

9-5-2006

Obendorf v. Terra Hug Spray Co., Inc. Clerk's Record v. 1 Dckt. 31195

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(VOLUME D)

lc-029

31195
IN THE
SUPREME COURT
OF THE
STATE OF IDAHO

GREG OBENDORF and BOYD GRAY,

Plaintiffs-Respondents-Cross
Appellants,

31217
vs-

TERRA HUG SPRAY COMPANY, INC.,
an Idaho corporation,

l. 8

Defendant,

and

J. R. SIMPLOT COMPANY, a Nevada
corporation, dba SIMPLOT SOILBUILDERS,

Defendant-Appellant-Cross
Respondent.

GREG OBENDORF and BOYD GRAY,

Plaintiffs-Respondents-Cross
Appellants,

FILED - COPY
SEP 5 2006
Supreme Court Court of Appeals
Entered on AFS by

-vs-

TERRA HUG SPRAY COMPANY, INC.,
an Idaho corporation,

Defendant-Appellant-Cross
Respondent,

and

J. R. SIMPLOT COMPANY, a Nevada
corporation, dba SIMPLOT SOILBUILDERS,

Defendant.

Appealed from the District of the Third Judicial District
for the State of Idaho, in and for Canyon County

Honorable GREGORY M. CULET, District Judge

David W. Cantrill
P. Mark Thompson

Attorneys for Appellant (Simplot)

James B. Lynch
Katherine M. Lynch

Attorneys for Appellant (Terra Hug Spray)

Wm. F. Gigray, III
Julie Klein Fischer

Attorneys for Respondents

31217
31195

IN THE SUPREME COURT OF THE
STATE OF IDAHO

GREG OBENDORF and BOYD GRAY,)

Plaintiffs-Respondents-Cross)
Appellants,)

-vs-)

TERRA HUG SPRAY COMPANY, INC.,)
an Idaho corporation,)

Defendant,)

and)

J. R. SIMPLOT COMPANY, a Nevada)
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Defendant-Appellant-Cross)
Respondent.)

Supreme Court No. 31195
31217

GREG OBENDORF and BOYD GRAY,)

Plaintiffs-Respondents-Cross)
Appellants,)

-vs-)

TERRA HUG SPRAY COMPANY, INC.,)
an Idaho corporation,)

Defendant-Appellant-Cross)
Respondent,)

and)

J. R. SIMPLOT COMPANY, a Nevada)
corporation, dba SIMPLOT SOILBUILDERS,)

Defendant.)

Appeal from the Third Judicial District, Canyon County, Idaho.

HONORABLE GREGORY M. CULET, Presiding

David W. Cantrill, P. O. Box 359, Boise, Idaho 83701

Attorney for Appellant (Simplot)

James B. Lynch, P. O. Box 739, Boise, Idaho 83701

Attorney for Appellant (Terra Hug Spray)

Wm. F. Gigray, III, 5700 E. Franklin Rd., Nampa, Idaho 83687

Attorney for Respondents

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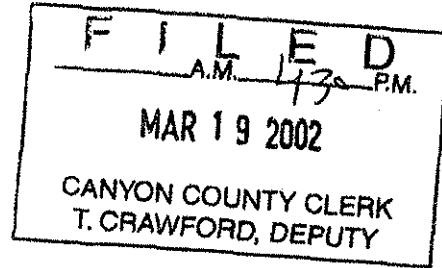
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Attorneys for Plaintiff



**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

GREG OBENDORF and BOYD GRAY,
Plaintiffs,

vs.

TERRA HUG SPRAY COMPANY, INC.,
an Idaho corporation, and J.R. SIMPLOT
COMPANY, a Nevada corporation, dba SIMPLOT
SOILBUILDERS,

Defendants.

Case No. CV02-2584
**VERIFIED COMPLAINT AND
DEMAND FOR JURY TRIAL**

Fee Category: A-1
Filing Fee: \$77.00

COMES NOW, Greg Obendorf and Boyd Gray, by and through their attorneys of record, White Peterson, and COMPLAIN AND ALLEGE as follows:

JURISDICTION, VENUE, AND PARTIES

1.

Plaintiff, Greg Obendorf, is and at all times relevant herein was, a resident of Canyon County, State of Idaho.

2.

Plaintiff, Boyd Gray, is now and at all times material to this action has been, a resident of Franklin County, State of Washington.

3.

Terra Hug Spray Company, Inc. (herein after referred to as "Terra Hug"), is a corporation organized under the law of the State of Idaho with its principal place of business in Canyon County, Idaho.

4.

J.R. Simplot Company (herein after referred to as "Simplot"), is a corporation organized and existing under the laws of the State of Nevada, doing business in Idaho as a foreign corporation, and doing business under the name and style of Simplot Soilbuilders, with facilities in the City of Wilder, Canyon County, Idaho.

5.

Terra Hug is, and at all times relevant to this action was, engaged in the business of transporting, delivering, mixing, and applying chemical products used for prevention and control of agricultural pests and weeds.

6.

Simplot is, and at all times relevant to this action was, engaged in the business of consulting with agricultural enterprises related to chemical products used for the prevention and control of agricultural pests and weeds, and offered chemical products for sale, transport, and delivery.

7.

This Court has jurisdiction over this matter pursuant to Idaho Code § 1-705.

8.

Venue is proper in Canyon County, Idaho, because the Defendant Terra Hug resided and had its principal place of business in that county at the commencement of this action pursuant to the provisions of Idaho Code § 5-404. Further, Simplot sold and delivered chemical products from its Wilder, Canyon County, Idaho facility to Plaintiffs' agricultural property which is also located in Canyon County, and Terra Hug mixed and applied chemical products to Plaintiffs' agricultural property.

FACTUAL ALLEGATIONS

9.

In 1998, Greg Obendorf and Boyd Gray (hereinafter collectively referred to as the "Plaintiffs") entered into a partnership to grow asparagus in various fields near Wilder, Idaho, in Canyon County.

10.

Asparagus is a perennial crop, which has stands with a productive life of approximately eighteen (18) years.

11.

In preparation for planting the asparagus crop, Plaintiffs secured a lease agreement with the L.A. and Mae Adams Trust to lease certain parcels of land for a term of 15 years.

12.

Greg Obendorf also secured a land lease agreement with Ray Obendorf to plant certain fields in asparagus and rent the fields for a term of 15 years.

13.

Boyd Gray grew the asparagus crowns in Washington State and then shipped the crowns to Greg Obendorf who oversaw the timely planting of the crowns in the fields during the crop year 1998.

14.

Plaintiffs timely planted one hundred sixty-two (162) acres of asparagus in crop year 1998.

15.

Plaintiffs were successful in raising a good stand of asparagus on the 162 acres and cultivated it with due diligence and according to the best rules of farming practice.

16.

In 1999, the second year of the asparagus crop, representatives of Seneca Foods Corporation ("Seneca") recommended that Plaintiffs begin harvesting the asparagus because of the high quality and excellent health of the crop.

17.

In 1999, Seneca and Plaintiffs entered into a contract under which Seneca agreed to purchase all asparagus grown by Plaintiffs.

18.

During 1999, Plaintiffs met with the field representative for Simplot regarding necessary herbicide applications to the subject fields in order to remove and control weeds. Based upon the recommendations of the field representative of Simplot, the Plaintiffs purchased herbicides including Divron (Karmex), Sinbar (Terbacil), and Metribuzin (Sencor) (hereinafter collectively referred to as the "Herbicides").

19.

Simplot subsequently delivered the Herbicides to Plaintiffs' fields and engaged Terra Hug to be the mixer, driver, and applicator of the Herbicides.

20.

In approximately May or June 1999, Terra Hug misapplied the Herbicides to the asparagus fields of Plaintiffs, failing to mix, handle, or apply the Herbicides within the generally accepted practice for removal and control of weeds.

21.

The Plaintiffs' asparagus fields had been in excellent health prior to the misapplication of the Herbicides by Terra Hug.

22.

Shortly after Terra Hug had applied the Herbicides to the asparagus crop fields, the asparagus plants showed signs of severe and irreversible damage and malformation.

FIRST CLAIM FOR RELIEF

Breach of Contract against Simplot and Terra Hug Spray Co.

23.

Plaintiffs reallege paragraphs 1 through 22 and incorporate the same herein by this reference.

24.

Simplot recommended the Herbicides to Plaintiffs and agreed to deliver the Herbicides and contract with an agent to mix and apply the Herbicides to Plaintiffs' asparagus fields and oversee and supervise the application of the Herbicides.

25.

Simplot engaged Terra Hug as its agent to mix and apply the Herbicides to Plaintiffs' asparagus fields.

26.

Terra Hug promised to mix the recommended the Herbicides and apply the Herbicides to Plaintiffs' asparagus fields, as requested by Plaintiffs.

27.

Terra Hug failed to properly mix and apply the Herbicides to Plaintiffs' asparagus fields as required pursuant to the agreement between the parties.

28.

As a result of Terra Hug's failure to properly mix and apply the Herbicides, Plaintiffs have suffered extensive crop loss damages and have been required to pay costs and attorney fees.

29.

Because of Terra Hug's failure to properly mix and apply the Herbicides pursuant to the agreement between the parties, Plaintiffs are entitled to judgment against Terra Hug for damages resulting from this breach of contract, along with accruing costs and attorney fees.

30.

Because of Simplot's recommendation of the Herbicides, and failure to oversee and supervise the mixing and application of the Herbicides, and the failure of Simplot's agent, Terra Hug, to properly mix and apply the Herbicides, pursuant to the agreement between the parties, Plaintiffs are entitled to judgment against Simplot for damages resulting from this breach of contract, along with accruing costs and attorney fees.

SECOND CLAIM FOR RELIEF

Negligence against Simplot and Terra Hug Spray Co.

31.

Plaintiffs reallege paragraphs 1 through 30 and incorporate the same herein by this reference.

32.

Simplot recommended the Herbicides for application to Plaintiffs' asparagus fields and negligently failed to supervise its agent, Terra Hug, during the mixing and application of the Herbicides to Plaintiffs' asparagus fields.

33.

Terra Hug recklessly and negligently mixed, applied, or attempted to apply the Herbicides to Plaintiffs' asparagus fields. The Herbicides were indiscriminately mixed, applied, and released by Terra Hug in such amounts as to cause damage to Plaintiffs' asparagus crop and fields.

34.

Terra Hug knew or should have known that the reckless, negligent and indiscriminate mixing, application and release of the Herbicides would cause damage to Plaintiffs' growing asparagus crop and fields.

35.

Simplot knew or should have known that the reckless, negligent and indiscriminate mixing, application and release of the Herbicides would cause damage to Plaintiffs' growing asparagus crop and fields.

36.

As a direct and proximate result of the reckless and negligent acts and conduct of Terra Hug, Plaintiffs' asparagus crop and fields were damaged.

37.

As a direct and proximate result of the reckless and negligent acts and conduct of Simplot, Plaintiffs' asparagus crop and fields were damaged.

38.

Terra Hug acted in a reckless and negligent manner causing damage to Plaintiffs' asparagus crop, and Plaintiffs are entitled to judgment against Terra Hug for damages resulting from this negligence, in an amount to be proven at trial, greater than \$25,000.00, along with accruing costs and attorney fees.

39.

Simplot acted in a reckless and negligent manner causing damage to Plaintiffs' asparagus crop, and Plaintiffs are entitled to judgment against Simplot for damages resulting from this negligence, in an amount to be proven at trial, greater than \$25,000.00, along with accruing costs and attorney fees.

40.

Simplot and Terra Hug recklessly and negligently acted in concert, pursuing a common plan or design which resulted in the commission of the reckless, negligent and indiscriminate mixing, application and release of the Herbicides, which damaged Plaintiffs' asparagus crop and fields.

THIRD CLAIM FOR RELIEF

Breach of Implied/Express Warranty against Simplot

41.

Plaintiffs reallege paragraphs 1 through 40 and incorporate the same herein by this reference.

42.

At the time of the agreement between Simplot and the Plaintiffs, Plaintiffs informed representative of Simplot as to the particular purpose for which the Herbicides were required, to prevent and control agricultural pests and weeds in Plaintiffs' asparagus crop and fields.

43.

Simplot recommended use and application of the Herbicides to prevent and control agricultural pests and weeds in Plaintiffs' asparagus crop and fields.

44.

Plaintiffs reasonably relied upon Simplot's recommendations and Simplot's skill and judgment in selecting and furnishing the Herbicides.

45.

Simplot recommended and engaged Terra Hug to be the mixer, driver, and applicator of the Herbicides to Plaintiffs' asparagus crop and fields.

46.

Plaintiffs reasonably relied upon Simplot's recommendation and Simplot's skill and judgment in selecting and engaging Terra Hug to mix, drive, and apply the Herbicides to Plaintiffs' asparagus crop and fields.

47.

As a result of the failure of the Herbicides to be fit for the purpose represented by Simplot, Simplot breached its express and implied warranties.

48.

As a result of the failure of Terra Hug to properly mix, drive and apply the Herbicides to Plaintiffs' asparagus crop and fields as represented by Simplot, Simplot breached its express and implied warranties.

49.

As a direct and proximate result of Simplot's breach of its implied and express warranties, Plaintiffs have suffered damage in an amount to be proven at trial, along with accruing costs and attorney fees.

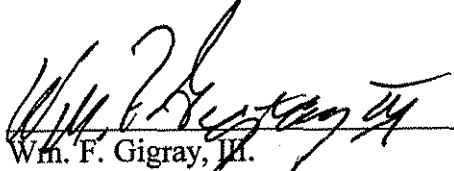
PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for the following relief:

1. That the Court declare Plaintiffs are entitled to a judgment against Terra Hug and Simplot for damages resulting from this breach of contract, along with costs and attorney fees;
2. That the Court declare Plaintiffs are entitled to a judgment against Terra Hug and Simplot for damages resulting from Terra Hug's negligence, along with costs and attorney fees;
3. For the sum of \$4,000.00 as and for attorney fees necessitated in this action if the matter is uncontested, or a reasonable sum as set by the Court if the matter is contested;
4. For costs of suit incurred herein; and
5. For such other and further relief as the Court may deem proper in the premises.

DATED this 14th day of March, 2002.

WHITE PETERSON


Wm. F. Gigray, III.
Attorneys for Plaintiff

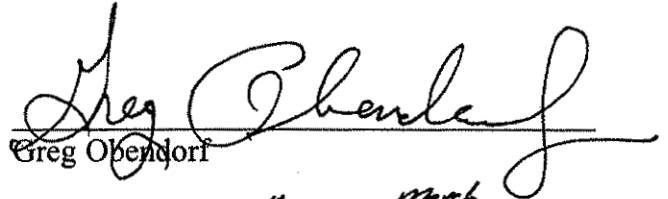
VERIFICATION

STATE OF IDAHO)
) ss.
County of Canyon)

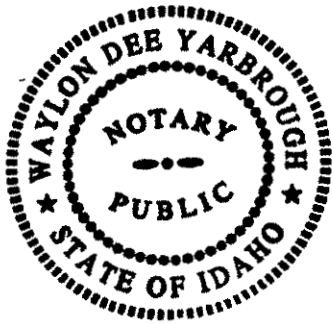
Greg Obendorf, being first duly sworn, deposes and says:

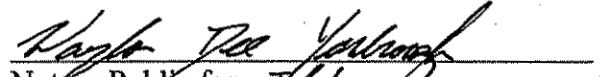
That he has read the foregoing Complaint, knows the contents thereof, and believes the facts therein stated to be true and correct to the best of his knowledge and belief.

DATED this 14 day of March, 2002.


Greg Obendorf

SUBSCRIBED AND SWORN TO before me this 14th day of ~~February~~ ^{March}, 2002.




Notary Public for Idaho
My Commission Expires: 2/28/08

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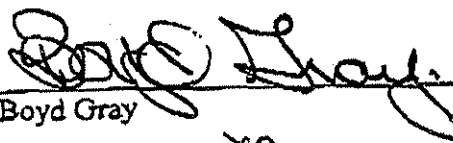
VERIFICATION

STATE OF WASHINGTON)
) ss.
County of Franklin)

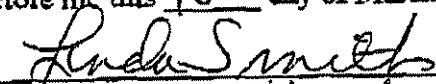
Boyd Gray, being first duly sworn, deposes and says:

That he has read the foregoing Complaint, knows the contents thereof, and believes the facts therein stated to be true and correct to the best of his knowledge and belief.

DATED this 18th day of March, 2002.


Boyd Gray

SUBSCRIBED AND SWORN TO before me this 18th day of March, 2002.


Notary Public for Washington
My Commission Expires: 3-5-06

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ORIGINAL

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

GREG OBENDORF and BOYD GRAY,)
)
Plaintiffs,)
)
vs.)
)
TERRA HUG SPRAY COMPANY, INC.,)
an Idaho corporation, and J.R. SIMPLOT)
COMPANY, a Nevada corporation, dba)
SIMPLOT SOILBUILDERS,)
)
Defendants.)
_____)

Case No. CV 02-2584

**ANSWER AND DEMAND FOR
JURY TRIAL**

COMES NOW, the Defendant J.R. Simplot Company, dba Simplot Soilbuilders, above
named, by and through their attorneys of record, and as and for an Answer to Plaintiffs'
Complaint on file herein admits, denies and alleges:

ANSWER AND DEMAND FOR JURY TRIAL - 1

FIRST DEFENSE

Defendant denies each and every allegation contained in Plaintiffs' Complaint not specifically admitted herein.

SECOND DEFENSE

1.

Defendant admits the allegations contained in paragraphs 1 and 2 of Plaintiffs' Complaint.

2.

With regard to the allegations contained in paragraph 3 of Plaintiffs' Complaint, Defendant is without sufficient knowledge to admit said allegations, so they are in turn denied.

3.

Defendant admits the allegations contained in paragraph 4 of Plaintiffs' Complaint.

4.

Defendant denies the allegations contained in paragraph 5 of Plaintiffs' Complaint.

5.

Defendant admits the allegations contained in paragraphs 6 and 7 of Plaintiffs' Complaint.

6.

With regard to the allegations contained in paragraph 8 of Plaintiffs' Complaint, Defendant admits only that venue is proper in Canyon County but denies the remaining allegations contained therein.

7.

With regard to the allegations contained in paragraph 9 of Plaintiffs' Complaint, Defendant is without sufficient knowledge to admit said allegations, so they are in turn denied.

8.

Defendant admits the allegations contained in paragraphs 10, 11 and 12 of Plaintiffs' Complaint.

9.

With regard to the allegations contained in paragraphs 13, 14 and 15 of Plaintiffs' Complaint, Defendant is without sufficient knowledge to admit said allegations, so they are in turn denied.

10.

Defendant denies the allegations contained in paragraphs 16, 17, 18, and 19 of Plaintiffs' Complaint.

11.

With regard to the allegations contained in paragraph 20 of Plaintiffs' Complaint, Defendant is without sufficient knowledge to admit said allegations, so they are in turn denied.

12.

Defendant denies the allegations contained in paragraphs 21 and 22 of Plaintiffs' Complaint.

13.

With regard to the allegations contained in paragraph 23 of Plaintiffs' Complaint, Defendant would reassert their answers as indicated above.

14.

Defendant denies the allegations contained in paragraphs 24, 25, 26, 27, 28, 29 and 30 of Plaintiffs' Complaint.

15.

With regard to the allegations contained in paragraph 31 of Plaintiffs' Complaint, Defendant would reassert their answers as indicated above.

16.

Defendant denies the allegations contained in paragraphs 32, 33, 34, 35, 36, 37, 38, 39 and 40 of Plaintiffs' Complaint.

17.

With regard to the allegations contained in paragraph 41 of Plaintiffs' Complaint, Defendant would reassert their answers as indicated above.

18.

Defendant denies the allegations contained in paragraphs 42, 43, 44, 45, 46, 47, 48 and 49 of Plaintiffs' Complaint.

FIRST AFFIRMATIVE DEFENSE

Plaintiffs' Complaint fails to state a cause of action against the Defendant upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

That the negligence of the Plaintiffs was equal to and/or greater than the negligence of the Defendant, and that the said Plaintiffs' negligence was the sole, direct and proximate cause of any damages and injuries allegedly sustained by the Plaintiff.

THIRD AFFIRMATIVE DEFENSE

Plaintiffs are not the real parties in interest as respects all or a part of their claims, contrary to Rule 17 of the Idaho Rules of Civil Procedure.

ANSWER AND DEMAND FOR JURY TRIAL - 4

000017

FOURTH AFFIRMATIVE DEFENSE

Plaintiffs' damages, if any, were caused by superseding, intervening forces, including but not limited to forces of nature and/or acts of other entities or individuals over which Defendant Simplot had no control.

FIFTH AFFIRMATIVE DEFENSE

Plaintiffs have failed to avoid or mitigate their alleged injury and damage. By asserting this defense, Defendant does not admit that Plaintiffs have been damaged.

SIXTH AFFIRMATIVE DEFENSE

Defendant Simplot affirmatively alleges a valid disclaimer of warranties and limitations of remedies pursuant to and under the applicable provisions of the Uniform Commercial Code, Title 28, Idaho Code, particularly Sections 28-3-316 and 28-2-719.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiffs failed, within a reasonable time after the alleged losses occurred, to notify Defendant of the same and make claim for the breach of warranties alleged in the Complaint.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiffs assumed the risk of the events, occurrences and damages alleged in the Complaint.

NINTH AFFIRMATIVE DEFENSE

Defendant had no opportunity or duty to inspect the product in a manner that should or would have revealed the existence of a danger of harm to Plaintiffs' crop. The "herbicides," as referenced in Plaintiffs' Complaint, were sold by Defendant Simplot in reliance upon the express representations and warranties of the manufacturer, who omitted the warning of dangers posed by

said herbicides to asparagus, if any.

TENTH AFFIRMATIVE DEFENSE

Any losses sustained by Plaintiffs, as alleged, were the result of Plaintiffs' misuse of the product referred to in the Complaint.

ELEVENTH AFFIRMATIVE DEFENSE

Defendant Simplot reserves the right to assert any additional affirmative defense and matters in avoidance as may be disclosed during the course of additional investigation and discovery, including, without limitation, the defense of sale to a sophisticated purchaser, useful safe life, laches, waiver or estoppel.

TWELFTH AFFIRMATIVE DEFENSE

That the negligence of the co-Defendant, Terra Hug Spray Company, Inc., was equal to or greater than the negligence of the Defendant J.R. Simplot Company, and that said co-Defendant's negligence was the sole, direct and proximate cause of any damages and injuries allegedly sustained by the Plaintiffs.

THIRTEENTH AFFIRMATIVE DEFENSE

The Plaintiffs did not file their lawsuit within the applicable statute of limitations, including but not limited to *Idaho Code* §§ 217, 218 and 219.

REQUEST FOR ATTORNEYS FEES

Defendant requests that they be awarded their attorneys fees and costs incurred herein pursuant to the provisions of §12-121 of the Idaho Code.

DEMAND FOR JURY TRIAL

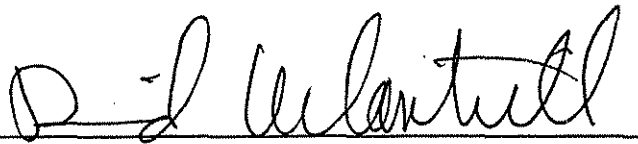
Defendant hereby demands a trial by jury in accordance with the provisions of Rule 38(b)

of the Idaho Rules of Civil Procedure.

WHEREFORE, having answered, Defendant prays that Plaintiffs take nothing by their Complaint herein, that the same be dismissed and that the Defendant be awarded their attorneys fees and costs incurred herein.

Dated this 8th day of May, 2002.

CANTRILL, SKINNER, SULLIVAN & KING LLP



David W. Cantrill, Of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2002, I served a true and correct copy of the within and foregoing instrument to the following named attorneys, in the following manner:

- U. S. Mail postage prepaid
- Facsimile Transmission
- Hand Delivery

Wm. F. Gigray, III
T. Guy Hallam, Jr.
White Peterson
5700 E. Franklin Road, Ste. 200
Nampa, Idaho 83687-8402

P. Mark Thompson
Attorney at Law
P. O. Box 27
Boise, Idaho 83707-0027

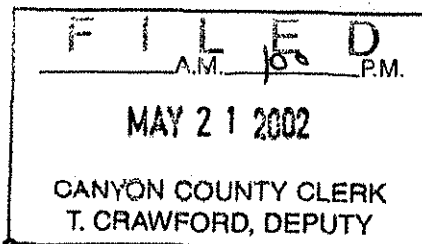


David W. Cantrill

ANSWER AND DEMAND FOR JURY TRIAL - 7

000020

James B. Lynch ISBN # 836
Katherine M. Lynch ISBN # 5259
LYNCH & ASSOCIATES, PLLC
225 North 9th Street, Suite 600
Post Office Box 739
Boise, Idaho 83701
Telephone (208) 331-5088
Facsimile (208) 331-0088



Attorney for Defendant Terra Hug Spray Company, Inc.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT, OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

GREG OBENFORF AND BOYD GRAY,

Plaintiffs,

vs.

TERRY HUG SPRAY COMPANY, INC.
an Idaho corporation, and J. R. SIMPLOT
COMPANY, a Nevada Corporation, dba
SIMPLOT SOIL BUILDERS,

Defendants.

Case No.: CV02-2584

ANSWER OF TERRA HUG
SPRAY COMPANY, INC.

Fee Category: I1
Filing Fee: \$47.00

COMES NOW, Terra Hug Spray Company, Inc., by and through its attorneys of record, Lynch & Associates, PLLC, and in answer the Plaintiff's VERIFIED COMPLAINT AND DEMAND FOR JURY TRIAL, asserts the following:

FIRST DEFENSE

The Plaintiff's Complaint fails to state a claim against the Defendant, Terra Hug Spray Company, Inc., upon which relief may be granted due to a lack of privity between the Plaintiff and this answering Defendant.

SECOND DEFENSE

The Plaintiffs apparently entered into contracts with the owners of real property referred to in the Complaint, and the Plaintiffs may therefore not be the real party in interest and may have failed to join an indispensable party plaintiff.

THIRD DEFENSE

Answering each of the allegations of the Plaintiff's VERIFIED COMPLAINT AND DEMAND FOR JURY TRIAL, the Defendant, Terra Hug Spray Company, Inc., admits, denies, and asserts the following:

1. The Defendant denies each and every allegation not specifically admitted herein.
2. The Defendant admits the allegations of Paragraphs 1, 2, and 3 of the Complaint.
3. The Defendant is without information pertaining to the allegations of Paragraph 4, and therefore at this time neither admits nor denies those allegations.
4. Answering the allegations of Paragraph 5, the Defendant admits that it was engaged in the business of applying chemical products on an occasion referenced in the Complaint, but denies that at that time it was in the business of transporting, delivering, or mixing chemical products.
5. The Defendant admits the allegations of Paragraph 6, 7, and 8 of the Complaint.
6. Answering allegations of Paragraph 9, the Defendant is without sufficient information to either admit or deny the allegations of Paragraph 9, but believes there is a possibility that other persons may have some interest in the proceeds from asparagus grown in the referenced fields, and reserves the right to file an amended Answer after completion of discovery.

7. *The Defendant is without sufficient knowledge to at this time admit or deny the allegations of Paragraphs 10, through 19, and therefore at this time does not admit or deny those allegations.*
8. *The Defendant denies the allegations of Paragraph 20, 21, and 22.*
9. *Answering the allegations of Paragraph 23, the Defendant realleges its response to Paragraphs 1-22 as if the same had been set out verbatim herein.*
10. *Answering the allegations of Paragraph 24, the Defendant is without sufficient information to respond, and therefore at this time neither admits nor denies the allegations of Paragraph 24.*
11. *Answering the allegations of Paragraph 25, the Defendant admits that the Defendant Simplot engaged Terra Hug to perform certain tasks at the direction of Simplot, but denies the remaining allegations of Paragraph 25.*
12. *The Defendant denies the allegations of Paragraph 26, 27, 28, and 29.*
13. *Answering the allegations of Paragraph 30, the Defendant is without sufficient information and information at this time to either admit or deny the allegations of Paragraph 30, and therefore does not admit or deny those allegations at this time.*
14. *Answering the allegations of Paragraph 31, the Defendant reasserts its response to Paragraph 1-30 as if the same had been set out verbatim herein.*
15. *Answering the allegations of Paragraph 32, the Defendant admits that Simplot recommended the herbicides that were applied to the field, and it asserts that Simplot determined which chemicals would be applied, how they would be mixed, and communicated that information to Defendant Terra Hut, but is without*

- sufficient information to either admit or deny the balance of the allegations, and therefore does not admit or deny the remaining allegations at this time.
16. The Defendant denies the allegations of Paragraph 33 and 34.
 17. Answering the allegations of Paragraphs 35-39, this answering Defendant asserts that it is without sufficient knowledge or information to at this time either to admit or deny those allegations, and therefore does not at this time admit or deny them.
 18. Answering Paragraph 40, the Defendant denies that Terra Hug acted recklessly or negligently, denies that it was acting in concert pursuant to any common plan or design, and asserts that it is without sufficient information at this time to admit or deny the balance of the allegations in Paragraph 40, and therefore does not admit or deny the allegations at this time.
 19. Answering the allegations of Paragraph 41, the Defendant reasserts its response to Paragraph 1-40 of the Complaint as if the same had been set out verbatim herein.
 20. Answering the allegations of Paragraph 42-49, the Defendant asserts that it is without sufficient information in advance of discovery to either admit or deny the allegations of these paragraphs, and therefore at this time does not admit or deny them.

FIRST AFFIRMATIVE DEFENSE

The Plaintiffs assumed the risk of the loss they claim in delegating decisions to Defendant Simplot and any claims against the Defendant Terra Hug are barred as a matter of law.

SECOND AFFIRMATIVE DEFENSE

In the event the Defendant is found to have acted negligently, which is specifically denied, the Defendant asserts that the Plaintiffs were contributorily negligent and that their negligence constituted a greater percentage of the causation of the loss than that of the Defendant, and the Plaintiffs' claims against this answering Defendant are barred as a matter of law.

THIRD AFFIRMATIVE DEFENSE

All of the Plaintiffs' asserted losses were proximately caused by the superceding intervening acts of the Plaintiffs and Simplot acting individually and together, and the Plaintiffs' claims against this answering Defendant are barred as a matter of law.

FOURTH AFFIRMATIVE DEFENSE

The Plaintiffs failed to mitigate their damages, and their claim against this answering Defendant are barred as a matter of law.

FIFTH AFFIRMATIVE DEFENSE

The Plaintiffs elected to delegate certain responsibilities to Simplot and are estopped from claiming that this answering Defendant is responsible for any asserted loss, and the Plaintiffs' claims against this answering Defendant are barred as a matter of law.

SIXTH AFFIRMATIVE DEFENSE

Without privity of contract existed between the Plaintiffs and this answering Defendant, this answering Defendant did not assume any obligation or duty other than to perform certain tasks at the direction of Simplot, and the Plaintiffs' claims against this answering Defendant are barred as a matter of law.

RESERVATION OF RIGHT TO FILE CROSS-CLAIM

The Defendant reserves the right to file an amended Answer and to assert a Cross-Claim or a Third Party Complaint following the completion of discovery. This answering Defendant is without information concerning the relationship between the parties and the allegations asserted in the Complaint, and is therefore in advance of completion of discovery unable to assert all potential defenses or claims against other parties at this time.

WHEREFORE, Defendant Terra Hug Spray Company, Inc., prays that the Plaintiffs' Complaint against it be dismissed with prejudice and that the Defendant be awarded its costs and attorneys fees incurred in the defense of the action.

DATED this 20th day May, 2002.

LYNCH & ASSOCIATES, PLLC

By James B. Lynch
JAMES B. LYNCH - Of the Firm
Attorneys for Defendant Terra Hug Spray
Company, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of May, 2002, I served a true and correct copy of the foregoing ANSWER OF TERRA HUG SPRAY COMPANY upon each of the following individuals by causing the same to be delivered by the method and to the addresses indicated below:

William F. Gigray, III
WHITE PETERSON
5700 E. Franklin Rd. Suite 200
Nampa, Idaho 83687-8402
Facsimile: (208) 466-4405

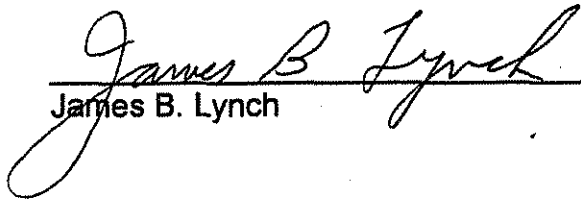
U.S. Mail, Postage Prepaid
 Priority Mail
 Hand Delivery
 Facsimile

P. Mark Thompson
J.R. Simplot Company
999 Main Street, 13th Floor
P.O. Box 27
Boise, Idaho 83707-0027
Facsimile: (208) 389-7464

U.S. Mail, Postage Prepaid
 Priority Mail
 Hand Delivery
 Facsimile

Tony Cantril
CANTRILL, SKINNER, SULLIVAN
& KING LLP
1423 Tyrell Lane
P.O. Box 359
Boise, Idaho 83701
Facsimile: (208) 345-7212

U.S. Mail, Postage Prepaid
 Priority Mail
 Hand Delivery
 Facsimile



James B. Lynch

F I L E D
A.M. P.M.
MAY 21 2004

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON
CANYON COUNTY CLERK
S. BRIGGS, DEPUTY

GREG OBENDORF and BOYD GRAY,)
)
 Plaintiffs,)
)
 -vs-)
)
 TERRA HUG SPRAY COMPANY, INC.,)
 an Idaho corporation, and J.R. SIMPLOT)
 COMPANY, a Nevada corporations, dba)
 SIMPLOT SOILBUILDERS,)
)
 Defendants.)
 _____)

Case No. CV-2002-2584

SPECIAL VERDICT FORM - 1

We, the jury, answer the questions submitted to us in the special verdict as follows:

NEGLIGENCE

Question No. 1: Was there negligence on the part of Terra Hug Spray Company which was a proximate cause of the damage to Plaintiffs?

Answer to Question No. 1: Yes No

Question No. 2: Was there negligence on the part of the defendant J.R. Simplot Company which was a proximate cause of the damage to Plaintiffs?

Answer to Question No. 2: Yes No

Question No. 3: Was there negligence on the part of the plaintiffs which was a proximate cause of their own damage?

Answer to Question No. 3: Yes No

If you answered "No" to preceding Question Nos. 1, 2, or 3, then enter a zero in the appropriate line of Question No. 4. If you answered any of the preceding questions "Yes," then enter a percentage of negligence you find attributable to that party on the appropriate line in your answer to Question No. 4. Your percentage must total 100%.

X **Question No. 4:** We find the parties contributed to the cause of the damage to Plaintiffs in the following percentages:

(a)	Terra Hug Spray Company	<u>15</u> %
(b)	J.R. Simplot Company	<u>85</u> %
(c)	Plaintiffs	<u>0</u> %

TOTAL: 100%

If the percentage of the causation for Plaintiffs is equal to or greater than the negligence attributed to both of the other parties individually, then you will not answer Question No. 5, but will sign this Special Verdict Form. If the percentage of negligence you attributed to Plaintiffs is less than the percentage of negligence attributed to either of the other parties, then you will answer Question No. 5. Question No. 5 is your determination of the total amount of damage sustained by Plaintiffs.

X **Question No. 5:** What is the total amount of damage sustained by Plaintiffs?

Answer No. 5:

\$2,435,906

You should include in your answer to Question No. 5 the total amount of all monetary damage which you find from the evidence sustained by Plaintiffs.

Finally, you should sign the verdict form as explained in another instruction.

[Signature]
FOREMAN

Paul Bremer 2
JUROR

Jody King 21
JUROR

Polby Hatt 49
JUROR

Marquet Johnson 616
JUROR

Kathryn W. Frost 606
JUROR

Nick [unclear] 644
JUROR

May Sawyer 16
JUROR

Monica Haddad 1237
JUROR

Pick [unclear] 618
JUROR

[Signature] 643
JUROR

JUROR

Dated this 21 day of May, 2004.

FILED
A.M. *4:30* P.M.

MAY 21 2004

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON,
CANYON COUNTY CLERK
SABRIGGS, DEPUTY

GREG OBENDORF and BOYD GRAY,)
)
 Plaintiffs,)
)
 -vs-)
)
 TERRA HUG SPRAY COMPANY, INC.,)
 an Idaho corporation, and J.R. SIMPLOT)
 COMPANY, a Nevada corporations, dba)
 SIMPLOT SOILBUILDERS,)
)
 Defendants.)
)
 _____)

Case No. CV-2002-2584

SPECIAL VERDICT FORM - 2

We, the jury, answer the questions submitted to us in the special verdict as follows:

BREACH OF CONTRACT

Question No. 1: Did the contract between the plaintiffs and the defendant J.R. Simplot Company involve the rendering of a service to select the herbicides that were applied on May 26, 27 and 28, 1999?

Answer to Question No. 1: Yes No

If your answer is Yes, then go on to Question 2.

If your answer is No, simply sign the verdict and do not answer Question Nos. 2 through 5.

Question No. 2: Did the defendant J.R. Simplot Company breach the contract by failing to perform the services in a workman-like manner?

Answer to Question No. 2: Yes No

If your answer is Yes, then go on to Question 3.

If your answer is No, then simply sign the verdict and do not answer Question Nos. 3 through 5.

X **Question No. 3:** Was the breach of the contract by the defendant J.R. Simplot Company the proximate cause of the damages claimed by the plaintiffs?

Answer to Question No. 3: Yes No

If your answer is Yes, then go on to Question 4.

If your answer is No, then simply sign the verdict and do not answer Question Nos. 4 and 5.

X **Question No. 4:** Has the defendant J.R. Simplot Company proven its affirmative defense that Plaintiff Boyd Gray had the final decision?

Answer to Question No. 4: Yes No

If your answer is No, then go on to Question 5.

If your answer is Yes, then simply sign the verdict and do not answer Question No. 5.

X **Question No. 5:** What amount, if any, would compensate the plaintiffs for the damages that were caused by the defendant J.R. Simplot's breach of the contract?

Answer to Question No. 5: Amount \$ 2,070,520.10

Finally, you should sign the verdict form as explained in another instruction.

Dated this 21 day of May, 2004.

[Signature] 44
FOREMAN

Dan Brun 2
JUROR

[Signature] 21
JUROR

Polly Hatt 49
JUROR

Margaret Johnson 616
JUROR

Kathryn D. Frost 606
JUROR

[Signature] 644
JUROR

Jay Sawney 16
JUROR

Monica Hottard 1137
JUROR

Rick Joseph 618
JUROR

[Signature] 643
JUROR

JUROR

FILED
A.M. *[Signature]* P.M.
MAY 21 2004

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON
CANYON COUNTY CLERK
SABYGG, DEPUTY

GREG OBENDORF and BOYD GRAY,)
)
 Plaintiffs,)
)
 -vs-)
)
 TERRA HUG SPRAY COMPANY, INC.,)
 an Idaho corporation, and J.R. SIMPLOT)
 COMPANY, a Nevada corporations, dba)
 SIMPLOT SOILBUILDERS,)
)
 Defendants.)
 _____)

Case No. CV-2002-2584

SPECIAL VERDICT FORM - 3

We, the jury, answer the questions submitted to us in the special verdict as follows:

BREACH OF CONTRACT WITH THIRD PARTY BENEFICIARY

Question No. 1: Did Defendant J.R. Simplot Company enter into a contract for services with Defendant Terra Hug Spray Company, Inc. for the application of products (pesticides and /or herbicides) on Plaintiffs' asparagus crop on May 26, 27, and 28, 1999?

Answer to Question No. 1: Yes X No

If you answered Question No. 1 yes, you must now answer Question No. 2. If you answered Question No. 1 no, then do not answer Question No. 2, and sign the verdict form.

X

Question No. 2: Was the contract between J.R. Simplot Company and Terra Hug Spray Company for the benefit of the plaintiffs?

Answer to Question No. 2: Yes No

If you answered Question No. 2 yes, you must now answer Question No. 3. If you answered Question No. 2 no, then do not answer Question Nos. 3, 4, or 5, and sign the verdict form.

X

Question No. 3: Did Defendant Terra Hug Spray Company, Inc. breach its contract with Defendant J.R. Simplot Company by not performing services in a workman-like manner in the application of products (pesticides and /or herbicides) on May 26, 27, and 28, 1999?

Answer to Question No. 3: Yes No

If your answer is Yes, then go on to Question 4.

X

If your answer is No, then simply sign the verdict form and do not answer Question Nos. 4 and 5.

Question No. 4: Was the breach of the contract by the defendant Terra Hug Spray Company the proximate cause of the damages claimed by the plaintiffs?

X

Answer to Question No. 4: Yes No

If your answer is Yes, then go on to Question 5.

If your answer is No, then simply sign the verdict form and do not answer Question No. 5.

X

Question No. 5: What amount, if any, would compensate the plaintiffs for the damages that were caused by the defendant Terra Hug Spray Company's breach of the contract?

Answer to Question No. 5: Amount \$ 365,385.90

Finally, you should sign the verdict form as explained in another instruction.

Dated this 21 day of May, 2004.

[Signature]
FOREMAN

[Signature]
JUROR

[Signature]
JUROR

[Signature] 49
JUROR

[Signature] 616
JUROR

[Signature] 606
JUROR

[Signature] 644
JUROR

[Signature] 16
JUROR

[Signature] 637
JUROR

[Signature] 618
JUROR

[Signature] 643
JUROR

JUROR

5:00 P.M.
JUN - 7 2004
CANYON COUNTY CLERK
E. P. GARCIA, DEPUTY

Wm. F. Gigray, III, ISB #1435
Julie Klein Fischer, ISB #4601
WHITE PETERSON
5700 East Franklin Road, Suite 200
Nampa, Idaho 83687
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wfg@whitepeterson.com
jkf@whitepeterson.com

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

GREG OBENDORF and BOYD GRAY,

Plaintiffs,

-vs-

TERRA HUG SPRAY COMPANY, INC., an
Idaho corporation, and J.R. SIMPLOT
COMPANY, a Nevada corporation, dba
SIMPLOT SOILBUILDERS,

Defendants.

CASE NO. CV02-2584

**JUDGMENT IN FAVOR OF
PLAINTIFFS AGAINST
DEFENDANT J.R. SIMPLOT
COMPANY, INC., A NEVADA
CORPORATION, DBA SIMPLOT
SOILBUILDERS**

This matter having been on for a jury trial, and the matter having been fully tried and submitted to the jury, and the jury having rendered their ^{special} ~~general~~ verdict on May 21, 2004 on Special Verdict Form-1 and Special Verdict Form-2; and

JUDGMENT IN FAVOR OF PLAINTIFFS AGAINST DEFENDANT
J.R. SIMPLOT COMPANY, INC., A NEVADA CORPORATION,
DBA SIMPLOT SOILBUILDERS.

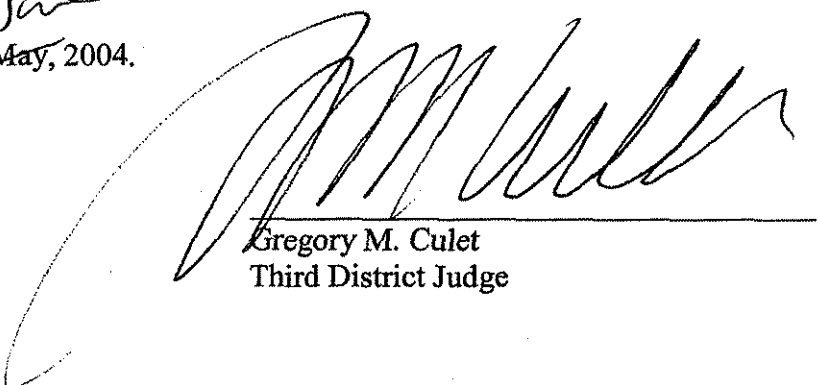
ORIGINAL

Pursuant to I.R.C.P. Rule 58 (a) upon a ^{special} ~~general~~ verdict of a jury providing for the ^{Gray} recovery of a sum certain in favor of the Plaintiffs Greg Obendorf and Boyd Gray against Defendant J.R. Simplot Company, Inc., a Nevada Corporation, dba Simplot Soilbuilders

IT IS HEREBY ORDERED ADJUDGED AND DECREED, AS FOLLOWS:

1. That Plaintiffs Greg Obendorf and Boyd Gray shall have and recover judgment against the Defendant J.R. Simplot Company, Inc., a Nevada Corporation, dba Simplot Soilbuilders, in the amount of Two million, seventy thousand, five hundred and twenty dollars and ten cents, (\$2,070,520.10).

DATED this ^{June} 2 day of ~~May~~, 2004.



Gregory M. Culet
Third District Judge

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a true and correct copy of the foregoing instrument was served upon the following by the method indicated:

US Mail P. Mark Thompson
 Overnight Mail Attorney at Law
 Hand Delivery 999 Main St., Ste. #1300
 Facsimile P.O. Box 27
 No. 389.7464 Boise, ID 83707

US Mail David Cantrill
 Overnight Mail CANTRILL, SKINNER, SULLIVAN & KING, LLP
 Hand Delivery 1423 Tyrell Lane
 Facsimile P.O. Box 359
 No. 345.7212 Boise, ID 83701

US Mail James B. Lynch
 Overnight Mail Katherine M. Lynch
 Hand Delivery LYNCH & ASSOCIATES, PLLC
 Facsimile 1412 W. Idaho Street, Ste. #200
 No. 331.0088 Boise, ID 83702

US Mail Wm. F. Gigray, III
 Overnight Mail Julie Klein Fischer
 Hand Delivery WHITE PETERSON
 Facsimile 5700 East Franklin Road, Suite 200
 No. 466.4405 Nampa, ID 83687

DATED this 7 day of May, 2004.


Clerk

Z:\Work\O\Obendorf, Greg\w. Terra Hug 18798\Pleadings\Non Discovery\pfd judgment Simplot 05-24-04 wy.doc

Special

Pursuant to I.R.C.P. Rule 58 (a) upon a ~~general~~ verdict of a jury providing for the recovery of a sum certain in favor of the Plaintiffs Greg Obendorf and Boyd Gray against defendant Terra Hug Spray Company, Inc.

IT IS HEREBY ORDERED ADJUDGED AND DECREED, AS FOLLOWS:

1. That Plaintiffs Greg Obendorf and Boyd Gray shall have and recover judgment against the defendant Terra Hug Spray Company, Inc., in the amount of Three hundred sixty-five thousand, three hundred and eight-five dollars and ninety cents, (\$365,385.90).

DATED this 2 day of ^{*June*} May, 2004.



Gregory M. Culet
Third District Judge

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a true and correct copy of the foregoing instrument was served upon the following by the method indicated:

US Mail
Overnight Mail
Hand Delivery
Facsimile
No. 389.7464

P. Mark Thompson
Attorney at Law
999 Main St., Ste. #1300
P.O. Box 27
Boise, ID 83707

US Mail
Overnight Mail
Hand Delivery
Facsimile
No. 345.7212

David Cantrill
CANTRILL, SKINNER, SULLIVAN & KING, LLP
1423 Tyrell Lane
P.O. Box 359
Boise, ID 83701

US Mail
Overnight Mail
Hand Delivery
Facsimile
No. 331.0088

James B. Lynch
Katherine M. Lynch
LYNCH & ASSOCIATES, PLLC
1412 W. Idaho Street, Ste. #200
Boise, ID 83702

US Mail
Overnight Mail
Hand Delivery
Facsimile
No. 466.4405

Wm. F. Gigray, III
Julie Klein Fischer
WHITE PETERSON
5700 East Franklin Road, Suite 200
Nampa, ID 83687

DATED this 7 day of May, 2004.

Clerk

ORIGINAL

FILED
A.M. *JS* P.M.

JUN 16 2004

CANYON COUNTY CLERK
C. SALINAS, DEPUTY

P. Mark Thompson
ISB #1945
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Telephone: (208) 344-8035
Facsimile: (208) 345-7212

Attorneys for Defendant J.R. Simplot Company, dba
Simplot Soilbuilders

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

GREG OBENDORF and BOYD GRAY,)
)
Plaintiffs,)
)
vs.)
)
TERRA HUG SPRAY COMPANY, INC.,)
an Idaho corporation, and J.R. SIMPLOT)
COMPANY, a Nevada corporation, dba)
SIMPLOT SOILBUILDERS,)
)
Defendants.)
)

Case No. CV 02-2584

**DEFENDANT SIMPLOT'S
MOTION FOR JUDGMENT
NOTWITHSTANDING THE
VERDICT, AND IN THE ALTERNATIVE,
MOTION FOR NEW TRIAL,
AND IN THE ALTERNATIVE,
MOTION FOR REMITTITUR**

COMES NOW Defendant J.R. Simplot Company, by and through its attorneys of record,

DEFENDANT SIMPLOT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, AND IN THE ALTERNATIVE, MOTION FOR NEW TRIAL, AND IN THE ALTERNATIVE, MOTION FOR REMITTITUR

Cantrill, Skinner, Sullivan & King, LLP, and hereby moves this Court for judgment notwithstanding the verdict pursuant to Idaho Rule of Civil Procedure Rule 50(b).

In the alternative, Defendant Simplot hereby moves the Court for a new trial pursuant to Idaho Rule of Civil Procedure Rule 59(a)(4), Rule 59(a)(7), Rule 59(a)(6), and Rule 59(a)(5).

In the alternative, Defendant Simplot moves the Court for a Remittitur pursuant to Idaho Rule of Civil Procedure Rule 59(a).

This Motion is based upon the record before the Court, the testimony at trial, the Affidavit of David W. Cantrill submitted concurrently herewith, and the Memorandum in Support of Defendant Simplot's Motions submitted herewith.

The Movant desires to present oral argument pursuant to Rule 7(b)(3).

DATED This 16th day of June, 2004.

CANTRILL, SKINNER, SULLIVAN & KING LLP

By: 

Robert D. Lewis, Of the Firm
Attorneys for Defendant J.R. Simplot Company, dba
Simplot Soilbuilders

DEFENDANT SIMPLOT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, AND IN THE ALTERNATIVE, MOTION FOR NEW TRIAL, AND IN THE ALTERNATIVE, MOTION FOR REMITTITUR

- 2

000044

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of June, 2004, I served a true and correct copy of the above and foregoing instrument, by method indicated below, upon:

Wm. F. Gigray, III	<input type="checkbox"/>	Facsimile
T. Guy Hallam, Jr.	<input type="checkbox"/>	Hand Delivery
White Peterson	<input checked="" type="checkbox"/>	U.S. Mail
5700 E. Franklin Rd., Ste. 200		
Nampa, ID 83687-8402		

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Lynch & Associates, PLLC	<input checked="" type="checkbox"/>	U.S. Mail
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P.O. Box 739		
Boise, ID 83701		

P. Mark Thompson	<input type="checkbox"/>	Facsimile
Attorney at Law	<input type="checkbox"/>	Hand Delivery
P.O. Box 27	<input checked="" type="checkbox"/>	U.S. Mail
Boise, ID 83707-0027		



Robert D. Lewis

DEFENDANT SIMPLOT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, AND IN THE ALTERNATIVE, MOTION FOR NEW TRIAL, AND IN THE ALTERNATIVE, MOTION FOR REMITTITUR

F I L E D
A.M. *2:15* P.M.

JUN 16 2004

**CANYON COUNTY CLERK
C. SALINAS, DEPUTY**

ORIGINAL

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Attorneys for Defendant J.R. Simplot Company, dba
Simplot Soilbuilders

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

GREG OBENDORF and BOYD GRAY,)
)
 Plaintiffs,)
)
 vs.)
)
 TERRA HUG SPRAY COMPANY, INC.,)
 an Idaho corporation, and J.R. SIMPLOT)
 COMPANY, a Nevada corporation, dba)
 SIMPLOT SOILBUILDERS,)
)
 Defendants.)
)

Case No. CV 02-2584

**AFFIDAVIT OF DAVID W.
CANTRILL IN SUPPORT OF
DEFENDANT'S MOTION FOR NEW
TRIAL UNDER I.R.C.P. 59(a)(4)**

STATE OF IDAHO)
) ss.
County of Ada)

David W. Cantrill, being first duly sworn upon oath, deposes and says:


1. That he is one of the attorneys of record for Defendant J.R. Simplot Company, and has personal knowledge of the facts set forth in this affidavit.
2. Seneca Food Corporation (hereinafter Seneca Foods) is a contract manufacturer of asparagus for General Mills. Seneca Foods is the owner of the asparagus processing plant located in Dayton, Washington.
3. Attached hereto as Exhibit 1 a newspaper article written for the Yakima Herald dated June 4, 2004. The article indicates that before June 4, the Washington Asparagus Commission was aware that General Mills was in Peru soliciting bids from asparagus canneries.
4. Exhibit 1 also indicates that since 2001, Seneca Foods had been lobbying the state legislature for relief from the minimum wages laws in the State of Washington and had made it clear to the state Senator from its region that if it did not get relief from the State's minimum wages laws that it would lose the asparagus industry in Washington.
5. On June 2, 2004, Seneca Food informed workers, growers and lawmakers that 2005 will be the last year it cans asparagus at its Dayton, Washington facility.
6. According to Exhibit 1, the decision to close the Dayton, Washington facility came from food industry conglomerate General Mills Inc.'s decision to fill its need for asparagus in some place other than Washington.
7. Additionally, Exhibit 1 indicates that General Mills will not confirm its plans to get its asparagus from Peru due to "competitive reasons."
8. I became aware of this article on June 7, 2004.
9. For the same "competitive reasons" cited in the article, I could not have produced evidence at trial of the fact that General Mills was in Peru soliciting bids from

asparagus canneries and the effect of General Mills' decision to fill its asparagus needs elsewhere.

10. If I had been able to provide this information to the jury it would have had a profound impact on the verdict and would have ultimately changed the result of the trial.
11. Plaintiffs' testified that if they had not plowed under their asparagus crop, it was their intent to truck the asparagus from Idaho to Seneca's processing plant in Dayton, Washington because Seneca Food's asparagus processing station had been closed in Parma, Idaho.
12. This newly discovered evidence is direct evidence that Plaintiffs plowed their asparagus fields under for economic reasons rather than the alleged chemical damage to the crop.
13. Further, the foundation of Plaintiff's damage estimates are based upon the facts that Plaintiff's asparagus crop had a 16 year life, and the contract price Seneca Food would have paid for Plaintiff's asparagus had it been delivered to Seneca Food's asparagus canning plant in Dayton, Washington.
14. Had this newly discovered evidence been presented to the jury it would have also had a profound impact on the issue of damages. The future damages would have terminated with the 2005 closure of the Dayton processing plant.
15. This newly discovered evidence is material to the issues in this cases.
16. This newly discovered evidence is not merely "cumulative or impeaching" since there wasn't any testimony at trial regarding the actions of General Mills or the direct relationship between General Mills and Seneca Foods.
17. I respectfully request that the Court grant a new trial in light of this newly discovered evidence.

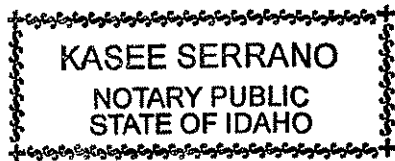
FURTHER, your Affiant saith not.


Dated this 16th day of June, 2004.



David W. Cantrill

SUBSCRIBED AND SWORN to before me this 16th day of June, 2004.





NOTARY PUBLIC FOR IDAHO
Residing at Base, Idaho
My commission expires: 10/28/09

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of June, 2004, I served a true and correct copy of the above and foregoing instrument, by method indicated below, upon:

Wm. F. Gigray, III	<input type="checkbox"/>	Facsimile
T. Guy Hallam, Jr.	<input type="checkbox"/>	Hand Delivery
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5700 E. Franklin Rd., Ste. 200		
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Boise, ID 83701		

P. Mark Thompson	<input type="checkbox"/>	Facsimile
Attorney at Law	<input type="checkbox"/>	Hand Delivery
P.O. Box 27	<input checked="" type="checkbox"/>	U.S. Mail
Boise, ID 83707-0027		



David W. Cantrill

Exhibit "1"

 THIS STORY HAS BEEN FORMATTED FOR EASY PRINTING

The article you requested is displayed below. [Search again]

State Losing Asparagus Canning Industry

Author(s): Benjamin J. Romano Date: June 4, 2004 Page: Section: Main/Home Front

By BENJAMIN ROMANO YAKIMA HERALD-REPUBLIC

Washington's last and biggest asparagus canning plant will close next year, taking half of the state's market with it and eliminating potentially thousands of seasonal jobs in the Columbia Basin and Yakima Valley.

"This is definitely a major, major blow to the industry," said Kevin Bouchey, an asparagus grower southwest of Toppenish and chairman of the Washington Asparagus Commission.

Seneca Foods Corp., owner of the plant in Dayton, Columbia County, told workers, growers and lawmakers Wednesday that 2005 will be the last year it cans asparagus there.

The decision came from food industry conglomerate General Mills Inc., for which **Seneca** is a contract manufacturer.

"We knew that General Mills had been down to Peru and had been getting bids" from canneries there, said Alan Schreiber, Asparagus Commission executive director.

Peruvian asparagus can be imported duty-free to the United States as part of a 13-year-old federal program meant to discourage narcotics production in South American countries by giving growers incentives to grow legal crops.

"It's because of the Andean Trade Preferences Act," he said. "We prop up their industry."

Also, labor costs in Peru are a fraction of what growers pay in Washington, which has the highest minimum wage in the country.

As a result, the 100-year-old Washington asparagus industry has watched its share of the both fresh and processed market steadily erode.

Spokeswoman Marybeth Thorsgaard would not confirm that General Mills plans to get its asparagus from Peru, citing competitive reasons.

The company, which sells canned asparagus under its Green Giant label, is ending the

Dayton operation as part of ongoing efforts to remain competitive and create value for its shareholders, she said.

"We continually evaluate our operations and work toward having the most efficient supply chain possible, and this includes sourcing, manufacturing and distribution," Thorsgaard said.

The Minneapolis-based company had a net income of \$917 million in 2003 on sales in excess of \$10.5 billion.

The Seneca plant is the third and final Washington asparagus cannery to fall in the last year. In July, the Del Monte plant in Toppenish announced an end to asparagus processing, as did the Seneca plant in Walla Walla, which had recently been acquired from Chiquita Processed Foods.

Those shutdowns, blamed on labor costs here and "beneficial economics" of buying and canning asparagus in Peru, erased the market for about 6.5 million pounds of Washington asparagus.

The impact of the Dayton closure will be much greater.

In a county of 4,103 people, as many as 1,000 workers process 28 million pounds of asparagus at the Seneca plant in a 70-day sprint each spring.

It has been there since 1934 and is the largest private employer in southeast Washington.

Growers sell about half of all asparagus grown in Washington - some \$15 million worth - to the Dayton plant, said the Asparagus Commission's Schreiber.

By his calculations, more than half of grower earnings are paid to workers harvesting the labor-intensive crop.

During the 2002 harvest, the asparagus industry employed an average of 3,884 people a month, with a peak of 6,616 workers in May, according to Washington Employment Security. Only the cherry and apple harvests employ more workers.

The high cost of labor is as much to blame for the decline of the industry as the Andean Trade Preferences Act, said state Sen. Mike Hewitt, R-Walla Walla.

"Seneca has made it clear to me since 2001," he said, "that if they did not get relief from the minimum wage in the state, we would probably lose the industry here."

Bills that would reverse voter-approved automatic minimum wage increases have been passed by the House each of the last two years, he said, only to go nowhere in the Senate.

Another Legislative effort this year directed \$3.8 million in state money toward automating the industry. That includes \$2 million to buy land at the Port of Walla Walla for a distribution center to serve the Seneca plant there, which does not process asparagus.

Growers who sell to the Dayton plant will have precious few markets for their crop when the plant closes in 2005, Schreiber said.

The fresh market is already glutted by asparagus from California, Peru and Washington growers who once sent their product to the Del Monte and Chiquita canneries.

"It's inconceivable that the fresh market can absorb all the **Seneca** canned acres," Bouchey said.

If it does hit the fresh market, prices will likely be depressed even further.

Another option is to plow under more acres of asparagus, as the industry has done for the last several years, to make room for a new crop.

But that will surely cost **Seneca** growers who were encouraged by the company to plant more acreage about four years ago, Schreiber said. The perennial crop has to be in the ground for several years before growers can recoup their investment in planting it.

"The youngest asparagus in the state is held by **Seneca** growers," he said. "That's the stuff you can't afford to plow out without losing a tremendous amount of money."

The Asparagus Commission has planned a meeting Monday to discuss the future of the industry and explore possible alternative markets.

Mabton-area grower Jon Nishi, formerly a Del Monte grower who now sells his crop on the fresh market, was able to find some semblance of a silver lining in this week's announcement.

"They did it nice and early so you can sure plan for it," Nishi said. "If you don't want to be in the asparagus business, you've got time now to weigh your choices."

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Finally, defendant Terra Hug moves this Court alternatively for Remittitur under I.R.C.P. 59.1.


This Motion is based upon the record before the Court, the testimony offered at trial, and the Memorandum submitted herewith.

This Movant desires oral argument pursuant to Rule 7(b)(3).

DATED this 2nd day of June, 2004.

LYNCH & ASSOCIATES, PLLC

By


KATHERINE M. LYNCH - Of the Firm
Attorneys for Defendant Terra Hug Spray
Company, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of June, 2004, I served a true and correct copy of the foregoing DEFENDANT TERRA HUG SPRAY COMPANY, INC.'S MOTION FOR A JUDGMENT NOTWITHSTANDING THE VERDICT PURSUANT TO I.R.C.P. 50(b), AND IN THE ALTERNATIVE MOTIONS FOR A NEW TRIAL AND/OR REMITTITUR by the method and to the addresses indicated below:

William F. Gigray, III
WHITE PETERSON
5700 E. Franklin Rd. Suite 200
Nampa, Idaho 83687-8402

U.S. Mail, Postage Prepaid
 Priority Mail
 Hand Delivery
 Facsimile
(208) 466-4405

Tony Cantrill
CANTRILL, SKINNER, SULLIVAN
& KING LLP
1423 Tyrell Lane
P.O. Box 359
Boise, Idaho 83701

U.S. Mail, Postage Prepaid
 Priority Mail
 Hand Delivery
 Facsimile
(208) 345-7212


Katherine M. Lynch

Defendants having raised an objection to the giving of Plaintiffs' requested instruction No. 27, a negligence *per se* instruction on of the basis that no such claim was specifically included in the Plaintiffs' Complaint; and

In response, Plaintiffs orally moved by interlineation pursuant to Idaho Rule of Civil Procedure 15(b) to amend their Complaint to include a claim against defendant Simplot for Negligence *per se* that the recommendation and/or the use of the Herbicides upon the Plaintiffs' asparagus fields was in a manner inconsistent with the labeling of said Herbicides and in violation of I.C. § 22-3420 (1) and (2) and the claim against defendant Terra Hug for Negligence *per se* that the application of the Herbicides upon the Plaintiffs' asparagus fields was in a manner which was inconsistent with the labeling of said Herbicides and in violation of I.C. § 22-3420 (8); and

The Court having heard oral argument on the matter made the following findings:

1. There was evidence produced by Plaintiffs at the trial regarding the recommendation, use and the application of the Herbicides on the Plaintiffs' fields was not consistent with the labeling of said Herbicides and there was adequate opportunity for the defendants to present evidence in response; and

2. It is found there was no undue prejudice or hardship to the Defendants; and

3. The presentation of the merits of the action will be subserved thereby.

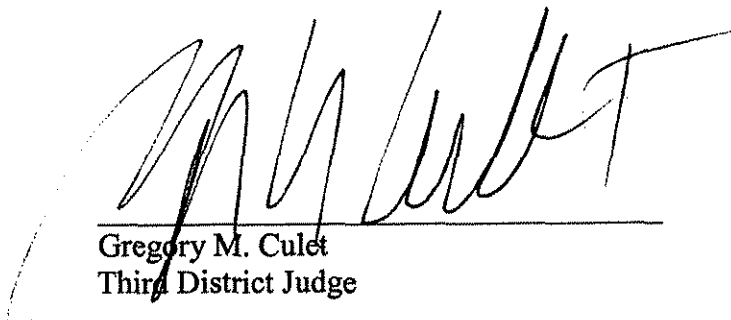
The Plaintiff having submitted and attached to this Order as Exhibit "A" an Amended Complaint and Demand for Jury Trial, which includes as the Fourth Claim for Relief— Negligence *per se* against said Defendants is found to be in accordance with the Plaintiffs' oral motion to amend their complaint above referenced.

IT WAS THEREFORE ORDERED AND THIS DOES ORDER NUNC PRO TUNC

THAT:

Plaintiffs' are granted leave to file their Amended Complaint and Demand for Jury Trial Exhibit "A" attached hereto.

DATED this 30 day of ^{June} July, 2004.



Gregory M. Culet
Third District Judge

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a true and correct copy of the foregoing instrument was served upon the following by the method indicated:

<u> X </u>	US Mail	P. Mark Thompson
_____	Overnight Mail	Attorney at Law
_____	Hand Delivery	999 Main St., Ste. #1300
_____	Facsimile	P.O. Box 27
_____	No. 389.7464	Boise, ID 83707
<u> X </u>	US Mail	David Cantrill
_____	Overnight Mail	CANTRILL, SKINNER, SULLIVAN & KING, LLP
_____	Hand Delivery	1423 Tyrell Lane
_____	Facsimile	P.O. Box 359
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<u> X </u>	US Mail	James B. Lynch
_____	Overnight Mail	Katherine M. Lynch
_____	Hand Delivery	LYNCH & ASSOCIATES, PLLC
_____	Facsimile	1412 W. Idaho Street, Ste. #200
_____	No. 331.0088	Boise, ID 83702
<u> X </u>	US Mail	Wm. F. Gigray, III
_____	Overnight Mail	Julie Klein Fischer
_____	Hand Delivery	WHITE PETERSON
_____	Facsimile	5700 East Franklin Road, Suite 200
_____	No. 466.4405	Nampa, ID 83687

DATED this 30 day of July, 2004.

Clerk *A. Ortega*

Z:\Work\O\Obendorf, Greg\ v. Terra Hug 18798\Pleadings\Non Discovery\pld ord amend complaint 06-28-04 wy.doc

**WRITTEN ORDER RE: ORAL ORDER IN OPEN
COURT *NUNC PRO TUNC* GRANTING PLAINTIFFS'
MOTION TO AMEND PLEADINGS TO CONFORM TO THE EVIDENCE**

Page 4 of 4

000057D

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Julie Klein Fischer, ISB #4601
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jkf@whitepeterson.com

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

_____)	
GREG OBENDORF and BOYD GRAY,)	CASE NO. CV02-2584
)	
Plaintiffs,)	
)	
-vs-)	AMENDED COMPLAINT AND
)	DEMAND FOR JURY TRIAL
)	
TERRA HUG SPRAY COMPANY, INC., an)	
Idaho corporation, and J.R. SIMPLOT)	
COMPANY, a Nevada corporation, dba)	
SIMPLOT SOILBUILDERS,)	
)	
Defendants.)	
_____)	

COMES NOW, Greg Obendorf and Boyd Gray, by and through their attorneys of record, of
the law firm of White Peterson, P.A., and hereby COMPLAIN AND ALLEGE as follows:

EXHIBIT A

JURISDICTION, VENUE, AND PARTIES

1.

Plaintiff, Greg Obendorf, is and at all times relevant herein was, a resident of Canyon County, State of Idaho.

2.

Plaintiff, Boyd Gray, is now and at all times material to this action has been, a resident of Franklin County, State of Washington.

3.

Terra Hug Spray Company, Inc. (herein after referred to as "Terra Hug"), is a corporation organized under the law of the State of Idaho with its principal place of business in Canyon County, Idaho.

4.

J.R. Simplot Company (herein after referred to as "Simplot"), is a corporation organized and existing under the laws of the State of Nevada, doing business in Idaho as a foreign corporation, and doing business under the name and style of Simplot Soilbuilders, with facilities in the City of Wilder, Canyon County, Idaho.

5.

Terra Hug is, and at all times relevant to this action was, engaged in the business of transporting, delivering, mixing, and applying chemical products used for prevention and control of agricultural pests and weeds.

6.

Simplot is, and at all times relevant to this action was, engaged in the business of consulting with agricultural enterprises related to chemical products used for the prevention and control of agricultural pests and weeds, and offered chemical products for sale, transport, and delivery.

7.

This Court has jurisdiction over this matter pursuant to Idaho Code § 1-705.

8.

Venue is proper in Canyon County, Idaho, because the Defendant Terra Hug resided and had its principal place of business in that county at the commencement of this action pursuant to the provisions of Idaho Code § 5-404. Further, Simplot sold and delivered chemical products from its Wilder, Canyon County, Idaho, facility to Plaintiffs agricultural property, which is also located in Canyon County, and Terra Hug mixed and applied chemical products to Plaintiffs agricultural property.

FACTUAL ALLEGATIONS

9.

In 1998, Greg Obendorf and Boyd Gray (hereinafter collectively referred to as the "Plaintiffs") entered into a partnership to grow asparagus in various fields near Wilder, Idaho, in Canyon County.

10.

Asparagus is a perennial crop, which has stands with a productive life of approximately eighteen (18) years.

11.

In preparation for planting the asparagus crop, Plaintiffs secured a lease agreement with the L.A. and Mae Adams Trust to lease certain parcels of land for a term of 15 years.

12.

Greg Obendorf also secured a land lease agreement with Ray Obendorf to plant certain fields in asparagus and rent the fields for a term of 15 years.

13.

Boyd Gray grew the asparagus crowns in Washington State and then shipped the crowns to Greg Obendorf who oversaw the timely planting of the crowns in the fields during the crop year 1998.

14.

Plaintiffs timely planted one hundred sixty-two (162) acres of asparagus in crop year 1998.

15.

Plaintiffs were successful in raising a good stand of asparagus on the 162 acres and cultivated it with due diligence and according to the best rules of farming practice.

16.

In 1999, the second year of the asparagus crop, representatives of Seneca Foods Corporation ("Seneca") recommended that Plaintiffs begin harvesting the asparagus because of the high quality and excellent health of the crop.

17.

In 1999, Seneca and Plaintiffs entered into a contract under which Seneca agreed to purchase all asparagus grown by Plaintiffs.

18.

During 1999, Plaintiffs met with the field representative for Simplot regarding necessary herbicide applications to the subject fields in order to remove and control weeds. Based upon the recommendations of the field representative of Simplot, the Plaintiffs purchased herbicides including Divron (Karmex), Sinbar (Terbacil), and Metribuzin (Sencor) (hereinafter collectively referred to as the "Herbicides").

19.

Simplot subsequently delivered the Herbicides to Plaintiffs' fields and engaged Terra Hug to be the mixer, driver, and applicator of the Herbicides.

20.

In approximately May or June 1999, Terra Hug misapplied the Herbicides to the asparagus fields of Plaintiffs, failing to mix, handle, or apply the Herbicides within the generally accepted practice for removal and control of weeds.

21.

The Plaintiffs' asparagus fields had been in excellent health prior to the misapplication of the Herbicides by Terra Hug.

22.

Shortly after Terra Hug had applied the Herbicides to the asparagus crop fields, the asparagus plants showed signs of severe and irreversible damage and malformation.

FIRST CLAIM FOR RELIEF

Breach of Contract against Simplot and Terra Hug Spray Co.

23.

Plaintiffs reallege paragraphs 1 through 22 and incorporate the same herein by this reference.

24.

Simplot recommended the Herbicides to Plaintiffs and agreed to deliver the Herbicides and contract with an agent to mix and apply the Herbicides to Plaintiffs' asparagus fields and oversee and supervise the application of the Herbicides.

25.

Simplot engaged Terra Hug as its agent to mix and apply the Herbicides to Plaintiffs' asparagus fields.

26.

Terra Hug promised to mix the recommended the Herbicides and apply the Herbicides to Plaintiffs' asparagus fields, as requested by Plaintiffs.

27.

Terra Hug failed to properly mix and apply the Herbicides to Plaintiffs' asparagus fields as required pursuant to the agreement between the parties.

28.

As a result of Terra Hug's failure to properly mix and apply the Herbicides, Plaintiffs have suffered extensive crop loss damages and have been required to pay costs and attorney fees.

29.

Because of Terra Hug's failure to properly mix and apply the Herbicides pursuant to the agreement between the parties, Plaintiffs are entitled to judgment against Terra Hug for damages resulting from this breach of contract, along with accruing costs and attorney fees.

30.

Because of Simplot's recommendation of the Herbicides, and failure to oversee and supervise the mixing and application of the Herbicides, and the failure of Simplot's agent, Terra Hug, to properly mix and apply the Herbicides, pursuant to the agreement between the parties, Plaintiffs are entitled to judgment against Simplot for damages resulting from this breach of contract, along with accruing costs and attorney fees.

SECOND CLAIM FOR RELIEF

Negligence against Simplot and Terra Hug Spray Co.

31.

Plaintiffs reallege paragraphs 1 through 30 and incorporate the same herein by this reference.

32.

Simplot recommended the Herbicides for application to Plaintiffs' asparagus fields and negligently failed to supervise its agent, Terra Hug, during the mixing and application of the Herbicides to Plaintiffs' asparagus fields.

33.

Terra Hug recklessly and negligently mixed, applied, or attempted to apply the Herbicides to Plaintiffs' asparagus fields. The Herbicides were indiscriminately mixed, applied, and released by Terra Hug in such amounts as to cause damage to Plaintiffs' asparagus crop and fields.

34.

Terra Hug knew or should have known that the reckless, negligent and indiscriminate mixing, application and release of the Herbicides would cause damage to Plaintiffs' growing asparagus crop and fields.

35.

Simplot knew or should have known that the reckless, negligent and indiscriminate mixing, application and release of the Herbicides would cause damage to Plaintiffs' growing asparagus crop and fields.

36.

As a direct and proximate result of the reckless and negligent acts and conduct of Terra Hug, Plaintiffs' asparagus crop and fields were damaged.

37.

As a direct and proximate result of the reckless and negligent acts and conduct of Simplot, Plaintiffs' asparagus crop and fields were damaged.

38.

Terra Hug acted in a reckless and negligent manner causing damage to Plaintiffs' asparagus crop, and Plaintiffs are entitled to judgment against Terra Hug for damages resulting from this negligence, in an amount to be proven at trial, greater than \$25,000.00, along with accruing costs and attorney fees.

39.

Simplot acted in a reckless and negligent manner causing damage to Plaintiffs' asparagus crop, and Plaintiffs are entitled to judgment against Simplot for damages resulting from this

negligence, in an amount to be proven at trial, greater than \$25,000.00, along with accruing costs and attorney fees.

40.

Simplot and Terra Hug recklessly and negligently acted in concert, pursuing a common plan or design which resulted in the commission of the reckless, negligent and indiscriminate mixing, application and release of the Herbicides, which damaged Plaintiffs' asparagus crop and fields.

THIRD CLAIM FOR RELIEF

Breach of Implied/Express Warranty against Simplot

41.

Plaintiffs reallege paragraphs 1 through 40 and incorporate the same herein by this reference.

42.

At the time of the agreement between Simplot and the Plaintiffs, Plaintiffs informed representative of Simplot as to the particular purpose for which the Herbicides were required, to prevent and control agricultural pests and weeds in Plaintiffs' asparagus crop and fields.

43.

Simplot recommended use and application of the Herbicides to prevent and control agricultural pests and weeds in Plaintiffs' asparagus crop and fields.

44.

Plaintiffs reasonably relied upon Simplot's recommendations and Simplot's skill and judgment in selecting and furnishing the Herbicides.

45.

Simplot recommended and engaged Terra Hug to be the mixer, driver, and applicator of the Herbicides to Plaintiffs' asparagus crop and fields.

46.

Plaintiffs reasonably relied upon Simplot's recommendation and Simplot's skill and judgment in selecting and engaging Terra Hug to mix, drive, and apply the Herbicides to Plaintiffs' asparagus crop and fields.

47.

As a result of the failure of the Herbicides to be fit for the purpose represented by Simplot, Simplot breached its express and implied warranties.

48.

As a result of the failure of Terra Hug to properly mix, drive and apply the Herbicides to Plaintiffs' asparagus crop and fields as represented by Simplot, Simplot breached its express and implied warranties.

49.

As a direct and proximate result of Simplot's breach of its implied and express warranties, Plaintiffs have suffered damage in an amount to be proven at trial, along with accruing costs and attorney fees.

FOURTH CLAIM FOR RELIEF

Negligence *per se* against Simplot and Terra Hug

50.

Plaintiffs reallege paragraphs 1 through 49 and incorporate the same herein by this reference.

51.

Defendant Simplot was guilty of negligence *per se* in that the recommendation and/or use of the Herbicides upon the Plaintiffs' asparagus crop and fields was in a manner inconsistent with its labeling and violated Idaho Code Section 22-3420 (1) and (2).

52.

Defendant Terra Hug was guilty of negligence per se in that the application of the Herbicides upon the Plaintiffs' asparagus crop and fields was in a manner inconsistent with its labeling and violated Idaho Code Section 22-3420 (8).

53.

As a direct and proximate result of Simplot's violation of Idaho Code § 22-3420 (1) and (2), Plaintiffs suffered damages in an amount in excess of \$25,000.00 to be proven at trial.

54.

As a direct and proximate result of Terra Hug's violation of Idaho Code § 22-3420 (8), Plaintiffs suffered damages in an amount in excess of \$25,000.00 to be proven at trial

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for the following relief:

1. That the Court declare Plaintiffs are entitled to a judgment against Terra Hug and Simplot for damages resulting from this breach of contract, along with costs and attorney fees;
 2. That the Court declare Plaintiffs are entitled to a judgment against Terra Hug and Simplot for damages resulting from Terra Hug's negligence, along with costs and attorney fees;
 3. For the sum of \$4,000.00 as and for attorney fees necessitated in this action if the matter is uncontested, or a reasonable sum as set by the Court if the matter is contested;
 4. For costs of suit incurred herein; and
 5. For such other and further relief as the Court may deem proper
- in the premises.

DATED this ____ day of June, 2004.

WHITE PETERSON

By:

Wm. F. Gigray, III, of the firm
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a true and correct copy of the foregoing instrument was served upon the following by the method indicated:

No. 389-7464

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James B. Lynch
Katherine M. Lynch
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Boise, ID 83702

DATED this ____ day of June, 2004.

for WHITE PETERSON

F I L E D
A.M. 4:50 P.M.
JUL - 2 2004
CANYON COUNTY CLERK
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7/26
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Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

GREG OBENDORF and BOYD GRAY,

Plaintiffs,

-vs-

TERRA HUG SPRAY COMPANY, INC., an
Idaho corporation, and J.R. SIMPLOT
COMPANY, a Nevada corporation, dba
SIMPLOT SOILBUILDERS,

Defendants.

CASE NO. CV02-2584

**AMENDED COMPLAINT AND
DEMAND FOR JURY TRIAL**

COMES NOW, Greg Obendorf and Boyd Gray, by and through their attorneys of record, of
the law firm of White Peterson, P.A., and hereby COMPLAIN AND ALLEGE as follows:

ORIGINAL

JURISDICTION, VENUE, AND PARTIES

1.

Plaintiff, Greg Obendorf, is and at all times relevant herein was, a resident of Canyon County, State of Idaho.

2.

Plaintiff, Boyd Gray, is now and at all times material to this action has been, a resident of Franklin County, State of Washington.

3.

Terra Hug Spray Company, Inc. (herein after referred to as "Terra Hug"), is a corporation organized under the law of the State of Idaho with its principal place of business in Canyon County, Idaho.

4.

J.R. Simplot Company (herein after referred to as "Simplot"), is a corporation organized and existing under the laws of the State of Nevada, doing business in Idaho as a foreign corporation, and doing business under the name and style of Simplot Soilbuilders, with facilities in the City of Wilder, Canyon County, Idaho.

5.

Terra Hug is, and at all times relevant to this action was, engaged in the business of transporting, delivering, mixing, and applying chemical products used for prevention and control of agricultural pests and weeds.

6.

Simplot is, and at all times relevant to this action was, engaged in the business of consulting with agricultural enterprises related to chemical products used for the prevention and control of agricultural pests and weeds, and offered chemical products for sale, transport, and delivery.

7.

This Court has jurisdiction over this matter pursuant to Idaho Code § 1-705.

8.

Venue is proper in Canyon County, Idaho, because the Defendant Terra Hug resided and had its principal place of business in that county at the commencement of this action pursuant to the provisions of Idaho Code § 5-404. Further, Simplot sold and delivered chemical products from its Wilder, Canyon County, Idaho, facility to Plaintiffs agricultural property, which is also located in Canyon County, and Terra Hug mixed and applied chemical products to Plaintiffs agricultural property.

FACTUAL ALLEGATIONS

9.

In 1998, Greg Obendorf and Boyd Gray (hereinafter collectively referred to as the "Plaintiffs") entered into a partnership to grow asparagus in various fields near Wilder, Idaho, in Canyon County.

10.

Asparagus is a perennial crop, which has stands with a productive life of approximately eighteen (18) years.

11.

In preparation for planting the asparagus crop, Plaintiffs secured a lease agreement with the L.A. and Mae Adams Trust to lease certain parcels of land for a term of 15 years.

12.

Greg Obendorf also secured a land lease agreement with Ray Obendorf to plant certain fields in asparagus and rent the fields for a term of 15 years.

13.

Boyd Gray grew the asparagus crowns in Washington State and then shipped the crowns to Greg Obendorf who oversaw the timely planting of the crowns in the fields during the crop year 1998.

14.

Plaintiffs timely planted one hundred sixty-two (162) acres of asparagus in crop year 1998.

15.

Plaintiffs were successful in raising a good stand of asparagus on the 162 acres and cultivated it with due diligence and according to the best rules of farming practice.

16.

In 1999, the second year of the asparagus crop, representatives of Seneca Foods Corporation ("Seneca") recommended that Plaintiffs begin harvesting the asparagus because of the high quality and excellent health of the crop.

17.

In 1999, Seneca and Plaintiffs entered into a contract under which Seneca agreed to purchase all asparagus grown by Plaintiffs.

18.

During 1999, Plaintiffs met with the field representative for Simplot regarding necessary herbicide applications to the subject fields in order to remove and control weeds. Based upon the recommendations of the field representative of Simplot, the Plaintiffs purchased herbicides including Divron (Karmex), Sinbar (Terbacil), and Metribuzin (Sencor) (hereinafter collectively referred to as the "Herbicides").

19.

Simplot subsequently delivered the Herbicides to Plaintiffs' fields and engaged Terra Hug to be the mixer, driver, and applicator of the Herbicides.

20.

In approximately May or June 1999, Terra Hug misapplied the Herbicides to the asparagus fields of Plaintiffs, failing to mix, handle, or apply the Herbicides within the generally accepted practice for removal and control of weeds.

21.

The Plaintiffs' asparagus fields had been in excellent health prior to the misapplication of the Herbicides by Terra Hug.

22.

Shortly after Terra Hug had applied the Herbicides to the asparagus crop fields, the asparagus plants showed signs of severe and irreversible damage and malformation.

FIRST CLAIM FOR RELIEF

Breach of Contract against Simplot and Terra Hug Spray Co.

23.

Plaintiffs reallege paragraphs 1 through 22 and incorporate the same herein by this reference.

24.

Simplot recommended the Herbicides to Plaintiffs and agreed to deliver the Herbicides and contract with an agent to mix and apply the Herbicides to Plaintiffs' asparagus fields and oversee and supervise the application of the Herbicides.

25.

Simplot engaged Terra Hug as its agent to mix and apply the Herbicides to Plaintiffs' asparagus fields.

26.

Terra Hug promised to mix the recommended the Herbicides and apply the Herbicides to Plaintiffs' asparagus fields, as requested by Plaintiffs.

27.

Terra Hug failed to properly mix and apply the Herbicides to Plaintiffs' asparagus fields as required pursuant to the agreement between the parties.

28.

As a result of Terra Hug's failure to properly mix and apply the Herbicides, Plaintiffs have suffered extensive crop loss damages and have been required to pay costs and attorney fees.

29.

Because of Terra Hug's failure to properly mix and apply the Herbicides pursuant to the agreement between the parties, Plaintiffs are entitled to judgment against Terra Hug for damages resulting from this breach of contract, along with accruing costs and attorney fees.

30.

Because of Simplot's recommendation of the Herbicides, and failure to oversee and supervise the mixing and application of the Herbicides, and the failure of Simplot's agent, Terra Hug, to properly mix and apply the Herbicides, pursuant to the agreement between the parties, Plaintiffs are entitled to judgment against Simplot for damages resulting from this breach of contract, along with accruing costs and attorney fees.

SECOND CLAIM FOR RELIEF

Negligence against Simplot and Terra Hug Spray Co.

31.

Plaintiffs reallege paragraphs 1 through 30 and incorporate the same herein by this reference.

32.

Simplot recommended the Herbicides for application to Plaintiffs' asparagus fields and negligently failed to supervise its agent, Terra Hug, during the mixing and application of the Herbicides to Plaintiffs' asparagus fields.

33.

Terra Hug recklessly and negligently mixed, applied, or attempted to apply the Herbicides to Plaintiffs' asparagus fields. The Herbicides were indiscriminately mixed, applied, and released by Terra Hug in such amounts as to cause damage to Plaintiffs' asparagus crop and fields.

34.

Terra Hug knew or should have known that the reckless, negligent and indiscriminate mixing, application and release of the Herbicides would cause damage to Plaintiffs' growing asparagus crop and fields.

35.

Simplot knew or should have known that the reckless, negligent and indiscriminate mixing, application and release of the Herbicides would cause damage to Plaintiffs' growing asparagus crop and fields.

36.

As a direct and proximate result of the reckless and negligent acts and conduct of Terra Hug, Plaintiffs' asparagus crop and fields were damaged.

37.

As a direct and proximate result of the reckless and negligent acts and conduct of Simplot, Plaintiffs' asparagus crop and fields were damaged.

38.

Terra Hug acted in a reckless and negligent manner causing damage to Plaintiffs' asparagus crop, and Plaintiffs are entitled to judgment against Terra Hug for damages resulting from this negligence, in an amount to be proven at trial, greater than \$25,000.00, along with accruing costs and attorney fees.

39.

Simplot acted in a reckless and negligent manner causing damage to Plaintiffs' asparagus crop, and Plaintiffs are entitled to judgment against Simplot for damages resulting from this

negligence, in an amount to be proven at trial, greater than \$25,000.00, along with accruing costs and attorney fees.

40.

Simplot and Terra Hug recklessly and negligently acted in concert, pursuing a common plan or design which resulted in the commission of the reckless, negligent and indiscriminate mixing, application and release of the Herbicides, which damaged Plaintiffs' asparagus crop and fields.

THIRD CLAIM FOR RELIEF

Breach of Implied/Express Warranty against Simplot

41.

Plaintiffs reallege paragraphs 1 through 40 and incorporate the same herein by this reference.

42.

At the time of the agreement between Simplot and the Plaintiffs, Plaintiffs informed representative of Simplot as to the particular purpose for which the Herbicides were required, to prevent and control agricultural pests and weeds in Plaintiffs' asparagus crop and fields.

43.

Simplot recommended use and application of the Herbicides to prevent and control agricultural pests and weeds in Plaintiffs' asparagus crop and fields.

44.

Plaintiffs reasonably relied upon Simplot's recommendations and Simplot's skill and judgment in selecting and furnishing the Herbicides.

45.

Simplot recommended and engaged Terra Hug to be the mixer, driver, and applicator of the Herbicides to Plaintiffs' asparagus crop and fields.

46.

Plaintiffs reasonably relied upon Simplot's recommendation and Simplot's skill and judgment in selecting and engaging Terra Hug to mix, drive, and apply the Herbicides to Plaintiffs' asparagus crop and fields.

47.

As a result of the failure of the Herbicides to be fit for the purpose represented by Simplot, Simplot breached its express and implied warranties.

48.

As a result of the failure of Terra Hug to properly mix, drive and apply the Herbicides to Plaintiffs' asparagus crop and fields as represented by Simplot, Simplot breached its express and implied warranties.

49.

As a direct and proximate result of Simplot's breach of its implied and express warranties, Plaintiffs have suffered damage in an amount to be proven at trial, along with accruing costs and attorney fees.

FOURTH CLAIM FOR RELIEF

Negligence *per se* against Simplot and Terra Hug

50.

Plaintiffs reallege paragraphs 1 through 49 and incorporate the same herein by this reference.

51.

Defendant Simplot was guilty of negligence *per se* in that the recommendation and/or use of the Herbicides upon the Plaintiffs' asparagus crop and fields was in a manner inconsistent with its labeling and violated Idaho Code Section 22-3420 (1) and (2).

52.

Defendant Terra Hug was guilty of negligence per se in that the application of the Herbicides upon the Plaintiffs' asparagus crop and fields was in a manner inconsistent with its labeling and violated Idaho Code Section 22-3420 (8).

53.

As a direct and proximate result of Simplot's violation of Idaho Code § 22-3420 (1) and (2), Plaintiffs suffered damages in an amount in excess of \$25,000.00 to be proven at trial.

54.

As a direct and proximate result of Terra Hug's violation of Idaho Code § 22-3420 (8), Plaintiffs suffered damages in an amount in excess of \$25,000.00 to be proven at trial

PRAYER FOR RELIEF

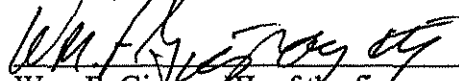
WHEREFORE, Plaintiffs pray for the following relief:

1. That the Court declare Plaintiffs are entitled to a judgment against Terra Hug and Simplot for damages resulting from this breach of contract, along with costs and attorney fees;
 2. That the Court declare Plaintiffs are entitled to a judgment against Terra Hug and Simplot for damages resulting from Terra Hug's negligence, along with costs and attorney fees;
 3. For the sum of \$4,000.00 as and for attorney fees necessitated in this action if the matter is uncontested, or a reasonable sum as set by the Court if the matter is contested;
 4. For costs of suit incurred herein; and
 5. For such other and further relief as the Court may deem proper
- in the premises.

DATED this 2 day of July, 2004.

WHITE PETERSON

By:


Wm. F. Gigray III, of the firm
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a true and correct copy of the foregoing instrument was served upon the following by the method indicated:

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No. 389-7464

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James B. Lynch
Katherine M. Lynch
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Boise, ID 83702

DATED this 2 day of July, 2004.


for WHITE PETERSON

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FILED
A.M. **5:17** P.M.
JUL - 6 2004
CANYON COUNTY CLERK
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Facsimile: (208) 345-7212

Attorneys for Defendant J.R. Simplot Company, dba
Simplot Soilbuilders

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

GREG OBENDORF and BOYD GRAY,)
)
Plaintiffs,)
)
vs.)
)
TERRA HUG SPRAY COMPANY, INC.,)
an Idaho corporation, and J.R. SIMPLOT)
COMPANY, a Nevada corporation, dba)
SIMPLOT SOILBUILDERS,)
)
Defendants.)
)
_____)

Case No. CV 02-2584

**SIMPLOT'S OBJECTION TO
PROPOSED *NUNC PRO TUNC*
ORDER ON PLAINTIFFS' MOTION
TO AMEND PLEADINGS**

COMES NOW J.R. Simplot Company, by and through their attorneys of record, Cantrill,

Skinner, Sullivan & King, LLP and hereby objects to the entry of the WRITTEN ORDER RE: ORAL ORDER IN OPEN COURT NUNC PRO TUNC GRANTING PLAINTIFFS' MOTION TO AMEND PLEADINGS TO CONFORM TO THE EVIDENCE.

Plaintiffs' proposed Order is inconsistent with the oral Motion made at trial, it sets forth a basis for granting the Order that was never articulated by Plaintiffs when the oral Motion was made, and it allows the filing of a cause of action for Negligence per se to which Defendant had no opportunity to present affirmative defense. Defendant objects.

The second full paragraph on page 2 of 4 of the proposed Order is inaccurate. Plaintiffs never articulated that only sub-parts (1) and (2) were being alleged against Simplot, with sub-part (8) being alleged against Terra Hug. At the time the Motion to Amend was made, the Jury Instructions before the Court, all sub-parts of the statute were allegedly violated by both Defendants, and no argument by Plaintiffs or ruling of this Court in trial was consistent with the terms of this Order as set forth in paragraph 2.

Furthermore, paragraph No. 1. on page 2 of 4 of the proposed Order does not accurately reflect the oral ruling made by this Court.

The ruling made verbally from the bench speaks for itself. Over objection, Plaintiffs were allowed to amend the Complaint for purposes of submitting their negligence per se instruction pursuant to that verbal ruling. As was the ruling, the amendment to the Complaint was verbal only. The proposed Order submitted by Plaintiffs is inaccurate. Its inaccuracy is prejudicial to Defendants and will serve to alter the true record that was made in open Court.

Furthermore, Defendant objects to the filing of the written Amended Complaint and Demand for Jury Trial, that incorporates the negligence per se allegations consistent with the defective proposed Order. This process for allowing nunc pro tunc filing of this pleading is prejudicial to Defendant and should not be allowed. The provisions of Section 22-3420 raise the possibility of an excuse by the language "except as provided by rule." Excuse is a valid affirmative defense to negligence per se claims. See, e.g., Stephens v. Stearns, 106 Idaho 249, 67-8 P.2d 41 (1989) (a UBC case). Defendant is prejudiced by the process because it never had notice before trial of the statutory claim, nor did it have opportunity to pursue the possibility of showing excuse of the alleged statutory violation.

Defendant objects to entry of this Order. In the event the Court enters this Order and allows this Amended Complaint to be filed, Defendant believes that this is further grounds for a New Trial.

Oral argument is requested pursuant to IRCP 7(b)(3).

DATED This 2 day of July, 2004.

CANTRILL, SKINNER, SULLIVAN & KING LLP

By: 

Robert D. Lewis, Of the Firm
Attorneys for Defendant J.R. Simplot Company, dba
Simplot Soilbuilders

CERTIFICATE OF SERVICE

I hereby certify that on the 2 day of July, 2004, I served a true and correct copy of the above and foregoing instrument, by method indicated below, upon:

Wm. F. Gigray, III
T. Guy Hallam, Jr.
White Peterson
5700 E. Franklin Rd., Ste. 200
Nampa, ID 83687-8402

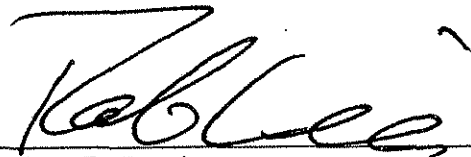
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Robert D. Lewis

✓
FILED
A.M. 10 P.M.
JUL 19 2004
CANYON COUNTY CLERK
E. P. GARCIA, DEPUTY

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Attorneys for Plaintiffs

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GREG OBENDORF and BOYD GRAY,

Plaintiffs,

-vs-

TERRA HUG SPRAY COMPANY, INC., an
Idaho corporation, and J.R. SIMPLOT
COMPANY, a Nevada corporation, dba
SIMPLOT SOILBUILDERS,

Defendants.

CASE NO. CV02-2584

**MOTION TO STRIKE
AFFIDAVIT OF DAVID W.
CANTRILL IN SUPPORT OF
DEFENDANT'S MOTION FOR
NEW TRIAL UNDER I.R.C.P.
59(a)(4) AND MEMORANDUM IN
SUPPORT**

MOTION

COME NOW, the above-named Plaintiffs, by and through their attorneys of record, the law firm of White Peterson, P.A., and hereby move this court for an order striking the Affidavit of David Cantrill in Support of Defendant's Motion for New Trial Under I.R.C.P. 59(a)(4). This

motion is based on I.R.E. 602 and 801 and I.R.C.P. 59(a)(4). Mr. Cantrill's affidavit is replete with inadmissible hearsay and there is insufficient foundation to demonstrate he has "personal knowledge" of the facts upon which he basis his averments. Plaintiffs' hereby state their objections to the Affidavit of David W. Cantrill in Support of Defendant J.R. Simplot Company's Motion for New Trial (hereinafter "Affidavit")

MEMORANDUM

In this matter, J.R. Simplot Company, dba Simplot Soilbuilders has moved the Court for, among other things, a new trial or amendment of the judgment rendered by the jury based on I.R.C.P. 59(a)(4)—newly discovered evidence. In support of Simplot's motion Mr. Cantrill has submitted an affidavit to the Court. Mr. Cantrill claims, in paragraph 1 of the affidavit to have "personal knowledge of the facts set forth in the affidavit." Mr. Cantrill, however, does not possess "personal knowledge"; instead he relies upon hearsay, in the form of a newspaper article, as the basis of many of his statements.

Indeed, the only statements contained in Mr. Cantrill's affidavit upon which he has personal knowledge are contained in the following paragraphs: Paragraph 1 in which Mr. Cantrill states he has personal knowledge of the statements within his affidavit; Paragraph 2 where Mr. Cantrill provides facts about Seneca Foods; ¶ 8 in which Mr. Cantrill states he became aware of a newspaper article on June 7, 2004; ¶ 11 where Mr. Cantrill states his recollection of the Plaintiffs' testimony in the two-week trial on this matter; and ¶ 13 where Mr. Cantrill states his recollection of the foundational basis for the Plaintiffs' damage estimates. As demonstrated below, only these averments are arguable properly contained in his affidavit; all other averments therein fail to satisfy even the most basic requirements of the Idaho Rules of Evidence.

First and foremost, Exhibit 1 to Mr. Cantrill's affidavit, a newspaper article purportedly from the Yakima-Herald website, is hearsay and should be stricken. Indeed, the only conceivable purpose for the newspaper article is an attempt to prove the truth of its contents. I.R.E. 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." Of course, hearsay is inadmissible unless it falls within certain particular exceptions, I.R.E. 802, none of which are applicable here.

Further, it is clear Exhibit 1 contains hearsay statements within it. For example, the exhibit purports to contain a quote allegedly made by one Alan Schreiber. This second layer of hearsay, likewise, must have an exception in order to be admissible. I.R.E. 805. Clearly, no exceptions are applicable to the "hearsay within hearsay" contained in Exhibit 1.

The lion's share of statements contained in Mr. Cantrill's affidavit are based on the hearsay contained in Exhibit 1. Such a basis for an individual's testimony is in direct contravention of the requirements of the Idaho Rules of Evidence. I.R.E. 602 provides, in relevant part: "*A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.*" (Emphasis added). Mr. Cantrill admits he has no personal knowledge of the facts underlying his statements when he states, for example, ¶ 3 of the affidavit states: "Exhibit 1 also indicates that since 2001, Seneca Foods had been lobbying the state [Washington] legislature." Clearly, Mr. Cantrill has no personal knowledge of such. ¶¶ 4, 5, 6, 7, and 9 likewise rely solely on the hearsay contents of Exhibit 1 and, thus, are likewise not based on the affiant's personal knowledge.

Further, an affidavit in support of a new trial must contain *facts*, not mere conjecture or opinion, and conclusory allegations. Such conjecture, improper opinion testimony, and

conclusory statements are contained in ¶ 10 (evidence would have had “a profound impact on the verdict”). Mr. Cantrill has no evidence of the impact any purported evidence would have on the jury which decided this matter in Plaintiffs’ favor. Paragraph 12 contains an assertion that the hearsay statements which are the entire basis for Mr. Cantrill’s affidavit are “direct evidence that Plaintiffs plowed their asparagus fields under for economic reasons.” There is no evidence of such, merely Mr. Cantrill’s opinion. Paragraphs 14, 15, and 16 are, likewise conclusory allegations and legal argument, not supportable facts.

Finally, ¶17 is not evidence at all, but a plea to the Court for action. Such is, of course, properly contained in a motion; it is not proper in an affidavit.

CONCLUSION

For the foregoing reasons, Plaintiffs request the Court strike the following portions of Mr. Cantrill’s affidavit:

1. Exhibit 1 – hearsay not within any exception in violation of I.R.E. 801, 802, and 805;
2. Paragraphs 3, 4, 5, 6, 7, and 9 – based on Exhibit 1 and, thus, the foundational requirements, mandating a witness testify based on “personal knowledge,” are neither satisfied nor capable of satisfaction;
3. Paragraphs 10, 12, 14, 15, 16 – averments which amount to nothing more than conjecture, improper opinion testimony, and conclusory statements;
4. Paragraph 17 – not a statement of fact.

DATED this 17th day of July, 2004.

WHITE PETERSON, P.A.

By:

Wm. F. Gigray, III
Wm. F. Gigray, III, of the Firm
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a true and correct copy of the foregoing instrument was served upon the following by the method indicated:

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James B. Lynch
Katherine M. Lynch
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Boise, ID 83702

DATED this 17th day of July, 2004.

Wm. F. Gigray, III
for WHITE PETERSON

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FILED
A.M. P.M.
JUL 21 2004
CANYON COUNTY CLERK
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Attorneys for Defendant J.R. Simplot Company, dba
Simplot Soilbuilders

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
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GREG OBENDORF and BOYD GRAY,)
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 TERRA HUG SPRAY COMPANY, INC.,)
 an Idaho corporation, and J.R. SIMPLOT)
 COMPANY, a Nevada corporation, dba)
 SIMPLOT SOILBUILDERS,)
)
 Defendants.)

Case No. CV 02-2584

J.R. SIMPLOT COMPANY'S
OPPOSITION TO PLAINTIFFS'
MOTION TO STRIKE AFFIDAVIT
OF DAVID W. CANTRILL

COMES NOW Defendant J.R. Simplot Company, by and through its attorneys of record,

J.R. SIMPLOT COMPANY'S OPPOSITION TO PLAINTIFFS' MOTION TO STRIKE AFFIDAVIT
OF DAVID W. CANTRILL - 1

Cantrill, Skinner, Sullivan & King, LLP, and hereby presents its objection to Plaintiffs' Motion to Strike Affidavit of David W. Cantrill.

IRCP Rule 7(b)(3) requires that Motions be filed no later than fourteen (14) days before the hearing on the Motion. This Motion to Strike was served on Defendants July 19, 2004. It came without a Notice of Hearing.

Defendant J.R. Simplot Company objects to this Court's consideration of the Motion to Strike the Affidavit of David W. Cantrill for any purpose at the Hearing on July 26, 2004, because of its untimely nature.

Plaintiffs have failed to comply with Idaho Rule of Civil Procedure 7(b)(3). The Motion is not filed within the perimeters of the Rules and should not be considered by the Court for purposes of the hearing on Defendant's post-trial Motions.

DATED This 20th day of July, 2004.

CANTRILL, SKINNER, SULLIVAN & KING LLP

By: 

Robert D. Lewis, Of the Firm

Attorneys for Defendant J.R. Simplot Company, dba
Simplot Soilbuilders

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of July, 2004, I served a true and correct copy of the above and foregoing instrument, by method indicated below, upon:

Wm. F. Gigray, III
T. Guy Hallam, Jr.
White Peterson
5700 E. Franklin Rd., Ste. 200
Nampa, ID 83687-8402


Facsimile
 Hand Delivery
 U.S. Mail

James B. Lynch
Katherine M. Lynch
Lynch & Associates, PLLC
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P.O. Box 739
Boise, ID 83701

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 U.S. Mail

P. Mark Thompson
Attorney at Law
P.O. Box 27
Boise, ID 83707-0027

Facsimile
 Hand Delivery
 U.S. Mail



Robert D. Lewis

F I L E D
A.M. 3:40 P.M.

JUL 22 2004

CANYON COUNTY CLERK
C. SALINAS, DEPUTY

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

GREG OBENDORF and BOYD)
GRAY,)

Plaintiff,)

-vs-)

TERRA HUG SPRAY COMPANY,)
INC., an Idaho corporation, and J.R.)
SIMPLOT COMPANY, a Nevada)
Corporation, dba SIMPLOT)
SOILBUILDERS,)

Defendant.)

CASE NO. CV02-2584
NOTICE OF ADDITIONAL ISSUE

Pursuant to the Court's oral order allowing the Plaintiffs to amend their complaint to conform to the evidence and include a claim for negligence per se, the plaintiffs submitted a proposed WRITTEN ORDER RE: ORAL ORDER IN OPEN COURT *NUNC PRO TUNC* GRANTING PLAINTIFFS' MOTION TO AMEND PLEADINGS TO CONFORM TO THE EVIDENCE, which the Court signed and entered on June 30, 2004.

On July 6, 2004, Defendant J. R. Simplot Company filed an objection to the proposed order and articulated their reasoning in the body of the objection. However, the defendant did not have the opportunity to address its objection prior to the Court entering the order. Consequently, the Court will permit this issue to be argued as an additional issue at the 1:30 p.m. hearing on July 26, 2004. This issue will be limited to the substance of the written order and whether it conforms to the ruling the Court made at trial.

NOTICE

Dated this 22 day of July, 2004.



Gregory M. Culet
District Judge

CERTIFICATION OF SERVICE

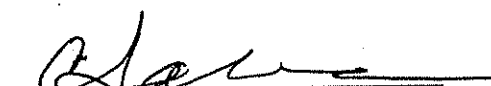
I HEREBY CERTIFY that a true and correct copy of the foregoing document was forwarded to the following persons on the 22 day of July, 2004 by fax and U.S. mail.

P. Mark Thompson
Attorney at Law
P.O. Box 27
Boise, Idaho 83707

David W. Cantrill
Attorney at Law
P.O. Box 359
Boise, Idaho 83701

Wm. F. Gigray, III
Julie Klein Fischer
Attorney at Law
5700 East Franklin Road, Suite 200
Nampa, Idaho 83687

James B. Lynch
Katherine M. Lynch
Attorney at Law
1412 W. Idaho Street, Ste. #200
Boise, Idaho 83702



Deputy Clerk

NOTICE

000083

CONFIDENTIAL DOCUMENT

Number of pages to follow: 2

PLEASE DELIVER IMMEDIATELY TO:

P. Mark Thompson
David W. Cantrill
Wm. F. Gigray, III/Julie Klein Fischer
James B. Lynch/Katherine M. Lynch

Sender: Judge Culet
Judge Kerrick
Linda Steude, Secretary

Office Telephone: (208) 454-7370

Fax Telephone : (208) 454-7525
454-7442

PC fax: 455-6048

000084

TRANSMISSION VERIFICATION REPORT

TIME : 07/22/2004 14:44
NAME : CANYON CO DIST CT
FAX : 2084547525
TEL : 2084547525

DATE, TIME	07/22 14:43
FAX NO./NAME	93310088
DURATION	00:00:44
PAGE(S)	03
RESULT	OK
MODE	STANDARD

000085

TRANSMISSION VERIFICATION REPORT

TIME : 07/22/2004 14:45
NAME : CANYON CO DIST CT
FAX : 2084547525
TEL : 2084547525

DATE, TIME	07/22 14:44
FAX NO./NAME	94664405
DURATION	00:00:40
PAGE(S)	03
RESULT	OK
MODE	STANDARD ECM

000086

TRANSMISSION VERIFICATION REPORT

TIME : 07/22/2004 14:46
NAME : CANYON CO DIST CT
FAX : 2084547525
TEL : 2084547525

DATE, TIME	07/22 14:45
FAX NO./NAME	93457212
DURATION	00:00:39
PAGE(S)	03
RESULT	OK
MODE	STANDARD ECM

000087

TRANSMISSION VERIFICATION REPORT

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FAX : 2084547525
TEL : 2084547525

DATE, TIME	07/22 14:47
FAX NO./NAME	93897464
DURATION	00:01:00
PAGE(S)	03
RESULT	OK
MODE	STANDARD

000088

FILED
A.M. 3:10 P.M.
AUG 02 2004

CANYON COUNTY CLERK
S. NICKEL, DEPUTY

ORIGINAL

David W. Cantrill
ISB #1291
CANTRILL, SKINNER, SULLIVAN & KING LLP
1423 Tyrell Lane
P. O. Box 359
Boise, Idaho 83701
Telephone: (208) 344-8035
Facsimile: (208) 345-7212

Attorneys for Defendant J.R. Simplot Company, dba
Simplot Soilbuilders

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

GREG OBENDORF and BOYD GRAY,)
)
Plaintiffs,)
)
vs.)
)
TERRA HUG SPRAY COMPANY, INC.,)
an Idaho corporation, and J.R. SIMPLOT)
COMPANY, a Nevada corporation, dba)
SIMPLOT SOILBUILDERS,)
)
Defendants.)
_____)

Case No. CV 02-2584
**NOTICE OF DEPOSITION DUCES
TECUM OF GENERAL MILLS
OPERATIONS, INC.**

August 24, 2004 @ 10:00 a.m.

TO: GENERAL MILLS OPERATIONS, INC.
1 General Mills Boulevard
Minneapolis, Minnesota 55426

PLEASE TAKE NOTICE THAT, pursuant to Idaho Rule of Civil Procedure 30(b)(6) and
Minnesota Rules of Civil Procedure 30 and 45, Defendant J.R. Simplot Company, dba Simplot
Soilbuilders, ("Simplot") with take the deposition of the individual(s) designated pursuant to Minn.

R. Civ. P. 30.02(f) by General Mills Operations, Inc., by oral examination before a qualified court reporter, on August 24, 2004, beginning at 10:00 a.m. and continuing thereafter by adjournment until the same shall be completed, at the offices of ANTHONY OSTLUND & BAER, P.A., 90 South Seventh Street, Ste. 3600, Minneapolis, Minnesota, 55402.

Pursuant to Minn. R. Civ. P. 30.02(f), Simplot requests that General Mills Operations, Inc. designate one or more knowledgeable persons to testify on its behalf with respect to:


1. The decision of General Mills Operations, Inc. to cease purchase of asparagus from Seneca Corporation within the State of Washington after the year 2005.

In addition, and pursuant to Minn. R. Civ. P. 30.02 and 45.02, Simplot requests that above referenced General Mills Operations, Inc. representative bring with him/her the following documents:

1. All documents surrounding the decision to cease purchase of asparagus from Seneca Corporation in the state of Washington after the year 2005.
2. Any and all documents which reflect the date General Mills decided to cease purchase of asparagus from Seneca Corporation in the state of Washington after the year 2005.
3. Any and all documents showing the date the above decision was communicated to Seneca Corporation.
4. Any and all documents reflecting, or related in any way to, the decision to not publicly announce that asparagus would not be purchased from Seneca Corporation in the state of Washington after the year 2005, until after May 21, 2004.
5. Any and all documents which show to whom, and the date the decision was communicated to, at Seneca Corporation that asparagus would not be purchased from Seneca Corporation in the state of Washington after the year 2005.

DATED This 2nd day of August, 2004.

CANTRILL, SKINNER, SULLIVAN & KING LLP

By: 
David W. Cantrill, Of the Firm
Attorneys for Defendant J.R. Simplot Company, dba
Simplot Soilbuilders

CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2004, I served a true and correct copy of the above and foregoing instrument, by method indicated below, upon:

Wm. F. Gigray, III
T. Guy Hallam, Jr.
White Peterson
5700 E. Franklin Rd., Ste. 200
Nampa, ID 83687-8402

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James B. Lynch
Katherine M. Lynch
Lynch & Associates, PLLC
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Boise, ID 83701

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P. Mark Thompson
Attorney at Law
P.O. Box 27
Boise, ID 83707-0027

Facsimile
 Hand Delivery
 U.S. Mail

Paradigm Reporting & Captioning, Inc.
1400 Rand Tower,
527 Marquette Avenue South
Minneapolis, MN 55402-1331
Fax #: (612)337-5575

Facsimile
 Hand Delivery
 U.S. Mail



David W. Cantrill

P. Mark Thompson
ISB #1945
Attorney at Law
999 Main Street, Ste. 1300
P.O. Box 27
Boise, Idaho 83707-0027
Telephone: (208) 389-7316

David W. Cantrill
ISB #1291
CANTRILL, SKINNER, SULLIVAN & KING LLP
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P. O. Box 359
Boise, Idaho 83701
Telephone: (208) 344-8035
Facsimile: (208) 345-7212

Attorneys for Defendant J. R. Simplot Company, dba
Simplot Soilbuilders

FILED
A.M. 11:30 P.M.
AUG 03 2004
CANYON COUNTY CLERK
T. CRAWFORD, DEPUTY
ORIGINAL

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

GREG OBENDORF and BOYD GRAY,)
)
 Plaintiffs,)
)
 vs.)
)
 TERRA HUG SPRAY COMPANY, INC.,)
 an Idaho corporation, and J. R. SIMPLOT)
 COMPANY, a Nevada corporation, dba)
 SIMPLOT SOILBUILDERS,)
)
 Defendants.)
)

Case No. CV 02-2584

DEFENDANT SIMPLOT'S MOTION
FOR LEAVE TO TAKE
DEPOSITION(S) PENDING APPEAL

Defendant J. R. Simplot Company, a Nevada Corporation, doing business as Simplot

DEFENDANT SIMPLOT'S MOTION FOR LEAVE TO TAKE DEPOSITION(S) PENDING
APPEAL - 1

Soilbuilders, by and through their counsel of record, and pursuant to Rule 27(b) of the Idaho Rules of Civil Procedure, moves this Honorable Court for an Order for leave to take the deposition(s) of the individual(s) designated pursuant to Minn. R. Civ. P. 30.02(f) and I.R.C.P. 30(b)(6) by General Mills Operations, Inc., to testify on its behalf with respect to:

1. The decision of General Mills Operations, Inc. to cease purchase of asparagus from Seneca Corporation within the State of Washington after the year 2005.

The reasons for perpetuating the testimony of the above-referenced designated individual(s) center around the fact that there would be no market for Plaintiffs' asparagus after 2005. Eleven of the sixteen years are removed from the future loss. Had this evidence been presented to the jury it would have had a profound impact on the jury's award of damages.

For the same "competitive reasons" cited by General Mills, there is no possible way that Simplot could have produced evidence at trial of the fact that General Mills was in Peru soliciting more economically viable sources of asparagus or the devastating effect General Mills' decisions would have on Seneca's asparagus processing plant in Dayton, Washington and the entire Washington asparagus industry. If Simplot had been able to present this information to the jury it would have had an indelible impact on the verdict and would have ultimately changed the result of the trial.

Since Seneca had closed its asparagus processing station in Parma, Idaho, Plaintiff's testified that if they had not dug up their asparagus crop it was their intent to truck the asparagus from Idaho to Seneca's processing plant in Dayton, Washington. This newly discovered evidence is direct evidence that Plaintiffs' dug up their asparagus fields due to economic reasons rather than the

chemical damage to the crop.

This newly discovered evidence is material to the issues in this cases. It is not merely "cumulative or impeaching" since there wasn't any testimony at trial regarding the actions of General Mills or the dependent relationship between Seneca Foods and General Mills. Under Rule 26(b) of the Idaho Rules of Civil Procedure, Defendant Simplot is taking depositions to perpetuate their testimony for the use in the event of further proceedings in the District Court.

Defendant requests oral argument, to be held via telephone, on this motion pursuant to the provisions of Rule 7(b)(4) of the Idaho Rules of Civil Procedure.

DATED This 3rd day of August, 2004.

CANTRILL, SKINNER, SULLIVAN & KING LLP

By: 

David W. Cantrill, Of the Firm
Attorneys for Defendant J. R. Simplot Company, dba
Simplot Soilbuilders

CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2004, I served a true and correct copy of the above and foregoing instrument, by method indicated below, upon:

Wm. F. Gigray, III
T. Guy Hallam, Jr.
White Peterson
5700 E. Franklin Rd., Ste. 200
Nampa, ID 83687-8402

Facsimile
 Hand Delivery
 U.S. Mail

James B. Lynch
Katherine M. Lynch
Lynch & Associates, PLLC
1412 W. Idaho Street, Suite 200
P.O. Box 739
Boise, ID 83701

Facsimile
 Hand Delivery
 U.S. Mail

P. Mark Thompson
Attorney at Law
P.O. Box 27
Boise, ID 83707-0027

Facsimile
 Hand Delivery
 U.S. Mail



David W. Cantrill

FILED
A.M. 4:10 P.M.
AUG - 6 2004
CANYON COUNTY CLERK
P. SPIERING, DEPUTY

District
8/10

Wm. F. Gigray, III, ISB #1435
Julie Klein Fischer, ISB #4601
WHITE PETERSON
5700 East Franklin Road, Suite 200
Nampa, Idaho 83687
Telephone: 208.466.9272
Facsimile: 208.466.4405
wfg@whitepeterson.com
jkf@whitepeterson.com

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

GREG OBENDORF and BOYD GRAY,

Plaintiffs,

-vs-

TERRA HUG SPRAY COMPANY, INC., an
Idaho corporation, and J.R. SIMPLOT
COMPANY, a Nevada corporation, dba
SIMPLOT SOILBUILDERS,

Defendants.

CASE NO. CV02-2584

AFFIDAVIT OF
WM. F. GIGRAY, III

STATE OF IDAHO)
)
County of Canyon) ss.

Wm. F. Gigray, III, being first duly sworn upon oath deposes and says:

ORIGINAL

1. I am one of the attorneys of record for the Plaintiffs in this matter and make this affidavit of my own personal knowledge.

2. As an officer of the Court, and in response to the statements of Simplot's defense counsel to the effect that there will be no asparagus market for Plaintiffs' asparagus crop after 2005 I do hereby state that the plaintiffs would fully intend to present evidence of a continuing market for their asparagus which would include that:

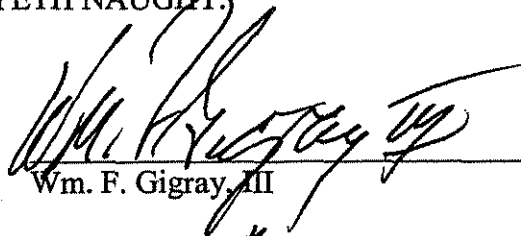
2.1 The Plaintiffs would have thence switched their contract for the asparagus to the pickled asparagus market; and

2.2 Contracts for pickled asparagus provide income at 70 cents per pound; and

2.3 The pickled asparagus market includes Costo and Shae Gorunmet, Inc., which contracts for pickled asparagus.

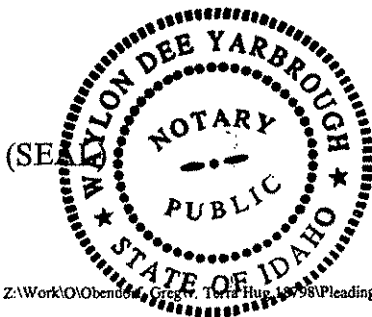
3. Attached hereto as Exhibit "A" are true and correct copies of the relevant portions of the Deposition of Phil Clouse, taken August 12, 2003.

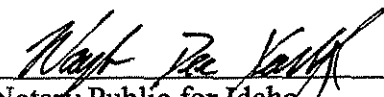
FURTHER YOUR AFFIANT SAYETH NAUGHT.



Wm. F. Gigray, III

SUBSCRIBED AND SWORN to before me this 6th day of August, 2004.





Notary Public for Idaho
My commission expires: 2/28/08

Z:\Work\O\Obendick, Greg v. Terra Hug, 08-98\Pleadings\Non Discovery\pid affy WFG re-motion to take depos 08-06-04 wy.doc

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a true and correct copy of the foregoing instrument was served upon the following by the method indicated:

<input checked="" type="checkbox"/>	US Mail	P. Mark Thompson
<input type="checkbox"/>	Overnight Mail	Attorney at Law
<input type="checkbox"/>	Hand Delivery	999 Main St., Ste. #1300
<input type="checkbox"/>	Facsimile	P.O. Box 27
	No. 389-7464	Boise, ID 83707

<input checked="" type="checkbox"/>	US Mail	David Cantrill
<input type="checkbox"/>	Overnight Mail	Steven Meade
<input type="checkbox"/>	Hand Delivery	CANTRILL, SKINNER, SULLIVAN & KING, LLP
<input checked="" type="checkbox"/>	Facsimile	1423 Tyrell Lane
	No. 345-7212	P.O. Box 359
		Boise, ID 83701

<input checked="" type="checkbox"/>	US Mail	James B. Lynch
<input type="checkbox"/>	Overnight Mail	Katherine M. Lynch
<input type="checkbox"/>	Hand Delivery	LYNCH & ASSOCIATES, PLLC
<input checked="" type="checkbox"/>	Facsimile	1412 W. Idaho Street, Ste. #200
	No. 331-0088	Boise, ID 83702

DATED this 6th day of July, 2004.



 for WHITE PETERSON

Z:\Work\O\Obendorf, Greg\w. Terra Hug 18798\Pleadings\Non Discovery\pld affy WFG re-motion to take depos 08-06-04 wy.doc

1 IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
 2 OF THE STATE OF IDAHO
 3 IN AND FOR THE COUNTY OF CANYON
 4
 5 GREG OBENDORF and BOYD GRAY,)
 6 Plaintiffs,)
 7 vs.) No. CV 02-2484
 8 TERRA HUG SPRAY COMPANY, INC.,)
 9 an Idaho corporation, and J.R.)
 10 SIMPLOT COMPANY, a Nevada)
 11 corporation, dba SIMPLOT)
 12 SOILBUILDERS,)
 13 Defendants.)

14 DEPOSITION OF PHIL CLOUSE
 15 Taken at the instance of the Defendants

16 **COPY**
 17 August 12, 2003
 18 1:30 p.m.
 19 911 Crest Loch Lane
 20 Pasco, Washington

21 BRIDGES & ASSOCIATES
 22 Certified Shorthand Reporters
 23 P.O. Box 5999
 24 Kennewick, Washington 99336
 25 (509) 735-2400 - (800) 358-2345

1 I N D E X
 2 OBENDORF vs. TERRA HUG, et al.
 3 No. CV 02-2484
 4 August 12, 2003

TESTIMONY

9	PHIL CLOUSE	PAGE NO.:
10	Examination by Mr. Cantrill	4 - 28
11	Examination by Ms. Lynch	28 - 31

EXHIBITS:

15	NO.:	IDENTIFICATION:	PAGE:
16	1	Seneca Foods Corporation 2003 Green Asparagus Contract, Contract No. 27 -- Dayton, Washington; 1 page	4
17			
18	2	Yield Data for Greg Obendorf Asparagus; 1 page	16

1 BE IT REMEMBERED that the deposition of
 2 PHIL CLOUSE was taken in behalf of the Defendants
 3 pursuant to the Idaho Rules of Civil Procedure before
 4 Susan J. Millay, Certified Court Reporter for
 5 Washington, on Tuesday, the 12th day of August, 2003,
 6 at 911 Crest Loch Lane, Pasco, Washington, commencing
 7 at the hour of 1:30 p.m.

8 * * *

APPEARANCES:

13 For the Plaintiffs: WILLIAM F. GIGRAY, III, ESQ.
 14 White Peterson
 15 5700 E. Franklin Road
 16 Nampa, ID 83687

17 For the Defendant DAVID W. CANTRILL, ESQ.
 18 J.R. Simplot: Cantrill, Skinner, Sullivan
 19 & King
 20 1423 Tyrell Lane
 21 Boise, ID 83701

22 For the Defendant KATHERINE M. LYNCH, ESQ.
 23 Terra Hug Spray Lynch & Associates
 24 Company: 225 North 9th Street,
 25 Suite 600
 Boise, ID 83701

Also Present: Boyd Gray

1 (PHIL CLOUSE, called as a witness by
 2 the Defendants being first duly sworn to tell the
 3 truth, the whole truth and nothing but the truth, was
 4 examined and testified as follows:)

(Exhibit No. 1 marked.)

EXAMINATION

11 BY MR. CANTRILL:

12 Q. You are Phil Clouse, C-l-o-u-s-e?

13 A. That's correct.

14 Q. And you're listed as the agricultural
 15 manager of Seneca Foods Corporation?

16 A. That's correct.

17 Q. And we are taking your deposition today in
 18 Pasco, Washington?

19 A. Yes.

20 Q. Have you ever been deposed before,
 21 Mr. Clouse?

22 A. Yes.

23 Q. In what capacity?

24 A. As the ag manager.

25 Q. For crop loss cases?

EXHIBIT A

1 A. No. One was by drawback program, and
 2 then the other was a crop loss, yes.
 3 Q. What kind of a crop?
 4 A. It was sweet corn.
 5 Q. Tell me a little bit about Seneca
 6 Corporation, will you.
 7 A. Seneca Foods is relatively a small company,
 8 a seasonal vegetable packer, basically. They process
 9 peas, corn, asparagus, snap beans. Those are the
 10 main core vegetables. They bought out the Green
 11 Giant facilities about seven years ago from the
 12 Pillsbury Company. And in that buyout there was a
 13 20-year production agreement signed that Seneca would
 14 produce all of the Green Giant products for Pillsbury
 15 Company. And so basically that's what we're doing.
 16 This past six months Seneca bought out
 17 Chiquita Company. I think they had 12 seasonal
 18 vegetable plants throughout the United States. And
 19 so I think right now Seneca has probably 25 to 26
 20 vegetable plants throughout the United States and
 21 Canada.
 22 Q. Does Pillsbury have any relationship to the
 23 Chiquita purchase?
 24 A. No. Pillsbury now -- There is no longer a
 25 Pillsbury.

1 that w source. We also source seed peas, some pearl
 2 onions, and then some baby whole carrots. So
 3 basically that's my responsibility is to develop the
 4 budgets, to go out and source the raw product, and
 5 build the budgets and manpower to do those jobs.
 6 Q. When you say "source the product," tell me
 7 what you mean by that.
 8 A. We go out and contract with the growers
 9 and -- but, you know, asparagus and then all crops,
 10 when you're given a plan of a total volume that they
 11 want, then you have to have a pretty sophisticated
 12 plan so that you don't overproduce or you don't
 13 underproduce.
 14 You have that -- That plant at Dayton is
 15 about a \$30 million asset that only has the ability
 16 to run about 70 days out of the year. So it's my
 17 responsibility to see that I get the required pounds
 18 so that we can run that plant the required 70 days
 19 out of the year.
 20 Q. So you have to find not only the farmer to
 21 sell you the product, you have to make sure that you
 22 have quality control as well?
 23 A. Correct.
 24 Q. And for the correct price?
 25 A. That is correct.

1 Q. But I thought you just said that --
 2 A. Well, Pillsbury was just bought out by
 3 General Mills.
 4 Q. Who signs your paycheck?
 5 A. Seneca Foods.
 6 Q. And is Seneca Foods a publicly traded
 7 company?
 8 A. Yes.
 9 Q. You are a witness, listed as a witness, but
 10 you have not been retained by Boyd Gray to testify,
 11 have you?
 12 A. No.
 13 Q. So if I want to talk to you about this case
 14 after the deposition, you don't have any problems
 15 talking to me directly?
 16 A. No.
 17 Q. What percentage of the production is
 18 asparagus?
 19 A. I don't understand your question.
 20 Q. That's a clumsy question. I'll come back
 21 in another direction. First of all, tell me what you
 22 do in your position as agricultural manager.
 23 A. My responsibilities are to source the
 24 required raw products for our vegetable plant at
 25 Dayton. Asparagus is just one of the raw products

1 Q. Did Seneca have a plant in Canyon County,
 2 Idaho?
 3 A. A plant?
 4 Q. Yeah.
 5 A. We had a receiving station. I don't know
 6 what county it was in. Parma, whatever county that's
 7 at, we have a receiving station there.
 8 Q. What we're talking about is an alleged
 9 asparagus crop loss in Canyon County suffered by the
 10 Plaintiffs in this lawsuit, Greg Obendorf and Boyd
 11 Gray.
 12 A. Okay.
 13 Q. There was no processing plant in Parma?
 14 A. It was a receiving station where we
 15 actually received it from the grower, weighed it,
 16 graded it, and determined the percent usable to
 17 determine how much money to pay the grower. And then
 18 we had a hydrocooler there and a cold room, and we
 19 would place it in the cold room until we had a full
 20 truckload and then we would put it on a truck and
 21 bring it to Dayton.
 22 Q. Why did you shut that receiving station
 23 down?
 24 A. Basically it was we had -- This is a
 25 complicated and a long story, but I guess that's what

1 we're here to talk ab It started back -- General
 2 Mills started to buy the Pillsbury Company. Okay?
 3 It took them 18 months for that to happen. Well, the
 4 marketing people that was in Pillsbury that last year
 5 were some new people that had come in and were very
 6 optimistic. They had -- The year prior to the
 7 company being bought, they had came and told us to go
 8 out and source additional pounds, which we did.
 9 Q. Source additional pounds of all vegetables
 10 or just asparagus?
 11 A. Just asparagus. And we did that. Well,
 12 those people that told us to do it, once General
 13 Mills started their merger or the buyout or whatever
 14 they call it, they jumped ship. Well, for 18 months
 15 there, product wasn't being sold on the normal
 16 schedule that it should have been plus then we had
 17 already overpacked an additional amount that wasn't
 18 normal to the system.
 19 So when General Mills finally took the
 20 buyout, they seen that we had a surplus of finished
 21 product in the warehouse. I was given the edict then
 22 to reduce 10 million pounds of raw product. So every
 23 one of my receiving stations I have set up as a
 24 separate company, and they operate on a
 25 cost-per-pound basis. So that's how the decision was

Page 9

1 And how many pounds were necessary to make
 2 it a viable --
 3 A. Well, under the way we had it set up, it
 4 would have probably had to have been 6 to 8 million.
 5 We shut down one up at Othello that we had been up
 6 there for 20 years, the same thing.
 7 Q. Who else besides Obendorf and Gray was
 8 selling asparagus to you in Canyon County?
 9 A. Froers, Craig and Owen Froer. I can't tell
 10 you -- Well, Ray Obendorf, Greg's dad. There was a
 11 couple other small guys. I just don't remember them.
 12 I'd have to look on the list.
 13 Q. Can you remember when the decision was made
 14 to shut the receiving station down?
 15 A. Yes.
 16 Q. When was that?
 17 A. The precise date, I can't tell you that.
 18 Well, I'll tell you. Let's see. This is 2003. It
 19 must have been '99 or 2000. I don't know. But I'll
 20 tell you it was the toughest decision that this ag
 21 department has ever gone through.
 22 Q. Why is that?
 23 A. Well, you know, you develop rapports with
 24 the growers, you know. They're just like employees
 25 to you, you know. And, yeah, we knew that it was

Page 11

1 made that we closed three receiving stations. And
 2 that happened to be one of them just because they
 3 were the highest cost receiving stations.
 4 Q. They cost you the most to get a pound of
 5 asparagus?
 6 A. Right. And it's not the fault of the
 7 growers. It was the fault of just sheer volume.
 8 Q. So irregardless of anything that happened
 9 in Canyon County, because of the lack of volume, you
 10 were going to shut down the plant?
 11 A. Say that again.
 12 Q. Irregardless of anything the farmers did,
 13 because of the small number of acres in Canyon
 14 County, you were required to shut down the plant?
 15 A. Yeah. It just takes a certain amount of
 16 people to run that receiving station and it can --
 17 they can -- I think we were probably bringing in a
 18 million and a half to 3 million pounds at that
 19 station. The same number of people could probably
 20 bring in 8 million. It was just the sheer volume
 21 that come in there that drove your cost per pound up.
 22 Q. How many acres did you receive in that area
 23 through that receiving station, or how many pounds?
 24 I guess you don't know how many acres.
 25 A. It was right at 3 million pounds.

Page 10

1 going to place hardships on those people because the
 2 alternatives for them to go elsewhere with their
 3 product probably wasn't as attractive as what we had.
 4 Q. What would you expect from a grower per
 5 acre in the way of pounds of asparagus from a good
 6 grower?
 7 A. It depends on the age.
 8 Q. Give me just a parameter so I know what
 9 we're dealing with.
 10 A. You got a piece of paper?
 11 Q. Sure.
 12 A. Asparagus works on a true bell curve. This
 13 is years on the bottom, and this is pounds on the
 14 side. Okay? You'd start out the first year after
 15 planting, we try to get them to cut 300 pounds.
 16 Q. Per acre?
 17 A. Per acre, yeah. And that's about a week's
 18 worth of cutting. And the reason we like to do that
 19 is it gets them past the frost risk time of the
 20 season, allows some of the weeds to start growing,
 21 and just gives them better chemical control on the
 22 weeds at the end of season. The next year then --
 23 Q. Excuse me. Is that 300 pounds per acre per
 24 week?
 25 A. Oh, no. In total for the season. They're

Page 12

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A.M. 4:10 P.M.
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P. SPIERING, DEPUTY

*District
8110
C*

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Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

_____)	
GREG OBENDORF and BOYD GRAY,)	CASE NO. CV 02-2584
)	
Plaintiffs,)	
)	
-vs-)	STATEMENT OF OPPOSITION
)	TO DEFENDANT SIMPLOT'S
TERRA HUG SPRAY COMPANY, INC., an)	MOTION FOR LEAVE TO TAKE
Idaho corporation, and J.R. SIMPLOT)	DEPOSITION(S) PENDING
COMPANY, a Nevada corporation, dba)	APPEAL
SIMPLOT SOILBUILDERS,)	
)	
Defendants.)	
_____)	

COME NOW, Plaintiffs Greg Obendorf and Boyd Gray, by and through their counsel of record, the firm of White Peterson, P.A., and hereby state their opposition to Defendant Simplot's Motion for Leave to Take Deposition(s) Pending Appeal (hereinafter referred to as Defendant Simplot's Motion for Leave).

ORIGINAL

Supporting Documents to this Statement includes the Memorandum and Statement of Counsel in Support of Statement of Opposition to Defendant Simplot's Motion for Leave to Take Deposition(s) Pending Appeal and the Affidavit of Wm. F. Gigray, III, filed contemporaneously herewith.

Basis for Opposition: That the subject motion does not contain the necessary information, nor does it present circumstances in justification of the requested order, as required under I.R.C.P. 27 (b) in that:

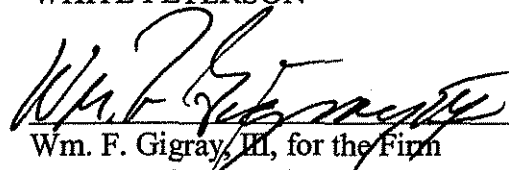
1. The Defendant Simplot has not demonstrated that the intent and purpose of Defendant Simplot's Motion for Leave motion is to preserve evidence that would otherwise be in danger of being lost; and
2. The Defendant Simplot has demonstrated that the purpose of the Defendant Simplot's Motion for Leave is to conduct discovery after the trial and after judgment has been entered by the Court which are not permissible purposes for the granting of the requested order.

The Plaintiffs requests the right to present oral argument in support of its opposition to the Defendant Simplot's Motion for Leave.

DATED this 6th day of August, 2004.

WHITE PETERSON

By:


Wm. F. Gigray, III, for the Firm
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a true and correct copy of the foregoing instrument was served upon the following by the method indicated:

<input checked="" type="checkbox"/>	US Mail	P. Mark Thompson
<input type="checkbox"/>	Overnight Mail	Attorney at Law
<input type="checkbox"/>	Hand Delivery	999 Main St., Ste. #1300
<input type="checkbox"/>	Facsimile	P.O. Box 27
	No. 389-7464	Boise, ID 83707

<input checked="" type="checkbox"/>	US Mail	David Cantrill
<input type="checkbox"/>	Overnight Mail	Steven Meade
<input type="checkbox"/>	Hand Delivery	CANTRILL, SKINNER, SULLIVAN & KING, LLP
<input checked="" type="checkbox"/>	Facsimile	1423 Tyrell Lane
	No. 345-7212	P.O. Box 359
		Boise, ID 83701

<input checked="" type="checkbox"/>	US Mail	James B. Lynch
<input type="checkbox"/>	Overnight Mail	Katherine M. Lynch
<input type="checkbox"/>	Hand Delivery	LYNCH & ASSOCIATES, PLLC
<input checked="" type="checkbox"/>	Facsimile	1412 W. Idaho Street, Ste. #200
	No. 331-0088	Boise, ID 83702

DATED this 6th day of August, 2004.


for WHITE PETERSON

Z:\Work\O\Obendorf, Greg\w. Terra Hug 18798\Pleadings\Non Discovery\pld opposition statement 08-06-04 wy.doc

ORIGINAL

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8/23
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CANYON COUNTY CLERK
D. BUTLER, DEPUTY

Attorneys for Defendant J. R. Simplot Company, dba
Simplot Soilbuilders

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

GREG OBENDORF and BOYD GRAY,)
)
 Plaintiffs,)
)
 vs.)
)
 TERRA HUG SPRAY COMPANY, INC.,)
 an Idaho corporation, and J. R. SIMPLOT)
 COMPANY, a Nevada corporation, dba)
 SIMPLOT SOILBUILDERS,)
)
 Defendants.)
)
 _____)

Case No. CV 02-2584

ORDER GRANTING DEFENDANT
SIMPLOT'S MOTION FOR LEAVE
TO TAKE DEPOSITION(S) PENDING
APPEAL

Defendant Simplot's Motion for Leave to Take Deposition(s) Pending Appeal, having come

ORDER GRANTING DEFENDANT SIMPLOT'S MOTION FOR LEAVE TO TAKE DEPOSITION(S)
PENDING APPEAL - 1

on regularly for hearing on the 10th day of August, 2004, all parties having appeared telephonically,
and the Court having heard oral argument, and the Court being fully advised in the premises;

Defendant Simplot's Motion for Leave to Take Deposition(s) Pending Appeal is hereby
GRANTED pursuant to said Defendant's compliance with the provisions of I.R.C.P. Rule 27(b).

Dated this 10 day of August, 2004.



GREGORY M. CULET
District Judge

ORDER GRANTING DEFENDANT SIMPLOT'S MOTION FOR LEAVE TO TAKE DEPOSITION(S)
PENDING APPEAL - 2

000107

AUG 24 2004

CANYON COUNTY CLERK
S. NICKEL, DEPUTY

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

GREG OBENDORF and BOYD)
GRAY,)

Plaintiffs,)

-vs-)

TERRA HUG SPRAY COMPANY,)
INC., an Idaho corporation, and J.R.)
SIMPLOT COMPANY, a Nevada)
Corporation, dba SIMPLOT)
SOILBUILDERS,)

Defendants.)

CASE NO. CV02-2584

PARTIAL ORDER ON POST-TRIAL
MOTIONS

The above-entitled cause came before the Court on July 26, 2004, on Defense motions for Judgment N.O.V. under Rule 50(b), as well as motions for new trial under Rules 59(a)(7) (prejudicial errors of law), 59(a)(4) (newly discovered evidence), 59(a)(6) (insufficiency of evidence), 59(a)(5) (excessive damages based on passion or prejudice), motion for a remittitur, and on other issues. At the conclusion of oral argument, and

pursuant to Rule 62(b), the Court stayed further proceedings on the Rule 59(a)(4) motion for new trial based on newly discovered evidence in order for additional discovery to occur. The Court denied the motion for J.N.O.V. and also denied motions for new trial based on Rules 59(a)(7) (prejudicial errors of law), 59(a)(6) (insufficiency of evidence), and 59(a)(5) (excessive damages based on passion or prejudice), but reserved the opportunity to reconsider the Rule 59(a)(5) and 59(a)(6) motions with regard to the issue of damages, but not with regard to the issue of liability. In addition, the Court reserved ruling on Defendants' objection to entry of a written *nunc pro tunc* order on Plaintiffs' oral Rule 15(b) motion to amend the pleadings to conform to the evidence by including a claim of negligence per se.

After further review, the Court's earlier findings and conclusions with regard to motions for new trial do not change. The substance of this decision is merely intended to be supplemental to the Court's previous ruling. Additionally, written *nunc pro tunc* order on Plaintiffs' oral Rule 15(b) motion to amend the pleadings to conform to the evidence, and the amended complaint filed pursuant to the order, shall be amended by interlineations to strike any specific focus of the subsections toward any particular defendants.

Analysis

Rule 59(a)(6)

A determination of a Rule 59(a)(6) motion for new trial based upon insufficient evidence to justify the verdict is within the discretion of the trial court. *Warren v. Sharp*, 139 Idaho 599, 83 P.3d 773 (2003). The court must utilize a two-pronged test in making the determination, but it is not unfettered discretion:

"The first prong directs the trial judge to consider whether the verdict was against the weight of the evidence and if the ends of justice would be served by vacating the verdict. The second prong ... directs the trial court to consider whether a different result would follow in a retrial.' *Burggraf v. Chaffin*, 121 Idaho 171, 174, 823 P.2d 775, 778 (1991) (citations omitted). The second prong "requires more than a mere possibility; there must be a probability that a different result would be obtained in a new trial." *Sheridan*, 135 Idaho at 782, 25 P.3d at 95.

"The judge does not have unlimited authority to disturb the verdict of a jury. Respect for the function of the jury prevents the granting of a new trial except in unusual circumstances." *Pratton v. Gage*, 122 Idaho 848, 850, 840 P.2d 392, 394 (1992). "The trial judge is not required to view the evidence in a light most favorable to the verdict-winner. Although the mere fact that the evidence is in conflict is not enough to set aside the verdict and grant a new trial, when a motion for a new trial is based on the ground that the verdict is against the weight of the evidence, the judge is free to weigh the conflicting evidence for himself." *Quick v. Crane*, 111 Idaho 759, 763, 727 P.2d 1187, 1195 (1986)

Warren v. Sharp, 83 P.3d at 777.

As the Court noted at the July 26, 2004 hearing, in Plaintiffs' Memorandum in Response to Post-Trial Motions of Defendant Simplot and Defendant Terra Hug Spray Co., Inc., they have accurately addressed the evidence which supports the jury verdict as to both liability and damages against both defendants. With regard to the issue of damages, that evidence includes, but is not limited to: Brad Dodson, a Seneca field representative who had examined and was familiar with the fields, testified that the chemical damage to the plaintiffs' fields was so spread out that it could not be isolated to any particular area, and was so extensive that the asparagus crop was no longer economically viable.¹ Marc Stone, an agricultural supervisor at Seneca, notified the plaintiffs of that same conclusion by letter in December of 2000. He further notified the plaintiffs that generally, under similar circumstances, other asparagus farmers plowed

¹ This is obviously also applicable to the issue of causation.

under their crop. The testimony of both Greg Obendorf and Boyd Gray was consistent with this conclusion.

With regard to the jury's verdict of total damages, it is apparent that in order for the jury to have reached their verdict in this case, they would have likely found that the asparagus fields would have been capable of producing at least 6,000 pounds per acre yield annually. After evaluating the evidence, this Court would have found that the plaintiffs' fields would produce an average yield significantly less than of 6000 pounds of asparagus per acre annually. Upon evaluation of the testimony and evidence, including the credibility of witnesses, this Court would have found that the fields would likely produce between 4,000 and 5,000 pounds per acre per year. The significance of this finding is that the total damages calculated pursuant to the formula utilized by Plaintiffs' expert, Dr. Walker, would have been reduced.

Having noted that, however, there still was significant evidence to support the jury verdict. Brad Dodson, Seneca field representative, testified that the fields in question had soil and other growing conditions similar to areas in Washington for which he typically expected between 5,000 to 7,000 pounds per acre yield per year after the crop has matured, with a life span of 15 to 18 years. Plaintiff Boyd Gray, who was experienced in growing asparagus in Washington, also testified to the same average yield in Washington, with a life span of between 15 and 20 years. Dr. David Walker, an agricultural economist, testified that based upon his research of published sources, including publication of research from Washington State University, a reasonable expectation of annual asparagus yields is 6,000 pounds per acre, reaching full yield in the sixth year of growth, with a life span of 15 to 22 years. Dr. Walker chose what he

deemed to be a conservative figure of 16 years as the life span of the crop for the purposes of determining damages. Dr. Walker's analysis contrasted the scenario of damaged asparagus crops and the planting of mitigating crops versus the scenario of an undamaged crop. His conclusion also took into consideration the additional transportation costs of shipping the crop to Dayton, Washington for processing and he discounted present value at a rate of four (4) percent. The sum and substance of the rest of Dr. Walker's testimony is accurately set out on pages 33 through 35 of Plaintiffs' Memorandum in Response to Post-Trial Motions of Defendant Simplot and Defendant Terra Hug Spray Company, Inc., which reflects that he presented a best case and worst case scenario of damages. The jury's damage verdict was numerically half way between those two best-worst case scenario figures.

On the other hand, Marc Stone, of Seneca, testified that the average yield for of all the asparagus crop in Washington state is 3,600 pounds per acre, and Phil Clouse, agricultural manager at Seneca, testified that the average yield from Seneca's growers is 3,300 to 3,500 pounds per acre, and finally, defense witness Dr. Jean Dawson testified that the average yield was akin to 3,000 pounds per acre. However, Dr. Dawson also testified that he has obtained 6,000 pounds per acre yield from crops in Washington.

Although there was testimony regarding instability of the Washington asparagus market, the testimony at trial by the Seneca representatives was that they still saw a viable future in the asparagus market in the state of Washington. After evaluating the conflicting evidence presented at trial, this Court cannot conclude that there is a probability that a new trial would result in a different verdict. Accordingly, the motion for new trial under Rule 59(a)(6) is still denied.

Rule 59(a)(5)

With regard to the defendants' motion for new trial based upon claim of excessive damages appearing to have been given under the influence of passion or prejudice, in order to grant such a motion, the Court must determine that there is a great disparity and that it appears to the Court that the jury's award was given under the influence of passion or prejudices. *Quick v. Crane, supra*. "When granting or denying a motion for new trial, the trial court must state its reasons unless the reasons are obvious from the record. A conclusory statement by the court, unsupported by the identification of any factual basis, is not adequate to illustrate its reasons for granting or denying a new trial." *Schaefer v. Ready*, 134 Idaho 378, 380, 3 P.3d 56, 58 (Ct. App. 2000).

"Of necessity, when the trial court *grants* one of these motions, it should state its reasons with particularity unless it is obvious from the record itself. Whereas, if the trial court simply *denies* the motion, it need only state, or point to where in the record it reveals, that the moving party has failed to meet its burden to justify granting the motion. We see no logic in requiring the trial court to explain a grant but not a denial of such motions, although the extent of his explanation will obviously be greater with a grant. In either case, he must distinguish between the various motions and the grounds upon which they are based, and not, as was the case here, simply lump them all together and issue a general grant or denial."

Quick v. Crane, 111 Idaho at 773, 727 P.2d at 1201. The *Quick* Court also noted:

Obviously, he [the judge] has a much better idea of what the scope and limitations on such damages may be. His figure of damages will often be different from that of the jury's. *But*, since it is a jury function to set the damage award based on its sense of fairness and justice, the trial judge must defer to the jury, *unless* it is apparent to the trial judge that there is a great disparity between the two damage awards and that disparity cannot be explained away as simply the product of two separate entities valuing the proof of the plaintiff's injuries in two equally fair ways. In other words, if the trial judge discovers that his determination of damages is so substantially different from that of the jury that he can *only* explain this difference as resulting from some unfair behavior, or what the law calls "passion or prejudice," on the part of the jury against one or some of the

parties, then he should grant a new trial. How substantial this difference must be is impossible to formulate with any degree of accuracy. It will necessarily vary with the factual context of each case and the trial judge's sense of fairness and justice.

Quick v. Crane, 111 Idaho 759, 769, 727 P.2d 1187, 1197 (1986). "While the trial court is not required to state the dollar amount it would have awarded, ... the ruling must show that the trial court has weighed the evidence, determined the amount he would have awarded, compared that amount with the jury's award, and found a disparity so great that it shocks the conscience of the court." *Pratton v. Gage*, 122 Idaho 848, 853, 840 P.2d 392, 397 (1992).

In the present case, the major significant deviation between the Court's damage analysis and finding from that of the jury's finding is the extent to which the apparent volume of per acre annual yield the jury's verdict reflects versus the Court's. (See previous section of this decision.) Even if the Court's finding with regard to per acre annual yield were to fall closer to the 4,000 pounds per acre annually figure identified in the previous section of this decision, thus significantly impacting the dollar value of the verdict, this Court cannot conclude that the disparity between the two findings cannot be explained away as simply the product of two separate entities (the Court and the jury) valuing the proof of the plaintiff's injuries and damages in two equally fair ways. In other words, while the jury's verdict was surprising to the Court, it did not "shock the conscience" of the Court. *See Pratton v. Gage, supra*.

Accordingly, the motion for new trial under Rule 59(a)(5) is still denied.

Additional issue

Defendant Simplot's objection to entry of written *nunc pro tunc* order on Plaintiffs' oral Rule 15(b) motion to amend the pleadings to conform to the evidence by including a claim of negligence *per se*.

After the conclusion of the evidentiary phase of the trial, the Court denied the plaintiffs' requested jury instruction (ultimately included as Instruction number 16-A), which contained portions of Idaho Code § 22-3420² and indicated that a violation of the statute was negligence per se. Thereafter, the plaintiffs moved to amend their complaint to conform to the evidence pursuant to Rule 15(b) to include a claim for negligence *per se*. After considering the defendants' objections, the court granted the motion, and the jury was further instructed on the issue of negligence per se in the form of Instruction Number 16-A.

Ultimately, and pursuant to the Court's instructions, the plaintiffs filed a proposed order authorizing the filing of an amended complaint *nunc pro tunc*. The order was filed and entered on July 30, 2004. Defendant Simplot has filed an objection to the order of amendment and to the amended complaint that conforms to the order. While portions of the defense argument go to the merits of the original motion to amend, which have already been ruled upon by the Court³, part

² The instruction read as follows:

"There was a certain statute in force in the State of Idaho at the time of the occurrence in question which provided that:

No person shall:

- (1) Use a pesticide in a manner inconsistent with its labeling except as provided for by rule.
- (2) Make pesticide recommendations in a manner inconsistent with its labeling except as provided for by rule.

...

- (8) Apply pesticides in a faulty, careless, or negligent manner.
(I.C., §22-3420)

A violation of this statute is negligence.

You are further instructed that for the purposes of this statute, herbicides are included in the definition of pesticides."

³ This court has previously ruled that a violation of the pertinent subsections of I.C. §22-3420 constitute negligence as a matter of law, in that the statute (1) clearly defines the required standard of conduct; (2) the statute is intended to prevent the type of harm the defendant's acts or omissions caused; (3) the plaintiffs are members of the class of persons the statute or regulation is designed to protect; and (4) any violation must be the proximate cause of the injury. *See Munns*

of the argument goes to the form of the amendment. Specifically, when the plaintiffs were originally granted their Rule 15(b) motion to amend, both their oral motion and the Court's verbal order applied the three listed subsections of I.C. §22-3420 (1), (2) and (8) to both defendants. The subsequent written order expressly applies subsections (1) and (2) only toward Simplot, and expressly applies subsection (8) only toward Terra Hug Spay. This Court is in agreement with the defendants' position in this regard. Inasmuch as the written order granting the amendment is inconsistent with the order entered at trial, the order shall be amended to strike any specific focus of the subsections toward any particular defendants. The corrections will be made by interlineations.

Having noted that, however, the issue itself may be moot. The Washington Court of Appeals has held "[n]egligence per se is not a separate cause of action. Rather it is a method of proving negligence through evidence of statutory violations." See, *Gilliam v Department Social and Health Services*, 89 Wash. App. 569, 586, 950 P.2d 20 (Ct. App. 1998). In *Gilliam*, the case went to trial on the issue of negligence. Under Washington statutes in effect at the time the cause of action arose, a violation of a statute, ordinance or administrative rule constituted negligence as a matter of law. *Id.* At the conclusion of evidence, the plaintiff moved to amend the complaint to include the additional claim of negligence per se with regard to certain alleged statutory violations by state workers. On appeal, the appellate Court held:

v. Swift Transp. Co., Inc., 103 Idaho 108, 58 P.3d 92 (2002) and *Orthman v. Idaho Power Co.*, 134 Idaho 598, 7 P.3d 207 (2000).

Negligence per se is not a separate cause of action. [FN38] Rather, it is a method of proving negligence through evidence of statutory violations. Gilliam filed his case prior to August 1, 1986. Prior to this date, violation of a statute, ordinance, or administrative rule was negligence as a matter of law. [FN39] Showing that Morrow violated pertinent statutes is one way Gilliam can prove she was negligent. To obtain instructions on the statutes he claimed she violated, it was not necessary to amend the complaint. We therefore treat this assignment of error as moot.

Gilliam v. Department of Social and Health Services, Child Protective Services, 89 Wash. App. 569, 585-586, 950 P.2d 20, 28 (Wash. App. Div. 1, 1998). *See also, Wise v. Fiberglass Systems, Inc.*, 110 Idaho 740, 718 P.2d 1178 (1986), (The Court held that the trial court was correct in instructing the jury regarding negligence *per se* in an action involving a claim and a counter-claim of negligence).⁴

Accordingly, while there is no specific authority on point in Idaho, it would appear that the Plaintiffs need not have amended their complaint to include a claim of negligence per se. However, in the event the matter is addressed on appeal, the record will reflect such an amendment was required by this Court as a condition precedent to instructing the jury on the issue of negligence *per se*.

Be it so ordered this 23 day of August, 2004,



Gregory M. Culet
District Judge

⁴ The appellate decision does not indicate whether a separate claim of negligence per se was filed by either side, but the history and record provided in the appellate decision would indicate that it was not.

CERTIFICATION OF SERVICE


I HEREBY CERTIFY that a true and correct copy of the foregoing document was forwarded to the following persons on the 24 day of August, 2004.

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Attorneys for Defendant J.R. Simplot Company, dba
Simplot Soilbuilders

10-18
Culet
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A.M. 1:15 P.M.
AUG 26 2004
CANYON COUNTY CLERK
K. CANO, DEPUTY

ORIGINAL

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

GREG OBENDORF and BOYD GRAY,)
)
Plaintiffs,)
)
vs.)
)
TERRA HUG SPRAY COMPANY, INC.,)
an Idaho corporation, and J.R. SIMPLOT)
COMPANY, a Nevada corporation, dba)
SIMPLOT SOILBUILDERS,)
)
Defendants.)

Case No. CV 02-2584

**FIRST AMENDED NOTICE OF
DEPOSITION DUCES TECUM OF
GENERAL MILLS OPERATIONS,
INC.**

September 24, 2004 @ 10:00 a.m.

TO: GENERAL MILLS OPERATIONS, INC.
1 General Mills Boulevard
Minneapolis, Minnesota 55426

PLEASE TAKE NOTICE THAT, pursuant to Idaho Rule of Civil Procedure 30(b)(6) and
Minnesota Rules of Civil Procedure 30 and 45, Defendant J.R. Simplot Company, dba Simplot

FIRST AMENDED NOTICE OF DEPOSITION DUCES TECUM OF GENERAL MILLS OPERATIONS,
INC. - 1

Soilbuilders, ("Simplot") with take the deposition of the individual(s) designated pursuant to Minn. R. Civ. P. 30.02(f) by General Mills Operations, Inc., by oral examination before a qualified court reporter, on September 24, 2004, beginning at 10:00 a.m. and continuing thereafter by adjournment until the same shall be completed, at the offices of ANTHONY OSTLUND & BAER, P.A., 90 South Seventh Street, Ste. 3600, Minneapolis, Minnesota, 55402.

Pursuant to Minn. R. Civ. P. 30.02(f), Simplot requests that General Mills Operations, Inc. designate one or more knowledgeable persons to testify on its behalf with respect to:

1. The decision of General Mills Operations, Inc. to cease purchase of asparagus from Seneca Corporation within the State of Washington after the year 2005.

In addition, and pursuant to Minn. R. Civ. P. 30.02 and 45.02, Simplot requests that above referenced General Mills Operations, Inc. representative bring with him/her the following documents:

1. All documents surrounding the decision to cease purchase of asparagus from Seneca Corporation in the state of Washington after the year 2005.
2. Any and all documents which reflect the date General Mills decided to cease purchase of asparagus from Seneca Corporation in the state of Washington after the year 2005.
3. Any and all documents showing the date the above decision was communicated to Seneca Corporation.
4. Any and all documents reflecting, or related in any way to, the decision to not publicly announce that asparagus would not be purchased from Seneca Corporation in the state of Washington after the year 2005, until after May 21, 2004.
5. Any and all documents which show to whom, and the date the decision was communicated to, at Seneca Corporation that asparagus would not be purchased from

Seneca Corporation in the state of Washington after the year 2005.

DATED This 25th day of August, 2004.

CANTRILL, SKINNER, SULLIVAN & KING LLP

By: _____



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