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Idaho Supreme Court
Karel Lehrman, Clerk of the Court
By: Brad Thies, Deputy Clerk

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

RESPONDENTS' 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 dismissing Burns' complaint and all of Burns' claims, 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.

Following Teton County's appeal to this Court of the judgment entered by the district court, Burns filed a cross-appeal and has filed the Cross-Appellants' Brief concurrently herewith.

B. Summary of The Proceedings.

Burns does not dispute the Course of Proceedings stated by Teton County at pages 2-3 in Appellant's Brief, but augments the description of the proceedings stated by both (i) incorporating herein by reference the Course of the Proceedings included at pages 3-5 in Cross-Appellants' Brief, and (ii) clarifying that the final judgment appealed by Burns in the prior appeal in this case dismissed Burns' complaint and all of Burns' claims [Clerk's Record, filed June 6, 2019 ("*R*"), p. 60].

C. Statement of The Facts.

In addition to disputing and clarifying below select statements made at pages 3-10 in Appellant's Brief, Burns augments Teton County's Statement of Facts by incorporating herein by reference the Statement of the Facts included at pages 5-27 in Cross-Appellants' Brief (hereinafter "*SOF*").

(i) Cessation of Plant Operations.

Teton County asserts at page 7, paragraph 21, of Appellant's Brief that Burns did not cease operations of the temporary plant in response to Teton County's 2012 demand letters. This is correct but misleading and requires clarification.

The district court's findings regarding Burns' cessation of plant operations are as follows:

> The fact that Teton County had not yet breached the contract when Burns Concrete incurred many of its expenses in reliance on the Agreement is immaterial to the determination of reliance damages. Teton County had created a sufficiently hostile environment as to cause, at least in part, Plaintiffs' decision to cease operations in Driggs. Subsequently, Plaintiffs continued to seek a variance to construct the permanent facility. After Plaintiffs were denied the variance, Teton County sent Plaintiffs letters

> revoking Plaintiffs' ability to operate the temporary facility and demanding the temporary facility's removal. Teton County's actions breached the Agreement. Both the County's actions prior to cessation of operations in 2010 and in breach of the Agreement prevented Plaintiffs from operating under the terms of the Agreement.

Memorandum Decision and Order Re: Motion for Amended and Additional Findings of Fact and Conclusions of Law, filed January 18, 2019 ("*Supplemental Findings & Conclusions*"), at 10-11 [*R*, pp. 246-47]. *See also* Findings of Fact and Conclusions of Law, filed October 4, 2018 ("*Findings & Conclusions*"), at 8 ("Burns Concrete's decision to cease operations in 2010 was based, at least in part, on the existence of an unfavorable environment in Teton County, created by actions of the Teton County Board of Commissioners.") [*R*, p. 213].

The district court's foregoing findings are supported by substantial and uncontested evidence in the record. *See SOF* ¶¶ 55-56.

(ii) Assignment of Claims.

Teton County asserts at page 8, paragraph 24, of Appellant's Brief that it was not the intent for Burns Holdings to transfer all of its claims against Teton County to Burns Concrete. This assertion is also correct but misleading and requires clarification.

The district court ruled on the applicable question as follows:

> [S]ince 2013, both Burns Holdings and Burns Concrete have an equal interest in the real property. Both Plaintiffs have assigned to each other an undivided interest [in] their respective claims in this action.

Findings & Conclusions 10 [*R*, p. 215].

The district court's foregoing ruling is supported by substantial and uncontested evidence in the record. *See SOF* ¶¶ 51-53; Exhibit 4 [Trial Exhibits, filed June 6, 2019 ("*Ex*"), pp. 104-06]; and Exhibit 5 [*Ex*, pp. 438-40].

(iii) Support for Claimed Damages.

Teton County asserts at page 9, paragraph 27, of Appellant's Brief that the damages claimed by Burns were not generated from accounting software and were not standard financial reports. This too is correct but misleading and requires clarification.

The district court's findings on the applicable question are as follows:

> 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. Allen Barger, Burns Concrete's controller, created Exhibit 8. In order to create Exhibit 8, Barger sifted through thousands of invoices, payments and other financial documents. Often, only a portion of any given invoice or payment was attributable to the Driggs facility, as opposed to other Burns Concrete sites. Barger's efforts to compile Exhibit 8 required him to work with both Kirk Burns and Burns Concrete's attorney and took one year to complete.
>
> This Court accepts the majority of those expenses shown on Exhibit 8 as legitimately incurred in reliance on the Agreement.

Findings & Conclusions 8 [*R*, p. 213].

The district court's foregoing finding is supported by substantial and uncontested evidence in the record. *See SOF* ¶¶ 33-38 and Exhibit 8 [*Ex*, pp. 2-102].

(iv) Support for Demobilization Costs.

Teton County asserts at page 9, paragraph 32, of Appellant's Brief that the estimated demolition costs to restore the subject property to a marketable condition are speculative costs

that have not yet been incurred. Although Teton County is correct in stating that the demobilization costs in question have yet to be incurred, the amount of these costs was supported by competent expert testimony.

The district court's finding on the applicable question is as follows:

> Burns Concrete's estimate of costs related to demobilization, as included in Exhibit 8, are reasonable.

Findings & Conclusions 9 [*R*, p. 214].

The district court's foregoing finding is supported by substantial and uncontested evidence in the record. *See SOF* ¶¶ 25, 37, 44, 59(b) & 62 and Ex. 9 [*Ex*, p. 1].

(v) Loss Caused by Breach of Agreement.

Finally, Teton County asserts at page 10, paragraph 34, of Appellant's Brief that Burns would not have generated any profits if the parties' agreement (the "Agreement") [*Ex*, pp. 200-11] had not been breached by Teton County. Teton County's contention was litigated at trial and decided to the contrary.

The district court's findings on whether Burns would have realized profits if Teton County had not breached the Agreement are as follows:

> - If Burns Concrete had been able to continue operating the temporary facility it would have made incremental profits every year from 2010 on. Burns Concrete's revenues would have permitted it to recover its costs over time, pay off all of its debt and produced a net income by 2017.

Findings & Conclusions 8 [*R*, p. 213].

> - Teton County did not establish Plaintiffs would have suffered losses entitling them to an additional offset.

Id. at 16 [*R*, p. 221].

- While Plaintiffs suffered a loss during the temporary facility's operation, it was projected, even by Teton County's expert, to make a net profit by 2017.

Supplemental Findings & Conclusions 9 [*R*, p. 245].

- If the Agreement had been fully performed, Plaintiffs would have paid off its expenses (including those encompassed by the reliance damages) and debt and produced a net profit by 2017. Teton County did not establish that Plaintiffs would have suffered a net loss even if it had been allowed to continue in operation. Teton County failed to prove losses sufficient to offset Plaintiffs' reliance damages.

Id.

The district court's foregoing findings are supported by substantial evidence in the record. Thus, the president and CEO of Burns Concrete, Kirk Burns, 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 of the costs included in Exhibit 8 over time and then generate a profit. [Trial Transcript, filed June 6, 2019 ("*Tr*"), p. 269, L. 13 – p. 273, L. 3.]

Further, Burns Concrete's rebuttal expert, Bruce L. Ross, calculated the incremental profit rate and cash flow for the temporary facility starting with the information contained in the report of Teton County's expert, Richard S. Hoffman, and explained each adjustment that should be made to Mr. Hoffman's report. [*Tr*, p. 718, L. 18 – p. 720, L. 18.] Mr. Ross then summarized his expert opinions as follows:

Q. So looking at this Slide 20, then, what is that telling you with respect to every dollar of concrete sales that would be made down at the Driggs facility? What is the impact, then, on incremental profits?

A. The impact is that Mr. Burns and – and I think Mr. Hoffman used these words – would be putting [sic] 45 cents for every dollar of concrete he could sell.

So for – for every yard of concrete he put out there, he'd be earning a 45 percent profit rate or cash flow rate.

Q. So for every dollar he collected, he put 45 percent – 45 cents in profits into his pocket, right?

A. Right.

Q. Does that give him the incentive to sell concrete?

A. Absolutely. He's already paid all the money to – to – to make the facility operate. All of that is debt. He had – he wouldn't [sic] have a profit overall at – at some point.

But every time he sold a yard, he'd be earning money. So he'd want to sell more and more yards. He'd want to sell as many yards as he could.

Q. And that's because he'd already paid for all the plant and all of the equipment and all of the fixed costs associated with running it?

A. Correct.

Q. And all of the plant and all of the equipment and all of the fixed costs for running it are still out there [or] at the site over in Idaho Falls, ready to be used, to your knowledge, right?

A. Based on what I've been informed about and based on my own physical observation.

Q. And is – are those the so-called sunk costs that we've talked about?

A. They are.

Q. They don't relate to incremental profits, do they?

A. They do not. Sunk costs do not relate to incremental profits.

* * *

Q. Is he [Hoffman] also assuming that the – ultimately, that the – that the temporary facility is not out there when it is out there; that it's not operational when it is operational?

That it could not earn a profit or generate a return to Burns when it, in fact, would have if it had been allowed to operate; all those things?

A. Yeah. I mean, as I said before, he's really calculating a return to shareholders.

And he may be right on that point in the sense that the shareholders might not have gotten a return at this point because the temporary facility's been – you know – you know, had – it's been closed. It had its problems. It suffered from – that's been described in this case.

But I – you know, it's pretty clear that, if he can sell a minimal number of yards, he would earn money on those yards.

And any reasonable businessperson would want him to operate a facility because he's already spent all the money. It's just sitting out there. He's not getting anything back for all the money spent.

And he – according to the numbers that we have in front of us – and this is where Mr. Hoffman and I agree – that, on an incremental basis, the Driggs facility, the temporary facility, would have earned an incremental profit.

Q. And that was reflected in every single year in Mr. Hoffman's report for the temporary facility, that it was generating an incremental profit – a significant incremental profit if you lay aside the debt payments, right?

> A. Yes. Again, your Honor, I'm just looking at Mr. Hoffman's Schedule 2.1. And in there, he has a line item that says "Expected Net Incremental Profit."
>
> And over the years of – the partial year 2010 through 2017, he shows $488,000 in profit, incremental profit.
>
> Q. Incremental profit.
>
> A. And I – I disagree with that number. I think it would be higher because he put in those extra expenses that shouldn't be there. But if you leave out the debt, he's – he and I are in total agreement.
>
> Q. That being that the Driggs facility was generating an incremental profit for every year of its operation, correct?
>
> A. And/or predicted operation.
>
> Q. And projected operations –
>
> A. Correct.

[*Tr*, p. 721, L. 20 – p. 723, L. 5 & p. 727, L. 14 – p. 729, L. 6.] *See also* Exhibit 31 at Schedule 2.1 (a true and correct copy of which is attached hereto) (reflecting, inter alia, Hoffman's projections of $488,632 in total net incremental profits through 2017 and of $115,602 in net cash available for equity holders from 2017 operations, with all debt associated with the temporary facility having been fully repaid in 2016) [*Ex*, p. 133]. Moreover, Mr. Hoffman did not project that Burns would incur any losses or negative cash flow after the debt he attributed to the Driggs facility was fully repaid in 2016, nor did Hoffman project what profits Burns would have realized after 2017.

II. ADDITIONAL ISSUE PRESENTED ON APPEAL

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. Preliminary Determinations.

Before considering the merits of questions presented by a second appeal in a case, the appellate court must first determine whether the "law of the case" doctrine bars consideration of each question presented. For as explained in *PHH Mortgage v. Nickerson*, 164 Idaho 33, 423 P.3d 454 (2018):

> This Court must first address what issues are properly before it in this appeal. Idaho adheres to the "law of the case" doctrine, which provides that when "the Supreme Court, in deciding a case presented states in its opinion a principle or rule of law necessary to the decision, such pronouncement becomes the law of the case and must be adhered to throughout its subsequent progress, both in the trial court and upon subsequent appeal." This "doctrine also prevents consideration on a subsequent appeal of alleged errors that might have been, but were not, raised in the earlier appeal."
>
> The doctrine's principles are "best understood as rules of sensible and sound practice that permit logical progression toward judgment." "Without something like it, an adverse judicial decision would become little more than an invitation to take a mulligan, encouraging lawyers and litigants alike to believe that if at first you don't succeed, just try again." This would lead to wasted judicial resources and increased delay in resolving cases, which would only serve to erode the public's trust in the court system.
>
> The Nickersons' appeal focuses heavily on issues this Court decided in *Nickerson I*. Of the seventeen issues they state in their opening brief, most involve an attempt to re-litigate the prior determinations of this Court. Because we adhere to the "law of the

> case," this Court will not consider such issues. Accordingly, this Court will address only those issues that were not decided or could not have been raised in *Nickerson I*.

Id. at 38, 423 P.3d at 459 (emphasis added) (citations omitted).

B. Findings Of Fact And Matters Of Law.

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. <u>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</u>. 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. (emphasis added) (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)).

C. Summary Judgment.

The opinion in *Huber* also articulates the standards for reviewing a grant of summary judgment:

> Appeals from an order of summary judgment are reviewed de novo, and this Court’s standard of review is the same as the standard used by the trial court in ruling on a motion for summary judgment. Summary judgment is appropriate if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. I.R.C.P. 56(c). Under this standard, disputed facts are construed in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are drawn in favor of the non-moving party. Where the evidence reveals no disputed issues of material fact, then only a question of law remains, over which this Court exercises free review.

Huber, 159 Idaho at 841, 367 P.3d at 236 (citation omitted).

IV. ARGUMENT

A. The District Court Did Not Err In Its Award Of Reliance Damages To Burns.

Teton County contests the district Court’s award of reliance damages to Burns on five stated grounds. Each of these five grounds is rebutted below in the sequence argued in Appellant’s Brief.

(i) Idaho Precedent Establishes That Reliance Damages Are Recoverable by Burns.

Teton Count requests this Court to adopt a limitation precluding a contracting party “from pursuing reliance damages when expectation damages are available.” Appellant’s Brief

12. However, both of Idaho's appellate courts have previously held that reliance damages are available at the election of a wronged party when a contract has been breached. *Brown v. Yacht Club of Coeur d'Alene, Ltd.*, 111 Idaho 195, 198-99, 722 P.2d 1062, 1065-66 (Ct. App. 1986) (quoting Restatement (Second) of Contracts § 344 (1981) (hereinafter "*Restatement § 344*")); *Beco Constr. Co., Inc. v. Harper Contracting, Inc.*, 130 Idaho 4, 9, 936 P.2d 202, 207 (Ct. App. 1997) (citing *Brown*); and *Silverwing at Sandpoint, LLC v. Bonner Cnty.*, 164 Idaho 786, 797, 435 P.3d 1106, 1117 (2019) (quoting *Restatement § 344*).

In regard to established precedent such as that just cited, this Court has repeatedly held as follows:

> "When there is controlling precedent on questions of Idaho law the rule of stare decisis dictates that we follow it, unless it is manifestly wrong, unless it has proven over time to be unjust or unwise, or unless overruling it is necessary to vindicate plain, obvious principles of law and remedy continued injustice." *Asbury Park, LLC v. Greenbriar Estate Homeowners' Ass'n, Inc.*, 152 Idaho 338, 343, 271 P.3d 1194, 1199 (2012) (quoting *Greenough v. Farm Bureau Mut. Ins. Co. of Idaho*, 142 Idaho 589, 592, 130 P.3d 1127, 1130 (2006)).

Doe v. Doe, 160 Idaho 854, 859, 380 P.3d 175, 180 (2016). Teton County presents no persuasive reason why the long-established principles established in the Restatement and Idaho's two appellate courts, including the Supreme Court's opinion earlier this year in *Silverwing*, should now be jettisoned.

Furthermore, the uncontroverted testimony at trial was that it was not possible to reasonably establish the profits the temporary facility would have generated but for Teton County's breach. [*Tr*, p. 282, L. 10 – p. 283, L. 14 & p. 284, LL. 7-15.] Thus, there is no

evidence in the record supporting the supposition that Burns could reasonably calculate the amount of its expectation damages.

(ii) Teton County Failed to Prove That Burns' Reliance Damages Should Be Capped.

Teton County argues that Burns' reliance damages should be reduced by the amount Burns would have lost had Teton County not breached the Agreement. Appellants Brief 14. However, as quoted above, and as substantial evidence in the record supports, the district court expressly found:

> If the Agreement had been fully performed, Plaintiffs would have paid off its expenses (including those encompassed by the reliance damages) and debt and produced a net profit by 2017. Teton County did not establish that Plaintiffs would have suffered a net loss even if it had been allowed to continue in operation. Teton County failed to prove losses sufficient to offset Plaintiffs' reliance damages.

Supplemental Findings & Conclusions 9 [*R*, p. 245]. Accordingly, because Teton County failed to prove that Burns would have incurred a loss had it been allowed to operate the temporary facility, there is no justification for capping Burns' reliance damages. *See* Restatement (Second) of Contracts § 349 (hereinafter "*Restatement § 349*"):

> As an alternative to the measure of damages stated in § 347 [pertaining to expectation interest], the injured party has a right to damages based on his reliance interest, including expenditures made in preparation for performance or in performance, <u>less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed</u>.

(Emphasis added.) *Accord Silverwing*, 164 Idaho at 797, 435 P.3d at 1117 (quoting *Restatement § 349*).

(iii) The District Court Found That Burns' Reliance Damages Were Caused by Teton County's Breach.

Teton County contends that "[t]he district court failed to consider causation as part of its calculation of damages." Appellant's Brief 16. But the district court not only discussed the question of causation at pages 10-11 in its *Supplemental Findings & Conclusions* [*R*, pp. 246-47], it both articulated the controlling legal principles under Idaho law and made supplemental findings of causation.

Thus, as the district court properly concluded,

> The applicable legal standard applied to reliance damages is:
>
> > A party aggrieved by a breach of contract may be entitled to reimbursement for losses caused by its reliance on the contract, even if the aggrieved party elects to rescind the contract. *Brown v. Yacht Club of Coeur d'Alene, Ltd.*, 111 Idaho 195, 198, 722 P.2d 1062, 1065 (Ct. App. 1986). Reliance damages include expenses reasonably related to the purposes of the contract which would not have been incurred but for the contract's existence. *Id*. at 198-200, 722 P.2d at 1065-1067.
>
> *Beco Const. Co. v. Harper Contracting, Inc.*, 130 Idaho 4, 9, 936 P.2d 202, 207 (Ct. App. 1997).

Supplemental Findings & Conclusions 10 [*R*, p. 246.] The Supreme Court's opinion in *Silverwing* earlier this year adopted the foregoing legal standard:

> This *Restatement* [*§ 344*] provision makes it clear that reliance damages are intended to put SilverWing in as good as a position as it would have been in had the County not made the alleged promises. In other words, an award of reliance damages "returns the plaintiff to its precontractual position by putting a dollar value on the detriment the plaintiff incurred in reliance on the now-broken promise."

164 Idaho at 797, 435 P.3d at 1117 (italics added) (citation omitted).

And after articulating the controlling legal principles and relevant factual findings, the district court expressly found as follows:

- *Burns Concrete incurred $1,461,393.53 in losses caused by its reliance on the Agreement. Those reliance damages were reasonably related to the Agreement's purpose. Burns Concrete would not have incurred the expenses if not for the Agreement's existence.*

Supplemental Findings & Conclusions 11 (emphasis in original) [*R*, p. 247]. There is substantial evidence in the record supporting the district court's findings. *SOF* ¶¶ 6, 13, 14, 31, 42, 55 & 56.

(iv) The District Court Limited Burns' Reliance Damages to a Reasonable Duration.

Teton County also argues that Burns' damages should be limited to the period beginning with the date of the Agreement and ending "when it is no longer reasonable to incur additional expenses in reliance on the promise that has been breached." Appellant's Brief 16. The issues concerning the appropriate "beginning date" and "ending date" are discussed in turn.

The undisputed evidence at trial established that Burns incurred expenses for the Drigg's facility in reasonable reliance on the Agreement being subsequently executed. [*Tr*, p. 219, L. 11 – p. 221, L. 12; p. 460, LL. 8-25 & p. 229, L. 1 – p. 230, L. 6.] The cited trial testimony fully supports the district courts following findings:

> In this case, Teton County approved a zone change of the property from commercial to light industrial on February 26, 2007. That zone change was conditioned on Burns Holdings entering a development agreement. Subsequent to that date, the parties began to negotiate the terms of the Agreement. A majority of Plaintiffs' claimed expenditures, which occurred subsequent to February 26,

> 2007 and prior to August 31, 2007, were incurred in making improvements to Highway 33 (as required under the Agreement), grading the site, and relocating and assembling the "Johnson Ross" plant for use as the temporary facility. Teton County foresaw both the magnitude and type of these expenditures. This Court is not convinced, however, that Teton County did or could have foreseen Plaintiffs' expenditures, which arose prior to the zone change made on February 26, 2007. Plaintiffs' expenditures, incurred in preparation for Plaintiffs' performance under the Agreement, shall be permitted from February 26, 2007, onward.

Findings and Conclusions 15-16 [R, pp. 220-21].

Teton County nonetheless argues, as it did below, that reliance damages are limited to the period commencing with the execution of a contract. Appellant's Brief 17. And although there is admittedly authority for such a limitation, there is a clear split of authority on the question, with the Idaho Supreme Court having decided the question to the contrary. The district court provided the following detailed support for its determination of the law:

> Plaintiffs respond that under the facts of this case, expenses were incurred in reliance on the contract prior to the contract's execution and should be included in the damages calculation. Plaintiffs cite *Westfed Holdings, Inc. v. United States*, 52 Fed. Cl. 135, 161 (2002), in support of its position that pre-contract expenses should be permitted.
>
> In *Westfed*, the United States Court of Federal Claims noted that many jurisdictions do not permit a plaintiff to recover pre-contractual expenditures. It then explained:
>
>> Notwithstanding such authorities, <u>courts have permitted recovery of pre-contract expenses when the defendant knew of such expenses</u>. *See, e.g., Coastland Corp. v. Third Nat'l Mortgage Co.*, 611 F.2d 969, 979 (4th Cir.1979). Under *Restatement (Second) of Contracts* § 349 (1979), reliance interest includes "expenditures made in preparation for performance." *See also Goodman v. Dicker*, 169

F.2d 684, 685 (D.C.Cir.1948) (permitting recovery of "moneys which appellees expended in preparation to do business" under a promised franchise); *Sec. Stove & Mfg. Co. v. Am. Ry. Express Co.*, 227 Mo. App. 175, 51 S.W.2d 572, 577 (1932) (granting pre-contractual expenses as reliance recovery on the ground that "[t]he whole damage . . . was suffered in contemplation of defendant performing its contract, which it failed to do, and would not have been sustained except for the reliance by plaintiff upon defendant to perform it").

. . . [T]he Federal Circuit has focused less on when the contract was executed and more on whether the damage was foreseeable:

> In order to . . . [recover] . . . reliance damages . . . plaintiff's loss must have been foreseeable to the party in breach at the time of contract formation. . . . "Loss may be foreseeable as a probable result of a breach because it follows from the breach (a) in the ordinary course of events, or (b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know." In order to be entitled to reliance damages, a plaintiff must prove that both the magnitude and type of damages were foreseeable. . . . [To be foreseeable] "the injury that occurs must be one of such a kind and amount as a prudent man would have realized to be a probable result of his breach."

Landmark Land Co. v. United States, 256 F.3d 1365, 1378 (Fed. Cir. 2001).

> . . . [C]ourts have recognized and applied the Restatement concept of recovering reliance interest that includes preparation to perform in the *Winstar* context. *See, e.g.*, *Glendale*, 239 F.3d at 1383 ("A party may recover expenses of preparation of part performance, as well as other foreseeable expenses incurred in reliance upon the contract. . . . [T]he injured party has a right to damages based on his reliance interest, including expenditures made in preparation for performance or in performance") (internal quotations and citations omitted). *See also Glass v. United States*, 47 Fed.Cl. 316, 326 (2000) (permitting recovery of accounting and legal fees expended in preparation for merger), *vacated in part on other grounds*, 258 F.3d 1349 (Fed.Cir.2001).

Westfed Holdings, Inc. v. United States, 52 Fed. Cl. 135, [161-62] (2002).

The Idaho Supreme Court has also taken the approach that reliance damages may include expenses incurred before the parties reach an agreement. In *French v. Nabob Silver-Lead Co.*, 82 Idaho 120, 350 P.2d 206 (I960), the plaintiff negotiated a lease extension with defendants. As part of negotiations, defendants notified plaintiff that it would be unable to supply compressed air to him as it had in the past. Throughout contract negotiations, plaintiff consulted with defendants regarding his efforts to construct an airline and how the timing of that completion might affect the lease. Plaintiff constructed the airline before the lease agreement was executed. After defendants breached the contract, plaintiff sought damages based on his costs in constructing the airline. The trial court denied plaintiff damages. On appeal, the Idaho Supreme Court reversed, explaining: "The airline was built in anticipation of a new lease in accordance with the suggestion of respondent's officers. Expenses incurred by a party in anticipation of or preparation for performance of a contract may be recovered as damages in an action for a breach thereof." *French v. Nabob Silver-Lead Co.,* 82 Idaho 120, 128, 350 P.2d 206, 210 (1960).

Findings & Conclusions 14-15 (emphasis added) [*R*, pp. 219-20].

Teton County presents no persuasive reason why the Idaho Supreme Court's holding in *French* is not controlling under the rule of stare decisis articulated in *Doe*, 160 Idaho at 859, 380 P.3d at 180.[1]

Teton County next argues that Burns' reliance damages should be limited to the period ending four years after Teton County approved the rezone on February 26, 2007, because "by February 26, 2011, Teton County was authorized by statute to rezone the Property." Appellant's Brief 18 (citation to record omitted). This argument is meritless for the elemental reason that Teton County has never had the right to rezone Burns' property because Burns has not breached the Agreement, as held in *Burns Concrete, Inc. v. Teton County*, 161 Idaho 117, 384 P.3d 354 (2016) ("*Burns Concrete I*"). Further, Teton County contends to this very day that the

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[1] *Cf.* DAN B. DOBBS, LAW OF REMEDIES § 12.3(1) (2d ed. 1993):

> *Recoupment through performance: pre-contract expenses and fixed overhead.* Given an enforceable set of promises, perhaps the most important reason for allowing recovery for some kinds of reliance expense is that they represent a kind of partial expectancy; they would have been recouped by the gain the plaintiff would have made if the defendant had performed. If this is correct, it would be perfectly sound to award the plaintiff any reasonably proven "partial expectancy." On this basis one might justify an award of pre-contract expenditures, even though they could not possibly be said to have been made in reliance on a non-existent promise. <u>If such expenditures were directed toward a hoped-for contract, the contract was in fact made and breached, and the expenditures would have been recouped had it been performed, it is difficult to see any objection to recovery</u>. Whether it is called "reliance expense or partial expectancy does not seem to matter very much when enforceable, bargained-for promises were exchanged.

Id. at 53-54 (emphasis added) (footnotes omitted).

Agreement should not be rescinded and that Teton County did not even breach the Agreement. And under such circumstances, Burns had no reasonable alternative but to incur those costs necessary to maintain its temporary facility in place, such as paying the property taxes and utilities, through trial.

Finally, Teton County agues that the district court's award of the demolition costs Burns will incur is error. But as previously stated, the district court found that the estimated demobilization costs were reasonable and this finding is supported by substantial and uncontested evidence in the record. *See supra* Statement of the Case at part C(iv) (Support for Demobilization Costs).

(v) The District Court Did Not Overstate Burns' Reliance Damages.

Teton County fails to cite any legal authority at all or make any new arguments with respect to the district court's factual findings not previously discussed by it in support of Teton County's fifth and final stated grounds for the contention that the district court erred in its award of reliance damages to Burns. *See* Appellant's Brief 18-20. In a nutshell, however, the gist of Teton County's argument is that the district court erred when it found:

> If the Agreement had been fully performed, Plaintiffs would have paid off its expenses (including those encompassed by the reliance damages) and debt and produced a net profit by 2017. Teton County did not establish that Plaintiffs would have suffered a net loss even if it had been allowed to continue in operation. Teton County failed to prove losses sufficient to offset Plaintiffs' reliance damages.

Supplemental Findings & Conclusions 9 [*R,* p. 245]. But because the district court's foregoing findings are supported by the substantial evidence in the record discussed, quoted, and cited in

the above Statement of the Case at part C(v) (Loss Caused by Breach of Agreement), these findings are not subject to overturn on appeal. *Huber*, 159 Idaho at 841, 367 P.3d at 236.

B. The District Court Did Not Err In Its Award Of Either Summary Judgment Or Final Judgment To Burns.

Burns' motion for summary judgment was briefed by the parties and then heard by the district court on April 10, 2017, during which hearing the court announced its decision and stated its reasons from the bench and following which the court entered its May 2, 2017, order in the form submitted by counsel for Teton County. [*R*, pp. 67-68.] As expressly stated in the order, both Burns Concrete and Burns Holdings were granted summary judgment on the liability issue only of their claim for breach of contract, together with rescission of the Agreement. Upon Teton County's subsequent motion for reconsideration, however, 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], in which the district court, inter alia, limited its grant for breach of contract and the right to seek reliance damages to Burns Holdings only. *Pretrial Decision* 14 & 19 [*R*, 88 & 93]. The facts supporting the grant of summary judgment to Burns Holdings on the liability issue are set forth in Cross-Appellants' Brief at *SOF* ¶¶ 9-20, and the district court's rulings granting Burns Holdings summary judgment on the liability issue are set forth in *SOF* ¶¶ 21-22.

Based on the foregoing rulings, the issue of Teton County's liability to Burns Concrete for breach of contract and reliance damages was unresolved and therefore tried to the district

court. And as also quoted in the above Statement of the Case at part C(ii) (Assignment of Claims), the district court ruled as follows on this issue:

> [S]ince 2013, both Burns Holdings and Burns Concrete have an equal interest in the real property. Both Plaintiffs have assigned to each other an undivided interest [in] their respective claims in this action.

Findings & Conclusions 10 [*R*, p. 215]. The district court's foregoing ruling is supported by substantial and uncontested evidence in the record. *SOF* ¶¶ 51-53, Exhibit 4 [*Ex*, pp. 104-106], and Exhibit 5 [*Ex*, pp. 438-40].

Moreover, although Teton County asserts three arguments under the heading "The district court erred in granting summary judgment on liability for breach of the Agreement," all of these arguments relate to the district court's findings and conclusions made after trial. Each of Teton County's three arguments are rebutted in turn below.

(i) Teton County's Breach of the Agreement Caused Burns' Injuries.

The gist of Teton County's first argument is that "[a]t trial, the Burns Companies did not establish, and the trial court did not find, a causal link between the 2012 demand letter [from Teton County] and any claimed injury." Appellant's Brief 24.

This argument is refuted by the district court's findings quoted and the substantial evidence in the record cited in the above Statement of the Case at part C(i) (Cessation of Plant Operations) and part C(v) (Loss Caused by Breach of Agreement).

(ii) Teton County Breached the Agreement.

Teton County next argues that it did not breach the Agreement for three stated reasons. Appellant's Brief 25-28.

This argument, however, is refuted with respect to the district court's grant of summary judgment to Burns Holdings by the facts set forth in *SOF* ¶¶ 9-20 and the court's rulings in *SOF* ¶¶ 21-22, as explained above. And the argument is further refuted with respect to both Burns Concrete and Burns Holdings by the district court's findings quoted and the substantial and uncontested evidence in the record cited in the above Statement of the Case at C(i) (Cessation of Plant Operations).

Additionally, Teton County's contention that "[t]he temporary batch plant violates Teton County's height restriction[,]" Appellant's Brief 27, is meritless for a host of reasons. First, because this defense to Burns' claims could have been raised in *Burns Concrete I*, consideration of the contention is proscribed by the "law of the case" doctrine. *PHH Mortg.*, 164 Idaho at 38, 423 P.3d at 459 (The "'doctrine also prevents consideration on a subsequent appeal of alleged errors that might have been, but were not, raised in the earlier appeal.'" (citation omitted)). Second, this defense was neither raised in Teton County's Answer and Counterclaim [*R*, pp. 44-59] nor raised and supported by any evidence presented at trial. *State of Idaho v. Victor Garcia-Rodriguez*, 162 Idaho 271, 275, 396 P.3d 700, 704 (2017) ("We have long held that '[a]ppellate court review is limited to the evidence, theories and arguments that were presented below.'" (citations omitted)). Third, there is no evidence in the record establishing that machinery or equipment not permanently located on real property must comply with height limitations on the construction of improvements to real property imposed under the zoning ordinances adopted by Teton County or the City of Driggs. *Id.* Fourth, the district court's decision prior to the first appeal cited by Teton County relating to – but not deciding – whether

machinery or equipment not permanently located on real property must comply with the zoning ordinances adopted by Teton County or the City of Driggs was vacated by the opinion in *Burns Concrete I*, with the specific question *never* having been presented to or decided by the district court. *Id.* Thus, for all four of the foregoing reasons Teton County's contention that the temporary facility violates some unspecified height restriction is not now subject to appellate review.

(iii) Burns Concrete Is a Party to the Agreement.

Teton County's third and final argument is that Burns Concrete is not a party to the Agreement. Appellant's Brief 28-29.

This defense to Burns Concrete's claims could also have been raised in *Burns Concrete I*. Accordingly, consideration of this contention is also proscribed by the "law of the case" doctrine. *PHH Mortg.*, 164 Idaho at 38, 423 P.3d at 459.

Moreover, the merits of this argument are refuted by the district court's ruling quoted and substantial and uncontested evidence in the record cited in the above Statement of the Case at part C(ii) (Assignment of Claims).[2]

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[2] The district court's ruling is supported by its following findings and conclusions:

> **A. Teton County is liable to both Plaintiffs for its breach of the Agreement.**
>
> The Idaho Supreme Court has held that covenants running with the land "may be enforced by one other than a party to them where the original parties intended that the restrictions should benefit the land of the person claiming the right of enforcement."

The law in Idaho with respect to the assignment of legal claims is set forth as follows in *St. Luke's Magic Valley Regional Medical Center v. Luciani*, 154 Idaho 37, 293 P.3d 661 (2013):

> It is settled in Idaho that "choses in action are generally assignable." *Purco Fleet Servs., Inc. v. Idaho State Dep't of Fin.*,

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> *Sun Valley Ctr. for Arts & Humanities, Inc. v. Sun Valley Co.*, 107 Idaho 411, 413, 690 P.2d 346, 348 (1984).
>
>> Land use covenants may run with the land, and the primary characteristic of a covenant running with the land is that both liability upon it and enforceability of it pass with the transfer of the estate. Thus, a covenant that runs with the land may be enforced against the party who bears the burden of the covenant by the party who receives the benefit of the burden, the buyer, or the current owner of the land. In fact, all grantors, back to and including the original grantor-covenantor, become liable upon the breach thereof to the assignee or grantee in possession or entitled to the possession at the time.
>
> 20 Am. Jur. 2d Covenants, Etc. § 119.
>
> Paragraph 12.b. of the Agreement indicates that it "*shall run with the land* and bind the property in perpetuity, and shall inure to the benefit of and be enforceable by the parties, and any of their respective legal representatives, heirs, successors, and assigns." (Emphasis added.) Burns Concrete owned the property designated in Exhibit A to the Agreement. <u>The Agreement clearly indicates that its terms applied to both Burns Holdings, as signatory to the Agreement, and to Burns Concrete, as owner of the property</u>.
>
> Furthermore, since 2013, both Burns Holdings and Burns Concrete have an equal interest in the real property. Both Plaintiffs have assigned to each other an undivided interest [in] their respective claims in this action.

Findings & Conclusions 10 (underscoring added) [*R*, p. 215].

> 140 Idaho 121, 126, 90 P.3d 346, 351 (2004). "An assignment of the chose in action transfers to the assignee and divests the assignor of all control and right to the cause of action, and the assignee becomes the real party in interest." *Id*. Thereafter, "[o]nly the assignee may prosecute an action on the chose in action." *Id*.

St Luke's, 154 Idaho at 41, 293 P.3d at 665.

Teton County challenges the district court's referenced ruling on the grounds that the cross-assignments made by Burns Concrete and Burns Holdings pursuant to Exhibit 5 [*Ex*, pp. 438-40] were ineffective because neither of these plaintiffs assigned all of its respective claim against Teton County to the other. But Teton County cites no authority holding that the assignment of a particular undivided interest in a claim is ineffectual if the assignor retains a separate and distinct undivided interest. Furthermore, Teton County's challenge ignores Idaho's law of common interests established by Idaho Code § 55-104 ("Every interest created in favor of several persons in their own right is an interest in common . . ."). And as held in *Ogilvie v. Idaho Bank & Trust Co.*, 99 Idaho 361, 366, 582 P.2d 215, 220 (1978), "Idaho continues to recognize joint tenancies between two persons as a valid and enforceable means of concurrent ownership of property, whether real, personal, tangible or intangible. I.C. § 55-104." *See also id.* at 366-67, 582 P.2d at 220-21 ("Richard Ogilvie and respondent Ogilvie acquired equal one-half interests in the stock certificates as tenants in common and IB&T could foreclose on Richard Ogilvie's one-half interest.").

Accordingly, the district court did not err when it concluded: "Both Plaintiffs have assigned to each other an undivided interest [in] their respective claims in this action." *Findings & Conclusions* 10 [*R*, p. 215].

C. The District Court Did Not Err By Granting Judgment In Accordance With *Burns Concrete I.*

Teton County's final contention is that the district court erred in including the following provision in the judgment being appealed:

> 2. The running of the 18-month period provided in Paragraph 2.b(iv) of the Developer's Agreement for Burns Holdings, LLC, recorded September 5, 2007 by the Teton County Recorder as Instrument No. 191250, pertaining to the construction of the Permanent Facility defined and described in such agreement is tolled in accordance with the Supreme Court of Idaho's opinion in *Burns Concrete, Inc. v. Teton County*, 161 Idaho 117, 384 P.3d 364 (2016.)

[*R*, p. 260-61.]

Teton County's challenge to incorporation of the foregoing provision in the judgment is again proscribed by the "law of the case" doctrine:

> Idaho adheres to the "law of the case" doctrine, which provides that when "the Supreme Court, in deciding a case presented states in its opinion a principle or rule of law necessary to the decision, <u>such pronouncement becomes the law of the case and must be adhered to throughout its subsequent progress, both in the trial court and upon subsequent appeal</u>.

PHH Mortg., 164 Idaho at 38, 438 P.3d at 459 (emphasis added).

Furthermore, although Teton County now asserts that "the requested declaration was moot and not ripe[, because] Teton County had withdrawn its breach of contract claim against the Burns Companies," Appellant's Brief 31, there is nothing in the record supporting this

assertion. And with respect to the assertion that "[t]he Parties did not try the declaratory judgment claim at trial," *id.*, Burns responds that (i) Burns proved at trial Teton County breached the Agreement, as established by the district court's ruling quoted and substantial and uncontested evidence in the record cited in the above Statement of the Case at part C(i) (Cessation of Plant Operations), and (ii) key factual matters supporting declaratory relief are supported by Burns' and Teton County's respective verified pleadings on file, as established by *SOF* ¶¶ 13, 14, and 16. It was therefore not error for the district court to incorporate into its judgment the Supreme Court's pronouncement in *Burns Concrete I*.

Finally, any conceivable concern that "inclusion of the declaration in the judgment presents the possibility of confusion and double recovery[,]" Appellant's Brief 31, can be completely eliminated with the rescission of the Agreement – which Burns' has steadfastly sought over the entire course of this very long case and Teton County has steadfastly opposed.

D. 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 defending against this 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 deny all relief sought by Teton County in this appeal, together with awarding Burns its reasonable attorney fees and costs incurred on appeal.

DATED this 24th day of October 2019.

PARSONS BEHLE & LATIMER

By *<u>/s/ Robert B. Burns</u>*
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 **RESPONDENTS' BRIEF** to be served by the method indicated below and addressed to the following:

Billie J. Siddoway	☐	U.S. Mail
Lindsey A. Blake	☐	Hand Delivered
Teton County Prosecuting Attorney	☐	Facsimile
230 N. Main Street, Room 125	☐	Email
Driggs, Idaho 83422-5124	☒	iCourt E-File Delivery
Facsimile (208) 354-2994		

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

Lone Peak Valuation Group

Burns Concrete v Teton County

Projected Available Cash for Equity Holders From Driggs Plant (Projected Revenue Using Building Permits)

Schedule 2.1

	Ref.	Assumed Expense Level	Feb-Dec 2010	2011	2012	2013	2014	2015	2016	2017	Total
<1> Projected Revenue	*Schedule 3.1*		158,869	$ 96,528	$ 126,693	$ 197,078	$ 197,078	$ 293,606	$ 331,815	$ 434,376	$ 1,836,042
Cost of Goods Sold											
Materials	*Schedule 7*	34.07%	54,120	32,883	43,159	67,136	67,136	100,019	113,035	147,973	625,460
Fuel	*Schedule 1*	6.31%	10,030	6,094	7,999	12,443	12,443	18,537	20,949	27,425	115,920
Repairs	*Schedule 1*	2.90%	4,609	2,801	3,676	5,718	5,718	8,518	9,627	12,603	53,270
Equipment Rent	*Schedule 1*	0.52%	832	505	663	1,032	1,032	1,537	1,737	2,274	9,614
Labor	*Schedule 1*	18.46%	29,322	17,816	23,384	36,375	36,375	54,191	61,243	80,173	338,878
Other	*Schedule 1*	1.59%	2,523	1,533	2,012	3,130	3,130	4,664	5,270	6,899	29,163
Total Cost of Goods Sold			$ 101,437	$ 61,633	$ 80,893	$ 125,833	$ 125,833	$ 187,466	$ 211,862	$ 277,347	$ 1,172,305
			63.85%	*63.85%*	*63.85%*	*63.85%*	*63.85%*	*63.85%*	*63.85%*	*63.85%*	*63.85%*
Operating Expenses											
Liability Insurance	*Schedule 1*	1.44%	2,293	1,393	1,828	2,844	2,844	4,237	4,789	6,269	26,498
Bad Debts	*Schedule 7.1*	0.28%	440	268	351	546	546	814	920	1,204	5,090
Officer Payroll	*Schedule 1*	2.99%	4,756	2,890	3,793	5,900	5,900	8,790	9,934	13,005	54,969
Payroll	*Schedule 1*	3.79%	6,026	3,662	4,806	7,476	7,476	11,137	12,587	16,477	69,646
Payroll Taxes and Insurance	*Schedule 1*	0.68%	1,084	659	865	1,345	1,345	2,004	2,265	2,965	12,533
Pension Contributions	*Schedule 1*	0.35%	551	335	440	684	684	1,019	1,151	1,507	6,369
Total Operating Expenses			$ 15,151	$ 9,206	$ 12,083	$ 18,795	$ 18,795	$ 28,001	$ 31,645	$ 41,427	$ 175,105
			9.54%	*9.54%*	*9.54%*	*9.54%*	*9.54%*	*9.54%*	*9.54%*	*9.54%*	*9.54%*
Expected Net Incremental Profits			$ 42,280	$ 25,689	$ 33,717	$ 52,449	$ 52,449	$ 78,138	$ 88,307	$ 115,602	$ 488,632.42
			26.61%	*26.61%*	*26.61%*	*26.61%*	*26.61%*	*26.61%*	*26.61%*	*26.61%*	*26.61%*
<2> Less: Interest Expense on Debt	*Schedule 5*		109,852	106,218	91,571	75,819	58,878	40,661	21,069	-	504,068
<2> Less: Debt Principle Repayment	*Schedule 5*		165,559	194,230	208,878	224,630	241,570	259,788	279,380	-	1,574,036
Less: Permanent Facility Capital Expenditures			-	-	-	-	-	-	-	-	-
Less: Taxes			-	-	-	-	-	-	-	-	-
Cash Available for Equity Holders			$ (233,131)	$ (274,759)	$ (266,731)	$ (248,000)	$ (248,000)	$ (222,310)	$ (212,142)	$ 115,602	$ (1,589,471)
Cumulative Cash Available for Equity Holders			$ (233,131)	$ (507,890)	$ (774,622)	$ (1,022,622)	$ (1,270,621)	$ (1,492,932)	$ (1,705,073)	$ (1,589,471)	
<3> Working Capital (Burns Idaho Falls Facility)			$ (3,425,844)	$ (3,572,123)	$ (534,843)	$ (1,146,323)	$ (528,156)	$ 181,221	$ 24,950	n/a	
Cumulative Cash Available for Equity Holders plus Working Capital (Burns Idaho Falls Facility)			$ (3,658,974)	$ (4,080,014)	$ (1,309,465)	$ (2,168,944)	$ (1,798,777)	$ (1,311,711)	$ (1,680,124)	$ (1,589,471)	

Notes:

<1> Based on information provided by James Walters, I understand that building permits are a good proxy for revenue allocation.

<2> Interest expense and principal repayment amount for 2010 is for 11 months calculated from the annual amounts on Schedule 5

<3> 2010 is calculated for 11 months. See Schedule 6

Schedule 2.1