

IN THE SUPREME COURT OF THE STATE OF IDAHO

In Re: Board of Tax Appeals, Appeal No. 16-A-1079

Supreme Court Docket No: 46191-2018

BRIAN STENDER, Canyon County Assessor,

Petitioner-Respondent/Cross-Appellant,

vs.

SSI FOOD SERVICES, INC.,

Respondent-Appellant/Cross-Respondent.

APPELLANT'S BRIEF

**Appeal from the District Court of the Third Judicial District
of the State of Idaho in and for the County of Canyon**

Honorable Gene Petty Presiding

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I. STATEMENT OF THE CASE

A. Nature of the Case

This appeal stems from a Petition for Judicial Review filed by Respondent Canyon County (“Canyon County”) in a real property tax dispute related to the 2016 fair market value of property located at 22303 U.S. Highway 95, Wilder Idaho (hereinafter referred to as the “Property”). Appellant SSI Food Services, Inc. (“SSI”)¹ is the owner of the Property and appealed the 2016 assessed value of the Property to the County Board of Equalization. The Board of Equalization deferred hearing the matter, thus the appeal was set before the Idaho State Board of Tax Appeals (“BOTA”). After a hearing on the market value of the Property, the BOTA assessed the Property at \$10,000,000. Canyon County appealed the BOTA decision to the District Court and a trial was held before the Honorable Judge Gene Petty. The District Court reversed the BOTA, the outcome of which is the subject of this current appeal.

B. Course of Proceedings

In 2016, Canyon County assessed the Property value at \$18,286,630 and SSI appealed this value to the Board of Equalization on June 25, 2016. (Ex. 1006). The Board of Equalization affirmed the value without a hearing on July 13, 2016. (Ex. 1007). SSI appealed to the BOTA on August 8, 2016. (Ex. 1008). A hearing was held with the BOTA on November 17, 2016. After hearing the testimony and reviewing the exhibits, the BOTA issued its Final Decision and Order on March 31, 2017, reducing the assessed value of the Property to \$10,000,000. (Ex. 1010). Canyon County filed its Petition for Reconsideration and Rehearing on April 12, 2017, which was denied by the BOTA on May 3, 2017. (Ex. 1011).

¹ During the course of proceedings in 2016, SSI began operating under the name CTI-SSI Food Services, LLC, but the caption on the lawsuit remained SSI.

On May 25, 2017, Canyon County filed a Petition for Judicial Review with the District Court, appealing the decision of the BOTA. (R., pp. 10-14). SSI filed its Answer on June 8, 2017. (R., pp. 15-21). SSI and Canyon County stipulated to scheduling and planning on August 8, 2017, stipulating and agreeing that Canyon County's expert witness disclosure deadline was 160 days prior to trial, SSI's expert witness deadline was 120 days before trial, and rebuttal expert witnesses were to be disclosed no later than 90 days prior to trial. (R., pp. 22-25). On August 10, 2017, the District Court entered its Order Governing Proceedings & Order Setting Trial and Pretrial Conference ("Order"), setting the matter for trial commencing March 20, 2018. (R., pp. 26-32). The District Court adopted the expert witness deadlines in the Stipulation stating, "For each expert that a party intends to call at trial, the party shall disclose all information required by Rule 26(b)(4) of the Idaho Rules of Civil Procedure regarding expert witnesses by the deadlines established in the Stipulation for Scheduling and Planning." (R., p. 23) (emphasis added).

In accordance with the Order, SSI filed Respondent's Expert Witness Disclosure on November 16, 2017, 120 days prior to trial. On December 18, 2017, SSI filed Respondent's Supplemental/Rebuttal Expert Witness Disclosure. (R., pp. 38-40). The Supplemental Disclosure updated and supplemented the original disclosure by referencing the completion of an appraisal on the Property and an appraisal review of Canyon County's expert witness, Michael Cowan, which were provided to Canyon County through the discovery process. (R., p. 39). Canyon County did not file an expert witness disclosure as required by the Order.

On January 5, 2018, SSI filed a Motion to Exclude Expert Witness Testimony and Strike Expert Opinions. (R., pp. 41-42). The Declaration of Terri Pickens Manweiler was filed with, and in support of, the motion. (R., pp. 43-68). SSI alleged that it would be prejudiced if Canyon County were able to introduce testimony of, and the report by, an expert witness it disclosed

through the discovery process on December 20, 2017, J. Philip Cook (“Cook”). (R., p. 44).² Canyon County objected to the Motion to Exclude Expert Witness on January 18, 2018. (R., pp. 69-71). Canyon County represented that Cook was merely a “rebuttal expert” to testify regarding the appraisal of Paul Hyde, SSI’s expert. (R., p. 75). Canyon County’s attorney further declared under penalty of perjury that “J. Philip Cook’s testimony, if any, is intended to rebut the testimony or evidence presented by the Respondent.” (R., p. 78). On February 6, 2018, SSI filed its Reply in Further Support of Motion to Exclude Expert Witness Testimony and Strike Expert Opinion, along with the Second Declaration of Terri Pickens Manweiler in Further Support of Respondent’s Motion to Exclude Expert Witness. (R., pp. 127-136). SSI argued that Cook was not, in fact, a rebuttal expert, but rather an expert that had been retained months earlier and not disclosed by Canyon County as an expert that it intended to use at trial to testify as to his opinion of value of the Property. (R., p. 126). Essentially, SSI argued that Cook was hired by Canyon County months earlier to simply bolster their own expert’s report, not as a rebuttal expert. (R., p. 126).

The District Court recognized in its Memorandum Decision and Order on Respondent’s Motion to Exclude Expert Witness Testimony and Strike Expert Opinion filed February 23, 2018, that “Mr. Cook was designated as a rebuttal expert and his testimony would be limited to rebutting conclusions of Respondent’s expert, Mr. Hyde.” (R., p. 180). Despite the deadline in the Order, and the recognition that Cook’s testimony was limited to rebuttal testimony, the District Court denied SSI’s Motion to Exclude Expert Witness. (R., p. 812).

On February 5, 2018, Canyon County filed Petitioner’s Witness List, identifying Cook as a “witness to provide testimony to rebut testimony provided by Respondent’s witnesses.” (R., p.

² Of note, Canyon County’s own documents establish that Cook was retained on or before October 17, 2017, yet he was not disclosed until December 20, 2017. (R., p. 347).

113). SSI filed Respondent's Anticipated Witness List that same day. (R., pp. 81-82). The parties also filed their exhibit lists and pretrial memoranda that same day. (R., pp. 93-100, pp. 115-124).

A court trial was held on March 20 and 21, 2018. Canyon County called one witness in its case in chief, Michael Cowan ("Cowan"), an employee of Canyon County. (Tr., p. 15). Cowan is a senior commercial appraiser for Canyon County. (Tr., p. 15, ll. 12-13). Cowan testified that he was not a licensed commercial general appraiser for the State of Idaho, nor did he carry the designation of MAI or any other standard certifications for real estate appraisers. (Tr., p. 114, ll. 8-16). During his testimony, Cowan opined that the Property had a market value of \$19,500,000. (Tr., p. 112, l. 9).

SSI called three witnesses in its case in chief, Dave Kubosumi ("Kubosumi"), Paul Hyde ("Hyde"), and David Smith ("Smith"). Kubosumi is the Engineering Manager at SSI. (Tr., p. 163, l. 23). As of trial, Kubosumi had been working with SSI for six years, and at the Property as his primary facility for that six years. (Tr., p. 164, ll. 11-18). Kubosumi testified that the Property had many functional issues related to layout, quality of construction, and old technology. (Tr., pp. 170-172). Kubosumi, as the plant engineer, testified that if he could rebuild the Property, he "would go back, and I would start from the very front and redo everything in that line, in that Plant." (Tr., p. 174, ll. 4-7). Kubosumi concluded that the Property was ninety percent (90%) inefficient and obsolete. (Tr., p. 177, ll. 12-18).

Hyde was SSI's retained expert witness to determine market value of the Property. (Tr., p. 187, ll. 2-6). Hyde testified as to his credentials, including his educational background and various certifications. (Tr., pp. 186-188, Ex. 1001, pp. 184-201). Hyde conducted an appraisal of the Property, which was introduced at trial. (Ex. 1001). Hyde testified that the market value of the Property was \$6,500,000. (Tr., p. 207, l. 15). He then testified at length about the weaknesses

in Cowan's approach to market value and concluded that Cowan's approach was flawed and his value incorrect. (Tr., p. 212, ll. 9-13). Hyde also conducted an Appraisal Review of Cowan's report, which was also introduced at trial. (Ex. 1002). Hyde concluded his testimony by concluding that Cowan's approach to market value was incorrect, thus Cowan's ultimate opinion of value was also incorrect. (Tr., p. 318, ll. 424-25, p. 319, ll. 1-2).

SSI's third witness, Smith, testified as the property tax consultant for SSI. (Tr., p. 321, l. 15). Smith testified regarding the process SSI took through the Canyon County Assessor's Office, the Board of Equalization and BOTA. (Exs. 1006, 1007, 1008). Smith testified further that he attempted to work with Cowan once the Hyde appraisal was complete, but before the BOTA, to resolve the tax appeal issue. (Tr., p. 336, ll. 7-10). Smith testified that those efforts were unsuccessful and that the BOTA determined market value of the Property to be \$10,000,000. (Tr., p. 337, ll. 16-18, Ex. 1010). After Smith's testimony, SSI rested its case in chief. (Tr., p. 339, ll. 16-17).

After SSI rested, Canyon County introduced Cook as a witness. SSI re-raised its motion to exclude the expert witness. (Tr., p. 339, ll. 22-25, p. 340, ll. 1-5). After lengthy discussion on the issue, SSI argued that Cook was not a rebuttal expert, but rather he was going to be testifying to his own opinion of value, with his own appraisal report. SSI specifically argued:

The testimony would be appropriate rebuttal, Your Honor. The appraisal report that he is providing as an exhibit is not. They are vastly different. And if they want to limit the scope of Mr. Cook's testimony to true rebuttal, which I will hold this court to – I'll object every time they go beyond that, the report clearly goes beyond that. Vastly beyond that. But if that is what Mr. Cook is going to testify to, I'll – I'll allow the rebuttal testimony. The report, on the other hand, is an absolute different subject altogether.

(Tr., p. 345, ll. 3-12). Then, despite the objection, the Court stated, "I am going to allow the witness to testify. I will allow him to opine as to why he believes the opinion of Mr. Hyde is

incorrect. I will also allow him to express his opinion of value.” (Tr., p. 345, ll. 21-25) (emphasis added). The District Court ultimately allowed Cook to testify about all matters discussed in the trial, including Cowan’s reports, Hyde’s appraisal, and appraisal review of Cowan, and the District Court allowed, over SSI’s objections, Cook’s appraisal to be admitted. (Tr., p. 399, ll. 3-15). With his appraisal in hand, Cook testified that he opined that the market value of the Property was \$17,000,000. (Tr., p. 403, ll. 5-10). On cross examination, Cook admitted he was retained prior to December 20, 2017, and up until trial, he had already billed Canyon County approximately \$45,000.00. (Tr., p. 404, ll. 20-23). Cook further testified that he did not independently research the data given to him by Cowan, and further that he relied on a newspaper article for his final opinion as to value. (Tr., pp. 421-422, ll. 4-25, 1-11).

As surrebuttal, SSI recalled Hyde to testify regarding the appraisal and testimony of Cook. SSI then introduced Hyde’s review of Cook’s appraisal. (Tr., p. 424-425, Ex. 1003). Hyde further testified that he confirmed the data in the Cowan and Cook appraisals was incorrect. (Tr., p. 432, ll. 4-14). Hyde concluded that the BOTA agreed with his approach regarding the appraisal methodology used to determine the market value of the Property. (Tr., p. 435, ll. 8-11).

After the testimony concluded, both Canyon County and SSI rested. (Tr., p. 436, ll. 17-19). The District Court ordered the parties to revise their previously submitted findings of fact and conclusions of law. (Tr. P. 439, l. 3). On April 11, 2018, Canyon County and SSI simultaneously filed their closing arguments and proposed findings of fact and conclusions of law. (R., pp. 192-255). On May 2, 2018, the District Court entered its Findings of Fact and Conclusions of Law. (R., pp. 256-266). The District Court made various findings of fact, but aside from citing the legal authority, the only legal conclusion the District Court made was:

Petitioner has met its burden to show that the value of the property exceeds \$10,000,000. The conclusion of the Board of Tax Appeals was erroneous. The

market value of the property on January 1, 2016 was, for *ad valorem* tax purposes, \$17,000,000.

(R., p. 265). The District Court based its decision on the testimony and appraisal of Cook, stating, “The Court finds that Mr. Cook’s opinion of the value of the Wilder Plant was supported by the weight of the evidence, and the Court finds Mr. Cook’s opinion of the market value to be particularly credible and reliable.” (R., p. 264).

SSI filed its Motion for Reconsideration on May 8, 2018. (R., pp. 267-68). SSI also filed its Memorandum in Support of Motion for Reconsideration of the Findings of Fact and Conclusions of Law with the motion. (R., pp. 269-285). SSI argued that the District Court failed to adequately address the three approaches for appraisal methodology in its Conclusions of Law. (R., p. 182).

On May 15, 2018, Canyon County submitted the Affidavit of Brian Stender, requesting penalties and interest on the amount of real property taxes due and owing by SSI as a result of the District Court’s \$17,000,000 valuation. (R., pp. 286-91). That same day, SSI filed its Objection to Request for Penalties and Interest on Tax Due. (R., pp. 292-93). Both matters were scheduled for a hearing on June 8, 2018. (R., pp. 296-97). On June 1, 2018, Canyon County filed its Response to Respondent’s Motion for Reconsideration and Objection to Affidavit of Brian Stender. (R, pp. 298-304). After hearing both matters, on June 21, 2018, the District Court entered its Memorandum Decision & Order Denying Respondent’s Motion for Reconsideration of the Findings of Fact and Conclusions of Law (R., pp. 333-37), and Memorandum Decision and Order on Additional Property Taxes, Late Charges, and Interest (R., pp. 327-332). Judgment was also entered on June 21, 2018. (R., pp. 338-39).

On July 3, 2018, Canyon County filed its Memorandum of Costs and Attorney Fees. (R., pp. 340-363). Accompanying the request, Canyon County also filed the Affidavits of Bradford D.

Goodsell and Brian Stender. (R., pp. 364-69). Canyon County sought costs as a matter of right in the amount of \$2,112.50³, discretionary costs in the amount of \$66,251.64⁴, and attorney's fees in the amount of \$42,247.50. (R., p. 362). Altogether, Canyon County sought \$110,611.64 in costs and attorney's fees. (R., p. 362). SSI filed its timely Motion to Disallow Petitioner's Costs and Attorney's Fees on July 16, 2018. (R., pp. 370-71). SSI also filed its Memorandum in Support of Motion to Disallow Petitioner's Costs and Attorney Fees with the motion. (R., p. 372-382).

On July 26, 2018, SSI timely filed its Notice of Appeal. (R., pp. 383-87). On August 14, 2018, Canyon County filed its Notice of Cross Appeal (R. pp. 388-394). On August 21, 2018, the District Court entered its Memorandum Decision and Order on Costs and Attorney Fees. (R., pp. 395-401). The District Court granted costs as a matter of right in the amount of \$2,112.50 but denied the remainder of Canyon County's request for costs and fees. (R., p. 400). With the decision, the District Court entered its Amended Final Judgment, including the award of costs to Canyon County. (R., pp. 402-03).⁵ Canyon County did not amend its Notice of Cross Appeal with regard to the denial of its costs and attorney's fees. Thus, this appeal is limited to SSI's appeal of determination that the BOTA erred setting market value at \$10,000,000, and Canyon County's appeal related to penalties and interest on the tax amount due.

C. Concise Statement of Facts

The Property that is subject to this appeal is a food processing facility in Wilder, Idaho, specifically operating as a meat processing facility. (Ex. 1001, p. 3). SSI acquired the Property in 2013 through a multi-state business acquisition. (Tr., p. 165, ll. 6-8). The Plant Engineer, Dave Kubosumi, was already working at the Property when it was acquired with seven other plants

³ This included \$2,000 expert witness fee for Cook and \$112.50 in witness fees and mileage. (R., p. 340).

⁴ This included \$63,798.64 in expert witness fees for Cook (in addition to the \$2,000 already sought), and \$2,453 for reproducing the trial transcript for purposes of drafting its closing argument. (R., p. 341).

⁵ SSI has since fully satisfied the Amended Final Judgment, by paying the \$2,112.50 to Canyon County.

nationwide. (Tr., p. 165, ll. 9-20). The Property consists of a 215,635 square foot food services manufacturing plant with multiple buildings, including some low-cost equipment storage and warehouse buildings, located on three contiguous parcels of land totaling 28.120 acres. (Ex. 1001, p. 2). The buildings comprising the original plant were constructed in 1988 and 1989 by the J. R. Simplot Company to process beef from its cattle operation. (Ex. 1001, p. 3). The Simplot Company later decided to get out of the beef processing portion of the business and sold the plant to its management team. Later the plant was sold to private equity firms as the business expanded. The latest sale was in 2013 to SSI. (Ex. 1001, p. 2). An appraisal of the purchase of the company was completed by Murray Devine Valuation Advisors of Philadelphia, PA as of June 28, 2013 for purposes of allocation of the purchase price for income and accounting purposes. The purchase price for the company was \$690.0 million of which \$48.1 was allocated to the seven plants located in various states included in the purchase. (Ex. 1001, p. 3). The Subject Property was valued at \$14.75 million however, this value included 553 acres of farm land, some other parcels, and the improvements on them. (Ex. 1001, p. 3). The portion of the Property subject to this tax appeal was valued at \$11,000,000 for purposes of the 2013 sales price allocation. (Tr., p. 215, ll. 6-10).

SSI currently uses the Property as a food processing facility. Since the plant was originally constructed, there have been a number of modifications, expansions, and additions to the Property. (Tr., p. 166, ll. 12-15). The Property is a hodgepodge of different lines and rooms for the various stages of meat processing. (Tr., p. 166, ll. 15-16). The facility has a workable layout for its current use producing ground beef, beef and chicken strips, and other related meat products primarily for sale to large fast food chains and quick service restaurants, although the layout is not ideal. (Tr., p. 166, ll. 17-18). For example, after one expansion adding raw cooler space for incoming raw goods, there is no access from the receiving dock to a freezer or dry storage, creating an

inefficiency in operations. (Tr., p. 166, ll. 20-15). The Property has eleven manufacturing lines through two facilities (the main building comprised of plants 1 and 2, and then a third building, plant 3). (Tr., p. 167, ll. 2-7). The Kubosumi testified that the Property is not an ideal facility given its layout, many renovations, inability to automate. (Tr., p. 168, l. 1-7). He estimated that the Property was approximately ninety percent (90%) functionally obsolete, or in other words, only ten percent (10%) efficient. (Tr., pp. 176-77, ll. 25, 1-17). Should this specific business operation no longer be needed in Wilder, Idaho, the Property would require a major remodel at a very large expense to convert its use to some other manufacturing use. (Ex. 1001, pp. 2-3). The layout of the facility would not lend itself at all to a distribution type use. Given its age, construction, and remodels, the facility has considerable functional and external obsolescence. (Ex., 1001, p. 3).

In 2016, Canyon County assessed the Property at \$18,286,630, which includes \$17,747,800 for the improvements and \$643,420 for the land value. (Ex. 1001, p. 4). This equates to \$85 per square foot. (Ex. 1001, p. 4). No other food processing plants in the United States could be identified as being valued at \$85 per square foot. (Ex. 1001, p. 4). Accordingly, SSI appealed the assessment to the Board of Equalization on June 25, 2016 (Ex. 1006). The Board of Equalization, without a hearing, upheld the value of \$18,286,630 on July 13, 2016 (Ex. 1007) and SSI appealed the determination on August 8, 2016 (Ex. 1008). SSI hired Hyde to appraise the Property and Hyde's appraisal valued the Property at \$6,500,000. (Ex. 1001).

The Hyde appraisal considered the highest and best use for the Property as a food manufacturing facility processing meat. (Ex. 1001, p. 9). Hyde considered all three appraisal approaches, the cost approach, the sales comparison approach, and the income approach. (Tr., p. 191, ll. 15-16). Hyde concluded that the cost approach would not be a feasible methodology under

the circumstances because of the nature, age, and condition of the building. (Tr., p. 191, ll. 1-14).⁶ Hyde did analyze the Property under the other two approaches. Cowan, conversely, presented his report which analyzed the cost approach and sales comparison approach, but not the income approach. (Ex. 1012).

1. The Sales Comparison Approach

For the sales comparison approach, Hyde analyzed data from eleven comparable properties, both in Idaho and nationwide. (Ex. 1001, pp. 168-171). The price per square foot for these facilities ranged from \$7 to \$31, with a median of \$22 per square foot. (Ex. 1001, p. 172). One of the comparable properties commonly referred to as Amy's Kitchen, was determined to be most similar to the Property. (Ex. 1001, p. 172). Amy's Kitchen is a food processing plant in Pocatello, Idaho, that had a listed sale date of November 1, 2014, for \$11,125,000.00, for a 476,485 square foot facility. (Ex. 1001, p. 168). The price per square foot at sale was \$23. Hyde then made various adjustments to the price per square foot, including adjustments for location, city population, year built, remodels, and quality of construction. (Ex. 1001, p. 168). Hyde determined that the adjusted price per square foot of Amy's Kitchen, as adjusted to the characteristics of the Property, was \$29 per square foot. (Ex. 1001, p. 168). Hyde concluded that the Property was worth \$30 per square foot, or \$6,469,050, or rounded up to \$6,500,000 under the sales comparison approach. (Tr., p. 202, ll. 16-20; Ex. 1001, p. 172).⁷

Cowan also analyzed the Property under the sales comparison approach. (Ex. 1012, pp. 13-18). Cowan provided information regarding four (4) sales from 2014, however, one (1) of the sales involved a beverage distribution facility, which is not comparable to the Property. (Ex. 1012,

⁶ The BOTA agreed with the conclusion that the cost approach was not an ideal methodology for the Property for the same reasons concluded by Hyde. (Ex. 1010, p. 10).

⁷ Hyde testified at length about the Amy's Kitchen property, as well as the other comparisons at trial. (Tr., pp. 193-202).

p. 14). The remaining sales were food processing properties more similar to subject's property type, including the Amy's Kitchen sale. (Ex. 1012, p. 14). However, rather than following general rules of appraisal practice, Cowan made adjustments which overall ranged from roughly +300% to +480% to the four properties. (Ex. 1012, p. 16). Cowan contended that the adjustments were proper because at the time the industrial properties were sold, they were in need of significant reconfiguration and updating work to become active food processing operations. (Ex. 1012, p. 17). Cowan simply took the total costs, the sources of which were unknown, of the tenant improvements for each sale and added them to the respective sale prices, which in the case of Amy's Kitchen was \$25 million, without confirmation that \$25 million was actually contemplated to be spent on the property to bring it to functional use. (Ex. 1012, p. 16).⁸

Cowan's analysis completely disregarded the fact the sale properties were likely superior to the Property after the renovations were finished. Essentially, Cowan compared the Property to new state-of-the-art food processing plants, even though the Property is an older facility with noted deficiencies. With the adjustments made to his four comparisons, Cowan concluded that the adjusted price per square foot for these properties ranged from \$81 to \$112 per square foot, with a median of \$103 per square foot. (Ex. 1012, p. 17). Cowan then concluded that the Property was valued at \$100 per square foot, or \$18,541,000, or rounded down to \$18,500,000. (Ex. 1012, p. 17).

2. The Income Approach

Hyde also analyzed the Property under the income approach. (Ex. 1001, p. 173). Hyde searched nationwide for similar facilities that had reported lease rates, settling on 14 properties

⁸ Hyde testified at trial that he confirmed with the Broker for Amy's Kitchen that the parties actually contemplated \$10 million in costs after sale for the property, not the \$25 million reported by Cowan. (Tr. P. 432, ll. 4-19). Cook, on the other hand, testified that he did not independently verify Cowan's reported \$25 million, but rather he assumed the data given to him by Cowan was correct. (Tr. P. 421, ll. 4-15).

similar enough in nature to the Property to analyze it under the income approach. (Ex. 1001, pp. 174-75). The average price per square foot for the properties ranged from \$2.50 to \$6.95, with a median price of \$3.78. (Ex. 1001, p. 175). Hyde concluded that the Property was approximately 85% of the median, or \$3.25 per square foot. (Ex. 1001, p. 175). Hyde then discussed the capitalization rate in detail, concluding that the appropriate rate was 9.5%. (Ex. 1001, p. 179). Hyde ultimately determined that Property value under the income approach was \$6,100,000. (Ex. 1001, p. 180-81).

Cowan did not conduct an analysis of the Property under the income approach.

3. The Cost Approach

Hyde, as referenced hereinabove, did not conduct an analysis of the Property under the cost approach.

Cowan, however, did do a cost approach analysis. (Ex. 1012, p. 4). Cowan relied on data from four area food processing plants to determine construction costs in comparison to the Property. (Ex. 1012, p. 7). Cowan relied solely on recent construction costs from only these four (4) local industrial facilities, failing to consider anything else. Based on his own data, exactly one-half (1/2) of Cowan's data suggest the average price of construction is \$475 per square foot for replacement cost new ("RCN"), and the average of the other two (2) is approximately \$213 per square foot for RCN. (Ex. 1012, p. 9). Cowan did not attempt to adjust or otherwise account for the obvious differences between the two conflicting costs, but rather, he simply did a regression analysis based on the four data points and concluded that the replacement cost new for the Property was \$480 per square foot for the manufacturing portion of the Property, \$95 per square foot for the low cost manufacturing area of the Property, \$75 per square foot for refrigerated and frozen storage, and \$50 per square foot for dry storage are of the Property. (Ex. 1012, p. 9). Cowan

provided no details regarding the work done or the level of interior finish of the four properties, nor did he explain how his regression analysis was at all reliable given the widely divergent cost numbers. (Ex. 1012, p. 9).

With his price per square foot for RCN, Cowan then analyzed depreciation values for the subject Property. After determining a total physical depreciation costs in the amount of \$29,744,000 and making a down adjustment for functional obsolescence of ten percent (10%), Cowan concluded that the total depreciated cost of the Property was \$26,769,600 or rounding down to \$27,600,000. (Ex. 1012, p. 12). At trial, Cowan changed his functional obsolescence percentage from ten percent (10%) to twenty-five percent (25%). (Tr., p. 92, ll. 1-3).

Hyde conducted an appraisal review of Cowan's report, and testified in detail about the deficiencies in Cowan's report at the trial. (Ex. 1002, Tr., pp. 212-225). Hyde testified that market value was what a willing buyer was willing to pay and what a willing seller was willing to sell for any particular property. (Tr., p. 212, ll. 15-18). Hyde stated that after talking to several brokers nationwide, buyers would, at the most pay \$50 per square foot for food processing facilities, yet, Cowan valued the Property at \$100 per square foot, nearly double that of the ideal facility. (Tr., p. 213, ll. 4-8).

In discussing Cowan's cost approach, Hyde testified, citing from *The Appraisal of Real Estate*:

It says: "To apply the cost approach, an appraiser estimates the market's perception of the difference between the property improvements being appraised and the newly-constructed building with optimal utility, i.e. the ideal improvement in highest and best use analysis." This is where the ideal improvement concept comes from. And in the Appraisal Institute as they teach in their appraisal classes when they're dealing with the cost approach, the whole concept of the cost approach is to develop what is called the ideal improvement.

(Tr., p. 217, ll. 4-13). Hyde then further explained the challenges with Cowan's replacement cost new analysis, given the broad discrepancies between the costs of the four comparable plants relied on by Cowan. (Tr., p. 220, ll. 8-13). Finally, Hyde detailed why functional obsolescence was too difficult to calculate on a plant as old and inefficient as the subject Property. (Tr., pp. 220-221, ll. 17-25, 1-7). The Plant Manager testified that the building was 90% obsolete, which Hyde pointed out would render a value much closer to his \$6,500,000 value. (Tr., p. 221, ll. 2-7). Hyde concluded that Cowan's functional obsolescence percentage was simply a wild guess. (Tr., p. 221, l. 13).

4. Final Conclusions of Value

Both Hyde and Cowan testified at trial as to their final determination of value for the Property. Cowan, in his report, did a reconciliation with of his cost approach (\$27,600,000) and sales comparison approach (\$18,500,000), for a final market value in the amount of \$23,000,000. (Ex. 1012, p. 19). At trial, however, Cowan reduced that amount from \$23,000,000 to \$19,500,000, reflecting the increase in the percentage of functional obsolescence from ten to twenty-five percent. (Tr., p. 90, l. 5). Hyde maintained his value from the appraisal at \$6,500,000 through his testimony at trial. (Tr., p. 190, ll. 7-8). The BOTA, after hearing virtually the identical evidence from Cowan and Hyde, including reviewing Hyde's appraisal and Cowan's report, the BOTA determined that the market value of the Property was \$10,000,000. The District Court, without further elaboration as to why, concluded, "The conclusion of the Board of Tax Appeals was erroneous. The market value of the property on January 1, 2016 was, for ad valorem tax purposes, \$17,000,000." (R., p. 265).

II. ISSUES PRESENTED ON APPEAL

1. Did the District Court err when it concluded as a matter of law that the Board of Tax Appeals decision was erroneous?
2. Did the District Court apply the proper formulas to determine market value of the property, i.e. the Income Approach, Cost Approach, and Sales Comparison Approach?
3. Did the District Court err in allowing expert witness J. Philip Cook to testify, given the late disclosure by Respondent?

III. ARGUMENT

A. Standard of Review.

In this case, the District Court conducted a trial *de novo* pursuant to Idaho Code § 63-3812(c) which states that a party may appeal a board of tax appeals decision on any issue to the district court where the issues will be determined by the court without a jury in a trial *de novo*.

Where the district court conducts a trial *de novo* in an appeal of a BOTA decision, this Court defers to the district court's findings of fact that are supported by substantial evidence but exercises free review over the district court's conclusions of law. *Kimbrough v. Idaho Bd. of Tax Appeals*, 150 Idaho 417, 419-20, 247 P.3d 644, 646-47 (2011); *Canyon Cnty. Bd. of Equalization v. Amalgamated Sugar Co.*, 143 Idaho 58, 60, 137 P.3d 445, 447 (2006). The interpretation of a statute is a question of law subject to free review. *Callies v. O'Neal*, 147 Idaho 841, 847, 216 P.3d 130, 136 (2009). The appellate court may substitute its own view for that of the district court on a legal issue. *Marshall v. Blair*, 130 Idaho 675, 946 P.2d 975 (1997).

Additionally, SSI is challenging the District Court's ruling to allow expert testimony of Cook, and an appraisal done by Cook, that were not properly disclosed. When reviewing the trial court's evidentiary rulings, this Court applies an abuse of discretion standard. *Lepper v. Eastern*

Idaho Health Services, Inc., 160 Idaho 104, 369 P.3d 882 (2016); *Dulaney v. St. Alphonsus Reg'l Med. Ctr.*, 137 Idaho 160, 163-64, 45 P.3d 816, 819-20 (2002). A trial court does not abuse its discretion if it (1) correctly perceives the issue as discretionary, (2) acts within the bounds of discretion and applies the correct legal standards, and (3) reaches the decision through an exercise of reason. *O'Connor v. Harger Constr., Inc.*, 145 Idaho 904, 909, 188 P.3d 846, 851 (2008).

B. Argument on Issues Presented on Appeal

The District Court erred when it concluded, as a matter of law, that the BOTA decision of value was erroneous because Canyon County did not present adequate evidence to meet its burden of proof to allow the District Court to overrule the BOTA decision. The District Court further erred when it concluded as a matter of law that the market value of the Property was \$17,000,000, an amount seventy-percent (70%) higher than the BOTA market value of the Property. The District Court erred in making this valuation determination because (i) the District Court did not follow Idaho law and administrative procedure rules in rendering its decision on market value, and (ii) the District Court failed to apply the proper formulas to determine market value of the Property, i.e. the income approach, cost approach, and sales comparison approach.

1. The District Court erred in determining the market value of the Property.

a. Canyon County Did Not Meet its Burden of Proof.

In this case, Canyon County had the burden of proof to show that the BOTA erred when it determined the market value of the Property was \$10,000,000. As the petitioner, Canyon County was responsible for presenting evidence establishing how the BOTA's value was erroneous. Canyon County failed to do so.

A taxpayer [or county] may appeal a determination by the Commission by filing a complaint against the Commission [or taxpayer] in district court. I.C. § 63-3049. The case is to

proceed as a *de novo* bench trial. I.C. § 63-3049; cf. I.C. § 63-3812(c). “A deficiency determination issued by the Commission is presumed to be correct, and the burden is on the taxpayer [or county] to show that the Commission’s decision is erroneous.” *Dunn v. Idaho State Tax Comm’n*, 162 Idaho 673, 403 P.3d 309 (2017) (emphasis added); *see also Albertson’s Inc. v. State Dep’t of Revenue*, 106 Idaho 810, 814, 683 P.2d 846, 850 (1984); *Parker v. Idaho State Tax Comm’n*, 148 Idaho 842, 845, 230 P.3d 734, 737 (2010).

Throughout the trial, Canyon County put on evidence of valuation by its expert Cowan, examined and cross-examined witnesses based on the actual and functional use of the Property, and attempted to discredit SSI’s expert witness, Hyde, but did not put forth any evidence as to how the BOTA’s decision was erroneous. Canyon County essentially re-tried its original case that was heard by the BOTA to the District Court. After SSI closed the presentation of its evidence supporting the BOTA decision, Canyon County then called its late disclosed expert, Cook. At the last hour, the District Court allowed Cook to testify, not only to Hyde’s appraisal, but also Cook’s own opinion of value of the Property. Nevertheless, Canyon County did not address the underlying BOTA decision. Without meeting its burden, the County cannot prevail on its Petition for Judicial Review, which means the District Court cannot overturn the BOTA decision without finding it was erroneous. Thus, the District Court erred when it concluded, without explanation, that the BOTA’s decision was erroneous.

b. The District Court’s Valuation is Unsupported by Idaho Law.

The District Court’s Property valuation of \$17,000,000 is unsupported by Idaho law and administrative procedural rules. At trial, it was well established by both parties that the interpretation of the phrase “actual and functional use” versus “value in use” was critical in this case. The Idaho legislature has not defined the phrase “actual and functional use.” When

interpreting a statute, courts are to begin with the literal words of the statute, giving the language its plain, obvious and rational meaning. *Thomson v. City of Lewiston*, 137 Idaho 473, 50 P.3d 488 (2002). The goal is to give effect to the purpose of the statute and the legislative intent in enacting it, which may be implied from the language used or inferred on grounds of policy or reasonableness. *Id.*

As further explained by Idaho courts, real property is typically valued at its highest and best use. *The Senator, Inc. v. Ada County Board of Equalization*, 138 Idaho 566, 670, 67 P.3d 45, 49 (2003). That determination takes into consideration the uses that are legally permissible, physically possible, financially feasible, maximally profitable, and reasonably probable in order to arrive at the highest value for the property. *Id.* The highest and best use of real property may not be its present use, or the use for which any of its improvements were designed. *Id.* The Idaho Supreme Court further analyzed “actual and functional use” along with the legislative history as to why it is now used for determining values for taxation, and determined:

In 1971 the legislature added to what was then Idaho Code § 63-202 (the forerunner of Idaho Code § 63-208) the requirement that “the actual and functional use shall be a major consideration when determining market value of commercial and agricultural properties.” Ch. 317, § 1, 1971 Idaho Sess. Laws 1264. In 1996, the legislature repealed former Idaho Code § 63-202 and enacted Idaho Code § 63-208, which retains the requirement that the actual and functional use shall be a major consideration when assessing real property, but it does not limit that requirement to commercial and agricultural properties. Ch. 98, §§ 1 & 3, 1996 Idaho Sess. Laws 308, 309, 318-22. It is apparent that the legislature inserted this requirement so that real property would not automatically be appraised at its highest and best use. *See Fairway Development Co. v. Bannock County*, 113 Idaho 933, 750 P.2d 954 (1988) (distinguishing cases from other jurisdictions because statutes in those jurisdictions required that real property be assessed according to its highest and best use rather than its actual and functional use). Although the actual and functional use may be the highest and best use, the two phrases are not meant to be synonymous.

The word “actual” means: “1. existing in act or fact; real: an actual case of treason; actual expenses; an actual hardship. 2. existing now; present; current: the actual position of the moon.” WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 15 (1989 Barnes & Noble, N.Y.) The word “functional” means: “1.

of or pertaining to a function or functions: functional difficulties in the administration. 2. having or serving a utilitarian purpose; capable of serving the purpose for which it was designed: functional architecture; a chair that is functional as well as decorative.” *Id.* at 574. Considering the definitions of “actual” and “functional” and the legislature’s apparent purpose in adding that requirement, the actual and functional use of real property is its existing use and the use for which it was designed or intended.

Id., 138 Idaho at 670, 67 P.3d at 49.

Furthermore, when determining the market value, what is being valued for assessment purposes is the real property, not the business being operated on the real property. *Id.* Finally, goodwill of the operating business is specifically exempt from taxation. I.C. § 63-602L.

The District Court did not make adequate conclusions of law to warrant or justify its determination of valuation, thus, such assignment of value is an error and SSI requests this Court reverse the District Court’s determination that the fair market value of the Property in 2016 was \$17,000,000 and uphold the BOTAs’s determination of value at \$10,000,000.

The District Court issued its Findings of Fact and Conclusions of Law on May 2, 2018 (R., p. 256). In those findings, the District Court made one fundamental factual error. The District Court found, “Between 2013 and 2015, Respondent [SSI] spent approximately \$10,000,000 dollars on renovations and improvements to the property.” (R., p. 259). The District Court further incorrectly found, “The property was valued by Respondent [SSI] between \$11,00,000 and \$12,100,000 in 2013, and Respondent [SSI] has since invested approximately \$10,000,000 into the Wilder Plant. That investment included a significant expansion of the improvements on the property.” (R., pp. 263-64). Neither SSI nor Canyon County elicited testimony regarding the cost of improvements to the Property between 2013 and 2015. Cowan’s report included a summary of the improvements (Ex. 1012, p. 1) and Cowan’s revised report included the same summary, and also an aerial photo overlay showing the improvements (Ex. 1013, pp. 3 & 22) but none of SSI’s

witnesses testified regarding the cost of those improvements. Further, Canyon County did not introduce any evidence that valued the improvements at \$10,000,000. Therefore, the factual findings are clearly erroneous and should be disregarded by this Court.

After the District Court issued its Findings of Fact and Conclusions of Law, SSI moved for reconsideration (R., p. 267) requesting the District Court reconsider its valuation of \$17,000,000 or provide additional conclusions of law or explanations of the conclusions of law as to how the District Court reached its ultimate decision. The District Court declined to give any further explanation for its conclusions of law, which quite literally and narrowly stated, “The conclusion of the Board of Tax Appeals was erroneous. The market value of the property on January 1, 2016 was, for ad valorem tax purposes, \$17,000,000.” (R., p. 265).

In an action tried to a court without a jury, the trial court is required to find the facts specially and state its conclusions of law separately which support its decision. I.R.C.P. 52(a). “The purpose behind requiring the court to ‘find the facts specially and state separately the conclusions of law thereon’ is to afford the appellate court a clear understanding of the basis of the trial court’s decision, so that it might be determined whether the trial court applied the proper law to the appropriate facts in reaching its ultimate judgment in the case.” *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 646 P.2d 988 (1982).

SSI contends the District Court’s conclusions of law were insufficient because they did not provide a clear understanding as to the basis of the District Court’s decision. The District Court’s

Conclusions of law provide:

Petitioner has met its burden to show that the value of the property exceeds \$10,000,000. The conclusion of the Board of Tax Appeals was erroneous. The market value of the property on January 1, 2016 was, for *ad valorem* tax purposes, \$17,000,000. Costs are awarded to Petitioner as the prevailing party.

R., p. 264.

SSI further contends that the District Court incorrectly identified conclusions of law in its findings of fact. For example, the District Court found, “Based on the testimony and evidence presented at trial, the Court finds that the cost approach was the most appropriate, credible, and reliable appraisal method for determining market value of the Wilder Plant.” (R., p. 262). This is a conclusion of law that has been lumped in with the findings of fact, a conclusion that this Court exercises free review over.

The District Court did this several times throughout its Findings of Fact. Another example, the District Court found, “the sales comparison approach is less reliable than the cost approach when applied to the Wilder Plant. The sales comparison approach raised too many issues in this case with adjustments made for post-sale investments, as evidenced by the three expert witnesses’ lack of agreement as to how to account for such expenditures.” (R., p. 262). Likewise, the District Court found, “The income approach is likewise less reliable than the cost approach.” (R., p. 263). These are legal conclusions that this Court exercises free review over. It may be that the District Court did not recognize its role in determining market value of the Property independent of the expert testimony given at trial.

In addition, the District Court’s Conclusions of Law should have addressed (1) how it determined that Canyon County met its statutory burden that the value of the Property exceeded \$10,000,000, (2) how the BOTA’s value of \$10,000,000 was erroneous; and (3) after considering each of the three valuation methods, how the District Court applied the law to the facts in the case which resulted in its conclusion that the Property should be valued at \$17,000,000. SSI was left without any information or authority to rely on which comprises the District Court’s Conclusions of Law, thus, SSI is seeking relief from this Court to exercise free review over the legal aspects of

this case. In sum, SSI requests this Court reverse the District Court's conclusion that the Property's market value was \$17,000,000 for January 1, 2016, and affirm the BOTAs determination of market value of the Property at \$10,000,000.

2. **The District Court did not apply the proper formulas to determine market value of the property, i.e., the Income Approach, Cost Approach, and Sales Comparison Approach.**

Idaho Code § 63-205 requires taxable property be assessed at market value annually on January 1; January 1, 2016 in this case. Market value is defined in Idaho Code § 63-201, as,

“Market value” means the amount of United States dollars or equivalent for which, in all probability, a property would exchange hands between a willing seller, under no compulsion to sell, and an informed, capable buyer, with a reasonable time allowed to consummate the sale, substantiated by a reasonable down or full cash payment.

Idaho Code § 63-208 requires county assessors to use generally recognized appraisal method for determining market value. The statute reads in relevant part:

RULES PERTAINING TO MARKET VALUE — DUTY OF ASSESSORS. (1) It shall be the duty of the state tax commission to prepare and distribute to each county assessor and the county commissioners within the state of Idaho, rules prescribing and directing the manner in which market value for assessment purposes is to be determined for the purpose of taxation. The rules promulgated by the state tax commission shall require each assessor to find market value for assessment purposes of all property, except that expressly exempt under chapter 6, title 63, Idaho Code, within his county **according to recognized appraisal methods and techniques** as set forth by the state tax commission; provided, that the actual and functional use shall be a major consideration when determining market value for assessment purposes.

I.C. § 63-208 (emphasis added). These recognized appraisal methods and techniques for determining market value are the sales comparison approach, the cost approach, and the income approach. *Merris v. Ada County*, 100 Idaho 59, 63, 593 P.2d 394, 398 (1979).

In this case, both SSI and Canyon County considered all three (3) approaches, however, each only relied on two (2) in reaching their respective value conclusions. The BOTAs articulated

which of the three approaches it relied on when reaching its \$10,000,000 market valuation, yet the District Court, in its Conclusions of Law, did not address, nor appear to apply, any of the three appraisal methods to determine the market value of the Property.

a. The Sales Comparison Approach.

The County and SSI both relied upon the sales comparison approach to determine their respective fair market values for the Property. In reliance of the sales comparison approach, Hyde, the expert for SSI, considered information related to eleven (11) recent sales and active listings – because actual sales are preferred for the sales comparison approach, nine (9) of the properties were considered, and those nine properties sold below the \$6.5 million value concluded for the Property, which indicated the considered properties were mostly inferior to the subject Property. To account for this, Hyde applied adjustments to make the properties comparable to the subject Property.

Canyon County, in reliance on the sales comparison approach, provided information regarding four (4) sales from 2014, however, one of the sales involved a beverage distribution facility, which was not comparable to the Property. The remaining three sales were food processing properties more similar to the Property, however, their comparability to the Property was questionable as evidenced by the magnitude of Canyon County (Cowan's) adjustments which overall ranged from roughly +300% to +480%. Cowan contended the adjustments were proper because at the time the industrial properties were sold, they needed significant reconfiguration and updating work to become active food processing operations. Cowan simply took the total costs of the tenant improvements, the sources of which are unknown, for each sale and added them to the respective sale prices. For example, in the case of Amy's Kitchen, the most similarly related

property, Cowan added \$25 million in value without explanation or verification.⁹ This effectively took the property from \$23 per square foot to \$112 per square foot¹⁰, with no further explanation as to why market value should increase 480%. Rather, Canyon County was satisfied with this increase because Cowan read in a newspaper article that Amy's Kitchen was going to be making improvements to the property after it was purchased. (Tr., p. 422, ll. 3-10).

Accordingly, Cowan's adjustment analysis is flawed. Though no details were shared regarding the work done to the sale properties after they were purchased, it is reasonable to assume the renovations to each of Cowan's four comparable sales included more than just the minimum work needed to begin operations. Cowan's analysis completely disregarded the fact the sale properties were likely superior to the Property after the renovations were finished. In essence, Canyon County compared the Property to new state-of-the-art food processing plants, even though the subject Property is an older facility with noted deficiencies. For example, when testifying at trial, Cowan testified that he had not been through the Amy's Kitchen plant, thus he could not know if the facility was either superior or inferior to the subject Property. (Tr., p. 156, ll. 15-18).

The District Court did not independently analyze the sales comparison approach. It merely found that because the three experts could not agree on how to make costs-after-sale adjustments, that the methodology was "less reliable than the cost approach." (R., p. 262).¹¹ The District Court did not elaborate as to why it made this factual finding, nor did the District Court make any conclusions of law related to the sales comparison approach. Consequently, the District Court erred by failing to properly analyze this recognized appraisal methodology.

⁹ As previously stated, Hyde confirmed with the Broker for the Amy's Kitchen sale that the contemplated costs after sale were closer to \$10,000,000, not the \$25,000,000 reported by Cowan from a newspaper article he had read. (Tr., p. 194, ll. 10-22).

¹⁰ Cowan testified that he valued the Amy's Kitchen plant at \$112 per square foot despite the fact that the plant actually sold for \$23 per square foot. (Tr., pp. 139-40, ll. 24-25, 1-3).

¹¹ Determining that the sales comparison approach was "less reliable than the cost approach" is actually a conclusion of law which this Court exercises free review.

b. The Cost Approach.

SSI did not rely on the cost approach because Hyde deemed it to be too unreliable due to the older age of the Property and the lack of support for accurately estimating potential functional and economic obsolescence. Canyon County, however, relied heavily on the cost approach.

In conducting the cost approach, Cowan relied solely on recent construction costs from only four (4) local industrial facilities. While it is proper to consider local construction costs, in this case, Cowan failed to consider anything else. In his revised report, Cowan states “The cost approach is most applicable for valuating [sic] industrial properties of specialized use, where abundant and reliable cost information is available and depreciation is minimal or easily discernable.” (Ex. 1013, p. 14). Yet, the Property was originally constructed in 1988 or 1989 with numerous additions and modifications since that time. It is a special purpose and special use property, i.e. it could not be used by virtually any other user without significant modifications. In addition, the Property’s layout is awkward; its own Plant Engineer, Kubosumi, called it a hodgepodge. Kubosumi testified that if a new building were constructed for its present use it would be designed very differently. Accordingly, the depreciation is not minimal nor is the amount of depreciation easily discernable.

Even more problematic is the variation in functional and external obsolescence. First Cowan attributed ten percent (10%) functional obsolescence to the Property (Ex. 1012, p. 12), then twenty-five percent (25%) in his revised report. (Ex. 1013, p. 26). There is no market evidence of any kind to support these amounts, they were simply guesses on his part. The actual amount of functional obsolescence and external obsolescence likely is much higher than 25%. Kubosumi testified that the Property was only ten percent (10%) efficient, or conversely ninety percent (90%) obsolete. (Tr., p. 177, ll. 15-18). Due to the age, configuration, layout, location and many other

factors, the quantification of the amount of functional obsolescence and external obsolescence of the Property is unknown. The best way to estimate depreciation from all causes, including obsolescence, is to extract it from the market. In order to extract it, similar properties that have sold must be analyzed in great detail and sufficient information must be available to make this type of analysis. Cowan made no attempt to provide any evidence to support his percentage of functional obsolescence to the Property.

Finally, Cowan did not have enough data points to determine the replacement cost new (“RCN”) for the Property. Cowan concluded that the Property RCN would be approximately \$480 per square foot. In order to determine the RCN for the Property improvements, Cowan used construction costs reportedly obtained from the construction of four food-processing plants built in 2009 and 2012 in Nampa, in 2013 in Twin Falls, and in 2014 in Caldwell. (Ex., 1013, p.19). In order to arrive at the cost of cold storage space, Cowan used two comparables built five years apart with much taller wall heights than the Property. (Ex. 1013, p. 20). Cowan made a subjective negative adjustment of 30% and arrived at \$75 per square foot. Cowan used \$50 per square foot for the cost of dry storage space claiming it came from “multiple warehouse facilities recently built in Canyon County.” (Ex. 1013, p. 20). Cowan then graphed out his four food processing cost comparables, subtracted \$101 per square foot for cold storage area, and subtracted \$50 per square foot for dry storage area to arrive at what he called “manufacturing only square footage”. (Ex. 1013, p. 21). Cowan concluded this manufacturing only price per square foot at \$519 for the Sorrento Whey plant in Nampa, \$536 per square foot for the Sorrento Nancy plant in Nampa, \$202 per square foot for the Chobani plant in Twin Falls, and \$304 per square foot for the Simplot potato plant in Caldwell. (Ex. 1013, p. 21). Cowan then applied a regression analysis with the four wildly differing data points, arriving at a conclusion of \$480 per square foot for the Property’s cost of

construction for the manufacturing and office area. A regression model based on so few data points fails even minimum standards of statistical reliability. On its face the data is conflicting, and Cowan did not attempt to adjust or otherwise account for the obvious differences. With no details regarding the work done or the level of interior finish, it is impossible to understand the reason for the widely divergent cost numbers.

For these reasons, Hyde declined to rely on the cost approach in his appraisal or his testimony at trial. Hyde testified:

But because of the nature of this property after I toured it – and I had the intention of the using the cost approach – I toured it and really looked at it, I had no idea how in the world to come up with the value of the cost of the ideal plant. ... You have to have some ideal improvement. In other words, what would this facility be like if it were built as absolutely perfect? And then you have to figure out the differences from that ideal improvement to what you actually have in the way of physical depreciation, economic depreciation, and as has been talked about quite a bit, functional obsolescence. And I was not convinced that there was any way in the world to figure out what that functional obsolescence would be with any degree of accuracy. And so I was also not convinced that we could come up with really an accurate amount of cost or replacement cost new.

(Tr., pp. 190-91, ll. 20-25, 1-14). Hyde concluded that he had enough data for the other two approaches that the cost approach was unnecessary. The BOTA agreed with Hyde that the cost approach was not the most appropriate or well supported method to determine market value for the Property. (Ex. 1010, p. 11).

The District Court did not do an independent cost approach analysis in its Conclusions of Law. Rather, the District Court found as fact that “the cost approach was the most appropriate, credible, and reliable in determining the market value of the Wilder Plant.” (R., p. 262).¹² The District Court failed to address any of the issues discussed by Hyde at trial or addressed at length in his appraisal (Ex. 1001) or appraisal review (Ex. 1002). The District Court erred by relying

¹² A finding that “the cost approach was the most appropriate, credible, and reliable in determining market value” is a conclusion of law which this Court exercises free review.

solely on the cost approach (although no conclusion of law indicated as such). Based on the District Court's Findings of Fact, the cost approach was the only "reliable" recognized methodology, therefore, the District Court erred when it presumably used the cost approach to determine market value of the Property.

c. The Income Approach.

Hyde, on behalf of SSI, also used the income approach to value the Property. The income approach is consistent with industry application for valuing properties of this kind. The parties agreed, and the District Court recognized, that special-use industrial properties like the Property are not typically leased to unrelated entities. (R., p. 263). Rather, such properties are typically owner-occupied and operated. Hyde testified regarding the difficulty getting local lease data, given the nature of the food processing plant, but nonetheless, Hyde was able to identify fourteen (14) comparable leased facilities throughout the United States. (Tr., p. 208, ll. 4-9). Hyde then discussed how he determined the capitalization rate for the income approach formula. (Tr., p. 209, ll. 3-6). Hyde concluded that the appropriate cap rate for a food processing plant in Wilder, Idaho would be 9.5%. (Tr., pp. 209-10, ll. 23-25, 1). Hyde then discussed the formula to determine the ultimate value under the income approach as identified in his appraisal (Ex. 1001), and he concluded the value of the Property was \$6,100,000 under the income approach. (Tr., p. 211, ll. 18-22; Ex. 1001, pp. 180-81).

Canyon County offered no evidence to refute SSI's income approach calculation, nor did Cowan do an income approach in his report or revised report. The BOTA found the income approach done by Hyde to be "generally well received" but noted "there is not a lot of information concerning appropriate lease rates." (Ex. 1010, p. 10). The District Court simply made the factual

finding that “[t]he income approach is likewise less reliable than the cost approach.” (R., p. 263).¹³

The District Court made no conclusion of law that it had analyzed the income approach as a recognized method of appraisal, nor did the District Court make any conclusion as to how the income approach should be applied in determining market value of the Property. Therefore, the District Court erred by failing to consider the income approach as a recognized method for determining market value.

3. The District Court erred in allowing expert witness J. Philip Cook to testify, given the late disclosure by Respondent.

a. Cook was Untimely Disclosed as an Expert.

The Idaho Rules of Civil Procedure require parties to disclose all witnesses, including expert witnesses, intended to be called to testify at trial. The rule states:

A party must disclose to the other parties by interrogatory and/or court order, the identity of any witness it expects will testify at trial to present evidence under I.R.E. 702, 703 and 705.

(i) **What must be disclosed; Retained experts.** For individuals retained or specially employed to provide expert testimony in the case or who are employees of the party:

- a complete statement of all opinions to be expressed and the basis and reasons for the opinion must be disclosed;
- the data or other information considered by the witness in forming the opinions;
- any exhibits to be used as a summary of or support for the opinions;
- any qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years;
- the compensation to be paid for the testimony; and
- a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

I.R.C.P. 26(b)(4)(A)(1)(i). A trial court has authority to sanction parties for non-compliance with pretrial orders and discovery rules, and sanctions may include those enumerated in I.R.C.P. 37(c)

¹³ A finding that “the income approach is likewise less reliable than the cost approach” is a conclusion of law which this Court exercises free review.

for discovery violations. The rule states in relevant part:

(1) Failure to Disclose or Supplement. If a party fails to supplement discovery responses when required or fails to comply with a disclosure requirement ordered by the court pursuant to a Rule 16 scheduling or pre-trial order, the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;

(B) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)—(vi).

I.R.C.P. 37(c) (emphasis added).

Typically, where the disclosure requirements of I.R.C.P. 26 are not met, an improperly disclosed expert will be excluded from testifying. *Aguilar v. Coonrod*, 151 Idaho 642, 646, 262 P.3d 671, 675 (2011). When the identity of a witness is tardily disclosed, the trial judge should request an explanation of the late disclosure, weigh the importance of the testimony in question, determine the time needed for preparation to meet the testimony, and consider the possibility of a continuance. *Viehweg v. Thompson*, 103 Idaho 265, 647 P.2d 311 (Ct. App. 1982). It is within the district court's discretion whether to impose such sanctions, and the appellate court will not overturn such a decision absent a manifest abuse of that discretion. *Edmunds v. Kraner*, 142 Idaho 867, 872-73, 136 P.3d 338, 343-44 (2006). When determining whether a district court abused its discretion, this Court considers three factors: (1) whether the trial court correctly perceived the issue as one of discretion, (2) whether it acted within the boundaries of its discretion and consistently with applicable legal principles, and (3) whether it reached its decision through an exercise of reason. *Lepper v. Eastern Idaho Health Services, Inc.*, 160 Idaho 104, 109, 369 P.3d 882, 887 (2016).

Canyon County's court-ordered deadline to disclose expert witnesses was one hundred-sixty (160) days prior to trial. (R., p. 23). One hundred-sixty (160) days prior to the trial in this case was on or before October 11, 2017. Canyon County failed to file an Expert Witness Disclosure with the District Court on October 11, 2017. In fact, Canyon County never filed an Expert Witness Disclosure with the District Court. To the contrary, Canyon County served responses to interrogatories and requests for production of documents on SSI on September 14, 2017, identifying its expert witnesses as (1) Michael Cowan, and (2) Joseph Cox. (R., pp. 53-54). Canyon County further represented:

ANSWER TO INTERROGATORY NO. 7. Petitioner had commissioned Mr. Scott Erwin, CGA to provide an expert report and act as an expert witness; however, Mr. Erwin passed away unexpectedly, and as such no investigation or report was started. Petitioner may seek to commission a 3rd party expert report, but as of this date, no expert report has been commissioned related to this matter.

(R., p. 55) (emphasis added).

On or before October 19, 2017, Canyon County hired Cook as an expert witness. (R., p. 347). Cook began extensive work on the SSI Property in October and throughout November 2017. (R., pp. 347-50). Canyon County did not supplement its discovery responses to disclose Cook after he was hired and commenced work for Canyon County, despite the fact that Canyon County's deadline for doing so had already passed over a week earlier.

On November 16, 2017, SSI filed its Expert Witness Disclosure as required by the scheduling order. (R., pp. 33-35). By November 16, 2017, Cook had already incurred \$4,622.50 in appraiser fees on the SSI Property. (R., pp. 347-49). Even after receiving SSI's expert witness disclosure, Canyon County still did not supplement its discovery responses to reveal their retained expert witness, Cook.

SSI supplemented its expert witness disclosure on December 18, 2017, including additional information for its already disclosed expert witness, Hyde. (R., pp. 38-40). Cook was disclosed as an expert witness by Canyon County on December 20, 2017, through supplemental responses to interrogatories and requests for production of documents. (R., p. 64). From the time SSI filed its initial expert disclosure on November 16, 2017 to December 20, 2017 when Canyon County finally disclosed Cook, Cook had incurred an additional \$29,172.50 working on the SSI Property. (R., pp. 348-52), yet, in that time, Canyon County never supplemented its discovery responses to notify SSI that it had in fact hired a new expert to do an appraisal of the SSI Property. Additionally, Canyon County never sought relief from the District Court of its scheduling order for disclosure deadlines or for relief to disclose a “3rd party expert report” beyond the deadline provided by the District Court.

Having been served with supplemental discovery responses from Canyon County right before Christmas, upon conclusion of the holiday, SSI filed its Respondent’s Motion to Exclude Expert Witness & Strike Expert Opinions. (R., pp. 41-42). On January 18, 2018, Canyon County filed its Objection to Motion to Exclude Expert Witness Testimony and Strike Expert Opinions, (R., pp. 69-71), incredulously stating that Cook was merely a rebuttal expert witness. Thus, Canyon County argued its disclosure was timely [R., p. 69]. The District Court denied SSI’s motion on February 23, 2018 [R., p.179-82].

Cook was not a true rebuttal witness, he was in fact an expert witness and Canyon County’s expert disclosure deadline expired 70 days before Cook was disclosed. No explanation was given by Canyon County as to the late disclosure, instead, Canyon County couched the disclosure as a rebuttal expert. Cook is not a rebuttal expert, and without a plausible excuse for late disclosure, such testimony and expert report should not have been allowed at the trial.

SSI respectfully requests this Court determine that the District Court committed an abuse of discretion in allowing Cook to testify and allowing his appraisal to be introduced and/or relied upon in the trial.

b. Mr. Cook is not a Rebuttal Expert.

The District Court determined Cook was a rebuttal expert witness because his identity was disclosed on the date rebuttal experts were due, December 20, 2017. However, Cook's report is not congruent with a rebuttal expert report, instead, it is a report that identifies a new value for the Property, a value that differs from Canyon County's initial expert witness, Cowan's valuation. Canyon County disclosed a new expert, with a new position on the matter, after the disclosure deadline but tried to couch Cook as a rebuttal expert.

Rebuttal evidence is "Evidence given to explain, repel, counteract, or disprove facts given in evidence by the opposing party." *Black's Law Dictionary*, 6th Ed., 1990. While Idaho appellate courts have not directly addressed the nature of rebuttal testimony versus retained experts for cases in chief, several other jurisdictions have. For example, in the Northern District of New York, courts have ruled that rebuttal expert testimony is limited to "new unforeseen facts brought out in the other side's case" and "cannot be used to advance new arguments or new evidence." *TC Sys. Inc., v. Town of Colonie, NY*, 213 F. Supp. 2d 171, 179 (N.D.N.Y. 2002) (emphasis added) (citing *Lindner v. Meadow Gold Dairies, Inc.*, 249 F.R.D. 625, 636 (D. Hawaii 2008) (individuals designated only as rebuttal experts could present limited testimony, could not testify as part of a party's case-in-chief, and would not be allowed to testify "unless and until" the experts they were designated to rebut testified at trial). *See also Marmo v. Tyson Fresh Meats, Inc.*, 457 F.3d 749, 759 (8th Cir. 2006) ("The function of rebuttal testimony is to explain, repel, counteract or disprove evidence of the adverse party."). Rebuttal expert reports are not the proper place for presenting

new arguments. *1-800-Contacts, Inc. v. Lens. com, Inc.*, 755 F. Supp. 2d 1151, 1167 (D. Utah 2010) (rev. in part on other grounds, 722 F.3d 1229 (10th Cir. 2013)). Further still, other jurisdictions have held that rebuttal experts cannot put forth their own theories; they must restrict their testimony to attacking the theories offered by the adversary's experts. *Withrow v. Spears*, 967 F.Supp.2d 982, 1002 (D. Del. 2013). Expert reports that simply address the same general subject matter as a previously-submitted report, but do not directly contradict or rebut the actual contents of that prior report, do not qualify as proper rebuttal or reply reports. *Id.*

In this case, Canyon County retained Cook in October of 2017, to conduct an appraisal of the SSI Property. As part of his responsibilities as Canyon County's expert witness, Cook came up with his own information, new information, and a new theory as to the value of the SSI Property. Cook's report contains a new valuation and new data relied upon to reach his opinion as the market value of the Property. The appraisal is certainly not rebutted because of something brought out in SSI's case. SSI retained Paul Hyde as their expert and Hyde's report was the same report introduced in front of the BOTA and did not change whatsoever from the use at the BOTA hearing to the use in the District Court case. Canyon County could have hired Cook to conduct his appraisal much sooner than October of 2017 when he was hired, but Canyon County, for whatever reason, delayed that engagement.

Not only did Mr. Cook produce a late disclosed appraisal, a supplemental appraisal by Cook was disclosed on February 20, 2018, less than one month before trial started. Cook's appraisals did not rebut Hyde's appraisal. Cook's appraisal served as the main appraisal of the case in lieu of Cowan's report. Supplementation should not cover failures of omission because the expert did an inadequate or incomplete preparation, nor should it provide an extension to a party who failed to properly retain and disclose an expert pursuant to court order. To construe

supplementation to apply whenever a party wants to bolster or submit additional expert opinions would wreak havoc in docket control and amount to unlimited expert opinion preparation. Simply put, Cook's appraisal was not a supplement nor was it a rebuttal, it was an expert report that contained new information which could have been disclosed any time from the filing of the complaint until the expert disclosure deadline. Instead, Canyon County waited until the last minute to disclose Cook, Cook's appraisal and Cook's supplemental appraisal which formed the position in their case that the Property was worth \$17,000,000, as stated in Cook's report and his testimony at trial.

The District Court should have stricken Cook's appraisal from use at trial and the District Court should not have allowed Cook to testify as to his opinion of value of the SSI Property. Accordingly, SSI respectfully requests this Court to determine the District Court committed an abuse of discretion in classifying Cook as a rebuttal expert and allowing his testimony and report to be used at the trial.

IV. ATTORNEY FEES ON APPEAL

The Idaho Appellate Rules 40 and 41 allow for an award of costs and attorney fees to the prevailing party. Attorney fees on appeal are appropriate under I.A.R. 41 if the appellate court is left without an abiding belief that the appeal has been brought or defended frivolously, unreasonably, or without foundation. *Durrant v. Christensen*, 117 Idaho 70, 74, 785 P.2d 634, 638 (1990). Should SSI prevail in this appeal, it is entitled to attorney fees based upon Idaho Code § 12-117(1) which provides:

(1) Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency or a political subdivision and a person, the state agency, political subdivision or the court hearing the proceeding, including on appeal, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law.

(2) If a party to a proceeding prevails on a portion of the case, and the state agency or political subdivision or the court hearing the proceeding, including on appeal, finds that the nonprevailing party acted without a reasonable basis in fact or law with respect to that portion of the case, it shall award the partially prevailing party reasonable attorney's fees, witness fees and other reasonable expenses with respect to that portion of the case on which it prevailed.

SSI contends that Canyon County acted without a reasonable basis in fact or law for the reasons set forth hereinabove. Therefore, if SSI prevails on appeal, it requests this Court award attorney fees and costs for the appeal.

V.CONCLUSION

The District Court erred in issuing insufficient Conclusions of Law, setting the Property value at \$17,000,000, without explanation or proper valuation. The District Court further erred in allowing Canyon County's late disclosed expert witness to testify and admit his report into evidence at the trial in this matter. Accordingly, SSI respectfully requests this Court determine that the District Court erred and reverse the decision of the District Court and this Court affirm the BOTAs Property valuation at \$10,000,000.

DATED: December 21, 2018.

PICKENS COZAKOS, P.A.

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