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Burns Concrete, INC v. Teton County Appellant's Brief 2 Dckt. 46827

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

BURNS CONCRETE, INC., an Idaho corporation, and BURNS HOLDINGS, LLC, an Idaho limited liability company,

Plaintiffs–Counterdefendants–Respondents–Cross-Appellants,

v.

TETON COUNTY, a political subdivision of the State of Idaho,

Defendant–Counterclaimant–Appellant–Cross-Respondent.

Supreme Court Docket No. 46827-2019

Teton County Case No. CV-2013-165

CROSS-APPELLANTS' BRIEF

Appeal from the District Court of the Seventh Judicial District for Teton County, the Honorable Dane H. Watkins, Jr., District Judge, Presiding.

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I. STATEMENT OF THE CASE

A. Summary Of The Dispute.

In 2007 Burns Holdings, LLC (jointly with its affiliate Burns Concrete, Inc., "Burns") entered into an agreement with Teton County, Idaho ("Teton County") providing for Burns' construction of (i) substantial road and other public improvements and (ii) a building for a concrete batch plant having the elevations depicted in an exhibit to the parties' agreement, which specified a 75-foot height for the building. But shortly after Teton County executed and recorded the agreement and Burns constructed the public improvements and other work it was contractually obligated to *immediately* construct, Teton County denied Burns the conditional use permit required by the relevant zoning ordinance for the building.

Because the agreement between Burns and Teton County *required* Burns to install and then operate a temporary concrete batch plant until the 75-foot building could be constructed, Burns installed and continued to operate its temporary plant while it sought to obtain the required zoning approvals and building permit. However, because (i) Teton County refused to issue Burns a conditional use permit to construct a 75-foot building, (ii) the Idaho Supreme Court subsequently ruled that Burns was required to obtain a zoning variance rather than a conditional use permit for the building, and (iii) Teton County then also refused to issue Burns a zoning variance to construct the building, Burns was left with no alternative but to operate its temporary batch plant until Teton County might amend its zoning ordinances to allow for Burns' construction of its desired 75-foot building.

Notwithstanding Teton County having induced Burns into buying the property and equipment required for a concrete batch plant, installing and operating a temporary and less efficient batch plant pending construction of the building depicted in the parties' agreement, and constructing extensive public and other improvements to satisfy Burns' contractual obligations, Teton County shut down Burns' operation of its temporary batch plant and attempted to rezone Burns' property so that it could no longer be used in accordance with the terms of the agreement. Burns then filed this lawsuit to enforce the terms of the agreement and recover either (i) Burns' actual damages for Teton County's repudiation and breach of the agreement, or (ii) should the agreement be held to be unenforceable for any reason (which it was not), restitution damages for the benefits Burns provided Teton County under the agreement.

This is the second appeal in this case. In the first appeal, the Idaho Supreme Court reversed the district court's holding that the force majeure clause in the parties' agreement did not apply, vacated the judgment entered for Teton County, and remanded the case for trial.

On remand, the district court granted Burns summary judgment on the liability element of its claim for breach of contract and, following a bench trial, entered judgment in Burns' favor (i) decreeing that the force majeure clause in the parties' agreement be given effect in accordance with the Supreme Court's opinion in the first appeal, and (ii) awarding Burns over $1 million in damages.

There are three substantive issues presented in this cross-appeal, in addition to Burns' request to recover the reasonable attorney fees and costs incurred on appeal. First, whether the district court erred in eliminating from Burns' damages award over $850 thousand of costs that

Burns incurred with respect to its concrete batch plant. Second, whether the district court erred in holding that rescission of the parties' agreement was unavailable as a matter of law. Third, whether the district court erred in denying Burns prejudgment interest on the more than $1.9 million in net costs Burns incurred with respect to its concrete batch plant over the 12+ years ending with the entry of judgment.

B. Course Of The Proceedings.

Burns filed its verified complaint initiating this civil action on May 21, 2013. [Clerk's Record filed in prior appeal No. 43527-2015, *Burns Concrete, Inc. v. Teton County* ("*R(PA)*"), p. 1.] After Teton County filed its verified answer and counterclaim on June 11, 2013 [*R(PA)*, p. 25], Burns filed its initial reply to the counterclaim against it on July 5, 2013 [*R(PA)*, p. 41]. Thereafter, and in accordance with the district court's order granting Burns leave to amend its reply [*R(PA)*, pp. 116-17], Burns filed an amended reply to Teton County's counterclaim on December 29, 2014 [*R(PA)*, p. 143].

Both Burns and Teton County moved for the entry of summary judgment, with Burns moving for the entry of partial summary judgment in its favor on the liability issues only [*R(PA)*, pp. 47-48], and Teton County moving for full summary judgment in its favor on both counts of its counterclaim [*R(PA)*, p. 65]. The district court denied Burns' motion and granted Teton County's by the court's Memorandum Decision and Order Re: Motions for Summary Judgment, filed December 19, 2014. [*R(PA)*, pp. 118 & 141.] The district court's "first" final judgment was filed on July 13, 2015 [*R(PA)*, p. 185], and Burns filed its notice of appeal on August 21, 2015 [*R(PA)*, p. 187].

By its opinion in *Burns Concrete, Inc. v. Teton County*, 161 Idaho 117, 121, 384 P.3d 364, 368 (2016) ("*Burns Concrete I*"), the Supreme Court reversed the district court's holding that the force majeure clause in the parties' agreement did not apply and vacated the judgment entered for Teton County, thereafter remitted the case for further proceedings consistent with the opinion [Clerk's Record, filed June 6, 2019 ("*R*"), p. 62].

On December 30, 2016, Burns renewed its previously denied motion for partial summary judgment seeking, inter alia, judgment on the liability component of Burns' claim for breach of contract and rescission. [*R*, p. 63.] The motion was briefed by the parties and then heard by the district court on April 10, 2017, following which the district court entered its May 2, 2017, order in the form submitted by counsel for Teton County granting Burns partial summary judgment on the liability issue only of its claim for breach of contract and on rescission of the parties' agreement. [*R*, pp. 66-67.]

Teton County moved the district court on January 3, 2018, to reconsider its order granting Burns partial summary judgment. [*R*, p. 12.] Following the hearing of the motion on January 17, 2018 [*R*, p. 80], the district court issued its Memorandum Decision and Order Re: Motion to Reconsider and Motion in Limine, filed February 12, 2018 ("*Pretrial Decision*") [*R*, pp. 75-99], by which reconsideration of the grant of summary judgment on Burns' claim for breach of contract was denied but reconsideration of the order granting rescission of the parties' agreement was granted [*R*, p. 98].

A bench trial to establish the amount of Burns' recoverable damages was held March 7-9, 2018, and then continued to and completed on May 11, 2018. [*R*, p. 15.]

Following preparation of the trial transcript by the court reporter and both parties then filing their respective proposed findings and conclusions and responses to the other party's filings [*R*, p. 15], the district court entered its Findings of Fact and Conclusions of Law, filed October 4, 2018 ("*Findings & Conclusions*") [R, pp. 205-25]. Burns then filed a motion for amended and additional findings and conclusions on October 25, 2018. [*R*, p. 16.] And after the motion was briefed and heard by the district court on December 19, 2018 [*R*, p. 16], the court entered its Memorandum Decision and Order Re: Motion for Amended and Additional Findings of Fact and Conclusions of Law, filed January 18, 2019 ("*Supplemental Findings & Conclusions*") [*R*, pp. 236-59], by which the district court made some additional findings of fact but denied Burns' request for reconsideration of the court's denial of rescission of the parties' agreement or of the other issues raised in this cross-appeal [*R*, pp. 257-58].

The district court's Judgment was thereafter filed on February 28, 2019. [*R*, pp. 260-62.] On the same day Teton County filed its Notice of Appeal [*R*, p. 263], followed later by both an amended notice and then a second amended notice.

Finally, Burns filed its Notice of Cross-Appeal on April 9, 2019 [*R*, p. 267], under and pursuant to Rule 11(a)(1), Idaho Appellate Rules ("I.A.R."), with respect to an appeal from a final judgment and within the 42-day period prescribed by I.A.R. 14(a) and 15(b).

C. Statement Of The Facts.

(i) Preliminary Statement.

1. Burns holds all rights of the defined "Developer" under that certain Developer's Agreement for Burns Holdings, LLC, made by and between Burns Holdings, LLC and Teton

County and recorded September 5, 2007, by Teton County as Instrument #191250 (the "Agreement"). Complaint ¶ 1 [*R*, p. 21]; Exhibit 1 [Trial Exhibits, filed June 6, 2019 ("*Ex*"), pp. 419-21]; Exhibit 2 [*Ex*, pp. 243-44]; Exhibit 3 [*Ex*, pp. 200-11]; Exhibit 4 [*Ex*, pp. 104-06]; Exhibit 5 [*Ex*, pp. 438-40].

2. A true and correct copy of the recorded Agreement is attached to the Complaint as Exhibit 1. Complaint ¶ 2 [*R*, p. 21]; Answer ¶ 2 [*R*, p. 45].

3. Burns sought by the Complaint (a) a decree that Teton County is estopped from rezoning the property described in the Agreement and that the time for constructing the "Permanent Facility" defined in the Agreement has been tolled since November 15, 2007, when the Teton County Board of County Commissioners first voted to deny issuance of the land use approvals required for construction of the Permanent Facility; (b) a decree establishing Teton County's anticipatory repudiation and material breach and Burns' rescission of the Agreement, together with judgment against Teton County for all damages incurred by Burns related to or arising out of the Agreement; and (c) in the event the Agreement should for any reason be held to be void or voidable by Teton County, judgment against Teton County for restitution damages in an amount equal to the benefits by which Teton County was unjustly enriched as a result of the public improvements constructed by Burns pursuant to the terms of the Agreement. Complaint ¶ 3 [*R*, p. 21].

(ii) Material Terms of the Agreement.

4. The real property subjected to the Agreement is located within the Area of Impact of the City of Driggs, Teton County, Idaho and is described in Exhibit "A" to the Agreement (the "Property"). Complaint ¶ 8 [*R*, p. 22]; Answer ¶ 8 [*R*, p. 45].

5. Pursuant to Paragraph 1 (titled, Zoning Ordinance Amendment) of the Agreement, Teton County agreed to "adopt an ordinance amending the Driggs Area of Impact Zoning map to rezone the property to M1." The Property was thereafter rezoned by Teton County to M1 (Light Industrial). Complaint ¶ 9 [*R*, p. 22]; Answer ¶ 9 [*R*, p. 46].

6. Pursuant to Paragraph 2 (titled, Conditions on Development) of the Agreement:

> The sole use allowed and restrictions pursuant to this conditional rezone as reflected in this Agreement are as follows:
>
> a. The property shall be used exclusively for the operation of a ready-mix concrete manufacturing plant.
>
> b. . . . This development and operation shall be subject to the following terms and conditions, in addition to the other terms hereof:
>
> (i) Developer intends to operate a Ready-Mix Concrete Manufacturing Facility (a "Facility") on the property.
>
> (ii) All operations on the property shall comply with all applicable and governing local, state or U.S. ordinances and laws relating to dust, noise, water quality and air quality.
>
> (iii) Attached as **Exhibit "B" – Site Plan, and Exhibit "C" – Building Elevations**, and by this reference incorporated herein are plans for construction of Developer's intended permanent facility ("Permanent Facility").
>
> (iv) Immediately upon execution of this Agreement, Developer shall order and commence construction of the

> Permanent Facility. The installation of the Permanent Facility shall be completed within eighteen (18) months of execution of this Agreement by the County, subject to delays resulting from weather, strikes, shortage of steel or manufacturing equipment or any other act of force majeure or action beyond Developer's control.
>
> (v) In order to facilitate and support the construction of the Permanent Facility and to allow the Developer to expedite commercial operations, the Developer shall erect and operate a temporary concrete batch plant on site as shown in **Exhibit "B" – Site Plan and Exhibit "D".**
>
> (vi) In the event that the Permanent Facility is not completed within the time allowed herein, the County shall have the right to revoke the authority to operate the Temporary Facility. The grant of authority of the Temporary Facility is to allow Developer to operate Developer's business until the Permanent Facility is constructed. The authority to operate the Temporary Facility shall terminate upon completion of the Permanent Facility even if sooner than the described eighteen (18) month time period.

(Bolding in original; emphasis altered.) Complaint ¶ 10 [*R*, pp. 22-23]; Answer ¶ 10 [*R*, p. 46].

7. Pursuant to Paragraph 12.b of the Agreement, the Agreement runs with the land, binds the Property in perpetuity, and inures to the benefit of and is enforceable by Developer and its assigns. Complaint ¶ 13 [*R*, p.24]; Answer ¶ 13 [*R*, p. 46].

8. Finally, Paragraph 2.b(iii) and Exhibit C of the Agreement expressly provide for and depict Burns' construction of its desired 75-foot "Permanent Facility." Complaint ¶ 14 [*R*, p. 24]; Answer ¶ 14 [*R*, p. 46].

(iii) Additional Facts Supporting Grant of Summary Judgment and Rescission.

9. In accordance with Teton County's requirements, the City of Driggs' Planning and Zoning Commission heard on July 11, 2007, and recommended for approval by Teton

County both the Agreement and the issuance of a conditional use permit allowing the 75-foot height of the Permanent Facility (the "CUP"). Complaint ¶ 15 [*R*, p. 24]; Answer ¶ 15 [*R*, p. 46].

10. Thereafter, on or about August 31, 2007, Teton County and Burns entered into the Agreement, and Teton County caused the Agreement to be recorded. Complaint ¶ 16 [*R*, p. 24]; Answer ¶ 16 [*R*, p. 46].

11. Notwithstanding the recommendation for approval by the City of Driggs' Planning and Zoning Commission, the Teton County Board of County Commissioners voted to deny the CUP on November 15, 2007. Complaint ¶ 18 [*R*, p. 25]; *Burns Holdings, LLC v. Teton Cnty. Bd. of Comm'rs*, 152 Idaho 440, 442, 272 P.3d 412, 414 (2012).

12. The Idaho Supreme Court held in *Burns Holdings* that a provision in the relevant zoning ordinance was void and that Burns must obtain a zoning variance from Teton County, rather than a CUP, in order to construct the Permanent Facility. 152 Idaho at 443-44, 273 P.3d at 415-16. Burns then applied for the required variance, which the Teton County Board of County Commissioners voted to deny on September 13, 2012. *Burns Concrete I,* 161 Idaho at 119, 384 P.3d at 366.

13. Burns cannot now construct the Permanent Facility without an amendment to the ordinances of Teton County. Complaint ¶ 21 [*R*, p.26]; Answer ¶ 21 [*R*, p. 48].

14. By letter dated October 4, 2012, from its Board of County Commissioners, Teton County revoked Burns' authority to operate the Temporary Facility and demanded its immediate removal from the Property. Complaint ¶ 32 [*R*, p. 28]; Answer ¶ 32 [*R*, p. 49].

15. In response to Teton County's revocation and demand, counsel for Burns provided Teton County written notice by letter dated October 15, 2012, that Teton County's action constituted a breach of the Agreement and demanded the following:

> (i) If the County contends the Developer has breached or is in default of the Agreement, that the County provide the Developer with "not less than thirty (30) days' Notice of Default, in writing . . . [and] specify the nature of the alleged default and, where appropriate, the manner and period of time during which said default may be satisfactorily cured" – in accordance with the requirements imposed under Paragraph 8 of the Agreement;
>
> (ii) That the County take no further action adverse to the Developer's rights under the Agreement without first providing a written Notice of Default and opportunity to cure the alleged default – as is expressly required by Paragraph 8 of the Agreement; and
>
> (iii) That the County provide the Developer with a written retraction of its notice of revocation dated October 4, 2012, within 30 days of the County's receipt of this letter – which demand is hereby made subject to the Developer's reservation of rights to treat any further action by the County that is adverse to the Developer's rights under the Agreement or the County's failure to retract its notice of revocation within said 30 days as a repudiation of the County's obligations under the Agreement.

Complaint ¶ 33 (emphasis added) [*R*, pp. 28-29]; Answer ¶ 33 [*R*, p. 49].

16. Nevertheless, by letter dated October 23, 2012, from the Teton County Prosecuting Attorney, Teton County resubmitted to the City of Driggs a previously withdrawn application for a recommendation by Driggs that the zoning of the Property should revert to C3 (Service and Highway Commercial). Although a final decision on the application was tabled by the City of Driggs' Planning and Zoning Commission, Teton County's proposal to rezone the Property remains pending. Complaint ¶ 26 [*R*, p. 26]; Answer ¶ 26 [*R*, p. 48].

17. Additionally, by letter dated November 5, 2012, from the Teton County Prosecuting Attorney to Burns' counsel, Teton County asserted that the clause in Paragraph 2.b(iv) of the Agreement extending the 18-month period to construct the Permanent Facility "is inapplicable to the present situation" and threatened to file suit to force Burns' removal of the Temporary Facility from the Property. Complaint ¶ 28 [*R*, p. 27]; Answer ¶ 28 [*R*, p. 48].

18. Thus, Teton County responded to Burns' October 15 notice and demand quoted in paragraph 15 above, (a) by acting to rezone the Property, and (b) by the Teton County Prosecuting Attorney's November 5 response referenced in paragraph 17 above, which rejected all the demands made by Burns and threatened suit to compel Burns' removal of the Temporary Facility from the Property. Complaint ¶ 34 [*R*, p. 29]; Answer ¶ 34 [*R*, p. 49].

19. Furthermore, Teton County sought and obtained from the district court, among other relief, "a decree stating that Teton County has the right, by agreement and by law, to rezone the subject property" and "a decree stating that the Temporary Facility has been in violation of the Teton County zoning laws . . . ." Counterclaim at Prayer ¶¶ 5-6 [*R*, pp. 57-58]; Memorandum Decision and Order Re: Motions for Summary Judgment, filed December 19, 2014, at 24 (Conclusion and Order) [*R(PA)*, pp. 118 & 141].

20. In reversing the district court and holding that the force majeure clause in the Agreement did in fact apply to this dispute, this Court ruled that "[i]t would not be foreseeable that the County would require the Developer to build a facility 75 feet in height and then prevent

the Developer from doing so." *Burns Concrete I*, 161 Idaho at 120, 384 P.3d at 367 (emphasis added).

(iv) Pretrial Summary Judgment and Rescission Rulings.

21. Shortly before trial the district court ruled that Teton County breached the terms of the Agreement in the following three ways:

> (a) "[T]he County breached the express language of Paragraph 2.b.(vi) when it ordered Burns Holdings to cease operating the Temporary Facility and remove it." *Pretrial Decision* 10 [*R*, p. 84].
>
> (b) "[T]he County did not provide Burns with a Notice of Default or an opportunity to cure, as required by Paragraph 8 of the Agreement." *Id.* at 11 [*R*, p. 85].
>
> (c) "By denying Burns Holdings the right to operate the Temporary Facility, the County violated, nullified and significantly impaired one of the Agreement's benefits – namely that Burns Holdings could continue to operate the Temporary Facility beyond 18 months if a delay outside Burns Holdings' control occurred." *Id*. at 12 [*R*, p. 86].

Thus, based on the district court's pretrial rulings, Teton County's breaches of the Agreement were grounded in its conduct in preventing Burns Holdings from operating the Temporary Facility, together with failing to provide Burns Holdings notice of an alleged default and an opportunity to cure.

22. Based on Teton County's breaches, the district court confirmed its earlier grant of "summary judgment in favor of Burns Holdings on its breach of contract claim." *Pretrial Decision* 14 [*R*, p. 88]. And with respect to recovering on the claim, the district court ruled that

"Burns Holdings may seek reliance damages as compensation for Teton County's breach of contract." *Id.* at 19 [*R*, p. 93].

23. However, the district court also reconsidered and vacated its earlier order granting rescission of the Agreement, holding that "rescission is unavailable as a matter of law." *Pretrial Decision* 17 [*R*, p. 91].

(v) Burns' Principal Witnesses and Trial Exhibits.

(a) Summary of Exhibits 8-11.

24. Counsel for Burns moved to admit Exhibit 8 [*Ex*, pp. 2-102] into evidence as a summary of relevant evidence pursuant to Rules 1006 and 803(24), Idaho Rules of Evidence, in lieu of admitting the many thousands of documents supporting the specific line items in the exhibit contained in 73 binders that were provided to Teton County prior to trial, produced in court, and referred to repeatedly during the course of trial. [Trial Transcript, filed June 6, 2019 ("*Tr*"), p. 341, L. 24 – p. 350, L. 1.] But before the district court ruled on Burns' motion to admit, Exhibit 8 was admitted into evidence upon stipulation of counsel subject to the limitations that (a) the prejudgment interest calculations reflected in the final four columns were not admitted, with the district court to determine after it entered judgment how prejudgment interest should be calculated and accrued based on the parties' post-judgment submissions, and (b) that the legal expenses reflected in line items 4695-4764 would be supplemented by the applicable supporting documentation for the Court's consideration. [*Tr*, p. 356, L. 14 – p. 357, L. 3 & p. 358, L. 3.] Counsel for Teton County did not subsequently introduce any of the documentation supporting line items 4695-4764 into evidence, however, and both Burns and Teton County

rested their respective cases, except with respect to a "battle of the experts" held on the final day of trial. [*Tr*, p. 531, LL. 7-14.]

25. Mr. Barger prepared Exhibit 9 [*Ex*, p. 1] to identify and summarize all the expert valuation and cost opinions applicable to the Driggs batch plant included in Exhibit 8 that Kirk Burns provided. [*Tr*, p. 68, L. 2 – p. 69, L. 5.] To isolate the valuation and cost information *not* provided by Kirk Burns, Mr. Barger prepared Exhibit 10 [*Ex*, pp. 318-418] summarizing all the remaining charges and credits applicable to the Driggs batch plant included in Exhibit 8. [*Tr*, p. 92, LL. 5-15.]

26. The district court expressly found in its *Findings & Conclusions* that "the majority of those expenses shown on Exhibit 8 [were] legitimately incurred in reliance on the Agreement." [*R*, p. 213.] And the district clarified its foregoing finding with respect to the expenditures included on Exhibit 8 in its *Supplemental Findings & Conclusions* as follows: "[W]ith the exception of the excluded categories, this Court found the expenditures listed in Exhibit 8 to be accurate and legitimately incurred." [*R*, p. 242.] In this regard, a comparison of the "excluded categories" identified by the district court in its *Findings & Conclusions* [*see R*, pp. 213-14] with the expenditures included in Exhibit 9 establishes that none of the Exhibit 9 expenditures fall within the district court's "excluded categories." For this reason, neither Exhibit 9 nor Exhibit 10 provides or summarizes relevant information for purposes of this cross-appeal that was not also properly included in Exhibit 8.

27. Mr. Barger prepared Exhibit 11 [*Ex*, pp. 292-317] to establish the sum to be added to the total principal amount reflected in Exhibit 8 in the event the district court ordered Burns to

convey the Driggs batch plant to Teton County, so to ensure that Burns did not receive a double recovery. [*Tr*, p. 85, L. 10 – p. 87, L. 7.] However, because Teton County didn't request that all or any component of the Driggs batch plant be conveyed to it and the district court didn't order Burns to convey either the Property or Temporary Facility to Teton County, Exhibit 11 also does not provide or summarize relevant information for purposes of this cross-appeal that was not also properly included in Exhibit 8.

28. Accordingly, both Burns' damages claim and the district court's damages award to Burns are derived from and solely based on the information included in Exhibit 8. In fact, the district court did not even mention Exhibit 9, Exhibit 10, or Exhibit 11 in either its *Findings & Conclusions* or its *Supplemental Findings & Conclusions*.

(b) Summary of Allen Barger Testimony.

29. Allen Barger has been the controller for Burns Concrete since August 2013 [*Tr*, p. 8, L. 22 – p. 9, L. 7]; and he has been licensed as a certified public accountant by Wisconsin since 1991 [*Tr*, p. 9, LL. 17-21]. Prior to becoming the controller for Burns Concrete, Mr. Barger worked for a certified public accounting firm for two years and then as the controller for two mechanical contractors for a total of 20 years. [*Tr*, p. 10, L. 9 – p. 11, L. 14.] Mr. Barger was in charge of accounting and finance for Burns Concrete and also provided information technology services. [*Tr*, p. 12, LL. 7-10.]

30. Mr. Barger prepared Exhibit 7 [*Ex*, p. 103] to determine whether Burns Concrete made money or lost money from operating the Driggs batch plant during those years (2007-2010) in which it was operated. [*Tr*, p. 13, LL. 2-15.] Mr. Barger testified that the Temporary

Facility lost money because it had insufficient sales volume to cover its costs. [*Tr*, p. 14, LL. 12-23.] Mr. Barger also testified that Exhibit 7 was not a detailed income statement and was prepared to establish that Burns Concrete didn't make a profit from the Temporary Facility. [*Tr*, p. 20, LL. 21-25 & p. 154, LL. 23-25.]

31. Mr. Barger prepared Exhibit 8 to summarize all the charges for costs and credits for reductions in costs applicable to the Driggs batch plant from inception through the first day of trial on March 7, 2018. [*Tr*, p. 21, L. 12 – p. 22, L. 8 & p. 94, LL. 9-17.] These generally include the costs of land and improvements, equipment and improvements, labor relating to the improvement of the land and equipment, taxes, attorney fees, utilities, insurance, etc., but exclude all operational costs relating to the sale of concrete from the Temporary Facility, such as the utilities during the months the facility was operated. [*Tr*, p. 95, LL. 5-8 & p. 167, LL. 19-25.]

32. The costs included in Exhibit 7 are distinct from those included in Exhibit 8, for as Mr. Barger explained: "Exhibit 7 is just an income statement of operating costs. Exhibit 8 is the cost related to bringing the Driggs plant to the point where we can do the stuff that's related on Exhibit 7." [*Tr*, p. 175, LL. 15-18.]

33. Mr. Barger personally inserted the information on every line item in Exhibit 8. [*Tr*, p. 58, LL. 1-7.] He started his work in March 2017 and finished the exhibit the week before trial, making corrections and additions as they were identified. [*Tr*, p. 60, L. 20 – p. 61, L. 20.] Mr. Barger testified that Exhibit 8 is as comprehensive as he could make it, reflecting every charge and every credit related to the acquisition and holding of the land and equipment that

comprise the Driggs batch plant. [*Tr*, p. 61, L. 21 – p. 62, L. 3.] He also confirmed that he is unaware of the omission of any credits from Exhibit 8 that would work to the benefit of Teton County but is aware of omitted charges that would work to the benefit of Burns Concrete, such as certain state and federal employment taxes and charges for which paper documentation could not be found. [*Tr*, p. 62, L. 9 – p. 63, L. 1 & p. 74, L. 20 – p. 75, L. 7.]

34. The information supporting the line items reflected in Exhibit 8 came from three sources: Burns Concrete's accounting records, directly from Teton County, or from expert valuation and cost opinions provided by Kirk Burns. [*Tr*, p. 67, LL. 12-16 & p. 70, LL. 21-24.] Burns Concrete's accounting records were both in computer and paper form. [*Tr*, p. 70, L. 25 – p. 71, L. 8.] But as stated in the prior paragraph, only those costs that were supported by paper documentation in Burns Concrete's accounting files were included in Exhibit 8. Mr. Barger also testified that the computer files and paper files on which he relied (a) were of the type over which he had control as Burns Concrete's controller, (b) were maintained as a regular part of Burns Concrete's business, (c) were typical accounting files and records, and (d) with one exception, were prepared in the ordinary course of Burns Concrete's business operations. [*Tr*, p. 75, L. 8 – p. 76, L. 9.] Mr. Barger also established that there were "thousands upon thousands" of business records pertaining to the over 7,300-line items included in Exhibit 8. [*Tr*, p. 59, LL. 11-14.]

35. The one exception to Mr. Barger's reliance on accounting records prepared in the ordinary course of Burns Concrete's business operations related to the labor and burden costs summarized by Mr. Barger in a large spreadsheet distilled from thousands of additional Burns

Concrete accounting records and included in the 73 binders of supporting documents produced at trial. [*Tr*, p. 76, L. 10 – p. 77, L. 21.] The entire spreadsheet was prepared by Mr. Barger from time cards and other accounting documentation and tax returns prepared in the ordinary course of Burns Concrete's business operations. [*Tr*, p. 78, L. 15 – p. 80, L. 18.]

36. The information supporting line items reflected in Exhibit 8 that came directly from Teton County was the appraisal report by Curtis Boam (Exhibit 13 [*Ex*, pp. 245-90]), which is the basis for the credits reflected as line items 2 and 3 in Exhibit 8. [*Tr*, p. 63, L. 14-21 & p. 189, L. 13 – p. 190, L. 1.]

37. The expert valuation and cost opinions provided by Kirk Burns supporting line items reflected in Exhibit 9 are all also reflected in Exhibit 8. [*Tr*, p. 68, L. 2 – p. 69, L. 5.]

38. With the exception of certain credits reversing earlier charges in Exhibit 8 for which supporting documentation was included in the 73 binders produced at trial, the documentation supporting the 7,300+ line items reflected in Exhibit 8 was included in the 73 binders. [*Tr*, p. 58, L. 13 – p. 59, L. 9 & p. 66, LL. 2-24.] The documentation included in the 73 binders supports the information reflected in the columns contained in Exhibit 8. [*Tr*, p. 109, L. 19 – p. 110, L. 17.]

39. The column in Exhibit 8 titled "Check Date/EFT Date/Financed Date" reflects the actual date a payment was made or a credit was received by Burns Concrete for purposes of calculating prejudgment interest. [*Tr*, p. 105, LL. 11-24 & p. 109, LL. 2-18.]

40. The column in Exhibit 8 titled "Applicable $ to Driggs" reflects all the charges and credits that are in fact applicable to the Driggs batch plant. [*Tr*, p. 109, LL. 19-24.]

41. Mr. Barger confirmed on redirect that counsel for Teton County did not in her cross-examination dispute in any way either the relevant dates or amounts reflected in Exhibit 8. [*Tr*, p. 186, L. 25 – p. 187, L. 5.]

42. The total amount of the charges and credits applicable to the Driggs batch plant that are included in Exhibit 8 is $1,905,344.78, as reflected at the top of each page to Exhibit 8 in three places, which is the principal amount of the damages claimed by Burns and is exclusive of any prejudgment interest. [*Tr*, p. 114, L. 20 – p. 115, L. 7.] The total amount applicable to the facility is the summation of the individual amounts reflected in the column titled "Applicable $ to Driggs" as calculated by the Excel program. [*Tr*, p. 93, LL. 14-21.]

43. *Teton County introduced no evidence at trial disputing any of the information reflected in Exhibit 8*, although Mr. Barger was cross-examined with respect to certain charges, such as whether portions of select invoices from the law firm Moffatt Thomas related to the present lawsuit and should be excluded and whether a $100 per hour charge for the use of a truck with welding and other equipment at the Driggs batch plant was appropriate. However, on redirect Mr. Barger (a) reviewed the Moffatt Thomas invoices in question, which related to the year prior to the commencement of this lawsuit, and confirmed that there was nothing in any of the invoices relating to the preparation of a complaint against Teton County [*Tr*, p. 182, L. 9 – p. 185, L. 10]; and (b) also confirmed that the $100 per hour charge was an allocation for the cost, wear and tear, and maintenance of the truck while being used to build the facility [*Tr*, p. 185, L. 12 – p. 186, L. 4]. Teton County introduced no evidence relating to the Moffatt Thomas invoices or the propriety of the $100 per hour truck charge.

(c) Summary of Kirk Burns Testimony.

44. Kirk Burns obtained a B.S. in construction engineering from Arizona State University's College of Engineering in 1985. [*Tr*, p. 196, LL. 2-10.] Mr. Burns has worked in construction management and the concrete industry since graduating college and had extensive experience in estimating construction work before starting Burns Concrete. [*Tr*, p. 197, L. 17 – p. 201, L. 14.] For the past 29 years Mr. Burns, as the president and chief officer of Burns Concrete, has done everything from managing large "nuclear" projects at the Idaho National Laboratory, to purchasing and mobilizing batch plants and producing concrete, to estimating the costs of and demobilizing batch plants. [*Tr*, p. 202, L. 12 – p. 203, L. 13.] Mr. Burns has numerous industry affiliations, including with the Associated General Contractors, National Ready Mix Concrete Association, American Concrete Institute, Strategic Development Council for the American Concrete Institute Foundation, John Deere Construction Corporation Lead User Group, and Oshkosh Corporation. [*Tr*, p. 203, L. 19 – p. 207, L. 19.] Mr. Burns is known for his expertise in concrete batch plants, concrete mixers, and aggregate production facilities. [*Tr*, p. 209, LL. 18-23.] He has been qualified as an expert witness and testified in two trials in Bonneville County [*Tr*, p. 208, LL. 1-8], in addition to being qualified as an expert during the trial of this dispute [*Tr*, p. 281, L. 25 – p. 282, L. 2.]

45. Mr. Burns is the president and CEO of Burns Concrete and controls 100% of its common stock. [*Tr*, p. 190, LL. 20-24 & p. 192, LL. 13-17.] Burns Concrete has been a concrete and aggregate producer in Southeastern Idaho since 1989, having about 40 employees at the time of trial. [*Tr*, p. 192, L. 18 – p. 193, L. 7.] Burns Concrete has multiple land holdings,

aggregate facilities, batch plants, aggregate-handling equipment, and mixers, including a 50% interest in the Property. [*Tr,* p. 193, LL. 8-25.] Burns Concrete's offices are located in Idaho Falls, out of which the operations of the Temporary Facility are conducted. [*Tr*, p. 194, LL. 1-10.]

46. Mr. Burns is the sole member and owner of Burns Holdings, which was formed in 2004 for the initial purpose of purchasing land in Rexburg for the development of an industrial/commercial facility, including a batch plant. [*Tr*, p. 194, L. 22 – p. 195, L. 15.] Burns Holdings, as its name implies, holds land, including a 50% undivided interest in the Property, but has no employees, offices, or equipment. [*Tr*, p. 191, LL. 6-12 & p. 195, LL. 16-24.]

47. Burns Concrete and Burns Holdings work together in connection with Mr. Burns' concrete operations as joint venturers for tax purposes and have joint ventured the Driggs batch plant from day one. [*Tr*, p. 190, L. 25 – p. 191, L. 17 & p. 247, LL. 9-12.]

48. Mr. Burns was personally involved in the purchase of the land and all the equipment acquired and dedicated for use at the Driggs batch plant, as well as with all the improvements made to the Temporary Facility, and he was the only person involved in Burns Concrete's sale or transfer of those pieces of equipment that are no longer dedicated to the facility. [*Tr*, p. 210, L. 2 – p. 211, L. 11.]

49. In late winter or early spring of 2006, Mr. Burns began discussing his development of a concrete batch plant in the Driggs area with Kurt Hibbert and Doug Self, who were the respective planning and zoning directors for Teton County and the City of Driggs. [*Tr*, p. 216, LL. 1-9.] Mr. Hibbert thought it was a very good idea, and both he and Mr. Self pointed

Mr. Burns to the specific property that was acquired for the Driggs batch plant, which was in the City of Driggs' Area of Impact. [*Tr*, p. 218, LL. 6-22.] Development of the proposed batch plant on the Property was approved in the fall of 2006 by the City of Driggs' Planning and Zoning Commission before the Property was purchased, and from the date of that approval Mr. Burns knew that a development agreement would be required for the Property. [*Tr*, p. 219, L. 11 – p. 220, L. 3 & p. 221, LL. 8-12.] There was little or no opposition to the proposed batch plant through the approval of the zone change to M-1 by the Teton County Board of County Commissioners on February 26, 2007, with a development agreement expressly being required by that approval. [*Tr*, p. 220, LL. 5-8; p. 220, L. 22 – p. 221, L. 5; p. 459, LL. 14-22 & p. 460, LL. 8-25.]

50. The Property was acquired in December 2006 by the deeds marked as Exhibits 1 and Exhibit 2. [*Tr*, p. 230, L. 20 – p. 231, L. 15.] And in reliance of the fact that a development agreement would be approved by the City of Driggs and Teton County, Mr. Burns commenced working on and ordering the equipment necessary for the Driggs batch plant in March 2007. [*Tr*, p. 229, L. 1 – p. 230, L. 6.]

51. In order to finance the construction of the Permanent Facility, title to the Property was initially taken in the name of Burns Concrete, with Mr. Burns intending to convey the Property to Burns Holdings after the required conditional use permit was issued and the Permanent Facility constructed in 2007 or 2008. [*Tr*, p. 231, L. 16 – p. 233, L. 16.]

52. The Agreement (Exhibit 3) was prepared by the City of Driggs and Teton County working together. [*Tr*, p. 238, LL. 2-5.] A single draft of the Agreement was prepared by

Driggs' city attorney, which included all the provisions required by Teton County. [*Tr*, p. 237, L. 5 – p. 238, L. 9.] Because the legal descriptions attached as Exhibit "A" to the Agreement use the precise metes-and-bounds descriptions as those used in the two deeds by which Burns Concrete acquired the Property (Exhibits 1 and 2) and expressly incorporate the recording numbers of those two deeds, the Agreement's drafter knew that title to the Property was held in the name of Burns Concrete. [*Tr*, p. 235, L. 17 – p. 236, L. 18 & p. 238, LL. 10-23.] Teton County recorded the Agreement against the Property, thereby binding the Property and the parties, together with their successors and assigns, as provided in paragraph 12.b of the Agreement. [*Tr*, p. 240, LL. 3-22.] Based on the terms in the Agreement specifying Burns Concrete's operations and Mr. Burns' meeting with the county's and city's planning and zoning directors, Kurt Hibbert and Doug Self, Mr. Burns believed when he signed the Agreement that it was binding on both Burns Concrete and Burns Holdings. [*Tr*, p. 241, LL. 1-24.]

53. By the Quitclaim Deed marked as Exhibit 4, which was executed and notarized on May 6, 2013, and recorded in Bonneville County, Burns Concrete conveyed an undivided 50% interest in the Property to Burns Holdings. [*Tr*, p. 242, L. 4 – p. 243, L. 6 & p. 463, LL. 19-23.] And by the Assignment and Assumption Agreement marked as Exhibit 5, which was executed by Mr. Burns and notarized on May 10, 2013, (a) Burns Holdings assigned to Burns Concrete an undivided interest in the Agreement, including all related claims, causes of action, and rights of enforcement of Burns Holdings, and (b) Burns Concrete assigned to Burns Holdings an undivided interest in all claims and causes of action related to the Property and/or the Agreement of Burns Concrete. [*Tr*, p. 244, L. 8 – p. 246, L. 12.] Mr. Burns' intent in executing Exhibit 5

was to ensure that both Burns Concrete and Burns Holdings would have equal rights, claims, and obligations under the Agreement. [*Tr*, p. 246, L. 20 – p. 247, L. 1.] By reason of Exhibit 4 and Exhibit 5, Burns Concrete and Burns Holdings each own equal undivided interests in both the Property and all claims under the Agreement against Teton County. [*Tr*, p. 247, L. 18 – p. 248, L. 10.]

54. In consideration of the increased efficiencies of operating a taller 75-foot concrete batch plant, the maintenance and operation costs resulting from installing a permanent 45-foot batch plant complying with Teton County's ordinances would have been exorbitant and economically infeasible. [*Tr*, p. 248, L. 18 – p. 253, L. 19.]

55. In April 2012 Teton County first gave written notice to Burns that its authority to operate the Temporary Facility had been revoked. [*Tr*, p. 253, L. 20 – p. 254, L. 7 & p. 413, L. 7 – p. 414, L. 5.] *See also* Exhibit 6 at p. 9, ¶ 10 [*Ex*, p. 430] (establishing April 9, 2012, as the precise date). Teton County has not ever rescinded or withdrawn its revocation, and Burns Concrete has been unable to legally operate the Temporary Facility since the 2012 revocation. [*Tr*, p. 254, LL. 8-18 & p. 259, LL. 22-25.]

56. By its Counterclaim included in Exhibit 6 [*Ex*, pp. 422-37], Teton County sued both Burns Concrete and Burns Holdings for breach of the Agreement. [*Tr*, p. 256, L. 2 – p. 257, L. 7.] As alleged in its Counterclaim, Teton County maintains "that the Temporary Facility has been in violation of the Teton County zoning laws since March 1, 2009." Exhibit 6 at p. 14, ¶ 43(e) [*Ex*, p. 435]. And as established by Mr. Burns' uncontroverted trial testimony, Teton County maintained since sometime in 2009 or 2010 through trial that the Temporary Facility was

in violation of Teton County's zoning laws. [*Tr*, p. 259, LL. 12-25.] As also explained at length by Mr. Burns' uncontroverted trial testimony, the foregoing conduct by Teton County effectively shut down the Temporary Facility and shifted its costs onto the other operations of Burns Concrete. [*Tr*, p. 260, L. 1 – p. 264, L. 20 & p. 278, LL. 8-23.]

57. Consistent with Mr. Barger's testimony, Mr. Burns established that neither Burns Concrete nor Burns Holdings made any money operating the Driggs batch plant nor did either of them in any way benefit from the Agreement, because Teton County stopped Burns Concrete from producing concrete since at least 2012 and has never allowed the Temporary Facility to again operate. [*Tr*, p. 268, L. 6 – p. 269, L. 12; p. 280, LL. 6-22 & p. 284, L. 16 – p. 285, L. 2.] Mr. Burns also confirmed that Burns Concrete would have continued to operate the Temporary Facility had Teton County allowed it to do so because all the costs of the facility had been paid for already and Burns Concrete's operations would yield a 30% to 40% gross margin, which would have allowed Burns Concrete to recover all the costs that are in Exhibit 8 over time and then generate a profit. [*Tr*, p. 269, L. 13 – p. 273, L. 3.] Finally, Mr. Burns established why in his expert opinion it was not possible to reasonably establish the profits that the Temporary Facility would have in the past realized or would in the future generate. [*Tr*, p. 282, L. 10 – p. 283, L. 14 & p. 284, LL. 7-15.]

58. Mr. Burns directed Allen Barger to prepare Exhibit 8 so that all the charges and credits applicable to the Driggs batch plant would be contained in a single spreadsheet. [*Tr*, p. 285, LL. 10-21.] Mr. Burns confirmed that tens of thousands of Burns Concrete's business records would pertain to the 7,300+ line items included in Exhibit 8. [*Tr*, p. 285, L. 22 – p. 286,

L. 9.] He also confirmed that these business records were contained in the 73 binders and boxes of time cards and payroll records that were brought to the courtroom and earlier provided to Teton County. [*Tr*, p. 286, L. 10 – p. 287, L. 7.] As was Allen Barger, Mr. Burns is unaware of any omitted corrections to Exhibit 8 that would work to Teton County's benefit. [*Tr*, p. 289, LL. 21-24.] Finally, Mr. Burns confirmed that he had personally reviewed each of the line items in Exhibit 8, that all of these line items relate to the Driggs batch plant, that there are no operational costs in Exhibit 8 that relate to the sale of concrete, and that all the line items on the exhibit relate to the property, plant, and equipment or other costs related to holding the Property. [*Tr*, p. 290, L. 12 – p. 291, L. 4 & p. 291, LL. 10-16.]

59. Mr. Burns also corroborated Allen Barger's trial testimony that all the charges included in Exhibit 8 are based on the actual costs incurred by Burns Concrete with two exceptions: (a) Mr. Burns' expert opinion of the value of the Johnson Ross temporary batch plant before any improvements, as set forth on line item 45 [*Tr*, p. 296, L. 9 – p. 297, L. 5]; and (b) Mr. Burns' expert opinion of the future costs to demobilize the Driggs batch plant, including moving the equipment back to Idaho Falls and removing the concrete slabs to facilitate the sale of the Property [*Tr*, p. 298, L. 11 – p. 299, L. 5 & p. 300, LL. 10-13]. The initial $200,000 value of the Johnson Ross plant, which was below its cost to Burns Concrete, was estimated because the plant was purchased about 18 years before trial and the cost records are no longer available. [*Tr*, p. 297, LL. 10-25 & p. 298, LL. 7-10.]

60. Mr. Burns provided additional and corroborating testimony to that of Allen Barger supporting the following charges included in Exhibit 8: (a) the taxes, insurance, and other

payroll-related costs [*Tr*, p. 300, LL. 14-22]; (b) the $100 per hour truck charge [*Tr*, p. 301, L. 4 – p. 304, L. 5]; and (c) the attorney fees related to the Driggs batch plant [*Tr*, p. 304, LL. 8-25].

61. As also stated above with respect to Allen Barger's trial testimony, *Teton County introduced no evidence at trial disputing any of the information reflected in Exhibit 8,* although Mr. Burns was cross-examined with respect to certain charges and credits, such as whether the unimproved value of the Johnson Ross temporary batch plant charged on line item 45 and credited on line item 46 should have been greater than $200,000 (which, because of the accrual of prejudgment interest, would have worked against Teton County's interests) and whether credit was given for all those items Mr. Burns admitted in his deposition should be credited to the benefit of Teton County. Mr. Burns confirmed on redirect, however, that credits were in fact provided in Exhibit 8 for all of these items. [*Tr*, p. 455, L. 5 – p. 456, L. 11.]

62. Mr. Burns also provided detailed and extensive explanations supporting all his expert valuation and cost opinions contained in Exhibit 9, which contains the various charges and credits related to the Driggs batch plant that are not based on either (a) Burns Concrete's accounting records, or (b) with respect to the credit for the current value of the Property, Teton County's own appraisal report (Exhibit 13). [*Tr*, p. 313, L. 5 – p. 339, L. 8.]

(vi) Summary of Teton County's Witnesses and Trial Exhibits.

63. Teton County called no witnesses and introduced no trial exhibits other than relating to the opinions of Teton County's expert witness Richard S. Hoffman, who was so severely impeached at trial that his testimony was wholly disregarded and not even mentioned by

the district court in either its *Findings & Conclusions* or its *Supplemental Findings & Conclusions.*

II. ISSUES PRESENTED ON APPEAL

A. Did the district court err in reducing Burns' damages award for the difference between the sales realized and the cost of materials incurred in operating the Temporary Facility, notwithstanding the Driggs batch plant having incurred a net loss from operations?

B. Did the district court err in reducing Burns' damages award for costs that were incurred for the Driggs batch plant without adequately identifying the disallowed costs and credits?

C. Did the district court err in holding that rescission of the Agreement is unavailable as a matter of law?

D. Did the district court err in disallowing all prejudgment interest on the damages awarded to Burns?

E. Is Burns entitled to its reasonable attorney fees incurred on appeal pursuant to Idaho Rules of Civil Procedure 54(e)(1) and Paragraph 12.e of the Agreement?

III. STANDARDS FOR REVIEW

A. Findings Of Fact And Matters of Law.

The issues presented by Burns in its cross-appeal were decided by the district court following a bench trial. Rule 52(a)(1), Idaho Rules of Civil Procedure ("I.R.C.P."), provides, in relevant part: "In an action tried on the facts without a jury . . . , the court must find the facts specially and state its conclusions of law separately." I.R.C.P. 52(b) further provides that upon a

party's timely motion, "the court may amend its findings, or make additional findings, and amend the judgment accordingly." The district court entered its *Findings & Conclusions* as required by I.R.C.P. 52(a)(1) and then entered its *Supplemental Findings & Conclusions* as permitted by I.R.C.P. 52(b).

The purpose of findings of fact and conclusions of law is to allow for a meaningful appellate review of the district court's decision. Thus, as explained in *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 646 P.2d 988 (1982):

> When the court sits as the trier of fact, it is charged with the duty of preparing findings of fact and conclusions of law in support of the decision which it reaches. The purpose behind requiring the court to "find the facts specially and state separately its 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.

Id. at 225, 646 P.2d at 996 (internal and concluding citations omitted). *Accord In re Bd. of Tax Appeals*, 165 Idaho 433, 442, 447 P.3d 881, 890 (2019) (quoting *Pope*). Or as articulated in *Huber v. Lightforce USA, Incorporated*, 159 Idaho 833, 367 P.3d 228 (2016): '"When reviewing a trial court's conclusions following a bench trial, our review is limited to ascertaining whether the evidence supports the findings of fact, and whether the findings support the conclusions of law."' *Id.* at 841, 367 P.3d at 236 (quoting *Vreeken v. Lockwood Eng'g, B.V.*, 148 Idaho 89, 108, 218 P.3d 1150, 1169 (2009)).

The court in *Huber* went on to summarize the standard for reviewing challenged findings of fact and conclusions of law as follows:

> "Since it is the province of the trial court to weigh conflicting evidence and testimony and to judge the credibility of witnesses, this Court will liberally construe the trial court's findings of fact in favor of the judgment entered. These findings of fact will not be set aside unless the trial court's findings are clearly erroneous. If the trial court based its findings on substantial evidence, even if the evidence is conflicting, this Court will not overturn those findings on appeal. Furthermore, this Court will not substitute its view of the facts for that of the trial court. However, we exercise free review over matters of law."

Id. (quoting *Vreeken*). *Accord Kemmer v. Newman*, 161 Idaho 463, 466, 387 P.3d 131, 134 (2016). And as the opinion in *Kemmer* further explains, "Evidence is regarded as substantial if a reasonable trier of fact would accept it and rely upon it in determining whether a disputed point of fact has been proven." *Id.* (citing *Miller v. St. Alphonsus Reg'l Med. Ctr., Inc.*, 139 Idaho 825, 832, 87 P.3d 934, 941 (2004)). *See also Kemmer*, 161 Idaho at 467, 387 P.3d at 135 ("Substantial evidence is 'relevant evidence as a reasonable mind might accept to support a conclusion.'" (quoting *State v. Straub*, 153 Idaho 882, 885, 292 P.3d 273, 276 (2013)).

Finally, where there is no substantial evidence in the record to support a district court's finding, the finding is reversed by the appellate court. *Kemmer*, 161 Idaho at 468, 387 P.3d at 136; *Searle v. Searle*, 162 Idaho 839, 847-48, 405 P.3d 1180, 1188-89 (2017); *Pope*, 103 Idaho at 225, 646 P.2d at 996.

B. Prejudgment Interest.

The award of prejudgment interest is reviewed for an abuse of discretion. *Huber*, 159 Idaho at 841, 367 P.3d at 236. As the opinion in *Huber* explains:

> "When examining whether a district court abused its discretion, this Court considers whether the district court: (1) perceived the issue as one of discretion; (2) acted within the outer boundaries of

> that discretion and consistently within the applicable legal standards; and (3) reached its decision by an exercise of reason."

Id. at 841-42, 367 P.3d at 236-37 (citation omitted).

IV. ARGUMENT

A. The District Court Erred In Reducing Burns' Damages Award For The Difference Between The Temporary Facilities' Sales And Cost Of Materials.

The Judgment on appeal grants Burns $1,049,250.90 in reliance damages, among other relief not contested by Burns. In this regard, one of the three substantive issues in this cross-appeal identified in the above Summary of the Dispute is whether the district court erred in eliminating from Burns' damages award over $850 thousand of net costs that Burns incurred with respect to its concrete batch plant. The $850 thousand reduction at issue is comprised of two distinct components.

The first component consists of a reduction in the amount of $412,142.63 based on the difference between the gross sales and the cost of materials sold from the Temporary Facility.[1] Exhibit 7 (a true and correct copy of which is attached hereto) is the basis for the district court's reduction. But in addition to the material costs of $213,053.82 reflected in Exhibit 7, Burns also incurred expenses in operating the Temporary Facility for equipment and plant costs, the write off of uncollected receivables, labor costs, and fuel costs. In fact, Exhibit 7 reflects a $325,606.72 *net loss* from operating the Temporary Facility, and not a net profit. Moreover, not

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[1] *See Findings & Conclusions* 16 ("Plaintiffs should be awarded $1,049,250.90 in reliance damages, calculated as follows: $1,461,393.53 (expenditures made in reasonable reliance on the Agreement) - $625,196.45 (compensation received by Plaintiffs through sales) + $213,053.82 (cost of sales).") [*R*, p. 221]. ($213,053.82 - $625,196.45 = -$412,142.63, which is the amount here at issue.)

only was Allen Barger's and Kirk Burns' trial testimony establishing that the Temporary Facility lost money from operating uncontested at trial, but the district court expressly found as follows:

> **2. Net Loss**
>
> Plaintiffs ask this Court to add a finding that the temporary facility lost money after considering incremental profits, debt service, and sunk costs.
>
> The evidence supports this finding. The FOFCOL should be amended to add the following finding of fact:
>
> - *During its operation, the temporary facility suffered a net loss when considering incremental profits, debt service, and sunk costs.*

Supplemental Findings & Conclusions 6-7 (emphasis in original) [*R*, pp. 241-42]. *See also id.* at 9 ("During its operation, the temporary facility suffered a net loss when considering incremental profits, debt service, and sunk costs.") and at 21 (same) [*R*, pp. 245 & 257].

Accordingly, because *all* the evidence at trial established and the district court found that the Temporary Facility incurred a net loss from operations, the district court erred in reducing Burns' damages award by the $412,142.63 difference between the gross sales realized and the material costs incurred at the Temporary Facility. Or stated differently, there is no substantial evidence in the record to support a finding that when all the costs Burns incurred in operating the Temporary Facility are considered – rather than an arbitrary subset of these costs – Burns obtained any financial benefit at all from its operation. Nor is there any substantial evidence in the record to support the district court's arbitrary extraction from Exhibit 7 of but two amounts therein reflected and subtraction of the $412,142.63 difference between the two amounts from the net costs incurred for the Driggs batch plant included in Exhibit 8. And based on the absence

of any such substantial supporting evidence, the district court's reduction of Burns' damages award by $412,142.63 should be reversed. *Kemmer*, 161 Idaho at 468, 387 P.3d at 136; *Searle*, 162 Idaho at 847-48, 405 P.3d at 1188-89; *Pope*, 103 Idaho at 225, 646 P.2d at 996.

B. The District Court Erred In Not Identifying The Specific Costs It Eliminated From Burns' Damages Award.

The second distinct component of the over $850 thousand the district court eliminated from Burns' damages award being contested by this cross-appeal consists of a reduction in the amount of $443,951.25 from the total net costs Burns incurred for the Driggs batch plant included in Exhibit 8.[2]

As established by Allen Barger's trial testimony, the many thousands of documents supporting the 7,300+ line items reflected in Exhibit 8 were included in 73 binders produced at trial but not introduced into evidence, with Exhibit 8 being admitted upon stipulation of counsel as a summary of the voluminous supporting documentation. And as noted above, Teton County introduced no evidence at trial disputing any of the information reflected in Exhibit 8.

The district court's $443,951.25 reduction from the total net costs Burns incurred for the Driggs batch plant is based *solely* on the court's following explanation with respect to five categories of costs:

> The evidence in the record does not indicate how expenditures described as "travel" were incurred. Plaintiffs did not

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[2] *See Findings & Conclusion* 8 ("As illustrated in Exhibit 8, Burns Concrete's financial records show net expenditures of $1,905,344.78 from December 2006 through the date of trial.") [*R*, p. 213], *and id.* at 9 ("Burns Concrete incurred $1,461,393.53 in expenditures made in reasonable reliance on the Agreement." (citing Exhibit 8)) [*R*, p. 214]. ($1,905,344.78 - $1,461,393.52 = $443,951.25, which is the amount here at issue.)

> persuade the Court that travel expenses were reasonable or were incurred in reliance on the Agreement.
>
> The record does not establish how each of the line entries for "Legal Expenses" was incurred. Plaintiffs did not persuade the Court that the claimed legal expenses were incurred in reliance on the Agreement.
>
> Plaintiffs' lost and were unable to recover the records verifying the cost of consumables labeled as "truck alloc" on Exhibit 8. This Court finds those charges to be speculative and does not include them in damages.
>
> Costs incurred to prepare presentations to Teton County for a CUP or zone variance were made for the purpose of complying with land use statutes and ordinances and are not attributable to reliance on the Agreement.
>
> * * *
>
> Plaintiffs' expenditures, incurred in preparation for Plaintiffs' performance under the Agreement, shall [only] be permitted from February 26, 2007, onward.

Findings & Conclusions 9 & 16 [*R*, pp. 214 & 221]. Thus, not only did the district court not identify the specific line items of costs in Exhibit 8 that were disallowed, but the district court did not even identify the amount of costs included within any of the five categories of disallowed costs. Nor did the district court identify any substantial evidence in the record supporting its determination to reject the trial testimony of Allen Barger and Kirk Burns supporting those costs falling within the first four of the above categories.

Based both on the lack of findings and evidence in the record to support the district court's $443,951.25 reduction, Burns moved the court to make additional findings of fact. *Supplemental Findings & Conclusions* 4-5 (stating that Burns asked the district court to make

among additional requested findings: "Which specific line items in Exhibit 8 were eliminated from this Court's damages calculations and why.") [R, pp. 239-40]. However, the district court declined to make the additional requested findings on the grounds that "[t]he Court's findings sufficiently provide a clear understanding of the basis of its decision." *Id*. at 7-8 [R, pp. 242-44].

Because, however, Exhibit 8 includes over 7,300 line items of charges and credits and is not organized by the five categories of disallowed costs identified by the district court, it is impossible for either the parties or this Court to review Exhibit 8 and determine (i) whether in fact there were $443,951.25 of net charges that are attributable to the five categories, or (ii) whether there was uncontested trial testimony supporting any of the disallowed charges that the district court overlooked, or (iii) whether there is substantial evidence in the record supporting the district court's lump-sum disallowance that a reasonable trier of fact would accept, or (iv) whether there is no substantial evidence in the record supporting the district court's disallowance of any particular line items of costs included in Exhibit 8. Moreover, if this Court reverses the district court's disallowance of all prejudgment interest, the amount of prejudgment interest awardable cannot be calculated without knowing what line items of costs are recoverable by Burns.

Accordingly, the district court's finding reducing Burns' damages award by the amount of $443,951.25 should also be reversed and, if this Court determines that there *may* be an adequate basis to support some reduction in Burns' damages award, the matter should be remanded to the district court to make the necessary findings to allow for a meaningful appellate review. *Owen v. Boydstun*, 102 Idaho 31, 36, 624 P.2d 413, 418 (1981) ("if it appears that an

issue was before the lower court but that the court failed to make the mandatory findings thereon as required by Rule 52(a), the case normally will be remanded with directions that the appropriate findings be made."). *Accord Pope*, 103 Idaho at 225, 646 P.2d at 996.

C. The District Court Erred In Holding That Rescission Of The Agreement Is Unavailable As A Matter Of Law.

It was both established and undisputed that Teton County has prevented Burns from constructing the Permanent Facility since 2007 and operating the Temporary Facility from 2012 through trial. Yet the district court reversed its prior grant of Burns' requested rescission of the Agreement *as a matter of law*, on the stated grounds that "Plaintiffs received the benefit of a zone change to light industrial and that the value of that benefit had not been tendered back to Teton County." *Findings & Conclusions* 11 [*R*, p. 216] (citing *Pretrial Decision* 17 [*R*, p. 91]). In a footnote to this finding the district court explained that "Plaintiffs clearly benefitted from the zone change and the ability to operate the temporary facility[,]" because (i) "Plaintiffs made incremental profits from 2007 through 2010"; (ii) "Had they continued in operation, they would have paid off all debts and recognized a net profit by 2017"; and (iii) "Teton County residents were impacted by Plaintiffs' operations." *Id*. at 11 n.3 [*R*, p. 216].

The issue of whether Burns financially benefitted from the operation of the Temporary Facility is refuted by the district court's own thrice stated supplemental finding quoted above that "[d]uring its operation, the temporary facility suffered a net loss when considering incremental profits, debt service, and sunk costs." [*R*, pp. 242, 245 & 257.] Thus, there was no financial benefit for Burns to tender to Teton County. Nor, of course, was there any financial benefit to

tender to Teton County from hypothetical operations that were proscribed by Teton County and weren't conducted by Burns. Further, even if local residents were impacted by operations at the Temporary Facility – and there is no evidence in the record that they were – Burns couldn't possibly identify, measure, and tender to unidentified third parties' hypothetical impacts.

Finally, even Teton County's own appraiser opined in Exhibit 13 that the value of the Property with its changed zoning was only $476,000 [*Ex*, pp. 245 & 265], whereas it was purchased for $823,119 (or approaching twice its rezoned value), as is established by line items 1-3 in Exhibit 8 [*Ex*, p. 2]. Accordingly, there is no evidence in the record (let alone any substantial evidence) establishing that Burns obtained any benefit at all from the zone change of the Property to light industrial or the prior but now long-proscribed operation of the Temporary Facility that Burns might have "tendered back to Teton County," contrary to the district court's finding.

In *Wilson v. Bogert*, 81 Idaho 535, 543-44, 347 P.2d 341, 346 (1959), the Supreme Court held that the repudiation of all liability under a compromise agreement by the defendants constitutes "a rescission of the compromise agreement on the part of defendants . . . ." Similarly, the Supreme Court held in *Sorensen v. Larue*, 43 Idaho 292, 302, 252 P. 494, 497 (1926), that a vendor plaintiff who "insisted up to the institution of this suit, and even until the interlocutory decree, that [his] title was sufficient[. . . had] by his conduct and by the bringing of the suit, declared the contract rescinded without right to do so." And based on the holdings in *Wilson* and *Sorensen*, Teton County's repudiation of Burns' continuing rights under the Agreement, including the right to operate the Temporary Facility, and its filing of the Counterclaim to,

among other things, shut down the operation of the Temporary Facility constitute a rescission of the Agreement.

The rescission or repudiation of an agreement by a contracting party entitles the other party to rescind. *Wilson*, 81 Idaho at 543, 347 P.2d at 346 ("A rescission or repudiation of an executory compromise agreement by one party thereto confers a right of election upon the other party. He may accept such rescission and himself rescind the agreement . . ."); *Sorensen*, 43 Idaho at 302, 252 P. at 497 ("The respondent, by his conduct and by the bringing of the suit, declared the contract rescinded without right so to do. The appellants, if not in default, had a right to adopt his rescission and breach of the contract, and thereupon to rescind . . ."); *Holley v. Holley*, 128 Idaho 503, 509, 915 P.2d 733, 739 (Ct. App. 1996) (quoting *Wilson*). Burns' right to rescind the Agreement is therefore established both by Teton County's material breach of the Agreement and by its own repudiation and rescission of the Agreement.

Accordingly, the district court's holding that rescission of the Agreement is unavailable to Burns as of a matter law should be reversed both because there is no substantial evidence in the record that Burns obtained any benefit under the Agreement and because Teton County has itself repudiated and rescinded the Agreement under Idaho law.

D. The District Court Erred In Disallowing All Prejudgment Interest On The Damages Awarded To Burns.

As stated above, Exhibit 8 was admitted into evidence upon stipulation of counsel subject to the limitation that the prejudgment interest calculations reflected in the final four columns were not admitted, with the district court to determine after it had entered judgment how

prejudgment interest should be calculated and accrued based on the parties' post-judgment submissions. Burns therefore did not consider the issue of prejudgment interest in Plaintiffs' Proposed Findings of Fact and Conclusions of Law, filed August 24, 2018 [*R*, pp. 140-89].

After the district court nonetheless ruled in its *Findings & Conclusions* that Burns was not entitled to an award of prejudgment interest, Burns presented the legal authority supporting such an award in its Memorandum in Support of Plaintiffs' Motion for Amended and Additional Findings of Fact and Conclusion of Law, filed October 25, 2018 [*R*, pp. 226-235]. The district court thereafter restated its conclusion on the question of prejudgment interest as follows:

> Considering the inequity of Teton County's inability to ascertain the amount of claimed damages prior to Plaintiffs' preparation of Exhibit 8 and its supporting binders, along with the fact that this Court had to use its discretion to determine which damages were reasonably incurred in reliance on the Agreement, plaintiffs' claimed expenses did not become liquidated or mathematically ascertainable until after trial. Plaintiffs are not entitled to an award of prejudgment interest.

Supplemental Findings & Conclusions 16 [*R*, p. 252]. Notwithstanding the foregoing conclusion, however, the district court also acknowledged "Teton County's failure to object to any specific line item [in Exhibit 8] . . . ." *Id*. 15 [*R*, p. 251].

For the reasons discussed below, Burns submits that the district court abused its discretion in reaching its quoted conclusion of law by not acting "consistently within the applicable legal standards[.]" *Huber*, Idaho at 841-42, 367 P.3d at 236-37.

Both of Idaho's appellate courts have held that "'where the amount of liability is liquidated or capable of ascertainment by mere mathematical processes' interest is allowed from

a time prior to judgment, 'for in that event the interest in fully compensating the injured party predominates over other equitable considerations.'" *Ross v. Ross* 145 Idaho 274, 276-77, 178 P.3d 639, 641-42 (Ct. App. 2007) (multiple citations omitted). The district court's articulated "inequity of Teton County's inability to ascertain the amount of claimed damages prior to Plaintiffs' preparation of Exhibit 8 and its supporting binders" is directly at odds with the established legal principle of fully compensating the injured party repeatedly confirmed by Idaho's appellate courts.

The central question, therefore, is not where the equities may be perceived to fall, but whether Burns' damages claim set forth in Exhibit 8 was liquidated or capable of ascertainment by mere mathematical processes. In this regard, both of Idaho's appellate courts have also held:

> "[D]amages are unascertainable where some factor necessary to calculate the amount of damages must be determined by a trier of fact." *Ross v. Ross*, 145 Idaho 274, 277, 178 P.3d 639, 642 (Ct. App. 2007). Contrastingly, "[a] claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance upon opinion or discretion." *Id.* (internal citation omitted).

Huber, 159 Idaho at 845 n.6, 367 P.3d at 240 (emphasis added). And as the Supreme Court went on to explain in the same quoted footnote, "the parties agreed that Huber's salary was $180,000 and, therefore, the amount owed was certain and exact." *Id.* (emphasis added). *See also Ross*, 145 Idaho at 277, 178 P.3d at 642 (stating that "claims for money paid out" are an example of a liquidated claim). Furthermore, and as the Court of Appeals explained in *Ross*:

> The mere fact that a claim is disputed or litigated does not render damages "unascertainable," for if this were the case, a party could delay payment without incurring interest expense by disputing and

> litigating any claim, and prejudgment interest would never be awarded.

Id. (citations omitted).

Although, as discussed above, the district court eliminated over $850 thousand of net costs from Exhibit 8, no adjustment at all was made to the remaining line items totaling $1,049,250.90 in reliance damages. *See supra* note 1. In fact, neither the amount nor the date of payment of *any* of the line items of costs reflected in Exhibit 8 was disputed by Teton County, both as the trial transcript establishes and as the district acknowledged. And precisely because none of the amounts or dates of payment of any of those line items of costs reflected in Exhibit 8 for which reliance damages were granted were disputed by Teton County – and which were found by the district court "to be accurate and legitimately incurred" – at least $1,049,250.90 of Burns' costs were both liquidated and capable of ascertainment by mere mathematical process. For as held by the court in *Ross*:

> In the present case, the amounts of Rick's three checks applied toward the purchase of the property and his payments for improvements on the property were readily ascertainable. *Compare Davis [v. Prof'l Bus. Serv., Inc.]*, 109 Idaho at 817, 712 P.2d at 518 (award of prejudgment interest affirmed where, "[I]n calculating plaintiff's damages . . . all the district court had to do was add up the amount of the checks."). *See also Dillon [v. Montgomery]*, 138 Idaho at 618, 67 P.3d at 97 (contract set forth procedure for ascertaining damages, and all the parties needed to do was add up the figures); *McGill v. Lester*, 108 Idaho 561, 700 P.2d 964 (Ct. App. 1985) (reimbursement for funds paid in an attempt to purchase property were ascertainable by mathematical computation). <u>These claims did not become unascertainable merely because Rick also claimed, in the same complaint, unliquidated claims of compensation for his labor</u>.

Ross, 145 Idaho at 278, 178 P.3d at 643 (emphasis added).

The opinion in *Ross* also decides the specific question of whether prejudgment interest is obtainable on only those components of a claim that are liquidated or ascertainable, "or whether the entire award is made unascertainable when any portion of it is unliquidated." *Id.*

> In a number of prior opinions, we have examined discrete parts of the total damages award to determine if prejudgment interest was appropriate on those portions. For example, in *Child [v. Blaser]*, 111 Idaho 702, 727 P.2d 893, the plaintiff was awarded damages for the lost value of lots after the defendant breached an agreement to complete the subdivision. The court also ordered reimbursement for taxes and water assessments that the plaintiff had paid. We determined that the value of the lots was not easily ascertainable because it required the trial court to sift through conflicting expert testimony and differing theories of recovery, but that prejudgment interest was owed on the amounts expended for taxes and water assessments because the dates and amounts of those expenditures were not disputed. Similarly, we approved prejudgment interest on discrete portions of a larger damages award in *Prouse v. Ransom*, 117 Idaho 734, 791 P.2d 1313 (Ct. App. 1989) and *Bergkamp v. Carrico*, 108 Idaho 476, 700 P.2d 98 (Ct. App. 1985). We have been cited to no authority, and have found none, disallowing prejudgment interest on a liquidated component of a larger damages award, and we perceive no reason for a rule that would deprive a claimant of prejudgment interest on a plainly liquidated claim merely because he or she also pressed an entirely separate, unliquidated claim in the same litigation.

Ross, 145 Idaho at 278, 178 P.3d at 643 (emphasis added).

Accordingly, the district court's conclusion that "plaintiffs' claimed expenses did not become liquidated or mathematically ascertainable until after trial" is directly at odds with the established legal principle that "'[a] claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance upon opinion or discretion.'" *Huber*, *supra* (quoting *Ross*).

It is also established Idaho law that prejudgment interest on the component costs incurred by a plaintiff is awardable when rescission is granted. For as explained in *Benz v. D.L. Evans Bank*, 152 Idaho 215, 268 P.3d 1167 (2012):

> In *Sorensen v. Larue*, 47 Idaho 772, 278 P. 1016 (1929), we held that "[w]hen rescission is granted the vendee, he is entitled not only to a return of so much of the purchase money as he has paid, but to interest thereon from time of payment." *Id.* at 778, 278 P. at 1018. We also held that the purchaser may recover "the amount of his necessary outlays, taxes, etc., incurred under the contract, with interest." *Id.* at 778-79, 278 P. at 1018.

Benz, 152 Idaho at 229, 268 P.3d at 1181 (emphasis added). Thus, whether or not the Agreement is rescinded, Burns is entitled to recover prejudgment interest on those components of damages set forth on an item-by-item basis in Trial Exhibit 8 that are liquidated or capable of ascertainment by mere mathematical processes.

Finally, as the Supreme Court has repeatedly held:

> Prejudgment "[i]nterest should be allowed as a matter of law from the date the sum became due in cases where the amount claimed, even though not liquidated, is capable of mathematical computation." *Mitchell v. Flandro*, 95 Idaho 228, 228, 506 P.2d 445, 445 (1972).

Opportunity, L.L.C. v. Ossewarde, 136 Idaho 602, 609, 38 P.3d 1258, 1265 (2002) (emphasis added). *Accord Greenough v. Farm Bureau Mut. Ins. Co. of Idaho*, 142 Idaho 589, 592, 130 P.3d 1127, 1130 (2006) (quoting *Dillon v. Montgomery*, 138 Idaho 614, 617, 67 P.3d 93, 96 (2003)); *Obray v. Mitchell*, 98 Idaho 533, 539, 567 P.2d 1284, 1290 (1977) (citing *Taylor v. Herbold*, 94 Idaho 133, 483 P.2d 664 (1971)).

Based on the foregoing points and authorities, the district court abused its discretion in disallowing all prejudgment interest on the damages awarded to Burns because it failed to act consistently within the applicable legal standards adopted under controlling Idaho precedent. The district court's denial of all prejudgment interest should therefore be reversed and the matter remanded to the district court to make the appropriate findings regarding, and determination of, the amount of prejudgment interest awardable under Idaho law. *Owen v. Boydstun, supra.*

E. Burns Is Entitled To Its Reasonable Attorney Fees Incurred On Appeal.

The district court held that Burns prevailed in this civil action. Order Granting Motion to Augment, filed in this appeal on October 9, 2019, Ex. 5 at pp. 224-26. In this regard, Paragraph 12.e of the Agreement provides: "If any party shall bring suit against the other party to enforce this agreement, the prevailing party shall be entitled to reasonable attorney fees and costs." Exhibit 3 at 6 [*Ex.* p. 205]. Accordingly, Burns should be awarded the attorney fees incurred in prosecuting this cross-appeal in accordance with I.A.R. 41 and I.R.C.P. 54(e)(1) ("In any civil action the court may award reasonable attorney fees, including paralegal fees, to the prevailing party or parties as defined in Rule 54(d)(1)(B), when provided for by any statute or contract."). *Indian Springs LLC v. Indian Springs Land Inv., LLC*, 147 Idaho 737, 751, 215 P.3d 457, 471 (2009) (awarding attorney fees on appeal pursuant to contractual provisions and I.R.C.P. 54(e)(1)).

V. CONCLUSION

For the reasons discussed above, Burns respectfully requests this Court to reverse the district court's (a) reduction of Burns' damages award by the $412,142.63 difference between

the Temporary Facilities' sales and cost of materials, (b) reduction of Burns' damages award by the $443,951.25 lump-sum disallowance of costs included in Exhibit 8, (c) holding that rescission of the Agreement is unavailable as a matter of law, and (d) disallowance of all prejudgment interest on the damages awarded to Burns, together with both remanding the case back to the district court for further proceedings consistent with this Court's opinion and awarding Burns its reasonable attorney fees and costs incurred for this cross-appeal.

DATED this 24th day of October 2019.

PARSONS BEHLE & LATIMER

By *__/s/ Robert B. Burns__*
Robert B. Burns
Attorneys for Plaintiffs–Counterdefendants–Respondents–Cross-Appellants

VI. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of October 2019, I caused the foregoing **CROSS-APPELLANTS' BRIEF** to be served by the method indicated below and addressed to the following:

Billie J. Siddoway
Lindsey A. Blake
Teton County Prosecuting Attorney
230 N. Main Street, Room 125
Driggs, Idaho 83422-5124
Facsimile (208) 354-2994

☐ U.S. Mail
☐ Hand Delivered
☐ Facsimile
☐ Email
☒ iCourt E-File Delivery

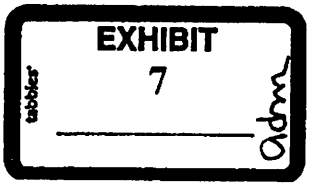
By *__/s/ Robert B. Burns__*
Robert B. Burns

BURNS CONCRETE, INC.

	DRIGGS FACILITY JAN 1, 2007 - DEC 31, 2010
SALES - CONCRETE - DRIGGS	504,146.52
TRUCKING - DELIVERY - DRIGGS	7,675.00
SALES - SAND & GRAVEL - DRIGGS	99,212.50
SALES - BAD GL # - DRIGGS	420.00
SALES - OTHER PRODUCTS - DRIGGS	28.00
SALES - ADDITIVES - DRIGGS	13,938.75
TOTAL SALES - DRIGGS	625,420.77

	QUANTITY	UM	$ / UM	
1/2 INCH ROCK	14.71	TN	8.24	121.21
1 1/2 INCH ROCK	37.36	TN	7.25	270.86
3/4 ROCK	4,091.92	TN	7.36	30,116.53
3/8 ROCK	87.07	TN	8.24	717.46
NON-CHLORIDE ACC	309.14	GA	6.13	1,895.03
ADVA 100	210.15	GA	12.00	2,521.80
AIR ENTMNT	155.80	GA	5.32	828.86
CALCIUM CHLORIDE	378.00	GA	1.18	446.04
CEMENT	1,201.26	TN	116.62	140,090.94
DARASET	691.95	GA	6.13	4,241.65
DELAY SET	24.72	GA	13.79	340.89
FLYASH	26.28	TN	104.60	2,748.89
WATER REDUCER	402.17	GA	6.23	2,505.52
WATER	0.08	TN		-
WATER	107,328.00	GA		-
SAND - COTTON	3,175.54	TN	8.24	26,166.45
SAND - ROBERT	5.06	TN	8.24	41.69
TOTAL MATERIAL COS				213,053.82
EQUIPMENT & PLANT COSTS	4,139,550 (AMORT 7 YR)			591,364.00
TOTAL COGS*				804,417.82
NET LOSS - BEFORE WRITE OFF				(178,997.05)
SILVER TREE CONTRACTORS COSTS W/O OF RECEIVABLES				(146,609.67)
NET LOSS - DRIGGS				(325,606.72) *

* - NOT INCLUDED ABOVE:
LABOR COSTS
FUEL



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