IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 30664

Anderson Industries, LLC,

Plaintiff and Appellee,

v.

Thermal Intelligence, LLC, a Canadian corporation,

Defendant and Appellant.

Appeal from the Circuit Court, Fifth Judicial Circuit, Day County, South Dakota
The Honorable Circuit Court Judge Lovrien

APPELLANT'S BRIEF

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Notice of Appeal filed on March 21, 2024.

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PRELIMINARY STATEMENT

Appellant Thermal Intelligence, LLC, a Canadian corporation, will be referred to as "Thermal Intelligence." Appellee Anderson Industries, LLC will be referred to as "Anderson Industries."

Unless otherwise noted, citations to the record will be indicated by "CR" followed, where applicable, by corresponding line(s) and page number(s). The Addendum will be referred to as "Add." followed, where applicable, by the corresponding line(s) and page number(s).

JURISDICTIONAL STATEMENT

Thermal Intelligence appeals from (1) the Judgment dated February 23, 2024 which incorporates the oral decision rendered on January 31, 2024, and (2) the Order Granting Anderson Industries' Motion for Summary Judgment entered, filed and recorded on February 23, 2024. The Notice of Appeal was timely filed on March 21, 2024. This Court has jurisdiction to hear this matter pursuant to SDCL 15-26A-3(1) as an appeal from a final judgment.

STATEMENT OF LEGAL ISSUES

I. Whether The Circuit Court Erred In Finding That A Valid Agreement Or Enforceable Promise Between Appellee And Appellant Existed.

Yes. The circuit court erred because the July 19, 2019 communications left open essential terms, required further negotiation, and the mutual intent of the parties was *not* carried into effect. Alternatively, if this Court determines that the July 19, 2019 conversations constitute an enforceable agreement, the circuit court erred by not considering all terms.

- *AFSCME v. Sioux Falls School Dist.*, 2000 SD 20, 605 N.W.2d 811.

- *City of Chamberlain v. R.E. Lien, Inc.*, 521 N.W.2d 130, 132 (S.D. 1994).
- *Hayes v. Northern Hills General Hosp.*, 1999 SD 28, 590 N.W.2d 243.
- *Liebig v. Kirchoff*, 851 N.W.2d 743 (S.D. 2014).
- *Weitzel v. Sioux Valley Heart Partners*, 2006 SD 45, 714 N.W.2d 884.
- *Wilcox v. Vermeulen*, 2010 SD 29, 781 N.W.2d 464.

II. **Whether The Circuit Court Erred By Not Considering A Subsequent and Superseding Agreement That Occurred on August 1, 2019.**

Yes. The circuit court failed to consider the August 1, 2019 agreement which unequivocally modified and superseded the July 19, 2019 'agreement'.

- SDCL 20–7–5
- *Haggar v. Olfert*, 387 N.W.2d 45 (S.D.1986).

III. **Whether The Circuit Court Erred In Finding That Thermal Intelligence Breached An Agreement With Anderson Industries.**

Yes. There are genuine issues of material fact as to the purpose of the payment schedule proposed by Thermal Intelligence. Further, there are genuine issues of material fact as to why Thermal Intelligence suspended payments to Anderson Industries.

IV. **Whether The Circuit Court Erred In Its Determination of Damages.**

Yes. The circuit court erred in its determination of damages because there are genuine issues of material fact as to the alleged damages.

PROCEDURAL HISTORY

In July 2020, Anderson Industries brought suit against Thermal Intelligence. On March 27, 2023, Anderson Industries moved for summary judgment. On July 12, 2023, Thermal Intelligence filed a cross motion for summary judgment. On November 1, 2023, arguments were heard before The Honorable Marshall Lovrien, Circuit Judge, at Webster, South Dakota. On January 31, 2024, a Status Hearing was held telephonically whereby The Honorable Judge Lovrien granted Anderson Industries' motion for

summary judgment and denied Thermal Intelligence's cross motion for Summary Judgment.

The circuit court held that there are no genuine issues of material fact that a valid agreement or enforceable promise between Anderson Industries and Thermal Intelligence existed, that Thermal Intelligence breached that agreement, and that Anderson Industries has suffered damages as a result. The specific findings of the circuit court are as follows:

> There are no genuine issues of material fact as to the argument that Thermal Intelligence entered into an agreement with Anderson Industries to purchase 30 V1.5 heaters at a price of $69,500 each.

CR 271; 4:20-24.

> There are no genuine issues of material fact that two down payments were made on July 19, 2019 and August 22, 2019 for the 30 V1.5 heaters at a price of $69,500 each.

CR 271-272; 4:25-5:12.

> There are no genuine issues of material fact that Thermal Intelligence committed to a written payment plan for the heaters.

CR 272; 5:13-15.

> There are no genuine issues of material fact that Thermal Intelligence ultimately paid Anderson Industries $1,167,000.

CR 272; 5:15-17.

> There are no genuine issues of material fact that Anderson Industries manufactured all 30 heaters and delivered 17 of them to Thermal Intelligence.

CR 272; 5:18-20.

> There are no genuine issues of material fact that Thermal Intelligence first breached its agreement with Anderson Industries when it failed to make payments according to the payment schedule.

CR 272 5:21-24.

> There are no genuine issues of material fact that Thermal Intelligence breached the agreement with Anderson Industries on November 18, 2019, when it terminated the entire agreement.

CR 273; 6:2-5.

> Anderson Industries did not misrepresent its capacity to fulfill the terms of the contract.

CR 273; 6:6-12.

> Anderson Industries did not repudiate the contract and has fulfilled all terms of the contract.

CR 273; 6:13-18.

> The contract was supported by consideration.

CR 273; 6:19-21.

> There is nothing in the record that the heaters were inoperable.

CR 273; 6:21-22.

> There is nothing in the record that indicates Thermal Intelligence ever attempted to return, reject, or request that Anderson Industries repair the heaters.

CR 273; 6:23-25.

> There are no genuine issues of material fact that Anderson Industries mitigated its damages by storing the heaters.

CR 274; 7:1-10.

STATEMENT OF THE FACTS

This case arises from a commercial dispute between Anderson Industries and Thermal Intelligence regarding the development, manufacturing, and sale and delivery of industrial diesel heaters. At the outset of the parties' relationship, Thermal Intelligence and Anderson Industries sought to collaboratively develop and market a new line of diesel heaters. (CR 070; 29:15-24). Thermal Intelligence provided Anderson Industries

with the required specifications needed for the business venture to be successful. (CR 070; 29:15-24). After some collaboration and developments, Thermal Intelligence agreed to purchase 30 V1.0 heaters from Anderson Industries. (CR 075 46:6-10). However, the V1.0 heaters did not meet Thermal Intelligence's expectations or specifications. (CR 075 47:1-7). In an attempt to mitigate this shortfall, Anderson Industries provided parts, and Thermal Intelligence paid for the labor to retrofit the heaters. (CR 075 47:8-21). The parties then sought to develop a new heater model that met Thermal Intelligence's specifications, specifically to address the V1.0 heating inadequately. (CR 076 51:13-55:10).

However, Anderson Industries had previously purchased materials for 60 V1.0 heaters in order to decrease overhead costs. (CR 076 52:11-22). Thus, before a new heater model could be developed, Anderson Industries needed to liquidate its excess supply of 30 V1.0 heaters and materials. (CR 132-133). Acting in good faith, the parties collaboratively developed a plan to modify the V1.0 design to address the inadequate heating issues—which became the V1.5 model. (CR 076 51:22-52:10). Meanwhile, discussions began concerning the development of future models, the V1.7 and V2.0 and the possibility of Thermal Intelligence acquiring the licensing and related intellectual property to the heater line. (CR 077 55:23-56:21).

On July 19, 2019, the parties continued discussions for a path forward. (CR 133-135). The parties then devised a plan whereby Thermal Intelligence would eventually purchase 30 V1.5 heaters, the parties would continue developing the V1.7 and V2.0 models together, and discussions concerning the IP acquisition would resume in the near future. (CR 133-135). These discussions continued, and on August 1, 2019 Kory

Anderson, on behalf of Anderson Industries, sent an agreement proposal whereby Thermal Intelligence would acquire the K2 V2.0 Diesel Flameless Heater Product Line. (CR 139). Brian Tiedemann, on behalf of Thermal Intelligence, accepted this offer. (CR 140).

On September 4, Brian Tiedemann reached out to close the loop on the agreement. (CR 141). Ten days later, on September 14, Kory Anderson proposed some modifications to the original offer, suggesting new pricing and additional services for Thermal Intelligence. (CR 188). Soon after, Brian Tiedemann communicated concerns about delivery delays and lack of support from Anderson Industries, emphasizing the impacts these issues were having on Thermal Intelligence's ability to meet customer expectations. (CR 189). Thermal Intelligence then learned that Anderson Industries had laid off key staff and was closing its facility in Mapleton, North Dakota. (CR 076 53:20-23; 54:5-7).

Soon thereafter, Thermal Intelligence began to experience financial strain as its customers were refusing to pay for defective and inoperable heaters. (CR 207). Meanwhile, Thermal Intelligence was incurring substantial expenses in attempts to repair these faulty units themselves because of the lack of support from Anderson Industries. (CR 191-192). With these significant changes in circumstances, Thermal Intelligence informed Anderson Industries of its position as to the price of the existing V1.5 units. (CR 145).

On October 3, 2019, Brian Tiedemann, on behalf of Thermal Intelligence, initiated a plan to keep the K2 heater developments alive. (CR 193). Brian Tiedemann proposed a payment schedule that ensured Anderson Industries could remain operational,

support the K2 heater line, and continue developing the V1.7 and V2.0 models. (CR 149). However, as of November 18, 2019, Thermal Intelligence had not received any replacement parts to fix the inoperable heaters. (CR 155). Brian Tiedemann, on behalf of Thermal Intelligence, notified Anderson Industries that this was one of many reasons why Thermal Intelligence would be terminating its relationship with Anderson Industries. (CR 155). As of this date, Thermal Intelligence received a total of 17 V1.5 heaters, albeit they did not meet Thermal Intelligence's standards or specifications. (CR 092 117:11-25).

STANDARD OF REVIEW

This is an appeal of an order granting a motion for summary judgment. Summary judgment is only proper when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. SDCL § 15-6-56(c). Summary judgment is an extreme remedy, which is not intended as a substitute for trial. *Discover Bank v. Stanley*, 2008 S.D. 111, 9 19, 757 N.W.2d 756, 761. "Summary judgment may be granted only where there is no genuine issue of material fact." *Erickson v. Lavielle*, 368 N.W.2d 624, 626 (S.D. 1985). "The moving party has the burden of clearly demonstrating an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law." *Johnson v. Matthew J. Batchelder Co.*, 2010 S.D. 23, ¶ 8, 779 N.W.2d 690, 693. This Court "view[s] all evidence and favorable inferences from that evidence in a light most favorable to the nonmoving party." *Id.*

ARGUMENT

I. The Circuit Court Erred In Finding That A Valid Agreement Or Enforceable Promise Between Appellee And Appellant Existed.

The circuit court granted summary judgment to Anderson Industries on the issue of whether an agreement existed between Thermal Intelligence and Anderson Industries. Specifically, the circuit court found that on July 19, 2019, Thermal Intelligence entered into an agreement with Anderson Industries to purchase 30 V1.5 heaters at a price of $69,500 each. Appellant disputes that the parties came to an agreement because these communications left open essential terms, required further negotiation, and the mutual intent of the parties was *not* carried into effect. Alternatively, if this Court determines that the July 19, 2019 conversations constitute an enforceable agreement, the circuit court erred by not considering all terms.

A. The July 19, 2019 conversations do not constitute an enforceable agreement.

Contract interpretation is a question of law, and upon appeal, this Court reviews the matter anew. *AFSCME v. Sioux Falls School Dist.*, 2000 SD 20, 605 N.W.2d 811; *Hayes v. Northern Hills General Hosp.*, 1999 SD 28, 590 N.W.2d 243. Under South Dakota law, "before a court may enforce a contract there must be a determination that a valid contract was created." *City of Chamberlain v. R.E. Lien, Inc.*, 521 N.W.2d 130, 132 (S.D. 1994). "The existence of a valid contract is a question of law, and the proponent has the burden to prove the contract by evidence so clear and satisfactory that no doubt remains." *Wilcox v. Vermeulen*, 2010 SD 29, ¶24, 781 N.W.2d 464, 472.

"If an agreement leaves open essential terms and calls for the parties to agree to agree and negotiate in the future on essential terms, then a contract is not established." *Weitzel v. Sioux Valley Heart Partners*, 2006 SD 45, ¶ 23, 714 N.W.2d 884, 892

(citations omitted). Further, "[t]here must be mutual assent or a meeting of the minds on all essential elements or terms in order to form a binding contract." *See Liebig v. Kirchoff*, 851 N.W.2d 743, 752 (S.D. 2014) (quoting *Vander Heide v. Boke Ranch, Inc.*, 736 N.W.2d 824, 832 (S.D. 2007)).

In the present case, the communications between the parties, while extensive, exhibit a lack of definitive and final terms which are essential for forming an enforceable contract. There was not mutual assent as to all essential terms as this was not a simple contract to purchase 30 V1.5 heaters. To demonstrate this, and for sake of clarity, below is a chronological representation of the July 19, 2019 email exchange between the parties that the circuit court held to be an enforceable contract:

> It seems that we've tied the price on the V1.5 to the acquisition of the IP and designs and this has complicated the negotiations, rather than simplifying them. It appears that IP and Designs are a longer-term discussion and we should continue that, but for now, time is of the essence for both our companies, so here's a fourth option with its subsets.

CR 135 (PL 00044).

1. Lower our V1.5 selling price to $69,500 on all 30 units, if you agree to provide a PO for all 30 units at a down payment of 20%). We make less per machine, but it may be easier for you to sell them and/or keep more profit. But, it helps us by getting V1.5 inventory out the door. On receipt of PO and down payment it is 10 weeks until we ship the first units. We may be able to ship sooner, but we are confident in the 10-week number if any contingencies arise.

CR 135 (PL 00044).

> RESPONSE FROM APPELLANT:
>
> We will issue a PO for 21 units at a price of $69,500 with a down payment of 20%, and issue subsequent PO's & downpayments immediately upon receiving commitment from customers.

CR133-134 (PL 00042-00043).

> RESPONSE FROM APPELLEE:

We agree, with the stipulation that no V1.7s are built until all 30 V1.5's have been sold.

CR 132-133 (PL 00041-00042).

ACCEPTANCE FROM APPELLANT:

We agree. Our intention all along was that we would exhaust the V1.5's first.

CR 131 (PL 00040).

2. V1.7, we need to hit 15 units to get to our first price break. Any less, the unit costs go up dramatically. To state a selling price is highly dependent on the number of units, so we would need discussions to establish a fair price. To help you and your customer, we estimate 14 weeks from PO and down payment.

CR 135 (PL 00044).

RESPONSE FROM APPELLANT:

if we agree to a transaction on the IP in the future we would like $5,000 /unit purchased... credited to that transaction.

CR 133-134 (PL 00042-00043).

RESPONSE FROM APPELLEE:

This seems reasonable to me.

CR 132-133 (PL 00041-00042).

ACCEPTANCE FROM APPELLANT:

Great.

CR 131 (PL 00040).

3. V2.0 (next year's model), we start from the market selling price and work backward to find the unit cost. If unit cost is higher than the market target price, then we either reduce features, quality or find cost savings in the nooks and crannies.

CR 135 (PL 00044).

RESPONSE FROM APPELLANT:

We understand your feedback on V1.7. Our desire is to sell V1.7 units this year and would like to know if we could cover the low

volume costs with a $5,000 margin erosion, or if the delta is greater than that.

CR 133-134 (PL 00042-00043).

RESPONSE FROM APPELLEE:

The costs of V1.7 depends significantly on the number of units sold, so giving you a number is a wild guess at this point. We can share the increased volume costs with you then you can see what level of margin erosion is acceptable.
As a start let's agree on defining the V1.7 costs as V1.5 (69,500)+ new MEL incremental (1.0K) + low volume increase$, so in effect, were selling the V1.7 at $70.5k + low volume costs, for this model year. But as before, we can build no V1.7s until the 30 V1.5s are gone.

CR 132-133 (PL 00041-00042).

ACCEPTANCE FROM APPELLANT:

Yes that's how we arrived at the 55,000 premium. We weren't looking for a hard number... Just needed to know if it was widely different. We need to be able to quote V1.7's and sell them even if we can't secure 15 at a time.

CR 131 (PL 00040).

4. When the current time pressure is lessened, we will resume a longer-term discussion of IP and design acquisition. Your current purchases of V1.5 and V1.7 could be negotiated as part of the overall terms and conditions.

CR 135 (PL 00044).

RESPONSE FROM APPELLANT:

It still remains critical the hydraulic heat exchanger is successfully relocated. I completely understand why Anderson would want to contain investment costs in this project, however from our perspective it appears as though little to no enthusiasm remains (for obvious reasons). We expected our feedback from the field would have been tested and applied to a completed 2.0 unit by June. In place of that the pace of progress has been glacial, and after paying a significant premium for our equipment we are now paying for our own warranty retrofits. So NAKOTA also continue to pay an unfair price for this adventure.

CR 133-134 (PL 00042-00043).

RESPONSE FROM APPELLEE:

> I respectfully disagree, I know that Tim, Nick, and Dan G are trying to find the best solution for you. We take pride in our work and want it to be the best. Here's what we know. Airflow over the CAC is spotty causing a too large Delta-T, which causes the NOx level to be too high. Here's what we're working on, in order of our preference.
> 1) Tim has Doosan Engineers working to see if the following can work. The NOx is produced by too large of delta-T. Doosan specs are at 100% load. Doosan is checking to see if a larger delta-T at 88% load is acceptable in NOx emissions. If it is, no changes need to be made to the machine.
> 2) Tim is checking what an air diverter to the poor CAC airflow spots will do to the Delta-T
> 3) The worst-case scenario, (but will work) is to allow first air to flow over the CAC

CR 132-133 (PL 00041-00042).

ACCEPTANCE FROM APPELLANT:

> To be fair I wasn't suggesting that they weren't trying to find the right solution... just that the problem was identified in Nov and it is now July. I have to think that if it was a priority it wouldn't take 9 months. It has been a critical performance barrier that we have been passionate about eliminating. Please keep us in the loop as we are waiting for the successful confirmation.

CR 131 (PL 00040).

Here, the required negotiation on essential terms beyond the date of the supposed agreement indicates that the contract could not be finalized on July 19, 2019. The communications reflect a 'work in progress' where key aspects were still open to future negotiation and agreement, rendering the existing discussions too indefinite to constitute an enforceable contract. Most importantly, the V1.5 heaters needed to produce more heat than the V1.0 model, and a solution was not agreed on and was still in the works. (CR 076; 51:22-25); (CR 133-134 (PL 00042-00043)).

Despite discussions about specific conditions and pricing, the email exchanges clearly illustrate that multiple essential terms were left open and were contingent upon

future negotiations and agreements. Resultingly, as a matter of law, an enforceable contract was *not* established. *See Weitzel*, 714 N.W.2d at 892 (a contract is not established if an agreement leaves open essential terms and calls for the parties to agree to agree and negotiate in the future on essential terms). This is particularly evident in the discussions concerning the V1.7 and V2.0 units, where pricing and other conditions were explicitly stated to depend on future developments and market conditions. *See* (CR 132-133 (PL 00041-00042)) ("We agree, with the stipulation that no V1.7s are built until all 30 V1.5's have been sold.").

Further, South Dakota law requires mutual assent or a meeting of the minds on all essential terms to form a binding contract. *See Liebig*, 851 N.W.2d at 752 (holding that in order to form a binding contract, there must be mutual assent or a meeting of the minds on all essential elements or terms). The dialogue regarding V1.5 modifications, future transactions, IP rights, and development of subsequent models, reveals a lack of definitive mutual assent on essential matters. The parties' agreed to continue discussions on these essential terms.

Additionally, the terms discussed were not only indefinite but were expressly conditional on the outcomes of ongoing negotiations. For instance, the agreement to adjust V1.7 pricing based on future unit sales and the incorporation of V1.5 sales into IP negotiations illustrate that the contract's terms were contingent on conditions not yet fulfilled. Such conditional and future-dependent stipulations prevent the formation of a legally binding contract as they leave material terms open and to be agreed upon in the future. The most significant aspect not agreed upon was the solution to the heat deficiency. This issue was never adequately resolved, and it was an essential element of

the negotiations. *See* (CR 133-134 (PL 00042-00043)) ("It still remains critical the hydraulic heat exchanger is successfully relocated.").

For these reasons, this Court should determine that because essential terms were left open and mutual assent to these terms was never reached, an enforceable contract was *not* established.

B. Alternatively, if the July 19, 2019 conversations constitute an enforceable agreement, the circuit court erred by not considering all terms.

The most essential rule in the construction of contracts is that the court must, if possible, ascertain and give effect to the mutual intention of the parties. *GMS, Inc. v. Deadwood Social Club, Inc.*, 333 N.W.2d 442 (S.D.1983); *Forester v. Weber*, 298 N.W.2d 96 (S.D.1980). In determining the intent of the parties, we must consider the entire contract. *Chord v. Pacer Corp.*, 326 N.W.2d 224 (S.D.1982). This Court has explained, "[w]hen interpreting a contract we prefer to give effect to all its terms, rather than an interpretation which leaves a part unreasonable or of no effect." *In re Dissolution of Midnight Star Enterprises, L.P. ex rel. Midnight*, 2006 SD 98, ¶ 12, 724 N.W.2d at 337 (quoting *Nelson v. Schellpfeffer*, 2003 SD 7, ¶ 14, 656 N.W.2d 740, 744) (internal quotations omitted). Once the provisions of an agreement have been given their proper meaning by the Court, "[w]hether a contract has been breached is a pure question of fact for the trier of fact to resolve." *Weitzel*, 714 N.W.2d at 894.

The circuit court simply held that on July 19, 2019, Thermal Intelligence entered into an agreement to purchase 30 V1.5 heaters at a price of $69,500 each. However, the circuit court failed to consider all terms of the agreement, which it was bound to do. *See Nelson*, 656 N.W.2d at 743 ("The contract is to be read as a whole, making every effort to give effect to all provisions.")

The circuit court's interpretation of the July 19, 2019 agreement only considered terms concerning the purchase of 30 V1.5 heaters. In doing so, the circuit court effectually determined that this constituted a complete and standalone agreement. However, as noted in the chronological representation of the July 19, 2019 conversations, the record clearly shows that there were additional terms in the agreement involving multiple clauses that involved future collaborations, developments, and negotiations. Accordingly, there are genuine issues of material fact as to the effect of the additional terms.

1. There are genuine issues of material fact as to the parties' intent.

When considering all terms of the agreement, there are genuine issues of material fact as to the parties' intent. At the outset of the parties' relationship, it was the parties' intent to design, manufacture, and sell heaters that met Thermal Intelligence's specifications at an appropriate economic price. (CR 072; 35:8-13). The email exchange that took place on July 19, 2019 cannot be isolated from this context. This intent is explicitly found within the four corners of the purported agreement:

> I would like to find a productive path forward to maintain and grow our relationship. It is in that spirit, I want to offer a fourth option and give you some definitive answers to your questions.

(CR 135 (PL 00044)).

In further support of the parties' intent, the record is clear. At the outset of their relationship, Thermal Intelligence and Anderson Industries worked together to develop the V1.0 heater. Thermal Intelligence then purchased 30 V1.0 heaters from Anderson Industries. However, these heaters did not produce enough heat and did not meet Thermal Intelligence's specifications. (CR 076; 52:11-16). The parties then began exploring

options for a new model. Unfortunately, Anderson Industries, in an attempt to cut overhead costs, had purchased parts for 60 V1.0 heaters, 30 more than what Thermal Intelligence had committed to purchase. (CR 076; 52:11-16). To contain Anderson Industries' investment costs, the parties discussed modifications that could be made to the V1.0 heater, specifically the relocation of the heat changer. (CR 133-134 (PL 00042-00043)); (CR 076; 51:22-25). These modified heaters became the V1.5 model. Because of Anderson Industries inventory overhead costs, the 30 V1.5 heaters needed to be sold before any new models could be made. This is supported by the July 19, 2019 communications wherein Dan Ewert, on behalf of Anderson Industries, explicitly stated "…it helps us by getting V1.5 inventory out the door." (CR 135 (PL 00044)). Accordingly, the intent of the parties during the July 19, 2019 communications was to continue developing future heater models, specifically the V1.7 and V2.0 heaters, and ultimately reach an IP acquisition deal, but this could not be achieved until the 30 V1.5 heaters were sold. The intent of the parties was *not* a simple sale of 30 V1.5 heaters. Thermal Intelligence would not have agreed to purchase 30 V1.5 heaters without additional terms. (CR 088; 98:20-99:2) ("we wanted to get those units sold for [Anderson Industries] … because we couldn't get to the next stage without getting them sold). This is a genuine issue of material fact. And further, the circuit court erred because it interpreted the alleged contract in a way that rendered the additional teams meaningless. *See Coffey v. Coffey*, 2016 SD 96, ¶ 8, 888 N.W.2d. 805, 809 (stating that courts should not interpret contracts in a way that renders a portion of the contract language meaningless).

2. ***There are genuine issues of material fact as to Anderson Industries' ability to satisfy all terms.***

Before the above referenced terms could occur, Anderson Industries laid off the entire innovation team and shut down its facility in Mapleton, North Dakota. *See* (CR 076; 53:20-23; 54:5-7). Without the original innovation team in place, the mutual intent of the parties to modify the V1.5 model and develop the V1.7 and V2.0 models could not be carried into effect. Thermal Intelligence clearly communicated this to Anderson Industries:

> Without the team who developed the heater in place we do not believe the product can be supported from your other operations.

(CR 191 (PL 00033)).

Even assuming, *arguendo*, that this intent could eventually be carried into effect, acquiring an entirely new innovation team would dramatically alter costs, lead times, and strategy, altering all essential terms of the July 19, 2019 communications. This was recognized by Anderson Industries:

> I agree that there are critical resources from our development team required to support this project. That is why our support strategy involves them in the plan. There is no way I could get support from our finance partner to deliver another year of heaters at no margin with such a high investment in the development of the product.

(CR 191 (PL 00033)). Further, Anderson Industries informed Thermal Intelligence that there would also be increased costs going forward:

> We will continue providing the K2 product and will have a support infrastructure, this obviously would have to be built into the price going forward if we table the IP deal.

(CR 192 (PL 00034)). Accordingly, there are genuine issues of material fact that Anderson Industries could satisfy all terms of the July 19, 2019 communications.

3. There are genuine issues of material fact as to the operability of the heaters and Thermal Intelligence's subsequent requests to repair the heaters.

The circuit court improperly found that there is nothing in the record indicating that the heaters were inoperable. *See* CR 273 at 6:21-22. The circuit court also improperly held that there is nothing in the record indicating that Thermal Intelligence ever attempted to return, reject, or request that Anderson Industries repair the heaters. *See* CR 273 at 6:23-25. However, the record clearly demonstrates that these findings are erroneous. Within the record there is communication between Thermal Intelligence and Anderson Industries specifically discussing the inoperable heaters:

> Do you know which units were the one(s) that wouldn't start out in western ND? I'd like to look at the telemetry data, and possibly get a data log pulled from those units to get a better idea of what might have taken place.

(CR 218 (Thermal 000013)).

> All I've really heard is that the units wouldn't start and were brought back by the customer. Do they both not start?

(CR 217 (Thermal 000012)). Additionally, within the record is an email exchange between Thermal Intelligence and one of its customers that, in great length, details the inoperability of heaters that were shipped directly from Anderson Industries. *See* (CR 207-208).

Further, the record clearly shows Anderson Industries inability to repair heaters at Thermal Intelligence's request. As a result of Anderson Industries' entire innovation team being laid off, Anderson Industries no longer had access to the remote data for the heaters:

> Do we (Anderson) no longer have access to the Proemion data for some reason? Dan Ewert spearheaded pretty much everything as far as the Proemion was concerned. Since Dan E is no longer here (and even while he was) my knowledge of the situation is minimal.

(CR 217 (Thermal 000012)). Additionally, Jason Chodur, Anderson Industries' employee responsible for ordering replacement parts, was now living in Wisconsin and had a different full-time job, which dramatically inhibited Anderson Industries' ability to perform any repairs or warranty requests:

> Jason is our main purchasing guy, who only works for Anderson on a limited basis, as he now lives in Wisconsin and has a different lull-time job.
>
> I myself haven't the foggiest idea how to go about ordering anything, so I'm not much help.
>
> Your best bet here is to stay in contact with Jason for updates. The ball is rolling on this order, I'm just not sure how to expedite it considering the current state of our company.

(CR 215 (Thermal 000123)). On October 8, 2019, Ivan Celuszak, on behalf of Thermal Intelligence, contacted Jason Chodur seeking assistance with ordering replacement parts for the inoperable heaters. (CR 213-214 (Thermal 000121-000122)). In his response, Jason Chodur informed Thermal Intelligence that he was working limited hours and was very busy because he had another full-time job and also farms. (CR 213 (Thermal 000121)). As of October 24, 2019, none of the necessary parts were ordered and Thermal Intelligence was unable to fix the inoperable heaters. (CR 211 (Thermal 000119)). And according to Anderson Industries' warranty policy, it was Anderson Industries' obligations to repair and/or replace any parts that were defective. *See* (CR 209 (PL 00008)).

As of November 18, 2019, Thermal Intelligence had not received any replacement parts to fix the inoperable heaters. Brian Tiedemann, on behalf of Thermal Intelligence, notified Anderson Industries that this was unacceptable and was one of many reasons why Thermal Intelligence would be terminating its relationship with Anderson Industries:

> [W]e have a million in receivables we can't collect because the equipment straight from factory doesn't work. So we are spending significant amounts of money and resources trying to save the day… Parts lead times are ridiculous and after placing a parts order many weeks ago we still have nothing. The equipment has way more issues than last year so everything has gone downhill… Kory this is not how any of us wanted this to end. Unfortunately with problematic equipment and zero support of any kind, we are no longer prepared to fight the war alone.

(CR 155 (PL 00028)).

Thus, the circuit court erred in its finding as to the operability of the heaters, Thermal Intelligence's subsequent requests to repair the heaters, and Anderson Industries' ability to fulfill the requests. Because of these genuine issues of material fact, if this Court determines that an agreement between the parties exists, this Court should find Anderson Industries' inability to render assistance or order replacement parts as a breach.

II. The Circuit Court Erred By Not Considering A Subsequent and Superseding Agreement That Occurred on August 1, 2019.

Even if the circuit court correctly determined that the July 19, 2019, conversation created an enforceable agreement, the terms of that agreement were subsequently superseded and modified by an August 1, 2019 agreement. This issue was raised by Thermal Intelligence but was not considered by the circuit court. *See* (CR 164); App. 007.

On August 1, 2019, Thermal Intelligence and Anderson Industries met via video/teleconference to continue negotiations in alignment with the July 19, 2019 email exchange. Following this meeting, Kory Anderson, on behalf of Anderson Industries, sent an agreement proposal whereby Thermal Intelligence would acquire the K2 V2.0 Diesel Flameless Heater Product Line. (CR 139 (THERMAL 000140)). On August 2, 2019, Brian Tiedemann, on behalf of Thermal Intelligence, accepted this proposal. (CR

140 (THERMAL 000138)). The terms and conditions of this agreement are as follows:

> Initial Transaction V1.5 - 30 units:
> Purchase at $64,500 plus an additional $10,000 per unit applied to acquire ownership of the product ($300,000 going to acquisition)
>
> Subsequent Order V1.7 - 20 Units to be purchased for 2019 season under same pricing and royalty structure
>
> The $64,500 base unit price includes Engineering, Support, and Production Management of the K2 product line. Anderson Innovations would remain the engineering and manufacturing partner on the K2 through this agreement for 5 years (through 2023 season).
> Engineering and product changes limited to minor product changes, options, and performance adjustments.
>
> Major redesigns involving more than budgeted monthly allowance or new models would be scoped through a new Engineering Services Agreement
>
> Budgeted Services Allowance of 180 hours per year
>
> Any changes affecting cost will adjust base price per unit and be communicated upfront during change process
>
> Annual Minimum Order of 50 units
>
> Complete transfer and licensing executed for K2 Product and related IP upon completion of the $1.8 Million purchase price through the royalty structure.
>
> Failure to meet payment obligations or minimum annual order requirements results in termination of the agreement without reimbursement, except for units paid for and in production.

(CR 139 (THERMAL 000140)). The circuit court failed to consider the above August 1, 2019 agreement which unequivocally modified and superseded the July 19, 2019 agreement. *See* SDCL 20-7-5 (defining "novation" as the substitution by contract of a new obligation for an existing one and is subject to the rules concerning contracts in general). This Court has delineated the essential elements of novation as:

> (1) a previous valid obligation, (2) agreement of all parties to the

> substitution under a new contract based on sufficient consideration, (3) extinguishment of the old contract, and (4) the validity of the new contract. Clear and convincing evidence is required in order to justify setting a written contract aside and holding it abandoned or substituted by subsequent parol evidence or contract.

Haggar v. Olfert, 387 N.W.2d 45, 50 (S.D.1986). Applying these elements to the case at hand, all four elements are met, thereby establishing novation.

First, the circuit court found there to be valid contractual obligation wherein Thermal Intelligence agreed to purchase 30 units of V1.5 heaters at $69,500 per unit. CR 271; 4:20-24. This determination was based on the provisions set forth in the July 19, 2019 email exchange. *See* (CR 131 (PL 00040)).

Second, during the August 1, 2019 video/teleconference, the parties reached a new agreement which altered the terms of the initial transaction. *See* (CR 139 (THERMAL 000140)). This subsequent agreement not only modified the price per unit to $64,500 but also added a component of $10,000 per unit being allocated towards acquiring ownership of the product line. This is a clear and distinct departure from the terms set forth in the July 19, 2019 agreement and indicates mutual consent to the new terms.

Third, the modified pricing structure and additional terms concerning the acquisition of the product line serves as a substitution for the July 19, 2019 agreement. This substitution extinguishes the previous agreement, as the parties have set new terms that replace the conditions of the original agreement. The inclusion of the product acquisition fee fundamentally changed the economic and strategic substance of the transaction, which reflects the parties' original intent—to successfully modify the V1.5 model, develop the V1.7 and V2.0 models, and reach an agreement on the acquisition of

the K2 V2.0 Diesel Flameless Heater Product Line.

And fourth, the agreement reached on August 1, 2019, is valid as it meets all the necessary legal requirements for a contract, including offer, acceptance, and consideration. The consideration is clearly reflected in the revised pricing, represented by the significant economic commitments made by Thermal Intelligence and the corresponding obligations of Anderson Industries to deliver heaters, provide warranty support, continue developments, and transfer its future product line.

Accordingly, this constitutes a clear instance of novation. The record displays the parties' intent to substitute the original agreement with a new one that significantly altered the economic and strategic engagements between them. Should this Court determine that an enforceable agreement was reached on July 19, 2019, this Court should recognize the establishment of novation and establish that the August 1, 2019 agreement replaced the July 19, 2019 agreement.

III. The Circuit Court Erred In Finding That Thermal Intelligence Breached An Agreement With Anderson Industries.

The circuit court found that on July 19, 2019, Thermal Intelligence entered into an agreement with Anderson Industries to purchase 30 V1.5 heaters at a price of $69,500 each, and that Thermal Intelligence first breached this agreement when it failed to make payments according to the payment schedule. However, there are genuine issues of material fact as to the payment schedule.

A. The payment schedule proposed by Thermal Intelligence was not an amendment to the July 19, 2019 'agreement.'

On or about September 27, 2019, Thermal Intelligence became aware that Anderson Industries had laid off key staff and was closing its facility in Mapleton, North Dakota. This exacerbated Thermal Intelligence's concerns with non-functional heaters

and lack of support from Anderson Industries. Thermal Intelligence communicated these concerns with Anderson Industries. *See* (CR 145-147 (PL 00033-00036)). Anderson Industries then notified Thermal Intelligence that "there are some things outside of each of our controls that prevent an IP alignment deal." (CR 145 (PL 00033)). With these significant changes in circumstances, Thermal Intelligence informed Anderson Industries of its position:

> I just want to make sure our position is clear so you have the appropriate context for your decisions that relate to Thermal intelligence.
>
> 1) Our cost for the existing units is $64,500 with no allotment for an IP transfer.
> 2) If we do not have exclusivity for the K2 design we can no longer represent the product.
> 3) Without resolution on whether or not we exclusively represent the K2 product we will swiftly change strategies to a mix of products we do exclusively represent. That decision will have to be made within the next 4 weeks before we start investing in our 2020 sales strategies.

(CR 145 (PL 00033)). Subsequently, on October 3, 2019, Brian Tiedemann, on behalf of Thermal Intelligence, initiated a plan to keep the K2 heater development alive:

> While there still remains considerable uncertainly on exactly what the path forward looks like, we are trying to find a path that makes economic sense, and allows the K2 design to live another day.

(CR 193 (PL 00035)). This plan consisted of a payment schedule that ensured Anderson Industries could remain operational, support the K2 heater line, and continue developing the V1.7 and V2.0 models. The proposed payment schedule is as follows:

> As we collect receivables from equipment sales we will in turn transfer funds to Anderson.
> In addition to that we will commit to:
> 2 - $100,000 payments per week on each Monday, & Thursday. So we will leverage our credit facilities to ensure Anderson is receiving a minimum of $200,000 per week.
> The first $200,000 wire transfer has been sent and is addition to the $417,000 already received by Anderson.

> As mentioned previously this schedule can be accelerated based on our receivables.

(CR 149 (THERMAL 000057)). Crucially, this proposal occurred *after* Thermal Intelligence made its position clear concerning V1.5 pricing and product exclusivity. Anderson Industries accepted this proposal. *See (*CR 149 (THERMAL 000057)).

Thermal Intelligence's intent for the payment proposal is clear, "we are trying to find a path that makes economic sense, and allows the K2 design to live another day." (CR 193 (PL 00035)). This was not simply a proposal to pay for 30 V1.5 heaters. Thermal Intelligence's intent was to ensure that Anderson Industries had enough cashflow to continue developing the K2 product line. Accordingly, there is a genuine issue of material fact as to what Thermal Intelligence was committing to concerning the payment schedule.

B. Thermal Intelligence expressly communicated its reasons for suspending all payments to Anderson Industries.

There is a genuine issue of material fact as to why Thermal Intelligence suspended all payments to Anderson Industries. Anderson Industries alleged that the sole reason Thermal Intelligence suspended payments was because Anderson Industries failed to release a heater. *See* CR 050; CR 154-157 (PL 00027-30). However, on Nov. 18, 2019, Thermal Intelligence notified Anderson Industries of its reasons. Specifically, Thermal Intelligence cited to a plethora of reasons: lack of communication, problematic and inoperable equipment, lack of support, lengthy parts lead times, failure to order/deliver replacement parts, frozen deliveries, and customers refusing to pay for inoperable heaters. (CR 155 (PL 00028)). Most importantly, Thermal Intelligence was spending significant money and resources trying to mitigate the damages caused by the inoperable heaters. (CR155 (PL 00028)). "Accepting anymore deliveries from Anderson [Industries] only

increased [Thermal Intelligence's] liabilities, risk, and exposure. (CR 155 (PL 00028)). Accordingly, there is a genuine issue of material fact as to the reasons why Thermal Intelligence suspended all payments to Anderson Industries.

IV. The Circuit Court Erred In Its Determination of Damages.

The circuit court erred in its determination of damages. Prior to any purported agreement to purchase any V1.5 heaters, Anderson Industries had already purchased and was in possession of the parts necessary to build 30 V1.5 heaters, many of which were already built. *See* (CR 131 (PL 00044)) ("…it helps us by getting V1.5 inventory out the door."); *see also* (CR 076; 52:16-19) ("[Anderson Industries] had built double the inventory that we had committed to buy…"). Thus, any claim for damages that considers the full costs of materials for the V1.5 heaters is not supported by the record. This is a genuine issue of material fact, rendering the circuit court's decision as to damages wholly inappropriate.

Furthermore, Anderson Industries filed this lawsuit in July 2020. Anderson Industries did not make any attempt to litigate these issues until it filed for summary judgment on March 27, 2023. Thus, applying nearly four years of interest is unfair to Thermal Intelligence and encourages and supports the practice of prolonged litigation. Should this Court determine that Anderson Industries is entitled to a monetary judgment, Thermal Intelligence requests that this Court equitably reduce the interest owed.

CONCLUSION

WHEREFORE, Thermal Intelligence respectfully requests that this honorable Court *reverse* the circuit court's judgment and remand with instructions to enter judgment in favor of Thermal Intelligence, or in the alternative, reassign this matter to a new judge to continue proceedings.

/s/ Tatum O'Brien

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REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests oral argument before this Court.

/s/ Tatum O'Brien
Tatum O'Brien

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellant's Brief does not exceed the word limit set forth in SDCL § 15-26A-66, said Brief containing 6,942 words, exclusive of the table of contents, table of cases, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel.

/s/ Tatum O'Brien
Tatum O'Brien

CERTIFICATE OF SERVICE

I, Tatum O'Brien, do hereby certify that on this 6th day of May, 2024, I have electronically filed the foregoing with the Supreme Court using the Odyssey File & Serve system which will send notification of such filing to the following:

Nichole J. Mohning
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Attorneys for Appellees

/s/ Tatum O'Brien
Tatum O'Brien

APPENDIX

1.	Order Regarding Cross-Motions for Summary Judgment	CR 279-280
2.	Judgment	CR 281-282
3.	Complaint	CR 002-007
4.	Answer	CR 009-013
5.	Defendant's Memorandum in Support of Defendant's Cross-Motion for Summary Judgment and Response to Plaintiff's Motion for Summary Judgment	CR 162-182
6.	Defendant's Reply to Plaintiff's Brief in Response to Defendant's Motion for Summary Judgment	CR 262-266
7.	Plaintiff's Brief in Support of Motion for Summary Judgment	CR 041-052
8.	Plaintiff's Brief in Response to Defendant's Motion for Summary Judgment	CR 241-256
9.	Defendant's Response to Plaintiff's Statement of Undisputed Material Facts and Defendant's Statement of Undisputed Material Facts	CR 230-235
10.	Plaintiff's Objections and Responses to Defendant's Statement of Undisputed Material Facts	CR 257-261
11.	Plaintiff's Statement of Undisputed Material Facts in Support of Motion for Summary Judgment	CR 054-058
12.	Transcript of Status Hearing	CR 268-278
13.	Transcript of Motions for Summary Judgment	CR 283-319

STATE OF SOUTH DAKOTA | IN CIRCUIT COURT

COUNTY OF DAY | FIFTH JUDICIAL CIRCUIT

ANDERSON INDUSTRIES, LLC, Plaintiff, vs. THERMAL INTELLIGENCE, INC., a Canadian corporation, Defendant.	18CIV20-000023 **ORDER REGARDING CROSS-MOTIONS FOR SUMMARY JUDGMENT**

This matter having come on for a hearing before the Honorable Marshall C. Lovrien, Circuit Court Judge, on November 1, 2023, at 2:00 P.M. at the Day County Courthouse in Webster, South Dakota, on Plaintiff and Defendant's Cross-Motions for Summary Judgment. Plaintiff appeared by and through its attorneys Jonathan A. Heber of Cutler Law Firm, Sioux Falls, South Dakota. Defendant appeared by and through its attorney Tatum O'Brien of O'Keefe, O'Brien, Lyson & Foss, LTD, Fargo, North Dakota.

On January 31, 2024, at 11:00 A.M., the Court rendered an oral decision on the Cross-Motions for Summary Judgment. Plaintiff appeared telephonically by and through its attorney Jonathan A. Heber of Cutler Law Firm, Sioux Falls, South Dakota. Defendant appeared telephonically by and through its attorney Tatum O'Brien of O'Keefe, O'Brien, Lyson & Foss, LTD, Fargo, North Dakota. The Court's oral findings and conclusions are incorporated in this Order as if set forth herein.

The Court having reviewed the briefs, statements of undisputed material fact, affidavits, and considered the arguments of counsel, and upon all the records and pleadings on file herein,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

1. Plaintiff Anderson Industries, LLC's Motion for Summary Judgment on its claims for breach of contract (Count I and Count II) against Defendant Thermal Intelligence, Inc. is in all respects **GRANTED**.

2. Defendant Thermal Intelligence, Inc.'s Cross-Motion for Summary Judgment on Plaintiff Anderson Industries, Inc.'s claims for breach of contract (Count I and Count II) against Defendant Thermal Intelligence, Inc. is in all respects **DENIED**.

2/23/2024 1:23:00 PM

Attest:
Opitz, Claudette
Clerk/Deputy

BY THE COURT:

HONORABLE MARSHALL C. LOVRIEN
Circuit Court Judge

STATE OF SOUTH DAKOTA | IN CIRCUIT COURT

COUNTY OF DAY | FIFTH JUDICIAL CIRCUIT

ANDERSON INDUSTRIES, LLC, Plaintiff, vs. THERMAL INTELLIGENCE, INC., a Canadian corporation, Defendant.	18CIV20-000023 **JUDGMENT**

Plaintiff Anderson Industries, LLC's Motion for Summary Judgment against Thermal Intelligence, Inc. was brought on for a hearing before the Honorable Marshall C. Lovrien on November 1, 2023, at 2:00 P.M., and for an oral decision on January 31, 2024, at 11:00 A.M. Plaintiff appeared through its attorney, Jonathan A. Heber, of Cutler Law Firm, LLP, of Sioux Falls South Dakota. Defendant appeared through its attorney, Tatum O'Brien of O'Keefe, O'Brien, Lyson & Foss, Ltd., Fargo, North Dakota Circuit. The Court's Order Granting Summary Judgment in favor of Anderson Industries, LLC is incorporated herein.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that a Judgment be entered herein in favor of Plaintiff Anderson Industries, LLC and against Thermal Intelligence, Inc. as follows:

1. That Plaintiff Anderson Industries, LLC shall have a judgment against and may recover from Defendant Thermal Intelligence, Inc. the following amounts:

Principal Amount:	$918,000.00
Prejudgment Interest @ 10% (11/18/2019 to 2/23/24):	$391,847.67
TOTAL:	**$1,309,847.67**

2. Interest shall accrue at the statutory rate from and after the date of this judgment.

3. Plaintiff Anderson Industries, LLC may make application for its cost and disbursements under SDCL § 15-6-54(d). **2/23/2024 1:23:25 PM**

Dated this _____ day of _____, 2024.

BY THE COURT:

Attest:
Opitz, Claudette
Clerk/Deputy

HONORABLE MARSHALL C. LOVRIEN
Circuit Court Judge

STATE OF SOUTH DAKOTA | IN CIRCUIT COURT

COUNTY OF DAY | FIFTH JUDICIAL CIRCUIT

ANDERSON INDUSTRIES, LLC, Plaintiff, v. THERMAL INTELLIGENCE, INC., a Canadian corporation, Defendant.	18CIV20-000023 **Defendant's Memorandum in Support of Defendant's Cross-Motion for Summary Judgment and Response to Plaintiff's Motion for Summary Judgment**

COMES NOW Defendant, Thermal Intelligence, Inc., by and through its undersigned counsel of record, respectfully submits the following Memorandum in Support of Defendant's Cross-Motion for Summary Judgment and Response to Plaintiff's Motion for Summary Judgment. Thermal Intelligence requests that this Court DENY Plaintiff's Motion. Additionally, Thermal Intelligence urges this Court to find that no binding contract exists between the parties. Alternatively, should this Court recognize the existence of a contract, this Court should find it unenforceable.

INTRODUCTION

[¶1] This case is far removed from a simple contractual dispute as framed by Anderson Industries. It is fundamentally about Anderson Industries' persistent mismanagement, internal disarray, and misrepresentation, with Thermal Intelligence's attempts to protect its significant investment in Anderson Industries' products and its own customers from this chaos. Thermal Intelligence was not merely a customer, but an essential investor in Anderson Industries, funding and assisting in the development of Anderson Industries' heaters with the expectation of receiving functional products and adequate support and warranty. The reality, however, was far from it.

[¶2] Anderson Industries neglects to mention that during the alleged negotiation phase, the talks were not merely about the purchase of 30 V1.5 heaters, but were intrinsically tied to the larger negotiation over the sale of the heater intellectual property and manufacturing infrastructure. Simultaneously, and unbeknownst to Thermal Intelligence, Anderson Industries was embroiled in intellectual property disputes, lawsuits, and internal strife, leading to a veritable implosion that resulted in furloughing key staff and closing down its Mapleton, North Dakota manufacturing plant.

[¶3] Anderson Industries' sudden and poorly managed implosion was a shock to Thermal Intelligence, which had significant offers on the table for the intellectual property and manufacturing infrastructure. The shockwaves of this implosion directly impacted Thermal Intelligence and its customers as Thermal Intelligence had sold a significant number of heaters to third parties and was relying on Anderson Industries' ability to provide warranty and support. Resultingly, Thermal Intelligence has suffered significant financial losses and damage to its reputation amongst its customers.

[¶4] And now, bizarrely, Anderson Industries has attempted to paint Thermal Intelligence as the contract-breacher. Thermal Intelligence's cross-motion and opposition to Plaintiff's Motion for Summary Judgment arise from the context of Anderson Industries' own mismanagement and dishonesty. In the sections that follow, Thermal Intelligence details the absence of a formal agreement, examples of ongoing negotiations, Anderson Industries' misrepresentations and breaches, and the detrimental consequences of these actions on Thermal Intelligence.

FACTUAL BACKGROUND

[¶5] Throughout 2019, Anderson Industries and Thermal Intelligence were negotiating the acquisition of the K2 V2.0 Diesel Flameless Heater Line. (Defendant's Exhibit E). With the fast-

approaching winter season in July of 2019 and customer orders starting to come in, an informal agreement was devised between Anderson Industries and Thermal Intelligence to enable Anderson Industries to start manufacturing V1.5 heaters for the upcoming season. (Plaintiff's Exhibit 4). The pertinent aspect of this informal agreement is Clause 4, which clearly stipulates, "When the current time pressure is lessened, we will resume a longer-term discussion of IP and design acquisition. Your current purchases of V1.5 and V1.7 could be negotiated as part of the overall terms and conditions." *Id.* Thermal Intelligence, operated in good faith under this informal agreement and continued negotiations with Anderson Industries. (Plaintiff's Exhibits 6-9).

[¶6] On August 1, 2019, a subsequent agreement was reached between Thermal Intelligence and Anderson Industries. (Plaintiff's Exhibit 7). The terms of this agreement represent the only document in evidence signifying a formal contract. *Id.* This contract stipulates Thermal Intelligence's acquisition of the K2 product line and designs, including the initial purchase of 30 V1.5 heaters at a price of $64,500. *Id.* The terms also included five years of AI's engineering, support, and product management—elements vital to Thermal Intelligence's business operations and customers. *Id.* It was also expressly stated that the purchase price of $64,500 per heater would include an additional $10,000 per unit applied to acquire ownership of the product line. *Id.* Thus, from Thermal Intelligence's perspective, they would also be making payments for the acquisition of the K2 product line, not just purchasing individual heaters. *Id.* On August 2, 2019, Brian Tiedemann accepted the proposed terms and inquired if any more steps were needed to formalize the agreement. (Plaintiff's Exhibit 8).

[¶7] On September 4, Brian Tiedemann reached out to close the loop on the agreement. (Plaintiff's Exhibit 9). Ten days later, on September 14, Kory Anderson proposed some modifications to the original offer, suggesting new pricing and additional services for Thermal

Intelligence. (Defendant's Exhibit A). Brian Tiedemann responded on September 17, expressing serious concerns about the support infrastructure at Anderson Industries, the need to solidify pricing, and the challenge of securing a 50-unit order by June of the following year. *Id.*

[¶8] Soon after, Brian Tiedemann communicated concerns about delivery delays and lack of support from Anderson Industries in emails sent on September 17, 19, and 26 emphasizing the impacts these issues were having on Thermal Intelligence's ability to meet customer expectations and outlining the financial implications of the Anderson Industries closure on their business. (Plaintiff's Exhibit 11; Defendant's Exhibit B). Additionally, Thermal Intelligence's lead mechanic inspected the heaters at Anderson Industries and discovered that there were no operable units ready to ship. (Defendant's Exhibit B).

[¶9] On September 27, Kory Anderson responded with a reassurance that there was a plan to support the K2 product even if the IP deal was not pursued. (Defendant's Exhibit C at 2-3). He requested a decision from Thermal Intelligence by the end of the day to ensure the transition to Thermal Intelligence remained open, if that was the path chosen. *Id.* Brian Tiedemann replied on the same day, clarifying Thermal Intelligence's position if an IP deal was off the table and expressing doubts about the support capabilities of Anderson Industries without its key team members. *Id.* Later that day, Brian Tiedemann reiterated Thermal Intelligence's position[1], outlining potential changes in strategy if an exclusive agreement for the K2 design could not be achieved. (Defendant's Exhibit D).

---

[1] "I just want to make sure our position is clear so you have the appropriate context for your decisions that relate to Thermal Intelligence.

1) Our cost for the existing units is $64,500 with no allotment for an IP transfer.
2) If we do not have exclusivity for the K2 design we can no longer represent the product
3) Without resolution on whether or not we exclusively represent the K2 product we will swiftly change strategies to a mix of products we do exclusively represent. That decision will have to be made within the next 4 weeks before we start investing in our 2020 sales strategies.

Once you have a clear executable strategy please advise." (Defendant's Exhibit D) (emphasis added).

[¶10] On October 3, Brian Tiedemann sent an email to Kory Anderson detailing the financial burden Thermal Intelligence was facing due to unexpected pre-shipment payment requirements. (Plaintiff's Exhibit 13). These requirements were not included in any previous agreement or arrangement. Thermal Intelligence proposed a plan to ensure a steady flow of payments to keep Anderson Industries afloat, including two $100,000 payments per week, which were implicitly subject to Thermal Intelligence's receipt of receivables from heater sales. *Id.* Kory Anderson replied the same day, agreeing to the proposed payment schedule and committing to proceed with shipments accordingly. *Id.* As of October 24, Thermal Intelligence had paid Anderson Industries $1,167,000, which exceeds the cost of 18 V1.5 heaters at a cost of $64,500. (Plaintiff's Brief at 9). By this point, Thermal Intelligence had only received 17 V1.5 heaters from Anderson Industries, albeit these heaters were later determined to have significant issues. (Affidavit of Kory Anderson at ¶ 23; Defendant's Exhibit F).

[¶11] Soon thereafter, Thermal Intelligence began to experience financial strain as its customers were refusing to pay for defective heaters and even threatened to return them. (Defendant's Exhibit F, Plaintiff's Exhibit 17:2). Meanwhile, the company was incurring substantial expenses in attempts to repair these faulty units themselves because of the utter lack of support from Anderson Industries. (Plaintiff's Exhibit 17:2). Thus, Thermal Intelligence was entirely justified in suspending payments to Anderson Industries and subsequently canceling any remaining orders for a plethora of reasons. For example, Anderson Industries refused to release a heater that Thermal Intelligence had paid for in full. (Plaintiff's Exhibit 17). Additionally, Thermal Intelligence was also becoming aware of how bad the situation was with the defective heaters that were already delivered. (Defendant's Exhibit F). Moreover, Anderson Industries showed complete disregard for the issues at hand, providing neither assistance nor any form of supportive measures to rectify the

situation.

[¶12] However, Anderson Industries now isolates the July 2019 conversations, discarding the wider context and *subsequent* agreements and negotiations, painting the informal July 2019 agreement as the sole binding contract between the parties. (Plaintiff's Brief at 2-3). In the process, Anderson Industries conveniently overlooks its obligation to deliver working equipment, provide full warranty support, and maintain a long-term relationship with Thermal Intelligence—commitments that were understood and expected from previous successful transactions. (Defendant's Exhibit E). Anderson Industries conveniently neglects this context in their lawsuit, cherry-picking conversations to suit their claim. Their failure to consider the terms of the August 1, 2019 agreement and continued negotiations in their entirety constitutes a significant misrepresentation of the parties' understanding. (Plaintiff's Exhibit 7).

[¶13] This revisionist approach from Anderson Industries fails to acknowledge their catastrophic internal issues that led to the furloughing of all staff and closure of their Mapleton, North Dakota plant. Such a significant shift not only violated the spirit of the informal agreement but also rendered any formal contractual obligations null and void. The aftermath of Anderson Industries' actions directly and negatively impacted Thermal Intelligence's business and the expectations set forth in the negotiations. Thus, the allegations of Thermal Intelligence breaching an enforceable agreement are baseless and misleading.

[¶14] Given the absence of the original development team for the heaters, it is no surprise that the delivered units turned out to be entirely non-functional, amounting to nothing more than useless scrap metal. A hard-hitting reality to address is the audacious strategy adopted by Anderson Industries once they received substantial payments from Thermal Intelligence. Rather than dedicating resources to fulfill their obligations, Anderson Industries effectively shut down

operations with their last internal communication about the V1.5 units occurring on September 16, 2019, showing a mindboggling level of complacency and unprofessionalism. (Defendant's Exhibit K). They appeared to be more focused on milking Thermal Intelligence for every penny they could, with no evident intention of delivering on their obligations.

[¶15] To exacerbate this egregious conduct, Anderson Industries didn't just falter on their responsibilities; they effectively took the money and ran. This cynical move raises serious concerns about Anderson Industries' business integrity and ethical considerations. The fact that Anderson Industries could readily abandon their obligations, leaving Thermal Intelligence stranded with faulty products and a mounting financial burden, paints a picture of a company interested only in immediate gain, rather than long-term reputation and customer relationships.

[¶16] Now, adding insult to injury, Anderson Industries has the audacity to seek litigation as another means of extracting funds from Thermal Intelligence. This course of action can be seen as nothing short of a cash squeeze, a blatant attempt to exploit the legal system for financial gain. It's a shocking display of corporate greed and dishonesty that deserves to be called out and challenged with the full force of the law.

LAW & ARGUMENT

I. Standard for Summary Judgment

[¶17] Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." SDCL 15-6-56(c). Further, "when challenging a summary judgment, the nonmoving party must substantiate his allegations with sufficient probative evidence that would permit a finding in his favor on more than mere speculation, conjecture, or fantasy." *Peters v. Great W. Bank, Inc.*, 2015 S.D. 4, ¶ 13, 859 N.W.2d 618, 624 (quoting *Estate of Elliot v. A & B Welding Supply Co.*, 1999

S.D. 57, ¶ 16, 594 N.W.2d 707, 710). "Entry of summary judgment is mandated against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *One Star v. Sisters of St. Francis, Denver, Colo.*, 2008 S.D. 55, ¶ 9, 752 N.W.2d 668, 674.

II. Anderson Industries Cannot Establish Breach of Contract as a Matter of Law.

A. There was no enforceable contract between Thermal Intelligence and Anderson Industries.

[¶18] An enforceable contract requires mutuality of consent. *See* SDCL 53-1-2(2); *Coffee Cup Fuel Stops & Convenience Stores, Inc. v. Donnelly*, 1999 S.D. 46, ¶ 22, 592 N.W.2d 924, 927; *Braunger v. Snow*, 405 N.W.2d 643, 646 (SD 1987). "There must be mutual assent or a meeting of the minds on all essential elements or terms in order to form a binding contract." 17A AmJur2d *Contracts* § 26 (1991). Mutual consent to a contract does not exist "unless the parties all agree upon the same things in the same sense." SDCL 53-3-3; *Braunger*, 405 N.W.2d at 646. Its existence is determined by considering the parties' words and actions. *See* 17A AmJur2d *Contracts* § 29 (1991).

[¶19] In the present case, it is clear from the evidence that the parties never agreed on the same things in the same sense. While there was certainly negotiation and communication between Thermal Intelligence and Anderson Industries, there was a significant amount of ambiguity, continuing negotiation, and lack of agreement on material terms that prohibit the formation of a definitive and enforceable contract. The negotiation correspondence included changes in the proposed terms, the delivery of non-functional products, lack of warranty and support from Anderson Industries, and unforeseen pre-shipment payment requirements, none of which were factored into a finalized agreement.

[¶20] The informal agreement from July 19, 2019 and the subsequent August 1, 2019 agreement

clearly indicates a lack of certainty on multiple material issues. Clause 4 of the informal agreement indicated that a "longer-term discussion of IP and design acquisition" was to take place, underlining the fact that these critical points were not yet settled. Meanwhile, the August 1, 2019 agreement expressly stated that the purchase price of $64,500 per heater would include an additional $10,000 per unit applied to acquire ownership of the product line. This addition raises questions about the scope of the agreement and further complicates the calculation of the actual cost per unit. It clearly shows that the parties were not on the same page regarding the price per unit, one of the essential elements of a valid contract.

[¶21] Anderson Industries decision to selectively quote the July 2019 conversations and ignore subsequent discussions and changes in circumstances, does not serve to simplify matters, but rather indicates a lack of agreement on the precise terms of the deal. This lack of a meeting of minds demonstrates that a formal, enforceable contract was not established. The fact that the terms of the agreement were constantly changing, and discussions were ongoing, supports Thermal Intelligence's assertion that no final, enforceable agreement was ever reached.

[¶22] Moreover, the negotiations' overall tone and content clearly reflect that both parties viewed their discussions as an ongoing, dynamic negotiation, and not a finalized, binding agreement. The continuous exchange of emails containing proposals, counter-proposals, and adjustments to the terms of the deal reveals a lack of finality necessary for contract formation. Terms and conditions were repeatedly proposed, revised, and countered, as is often the case in dynamic and complex business transactions. Especially in cases involving the sale of IP and manufacturing infrastructure. As such, it would be erroneous to isolate a few selected communications from this ongoing exchange and deem them to constitute a binding contract.

[¶23] Therefore, given the lack of mutual assent and the absence of agreement on all material

terms, no enforceable contract was ever formed between Thermal Intelligence and Anderson Industries. Anderson Industries' attempt to argue otherwise is a gross oversimplification of a complex and evolving business negotiation and should be rejected accordingly.

B. Anderson Industries Misrepresented its capacity to fulfill the terms of any agreements.

[¶24] Should this Court find an enforceable contract existed between the parties, it is imperative that extrinsic evidence be allowed to corroborate Thermal Intelligence's statements concerning Anderson Industries' misrepresentation of its capacity to fulfill the terms of all agreements. The doctrine of the parol evidence rule might typically exclude the admission of oral or extrinsic evidence to modify the terms of a written contract. *See SDCL* 53-8-5; *Auto-Owners Ins. Co. v. Hansen Hous., Inc.*, 2000 S.D. 13, ¶ 13, 604 N.W.2d 504, 510. However, this is a rule of substantive law and not an absolute rule of evidence. *Auto-Owners*, 2000 S.D. 13, ¶ 14, 604 N.W.2d at 510. Thus, the parol evidence rule does not apply in cases of fraudulent inducement, even where the contract is clear, unambiguous, and fully integrated. *Oxton v. Rudland*, 2017 S.D. 35, ¶ 14, 897 N.W.2d 356, 360; *Poeppel*, 2013 S.D. 17, ¶¶ 19, 21, 827 N.W.2d at 584-85; *Engels v. Ranger Bar, Inc.*, 2000 S.D. 1, ¶ 15, 604 N.W.2d 241, 245.

[¶25] Anderson Industries significantly misrepresented its capacity to fulfill the terms of all potential agreements. Intentional misrepresentation is defined as a willful deception made with the intention of inducing a person "to alter his position to his injury or risk." *Littau v. Midwest Commodities*, 316 N.W.2d 639, 643 (S.D. 1982) (citing SDCL 20-10-1). Negligent misrepresentation is defined as:

> "Knowledge, or its equivalent, that the information is desired for a serious purpose; that he to whom it is given intends to rely and act upon it; that, if false or erroneous, he will because of it be injured in person or property. Finally, the relationship of the parties, arising out of contract or otherwise, must be such that in morals and good conscience the one has the right to rely upon the other for information, and the other giving the information owes a duty to give it with care." *Littau*, 316

N.W.2d at 644 (quoting *Boos v. Claude*, 69 S.D. 254, 9 N.W.2d 262, 264 (1943)).

[¶26] Additionally, "the relationship of the parties determines when such a duty arises." Such a duty can be established if a "complex transaction is involved requiring one of the parties to rely on the superior knowledge of the other." *Id.* (quoting *Fleming v. Torrey*, 273 N.W.2d 169 (S.D. 1978); *Moore v. Kluthe & Lane Ins. Agency, Inc.*, 89 S.D. 419, 234 N.W.2d 260 (1975)).

[¶27] The South Dakota Supreme Court has delineated the following elements to establish negligent misrepresentation:

> "Negligent misrepresentation occurs when one party makes (1) a misrepresentation, (2) without a reasonable basis for believing the statement to be true, (3) intending to induce a specific action by another party, where the other party (4) changes position based on actual and justifiable reliance on the statement, and (5) suffers damage as a result." *Fisher v. Kahler*, 2002 S.D. 30, ¶ 10, 641 N.W.2d 122, 126-27.

[¶28] Here, Anderson Industries engaged in extensive discussions with Thermal Intelligence, portraying itself as a capable and trustworthy supplier that could deliver high-quality heaters according to the agreed-upon specifications. However, Anderson Industries subsequent actions tell a different story. This was a direct result of the internal strife occurring at Anderson Industries.[2]

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[2] The internal disputes involving Anderson Industries and/or Kory Anderson encompass a variety of lawsuits, indicating a pattern of tumultuous business relations. These include, but may not be limited to:

Joel Jorgenson v. IronMaster Innovations, LLC, et al. (including defendants Kory Anderson and Anderson Industries, LLC); Case No. 09-2019-CV-01241, Cass County ND District Court. This lawsuit, served in October 2018 and filed with the Court in April 2019, was stipulated to dismiss with prejudice in January 2022. The litigation revolved around internal employee disputes, business entity dissolution, and disputes over intellectual property ownership.

Joel Jorgenson v. Kory Anderson, et al.; Case No. 09-2021-CV-01461; Cass County ND District Court. Served in June 2020 and filed with the Court in April 2021, it was stipulated to dismiss with prejudice in January 2022. This case was based on allegations of slander and tortious interference by a former employee.

Joel Jorgenson v. Kory Anderson, et al.; Case No. 3:21-CV-00102; U.S. District Court, District of North Dakota. The lawsuit commenced in May 2021 and was stipulated to dismiss with prejudice in January 2022. The central issue in this case involved patent ownership disputes, particularly pertaining to patents regarding flameless heater technology.

These cases indicate the turmoil within Anderson Industries, providing context to its actions and decisions during its negotiations with Thermal Intelligence.

[¶29] Anderson Industries' assertions regarding the quality, functionality, and reliability of the V1.5 heaters were unambiguous misrepresentations. Anderson Industries, in its capacity as the seller and manufacturer, asserted the efficacy of the heaters without a reasonable basis for such belief.

[¶30] These statements were intentionally made to induce Thermal Intelligence's action—specifically, to purchase the V1.5 heaters. Given Anderson Industries role as the manufacturer and the technical expertise it presumably possessed, Thermal Intelligence had no reason to doubt Anderson Industries' assurances. Thermal Intelligence was justifiably reliant on these misrepresentations when they proceeded with the transactions.

[¶31] As a direct result of Anderson Industries' misrepresentations, Thermal Intelligence changed its position by purchasing the V1.5 heaters, which were fundamentally unfit for their ordinary purpose. The fallout from this transaction was substantial, leading to significant negative repercussions with Thermal Intelligence's customers.

[¶32] Additionally, during the time when Thermal Intelligence and Anderson Industries were in negotiations for the acquisition of the heater product line, Anderson Industries was simultaneously planning to shut down its Mapleton, North Dakota manufacturing plant and furlough key workers. This plant was a critical part of the manufacturing infrastructure associated with the entire heater product line. This non-disclosure of critical information was a negligent misrepresentation by omission. Anderson Industries knew or should have known that this was essential information for Thermal Intelligence, whose decision to proceed with any agreement or negotiation was predicated on the belief that the same workforce and manufacturing infrastructure would continue to exist.

[¶33] In the course of these negotiations, Anderson Industries represented the continued viability of the heater product line, which included both the intellectual property and the manufacturing

infrastructure. Thermal Intelligence's proposed acquisition was premised on the understanding that the production capacity for the heaters would be sustained and transferred.

[¶34] Thus, in addition to the misrepresentations related to the quality of the heaters, Anderson Industries' non-disclosure of its plans to cease production operations also constitutes negligent misrepresentation. As a result of these actions and omissions, Thermal Intelligence suffered substantial damages and is entitled to appropriate remedies under South Dakota law.

[¶35] In addition to delivering non-functional products, Anderson Industries displayed a lack of commitment to providing the necessary support to Thermal Intelligence. Following the delivery of the faulty units, Thermal Intelligence attempted, on multiple occasions, to obtain necessary technical support from Anderson Industries in order to rectify the problems and get the heaters operational. On October 8, 2019, Nakoda Energy Services, one of Thermal Intelligence's largest customers, was notified that Jason Chodur, the person responsible for handling warranty/replacement orders for Thermal Intelligence, was now living in Wisconsin with a different full-time job in addition to farming. *See* Defendant's Exhibit H. However, these efforts were met with inability, silence, or significant delay from Anderson Industries, so much to the point that customers began voicing concerns. *See Id.* Such inaction and disregard towards a business partner are clear indications of Anderson Industries' inability or unwillingness to fulfill its obligations.

[¶36] Moreover, Anderson Industries imposed a sudden pre-shipment payment requirement which was not previously agreed upon. This last-minute change not only violated the principle of good faith in business dealings but also raises doubts about Anderson Industries' financial stability or its trust in its own products. Anderson Industries alleges that there were reasonable grounds for insecurity that Thermal Intelligence would not be able to make payments. And as noted by

Anderson Industries, Thermal Intelligence testified, "[Thermal Intelligence might not have had the money." Plaintiff's Brief at 10-11. However, Anderson Industries fails to note that this was a direct consequence of its own delivery of entirely defective heaters. Thermal Intelligence had around $1,000,000 in receivables that could not be collected because its customers were refusing to pay for the defective heaters. Plaintiff's Exhibit 17:2. Additionally, Thermal Intelligence was incurring significant costs attempting to fix the heaters themselves after Anderson Industries failed to provide warranty and support. *Id.*

[¶37] Anderson Industries' pattern of promising performance, failing to deliver, and evading responsibility raises serious doubts about its ability and intention to fulfill its contractual obligations. These actions, or lack thereof, amount to willful and negligent misrepresentation of Anderson Industries' capacity to meet the terms of any agreement, causing Thermal Intelligence to incur losses and hindering its operations. Such behavior is detrimental to the formation of any contractual relationship and raises questions about the validity and enforceability of any purported agreements.

[¶38] Accordingly, it is clear that Anderson Industries misrepresented its capacity to fulfill the terms of any potential agreement, further undermining the claim of the existence of an enforceable contract between Anderson Industries and Thermal Intelligence. Therefore, Anderson Industries' conduct should bar it from enforcing any purported agreement.

C. Anderson Industries Anticipatorily Repudiated Its Obligations Under Any Agreement.

[¶39] To the extent this Court finds an enforceable contract existed between the parties, Anderson Industries anticipatorily repudiated its obligations under the contract by closing its Mapleton, North Dakota facility and terminating all employees who had previously worked on the manufacture of industrial heaters at such facility.

[¶40] Anticipatory repudiation refers to an assertion by a contracting party that it will not perform its obligations under a contract in the future. *See* Restatement (Second) of Contracts § 250 (1981). It represents a clear and unequivocal refusal to perform, amounting to a breach of contract. *See Id.* at § 253. When a party anticipatorily repudiates a contract, the non-repudiating party is released from its contractual obligations. *Id.*

[¶41] In the present case, should the Court find an enforceable contract did exist between Anderson Industries and Thermal Intelligence, it's indisputable that Anderson Industries anticipatorily repudiated its contractual obligations by closing its Mapleton, North Dakota facility and furloughing all key staff. This facility was the primary source of production for the industrial heaters to be supplied to Thermal Intelligence. The abrupt and unexpected closure of this facility, and the concurrent termination of employees who had knowledge and expertise regarding the manufacture of the heaters, indicate Anderson Industries intention to discontinue its performance under the alleged contract.

[¶42] It is pertinent to note that Anderson Industries took these drastic measures without notifying Thermal Intelligence, thus displaying a lack of respect for the presumed contractual relationship and an unwillingness to uphold its commitments. The closure of the Mapleton facility effectively rendered Anderson Industries incapable of fulfilling its obligations to manufacture and deliver the heaters as allegedly agreed upon.

[¶43] Even if Anderson Industries planned to shift production to a different facility, the absence of the experienced employees who had previously worked on the manufacture of the heaters would undeniably affect the quality and timeliness of the production. It would be unrealistic and unfair to expect Thermal Intelligence to bear the burden of potential delays, compromised quality, and the inevitable uncertainty stemming from such drastic changes.

[¶44] Anderson Industries' actions—shutting down its production facility and terminating knowledgeable employees—signify an anticipatory repudiation of its obligations. As a result, Thermal Intelligence was justified in ceasing to perform its duties under any agreement and is entitled to seek remedies for the breach.

[¶45] Based on these circumstances, the Court should hold that Anderson Industries anticipatorily repudiated its contractual obligations, thereby releasing Thermal Intelligence from any potential contractual duties and entitling it to claim damages for Anderson Industries' breach.

D. The Consideration Provided by Anderson Industries Fails and is Void.

[¶46] To the extent this Court finds an enforceable contract existed between the parties, rescission of the contract is proper because the consideration provided by Anderson Industries has failed and is void. Rescission is an equitable remedy. See *Knudsen v. Jensen*, 521 N.W.2d 415, 418 (S.D. 1994). Under South Dakota law, rescission of a contract is permitted in specific circumstances, one of which is total or partial failure of consideration. *See* SDCL § 53-11-2. In order to justify rescission due to failure of consideration, it must be shown that the claimant derived no benefit from the contract. *See Bankwest, Inc. v. Valentine*, 451 N.W.2d 732, 735 (S.D. 1990).

[¶47] Rescission is not generally allowed "for a casual, technical, or unimportant breach or failure of performance, but only for a breach so substantial as to tend to defeat the very object of the contract." *Dusek v. Reese*, 80 S.D. 96, 102, 119 N.W.2d 656, 660 (1963) (quoting 1 Bl.Resc. (2d Ed.) § 197, p. 550). The same standard also applies "to rescission based upon partial failure of consideration under our [South Dakota] statute. Such a breach must also be substantial or relate to a material part of the contract." *Id.*

[¶48] Here, there was a total failure of consideration given that the V1.5 heaters provided by Anderson Industries were totally defective and inoperable. Despite Thermal Intelligence's best efforts to incorporate the heaters into its operations, the ongoing mechanical failures led to a

situation where Thermal Intelligence could derive no benefit from the contract. These issues are not casual, technical, or unimportant breaches; they are so substantial that they defeated the object of the contract: to obtain functioning and reliable heaters.

[¶49] Additionally, by furloughing its workforce and closing its North Dakota plant during the negotiation of the supposed agreement, Anderson Industries effectively destroyed its capacity to fulfill the terms of any potential agreement. This action, taken without notifying Thermal, undermined the very foundation of any agreement and substantiates Thermal Intelligence's position for total failure of consideration.

[¶50] Permitting Anderson Industries to enforce the contract under these circumstances would be significantly unfair to Thermal Intelligence. Anderson Industries has not delivered the consideration that Thermal Intelligence was led to believe it would receive. The heaters provided by Anderson Industries were unfit for their intended purpose and the financial risks associated with their sale unsuitable and rendered the object of any contract unattainable. Accordingly, given these undisputed facts, Thermal Intelligence has provided "clear and convincing evidence" to demonstrate its entitlement to the extraordinary remedy of rescission. *See Knudsen*, 521 N.W.2d at 418.

E. Anderson Industries Breached the Implied Warranty of Merchantability Under South Dakota Law.

[¶51] Pursuant to South Dakota law, a warranty that goods will be merchantable is implicitly embedded in a contract for their sale if the seller is a merchant with respect to goods of that kind (SDCL 57A-2-314(1)). This implies that the products sold should pass without objection in the trade under the contract description, be fit for the ordinary purposes for which such goods are used, and conform to the promises or affirmations of fact made on the container or label if any (SDCL 57A-2-314(2)).

[¶52] Firstly, the V1.5 heaters did not pass without objection in the trade under the contract description. The consistent, persistent, and recurring faults in the heaters, despite repairs, render the goods objectionable in the industry. The severity and frequency of these defects suggest a fundamental flaw in design or manufacturing, demonstrating that the goods were not as described under the alleged contract. The heaters that were delivered to a Thermal Intelligence customer in western North Dakota were entirely dysfunctional. Defendant's Exhibit J. These delivered heaters, straight from Anderson Industries would not even start. *Id.*

[¶53] Secondly, the V1.5 heaters were not fit for the ordinary purposes for which such goods are used. Industrial heaters are expected to provide reliable and efficient heating solutions. The V1.5 heaters, with their consistent malfunctions and breakdowns, failed to serve this fundamental purpose. The inability of the heaters to perform their basic function denotes a breach of the implied warranty of merchantability.

[¶54] The combined effect of these breaches had significant repercussions for Thermal Intelligence. It lost business, suffered reputational damage, and incurred additional costs associated with handling customer complaints and attempting to rectify the heaters' malfunctions.

[¶55] The record clearly establishes that Anderson Industries breached the implied warranty of merchantability under South Dakota law by supplying heaters that were not fit for the ordinary purposes for which such goods are used and did not pass without objection in the trade under the contract description. As a result of this breach, Thermal Intelligence has suffered substantial losses and is entitled to appropriate remedies under the law.

III. The October 3, 2019 Payment Schedule Was Not Part of the July 19, 2019 Agreement, but a Voluntary and Separate Arrangement.

[¶56] Anderson Industries argues that the October 3, 2019, Payment Schedule was part of the July 19, 2019, agreement and Thermal Intelligence breached the July 19, 2019 agreement by

failing to meet the payment schedule. This is incorrect. The chronology of events and correspondence clearly demonstrates that the Payment Schedule was proposed subsequent to the July 19 agreement and was, in fact, a separate arrangement.

[¶57] On September 17, 2019, Thermal Intelligence's lead mechanic inspected the heaters at Anderson Industries. There, the lead mechanic discovered that there were no operable units and was informed that the units were behind the agreed upon schedule. On September 27, 2019, Thermal Intelligence became aware that Anderson Industries was closing and had furloughed key staff, exacerbating concerns about the potential for non-functional heaters and lack of support for existing units.

[¶58] It was following this correspondence that Brian Tiedemann proposed the Payment Schedule on October 3, 2019. Thermal Intelligence notified Anderson Industries about its awareness of Anderson Industries' cash difficulties and offered to pay $200,000 per week to mitigate potential damages on fulfilled and unfulfilled orders.

[¶59] On October 9, 2019, Thermal Intelligence received a complaint from a customer in western North Dakota regarding the non-operability of heaters shipped directly from Anderson Industries. Defendant's Exhibit J. Anderson Industries refused to assist with troubleshooting, forcing Thermal Intelligence to attempt to resolve the deficiencies themselves, resulting in significant time and expense. On October 22, 2019, Anderson Industries refused to provide an operating manual to Thermal Intelligence unless further negotiations were conducted, despite Thermal Intelligence customer complaints and the threat of nonpayment and equipment returns. Due to continuous problems, Thermal Intelligence stopped making *voluntary* weekly payments to Anderson Industries on October 24, 2019, after having paid $1,167,000 for heaters that were either experiencing significant problems or were entirely not field ready.

[¶60] Moreover, the fact that the Payment Schedule was proposed after the September 27, 2019 email detailing the cost of existing units, clearly indicates that the Payment Schedule could not have been a part of the July 19 agreement. It is also pertinent to mention that Anderson Industries has presented no substantial evidence suggesting that the Payment Schedule was an amendment to or part of the July 19 agreement. Thus, the October 3, 2019 Payment Schedule was not part of the July 19, 2019 agreement, but a separate and voluntary arrangement, made to ensure Anderson Industries' financial stability. Any attempt by Anderson Industries to incorporate this Payment Schedule as part of the July 19 agreement is misguided and unsupported by the evidence.

IV. Anderson Industries Failed to Mitigate Damages.

[¶61] Anderson Industries, post the fallout of the business relationship, did not take any reasonable steps to mitigate the damages they now claim to have suffered. Even though Anderson Industries was well aware of the issues surrounding the heaters and their impacts on both companies, Anderson Industries heedlessly neglected to take any actions to protect their interests. This behavior is in clear violation of the principles laid out in the *Security State Bank v. Benning* 433 N.W.2d 232, 235 (S.D. 1988), which mandates the mitigation of damages when a party is aware of the harm and intentionally or heedlessly fails to protect its own interests.

[¶62] In the light of their apparent disregard for their own interests, any claim of damages by Anderson Industries should be considerably reduced or wholly dismissed due to their clear failure to mitigate the damages they now allege to have suffered.

[¶63] The evidence therefore indicates that Anderson Industries did not fulfill their duty to mitigate damages, thereby fundamentally weakening their case and claim for damages. This neglect also further underscores their exploitative approach to this litigation, as they have shown a willingness to overlook crucial legal principles in their pursuit of unwarranted financial gain.

CONCLUSION

[¶64] Thermal Intelligence respectfully requests this Court to deny Anderson Industries' Motion for Summary Judgment in its entirety. Moreover, given the weight of the evidence in Thermal Intelligence's favor, this Court should grant Defendant's Cross Motion for Summary Judgment.

Dated this 26th day of July, 2023.

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STATE OF SOUTH DAKOTA | IN CIRCUIT COURT

COUNTY OF DAY | FIFTH JUDICIAL CIRCUIT

ANDERSON INDUSTRIES, LLC, Plaintiff, v. THERMAL INTELLIGENCE, INC., a Canadian corporation, Defendant.	18CIV20-000023 **DEFENDANT'S REPLY TO PLAINTIFF'S BRIEF IN RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

COMES NOW Defendant, Thermal Intelligence, Inc., by and through its undersigned counsel of record, respectfully submits the following Reply to Plaintiff's Brief in Response to Defendant's Motion for Summary Judgment. Thermal Intelligence requests that this Court DENY Plaintiff's Motion. Additionally, Thermal Intelligence urges this Court to find that no binding contract exists between the parties. Alternatively, should this Court recognize the existence of a contract, this Court should find it unenforceable. Further, this Court should grant Defendant's Cross Motion for Summary Judgment.

INTRODUCTION

[¶1] Defendant provides this Reply Memorandum to clarify three points. First, Defendant's Answer sufficiently pleaded its affirmative defenses. Second, if this Court determines that the Defendant's Answer was in any manner deficient, Plaintiff's Response Brief serves as an implied amendment to its Answer. Further, because Anderson Industries engaged with these arguments substantively, and had ample time to address them, implied consent to try the issues was given. And third, even if this Court rejects the first two points, Defendant should be granted leave to Amend its complaint to cure any deficiencies. Anderson Industries will not be prejudiced and has

not been surprised nor made unprepared by any such amendments.

RELEVANT LAW

[¶2] In South Dakota, affirmative defenses must be specifically pled, and failure to do so can result in the defense being barred. See Schecher v. Shakstad Elec. & Mach. Works, 414 N.W.2d 303 (S.D. 1987). However, case law also explicitly provides two exceptions: 1) if the pleadings are properly amended to include the defense, or 2) if the issue was tried by express or implied consent. See Schecher, supra; American Property Services v. Barringer, 256 N.W.2d 887, 890 (S.D. 1977).

[¶3] Further, "[a]n affirmative defense is not waived if the pleadings are properly amended to include the unpled defense or if the issue was tried by express or implied consent." Dakota Cheese, Inc. v. Ford, 1999 S.D. 147, ¶ 25, 603 N.W.2d 73, 78 (quoting Beyer v. Cordell, 420 N.W.2d 767, 769 (S.D. 1988) (emphasis removed). "[T]he most important consideration in determining whether a party should be allowed to amend a pleading is whether the nonmoving party will be prejudiced by the amendment." Id. ¶ 24, 603 N.W.2d at 78 (quoting Isakson v. Parris, 526 N.W.2d 733, 736 (S.D. 1995)). "Prejudice is often shown when a party is surprised and unprepared to meet the contents of the proposed amendment." Robinson-Podoll, 2020 S.D. 5, ¶ 14, 939 N.W.2d at 38 (quoting Tesch v. Tesch, 399 N.W.2d 880, 882 (S.D. 1987)).

ARGUMENT

I. Defendant's Answer Sufficiently Pleaded its Affirmative Defenses.

[¶4] Defendant served its Answer to Plaintiff's Complaint on August 3, 2020. In its Answer, Defendant asserted affirmative defenses including but not limited to:

1. Violation of the statue of frauds under S.D.C.L. § 57A-2-201;
2. Lack of contract under S.D.C.L. § 57A-2-204 et seq.;
3. Failure to mitigate damages;
4. Inability to recover damages under S.D.C.L. §§ 57A-2-703 to 57A-2-710;
5. Breach of contract for failure to manufacture to specifications and failure to

provide warranty and service work as promised;
6. Anticipatory repudiation;
7. Voidable contract due to failure of consideration; and
8. Principals of quantum meruit.

Anderson Industries' assertion that Thermal Intelligence did not raise applicable affirmative defenses is clearly incorrect. Specifically, Anderson Industries' failure to manufacture to specifications and failure to provide warranty and service work as promised was a result of various misrepresentations. See Defendant's Brief at 10-14. Further, Anderson Industries' allegation that Defendant's claims in support of summary judgment are "wholly new and different" is disingenuous. These issues were sufficiently expanded on in Defendant's Response and Cross Motion for Summary Judgment. Id.

II. Defendant's Response and Cross Motion for Summary Judgment Serves as an Implied Amendment to its Answer.

[¶5] Under SDCL 15-6-15(b), "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial of these issues."

[¶6] In the present matter, to the extent any defenses were not sufficiently asserted in the Defendant's Answer as an affirmative defense and/or counterclaim, Defendant asserts that they have been or will be tried by implied consent, given the extensive briefing and discussion that has taken place to date.

III. To the Extent This Court Finds Defendant's Answer Deficient, Defendant Requests Leave to Formally Amend its Answer.

[¶7] To the extent this Court finds Defendant's Answer deficient, Defendant requests leave of this Court to formally amend its Answer. The decision to allow amendment of pleadings is within

the discretion of the trial court. Dakota Cheese, Inc. v. Ford, 1999 S.D. 147, ¶ 25, 603 N.W.2d 73, 78; see also Ries v. JM Custom Homes, LLC, 2022 S.D. 52, ¶ 13, 980 N.W.2d 217, 222 (granting a motion to amend the answer to assert defenses, even though an answer has been served and the parties had engaged in extensive discovery, no pretrial deadlines had been agreed to by the parties or ordered by the circuit court; the opposing party's ability to prepare a response to the assertion of defenses was not restricted, and allowing the amended answer would not prejudice the opposing party).

[¶8] In this case, Anderson Industries received Defendant's Response Brief on July 27, 2023. Anderson Industries had ample time to reject Defendant's theories to ensure judicial efficiency. Now, fourteen (14) days before a hearing for Summary Judgment, Anderson Industries argues that Defendant's affirmative defenses were raised improperly. Anderson Industries will not be prejudiced by an amendment, whether implied or formal. Further, Anderson Industries has not been surprised nor unprepared to meet the contents of the proposed amendment. See Dakota Cheese, Inc. v. Ford, 1999 S.D. 147, ¶ 25, 603 N.W.2d 73, 78 (holding that the most important consideration in determining whether a party should be allowed to amend a pleading is whether the nonmoving party will be prejudiced by the amendment) see also Robinson-Podoll, 2020 S.D. 5, ¶ 14, 939 N.W.2d at 38 (noting that prejudice is often shown when a party is surprised and unprepared to meet the contents of the proposed amendment).

[¶9] Here, Defendant will be the party prejudiced if this Court determines that affirmative defenses raised were improperly. Accordingly, this Court, in the alternative, should grant Defendant leave to Amend its Answer.

CONCLUSION

[¶10] Defendant respectfully objects to the remaining assertions made by Anderson Industries in

its Response. However, rather than further reiterating the points made in Defendant's Response and Cross Motion, Defendant will address these matters via oral argument at the scheduled hearing.

[¶11] Thus, Thermal Intelligence respectfully requests this Court to deny Anderson Industries' Motion for Summary Judgment in its entirety. Moreover, given the weight of the evidence in Thermal Intelligence's favor, this Court should grant Defendant's Cross Motion for Summary Judgment.

Dated this 25th day of October, 2023.

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STATE OF SOUTH DAKOTA	IN CIRCUIT COURT
COUNTY OF DAY	FIFTH JUDICIAL CIRCUIT

ANDERSON INDUSTRIES, LLC, Plaintiff, vs. THERMAL INTELLIGENCE, INC., a Canadian corporation, Defendant.	18CIV20-000023 **BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

COMES NOW the Plaintiff, Anderson Industries, LLC, by and through its undersigned counsel of record, and hereby respectfully submits the following Brief in Support of its Motion for Summary Judgment. Anderson Industries seeks summary judgment on its claim for payment of $918,000.00 in connection with a contract to sell 30 K2 V1.5 industrial heaters to Thermal Intelligence.

FACTUAL BACKGROUND

Anderson Industries, LLC ("Anderson Industries") is a South Dakota limited liability company that was formed on or about January 11, 2006. Statement of Undisputed Material Facts at ¶ 1 (hereinafter, "SUMF"). Thermal Intelligence, Inc. ("Thermal Intelligence") is a Canadian corporation engaged in the business of purchasing, developing, and manufacturing industrial heaters for sale to third-party companies. *Id.* at ¶ 2.

In 2018, Anderson Industries and Thermal Intelligence entered into an initial agreement wherein Anderson Industries would build and sell to Thermal Intelligence 30 custom-made industrial heaters, which were referred to between the parties as "K2 V1.0" heaters (hereinafter, "V1.0

Heaters"), in exchange for payment for each heater. *Id.* at ¶ 3. Thermal Intelligence would then sell those heaters to end customers. *Id.* at ¶ 17. Anderson Industries constructed the V1.0 Heaters with the logos and insignia of Thermal Intelligence logos and were otherwise custom-made to meet the specifications requested and negotiated by Thermal Intelligence. *Id.* at ¶ 3.

Anderson Industries performed and built the 30 V1.0 Heaters and then sold them to Thermal Intelligence. *Id.* at ¶ 4. Thermal Intelligence paid Anderson Industries in full for all 30 of the V1.0 Heaters. *Id.*

In 2019, Thermal Intelligence and Anderson Industries discussed potential upgrades to the V1.0 Heater. *Id.* at ¶ 6. The upgraded industrial heater was referred to as the "K2 V1.5" heater (hereinafter, "V1.5 Heater"). *Id.* Thermal Intelligence eventually agreed to purchase an additional 30 V1.5 Heaters from Anderson Industries (the "Agreement"). *Id.* at ¶ 7. Specifically, on July 19, 2019, Brian Tiedemann, President and co-owner of Thermal Intelligence, e-mailed the terms of the agreement to Dan Ewert on behalf of Anderson Industries. *Id.* at ¶ 6; Aff. of Anderson, Ex. 4. That same day, Dan Ewert responded and agreed to the terms of the agreement to sell the 30 V1.5 Heaters to Thermal Intelligence. *Id.*

The terms of the agreement were as follows:

1. **Quantity**. The parties agreed that Thermal Intelligence would purchase 30 V1.5 Heaters.
2. **Price**. The parties agreed that each V1.5 Heater would be sold for a unit price of $69,500.00. Thus, the total price equaled $2,085,000.00.
3. **Conditional Credit**. Anderson Industries agreed to credit a total of $5,000.00 towards the purchase price of each industrial heater if the parties successfully completed a sale of the intellectual property for the industrial heaters. If that condition

was satisfied, the purchase price for each V1.5 Heater would be reduced from $69,500.00 to $64,500.00. If that condition was not satisfied, the purchase price would remain at $69,500.00.

4. **Down Payment**. Thermal Intelligence agreed to pay a 20.00% downpayment for the purchase of the V1.5 industrial heaters. On or about July 19, 2019, the parties agreed that Thermal Intelligence would put a down payment down for 21 V1.5 Heaters at the price of $69,500.00, and then issue subsequent purchase orders and downpayments immediately upon receiving a commitment from the end-user customers for the 9 remaining V1.5 Heaters. Thermal Intelligence stated in an e-mail on July 19, 2019: "We will issue a PO for 21 units at a price of $69,500 with a downpayment of 20%, and issue subsequent PO's & downpayments immediately upon receiving a commitment from customers."

5. **Lead Time**. The parties agreed there would be a 10-week production lead time from receipt of the down payment until the industrial heaters were ready for delivery. In an e-mail from Kory Anderson to Brian Tiedemann on July 6, 2019, he stated: "These units because we have most long lead-time inventory on already available have a 10 week production lead time for the first truckload of ready units from the receipt of the 20% down payment." Affidavit of Kory Anderson, Ex. 1.

Id. at ¶ 6; Aff. of Anderson, Ex. 4.

Consistent with the Agreement, Thermal Intelligence paid Anderson Industries $291,900.00 on July 22, 2019, which is equal to 20.00% of the cost of the initial 21 V1.5 Heaters (e.g., $69,500.00 x 21 V1.5 Heaters = $1,459,500.00). *Id.* at ¶ 13. Anderson Industries began building the initial 21 V1.5 Heaters in accordance with the 10-week lead time. *Id.* at ¶ 13. On or about August 22, 2019,

Thermal Intelligence paid Anderson Industries an additional $125,100.00, which is equal to 20.00% of the cost of the remaining 9 V1.5 industrial heaters (e.g., $69,500 x 9 V1.5 Heaters = $625,000.00). *Id.* at ¶ 14. Anderson Industries then began building the 9 remaining V1.5 Heaters in accordance with the 10-week lead time. *Id.* at ¶ 15. Between the two payments, Thermal Intelligence paid $417,000.00 in down payments, which is equal to 20.00% of the 30 industrial heaters (e.g., $69,500 x 30 V1.5 Units = $2,085,000.00). *See id.* This left an outstanding balance of $1,668,000.00. *See id.*

On October 3, 2019, Thermal Intelligence and Anderson Industries agreed to a written payment plan to secure the payment of the V1.5 Heaters. *Id.* at ¶ 16. Specifically, Thermal Intelligence agreed to pay $100,000.00 to Anderson Industries twice per week on each Monday and Thursday for a total of $200,000.00 per week, unless it received payment in addition to those amounts from the end users, in which case Thermal Intelligence would accelerate the payments. *Id.* at 17. In other words, the payment schedule could be accelerated by the collection of payments from the end users, but at a minimum the payments would be $200,000.00 per week. *See id.* Thermal Intelligence made a total of seven and a half installment payments to Anderson Industries in the total amount of $750,000.00, which included the following payments to Anderson Industries:

Thursday, October 3, 2019:	$200,000.00
Monday, October 7, 2019:	$100,000.00
Thursday, October 10, 2019:	$100,000.00
Tuesday, October 15, 2019:	$100,000.00
Tuesday, October 15, 2019:	$100,000.00
Monday, October 21, 2019:	$100,000.00
Thursday, October 24, 2019:	$50,000.00
TOTAL:	$750,000.00

Id. at ¶ 20.

After the final partial payment on Thursday, October 24, 2019, Anderson Industries received no further payments from Thermal Intelligence, leaving a balance of $918,000.00. *Id.* at

¶ 19. Thermal Intelligence proceeded to miss scheduled payments on October 27, October 31, November 4, November 7, November 11, and November 14. *See id.* On November 15, 2019, Zoe Benson, on behalf of Anderson Industries e-mailed Mr. Tiedemann and stated:

> Good morning,
>
> With the high Capital Cost of Building the units and bills we have to support we can only extend a credit limit of 200,000 on our heater shipments. We need to receive some payments before we can release any more shipments. I was informed that heater number 53 is scheduled to go out Monday, so we need to receive some payment today in order to let the heater go out as scheduled. Please let me know if you have any questions. Thank you.

Id. at ¶ 21.

Despite failing to make payment according to the agreed schedule, Mr. Tiedemann e-mailed a response to Ms. Benson on November 18, 2019, and wrote: "I notified Kory on Friday that if the heater wasn't released we would be terminating our relationship with Anderson effective immediately. The heater was not released so we have notified our customers that all remaining orders have been canceled." *Id.* at ¶ 22.

As of that date, Anderson Industries had built all the remaining 13 V1.5 Heaters and, since then, has been storing them at its warehouse. *Id.* at ¶ 25. The remaining principal balance owed to Anderson Industries is $918,000.00.

ANALYSIS

1. Legal Standard for Summary Judgment.

Summary judgment is authorized "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law." SDCL § 15-6-56(c). "All reasonable inferences drawn from the facts must be viewed in favor of the non-moving party. The burden is on the moving party to clearly show an absence of any genuine issue of material

fact and an entitlement to judgment as a matter of law." *Hayes v. N. Hills General Hosp.*, 1999 S.D. 28, ¶ 12, 590 N.W.2d 243, 247 (quoting SDCL § 15-6-56(c)). "The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party." *Saathoff v. Kuhlman*, 2009 S.D. 17, ¶ 11, 763 N.W.2d 800, 804 (quoting *Pellegrino v. Loen*, 2007 S.D. 129, ¶ 13, 743 N.W.2d 140, 143). "The nonmoving party, however, must present specific facts showing that a genuine, material issue for trial exists." *Id.*

2. Thermal Intelligence Breached its Agreement with Anderson Industries.

Thermal Intelligence breached its agreement with Anderson Industries by failing to compensate Anderson Industries for the V1.5 Heaters. Thermal Intelligence owes a principal balance of $918,000.00 and 10.00% interest in the amount of $326,707.40 for a total of $1,244,707.40.

A claim for breach of contract requires "(1) an enforceable promise; (2) a breach of the promise; and (3) resulting damage." *Nooney v. StubHub*, 2015 S.D. 102, ¶ 13, 873 N.W.2d 497, 500 (quoting *Gul v. Ctr. for Family Med.*, 2009 S.D. 12, ¶ 10, 762 N.W.2d 629, 633).

The clear breach of the Agreement by Thermal Intelligence shows Anderson Industries is entitled to summary judgment as a matter of law.

A. <u>Agreement to purchase 30 V1.5 heaters.</u>

Mr. Tiedemann consistently testified and admitted throughout his deposition that Anderson Industries and Thermal Intelligence reached an agreement wherein Thermal Intelligence would purchase 30 V1.5 Heaters for $69,500.00.[1] If the two parties were able to agree to a transaction

[1] Tiedemann testified that Anderson Industries overbuilt the original order of 30 heaters by building an additional 30 heaters. Although we perhaps consider this a non-material distinction, Anderson Industries *did not* originally build 60 V1.0 heaters. Nor did it retrofit 30 heaters from V1.0 to V1.5. Instead, Anderson Industries ordered parts to be able to construct up to 60 heaters (due to Thermal Intelligence originally wanting 60 units rather than 30 units), and nearly all the V1.5 heaters were constructed in full, rather than retrofitted, *after* the orders were placed for the 30 V1.5 heaters in 2019. Aff. of Anderson at ¶¶ 4-6, 24.

on the IP for the product line in the future, Anderson Industries would then credit $5,000.00 toward each heater and, in effect, the price per heater would be reduced to $64,500.00. Aff. of Counsel, Ex. A (Tiedemann Dep. at 77:18-25; 79:8-16); Aff. of Anderson, Ex. 4 at p. 2. Further, the parties understood there would be a 10-week production time from the date of the receipt of the down payment. Aff. of Counsel, Ex. B (Thermal Dep. at 33:8-23).

> **A:** [O]ur goal was, at a minimum, to at least sell the stock that he overbuilt to liberate his cash flow."
> (Tiedemann Dep. at 63:1-4).
>
> **Q:** [I]s it fair to say, you've got an agreement to liquidate those 30 units?
> **A:** Yeah, well, I think we did have an agreement to liquidate the 30 units.
> (Tiedemann Dep. at 88:18-21).
>
> **Q:** And so there was at least an initial agreement as to getting those 30 units liquidated and purchased, but there were continuing conversations about still purchasing the product line. Am I tracking with you?
> A: Yeah, our intention was to try and sell all 30 units.
> (Tiedemann Dep. at 90:18-22).
>
> **A:** [I]t also was our intention to buy those – all 30 units. That was our goal and that was our intention."
> (Tiedemann Dep. at 96:22-24).
>
> **Q:** And terms were reached because an order was placed, right?
> **A:** Eventually, yeah.
> (Tiedemann Dep. at 104:6-8).

Consequently, there was unequivocally an agreement for purchasing the 30 V1.5 Heaters at a price of $69,500.00.[2]

The uncontested agreement was breached when Thermal Intelligence did not pay for the V1.5 Heaters they admittedly ordered. Accordingly, summary judgment is appropriate and should be granted against Thermal Intelligence for their blatant breach of contract.

[2] Mr. Tiedemann agreed that Thermal Intelligence was not forced to purchase any of the V1.5 heaters (Tiedemann Dep. at 74:17-19).

B. First down payment.

On or about July 19, 2019, Anderson Industries and Thermal Intelligence agreed that Thermal Intelligence would first purchase "21 units at a price of $69,500 with a downpayment of 20%, and issue subsequent PO's & downpayments immediately upon receiving a commitment from customers." Aff. of Anderson, Ex. 4 at p. 2. On or about July 22, 2019, Thermal Intelligence paid Anderson Industries $291,900.00 (Aff. of Anderson, Ex. 5), which is equal to 20% of the cost of 21 heaters (*i.e.*, $1,459,500.00). Mr. Tiedemann admitted that the foregoing payment was a 20% down payment for 21 of the 30 V1.5 Heaters.

> **Q:** Okay. So everyone was aligned and had agreement then on 21 units at $69,500 down payment and 20 percent. That much was agreed upon?
> **A:** Yeah.
> (Tiedemann Dep. at 79:4-7).

> **Q:** You paid what appears to be the down payment for those 21 units; is that correct?
> **A:** Correct.
> (Tiedemann Dep. at 85:5-8).

C. Second down payment.

On or about August 22, 2019, Thermal Intelligence paid Anderson Industries $125,100.00, which is equal to 20% of the cost of the 9 remaining V1.5 Heaters (*i.e.*, $625,500.00). In an e-mail dated October 3, 2019, Mr. Tiedemann wrote that Thermal Intelligence has "already paid $417,000 in deposits," which is equal to 20% of all 30 units (*i.e.*, $2,085,000). Mr. Tiedemann testified that while he does not recall a second down payment being made, he conceded that he was not the individual who made the wire transfer[3] and that it could have been the down payment for the other 9 V1.5 Heaters.

[3] Mr. Tiedemann testified that Thermal Intelligence's senior account, Jodi Lalonde, would have been the individual responsible for issuing the wire transfers (Tiedemann Dep. at 98:4-12; 97:18-22).

> **A:** And, hey, maybe that – maybe that down payment was for the other 9. I don't know. I honestly don't remember it, but I will admit it's quite coincidental in the amount of it, but it also was our intention to buy those – all 30 units. That was our goal and that was our intention.
> (Tiedemann Dep. at 96:20-24).

Upon receipt of the second down payment, Anderson Industries began constructing the remaining 9 V1.5 Heaters in accordance with the agreed 10-week lead time. Aff. of Anderson at ¶ 24.

D. Payment Plan.

On October 3, 2019, Thermal Intelligence committed to a written payment plan with Anderson Industries for payment of the V1.5 Heaters. Aff. of Anderson, Ex. 13. Mr. Tiedemann testified that he was aware of the payment plan (Tiedemann Dep. at 107:17-19). In an e-mail dated October 3, 2019, Mr. Tiedemann wrote:

> "As we collect receivables from equipment sales we will in turn transfer funds to Anderson.
>
> In addition to that we will commit to:
>
> 2 - $100,000 payments per week on each Monday, & Thursday. So we will leverage our credit facilities to ensure Anderson is receiving a minimum of $200,000 per week.
>
> The first $200,000 wire transfer has been sent and is in addition to the $417,000 already received by Anderson.
>
> As mentioned previously this schedule can be accelerated based on our receivables."

Aff. of Anderson, Ex. 13. Thermal Intelligence made a total of seven payments following the payment plan in the total amount of $750,000, including an initial payment of $200,000 on or about October 3, 2019, a payment of $100,000 on Monday, October 7, 2019, a payment of $100,000 on Thursday, October 10, 2019, two payments of $100,000 on Tuesday, October 15, 2019, a payment of $100,000 on Monday, October 21, 2019, and a partial payment of $50,000 on Thursday, October 24, 2019. Aff. of Anderson, Ex 14. In total, Thermal Intelligence paid Anderson Industries $1,167,000.00.

Anderson Industries received no further payments after the partial payment on Thursday, October 24, 2019. Thermal Intelligence admitted that Thermal Intelligence stopped making payments. Aff. of Counsel, Ex. B (Thermal Dep. at 51:1-3). On November 15, 2019, after which Thermal Intelligence had continued to miss the scheduled payments, Zoe Benson on behalf of Anderson Industries e-mailed Mr. Tiedemann and stated:

> Good morning,
>
> With the high Capital Cost of Building the units and bills we have to support we can only extend a credit limit of 200,000 on our heater shipments. We need to receive some payments before we can release any more shipments. I was informed that heater number 53 is scheduled to go out Monday, so we need to receive some payment today in order to let the heater go out as scheduled. Please let me know if you have any questions. Thank you.

Aff. of Anderson, Ex. 17 at p. 4. On November 18, 2019, Mr. Tiedemann e-mailed a response to Ms. Benson, and wrote: "I notified Kory on Friday that if the heater wasn't released we would be terminating our relationship with Anderson effective immediately. The heater was not released so we have notified our customers that all remaining orders have been canceled." *Id.*

E. <u>Breach of Agreement.</u>

Thermal Intelligence first breached the agreement with Anderson Industries when Thermal Intelligence failed to make payments according to the payment schedule. Due to the breach of the payment plan and, in addition, having reasonable grounds for insecurity that Thermal Intelligence would be able to perform under the agreement to make payment, Ms. Benson made a written demand for compromise and reasonable assurances for a payment of at least $200,000.00 before additional V1.5 Heaters would be released to Thermal Intelligence. *See* SDCL § 57A-2-609. While the breach of the payment plan was sufficient reason alone to suspend release of the V1.5 Heaters, Anderson Industries' grounds for insecurity were nevertheless also justified because, as Thermal Intelligence testified, "[Thermal Intelligence] might not have had the money" to make

the payments according to the payment schedule. Aff. of Counsel, Ex. B (Thermal Dep. at 51:8). Mr. Tiedemann also testified, "It could have been as simple as the fact that we'd been squeezed for cash pretty hard and we didn't have it" Aff. of Counsel, Ex. A (Tiedemann Dep. at 121:11-25). Both admissions by Thermal Intelligence communicate it did not make payments in accordance with the Agreement.

Thermal Intelligence then breached the agreement with Anderson Industries a final time when it terminated the entire agreement with Anderson Industries on November 18, 2019, due to the alleged reason of failing to release the V1.5 Heater. Aff. of Anderson, Ex. 17).[4] Thermal Intelligence never attempted to return any V1.5 Heaters to Anderson Industries or notify it that the heaters would be rejected and, therefore, cannot claim rightful rejection of any of the heaters. Aff. of Counsel, Ex. A (Tiedemann Dep. at 118:24-119:2; 127:6-11). *See* SDCL 57A-2-602 ("Rejection of goods must be within a reasonable time after their delivery or tender."); *see also* SDCL 57A-2-605 ("The buyer's failure to state in connection with rejection a particular defect which is ascertainable by reasonable inspection precludes him from relying on the unstated defect to justify rejection or to establish breach[.]"). To the contrary, Thermal Intelligence was still in the process of attempting to pick up more V1.5 Heaters from Anderson Industries. To that end, the undisputed record reflects that Thermal Intelligence breached its agreement with Anderson Industries.

F. <u>Damages.</u>

Anderson Industries' damages are measured by SDCL §§ 57A-2-709 and -710. The V1.5 Heaters were custom built for Thermal Intelligence and do not have a secondary market value for

[4] Thermal Intelligence admitted that no other reason for termination was released or made in writing (Thermal Dep. at 51:25-52:20).

Anderson Industries. Thermal Intelligence admitted that it is an expensive process to develop a heater and that these heaters had Thermal Intelligence's unique insignia on them. Aff. of Counsel, Ex. B (Thermal Dep. at 16:3-8). For purposes of this motion for summary judgment only and not as a waiver of any other damages,[5] Anderson Industries requests the outstanding amount and statutory interest at 10.00%. As of June 9, 2023, the principal balance of $918,000.00 and 10.00% interest in the amount of $326,707.40 for a total of $1,244,707.40.

CONCLUSION

For the foregoing reasons, Anderson Industries respectfully asks the Court to enter an Order granting summary judgment in its favor for Plaintiff's claims for breach of contract.

Dated this 14th day of June, 2023.

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[5] If the Motion is denied, Anderson Industries reserves the right to demand the full measure of damages, including, but not limited to, storage costs, consequential damages, and the accounts receivable amount of $78,726.05, which is reflected in the account statement with Thermal Intelligence. *See* Aff. of Anderson, Ex. 5.

STATE OF SOUTH DAKOTA	IN CIRCUIT COURT
COUNTY OF DAY	FIFTH JUDICIAL CIRCUIT

ANDERSON INDUSTRIES, LLC, Plaintiff, vs. THERMAL INTELLIGENCE, INC., a Canadian corporation, Defendant.	18CIV20-000023 **PLAINTIFF'S BRIEF IN RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

COMES NOW the Plaintiff, Anderson Industries, LLC, by and through its undersigned counsel of record, and hereby respectfully submits the following Response to Defendant Thermal Intelligence, Inc.'s Motion for Summary Judgment.

INTRODUCTION

Despite Defendant's attempt to convolute the issues, this case remains a simple collection action. The parties entered into a contract wherein Anderson Industries, in exchange for payment, would manufacture and sell 30 custom-made heaters to Thermal Intelligence. Anderson Industries manufactured all 30 heaters and delivered 17 to Thermal Intelligence. When Thermal Intelligence failed to make timely several payments, Anderson Industries suspended delivery and demanded reasonable assurances that Thermal Intelligence would make payment prior to shipment. Thermal Intelligence then further breached the agreement by abandoning the same and declaring its intention not to perform thereunder in advising Anderson Industries that because it would not release the heaters Thermal Intelligence was refusing to pay for, it was canceling the agreement. Thus, Anderson Industries is entitled to collect the balance due under that agreement.

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Now, Thermal Intelligence makes a variety of confusing arguments, including, but not limited to, the assertion that the sales agreement was somehow an "informal" agreement to which Thermal Intelligence was not bound, that Anderson Industries closed its business and delivered inoperable heaters while ignoring the undisputed fact that Thermal Intelligence was still demanding that Anderson Industries release the heaters up until the termination date, and that Thermal Intelligence proposed a payment plan and then immediately reneged on that plan. The reality is that Anderson Industries performed its end of the bargain by manufacturing the 30 custom-made heaters and Thermal Intelligence refused to pay for the same. In fact, Defendant has *failed* to even pay for the 17 heaters that it did pick up.[1] It is unlawful for Thermal Intelligence to refuse to pay for the remaining 13 custom-built heaters it ordered. To be sure, Defendant fails to cite any statute within the South Dakota UCC (SDCL Chapter 57A-2) permitting Defendant to unilaterally terminate the agreement and refuse to accept delivery or make payment for the remaining heaters it requested.

Ultimately, Defendant's positions are those of subterfuge asserted now only to avoid paying for specially manufactured goods it contracted for as a result of its own internal and financial instability. If Defendant felt there was not a contract in place, it should not have accepted the fruits of that contract, continued to communicate about that contract, including arranging payment therefor. If the heaters were in fact inoperable, Defendant needed to seasonably reject them and notify Plaintiff, but it did not; instead, it admitted that it sold the heaters to the end customers. If Defendant was worried about the impact of an alleged facility closure, it necessarily would have to inquire because it is an outsider to Plaintiff with no verifiable knowledge or proof this would impact production. Rather, Defendant *re-affirmed* its obligations to pay. If Defendant's grievances were

[1] Thermal Intelligence has paid $1,167,000.00 and has picked up 17 heaters. The total price for 17 heaters at a per unit price is $1,181,500, which is $14,500 more than has been paid by Thermal Intelligence.

genuine, which they are not, its repeated failures to merely communicate about the same defeat all of its arguments on their face.

ANALYSIS

I. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT FOR BREACH OF CONTRACT SHOULD BE GRANTED.

At summary judgment, the nonmoving party "must present specific facts showing that a genuine, material issue for trial exists." *Hass v. Wentzlaff*, 2012 S.D. 50, ¶ 11, 816 N.W.2d 96, 101 (quoting *Saathoff v. Kuhlman*, 2009 S.D. 17, ¶ 11, 763 N.W.2d 800, 804). A non-moving party must substantiate allegations with "sufficient probative evidence that would permit a finding in his favor on ***more than mere speculation, conjecture, or fantasy***." *Hanson v. Big Stone Therapies, Inc.*, 2018 S.D. 60, ¶ 28, 916 N.W.2d 151, 159 (quoting *Gades v. Meyer Modernizing Co.*, 2015 S.D. 42, ¶ 7, 865 N.W.2d 155, 157-58) (emphasis added). "General allegations and denials which do not set forth specific facts will not prevent the issuance of a judgment." *Mark, Inc. v. Maguire Ins. Agency, Inc.*, 518 N.W.2d 227, 230 (S.D. 1994). Moreover, it is well settled a party "cannot claim a version of the facts more favorable to his position than he gave in his own testimony" and "a party who has testified to the facts cannot now claim a material issue of fact which assumes a conclusion contrary to [her] own testimony." *Lalley v. Safway Steel Scaffolds, Inc.*, 364 N.W.2d 139, 141 (S.D. 1985) (citation omitted).

At the outset, it is important to note several of Defendant's arguments must be rejected without consideration on the merits. Defendant asserts Plaintiff committed fraudulent inducement, intentional misrepresentation, negligent misrepresentation, anticipatory repudiation, and a breach of implied warranty. All of these issues are claims with distinct elements that must be plead and proven; however, Defendant did not assert any counterclaims in this matter nor did it plead these issues as

affirmative defenses. *See* Answer.[2, 3, 4] Numerous jurisdictions recognize that "[a] party cannot wait until a summary judgment motion is filed against a theory advanced by it and, realizing the lack of merit in its position, suddenly shift to a wholly new and different one." *Kansas Mun. Gas Agency v. Vesta Energy Co., Inc.*, 840 F.Supp. 814 (D.Kan. 1993); *Bassiouni v. C.I.A.*, 2004 WL 1125919 at *8 (N.D.Ill. March 31, 2004) ("A plaintiff cannot create a genuine issue of material fact, thereby precluding summary judgment, by raising facts for the first time in response to defendant's motion for summary judgment which were not raised in the complaint."); *Shanahan v. City of Chicago*, 82 F.3d 776, 781 (7th Cir. 1996) ("plaintiff may not amend his complaint through arguments in his brief in opposition to a motion for summary judgment"). Therefore, this Court must decline to consider any of the foregoing issues on their merits. For purposes of a complete record, Plaintiff has addressed them where necessary, but does not consent to any such issue being tried.

Defendant's procedural and substantive failures to create a genuine issue of material fact as to its breach of contract requires denying Defendant's Motion for Summary Judgment and granting Plaintiff's Motion for Summary Judgment.

A. An Enforceable Contract Exists.

Defendant's attempt to turn a contract for the manufacture and sale of goods into a convoluted transaction is unpersuasive and, at the very least, supports denying Defendant's cross-

[2] Failing to plead fraud with particularity requires dismissal of the claim. *See, e.g.*, SDCL § 15-6-9; *Lee v. Beauchene*, 337 N.W.2d 827, 829 (S.D. 1983) ("Appellant did not plead any willful or intentional act.").

[3] Negligent misrepresentation must be plead as a claim to be considered. *See, e.g., Bass v. Hendrix*, 931 F.Supp. 523, 538 (S.D.Tex. 1996) ("Bass, however, did not plead negligent misrepresentation in her first amended complaint. Now, she may not rely on a new claim, raised only in her response, to defeat IRT's motion for summary judgment.").

[4] Both anticipatory repudiation and breaches warranty are a breach of contract and therefore must be plead. *See, e.g.*, SDCL § 57A-2-314 ("a warranty that the goods shall be merchantable is implied in a contract"); *Union Pacific R.R. v. Certain Underwriters at Lloyd's London*, 2009 S.D. 70, ¶ 39, 711 N.W.2d 611, 622 (anticipatory repudiation "allows the nonbreaching party to treat the repudiation as an immediate breach of contract"); *In re Richard Family Trust*, 2016 S.D. 64, ¶¶ 22-26, 886 N.W.2d 326, 332 (declining to consider the merits of a breach of contract claim that was never plead initially or by amendment).

motion for summary judgment. Consent is an "essential element of a contract" and "must be free, mutual and communicated." *Vander Heide v. Boke Ranch, Inc.*, 2007 S.D. 69, ¶ 21, 736 N.W.2d 824, 831 (citing SDCL § 53-1-2(2); *Richter v. Industrial Finance Co. Inc.*, 221 N.W.2d 31, 35 (S.D. 1974)). "The existence of mutual consent is determined by considering the parties' words and actions." *Id.* The undisputed facts demonstrate the parties' mutual assent for the manufacture and sale of goods.

Unequivocally, Plaintiff and Defendant expressed mutual assent to manufacture, sell, and purchase 30 V1.5 heaters. The record in this case includes e-mails between the parties expressing their written assent to this agreement (Exhibit 4), it includes incontrovertible evidence of two 20% down payments from Thermal Intelligence for the exact amounts agreed to by the parties (Exhibit 5), and it further includes part-performance through payments from Defendant consistent with the purchase orders for the 30 V1.5 heaters and the payment plan agreed to by the parties (Exhibit 5). Moreover, Mr. Tiedemann, who is the owner and president of Defendant, testified and admitted to the agreement. Aff. of Heber, Ex. A (Tiedemann Dep. at 77:18-25; 79:8-16); Ex. B (Tiedemann Dep. at 63:1-4; 88:18-21; 90:18-22; 96:22-24; 104:6-8).

Furthermore, pursuant to SDCL § 53-3-5, "[a] voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it so far as the facts are known or ought to be known to the person accepting." *See also, e.g., Strom v. Bohl*, 46 N.W.2d 912, 914 (S.D. 1951); (holding that "[t]he existence of the instrument, possession by respondents and acceptance of rents according to the lease over a term of nearly nine years precludes the appellants from repudiating the obligation"); SDCL § 53-3-5 prevents Defendant "from questioning the validity and effectiveness of a matter or transaction insofar as it imposes a liability or obligation upon him." *Strom*, 46 N.W.2d at 914. Defendant made payments (for awhile)

consistent with the parties' agreement, accepted the heaters, and even resold the heaters to end users. *See Grynberg Exploration Corp. v. Puckett*, 2004 S.D. 77, ¶ 24, 682 N.W.2d 317, 322 (holding that the defendants were "precluded from repudiating the accompanying obligations" under SDCL § 53-3-5 because they "received and accepted production revenue").They cannot now claim no such agreement existed.

Even assuming, *arguendo*, consent was lacking, "[a] contract voidable for want of consent may . . . be ratified by subsequent consent." *Shedd v. Lamb*, 1996 S.D. 117, ¶ 19, 553 N.W.2d 241, 244 (citing SDCL § 53-3-4). Importantly, "[r]atification can either be express or implied by conduct." *First State Bank of Sinai v. Hyland*, 399 N.W.2d 894, 898 (S.D. 1987) (citing *Bank of Hoven v. Rausch*, 382 N.W.2d 39, 41 (S.D. 1986); 17 C.J.S. Contracts § 133 (1963)). In fact, when there is an installment contract for the sale of goods, as is the case here, "the aggrieved party reinstates the contract if he accepts a nonconforming installment without seasonably notifying of cancellation[.]" SDCL § 57A-2-612; SDCL § 57A-2-602 ("Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller."). However, Defendant not only failed to reject any such heaters, it accepted the same and has kept the supposedly defective heaters in its possession. Aff. of Heber, Ex. A (Tiedemann Dep. at 118:24-119:2; 127:6-11).

Here, there is no genuine dispute that Defendant placed an order with Plaintiff to supply 30 V1.5 heaters under their agreement. Defendant timely paid the 20% downpayment in accordance with the agreement. During the agreement, Defendant proposed a payment plan for the purchase of the heaters, which Plaintiff accepted. Plaintiff timely manufactured the heaters in accordance with the 10-week lead time agreed to by the parties, and Defendant picked up 17 of the 30 V1.5 heaters. When Defendant stopped making payment in accordance with their payment

plan and Defendant's credit limit on payments had also reached too much and Plaintiff became insecure about Defendant's ability to perform by making payment, Plaintiff was entitled to withhold delivery of such goods until payment was made. *See* SDCL § 57A-2-703; *Celtic, LLC v. Patey*, 489 F.Supp.3d 1275, 1285 (D. Utah 2020) ("The UCC further provides that when a 'buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole . . . the aggrieved seller' is entitled to 'withhold delivery of such goods,' 'recover damages for nonacceptance',' or 'cancel' the agreement.").

In *Cherwell-Ralli, Inc. v. Rytman Grain Company, Inc.*, the Supreme Court of Connecticut considered a situation almost identical to this case. The seller brought a collection action against the buyer for nonpayment owing under an installment contract. 433 A.2d 984 (Conn. 1980). The buyer argued that the seller may not terminate the contract without first invoking the insecurity methodology under UCC Rule 2-609. *Id.* While Anderson Industries did in fact invoke the insecurity methodology and while it was Thermal Intelligence who attempted to terminate the agreement, Anderson Industries was not even required to go to such lengths to suspend delivery. As the *Cherwell-Ralli* court acknowledged, "[i]f there is a reasonable doubt about whether the buyer's default is substantial, the seller may be well advised to temporize by suspending further performance until it can ascertain whether the buyer is able to offer adequate assurance of future payments." *Id.* Further, the court remarked that the *buyer* "could not rely on its own nonpayments as a basis for its own insecurity" when "the buyer had received all of the goods which it had ordered." *Id.* In the present case, Thermal Intelligence received 17 heaters, which Thermal Intelligence has not even fully paid for, and there is no dispute that Thermal Intelligence resold

those heaters to its end customers. Thermal Intelligence was not entitled to cancel the agreement due to Anderson Industries' suspension of delivery pending payment.

Plaintiff has shown as a matter of law that it is entitled to summary judgment on the claim for breach of contract.

B. Plaintiff Did Not Misrepresent its Capacity to Fulfill the Terms of the Contract.

The ultimate goal of Defendant's argument concerning Plaintiff's supposed misrepresentation of its capacity to fulfill terms is unclear as it purports to be making claims for various degrees of fraud ("the parol evidence rule does not apply in cases of fraudulent inducement"), negligent misrepresentation ("The South Dakota Supreme Court has delineated the following elements to establish negligent misrepresentation"), and perhaps even rescission ("further undermining the claim of the existence of an enforceable contract") or estoppel ("Therefore, Anderson Industries conduct should bar it from enforcing any purported agreement"). Defendant's Brief at 10-14. Once again, these claims or defenses need not be considered because they were never plead as a counterclaim or as an affirmative defense. *See, e.g., Independent Harvester Co. v. Lee*, 168 N.W.2d 28 (S.D. 1918) ("He did not plead a rescission. Neither did the evidence prove more than that at one time he made a demand upon plaintiff, indicating a desire and perhaps a present intention to attempt a rescission."); *Great American Ins. Co. v. General Builders, Inc.*, 934 P.2d 257, 263 (Nev. 1997) (the district court did not err in barring [plaintiff's] rescission evidence on the ground that [it] did not properly plead the defense."); *see also State ex rel. Hurd v. Blomstrom*, 37 N.W.2d 247, 250 (S.D. 1949) ("Estoppel must be plead to be available as a defense").

Even so, Plaintiff did not misrepresent its capacity to fulfill the terms of the contract. Defendant claims that Plaintiff allegedly closed its plant, which, according to Defendant (at p.12), "was a critical part of the manufacturing infrastructure associated with the entire heater product line."

Although Plaintiff denies these allegations as its manufacturing plant remains operational in Webster, SD, to this present day (https://anderson-industries.com/), it must be noted this argument is disingenuous at best. On September 27, 2019, Brian Tiedemann, on behalf of Defendant, acknowledged that Plaintiff was planning to close its engineering plant in Mapleton, but that, nevertheless, he wanted "to make sure our position is clear so you have the appropriate context for your decisions that relate to Thermal Intelligence" and confirm the "cost for the existing units." Affidavit of Anderson, Ex. 12. Kory Anderson responded on October 1, 2019, and stated that "[w]e have an agreement to fulfill the 30 units at $69,500." *Id.*, Ex. 12. Thereafter, the parties entered into a payment plan and Defendant continued to make payment and accept deliveries. *Id.*, Ex. 13. Thus, any claim that the alleged plant closure had on the agreement is contradicted by the record and Thermal Intelligence's *express*, written acknowledgement of its obligation to pay for 30 heaters.

C. Plaintiff Did Not Repudiate the Contract.

Defendant wholly fails to present any evidence of a supposed anticipatory repudiation by Plaintiff. "Before a repudiation by an obligor will relieve the obligee from performing conditions precedent to the obligor's performance, it must unequivocally indicate that the repudiating party intends not to honor his or her obligations under the contract." *Union Pacific R.R.*, 2009 S.D. 70, ¶ 39, 711 N.W.2d at 622 (citation omitted). However, Defendant presents no evidence or overt act representing "a clear and unequivocal refusal to perform." Defendant broadly states the closure of a facility in North Dakota "indicate[s] [Plaintiff's] intention to discontinue performance under the alleged contract." Defendant's Brief at 14. Even assuming, *arguendo*, this conclusory allegation was sufficient, a repudiation only creates remedial rights when the loss of the "performance not yet due" "will substantially impair the value of the contract to the other." SDCL § 57A-2-610. Yet, Defendant further fails to explain, let alone present any evidence, of how this closure would have or

did have any effect on Plaintiff's ability to fulfill the terms of the contract. To the contrary, Plaintiff did fulfill the terms of the contract and has manufactured all of the custom-made heaters that Defendant contracted for. Aff. of Anderson at ¶ 38. Defendant's allegations are merely those of "speculation, conjecture, [and] fantasy" and therefore must be rejected. *See Hanson*, 2018 S.D. 60, ¶ 28, 916 N.W.2d 151, 159 (citation omitted).

Defendant has failed to provide any evidence regarding an alleged closure by Anderson Industries and, thus, the argument should be summarily rejected. Regardless, the argument is confusing insofar as Plaintiff remains operational, including its manufacturing plant in Webster. *See* https://anderson-industries.com/. Moreover, Thermal Intelligence never expressed anything to Anderson Industries regarding an alleged closing of operations for the reason of termination. To the contrary, Thermal Intelligence stated in clear and unequivocal terms, "[t]he heater was not released so we have notified our customers that all remaining orders have been canceled." Aff. of Anderson, Ex. 17.

Indeed, when affirming summary judgment on a breach of contract claim, the South Dakota Supreme Court in *Union Pacific R.R. v. Certain Underwriters at Lloyd's London* rejected the plaintiff's argument that the defendant had repudiated. 2009 S.D. 70, ¶ 40, 711 N.W.2d 611, 622 (citation omitted) In so holding, the Court emphasized that there was no evidence that the defendant had any intention to refuse to perform under the contract; rather, it was plaintiff who chose *not* to perform. *Id.* ("However, there has been no evidence or overt act in this case indicating that Continental had any intention of refusing to perform its part of the contract or that Continental ever indicated such an intention to UP at any time. Instead, it was UP which deliberately chose to refuse to perform its obligation under the contract. In fact, once Continental was notified of the loss it took steps to try to obtain the information and documentation it needed to make a determination regarding

whether it would provide coverage."). The same is true here. Plaintiff manufactured the heaters as requested and Defendant chose not to pay for them. The only party that failed to perform under the contract was Thermal Intelligence.

D. The Contract was Supported by Consideration.

Defendant claims that the heaters were inoperable and, therefore, not supported by consideration. Yet, there is *no* evidence in the record that the heaters were inoperable. In fact, Thermal Intelligence has admitted in testimony that it accepted delivery of the heaters from Anderson Industries and then resold them to end customers, who have never returned any of them to Thermal Intelligence. Aff. of Anderson, Ex. A (Tiedemann Dep. at 127:6-11). "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Steed by & through Steed v. Missouri State Highway Patrol*, 2 F.4th 767, 770 (8th Cir. 2021) (citing *Scott v. Harris*, 550 U.S. 372, 380 (2007)). Simply put, Defendant's argument fails to meet the burden of proof prescribed at summary judgment.

Furthermore, Defendant's claims about supposed defects to the heaters must be discarded without consideration because Defendant failed to seasonably reject the same. SDCL § 57A-2-612 ("the aggrieved party reinstates the contract if he accepts a nonconforming installment without seasonably notifying of cancellation"); *First State Bank of Sinai*, 399 N.W.2d at 898 ("failure of a party to disaffirm a contract over a period of time may, by itself, ripen into a ratification, especially if rescission will result in prejudice to the other party.") (citations omitted).

As set forth above, Defendant's assertion that the closure of facility in North Dakota "effectively destroyed [Plaintiff's] capacity to fulfill the terms of [the contract]" is wholly without

merit. This claim is not based on any evidence and instead, is contradicted by all of the evidence because Plaintiff did fully perform.

E. Plaintiff Did Not Breach an Implied Warranty of Merchantability.

Defendant continues to recycle its unsupported claim that the heaters were inoperable to assert the implied warranty of merchantability was breached. However, once again, this argument must be disregarded without consideration because Defendant did not plead a breach of warranty, *and* more importantly, Defendant failed to seasonably reject any supposed "non-conforming" goods. SDCL § 57A-2-612. Even assuming, *arguendo*, the Court considers the issue on its merits, the Court should reject the argument because at no point did Thermal Intelligence ever attempt to reject, return, or request that Anderson Industries repair the heaters. Instead, Thermal Intelligence accepted the bargain of the agreement by accepting delivery of the heaters, and then it in turn resold the heaters to end customers. To date, there is no evidence that any such heater has been returned to Thermal Intelligence. Aff. of Heber, Ex. A (Tiedemann Dep. at 123:13-16) (admitting that no heaters were ever returned to Anderson Industries); (Tiedemann Dep. at 17:6-11) (admitting that no end customers ever returned any heaters to Thermal Intelligence).

F. The Payment Schedule Was Thermal Intelligence's Proposal.

Defendant appears to make a vague argument that the October 3, 2019 payment plan was a "separate and voluntary arrangement." The purpose of this argument is unclear insofar as the payment plan did not obviate Defendant's need to perform under the agreement. Instead, the payment plan was specifically proposed by Defendant to Plaintiff (Ex. 13), and Plaintiff accepted the payment plan in writing. Originally, the agreement to sell heaters was an open term credit agreement. SDCL 57A-2-310 ("Unless otherwise agreed: (a) Payment is due at the time and place

at which the buyer is to receive the goods even though the place of shipment is the place of delivery[.]").

Mr. Tiedemann, on behalf of Defendant, wrote: "Please confirm that this is an acceptable plan and that equipment deliveries will not be delayed." Ex. 13. Mr. Anderson wrote back, "We agree to these terms and will move forward with shipment releases based on accountability to your proposed payment schedule." Ex. 13.

It is undisputed Defendant made several timely payments under that same payment schedule before falling behind multiple weeks in making payments. Thus, Plaintiff had the statutory right to demand adequate assurance of due performance and until it receives such assurance, it may suspend performance on its end. SDCL § 57A-2-609 ("A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return."). The purpose of SDCL § 57A-2-609 is to allow the seller to seek adequate assurance of performance "to obviate the necessity of one party guessing whether or not the other intends to perform when he begins to receive signals that cause him concern." *Atwood-Kellogg, Inc. v. Nickeson Farms*, 1999 S.D. 148, ¶ 11, 602 N.W.2d 749, 752 (acknowledging that "a demand for adequate assurances may be ither written or oral, as long as the demand provides a 'clear understanding' of the insecure party's intent to suspend performance until receipt of adequate assurances from the other party.").

To that end, on Friday, November 15, 2019, Zoe Benson, on behalf of Plaintiff, wrote Mr. Tiedemann and requested adequate assurances that payment would be given by Defendant in order to release the heaters to Defendant:

> With the high Capital Cost of Building the units and bills we have to support we can only extend a credit limit of $200,000 on our heater shipments. We need to receive some payments before we can release any more shipments. I was informed that heater number 53 is scheduled to go out Monday, so we need to receive some payment today in order to let the heater go out as scheduled. Please let me know if you have any questions. Thank you.

Exhibit 17. Nevertheless, Defendant demanded that the heater be released without any payment to resolve the outstanding credit or any payment for the heater it was picking up. Defendant's attempted termination of the agreement violated: (1) SDCL § 57A-2-310's provision that payment is due at the time Defendant was to receive the heaters, (2) Defendant's own proposed payment plan accepted by both parties, and (3) Plaintiff's request for adequate assurances under SDCL § 57A-2-609. "Unless otherwise agreed tender of payment is a condition to the seller's duty to tender and complete any delivery." SDCL § 57A-2-511. Apparently, Defendant believed it was entitled to receive the heaters for free without making any payment. That was not grounds for Defendant to attempt to unilaterally terminate the agreement.[5] There is no genuine dispute that Plaintiff was well within its statutory right to suspend release of the heaters until it receives adequate assurances from Defendant. SDCL § 57A-2-609. Defendant not only failed to provide any reasonable assurance, it expressly did the opposite.

G. Plaintiff Did Not Fail to Mitigate Damages.

Defendant claims that Plaintiff failed to mitigate its damages and, therefore, summary judgment should not be granted. "The defense of mitigation of damages does not require more

[5] Defendant makes numerous factual arguments in this section with no citation to the record of any evidence to support those allegations. Those arguments should be rejected as improper arguments by counsel.

than that the injured party exercise diligence to avoid further loss." *Boxa v. Vaughn*, 2003 S.D. 154, ¶ 21, 674 N.W.2d 306, 313. Here, Defendant has failed to provide any probative evidence in the record that Plaintiff failed to mitigate its damages. In fact, Defendant fails to cite to a shred of evidence in the record to support its claim. However, as the party asserting the affirmative defense of failure to mitigate, Defendant has the burden of proof on it. *Burhenn v. Dennis Supply Co.*, 2004 S.D. 91, ¶ 32, 685 N.W.2d 778, 786. To that end, "[w]here no probative evidence is offered, the party who bears the burden of proof must lose." *Cavender v. Bodily, Inc.*, 1996 S.D. 74, ¶ 22, 550 N.W.2d 85, 90 (citing *Frank Stinson Chevrolet, Inc. v. Connelly*, 356 N.W.2d 480, 483 (S.D. 1984)). Defendant must do more than simply declare that Plaintiff failed to mitigate its damages. Defendant's argument should be summarily denied.

In fact, Plaintiff has presented evidence via testimony from Kory Anderson that there was no secondary market available to Anderson Industries because the heaters were specifically custom-built to Defendant's specifications and bore insignia of Thermal Intelligence on the heaters. Affidavit of Kory Anderson at ¶ 38. To that end, Plaintiff has actually taken affirmative steps to mitigate its damages by *storing* the heaters for four years, at its own cost and to which it is not requesting storage damages in this motion for summary judgment, and is willing to release those heaters to Thermal Intelligence in the event summary judgment is granted and payment is made to Anderson Industries.

Even assuming, *arguendo*, a genuine issue of material fact remains on the affirmative defense of failure to mitigate, it does not prevent the Court from granting summary judgment that Defendant did, in fact, a breach the contract by failing to pay for goods it contracted for.

CONCLUSION

For the foregoing reasons, Anderson Industries respectfully asks the Court to enter an Order granting summary judgment in its favor on its claims for breach of contract, and to further enter an Order denying Defendant's Motion for Summary Judgment.

Dated this 18th day of October, 2023.

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CERTIFICATE OF SERVICE

I, Jonathan A. Heber, do hereby certify that on this 18th day of October, 2023, I have electronically filed the foregoing with the Clerk of Court using the Odyssey File & Serve system which will send notification of such filing to the following:

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STATE OF SOUTH DAKOTA | IN CIRCUIT COURT

COUNTY OF DAY | FIFTH JUDICIAL CIRCUIT

ANDERSON INDUSTRIES, LLC, Plaintiff, v. THERMAL INTELLIGENCE, INC., a Canadian corporation, Defendant.	18CIV20-000023 **DEFENDANT'S RESPONSE TO PLAINTIFF'S STATEMENT OF UNDISPUTED MATERIAL FACTS AND DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS**

COMES NOW, Defendant Thermal Intelligence, Inc. ("Thermal Intelligence"), by and through the undersigned attorney, respectfully submits the following Response to Plaintiff's Statement of Undisputed Material Facts in opposition to Plaintiff's Motion for Summary Judgment and Defendant's Statement of Undisputed Material Facts in support of Defendant's Cross-Motion for Summary Judgment under SDCL § 15-6-56.

DEFENDANT'S RESPONSE TO PLAINTIFF'S STATEMENT OF UNDISPUTED MATERIAL FACTS

[¶1] Admitted.

[¶2] Admitted.

[¶3] Defendant admits that in 2018, Anderson Industries and Thermal Intelligence entered into an agreement wherein Anderson Industries would construct and sell to Thermal Intelligence 30 V1.0 custom industrial heaters. However, Defendant denies the assertion that the heaters were built solely to Thermal Intelligence's specifications. The development and production of the V1.0 model was a collaborative effort, involving input and engineering contributions from both Anderson Industries and Thermal Intelligence. Consequently, these were not entirely custom-built products of Thermal Intelligence's specifications but rather the result of mutual design and engineering

efforts.

[¶4] Denied in part. While Thermal Intelligence did pay for 30 V1.0 industrial heaters, these heaters did not meet the agreed upon specifications, hence the subsequent discussions for V1.5, V1.7, and V2.0 designs.

[¶5] Admitted in part. Anderson Industries did over purchase parts due to initial larger order discussions, but this does not constitute a binding obligation on Thermal Intelligence to purchase any additional heaters.

[¶6] Denied in part. Discussions were indeed held between the parties about an improved V1.5 industrial heater, but no formal binding agreement was reached and negotiations continued.

[¶7] Admitted.

[¶8] Denied.

[¶9] Denied. Thermal Intelligence agreed to a reduction in price pending the successful completion of a sale of intellectual property. However, unbeknownst to Thermal Intelligence, Anderson Industries was embroiled in legal battles over the ownership of the K2 V2.0 Diesel Flameless Heater Product Line. Yet, Anderson Industries continued to engage in bad-faith negotiations with Thermal Intelligence. Any agreement made by Thermal Intelligence was made in good-faith during the course of negotiations for a sale of intellectual property, which never occurred, nor could have occurred.

[¶10] Denied in part. An initial downpayment was made with the understanding that Anderson Industries would provide functional heaters and support, which it failed to do. Additionally, this was an informal arrangement that was devised between Anderson Industries and Thermal Intelligence to enable Anderson Industries to start manufacturing V1.5 heaters for the upcoming season.

[¶11] Denied in part. The lead time was agreed upon with the expectation that Anderson Industries would timely deliver operational heaters, which it failed to do.

[¶12] Denied. The arrangement was contingent upon the timely and functional delivery of heaters, which did not happen.

[¶13] Denied. The payment was made with the understanding that Anderson Industries would construct operational heaters, which it failed to do.

[¶14] Denied. Any payment made was under the assumption that Anderson Industries would fulfill its promises, which it did not.

[¶15] Denied. While Anderson Industries may have started constructing the heaters, the heaters provided did not meet Thermal's specifications.

[¶16] Denied. On October 3, 2019, Thermal Intelligence notified Anderson Industries about its awareness of its cash difficulties and offered to pay $200,000 per week to mitigate potential damages on fulfilled and unfulfilled orders.

[¶17] Denied. Any payment schedule was voluntary and was dependent upon Anderson Industries delivering on its promises, which it did not.

[¶18] Admitted in part. Payments were indeed made, but under the understanding that Anderson Industries would fulfill its obligations, which it failed to do.

[¶19] Admitted.

[¶20] Admitted.

[¶21] Denied in part. The e-mail from Zoe Benson on behalf of Anderson Industries does not accurately represent the existing issues and obligations between the parties as these unforeseen pre-shipment payment requirements were not factored into a finalized agreement.

[¶22] Admitted. However, Anderson Industries refusal to release a heater was not the sole reason

that Thermal Intelligence terminated its relationship with Anderson Industries.

[¶23] Admitted.

[¶24] Denied in part. While Thermal did indeed pick up 17 V1.5 heaters, these heaters were later found to be defective, and Anderson Industries failed to provide warranty and support.

[¶25] Denied. On this date Kory Anderson emailed Brian Tiedemann and stated, "we still have a handful of units being custom built to your order in process." (Plaintiff's Exhibit 17:2).

DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS

[¶1] During 2019, Thermal Intelligence and Anderson Industries held negotiations for the acquisition of the K2 V2.0 Diesel Flameless Heater Line. (Defendant's Exhibit E).

[¶2] In July 2019, with customer orders coming in for the winter season, an informal agreement was established to allow Anderson Industries to manufacture V1.5 heaters. The agreement included Clause 4 which states, "When the current time pressure is lessened, we will resume a longer-term discussion of IP and design acquisition. Your current purchases of V1.5 and V1.7 could be negotiated as part of the overall terms and conditions." (Plaintiff's Exhibit 4).

[¶3] On August 1, 2019, a subsequent agreement was formalized between Thermal Intelligence and Anderson Industries. This agreement represents the only document signifying a formal contract and includes the purchase of 30 V1.5 heaters at a price of $64,500 each, plus an additional $10,000 per unit for the ownership of the product line. (Plaintiff's Exhibit 7).

[¶4] On September 14, Kory Anderson proposed modifications to the original offer, which included new pricing and additional services for Thermal Intelligence. These proposals raised serious concerns for Thermal Intelligence, including issues about the support infrastructure at Anderson Industries and the feasibility of a 50-unit order by the following June. (Defendant's Exhibit A).

[¶5] Thermal Intelligence experienced issues with Anderson Industries regarding delivery delays and lack of support, which were communicated in multiple emails during September. Inspection of the heaters at Anderson Industries also revealed no operable units ready to ship. (Plaintiff's Exhibit 11; Defendant's Exhibit B).

[¶6] On October 3, Thermal Intelligence communicated to Anderson Industries about the financial burden it was facing due to unexpected pre-shipment payment requirements. (Plaintiff's Exhibit 13). As of October 24, Thermal Intelligence had paid Anderson Industries $1,167,000, exceeding the cost of 18 V1.5 heaters at a cost of $64,500 each. (Plaintiff's Brief at 9).

[¶7] Thermal Intelligence began to face financial strain from customers refusing to pay for defective heaters and threats of returns. They also experienced additional costs in attempts to repair these faulty units themselves due to lack of support from Anderson Industries. (Defendant's Exhibit F, Plaintiff's Exhibit 17:2).

[¶8] Anderson Industries has positioned the informal July 2019 agreement as the sole binding contract, neglecting to acknowledge its obligations to deliver functioning equipment, provide full warranty support, and maintain a long-term relationship. This overlooks the context of the August 1, 2019 agreement and continued negotiations. (Plaintiff's Brief at 2-3; Defendant's Exhibit E).

[¶9] Internal issues within Anderson Industries led to the furloughing of all staff and the closure of their Mapleton, North Dakota plant. These actions directly impacted Thermal Intelligence's business operations and violated the understanding set forth in the negotiations.

[¶10] The delivered heaters from Anderson Industries were non-functional due to the absence of the original development team. Anderson Industries' last internal communication about the V1.5 units occurred on September 16, 2019. (Defendant's Exhibit K).

[¶11] After receiving substantial payments, Anderson Industries ceased operations and failed to

fulfill their obligations, leaving Thermal Intelligence with faulty products and a mounting financial burden.

Dated this 26th day of July, 2023.

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STATE OF SOUTH DAKOTA | IN CIRCUIT COURT

COUNTY OF DAY | FIFTH JUDICIAL CIRCUIT

ANDERSON INDUSTRIES, LLC, Plaintiff, vs. THERMAL INTELLIGENCE, INC., a Canadian corporation, Defendant.	18CIV20-000023 **PLAINTIFF'S OBJECTIONS AND RESPONSES TO DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS**

COMES NOW the Plaintiff, Anderson Industries, LLC, by and through its undersigned counsel of record, and hereby respectfully submits the following Objections and Responses to Defendant's Statement of Undisputed Material Facts.

1. During 2019, Thermal Intelligence and Anderson Industries held negotiations for the acquisition of the K2 V2.0 Diesel Flameless Heater Line.

ANSWER: Objection to the extent the statement is immaterial to the question of whether Thermal Intelligence breached its agreement for purchase of the 30 K2 V1.5 Diesel Flameless Heater Line. Subject to and without waiver of the foregoing objections, undisputed.

2. In July 2019, with customer orders coming in for the winter season, an informal agreement was established to allow Anderson Industries to manufacture V1.5 heaters. The agreement included Clause 4 which states, "When the current time pressure is lessened, we will resume a longer-term discussion of IP and design acquisition. Your current purchases of V1.5 and V1.7 could be negotiated as part of the overall terms and conditions."

ANSWER: Disputed. Plaintiff does not understand what Defendant means by "informal agreement." There was an agreement between Plaintiff and Defendant to purchase 30 V1.5 heaters for $69,500 per heater, which is reflected in e-mail correspondence

and payments. *See generally* Affidavit of Kory Anderson, Exhibits 1-17; in particular, Exhibit 4. As for Clause 4, which is immaterial anyways insofar as the IP and design acquisition was not successful, that particular clause was rejected by Thermal Intelligence and was not otherwise made a part of the agreement but was instead part of the negotiations for the agreement to purchase $69,500.00.

3. On August 1, 2019, a subsequent agreement was formalized between Thermal Intelligence and Anderson Industries. This agreement represents the only document signifying a formal contract and includes the purchase of 30 V1.5 heaters at a price of $64,500 each, plus an additional $10,000 per unit for the ownership of the product line.

ANSWER: **Undisputed that an agreement to purchase 30 V1.5 heaters for $69,500 was reached. However, said agreement was reached on or about July 19, 2019. *See* Affidavit of Kory Anderson, Exhibit 4. Moreover, there is numerous documentation evidencing said agreement. *See generally* Affidavit of Kory Anderson, Exhibits 1-17. If the product line was purchased, then there would be a $5,000 credit applied and the purchase price would be $64,500.00.**

4. On September 14, Kory Anderson proposed modifications to the original offer, which included new pricing and additional services for Thermal Intelligence. These proposals raised serious concerns for Thermal Intelligence, including issues about the support infrastructure at Anderson Industries and the feasibility of a 50-unit order by the following June.

ANSWER: **Objection to the extent said statement is immaterial. The e-mail on September 14, 2019, was a prospective conversation about a separate and independent order for 30 more units. It did not materialize. Even if it had, it would not have changed the terms of the existing order of 30 V1.5 units. Indeed, Thermal Intelligence continued to make payments for the 30 V1.5 heaters at a price of $69,500.00 per heater. Even Mr. Tiedemann testified that there was an agreement for purchase at $69,500.00 per unit. Tiedemann Dep. at 79:47; 85:5-8).**

Exhibit 7 to the Affidavit of Anderson describes a separate outline for the potential purchase of the K2 V2.0 Diesel Flameless Heater Product Line. In that outline, which never materialized, it was discussed that a subsequent order would be made for V1.7, and it also reflected an understanding that a $5,000.00 credit would be made toward the V1.5 heaters, which was agreed-upon in those purchase orders.

5. Thermal Intelligence experienced issues with Anderson Industries regarding delivery delays and lack of support, which were communicated in multiple emails during

September. Inspection of the heaters at Anderson Industries also revealed no operable units ready to ship.

ANSWER: **Dispute as to the substance of the e-mails, but undisputed that Thermal Intelligence sent the referenced e-mails in September. Anderson Industries stated that Thermal Intelligence was delayed in issuing the POs and with the product lead time of 10-weeks (Exhibit 1), Anderson Industries was put a month behind due to Thermal Intelligence. Moreover, Thermal Intelligence requested changes to the fan inlet guard. *See* Affidavit of Kory Anderson, Exhibit 11. Nevertheless, Thermal Intelligence never rejected any heaters or expressed termination of the deal due to alleged inoperable heaters.**

6. On October 3, Thermal Intelligence communicated to Anderson Industries about the financial burden it was facing due to unexpected pre-shipment payment requirements. As of October 24, Thermal Intelligence had paid Anderson Industries $1,167,000, exceeding the cost of 18 V1.5 heaters at a cost of $64,500 each.

OBJECTION AND ANSWER: **Undisputed that Thermal Intelligence had paid $1,167,000, but clarifies that the purchase price was $69,500 per unit. On October 3, 2019, Thermal Intelligence committed to a written payment plan, and Mr. Tiedemann testified that he was aware of the payment plan (Tiedemann Dep. at 107:17-19).**

7. Thermal Intelligence began to face financial strain from customers in refusing to pay for defective heaters and threats of returns. They also experienced additional costs in attempts to repair these faulty units themselves due to lack of support from Anderson Industries.

ANSWER: **Objection insofar as the statement is immaterial to the motion for summary judgment insofar as Thermal Intelligence never made any attempts to return heaters or terminate the agreement as to alleged issues with the heaters, and therefore cannot claim rightful rejection of the heaters. Aff. of Jonathan A. Heber, Ex. A (Tiedemann Dep. at 118:24-119:2; 127-6-11); see also SDCL 57A-2-605 ("The buyers failure to state in connection with rejection a particular defect which is ascertainable by reasonable inspection precludes him from relying on the unstated defect to justify rejection or establish breach[.]").**

8. Anderson Industries has positioned the informal July 2019 agreement as the sole binding contract, neglecting to acknowledge its obligations to deliver functioning equipment, provide full warranty support, and maintain a long-term relationship. This overlooks the context of the August 1, 2019 agreement and continued negotiations.

ANSWER: Objection to the extent the statement is legal argument and not a proper statement. The record is replete with evidence that there was an agreement to purchase 30 V1.5 heaters and Thermal Intelligence breached said agreement by failing to make payment. *See* Affidavit of Kory Anderson, Exhibits 1-17.

9. Internal issues with Anderson Industries led to the furloughing of all staff and the closure of their Mapleton, North Dakota plant. These actions directly impacted Thermal Intelligence's business operations and violated the understanding set forth in the negotiations.

ANSWER: Denied. Furthermore, the statement improperly fails to cite to any evidence in the record. SDCL 15-6-56(c)(1) requires appropriate citation to the record for each statement. Moreover, Thermal Intelligence stated in writing that it attempted to terminate the agreement because Anderson Industries refused to release heaters without payment. Affidavit of Anderson, Ex. 17 ("I notified Kory that if the heater wasn't released we would be terminating our relationship with Anderson effective immediately.").

Furthermore, the Mapleton plant was only for engineering and when the deal to purchase the IP or build the V2.0 fell through, Plaintiff closed the Mapleton plant. The Webster, SD plant was for production and manufacturing, which is where the heaters were manufactured, and remains open to this day.

10. The delivered heaters from Anderson Industries were non-functional due to the absence of the original development team. Anderson Industries' last internal communication about the V1.5 units occurred on September 16, 2019.

ANSWER: Disputed. The statement fails to cite to any evidence in the record regarding non-functionality. SDCL 15-6-56(c)(1), and therefore no response is required. Moreover, Thermal Intelligence testified that it never made any attempts to return heaters or terminate the agreement as to alleged issues with the heaters. As to the second sentence, disputed and immaterial. Exhibit K is a reference to Monday.com which is a platform for communications between Anderson Industries and Thermal Intelligence, and all this indicates is the parties stopped communicating on the platform by September 16, 2019, and instead communicated by e-mail or phone thereafter, as confirmed by the e-mails between the parties relating to the parties after September 16, 2019. Affidavit of Kory Anderson, Exhibits 10-17.

11. After receiving substantial payments, Anderson Industries ceased operations and failed to fulfill their obligations, leaving Thermal Intelligence with faulty products and a mounting financial burden.

ANSWER: Denied. Furthermore, the statement improperly fails to cite to any evidence in the record. SDCL 15-6-56(c)(1) requires appropriate citation to the record for each statement. Moreover, Thermal Intelligence stated in writing that it attempted to terminate the agreement because Anderson Industries refused to release heaters without payment, not because of any allegations of ceasing operations, faulty products, or mounting financial burden. Affidavit of Anderson, Ex. 17 ("I notified Kory that if the heater wasn't released we would be terminating our relationship with Anderson effective immediately.").

Furthermore, Anderson Industries has never ceased operations and remains an operational business. See https://anderson-industries.com/; *see* South Dakota Secretary of State website reflecting an ongoing business.

Dated this 18th day of October, 2023.

CUTLER LAW FIRM, LLP
Attorneys at Law

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CERTIFICATE OF SERVICE

I, Jonathan A. Heber, do hereby certify that on this 18th day of October, 2023, I have electronically filed the foregoing with the Clerk of Court using the Odyssey File & Serve system which will send notification of such filing to the following:

Tatum O'Brien
O'Keefe, O'Brien, Lyson & Foss, LTD.
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tatum@okeefeattorneys.com

/s/ Jonathan A. Heber
Attorney for Plaintiff

STATE OF SOUTH DAKOTA | IN CIRCUIT COURT

COUNTY OF DAY | FIFTH JUDICIAL CIRCUIT

ANDERSON INDUSTRIES, LLC, Plaintiff, vs. THERMAL INTELLIGENCE, INC., a Canadian corporation, Defendant.	18CIV20-000023 **STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

COMES NOW Anderson Industries, LLC ("Anderson Industries"), by and through its undersigned counsel of record, and hereby respectfully submits the following Statement of Undisputed Material Facts in support of its Motion for an Order granting Summary Judgment under SDCL § 15-6-56.

UNDISPUTED MATERIAL FACTS

1. Anderson Industries, LLC ("Anderson Industries") was formed on or about January 11, 2006, and remains in good standing in the State of South Dakota. Affidavit of Kory Anderson, at ¶ 2.

2. Thermal Intelligence, Inc. ("Thermal Intelligence") is a Canadian corporation in the business of, among other things, purchasing, developing, and manufacturing industrial heaters for sale to third-party businesses. *Id.* at ¶ 3.

3. In 2018, Anderson Industries and Thermal Intelligence entered into an agreement wherein Anderson Industries would construct and sell to Thermal Intelligence 30 V1.0 custom

industrial heaters. Aff. of Anderson at ¶ 4. The industrial heaters bore Thermal Intelligence logos and were custom-built specifically to the specifications requested by Thermal Intelligence. *Id.*

4. Per the agreement, Anderson Industries constructed the 30 V1.0 industrial heaters for Thermal Intelligence and then sold and delivered each of them to Thermal Intelligence. *Id.* at ¶ 5. Thermal Intelligence paid in full for all 30 of the V1.0 industrial heaters. Thermal Intelligence did not return or attempt to return any of the 30 V 1.0 industrial heaters. *Id.*

5. Anderson Industries intentionally overpurchased the parts for the 30 V1.0 heaters due to Thermal Intelligence originally requesting 60 units rather than 30 units in the event Thermal Intelligence decided to purchase more units. *Id.* at ¶ 6. As a result, it had parts on hand for an additional 30 industrial heaters. *Id.*

6. In 2019, Thermal Intelligence and Anderson Industries discussed upgraded improved specifications for a V1.5 industrial heater. *Id.* at ¶ 7. After an exchange of e-mails between the companies, Thermal Intelligence agreed to purchase 30 V1.5 industrial heaters from Anderson Industries. *Id.*

7. Thermal Intelligence had no prior obligation to purchase an additional 30 industrial heaters from Anderson Industries. *Id.* at ¶ 8.

8. Thermal Intelligence agreed to purchase 30 V1.5 Heaters at a price of $69,500.00 per unit for a total price of $2,085.000.00. *Id.* at ¶ 12.

9. As part of the agreement, Anderson Industries agreed that it would credit $5,000.00 towards the purchase of each industrial heater if the parties were successful in completing a sale of the intellectual property for the industrial heaters from Anderson Industries to Thermal Intelligence. In effect, the purchase price would be lowered to $64,500.00. *Id.* at ¶ 13.

10. The parties agreed to a 20.00% downpayment for the purchase of the V1.5 industrial heaters. *Id.* at ¶ 14.

11. The parties agreed there would be a 10-week production lead time from receipt of the down payment until the industrial heaters were ready for delivery to Thermal Intelligence. *Id.* at ¶15.

12. On or about July 19, 2019, Anderson Industries and Thermal Intelligence agreed that Thermal Intelligence would first purchase 21 units at a price of $69,500.00 with a downpayment of 20%, and then issue subsequent purchase orders and downpayments immediately upon receiving a commitment from the end-user customers. *Id.* at ¶ 16.

13. On or about July 22, 2019, Thermal Intelligence paid Anderson Industries $291,900.00, which is exactly equal to 20% of the cost of 21 V1.5 Heaters (i.e., $1,459,500.00). *Id.* at ¶ 20. Anderson Industries began constructing the 21 V1.5 Heaters.

14. On or about August 22, 2019, Thermal Intelligence paid Anderson Industries $125,100.00, which is exactly equal to 20% of the cost of the remaining 9 V1.5 industrial heaters (i.e., $625,000.00). In total, Thermal Intelligence paid $417,000.00 in deposits, which is equal to 20% of the 30 industrial heaters (i.e., $2,085,000.00). *Id.* at ¶ 23.

15. Upon receipt of the second downpayment, Anderson Industries began constructing the remaining 9 heaters in accordance with the 10-week lead time for production. *Id.* at ¶ 24.

16. On October 3, 2019, Thermal Intelligence committed to a written payment plan with Anderson Industries for payment of the heaters. *Id.* at ¶ 27.

17. Specifically, Thermal Intelligence agreed that it would transfer funds to Anderson Industries as it collected receivables from the sale of the industrial heaters to its end users. At minimum, Thermal Intelligence would pay $100,000.00 to Anderson Industries twice per week on

each Monday and Thursday for a total of $200,000.00 per week. Thus, that schedule would be accelerated by the collection of receivables from the end users. *Id.* at ¶ 28.

18. Thermal Intelligence made a total of seven and a half installment payments in the total amount of $750,000.00, including an initial payment of $200,000 on or about October 3, 2019, a payment of $100,000 on Monday, October 7, 2019, a payment of $100,000 on Thursday, October 10, 2019, two payments of $100,000 on Tuesday, October 15, 2019, a payment of $100,000 on Monday, October 21, 2019, and a partial payment of $50,000 on Thursday, October 24, 2019. *Id.* at ¶ 30.

19. Anderson Industries received no further payments after the partial payment on Thursday, October 24, 2019. *Id.* at ¶ 31.

20. In total, Thermal Intelligence paid Anderson Industries $1,167,000.00, which included $417,000.00 in downpayment deposits and $750,000.00 in installment payments. *Id.* at ¶32.

21. On November 15, 2019, after which Thermal Intelligence had continued to miss the scheduled payments, Zoe Benson on behalf of Anderson Industries e-mailed Mr. Tiedemann and stated:

> Good morning,
>
> With the high Capital Cost of Building the units and bills we have to support we can only extend a credit limit of 200,000 on our heater shipments. We need to receive some payments before we can release any more shipments. I was informed that heater number 53 is scheduled to go out Monday, so we need to receive some payment today in order to let the heater go out as scheduled. Please let me know if you have any questions. Thank you.

Id. at ¶ 34.

22. On November 18, 2019, Mr. Tiedemann e-mailed a response to Ms. Benson, and wrote: "I notified Kory on Friday that if the heater wasn't released we would be terminating our

relationship with Anderson effective immediately. The heater was not released so we have notified our customers that all remaining orders have been canceled." *Id.* at ¶ 35.

23. Thermal Intelligence picked up 17 V1.5 of the 30 V1.5 industrial heaters from Anderson Industries. *Id.* at ¶ 36.

24. Thermal Intelligence accepted delivery of each of the 17 V1.5 industrial heaters and otherwise never attempted to return any heaters to Anderson Industries or notify it that the heaters would be rejected and, therefore, cannot claim rightful rejection of any of the heaters. *Id.* at ¶ 37.

25. As of that date, Anderson Industries had constructed the remaining 13 V1.5 industrial heaters and has been storing them at its warehouse since then. *Id.* at ¶ 38.

Dated this 14th day of June, 2023.

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STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
)	
COUNTY OF DAY)	FIFTH JUDICIAL CIRCUIT
)	
Anderson Industries, LLC,)	
)	
Plaintiff,)	
)	Status Hearing
vs.)	
)	
Thermal Intelligence, Inc., a Canadian corporation,)	
)	18CIV20-000023
Defendant .)	

BEFORE: **THE HONORABLE JUDGE LOVRIEN**
Circuit Court Judge
Webster, South Dakota
January 31, 2024, at 11:10 a.m.

APPEARING TELEPHONICALLY:

For the Plaintiff: **JONATHAN A. HEBER**
Cutler Law Firm, LLP
140 N Phillips Ave., 4th Floor
Sioux Falls, South Dakota 57104

For the Defendant: **TATUM O'BRIEN**
THEODORE RAMAGE
O'Keefe O'Brien Lyson, LTD.
720 Main Avenue
Fargo, North Dakota 58103

(WHEREUPON, the following proceedings were duly had:)

THE COURT: We are on the record. Our next file this morning is a civil file, file 20-23, Anderson Industries versus Thermal Intelligence. This is the time and place that the Court has set for a ruling in regards to the plaintiff and defendant's cross-motions for summary judgment.

Appearing on behalf of Anderson Industries, this morning, telephonically, is attorney Jonathan Heber; and appearing telephonically on behalf of the defendant Thermal Intelligence is Tatum O'Brien; and Theodore Ramage is also appearing on behalf of Thermal Intelligence.

As the Court indicated, this is the time that's been set for the Court's ruling on the cross-motions for summary judgment. And this would be the Court's ruling in regards to those motions.

The standard for summary judgment is well-known. It is authorized if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law.

All reasonable inferences drawn from the facts must be viewed in favor of the nonmoving party. The burden is on the moving party to clearly show an absence of any

genuine issue of material fact and an entitlement to judgment as a matter of law.

The evidence must be viewed most favorably to the nonmoving party, and reasonable doubts should be resolved against the moving party. The nonmoving party, however, must present specific facts showing that a genuine material issue for trial exists.

A nonmoving party must substantiate allegations with sufficient probative evidence that would permit a finding in his favor on more than speculation, conjecture, or fantasy. General allegations and denials which do not set forth specific facts will not prevent the issuance of a judgment.

The plaintiff has filed a motion with the required statement of undisputed material facts with citations to the record in support of each of those facts. SDCL 15-6-56 sub C requires that a party opposing a motion for summary judgment include a separate, short, and concise statement of the material facts as to which the opposing party contends a genuine issue exists to be tried. That statute further requires that the opposing party must respond to each numbered paragraph in the moving party's statement with a separately numbered response and appropriate citation to the record.

In this case, Anderson Industries filed a statement

of undisputed material facts. And then on July 26, 2023, the defendant filed a response. But in many of those responses, the defendant failed to cite to the record where a genuine issue of material fact exists.

For example, in the plaintiff's statement of undisputed material facts filed on June 14th, specifically, fact number 8, the plaintiff alleges that Thermal Intelligence agreed to purchase 30 V1.5 heaters at a price of $69,500 per unit for a total price of $2,000,085 [sic]. In response to that statement of undisputed material fact, the defendant simply wrote "Denied."

That failure, as far as I'm concerned, could be a basis for me to admit all of the material facts set forth by the plaintiff under 15-6-56C sub 3, which says, "All material facts set forth in the statement that the moving party is required to serve shall be admitted unless controverted by the statement required to be served by the opposing party."

In any event, I find that there are no genuine issues of material fact as to the argument that Thermal Intelligence entered into an agreement with Anderson Industries to purchase 30 V1.5 heaters at a price of $69,500 each.

There's also no genuine issue of material fact that

two down payments were made, specifically, that on July 19, 2019, Anderson Industries and Thermal Intelligence agreed that Thermal Intelligence would first purchase 21 units at a price of sixty-nine thousand dollars five hundred -- $69,500 -- excuse me -- with a down payment of 20 percent. And then there was a second down payment on or about August 22, 2019, where Thermal Intelligence paid Anderson Industries $125,100, which again is equal to 20 percent of the cost of the nine remaining V1.5 heaters. So, again, there's no genuine issue of material fact that those two down payments were made.

There's also no genuine issue of material fact regarding the claim that Thermal Intelligence committed to a written payment plan for those heaters. There is no genuine issue of material fact that Thermal Intelligence ultimately paid Anderson Industries $1,167,000.

There's no genuine issue of material fact that Anderson Industries manufactured all 30 heaters and delivered 17 of them to Thermal Intelligence.

There's no genuine issue of material fact that Thermal Intelligence first breached its agreement with Anderson Industries when it failed to make payments according to the payment schedule with the last payment Thermal Intelligence having made to Anderson Industries be

on October 24, 2019.

There's no genuine issue of material fact that Thermal Intelligence breached the agreement with Anderson Industries when on November 18, 2019, it terminated the entire agreement.

Contrary to the claims of the defendant, I do not find that there is a genuine issue of material fact as to the plaintiff's misrepresentation of its capacity to fulfill the terms of the contract. Said another way, based on the record before me, Plaintiff did not misrepresent its capacity to fulfill the terms of the contract.

I also find that there is no genuine issue of material fact that Plaintiff did not repudiate the contract. In fact, the evidence before me is that Plaintiff did fulfill the terms of the contract and has manufactured all of the custom-made heaters the defendant contracted for.

There is also no genuine issue of material fact regarding consideration. In other words, the contract was supported by consideration. There is nothing in the record before me that the heaters were inoperable. There's also nothing in the record that indicates Thermal Intelligence ever attempted to return, reject, or request that Anderson Industries repair the heaters.

Finally, the defendant has claimed that Plaintiff has failed to mitigate its damages. I disagree. Defendant has failed to cite any evidence in the record to support its claim. On the contrary, the plaintiff has presented evidence cited to in the record that there is no secondary market available to Anderson Industries, because the heaters were specifically built for the defendant, and further that Anderson Industries has taken affirmative steps to mitigate its damages by storing the heaters for four years at its own cost.

In short, I find that there are no genuine issues of material fact that a valid agreement or enforceable promise between Anderson Industries and Thermal Intelligence existed, that Thermal Intelligence breached that agreement, and that Anderson Industries has suffered damages as a result. The plaintiff's motion is granted and the defendant's motion is denied.

Mr. Heber, I trust you'll get me a proposed order consistent with the Court's ruling?

MR. HEBER: Yes, Your Honor.

THE COURT: Any clarification that you need from me on that, Mr. Heber?

MR. HEBER: No, Your Honor.

THE COURT: Ms. O'Brien, anything else we need to talk about on the record today?

MS. O'BRIEN: No, Your Honor. Thank you.

THE COURT: All right. We're in recess in this matter.

(WHEREUPON, the foregoing proceedings concluded.)

STATE OF SOUTH DAKOTA)
) SS. CERTIFICATE
COUNTY OF DAY)

I, KELLI LARDY, RPR, an Official Court Reporter and Notary Public in the State of South Dakota, Fifth Judicial Circuit, do hereby certify that I reported in machine shorthand the proceedings in the above-entitled matter and that Pages 1 through 9, inclusive, are a true and correct copy, to the best of my ability, of my stenotype notes of said proceedings had before the HONORABLE JUDGE MARSHALL LOVRIEN, Circuit Court Judge.

Dated at Watertown, South Dakota, this 13th day of February, 2024.

/s/ Kelli Lardy
KELLI LARDY, RPR
My Commission Expires: 10/21/28

STATE OF SOUTH DAKOTA — IN CIRCUIT COURT

COUNTY OF DAY — FIFTH JUDICIAL CIRCUIT

ANDERSON INDUSTRIES, LLC,
Plaintiff,

v.

THERMAL INTELLIGENCE, LLC, A CANADIAN CORPORATION,

Defendant.

18CIV20-23

TRANSCRIPT OF MOTIONS FOR SUMMARY JUDGMENT

BEFORE: THE HONORABLE MARSHALL LOVRIEN, Circuit Judge, at Webster, South Dakota, on November 1, 2023 at 2:08 P.M.

APPEARANCES: For the Plaintiff:

Mr. Jonathan A. Heber
Attorney at Law
140 N. Phillips Ave.
P.O. Box 1400
Sioux Falls, South Dakota

For the Defendant:

Ms. Tatum O'Brien
Attorney at Law
720 Main Ave.
Fargo, North Dakota

THE COURT: All right. We're on the record in this file this afternoon it's a civil file, file 20-23, Anderson Industries, LLC v. Thermal Intelligence, Incorporated, a Canadian Corporation. Appearing on behalf of Plaintiff, Anderson Industries, is attorney Jonathan Heber and appearing on behalf of the Defendant, Thermal Intelligence, is Tatum O'Brien. This is the time and place that's been set for the hearing in regards to what are now cross motions for summary judgment. I guess, Counsel, in terms of housekeeping for the argument today, Mr. Heber, do you want to present your argument and then Thermal Intelligence responds and you reply or I'm certainly open to however you folks want to handle it, so--

MR. HEBER: Your Honor, I think the issues overlap so I'd be fine if we just start hearing the entirety of it and turning it over to you.

MS. O'BRIEN: Agreed, Your Honor.

THE COURT: Okay. So that's how we'll approach it. Of course, as I indicated, this is the time and place set for a hearing in regards to the cross motions for summary judgment. I'll let counsel know, as you can probably see, I have the entire file in front of me and I have reviewed all of the pleadings, particularly the briefs in support of and in

opposition to the cross motions as well as the statements of undisputed material facts and the objections to those. Mr. Heber, since you're the Plaintiff, I'll let you proceed.

MR. HEBER: Thank you, Your Honor. If I could, could we go off the record for a moment for a housekeeping matter?

THE COURT: Say that again.

MR. HEBER: Could I go off the record for a moment for a housekeeping matter?

THE COURT: Sure, absolutely.

(Off-the-record discussion held, resuming with the following.)

THE COURT: We are back on the record. We just had an off the record conversation regarding the scheduling of a hearing after this unrelated to this matter. Mr. Heber was gracious enough to be a messenger for a colleague at the Bar letting me know that my 3:00 may run a little bit late. I appreciate that. Go ahead, Mr. Heber.

MR. HEBER: Thank you, Your Honor. Again, I represent Plaintiff, Anderson Industries. We had moved for summary judgment and we oppose the cross motion for summary judgment. As we see it in this case, we believe this is a simple contract for a

manufacturer of heaters and that the law that applies is UCC 2 for sales and so this is what we would consider a pretty simple UCC case. And now I know the law has been muddied through summary judgment with alot of affirmative defenses and other arguments and we believe that sort of muddies the water of summary judgment and is distracting to the ultimate issues at hand. So I want to talk about the agreement that we have here and what we're dealing with. Thermal Intelligence is, as Your Honor observed, a Canadian corporation. Anderson Industries is a business located here in South Dakota. And in Webster. And Anderson Industries manufactured custom built industrial heaters for Thermal Intelligence. And the two of them worked together closely to determine what the specifications work. And the heaters at issue in this lawsuit are actually a later addition than the original. We refer to them as Version 1.5 which follows Version 1.0. Version 1.0, while not necessarily material this this motion does set the backdrop as to why we're here. Those heaters were developed, they were sold to Thermal Intelligence. All the heaters in that agreement were sold and purchased and then the parties discussed the next generation, Version 1.5. And within that and I'll get

to this but I raise it just for again context. Within those discussions there were simultaneous discussions about purchasing the IP and product line. I think that's important because it goes towards the uniqueness of these goods for Thermal Intelligence. They were met. The specifications that their motel just wanted and were specifically made for Thermal Intelligence. Anderson Industries doesn't and did not sell any end users, that was Thermal Intelligence. So Thermal Intelligence would purchase the heaters, they actually, I think, sell or assign them to an affiliate company, Nakoda, N-A-K-O-D-A and Nakoda would then sell them to the end dealers. So what happened in 2019 was Thermal Intelligence and Anderson Industries entered into an agreement to purchase 30 more heaters. Thirty 1.5. And the agreement is born out in correspondence and those e-mails have largely been attached to the affidavit of Kory Anderson. Notably, July 19th Brian Tiedemann, who is the president of Thermal Intelligence, e-mails Kory Anderson, the owner and president of Anderson Industries. His or Thermal Intelligence's agreement to contract. And so what is the contract? I think that's important. It's for 30 Version 1.5 heaters. We know the quantity. And we know the price. The price was 69,500 for each year.

There was a conditional credit built into that if the parties were successful in negotiating the sale of the IP, which did not happen and that's undisputed. There's also a down payment of 20 percent on the heaters. Now there was an agreement to purchase 30 but it was actually in two different installment contracts, one of 21 and one of nine. So, technically, two different down payments were made. And those down payments are reflected in the accounting and I don't think there's any dispute as we sit here today that those down payments were made. Another material term is that there be a ten-week lead time. So once the down payment was made Anderson Industries would then begin the process of actually constructing those heaters. I believe the first down payment was made on July 22nd of 2019 which would have put the lead time at September 30th. Which would have been around the time the record reflects that the heaters started being released to Thermal Intelligence in the early days of October and through October. Now Thermal Intelligence makes alot of arguments in their cross motion that there's an informal agreement or no agreement. I think alot of different arguments they used at deposition versus the briefing. There was an agreement, heaters were constructed, they were

delivered, payments were made. And that is, regardless if we have a formal written contract or we have an agreement by e-mails, the legal significance is the same. Even if we had no e-mails and it was oral the legal significance would be the same. And the UCC covers all that. What we do have is e-mails with an agreement and responsive e-mails indicating their agreement and performance, creating a binding agreement. And so as we sit here today, all 30 heaters have been constructed. And 17 have been delivered. I believe you do the math, Your Honor, as we pointed out in our briefs, in fact, I think Thermal Intelligence hasn't even quite paid for all 17 heaters as we sit here today. And so what's important is the UCC tells us exactly how the parties are to interact. If there are breaches or defaults or defects or nonpayment, the UCC covers all of it and the statute says exactly what the parties need to do in the event of any of those occurrences. What happened was -- I digress, I should back up a moment. The one material term that was left open which the UCC allows is when payment was to be made. The parties did discuss down payments but did not agree to when payment would be made. UCC anticipates that in a number of statutes at play for when that occurs. And payment, if left open, is SDCL

57A-2-310 states payment is due at the time and place at which the buyer received the goods. I think there's a few other statutes well on point that I cited in the brief. But, with that said, in that early October time period once the heaters were began being released after the ten-week lead time the parties actually agreed to a payment plan. And so they resolved that issue of when the payments were going to come in so it's, frankly, a non-issue but even if it were an issue the UCC controls. Brian Tiedemann, on behalf of Thermal Intelligence actually came up with the payment plan that Thermal Intelligence would pay and that was these hundred thousand dollars payments twice a week on Mondays and Thursdays. And that occurred on October 3rd which would have been, I believe, three days after the ten-week lead time deadline. And $750,000 were paid. You know, sort of in accordance with that payment plan, give or take a few days. And then those payments stopped. And October 24th of 2019 would have been the last date payment was made of a half payment. November after a few weeks after that, about three weeks after that, November 15th, after which Thermal Intelligence continued to miss payments, accounting representative of Anderson Industries had reached out to Thermal

Intelligence and indicated, hey, we need payment if we're going to release anymore heaters. And, again, that's allowed under UCC under, actually, a number of different statutes that are cited in the brief and I could certainly point them out here if the Court would like. But a seller under a contract such as this, specifically even an installment contract, has the right or remedy to withhold payment if the payment is conditioned on delivery which the UCC says that it is. It's an open term. Two, an adequate assurance if it feels any level of insecurity that payment isn't gonna come. I think, as a matter of law, the Court can actually determine that --that three weeks had passed without payment. So Anderson Industries communicated to Thermal Intelligence that we need payment, otherwise we're not going to release it. Thermal Intelligence says you need to release it, period. And, in fact, if the Court scrutinizes the correspondence I think what actually happened was there was a scheduled release of a heater, one heater, on Monday. And Thermal Intelligence showed up, I think, with their delivery guys on Friday, a couple days before. And so Anderson Industries was actually caught off guard that they were going to show up that day and I think that's reflected in Exhibit 17 of Kory Anderson's affidavit.

But Thermal Intelligence sends an e-mail then on the Monday when it actually was scheduled to be released and begins the reason for Thermal Intelligence termination of the agreement. And it states-- Brian Tiedemann states I notified Kory on Friday that if the heater wasn't released we would be terminating our relationship with Anderson effective immediately. The heater was not released so we notified our customers that all remaining orders had been canceled. So that was the reason given. That's important because the UCC talks about when notice was given for a breach. Here this was no breach as a matter of law because Anderson Industries was requiring that payment be made before it released the heater. And Thermal Intelligence hadn't actually even paid for all 17 of the heaters yet that it had in its possession. So under the UCC, Your Honor, Thermal Intelligence hasn't done anything it needed to do to terminate the agreement. It didn't have the right to terminate. And it sits here today and I expect counsel will argue that there were defects and there were misrepresentations. We deny all those but they're irrelevant. Because if those things were true they needed to be communicated as required under the UCC and they weren't. The UCC actually talks about what the buyer's remedies are for defects

of the heaters and what it would have needed to do to notify Anderson Industries to let it have an opportunity to fix it or inspect it. That didn't happen. What did happen, Your Honor, is Thermal Intelligence took 17 heaters and sold them to end users and those end users, as Brian Tiedemann testified in his deposition, they never even returned those to Thermal so they were still out in the field, no issue. They profited, they made their money. In fact, claiming defect doesn't pass the test here because Thermal Intelligence wanted more heaters. They wanted more. The reason-- the given reason for the termination was that, essentially, Anderson Industries wouldn't release them without payment. And so, as a matter of law, Thermal Intelligence can't claim these defenses it claims, defect, misrepresentation. I would go one step further to say, even so, we're here on summary judgment. It's Thermal Intelligence's responsibility as a matter of law in summary judgment that he needs to actually substantiate these allegations anyways with probative evidence more than just speculation and it hasn't done so. I don't see any affidavit from Brian Tiedemann. I don't see any additional evidence that any end users were returning heaters and Thermal Intelligence had to take those.

Instead, what we have is what I discussed. And it's born out in the record. Thermal Intelligence wanted the heaters without paying and Anderson Industries refused. And so what's more at play here, Your Honor, I think it can kinda be sussed out from the record and then just for context. Thermal Intelligence wanted the IP of Anderson Industries and when that didn't happen, that put-- that deal fell through, as the kinda side discussions, this deal then got terminated by Thermal Intelligence. And Brian Tiedeman's deposition is replete with statements about how Thermal Intelligence now does what Anderson Industries did with these heaters. It constructs these heaters. It does everything. It's the best player in the entire industry for these kind of heaters. It didn't need Anderson Industries anymore for these heaters. That's what happened, Your Honor. Doesn't need Anderson Industries anymore for these heaters. And so that's -- you know, again, when Anderson Industries' belief is as to what happened but that-- I mean, that again, for purposes of summary judgment, not necessary to get there. Just got there. And so to that end, Your Honor, we believe that under the law and under the cases we've cited that are fairly similar to this case, Your Honor can determine that there was an

agreement and determine what the terms of that agreement were as a matter of law and can determine that the termination, stated termination by Thermal Intelligence was wrongful and then can determine what the damages are for Anderson Industries. To the extent for any reason the damages are not certain, liability could be granted and the damages could be reserved. But we would say that the damages are quite certain, it's just a math problem as to what amount was outstanding and then any interest that's accrued on that amount. It's what we're asking for. We're not asking for purposes of summary judgment any storage costs. For the record, Anderson Industries is still storing those heaters. I believe they're here at the warehouse here in Webster. And all 13 of those heaters have been delivered to there. They've been storing them for about over four years now, actually. We're not seeking those storage costs that I believe we would be entitled to. We're not seeking them here today. But as part of this, and I know it's sort of outside of the context of summary judgment, Anderson Industries will release those if it did get a judgment and resolve this thing. That's -- what it has done to try to mitigate its damages at least for Thermal Intelligence against the judgment but would still like

to give those heaters to Thermal Intelligence. I don't think it needed to do that. I think the UCC is clear that it only needs to keep the goods for a reasonable period of time and then can do away with them. The issue there as set forth in the affidavit, this will kinda be one of the last points, Your Honor. As to mitigation of damages issue, first of all, we believe that that's incumbent, an affirmative defense, it's incumbent upon Thermal Intelligence to actually identify with some of the evidence where could they have sold these goods, how much could they have sold these goods, where is the market for this available to Anderson Industries. That would be incumbent upon Thermal Intelligence. I don't -- the law isn't that you simply claim mitigation of damages and then you overcome summary judgment. You have to have some level of evidence of mitigation. Here, and the reason I brought it up in the beginning of my argument was they were custom built heaters. There is no ability for Anderson Industries available to it or any marketing it has available to sell all these heaters or it would have a long time ago recouped that cost. Certainly not happily sitting here idly by with over a million dollars receivable. Essentially, that they would have to be taken for scrap which would just be pennies,

essentially. And that cost Anderson Industries can't-- hasn't identified and neither has Thermal Intelligence. And so Thermal Intelligence in the industry and construction of those heaters as well certainly has the capability to submit some evidence in that regard and hasn't. And so to that end we don't-- I think Your Honor could grant summary judgment over top of the affirmative defenses of failure to mitigate and misrepresentation and defect and warranties and implied merchantability. I don't think any of those pass muster for summary judgment. I don't think they're supported by evidence. And, beyond that, I think the UCC trumps them due to the conduct of the parties at the time of termination. So, with that, Your Honor, anything I missed or didn't cover in my argument I'll otherwise rely upon the briefs. If Your Honor has any questions for me I'll be happy to address them now.

THE COURT: Thank you counsel. I don't now but I might be depending on the argument I hear from opposing counsel. Miss O'Brien, you may proceed.

MS. O'BRIEN: Thank you, Your Honor. They-- and by "they" I mean Anderson Industries filed a motion for summary judgment. And they want this Court to look at the agreement from July in a bubble. Like this. And

what they're not wanting the Court to look at is everything else. All of the e-mails, all of the Monday.com messages, all of the proposed agreements, all of the correspondence back and forth indicating that these two companies were trying to make this work and were trying to make something work together. But it all fell apart. And so the first request that we have as the defendants in this case is for the Court to just dismiss the case. We're not asking although we do believe that we have overpaid for what we received, we're not asking for that money back. I think if the Court looks through all the documents provided by the plaintiffs and by the defendants you will see that there's Exhibit 4 for the plaintiffs which talks about a unit price of 69,500. A 30-unit. And then there's an agreement at Exhibit 7 for the plaintiffs from August that talks about here's a proposal, 64,500 plus 10,000 per unit to acquire -- if they acquired the IP. There's several other correspondence from September wherein Tiedemann indicates to Kory Anderson, okay, basically, if the IP stuff is falling apart we're paying 64,500 for each unit that we purchase. And Kory responds and says, no, you're buying 30 units at 69,500. That's in late September. I don't know how we get to a meeting of the minds and an assent here

between these two companies because, although it's clear that they were working together and trying to come up with this, it was falling apart. And part of the reason why it was falling apart is because Thermal had received these 17 heaters but they were receiving complaints, they weren't getting paid from their customers. They were having issues with support which they were supposed to be getting from Anderson. And so at the end of the day they weren't able to purchase or get those additional 13 units because the 17 they had weren't working out, the customers weren't happy. The plaintiffs are indicating to the Court that there's no evidence of any issues with these heaters. But they're looking at -- they're ignoring -- I mean, Plaintiff's Exhibit 17 talks about, you know, all of the problems with the heaters, the-- he even said-- Brian Tiedemann says, you know, we're done, essentially, and you're free to sell whatever remaining heaters you have. There is exhibit-- our Exhibit B which indicates that Thermal is already having problems with the level of support. There is Exhibit H which indicates that their main guy is only working on a part-time basis and they don't know how to expedite things considering the current state of our company. Exhibit C indicates that Thermal intelligence has concerns about the

ability to support the product now that key members of the team are gone Anderson assures him that they have a strategy for support. But then again, like I said, on September 19th Brian Tiedemann says "our costs are the existing units 64,500 with no allotment for IP." And Kory replied on October 1st, we have an agreement to fulfill 30 units at 69,500. Clearly these parties are not in agreement on the unit price and the number that Thermal was either obligated or not obligated to purchase. Our position is they purchased 17, they received 17. They actually paid for 18 and the whole thing really blew up when they wouldn't ship that final 18th heater. Because, Your Honor, if you look at the math there isn't a dispute that Thermal paid Anderson $1,167,000. And if you divide that by 64,500, that's more than enough money to pay for the 18 heaters. That's -- that's 1,161,000. But even if you believe their price of 69,500, we've paid for 16.7 heaters. If you do the math. It's almost the complete total amount that we've paid which is the 1,167,000.

THE COURT: If I use your math, though, with the 69,500 and 16.7 heaters you've received or your clients received 17 heaters, right?

MS. OBRIEN: That is correct, that is correct. So, like I said, Your Honor, if this Court wants to

use the 69,500 unit price we're close but not quite there for the amount that we've already paid because we did receive 17. But if you believe in several other documents that the unit price was 64,500 then we have overpaid for the 17 units that we received. So, again, Your Honor, more evidence of the fact that there was not an actual agreement in this case. And Kory Anderson, of Anderson Industries is trying to bootstrap Thermal Industries into pay for these 13 heaters that were never received and the order was canceled and stopped because the 17 that they received were not satisfactory, they were receiving several complaints. They kept e-mailing and talking to Anderson about lack of support, all these issues that were not getting remedied and, eventually, the two companies parted ways. And so, Your Honor--

THE COURT: So let me stop you right there. Mr. Heber says that under the UCC any of those complaints would have needed to have been communicated from your client to Anderson Industries, was that done?

MS. OBRIEN: It was done, Your Honor. And that is evidenced in several of the messages and exhibits that I've referenced in there included in the very large file that Your Honor has in front of him. But there, as I indicated, just some examples, Exhibit B

indicates that Thermal is already having problems in getting support that they need. That there is another Exhibit C that shows that Thermal's really concerned about having lost key members of the team. That there was -- like I said, Kory Anderson's own Exhibit 17 which indicates in length the parties going back and forth about the issues that the companies were having. There's also our Exhibit J which Thermal requested Anderson fix something. So, like I said, Your Honor, there's several examples included in this in which things weren't working out between the two companies and eventually they had to part ways. Thermal wasn't being paid from their customers because their customers weren't happy with the 17 heaters that they were supplied. And in the meantime, Anderson is asking Thermal for more money to continue producing or try to produce these additional 13 heaters that eventually Thermal just decided that they weren't going to make this deal work because, as indicated by the plaintiff, the whole point of this agreement, this arrangement, and as indicated in all of these e-mailed documents, was that Thermal was going to acquire the IP for this as part of this deal and then that's why they were finally supporting Anderson while they were trying to create his product sort of together. There was no

agreement. Even if the Court finds that there was, it was not completed. You can go with anticipatory repudiation, you can go with recission. There's all kinds of-- the misrepresentations, the lack of warranty, merchantability for the heaters not working. But also the fact that we're not sitting here saying, you know, we got a bunch of heaters and we didn't pay anything for them. We paid for what we've got. We might have overpaid. We might have slightly underpaid depending on what value one would assign to these, the 69 or the 64. But, essentially, Your Honor, it isn't a simple case that the plaintiffs are making it out to be, there are alot of different things going on here. But at the end of the day they're trying to make Thermal pay for these 13 heaters that they never agreed to buy. They agreed and paid on the 17. They never agreed to buy ones in the future, especially when all of these issues started coming up. The relationship was terminated and the parties went their separate ways. We ask the Court to consider dismissal of this entire matter.

THE COURT: Let me ask you this. In the plaintiff's statement of undisputed material facts, specifically number eight, the plaintiff alleges that Thermal Intelligence agreed to purchase 30 V1.5

heaters at a price of $69,500 per unit, for a total price of $2,000,085. So $69,500 times 30 units and that's where you come up with that figure. So that's what the plaintiff has alleged is an undisputed material fact. Your client has responded that it denies or objects to that. But there was no citation to anything in the record other than a blanket denial of that statement. So can't I consider fact number eight then to be true?

MS. O'BRIEN: No, Your Honor. I think that in our brief and in our other submissions we've made it clear that there was talk of 30 units of the V1.5, that there was ongoing negotiations on the unit price between the 69,500 and the 64,500 with the 5,000 equity. There's also reference to a $10,000 equity. But at the end of the day there was no agreement on 30 units at 69,500. The plaintiffs themselves reference an agreement on Exhibit 6 which is from August which indicates a unit price of 64,500. And that's their own exhibit.

THE COURT: I really don't know what to do, I apologize.

MS. O'BRIEN: I really don't have anything else for the Court. I think that we've briefed this extensively. There's extensive exhibits. I think that

there are alot of things that we don't disagree on. We don't disagree that there were 30 other heaters from 2018, that everything went fine. That we don't disagree that the total payment made was 1,167,000, that we didn't pay for the 13 units unless you're talking about that 18th unit that never got shipped. But those things are all in agreement, Your Honor. It's just a matter of whether or not there was an actual agreement to purchase all 30. Because our client adamantly disputes that there was an obligation to purchase all 30 of these units. They purchased 17, they paid for 17, the matter should be dismissed. As indicated, the reason it all fell apart was because they were having all these problems with support and communication and problems with the heaters and they didn't want to continue on business with Anderson Industries with all these issues.

THE COURT: Thank you, Miss O'Brien. Mr. Heber, I'll let you respond. And just so you know this. I'll give you the last word since, again, they're cross motions for summary judgment.

MR. HEBER: Thank you. I want to quickly dispense of this 64,500/69,500 issue. The correspondence is quite clear between the parties as to what the purchase price was. Your Honor, Exhibit 4,

which forms the initial agreement here, I'd have Your Honor turn, if you could, to the, I believe, third to fourth page of that exhibit and it's bate stamped PL42, 43. This should clear it up. So this is coming from Brian Tiedemann on behalf of Thermal Intelligence. On to PL43 there's four points that form the agreement here and it states, this is following other correspondence, but it states: We will issue a purchase order for 21 units at a price of 69,500, okay? That was the first installment. And there's a second installment, I'll get to that. Number two resolves this issue of the 5,000. If we agree to a transaction on the IP in the future we would like $5,000 per unit purchased credited to that transaction. Okay. That's conditional. If the IP is acquired, then the units had a credit to them. The purchase price was still 69,500 but there would be a credit if the IP is acquired. It's undisputed, Your Honor, that the IP was not acquired. Okay? Undisputed between the parties. Purchase price is 69,500. And--

THE COURT: Because your argument is you only get the $5,000 credit if the IP was successful?

MR. HEBER: Correct, Your Honor. And, in fact, that's exactly what the e-mail states and what that entire e-mail chain states. If you go back, you go up,

up is actually later correspondence with the e-mail chain. There's an agreement on that. In the proposal that's referenced, I think it's Exhibit 7, in August, that's the proposal for the IP. And it reflects exactly that agreement which is the purchase price of the heaters will be 64,500 if the IP is purchased. So it makes sense-- it makes perfect sense that that proposal would follow this correspondence because the parties understood that discussion would happen and it did happen. And the parties had a proposal and they considered it and then it didn't happen, ultimately. And what that means is the purchase price stayed at 69,500. And, again, why this is not an issue is because Your Honor can follow the money trail here. Thermal Intelligence made a deposit of 20 percent which is exactly equal to 21 units times 69,500. Perfectly to the cent. And it made its second down payment for nine units which is perfectly equal to the calculation of nine units times 69,500. It understood the price, period. Its conduct confirms that. There's no question. It's safe to say here, Your Honor, that it believes that is was 64,500 is -- is erroneous, if not intentionally trying to muddy the waters. It knew, it of course knew. So that's not a disputed fact and it's not a barely disputed fact, Your Honor. And,

in fact, what frustrates me more is that there's an argument now that there was no agreement on 30 units. Not only was the correspondence we looked at on Exhibit 4 referencing an agreement as to 30 units, Brian Tiedemann testified as president and on behalf of the company at the 30B6 deposition, two depositions. And I'll read some of his testimony. This is Brian Tiedeman's testimony. I ask: Is it fair to say you've got an agreement to liquidate those 30 units? Answer by Mr. Tiedemann: Yeah, well, I think we did have an agreement to liquidate the 30 units. Next question later on in the deposition: And so there was at least an initial agreement as to getting those 30 units liquidated and purchased but there were continuing conversations about still purchasing the product line, am I tracking with you? Answer: Yeah, our intention was to try and sell all 30 units. Another answer: It was our intention to buy those all 30 units. That was our goal and that was our intention. And the most important question asked by me: And terms were reached because an order was placed, right? Answer: Eventually, yeah. Brian Tiedemann testified that there was an agreement as to 30 units. And that follows because two down payments were made that exactly equal the down payment of

20 percent for 30 units. And it further tracks because the parties followed that ten-week lead time that was agreed to between the parties. And after the ten-week lead time heaters began being released. And 17 were picked up. Scratch that. The math that Thermal Intelligence is using to indicate that it overpaid is erroneous because it's relying on the 64,500. The 69,500 and, in fact, not full payment has been made but that, again, that's beside the point because the question here is whether or not there's an obligation to buy at all and the answer to that is yes.

THE COURT: Mr. Heber, how do you respond to Miss O'Brien's comment that the concerns of the work-ability or the functionality of the heaters was communicated to your client?

MR. HEBER: Sure. Yes, Your Honor. The parties did have discussions about the specifications of the heaters. And whether or not it was meeting the temperature level and other things with the heaters, that was a continuing conversation between the parties and, frankly, expected with the agreement because Anderson Industries was upgrading its heaters to meet that 1.5 and so the parties were continuing that discussion and I think the Monday.com, which is like, I kinda call it the Facebook for manufacturers.

Essentially, that's what it looks like. The Excel version doesn't but I-- what it-- actually I think there's if you look at it what it actually looks like you literally can make posts and people can comment on 'em. And they were having discussions from the beginning all the way until the end about the specifications. What's important for this motion for summary judgment, though, was whether or not those concerns were communicated as required under the UCC and the UCC actually covers exactly when a party can terminate an agreement based on defects and what it needs to do. And, for instance, SDCL 57A-2-602 talks about rejection and return of -- of goods due to defects. And that actually states: Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller. To be very clear, Your Honor, no attempt was ever made by Thermal Intelligence, their record supports that, and Brian Tiedeman's testimony supports that, that any heaters were rejected or attempted to be returned. That never happened. In fact, the end users, as we know, have all 17 of those heaters, all 17 of those heaters made it into the field. And so that didn't happen. No heaters were rejected, not a single one. Certainly, the terms

were communicated about the heaters and Anderson Industries had an opportunity to respond to those and that happened but that wasn't the basis for the termination of the agreement. And we know that because Brian Tiedemann, the president of Thermal Intelligence communicated in writing his basis for termination. And I read that into the record at an earlier hearing. He -- Thermal Intelligence was trying to get more heaters, it wasn't rejecting them, it wasn't returning heaters, he was trying to get more. And Thermal Intelligence communicated to Anderson Industries and this can be determined as a matter of law, if you don't release those heaters we're going to cancel the agreement. So to sit here and claim that the agreement was terminated because of concerns about the defects is unsupported by the evidence if not completely contradicted by the evidence. Because they were trying to get more heaters and that's shown by the correspondence. And then the reason that was given in writing was that the heater wasn't released. If Thermal Intelligence could have got its way it would have taken that heater on that Friday without making payment for it. And so any arguments again can determined as a matter of law don't pass muster on these arguments of warranty and quality and defects

because, again, these-- and buyers have specific remedies outlined in the UCC and none of that happened. In fact, Thermal Intelligence could have had its own right to adequate assurance performance under SDCL 57A-2-609 and could have withheld their performance based on promises by Anderson Industries to do certain things, such as-- a commitment. If Thermal Intelligence was concerned about the quality and that was, allegedly, the basis for termination, it could have stated to Anderson Industries we're concerned about performance, we need commitment from you that you have the personnel at Anderson Industries, you have the plant opened, all those things to be able to service our heaters and we need to know that from you. And if you can't we're going to terminate it based on that reason. SDCL 57A-2-609 it states: When reasonable grounds for insecurity arise with respect to the performance of either party, the other may in writing demand adequate assurance of due performance and until he receives such assurance may, if commercially reasonable, suspend any performance for which he has not already received the agreed return. So under Thermal Intelligence's version now of the case, what needed to happen to terminate the agreement based on defects would have been to

communicate to Anderson Industries we're done unless you take these heaters back and refund us. That would be one option. Two, we need assurances that you can actually perform under the agreement. But what Thermal Intelligence can't do, unless it wants to be bound by the contract still, is continue to demand more heaters be released. And, in fact, SDCL 57A-26-12 about installment contracts states at the end of subsection three says: But the aggrieved party reinstates the contract and it goes on for a provision that's not relevant, the aggrieved parties reinstates the contract if he demands performance as to future installments. That's what it did. It demanded that more heaters be released. That's what happened. And so any argument that the contract was terminated at that time as a matter of law can't pass muster because, at a minimum, Thermal Intelligence reinstated the contract by demanding that more heaters be released. So in that way, Your Honor, there very much was an agreement. The record is clear that there was an agreement. But, also, Thermal Intelligence admits in its deposition testimony that there was an agreement and made payments which confirmed the agreement. It took heaters which confirmed the agreement. And, in fact, if you look at that sentence just noted, by

Brian Tiedemann on November -- it states in that termination e-mail second line: The heater was not released so we have notified our customers that all remaining orders have been canceled. They had orders, according to Brian Tiedemann for the additional heaters and they canceled those. So to sit here and claim that there was only an agreement to 17 isn't reflected anywhere and is contradicted everywhere. And so, with that, Your Honor, we think Your Honor is well within its discretion to grant summary judgment here and put an end to this case and grant judgment in favor of Anderson Industries for the amount still owing the agreement. That's all, Your Honor.

THE COURT: Thank you, Mr. Heber. Miss O'Brien, I'll give you the last word.

MS. O'BRIEN: Thank you, Your Honor. Going back to Exhibit 4, Plaintiff's Exhibit 4, the bate number is 43. They're claiming again that this all stems from this complete agreement that everybody had in July. Well, here's an e-mail from Brian Tiedemann in July, and it's attached, it's part of Exhibit 4. We currently do not see a profitable path forward that does not include consolidation of the IP as a cost reduction strategy. So from that perspective, we still need to see that as an outcome. And he says we agree

timing on this negotiation is brutal. The next line down says we will issue a purchase agreement for 21 units at 69,500 with the down payment. But if we agree to a transaction on the IP in the future a $5,000 unit purchase, it talks about units 1.7 and a $5,000 market erosion and it goes down further and it says: In closing, we do not believe the existing business model is or would will be successful. We are genuinely trying to make the best of an unfortunate situation. This venture has cost us a significant amount of investment in both Thermal and the other company. Costs we cannot continue to incur. So that's all in July, Your Honor. And you look forward to this proposed agreement that Kory sends to Brian in-- on Exhibit 7. And this agreement: The plaintiff's claim that this 69,500 per unit was completely clear. And that this $5,000 per unit was only if the IP was acquired and everybody knew that and all the documents support it. Well, this document says 30 units, 64,500 plus an additional 10,000 per unit to be required for ownership product. So that's Exhibit 7. Then if we go forward to-- there is some e-mails in September, Exhibit C. We have an e-mail from Brian indicating, well, since the IP fell apart where our 64,000 units, no allotment for IP transfer.

You have the response from Kory Anderson that says 30 units at 69. But then there's another e-mail that-- from Kory --I apologize, Your Honor, I just had it here. That indicates, well, how about we do those 30 units at 74,000 in order to make this all work. Oh, here it is, Your Honor. It's Exhibit A. And this is in September. Hi, Brian, a couple of things to follow up with. If we do the 74,500 on these 30 units I will insure we get the V2.0. This will cover development and costs to get us there as well as testing this winter to prove out the changes. And then there was more discussion on that and then he says two going forward will give you a complete inclusion deal at a base price at 71-5 for V2. So in September Kory is now asking for 74,500 per unit and then you have the September responses that I referenced before that I think were Exhibit D where our client responds and says 64,500. Kory responds and says 69,500. There's no way that this could all be construed as an agreement that the parties have because there's different prices and units and timing mentioned on several different correspondence going all the way into September. And what we're asking Your Honor and I think I've been clear. Oh, the other thing I wanted to indicate was if the Court goes with the unit price of 64,500, that

18th heater that the plaintiff has been focused on, they paid for that, Your Honor. That's why Mr. Tiedemann was saying give us the heater and they were saying no, send us more money. And he's saying no, give me the heater. So depending on who you believe and which e-mail and agreement you believe, either the 18th unit was paid for already or it wasn't. Depending on which unit price is ascertained in this matter. But, as I indicated, we do agree with the Plaintiffs on one thing, that this Court should just dismiss this matter with no costs and with prejudice.

THE COURT: Thank you. You're not going to get an opinion from me today. I may do a written opinion. Obviously, if I do that you'll see it when it's filed. If I decide to issue a bench opinion even though it won't be today I'll have the Clerk's office let you know. I certainly have no objection or problem with you folks appearing telephonically for that just to keep the costs down and that may be easier to get on your schedules. It's a little different having telephonic hearings, of course, when there's testimony and there's argument but if it's me just giving you my ruling I think it's a little easier to do because my court reporter is still sitting right next to me. So I appreciate the advocacy, you both have done a

phenominal job of briefing and the arguments today. You've given me plenty to think about and I don't mean that in any sort of disrespectful way. But I will take the matter under advisement. I'll get you something as quickly as possible whether that be a written opinion or whether it be correspondence from the Clerk's office on when I may issue a bench opinion. Of course, if I do issue a bench opinion you're certainly free to drive up if you want and sit here but I'm certainly not expecting you to do that and we can make those arrangements to have you appear telephonically. Anything else we need to address on the record today, Mr. Heber?

MR. HEBER: Your Honor, respectfully on the argument one new point was raised and that's the 74,500. May I address that in just a couple sentences for the record?

THE COURT: Certainly.

MR. HEBER: Very briefly. So those e-mails that were referenced as Exhibit A for the defendant's affidavit. And that is relating to and Your Honor can review the record, that's relating to getting the prop line up to version 2.0 which the parties had been discussing. The proposal that's referenced as Exhibit 7 of plaintiff's actually talks about a subsequent

order of Version 1.7 which is an inbetween order of the 1.5 and 2.0. That's what's being referred to. The parties were having alot of discussions about alot of things but it doesn't negate the fact that there was an order for the 30. And so I just wanted to make that very, very clear that that amount refers to a prospective order that never happened. That's all.

THE COURT: Thank you. Have a good day, folks.

(End of proceedings).

STATE OF SOUTH DAKOTA)
SS CERTIFICATE
COUNTY OF ROBERTS)

I, Calleen Thorn Misterek, am an Official Court Reporter within and for the Fifth Judicial Circuit of the State of South Dakota and I do hereby certify that I acted as such reporter for this hearing and that the preceding 37 pages constitute a full, true and correct transcript of all of the proceedings held thereon.

Dated at Sisseton, South Dakota, this 26th day of February, 2024.

_____RPR

Official Court Reporter

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 30664

ANDERSON INDUSTRIES, LLC

Plaintiff and Appellee,

v.

THERMAL INTELLIGENCE, LLC, a Canadian corporation

Defendant and Appellant,

Appeal from the Circuit Court, Fifth Circuit
Day County, South Dakota

The Honorable Marshall C. Lovrien
Circuit Judge

APPELLEE'S BRIEF

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Notice of Appeal filed March 21, 2024

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PRELIMINARY STATEMENT

Appellant Thermal Intelligence, LLC, a Canadian corporation, will be referred to as "Thermal Intelligence." Appellee Anderson Industries, LLC will be referred to as "Anderson Industries."

Unless otherwise noted, citations to the record will be indicated by "CR" followed, where applicable, by corresponding line(s) and page number(s). The motions hearing held on November 1, 2023, shall be referred to as "MH." The status hearing held on January 31, 2024, shall be referred to as "SH." Thermal Intelligence's Addendum to its Appellant's Brief will be referred to as "TI Add." followed, where applicable, by the corresponding line(s) and page number(s).

JURISDICTIONAL STATEMENT

Thermal Intelligence appeals from (1) the Judgment dated February 23, 2024, which incorporates the oral decision rendered on January 31, 2024, and (2) the Order Granting Andreson Industries' Motion for Summary Judgment entered, filed, and recorded on February 23, 2024. The Notice of Appeal was timely filed on March 21, 2024. This Court has jurisdiction to hear this matter pursuant to SDCL § 15-26A(3)(1) as an appeal from a final judgment.

STATEMENT OF LEGAL ISSUES

I. Whether the Circuit Court Erred in Finding That a Valid Agreement or Enforceable Promise Between Appellee and Appellant Existed.

The circuit court did not err in concluding that there was an enforceable agreement between Anderson Industries and Thermal Intelligence.

- *Liebig v. Kirchoff*, 2014 S.D. 53, 851 N.W.2d 743
- *Mark, Inc. v. Maguire Ins. Agency, Inc.*, 518 N.W.2d 227 (S.D. 1994)

II. Whether the Circuit Court Erred By Not Considering a Subsequent and Superseding Agreement That Occurred on August 1, 2019.

The Circuit Court properly rejected the argument regarding an alleged subsequent and superseding agreement. Furthermore, the newly-raised issue of novation was never pleaded or raised to the circuit court and was, therefore, waived.

- *Union Pacific R.R. v. Certain Underwriters at Lloyd's London*, 2009 S.D. 70, 711 N.W.2d 611

III. Whether the Circuit Court Erred In Finding That Thermal Intelligence Breached An Agreement With Anderson Industries.

The circuit court properly concluded that Thermal Intelligence breached its agreement with Anderson Industries.

- *Atwood-Kellogg, Inc. v. Nickeson Farms*, 1999 S.D. 148, 602 N.W.2d 749

IV. Whether The Circuit Court Erred In Its Determination of Damages.

The circuit court did not err in its determination of damages. Thermal Intelligence presents new arguments on appeal that were not preserved and therefore waives its argument on appeal relating to damages.

- *Wright v. Temple*, 2023 S.D. 34, 993 N.W.2d 553

STATEMENT OF THE CASE

Anderson Industries commenced a lawsuit against Thermal Intelligence for breach of contract. The parties conducted written discovery and took depositions. On March 27, 2023, Anderson Industries moved for summary judgment. On July 12, 2023, Thermal Intelligence filed a cross motion for summary judgment. On November 1, 2023, the circuit court, Honorable Judge Marshall C. Lovrien presiding, held a hearing on the cross motions for summary judgment in Webster, South Dakota. On January 31, 2024, the circuit court held a telephonic status hearing and granted Anderson Industries' motion for summary judgment and denied Thermal Intelligence's cross motion for summary judgment.

The circuit court held that there were no genuine issues of material fact that a contract existed between Anderson Industries and Thermal Intelligence, that Thermal Intelligence breached that contract, and that Andreson Industries suffered a determinable amount of damages as a result. The circuit court's findings and conclusions are set forth in full in the transcript for the status hearing. SH 2:17-7:17.

The circuit court signed, entered, and filed an Order granting Anderson Industries' motion for summary judgment on February 23, 2024. The circuit court also signed, entered, and filed a judgment in favor of Anderson Industries on February 23, 2024. Anderson Industries served a notice of entry of the Order and Judgment on February 27, 2024.

STATEMENT OF THE FACTS

Anderson Industries, LLC ("Anderson Industries") is a South Dakota limited liability company that was formed on or about January 11, 2006. CR 54 at ¶ 1 (Anderson Industries' SUMF). Thermal Intelligence, Inc. ("Thermal Intelligence") is a Canadian corporation engaged in the business of purchasing, developing, and manufacturing industrial heaters for sale to third-party companies. *Id.* at ¶ 2. Kory Anderson is the President of Anderson Industries. Brian Tiedemann is the President of Thermal Intelligence.

In 2018, Anderson Industries and Thermal Intelligence entered into an initial agreement wherein Anderson Industries would build and sell to Thermal Intelligence 30 custom-made industrial heaters, which were referred to between the parties as "K2 V1.0" heaters ("V1.0 Heaters"), in exchange for payment for each heater. CR 53-54 at ¶ 3. Thermal Intelligence would then sell those heaters to end customers. CR 55-56 at ¶ 17. Anderson Industries constructed the V1.0 Heaters with the logos and insignia of Thermal Intelligence logos and otherwise custom-made the products to meet the specifications requested and negotiated by Thermal Intelligence. CR 53-54 at ¶ 3.

Anderson Industries performed and built the 30 V1.0 Heaters and then sold them to Thermal Intelligence. CR 54 at ¶ 4. Thermal Intelligence paid Anderson Industries in full for all 30 of the V1.0 Heaters. *Id.*

In 2019, Thermal Intelligence and Anderson Industries discussed potential upgrades to the V1.0 Heater. *Id.* at ¶ 6. The upgraded industrial heater was referred to as the "K2 V1.5" heater ("V1.5 Heater"). *Id.* Thermal Intelligence eventually agreed to purchase an additional 30 V1.5 Heaters from Anderson Industries. *Id.* at ¶ 7. Specifically, on July 19, 2019, Brian Tiedemann e-mailed the terms of the agreement to Dan Ewert of Anderson Industries. *Id.* at ¶ 6. That same day, Dan Ewert responded and agreed to the terms of the

agreement to sell the 30 V1.5 Heaters to Thermal Intelligence. *Id.*

The material terms of the agreement were as follows:

1. Quantity. 30 V1.5 Heaters.

2. Price. Per unit price of $69,500 and total price of $2,085,000.

3. Conditional Credit. Credit of $5,000 towards the purchase price of each heater if the parties successfully completed a sale of the IP for the heaters.

4. Down Payment. Thermal Intelligence agreed to pay a 20% down payment for the purchase of the V1.5 industrial heaters.

5. Lead Time. 10-week production lead time from down payment.

CR 131-132, Ex. 4 (PL 00040-41); CR 124, Ex. 1 (Thermal 000034).

Consistent with the agreement, Thermal Intelligence paid Anderson Industries $291,900 on July 22, 2019, which is equal to 20% of the cost of the initial 21 V1.5 Heaters (e.g., $69,500 x 21 V1.5 Heaters = $1,459,500). CR 55 at ¶ 13. Anderson Industries began building the initial 21 V1.5 Heaters in accordance with the 10-week lead time. *Id.* at ¶ 13. On or about August 22, 2019, Thermal Intelligence paid Anderson Industries an additional $125,100, which is equal to 20% of the cost of the remaining 9 V1.5 industrial heaters (e.g., $69,500 x 9 V1.5 Heaters = $625,000). *Id.* at ¶ 14. Anderson Industries then began building the 9 remaining V1.5 Heaters in accordance with the 10-week lead time. *Id.* at ¶ 15. Between the two payments, Thermal Intelligence paid $417,000 in down payments, which is equal to 20% of the 30 industrial heaters (e.g., $69,500 x 30 V1.5 Units = $2,085,000). *See id.* This left an outstanding balance of $1,668,000. *See id.*

On October 3, 2019, Thermal Intelligence and Anderson Industries agreed to a written payment plan to secure the payment of the V1.5 Heaters. *Id.* at ¶ 16. Specifically, Thermal Intelligence agreed to pay $100,000 to Anderson Industries twice per week on each Monday and Thursday for a total of $200,000 per week, unless it received payment

in addition to those amounts from the end users, in which case Thermal Intelligence would accelerate the payments. CR 56-57 at ¶ 17. In other words, the payment schedule could be accelerated by the collection of payments from the end users, but at a minimum the payments would be $200,000 per week. *See id.* Thermal Intelligence made a total of seven and a half installment payments to Anderson Industries in the total amount of $750,000, which included the following payments to Anderson Industries:

Thursday, October 3, 2019:	$200,000
Monday, October 7, 2019:	$100,000
Thursday, October 10, 2019:	$100,000
Tuesday, October 15, 2019:	$100,000
Tuesday, October 15, 2019:	$100,000
Monday, October 21, 2019:	$100,000
Thursday, October 24, 2019:	$50,000
	$750,000

CR 57 at ¶ 20.

After the final partial payment on Thursday, October 24, 2019, Anderson Industries received no further payments from Thermal Intelligence, leaving a balance of $918,000. *Id.* at ¶ 19. Thermal Intelligence proceeded to miss scheduled payments on October 27, October 31, November 4, November 7, November 11, and November 14. *See id.* On November 15, 2019, Zoe Benson, on behalf of Anderson Industries, e-mailed Brian Tiedemann and stated:

> Good morning,
>
> With the high Capital Cost of Building the units and bills we have to support we can only extend a credit limit of 200,000 on our heater shipments. We need to receive some payments before we can release any more shipments. I was informed that heater number 53 is scheduled to go out Monday, so we need to receive some payment today in order to let the heater go out as scheduled. Please let me know if you have any questions. Thank you.

Id. at ¶ 21.

Even though Thermal Intelligence failed to make payment, Thermal Intelligence

continued to demand a release of the heaters without making further payment. Brian Tiedemann e-mailed a response to Ms. Benson on November 18, 2019, and wrote: "I notified Kory on Friday that if the heater wasn't released we would be terminating our relationship with Anderson effective immediately. The heater was not released so we have notified our customers that all remaining orders have been canceled." CR 57-58 at ¶ 22.

As of that date, Anderson Industries had built all the remaining 13 V1.5 Heaters and stored them at its warehouse. CR 58 at ¶ 25. The remaining principal balance owed to Anderson Industries was $918,000.

ARGUMENT

Thermal Intelligence appeals from a judgment and an order granting summary judgment in favor of Anderson Industries and against Thermal Intelligence for a claim of breach of contract.

A claim for breach of contract requires "(1) an enforceable promise; (2) a breach of the promise; and (3) resulting damage." *Uhre Realty Corp. v. Tronnes*, 2024 S.D. 10, ¶ 20, 3 N.W.2d 427, 434 (quoting *Bowes Constr., Inc. v. S.D. Dep't of Transp.*, 2010 S.D. 99, ¶ 21, 793 N.W.2d 36, 43). "Contract interpretation is a question of law reviewed de novo." *Lillibridge v. Meade School Dist. #46-1*, 2008 S.D. 17, ¶ 9, 746 N.W.2d 428, 431.

In a motion for summary judgment brought under SDCL § 15-6-56, the nonmoving party "must present specific facts showing that a genuine, material issue for trial exists." *Hass v. Wentzlaff*, 2012 S.D. 50, ¶ 11, 816 N.W.2d 96, 101 (quoting *Saathoff v. Kuhlman*, 2009 S.D. 17, ¶ 11, 763 N.W.2d 800, 804). A non-moving party must substantiate allegations with "sufficient probative evidence that would permit a finding in his favor on

more than mere speculation, conjecture, or fantasy." *Hanson v. Big Stone Therapies, Inc.*, 2018 S.D. 60, ¶ 28, 916 N.W.2d 151, 159 (quoting *Gades v. Meyer Modernizing Co.*, 2015 S.D. 42, ¶ 7, 865 N.W.2d 155, 157-58) (emphasis added). "General allegations and denials which do not set forth specific facts will not prevent the issuance of a judgment." *Mark, Inc. v. Maguire Ins. Agency, Inc.*, 518 N.W.2d 227, 230 (S.D. 1994). It is well settled a party "cannot claim a version of the facts more favorable to his position than he gave in his own testimony" and "a party who has testified to the facts cannot now claim a material issue of fact which assumes a conclusion contrary to [her] own testimony." *Lalley v. Safway Steel Scaffolds, Inc.*, 364 N.W.2d 139, 141 (S.D. 1985) (citation omitted).

While the existence of the agreement between Anderson Industries and Thermal Intelligence is self-evident, this Court need not reach this threshold question because Thermal Intelligence has, as a procedural matter, admitted the existence of an agreement by failing to cite to evidence and the record in response to the statement of undisputed material facts submitted by Anderson Industries. As the circuit court acknowledged at the status hearing on November 1, 2023, Thermal Intelligence failed to cite to the record or any evidence to controvert the statement of Anderson Industries. *See* SH 3:8-4:19; SDCL § 15-6-56(c)(2) ("The opposing party must respond to each numbered paragraph in the moving party's statement with a separately numbered response and appropriate citations to the record.").[1]

Indeed, Thermal Intelligence failed to cite to the record or any evidence in

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[1] The circuit court acknowledged that this "failure, as far as I'm concerned, could be a basis for me to admit all of the material facts set forth by the plaintiff."

response to all of Anderson Industries' 25 statements of undisputed material fact.[2] *See* CR 234-237. In opposing the summary judgment, Thermal Intelligence did not submit any affidavits from any witnesses, including any representatives of Thermal Intelligence. *See id.* Thermal Intelligence also did not take the deposition of Anderson Industries or any of its representatives. In response to Statement No. 8 that "Thermal Intelligence agreed to purchase 30 V1.5 Heaters at a price of $69,500 per unit for a total price of $2,085.000.00 [sic]" (CR 55), Thermal Intelligence merely responded: "Denied" (CR 235). *See, e.g., DT-Trak Consulting v. Kolda*, 2022 S.D. 50, ¶ 26, 979 N.W.2d 304, 312 (acknowledging that the response of "Denied" to a statement of undisputed material fact "is without citation to the record"); *Delka v. Continental Cas. Co.*, 2008 S.D. 28, ¶ 29, 748 N.W.2d 140, 151 ("This general response failed to raise a genuine issue of material fact as required by SDCL 15-6-56(e)).

It is a well settled rule that "[t]he party opposing a motion for summary judgment must be diligent in resisting the motion, and mere general allegations and denials which do not set forth specific facts will not prevent issuance of a judgment." *Delka*, 2008 S.D. 28, ¶ 29, 748 N.W.2d at 151 (quoting *McDowell v. Citicorp U.S.A.*, 2007 S.D. 53, ¶ 22, 734 N.W.2d 14, 21); *see also Himrich v. Carpenter*, 1997 S.D. 116, ¶ 18, 569 N.W.2d 568, 573 (noting "[w]hen challenging a summary judgment, the nonmoving party 'must substantiate his allegations with sufficient probative evidence [that] would permit a finding in [his] favor on more than mere speculation, conjecture, or fantasy.'"). Because Thermal Intelligence failed to cite to the record or evidence in its response to the

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[2] In Thermal Intelligence's response to Statement No. 25, it cited to one exhibit from Kory Anderson's affidavit.

statement of undisputed material facts, Thermal Intelligence should be found to have admitted the existence of an agreement and a breach thereof. *See* CR 234-237.

I. THE CIRCUIT COURT PROPERLY FOUND THE EXISTENCE OF AN AGREEMENT.

A. There is an Enforceable Agreement Between Anderson Industries and Thermal Intelligence.

First, Thermal Intelligence argues that the first element for a breach of contract is satisfied because allegedly there was no enforceable agreement. In other words, Thermal Intelligence is denying an agreement that it agreed to in writing, an agreement that it wired downpayments to Anderson Industries for in the amount of $417,000, an agreement that it also wired Anderson Industries additional installment payments totaling $750,000 in accordance with a payment plan it proposed, and an agreement wherein Thermal Intelligence accepted delivery of 17 heaters and sold them to end users. In fact, when Thermal Intelligence repudiated the agreement, it acknowledged the very existence of it by e-mailing: "The heater was not released so we have notified our customers that all remaining orders have been canceled." CR 156, Ex. 17 (PL 00029). The position confounds reason and all of the evidence.

Accordingly, the circuit court correctly concluded that "there are no genuine issues of material fact as to the argument that Thermal Intelligence entered into an agreement with Anderson Industries to purchase 30 V1.5 heaters at a price of $69,500 each." SH 4:20-24.

1. The Agreement to Purchase 30 V1.5 Heaters.

Even if Thermal Intelligence is determined to have adequately responded to the statement of undisputed material facts, Thermal Intelligence failed to identify any genuine issues of material fact precluding summary judgment on the question of an enforceable agreement.

"In order to create a contract, four elements must exist: (1) the parties must be capable of contracting; (2) they must consent; (3) the purpose for contracting must be lawful; and (4) there must be sufficient cause or consideration." *Setliff v. Akins*, 2000 S.D. 124, ¶ 28, 616 N.W.2d 878, 888. Consent is an "essential element of a contract" and "must be free, mutual and communicated." *Vander Heide v. Boke Ranch, Inc.*, 2007 S.D. 69, ¶ 21, 736 N.W.2d 824, 831 (citing SDCL § 53-1-2(2); *Richter v. Industrial Finance Co. Inc.*, 221 N.W.2d 31, 35 (S.D. 1974)). "The existence of mutual consent is determined by considering the parties' words and actions." *Id.*

Thermal Intelligence only takes aim at the second element regarding consent. But, the record is incontrovertible that the parties consented to an agreement. The agreement was simple. *See infra* p. 4 (listing the material terms of the agreement). Anderson Industries and Thermal Intelligence expressed mutual assent to manufacture, sell, and purchase 30 V1.5 heaters for the per unit price of $69,500. CR 131-132 (PL 00040-41). If the two parties reached an agreement as a transaction on the IP for the product line sometime in the future, Anderson Industries would then credit $5,000 toward each heater and, in effect, the price per heater would be reduced to $64,500. CR 60, Ex. A (Tiedemann Dep. at 77:18-25; 79:8-16); CR 132, Ex. 4 (PL 00041). Further, the parties understood there would be a 10-week production time from the date of the receipt of the down payment. CR 60, Ex. B (Thermal Dep. at 33:8-23).

Brian Tiedemann, who is the President of Thermal Intelligence and who was chosen by Thermal Intelligence to testify on its behalf,[3] repeatedly admitted what is already

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[3] Brian Tiedemann testified twice. He first testified in his personal capacity as a President of Thermal Intelligence. He then testified on behalf of Thermal Intelligence in a 30(b)(6) deposition.

plainly obvious from the record that Anderson Industries and Thermal Intelligence reached an agreement to manufacture, sell, and purchase 30 V1.5 heaters. In Brian Tiedemann's own words:

> **Tiedemann:** [O]ur goal was, at a minimum, to at least sell the stock that he overbuilt to liberate his cash flow.
> CR 60, Ex. A (Tiedemann Dep. at 63:1-4).
>
> **Attorney Heber:** [I]s it fair to say, you've got an agreement to liquidate those 30 units?
> **Tiedemann:** Yeah, well, I think we did have an agreement to liquidate the 30 units.
> *Id.* (Tiedemann Dep. at 88:18-21).
>
> **Attorney Heber:** And so there was at least an initial agreement as to getting those 30 units liquidated and purchased, but there were continuing conversations about still purchasing the product line. Am I tracking with you?
> **Tiedemann:** Yeah, our intention was to try and sell all 30 units.
> *Id.* (Tiedemann Dep. at 90:18-22).
>
> **Tiedemann:** [I]t also was our intention to buy those – all 30 units. That was our goal and that was our intention."
> *Id.* (Tiedemann Dep. at 96:22-24).
>
> **Attorney Heber:** And terms were reached because an order was placed, right?
> **Tiedemann:** Eventually, yeah.
> *Id.* (Tiedemann Dep. at 104:6-8).

Despite admitting under oath that there was an agreement reached, Thermal Intelligence nevertheless argues that it was a "work in progress" with key aspects open to further negotiation. Yet, Thermal Intelligence failed to identify *what* key aspects to the agreement remained open to negotiation to the circuit court. To overcome summary judgment, Thermal Intelligence needed to identify, with evidence and citation to the record, what material terms of the agreement were still left open for negotiation, which there were none. *See Mark, Inc.*, 518 N.W.2d at 230 ("General allegations and denials which do not set forth specific facts will not prevent the issuance of a judgment."). Without question,

Thermal Intelligence failed to satisfy its obligations at summary judgment.

On appeal, Thermal Intelligence now raises a new, albeit meritless, theory for the first time on appeal that an issue regarding a "heat exchanger" was not agreed upon by the parties. *See* Appellant's Brief at pp. 17-19. This Court has "consistently held that this Court may not review theories argued for the first time on appeal." *Liebig v. Kirchoff*, 2014 S.D. 53, ¶ 35, 851 N.W.2d 743, 752 (declining to address the issue) (quoting *Alvine Family Ltd. P'ship v. Hagemann*, 2010 S.D. 28, ¶ 21, 780 N.W.2d 507, 514). As such, any argument regarding the "heat exchanger" is waived on appeal. Even assuming the Court considered the argument, there is no evidence in the record suggesting that the heat exchanged was not successfully relocated or, more importantly, that Thermal Intelligence rejected or attempted to return any of the heaters to which it accepted delivery. Instead, the evidence shows that Thermal Intelligence repudiated the agreement when Anderson Industries suspended delivery pending payment from Thermal Intelligence. CR 156, Ex. 17 (PL 00029).

As such, the circuit court was correct in determining that the undisputed facts demonstrated the parties' mutual assent for the manufacture and sale of goods.

2. Thermal Intelligence Made Payments to Anderson Industries.

It defies reasoning that Thermal Intelligence would deny the existence of an agreement when it paid Anderson Industries a total of $1,167,000 under that same agreement, including downpayments at the exact percentage of twenty percent that the parties agreed upon. Thermal Intelligence consented to the agreement because it made payments toward the agreement *and* accepted delivery of the heaters. *See* SDCL § 53-3-3 (Mutuality of consent). "Whether a contract is formed is judged objectively by the conduct of the parties, not by their subjective intent. The question is not what the party

really meant, but what words and actions justified the other party to assume what was meant." *Geraets v. Haltner*, 1999 S.D. 11, ¶ 17, 588 N.W.2d 231, 234 (quoting *Crince v. Kulzer*, 498 N.W.2d 55, 57 (Minn. App. 1993)). To that end, [a]nother test to be applied in determining the meaning of a contract is the construction actually placed on the contract by the parties as evidenced by their subsequent behavior." *Malcolm v. Malcolm*, 365 N.W.2d 863, 865 (S.D. 1985) (quoting 17 Am.Jur.2d *Contracts* § 274 (1964); Restatement (Second) of Contracts § 202 (1981)).

When the conduct of Thermal Intelligence is adjudged objectively, it is beyond refute that Thermal Intelligence consented to the agreement with Anderson Industries.

On or about July 19, 2019, Anderson Industries and Thermal Intelligence agreed that Thermal Intelligence would first purchase "21 units at a price of $69,500 with a downpayment of 20%, and issue subsequent PO's & downpayments immediately upon receiving a commitment from customers." CR 132, Ex. 4 (PL 00041). Three days later on July 22, 2019, Thermal Intelligence wire transferred a payment to Anderson Industries in the amount of $291,900 (CR 137, Ex. 5 (Thermal 00040), which, not coincidentally, is equal to 20% of the cost of the 21 heaters (*i.e.*, $1,459,500). Brian Tiedemann testified that the payment was a 20% down payment for 21 of the 30 V1.5 Heaters.

> **Attorney Heber:** Okay. So everyone was aligned and had agreement then on 21 units at $69,500 down payment and 20 percent. That much was agreed upon?
> **Tiedemann:** Yeah.
> CR 60, Ex. A (Tiedemann Dep. at 79:4-7).

> **Attorney Heber:** You paid what appears to be the down payment for those 21 units; is that correct?
> **Tiedemann:** Correct.
> CR 60, Ex. A (Tiedemann Dep. at 85:5-8).

On or about August 22, 2019, Thermal Intelligence wire transferred Anderson Industries an additional $125,100, which, again not coincidentally, was equal to 20% of the cost of the 9 remaining V1.5 Heaters (*i.e.*, $625,500). In an e-mail dated October 3, 2019, Brian Tiedemann admitted that Thermal Intelligence had "already paid $417,000 in deposits," which, once more not coincidentally, was equal to 20% of all 30 heaters (*i.e.*, $2,085,000). Brian Tiedemann testified that it could have been the down payment for the other 9 V1.5 Heaters.[4]

> **Tiedemann:** And, hey, maybe that – maybe that down payment was for the other 9. I don't know. I honestly don't remember it, but I will admit it's quite coincidental in the amount of it, but it also was our intention to buy those – all 30 units. That was our goal and that was our intention.
> CR 60, Ex. A (Tiedemann Dep. at 96:20-24).

Upon receipt of the second down payment, Anderson Industries began constructing the remaining 9 V1.5 Heaters in accordance with the agreed 10-week lead time. CR 116, ¶ 24.

Sometime thereafter, Anderson Industries and Thermal Intelligence had a discussion regarding a schedule for the payments. On October 3, 2019, Thermal Intelligence committed to a written payment plan with Anderson Industries for payment of the V1.5 Heaters. CR 149, Ex. 13 (Thermal 000057). Brian Tiedemann testified that he was aware of the payment plan. CR 60, Ex. A (Tiedemann Dep. at 107:17-19). In an e-mail dated October 3, 2019, Brian Tiedemann proposed a payment plan of at minimum $200,000 per week. CR 149, Ex. 13 (Thermal 000057). Thermal Intelligence made a

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[4] Brian Tiedemann testified that Thermal Intelligence's senior account, Jodi Lalonde, was the individual responsible for issuing the wire transfers. CR 60, Ex. A (Tiedemann Dep. at 98:4-12; 97:18-22). Thermal Intelligence did not submit an affidavit from Jodi Lalonde—or from any person, for that matter—in opposition to Anderson Industries' motion for summary judgment.

total of seven payments following the payment plan in the total amount of $750,000, including an initial payment of $200,000 on or about October 3, 2019, a payment of $100,000 on Monday, October 7, 2019, a payment of $100,000 on Thursday, October 10, 2019, two payments of $100,000 on Tuesday, October 15, 2019, a payment of $100,000 on Monday, October 21, 2019, and a partial payment of $50,000 on Thursday, October 24, 2019. CR 150, Ex 14 (Thermal 000049). In total, Thermal Intelligence paid Anderson Industries $1,167,000.

Anderson Industries received no further payments after the partial payment on Thursday, October 24, 2019. Thermal Intelligence admitted that it stopped making payments. CR 60, Ex. B (Thermal Dep. at 51:1-3). On November 15, 2019, after which Thermal Intelligence had continued to miss the scheduled payments, Zoe Benson on behalf of Anderson Industries e-mailed Brian Tiedemann and stated:

> With the high Capital Cost of Building the units and bills we have to support we can only extend a credit limit of 200,000 on our heater shipments. We need to receive some payments before we can release any more shipments. I was informed that heater number 53 is scheduled to go out Monday, so we need to receive some payment today in order to let the heater go out as scheduled. Please let me know if you have any questions. Thank you.

CR 157, Ex. 17 (PL 00030). On November 18, 2019, Brian Tiedemann e-mailed a response to Ms. Benson, and wrote: "I notified Kory on Friday that if the heater wasn't released we would be terminating our relationship with Anderson effective immediately. The heater was not released so we have notified our customers that all remaining orders have been canceled." CR 156, Ex. 17 (PL 00029). The words chosen by Brian Tiedemann, in conjunction with the payments made by Thermal Intelligence, render the existence of an enforceable agreement beyond reasonable or genuine dispute.

3. Thermal Intelligence Voluntarily Accepted the Benefits of the Agreement.

Furthermore, Thermal Intelligence cannot deny the existence of the agreement with Anderson Industries when it voluntarily accepted the V1.5 heaters from Anderson Industries. Pursuant to SDCL § 53-3-5, "[a] voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it so far as the facts are known or ought to be known to the person accepting." *See also, e.g., Strom v. Bohl*, 46 N.W.2d 912, 914 (S.D. 1951) (holding that "[t]he existence of the instrument, possession by respondents and acceptance of rents according to the lease over a term of nearly nine years precludes the appellants from repudiating the obligation"). SDCL § 53-3-5 prevents Thermal Intelligence "from questioning the validity and effectiveness of a matter or transaction insofar as it imposes a liability or obligation upon him." *Strom*, 46 N.W.2d at 914. Thermal Intelligence made payments (for awhile) consistent with the parties' agreement, accepted the heaters, and even resold the heaters to end users. *See Grynberg Exploration Corp. v. Puckett*, 2004 S.D. 77, ¶ 24, 682 N.W.2d 317, 322 (holding that the defendants were "precluded from repudiating the accompanying obligations" under SDCL § 53-3-5 because they "received and accepted production revenue"). They cannot now claim no such agreement existed.

4. Thermal Intelligence Ratified the Agreement.

Even assuming consent was lacking, "[a] contract voidable for want of consent may . . . be ratified by subsequent consent." *Shedd v. Lamb*, 1996 S.D. 117, ¶ 19, 553 N.W.2d 241, 244 (citing SDCL § 53-3-4). Importantly, "[r]atification can either be express or implied by conduct." *First State Bank of Sinai v. Hyland*, 399 N.W.2d 894, 898 (S.D. 1987) (citing *Bank of Hoven v. Rausch*, 382 N.W.2d 39, 41 (S.D. 1986); 17

C.J.S. Contracts § 133 (1963)). In fact, when there is an installment contract for the sale of goods, as is the case here, "the aggrieved party reinstates the contract if he accepts a nonconforming installment without seasonably notifying of cancellation[.]" SDCL § 57A-2-612; SDCL § 57A-2-602 ("Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller."). Thermal Intelligence not only failed to reject any such heaters, it accepted the same without seasonably notifying of any cancellation based on an alleged nonconforming installment. CR 60, Ex. A (Tiedemann Dep. at 118:24-119:2; 127:6-11).

Anderson Industries has proven as a matter of law that there was an enforceable agreement between the parties. Thus, the circuit court correctly granted summary judgment.

B. There are No Genuine Issues of Material Fact as to the Terms of the Agreement.

Thermal Intelligence argues that "the circuit court failed to consider all terms of the agreement." Specifically, Thermal Intelligence claims that there were genuine issues of material fact regarding (1) the parties' intent, (2) Anderson Industries' ability to satisfy all terms, and (3) the operability of the heaters. All three arguments lack merit.

1. No Genuine Issues as to Intent.

First, Thermal Intelligence argues (at p. 20) that "there are genuine issues of material fact as to the parties' intent." However, there are no issues of intent regarding the purchase of the 30 V1.5 heaters.

Thermal Intelligence claims that "the intent of the parties during the July 19, 2019, communication was to continue developing future heater models, specifically the V1.7 and V2.0 heaters, and ultimately reach an IP acquisition deal, but this could not be

achieved until the 30 V1.5 heaters were sold." But the agreement of the parties for the purchase of the V1.5 heaters *was not conditioned* on an acquisition deal or the success of a newer edition of the heaters. To be sure, Kory Anderson stated, "We agree, with the stipulation … no V1.7s are built until all 30 V1.5s have been sold." CR 132, Ex. 4 (PL 00041) (ellipses in original). Thus, the sale of the 30 V1.5s was not conditioned on any sale of V1.7s. Furthermore, the parties agreed that "if" there was an agreement on "a transaction on the IP in the future," then $5,000 would be credited toward the purchase price of $69,500. *Id.* Therefore, the sale of the 30 V1.5s was also not conditioned on the acquisition of the IP for the heaters. Indeed, Brian Tiedemann e-mailed Kory Anderson and stated: "We agree. Our intention all along was that we would exhaust the V1.5's first." *Id.* (PL 00040).

There is no genuine dispute as to the parties' intentions for the sale of the 30 V1.5 heaters. In fact, Thermal Intelligence paid a 20% downpayment on all 30 V1.5 heaters in the amount of $417,000, it made additional payments of $750,000 toward the heaters, and accepted delivery of 17 of the 30 heaters. It was not until Anderson Industries withheld delivery upon nonpayment that Thermal Intelligence attempted to terminate the agreement. Consequently, there is no genuine issue of material fact as to the intent of the parties.

2. Ability to Satisfy All Terms.

Second, Thermal Intelligence claims that there are genuine issues of material fact regarding Anderson Industries' ability to satisfy all terms of the agreement. Yet, this argument must also fail as a matter of law because Thermal Intelligence is not arguing that Anderson Industries actually failed to perform or, more pertinently, that Anderson Industries anticipatorily repudiated the agreement. Because Thermal Intelligence has

failed to present any evidence that Anderson Industries failed to perform or that an alleged failure to perform was the reason for cancellation of the agreement, this Court should reject this argument.

Even assuming this Court were to consider this argument, Thermal Intelligence would have needed to show that Anderson Industries repudiated the agreement by its failure to perform. "Before a repudiation by an obligor will relieve the obligee from performing conditions precedent to the obligor's performance, it must unequivocally indicate that the repudiating party intends not to honor his or her obligations under the contract." *Union Pacific R.R. v. Certain Underwriters at Lloyd's London*, 2009 S.D. 70, ¶ 39, 711 N.W.2d 611, 622 (citation omitted). However, Thermal Intelligence presents no evidence or overt act representing "a clear and unequivocal refusal to perform." Thermal Intelligence broadly states that "there are genuine issues of material fact that Anderson Industries could satisfy all terms." Appellant Br. at 22. Even assuming, *arguendo*, this conclusory allegation was sufficient, a repudiation only creates remedial rights when the loss of the "performance not yet due" "will substantially impair the value of the contract to the other." SDCL § 57A-2-610. However, Thermal Intelligence further fails to explain, let alone present any evidence, of how this closure would have or did have any effect on Anderson Industries' ability to fulfill the terms of the contract. To the contrary, Anderson Industries did fulfill the terms of the contract and has manufactured all of the custom-made heaters that Thermal Intelligence contracted for. CR 119 at ¶ 38. Thermal Intelligence's allegations are merely those of "speculation, conjecture, [and] fantasy" and therefore must be rejected. *See Hanson*, 2018 S.D. 60, ¶ 28, 916 N.W.2d 151, 159 (citation omitted).

Thermal Intelligence failed to produce any credible evidence that Anderson Industries did in fact close its facilities, and that such closure was the basis for repudiating

the agreement.[5] Just the opposite, Thermal Intelligence was still demanding release of the heaters that were manufactured while simultaneously not making payment or following its own payment schedule that it proposed. *See* CR 156-57, Ex. 17 (PL 00029-30). Moreover, Thermal Intelligence never expressed anything to Anderson Industries regarding an alleged closing of operations for the reason of termination. In fact, Thermal Intelligence stated in clear and unequivocal terms, "[t]he heater was not released so we have notified our customers that all remaining orders have been canceled." CR 156, Ex. 17 (PL 00029). Thus, these arguments should be summarily rejected.

Indeed, when affirming summary judgment on a breach of contract claim, this Court in *Union Pacific R.R. v. Certain Underwriters at Lloyd's London* rejected the plaintiff's argument that the defendant had repudiated. 2009 S.D. 70, ¶ 40, 711 N.W.2d 611, 622 (citation omitted). In so holding, this Court emphasized that there was no evidence that the defendant had any intention to refuse to perform under the contract; rather, it was plaintiff who chose *not* to perform. *Id.* ("However, there has been no evidence or overt act in this case indicating that Continental had any intention of refusing to perform its part of the contract or that Continental ever indicated such an intention to UP at any time. Instead, it was UP which deliberately chose to refuse to perform its obligation under the contract. In fact, once Continental was notified of the loss it took steps to try to obtain the information and documentation it needed to make a determination regarding whether it would provide coverage."). The same is true here. Anderson Industries manufactured the heaters as requested and Thermal Intelligence chose not to pay for them.

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[5] As pointed out in Anderson Industries' response to summary judgment, Anderson Industries remains operational. *See* CR 253-54 (citing https://anderson-industries.com).

The only party that failed to perform under the contract was Thermal Intelligence.

3. Operability of the Heaters.

Third, Thermal Intelligence claims that there were genuine issues of material fact regarding the operability of the heaters. Once again, there is no evidence in the record that the heaters were, in fact, inoperable. To the contrary, Thermal Intelligence has admitted in testimony that it accepted delivery of the heaters from Anderson Industries and then resold them to end customers, who have never returned any of them to Thermal Intelligence. CR 60, Ex. A (Tiedemann Dep. at 127:6-11). "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Steed by & through Steed v. Missouri State Highway Patrol*, 2 F.4th 767, 770 (8th Cir. 2021) (citing *Scott v. Harris*, 550 U.S. 372, 380 (2007)). Simply put, Thermal Intelligence's argument fails to meet the burden of proof prescribed at summary judgment.

Furthermore, Thermal Intelligence's claims about supposed defects to the heaters must be discarded without consideration because Thermal Intelligence failed to seasonably reject the same. SDCL § 57A-2-612 ("the aggrieved party reinstates the contract if he accepts a nonconforming installment without seasonably notifying of cancellation"); *First State Bank of Sinai*, 399 N.W.2d at 898 ("failure of a party to disaffirm a contract over a period of time may, by itself, ripen into a ratification, especially if rescission will result in prejudice to the other party.") (citations omitted).

As set forth above, Thermal Intelligence's assertion that the closure of facility in North Dakota "effectively destroyed [Anderson Industries'] capacity to fulfill the terms of [the contract]" is wholly without merit. This claim is not based on any evidence and

instead, is contradicted by all of the evidence because Anderson Industries did fully perform.

II. There Was No Subsequent or Superseding Agreement.

Thermal Intelligence argues that even if there was an agreement to purchase the 30 V1.5 heaters, there was a subsequent agreement that superseded it under the theory of novation. The circuit court appropriately rejected this argument.

Thermal Intelligence has raised, for the first time on appeal, the theory of novation.[6] The theory of novation was not raised as a defense in opposition to Anderson Industries' motion for summary judgment or in support of Thermal Intelligence's cross motion for summary judgment. *See* CR 164, 234. Nor was the theory of novation raised as an argument at the motions hearing. SH 1-8. Most importantly, novation was not pleaded as an affirmative defense. *Ducheneaux v. Miller*, 488 N.W.2d 902 (S.D. 1992) ("Novation is an affirmative defense; and therefore it was Miller's burden to prove a novation took place."). As such, the issue of novation has been waived. *See High Plains Genetics Research, Inc. v. J K Mill-Iron Ranch*, 535 N.W.2d 839, 845 (S.D. 1995) (stating that "[a] party has 'a duty to plead' affirmative defenses, and as a result, they were waived"); *Christensen v. Christensen*, 2003 S.D. 137, ¶ 19, 672 N.W.2d 466, 472 ("Here, Daniel failed to plead or argue these affirmative defenses, and as a result, they were waived."). This Court has "consistently held that this Court may not review theories argued for the first time on appeal." *Liebig*, 2014 S.D. 53, ¶ 35, 851 N.W.2d 743, 752

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[6] While Thermal Intelligence may argue that it referenced the August 1 e-mail at summary judgment, it did not cite it in the context of novation. Instead, Thermal Intelligence relied upon this e-mail to suggest that "the parties were not on the same page regarding the price per unit, one of the essential elements of a valid contract." CR 171-72 at ¶ 20.

(quoting *Alvine Family Ltd. P'ship*, 2010 S.D. 28, ¶ 21, 780 N.W.2d at 514).

Even assuming Thermal Intelligence preserved the theory of novation for this appeal, the argument still fails. The elements of novation are as follows:

> (1) a previous valid obligation, (2) agreement of all parties to the substitution under a new contract based on sufficient consideration, (3) extinguishment of the old contract, and (4) the validity of the new contract. Clear and convincing evidence is required in order to justify setting a written contract aside and holding it abandoned or substituted by subsequent parol evidence or contract.

Haggar v. Olfert, 387 N.W.2d 45, 50 (S.D. 1986).

Thermal Intelligence argues (at p. 27) that the "parties reached a new agreement which altered the terms of the initial transaction." Even if this were true, the alleged superseding agreement would have still required the purchase of the 30 V1.5 heaters, which Thermal Intelligence would have still breached. Under this proposed, but not finalized agreement, the base price would have been merely reduced from $69,500 to $64,500, and an additional $10,000 would then be paid per unit for purchasing the product line for the heaters. CR 139, Ex. 7 (Thermal 000140). However, this proposed agreement never came to fruition and, instead, the parties continued with the original transaction for the sale of the 30 V1.5 heaters at a price of $69,500.

This is confirmed by the objective words and conduct of the parties after the e-mail was sent on August 1, 2019, which Thermal Intelligence claims represents a binding agreement. In fact, Brian Tiedemann undermines the finality of the supposed agreement by stating, "Please let us know if there is anything else required on our end and the next steps to formalize our new agreement." CR 140, Ex. 8 (Thermal 000138) (emphasis added).

Perhaps most damaging to Thermal Intelligence's theory of a superseding

agreement is that Thermal Intelligence continued to make payment based on a base price of $69,5000, rather than $64,500. On or about August 22, 2019, Thermal Intelligence wire transferred Anderson Industries an additional $125,100, was equal to 20% of the cost of the 9 remaining V1.5 Heaters at a price of $69,500 (*i.e.*, $625,500).

Then, on September 4, 2019, Brian Tiedemann e-mailed Anderson Industries and again acknowledged that there was not yet any modification to the original agreement by stating, "Just looking to close the loop on this agreement." CR 141, Ex. 9 (Thermal 000136).

On October 1, 2019, Kory Anderson e-mailed Brian Tiedemann to reiterate the terms of the original agreement by stating: "We have an agreement to fulfill the 30 units at $69,500." CR 144, Ex. 12 (PL 00032). Thermal Intelligence failed to submit any evidence into the record that Thermal Intelligence challenged this e-mail from Kory Anderson. To the contrary, Thermal Intelligence wired an additional $750,000 to Anderson Industries after Kory Anderson reiterated the terms of the original agreement. CR 149-50, Ex. 13 & 14.

On October 3, 2019, Brian Tiedemann responded to Kory Anderson and reaffirmed that Thermal Intelligence had "already paid $417,000 in deposits," which is equal to 20% of the total purchase price of 30 V1.5 heaters at a per unit cost of $69,500. CR 149, Ex. 13 (Thermal 000057). In that same e-mail, Brian Tiedemann proposed a payment plan for completing payment of the 30 V1.5 heaters and then some, but not all, of the payments proposed under that plan. *Id.* Kory Anderson e-mailed his agreement to those payments on October 3, 2019. *Id.*

Consequently, Thermal Intelligence has not presented any question of fact regarding the (already waived) issue of novation. The record confirms that the parties

continued with performance and payment under the original agreement for purchase of the 30 V1.5 heaters at a purchase price of $69,500 per unit.

III. THE CIRCUIT COURT PROPERLY FOUND THAT THERMAL INTELLIGENCE BREACHED THE AGREEMENT WITH ANDERSON INDUSTRIES.

Thermal Intelligence argues that there is a genuine issue of material fact relating to the payment schedule. This argument lacks merit.

The payment plan was specifically proposed by Thermal Intelligence to Anderson Industries (Ex. 13), and Anderson Industries accepted the payment plan in writing. Originally, the agreement to sell heaters was an open term credit agreement. SDCL § 57A-2-310 ("Unless otherwise agreed: (a) Payment is due at the time and place at which the buyer is to receive the goods even though the place of shipment is the place of delivery[.]"). Specifically, in an e-mail dated October 3, 2019, Brian Tiedemann wrote:

> As we collect receivables from equipment sales we will in turn transfer funds to Anderson.
>
> In addition to that we will commit to:
>
> 2 - $100,000 payments per week on each Monday, & Thursday. So we will leverage our credit facilities to ensure Anderson is receiving a minimum of $200,000 per week.
>
> The first $200,000 wire transfer has been sent and is in addition to the $417,000 already received by Anderson.
>
> As mentioned previously this schedule can be accelerated based on our receivables.

CR 149, Ex. 13 (Thermal 000057). Brian Tiedemann, on behalf of Thermal Intelligence, wrote: "Please confirm that this is an acceptable plan and that equipment deliveries will not be delayed." *Id.* Kory Anderson wrote back, "We agree to these terms and will move forward with shipment releases based on accountability to your proposed payment schedule." *Id.*

It is undisputed Thermal Intelligence made several timely payments under that same payment schedule before falling behind multiple weeks in making payments. Thermal Intelligence made a total of seven payments following the payment plan in the total amount of $750,000. CR 150, Ex 14 (Thermal 000049). In total, Thermal Intelligence paid Anderson Industries $1,167,000. However, Thermal Intelligence stopped making payments thereafter.

When Thermal Intelligence stopped making payments, Anderson Industries had the statutory right to demand adequate assurance of due performance and until it received such assurance, it could suspend performance on its end. SDCL § 57A-2-609 ("A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return."). The purpose of SDCL § 57A-2-609 is to allow the seller to seek adequate assurance of performance "to obviate the necessity of one party guessing whether or not the other intends to perform when he begins to receive signals that cause him concern." *Atwood-Kellogg, Inc. v. Nickeson Farms*, 1999 S.D. 148, ¶ 11, 602 N.W.2d 749, 752 (acknowledging that "a demand for adequate assurances may be ither written or oral, as long as the demand provides a 'clear understanding' of the insecure party's intent to suspend performance until receipt of adequate assurances from the other party."). Anderson Industries did exactly as the law allows it to.

To that end, the e-mail from Zoe Benson, on behalf of Anderson Industries, on Friday, November 15, 2019, to Brian Tiedemann was a request for adequate assurances

that payment would be given by Thermal Intelligence so that the heaters could be released to Thermal Intelligence. CR 157, Ex. 17 (PL 00030). Nevertheless, Thermal Intelligence demanded that the heater be released without any payment to resolve the outstanding credit or any payment for the heater it was picking up. Thermal Intelligence's attempted termination of the agreement violated: (1) SDCL § 57A-2-310's provision that payment is due at the time Thermal Intelligence was to receive the heaters, (2) Thermal Intelligence's own proposed payment plan accepted by both parties, and (3) Anderson Industries' request for adequate assurances under SDCL § 57A-2-609. "Unless otherwise agreed tender of payment is a condition to the seller's duty to tender and complete any delivery." SDCL § 57A-2-511. Apparently, Thermal Intelligence believed it was entitled to receive the heaters for free without making any payment. That was not grounds for Thermal Intelligence to attempt to unilaterally terminate the agreement.[7] There is no genuine dispute that Anderson Industries was well within its statutory right to suspend release of the heaters until it received adequate assurances from Thermal Intelligence. *See supra* SDCL § 57A-2-609. Thermal Intelligence not only failed to provide any reasonable assurance, it expressly did the opposite.

When Thermal Intelligence stopped making payment in accordance with their payment plan and Thermal Intelligence's credit limit on payments had also reached too much and Anderson Industries became insecure about Thermal Intelligence's ability to perform by making payment, Anderson Industries was entitled to withhold delivery of such goods until payment was made. *See* SDCL § 57A-2-703; *Celtic, LLC v. Patey*, 489

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[7] Thermal Intelligence makes numerous factual arguments in this section with no citation to the record of any evidence to support those allegations. Those arguments should be rejected as improper arguments by counsel.

F.Supp.3d 1275, 1285 (D. Utah 2020) ("The UCC further provides that when a 'buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole . . . the aggrieved seller' is entitled to 'withhold delivery of such goods,' 'recover damages for nonacceptance',' or 'cancel' the agreement.").

In *Cherwell-Ralli, Inc. v. Rytman Grain Company, Inc.*, the Supreme Court of Connecticut considered a situation almost identical to this case. Therein, the seller brought a collection action against the buyer for nonpayment owing under an installment contract. 433 A.2d 984 (Conn. 1980). The buyer argued that the seller may not terminate the contract without first invoking the insecurity methodology under UCC Rule 2-609. *Id.* While Anderson Industries did in fact invoke the insecurity methodology and while it was Thermal Intelligence who attempted to terminate the agreement, Anderson Industries was not even required to go to such lengths to suspend delivery. As the *Cherwell-Ralli* court acknowledged, "[i]f there is a reasonable doubt about whether the buyer's default is substantial, the seller may be well advised to temporize by suspending further performance until it can ascertain whether the buyer is able to offer adequate assurance of future payments." *Id.* Further, the court remarked that the *buyer* "could not rely on its own nonpayments as a basis for its own insecurity" when "the buyer had received all of the goods which it had ordered." *Id.* In the present case, Thermal Intelligence received 17 heaters, which Thermal Intelligence has not even fully paid for, and there is no dispute that Thermal Intelligence resold those heaters to its end customers. Thermal Intelligence was not entitled to cancel the agreement due to Anderson Industries' suspension of delivery pending payment.

Thermal Intelligence also breached the agreement with Anderson Industries when Thermal Intelligence terminated the entire agreement with Anderson Industries on November 18, 2019, due to the alleged reason of failing to release the V1.5 Heater. CR 156, Ex. 17 (PL 00029).[8] It is undisputed that Thermal Intelligence never attempted to return any V1.5 Heaters to Anderson Industries or notify it that the heaters would be rejected and, therefore, cannot claim rightful rejection of any of the heaters. CR 60, Ex. A (Tiedemann Dep. at 118:24-119:2; 127:6-11); *see also* SDCL § 57A-2-602;("Rejection of goods must be within a reasonable time after their delivery or tender.");SDCL § 57A-2-605 ("The buyer's failure to state in connection with rejection a particular defect which is ascertainable by reasonable inspection precludes him from relying on the unstated defect to justify rejection or to establish breach[.]"). To the contrary, Thermal Intelligence was still in the process of attempting to pick up more V1.5 Heaters from Anderson Industries when it stated it was terminating the agreement. Had Anderson Industries released the heater, Thermal Intelligence would have accepted it based on its own statements and conduct.

Thermal Intelligence retroactively attempts to argue (at pp. 30-31) that there were supposed "other" reasons for terminating the agreement. However, that argument lacks merit. Brian Tiedemann stated in clear and uncertain terms the reason for prematurely terminating the agreement on November 18, 2019, at 10:12AM. The complete e-mail reads as follows:

> I notified Kory on Friday that if the heater wasn't released we would be terminating our relationship with Anderson effective immediately. The heater was not released so we have notified our customers that all remaining orders have been canceled.

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[8] Thermal Intelligence testified that no other reason for termination was given to Anderson Industries in writing. CR 60, Ex. B (Thermal Dep. at 51:25-52:20).

Brian

CR 156, Ex. 17 (PL 00029). Brian Tiedemann testified and admitted that Thermal Intelligence did not communicate in writing any other basis for termination to Anderson Industries. CR 60, Ex. B (Thermal Intelligence Dep. at 52:14-20). Consequently, any argument attempting to recharacterize the basis for termination lacks merit. Indeed, the undisputed record reflects that Thermal Intelligence breached its agreement with Anderson Industries.

IV. THE CIRCUIT COURT PROPERLY DETERMINED DAMAGES.

The circuit court properly determined the amount of damages for the breach of contract. Anderson Industries' damages are measured by SDCL §§ 57A-2-709 and -710. Anderson Industries requested the outstanding principal amount of $918,000 and statutory interest at 10%.

First, Thermal Intelligence makes a new argument on appeal (at p. 31) that "any claim for damages that considers the full cost of materials for the V1.5 heaters is not supported by the record." However, Thermal Intelligence never raised this argument to the circuit court nor presented any evidence to support its position. Therefore, Thermal Intelligence waives the argument. *Liebig*, 2014 S.D. 53, ¶ 35, 851 N.W.2d 743, 752 (quoting *Alvine Family Ltd. P'ship*, 2010 S.D. 28, ¶ 21, 780 N.W.2d at 514). Regardless, the proper calculation of damages is, at minimum, the principal amount owed for the 30 V1.5 heaters.[9]

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[9] Thermal Intelligence did not argue on appeal, and thus waives the issue, regarding reasonable efforts to resell the heaters. Thus, the proper damages is the full price of all thirty heaters under subsection (1)(b) of SDCL 57A-2-709, plus incidental damages which Anderson Industries did not request as part of summary judgment.

Second, Thermal Intelligence objects, for the first time on appeal, to the award of prejudgment interest. Much like the rest of its brief, Thermal Intelligence never objected to the circuit court's award of prejudgment interest or otherwise requested the legally unfounded equitable reduction it does now. Consequently, the issue is not preserved for appeal and it cannot be raised now. *See, e.g., Alvine v. Mercedes–Benz of N. Am.*, 2001 S.D. 3, ¶ 29, 620 N.W.2d 608, 614 (declining to remand for an improper jury instruction on prejudgment interest because the plaintiff failed to object to it). Even if it was preserved, Thermal Intelligence still waived the issue by failing to cite to *any* supporting legal authority for its position that a court has the discretion to reduce an award of prejudgment interest for any reason. *See* SDCL § 15-26A-60(6); *Hart v. Miller*, 2000 S.D. 53, ¶¶ 40, 42, 45, 609 N.W.2d 138, 148-49 (acknowledging that "failure to cite authority for an argument on appeal constitutes waiver of that issue"). As such, Thermal Intelligence is twice precluded from contesting the award of prejudgment interest.

Moreover, Thermal Intelligence's request for an equitable reduction directly contradicts South Dakota law. Indeed, under SDCL § 21-1-13.1, the circuit court was *required* to award Anderson Industries prejudgment interest of 10% on the principal amount of damages:

> Any person who is entitled to recover damages . . . is ***entitled to recover interest*** thereon from the day that the loss or damage occurred, except during such time as the debtor is prevented by law, or by act of the creditor, from paying the debt . . . . Prejudgment interest on damages arising from a contract . . . . shall be at the Category B rate of interest specified in § 54-3-16 . . . . The court ***shall compute and award the interest*** provided in this section and ***shall include such interest in the judgment*** in the same manner as it taxes costs.

(Emphasis added); *Wright v. Temple*, 2023 S.D. 34, ¶ 30, 993 N.W.2d 553, 562 ("this Court has made clear that South Dakota statutes require an award of prejudgment interest

on compensatory damages, calculated 'from the day that the loss or damages occurring."). In fact, this Court has expressly stated in numerous opinions that "[p]rejudgment interest is now ***mandatory, not discretionary***[.]" *See, e.g., Wright*, 2023 S.D. 34, ¶ 30, 993 N.W.2d at 562 (quoting *Alvine*, 2001 S.D. 3, ¶ 29, 620 N.W.2d at 614); *JAS Enters., Inc. v. BBS Enters., Inc.*, 2013 S.D. 54, ¶ 45, 835 N.W.2d 117, 129 (same); *Colburn v. Hartshorn*, 2013 S.D. 92, ¶ 15, 841 N.W.2d 267, 271 (same). South Dakota law does not provide for any reduction of prejudgment interest, let alone for the breaching party's subjective claim that the litigation was "prolonged." *Accord Thomas v. Thomas*, 2003 S.D. 39, ¶ 34, 661 N.W.2d 1, 9 ("While the trial court's belief that the mass of litigation left no one entirely certain as to who owed property taxes is true, the statute is clear and the trial court retains no discretion to deny prejudgment interest."); *All Star Const. Co., Inc. v. Koehn*, 2007 S.D. 111, ¶ 24, 741 N.W.2d 736, 742 ("Prejudgment interest is allowed from the date of the loss regardless of whether the damages were known with certainty.").

To that end, Thermal Intelligence's position is a fallacy. The amount of Thermal Intelligence's interest would have been the same regardless of the litigation because prejudgment interest begins accruing on the date of the breach and the rate of pre- and post-judgment interest is the same—10%. *See* SDCL § 21-1-13.1; SDCL § 54-3-5.1 ("Interest is payable on all judgments . . . at the Category B rate of interest"). Furthermore, it was solely Thermal Intelligence's conduct that necessitated the litigation. If Thermal Intelligence simply paid its bills when they were due, there would be no litigation. Or, if Thermal Intelligence paid Anderson Industries what was due *at any time* since its breach, it would have the reduced interest it seeks now. Yet, despite multiple demands for payment, Thermal Intelligence has and continues to choose not to fulfill the

contract. Thermal Intelligence's control over the amount of interest it accrues only exemplifies the underlying purpose of pre-judgment interest. *See Reuben C. Setliff, III, M.D., P.C. v. Stewart*, 2005 S.D. 40, ¶ 47, 694 N.W.2d 859, 871 ("Prejudgment interest seeks to 'compensate an injured party for [the] wrongful detention of money owed.'").

The circuit court followed the provisions of SDCL § 21-1-13.1 to the letter. After determining that Anderson Industries was entitled to recover damages, it computed the pre-judgment interest owed thereon at the statutory rate of 10% from the date of the breach, November 18, 2019, through the date of its Judgment, February 23, 2024. CR 286. It then issued a Judgment that specifically delineated the amount of principal and prejudgment interest that Thermal Intelligence was liable to pay. *Id.* Thermal Intelligence never objected to the circuit court's computation of interest and it cannot do so now either. This Court should affirm.

CONCLUSION

For the foregoing reasons, Anderson Industries respectfully requests that this Court affirm the circuit court's order and judgment granting summary judgment.

Dated this 1st day of July, 2024.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellee Brief does not exceed the word limit set forth in SDCL § 15-26A-66, said Brief containing 9,503 words and 49,874 characters, exclusive of the table of contents, table of cases, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel.

/s/ Jonathan A. Heber
Jonathan A. Heber

CERTIFICATE OF SERVICE

I, Jonathan A. Heber, do hereby certify that on this 1st day of July, 2024, I have electronically filed the foregoing with the Supreme Court using the Odyssey File & Serve system which will send notification of such filing to the following:

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 30664

Anderson Industries, LLC,

Plaintiff and Appellee,

v.

Thermal Intelligence, LLC, a Canadian corporation,

Defendant and Appellant.

Appeal from the Circuit Court, Fifth Judicial Circuit, Day County, South Dakota
The Honorable Circuit Court Judge Lovrien

APPELLANT'S REPLY BRIEF

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Notice of Appeal filed on March 21, 2024.

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II. Whether Thermal Intelligence previously and sufficiently raised the theory of Novation.

Yes. The issue was adequately raised in Thermal Intelligence's summary

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Yes.

LEGAL ARGUMENT

I. Thermal Intelligence properly resisted the summary judgment motion filed by Anderson Industries, and sufficiently cited to evidence and the record.

In its appellee brief, Anderson Industries alleges that this Court need not even review the lower court's incorrect finding of a lack of genuine issues of fact, asserting that Thermal Intelligence's SDCL 15-6-56(c) response to statement of material facts was deficient and therefore admitted to Anderson Industries' version of facts. This argument fails.

In the present matter, Thermal Intelligence filed a combined Response to Plaintiff's Statement of Undisputed Material Facts and Defendant's Statement of Undisputed Material Facts. CR 230-235. In its argument on this matter, Anderson Industries focuses solely on the first half of the combined documents – Defendant's Response to Plaintiff's Statement of Undisputed Material Facts – and seeks to have this Court decide purely on technicality that Thermal Intelligence did not adequately cite to the record in this section, and therefore admitted to Anderson Industries' version of undisputed material facts.

However, within that same document and immediately following the Defendant's Response to Plaintiff's Statement of Undisputed Material Facts, Thermal Intelligence presented its Defendant's Statement of Undisputed Material Facts. CR233-235. Additionally, Thermal Intelligence further addressed and discussed the factual issues of this case in its Memorandum in Support of Cross-Motion for Summary Judgment and Response to Plaintiff's Motion for Summary Judgement (CR162-182) and in its Reply Brief (CR 262-266).

The Supreme Court of South Dakota has previously expressed its preference that matters be resolved on their merits and not on technical violations. Velocity Invs., LLC v. Dybvig Installations, Inc., 2013 S.D. 41, ¶ 12, 833 N.W.2d 41, 44 (citations omitted). The Velocity court reversed a decision to grant summary judgment when it was clear that the trial court granted summary judgment solely based upon the defendant's failure to respond to the request for admissions supporting a statement of undisputed facts, and recognized that genuine issues of material fact existed. Id. at ¶ 16. See also Domson, Inc. v. Kadrmas Lee & Jackson, Inc., 2018 S.D. 67, 918 N.W.2d 396 (party who failed to file any separate response to a statement of material facts and only filed a responsive brief lacking citations to the record was given "the benefit of the doubt" on its submission and a review of the case based on the merits of both parties' arguments was conducted).

In resisting the motion for summary judgment filed by Anderson Industries, Thermal Intelligence was required to "be diligent in resisting the motion" and not rely on "mere general allegations and denials which do not set forth specific facts." State Farm Fire & Cas. Co. v. Harbert, 2007 S.D. 107, ¶ 11, 741 N.W.2d 228, 233. Thermal Intelligence has done just that. Specific to SDCL 15-6-56(c), Thermal Intelligence's Response to Plaintiff's Statement of Undisputed Material Facts and Defendant's Statement of Undisputed Material Facts (CR 230-235) substantially complied and sets forth specific facts upon which Thermal Intelligence relies. Furthermore, as Anderson Industries notes in its appellee brief, the trial court judge already rejected the notion of a de-facto admission of material facts based solely on the format of Thermal Intelligence's motion documents.

To the extent that this Court gives any consideration to the argument that Thermal Intelligence was deemed to have admitted to Anderson Industries' version of undisputed material facts, this Court should decline to adopt a de-facto admission of facts and should evaluate this case based on the merits and the entirety of the record.

II. Thermal Intelligence previously and sufficiently raised the theory of Novation

Anderson Industries falsely claims that Thermal Intelligence raised the theory of Novation for the first time on appeal. This allegation is incorrect. While not titling it novation, Thermal Intelligence has raised the *theory* of novation since the outset of the summary judgment proceedings.

"Novation is the substitution by contract of a new obligation for an existing one and is subject to the rules concerning contracts in general." Jermar Properties, LLC v. Lamar Advert. Co., 2015 S.D. 26, ¶ 6, 864 N.W.2d 1, 2–3 (citing SDCL § 20–7–5). "Essential elements of novation are: (1) a previous valid obligation, (2) agreement of all parties to the substitution under a new contract based on sufficient consideration, (3) extinguishment of the old contract, and (4) the validity of the new contract." Jermar Properties, LLC at ¶ 6 (citations omitted).

Regarding novation, "[t]he point in every case ... is[ ] did the parties intend by their arrangement to extinguish the old debt or obligation and rely entirely on the new, or did they intend to keep the old alive and merely accept the new as further security, and this question of intention must be decided from all the circumstances." Jermar Properties, LLC at ¶ 6 (citations omitted). "Intent may be found even if the new agreement is silent on intent." Id. "[T]he intent to effect a novation may be inferred from

the circumstances surrounding the creation of a new obligation." Id. "[N]ovation presents questions of fact if there is any supporting evidence and the terms of the agreement are equivocal or uncertain." Id. at ¶ 7.

Thermal Intelligence has, from the beginning of the summary judgment proceedings, argued that the parties' August 1, 2019 agreement with a price of $64,500 per heater was either the only formal agreement between the parties, or was a subsequent/new agreement if it could be found that the parties' July 2019 informal agreement was considered a valid previous contract.

In the Defendant's Statement of Undisputed Material Facts, Thermal Intelligence argued that "On August 1, 2019, a *subsequent* agreement was formalized between Thermal Intelligence and Anderson Industries. This agreement represents the only document signifying a formal contract and includes the purchase of 30 V1.5 heaters at a price of $64,500 each, plus an additional $10,000 per unit for the ownership of the product line. (Plaintiff's Exhibit 7).) Emphasis added. (CR 233).

Thermal Intelligence further clarified its argument in its Memorandum in Support of Defendant's Cross Motion for Summary Judgment:

> However, Anderson Industries now isolates the July 2019 conversations, discarding the wider context and *subsequent* agreements and negotiations, painting the informal July 2019 agreement as the sole binding contract between the parties. (Plaintiff's Brief at 2-3). In the process, Anderson Industries conveniently overlooks its obligation to deliver working equipment, provide full warranty support, and maintain a long-term relationship with Thermal Intelligence—commitments that were understood and expected from previous successful transactions. (Defendant's Exhibit E). Anderson Industries conveniently neglects this context in their lawsuit, cherry-picking conversations to suit their claim. Their failure to consider the terms of the August 1, 2019 agreement and continued negotiations in their entirety constitutes a significant misrepresentation of the parties' understanding. (Plaintiff's Exhibit 7).

CR 167. Emphasis in original.

Additionally, Thermal Intelligence further discussed the theory at the summary judgment motion hearing.

> I think if the Court looks through all the documents provided by the plaintiffs and by the defendants you will see that there's Exhibit 4 for the plaintiffs which talks about a unit price of 69,500. A 30-unit. And then there's an agreement at Exhibit 7 for the plaintiffs from August that talks about here's a proposal, 64,500 plus 10,000 per unit to acquire -- if they acquired the IP. There's several other correspondence from September wherein Tiedemann indicates to Kory Anderson, okay, basically, if the IP stuff is falling apart we're paying 64,500 for each unit that we purchase.

See CR 298, 300-301.

It has been the position of Thermal Intelligence that the parties did not have a formal, enforceable agreement with mutual consent as to all terms. However, Thermal Intelligence has argued alternatively that, if it could be found that the parties' July 2019 informal agreement was an enforceable contract, then said contract was replaced by the parties August 1, 2019 agreement stipulating to a price of $64,500 per heater. Anderson Industries' confusion over the theories of Thermal Intelligence's position only sheds further light on the pervasive issue of this case – that the parties' multiple communications regarding terms, conditions, and purchase price(s) is clear evidence of lack of mutual assent on all essential terms of a contract. As to any complaint that Thermal Intelligence failed to plead an affirmative defense, Thermal Intelligence addressed this issue in its Reply Brief (CR 262-266).

Not only is this Court justified in considering the theory of novation, but this Court should also conclude that the Circuit Court was incorrect in rejecting the theory

and finding that the parties had an agreement to purchase heaters for a price of $69,500. As SDCL § 15-26A-62 requires that Thermal Intelligence only address new matters in its Reply Brief, Thermal Intelligence has only addressed this Court's ability to consider the theory of novation and not the merits of the argument itself. Thermal Intelligence would direct this Court to its Appellate Brief for its detailed argument regarding the existing factual issues and errors in the circuit court's consideration of available evidence on the record.

III. Thermal Intelligence Properly Addressed the issue of Damages.

In its initial Memorandum in Support of Defendants Cross Motion for Summary Judgment, Thermal Intelligence argued that Anderson Industries failed to mitigate its damages (CR 181).

Thermal Intelligence argued at the motion hearing: "Plaintiff's Exhibit 17 talks about, you know, all of the problems with the heaters, the-- he even said-- Brian Tiedemann says, you know, we're done, essentially, and you're free to sell whatever remaining heaters you have." CR 299; See also CR 154 (PL 00027, Plaintiff's Exhibit 17) ("We are well aware of our obligations and re-stocking fees are not part of them. You are free to sell whatever remaining stock you have to whomever you choose. Our account is officially and permanently closed.). This was communicated to Anderson Industries on November 18, 2019.

Anderson Industries commenced its action in June 2020 (CR 001-008). Following written discovery and communications regarding a protective order, depositions of Thermal Intelligence took place on February 8, 2022. (CR 063-112). Anderson Industries took little to no substantive action to further its pursuit of the case

for a significant period of time, inexplicably filing its Motion for Summary Judgment in March 2023 (CR 039) and its supportive Brief months later in June (CR 041-52). Anderson Industries cannot be surprised that Thermal Intelligence would take issue with awarding prejudgment interest for the alleged full cost of materials and damages, when Anderson Industries was notified in 2019 that it should take steps to mitigate these alleged damages but chose to take no steps to do so. Furthermore, Anderson Industries cannot be surprised that Thermal Intelligence would take issue with prejudgment interest being applied to a nearly four-year period, when it was Anderson Industries' own failure to actively prosecute its own case. Anderson Industries' claim that there was absolutely no other market for these products, without presenting any evidence of attempts to locate other buyers, is insufficient.

IV. Anderson Industries continues to mischaracterize and incorrectly summarize the evidentiary support in the record regarding genuine issues of material fact.

As has been an issue from the outset of summary judgment motion practice in this case, Anderson Industries, in its appellee brief, makes numerous incorrect statements and/or summarizations of the evidentiary record in this case, that must be addressed.

A. There are genuine issues of material fact regarding the parties' intent.

Anderson Industries continues to rely solely on the statements made by its principal representative, Kory Anderson, and ignore any evidence regarding the intent of Thermal Intelligence's principal representative, Brian Tiedemann, to argue that there are no disputes regarding the parties' intent.

Contrary to the position taken by Anderson Industries, the purchase of 30 V1.5 heaters cannot be picked out and separated from the overall communications between the

parties regarding purchase of heaters, development of future models, and IP acquisition. Once the future developments of the V1.7 and V2.0 heaters became impossible due to the implosion at Anderson Industries, and IP acquisition was no longer possible, Thermal Intelligence was not obligated to continue purchasing the faulty V1.5 heaters.

The parties' July 19, 2019 communication, particularly that of Brian Tiedemann on behalf of Thermal Intelligence, makes it clear that Thermal Intelligence's intent regarding heater purchase is intrinsically tied to IP acquisition, ensuring a successful design of products, and ultimately finding a business model that is successful for both parties. See CR 131-136 (Anderson Industries' original Exhibit 4). Subsequent communication between the parties make it clear that purchase of heaters is contingent upon a number of other aspects falling into place. See CR 138-147 (Anderson Industries' original Exhibits 6-12).

Anderson Industries cannot continue to only point to Kory Anderson's one-sided statements that there was an agreement for Thermal Intelligence to purchase 30 heaters for $69,500 while ignoring other evidence on the record in order to come to its incorrect conclusion that there was no genuine issue of material fact regarding the parties' intent.

B. There is sufficient evidence in the record regarding Anderson Industries' ability to satisfy the terms of the contract.

Contrary to Anderson Industries' assertion, there is sufficient evidence in the record that Anderson Industries closure – or alternatively, furloughing of essential team members from its "operational" facility – prevented Anderson Industries from being able to satisfy its responsibilities to Thermal Intelligence.

When Thermal Intelligence raised its concerns regarding Anderson Industries'

lack of support for the products, Anderson Industries agreed that "critical resources from our development team [are] required to support this product" and that it had a support strategy with these critical team members in place. CR 191.

However, when issues arose it was clear that Anderson Industries did not in fact have sufficient support resources available. Thermal Intelligence customers raised numerous questions and concerns, but did not receive timely support. CR 216 (Thermal's original Exhibit I).

Specifically, Anderson Industries' "main purchasing guy" Jason Chodur only worked for Anderson Industries on a limited basis, because he lived out of state, had a separate full-time job, and also farmed so he was "very busy" with those outside responsibilities, especially in fall and spring. CR 213-215 (Thermal's original Exhibit H). As is clear from the record, Jason was not able to timely secure parts for one of Thermal Intelligence's customers. CR 211 (Thermal's original Exhibit H).

Additionally, Dan Ewert was no longer working at Anderson Industries, and he was the only person with knowledge concerning the Proemion data regarding the units (CR 217 (Thermal's original Exhibit J). Anderson Industries' employee assigned to address these concerns, Dan Geiger, admittedly had "minimal" knowledge of the situation. Id. The issues continued up and until November 18, 2019 when Brian Tiedemann cancelled any remaining heater orders and communicated his numerous reasons – including but not limited to, Anderson Industries' inability to support the product – for doing so to Kory Anderson. CR 155 (Anderson Industries' original exhibit 17).

Contrary to Anderson Industries' assertion, Thermal Intelligence *has* argued that

Anderson Industries anticipatorily repudiated any contract between the parties for failing to fulfill its obligations. CR 175-177 (asserted in the cross-motion for summary judgment). The record in this case contains significant evidentiary support of the same.

C. There is sufficient evidence in the record regarding the defectiveness of the heaters and Anderson Industries' failure to provide repairs and warranty work.

Anderson Industries continues to mistakenly allege that there was no evidence in the record that the heaters it sold to Thermal Intelligence were inoperable or defective. Interestingly, Anderson Industries did not deny its failure to provide heater repairs or product support as discussed above. Anderson simply focuses on the mistaken claim that because Thermal and its customers had not yet rejected the defective heaters, then they had accepted the heaters as-is and without recourse. This argument fails.

What Anderson Industries ignores in its mistaken claim that Thermal Intelligence failed to seasonably reject the heaters is that "[w]hat is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action." Schumaker v. Ivers, 90 S.D. 75, 83, 238 N.W.2d 284, 288 (1976) (citations omitted). Included in the analysis of a reasonable length of time to seasonably reject faulty good is providing the opportunity for the seller to remedy the defect before rejection. Schumaker, 90 S.D. at 83-84 (finding when the buyer allowed the seller an opportunity to repair the machine and withheld revocation of acceptance until it was clear that the seller could not or would not perform the contract, the delay in notice did not prejudice the seller and was deemed not unreasonable).

As discussed above, there is significant evidence in the record that the products delivered by Anderson Industries were defective, and that Thermal Intelligence was

seeking support from Anderson Industries to repair the same. See also CR 207-208 (Thermal Intelligence's original Exhibit F; additional evidence of faulty product).

Anderson Industries cannot rely on the delays that it itself caused by failing to timely provide the promised repair and support of its products when arguing that Thermal Intelligence did not return or reject the products soon enough.

CONCLUSION

WHEREFORE, Thermal Intelligence respectfully requests that this honorable Court *reverse* the circuit court's judgment and remand with instructions to enter judgment in favor of Thermal Intelligence, or in the alternative, reassign this matter to a new judge to continue proceedings.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Reply Brief does not exceed either the page or the word limit set forth in SDCL § 15-26A-66. The foregoing Reply Brief contains 11 pages or 2,865 words, exclusive of the table of contents, table of cases, statement of legal issues, and any certificates of counsel.

/s/ Tatum O'Brien
Tatum O'Brien

CERTIFICATE OF SERVICE

I, Tatum O'Brien, do hereby certify that on this 15th day of August, 2024, I have electronically filed the foregoing with the Supreme Court using the Odyssey File & Serve system which will send notification of such filing to the following:

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