

3-12-2012

# Silicon Intern. Ore, LLC v. Monsanto Co. Clerk's Record v. 5 Dckt. 39409

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Vol. 506

IN THE SUPREME COURT  
OF THE STATE OF IDAHO  
SUPREME COURT DOCKET NO.

39409-2011

Silicon International Ore, LLC, and Idaho  
Limited Liability Company,

Plaintiff/Appellant,

LAW CLERK

vs.

Monsanto Company, a Delaware  
Corporation and Washington Group  
International, Inc., and Ohio

Defendant/Respondent

FILED - COPY  
MAR 12 2012  
Supreme Court Clerk of Appellate  
State of Idaho

**MITCHELL W. BROWN**  
District Judge

Appealed from the District Court of the SIXTH  
Judicial District of the State of Idaho, in and  
for Caribou COUNTY.

David P. Garner

Attorney for Appellant

Randall Budge

Eugene Ritti

Attorney for Respondent

Volume 5045

**29409**

COPY

Silicon International Ore, LLC vs. Monsanto Company, Washington Group International, Inc

Date	Code	User		Judge
12/31/2009	NCOC	WELL	New Case Filed - Other Claims	Mitchell W Brown
	COMP	WELL	Complaint Filed	Mitchell W Brown
	SMIS	WELL	Summons Issued - Washington group	Mitchell W Brown
	APER	WELL	Plaintiff: Silicon International Ore, LLC Appearance David P. Gardner	Mitchell W Brown
		WELL	Filing: A - All initial civil case filings of any type not listed in categories B-H, or the other A listings below Paid by: Gardner, David P. (attorney for Silicon International Ore, LLC) Receipt number: 0006050 Dated: 12/31/2009 Amount: \$88.00 (Check) For: Silicon International Ore, LLC (plaintiff)	Mitchell W Brown
	SMIS	WELL	Summons Issued - Monsanto Co	Mitchell W Brown
1/22/2010		JORGEN	Filing: I1 - Initial Appearance by persons other than the plaintiff or petitioner Paid by: Monsanto Company (defendant) Receipt number: 0000170 Dated: 1/25/2010 Amount: \$58.00 (Check) For: Monsanto Company (defendant)	Mitchell W Brown
	NOAP	WELL	Notice Of Appearance - Randall C. Budge for Monsanto	Mitchell W Brown
1/25/2010	APER	WELL	Defendant: Monsanto Company Appearance Randall C Budge	Mitchell W Brown
	AFSV	WELL	Affidavit Of Service - Washington Group - January 14, 2010 - served S.J Tharp of CT Corp System	Mitchell W Brown
	AFSV	WELL	Affidavit Of Service - Monsanto - January 14, 2010 - served on Michelle Smith	Mitchell W Brown
2/1/2010		WELL	Filing: I1 - Initial Appearance by persons other than the plaintiff or petitioner Paid by: Hawley Troxell Ennis & Hawley, LLP Receipt number: 0000218 Dated: 2/1/2010 Amount: \$58.00 (Check) For: Washington Group International, Inc (defendant)	Mitchell W Brown
	NOAP	WELL	Notice Of Appearance - for Washington Group International, Inc.	Mitchell W Brown
	APER	WELL	Defendant: Washington Group International, Inc Appearance Eugene A Ritti	Mitchell W Brown
2/12/2010	ANSW	WELL	Answer and Demand for Jury Trial on Defnedant Washington Group International, Inc.	Mitchell W Brown
2/18/2010		WELL	Order for Submission of Information for Scheduling Order	Mitchell W Brown
2/23/2010	HRSC	WELL	Hearing Scheduled (Clerk Review 03/12/2010 05:00 PM) order of Submission due	Mitchell W Brown
2/26/2010	ANSW	WELL	Answer of Defendant Monsanto Company	Mitchell W Brown
	NOSV	WELL	Notice Of Service - Defendant Monsanto Company's First Interrogatories and Requests for Production of Documents of Plaintiff	Mitchell W Brown

Silicon International Ore, LLC vs. Monsanto Company, Washington Group International, Inc

Date	Code	User		Judge
3/4/2010		WELL	joint submission regarding scheduling	Mitchell W Brown
3/5/2010	HRSC	WELL	Hearing Scheduled ((B) Jury Trial - 2nd Setting 04/04/2011 09:00 AM)	Mitchell W Brown
	HRSC	WELL	Hearing Scheduled ((A) Jury Trial - 3rd Setting 05/02/2011 09:00 AM)	Mitchell W Brown
	NOSV	WELL	Notice Of Service - Defendant Washington Group International, Inc.'s First Set of Interrogatories to Plaintiff	Mitchell W Brown
	NOSV	WELL	Notice Of Service - Defendant Washington Group Inc.'s First Request for Production of Documents to Plaintiff	Mitchell W Brown
3/15/2010	STIP	WELL	Stipulation	Mitchell W Brown
		WELL	Order Setting Jury Trial	Mitchell W Brown
3/18/2010	MOTN	WELL	Motion for Disqualification without cause (Rule 40(d)(1)(G)) (as to alternate Judge P. McDermott)	Mitchell W Brown
3/19/2010	ORDR	WELL	Order of Disqualification without Cause	Mitchell W Brown
	CERT	WELL	Certificate Of Mailing	Mitchell W Brown
3/24/2010		WELL	Amended Order Setting Jury Trial	Mitchell W Brown
4/26/2010	WDAT	WELL	Withdrawal Of Attorney - Robert K Reynard's Notice of Withdrawal of Counsel (Utah Attorney - Firm still representing Pro Hac Vice Admission Pending)	Mitchell W Brown
5/28/2010	CRSR	JORGEN	Certificate of service plaintiffs responses to defendant Monsanto's company's first set of interrogatories and request for production of documents	Mitchell W Brown
6/3/2010	MOTN	WELL	Motion for Admission Pro Hac Vice	Mitchell W Brown
6/7/2010	CRSR	WELL	Certificate Of Service - Plaintiff's response to Defendant Washington Group Int. first set of interrogatories and Plaintiff's responses to defendant Washington Group Int first request for production of Documents to plaintiff	Mitchell W Brown
6/8/2010	APER	WELL	Plaintiff: Silicon International Ore, LLC Appearance Daniel K Brough	Mitchell W Brown
	ORDR	WELL	Order for Admission pro hac vice	Mitchell W Brown
6/28/2010	STIP	WELL	Stipulated Protective Order	Mitchell W Brown
6/29/2010	GRNT	WELL	Motion Granted	Mitchell W Brown
11/10/2010	NOTC	WELL	Notice of Service - Plaintiff's first set of interrogatories and requests for production of documents to defendant Washington Group International, Inc., plaintiff's first set of interrogatories and requests for production of documents to defendant Monsanto company	Mitchell W Brown

Silicon International Ore, LLC vs. Monsanto Company, Washington Group International, Inc

Date	Code	User		Judge
12/6/2010	NOSV	WELL	Notice Of Service - Defendant Monsanto Company's Answers and Responses to Plaintiff's First Set of Interrogatories and Requests for Production	Mitchell W Brown
1/25/2011	NOTC	WELL	Notice of Hearing	Mitchell W Brown
	MOTN	WELL	Defendant Monsanto Company's Motion for Summary Judgment	Mitchell W Brown
	MEMO	WELL	Defendant Monsanto Company's Memorandum in Support of Motion for Summary Judgment	Mitchell W Brown
	AFFD	WELL	Affidavit of Randall C. Budge	Mitchell W Brown
	AFFD	WELL	Affidavit of Mitchell J. Hart. P.E.	Mitchell W Brown
	AFFD	WELL	Affidavit of James R. Smith	Mitchell W Brown
1/26/2011	NOSV	WELL	Notice Of Service - Defendant Monsanto Company's First Supplemental Response to Plaintiff's First Set of Interrogatories and Requests for Production of Documents	Mitchell W Brown
	AFFD	WELL	Affidavit of Craig Nelson in Support of Defendant Washington Group International, Inc.'s Motion for Summary Judgment	Mitchell W Brown
	AFFD	WELL	Affidavit of Eugene A. Ritti in Support of Defendant Washington Group International, Inc.'s Motion for Summary Judgment	Mitchell W Brown
	MEMO	WELL	Memorandum in Support of Defendant Washington Group International, Inc.'s Motion for Summary Judgment	Mitchell W Brown
	MOTN	WELL	Defendant Washington Group International, Inc.'s Motion for Summary Judgment	Mitchell W Brown
	NOTC	WELL	Notice of Hearing	Mitchell W Brown
1/27/2011	NOSV	WELL	Notice Of Service - Defendant Washington Group International, Second Request for production of Documents to Plaintiff	Mitchell W Brown
	NOSV	WELL	Notice Of Service - Defendant Washington Group International, Second set of interrogatories to plaintiff	Mitchell W Brown
2/1/2011	HRSC	WELL	Hearing Scheduled (Motion for Summary Judgment 02/25/2011 01:30 PM)	Mitchell W Brown
		WELL	Second Affidavit of Eugene A. Ritti in Support of Defendant Washington Group International, Inc.'s Motion for Summary Judgment (filed in a separate confidential file folder)	Mitchell W Brown
			Document sealed	
2/14/2011	STIP	WELL	Stipulation and Order Re: Schedule	Mitchell W Brown
	CERT	WELL	Certificate Of Mailing	Mitchell W Brown
	HRVC	WELL	Hearing result for Jury Trial held on 05/02/2011 09:00 AM: Hearing Vacated Firm Setting	Mitchell W Brown
	HRVC	WELL	Hearing result for Motion for Summary Judgment held on 02/25/2011 01:30 PM: Hearing Vacated	Mitchell W Brown

Silicon International Ore, LLC vs. Monsanto Company, Washington Group International, Inc

Date	Code	User		Judge
2/14/2011	HRSC	WELL	Hearing Scheduled (Scheduling Conference 03/11/2011 01:30 PM)	Mitchell W Brown
		WELL	Notice of Hearing	Mitchell W Brown
2/15/2011	HRSC	WELL	Hearing Scheduled (Motion for Summary Judgment 04/21/2011 01:30 PM)	Mitchell W Brown
	NOSV	WELL	Notice Of Service - Defendant Monsanto Company's Second Supplemental Response to Plaintiff's First Set of Interrogatories and Requests for Production of Documents	Mitchell W Brown
2/16/2011	NOTC	WELL	Amended Notice of Hearing	Mitchell W Brown
2/22/2011	NOTC	WELL	Notice of Compliance	Mitchell W Brown
2/28/2011		WELL	Second amended Notice of Hearing	Mitchell W Brown
	CONT	WELL	Continued (Motion for Summary Judgment 05/13/2011 01:30 PM)	Mitchell W Brown
3/8/2011	NOTC	WELL	Notice of Deposition (John Rosenbaum)	Mitchell W Brown
3/11/2011	CMIN	WELL	Court Minutes Hearing type: Scheduling Conference Hearing date: 3/11/2011 Time: 1:43 pm Courtroom: Large Courtroom 301 Court reporter: Digital Recording Only as per admin order 11-01 Minutes Clerk: Sharon Wells Tape Number: Mr. Brough Mr. Gardner Mr. Budge Mr. Ritti	Mitchell W Brown
	HRSC	WELL	Hearing Scheduled (Jury Trial 09/26/2011 09:00 AM)	Mitchell W Brown
		WELL	Order Setting Jury Trial (Scheduling Order, Notice of Trial Setting and Initial Pretrial Order)	Mitchell W Brown
	CERT	WELL	Certificate Of Mailing	Mitchell W Brown
	DCHH	WELL	Hearing result for Scheduling Conference held on 03/11/2011 01:30 PM: District Court Hearing Held Court Reporter: Digital Recording Number of Transcript Pages for this hearing estimated: Less than 100 pages - telephonic	Mitchell W Brown
3/14/2011	NOTC	WELL	Notice of Compliance - re: Washington Group International - Supplemental Response to Plaintiff's First Set of Interrogatories and Request for Production of Documents	Mitchell W Brown
	CRSR	WELL	Certificate Of Service - (Plaintiff's Responses to Defendant Washington Goup International, Inc.'s Second Set of Interrogatories	Mitchell W Brown
3/15/2011	NOTD	WELL	Notice of Deposition Pursuant to Idaho Rule of Civil Procedure 30 (b)(6) (Monsanto Company)	Mitchell W Brown
	NOTD	WELL	Notice Of Deposition (Jim Smith)	Mitchell W Brown

Silicon International Ore, LLC vs. Monsanto Company, Washington Group International, Inc

Date	Code	User		Judge
3/15/2011	NOTD	WELL	Notice Of Deposition (Dave Farnsworth)	Mitchell W Brown
	NOTD	WELL	Notice Of Deposition (Mitch Hart)	Mitchell W Brown
3/17/2011	CRSR	WELL	Certificate Of Service - (Plaintiff's Response to Defendant Washington Group International, Inc.'s Second Set of Requests for Production of Documents)	Mitchell W Brown
3/21/2011	NOSV	WELL	Notice Of Service - Defendant Washington Group International, Inc's Third Request for Production of Documents to Plaintiff	Mitchell W Brown
	NOTC	WELL	Notice of Compliance: Washington Group International, Inc's Supplemental Response to Plaintiff's First Set of Interrogatories and Request for Production of Documents	Mitchell W Brown
3/23/2011	MOTN	WELL	Motion for Admission Pro Hac Vice	Mitchell W Brown
3/29/2011	CERT	WELL	Certificate Of Mailing	Mitchell W Brown
	ORDR	WELL	Order for Admission Pro Hac Vice - Berry Johnson	Mitchell W Brown
	APER	WELL	Plaintiff: Silicon International Ore, LLC Appearance Barry N Johnson	Mitchell W Brown
4/5/2011	NOTC	WELL	Notice of Deposition - (Clayton Krall)	Mitchell W Brown
	NOTC	WELL	Notice of Deposition Pursuant to Idaho Rule of Civil Procedure 30(b)(6) (Washington Group International, Inc)	Mitchell W Brown
4/26/2011	CRSR	WELL	Certificate Of Service - (Plaintiff's Responses to Defendant Washington Group International, Inc.'s Third Set of Requests for Production of Documents)	Mitchell W Brown
4/29/2011		WELL	Plaintiff's Memorandum in Opposition to Defendant Monsanto Company's Motion for Summary Judgment	Mitchell W Brown
		WELL	Plaintiff's Memorandum in Opposition to Defendant Washington Group International, Inc.'s Motion for Summary Judgment	Mitchell W Brown
	AFFD	WELL	Affidavit of Kent W. Goates	Mitchell W Brown
	AFFD	WELL	Affidavit of Todd Sullivan	Mitchell W Brown
	AFFD	WELL	Affidavit of Daniel K. Brough	Mitchell W Brown
5/5/2011	LETT	WELL	Letter - regarding Depositions of James R. Smith, David Farnsworth and Mitchell J. Hart	Mitchell W Brown
5/6/2011	AFFD	WELL	Third Affidavit of Eugene A. Ritti in Support of Defendant Washington group International, Inc.'s Motion for Summary Judgment	Mitchell W Brown
	RPLY	WELL	Reply Memorandum in Support of Defendant Washington Group International, Inc.'s Motion for Summary Judgment	Mitchell W Brown
	RPLY	WELL	Defendant Monsanto Company's Reply Memorandum in Support of Motion for Summary Judgment	Mitchell W Brown

Silicon International Ore, LLC vs. Monsanto Company, Washington Group International, Inc

Date	Code	User		Judge
5/6/2011	MOTN	WELL	Motion to Strike	Mitchell W Brown
	MEMO	WELL	Memorandum in Support of Motion to Strike	Mitchell W Brown
	NOTC	WELL	Notice of Hearing	Mitchell W Brown
5/13/2011		WELL	Plaintiff's Response to Defendant Monsanto Company's Motion to Strike	Mitchell W Brown
	CMIN	WELL	Court Minutes Hearing type: Motion for Summary Judgment Hearing date: 5/13/2011 Time: 1:41 pm Courtroom: Large Courtroom 301 Court reporter: Digital Recording Only as per admin order 11-01 Minutes Clerk: Sharon L Wells Tape Number:	Mitchell W Brown
	CMIN	WELL	Court Minutes Hearing type: Motion to Compel Hearing date: 5/13/2011 Time: 3:50 pm Courtroom: Large Courtroom 301 Court reporter: Digital Recording Only as per admin order 11-01 Minutes Clerk: Sharon L Wells Tape Number:	Mitchell W Brown
	DCHH	WELL	Hearing result for Motion for Summary Judgment held on 05/13/2011 01:30 PM: District Court Hearing Held Court Reporter: Digital Number of Transcript Pages for this hearing estimated: Less than 100 pages	Mitchell W Brown
	ADVS	WELL	Case Taken Under Advisement	Mitchell W Brown
5/19/2011		WELL	Minute Entry and Order for hearing on May 13, 2011 Motion for Summary Judgment and Motion to Strike	Mitchell W Brown
5/20/2011	STIP	WELL	Stipulation to Order Vacating Second Amended Scheduling Order, Notice of Trial Setting and Initial Pretrial Order	Mitchell W Brown
	ORDR	WELL	Order Vacating Second Amended Scheduling Order, Notice of Trial Setting and Initial Pretrial Order	Mitchell W Brown
9/20/2011	HRVC	WELL	Hearing result for Jury Trial scheduled on 09/26/2011 09:00 AM: Hearing Vacated	Mitchell W Brown
9/21/2011	DEOP	WELL	Decision Or Opinion - Motions for Summary Judgment May 13, 2011 (Memorandum Decision and Order on Defendants' Motions for Summary Judgment) - Granted both Monsanto and Washington Groups Motions for Summary Judgment	Mitchell W Brown
10/7/2011	JDMT	WELL	Judgment	Mitchell W Brown



Silicon International Ore, LLC vs. Monsanto Company, Washington Group International, Inc

Date	Code	User	Judge
10/7/2011	STAT	WELL	STATUS CHANGED: Closed Mitchell W Brown
	MOTN	WELL	Motion for Order Awarding Attorney Fees and Costs Mitchell W Brown
	BREF	WELL	Defendant Monsanto Company's Brief in Support of Motion for Attorney Fees and Costs Mitchell W Brown
	MEMO	WELL	Memorandum of Fees and Costs Mitchell W Brown
	AFFD	WELL	Affidavit of Randall C. Budge in Support of Motion for Fees and Costs Mitchell W Brown
	CDIS	WELL	Civil Disposition entered for: Monsanto Company, Defendant; Washington Group International, Inc, Defendant; Silicon International Ore, LLC, Plaintiff. Filing date: 10/7/2011 Mitchell W Brown
	STAT	WELL	STATUS CHANGED: closed pending clerk action Mitchell W Brown
10/14/2011	MEMO	WELL	Memorandum in Support of Defendant Washington Group International's Motion for Order Awarding Costs and Attorney Fees Mitchell W Brown
	MEMO	WELL	Defendant Washington Group International's Memorandum of Costs and Attorney Fees Mitchell W Brown
	MOTN	WELL	Defendant Washington Group International's Motion for Order Awarding Costs And Attorney Fees Mitchell W Brown
	AFFD	WELL	Affidavit of Eugene A. Ritti In Support of Defendant Washington Group International's Motion for Costs and Attorney fees Mitchell W Brown
10/20/2011	MEMO	WELL	Plaintiff's Memorandum in Opposition to Defendant Monsanto Company's Motion for Order Awarding Attorney Fees and Costs Mitchell W Brown
	AFFD	WELL	Affidavit of Daniel K. Brough in Support of Memorandum in Opposition to Motion for Order Awarding Fees and Costs Mitchell W Brown
10/26/2011	MEMO	WELL	Memorandum in Opposition to Defendant Washington Group international, Inc's Motion for Order Awarding Costs and Attoreny Fees Mitchell W Brown
11/15/2011	NOTC	WELL	Notice of Hearing Mitchell W Brown
	HRSC	WELL	Hearing Scheduled (Motion for Attorney fees and Costs 12/09/2011 03:00 PM) Mitchell W Brown
11/18/2011	NOTA	WELL	NOTICE OF APPEAL Mitchell W Brown
11/21/2011		WELL	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Gardner, David P. (attorney for Silicon International Ore, LLC) Receipt number: 0002741 Dated: 11/21/2011 Amount: \$101.00 (Check) For: Silicon International Ore, LLC (plaintiff) Mitchell W Brown
	BNDC	WELL	Bond Posted - Cash (Receipt 2742 Dated 11/21/2011 for 100.00) Mitchell W Brown

Silicon International Ore, LLC vs. Monsanto Company, Washington Group International, Inc

Date	Code	User		Judge
11/22/2011	RESP	WELL	Defendant Monsanto's Response to Plaintiff's Opposition to Monsanto Company's Fees and Costs	Mitchell W Brown
11/23/2011	RPLY	WELL	Reply memorandum in Support of Defendant Washington Group International's Motion for Order Awarding Costs and Attorney Fees	Mitchell W Brown
12/1/2011	CONT	WELL	Continued (Motion for Attorney fees and Costs 01/24/2012 10:00 AM)	Mitchell W Brown
12/2/2011	CONT	WELL	Continued (Motion for Attorney fees and Costs 02/10/2012 02:00 PM)	Mitchell W Brown
		WELL	Notice of Hearing	Mitchell W Brown
		WELL	Defendant Washington Group Interanational, Inc.'s Request for Additional Record	Mitchell W Brown
		WELL	Defendant Washington Group International, Inc.'s Second Request For Additional Record	Mitchell W Brown
12/15/2011	BNDC	WELL	Bond Posted - Cash (Receipt 2927 Dated 12/15/2011 for 100.00)	Mitchell W Brown
1/6/2012	CONT	JORGEN	Hearing result for Motion for Attorney fees and Costs scheduled on 02/10/2012 02:00 PM: Continued	Mitchell W Brown
	HRSC	JORGEN	Hearing Scheduled (Motion for Attorney fees and Costs 02/10/2012 04:00 PM) To be recorded in Caribou	Mitchell W Brown
	NOTC	JORGEN	Amended notice of hearing-Sent by Randall Budge	Mitchell W Brown

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**Exhibit 1A**  
**Silicon-International Ore, LLC**  
**Facts, Inputs and Assumptions**

**Cost of Equity (COE)**

**Buildup 1**

	$R_f$	4.50%
	$RP_{M+S, \text{high-financial risk}}$	14.26%
	ERP Adj	1.20%
	$COE_{\text{Buildup 1}}$	<u>19.96%</u>

Average	20.14%
---------	--------

**Capital Asset Pricing Model (CAPM)**

	$R_f$	4.50%
	( $\beta$ * ERP)	8.91%
	$RP_{S, \text{high-financial-risk}}$	6.90%
	$COE_{\text{CAPM}}$	<u>20.31%</u>

**Key Inputs**

$R_f$	<i>Risk Free Rate at December 31, 2007 (Long Term 20 Year Treasury Bond Yield - constant maturity.)</i>	4.50%
ERP	<i>Equity Risk Premium (Long-horizon expected return of large stocks over risk free securities.)</i>	5.50%
$RP_{S, \text{high-financial-risk}}$	<i>Risk Premia over CAPM (Return on small company stock in excess of that predicted by CAPM - beta adjusted size premium for a company considered a high-financial-risk.)</i>	6.90%
$\beta$	<i>Beta (The sensitivity of a stock's price relative to movements of a specific market benchmark or index.)</i>	1.62
$RP_{M+S, \text{high-financial-risk}}$	<i>Arithmetic Average Risk Premium over Risk Free Rate (Long-horizon expected return of stocks over risk free securities in terms of the combined effect of market risk and size risk for a company considered a high-financial-risk.)</i>	14.26%
ERP Adj	<i>ERP Adjustment (Made to reconcile a historically-derived ERP with a forward-looking ERP as of the valuation date.)</i>	1.20%

Source: Duff & Phelps Risk Premium Report - Cost of Equity Estimates - January 1, 2010

**Exhibit 2**  
**Silicon International Ore, LLC**  
**Computation of Reliance Damages**

Start: All Transactions After May 16, 2000 connected with the Soda Springs Facility  
 End: March 20, 2011, with interest running through October 7, 2007

**Costs of Starting, Operating, Shutting Down the Business**

Monies Invested

Members' Equity \$ 660,364

Loans, Credit Cards and other Payables (Exhibit 2A)

SICOG Loan #1	77,367	
SICOG Loan #2	60,574	
SICOG Loan #3	37,501	
Eggleston Loan	46,000	
Credit Cards	23,379	
Other Liabilities	(4,776)	
Subtotal		240,044

Accrued Interest on Loans and Credits Cards (Exhibit 2B)

SICOG Loan #1	8,404	
SICOG Loan #2	7,560	
SICOG Loan #3	4,697	
Eggleston Loan	32,888	
Credit Cards	1,266	
Subtotal		54,814

Interest on SIO Debts Assumed by Members (Exhibit 2B)

First Mortgage	78,274	
Second Mortgage	20,636	
Subtotal		98,910

Assets at May 15, 2000 used for facility and operations (Exhibit 2A)

Proceeds of Notes and Loans Receivable	241,378	
Cash	27,064	
Subtotal		268,442

Costs Incurred in Operating SIO (Exhibit 2A)

Cost of Goods Sold	950,844	
Royalties Paid to Monsanto and WGI	104,771	
Salaries and Wages	330,592	
General and Administrative Costs	952,411	
Loss on Sales of Equipment	436,456	
Subtotal		2,775,073

**Mitigating Revenues, Gains and Proceeds**

Revenues and Gains (Exhibit 2A)

Sales and Service Income	(1,862,389)	
Interest Earned	(27,721)	
Other Income	(320)	
Subtotal		(1,890,430)

Assets

Net Book Value (Exhibit 2A)	(284,208)	
Scrap Value at 5%	5%	
Subtotal		(14,210)

Total Unrecovered, Unmitigated Investments, Loans and Costs \$ 2,193,006

**Exhibit 2A**

**Silicon International Ore, LLC**

**Changes in Financials between May 15, 2000 and March 20, 2011**

<u>Balance Sheets as of</u>	<u>May 15, 2000</u>	<u>March 20, 2011</u>	<u>Difference</u>
<b>Assets</b>			
Cash in Bank	\$ 41,264	\$ 14,200	\$ (27,064)
<b>Short and Long Term Receivables</b>			
Accounts Receivable	-	(2)	(2)
Interest Receivable	1,150	-	(1,150)
Notes Receivable	136,727	-	(136,727)
Loans Receivable	\$ 103,500	\$ -	\$ (103,500)
Total Short and Long Term Receivables	\$ 241,377	\$ (2)	\$ (241,378)
<b>Property, Plant &amp; Equipment</b>			
Equipment	\$ -	\$ 313,611	\$ 313,611
Accum. Depreciaion - Equipment	-	(26,810)	(26,810)
Office Equipment -Computers	3,531	-	(3,531)
Other Office Equipment	-	1,355	1,355
Accum Depreciation - Office Equipment	(705)	(1,123)	(418)
Net Book Basis of PP&E	\$ 2,826	\$ 287,033	\$ 284,208
<b>Total Assets</b>	<b>\$ 285,466</b>	<b>\$ 301,231</b>	<b>\$ 15,766</b>
<b>Liabilities</b>			
Accounts Payable	\$ -	\$ 175	\$ 175
Credit Cards Payable	-	23,379	23,379
Payroll Taxes Payable	4,951	-	(4,951)
<b>Loans and Notes Payable</b>			
Eggleston	-	46,000	46,000
SICOG Loan #1	-	77,367	77,367
SICOG Loan # 2	-	60,574	60,574
SICOG Loan # 3	-	37,501	37,501
Total Loans and Notes Payable	\$ -	\$ 221,441	\$ 221,441
<b>Total Liabilities</b>	<b>\$ 4,951</b>	<b>\$ 244,995</b>	<b>\$ 240,044</b>
<b>Equity</b>			
Member Investments	\$ 503,000	\$ 1,163,364	\$ 660,364
Retained Earnings	(222,485)	(1,107,128)	(884,643)
Total Equity	\$ 280,515	\$ 56,236	\$ (224,279)
<b>Total Liabilities and Equity</b>	<b>\$ 285,466</b>	<b>\$ 301,231</b>	<b>\$ 15,766</b>
<b>Profit &amp; Loss Summary for the periods</b>			
	<u>January 1, 1999 to May 15, 2000</u>	<u>January 1, 1999 to March 20, 2011</u>	<u>Change</u>
<b>Income</b>			
Sales	\$ -	\$ 1,862,389	\$ 1,862,389
Interest Income	17,649	45,370	27,721
Other Income	-	320	320
Total Income	\$ 17,649	\$ 1,908,079	\$ 1,890,430
<b>Expenses</b>			
Cost of Goods Sold	\$ -	\$ 950,844	\$ 950,844
Royalties Paid to Monsanto and WGI	-	104,771	104,771
Salaries and Wages	-	330,592	330,592
General and Administrative Costs	240,134	1,192,545	952,411
Loss on Sales of Equipment	-	436,456	436,456
Total Expenses	\$ 240,134	\$ 3,015,207	\$ 2,775,073
<b>Net Profit (Loss)</b>	<b>\$ (222,485)</b>	<b>\$ (1,107,128)</b>	<b>(884,643)</b>

**Exhibit 2B**  
**Silicon International Ore, LLC**  
**Accrued Interest on Company Obligations**

	Loan Start Date For Accrual <sup>1</sup>	Principal Balance <sup>2</sup>	Interest Rate	Term (Months)	Monthly Payments Made	Compound or Simple	End Date of Accrual	Accrued Interest
<b>Loans Assumed by Members</b>								
First Mortgage 3	5/1/2008	\$ 417,000	5.625%	360	\$ 2,500.00	Compound	10/7/2011	\$ 78,274
Second Mortgage 3	5/1/2008	\$ 119,000	5.500%	360	\$ 1,000.00	Compound	10/7/2011	\$ 20,636
<b>Eggleston Notes</b>								
Eggleston Note 1 <sup>4</sup>	3/15/2004	\$ 10,000	10.000%	-	\$ -	Simple	10/7/2011	\$ 7,478
Eggleston Note 2 <sup>4</sup>	4/21/2004	\$ 16,000	10.000%	-	\$ -	Simple	10/7/2011	\$ 11,804
Eggleston Note 3 <sup>4</sup>	11/18/2004	\$ 20,000	10.000%	-	\$ -	Simple	10/7/2011	\$ 13,606
Totals		<u>\$ 46,000</u>						<u>\$ 32,888</u>
<b>Notes with SICO</b>								
SICO Loan #1 <sup>5</sup>	12/31/2009	\$ 80,585	6.000%	120	\$ -	Simple	10/7/2011	\$ 8,404
SICO Loan #2 <sup>5</sup>	12/31/2009	\$ 62,074	7.000%	120	\$ -	Simple	10/7/2011	\$ 7,560
SICO Loan #3 <sup>5</sup>	12/31/2009	\$ 39,407	7.000%	120	\$ -	Simple	10/7/2011	\$ 4,697
<b>Credit Cards</b>								
Credit Cards	3/20/2011	\$ 23,379	10.500%	-	3% Minimum	Compound	10/7/2011	\$ 1,266

<sup>1</sup> SIO's financial statements did not accrue interest payable mortgages, notes, loans and credit cards. The date shown is the date on which accrual should begin.

<sup>2</sup> Principal Balance on the "Loan Start Date For Accrual."

<sup>3</sup> Effective May 1, 2008, SIO members assumed the obligation for payment of these two mortgages.

<sup>4</sup> Eggleston Notes are interest only until paid.

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**Exhibit 2C**

**Silicon International Ore, LLC**

**Computation of Statutory Pre-Judgment Interest on Reliance Damages**

Date of Breach	12/31/2007
Date of Analysis	10/7/2011
Sum of damages caused to SIO due to reliance on Monsanto commitment (Exhibit 2)	\$ 2,193,006
Rate of pre-judgment interest allowed pursuant to Idaho Code § 28-22-104 (simple interest)	<u>12%</u>
Pre-judgment interest from the Date of Breach to the Date of Analysis	<u>\$ 991,401</u>
Total - Reliance Damages plus Pre-Judgment Interest	<u><u>\$ 3,184,407</u></u>

**Exhibit 3**

**Silicon International Ore, LLC**

**Determination of Lost Business Value at December 31, 2007, with a Net Present Value Date of October 7, 2011**

	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
<b>Production</b>										
Annual Production (tons)	5,960	7,259	8,841	10,767	13,113	15,736	18,883	22,660	26,739	31,552
Year-to-Year Growth	21.79%	21.79%	21.79%	21.79%	21.79%	20.00%	20.00%	20.00%	18.00%	18.00%
Revenues	\$ 419,618	\$ 522,850	\$ 653,336	\$ 816,386	\$ 1,023,033	\$ 1,255,981	\$ 1,546,363	\$ 1,903,882	\$ 2,311,559	\$ 2,785,773
<b>Cost of Goods Sold</b>										
Materials and Supplies	\$ (180,336)	\$ (221,824)	\$ (273,540)	\$ (337,196)	\$ (416,700)	\$ (504,313)	\$ (611,847)	\$ (742,008)	\$ (887,005)	\$ (1,052,025)
Labor	(64,731)	(79,622)	(98,185)	(121,034)	(149,571)	(181,019)	(219,617)	(266,337)	(318,382)	(377,615)
Royalties	(23,014)	(28,675)	(35,807)	(44,687)	(55,894)	(68,458)	(84,036)	(103,109)	(124,697)	(149,880)
Total COGS	\$ (268,083)	\$ (330,121)	\$ (407,532)	\$ (502,917)	\$ (622,165)	\$ (753,788)	\$ (915,500)	\$ (1,111,454)	\$ (1,330,084)	\$ (1,578,520)
Gross Profit	151,535	192,729	245,803	313,469	400,868	502,192	630,863	792,428	981,475	1,206,253
%	36.11%	36.86%	37.62%	38.40%	39.18%	39.98%	40.80%	41.62%	42.46%	43.30%
<b>Operating Expenses</b>										
General, Administrative & Other	\$ (147,395)	\$ (149,987)	\$ (155,096)	\$ (162,885)	\$ (173,889)	\$ (187,116)	\$ (205,566)	\$ (226,931)	\$ (256,182)	\$ (287,669)
Depreciation	(120,732)	(90,684)	(29,744)	(20,949)	(9,367)	(9,367)	(9,367)	(7,136)	(4,905)	(4,905)
Total Operating Expenses	\$ (268,127)	\$ (240,671)	\$ (184,841)	\$ (183,814)	\$ (183,257)	\$ (196,483)	\$ (214,934)	\$ (236,067)	\$ (261,087)	\$ (292,574)
Pre-Tax Operating Income (Loss)	\$ (116,592)	\$ (47,941)	\$ 60,963	\$ 129,655	\$ 217,612	\$ 305,709	\$ 415,929	\$ 556,361	\$ 720,389	\$ 913,679
Tax (Expense)/Benefit	40,807	16,779	(21,337)	(45,379)	(76,164)	(106,998)	(145,575)	(194,726)	(252,136)	(319,788)
After-Tax Operating Income (Loss)	\$ (75,785)	\$ (31,162)	\$ 39,626	\$ 84,276	\$ 141,448	\$ 198,711	\$ 270,354	\$ 361,635	\$ 468,253	\$ 593,891
Add Back: Depreciation	120,732	90,684	29,744	20,949	9,367	9,367	9,367	7,136	4,905	4,905
Add: Capital Investment	115,000	-	-	-	-	-	-	-	-	-
Less: Capital Expenditures	(50,000)	-	-	-	-	-	-	-	-	-
Principal Payments on Debt	(74,121)	(68,631)	(65,138)	(63,237)	(62,619)	(37,513)	(29,898)	(11,824)	(7,349)	(6,544)
Net Cash Flow	\$ 35,827	\$ (9,109)	\$ 4,232	\$ 41,988	\$ 88,196	\$ 170,565	\$ 249,823	\$ 356,946	\$ 465,808	\$ 592,252
Discount Factor	1.00000	1.00000	1.00000	0.961506	0.802570	0.669906	0.559171	0.466741	0.389589	0.325191
Present Value by Year	35,827	(9,109)	4,232	40,372	70,783	114,263	139,594	166,602	181,474	192,595

Present Value at October 7, 2011

\$ 2,536,217

9/6/07

**Exhibit 3**  
**Silicon International Ore, LLC**  
**Determination of Lost Business**

	2016	2019	2020	2021	2022	2023	2024	2025	2026	2027
<b>Production</b>										
Annual Production (tons)	36,285	41,727	46,735	52,343	57,577	62,183	67,158	70,516	71,926	73,364
Year-to-Year Growth	15.00%	15.00%	12.00%	12.00%	10.00%	8.00%	8.00%	5.00%	2.00%	2.00%
<b>Revenues</b>	\$ 3,292,639	\$ 3,884,984	\$ 4,477,032	\$ 5,087,922	\$ 5,639,986	\$ 6,184,984	\$ 6,795,107	\$ 7,249,776	\$ 7,566,599	\$ 7,883,098
<b>Cost of Goods Sold</b>										
Materials and Supplies	\$ (1,223,158)	\$ (1,418,974)	\$ (1,608,947)	\$ (1,808,530)	\$ (2,000,155)	\$ (2,178,129)	\$ (2,373,106)	\$ (2,497,825)	\$ (2,559,498)	\$ (2,816,249)
Labor	(439,041)	(509,328)	(576,799)	(649,155)	(717,937)	(781,820)	(851,805)	(898,572)	(918,709)	(939,079)
Royalties	(175,990)	(206,562)	(236,695)	(269,580)	(302,296)	(332,699)	(367,073)	(391,984)	(406,405)	(421,870)
Total COGS	\$ (1,838,189)	\$ (2,134,864)	\$ (2,420,441)	\$ (2,727,265)	\$ (3,020,389)	\$ (3,292,647)	\$ (3,591,984)	\$ (3,785,781)	\$ (3,884,611)	\$ (3,977,198)
Gross Profit	1,454,449	1,750,120	2,056,591	2,360,657	2,619,597	2,892,337	3,203,123	3,463,995	3,681,988	3,905,900
%	44.17%	45.05%	45.94%	46.40%	46.45%	46.76%	47.14%	47.78%	48.66%	49.55%
<b>Operating Expenses</b>										
General, Administrative & Other	\$ (319,749)	\$ (356,866)	\$ (392,510)	\$ (430,737)	\$ (467,656)	\$ (500,764)	\$ (537,661)	\$ (561,174)	\$ (572,664)	\$ (583,941)
Depreciation	(4,905)	(55,546)	(139,978)	(66,129)	(48,637)	(36,142)	(36,142)	(36,142)	(20,523)	(69,243)
Total Operating Expenses	\$ (324,654)	\$ (412,412)	\$ (532,488)	\$ (496,866)	\$ (516,293)	\$ (536,906)	\$ (573,803)	\$ (597,316)	\$ (593,188)	\$ (653,184)
Pre-Tax Operating Income (Loss)	\$ 1,129,795	\$ 1,337,708	\$ 1,524,103	\$ 1,863,791	\$ 2,103,304	\$ 2,355,432	\$ 2,629,319	\$ 2,866,679	\$ 3,088,800	\$ 3,252,716
Tax (Expense)/Benefit	(395,428)	(468,198)	(533,436)	(652,327)	(736,156)	(824,401)	(920,262)	(1,003,338)	(1,081,080)	(1,138,451)
After-Tax Operating Income (Loss)	\$ 734,367	\$ 869,510	\$ 990,667	\$ 1,211,464	\$ 1,367,148	\$ 1,531,031	\$ 1,709,058	\$ 1,863,341	\$ 2,007,720	\$ 2,114,266
Add Back: Depreciation	4,905	55,546	139,978	66,129	48,637	36,142	36,142	36,142	20,523	69,243
Add: Capital Investment	-	-	-	-	-	-	-	-	-	-
Less: Capital Expenditures	-	(450,000)	-	-	-	-	-	-	-	-
Principal Payments on Debt	(5,988)	(5,628)	(5,427)	(5,354)	(5,386)	(5,506)	(5,701)	(5,962)	(6,283)	(521,155)
Net Cash Flow	\$ 733,284	\$ 469,428	\$ 1,125,218	\$ 1,272,239	\$ 1,410,398	\$ 1,561,667	\$ 1,739,496	\$ 1,893,521	\$ 2,021,961	\$ 1,662,353
Discount Factor	0.271437	0.226569	0.189117	0.157856	0.131763	0.109983	0.091803	0.076628	0.063961	0.053389
Present Value by Year	199,040	106,358	212,798	200,831	185,838	171,756	159,890	145,098	129,327	88,751

Present Value at October 7, 2011

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**Exhibit 4**  
**Silicon International Ore, LLC**  
**Estimated Lost Profits**

<u>Year</u>	<u>Estimated Lost Pre-Tax Profits/(Losses)<sup>1</sup></u>	<u>Cumulative Total</u>
2008	\$ (116,592)	\$ (116,592)
2009	(47,941)	(164,533)
2010	60,963	(103,570)
2011	129,655	26,085
2012	217,612	243,696
2013	305,709	549,405
2014	415,929	965,335
2015	556,361	1,521,696
2016	720,389	2,242,084
2017	913,679	3,155,763
2018	1,129,795	4,285,558
2019	1,337,708	5,623,266
2020	1,524,103	7,147,369
2021	1,863,791	9,011,160
2022	2,103,304	11,114,465
2023	2,355,432	13,469,896
2024	2,629,319	16,099,216
2025	2,866,679	18,965,895
2026	3,088,800	22,054,695
2027	3,252,716	25,307,411
Total	<u>\$ 25,307,411</u>	

<sup>1</sup> See Exhibit 3

**KENT W. GOATES, CPA**  
**MANAGING MEMBER**  
**BRIGHTEDGE ASSOCIATES, LLC**

MOBILE: (801) 201-1192 | EMAIL: KGOATES@BRIGHTEDGEGROUP.COM  
PO BOX 95150, SOUTH JORDAN, UTAH 84095 | 9893 STERLING PARK CIRCLE, SOUTH JORDAN, UTAH 84095

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**PROFESSIONAL EXPERIENCE**

**BRIGHTEDGE ASSOCIATES, LLC**, *South Jordan, Utah* 2009-Present  
CPA firm specializing in management, financial and litigation support consultation. The firm also provides outsourced executive services. BrightEdge's purpose is to use the deep CPA and senior executive experience of its principals in providing exceptional, high-quality assistance to businesses, bankers, and attorneys as they deal with complex financial, management and operational matters and decisions.

**AMP CAPITAL PARTNERS, LLC**, *Draper, Utah* 2007-2009  
Privately held venture capital firm interested primarily in renewable energy, technology, real estate, mining, and heavy equipment.

**Partner, Chief Operating Officer and Chief Financial Officer**

- Led day-to-day operations of firm, and oversaw operations, finance & control, human resources, IT and risk management of more than one dozen portfolio entities. Directed due diligence efforts; bought, grew, sold, and dissolved companies; assisted in raising capital; managed relationships with all key service providers; negotiated contracts; installed operating procedures; and mentored entrepreneurs.
  - Negotiated and sold technology licensing company to international buyer.
  - Set up foreign operations in Ghana, Africa for four unique businesses.
  - Instigated and directed protection of all companies' assets, including IP patenting and trademarking.
  - Oversaw outside attorneys with all documents and transactions and over two difficult lawsuits.
  - Directed portfolio company managements in instituting proper processes.

**AMP RESOURCES, LLC**, *Draper, Utah* 2005-2007  
Development stage company working to build renewable energy power plants with geothermal and industrial waste heat sources through utilizing and licensing proprietary technology.

**Chief Financial Officer**

- Leader on financial, strategic and several operational matters. Established methodologies and procedures in human resources, finance, risk management, administration, and operations. Negotiated key contracts. Worked directly with board members, key stakeholders, financing and investment parties, and buyers.
  - Handled all financial matters and relationships during a time of significant financial hardship while maintaining friendly relationships with all investors, customers, and vendors.
  - Led significant aspects of getting this organization to a successful \$120 million sale transaction.

**CERTIPORT, INC.** *American Fork, Utah* 2003-2005  
Leading provider of international, performance-based certification programs and services designed to enable individual success and advancement.

**Executive Vice President, Chief Operating Officer and Chief Financial Officer**

- Top level executive overseeing nearly all aspects of this 120 employee organization. Directed steps to unify management and gain focus with corporate objectives, directions, and strategies. Instigated significant new policies and procedures and installed project and product review processes. Identified and directed initiatives to resolve significant business problems and inefficiencies. Oversaw renovation of channel and directly managed several key and vital external relationships.
  - Reduced corporate headcount by 20 percent (with commensurate cost reductions) and consolidated three departments, payrolls, and management systems resulting in an immediately more efficient and functional organization.

KENNECOTT ENERGY COMPANY, Gillette, Wyoming

1997-2003

Large subsidiary of Rio Tinto (a premiere worldwide mining organization) with six mining operations in Wyoming, Montana and Colorado. Second largest U.S. coal producer with annual revenues exceeding \$950 million.

**Vice President and Chief Financial Officer**

- Corporate officer, member of five-person executive team and Board of Directors. Responsible for business development (including mergers and acquisitions, evaluation of business conditions, and formulation of comprehensive strategic and tactical plans); financial control; budgeting and forecasting; economic analysis; capital investments and spending; credit, insurance, and risk management; coordination of treasury and cash management; internal audit; information systems & technology; procurement; office administration; aircraft oversight; security, and the integration of these activities into overall operating plans. Headed the Company's investment committee. Managed all major core and non-core partnerships and business joint ventures.
  - Directed effort in acquiring significant competitor, resulting in improved market penetration by 25% and increased revenues by more than 35%.
  - Negotiated full ownership of a contract previously shared with a third party, thereby increasing annual net income by over \$9 million.
  - Led efforts to acquire over 800 million tons of additional coal reserves in a competitive bid environment, thus helping to secure the long-term viability of two mining operations.
  - Implemented first-of-kind, award-winning reclamation project which rendered savings of over \$16 million and left a long term environmental asset for the State of Wyoming.
  - Sponsored large company-wide ERP implementation that was brought in under-time and under-budget.
  - Oversaw implementation of "paperless" initiatives (including electronic expense reporting, invoice scanning and purchasing cards) resulting in increased processing speeds, reduced overtime, annual savings of over \$1 million, and improved working conditions for employees.
  - Provided leadership of two significant restructuring and cost reduction initiatives, resulting in overall annual savings of \$19 million.

KENNECOTT CORPORATION, Salt Lake City, Utah

1993-1997

\$1.7 billion diversified U.S. mining organization with over 5,000 employees; subsidiary of Rio Tinto. Holdings included Kennecott Utah Copper, Kennecott Minerals, Kennecott Energy, and Kennecott Exploration. Operations were located in Utah, Wyoming, Montana, Nevada, Wisconsin, South Carolina, Alaska, and Colorado. Primary products include copper, gold, coal, molybdenum, lead, silver, and zinc.

**Director of Tax**

- Directed all tax related activities for this consolidated organization of 80 plus corporate entities, including planning, compliance, structuring, and due diligence involving both income and non-income taxes. Oversaw the daily activities of eight employees and several consultants and acted as liaison with other Rio Tinto organizations in the U.S. and U.K.
  - Initiated and oversaw R&D study that generated \$54 million in tax savings between 1994 and 1998.
  - Worked with Utah State Tax Commission and served as primary author of State of Utah rule on valuation of mining properties that led to more equitable valuation methodologies for both the State and the mining industry. Average annual savings to the company exceeded \$4 million in property taxes over the period 1998 through 2002.
  - Extensively lobbied the IRS, Department of Treasury, and members of Congress and obtained a Section 29 Private Letter Ruling from the IRS at a time when the IRS had halted such rulings.
  - Led tax side of several due diligence efforts; successes included acquiring two major coal operations.
  - Generated one time tax savings exceeding \$40 million on one major manufacturing facility through obtaining a sales & use tax manufacturing exemption from the Utah State Tax Commission.
  - Established a Foreign Sales Corporation for international sales of molybdenum. Annual tax savings averaged \$1 million.

PRICE WATERHOUSE, Southern California, New York City, New York  
Worldwide audit, tax, financial services, and consulting firm.

1987 - 1993

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Promotion to **Tax Senior Manager** in 1989, *Orange County, Los Angeles and other So California offices*  
 Full-service tax professional with broad spectrum of experience in tax consulting for a wide variety of companies in the aerospace, manufacturing, high technology, services, and retail industries. Significant participation in mergers, acquisitions and leveraged buy-outs. Supervised projects and staff in five Southern California offices. Regular instructor for the Firm's national training program. Frequent public speaker.

- Served tour-of-duty in the Technical Tax Services group (one of six tour managers selected from throughout the U.S.) in the National Office in New York City (1990 – 1991). Provided technical consulting to practice offices nationally. Edited technical publications and wrote technical articles. Analyzed tax simplification proposals for the AICPA and provided guidance to the Tax Foundation in Washington, D.C. concerning areas of the tax law needing change. Served as the sole non-partner on the firmwide tax department strategy committee. Worked directly for the head of the tax department for the entire firm on several projects.
- Conducted reviews of tax departments (looking at structure and competencies) and technical tax issues for large client corporations.

ARTHUR ANDERSEN & CO., *Salt Lake City, Utah* 1982 – 1987  
 Worldwide audit, tax, financial services, and consulting firm.

Promotion to **Tax Manager** in 1986  
 Supervised and performed tax consultation and compliance work in individual, corporate, partnership, and trust taxation covering numerous industries. Participated on firmwide software advisory group and served on the western regional steering committee for the use of tax software in the offices.

**EDUCATION & TRAINING**

<b>Master of Professional Accountancy (Tax Emphasis)</b> , <i>University of Utah, Salt Lake City, Utah</i>	1982
<i>Graduated Magna Cum Laude</i>	
<b>Bachelor of Science (Accounting)</b> , <i>University of Utah, Salt Lake City, Utah</i>	1981
<i>Graduated Magna Cum Laude</i>	
<b>Effective Negotiating and Influencing</b> , <i>Effective Negotiating Services</i>	2002
<b>Leadership Development Program</b> , <i>Center for Creative Leadership</i>	1996, 2000
<b>Program on Negotiations for Senior Executives</b> , <i>Harvard, MIT and Tufts Universities</i>	1996
<b>Dealing with Difficult People in Difficult Situations</b> , <i>Harvard, MIT and Tufts Universities</i>	1996
<b>Economic Evaluation and Investment Decisions Methods</b> , <i>Colorado School of Mines</i>	2001
<b>General Securities Dealer</b> , <i>Bisys for National Association of Securities Dealers exams 66 and 7</i>	2003
<b>Life and Health Insurance</b> , <i>Dearborn for State of Utah Insurance Department insurance exams</i>	2003

**AFFILIATIONS/ASSOCIATIONS**

- American Institute of Certified Public Accountants
- Utah Association of Certified Public Accountants
- Local leader within Boy Scouts of America
- Financial Literacy Volunteer Instructor – UACPA Foundation
- Volunteer with the UACPA for conferences
- Former Board Member – Wyoming Taxpayers Association
- Former Member – Rio Tinto America Pension and Savings Plans Investment Committees
- Former Member – National Mining Association Financial Management Committee
- Former Member – University of Utah School of Accountancy Advisory Board

**CERTIFICATIONS & LICENSES**

- Certified Public Accountant, 1981, licensed in the State of Utah
- Former licensed Financial Advisor in the States of Utah and Wyoming

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**KENT W. GOATES, MPRA, CPA**  
**MANAGING MEMBER**  
**BRIGHTEDGE ASSOCIATES, LLC**

MOBILE: (801) 201-1192 | EMAIL: KGOATES@BRIGHTEDGEGROUP.COM  
PO BOX 95150, SOUTH JORDAN, UTAH 84095 | 9893 STERLING PARK CIRCLE, SOUTH JORDAN, UTAH 84095

---

- Publications authored by the witness within the preceding ten years: None.
- Compensation to be paid for the study and testimony: \$225 per hour.
- Listing of any other cases in which the witness has testified as an expert, at trial or by deposition within the preceding four years: None.



**ARTICLES OF ORGANIZATION  
LIMITED LIABILITY COMPANY**

To the Secretary of State of Idaho  
Corporations Division  
700 West Jefferson Room 203  
P.O. Box 83720 • Boise, ID 83720-0080

**FILED**



1999 FEB 24

SECRETARY OF STATE  
STATE OF IDAHO

- 1. The name of the limited liability company is: Silicon International Ore, LLC
- 2. The address of the initial registered office is: 7425 Westwood Dr., Boise ID 83704  
(not a PO Box)  
\_\_\_\_\_ and the name of the initial registered agent at that address is: Timothy M. Sullivan

Signature of registered agent : *Timothy M. Sullivan*

- 3. The latest date certain on which the limited liability company will dissolve: Dec. 31, 2049

- 4. Is management of the limited liability company vested in a manager or managers?  
 Yes       No (check appropriate box)

- 5. If management is vested in one or more manager(s), list the name(s) and address(es) of at least one initial manager. If management is vested in the members, list the name(s) and address(es) of at least one initial member.

<u>Name:</u>	<u>Address:</u>
<u>Robert E. H. Sullivan</u>	<u>3636 East McLain Mtn. Cir.</u>
	<u>Salt Lake City, Utah 84121</u>
<u>Timothy M. Sullivan</u>	<u>7425 Westwood Drive</u>
	<u>Boise, Idaho 83704</u>

- 6. Signature of at least one person listed in #5 above:

*Robert E. H. Sullivan*      Robert E. H. Sullivan

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

IDAHO SECRETARY OF STATE  
Secretary of State use only  
**02/24/1999 09:00**  
CK: 1046 CT: 111537 BH: 190025  
1 @ 100.00 = 100.00 ORGAN LLC # 2  
*W8119*

**EXHIBIT**  
K



# IDAHO SECRETARY OF STATE Viewing Business Entity

Ben Ysursa, Secretary of State

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## SILICON INTERNATIONAL ORE, LLC

599 BENCH-LAGO RD  
GRACE, ID 83241

**Type of Business:** LIMITED LIABILITY COMPANY

**Status:** ADMIN DISSOLVED, ADMIN DISSLV 06 May 2009

**State of Origin:** IDAHO

**Date of** 24 Feb 1999

**Origination/Authorization:**

**Current Registered Agent:** TIMOTHY M SULLIVAN  
599 BENCH-LAGO RD  
GRACE, ID 83241

**File Number:** W8119

**Date of Last Annual Report:** 19 Dec 2007

### Original Filing:

**Filed 24 Feb 1999** ARTICLES OF ORGANIZATION

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### Annual Reports:

<b>Report for year 2008</b>	ANNUAL REPORT	<a href="#">View Image (PDF format)</a> <a href="#">View Image (TIFF format)</a>
<b>Report for year 2007</b>	ANNUAL REPORT	<a href="#">View Image (PDF format)</a> <a href="#">View Image (TIFF format)</a>
<b>Report for year 2006</b>	ANNUAL REPORT	<a href="#">View Image (PDF format)</a> <a href="#">View Image (TIFF format)</a>
<b>Report for year 2005</b>	ANNUAL REPORT	<a href="#">View Image (PDF format)</a> <a href="#">View Image (TIFF format)</a>
<b>Report for year 2004</b>	ANNUAL REPORT	<a href="#">View Image (PDF format)</a> <a href="#">View Image (TIFF format)</a>
<b>Report for year 2003</b>	ANNUAL REPORT	<a href="#">View Image (PDF format)</a> <a href="#">View Image (TIFF format)</a>
<b>Report for year 2002</b>	ANNUAL REPORT	<a href="#">View Image (PDF format)</a> <a href="#">View Image (TIFF format)</a>
<b>Report for year 2001</b>	ANNUAL REPORT	<a href="#">View Image (PDF format)</a> <a href="#">View Image (TIFF format)</a>
<b>Report for year 1999</b>	ANNUAL REPORT	<a href="#">View Image (PDF format)</a> <a href="#">View Image (TIFF format)</a>

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Comments, questions or suggestions can be emailed to: [sosinfo@sos.idaho.gov](mailto:sosinfo@sos.idaho.gov)



David P. Gardner (Idaho Bar No. 5350)  
 MOFFATT THOMAS BARRETT ROCK & FIELDS, CHTD.  
 412 West Center, Suite 2000  
 Pocatello, ID 83204-0817  
 Telephone: (208) 233-2001  
 Facsimile: (208) 232-0150  
 Email: [dpg@moffatt.com](mailto:dpg@moffatt.com)

Barry N. Johnson (Utah Bar No. 6255)  
 Daniel K. Brough (Utah Bar No. 10283)  
*Pro Hac Vice Admission Pending*  
 BENNETT TUELLER JOHNSON & DEERE  
 3165 East Millrock Drive, Suite 500  
 Salt Lake City, Utah 84121  
 Telephone: (801) 438-2000  
 Facsimile: (801) 438-2050  
 Email: [bjohnson@btjd.com](mailto:bjohnson@btjd.com), [dbrough@btjd.com](mailto:dbrough@btjd.com)

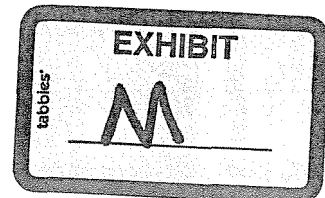
*Attorneys for Plaintiff Silicon International Ore, LLC*

**IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT  
 STATE OF IDAHO, COUNTY OF CARIBOU**

\*\*\*\*\*

SILICON INTERNATIONAL ORE, LLC,	)	
an Idaho limited liability company,	)	
	)	<b>PLAINTIFF'S RESPONSES TO</b>
Plaintiff,	)	<b>DEFENDANT WASHINGTON GROUP</b>
	)	<b>INTERNATIONAL INC.'S FIRST SET</b>
	)	<b>OF INTERROGATORIES</b>
vs.	)	
	)	
MONSANTO COMPANY, a Delaware	)	Case No. CV-2009-0000366
corporation; and WASHINGTON GROUP	)	
INTERNATIONAL, INC., an Ohio	)	Judge Mitchell W Brown
corporation;	)	
	)	
Defendants.	)	

\*\*\*\*\*



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Plaintiff Silicon International Ore, LLC ("SIO"), by and through counsel, hereby responds to the First Set of Interrogatories (the "Interrogatories" and each an "Interrogatory") issued by Defendant Washington Group International, Inc. ("WGI").

**GENERAL OBJECTIONS**

**GENERAL OBJECTION NO. 1:** SIO objects to each and every Interrogatory to the extent that WGI attempts to impose requirements or obligations beyond those imposed by the Idaho Rules of Civil Procedure.

**GENERAL OBJECTION NO. 2:** SIO objects to each and every Interrogatory to the extent that WGI seeks information protected by the attorney-client privilege, information protected by the work product doctrine, or trial preparation materials protected under the Idaho Rules of Civil Procedure or under any other valid doctrine or privilege.

**GENERAL OBJECTION NO. 3:** SIO objects to each and every Interrogatory to the extent that WGI seeks information that is irrelevant to the subject matter of this lawsuit and is not reasonably calculated to lead to the discovery of admissible evidence.

**GENERAL OBJECTION NO. 4:** SIO objects to each and every Interrogatory to the extent that it is overly broad or unduly burdensome and oppressive such that the burden or expense of the proposed discovery outweighs its likely benefit.

**GENERAL OBJECTION NO. 5:** SIO objects to each and every Interrogatory to the extent it is ambiguous and too vague to adequately apprise SIO of what information is being sought or to permit SIO to furnish such information with reasonable effort.

**GENERAL OBJECTION NO. 6:** SIO objects to each and every Interrogatory to the extent it purports to impose a burden of disclosing information not readily available to SIO and/or equally available to WGL.

**GENERAL OBJECTION NO. 7:** SIO objects to each and every Discovery Request to the extent it requires SIO to render a legal conclusion or to interpret the meaning of a statute.

**GENERAL OBJECTION NO. 8:** SIO objects to each and every Discovery Request to the extent it requires SIO to disclose "all evidence" or "all documents," or utilize similar all-encompassing phrases. Discovery in this matter is ongoing, and SIO may yet discover additional evidence supporting its defenses. An admission of evidence or lack of evidence should be construed as an admission only as of the date of these Responses.

**GENERAL OBJECTION NO. 9:** SIO objects to each and every Discovery Request to the extent it requests information that constitutes expert testimony.

**GENERAL OBJECTION NO. 10:** Subject to and without waiving the foregoing objections and reservations, which are incorporated into SIO's specific responses as if set forth at length therein, the following answers are provided based upon review of matters to date. SIO reserves the right to supplement its answers if and when additional information is obtained.

### **RESPONSES TO INTERROGATORIES**

**INTERROGATORY NO. 1:** Please state the name, address and telephone number of each and every person known to you or your attorneys who has any knowledge of, or who purports to have any knowledge of, any of the facts of this case, including but not limited to any facts relevant to the allegations (both as to liability and damages) set forth in your complaint, the allegations set forth in Washington Group's answer thereto, or the allegations set forth in Monsanto Company's ("Monsanto") answer thereto and, for each person, state the relevant fact or facts which you understand to be within the knowledge of such person.

**RESPONSE:** SIO objects to Interrogatory No. 1 on the ground that it is unduly burdensome and oppressive such that the burden or expense of the proposed discovery outweighs its likely benefit. The information requested in Interrogatory No. 1 is more efficiently disclosed in a deposition than a written response to an interrogatory. Nevertheless, subject to and without waiving any of the foregoing objections, including but not limited to the General Objections, SIO responds to Interrogatory No. 1 in good faith as follows:

1. Bob Sullivan—c/o Bennett Tueller Johnson & Deere, 3165 East Millrock Drive, Suite 500, Salt Lake City, Utah, 84121, tel. (801) 438-2000.
2. Todd Sullivan (“Todd Sullivan”)—c/o Bennett Tueller Johnson & Deere, 3165 East Millrock Drive, Suite 500, Salt Lake City, Utah, 84121, tel. (801) 438-2000.
3. Tim Sullivan (“Tim Sullivan”)—c/o Bennett Tueller Johnson & Deere, 3165 East Millrock Drive, Suite 500, Salt Lake City, Utah, 84121, tel. (801) 438-2000.
4. DeLane Sullivan—c/o Bennett Tueller Johnson & Deere, 3165 East Millrock Drive, Suite 500, Salt Lake City, Utah, 84121, tel. (801) 438-2000.
5. Sue Sullivan—c/o Bennett Tueller Johnson & Deere, 3165 East Millrock Drive, Suite 500, Salt Lake City, Utah, 84121, tel. (801) 438-2000.
6. Andrew Rudd—c/o Bennett Tueller Johnson & Deere, 3165 East Millrock Drive, Suite 500, Salt Lake City, Utah, 84121, tel. (801) 438-2000.
7. Jim Smith (“Smith”)—c/o Racine, Olson, Nye, Budge & Bailey, Chtd., P.O. Box 1391, 201 E. Center Street, Pocatello, ID 83204-1391, tel. (208) 232-6101.

8. Mick Porta ("Porta")—c/o Racine, Olson, Nye, Budge & Bailey, Chtd., P.O. Box 1391, 201 E. Center Street, Pocatello, ID 83204-1391, tel. (208) 232-6101.
9. Mark Boswell—c/o Racine, Olson, Nye, Budge & Bailey, Chtd., P.O. Box 1391, 201 E. Center Street, Pocatello, ID 83204-1391, tel. (208) 232-6101.
10. Don Wind—c/o Racine, Olson, Nye, Budge & Bailey, Chtd., P.O. Box 1391, 201 E. Center Street, Pocatello, ID 83204-1391, tel. (208) 232-6101.
11. Randy Vranes—c/o Racine, Olson, Nye, Budge & Bailey, Chtd., P.O. Box 1391, 201 E. Center Street, Pocatello, ID 83204-1391, tel. (208) 232-6101.
12. Dave Farnsworth ("Farnsworth")—c/o Racine, Olson, Nye, Budge & Bailey, Chtd., P.O. Box 1391, 201 E. Center Street, Pocatello, ID 83204-1391, tel. (208) 232-6101.
13. Jill Lloyd— c/o Racine, Olson, Nye, Budge & Bailey, Chtd., P.O. Box 1391, 201 E. Center Street, Pocatello, ID 83204-1391, tel. (208) 232-6101.
14. Bruce Palanti—c/o Racine, Olson, Nye, Budge & Bailey, Chtd., P.O. Box 1391, 201 E. Center Street, Pocatello, ID 83204-1391, tel. (208) 232-6101.
15. Amity White—c/o Racine, Olson, Nye, Budge & Bailey, Chtd., P.O. Box 1391, 201 E. Center Street, Pocatello, ID 83204-1391, tel. (208) 232-6101.
16. Trent Clark—c/o Racine, Olson, Nye, Budge & Bailey, Chtd., P.O. Box 1391, 201 E. Center Street, Pocatello, ID 83204-1391, tel. (208) 232-6101.
17. Scott Elsmore—c/o Racine, Olson, Nye, Budge & Bailey, Chtd., P.O. Box 1391, 201 E. Center Street, Pocatello, ID 83204-1391, tel. (208) 232-6101.

18. Chris Leatherman ("Leatherman")—c/o Racine, Olson, Nye, Budge & Bailey, Chtd., P.O. Box 1391, 201 E. Center Street, Pocatello, ID 83204-1391, tel. (208) 232-6101.
19. Tab Mendenhall—c/o Racine, Olson, Nye, Budge & Bailey, Chtd., P.O. Box 1391, 201 E. Center Street, Pocatello, ID 83204-1391, tel. (208) 232-6101.
20. Travene Armstrong—c/o Hawley Troxell Ennis & Hawley LLP, 877 Main Street, Suite 1000, P.O. Box 1617, Boise, Idaho, 83701-1617, tel. (208) 344-6000.
21. Francis Sase—c/o Hawley Troxell Ennis & Hawley LLP, 877 Main Street, Suite 1000, P.O. Box 1617, Boise, Idaho, 83701-1617, tel. (208) 344-6000.
22. Joe Jenkins—c/o Hawley Troxell Ennis & Hawley LLP, 877 Main Street, Suite 1000, P.O. Box 1617, Boise, Idaho, 83701-1617, tel. (208) 344-6000.
23. Steven Hanson—c/o Hawley Troxell Ennis & Hawley LLP, 877 Main Street, Suite 1000, P.O. Box 1617, Boise, Idaho, 83701-1617, tel. (208) 344-6000.
24. Dan Windell—c/o Hawley Troxell Ennis & Hawley LLP, 877 Main Street, Suite 1000, P.O. Box 1617, Boise, Idaho, 83701-1617, tel. (208) 344-6000.
25. Hugh Lawrence ("Lawrence")—c/o Hawley Troxell Ennis & Hawley LLP, 877 Main Street, Suite 1000, P.O. Box 1617, Boise, Idaho, 83701-1617, tel. (208) 344-6000.
26. Mike Morgan—c/o Hawley Troxell Ennis & Hawley LLP, 877 Main Street, Suite 1000, P.O. Box 1617, Boise, Idaho, 83701-1617, tel. (208) 344-6000.
27. John R. Rosenbaum ("Rosenbaum")—c/o Hawley Troxell Ennis & Hawley LLP, 877 Main Street, Suite 1000, P.O. Box 1617, Boise, Idaho, 83701-1617, tel. (208) 344-6000.



28. Steve Taylor—c/o Hawley Troxell Ennis & Hawley LLP, 877 Main Street, Suite 1000, P.O. Box 1617, Boise, Idaho, 83701-1617, tel. (208) 344-6000.
29. Clayton Krall—c/o Hawley Troxell Ennis & Hawley LLP, 877 Main Street, Suite 1000, P.O. Box 1617, Boise, Idaho, 83701-1617, tel. (208) 344-6000.
30. Reid Lester (“Lester”)—c/o Hawley Troxell Ennis & Hawley LLP, 877 Main Street, Suite 1000, P.O. Box 1617, Boise, Idaho, 83701-1617, tel. (208) 344-6000.
31. Wade Zander (“Zander”)—c/o Hawley Troxell Ennis & Hawley LLP, 877 Main Street, Suite 1000, P.O. Box 1617, Boise, Idaho, 83701-1617, tel. (208) 344-6000.
32. Bill Lovely (“Lovely”)—c/o Hawley Troxell Ennis & Hawley LLP, 877 Main Street, Suite 1000, P.O. Box 1617, Boise, Idaho, 83701-1617, tel. (208) 344-6000.
33. Steve Kirk—c/o Hawley Troxell Ennis & Hawley LLP, 877 Main Street, Suite 1000, P.O. Box 1617, Boise, Idaho, 83701-1617, tel. (208) 344-6000.
34. Dave Orchard (“Orchard”)—c/o Hawley Troxell Ennis & Hawley LLP, 877 Main Street, Suite 1000, P.O. Box 1617, Boise, Idaho, 83701-1617, tel. (208) 344-6000.
35. Shawn Gorton (“Gorton”)—c/o Hawley Troxell Ennis & Hawley LLP, 877 Main Street, Suite 1000, P.O. Box 1617, Boise, Idaho, 83701-1617, tel. (208) 344-6000.
36. Sage Lish (“Lish”)—c/o Hawley Troxell Ennis & Hawley LLP, 877 Main Street, Suite 1000, P.O. Box 1617, Boise, Idaho, 83701-1617, tel. (208) 344-6000.
37. Mike Zander—c/o Hawley Troxell Ennis & Hawley LLP, 877 Main Street, Suite 1000, P.O. Box 1617, Boise, Idaho, 83701-1617, tel. (208) 344-6000.

38. Terrell Parsons (“Parsons”)—c/o Hawley Troxell Ennis & Hawley LLP, 877 Main Street, Suite 1000, P.O. Box 1617, Boise, Idaho, 83701-1617, tel. (208) 344-6000.
39. Ken Hecker—c/o Hawley Troxell Ennis & Hawley LLP, 877 Main Street, Suite 1000, P.O. Box 1617, Boise, Idaho, 83701-1617, tel. (208) 344-6000.
40. Bill Gerry (“Gerry”)— c/o Hawley Troxell Ennis & Hawley LLP, 877 Main Street, Suite 1000, P.O. Box 1617, Boise, Idaho, 83701-1617, tel. (208) 344-6000.
41. Steve Rigby (“Rigby”)—SIO does not possess current contact information for Mr. Rigby that it has verified as current. Nevertheless, upon information and belief, Rigby’s address is 404 North Main Street, Grace, Idaho, 83124, and his telephone number is (208) 425-3940.
42. Sidney Kim “Leroy” Johnson (“Johnson”)—SIO does not possess contact information for Johnson that it has verified as current. However, upon information and belief, Johnson’s address is 65 S. Third E., Preston, ID 83263-1318, and his telephone number is (208) 852-2693.
43. Sherrie Herrman—Southeast Idaho Council of Governments, P.O. Box 6079, Pocatello, Idaho, 83205-6079, email [sherrie@sicog.org](mailto:sherrie@sicog.org).
44. Mitch Hart (“Hart”)—SIO does not possess contact information for Mr. Hart that it has verified as current. However, upon information and belief, Mr. Hart’s cell phone number is (208) 390-5212, and his business email address is [mjhart57@icsofidaho.com](mailto:mjhart57@icsofidaho.com).
45. David Benjamin—SIO does not possess contact information for Mr. Benjamin that is verified as current. However, upon information and belief, Mr. Benjamin is employed by

the Mine Safety and Health Administration's Boise, Idaho field office, 300 E. Mallard, Suite 150, Lake Point Centre 1, Boise, ID, tel. (208) 334-1835.

46. David Poulson—SIO does not possess contact information for Mr. Poulson that is verified as current. However, upon information and belief, Mr. Poulson is employed by the Mine Safety and Health Administration's Boise, Idaho field office, 300 E. Mallard, Suite 150, Lake Point Centre 1, Boise, ID, tel. (208) 334-1835.

47. Todd Frolick ("Frolick")—SIO does not possess contact information for Mr. Frolick that is verified as current. However, upon information and belief, Mr. Frolick is employed by Caribou Electrical, 631 5th East Street, Soda Springs, ID 83276-1365, tel. (208) 547-0327.

48. Todd Reid—SIO does not possess contact information for Mr. Frolick that is verified as current. However, upon information and belief, Mr. Frolick is employed by Caribou Electrical, 631 5th East Street, Soda Springs, ID 83276-1365, tel. (208) 547-0327.

49. Eric Evans ("Evans")—SIO does not possess contact information for Mr. Evans that is verified as current. However, upon information and belief, Mr. Evans is employed by Intermountain Equipment, 1280 College Road, Pocatello, ID 83204-5022, tel. (208) 234-1242.

50. Rusty Hayes—SIO does not possess contact information for Mr. Hayes that is verified as current. However, upon information and belief, Mr. Hayes is employed by R & R Transport, 610 U.S. 30, Soda Springs, ID 83276, tel. (208) 547-4616.

51. Gene Bennett—SIO does not possess contact information for Mr. Bennett that is verified as current.

52. Gradis Healing—SIO does not possess contact information for Mr. Healing that is verified as current.

Individuals numbered 1–6 possess relevant knowledge and information regarding, without limitation, SIO’s operations, SIO’s negotiations with Monsanto and WGI regarding the Monsanto Agreement, SIO’s organization, and SIO’s damages. Individuals numbered 7–19 and 44 possess relevant knowledge and information regarding, without limitation, Monsanto’s operations and its negotiations and performance of the Monsanto Agreement. Individuals numbered 20–43 possess relevant knowledge and information regarding, without limitation, WGI’s involvement in the Monsanto Agreement and Monsanto’s performance thereof. Individuals numbered 44–52 possess relevant knowledge and information regarding, without limitation, SIO’s actions taken in reliance upon the Monsanto Agreement.

INTERROGATORY NO. 2: Please identify each person whom you might call to testify as a lay witness in the trial of this matter and, as to each, please state the substance of the facts to which he or she is expected to testify.

RESPONSE: SIO objects to Interrogatory No. 2 on the ground that discovery is ongoing, and SIO has not yet identified the persons it intends to call as witnesses at trial, nor has it identified the anticipated substance of those persons’ expected testimony. SIO will provide that information when it has determined the identity and anticipated testimony of its witnesses, and in accordance with the procedures set forth in the Idaho Rules of Civil Procedure. SIO reserves the right to call as a witness any of the individuals listed in SIO’s response to Interrogatory No. 1, above.

INTERROGATORY NO 3: Are you aware of any written, oral, or non-verbal statements, assertions, or admissions (either signed or unsigned) (hereinafter collectively "statement") made by any person (including but not limited to the parties in this case), other than given during depositions for this proceeding, concerning the allegations (both as to liability and damages) in any of the pleadings filed by any party in this case and, if so, please separately state the following for each such statement:

(a) The circumstance surrounding the making of the statement, including the identity of the person making the statement; the identity of the person receiving the statement and any other person(s) present when the statement was made; the date, time of day and place of the making of the statement; the subject matter and entire content of the statement; and the identity of the person or persons, if any, who wrote, recorded and/or transcribed the statement; and

(b) Whether a copy or recording of the statement exists.

RESPONSE: SIO objects to Interrogatory No. 3 on the ground that it is unduly burdensome and oppressive such that the burden or expense of the proposed discovery outweighs its likely benefit. The information requested in Interrogatory No. 3 is more efficiently disclosed in a deposition than a written response to an interrogatory. SIO further objects to Interrogatory No. 3 on the ground that the word "statement" is vague and ambiguous. SIO cannot discern whether "statement" refers to a formal statement, such an affidavit, declaration, or other sworn statement, or whether it refers to any type of written or oral communication. SIO further objects to Interrogatory No. 3 to the extent it requests information protected by the attorney-client privilege, information protected by the work product doctrine, or trial preparation materials protected under the Idaho Rules of Civil Procedure or under any other valid doctrine or privilege. Nevertheless, subject to and without waiving any of the foregoing objections, including the General Objections, SIO responds in good faith to Interrogatory No. 3 as follows:

Pursuant to Idaho Rule of Civil Procedure 33(c), SIO will produce, for inspection and copying, all responsive, nonprivileged documents in its possession, custody, or control

that pertain in any way to SIO's communications with WGI or Monsanto. Also, SIO discloses and other oral communications as described in its responses to WGI's interrogatories as set forth herein. SIO has not rendered any affidavits, declarations, or sworn statements in connection with this action.

INTERROGATORY NO. 4: Please identify each and every communication, whether written or oral, which you had with any person, including but not limited to, anyone employed by Monsanto or Washington Group, or with any nonparty, regarding the claims alleged in your complaint and the answers filed thereto.

RESPONSE: See response to Interrogatory No. 3 above.

INTERROGATORY NO. 5: Please set forth in detail a full and complete itemization of all damages claimed by you in this case, itemizing individually all damages claimed to arise out of the actions of Monsanto and itemizing individually all damages claimed to arise out of the actions of Washington Group.

RESPONSE: SIO objects to Interrogatory No. 5 on the ground that discovery is ongoing, and SIO has not yet computed a final calculation of its damages. SIO further objects to Interrogatory No. 5 on the ground that SIO's calculation of its damages is a matter for expert examination and calculation, and SIO is not qualified to make that calculation. SIO further objects to Interrogatory No. 5 on the ground that SIO's damages themselves are ongoing and fluctuating. Nevertheless, subject to and without waiving any of the foregoing objections, including the General Objections, SIO responds in good faith to Interrogatory No. 6 as follows:

SIO's damages include the following categories of damages:

1. Profits that SIO could have made, but did not, as a result of its inability to continue its operations due to WGI's conduct.
2. Damages that SIO incurred in reliance upon Monsanto's representations and conduct. Such damages include, without limitation, damages arising from business and other loans extended to SIO, that SIO cannot repay. SIO imputes these damages to WGI due to WGI's tortious interference with the Monsanto Agreement.
3. Loss of the value of SIO's business itself.
4. Damages SIO incurred as a direct and proximate result of WGI's conduct, including but not limited to the purchase price of a new, but unnecessary, screen as described herein.

INTERROGATORY NO. 6: Have you entered into a release, settlement agreement, compromise, covenant or any other type of agreement with any person, firm or corporation as a result of the allegations (both to liability and damages) in your complaint and, if so, please set forth the name and address of the person, firm or corporation; the type of agreement or instrument by which you compromised, settled or released any claims; the date thereof; and the amount of consideration received by you for the same.

RESPONSE: SIO has not entered into any release as described in Interrogatory No. 6.

INTERROGATORY NO. 7: Identify each person whom you might call to testify as an expert witness at the trial of this matter and, as to each, please:

- (a) Set forth a complete statement of all opinions to be expressed and the bases and reasons therefor;
- (b) Set forth all facts, data or other information considered by the expert in forming his or her opinions;
- (c) Produce any exhibits to be used as a summary of or in support of the opinions of such expert;

- (d) Set forth any qualifications of the expert, including a list of all publications authored by the witness within the preceding 10 years;
- (e) Identify how the expert is to be compensated for his or her testimony;
- (f) List all cases in which the expert has testified as an expert at trial or by deposition within the preceding four years; and
- (g) Identify the name and address of the school or university where the expert received special education or training in his or her field of expertise; the dates when the expert attended each such school or university for training; identify the name and/or description of each degree the expert received, including the date when each was received and the name of the school or university from which received.

**RESPONSE:** SIO objects to Interrogatory No.7 on the ground that discovery is ongoing, and SIO has not yet identified the persons it intends to call as expert witnesses at trial, nor has it identified the anticipated substance of those persons' expected testimony. SIO will provide that information when it has determined the identity and anticipated testimony of its expert witnesses, and in accordance with the procedures set forth in the Idaho Rules of Civil Procedure.

**INTERROGATORY NO. 8:** Other than the instant litigation, if you have ever been a plaintiff or defendant in any civil litigation, please state the name and address of each and every court wherein such complaint was filed, set forth the names of the parties to said proceedings, identify the number assigned to the litigation, and state what that litigation consisted of and the disposition thereof.

**RESPONSE:** SIO objects to Interrogatory No. 8 on the ground that the information it seeks is irrelevant to the subject matter of this lawsuit and is not reasonably calculated to lead to the discovery of admissible evidence. Nevertheless, subject to and without waiving any of the foregoing objections, including the General Objections, SIO responds in good faith to Interrogatory No. 8 as follows:



In Case No. 080917442, *Western Community Insurance Company v. Union Pacific Railroad Company*, commenced in the Third Judicial District Court of Salt Lake County, Utah, SIO was named as a third-party defendant. SIO also asserted a counterclaim against Union Pacific Railroad. The parties to the lawsuit consisted of Western Community Insurance Company, Union Pacific Railroad Company, and SIO. The court where the lawsuit was commenced is located at 450 South State Street, Salt Lake City, Utah, 84111. This lawsuit arose out of the crash of a Union Pacific Railroad train into an SIO tractor trailer that was carrying railroad traction sand processed by SIO. SIO tendered its defense, and the prosecution of its counterclaim, to its insurance carrier. The lawsuit is pending as of the date of this response.

INTERROGATORY NO. 9: If you contend that you and Monsanto reached an agreement termed the "Monsanto Agreement," as alleged in paragraph 10 of your complaint, please state the commencement date of the Monsanto Agreement and how and when it was determined, state the termination date of the Monsanto Agreement and how and when it was determined, set forth each and every term and condition of the Monsanto Agreement and how and when each said term and condition was determined, describe the author and identify the custodian of all documents or writings which identify, describe or discuss each and every term of the Monsanto Agreement, and set forth the name, title and authority of each Monsanto employee who agreed to or accepted each term of the Monsanto Agreement.

RESPONSE: SIO objects to Interrogatory No. 9 on the ground that it is ambiguous and too vague to adequately apprise SIO of what information is being sought or to permit SIO to furnish such information with reasonable effort. Specifically, but without limitation, SIO cannot ascertain with precision the meaning of the terms "commencement date," "termination date," or the "determination" of certain terms of the Monsanto Agreement. Nevertheless, subject to and

without waiving any of the foregoing objections, including the General Objections, SIO responds in good faith to Interrogatory No. 9 as follows:

a. SIO and Monsanto reached the Monsanto Agreement on or about May 15, 2000. Upon entering into the Monsanto Agreement, SIO immediately commenced performance of its obligations under the Monsanto Agreement by, without limitation, seeking necessary approvals, creating relationships with suppliers, contractors, and builders, and participating in the process of creating a facility for the processing, bagging, and selling of sand. In their negotiations, SIO and Monsanto contemplated that Monsanto would immediately commence preparations for selling sand, and that it would actually start selling sand as soon as possible.

b. In their negotiations, SIO and Monsanto contemplated that the Monsanto Agreement would not terminate so long as the relationship between SIO and Monsanto was mutually beneficial, a standard that would be assessed in accordance with the following criteria: (1) SIO conformed to all of Monsanto's environmental, safety, and control regulations; (2) SIO provided Monsanto with agreed-upon royalty payments; and (3) SIO permitted Monsanto to reasonably control the markets in which SIO could sell improved sand. Monsanto unilaterally terminated the Monsanto Agreement, thereby breaching it, subsequent to WGI's December 28, 2007, letter.

c. In negotiations culminating on or about May 15, 2000, SIO and Monsanto agreed to the following terms, which comprise the Monsanto Agreement:

i. Monsanto would furnish SIO with certain agreed-upon quantities of sand that could be processed and improved in a safe, healthy, and environmentally sound manner.

- ii. Although SIO could sell improved, value-added sand to third parties, Monsanto reserved the right to limit the markets in which SIO could sell improved sand.
- ii. SIO could obtain sand that WGI extracted as per the Monsanto Agreement.
- iv. SIO would pay Monsanto royalties through WGI in amounts calculated in accordance with type and weight of sand extracted.
- v. The Monsanto Agreement would remain in full force and effect for so long as it was mutually beneficial to both SIO and Monsanto to operate in accordance with the Monsanto Agreement. Both SIO and Monsanto understood and agreed that “mutual benefit” would be assessed in accordance with the following criteria: (1) SIO conformed to all of Monsanto’s environmental, safety, and control regulations; (2) SIO provided Monsanto with agreed-upon royalty payments; and (3) SIO permitted Monsanto to reasonably control the markets in which SIO could sell improved sand. So long as those criteria were satisfied, Monsanto would continue to provide agreed-upon quantities of sand and permit SIO to extract and sell improved sand obtained from Monsanto’s premises.
- d. Pursuant to Idaho Rule of Civil Procedure 33(c), SIO will produce, for inspection and copying, all responsive, nonprivileged documents in its possession, custody, or control pertaining, implicitly or explicitly, to the terms of the Monsanto Agreement.

INTERROGATORY NO. 10: If you contend that you and Monsanto understood and agreed as to how a “mutual benefit” would be assessed, as alleged in paragraph 11(e) of your complaint, please set forth all facts upon which you base such contention, identify all persons who have

knowledge of such a contention and set forth what knowledge each said person has, and identify all documents relating in any way to said "mutual benefit."

**RESPONSE:** See SIO's response to Interrogatory No. 9, above.

**INTERROGATORY NO. 11:** If you contend that Mr. Hart provided the assurance which Mr. Sullivan requested, as described in paragraph 17 of your complaint, please identify with specificity exactly what assurance Mr. Hart provided, when it was provided, identify whether it was oral or written, and set forth all terms of the assurance.

**RESPONSE:** Hart orally assured Todd Sullivan that Monsanto would not abruptly terminate the Monsanto Agreement after a short period of time. The assurance was a representation of Monsanto's good faith, and a recognition that SIO's business relied on Monsanto providing SIO with sufficient time to commence operating for profit. SIO does not recollect the precise date of Hart's assurance, but it was prior to the execution of SIO's agreement with WGI.

**INTERROGATORY NO. 12:** If you contend that the "Tailings" was a material that was an environmental hazard and otherwise burdensome to Monsanto, as alleged in paragraph 18 of your complaint, please set forth all facts upon which you base such a contention, identify all persons with knowledge of said facts, and identify what federal, state or other governmental law, statute, rule or regulation declared the "Tailings" an environmental hazard.

**RESPONSE:** SIO objects to Interrogatory No. 12 on the ground that it calls for a legal conclusion and asks SIO to opine on the meaning of statutes, rules and regulations.

Nevertheless, subject to and without waiving any of the foregoing objections, including the General Objections, SIO responds in good faith to Interrogatory No. 12 as follows:

Monsanto's Soda Springs site has been designated a Superfund site pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act. This is public information that is readily available on the internet and from other sources. *See, e.g.,*

[http://en.wikipedia.org/wiki/List\\_of\\_Superfund\\_sites\\_in\\_Idaho](http://en.wikipedia.org/wiki/List_of_Superfund_sites_in_Idaho). Moreover, it is SIO's understanding that the tailings present on the Monsanto site, and which formed the basis of SIO's business, consist of silicon dioxide which, in granules as small as the tailings, causes silicosis when inhaled. SIO further understands silicosis to be an irreversible lung condition involving inflammation and scarring of the victim's lungs. SIO and the individuals associated with it gained that knowledge simply by working in the silicon processing industry; it is their understanding that silicosis, and the fact that inhaling small silicon dioxide granules like the tailings causes silicosis, are common knowledge in that industry.

**INTERROGATORY NO. 13:** Regarding the "long-term financing" to which you refer in paragraph 19 of your complaint, identify each lender or credit agency which provided such financing, when it was provided, to whom it was provided, and specifically identify the terms of the financing.

**RESPONSE:** Pursuant to Idaho Rule of Civil Procedure 33(c), SIO will produce, for inspection and copying, all responsive, nonprivileged documents in its possession, custody, or control that pertain in any way to SIO's financing. SIO obtained its primary financing from the Southeastern Idaho Council of Governments.

**INTERROGATORY NO. 14:** If you contend that Washington Group consistently took various actions to undermine and hinder SIO's work, as alleged in paragraph 34 of your complaint, identify who on behalf of Washington Group took any such action, when each said action was taken, what action each said person took, and explain how any such action hindered SIO's work.

**RESPONSE:** SIO objects to Interrogatory No. 14 on the ground that it is unduly burdensome and oppressive such that the burden or expense of the proposed discovery outweighs its likely benefit. Specifically, the information requested in Interrogatory No. 14 is more

efficiently furnished during a deposition rather than in a written response to an interrogatory. Nevertheless, subject to and without waiving any of the foregoing objections, including the General Objections, SIO responds in good faith to Interrogatory No. 14 as follows:

1. The Screen. It is SIO's understanding that, in approximately 1998, WGI washed sand for another company. The sand was to be used as golf course bunker and top dressing sand. A screen to sort fine sand was needed to wash and process the sand. Rather than purchase and construct a new screen (which is a time and cost-intensive project), WGI simply covered one of its own screen decks with rubber and silicone glue to fill in screen holes, thereby creating a serviceable screen at a cost of merely a few hundred dollars.

However, in approximately the spring of 2004, SIO needed another screen to continue with its operations. Tim Sullivan asked both Rosenbaum and Parsons if they would be willing to do the same thing for SIO that they did for the golf course sand company in 1998. They refused. At that point, SIO was not getting enough sand to get through the winter without experiencing losses, so its choice was to either build the screen it needed or go out of business. It elected to build the screen.

WGI designated Lester to build the screen. Building the screen itself was an inordinately large job for one individual to accomplish. Nevertheless, Lester built a significant amount of the screen facility on its own. When Tim Sullivan expressed a concern that construction on the screen was progressing very slowly, he asked Parsons for help. However, Parsons refused to staff the screen construction project with additional workers, even though WGI previously had brought in individuals from other mine sites to help with concrete, bin construction, and other

projects. Consequently, Tim Sullivan asked Lovely for additional staff on the screen construction project. Ultimately, Orchard and Rigby assisted and, with Lester, completed the screen. In other words, SIO had to go beyond the mine superintendant to the mine supervisor to get the screen construction project done. During the delay period, when Lester was working on building the screen on his own at WGI's insistence, SIO was unable to take advantage of normal scheduling and run times and had to pay additional WGI workers for approximately three weeks, and to secure trucks and loaders, in order to bring the sand to SIO screen, feed the screen manually, and then have the sand transported away.

The screen itself cost between \$125,000.00 and \$150,000.00 to build. SIO incurred significant additional trucking and labor costs due to the delay in building the screen. All of that could have been avoided if WGI had simply modified an existing screen, as it had done in 1998, which would have cost only a few hundred dollars. Zander also has knowledge of the screen issue.

After about a few months of use, WGI disconnected the screen that SIO had purchased, rendering it inoperable, and rendering SIO's large expenditure to obtain the screen largely superfluous.

2. Construction Delays. WGI dragged its feet in constructing SIO's principal on-site facility. That delay resulted in additional costs to SIO, as well as time delays, as sand had to be transported to be washed, and then transported back to the facility for shipping. SIO paid WGI to do this.

3. Constricting Movement. In approximately winter 2006, Lawrence and Gerry—individuals who worked on WGI safety operations—asked Tim Sullivan what the geographic scope of SIO’s operations on the premises was. They did not represent to Tim Sullivan that they had any particular reason for asking. Tim Sullivan described the general parameters of the premises that SIO used. Subsequently, WGI delineated the boundaries that Tim Sullivan disclosed to Lawrence and Gerry, using a tape measure and an orange cone, and instructed SIO to not operate outside of those boundaries. WGI imposed this restriction even though it did not impose similar restrictions upon other contractors. The practical effect of the restriction was that it reduced SIO’s efficiency and ability to operate, as SIO had to arrange for WGI employees to enter SIO’s “boundaries” and remove waste sand and dust for dumping. In light of the fact that WGI initiated contact with SIO via Lawrence and Gerry, who were WGI safety personnel, SIO understood that WGI instituted these boundary restrictions under a pretextual guise of safety, despite SIO’s impeccable safety record.

Additionally, it is SIO’s understanding that in approximately September 2006, Monsanto and WGI had a meeting to discuss whether SIO could obtain contractor status, thereby removing the boundary restrictions WGI had imposed. SIO received ambiguous reports as to the outcome and matters of discussion of that meeting.

4. Dump Truck. SIO initially utilized a dump truck (albeit one that was too large for its operations) to which WGI had granted it access. SIO understands that in approximately the fall of 2007, WGI obtained a contract with a lime mining company. In approximately the winter of 2007, WGI removed most of its equipment (dump trucks, loaders, plows, etc.) off of the SIO



site and moved it to a mine site north of SIO, for the use of the lime mining company. SIO therefore needed a dump truck and requested one from WGI. WGI responded that it could not find a dump truck of the size that SIO needed, and it ultimately refused to furnish a dump truck. Consequently, SIO purchased its own dump truck with a snow plow fixture on the front.

Roads on the premises were required to be plowed of snow, but WGI informed SIO that SIO could not use its dump truck (with its plow fixture) to plow the roads, even though WGI permitted other companies to plow. WGI also prohibited SIO from using its dump truck outside of the boundaries that WGI had delineated. Moreover, subsequently, SIO understands that the lime mining company mentioned above needed a small dump truck, with a plow fixture. WGI asked SIO to lease its dump truck. SIO agreed contingent upon receiving a lease rate similar to what WGI would have charged SIO to lease a dump truck from SIO. WGI balked. SIO subsequently learned that WGI procured a truck with a plow fixture for the lime mining company, even though WGI had previously told SIO that it could not furnish one to SIO.

5. Backhoe. WGI provided SIO with access to an old backhoe that WGI owned, but that backhoe was broken on a regular basis and substandard in general. As a result of the broken backhoe and delayed maintenance, SIO missed a delivery of processed sand. SIO ultimately purchased its own backhoe. Rosenbaum expressed displeasure over SIO's decision to purchase a new backhoe.

6. Forklift. WGI provided SIO with an old forklift belonging to WGI, but it leaked oil, was often broken, was too large for SIO's needs, and was, at times, unfit for use. WGI ultimately got rid of that forklift, and SIO purchased its own forklift.

7. Labor. In approximately winter 2001, when SIO's business was first underway, WGI required that SIO staff its facility with four expensive WGI workers: Johnson, Lovely, Zander, and Lester. WGI made it clear that it would not permit SIO to operate without any one of those four individuals, even though SIO did not need all four. Rosenbaum represented that MSHA required this. Paying all four of those individuals nearly drove SIO out of business at its inception, and it is SIO's understanding that MSHA in fact did not require this. Nevertheless, whenever WGI needed additional labor, it used SIO's designated workers. Because delivery schedules were fixed and rather inflexible, this caused problems. SIO had to postpone a few deliveries because of that.

8. General Involvement and Cost. During SIO's work on the Monsanto premises, when the screen was finally completed, Portra orally informed Tim Sullivan that WGI, not Monsanto, should have paid for and installed the screen pursuant to WGI's contract with Monsanto. Farnsworth, in approximately November 2006, informed SIO of the same thing—that WGI should be the one furnishing equipment.

9. Miscellaneous. There were other, miscellaneous minor acts that WGI performed that SIO believed undermined its operations. SIO cannot identify, at present, any additional specific acts not described herein, but SIO does note that there was a general feeling that WGI intended to make SIO's operations as difficult and costly as possible.

INTERROGATORY NO. 15: If you contend that Washington Group forced SIO to purchase an expensive but ultimately unnecessary screen to be used in SIO's work, as alleged in paragraph 34 of your complaint, please identify who within Washington Group forced SIO to purchase such a screen, describe the means by which Washington Group forced SIO to purchase such a screen,

set forth in detail all communications between SIO and Washington Group regarding this allegation (including who said what to whom and when), identify the screen by make and model number, identify when you purchased the screen and from whom, set forth the amount of the purchase price, and state where the screen is now.

**RESPONSE:** See SIO's response to Interrogatory No. 14, above. Additionally, SIO purchased the screen component from Intermountain Equipment, through Evans. It was a used model. That screen—which constitutes only a part of the larger screen facility that SIO needed, is presently in Pocatello, Idaho, along with conveyors and other components of the screen facility. The concrete slab upon which the screen facility was built remains on the Monsanto premises.

Pursuant to Idaho Rule of Civil Procedure 33(c), SIO will produce, for inspection and copying, all responsive, nonprivileged documents in its possession, custody, or control pertaining to the screen. These documents reflect costs associated with the screen, the precise identity (make and model) of the upper screen component purchased from Intermountain Equipment, and other requested information.

**INTERROGATORY NO. 16:** If you contend that Mr. Johnson alluded in a statement to Mr. Sullivan as to Washington Group's desire to take over SIO's buildings after SIO's failure, as alleged in paragraph 35 of your complaint, please set forth when Mr. Johnson made such an allusion, to whom the allusion was made, who else was present to hear the allusion, whether the allusion was oral or in writing, and specifically set forth exactly what Mr. Johnson alluded.

**RESPONSE:** At the end of the spring of 2002, Tim Sullivan and Johnson were standing in front of WGI's shop, looking at SIO's shop. Johnson made a statement to Tim Sullivan to the effect of complimenting SIO's shop and stating that when WGI runs SIO out of business, SIO's shop would then belong to WGI. This statement was made orally. There was nobody else present other than Johnson and Tim Sullivan.

INTERROGATORY NO. 17: If you contend that Mr. Sullivan subsequently heard similar allusions from other Washington-Group affiliated persons including a suggestion that Washington Group “intended to run SIO out of business,” as alleged in paragraph 35 of your complaint, please set forth when each such Washington Group-affiliated person made such an allusion, to whom the allusion was made, who else was present to hear the allusion, whether the allusion was oral or in writing, and specifically set forth exactly what each such Washington Group-affiliated person alluded.

RESPONSE: SIO responds to Interrogatory No. 17 as follows:

1. In approximately the spring of 2009, Lester orally informed Tim Sullivan that, while SIO was working on the Monsanto premises, Rosenbaum would constantly ask Lester whether SIO was out of business yet. The implication behind Lester’s comment was not that WGI simply expected SIO to go out of business, but that WGI was intentionally trying to drive SIO out of business. Zander was present when Lester made that statement to Tim Sullivan.

2. In approximately the winter of 2007, Lawrence and Tim Sullivan were discussing, over the telephone, SIO’s operations and business with WGI. During that conversation, Lawrence made a statement to the effect of questioning what prevented Monsanto from putting SIO out of business during the following year by raising its royalties. Lawrence also suggested that he was the only friend SIO had in connection with its work on the Monsanto premises, implying that others affiliated with Monsanto and WGI were aligned against SIO.

3. In approximately spring 2008, Zander called Tim Sullivan and informed him that WGI was installing two conduits on the Monsanto premises—one to SIO’s operation, and the other to WGI’s operation. Zander expressed bewilderment at WGI’s actions.

4. Also in approximately spring 2008, after the termination of the Monsanto Agreement and the WGI Agreement, Frolich orally made a statement to Tim Sullivan along the

lines of how it looked like WGI had finally "got" SIO, and that it was common knowledge that WGI wanted SIO's building.

5. Also in approximately spring 2008, orally informed Tim Sullivan that WGI intended to take over SIO's plant after SIO departed.

6. Tim Sullivan orally heard various other rumors from such other individuals.

INTERROGATORY NO. 18: If you contend that Mr. Smith informed SIO that Monsanto intended to continue working with Washington Group on the Tailings processing operations after termination of the Monsanto Agreement, as alleged in paragraph 36 of your complaint, please identify the SIO person or persons to whom Mr. Smith made such statement, state specifically what Mr. Smith said, and identify whether anyone else was present to hear what Mr. Smith said.

RESPONSE: In January 2008, Tim Sullivan, Todd Sullivan, Bob Sullivan, Smith, and Leatherman all participated in a face-to-face meeting at Monsanto's office in Soda Springs. At that meeting, Smith informed SIO that it intended to continue working with WGI on the "silica project" after the termination of the Monsanto Agreement. Smith repeated this approximately three times during the course of that meeting. Smith also stated that Monsanto had chosen WGI specifically because of its willingness to continue with the "silica project." SIO noted that Smith specifically referred to the project as the "silica project," rather than "your project" or some similar statement denoting ownership of the silica project resting in SIO.

INTERROGATORY NO. 19: If you contend that Mr. Smith also informed SIO in January 2008 that Washington Group had committed to Monsanto to continue the Tailings processing operations and that Monsanto had already negotiated and obtained from Washington group agreeable pricing for washed sand, as alleged in paragraph 37 of your complaint, please identify the SIO person or persons to whom Mr. Smith made such a statement, state specifically what Mr. Smith said, and identify whether anyone else was present to hear what Mr. Smith said.

**RESPONSE:** At the same meeting described in SIO's response to Interrogatory No. 19, above, Smith informed SIO that although it had not entered into a formal agreement with WGI, it had entered into a letter of intent agreement with WGI regarding WGI's work, in general, for Monsanto. SIO suspected—in light of Smith's representation that Monsanto intended to continue to work with WGI on SIO's silica project—that a new letter of intent agreement meant that Monsanto and WGI had come to some preliminary agreement regarding pricing and other terms.

**INTERROGATORY NO. 20:** Please identify each and every action which you contend Washington Group allegedly took or failed to take when it breached the implied covenant of good faith and fair dealing as you contend in paragraph 76 of your complaint, and set forth in your answer each said action, when each said action was taken, who on behalf of Washington Group took each said action, who on behalf of SIO witnessed each said action, and how SIO learned of each such action.

**RESPONSE:** See SIO's responses to Interrogatories Nos. 14–19, above.

**INTERROGATORY NO. 21:** Regarding the allegations in paragraph 82 of your complaint that Washington group intentionally interfered with Monsanto's and SIO's performance of their respective obligations pursuant to the Monsanto Agreement, please set forth all facts upon which you base such a contention, identify all persons with knowledge of such a contention, identify each date on which Washington Group allegedly interfered as you describe in that paragraph, and identify who from Washington Group committed the interference.

**RESPONSE:** See SIO's responses Interrogatories Nos. 14–19, above.

**INTERROGATORY NO. 22:** Regarding the allegations in paragraph 83 of your complaint that Washington Group consistently took various actions to undermine and hinder SIO's work at the quarry, please set forth all facts upon which you base such a contention, identify all persons with knowledge of such a contention, identify who from Washington Group took such actions, when each said action was taken, what each said action was, and identify whether anyone from SIO witnessed said action.

**RESPONSE:** See SIO's responses Interrogatories Nos. 14-19, above.

**INTERROGATORY NO. 23:** Regarding the allegations in paragraph 84 of your complaint that Washington Group allegedly persuaded and/or conspired with Monsanto to terminate the Monsanto Agreement, please set forth all facts upon which you base such a contention, identify all persons with knowledge of such a contention, identify who from Washington Group took such actions, when each said action was taken, what each said action was, and identify whether anyone from SIO witnessed said action.

**RESPONSE:** See SIO's responses Interrogatories Nos. 18-19, above.

**INTERROGATORY NO. 24:** For each month you sold improved, value-added Tailings to third parties, as alleged in paragraph 10 of your complaint, please: identify each said third party and include in your answer the identity of who was your principal contact at such third party; set forth the quantity of such Tailings you sold to each such third party each month; set forth how much revenue you received from each such third party each month; and set forth whether you ever wrote off any account receivable from each such third party and if so how much.

**RESPONSE:** SIO objects to Interrogatory No. 24 on the ground that it requires SIO to disclose confidential and proprietary information pertaining to SIO's customers. Nevertheless, subject to and without waiving any of the foregoing objections, including the General Objections, SIO responds in good faith to Interrogatory No. 24 as follows:

Pursuant to Idaho Rule of Civil Procedure 33(c), SIO will make available for inspection and copying all nonprivileged documents in its possession, custody, or control reflecting information requested in Interrogatory No. 24 upon entry of a protective order shielding the disclosed documents from competitive use.

DATED this 4 day of June, 2010.

AS TO OBJECTIONS:

MOFFATT THOMAS BARRETT ROCK & FIELDS,  
CHTD.



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David P. Gardner

BENNETT TUELLER JOHNSON & DEERE  
Barry N. Johnson  
Daniel K. Brough

*Attorneys for Plaintiff Silicon International Ore, LLC*

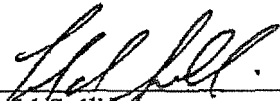


VERIFICATION

STATE OF UTAH                    )  
  ) ss.  
COUNTY OF SALT LAKE        )

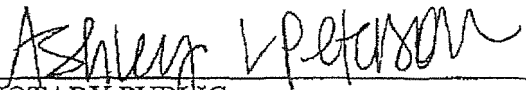
I, Todd Sullivan, being first duly sworn, do say that I have read **PLAINTIFF'S RESPONSES TO DEFENDANT WASHINGTON GROUP INTERNATIONAL INC.'S FIRST SET OF INTERROGATORIES**, that the information contained therein is true and correct as to my knowledge, information and belief, and that I am authorized to make this verification on behalf of Plaintiff Silicon International Ore, LLC.

DATED this 3<sup>rd</sup> day of June, 2010.

  
\_\_\_\_\_  
Todd Sullivan

SUBSCRIBED AND SWORN to before me this 3<sup>rd</sup> day of June, 2010.



  
\_\_\_\_\_  
NOTARY PUBLIC

**Todd Sullivan**

**From:** FARNSWORTH, DAVE W [AG/1850] [dave.w.farnsworth@monsanto.com]  
**Sent:** Monday, February 03, 2003 9:21 AM  
**To:** 'Todd Sullivan'; SMITH, JIM R [AG/1850]; FARNSWORTH, DAVE W [AG/1850]  
**Cc:** Karen Corrigan  
**Subject:** RE: SIO Letter

Todd,

I talked with Jim Smith this morning. He is going to tweak the language slightly and then get it out. Hope that will work for you. If not, please give Jim a call.

Dave

-----Original Message-----

**From:** Todd Sullivan [mailto:todd.sullivan@oakleynetworks.com]  
**Sent:** Thursday, January 30, 2003 4:49 PM  
**To:** Jim Smith; Dave Farnsworth  
**Cc:** Karen Corrigan  
**Subject:** SIO Letter

Jim & Dave

Here is the draft letter from the Southeast Idaho Council of Governments (SICOG) concerning our upcoming financing with them. Basically the letter informs Monsanto of SICOG's security interest, and Monsanto agrees to allow SICOG reasonable access to the equipment if we default on the loan - 4 sentences. Please review the letter and if you are comfortable with it, just print it out on Monsanto letterhead, sign, and send it to Karen Corrigan at the following address:

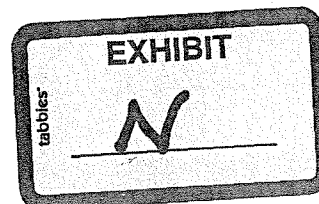
Karen Corrigan  
 Loan Officer  
 Southeast Idaho Council of Governments  
 P.O. Box 6079  
 Pocatello, ID 83205-6079  
 Fax: 208-233-4841  
 Phone: 208-233-4032 x15

Thank you very much for your help on this. We are planning to close on the financing sometime next week. Most of this financing is for additional improvements at our site that will greatly improve our operational efficiency.

Todd Sullivan  
Silicon International Ore

4/26/2010

716



SIO-MON001711

**Todd Sullivan**

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**From:** FARNSWORTH, DAVE W [AG/1850] [dave.w.farnsworth@monsanto.com]  
**Sent:** Monday, February 03, 2003 10:42 AM  
**To:** 'Todd Sullivan'  
**Cc:** PORTRA, MICHAEL T [AG/1850]  
**Subject:** RE: SIO Letter

Mick Portra just brought me in our copies of last month's shipment records. Many of them are illegible. Mick has asked Tim and John Rosenbaum on numerous occasions that we receive copies that we can read and has been assured that next month will be better. You're asking for our help below and on other issues. If we don't get clear and readable copies of the shipping records our cooperation is going to come to a complete and rapid conclusion.

There continue to be some questionable practices on some of the weigh tickets with numbers being written in. I'd appreciate your help to get these things resolved. If you've questions on specifics I'd suggest you give Mick a call.

Thanks,  
 Dave

-----Original Message-----

**From:** Todd Sullivan [mailto:todd.sullivan@oakleynetworks.com]  
**Sent:** Thursday, January 30, 2003 4:49 PM  
**To:** Jim Smith; Dave Farnsworth  
**Cc:** Karen Corrigan  
**Subject:** SIO Letter

Jim & Dave

Here is the draft letter from the Southeast Idaho Council of Governments (SICOG) concerning our upcoming financing with them. Basically the letter informs Monsanto of SICOG's security interest, and Monsanto agrees to allow SICOG reasonable access to the equipment if we default on the loan - 4 sentences. Please review the letter and if you are comfortable with it, just print it out on Monsanto letterhead, sign, and send it to Karen Corrigan at the following address:

Karen Corrigan  
 Loan Officer  
 Southeast Idaho Council of Governments  
 P.O. Box 6079  
 Pocatello, ID 83205-6079  
 Fax: 208-233-4841  
 Phone: 208-233-4032 x15

Thank you very much for your help on this. We are planning to close on the financing sometime next week. Most of this financing is for additional improvements at our site that will greatly improve our operational efficiency.

Todd Sullivan  
 Silicon International Ore

11/8/2006

SIO-MON001712

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Eugene A. Ritti, ISB No. 2156  
Lynnette M. Davis, ISB No. 5263  
HAWLEY TROXELL ENNIS & HAWLEY LLP  
877 Main Street, Suite 1000  
P.O. Box 1617  
Boise, ID 83701-1617  
Telephone: 208.344.6000  
Facsimile: 208.954.5256  
Email: eritti@hawleytroxell.com  
ldavis@hawleytroxell.com

Attorneys for Defendant Washington Group International, Inc.

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CARIBOU

SILICON INTERNATIONAL ORE, LLC, an )  
Idaho limited liability company, )  
 )  
Plaintiff, )  
vs. )  
MONSANTO COMPANY, a Delaware )  
corporation; and WASHINGTON GROUP )  
INTERNATIONAL, INC., an Ohio )  
corporation, )  
 )  
Defendants. )  
 )

Case No. CV-2009-366  
THIRD AFFIDAVIT OF EUGENE A.  
RITTI IN SUPPORT OF DEFENDANT  
WASHINGTON GROUP  
INTERNATIONAL, INC.'S MOTION  
FOR SUMMARY JUDGMENT

EUGENE A. RITTI, being first duly sworn, deposes and says:

1. I am counsel of record for Defendant Washington Group International, Inc. I make this affidavit based upon my personal knowledge.

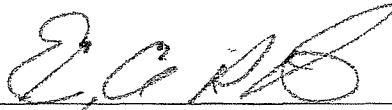
THIRD AFFIDAVIT OF EUGENE A. RITTI IN SUPPORT OF DEFENDANT  
WASHINGTON GROUP INTERNATIONAL, INC.'S MOTION FOR  
SUMMARY JUDGMENT - 1

718

AFFIDAVIT

2. Attached as Exhibit F is a true and correct copy of a document produced in discovery in this action by Plaintiff Silicon International Ore, LLC.


Further your affiant sayeth naught.

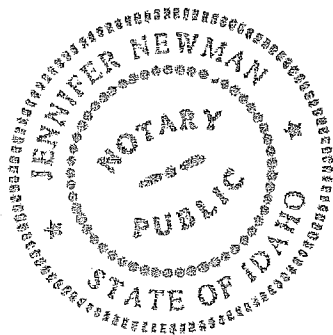


Eugene A. Ritti

STATE OF IDAHO )  
 ) ss.  
County of Ada )

SUBSCRIBED AND SWORN before me this 6 day of May, 2011.

  
Name: Jennifer Newman  
Notary Public for Idaho  
Residing at Boise, ID  
My commission expires 5/5/2015



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6<sup>th</sup> day of May, 2011, I caused to be served a true copy of the foregoing THIRD AFFIDAVIT OF EUGENE A. RITTI IN SUPPORT OF DEFENDANT WASHINGTON GROUP INTERNATIONAL, INC.'S MOTION FOR SUMMARY JUDGMENT by the method indicated below, and addressed to each of the following:

David P. Gardner  
MOFFATT THOMAS BARRETT ROCK  
& FIELDS, CHTD.  
412 West Center, Suite 2000  
Pocatello, ID 83204-0817  
[Attorneys for Plaintiff Silicon International Ore, LLC]

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 E-mail  
 Telecopy 208.232.0150

Barry N. Johnson  
Daniel K. Brough  
Robert K. Reynard  
BENNETT TUELLER JOHNSON & DEERE  
3165 East Millrock Drive, Suite 500  
Salt Lake City, UT 84121  
[Attorneys for Plaintiff Silicon International Ore, LLC]

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 E-mail  
 Telecopy 801.438.2050

Randall C. Budge  
RACINE OLSON NYE BUDGE & BAILEY, CHTD.  
201 E. Center  
P.O. Box 1391  
Pocatello, ID 83204-1391  
[Attorneys for Defendant Monsanto Company]

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 E-mail  
 Telecopy 208.232.6109

  
\_\_\_\_\_  
Eugene A. Ritti



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From: Todd Sullivan <todd.sullivan@oakleynetworks.com>

To: Bob Sullivan SIO <bob.sio@att.net>

Subject: FW: SIO-Monsanto Relationship

Date: Wednesday, April 09, 2008 3:49:40 PM [View Source] High Priority

-----Original Message-----

From: Todd Sullivan [mailto:todd.sullivan@oakleynetworks.com]

Sent: Wednesday, April 09, 2008 3:46 PM

To: Dave Farnsworth

Cc: Jim Smith; Clayton Krall (clayton.krall@wgiht.com); Bob Sullivan

Subject: SIO-Monsanto Relationship

Importance: High

April 9, 2008

Mr. Dave Farnsworth  
Monsanto Company  
1853 Highway 34  
Soda Springs, ID 83276

RE: Silicon International Ore-Monsanto Relationship

Dear Dave,

You are undoubtedly aware that the Washington Group Division of URS (Washington Group) has informed Silicon International Ore (Silicon) that it does not intend to renew the operations agreement relating to Silicon's processing operation at the Monsanto Silica Quarry (the Site), and that it has demanded Silicon to remove its processing equipment from the Site by April 29, 2008. In response, Silicon has alerted Washington Group that the expiration of Washington Group's operations agreement does not warrant or otherwise authorize Washington Group to exercise the demobilization demands it has made on Silicon. With that in mind, we write to you to (1) remind you of Monsanto's agreement with Silicon (the Monsanto/Silicon Agreement) and the terms of that agreement, and (2) emphasize to you that, based on the Monsanto/Silicon Agreement, Silicon has no intention of removing its processing equipment from the Site. Our hope and expectation is that this letter will clarify for you the terms of the Monsanto/Silicon Agreement—an agreement reached by Monsanto representatives that no longer work for Monsanto and with which you may not be familiar—and to attempt to avoid what could be an expensive and protracted dispute between Silicon and Monsanto.

The fact is that Silicon commenced its processing operations at the beginning of 2002 and has continued those operations for the last six years based on the Monsanto/Silicon Agreement, not on any agreement with Washington Group. The operations agreement

between Monsanto and Washington Group was merely an instrument through which Silicon's arrangement with Monsanto was facilitated. The expiration of Washington Group's operations agreement has no impact on Silicon's right to continue to operate its processing equipment at the Site. The Monsanto/Silicon Agreement governs Silicon's continuing right to operate its processing business at the Site. \*

The Monsanto/Silicon Agreement provided Silicon the continuing opportunity to operate its business at the Site so long as its operations benefited both Silicon and Monsanto -- meaning that back in 2000 Monsanto promised Silicon that Silicon could commence and continue its processing business at the Site and that it would supply Silicon specified volumes of sand as long as Silicon (1) complied with Monsanto's environmental, safety and other control regulations, (2) provided Monsanto with agreed-upon royalty payments that essentially offset costs incurred by Monsanto in connection with Silicon's operation, and (3) permit Monsanto to reasonably control the markets targeted by Silicon. Silicon relied on Monsanto's promises and invested two million dollars in its processing equipment and business operations. Silicon *never* would have commenced this venture back in 2000 and invested the money it has expended on its business in the absence of such promises from Monsanto. Indeed, it simply would not have been worth the investment if Silicon would have been subject to the whims of Washington Group and the expiration of Washington Group's operations agreement. Washington Group came onto the scene later, and its operations agreement authorized it only to act as Monsanto's agent to facilitate the terms of the Monsanto/Silicon Agreement.

Mitch Hart was Monsanto's key representative at the time Monsanto and Silicon struck the Monsanto/Silicon Agreement. Hart has confirmed for Silicon the terms of the Monsanto/Silicon Agreement described above. Based on Silicon's recent communications with Hart and Hart's confirmation of the Monsanto/Silicon Agreement, Silicon remains firm in its position and in its resolve to continue its operations at the Site.

Presently, Washington Group maintains that it is not willing to continue the contract. With that communication, Washington Group assumes that it has the authority to demand Silicon's removal from the Site and essentially supplant the Monsanto/Silicon Agreement with a clean-up clause in the operations agreement. More importantly, we have reason to believe that Washington Group takes the position it takes in bad faith and for the primary purpose of acquiring Silicon's processing building and possibly even continuing Silicon's business. This makes sense from Washington Group's perspective because the benefit of seizing Silicon's building outweighs the benefit of washing sand for Silicon. (Interestingly, Jim Smith informed us that Washington Group committed to Monsanto to continue the silica operation. Smith even told us that he negotiated with and obtained from Washington Group agreeable pricing for washed sand.) Silicon, however, will not acquiesce in Washington Group's demands and will take all necessary steps to keep its operations in place and otherwise enforce the Monsanto/Silicon Agreement.

Monsanto must remember that Silicon did not rely on Washington Group's representations in deciding to embark on its venture at the Monsanto Site, nor would it even have been rational for Silicon to do so. Silicon relied on Monsanto's representations and the terms of the Monsanto/Silicon Agreement--an agreement reached before Washington Group came into the picture. In fact, from Silicon's perspective, Washington Group simply acts as Monsanto's agent in processing Monsanto's silica sand on Monsanto's land. Therefore, Washington Group could not have made the representations concerning the terms of Silicon's venture because it did not have the authority to do so. It was Monsanto's assurances that resulted in the Monsanto/Silicon Agreement described above.

Additionally, Monsanto's conduct subsequent to the origination of the Monsanto/Silicon Agreement sustains that conclusion: specifically, Monsanto obtained the building permit, Monsanto negotiated the royalty agreement, and Monsanto even helped oversee the operation and construction of Silicon's plant for the first few years. To this day, Monsanto controls all of Silicon's markets. Washington Group may be the conduit, but Monsanto has the authority because it is Monsanto's Site and Monsanto's sand through which Silicon maintains its operations. Silicon, therefore, expects and demands that Monsanto live up to the promises it made through the Monsanto/Silicon Agreement.



To summarize and emphasize, Silicon relied on Monsanto's representations concerning its right to operate at the Site and to continue to operate at the Site so long as it complied with its obligations in the Monsanto/Silicon Agreement. Subsequently, Monsanto contracted with Washington Group to execute and manage Monsanto's obligations under the Monsanto/Silicon Agreement. Although Washington Group's operations agreement is now expired, the Monsanto/Silicon Agreement is still in full force and effect, and Silicon will continue to operate pursuant to that agreement.



We urge Monsanto to honor its original commitment to Silicon, to continue to provide Silicon with specified volumes of washed sand, to otherwise permit Silicon to continue to operate its business at the Site, and to prohibit Washington Group from interfering with Silicon's operations. We emphasize to you Silicon's commitment to enforce its rights under the Monsanto/Silicon Agreement and to maintain its operations at the Site. If Monsanto elects to breach its obligations under the Monsanto/Silicon Agreement, Silicon will seek appropriate injunctive relief for it to remain at the Site and for Monsanto to honor its obligations under the Monsanto/Silicon Agreement. In the event Silicon is not afforded such injunctive relief, it will notify its customers of its inability to continue to operate as a consequence of Monsanto's breach. In addition, Silicon will necessarily notify its creditor, the Southeast Idaho Council of Governments (SICOG), who holds the security interest on all of Silicon's equipment. This will obviously result in the deconstruction of the plant and all the equipment on the Site, which will then be sold at salvage value. In such an instance, Silicon will indeed hold Monsanto liable for the resulting damages and losses, including reimbursement of its investment and lost profits.

We believe that we can and should be able to easily work out an arrangement whereby Silicon can continue to operate and Monsanto can continue to receive the benefits of Silicon's operation, including a fair price for its washed sand and its right to receive a royalty.

We have appreciated your listening ear over the years and believe that this can still work out for the benefit of Monsanto and Silicon. As you know, time is of the essence. We need you to inform us and Washington Group of your intentions with respect to the Monsanto/Silicon Agreement, and to otherwise preclude Washington Group from acting on its threats to remove Silicon from the Site. We also need Monsanto to replenish the pile of washed sand at the Site. Accordingly, we need to receive your assurance in this regard by no later than Tuesday, April 15, 2008.

Sincerely,  
 Todd Sullivan  
 Silicon International Ore

Cc: Jim Smith, Monsanto Company  
 Clayton Krall, Washington Division of URS Corporation  
 Bob Sullivan, Silicon International Ore

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Randall C. Budge, ISB No. 1949  
W. Marcus W. Nye, ISB No. 1629  
Mark A. Shaffer, ISB No. 7559  
RACINE, OLSON, NYE, BUDGE &  
BAILEY, CHARTERED  
P.O. Box 1391; 201 E. Center Street  
Pocatello, Idaho 83204-1391  
Telephone: 208-232-6101  
Facsimile: 208-232-6109  
Email: [rcb@racinelaw.net](mailto:rcb@racinelaw.net)

*Attorneys for Defendant Monsanto Company*

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CARIBOU

SILICON INTERNATIONAL ORE, LLC, )  
an Idaho limited liability company, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
MONSANTO COMPANY, a Delaware )  
Corporation, and WASHINGTON GROUP )  
INTERNATIONAL, INC., an Ohio )  
Corporation, )  
 )  
Defendants. )  
 )

Case No. CV-2009-366

**DEFENDANT MONSANTO  
COMPANY'S REPLY MEMORANDUM  
IN SUPPORT OF MOTION FOR  
SUMMARY JUDGMENT**

COMES NOW Defendant Monsanto Company (hereinafter "Monsanto"), by and through counsel, and submits this Reply Memorandum in Support of Motion for Summary Judgment. Monsanto set forth an Introduction and Statement of Undisputed Facts in its Memorandum in Support of Motion for Summary Judgment filed January 25, 2011 ("Summary Judgment

**DEFENDANT MONSANTO COMPANY'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR  
SUMMARY JUDGMENT - PAGE 1**

Memorandum”), which are incorporated by reference. This Reply is supported by the Summary Judgment Memorandum, all supporting affidavits, and the record herein.

### INTRODUCTION

Plaintiff Silicon International Ore, LLC’s (hereinafter “SIO”) opposition to Monsanto’s motion for summary judgment presents no material issues of fact to prevent this Court from granting summary judgment in Monsanto’s favor as a matter of law. Monsanto is entitled to summary judgment on the following grounds:

#### SIO’s breach of contract claim

- SIO admits that there is no written contract between SIO and Monsanto. Monsanto did not enter into an oral agreement with SIO. Monsanto does not enter into oral agreements as a matter of standard business practice, and Mitch Hart never had the authority to negotiate or enter into contracts on behalf of Monsanto. SIO’s proposed written contract to Monsanto was rejected. SIO instead entered into a written contract with Defendant Washington Group International, Inc. (“WGI”).
- SIO has presented no evidence of partial performance of an oral contract to fall within the exception to the requirement of a written contract. SIO did not purchase and/or receive sand from Monsanto nor pay any royalty to Monsanto. The record is clear that SIO purchased and received all sand from WGI and paid royalty payments only to WGI.
- SIO has presented no evidence that the terms of the alleged oral agreement are sufficiently definite. The terms as presented by SIO appear to be merely an “agreement to agree.” The alleged terms of the alleged oral agreement are vague, indefinite, uncertain and therefore no contract exists as a matter of law.
- Even if the alleged oral agreement did exist, the alleged oral agreement was properly terminated by Monsanto. Also, any oral agreement could only be valid for the goods which have already been received and accepted by SIO, and the valid portion of such an oral agreement has been performed. SIO has no claim for damages under the Uniform Commercial Code as a matter of law.
- SIO is attempting to create an after-the-fact theory of an alleged oral agreement. SIO has generated such a theory only after its contract with WGI was terminated.

SIO is attempting to base its theory on inadmissible email correspondence with a former Monsanto employee, who had no authority to bind Monsanto even when he was a Monsanto employee.

**SIO's breach of implied covenant claim**

- No contract between SIO and Monsanto exists. SIO has presented no evidence of any damages suffered as a result of Monsanto's alleged breaches of the implied covenant of good faith and fair dealing.

**SIO's equitable estoppel and quasi-estoppel claims**

- SIO has presented no evidence to support its claims of equitable estoppel and/or quasi-estoppel. SIO could not have reasonably relied upon alleged representations made by a former Monsanto employee who had no authority to bind Monsanto even when he was a Monsanto employee. Nor does the record contain any evidence that Monsanto has taken a different position than its original position. Monsanto rejected SIO's proposed draft written contract. Monsanto has continually maintained its position that it would not contract with SIO.

**ARGUMENT**

**I. NO AGREEMENT EXISTS BETWEEN MONSANTO AND SIO.**

**A. Monsanto's contract is with WGI.**

SIO argues that it entered into an oral agreement with Monsanto based solely on discussions with Monsanto's then employee Mitch Hart. However, Monsanto does not enter into oral agreements with its contractors or vendors as a matter of standard business practice. *See* Affidavit of James R. Smith ("Smith Aff.") at ¶ 3. Additionally, Mitch Hart did not have authority to contract on behalf of Monsanto. *See* Deposition Transcript of Mitchell J. Hart ("Hart Dep."), attached as Exhibit B to the Affidavit of Daniel K. Brough ("Brough Aff."), at 15:14-19, 33:16-34:15, 91:16-92:4, 92:24-94:12; Affidavit of Mitchell J. Hart ("Hart Aff.") at ¶ 4; Smith Aff. at ¶ 3. Monsanto has a delegation of authority policy that gives direction to Monsanto employees as to what authority they may or may not have relative to entering into contractual

obligations with others. *See id.*; Deposition Transcript of David Farnsworth (“Farnsworth Dep.”), attached as Exhibit G to the Brough Aff., at 14:9–15:11, 78:14–79:16, 80:11–81:10; Deposition Transcript of James R. Smith (“Smith Dep.”), attached as Exhibit F to the Brough Aff., at 22:4–23:4. The delegation of authority policy identifies an officer or employee with authority to sign contracts and bind Monsanto based upon the type of contract, term and dollar amount involved. *See Smith Aff.* at ¶ 3. The record demonstrates that Monsanto did not enter into any type of contractual relationship with SIO. Monsanto instead has a contract with WGI.

The record demonstrates that in early 2000, Monsanto was contacted by SIO expressing an interest in acquiring silica sand. *See Smith Aff.* at ¶ 8. The record also demonstrates that SIO had certain terms in mind and that it prepared and sent Monsanto a proposed draft written contract to buy silica sand for a 20 year term. *See Smith Aff.* at ¶ 8; Exhibit 9 to Smith Aff. While Monsanto was willing to consider the sale of silica sand to SIO for delivery off-site, SIO insisted on having a screening and processing facility within Monsanto’s quarry (which was being operated by WGI under the contract Monsanto had with WGI). *See Smith Dep.* 100:4–102:14, 131:18–134:23; Farnsworth Dep. 41:15–43:10. Monsanto determined that it had no interest in having SIO on-site as a new and inexperienced contractor giving rise to any new liability risks. *See id.* Therefore, Monsanto rejected SIO’s proposal to purchase sand from Monsanto and SIO’s draft contract was never signed.<sup>1</sup> *See id.*; Smith Aff. at ¶ 8.

Monsanto determined that if SIO wanted to purchase silica sand, SIO would need to

---

<sup>1</sup> The draft contract prepared by SIO and rejected by Monsanto was entitled “Quartzite Requirements Contract.” *See Exhibits 27 and 28 to Smith Dep.* Argument by SIO as to the alleged oral agreement being a “requirements contract” is unavailing. Any request by SIO to a “requirements contract” was rejected by Monsanto.

contract with and acquire the silica sand from WGI. *See* Smith Dep. 100:4-102:14; Smith Aff. at ¶ 8. SIO thereafter entered into the Master Agreement with WGI to acquire the sand. *See* Exhibit 5 to Smith Aff. Because SIO was entering into a written contract with WGI, Monsanto agreed to amend its existing written contract with WGI to allow WGI to construct and operate a silica sand processing facility on behalf of SIO. *See* Exhibit 4 to Smith Aff. Under the addendum to Monsanto's written contract with WGI, WGI was to be responsible for SIO's compliance with Monsanto's stringent safety, environmental, and health requirements. *See* Smith Dep. 102:4-14; Exhibit 4 to Smith Aff. Additionally, Monsanto's addendums to its written contract with WGI authorized WGI to sell silica sand on a royalty basis to SIO. *See* Farnsworth Dep. 28:8-17, 48:9-12; Exhibits 2 and 4 to Smith Aff.

SIO's claim to an oral contract with Monsanto come to light only after WGI terminated its contract with SIO and is entirely inconsistent with the clear course of dealings between the parties as established by detailed written contracts. The facts are undisputed that SIO never entered into any written contract with Monsanto, only with WGI.

**B. SIO purchased and received all silica sand from WGI, not from Monsanto.**

SIO argues that it had a separate oral contract with Monsanto whereby Monsanto would sell sand directly to SIO, and SIO would pay Monsanto for the sand in royalty amounts agreed upon by Monsanto. However, the record is clear that SIO made payments only to WGI and never made a single payment to Monsanto. Based on the written contracts, SIO purchased and received all sand from WGI.

The Master Agreement entered into between WGI and SIO specifically provides that "[u]nless otherwise agreed to in writing by both parties, this Agreement shall apply to all

purchase orders, or other written communications or agreements between the parties (including, but not limited to Work Orders between the parties dated either before or after this agreement).”<sup>2</sup> Exhibit 5 to Smith Aff. at ¶ 2. The Master Agreement thereafter provides that all payments for the silica sand were to be made by SIO to WGI. See Exhibit 5 to Smith Aff. at ¶ 3. The undisputed record is clear that all payments SIO made for the silica sand were made directly to WGI, and SIO has produced no evidence demonstrating otherwise.

The Master Agreement also specifically provides that WGI would sell silica sand to SIO, and that SIO would be purchasing the sand directly from WGI. The recitals to the Master Agreement state that “[WGI] desires to offer *to sell* on a continuing basis silica sand . . . as may be selected from time to time by [SIO],” and that “to avoid repetitive negotiations, the parties desire to enter into this agreement establishing the terms and conditions of *sale* which will be applicable to the transactions between the parties.” Exhibit 5 to Smith Aff., pg. 1 (emphasis added). The Master Agreement also specifies that (1) “[WGI] will provide to [SIO] silica sand” (Exhibit 5 to Smith Aff. at ¶ 1); (2) “[SIO] shall pay directly or reimburse [WGI] for all sales and use taxes . . . which are imposed on the sale of the [silica sand]” (Exhibit 5 to Smith Aff. at ¶ 4); (3) “[WGI] shall invoice [SIO] for [silica sand] on or after [SIO]’s receipt of such [silica sand],” and that the invoices contain such information as required by WGI (Exhibit 5 to Smith Aff. at ¶ 5); (4) “[t]itle to the [silica sand] shall pass to [SIO] upon delivery of such [silica sand] to [SIO]”, and that “[WGI] shall bear the risk of loss of or damage to [the silica sand] until delivery of the

---

<sup>2</sup> Because the Master Agreement states that it is entered into between SIO and WGI and can only be amended by those parties, SIO is effectively estopped from now arguing that WGI was merely an intermediary between Monsanto and SIO.

[silica sand]" (Exhibit 5 to Smith Aff. at ¶ 7); and (5) [WGI] warrants that it has all right, title and ownership interest and/or rights necessary to perform under this terms of this Agreement." (Exhibit 5 to Smith Aff. at ¶ 8).

Under the terms of the Master Agreement, SIO and WGI unambiguously agreed that WGI would sell the silica sand to SIO, and that SIO would purchase the sand from WGI. The record is also clear that SIO made no payments to Monsanto, and that SIO purchased and received all sand from WGI.

**C. The alleged terms of the alleged oral agreement are vague, indefinite, uncertain and unenforceable as a matter of law.**

SIO argues that the terms of the alleged oral agreement are sufficiently definite, and that the alleged agreement provided for a method of determining all amounts involved. However, the terms of the alleged oral agreement are indefinite and should be construed as merely an agreement to agree.

The Idaho Supreme Court has held that "[g]enerally, an agreement to agree is unenforceable, as its terms are so indefinite that it fails to show a mutual intent to create an enforceable obligation. . . . No enforceable contract comes into being when the parties leave a material term for future negotiations, creating a mere agreement to agree." *Univ. of Idaho Found., Inc. v. Civic Partners, Inc.*, 146 Idaho 527, 533, 199 P.3d 102, 108 (2008) (quoting *Maroun v. Wyreless Systems, Inc.*, 141 Idaho 604, 614, 114 P.3d 974, 984 (2005)).

In this case, SIO alleges that "as for the amount of sand and payment, the Master Agreement between SIO and WGI specifies royalty amounts, calculated per quantity of sand sold by SIO, to be paid by SIO to WGI," and that "[t]he Addendum to Second Quartzite Agreement



[between Monsanto and WGI] provides for royalty payments (in amount and price) that 'parallel' the Master Agreement's royalty provisions." Plaintiff's Memorandum in Opposition to Defendant Monsanto Company's Motion for Summary Judgment, pg. 25. Therefore, SIO admits that the methods for determining the amounts of seed and compensation involved in the alleged oral agreement are not found within the alleged oral agreement's own terms. *See Bauchman-Kingston P'ship, LP v. Haroldsen*, 233 P.3d 18, 24 (2008). SIO instead wants the Court to find that such methods are to be found in written agreements that are not between Monsanto and SIO. The terms of the alleged oral agreement itself do not provide for any "objective method" of determining the amounts. *See id.*

The record demonstrates that Monsanto and SIO did not enter into any agreement. *See* Smith Dep. 100:4–102:14, 131:18–134:23; Farnsworth Dep. 41:15–43:10; Smith Aff. at ¶ 8. Monsanto rejected SIO's proposed contract and it was never signed.<sup>3</sup> *See id.*; Smith Aff. at ¶ 8. Instead, Monsanto amended its agreement with WGI, and SIO entered into the Master Agreement with WGI. If anything, the alleged terms of the alleged oral agreement should be characterized as merely potential "agreements to agree." The alleged terms of the alleged oral agreement are undisputedly vague, indefinite and uncertain, and therefore legally unenforceable as a contract as a matter of law.

**D. Even if the Court determines that the alleged oral agreement exists, the alleged oral agreement was properly terminated, and SIO has received and accepted the goods as contemplated by the alleged oral agreement.**

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<sup>3</sup> The draft contract prepared by SIO and rejected by Monsanto included Monsanto's rejection of SIO's proposed twenty (20) year term. *See* Exhibits 27 and 28 to Smith Dep. SIO's current claim that the parties contemplated an indefinite term and that Monsanto subsequently agreed to an indefinite term is unavailing.

**i. Even if the alleged oral agreement existed, Monsanto properly terminated the alleged oral agreement.**

SIO argues that the alleged oral agreement would remain in full force and effect for so long as it was “mutually beneficial to both SIO and Monsanto.” Such an indefinite term gives either party the right to terminate the alleged oral agreement when it is no longer beneficial to that party.

After WGI elected to terminate its written contract with SIO, SIO asserted for the first time that an oral contract existed with Monsanto. The record demonstrates that Monsanto’s Assistant General Counsel (Mark W. Boswell) sent a letter dated April 17, 2008 to Mr. Todd Sullivan of SIO. *See* Exhibit 8 to Smith Aff. In the letter, after adamantly denying the existence of any “phantom contract” with SIO, Monsanto notified SIO that any permission SIO had to conduct activities at Monsanto’s site was revoked pursuant to the terms of the letter, and that SIO’s contract to remove sand through WGI was terminated and expired. *See id.* Therefore, any alleged oral agreement was lawfully terminated by Monsanto. Accordingly, even if an oral agreement could have existed as claimed by SIO, it was properly terminated by Monsanto, leaving no factual or legal basis for SIO to claim damages for breach of oral contract.

**ii. Any oral agreement could only be valid for the goods which have already been received and accepted by SIO.**

Even if the Court were to somehow determine that Monsanto entered into an oral agreement with SIO based on the alleged discussions with Mitch Hart, such an oral agreement would be valid only for the goods which have been received and accepted by SIO.

Idaho’s Uniform Commercial Code requires that contracts for the sale of goods for the price of \$500 or more must be in writing in order to be enforceable. *See* Idaho Code § 28-2-

201(1). The term “goods” is defined as meaning all things . . . which are movable at the time of identification to the contract for sale” and “must be both existing and identified before any interest in them can pass.” Idaho Code § 28-2-105(1), (2). In this case, the sand contemplated by the alleged oral agreement would be movable, existing and identifiable at the time of any contract for sale. Therefore, the sand would meet the definition of “goods” as defined in Idaho’s UCC. While SIO includes an argument that somehow the alleged oral agreement for the sale of goods does not fall within the UCC, SIO has provided no authority in support of such argument and Monsanto submits that none exists. The UCC is controlling and requires a written contract.

Idaho’s Uniform Commercial Code allows an exception to the statute of frauds “with respect to goods for which payment has been made and accepted or which have been received and accepted.” Idaho Code § 28-2-201(3)(c). The undisputed record, however, demonstrates that SIO made no payments to Monsanto. *See* section I(B) above. The record also demonstrates that SIO purchased and received all sand from WGI. *See id.* SIO has not established any substantial partial performance of the alleged oral contract as an exception to the statute of frauds requirement of a written contract. The exception to the statute of frauds does not apply. SIO must therefore prove a written contract with Monsanto, yet none exists.

Even accepting SIO’s argument that it received and accepted the sand from Monsanto, the alleged oral agreement would only be enforceable as to the portion of the sand already received and accepted. Idaho’s Uniform Commercial Code provides that “[p]artial performance’ as a substitute for the required memorandum can validate the contract only for the goods which have been accepted or for which payment has been made and accepted.” I.C. § 28-2-201 cmt. 2 (found under the statute’s “Purposes of Changes” section). The Idaho Supreme Court has stated that

“[t]he UCC is clear that where the goods are apportionable part payment permits enforcement of the contract only as to the portion of the goods for which payment has been made.” *Paloukos v. Intermountain Chevrolet Co.*, 99 Idaho 740, 745, 588 P.2d 939, 944 (1978) (citing I.C. § 28-2-201 cmt. 2). The Court in *Paloukos* further held that “[t]he obvious purpose of limiting enforcement of an oral contract to the extent of partial payment [or partial receipt and acceptance] is to permit enforcement of that part of the contract verified by the partial performance and to avoid disputes over the quantity.” *See id.*; *see also Bagby Land & Cattle Co. v. California Livestock Com. Co.*, 439 F.2d 315, 317 (5th Cir. 1971) (under identical state statute, the United States Court of Appeals for the Fifth Circuit determined that “acceptance of 222 cattle delivered pursuant to the alleged contract does not, therefore, give rise to the right to have delivery of any other cattle for which it orally contracted”); *Lockwood v. Smigel*, 96 Cal. Rptr. 289, 291 (Ct. App. 1971) (noting that “[t]he new requirement that part payment validates the contract only with respect to goods for which payment has been made is an exception to the policy of liberalization. This exception reflects a purpose to avoid disputes over quantity.”).

Thus, any alleged oral agreement would only be valid as to the sand that has already been received and accepted by SIO. There is no dispute as to the receipt of, acceptance of, and/or payment for those goods. Therefore, even if there was an oral agreement as SIO contends, the valid portion of such an oral agreement has been performed and SIO has no claim for damages as a matter of law.

**E. The record contains no evidence to support SIO’s claims of equitable estoppel and/or quasi-estoppel.**

SIO argues that the alleged representations made by Mitch Hart to SIO provide sufficient

evidence to allow SIO's equitable estoppel and quasi-estoppel claims to survive summary judgment. However, Mr. Hart's hearsay representations made as a non-employee of Monsanto approximately eight (8) years after the fact do not support SIO's allegations.

The undisputed record demonstrates that Mr. Hart never had the authority to negotiate or enter into contracts on behalf of Monsanto. *See* Hart Dep. 15:14-19, 33:16-34:15, 91:16-92:4, 92:24-94:12; Hart Aff. at ¶ 4; Smith Aff. at ¶ 3. SIO knew that Mr. Hart was merely a "point contact" and that other individuals from Monsanto with more authority were involved in discussions for the potential sale of sand to SIO. SIO could not have reasonably relied upon any representation made by Mr. Hart as to the alleged oral agreement. It is entirely inconsistent and unbelievable for SIO to claim an oral agreement with Monsanto at the same time SIO signed a written contract with WGI to acquire silica sand and operate in the quarry.

In addition, as SIO's own memorandum and the undisputed record demonstrates, SIO was aware of the Quartzite Agreement between Monsanto and WGI dated March 10, 1993 and the Quartzite Agreement between Monsanto and WGI dated September 24, 2001 (collectively "Quartzite Agreements"). *See* Exhibits 1 and 3 to Smith Aff. SIO was therefore aware that the Quartzite Agreements were set to expire at the end of 2002 and 2007, respectively, and that the Quartzite Agreements could be terminated with or without cause. *See* Exhibit 1 to Smith Aff. at ¶¶ 4(b), 15, 16; Exhibit 3 to Smith Aff. at ¶¶ 3(b), 13. SIO itself alleges that WGI was an intermediary between Monsanto and SIO, and that WGI was the means by which the alleged oral agreement was carried out (that WGI was Monsanto's facilitator for selling purchased sand to third parties). If the Quartzite Agreements could be terminated in such a manner, SIO could not reasonably have relied upon any alleged representation from Mr. Hart that the alleged oral

agreement would not be abruptly terminated. The termination of the Quartzite Agreement between Monsanto and WGI would effectively terminate the mutual benefit of the alleged oral agreement. SIO received the sand from WGI and made all payments for the sand to WGI. According to SIO's own admission, without WGI the alleged oral agreement would not work. Thus, pursuant to SIO's own portrayal of the relationship between Monsanto, WGI and SIO, the termination of the Quartzite Agreements between Monsanto and WGI would effectively terminate the alleged oral agreement.

SIO also argues that Monsanto was aware of SIO's reliance on Hart's alleged representation that Monsanto would not abruptly terminate the alleged oral agreement. However, Mitch Hart had no authority to contract on behalf of Monsanto. Additionally, the SICOG letter cited to by SIO provides no evidence of Monsanto's knowledge of or intent for SIO's reliance on such alleged representation. *See* Exhibit H to Affidavit of Todd Sullivan. The letter instead evidences Monsanto's good faith attempts to assist SIO in making SIO's business venture succeed. *See id.* In addition, the letter's reference to Monsanto's knowledge and approval of the facility refers to Monsanto's knowledge and approval as contained in its agreement with WGI that WGI be able to construct a facility on behalf of SIO, and that WGI would enter into a contract with SIO. *See* Exhibit 4 to Smith Aff.

Further, SIO's reliance on Bob Sullivan's reference to a "long-term relationship" between SIO and Monsanto is misplaced. Mr. Sullivan's letter dated December 19, 2000 clearly refers to the confidentiality agreement provided by SIO to Monsanto on December 19, 2000. *See* Smith Aff. at ¶¶ 3, 4; Exhibit 6 to Smith Aff. Such confidentiality agreement was required of SIO as an obligation under the Master Agreement between SIO and WGI. *See* Exhibit 5 to Smith Aff. at ¶

13; Exhibits 2 and 4 to Smith Aff. at ¶ 23(f). The letter from Mr. Sullivan even indicates that the enclosure is the confidentiality agreement. The letter provides no evidence of an oral agreement.

Finally, the record contains no evidence that Monsanto made any false representation to SIO, or that any false representation was made with the intent that it be relied upon. Nor does the record contain any evidence that Monsanto has taken a different position than its original position. The undisputed record, however, does contain evidence that SIO presented Monsanto with a proposed draft contract that Monsanto rejected. *See* section I(A) above. Monsanto's position from the very beginning has been that it would not contract with SIO.

## **II. SIO CANNOT PROVE DAMAGES.**

As discussed in Monsanto's Summary Judgment Memorandum, SIO has no provable damages. SIO simply cannot claim a loss of profits and/or earnings because SIO did not generate profits and/or earnings at any time during the seven years it was in business.

Additionally, as discussed in section D(ii) above, any alleged oral agreement would only be valid as to the sand that has already been received and accepted by SIO. Thus, the valid portion of any alleged oral agreement has been performed and SIO has no claim for damages as a matter of law.

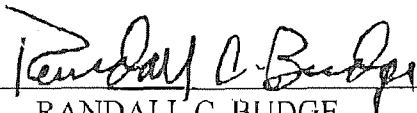
## **CONCLUSION**

Monsanto is entitled to summary judgment as a matter of law because there is simply no written contract between Monsanto and SIO as required by the UCC (for the sale of goods exceeding \$500 in value). Nor can SIO fall within any exception to the requirement of a written contract because SIO never made payments to or otherwise performed with Monsanto. SIO's proposed written contract with Monsanto was rejected and never signed. SIO then proceeded to

enter into a written contract with WGI, who provided the sand to SIO and to whom SIO made all payments for the sand. SIO's alleged after-the-fact phantom contract with Monsanto is entirely inconsistent with the written contracts between SIO and WGI and between WGI and Monsanto. Furthermore, the terms of the alleged contract with Monsanto are vague and indefinite and as such cannot create an enforceable contract as a matter of law. Even if the alleged oral agreement existed, Monsanto lawfully terminated the agreement by reason of which no lawful claim for breach or damages can exist as a matter of law. Finally, if an oral agreement existed to buy silica sand from Monsanto, under the UCC recoverable damages exist only to the extent silica sand was paid for and received by SIO, which did not occur. SIO has no provable damages.

DATED this 6<sup>th</sup> day of May, 2011.

RACINE, OLSON, NYE, BUDGE  
& BAILEY, CHARTERED

By   
RANDALL C. BUDGE



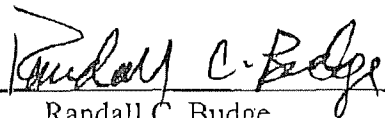
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6<sup>th</sup> day of May, 2011, I served a true and complete copy of the foregoing document in the manner indicated upon the following:

David P. Gardner	<input checked="" type="checkbox"/>	U.S. Mail/Postage Prepaid
Moffatt Thomas Barrett Rock & Fields	<input type="checkbox"/>	Hand Delivery
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Pocatello, Idaho 83204-0817	<input checked="" type="checkbox"/>	Email

Barry N. Johnson	<input checked="" type="checkbox"/>	U.S. Mail/Postage Prepaid
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3165 East Millrock Drive, Ste 500	<input checked="" type="checkbox"/>	Email
Salt Lake City, Utah 84121		

Eugene A. Ritti	<input checked="" type="checkbox"/>	U.S. Mail/Postage Prepaid
Hawley Troxell Ennis & Hawley	<input type="checkbox"/>	Hand Delivery
877 Main Street, Ste 1000	<input type="checkbox"/>	Overnight Mail
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 \_\_\_\_\_  
 Randall C. Budge

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DEPUTY

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Eugene A. Ritti, ISB No. 2156  
Lynnette M. Davis, ISB No. 5263  
HAWLEY TROXELL ENNIS & HAWLEY LLP  
877 Main Street, Suite 1000  
P.O. Box 1617  
Boise, ID 83701-1617  
Telephone: 208.344.6000  
Facsimile: 208.954.5256  
Email: eritti@hawleytroxell.com  
ldavis@hawleytroxell.com

Attorneys for Defendant Washington Group  
International, Inc.

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CARIBOU

SILICON INTERNATIONAL ORE, LLC, an )  
Idaho limited liability company, )  
 )  
Plaintiff, )  
vs. )  
 )  
MONSANTO COMPANY, a Delaware )  
corporation; and WASHINGTON GROUP )  
INTERNATIONAL, INC., an Ohio )  
corporation, )  
 )  
Defendants. )

Case No. CV-2009-366

REPLY MEMORANDUM IN SUPPORT  
OF DEFENDANT WASHINGTON  
GROUP INTERNATIONAL, INC.'S  
MOTION FOR SUMMARY JUDGMENT

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Pursuant to I.R.C.P. 56(c), Defendant Washington Group International, Inc. ("Washington Group") submits this reply memorandum in support of its motion for summary judgment against Plaintiff Silicon International Ore, LLC ("SIO").

I.

INTRODUCTION

SIO's opposition to Washington Group's motion for summary judgment is, for the most part, non-responsive to Washington Group's arguments. Washington Group is entitled to summary judgment on the following grounds:

SIO's tortious-interference claim

- Monsanto demonstrates it never made any oral contract with SIO. Washington Group obviously could not have interfered with a contract that never existed.
- The part of the tortious-interference claim that alleges Washington Group interfered with SIO's own performance of the alleged oral contract with Monsanto fails because SIO presented no evidence that SIO breached (and, in fact, affirmatively stated that it did not breach).

SIO's implied-covenant claim

- SIO presented no evidence of any damages suffered as a result of Washington Group's alleged breaches of the implied covenant of good faith and fair dealing.
- To the extent the implied-covenant claim alleges Washington Group conspired with Monsanto to steal SIO's business, it fails for two reasons: (1) there is no evidence of a conspiracy, and, as SIO concedes, neither Washington Group nor Monsanto has continued its line of business; and (2) the contract contains no implied requirement that, after its expiration, Washington Group must stay out of that line of business.
- To the extent the implied-covenant claim alleges Washington Group refused to furnish SIO a screen, it fails because the contract required SIO to furnish any screen needed to conduct its business under the contract.

Both claims

- Because SIO, an administratively dissolved limited liability company, insists on pursuing a form of relief incompatible with its limited statutory authority to conduct "winding up" litigation, this action is beyond its power and cannot proceed further.

## II.

### ANALYSIS<sup>1</sup>

- A. **In light of Monsanto's evidence that it never made the alleged oral contract with SIO, SIO cannot possibly prevail on its claim against Washington Group for tortious interference with that alleged contract.**

In its opening memorandum, Washington Group argued that if Monsanto disproves it ever made the alleged oral contract with SIO, summary judgment must be entered against the sixth count of SIO's complaint, a claim against Washington Group for tortious interference with that alleged oral contract. In response, SIO suggests the Court should reject Washington Group's argument out of hand because Washington Group offered no proof the alleged oral contract was never made. But the rules do not require that Washington Group itself offer the proof on which it relies, only that the record contain it. *See* I.R.C.P. 56(b) ("A party against whom a claim . . . is asserted . . . may, at any time, move with or without supporting affidavits for a summary

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<sup>1</sup> Section III(A) of Washington Group's opening memorandum presented an argument that summary judgment is required because SIO cannot prove damages without expert testimony, yet failed to disclose any by the expert-disclosure deadline established in the scheduling order then in effect. After Washington Group filed its moving papers, the scheduling order was modified extensively, giving SIO a second chance to make expert disclosures. SIO now presents an affidavit by Kent W. Goates, who ostensibly offers expert opinion supporting its claim for damages: a severely flawed analysis suggesting SIO, a proven money-loser, was on the cusp of a reversal of fortune, to the tune of \$25 million in profits. Washington Group believes this summary-judgment reply is not the right setting in which to challenge Goates' opinions, no matter how incredible and unwarranted they are. Accordingly, Washington Group chooses to withdraw the argument made in Section III(A) of its opening memorandum, without prejudice to a later challenge to the admissibility of Goates' opinions or their sufficiency to support an award of damages against Washington Group.

That said, Washington Group continues to argue in Section II(C) of this memorandum that SIO failed to offer any evidence of damages in connection with its claim against Washington Group for breach of the implied covenant of good faith and fair dealing. Goates' opinions do not help SIO substantiate the kinds of damages at issue in that claim.

judgment in that party's favor . . . ."); I.R.C.P. 56(c) ("The judgment sought shall be rendered forthwith 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 judgment as a matter of law."). Washington Group was within its rights to expressly rely in its moving papers on Monsanto's proof of that point. Washington Group continues to take that approach, sparing the Court from receiving two different reply memoranda explaining why, despite SIO's response papers, Monsanto is entitled to summary judgment against SIO's claim for breach of the alleged oral contract.

**B. Washington Group is entitled to partial summary judgment against SIO's claim for tortious interference, to the extent it alleges Washington Group interfered with SIO's performance of its alleged oral contract with Monsanto.**

As Washington Group noted in its opening memorandum, SIO's complaint alleges two distinct types of interference by Washington Group with the alleged oral contract between SIO and Monsanto. The first type is needlessly complicating SIO's performance. (Compl. ¶ 83.) The second type is causing Monsanto to breach. (*Id.* ¶¶ 84, 86.) The first type is not actionable because SIO does not allege—and, in fact, affirmatively denies—that it breached. (Pl.'s Mem. Opp'n Def. Washington Group's Mot. Summ. J. at 14.) As a matter of Idaho law, interference with a contract is actionable only if it results in a breach. *E.g., Bybee v. Isaac*, 145 Idaho 251, 259, 178 P.3d 616, 624 (2008) (holding that an element of a claim for tortious interference with a contract is "intentional interference causing a breach of the contract"). Since SIO affirmatively denies it breached, Washington Group is entitled to partial summary judgment against the claim for tortious interference, to the extent it is based on alleged interference with SIO's performance.

To try to avoid that conclusion, SIO offers two arguments. Neither has merit.

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PAGE 11

First, SIO argues that Washington Group's motion for summary judgment is a motion to dismiss in disguise and must be decided as such. (Pl.'s Mem. Opp'n Def. Washington Group's Mot. Summ. J. at 12-13.) In essence, the argument is that evidence must accompany a motion for summary judgment, or it is not actually a motion for summary judgment. The rules say otherwise. See I.R.C.P. 56(b) ("A party against whom a claim . . . is asserted . . . may, at any time, move with or without supporting affidavits for a summary judgment in that party's favor as to all or any part thereof."). Supporting evidence is not required. See also, e.g., *Boots ex rel. Boots v. Winters*, 145 Idaho 389, 392, 179 P.3d 352, 355 (Ct. App. 2008) (holding that the party seeking summary judgment can shift the burden to the non-moving party by contending the non-moving party's evidence is insufficient to prove an element of its claim). Even if supporting evidence were required, the record contains supporting evidence, in the form of a judicial admission by SIO that "it did not breach its agreement with Monsanto."<sup>2</sup> (Pl.'s Mem. Opp'n Def. Washington Group's Mot. Summ. J. at 14.)

More importantly, even if I.R.C.P. 12(b)(6) applied, it would require dismissal. See, e.g., *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002) (holding that, if proof of a complaint's factual allegations would be insufficient as a matter of law to sustain a claim in the complaint, that claim must be dismissed pursuant to I.R.C.P. 12(b)(6)). As demonstrated

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<sup>2</sup> "A judicial admission is a statement made by a party or attorney, in the course of judicial proceedings, for the purpose, or with the effect, of dispensing with the need for proof by the opposing party of some fact." *Sun Valley Potato Growers, Inc. v. Texas Refinery Corp.*, 139 Idaho 761, 765, 86 P.3d 475, 479 (2004). "A judicial admission is a deliberate, clear, unequivocal statement of a party about a concrete fact within the party's peculiar knowledge, not a matter of law and not opinion." *In re Universe Life Ins. Co.*, 144 Idaho 751, 759, 171 P.3d 242, 250 (2007) (internal brackets and ellipsis points omitted) (quoting 29A Am. Jur.2d *Evidence* § 770 (1994)).

above, SIO's claim is legally invalid, and therefore subject to dismissal, to the extent it alleges Washington Group complicated SIO's performance. That conclusion is unaffected by the fact that, to the extent the claim alleges Washington Group caused Monsanto to breach, it is adequately pleaded.

Second, SIO argues that discovery might eventually reveal that it breached the alleged oral contract with Monsanto after all, in which event a claim not now supported by any evidence would come to have evidentiary support. But that prospect does not permit a factually unsupported claim to remain part of this action. Only claims that are "well grounded in fact" may be pleaded. I.R.C.P. 11(a)(1). SIO admits this claim has no factual support. The claim may not linger just in case supporting evidence eventually materializes.

The undertone of SIO's arguments is that because Washington Group's challenge focuses on only one of the two types of interference alleged in the complaint, the Court should not bother to consider that challenge at all. The rules expressly provide, however, for awards of partial summary judgment. I.R.C.P. 56(b) ("A party against whom a claim . . . is asserted . . . may, at any time, move with or without supporting affidavits for a summary judgment in that party's favor as to all or any part thereof."). Washington Group has demonstrated that SIO's claim for tortious interference is invalid, in part, as a matter of law. Consequently, the partial summary judgment it seeks "shall be rendered forthwith." I.R.C.P. 56(c).

**C. SIO's claim against Washington Group for breach of the implied covenant of good faith and fair dealing fails because SIO presented no evidence of damages and because its primary theories of liability do not square with the Master Agreement.**

SIO's claim for breach of the covenant of good faith and fair dealing inherent in its Master Agreement with Washington Group, as that claim is pleaded, alleges two types of breaches: (1) "taking various actions to undermine and hinder SIO's work at the Quarry,



including but not limited to forcing SIO to purchase an expensive but ultimately unnecessary screen to be used in its work’; and (2) “conspiring with Monsanto to take over SIO’s Tailing improvement business.” (Compl. ¶ 76.) In its opening memorandum, Washington Group thoroughly demonstrated that both of those theories of liability fail as a matter of law. First, the Master Agreement makes clear that if SIO needed a screen to conduct its business, SIO was responsible for getting one itself.<sup>3</sup> Second, there is no evidence of a “takeover conspiracy.”<sup>4</sup> And, even if Washington Group had continued SIO’s line of business, the Master Agreement cannot be read to contain an implied post-expiration restriction on Washington Group’s ability to do so.<sup>5</sup> SIO attempts no response to these arguments. Summary judgment is therefore required

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- <sup>3</sup> SIO obliquely suggests this is not the case, noting that a contract between Monsanto and Washington Group—to which SIO is not a party—makes Washington Group responsible for the expenses of operating SIO’s silica-processing facility. (Pl.’s Mem. Opp’n Def. Washington Group’s Mot. Summ. J. at 16.) As between Washington Group and Monsanto, Washington Group may have borne those expenses. But, as between Washington Group and SIO, SIO plainly bore them. As the Master Agreement states, “[SIO] agrees to provide all necessary plant equipment to dry, screen, and bag the silica sand.” (Ritti Aff. filed Jan. 26, 2011 Ex. C § 3.)
- <sup>4</sup> To the contrary, the record unequivocally demonstrates that neither Washington Group nor Monsanto has pursued SIO’s line of business after its operations at the Monsanto quarry concluded. (Nelson Aff. ¶ 3; Smith Aff. ¶ 14.) SIO concedes this point. (Pl.’s Mem. Opp’n Def. Washington Group’s Mot. Summ. J. at 7.)
- <sup>5</sup> An SIO principal, Todd Sullivan, suggests in his affidavit that the business relationship between SIO and Washington Group became one of indefinite duration because it continued after the Master Agreement’s expiration in 2005. (Sullivan Aff. ¶ 16.) SIO does not argue in its opposition memorandum, however, that it made an indefinite or perpetual contract with Washington Group. No such argument would be factually supportable. In April 2008, long before filing this action, Sullivan himself conceded unequivocally that the Master Agreement “is now expired.” (Third Ritti Aff. Ex. F at 3.)

at least to the extent the implied-covenant claim is based on the "screen" issue and the "takeover conspiracy" issue.

Instead of trying to rebut Washington Group's arguments for summary judgment against the implied-covenant claim, as it was pleaded, SIO's tack is to broaden the claim. To that end, SIO presents a laundry list of alleged breaches of the implied covenant, summarizing the implied-covenant breach allegations made in its discovery responses. (Pl.'s Mem. Opp'n Def. Washington Group's Mot. Summ. J. at 15-16.) Even assuming *arguendo* that the Court will permit the assertion of unpleaded breaches, that tack has a problem SIO cannot overcome: the complete absence of evidence of damages.

Washington Group sought summary judgment against SIO's implied-covenant claim not only on grounds that the "screen" and "takeover conspiracy" theories fail for the reasons just summarized, but also on grounds that SIO has no evidence of damages. (Mem. Supp. Def. Washington Group's Mot. Summ. J. at 5-8.) In the very same set of discovery responses to which SIO points for its laundry list of alleged implied-covenant breaches, SIO refused to provide an itemization of the resulting damages, contending that information would not be disclosed until it made expert disclosures, as "SIO is not qualified to make that calculation" itself. (Ritti Aff. filed Jan. 26, 2011 Ex. B at 12-13.) SIO has not made any expert disclosures that address the damages resulting from the laundry list of alleged implied-covenant breaches. SIO has provided a report by a professed damages expert, Kent W. Goates, but Goates' report simply does not address that subject. Page 1 of his report, which includes a bullet-point list of the damages topics he addresses, proves this point. (Goates Aff. Ex. 1 at 1.)

SIO rests its case, insofar as the pending summary-judgment motions are concerned, on the evidence presented in its response papers. That evidence is simply insufficient to prove damages resulting from the laundry list of alleged implied-covenant breaches, which is its burden as the plaintiff. *See, e.g.*, IDJI 6.10.1 (stating that the fact and amount of damages are elements of a claim for breach of contract, and allocating the burden of proof to the plaintiff); *Bergkamp v. Martin*, 114 Idaho 650, 653, 759 P.2d 941, 944 (Ct. App. 1988) (“Although a plaintiff has been legally wronged [by the defendant’s breach of contract], he may not recover damages unless he has been economically injured. If he wishes to protect some noneconomic interest in a contract, then he may pursue another remedy such as injunctive relief or specific performance.”) (internal citation and quotation marks omitted).

Because SIO failed to carry its burden on the issue of damages, Washington Group is entitled to summary judgment against the implied-covenant claim in its entirety, not merely against the “screen” and “takeover conspiracy” aspects of that claim.

**D. Because SIO apparently declines to conform the scope of this action to the statutory limitation on its authority to conduct litigation, this action cannot proceed further.**

It is undisputed that SIO has allowed itself to be administratively dissolved by the Idaho Secretary of State. The legal consequence of SIO’s administrative dissolution also is undisputed: while it may “[p]rosecute and defend actions,” it may do so only “[i]n winding up its activities.” Idaho Code § 30-6-702(2)(b)(iii). SIO tries to characterize this action as an exercise of its right to conduct “winding up” litigation. That characterization is inaccurate, given that SIO seeks “a judgment ordering and compelling Monsanto to specifically perform its obligations under the Monsanto Agreement in accordance with the terms thereof.” (Compl. Prayer for Relief ¶¶ 3-4.) SIO did not withdraw its demand for that form of relief, even after Monsanto and Washington

Group demonstrated in their moving papers that it imperils this entire action. For so long as SIO continues to pursue a form of relief that is inconsistent with "winding up its activities," this action does not constitute "winding up" litigation and cannot continue.

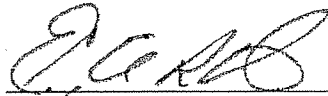
III.

CONCLUSION

Washington Group is entitled to summary judgment against SIO's claims.

DATED THIS 6<sup>TH</sup> day of May, 2011.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By   
Eugene A. Ritti, ISB No. 2156  
Attorneys for Defendant Washington Group  
International, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6<sup>th</sup> day of May, 2011, I caused to be served a true copy of the foregoing REPLY MEMORANDUM IN SUPPORT OF DEFENDANT WASHINGTON GROUP INTERNATIONAL, INC.'S MOTION FOR SUMMARY JUDGMENT by the method indicated below, and addressed to each of the following:

David P. Gardner  
MOFFATT THOMAS BARRETT ROCK  
& FIELDS, CHTD.  
412 West Center, Suite 2000  
Pocatello, ID 83204-0817  
[Attorneys for Plaintiff Silicon International Ore, LLC]

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 E-mail  
 Telecopy: 208.232.0150

Barry N. Johnson  
Daniel K. Brough  
Robert K. Reynard  
BENNETT TUELLER JOHNSON & DEERE  
3165 East Millrock Drive, Suite 500  
Salt Lake City, UT 84121  
[Attorneys for Plaintiff Silicon International Ore, LLC]

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 E-mail  
 Telecopy: 801.438.2050

Randall C. Budge  
RACINE OLSON NYE BUDGE & BAILEY, CHTD.  
201 E. Center  
P.O. Box 1391  
Pocatello, ID 83204-1391  
[Attorneys for Defendant Monsanto Company]

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 E-mail  
 Telecopy: 208.232.6109

  
\_\_\_\_\_  
Eugene A. Ritti

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*[Signature]*  
DEPUTY

2011 MAY -6 PM 4: 27

Randall C. Budge, ISB No. 1949  
W. Marcus W. Nye, ISB No. 1629  
Mark A. Shaffer, ISB No. 7559  
RACINE, OLSON, NYE, BUDGE &  
BAILEY, CHARTERED  
P.O. Box 1391; 201 E. Center Street  
Pocatello, Idaho 83204-1391  
Telephone: 208-232-6101  
Facsimile: 208-232-6109  
Email: [rcb@racinelaw.net](mailto:rcb@racinelaw.net)

*Attorneys for Defendant Monsanto Company*

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CARIBOU

SILICON INTERNATIONAL ORE, LLC, )  
an Idaho limited liability company, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
MONSANTO COMPANY, a Delaware )  
Corporation, and WASHINGTON GROUP )  
INTERNATIONAL, INC., an Ohio )  
Corporation, )  
 )  
Defendants. )  
\_\_\_\_\_ )

Case No. CV-2009-366

**MOTION TO STRIKE**

COMES NOW Defendant Monsanto Company ("Monsanto"), by and through counsel,  
and hereby objects to and moves this Court to strike from the record and not consider as evidence  
any and all email messages between Mitch Hart and Plaintiff Silicon International Ore, LLC  
("SIO") and/or any of SIO's representatives after Mr. Hart's employment with Monsanto ended,  
as well as any and all references to such email messages. This objection and motion is made

pursuant to Rules 12(f), 32, and 56(e) of the Idaho Rules of Civil Procedure and on the grounds and for the reasons that the depositions and affidavits, along with the respective exhibits attached thereto, contain facts not admissible under the Idaho Rules of Evidence. This objection and motion to strike is based upon the fact that the email messages to and from Mr. Hart after Mr. Hart's employment with Monsanto ended are clearly hearsay and do not fit within any of the hearsay exceptions.

DATED this 6<sup>th</sup> day of May, 2011.

RACINE, OLSON, NYE, BUDGE  
& BAILEY, CHARTERED

By *Randall C. Budge*  
RANDALL C. BUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6<sup>th</sup> day of May, 2011, I served a true and complete copy of the foregoing document in the manner indicated upon the following:

David P. Gardner  
Moffatt Thomas Barrett Rock & Fields  
412 W. Center Street, Ste 2000  
Pocatello, Idaho 83204-0817

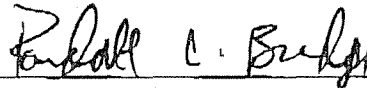
U.S. Mail/Postage Prepaid  
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 Overnight Mail  
 Email

Barry N. Johnson  
Daniel K. Brough  
Bennett Tueller Johnson & Deere  
3165 East Millrock Drive, Ste 500  
Salt Lake City, Utah 84121

U.S. Mail/Postage Prepaid  
 Hand Delivery  
 Overnight Mail  
 Email

Eugene A. Ritti  
Hawley Troxell Ennis & Hawley  
877 Main Street, Ste 1000  
Boise, Idaho 83702

U.S. Mail/Postage Prepaid  
 Hand Delivery  
 Overnight Mail  
 Email



Randall C. Budge



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*Maury Wilk*  
DEPUTY

2011 MAY -6 PM 4: 27

Randall C. Budge, ISB No. 1949  
W. Marcus W. Nye, ISB No. 1629  
Mark A. Shaffer, ISB No. 7559  
RACINE, OLSON, NYE, BUDGE &  
BAILEY, CHARTERED  
P.O. Box 1391; 201 E. Center Street  
Pocatello, Idaho 83204-1391  
Telephone: 208-232-6101  
Facsimile: 208-232-6109  
Email: [rcb@racinelaw.net](mailto:rcb@racinelaw.net)

*Attorneys for Defendant Monsanto Company*

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CARIBOU

SILICON INTERNATIONAL ORE, LLC, )  
an Idaho limited liability company, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
MONSANTO COMPANY, a Delaware )  
Corporation, and WASHINGTON GROUP )  
INTERNATIONAL, INC., an Ohio )  
Corporation, )  
 )  
Defendants. )  
\_\_\_\_\_ )

Case No. CV-2009-366

**MEMORANDUM IN SUPPORT OF  
MOTION TO STRIKE**

COMES NOW Defendant Monsanto Company (hereinafter "Monsanto"), by and through counsel, and submits this memorandum in support of its Motion to Strike filed herewith.

**INTRODUCTION**

Plaintiff Silicon International Ore, LLC (hereinafter "SIO") filed an Affidavit of Todd Sullivan ("Sullivan Aff.") and an Affidavit of Daniel K. Brough ("Brough Aff.") on April 29,

2011 in Support of Plaintiff's Memorandum in Opposition to Defendant Washington Group International, Inc.'s Motion for Summary Judgment. However, the affidavits do not comply with Rules 32 and/or 56(e) of the Idaho Rules of Civil Procedure because they do not set forth facts as would be admissible in evidence. *See* I.R.C.P. 32(a) (noting that "any part or all of a deposition, so far as admissible under the rules of evidence" may be used "upon the hearing of a motion") (emphasis added); I.R.C.P. 56(e) (stating that "[s]upporting and opposing affidavits shall . . . set forth such facts as would be admissible in evidence. . .") (emphasis added). The relevant affidavits and depositions contain statements about and copies of email messages to and from Mitch Hart after his employment with Monsanto ended, including but not limited to (1) the Sullivan Aff. at ¶¶ 5, 6 and Exhibits A and B attached thereto; (2) the Brough Aff. at ¶ 5 and Exhibit B attached thereto containing the deposition transcript of Mitch Hart ("Hart Dep."); and (3) Exhibit Nos. 19, 20, and 24 attached to Exhibit B of the Brough Aff. In addition, the deposition transcript of Mitch Hart contains numerous references to the relevant email messages.

The email messages and all references thereto are hearsay and do not fit within any of the hearsay exceptions. Therefore, the Court should not consider the relevant email messages and/or any references thereto. The messages are not admissible and should be stricken from the record.

### ARGUMENT

SIO is attempting to admit into evidence written statements to and from Mitch Hart (in the form of email messages) that SIO asserts are binding upon Monsanto. SIO argues that such email messages are evidence of the terms of an alleged oral agreement between Monsanto and SIO. However, such relevant email messages were not to or from Monsanto and are hearsay.

Rule 801 of the Idaho Rules of Evidence defines "hearsay" as "a statement, other than

one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." IRE 801(c). The term "declarant" is defined as "a person who makes the statement." IRE 801(b).

In this case, SIO is asserting that the terms of the alleged oral agreement were agreed to by Monsanto. The undisputed record, however, demonstrates that Mr. Hart never had the authority to negotiate or enter into contracts on behalf of Monsanto. *See* Hart Dep. 15:14-19, 33:16-34:15, 91:16-92:4, 92:24-94:12; Affidavit of Mitchell J. Hart ("Hart Aff.") at ¶ 4; Affidavit of James R. Smith at ¶ 3. Further, the undisputed record clearly demonstrates that Mitch Hart was not employed by Monsanto at the time he wrote and received the relevant email messages, and that he was not an agent or representative of Monsanto when he wrote and received the email messages. *See* Hart Aff. at ¶ 2; Hart Dep. 10:25-11:1, 16:7-9; Exhibit Nos. 19, 20, and 24 attached to Hart Dep.; Sullivan Aff. at ¶¶ 5, 6 and Exhibits A and B attached thereto. The email messages were therefore statements made by someone other than the declarant (Monsanto) offered into evidence to prove the truth of the matter asserted (the terms of an alleged oral agreement). The email messages to and from Mr. Hart after his employment with Monsanto ended are hearsay.

Further, the relevant email messages do not fit into any of the hearsay exceptions. The email messages cannot be offered against Monsanto because the messages were not Monsanto's own statement, were not adopted by Monsanto, were not authorized by Monsanto, were not from an agent or servant of Monsanto, and were not statements by a co-conspirator. *See* IRE 801(d)(1), (2); IRE 803; IRE 804. Mr. Hart simply was not authorized by Monsanto to make any statements or contracts on its behalf, either before or after his employment with Monsanto.

CONCLUSION

The relevant email messages to and from Mr. Hart after his employment with Monsanto ended are hearsay. Such email messages and all references thereto are not admissible into evidence and should not be considered by the Court. Monsanto therefore requests that such email messages and all references thereto be stricken from the record.

DATED this 6<sup>th</sup> day of May, 2011.

RACINE, OLSON, NYE, BUDGE  
& BAILEY, CHARTERED

By   
RANDALL C. BUDGE

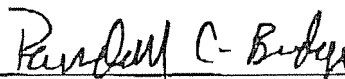
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6<sup>th</sup> day of May, 2011, I served a true and complete copy of the foregoing document in the manner indicated upon the following:

David P. Gardner [X ] U.S. Mail/Postage Prepaid  
Moffatt Thomas Barrett Rock & Fields [ ] Hand Delivery  
412 W. Center Street, Ste 2000 [ ] Overnight Mail  
Pocatello, Idaho 83204-0817 [X ] Email

Barry N. Johnson [X ] U.S. Mail/Postage Prepaid  
Daniel K. Brough [ ] Hand Delivery  
Bennett Tueller Johnson & Deere [ ] Overnight Mail  
3165 East Millrock Drive, Ste 500 [X ] Email  
Salt Lake City, Utah 84121

Eugene A. Ritti [X ] U.S. Mail/Postage Prepaid  
Hawley Troxell Ennis & Hawley [ ] Hand Delivery  
877 Main Street, Ste 1000 [ ] Overnight Mail  
Boise, Idaho 83702 [X ] Email



\_\_\_\_\_  
Randall C. Budge

RACINE, OLSON, NYE, BUDGE &  
BAILEY, CHARTERED

By *Randall C. Budge*  
RANDALL C. BUDGE

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U.S. Mail and Email

Barry N. Johnson  
Daniel K. Brough  
Bennett Tueller Johnson & Decre  
3165 East Millrock Drive, Ste 500  
Salt Lake City, Utah 84121

U.S. Mail and Email

Eugene A. Ritti  
Hawley Troxell Ennis & Hawley  
877 Main Street, Ste 1000  
Boise, Idaho 83702

U.S. Mail and Email

*Randall C. Budge*  
RANDALL C. BUDGE

760

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*Sharon Wells*  
 DEPUTY  
 2011 MAY 12 PM 4:44

David P. Gardner (Idaho Bar No. 5350)  
 MOFFATT THOMAS BARRETT ROCK & FIELDS, CHTD.  
 412 West Center, Suite 2000  
 Pocatello, ID 83204-0817  
 Telephone: (208) 233-2001  
 Facsimile: (208) 232-0150  
 Email: [dpg@moffatt.com](mailto:dpg@moffatt.com)

Barry N. Johnson (Utah Bar No. 6255)  
*Admitted Pro Hac Vice*  
 Daniel K. Brough (Utah Bar No. 10283)  
*Admitted Pro Hac Vice*  
 BENNETT TUELLER JOHNSON & DEERE  
 3165 East Millrock Drive, Suite 500  
 Salt Lake City, Utah 84121  
 Telephone: (801) 438-2000  
 Facsimile: (801) 438-2050  
 Email: [bjohnson@btjd.com](mailto:bjohnson@btjd.com), [dbrough@btjd.com](mailto:dbrough@btjd.com)

*Attorneys for Plaintiff Silicon International Ore, LLC*

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT  
 STATE OF IDAHO, COUNTY OF CARIBOU

\*\*\*\*\*

SILICON INTERNATIONAL ORE, LLC,	)	
an Idaho limited liability company,	)	
	)	<b>PLAINTIFF'S RESPONSE TO</b>
Plaintiff,	)	<b>DEFENDANT MONSANTO</b>
	)	<b>COMPANY'S MOTION TO STRIKE</b>
vs.	)	
	)	Case No. CV-2009-0000366
MONSANTO COMPANY, a Delaware	)	
corporation; and WASHINGTON GROUP	)	Judge Mitchell W Brown
INTERNATIONAL, INC., an Ohio	)	
corporation;	)	
	)	
Defendants.	)	

\*\*\*\*\*

Plaintiff Silicon International Ore, LLC ("SIO"), by and through counsel, submits this Memorandum in Opposition to Defendant Monsanto Company's ("Monsanto") Motion to Strike.

### INTRODUCTION

Monsanto asks this Court to strike three emails that Mitchell Hart ("Hart") sent to Todd Sullivan ("Sullivan"), of SIO, as well as all references to those emails in Hart's deposition transcript and SIO's memorandum in opposition to Monsanto's motion for summary judgment. But the Idaho Rules of Civil Procedure do not recognize a motion to strike testimony submitted in opposition to a motion for summary judgment. For that reason alone, the Court should deny Monsanto's motion to strike.

But Monsanto's motion also suffers from a number of fatal substantive flaws. First among equals is the fact that Monsanto, ironically, seeks to strike references to emails that Hart himself authenticated and attached to his own affidavit, which Monsanto itself filed in support of its motion for summary judgment. Hart further authenticated all three emails in his deposition, a fact that Monsanto admits. Therefore, the testimony before the Court is Hart's own testimony regarding those emails. Particularly on summary judgment, it is *not* out-of-court testimony. In any event, Hart's emails, as well as his testimony regarding them, are undoubtedly trustworthy and material. Idaho's residual hearsay exception therefore covers them. For these reasons, the Court should deny Monsanto's motion to strike.<sup>1</sup>

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<sup>1</sup> A written motion, like Monsanto's motion to strike, must "be filed with the court, and served so that it is received by the parties no later than fourteen (14) days before the time specified for the hearing." See Idaho R. Civ. P. 7(b)(3)(A). Monsanto filed and served its motion on May 6, 2011, but noticed the hearing on its motion for May 13, 2011. Rather than delay the hearing on this



## ARGUMENT

### I. THE IDAHO RULES OF CIVIL PROCEDURE DO NOT RECOGNIZE A MOTION TO STRIKE PORTIONS OF AFFIDAVITS, MEMORANDA, OR EXHIBITS TO THEM, WHERE THOSE MATERIALS ARE SUBMITTED IN OPPOSITION TO A MOTION FOR SUMMARY JUDGMENT.

As authority for its motion, Monsanto relies upon Idaho Rule of Civil Procedure 12(f).

That rule provides as follows:

Upon motion made by a party before responding to a *pleading* or, if no responsive pleading is permitted by these rules, upon motion made by a party *within twenty (20) days after the service of the pleading* upon the party or upon the court's own initiative at any time, the court may order stricken from any *pleading* any *insufficient defense* or any redundant, immaterial, impertinent, or scandalous matter.

*See* Idaho R. Civ. P. 12(f) (emphasis added). Rule 12(f) plainly applies only to the striking of pleadings. But the Idaho Rules of Civil Procedure recognizes only certain documents as pleadings: “a complaint and an answer; . . . a reply to a counterclaim denominated as such; an answer to a cross-claim . . . ; a third-party complaint . . . ; [and] a third-party answer.” *See* Idaho R. Civ. P. 7(a). “No other pleading shall be allowed . . . .” *Id.* Affidavits, memoranda, and exhibits thereto are not pleadings and are therefore not subject to Rule 12(f).

No other Rule of Civil Procedure authorizes the Court to strike affidavits, memoranda, or exhibits thereto, submitted in opposition to a motion for summary judgment. Even Rule 56, which specifically addresses summary judgment motions, does not mention such a motion. *See*

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motion, or on the pending motions for summary judgment, SIO deems the hearing date—for purposes of the due date of its opposition—to be May 20, 2011, making its response to the motion due on May 13. Even so, SIO has no objection to the Court's taking up and ruling upon Monsanto's motion to strike at the May 13, 2011, hearing on the pending motions for summary judgment.

*generally* Idaho R. Civ. P. 56. And although Rule 37 authorizes the striking of filings, it does so only to punish discovery-related conduct. *See generally* Idaho R. Civ. P. 37. The Idaho Rules of Civil Procedure identify no basis for striking affidavits, memoranda, and exhibits offered in opposition to a motion for summary judgment.

If Hart's emails constitute inadmissible hearsay, the Court is free to refuse to consider them in ruling on the motions for summary judgment. *See* Idaho R. Civ. P. 56(e) (noting that opposing affidavits "shall set forth such facts as would be admissible in evidence). But those emails, and Sullivan's and Hart's references to them, are what they are and say what they say, and Monsanto is not entitled to the extraordinary remedy of having them stricken from the record.

## II. HART'S EMAILS ARE NOT HEARSAY.

Idaho Rule of Evidence 801 defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *See* IRE 801(c). In turn, a "declarant" is "a person who makes a statement." *See id.* 801(b).

Hart's emails are not hearsay for the simple reason that Hart himself has, under oath, authenticated them. He has done so twice. First, in an affidavit Monsanto filed in support of its motion for summary judgment, Hart admits that he "did send [Sullivan] emails dated January 17, 2008 and March 6, 2008," copies of which were attached to his affidavit. *See* Hart Aff. ¶ 8 (on file with the Court). In other words, in an affidavit offered by Monsanto itself in support of its motion for summary judgment, Hart himself admits sending two of the three emails in question

to Sullivan, and he authenticates copies of those emails.<sup>2</sup> Those emails are a component of Hart's own testimony and are therefore admissible, as Hart admitted sending, and authenticated, "while testifying at the trial or hearing." *See* IRE 801(c).<sup>3</sup>

Second, Monsanto implicitly concedes that Hart again admitted sending, and authenticated, those emails in his deposition. *See* Mem. Supp. Mot. Strike at 2, 3 (on file with the Court) (noting that the three emails in question are attached to the Hart's deposition transcript as Exhibits 19, 20, and 24). Monsanto's concession is correct. Regarding the January 17, 2008, email, Hart testified at length as to the origins of that email, its content, and the reasons why Hart wrote it, as well as the email correspondence preceding it, thereby fully authenticating it, with his own testimony offered during his own deposition, as an email he sent. *See* Brough Aff. ¶ 5 and Exhibit B thereto (Hart Dep. Tr. at 36:17–45:17) (on file with the Court); *see also* IRE 901 ("The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."). He remembers "actually sitting at a computer and typing this email." *See* Brough Aff. ¶ 5 and Exhibit B thereto (Hart Dep. Tr. at 45:2–4). Hart similarly admitted sending, and authenticated, the March 6, 2008 email. *See* Brough Aff. ¶ 5 and Exhibit B thereto (Hart Dep. Tr. at 45:18–52:15). He did the same for his March 14, 2008, email, in which he

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<sup>2</sup> Monsanto plainly cannot first offer evidence and then move to strike its own evidence.

<sup>3</sup> The reference to "trial or hearing" does not exclude presentation of that evidence in an affidavit, or in a deposition transcript attached to an affidavit. Idaho Rule of Civil Procedure 56(c) expressly permits the Court to consider affidavits.

approved Sullivan's characterization of his and Hart's conversations and correspondence. *See* Brough Aff. ¶ 5 and Exhibit B thereto (Hart Dep. Tr. at 52:16–57:18).

Hart's emails are not hearsay, and are admissible, because they are part and parcel of testimony Hart himself offered while under oath, and which is being presented to the Court as a part of Hart's own testimony "at the trial or hearing," both in his deposition and in the very affidavit Monsanto filed in support of its motion for summary judgment. *See* IRE 801(c).<sup>4</sup>

## II. EVEN IF THE EMAILS ARE HEARSAY, IDAHO'S RESIDUAL HEARSAY EXCEPTION PERMITS THEIR ADMISSION.

The Idaho Rules of Evidence contain a residual exception to the hearsay rule. That exception permits the admission of:

A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

*See* IRE 803(24).

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<sup>4</sup> In the context of its oppositions to the pending motions for summary judgment, SIO presented Hart's emails as exhibits to Sullivan's affidavit. *See* Sullivan Aff. ¶¶ 5–6 (on file with the Court). But Sullivan can certainly testify as to his receipt of the emails, and that is all he does. *See id.* Sullivan offered the emails solely as evidence of communications he received from Hart. The fact of those communications themselves is relevant, separate and apart from whether those emails are evidence of a contract between SIO and Monsanto. In that sense, Sullivan does not offer those emails to "prove the truth of the matter asserted." *See* IRE 801(c). Those emails are therefore not hearsay in the context of Sullivan's testimony. Hart can, and did, make those emails part of his own in-court testimony, and the emails, as offered by Hart, are therefore not hearsay in that context, either. On the complete record before the Court, the emails are admissible.

Hart's emails easily satisfy these criteria. The Idaho Court of Appeals, citing the United States Supreme Court, has noted that "the spontaneity of the statement, the consistency of repetition, the mental state of the declarant and the lack of motive to fabricate" are nonexclusive "indicators of trustworthiness." *See State v. Gray*, 129 Idaho 784, 792, 932 P.2d 907, 915 (Ct. App. 1997). Hart has testified that he considered the content of the first, January 15, 2008, email, over a period of two days, that it took him thirty minutes to actually write it, and that he considered its content to be accurate at the time he wrote it. *See Brough Aff.* ¶ 5 and Exhibit B thereto (Hart Dep. Tr. at 45:2-17). Moreover, over the course of the subsequent two emails, Hart effectively repeated the content of that first email. There is no indication in the record that Hart was anything other than lucid and competent when he wrote the email. And as a former Monsanto employee, Hart would have no motivation whatsoever to falsely state, in an email to an individual he knew was entering into a conflict with Monsanto over Monsanto's contractual obligations, that there was in fact a contract between SIO and Monsanto. *See Brough Aff.* ¶ 5 and Exhibit B thereto (Hart Dep. Tr. at 53:16-24) (Hart's testimony admitting that he knew that Sullivan was preparing some type of correspondence to Monsanto); *id.* (Hart Dep. Tr. at 95:17-24) (Hart's testimony admitting that "it was understood" that Monsanto was "looking at liquidating [SIO's] facility").

Moreover, and critically, Hart *admits* sending all three emails to Sullivan, and in his deposition, he extensively verified the content of the emails that SIO has offered in opposition to the pending motions for summary judgment. *See Brough Aff.* ¶ 5 and Exhibit B thereto (Hart Dep. Tr. at 36:17-45:17) (on file with the Court); *id.* (Hart Dep. Tr. at 45:18-52:15); *id.* (Hart

Dep. Tr. at 52:16–57:18). Sullivan confirms receiving those emails in the very same format that Hart admits sending them. *See* Sullivan Aff. ¶¶ 5–6. There is no dispute whatsoever that the emails that SIO has proffered are true and correct copies of the very emails that Hart sent, and which Sullivan received.

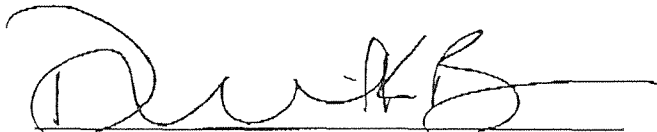
Furthermore, it is undisputed (and, indeed, proven by Monsanto’s staunch resistance to these emails) that the emails bear on a fact that is enormously material to this action: the existence of a contract between SIO and Monsanto. In this case, which encompasses proof of an oral contract between SIO and Monsanto, those emails are critically probative; if they are not the most probative evidence available to SIO, they are close. And the Idaho Rules of Evidence “shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence, to the end that the truth may be ascertained and proceedings justly determined.” *See* IRE 102. In particular, “[t]he principal purpose underlying the policy behind the hearsay rule is” simply “to assure that testimony of assertions shall be subjected to cross-examination.” *See State v. McPhie*, 104 Idaho 652, 655, 662 P.2d 233, 236 (1983). Hart would be subject to cross-examination at trial, and in any event, he has already had an opportunity to comment on the emails, given that he has already produced an affidavit filed in this case by Monsanto. Because it is undisputed that Hart sent the emails in question, exactly as SIO has presented them to the Court, and those emails bear on a critical issue in this case, the “general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence,” even if they are hearsay. *See* IRE 803(24).

CONCLUSION

There is no such motion as a motion to strike evidence, affidavits, or testimony offered in opposition to a motion for summary judgment. Even if there were, Hart's three emails are not hearsay, as he has personally—under oath—admitted to sending them and authenticated them. Even if Hart's emails are hearsay, the fact of their existence is undisputed, they are inordinately probative, they are undisputedly trustworthy and reliable, and the purposes of the Rules of Evidence, and the hearsay rule in particular, would be well served by their admission. For these reasons, the Court should deny Monsanto's motion to strike.

DATED this 12<sup>th</sup> day of May, 2011.

BENNETT TUELLER JOHNSON & DEERE



Barry N. Johnson (admitted pro hac vice)  
Daniel K. Brough (admitted pro hac vice)

MOFFATT THOMAS BARRETT ROCK & FIELDS,  
CHTD.

David M. Gardner  
*Attorneys for Plaintiff Silicon International Ore, LLC*

CERTIFICATE OF SERVICE

I hereby certify that on the 12<sup>th</sup> day of May, 2011, I caused a true and correct copy of the foregoing **PLAINTIFF'S RESPONSE TO DEFENDANT MONSANTO COMPANY'S MOTION TO STRIKE** to be served by the methods indicated below, and addressed to the following:

Randall C. Budge  
RACINE, OLSON, NYE, BUDGE & BAILEY, CHTD.  
P.O. Box 1391  
201 E. Center Street  
Pocatello, ID 83204-1391  
*Via U.S. Mail, facsimile ((208) 232-6109) and email ([rcb@racinelaw.net](mailto:rcb@racinelaw.net))*

Eugene A. Ritti  
HAWLEY TROXELL ENNIS & HAWLEY  
877 Main Street, Suite 1000  
Boise, ID 83702  
*Via U.S. Mail, facsimile ((208) 954-5256) and email ([eritti@hawleytroxell.com](mailto:eritti@hawleytroxell.com))*

*Mari Fuellenbach*



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*Shawn Wells*  
DEPUTY

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IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CARIBOU

SILICON INTERNATIONAL ORE, LLC,	)	
AN IDAHO LIMITED LIABILITY	)	Case No: CV-2009-0000366
COMPANY	)	
	)	
PLAINTIFF,	)	
	)	<b>MINUTE ENTRY AND ORDER</b>
VS	)	
	)	
MONSANTO COMPANY, A DELAWARE	)	
CORPORATION; WASHINGTON GROUP	)	
INTERNATIONAL, INC, AN OHIO	)	
CORPORATION,	)	
	)	
DEFENDANTS.	)	
	)	

**COURT REPORTER:** No court reporter was available for this matter due to the retirement of the court reporter. Administrative Order 11-01 was issued on January 5, 2011, wherein the application of Idaho Administrative Rule 27, as it applies to having a certified court reporter attend all district court proceedings, shall be suspended until further notice.

**DATE:** Friday, May 13, 2011 01:30 PM

**APPEARANCES:** Barry N. Johnson, Attorney for Plaintiff  
Daniel K. Brough, Attorney for Plaintiff  
Randall C Budge, Attorney for Defendant Monsanto Company  
Mark A. Shaffer, Attorney for Defendant Monsanto Company  
Eugene A. Rutti, Attorney for Defendant Washington Group International

**MATTER BEFORE THE COURT:** Motion for Summary Judgment and Motion to Strike

**PROCEEDINGS:** The above-entitled matter came before the Court as regularly scheduled for hearing on Motions for Summary Judgment. Defendant Monsanto Company also filed a Motion to Strike which was heard contemporaneously with the Motion for Summary Judgment. Barry N. Johnson and Daniel K. Brough, Attorneys for Plaintiff appeared on behalf of Silicon International Ore, LLC, Plaintiff. Randall C. Budge and Mark A. Shaffer, Attorneys for Defendant appeared on

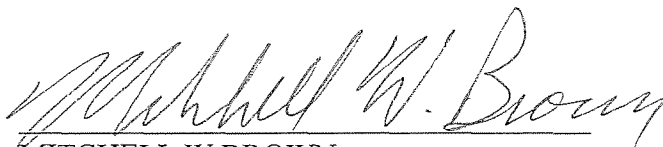
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behalf of Monsanto Company, Defendant and Eugene A. Ritti, Attorney for Defendant appeared with Washington Group International, Inc, Defendant. The parties argued their respective positions to the Court.

**DISPOSITION:** The Court will take the matter under advisement and render a decision.

**IT IS SO ORDERED.**

**DATED:** this 13th day of May, 2011.



MITCHELL W BROWN  
District Judge

**CERTIFICATE OF MAILING/SERVICE**

I hereby certify that on ~~Wednesday, May 18,~~ May 18, 2011, I mailed/served a true copy of the Minute Entry and Order on the attorney(s)/person(s) listed below by mail with correct postage thereon or causing the same to be hand delivered.

**PLAINTIFF ATTORNEY:**

Daniel K Brough  
3165 East Millrock Drive, Suite 500  
Salt Lake City UT 84121  
(801) 438-2050

- Faxed
- Hand Delivered
- Mailed

Barry N Johnson  
3165 East Millrock Drive, Suite 500  
Salt Lake City UT 84121  
(801) 438-2050

- Faxed
- Hand Delivered
- Mailed

David P. Gardner  
412 West Center, Suite 200  
Pocatello, ID 83204-0817  
(208) 232-0150

- Faxed
- Hand Delivered
- Mailed

**DEFENDANT ATTORNEY:**

Randall C Budge  
Po Box 1391  
Pocatello ID 83204-1391  
(208) 232-6109

- Faxed
- Hand Delivered
- Mailed

Eugene A Ritti  
PO Box 1617  
Boise ID 83701-1617  
(208) 954-5256

- Faxed
- Hand Delivered
- Mailed

Veda Mascarenas, Clerk

By: Sharon L Wells  
Sharon L Wells  
Deputy Clerk

2011 MAY 20 PM 3: 00

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CARIBOU

SILICON INTERNATIONAL ORE, LLC, an )  
Idaho limited liability company, )  
 )  
Plaintiff, )  
vs. )  
 )  
MONSANTO COMPANY, a Delaware )  
corporation; and WASHINGTON GROUP )  
INTERNATIONAL, INC., an Ohio )  
corporation, )  
 )  
Defendants. )  
 )

Case No. CV-2009-366

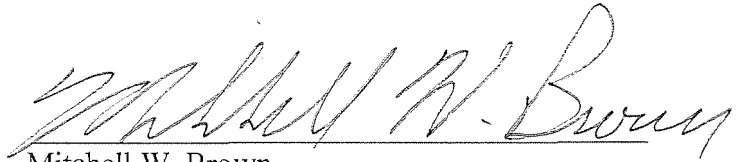
ORDER VACATING SECOND  
AMENDED SCHEDULING ORDER,  
NOTICE OF TRIAL SETTING AND  
INITIAL PRETRIAL ORDER

Upon duly filed Stipulation for Order Vacating Second Amended Scheduling Order,  
Notice of Trial Setting and Initial Pretrial Order (“Order”) dated March 11, 2011, including the  
September 26, 2011 trial date set forth therein, and for good cause shown,

IT IS HEREBY ORDERED that the Order is vacated. Following entry of this Court’s  
decision on the pending summary judgment motions, and should further proceedings even be  
necessary, a telephone scheduling conference shall be held as soon as practicable to determine a

trial date and new pretrial deadlines, including whether reconsidering a September 26, 2011 trial date is even still possible from a scheduling perspective.

DATED THIS 20<sup>th</sup> day of May, 2011.

  
\_\_\_\_\_  
Mitchell W. Brown  
District Judge

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20 day of May, 2011, I caused to be served a true copy of the foregoing ORDER VACATING SECOND AMENDED SCHEDULING ORDER, NOTICE OF TRIAL SETTING AND INITIAL PRETRIAL ORDER by the method indicated below, and addressed to each of the following:

David P. Gardner  
MOFFATT THOMAS BARRETT ROCK  
& FIELDS, CHTD.  
412 West Center, Suite 2000  
Pocatello, ID 83204-0817  
[Attorneys for Plaintiff Silicon International Ore, LLC]

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 E-mail  
 Telecopy 208.232.0150

Barry N. Johnson  
Daniel K. Brough  
Robert K. Reynard  
BENNETT TUELLER JOHNSON & DEERE  
3165 East Millrock Drive, Suite 500  
Salt Lake City, UT 84121  
[Attorneys for Plaintiff Silicon International Ore, LLC]

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 E-mail  
 Telecopy 801.438.2050

Randall C. Budge  
RACINE OLSON NYE BUDGE & BAILEY, CHTD.  
201 E. Center  
P.O. Box 1391  
Pocatello, ID 83204-1391  
[Attorneys for Defendant Monsanto Company]

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 E-mail  
 Telecopy 208.232.6109

Eugene A. Ritti  
HAWLEY TROXELL ENNIS & HAWLEY LLP  
877 Main Street, Suite 1000  
P.O. Box 1617  
Boise, Idaho 83701-1617

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 E-mail  
 Telecopy 208.954.5256

Clerk of the Court

By Shawn Wells  
Deputy Clerk

2011 SEP 21 AM 10:49

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CARIBOU

SILICON INTERNATIONAL ORE, LLC, AN )  
IDAHO LIMITED LIABILITY COMPANY, )  
 ) Case No: CV-2009-0000366  
 )  
 ) PLAINTIFF, ) **MEMORANDUM DECISION AND**  
 ) **ORDER ON DEFENDANTS'**  
 ) **MOTIONS FOR SUMMARY**  
 ) **JUDGMENT**  
 )  
VS )  
 )  
MONSANTO COMPANY, A DELAWARE )  
CORPORATION AND WASHINGTON )  
GROUP INTERNATIONAL, INC, AN OHIO )  
CORPORATION, )  
 )  
 )  
 ) DEFENDANTS. )  
 )

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This matter is before the Court on Defendants', Monsanto Company (Monsanto) and Washington Group International, Inc. (WGI) motions for summary judgment. Both Monsanto and WGI seek summary judgment and dismissal of Plaintiff's, Silicon International Ore, LLC (SIO), claims against them as set forth in its Complaint dated December 31, 2009.

In addition to the motions for summary judgment, Monsanto has filed an ancillary motion to strike portions of the affidavits of Todd Sullivan and Daniel K. Brough as well as certain exhibits attached thereto.

The parties have filed their submissions both in support of and in opposition to the motions for summary judgment. Monsanto's Motion for Summary Judgment is supported by the affidavits of Randall C. Budge, Mitchell J. Hart, P.E., and James R. Smith. WGI's Motion for Summary Judgment is supported by three (3) affidavits of Eugene A. Ritti, and an affidavit of Craig Nelson.

SIO's opposition to both Monsanto's and WGI's motions for summary judgment is supported by the affidavits of Kent W. Goates, Todd Sullivan, and Daniel K. Brough.

The Court heard oral argument from the parties on the motions for summary judgment and following arguments took these matters under advisement. The Court now issues its Memorandum Decision and Order on the Defendants' Motions for Summary Judgment.

### NATURE OF PROCEEDINGS

On December 31, 2009, SIO filed its Complaint in the district court for Caribou County. SIO's Complaint named as defendants, Monsanto and WGI. This complaint asserts various causes of action against these defendants arising out of an alleged oral contract between Monsanto and SIO and a separate contract (the Master Agreement) between SIO and WGI.

SIO claims that the alleged oral contract was consummated in approximately May of 2000. SIO claims that Monsanto then "retained" WGI, presumably to act as an intermediary between Monsanto and SIO, to "administer" and oversee the oral contract between Monsanto and SIO. As a result, SIO claims that it entered into a written contract, the Master Agreement, with WGI in approximately December 2000. This Master Agreement between SIO and WGI expired five (5) years after its effective date or in December 2005. However, the parties continued to perform, without the benefit of a written document, until WGI determined that it did not wish to continue with the arrangement and terminated the relationship effective year end 2007.

SIO contends, among other things, that Monsanto is in breach of its oral contract with SIO and that WGI, among other things, committed acts which constitute tortious interference by WGI with SIO's oral contract with Monsanto.

Monsanto generally denies that it entered into any contractual relationship with SIO and specifically denies entering into an oral contract with SIO in December of 2000. WGI



acknowledges that it entered into a five (5) year contract with SIO in December of 2000. It further contends that it formally terminated that relationship in December of 2007, some two (2) years after the express term of the contract.

Plaintiff has asserted four (4) separate causes of action against Monsanto: **First Claim for Relief** – Breach of Contract; **Second Claim for Relief** – Breach of Implied Covenant of Good Faith and Fair Dealing; **Third Claim for Relief** – Equitable Estoppel; and the **Fourth Claim for Relief** – Quasi Estoppel.

Plaintiff has also asserted two (2) separate causes of action against WGI: **Fifth Claim for Relief** – Breach of Implied Covenant of Good Faith and Fair Dealing; and **Sixth Claim for Relief** – Tortious Interference with Contract.

Defendants both claim that they are entitled to summary judgment on all of SIO's claims for relief.

#### STANDARD OF REVIEW

A party is entitled to summary judgment when the pleadings, depositions, and admissions, together with any affidavits, 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. Idaho Rules of Civil Procedure 56(c); *Foster v. Traul* 141 Idaho 890, 892, 120 P.3d 278 (2005); *U.S. Bank Nat'l Ass'n v. Kuenzli*, 134 Idaho 222, 225, 999 P.2d 877 (2000).

The standards applicable to summary judgment require the courts to liberally construe the facts in the record in favor of the non-moving party and to draw all reasonable inferences from those facts in favor of the non-moving party. *Northwest Bec-Corp. v. Home Living Serv.*, 136 Idaho 835, 838, 41 P.3d 263 (2002). If the record contains conflicting inferences or reasonable minds might reach different conclusions, summary judgment must be denied. *Id.* All disputed

facts are to be construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the records are to be drawn in favor of the non-moving party. *Barker Mgmt., Inc.*, 137 Idaho 322, 327, 48 P.3d 651, 656 (2002).

The burden of establishing the absence of a genuine issue of material fact rests at all times with the party moving for summary judgment. *Foster v. Traul*, 141 Idaho 890, 893, 120 P.3d 278, 281 (2005). In order to meet its burden, the moving party must challenge in its motion and establish through evidence the absence of any genuine issue of material fact on an element of the non-moving party's case. If the moving party fails to challenge an element or fails to present evidence establishing the absence of a genuine issue of material fact, the burden does not shift to the non-moving party, and the non-moving party is not required to respond with supporting evidence. *Smith v. Meridian Joint Sch. Dist. No. 2*, 128 Idaho 714, 719, 918 P.2d 583, 588 (1996). However, if the moving party challenges an element of the non-moving party's case on the basis that no genuine issue of material fact exists, the burden then shifts to the non-moving party to come forward with sufficient evidence to create a genuine issue of fact. *Id.* Summary judgment is appropriate where the non-moving party bearing the burden of proof fails to make a showing sufficient to establish the existence of an element essential to that party's case. *Barker Mgmt., Inc.*, 137 Idaho 322, 327, 48 P.3d 651, 656 (2002).

The party opposing the summary judgment motion "may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. *Smith v. Meridian Joint Sch. Dist. No. 2*, 128 Idaho 714, 719, 918 P.2d 583, 588 (1996). The non-moving party's case must be anchored in something more than speculation, and a mere scintilla of evidence is not enough to create a genuine issue of fact. *Brown v. City of Pocatello*,

148 Idaho 802, 806, 229 P.3d 1164, 1168 (2010). If the non-moving party does not come forward as provided in the rule, then summary judgment should be entered against that party. *State v. Shama Resources Ltd.*, 127 Idaho 267, 270, 899 P.2d 977, 980 (1995).

All doubts are to be resolved against the moving party, and the motion must be denied if the evidence is such that one may draw conflicting inferences, and if reasonable people might reach different conclusions. *Mackay v. Four Rivers Packing Co.*, 145 Idaho 408, 411, 179 P.3d 1064, 1066-67 (2008). The burden of establishing that there is no genuine issue of material fact rests at all times upon the moving party. *Jordan v. Beeks*, 135 Idaho 586, 590, 21 P.3d 908 (2001); *Thompson v. City of Idaho Falls*, 126 Idaho 587, 590, 887 P.2d 1094 (Ct.App. 1994).

## DISCUSSION

### I. Monsanto's Motion to Strike

Before the Court addresses Defendants' motions for summary judgment, the Court must first address Monsanto's Motion to Strike. This motion seeks to "strike from the record and not consider as evidence" the affidavits of Todd Sullivan and Daniel K. Brough, to the extent those affidavits contain "references" to or the "email messages between Mitch Hart and Plaintiff Silicon International Ore, LLC ... and/or any of SIO's representatives after Mr. Hart's employment with Monsanto ended." *See* Motion to Strike, p.1. The claimed basis for this Motion to Strike is "that the depositions and affidavits, along with the respective exhibits attached thereto, contain facts not admissible under the Idaho Rules of Evidence", specifically that the same are "hearsay and do not fit within any of the hearsay exceptions." *Id.* at 2.

SIO opposes this motion, claiming that "the Idaho Rules of Civil Procedure do not recognize a motion to strike testimony in opposition to a motion for summary judgment." Plaintiff's Response to Defendant Monsanto Company's Motion to Strike, p. 2. SIO also points out that Exhibits A and

B to the Todd Sullivan Affidavit have been attached to Mitchell J. Hart's Affidavit which was filed by Monsanto in support of its own summary judgment. Finally, SIO argues that the Court should consider these e-mails pursuant to Idaho's residual hearsay exception.

While the Court agrees with SIO's contention that there is no specific rule of civil procedure authorizing the Court to strike from the record an affidavit or portions thereof, practitioners routinely file motions brought pursuant to Rule 56(e) of the Idaho Rules of Civil Procedure as motions to strike. While the effect of granting such a motion is not to strike it from the record in its entirety, but rather to strike it from the record being considered on summary judgment. In other words, it is stricken from the evidence that will be considered on summary judgment, but not from the Court's file.

Rule 56(e) of the Idaho Rules of Civil Procedure provides in relevant part as follows:

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

As such, the issue at hand is not whether the affidavits should be stricken from the Court's file, but whether they should be stricken from consideration on summary judgment. *See State v. Shama Resources Ltd. Partnership*, 127 Idaho 267, 271, 899 P.2d 977, 981 (1995) (concluding that affidavits not based on personal knowledge, conclusory in nature, and containing statements of hearsay were not admissible into evidence, being in violation of Rule 56 (e) of the Idaho Rules of Civil Procedure, were properly rejected by the trial court and were appropriately not considered by the trial court when ruling on the motion for summary judgment).

The e-mail chains between Todd Sullivan and Mitchell J. Hart are clearly hearsay. SIO contends that despite their hearsay character, the Court should consider them pursuant to Rule

803(24) of the Idaho Rules of Evidence. This exception to the hearsay rule provides, in relevant part, as follows:

A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interest of justice will be best served by admission of the statement. ...

Based upon a clear reading of I.R.E 803(24), this Court will decline SIO's request that the Court admit these e-mail chains pursuant to this exception to the hearsay rule. The Court specifically holds that these e-mail chains do not meet the requirements for admission under this rule of evidence. Requirement (B) establishes that the hearsay statement must be more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts. Both of the parties involved in this e-mail exchange are available and have filed affidavits in support of this motion for summary judgment. Therefore, both of their testimonies can reasonably be procured. Further, this Court concludes that their respective personal testimony on this issue is more probative than the hearsay e-mail chains.

However, the Court is cognizant of the fact that a portion of these e-mail chains are placed into the summary judgment record by Monsanto as an attachment to the Affidavit of Mitchell J. Hart. To the extent that these hearsay statements are placed into the record by Monsanto, the Court will consider them on summary judgment.

Despite SIO's attempt to identify a hearsay exception, it is clear to the Court that SIO's real purpose in submitting these e-mail chains is an attempt to discredit or impeach Mitchell J. Hart's testimony. As stated by the Idaho Supreme Court in *Herrick v. Leuszinger*, 127 Idaho 293, 900 P.2d 201 (1995):

[t]he hearsay preclusion of I.R.E. 802 applies when an out-of-court statement is offered to prove the truth of the matter stated and its value thus rests upon credibility of the declarant. If the evidence is offered for purposes for which the truth or falsity of the statement is irrelevant, the hearsay rule does not apply. For that reason, an out-of-court statement offered to impeach a witness's credibility is not hearsay. *United States v. Miller*, 874 F.2d 1255, 1271 n.9 (9<sup>th</sup> Cir.1989), *cert. denied*, 510 U.S. 894, 114 S.Ct. 258, 126 L.Ed. 2d 210 (1993); *United States v. Winkle*, 587 F.2d 705, 710 (5<sup>th</sup> Cir. 1979), *cert. denied*, 444 U.S. 827, 100 S.Ct.51, 62 L.Ed. 2d 34 (1979); 1 Kenneth S. Broun, et al., *McCORMICK ON EVIDENCE* §34 at 113 (John W. Strong, ed., 4<sup>th</sup> ed. 1992). In such circumstances it is not the truth of the statement that has evidentiary value, but rather its juxtaposition against the inconsistent testimony of the witness.

As such, it is clear that what might otherwise be an inadmissible hearsay statement may still be admissible at trial, not for the truth of the matter asserted, but to impeach the testimony of a witness which is inconsistent with prior out-of-court statements.

This gives rise to the dilemma concerning what place, if any, does impeachment testimony have in a summary judgment proceeding where the Court is prohibited from weighing evidence? This issue has never been specifically addressed by the Idaho appellate courts. It has long been the rule in Idaho “that federal case law provides persuasive authority when interpreting rules under the I.R.C.P. that are substantially similar to rules under the F.R.C.P.” *Terra-West, Inc. v. Idaho Mut. Trust, LLC*, 150 Idaho 393, \_\_\_, 247 P.3d 620, 625 (2010). The case law in the federal courts seems to conclude that impeachment evidence of this nature is not to be considered by the trial court on a motion for summary judgment. In *McMillian v. Johnson*, 88 F.3d 1573, 1584 (11<sup>th</sup> Cir.1996) the court stated as follows:

[M]cMillian alternatively contends that he can use the statements to impeach Hooks and Hightower if they testify, consistently with their affidavits, that they were not coerced and did not testify falsely at McMillian's criminal trial. While the statements may be admissible for that purpose, the district court correctly noted that such impeachment evidence is not substantive evidence of the truth of the statements alleging coercion. Such potential impeachment evidence, therefore, may not be used to create a genuine issue of material fact for trial.

In *Bellard v. Gautreaux*, 2011 WL 1103320 (U.S. Dist. Ct. La. 2011) \*1, the court held as follows:

[T]he court further found that, while the alleged communication between the Sheriff and LeDuff would be subject to a hearsay exception under Fed.R.Evid. 801(d)(2)(A) because it may constitute a statement made by a party and offered against that party, any alleged communication by LeDuff to plaintiff might only be offered as impeachment evidence and is not, accordingly, competent summary judgment evidence on the issue of publication.

In *Naylor Medical Sales & Rental Inc. v. Invacare*, 2010 WL 5055913 (U.S. Dist.Tenn.2010) \*6, the Court held that:

[E]ven if these hearsay statements might be admissible at trial for impeachment purposes, for these statements to be considered for summary judgment purposes, the statements must be admissible as substantive evidence. Consequently, this Court finds that the Defendants have offered no evidence to demonstrate that there is a genuine dispute of material fact, and, as such, this Court finds that summary judgment on Counts II, III, and IV of the Counterclaim should be granted.

Finally, in the state court decision of *Gooch v. Maryland Mechanical Systems, Inc.*, 567 A.2d 954, 963 (Md.App.1990), the same result was reached:

Ordinarily, drawing all inferences in favor of the appellant, we would find that the affidavit by Mr. Powell presents a genuine dispute as to a material fact on the issue of damages. The report of Mr. Brown's statement by Mr. Powell, however, can only be characterized as classic hearsay. As reported, the statement is being offered to prove that Mr. Brown denied further contracts to Mr. Gooch because of the Wolfe defamation statement. We note, however, that the substance of the affidavit-which was a prior inconsistent statement-could have been used for impeachment purposes at a trial on the merits had sufficient probative evidence of damages been presented to overcome the summary judgment motion. While proof of a prior contradictory statement may have an evidentiary effect of impeaching the credibility of a witness, it may not be employed as a matter of substantive evidence.

This seems to be a representative sampling of the manner that both state and federal courts have treated this issue. Further, the Court views these approaches to be persuasive and consistent with this Court's view of summary judgment. The function of this Court on summary judgment is to ascertain whether or not there are genuine issues of material fact sufficient to warrant a jury determination on those issues. If so, the Court must deny summary judgment and

allow the disputed issues to proceed to the jury. If there are no genuine issues of material fact, then the Court should grant summary judgment in favor of the non-moving party. It is not the function of the Court on summary judgment to assess the credibility of witnesses or to weigh the evidence; this is purely a jury function. Therefore, issues designed to challenge credibility or weight are not to be considered on summary judgment.

Based upon the foregoing, the Court will grant Monsanto's Motion to Strike to the extent that said motion requests that the Court not consider the e-mail chains attached to and discussed in the Todd Sullivan and Daniel K. Brough affidavits on summary judgment. However, the Court is mindful of the fact that Monsanto, through Mitchell J. Hart's affidavit, introduced into the summary judgment record two (2) of these e-mail chains. To that extent, the Court concludes that Monsanto has waived any objection to these two (2) e-mail chains. Therefore, the Court will consider those e-mails, specifically Exhibits A and B to the Todd Sullivan Affidavit, on summary judgment for whatever evidentiary value they may possess.

## **II. Monsanto's Motion for Summary Judgment**

### **A. Breach of Contract.**

Monsanto first asserts that it is entitled to summary judgment in its favor on the basis of the statute of frauds. Because this Court determines that this claim is dispositive of Monsanto's Motion for Summary Judgment, at least as it relates to the breach of contract claims, the Court will consider this issue first.<sup>1</sup>

Monsanto asserts that SIO's breach of contract claim and by extension its breach of the implied covenant of good faith and fair dealing claim are both barred by the applicable statute of

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<sup>1</sup>Another reason for the Court's analysis being conducted in this fashion is that, although the Court has not done a detailed analysis, nor does it intend to, based upon its ruling on the statute of frauds issue, the Court believes there are very likely triable issues of fact which would preclude summary judgment with regard to Monsanto's other asserted basis for summary judgment, i.e. vagueness, uncertainty of terms and no provable damages.



frauds. Specifically, Monsanto raises Idaho Code §28-2-201(1) as the applicable statute of frauds which bars SIO's claim of an oral contract. I.C. §28-2-201(1) provides in relevant part as follows:

Except as otherwise provided in this section a contract for the sale of goods for the price of \$500.00 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. ...

Although Monsanto denies the existence of an oral contract between it and SIO, recognizing that this Court may conclude that there are genuine issues of material fact with respect to this issue; it argues in the alternative that SIO's claim of an oral contract must be deemed to be unenforceable by application of this statute.

SIO counters by asserting that the statute of frauds does not bar SIO's breach of contract and other claims arising out of an oral contract. Specifically, SIO asserts that its contract claims can survive by an application of Idaho Code §28-2-201(3)(c). There are several statutory exceptions to the writing requirement set forth in I.C. §28-2-201(1). One of these is found in I.C. §28-2-201(3)(c). This exception to the writing requirement provides as follows:

(3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable

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(c) with respect to goods for which payment has been made and accepted or which have been received and accepted (section 28-2-606).

Monsanto argues, in its reply memorandum, that the performance was not Monsanto's performance. Rather it was WGI who performed and that WGI's performance was pursuant to its written agreement with SIO. However, the Court need not even delve into this dispute to render its decision.

SIO cites to the case of *Paloukous v. Intermountain Chev. Co.* 99 Idaho 740, 588 P.2d 939 (1978) (*Paloukous*) as support for its position that the writing requirement contained in I.C. §28-2-201(1) can be excused in this case based upon Monsanto's past performance. However, *Paloukous* does not stand for this proposition. Rather, *Paloukous*, if read in its proper context, establishes that SIO's position lack merit.

J. White & R. Summers, Handbook of the Law Under the Uniform Commercial Code §2-5 at 67 (1980) provides as follows:

[T]his subsection [2-201(3)(c)] expressly limits enforceability only to the apportionable part of goods that the buyer has received and accepted, or for which seller has received and accepted payment. ...

*Paloukous* dealt with a factually distinguishable set of circumstances from the present case. In *Paloukous*, the plaintiff paid and the dealer accepted partial payment on an alleged sale of a pickup truck. The Court in addressing the issue of whether this part performance excused the writing requirement of Idaho's Uniform Commercial Code, I.C. §28-2-201, held as follows:

The UCC is clear that where the goods are apportionable part payment permits enforcement of the contract only as to the portion of the goods for which payment has been made. See I.C. §28-2-201, comment 2. However, the UCC is ambiguous with respect to a partial payment in a transaction involving a single, non-divisible item, such as an automobile. We agree with the commentators and the majority of the courts which have considered the issue that part payment for a non-divisible unit, such as an automobile, permits the party under I.C. §28-2-201(3)(c) to prove and recover in full on the oral contract.

99 Idaho at 745. *Paloukous* dealt with a non-divisible item, a pickup truck. The present circumstance is not a non-divisible item. Rather, it is apportionable and therefore, as stated clearly and unequivocally in J. White & R. Summers, Handbook of the Law Under the Uniform Commercial Code and more importantly in *Paloukous*, "apportionable part payments permits enforcement of the contract only as to the portion of the goods for which payment has been made." *Id.*

In the present case, SIO is seeking to enforce prospectively an oral agreement that is violative of I.C. §28-2-201(a). However, such a contract is unenforceable under I.C. §28-2-201(a) nor does the exception asserted by SIO apply.

Therefore, the Court must **GRANT** Monsanto's Motion for Summary Judgment as it relates to SIO's first claim for relief against Monsanto, breach of contract.

**B. Breach of Implied Covenant of Good Faith and Fair Dealing.**

SIO has also asserted a claim for breach of the implied covenant of good faith and fair dealing against Monsanto. *See* Second Claim for Relief, Complaint, p.11. As addressed by the Idaho Supreme Court in *Cantwell v. City of Boise*, 146 Idaho 127, 135, 191 P.3d 205, 213 (2008):

Idaho law recognizes a cause of action for breach of an implied covenant of good faith and fair dealing. *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 242, 108 P.3d 380, 389 (2005). ... The covenant requires the parties to perform, in good faith, the obligations required by their agreement. *Fox v. Mountain W. Elec.*, 137 Idaho 703, 710-11, 52 P.3d 848, 855-56 (2002).

Since the Court has ruled that any alleged oral contract between Monsanto and SIO is unenforceable pursuant to I.C. §28-2-201(a), the Court also must conclude that any implied covenant of good faith and fair dealing is also equally unenforceable against Monsanto.

Therefore, the Court will also **GRANT** Monsanto summary judgment on SIO's second claim for relief against Monsanto, breach of the implied covenant of good faith and fair dealing.

**C. Equitable Estoppel.**

Monsanto's Motion for Summary Judgment does not purport to be a partial claim for summary judgment; rather it seeks summary judgment against SIO on all claims. If this proposition was in doubt following Monsanto's initial submission in support of summary

judgment, Monsanto's reply submission leaves little doubt that it is seeking summary judgment on all claims for relief asserted by SIO in its Complaint.

The elements associated with a claim for relief under the equitable theory of Equitable Estoppel have most recently been addressed by the Idaho Supreme Court in the case of *Ogden v. Griffith*, 149 Idaho 489, 236 P.3d 1249 (2010) (*Ogden*). These elements are:

(1) a false representation or concealment of a material fact with actual or constructive knowledge of the truth; (2), that the party asserting estoppel did not know or could not discover the truth; (3) that the false representation or concealment was made with the intent that it be relied upon; and (4) that the person to whom the representation was made, or from whom the facts were concealed, relied and acted upon the representation or concealment to his prejudice.

*Id.* at 495.

In the present case, SIO has alleged, in its Complaint, that Monsanto represented, through its agent Mitchell J. Hart, that it "would not abruptly terminate the Monsanto Agreement after a short period of time." See Complaint, p.5, ¶ 17. More importantly for summary judgment purposes, Todd Sullivan makes the same claim in his affidavit. In his affidavit he states as follows:

In late 2000, I orally requested that Hart confirm that Monsanto would not abruptly terminate its agreement within a few years after SIO had commenced its business. In response, Hart provided that assurance.

Affidavit of Todd Sullivan, p.4, ¶8. The problem with Sullivan's claim is that the representation Todd Sullivan claims was made is so general and indefinite, that this Court will conclude on the summary judgment record before it, that as a matter of law it was not a misrepresentation or "false representation", even if made. The phrase "within a few years" is both indefinite and

lacks any definition or certainty. To one person that phrase may mean five (5) years and to another it may mean in perpetuity.<sup>2</sup>

This is the only representation that SIO asserts as the basis for its Equitable Estoppel claim. The problem with this assertion is that this Court, on the record before it on summary judgment, cannot find that there are disputed issues of material fact concerning whether this is a “false representation.” In fact, this Court finds, as a matter of law, that this representation of Mitchell J. Hart is not a false representation. Therefore, the Court concludes that because SIO cannot establish the first element of Equitable Estoppel, its claim for Equitable Estoppel must fail and the Court will **GRANT** Monsanto’s Motion for Summary Judgment on SIO’s third claim for relief, Equitable Estoppel.<sup>3</sup>

#### D. Quasi Estoppel.

SIO’s last cause of action against Monsanto is Quasi Estoppel. In the recent case of *City of Eagle v. Idaho Dept. of Water Resources*, 150 Idaho 449 \_\_\_\_, 247 P.3d 1037, 1041 (2011) the

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<sup>2</sup>In this case a review of affidavits on summary judgment and the attachments illustrate this point. SIO has taken the position that the representation was that the relationship would continue in perpetuity as long as it was mutually beneficial. See Affidavit of Todd Sullivan, pp. 2-3, ¶4e. However, Mitchell J. Hart states in his affidavit that “Monsanto had long-term arrangements in place with WGI to operate the silica mine.” As the record also reflects these “long-term arrangements” were contracts of ten (10) and five (5) years respectively. See Affidavit of James R. Smith, pp. 2-3, ¶4 and Exhibits 1 and 3. This subjective difference in what constitutes “within a few years” just underscores the problems with SIO’s claim for Equitable Estoppel. What to Mitchell J. Hart constitutes a “few years” is obviously something less than five (5) years, hence his comment that Monsanto had long-term arrangements, one of which was five (5) years, in place with WGI; to Sullivan the phrase means something entirely different, certainly more than seven (7) years.

<sup>3</sup>It should also be noted that this Court also concludes that SIO cannot meet element two (2) of the elements for Equitable Estoppel. This element provides that “the party asserting estoppel did not know or could not discover the truth”. It is incomprehensible to this Court that an entity, such as SIO, would commence this business venture and invest \$2,193,006 in start-up expense, without requiring more certainty and definiteness in the terms of that relationship than a vague and indefinite statement that the enterprise will not be abruptly terminated within a few years. While the Court has its own personal views concerning why SIO would act in such a manner, those views are not to form a basis for this opinion, because the Court function on summary judgment is not to weigh the evidence or determine its credibility. Suffice it to state on summary judgment that if, in fact, SIO did not know what the intent of Monsanto or Mitchell J Hart was with respect to the phrase “within a few years”; it was certainly within SIO’s power to make those reasonable and prudent inquires and have them documented and reduced to writing in some fashion. Because they did not, they cannot meet element two (2) of the Equitable Estoppel elements.

Idaho Supreme Court addressed the equitable doctrine of Quasi Estoppel. The Supreme Court stated that:

Quasi-Estoppel is properly invoked against a person asserting a claim inconsistent with a position previously taken by him with knowledge of the facts and his rights, to the detriment of the person seeking application of the doctrine. *KTVB, Inc. v. Boise City*, 94 Idaho 279, 282, 486 P.2d 992, 995 (1971). The doctrine of quasi-estoppel applies when it would be unconscionable to allow a party to assert a right which is inconsistent with a prior position. *Mitchell v. Zilog, Inc.*, 125 Idaho 709, 715, 874 P.2d 520, 526 (1994).

For the same reasons, this Court concluded that SIO could not meet element one (1) of the Equitable Estoppel elements, this Court concludes that SIO cannot meet the requirements of Quasi Estoppel. This Court believes the record on summary judgment, even when construed in a light most favorable to SIO, cannot support a finding that Monsanto has taken inconsistent positions. Instead, the communications and assurances that SIO relies on are so vague and so lacking that it was incumbent upon SIO to inquire further rather than rely upon some unreasonable and questionable interpretation of a vague and subjective statement of Monsanto and/or its then agent Mitchell J. Hart. This Court cannot find that Monsanto has taken inconsistent positions. Rather, at best, Monsanto has made general statements which SIO unreasonably relied upon. SIO had every ability to clarify these ambiguities and/or better yet reduce the same to writing which one would expect to have been done in an endeavor of this magnitude.<sup>4</sup>

Therefore, the Court will **GRANT** Monsanto's Motion for Summary Judgment on SIO's fourth claim for relief against Monsanto, Quasi Estoppel.

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<sup>4</sup>While the Court recognizes that Monsanto maintains a vastly different view of the facts and in turn does maintain that SIO's agreement was reduced to writing with WGI, on summary judgment the Court is bound to accept the non-moving party's, SIO, version of the facts.

### **III. WGPI'S Motion for Summary Judgment**

#### **A. Tortious Interference with a Contract.**

SIO has asserted two (2) claims for relief against WGI. The Court will first address SIO's claim of tortious interference with a contract. WGI claims it is entitled to summary judgment, in part, on the basis that if Monsanto shows it made no contract with SIO, then WGI cannot be liable to SIO for tortious interference with a contract.

However, the Court has limited its decision on summary judgment to a finding that SIO's oral contract, if in fact one exists, is unenforceable pursuant to I.C. §28-2-201. SIO correctly points out that Idaho Supreme Court's decision in *Commerical Ventures, Inc. v. Rex M. & Lynn Lea Family Trust*, 145 Idaho 208, 217, 177 P.3d 955, 964 (2008) provides that "the contract need not be enforceable in adversary proceedings" to be the subject of a claim for tortious interference with a contract.

Therefore, if SIO can make the requisite showing on summary judgment, WGI may still be subject to a claim for tortious interference with a contract despite this Court's ruling that the claimed oral contract between SIO and Monsanto is unenforceable.

A party asserting a claim of tortious interference must establish the following elements:

(1) the existence of a contract; (2) knowledge of the contract on the part of the defendant; (3) intentional interference causing a breach of the contract; and (4) injury to the plaintiff resulting from the breach. *Idaho First Natl. Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266, 283-84, 824 P.2d 841, 858-59 (1991).

The parties, in discussing their respective positions on summary judgment, miss what this Court believes to be the most salient point. That being that the record on summary judgment is entirely lacking one of the key elements necessary for SIO to proceed with its claim on this issue. The missing element is that WGI had no knowledge of the alleged oral contract between SIO and Monsanto.

It is settled law that the Court can sua sponte grant summary judgment although a party may not have moved for summary judgment. *Aardema v. U.S Dairy Systems, Inc.*, 147 Idaho 785, 793, 215 P.3d 505, 513 (2009), *Harwood v. Talbot*, 136 Idaho 672, 678, 39 P.3d 612, 618 (2001). Based upon this legal principle it seems logical that the Court can also decide a summary judgment issue on a different legal theory than one asserted by the moving party.

On this record there is absolutely no evidence to support a conclusion that SIO can meet element two (2) of the tortious interference with contract elements. The evidence, viewed in a light most favorable to SIO, establishes that there was an oral contract between SIO and Monsanto. That Monsanto retained WGI to oversee its relationship with SIO. However, there is nothing in the record that establishes that WGI was aware of an oral contract or the terms of any oral contract. SIO and WGI then entered into an express contract which governed the terms of their relationship and to which Monsanto was a third party beneficiary because it received royalties incident to this contract. Certainly there is no legal requirement that there be an independent contract between Monsanto and SIO to facilitate this arrangement and there is absolutely no evidence in the record that would establish this necessary element, that WGI knew of a separate oral contract between SIO and Monsanto, relative to a claim of tortious interference with contract.

Therefore, the Court concludes that SIO has failed to set forth facts in defense of this summary judgment proceeding on an element of its claim upon which it will bear the burden of proof at trial. Based upon this failure, the Court will **GRANT** WGI's Motion for Summary Judgment as it relates to SIO's sixth claim for relief, tortious interference with a contract.<sup>5</sup>

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<sup>5</sup>The Court would note that a very similar cause of action is one for intentional interference with a prospective economic advantage. The significant difference between the two (2) is the type of economic relationship involved. See *Highland Enter. Inc., v. Barker*, 133 Idaho 330, 338, 986 P.2d 996, 1004 (1999), footnote 3. However, a review of SIO's Complaint as well as its pleadings and arguments on summary judgment establishes quite clearly that it has



**B. Breach of Implied Covenant of Good Faith and Fair Dealing.**

SIO asserts a claim against WGI for breach of the implied covenant of good faith and fair dealing. This claim is distinct from the other claims for relief asserted by SIO. All of the other claims for relief arise out the alleged oral contract between SIO and Monsanto. However, this claim arises out of the contract between SIO and WGI. The existence of this contract is not in dispute. *See* Master Agreement, Exhibit C to the Affidavit of Eugene A. Ritti in Support of Defendant Washington Group International, Inc.'s Motion for Summary Judgment.

WGI requests that the Court enter summary judgment on its behalf as it relates to SIO's breach of the implied covenant of good faith and fair dealing claim for relief. WGI has asserted a number of arguments in support of this motion. For purposes of this motion, the Court concludes that there are genuine issues of material fact which preclude summary judgment as it relates to each of WGI's arguments for summary judgment, except for one (1) issue.<sup>6</sup>

However, the Court finds, as a matter of law, that SIO has not established that it sustained any damage arising out of WGI's alleged breach of the duty of good faith and fair dealing. In fact, this Court's review of the record fails to identify any damage arising from the claimed breaches of the implied covenant of good faith and fair dealing.

While SIO has spent a considerable amount of time establishing that its claim for relief is not merely limited to the two (2) points raised by WGI in its initial brief in support of summary judgment, it completely fails to establish or document any damage flowing from this claimed breach of the implied covenant of good faith and fair dealing. SIO chronicles its claims for breach by outlining various conduct which it claims breaches the covenant of good faith and fair

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asserted only a cause of action for tortious interference with contract. Despite Idaho's permissive pleading rules which allow a party to set forth claims or causes of action in the alternative, SIO has not attempted to plead either directly or in the alternative a claim for intentional interference with a prospective economic advantage.

<sup>6</sup>Therefore, the Court will address only that issue upon which it is granting summary judgment.

dealing. See Plaintiff's Memorandum in Opposition to Defendant Washington Group International, Inc.'s Motion for Summary Judgment, pp.15-16.<sup>7</sup>

The damage evidence that is in the record on summary judgment seems to be directed at the other claims discussed and dismissed above. However, to the extent that the damages being set forth in the Affidavit of Kent Goates are being asserted as an element of damage on SIO's claim of breach of the implied covenant of good faith and fair dealing as that claim relates to WGI, those claimed damages are misplaced and cannot survive summary judgment.

In *Silver Creek Computers, Inc. v. Petra, Inc.*, 136 Idaho 879, 884-85, 42 P.3d 672, 677-78 (2002) the Idaho Supreme Court discusses contract damages. The Supreme Court stated as follows with regard to contract damages:

Damages recoverable for breach of contract are those that arise naturally from the breach and are reasonably foreseeable. *Appel v. LePage*, 135 Idaho 133, 15 P.3d 1141 (2000).

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Consequential damages are not recoverable unless specifically within the contemplation of the parties at time of contracting. *Appel v. LePage*, 135 Idaho 133, 15 P.3d 1141 (2000); *Brown's Tie & Lumber Co. v. Chicago Title Co. of Idaho*, 115 Idaho 56, 61, 764 P.2d 423, 428 (1988). Lost profits are generally not recoverable in contract unless there is something in that contract that suggests that they were within the contemplation of the parties and are proved with reasonable certainty. *Brown's Tie & Lumber Co. v. Chicago Title Co. of Idaho*, 115 Idaho 56, 764 P.2d 423 (1988).

There is nothing in the Master Agreement between SIO and WGI or the record on summary judgment that would establish that consequential damages of the type outlined by Kent Goates in his affidavit were within the contemplation of the parties at the time of contracting.

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<sup>7</sup>However, despite the detailed discussion of the claimed breaches, there are only two (2) conclusory statements regarding the damages incurred and flowing from these claimed breaches. The first being that "WGI built the screen, but it did so in such a slow and inefficient manner that SIO sustained damage as a result" and the second alleging that SIO was unnecessarily overcharged on labor that SIO purchased equipment that WGI should have paid

Similarly, there is nothing in the Master Agreement or the record on summary judgment to suggest that lost profits were in the contemplation of the parties when the contract was created. Without such a showing, these types of damages are not allowed, as a matter of law, in a contract action. The only damages that "arise naturally" from the breaches claimed by SIO would be the damages referred to by SIO in its discovery responses referenced in the reply memorandum. See Plaintiff's Memorandum in Opposition to Defendant Washington Group International, Inc.'s Motion for Summary Judgment, pp.15-16. However, as stated above, these damages are only conclusory in nature and cannot, without quantifying the same, give rise to a genuine issue of material fact on summary judgment.

For the foregoing reasons, the Court will **GRANT** WGI's Motion for Summary Judgment on SIO's sixth claim for relief, breach of the implied covenant of good faith and fair dealing.

#### CONCLUSION

As the foregoing discussion establishes, the Court has **GRANTED** both Monsanto's and WGI's motions for summary judgment in full. Based upon this ruling of the Court, upon submission by these Defendants of an appropriate form of judgment, the Court will enter the same.

**IT IS SO ORDERED.**

Dated this 21<sup>th</sup> day of September 2011.



MITCHELL W. BROWN  
District Judge

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for under the contract. However, aside from these conclusory claims no admissible evidence is in the record on summary judgment regarding the amount of this damage.

**CERTIFICATE OF MAILING/SERVICE**

The undersigned certifies that on the 21th day of September, 2011, she caused a true and correct copy of the foregoing Memorandum Decision and Order on Defendants' Motions for Summary Judgment to be served upon the following persons in the following manner:

**PLAINTIFF ATTORNEY:**

David P. Gardner  
PO Box 817  
Pocatello ID 83204  
(208) 232-0150

- Faxed
- Hand Delivered
- Mailed

Barry N. Johnson  
Daniel K. Brough  
3165 East Millrock Drive, Suite 500  
Salt Lake City UT 84121  
(801) 438-2050

- Faxed
- Hand Delivered
- Mailed

**DEFENDANT ATTORNEY:**

Randall C. Budge  
Racine, Olsen, Nye, Budge & Bailey, Chrt'd  
Po Box 1391  
Pocatello ID 83204-1391  
(208) 232-6109

- Faxed
- Hand Delivered
- Mailed

Eugene A. Ritti  
Hawley Troxell Ennis & Hawley, LLP  
PO Box 1617  
Boise ID 83701-1617  
(208) 954-5256

- Faxed
- Hand Delivered
- Mailed

VEDA MASCARENAS, Clerk

By: Sharon L. Wells  
Sharon L. Wells  
Deputy Clerk

FILED  
CARIBOU COUNTY CLERK  
DEPUTY

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Randall C. Budge, ISB No. 1949  
RACINE, OLSON, NYE, BUDGE &  
BAILEY, CHARTERED  
P.O. Box 1391; 201 E. Center Street  
Pocatello, Idaho 83204-1391  
Telephone: 208-232-6101  
Facsimile: 208-232-6109  
Email: [rcb@racinelaw.net](mailto:rcb@racinelaw.net)

*Attorneys for Defendant Monsanto Company*

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CARIBOU

SILICON INTERNATIONAL ORE, LLC, )  
an Idaho limited liability company, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
MONSANTO COMPANY, a Delaware )  
Corporation, and WASHINGTON GROUP )  
INTERNATIONAL, INC., an Ohio )  
Corporation, )  
 )  
Defendants. )  
\_\_\_\_\_ )

Case No. CV-2009-366

**JUDGMENT**

This matter having come on regularly for hearing before the Court on Motions for Summary Judgment filed by Defendants, Monsanto Company and Washington Group International, Inc., the Honorable Mitchell W. Brown, District Judge, presiding. The Court having considered the Briefs, Affidavits, pleadings of record and arguments of counsel, and having entered its Memorandum Decision and Order on Defendants' Motion for Summary Judgment dated September 21, 2011, granting Defendants' Motions for Summary Judgment in

full, and the Court finding that Defendants are entitled to Judgment against Plaintiff Silicon International Ore, LLC, as a matter of law, and good cause appearing therefor;

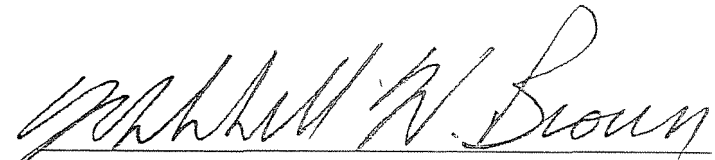
NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Defendants shall have judgment against Plaintiff Silicon International Ore, LLC, with respect to all issues and claims for relief asserted in the above-entitled action and addressed and adjudicated by this Court's *Memorandum Decision and Order on Defendants' Motion for Summary Judgment*, dated September 21, 2011.

2. That Plaintiff's Complaint against Defendants be and is hereby dismissed with prejudice.

3. This Judgment may hereafter be amended to include any attorney fees and costs that may be subsequently awarded.

DATED this 7<sup>th</sup> day of October, 2011.

  
MITCHELL W. BROWN  
District Judge

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12 day of October, 2010, I served a true and complete copy of the foregoing document in the manner indicated upon the following:

David P. Gardner  
Moffatt Thomas Barrett Rock & Fields  
412 W. Center Street, Ste 2000  
Pocatello, Idaho 83204-0817

Barry N. Johnson  
Daniel K. Brough  
Bennett Tueller Johnson & Deere  
3165 East Millrock Drive, Ste 500  
Salt Lake City, Utah 84121

Eugene A. Ritti  
Hawley Troxell Ennis & Hawley  
877 Main Street, Ste 1000  
Boise, Idaho 83702

Randall C. Budge  
Racine, Olson, Nye, Budge & Bailey  
P.O. Box 1391  
Pocatello, Idaho 83204-1391

  
Deputy Clerk

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CARIBOU COUNTY CLERK  
*Shawn Wells*  
DEPUTY

2011 NOV 18 AM 11 31

David P. Gardner, ISB No. 5350  
MOFFATT, THOMAS, BARRETT, ROCK &  
FIELDS, CHARTERED  
412 West Center  
Post Office Box 817  
Pocatello, Idaho 83204  
Telephone: (208) 233-2001  
Facsimile: (208) 232-0150  
dpg@moffatt.com  
24461.0000

Barry N. Johnson (Utah Bar No. 6255)  
*Admitted Pro Hac Vice*  
Daniel K. Brough (Utah Bar No. 10283)  
*Admitted Pro Hac Vice*  
Bennett Tueller Johnson & Deere  
3165 East Millrock Drive, Suite 500  
Salt Lake City, Utah 84121  
Telephone: (801) 438-2000  
Facsimile: (801) 438-2050  
bjohnson@btjd.com  
dbrough@btjd.com

Attorneys for Plaintiff Silicon International Ore, LLC

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CARIBOU

SILICON INTERNATIONAL ORE, LLC, an  
Idaho limited liability company,

Plaintiff,

vs.

MONSANTO COMPANY, a Delaware  
Corporation, and WASHINGTON GROUP  
INTERNATIONAL, INC., an Ohio

Case No. CV-2009-366

PLAINTIFF SILICON  
INTERNATIONAL ORE, LLC'S  
NOTICE OF APPEAL



Corporation,

Defendants.

TO: THE ABOVE NAMED RESPONDENTS MONSANTO COMPANY ("MONSANTO") AND WASHINGTON GROUP INTERNATIONAL, INC. ("WGI") AND THEIR ATTORNEYS RANDALL C. BUDGE, RACINE, OLSON, NYE, BUDGE & BAILEY, CHTD, P.O. BOX 1391, 201 E. CENTER STREET, POCATELLO, ID 83204-1391 AND EUGENE A. RITTI, HAWLEY TROXELL ENNIS & HAWLEY, 877 MAIN STREET, STE. 1000, BOISE, ID 83702 AND THE CLERK OF THE ABOVE-ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above-named plaintiff/appellant, Silicon International Ore, LLC ("SIO"), appeals against the above-named defendants/respondents to the Idaho Supreme Court from the Rule 56 Summary Judgment entered in the above-entitled action on October 7, 2011, Honorable Judge Mitchell W. Brown presiding, as well as the Memorandum of Decision and Order on Defendants' Motions for Summary Judgment of September 21, 2011 associated with the above judgment.

2. The appellant has the right to appeal to the Idaho Supreme Court, and the judgment described in paragraph 1 above is an appealable order pursuant to Rules 4 and 11(a)(1) of the Idaho Appellate Rules.

3. The preliminary issues on appeal are:

(a) Whether the District Court erred and/or abused its discretion in striking portions of the affidavits of Todd Sullivan and Daniel K. Brough, as well as exhibits attached thereto.

(b) Whether the District Court erred in concluding that there was no genuine issue of material fact regarding the existence of a contract between Monsanto and SIO

and that, as a matter of law, no such contract existed, thereby granting summary judgment in favor of Monsanto on SIO's claim for breach of contract.

(c) Whether the District Court erred in granting summary judgment on SIO's equitable estoppel claim against Monsanto based on, without limitation: (1) the District Court's incorrect identification of the statements SIO alleged to be false representations; (2) the District Court's conclusion that Monsanto's representations were "general and indefinite," disregarding evidence that either clarified the indefinite statements or created a genuine issue of material fact as to both their meaning and their falseness; and (3) the District Court's misplaced analysis of whether SIO could have discovered the meaning of Monsanto's statement rather than whether SIO could have discovered the truth of Monsanto's stated intent regarding its contract with SIO.

(d) Whether the District Court erroneously granted summary judgment on SIO's quasi-estoppel claim against Monsanto on the basis that, without limitation, Monsanto's statements were vague when, without limitation, the record shows that Flart gave SIO several specific conditions under which the contract with Monsanto would continue.

(e) Whether the District Court erred in granting summary judgment on the tortious interference with contract claim on the basis that, without limitation, no evidence existed as to WGI's knowledge of SIO's contract with Monsanto when the record contains evidence that WGI was brought in to administer the contract and that WGI was present in meetings where SIO negotiated the contract terms directly with Monsanto.

(f) Whether the District Court erred in granting summary judgment on SIO's claim that WGI breached its duty of good faith and fair dealing.

4. No order has been entered sealing all or any portion of the record in this action.

5. A transcript of the hearing on the motion to strike and motion for summary judgment of May 13, 2011 is requested in electronic format.

6. The appellant requests the following documents to be included in the clerk's record in addition to those automatically included in Rule 28 of the Idaho Appellate Rules.

(a) A copy of SIO's opposition to Defendant Monsanto's Motion for Summary Judgment filed April 29, 2011.

(b) A copy of SIO's opposition to Defendant WGI's Motion for Summary Judgment filed April 29, 2011.

(c) A copy of the Affidavit of Todd Sullivan with accompanying exhibits filed April 29, 2011.

(d) A copy of the Affidavit of Kent W. Goates and accompanying exhibits filed April 29, 2011.

(e) A copy of the Affidavit of Daniel K. Brough and accompanying exhibits filed April 29, 2011.

(f) A copy of the Affidavit of Mitchell J. Hart, P.E. and accompanying exhibits filed January 19, 2011.

7. I certify

(a) that no reporter was present at the hearing, therefore, a copy of the notice of appeal was filed with the clerk of the court;

(b) that the clerk of the district court has been paid the estimated fee for preparation of the reporter's transcript,


(c) that the estimated fee for the preparation of the clerk's record has been paid;

(d) that the appellate filing fee has been paid; and

(e) that service has been made upon all parties required to be served pursuant to Rule 20 of the Idaho Appellate Rules.

DATED this 18th day of November, 2011.

MOFFATT, THOMAS, BARRETT, ROCK &  
FIELDS, CHARTERED

By   
David P. Gardner – Of the Firm  
Attorney for Defendants

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18 day of November, 2011, I caused a true and correct copy of the foregoing **NOTICE OF APPEAL** to be served by the method indicated below, and addressed to the following:

Barry N. Johnson  
Daniel K. Brough  
BENNETT TUELLER JOHNSON & DEERE  
3165 E. Millrock Dr., Ste. 500  
Salt Lake City, UT 84121  
Fax: (801) 438-2050

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 Facsimile

NOV 10 2011 PM 11:00 AM FEDERAL COURTELLS  
THE NOV 10 2011 PM 11:00  
11 09/00

Randall C. Budge  
RACINE, OLSON, NYE, BUDGE & BAILEY, CHTD.  
P.O. Box 1391  
201 E. Center Street  
Pocatello, ID 83204-1391  
Fax: (208) 232-6109

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 Facsimile

Eugene A. Ritti  
HAWLEY TROXELL ENNIS & HAWLEY  
877 Main Street, Ste. 1000  
Boise, ID 83702  
Fax: (208) 954-5256

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 Facsimile



David P. Gardner

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*Shawn Welch*  
DEPUTY  
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Eugene A. Ritti, ISB No. 2156  
Lynnette M. Davis, ISB No. 5263  
HAWLEY TROXELL ENNIS & HAWLEY LLP  
877 Main Street, Suite 1000  
P.O. Box 1617  
Boise, ID 83701-1617  
Telephone: 208.344.6000  
Facsimile: 208.954.5256  
Email: eritti@hawleytroxell.com  
ldavis@hawleytroxell.com

Attorneys for Defendant/Respondent Washington Group  
International, Inc.

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CARIBOU

SILICON INTERNATIONAL ORE, LLC, an )  
Idaho limited liability company, )  
 )  
Plaintiff/Appellant, )  
vs. )  
 )  
MONSANTO COMPANY, a Delaware )  
corporation; and WASHINGTON GROUP )  
INTERNATIONAL, INC., an Ohio )  
corporation, )  
 )  
Defendants/Respondents. )  
 )

Case No. CV-2009-366  
DEFENDANT WASHINGTON GROUP  
INTERNATIONAL, INC.'S REQUEST  
FOR ADDITIONAL RECORD

TO: THE ABOVE-NAMED APPELLANT AND ITS ATTORNEYS, AND THE CLERK OF  
THE ABOVE-ENTITLED COURT.

NOTICE IS HEREBY GIVEN, that Washington Group International, Inc., a respondent in the  
above-entitled proceeding, hereby requests pursuant to Rule 19, I.A.R., the inclusion of the

DEFENDANT WASHINGTON GROUP INTERNATIONAL, INC.'S  
REQUEST FOR ADDITIONAL RECORD - 1

*POB*

following material in the clerk's record in addition to that required to be included by the I.A.R. and the notice of appeal:

1. Clerk's Record:

- (a) Defendant Washington Group International, Inc.'s Motion for Summary Judgment (filed January 26, 2011);
- (b) Memorandum in Support of Defendant Washington Group International, Inc.'s Motion for Summary Judgment (filed January 26, 2011);
- (c) Affidavit of Craig Nelson in Support of Defendant Washington Group International, Inc.'s Motion for Summary Judgment (filed January 26, 2011);
- (d) Affidavit of Eugene A. Ritti in Support of Defendant Washington Group International, Inc.'s Motion for Summary Judgment (filed January 26, 2011);
- (e) Second Affidavit of Eugene A. Ritti in Support of Defendant Washington Group International, Inc.'s Motion for Summary Judgment (filed February 1, 2011, under seal);
- (f) Third Affidavit of Eugene A. Ritti in Support of Defendant Washington Group International, Inc.'s Motion for Summary Judgment (filed May 6, 2011); and
- (g) Reply Memorandum in Support of Defendant Washington Group International, Inc.'s Motion for Summary Judgment (filed May 6, 2011).

2. I certify that this request for additional record has been served upon the clerk of the district court and upon all parties required to be served pursuant to Rule 20.

DATED THIS 15<sup>th</sup> day of December, 2011.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By   
Eugene A. Ritti, ISB No. 2156

Attorneys for Defendant/Respondent Washington Group International, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15 day of December, 2011, I caused to be served a true copy of the foregoing DEFENDANT WASHINGTON GROUP INTERNATIONAL, INC.'S REQUEST FOR ADDITIONAL RECORD by the method indicated below, and addressed to each of the following:

David P. Gardner  
MOFFATT THOMAS BARRETT ROCK  
& FIELDS, CHTD.  
412 West Center, Suite 2000  
Pocatello, ID 83204-0817  
[Attorneys for Plaintiff Silicon International Ore, LLC]

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 E-mail  
 Telecopy 208.232.0150

Barry N. Johnson  
Daniel K. Brough  
Robert K. Reynard  
BENNETT TUELLER JOHNSON & DEERE  
3165 East Millrock Drive, Suite 500  
Salt Lake City, UT 84121  
[Attorneys for Plaintiff Silicon International Ore, LLC]

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 E-mail  
 Telecopy 801.438.2050

Randall C. Budge  
RACINE OLSON NYE BUDGE & BAILEY, CHTD.  
201 E. Center  
P.O. Box 1391  
Pocatello, ID 83204-1391  
[Attorneys for Defendant Monsanto Company]

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 E-mail  
 Telecopy 208.232.6109

Clerk of the Court  
Caribou County Courthouse  
159 S. Main  
Soda Springs, ID 83276

U.S. Mail, Postage Prepaid  
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 Telecopy

  
\_\_\_\_\_  
Eugene A. Ritti



CLERK OF DISTRICT COURT  
CARIBOU COUNTY CLERK  
*Sharon M. Hill*  
DEPUTY

2011 DEC 2 PM 4 37

Eugene A. Ritti, ISB No. 2156  
Lynnette M. Davis, ISB No. 5263  
HAWLEY TROXELL ENNIS & HAWLEY LLP  
877 Main Street, Suite 1000  
P.O. Box 1617  
Boise, ID 83701-1617  
Telephone: 208.344.6000  
Facsimile: 208.954.5256  
Email: eritti@hawleytroxell.com  
ldavis@hawleytroxell.com

Attorneys for Defendant/Respondent Washington Group  
International, Inc.

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CARIBOU

SILICON INTERNATIONAL ORE, LLC, an )  
Idaho limited liability company, )  
 )  
Plaintiff/Appellant, )  
vs. )  
 )  
MONSANTO COMPANY, a Delaware )  
corporation; and WASHINGTON GROUP )  
INTERNATIONAL, INC., an Ohio )  
corporation, )  
 )  
Defendants/Respondents. )

Case No. CV-2009-366

DEFENDANT WASHINGTON GROUP  
INTERNATIONAL, INC.'S SECOND  
REQUEST FOR ADDITIONAL  
RECORD

TO: THE ABOVE-NAMED APPELLANT AND ITS ATTORNEYS, AND THE CLERK OF  
THE ABOVE-ENTITLED COURT.

NOTICE IS HEREBY GIVEN, that Washington Group International, Inc., a respondent in the  
above-entitled proceeding, hereby requests pursuant to Rule 19, I.A.R., the inclusion of the  
following material in the clerk's record in addition to that required to be included by the I.A.R.

DEFENDANT WASHINGTON GROUP INTERNATIONAL, INC.'S  
SECOND REQUEST FOR ADDITIONAL RECORD - 1

and the notice of appeal (and in addition to that required to be included by Washington Group International, Inc.'s [First] Request for Additional Record, filed earlier today):

1. Clerk's Record:

- (a) Defendant Monsanto Company's Motion for Summary Judgment (filed January 25, 2011);
- (b) Defendant Monsanto Company's Memorandum in Support of Motion for Summary Judgment (filed January 25, 2011);
- (c) Affidavit of Randall C. Budge (filed January 25, 2011);
- (d) Affidavit of James R. Smith (filed January 25, 2011);
- (e) Defendant Monsanto Company's Reply Memorandum in Support of Motion for Summary Judgment (filed May 6, 2011);
- (f) Motion to Strike (filed May 6, 2011);
- (g) Memorandum in Support of Motion to Strike (filed May 6, 2011); and
- (h) Plaintiff's Response to Defendant Monsanto Company's Motion to Strike (filed May 13, 2011).

2. I certify that this request for additional record has been served upon the clerk of the district court and upon all parties required to be served pursuant to Rule 20.

DATED THIS 2nd day of December, 2011.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By   
Eugene A. Ritti, ISB No. 2156

Attorneys for Defendant/Respondent Washington Group International, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of December, 2011, I caused to be served a true copy of the foregoing DEFENDANT WASHINGTON GROUP INTERNATIONAL, INC.'S SECOND REQUEST FOR ADDITIONAL RECORD by the method indicated below, and addressed to each of the following:

David P. Gardner  
MOFFATT THOMAS BARRETT ROCK  
& FIELDS, CHTD.  
412 West Center, Suite 2000  
Pocatello, ID 83204-0817  
[Attorneys for Plaintiff Silicon International Ore, LLC]

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Barry N. Johnson  
Daniel K. Brough  
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BENNETT TUELLER JOHNSON & DEERE  
3165 East Millrock Drive, Suite 500  
Salt Lake City, UT 84121  
[Attorneys for Plaintiff Silicon International Ore, LLC]

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[Attorneys for Defendant Monsanto Company]

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\_\_\_\_\_  
Eugene A. Ritti

VEDA MASCARENAS  
CLERK OF THE DISTRICT COURT

By Stacie Jorgensen  
Stacie Jorgensen, Deputy Clerk