar amount of the net benefit bestowed by Siddoway PC on Reese PC.

1. <u>The District Court Conclusion are Contrary to or Unsupported by the Evidence.</u>

In its FFCL, the District Court calculated a net benefit bestowed by Siddoway PC on Reese PC of $21,358.50. (R., Vol. I, p, 422). Accordingly, one would reasonably expect an award to Siddoway in at least that amount. However, the District Court declined to issue a

judgment in Siddoway's favor, stating the Siddoway had not established that it was unjust to award nothing. The District Court based this holding on the following assertions:

1) That Siddoway PC separated from SWR too early. (R., Vol. I, p. 422).
2) That Siddoway's separation, so early in the transition period, was not contemplated by the Reese Agreement. (R., Vol. I, p. 422-423).
3) The District Court's impression that "though Siddoway PC brought more clients, Reese PC likely performed much more of the work necessary to service them." (R., Vol. I, p. 423-424).

These conclusions are unsupported or contrary to the evidence.

a) Siddoway's Separation was not Premature

Siddoway separated himself from SWR's on or about September 2015, nearly two years after the formation of SWR. (R., Vol. I, p. 390, ¶ 19). Two years is a substantial period of time and can hardly be deemed premature under the circumstances. During the two years, Siddoway took substantial steps to transfer client relationships to Reese. The first step, of course, was agreeing to be Reese's partner "on terms that involved Reese buying a one-half interest in Siddoway's practice, as Siddoway had an established client base but Reese didn't." (R., Vol. I, p. 386, ¶ 4) (Tr. 56:9–22, 342:10–23, 349:11–350:7, 491:16–22, 620:16–621:13, 1003:12–25.).

Siddoway spearheaded SWR's acquisition of hundreds of clients from Steve Harding, an opportunity that arose due to "the past relationship between Siddoway and Harding. (R., Vol. I, p. 386, ¶¶ 3, 6).

Siddoway "recommended and introduced Reese to many of these clients . . . giving Reese the opportunity to service many of them . . . as well as the opportunity to benefit from the resulting revenue to [SWR]." (R., Vol. I, p. 386-387, ¶ 8) (Tr. 404:3–405:17, 409:11–15, 412:8–12, Tr. 167:23–168:15, Tr. 166:8–12).

In fact, by December 2014, nearly a year before Siddoway separated from SWR, Reese had been designated as "relationship partner" to clients representing $340,846.04 of prior years billings. (Ex. 49, Vol. I, p. 296-326). A striking improvement considering that "Reese brought with him to [SWR] only two or three clients from his previous employment." (R., Vol. I, p. 386, ¶ 7).

Despite Siddoway's two years of personal services to SWR, largely devoted to transferring client relationships and other benefits to Reese, the District Court concluded that Siddoway's departure was premature and "wasn't contemplated by the Reese Agreement." (R., Vol. I, p. 422-23, ¶ 61). However, this conclusion is not supported by the express terms of the Reese Agreement. The Reese Agreement is devoid of any term obligating Siddoway to provide personal services to SWR for any period of time.

Siddoway's separation was not premature.

b) Siddoway's Separation was not Unanticipated

Siddoway's departure was hardly unanticipated. Prior to Siddoway's separation from SWR, the parties had been discussing a buyout for months. (R., Vol. I, p. 389-390, ¶¶ 14-19). More importantly, prior to the formation of SWR Siddoway put Reese and Wadsworth on notice

that he would leave SWR to start a separate business advisory practice. (Tr. 293:14-294:14) (Tr. 404:3-25) (Tr. 730:8-731:15) (Tr. 836:8-17) (Tr. 1019:11-20) (R., Vol. I, p. 81, ¶ 22) (R., Vol. I, p. 139, ¶ 22) (R., Vol. I, p. 277, ¶ 31) (R., Vol. I, p. 304, ¶ 31).

In the months leading up to September 2015, the parties had substantial discussions regarding Siddoway's separation from the firm, acknowledging that Siddoway could take ½ of his prior client base with him and still expect to receive buy-in payments from Reese. (Ex. 1004, Vol. I, p. 710).

After leaving SWR to start a separate company, consistent with Siddoway's earlier notice to Reese and Wadsworth, Wadsworth and Reese responded by suing Siddoway and multiple other Defendants for money damages, all of which claims ultimately failed either on summary judgment or after trial.

Siddoway's separation from SWR was not unanticipated.

c) <u>There is No Evidence of Unjust Work Load.</u>

The District Court's final stated reason for declining to award any damages to Siddoway was that the "Court was left with the impression that, though Siddoway PC brought more clients into the venture, Reese PC likely performed much more of the work necessary to service them." (R., Vol. I, p. 423-424).

The single piece of evidence that even implies any level of unfairness in workload between Reese and Siddoway was a one-word answer by Reese to a leading question by his legal

counsel regarding Exhibit 49, a spreadsheet designating various parties as "originating partners" or "relationship partners" to SWR's clients.

> *Q. So under Mr. Siddoway's proposal, he assigns himself no clients to work on, but he has an administrative assistant; and he's still supposed to get paid evenly every month with you guys?*
> *A. Yes.*
> *Q. Was that one of the issues causing the partners some consternation?*
> *A. Yes.*
> (Tr. 266:1-9).

However, Reese testified that Exhibit 49 was a proposal by Randy, only, and not an accurate representation of division of labor between the parties. (Tr. 268:24-269:2). Moreover, Reese's testimony establishes that his level of "consternation" was minimal, at most, as he objected to only a handful of assignments out of more than 600. (Tr. 189:20-192:4). Finally, and perhaps most importantly, Reese never raised the issue of unjust separation of duties in the context of his competing unjust enrichment claim.

2. Award to Siddoway is Supported by the Arbitration Decision.

The unjust enrichment judgement sought in favor of Siddoway is supported, and consistent with the Arbitration Order regarding the Reese Agreement.

On November 8, 2016, Arbitrator W. Anthony Park (**"Arbitrator Park"**) issued the Arbitrator's Order, holding the written Reese Agreement void due to failure of a condition subsequent. However, the Arbitrator declined to render further judgment in the arbitration as he believed his jurisdiction ended upon finding the written Reese Agreement void. Specifically, Arbitrator Park declined to rule on the effects of his ruling voiding the Reese Agreement.

The District Court erred in not properly considering the effects of the Reese Agreement being rendered void in Arbitration, in the context of Siddoway's and Reese's competing unjust enrichment claims.

When a contract is voided, it is a basic principle of contract law that a "party who has received certain consideration, no matter how small or inadequate, for any contract or conveyance, must return that consideration . . . before he is entitled to have the contract or conveyance set aside. He cannot, while retaining the benefits of a transaction, repudiate it as null and void." Dunbar v. Severance, 50 Kan. 395, 31 P. 1055, 1057 (1893).

When a contract is voided, the parties must be placed back in the same position they were in immediately before entering into the contract. This requires **both parties** to return the consideration they received or provide alternative and sufficient restitution. In the words of the Idaho Supreme Court, one "cannot both 'eat his cake and keep it.' The purchaser who concludes that the article purchased is not what it was represented to be, or what he had a right to believe it was or should be, cannot, after such discovery, go on using the article and thereafter refuse to pay the agreed purchase price. He may after such discovery repudiate the contract, return the article, and demand return of any consideration paid." West v. Prater, 57 Idaho 583, 67 P.2d 273, 278 (1937).

The modern rendition of this basic legal principle states that "[a] party whose duty of performance does not arise or is discharged as a result of . . . non-occurrence of a condition . . . **is**

entitled to restitution for any benefit that he has conferred on the other party by way of part performance or reliance." RESTATEMENT (SECOND) OF CONTRACTS § 377 (emphasis added).

The evidence overwhelmingly establishes the consideration each party received in the Reese Agreement.

For Reese, it was his 1/3 Membership Interest in SWR. As noted above, in an order issued on August 9, 2016, this District Court held that "the Reese Agreement is basically understandable. . . . that Reese PC would pay Siddoway PC $200,000 for the right to a one-third membership interest in Wadsworth Reese, PLLC." (R., Vol. I, p. 250-251) The District Court further observed, that the "Reese Agreement does not lack consideration. In the Reese Agreement, Reese PC agreed to pay Siddoway PC $200,000 in return for the right to a one-third membership interest in Wadsworth Reese, PLLC." (R., Vol. I, p. 252, f 5).

Randy's consideration was Reese's promise to pay Siddoway $200,000. Yet, Reese only paid $28,000.

One way to correctly apply the equitable remedy of a voided contract, in this instance, would be to have Siddoway Co. return to Reese PC the $28,000 Reese PC paid to Siddoway Co. and absolve Reese of the obligation to pay $200,000. In turn, Reese PC, would be required to return to Siddoway Co. the consideration Reese PC received. Specifically, the 1/3 membership interest in SWR received by Reese PC and everything of value Reese received through that membership interest. In short Reese would need to return to his status as a non-partner with only

a few clients to service. In this instance, however, it is impossible for Reese to return to Siddoway Co. the consideration/benefit Reese PC received because time cannot be turned back.

Over the past five years Reese has enjoyed his equal membership in SWR including voting on management issues, voting as a member, holding himself out as a partner in SWR, developing relationships with clients as a partner of SWR, enjoying employment by SWR, receiving distributions from SWR, and even the right to decide to bring this derivative action against Siddoway and other Defendants on behalf of SWR.

Because we cannot turn back time and take back all of the benefits Reese received, the only remaining option is for Reese to pay to Siddoway "restitution for any benefit that he received." RESTATEMENT (SECOND) OF CONTRACTS § 377. The best evidence of the value of the benefits Reese received is the $200,000 purchase price the parties agreed to in 2013, at the very inception of their partnership, and before disputes arose.

The Reese Agreement was deemed void, yet Reese retains the benefit of his 1/3 Membership interest in SWR to this day. Accordingly, it would be unjust to for Reese to keep the benefit without paying the price he agreed to pay.

3. <u>The Weight of the Evidence Supports an Award to Siddoway.</u>

In addition to the reasons established above, the overwhelming weight of the evidence supports an award to Siddoway in Unjust Enrichment, as detailed in the District Court's current FFCL:

- "Siddoway and Reese began discussing becoming partners or co-owners of an accounting firm, on terms that involved Reese buying a one-half interest in Siddoway's practice, as Siddoway had an established client base but Reese didn't." (R., Vol. I, p. 386, ¶4) (Tr. 56:9–22, 342:10–23, 349:11–350:7, 491:16–22, 620:16–621:13, 1003:12–25.)
- "[S]hortly after its formation, SWR purchased the Harding client base. (Tr. 55:5–7.) The company had this opportunity because of the past relationship between Siddoway and Harding." (R., Vol. I, p 386, ¶ 6).
- "Reese brought with him to Wadsworth Reese only two or three clients from his previous employment and five or six clients he developed while employed by Siddoway PC. (Tr. 150:8–22.)" (R., Vol. I, p 386, ¶ 7).
- "Siddoway, by contrast, brought hundreds of clients into SWR, numbering around 450. (Tr. 150:23–151:6, 478:3–8.) He recommended and introduced Reese to many of these clients, (Tr. 404:3–405:17, 409:11–15, 412:8–12), giving Reese the opportunity to service many of them, (Tr. 167:23–168:15), as well as the opportunity to benefit from the resulting revenue to Wadsworth Reese, (Tr. 166:8–12)." (R., Vol. I, p 386, ¶ 8).
- "In the Reese Agreement, Reese PC agreed to pay Siddoway PC $200,000 in return for the right to a one-third membership interest in Wadsworth Reese, PLLC." *Id*., at 12 f 5.

- The District Court held that Siddoway did not breach any fiduciary duty he may have owed to Reese, Wadsworth, or the Company. (R., Vol. I, p. 399, ¶ 16).

The District Court determined that a net benefit was bestowed on Reese by Siddoway (although the amount is disputed, as detailed above). Siddoway's separation from SWR was not premature. Siddoway's separation from SWR was not unanticipated. The legal principles of voided contracts and the overwhelming weight of the evidence supports an award to Siddoway in unjust enrichment. Accordingly, the District Court erred in declining to grant such relief to Siddoway.

VI. CONCLUSION

As established herein, Siddoway is entitled to an award in the amount of his attorney fees and costs related to successfully compelling arbitration of the Reese Agreement. It was improper for Wadsworth and Reese to cause SWR to pay virtually all of the litigation costs in this matter, including Reese's separate legal expenses. Improper use of SWR funds constitutes disproportionate distributions in favor of Reese and Wadsworth and is a breach of the utmost fiduciary duties owed by Reese and Wadsworth to Siddoway. Reese has been unjustly enriched by Siddoway and, therefore, Siddoway is entitled to a judgment against Reese. Siddoway is entitle to, and requests, an award of attorney's fees and costs as mandated by the Reese Agreement and Idaho statute. Accordingly, Appellant respectfully requests that this Court take appropriate action to remedy the errors of the District Court established herein.

Respectfully submitted this 14th day of December, 2018.

/s/Brett W. Hastings
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