IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 28825

SDIF LIMITED PARTNERSHIP 2, a South Dakota Limited Partnership,

Plaintiff,

vs.

TENTEXKOTA, L.L.C., a South Dakota Limited Liability Company,
W. KENNETH ALPHIN,
TIMOTHY J. CONRAD,
MICHAEL R. GUSTAFSON,
GEORGE D. MITCHELL,
DALE MORRIS,
MARC W. OSWALD,
RONALD W. WHEELER, and
DWIGHT P. WILES,

Defendants.

Certified Question from the United States
District Court, District of South Dakota, Northern Division
Honorable Charles B. Kornmann, Presiding Judge

BRIEF OF DEFENDANTS TENTEXKOTA, L.L.C., as South Dakota Limited Liability Company, W. KENNETH ALPHIN, TIMOTHY J. CONRAD, MICHAEL R. GUSTAFSON, GEORGE D. MITCHELL, DALE MORRIS, MARC W. OSWALD, RONALD W. WHEELER, AND DWIGHT P. WILES

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Certified Question Accepted January 3, 2019

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JURISDICTIONAL STATEMENT

The United States District Court for the District of South Dakota, Northern Division, pursuant to SDCL 15-24A-1, certified three questions to the South Dakota Supreme Court in its Memorandum Opinion and Order dated December 7, 2018. The South Dakota Supreme Court issued an Order Accepting Certification on January 3, 2019. This Court has authority to answer the certified questions under SDCL Ch. 15-24A, *et seq.*

PRELIMINARY STATEMENT

The Court has received a copy of the record before the United States District Court. Documents from Case 1:17-cv-01002-CBK will be referred to by the document filing number and the referenced page. Documents from Case 15-16-cv-05101-LLP will be included in this brief's Appendix and be referred to by the specific Appendix numbers. Additional deposition excerpts will also be included in the Appendix. This brief is being submitted on behalf of all Defendants. If differences among Defendants arise during subsequent brief, each Defendant's individual counsel will submit their own response.

A STATEMENT OF ISSUES

The certified questions for this Court's consideration are as follows:

I. **Does SDCL 47-34A-303 invalidate personal guarantees signed by members of an LLC in their capacity as members (a) if that LLC has not amended its articles of organization to state that its members are liable for the LLC debts, obligations, and/or liabilities in their capacity as members and (b) members**

have not consented in writing to the adoption of any such provision or to be bound by such a provision?

Relevant Statutes and Cases:

SDCL 47-34A-303(c)

U.L.L.C.A. § 303 (UNIF. LAW COMM'N 1996)

Puelo v. Topel, 856 N.E.2d 1152 (Ill. App. Ct. 2006)

Dass v. Yale, 3 N.E. 3d 858, 866 (Ill. App. Ct. 2013)

II. Does SDCL 53-9-1 apply so as to prohibit plaintiff from recovering under the guarantees if the guarantees violate SDCL 47-34A-303?

Relevant Statutes and Cases:

SDCL 53-9-1

SDCL 47-34A-303(c)

Norbeck & Nicholson Co. v. State, 142 N.W. 847 (S.D. 1913)

Minnesota, D & P. Ry. Co. v. Way, et. al., 148 NW 858 (S.D. 1914)

III. What is the legal effect of the LLC's operating agreement permitting members to personally guarantee corporate debts but only by a "vote" of the majority of members when there is no evidence of any such "vote"?

Relevant Statutes and Cases:

SDCL 47-34A-303(c)

STATEMENT OF THE CASE

On November 7, 2016, SDIF Limited Partnership 2 ("SDIF LP2") commenced an action in South Dakota State Court, Fourth Judicial Circuit, seeking repayment of an EB-5 loan made to Tentexkota, LLC, for construction and operation of the Deadwood Mountain Grand. (Doc. 1-1). Plaintiff's complaint sought repayment against the

individual members of Tentexkota through guaranty and pledge agreements and not through foreclosure of the mortgages. *Id.*

On November 8, 2016, prior to service of SDIF LP2's lawsuit, Tentexkota and its members filed a Federal Court Action in the Western Division against SDIF LP 2, Joop Bollen, SDRC, Inc., and John Does 1-65 seeking declaratory judgment that the Guaranty and Pledge Agreements violated 8 C.F.R. § 204.6 and were void pursuant to SDCL 53-9-3. (App. 001).

On November 15, 2016, SDIF LP2's state court action was removed to federal court. (Doc. 1) The lawsuits were then consolidated with SDIF LP2's collection action proceeding as the main case and Tentexkota Defendants' ("Tentexkota") declaratory judgment action proceeding as a third-party claim. Following consolidation, venue was changed to the Northern Division, with the Honorable Charles B. Kornmann presiding. (Doc.15).

On June 2, 2017, the Court issued a Memorandum inquiring into SDCL 47-34A-303(c)'s impact on the Guaranty and Pledge Agreements. (Doc. 43). Tentexkota moved to amend its claims to include SDCL 47-34A-303 on October 19, 2017. (Doc. 53). The Court granted Tentexkota's motion and its Amended Answer and Third-Party Complaint was filed on December 20, 2017. (Doc. 67).

On June 16, 2018, the Court allowed Tentexkota to amend its claims a second time to include language that there was no vote under Section 7.6 of Tentexkota's Operating Agreement allowing members to personally guarantee the debts of the LLC. (Doc. 137).

On July 9, 2018, the Court permitted SDIF LP2 to amend its Complaint to include allegations that the individuals who owned a membership interest in Tentexkota through another LLC could not be afforded protection under SDCL 47-34A-303(c).

SDIF LP2 moved for summary judgment on September 19, 2018, with cross motions for summary judgment by Tentexkota and the remaining Third-Party Defendants being filed on October 10, 2018. (Docs. 160; 168; 176).

In its December 10, 2018, Opinion and Order, the District Court found that SDCL 47-34A-303(c)'s impact on the Guaranty and Pledge Agreements was a question of law affecting the determination of whether Tentexkota was entitled to dismissal of Plaintiff's claims. (Doc. 205). The Court concluded that given the lack of any authority on this issue, it was appropriate to certify the questions presented in this case to the South Dakota Supreme Court. *Id.* This Court accepted the certification by an Order dated January 3, 2019.

STATEMENT OF FACTS

The EB-5 immigrant investor program, created in 1990, allows foreigners and their immediate relatives to apply for permanent resident status in the United States if they invest $500,000 in rural projects that create at least ten jobs. (Doc. 177.1). Governor Janklow's office saw the program as a tool for attracting foreign investment to South Dakota, and, through a partnership with Northern State University, South Dakota created its EB-5 program in 2004. (Doc. 177.2).

South Dakota's first EB-5 projects were structured as direct investments, under which foreign investors placed money directly into South Dakota businesses. *Id.* By 2007, Northern State University employee, Joop Bollen, began transitioning the program

away from direct investments and into loan model investments. *Id.* Through the loan model, Bollen created limited partnerships in which his own corporation, SDRC, Inc., served as the general partner and the foreign investors as the limited partners. *Id.* The loan model structure gave Bollen the ability to not only manage South Dakota's EB-5 program, but to also personally profit from each project. *Id.*

TENTEXKOTA, LLC

Converting the historic Homestake Mining Co. into a music venue became the dream of Bill McDavid, a Texan enamored with the music industry. (App. 003). McDavid strategized for several years, hiring architects and developing conceptual plans for its development, but in the end, his plans fell apart and the project sat idle. *Id.*

Tentexkota, LLC, was incorporated in 2006 to resume McDavid's project and to finish converting the historic Homestake Mining Co. in Deadwood, into a casino, bar, restaurant, and event center, called the Deadwood Mountain Grand ("DMG"). *Id.* (Wheeler 30(b)(6) depo at 13-17).

During organization, Tentexkota took steps to limit its members' liability. (Doc. 177.7). In its Articles of Organization, filed on November 20, 2006, Tentexkota included the following language in Article Six: "No members of the company are to be liable for its debts and obligations pursuant to SDCL § 47-34A-303(c)." *Id.* In its Operating Agreement, effective March 28, 2007, Tentexkota defined members in section 4.1(C) as follows: "Any person may be a Member unless the person lacks capacity apart from the Act." (Doc. 177.13). Section 4.3 provides that "Except as otherwise expressly agreed in writing, no Member or Officer shall be liable for the debts, obligations or liabilities of the Company, including under a judgment decree or order of a court." *Id.*

To get the project off the ground, the members of Tentexkota funded the project through a $10,150,947 capital investment. (Doc. 47 at 10).

EB-5 FUNDING

Bollen vetted the DMG project for additional EB-5 funding in 2009 and issued a Confidential Offering Memorandum ("COM") to foreign investors not long after. (Doc. 39-8). The COM called for two forms of security for any loan made to Tentexkota. *Id.*at 30. The first was a $32,500,000 first mortgage on the DMG property followed by personal guaranty and pledge agreements from Tentexkota's members. *Id.*

On April 28, 2010, SDIF LP2 loaned Tentexkota $28,000,000 for construction of the DMG. (Docs. 39.10-39.14). The loan documents included a credit agreement, a security and pledge agreement, a collateral assignment and a mortgage on the DMG property. *Id.* Joint and several guaranty and pledge agreements were also signed by Tenexkota members Dale Morris, Marc Oswasld, Michael Gustafson, Tim Conrad, George Mitchell, Ronald Wheeler, W. Kenneth Alphin and Dwight Wiles. (Docs. 117.21-117.28).

In April 2010, Morris, Oswald, Alphin and Conrad owned their membership directly in the LLC. Gustafson, Mitch ell and Wiles indirectly owned their membership interest. (Doc. 163.1). Gustafson through his limited liability company, Double Bar X Ranch, LLC; Mitchell through his limited liability company, Original Deadwood Partners, LLC; and Wiles through his limited liability company Division Street Partners, LLC. *Id.* Although the company executed a Consent to Take Action of Members of Tentexkota for the LLC to enter into the loan, it never amended its articles of

organization, section six, or its operating agreement to allow members to personally assume the debts of the company. (Doc. 163.1).

On April 4, 2011, SDIF LP2 loaned Tentexkota an additional $4,500,000. (Docs. 39.16-39.20; 39.29-36). The second loan included an amended credit agreement, amended security and pledge agreement, amended collateral assignment and a second set of guaranty and pledge agreements signed by the same members. *Id.* The members owned their interests as members in the same manner as 2010, and again the LLC did not amend section six of its articles of organization or its operating agreement to allow members to personally assume the debts of the company. (*See* Doc. 137).

Forbearance Agreement

Despite the best efforts of its members, the DMG was unprofitable and Tentexkota was unable to repay the loan by its 2015 deadline. In June 2015, Tentexkota paid SDIF LP2 $1,500,000 and a 1% interest rate increase in consideration for a one-year forbearance on the loan. (Doc. 39.9). By 2016 the DMG was still struggling financially and, despite having paid $6,700,524.48 in interest over time, Tentexkota could still not repay the $32,500,000 loan. (*See generally* Doc. 47).

Litigation

SDIF LP2 moved to enforce repayment of the loan in the fall of 2016. Rather than foreclose on its mortgage interest, SDIF LP2 sought to enforce the loan repayment against the individual LLC members. (Doc. 1-1). The unique nature of South Dakota's LLC statutes resulted in the questions presented to this Court. (Doc.207)

STANDARD OF REVIEW

Although this Court does not technically sit as an appellate court, as the matter came to the Court as a certified question from the United States District Court for the District of South Dakota, the Court employs the same legal standard that it would use when reviewing an appellate case. *Unruh v. Davison Cnty.,* 2008 S.D. 9, ¶ 5, 744 N.W.2d 839, 841–42. "The construction of a statute is a question of law." *Id*. This Court has also held that when interpreting a statutes, it begins "with the plain language and structure of the statute." *Farm Bureau Life Ins. Co. v. Dolly,* 2018 S.D. 29, ¶ 9, 910 N.W.2d 196, 199-200. "When the language in a statute is clear, certain, and unambiguous there is no reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed." *Id.*

ARGUMENT

I. SDCL 47-34A-303 invalidates personal guarantees signed by members of an LLC in their capacity as members (a) if that LLC has not amended its articles of organization to state that its members are liable for the LLC debts, obligations, and/or liabilities in their capacity as members and (b) members have not consented in writing to the adoption of any such provision or to be bound by such a provision.

The historical advantage of doing business as an LLC is the ability of the members, as the owners of the business, to limit their personal liability for the business's debts and obligations. *See generally* Ann K. Wooster, *Construction and Application of Limited Liability Company Acts—Issues Relating to Personal Liability of Individual Members and Managers of Limited Liability Company as to Third Parties,* 47 A.L.R. 6th

1 (2009). South Dakota was within the first wave of states to adopt LLC legislation, becoming one of only 19 states, as of 1993, to authorize limited liability companies.[1]

The first-generation statutes contained strict mandates that dictated what must be contained in the LLC organizing documents, more so than the unique needs of each business relationship. Patrick G. Goetzinger, Brian K. Kirby, & Terrance A. Nemec, *The South Dakota Limited Liability Company Act: The Next Generation Begins*, 44 S.D. L. Rev. 207, 211 (1999).

South Dakota has always, by statute, defined the parameters through which a creditor may impose personal liability on the members of an LLC. *See generally* 1993 South Dakota Laws Ch. 344 (S.B. 1993); SDCL Ch. 47-34A. Under the first-generation statutes, there was no member liability:

> Section 17. Neither the member of a limited liability company nor the managers of a limited liability managed by a manager or managers are liable under a judgment, decree or order of a court, or in any other manner, for a debt, obligation or liability of the limited liability company.

1993 South Dakota Laws Ch. 344 (S.B, 1993). After amending its LLC statutes in 1998, the legislature provided a strict, two-step requirement to impose liability upon LLC members:

> (c) All or specified members of a limited liability company are liable in their capacity as members for all or specified debts, obligations, or liabilities of the company if:
>
> (1) A provision to that effect is contained in the articles of organization; and

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[1] In 1993, Senate Bill 139, entitled "An Act to Provide for Limited Liability Companies," was unanimously passed by the South Dakota Senate, and was passed by the House on a 62 to 2 vote. Former Governor Mickelson signed the bill, and it became effective as S.D.C.L. section 47-34 on July 1, 1993. The Limited Liability Company Act was initially codified in S.D.C.L. section 47-34.

(2) A member so liable has consented in writing to the adoption of the provision or to be bound by the provision.

If the proper procedures are not met, liability cannot be enforced against the individual members.

A. South Dakota statutes were amended to allow member liability only if the written requirements are met

The Uniform Limited Liability Company Act ("ULLCA") was completed in 1994. By November 1995, commentators noted that ULLCA §303 could invalidate guarantees without the proper filings. *See* 3 Ribstein and Keatinge on Ltd. Liab. Cos. Appendix D-3; 2 Ribstein and Keatinge on Ltd. Liab. Cos. §12:5; Larry E. Ribstein, *The Emergence of the Limited Liability Company*, 51 BUS. LAW 1, 6 (Nov.1995). In 1996, the drafters of the uniform act acknowledged that the written waiver to the articles of organization, albeit unusual, was important. *See* Uniform Limited Liability Act § 303 cmt. (1996). Regardless, South Dakota adopted ULLCA §303 in its entirety in 1998.

In 2006, the uniform law commission proposed a Revised Uniform Limited Liability Company Act ("RULLCA"), which removed the language from §303 and replaced it with new language under §304, which removed the written requirements of §303. South Dakota rejected these changes, and, despite amending its LLC statutes nine times, left SDCL 47-34A-303 unchanged.

By adopting ULLCA in 1998, the legislature provided for flexibility in the liability shield, amending the statute to contain provisions by which to impose liability upon members rather than prohibiting it outright. But by rejecting the changes proposed in RULLCA, the Legislature declined to allow for an automatic waiver of liability through guaranty agreements.

B. The unusual characteristics of SDCL 47-34A-303 are currently only enacted in five states

Other than South Dakota, only four states' LLC statutes contain the language found in ULLCA § 303. Namely, they are: Hawaii[2], Illinois[3], South Carolina[4], and West Virginia[5].

Illinois is the only state to address the written requirements of §303(c)[6]. In *Puelo v. Topel*, the Illinois Appellate Court was presented with a situation where a defendant LLC failed to pay independent contractors for work performed on behalf of the LLC. 856 N.E.2d 1152, 1153-54 (Ill. App. Ct. 2006).[7] After the LLC was dissolved, the independent contractors filed suit against the LLC and its only member. *Id.* The parties disputed liability under the language found in RULLCA § 303. *Id.* at 1154.

Prior to adopting its current statute, which contains the written requirements found in ULLCA § 303(c), Illinois' statute contained the following language similar to RULLCA § 304:

> (a) A member of a limited liability company shall be personally liable for any act, debt, obligation, or liability of the limited liability company or another member or manager to the extent that a shareholder of an Illinois business corporation is liable in analogous circumstances under Illinois law.

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[2] HAW. REV. STAT. ANN. § 428-303 (West 1996); Hawaii has no case law on point.
[3] 805 ILL. COMP. STAT. ANN. 180/10-10 (West 1998)
[4] S.C. CODE ANN. §33-44-303 (West 1996)
[5] W. VA. CODE ANN. §31B-3-303 (West 1999)
[6] Codified at 805 ILL. COMP. STAT. ANN. 180/10-10 (West 1998)
[7] The case itself does not involve the use of guaranty agreements but does provide instructive insight into Illinois treatment of the language found in ULLCA § 303 and RULLCA § 304.

> (b) A manager of a limited liability company shall be personally liable for any act, debt, obligation, or liability of the limited liability company or another manager or member to the extent that a director of an Illinois business corporation is liable in analogous circumstances under Illinois law.

805 ILCS 180/10–10 (West 1996); *see also Dass v. Yale,* 3 N.E. 3d 858, 866 (Ill. App. Ct. 2013) (noting that the amended statute 10-10, codified at 805 ILL. COMP. STAT. ANN. 180/10–10 (1998) contains substantially the same language as § 303 of the Uniform Limited Liability Company Act (1996)).

In 1998, the legislature amended the Illinois statute to remove the language in subsection (a). The *Puelo* court held that in doing so, "the legislature meant to shield a member of an LLC from personal liability." 856 N.E.2d at 1157. As a result, the court declined "plaintiffs' request to ignore the statutory language" and waive the written requirements of the statute, holding that "no rule of construction authorizes this court to declare that the legislature did not mean what the plain language of the statute imports." *Id.* at 1158.

Puelo was upheld in 2013 in *Dass*. The *Dass* court held that language of the LLC Act "clearly indicates that a member or manager of an LLC is not personally liable for debts the company incurs unless" there is both a written provision in the LLC's articles of organization and a written agreement signed by the members consenting to be bound by that provision. 3 N.E.3d at 866 (quoting *Puelo*, 856 N.E.2d at 1156). Because in *Dass* those written provisions did not exist, the court held that the LLC managing member was not personally liable for the debt obligations of the LLC. *Id.*

Although *Puelo* and *Dass* did not involve personal guarantees, the case itself is instructive on the unique importance of the written requirements. Importantly, this Court

follows the same standards of statutory construction as the court in *Puelo*. *See Dale v. Young*, 2015 SD 96, 873 N.W.2d 72. Specifically, "the language expressed in the statute is the paramount consideration" and "if the words and phrases in the statute have plain meaning and effect, we should simply declare their meaning and not resort to statutory construction." *Id.* at ¶ 6 (alteration omitted) (quoting *In re W. River Elec Ass'n, Inc.*, 2004 S.D. 11, ¶ 15, 675 N.W.2d 222, 226).

Under *Puelo,* adherence to the written requirements of §303 is required to hold members of an LLC liable for its debts. That court's reasoning is equally applicable here. By rejecting the automatic waiver found in RULLCA § 304, the South Dakota Legislature consciously chose to shield a member or manager of an LLC from personal liability in the absence of the written provisions of the ULLCA.

The written requirements found in §303(c) balance the rights of the public and of LLC members. All LLCs are required to file their articles of organization with the secretary of state where they are readily available to the public. Under SDCL 47-34A-303, the articles must state whether the members can or cannot incur liability for the debts of the corporation. If, as in this case, the articles do not allow the members to be held liable, any potential creditor is on notice that all debt will be owed directly from the corporation and not the members. This places creditors on notice of the risk they incur by transacting business with each LLC.

If a creditor chooses not to conduct business with an LLC due to the inherent risk posed by the liability shield, the LLC can either amend its articles to allow for personal liability or transact business with a different creditor. Moreover, the requirements of

§ 303(c) clarify whether the members intend to be bound personally or whether they believe they are acting in a member/management capacity on behalf of the LLC.

Therefore, SDCL 47-34A-303(c) does not prevent the use of guarantees in loan transactions. Rather, it mandates the execution of certain written instruments before members of an LLC may be held liable for that LLC's debts.

C. The remaining states either expressly provide for guaranty liability or have adopted RULLCA § 304.

Many state legislatures including California, Connecticut, Delaware, Georgia, Kansas, Louisiana, Minnesota, Mississippi, Montana, New Hampshire, New York, Ohio, Pennsylvania, Tennessee, Washington, Wisconsin and Wyoming adopted statutory language specifically addressing member liability through guarantees.[8] These states specifically provide that members expose themselves to liability if they execute guarantees.[9] In contrast, South Dakota does not provide this automatic waiver but instead requires written provisions, both in the articles of organization and by the members. *See* Doc.82-1. The remaining twenty-eight states have adopted statutes that are identical or

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8 CAL. CA CORP. CODE §17703.04 (West 2014); CONN. GEN. STATE. ANN. § 34-251a (West 2017); DEL. CODE ANN. tit. 6 § 18-303 (West 1994); G.A. CODE ANN. §14-11-303 (West 2009); KAN. STAT. ANN. §17-7688 (West 2014); LA. STAT. ANN. § 12:1320 (West 1993); MINN. STAT. ANN. §322C.0304 (West 2015); MISS. CODE ANN. §79-29-311 (West 2011); MONT. CODE ANN. §35-8-304 (West 2013); N.H. REV. STAT. ANN. §304-C:23 (West 2013); N.Y. LIMITED LIABILITY COMPANY LAW § 609 (McKinney 2015); OHIO REV. CODE ANN. §1705.48 (West 2016); 15 PA. STAT. AND CONS. STAT. ANN. § 8922 (West 2013); TENN. CODE ANN. §48-217-101 (West 2012); WASH. REV. CODE ANN. §25.15.038 (West 2016); WIS. STAT. ANN. §183.0304 (West 2017); WYO. STAT. ANN. §17-29-304 (West 2016)

9 *Id.*

substantially similar to the language in RULLCA § 304 and are not instructive in determining the outcome under South Dakota law. [10]

II. SDCL 53-9-1 prohibits plaintiff from recovering under the guarantees if the guarantees violate SDCL 47-34A-303.

By failing to follow the proper procedures to impose personal liability, the parties entered into contracts that violate the express provisions of SDCL 47-34A-303(c). "A contract provision contrary to an express provision of law or to the policy of express law, though not expressly prohibited or otherwise contrary to good morals, is unlawful." SDCL 53-9-1. SDCL 53-5-3 states that "[w]here a contract has but a single object and such object is unlawful in whole or in part, or wholly impossible of performance, or so vaguely expressed as to be wholly unascertainable, the entire contract is void." SDCL 20-2-2. "It is the general rule that a contract which is contrary to statutory or constitutional law in invalid and unenforceable." *Willers v. Wettstad*, 510 N.W.2d 676, 680 (S.D. 1994).

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[10] ALA. CODE §10A-5A-3.01 (2015); ALASKA STAT. §10.50.265 (West 1997); ARIZ. REV. STAT. ANN. § 29-651 (1992); ARK. CODE ANN. §4-32-302 (West 1993); COLO. REV. STAT. §7-80-705 (West 1990); FLA. STAT. ANN § 605.0304 (West 2014); IDAHO CODE ANN. § 30-25-304 (West 2015); INDIANA CODE ANN. § 23-18-3-3 (West 1993); IOWA CODE ANN. § 489.304 (West 2009); KY. REV. STAT. ANN. § 275.150 (West 1994);; ME. REV. STAT. ANN. tit. 31 § 1544 (West 2011); MD. CODE ANN. corporations and associations, § 47-301 (West 1992); MASS. GEN. LAWS. ANN. ch. 156C, § 22 (West 2003); MICH. COMP. LAWS ANN. § 450.4501 (West 2010); MO. REV. STAT. § 347.057 (West 1993); NEB. REV. STAT. ANN. § 21-129 (West 2011); NEV. REV. STAT. ANN. § 86.371 (West 1995); N.J. REV. STAT. ANN. § 42:2C-30 (West 2013); N.M. STAT. ANN. § 53-19-13 (West 1993); N.C. GEN. ANN. § 57D-3-30 (West 2014); N.D. CENT CODE. ANN. § 10-32.1-26 (West 2015); OKLA. STAT. ANN. tit. 18 § 2022 (West 1992); OR. REV. STAT. ANN. § 63.165 (West 1999);7 R.I. GEN. LAWS § 7-16-23 (West 1992); TEX. BUS. ORG. CODE ANN. § 101.114 (West 2006); UTAH CODE ANN. § 48-3A-303 (West 2014); CT. STAT. ANN. tit. 11 § 4042 (West 2015); VA. CODE ANN. § 13.1-1019 (West 2015).

A. The South Dakota Supreme Court has voided contracts under SDCL § 53-9-1 in numerous situations.

It is immaterial that the guaranty and pledge agreements may have been lawful if they had been signed by parties other than members of the LLC. In *Norbeck & Nicholson Co. v. State,* this Court invalidated a contract that would have been otherwise lawful but for the fact that one of the parties, state senator Peter Norbeck, was a member of the legislature when his company entered into a contract with the state. 142 N.W. 847, 848 (S.D. 1913). The contract was unlawful as it violated a state constitutional provision, even though Norbeck performed his obligation and the state benefitted from the contract. *Id.* The Court denied Norbeck's claim for relief, even though the subject matter of the contract was lawful, because the contract was illegal by virtue of his position. *Id.* at 849. In fact, the Court ruled that Norbeck was prohibited from recovering even under a theory of quantum meruit:

> The general rule is that illegal contracts—illegal by reason of being expressly prohibited by law—are unenforceable, and no one can acquire any legal right under such a contract. If one of the parties has performed in whole or in part he cannot avoid the contract and recover from the adversary party a reasonable compensation for such performance. No right, therefore, arises out of an illegal transaction even on the theory of constructive contracts. The law leaves the parties to illegal contracts where it finds them, and gives them no assistance in extricating themselves from the situation in which they have placed themselves—no recovery can be had for services rendered thereunder, either on the express contract, or on an implied contract, or on quantum meruit.

Id.; s*ee also City of Tyndall v. Schuurmans*, 56 N.W.2d 693, 698 (S.D. 1953) ("The doctrine of estoppel by conduct has no application to an agreement which is illegal because it violates an express mandate of law.").

This Court has invalidated contracts on the grounds that they were void as against public policy or in violation of statutory provisions on several occasions. In *Minnesota, D & P. Ry. Co. v. Way, et. al.,* 148 NW 858 (S.D. 1914), a railroad company entered into an agreement with the defendant, Way, whereby Way would procure and convey title to certain land to the railroad company in exchange for secret advance information from the railroad company's chief engineer regarding the best places for Way to purchase and lay out town sites on the projected railroad line. *Id.* The railroad company fulfilled their part of the agreement, but Way failed to perform, and the railroad company sued for breach of contract. The South Dakota Supreme Court concluded that the contract was void and against public policy, on the grounds that the railroad's conduct in giving secret information to Way violated the railroad's public trust. *Id.* at 859. Therefore, the contract between the parties was "without consideration, ultra vires, and illegal and void." *Id.* The railroad's conduct regarding Way was "illegal consideration, which, in effect, was no consideration." *Id.*

The railroad further argued that even if the contract was void, Way still benefitted from it, and was therefore estopped from asserting the invalidity of the contract. *Id.* at 860. The court rejected this argument on the grounds that "[v]alidity cannot be given to an illegal contract through any principle of estoppel. As between parties in pari delicto, the courts will leave them where it has found them. *Id.* Courts will not adjudicate rights under illegal contracts." *Id.*

Even when a party seeking to enforce a contract is completely innocent of the illegality, South Dakota law prohibits enforcement. In *Beverage Co. v. Villa Marie Co.,* 13 N.W.2d 670 (S.D. 1944), the plaintiff sued to recover on a promissory note and

mortgage from the defendant. *Id.* The defendant had originally purchased beer brewery equipment from a third party in exchange for a promissory note. *Id.* That sale was illegal and violated a misdemeanor criminal statute. *Id.* at 671. The third-party assigned that note to the plaintiff. *Id.* 670. The plaintiff was unaware of the illegality of the consideration for the note that it held. *Id.* The plaintiff accepted partial payment on the note from the defendant, and a new promissory note and mortgage from the defendant. *Id.* When that new note came due, the plaintiff moved to foreclose. *Id.* 671. The defendant resisted on the grounds that the transaction was illegal. *Id.* The plaintiff argued that the note and mortgage were valid and enforceable because they were new contracts, not tainted by the original illegal transaction, and because the plaintiff was innocent of the original illegal contract. *Id.*

This Court sided with the defendant. *Id.* at 632. Since the original contract was illegal, the subsequent agreement was also illegal. *Id.* Furthermore, the fact that the plaintiff was not a party to the original agreement but was just an assignee of the original note, was not enough to justify enforcing the note. *Id.* According to the Court, "[i]t is all too apparent that to so to extend the policy would provide a guilty party to an illegal bargain with a convenient means of defeating public policy." *Id.*

Like the holder of the promissory notes in *Beverage Co*., SDIF LP2 cannot enforce the guaranty and pledge agreements against the individual members of Tentexkota. The guarantees are, by their own language and the language of the Credit Agreement, inextricably part and parcel of the loan. Allowing SDIF LP2 to enforce the guaranty and pledge agreements would evade the requirements of SDCL 47-34A-303(c) and would provide "a convenient means of defeating public policy." *Beverage Co.* at 632.

In *Nature's 10 Jewelers. Gunderson,* 2002 S.D. 80, 648 N.W.2d 804, the South Dakota Supreme Court declared a franchise contract between the parties void because the defendant's franchise registration had expired before the contract, prohibiting the defendant from "engag[ing] in the offer or sale of franchises in South Dakota" under state law. *Id*. at ¶ 4. The plaintiff was unaware that the defendant did not have the right to offer or sell franchises in South Dakota. *Id.* at ¶ 8. The plaintiff signed a franchise agreement with the defendant to operate a jewelry store in Naples, Florida. *Id.* at ¶ 5. The defendant failed to fulfill its obligations under the contract in various ways, and the plaintiff suffered serious financial losses as a result. *Id.* at ¶¶ 7-8. The plaintiff sued the defendant for breach of contract. *Id.* at ¶ 8. The defendant tried to assert a mandatory arbitration clause from the parties' franchise agreement, but the plaintiff resisted. *Id.* The Supreme Court, despite its preference for arbitration, held that the arbitration clause was unenforceable by the defendant:

> A void contract is invalid or unlawful from its inception. It is a "mere nullity, and incapable of confirmation or ratification." Black's Law Dictionary at 1573 (6th ed. 1990) . . . Here the franchise agreement between [the plaintiff] and [the defendant] was signed in violation of SDCL 37A-5A-6. . . . Because there was no effective registration statement on file, the agreement between [the defendant] and [the plaintiff] was unlawful from its inception. SDCL 53-9-1. An unlawful contract is void. SDCL 53-5-3 and 20-2-2; *Green v. Mt. Diablo Hosp. Dist*., 207 Cal.App.3d 63, 254 Cal.Rptr. 689, 697 (1989) (stating "illegality" serves to void the entire contract").

Id. at ¶ 12.

The Nature's 10 Jewelers franchise agreement was void at inception because the defendant in that case was prohibited from entering into franchise agreements by state law: SDCL 37A-5A-6. Likewise, the guaranty and pledge agreements that Plaintiff seeks

to enforce in the present action were void at inception because the guarantors were prohibited from entering into them by state law: SDCL 47-34A-303.

It is not necessary that the guarantors demonstrate an actual injury or harm to the public in order for the illegal guarantees to be declared void. The fact that they defy SDCL 47-34A-303 is enough. According to this Court:

> [A contract's] validity is determined by its general tendency at the time it is made, and if this is opposed to the interests of the public it will be invalid, even if the intent of all the parties was good, and no injury to the public would result in the particular case. The test is the evil tendency of the contract, and not its actual injury to the public in a particular instance.

Minnesota, D & P. Ry. Co., 148 N.W. at 859. Nor does any speculative injury to SDIF LP2 prevent the guarantees from being declared void. Any injury to SDIF LP2 by virtue of the guarantees being void is mitigated by the fact that SDIF LP2 has other remedies. SDIF LP2 is secured by valid mortgages on the property and against the LLC entity under the credit agreement and SDCL 47-34A-302, which provides:

> A limited liability company is liable for loss or injury caused to a person, or for a penalty incurred, as a result of a wrongful act, or omission, or other actionable conduct, of a member or manager acting in the ordinary course of business of the company or with authority of the company.

The guarantees in question here were in violation of SDCL 47-34A-303(c), and thus South Dakota law and the precedent of this Court render them unlawful and unenforceable. *See* SDCL 53-5-3, 53-9-1; *Willers*, 510 N.W.2d at 680.

III. What is the legal effect of the LLC's operating agreement permitting members to personally guarantee corporate debts but only by a "vote" of the majority of members when there is no evidence of any such "vote"?

If, as in this case, the operating agreement specifies that there must be a vote by the member to impose personal liability, and there is no evidence of such vote, then the members have not consented to be bound personally for the debt of the corporation.

The operating agreement regulates "the affairs of the company and the conduct of its business." SDCL 47-34A-103(a). It also governs the "relations among the members, managers, and the company." *Id.* South Dakota has mandatory and default provisions within its LLC act. *See* Laurie A. Ronholdt & Alex Pederson, *Tips For Drafting and Issues Presented By LLC Operating Agreements*, 23 No. 1 Trac. Tax Law. 7-8 (2008). Mandatory provisions cannot be overridden in the operating agreement. *Id.* Default provisions, by contrast, apply only if the operating agreement does not contain a conflicting provision. *Id.*

As discussed above, SDCL 47-34A-303(c) is a mandatory provision. *See* SDCL 47-34A-112 (stating that an LLC may engage in any lawful activity subject to the laws of South Dakota). Even if the operating agreement, as in this case, states that members may incur liability through a majority vote of the membership, it still has no effect if the written requirements of SDCL 47-34A-303(c) are not met. This is because the operating agreement is "an organic document of the LLC, the operating agreement is a charter or constitution or 'super contract.'" Ronholdt et al., *Tips For Drafting and Issues Presented By LLC Operating Agreements*, 23 No. 1 Trac. Tax Law. 7-8 (2008). "It is simply a bilateral or multilateral contract which sets forth in preferably tangible form the voluntary agreement of the parties." *Id.*

In this case, the operating agreement specified that there must be a majority vote by the members for the members to incur personal liability. Tentexkota never voted for its members to incur personal liability, or to amend its articles of incorporation. This demonstrates that the members never intended to waive the LLC's liability shield and believed the debt was that of the LLC.

CONCLUSION

The practical effect of SDCL 47-34A-303(c) on personal guarantees is an issue of first impression due to the diverse nature of LLC statutes across the country and the reformation of the uniform laws.

South Dakota, despite being in the minority of states, has chosen to adopt specific requirements before liability can be imposed on the members of an LLC. Ignoring these requirements guts SDCL 47-34A-303(C) and renders the statute meaningless.

REQUEST FOR ORAL ARGUMENT

Defendants hereby respectfully request the privilege of appearing for an oral argument before this honorable Court.

Dated this 28th day of January, 2019.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Appellants' Brief and all appendices were e-mailed and mailed by first class mail, postage prepaid to:

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This Brief was prepared using Microsoft Word, and contains 5789 words from the Statement of the Case through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

Dated this 28th day of January, 2019.

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APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

TENTEXKOTA, LLC, MARC OSWALD, DALE MORRIS, TIMOTHY CONRAD, MICHAEL GUSTAFSON, GEORGE MITCHELL, RONALD WHEELER, W. KENNETH ALPHIN, DWIGHT WILES, DEADWOOD INVESTMENTS, LLC, ORIGINAL DEADWOOD PARTNERS, LLC, DIVISION STREET PARTNERS, LLC, DOUBLE BAR X RANCH, LLC, DEADWOOD INVESTMENTS, LLC, Plaintiffs, v. JOOP BOLLEN, SDRC, INC., a South Dakota Corporation, SDIF LIMITED PARTNERSHIP 2, a South Dakota Limited Partnership, SD INVESTMENT FUND LLC2, a South Dakota Limited Liability Company, John Doe 1-75. Defendants.	CIV. 16-5101 **COMPLAINT** **-AND-** **DEMAND FOR JURY TRIAL**

The Plaintiffs, Tentexkota, LLC, Marc Oswald, Dale Morris, Timothy Conrad, Michael Gustafson, George Mitchell, Ronald Wheeler, W. Kenneth Alphin, Dwight Wiles, Deadwood Investments, LLC, Original Deadwood Partners, LLC, DJDW, LLC, Double Bar X Ranch, LLC, Deadwood Investments, LLC, by and through their counsel and for their claims against the above-named Defendants, hereby state and allege as follows:

PARTIES

1.

Plaintiff Tentexkota is a South Dakota Corporation with its principle place of business in Deadwood, South Dakota.

2.

Plaintiff Marc Oswald is a resident of Tennessee.

3.

Plaintiff Dale Morris is a resident of Tennessee.

4.

Plaintiff Timothy Conrad is a resident of South Dakota.

5.

Plaintiff Michael Gustafson is a resident of South Dakota.

6.

Plaintiff George Mitchell is a resident of South Dakota.

7.

Plaintiff Ronald Wheeler is a resident of South Dakota

8.

Plaintiff W. Kenneth Alphin is a resident of Tennessee.

9.

Plaintiff Dwight Wiles is a resident of Tennessee.

10.

Plaintiff Deadwood Investments, LLC, is a limited liability company with its principal place of business in Nashville, Tennessee.

11.

Plaintiff Original Deadwood Partners, LLC, is a limited liability company with its principal place of business in Rapid City, South Dakota.

12.

Plaintiff Division Street Partners, LLC, is a limited liability company with its principal place of business in Nashville, Tennessee.

13.

Plaintiff Double Bar X Ranch, LLC, is a limited liability company with its principal place of business in Rapid City, South Dakota.

14.

To the best of Plaintiff's knowledge, Defendant Joop Bollen is, and at all times relevant hereto was, a resident of Aberdeen, South Dakota.

15.

Defendant SDRC, Inc., is a South Dakota corporation with its principal place of business in South Dakota.

16.

Defendant SDIF Limited Partnership 2, is a South Dakota limited partnership with its principal place of business in South Dakota.

17.

Defendant SD Investment Fund LLC2, is a South Dakota limited liability company with its principal place of business in South Dakota.

JURISDICTION AND VENUE

18.

Plaintiffs invoke the jurisdiction of this Court pursuant to 28 U.S.C. 1331 based upon federal question jurisdiction.

19.

Venue exists in this District pursuant to 28 U.S.C. 1391(b)(2) because a substantial part of the events or omissions giving rise to the claims occurred in this District.

FACTS

Relevant requirements of EB-5

20.

The United States Congress established the EB-5 Program in 1990 to bring new investment capital into the country and to create new jobs for U.S. workers. The EB-5 Program is based on our nation's interest in creating and preserving needed jobs for U.S. workers by promoting the immigration of people who invest their capital in new, restructured, or expanded businesses and projects in the United States.

21.

In the EB-5 Program, immigrants who invest their capital in job-creating businesses and projects in the United States receive conditional permanent resident status in the United States for a two-year period. After two years, if the immigrants have satisfied the conditions of the EB-5 Program and other criteria of eligibility, the conditions are removed and the immigrants become unconditional lawful, permanent residents of the United States.

22.

The EB-5 Program is based on four main elements: (1) the immigrant's investment of capital, (2) in a new commercial enterprise, (3) that creates jobs, (4) which must be at risk.

23.

The EB-5 Program is based in part upon the fact that the United States economy will benefit from an immigrant's contribution of capital. It is also based on the view that the benefit to the U.S. economy is greatest when capital is placed at risk and invested into a new commercial enterprise that, as a result of the investment, creates at least ten jobs for U.S. workers.

24.

EB-5 program regulations provide that in order to qualify as a valid investment in the EB-5 Program, the immigrant investor must actually place his or her capital "at risk" for the purpose of generating a return. For the capital to be "at risk" there must be a risk of loss and a chance for gain. *See* 8 C.F.R. 204.6.

25.

If the immigrant investor is guaranteed the return of a portion of his or her investment, or is guaranteed a rate of return on a portion of his or her investment, then that portion of the capital is not at risk. *Matter of Izummi*, 22 I&N Dec. 169, 180-88.

26.

If the agreement between the new commercial enterprise and immigrant investor, such as a limited partnership agreement or operating agreement, provides that the investor may demand return of or redeem some portion of capital after obtaining conditional lawful permanent resident status, that portion of the capital is not at risk.

27.

An investment cannot be considered a qualifying contribution of capital at risk to the extent of a guaranteed return. *Izummi* at 184.

28.

The immigrant investor must invest at least $1,000,000 in capital in a new commercial enterprise that creates not fewer than ten jobs. An exception exists if the immigrant investor invests capital in a new commercial enterprise that is principally doing business in, and creates jobs in, a targeted employment area that is a rural area or an area that has experienced unemployment of at least 150 percent of the national average rate. In such case, the immigrant investor must invest a minimum of $500,000 in capital.

29.

Upon information and belief, South Dakota qualifies as a targeted employment area.

South Dakota Regional Center, also known as SDRC

30.

Defendant SDIBI is a non-profit organization located in Aberdeen, South Dakota. SDIBI offers a variety of programs designed to facilitate and promote international trade by and amongst South Dakota companies. SDIBI is also responsible for attracting and recruiting foreign investment to South Dakota.

31.

In or about January 1994, Northern State University founded SDIBI.

32.

In or about January 1994, Defendant Joop Bollen was hired by Northern State University as the director of SDIBI.

33.

The EB-5 investor visa grants legal permanent residence to foreign nationals who, indirectly or directly, create or save 10 full-time jobs by investing at least $500,000 in a U.S. business in a designated "regional center."

34.

Regional centers, which must be approved by the federal government, are typically located in rural or high unemployment areas. Entities applying for regional center status must demonstrate that investor funds will be used to support a specific area of industry or economic

activity within the designated regional center, and that the investment will create permanent jobs for U.S. citizens.

35.

Upon information and belief, SDIBI became an approved regional center for a contiguous 45-county area in eastern South Dakota in or about June 2004.

36.

The regional center at SDIBI was called South Dakota Regional Center (hereinafter "SDRC").

37.

SDRC is focused on attracting investments that support approved investment opportunities/projects within its regional center.

38.

SDRC utilizes the employment-based EB-5 investor visa to attract foreign investments to South Dakota.

Formation of SDRC, Inc.

39.

Joop Bollen testified on or about April 16, 2014, that SDRC could not enter into agreements with foreign investors.

40.

On or about January 10, 2008, Joop Bollen incorporated SDRC, Inc. for the purpose of entering into agreements with investors and entities.

41.

Joop Bollen testified on or about April 16, 2014, that he was the part-owner and manager of SDRC, Inc. SDRC, Inc.'s Annual Report filed with the South Dakota Secretary of State in 2016, documents Joop Bollen as the registered agent and President of the corporation.

Formation of SDIF Limited Partnership 2

42.

Under his power as owner and manager of SDRC, Inc., Joop Bollen began creating limited partnerships in January 2008.

43.

SDIF Limited Partnership 2 was incorporated January 10, 2008. Joop Bollen has at all times relevant been the registered agent of SDIF Limited Partnership 2. The Domestic Certificate of Limited Partnership for SDIF Limited Partnership 2 lists the sole general partner as SD Investment Fund LLC2.

Formation of SD Investment Fund LLC2

44.

On or about January 10, 2008, SD Investment Fund LLC2 was incorporated. Joop Bollen has at all times relevant been the registered agent and manager of SD Investment Fund LLC2.

45.

SD Investment Fund LLC2 is the general partner of SDIF Limited Partnership 2.

Tentexkota, LLC

46.

Tentexkota, LLC, was incorporated in 2006. Tentexkota was founded to rehabilitate the historic Homestake Mining Co. in Deadwood, South Dakota, into a casino, bar, restaurant and entertainment events center capable of holding conventions and events for up to 2,500 people ("hereinafter "The Project"). The Homestake Mining Co. is also known as the "gold processing plant" or "slime plant". The finished project was to be named the Deadwood Mountain Grand Event Center and Casino.

47.

To begin The Project, $6,000,000.00 was invested by the members of TenTexKota and $1,700,000.00 was received as a Historical Preservation Grant for a total of $7,700,000.00 to start construction.

Actions of Joop Bollen

48.

In 2009, Tentexkota was in contact with Defendant Joop Bollen as director of SDIBI in regards to EB-5. On or about September 1, 2009, Tentexkota confirmed its commitments to working with SDIBI to obtain an EB-5 Program loan for The Project.

49.

Defendant Bollen represented to Tentexkota that personal guarantees were required to receive and secure EB-5 funds.

50.

Upon information and belief, at all times relevant, Defendant Bollen knew that the alien investment funds must be placed "at risk" under 8 C.F.R. 204.6.

Documents signed in reliance upon the actions of Joop Bollen

51.

On or about April 21, 2010, two Tentexkota members signed personal guarantees and pledge agreements.

52.

On or about April 22, 2010, four Tentexkota members signed personal guarantees and pledge agreements.

53.

On or about April 23, 2010, one Tentexkota member signed a personal guarantee and pledge agreement.

54.

On or about April 28, 2010, the managing member of Tentexkota signed a promissory note, credit agreement, security agreement, pledge agreement, collateral assignment and mortgage.

55.

On or about April 29, 2010, Joop Bollen as general partner of SDIF limited partnership 2 signed a credit agreement, security agreement and pledge agreement.

56.

On or about April 1, 2011, two members of Tentexkota signed a second guaranty and pledge agreement.

57.

On or about April 4, 2011, Tentexkota signed a consent to take action authorizing the borrowing of an additional $4,500,000.00 from SDIF LP 2.

58.

On or about April 4, 2011, one member of Tentexkota signed a second guaranty and pledge agreement.

59.

On or about April 5, 2011, one member of Tentexkota signed a second guaranty and pledge agreement.

60.

On or about April 2011, two members of Tentexktoa signed a second guaranty and pledge agreement.

61.

On or about July 6, 2011, two members of Tentexkota signed a second guaranty and pledge agreement.

62.

On or about February 14, 2012, Tentexkota signed a new Mortgage-180 day redemption, security agreement and financing statement.

63.

Defendants sent their notice of default to Plaintiffs in a letter dated May 11, 2016.

Alien Investors

64.

Upon information and belief, sixty-five aliens provided funds to Tentexkota through the EB-5 visa program.

65.

Upon information and belief, all sixty-five aliens have been granted permanent American citizenship, or are in the process of receiving conditional lawful permanent resident status as a result of their participation in the EB-5 program.

COUNT I

Declaratory Judgment Action Under SDCL § 53-9-1

66.

Plaintiffs reallege the preceding paragraphs and incorporate them as if set forth fully herein.

67.

Pursuant to SDCL § 21-24 *et. seq.*, Plaintiffs seek a declaration that the personal guarantees and pledge agreements signed by the Plaintiffs are void.

68.

"A contract provision contrary to an express provision of law or to the policy of express law, though not expressly prohibited or otherwise contrary to good morals, is unlawful." SDCL § 53-9-1.

69.

An unlawful contract is "void, not voidable" and "[a] void contract is invalid or unlawful from its inception. It is a 'mere nullity, and incapable of confirmation or ratification." *Nature's 10 Jewelers v. Gunderson,* 2002 SD 80, ¶12, 648 N.W.2d 804, 807 (*citing* Black's Law Dictionary at 1573 (6th ed. 1990).

70.

Under 8 C.F.R. 204.6, the investment by the immigrant alien must be placed "at risk".

71.

The personal guarantees and pledge agreements signed by members of Tentexkota, provide a secured return on the EB-5 funds, thereby violating the "at risk" requirement of 8 C.F.R. 504.6.

72.

By providing a guaranteed return of funds, the personal guarantees are expressly prohibited by 8 C.F.R. 204.6 and are therefore unlawful under SDCL § 53-9-1.

73.

Accordingly, Plaintiffs seek this Court's declaration that the personal guarantees and pledge agreements are void as they are in violation of 8 C.F.R. 504.6 and are therefore void under SDCL 53-9-3 and as against public policy.

COUNT II

Declaratory Judgment Action Regarding lack of Consideration

74.

Plaintiffs reallege the preceding paragraphs and incorporate them as if set forth fully herein.

75.

Pursuant to SDCL § 21-24 *et. seq.*, Plaintiffs seek a declaration that the personal guarantees and pledge agreements signed by the members of Tentexkota are void due to a lack of consideration.

76.

"If any part of a single consideration for one or more objects or of several considerations for a single object is unlawful, the entire contract is void." SDCL § 53-6-6.

77.

Under 8 C.F.R. 204.6 all funds provided through the EB-5 visa program must be placed "at risk".

78.

As all funds provided to Tentexkota through the EB-5 visa program were secured by personal guarantees and pledge agreements, the funds were not placed at risk and are unlawful under 8 C.F.R. 204.6.

79.

Accordingly, Plaintiffs seek this Court's declaration that the personal guarantees and pledge agreements are void under SDCL § 53-6-6 due to the unlawful nature of the personal guarantees and pledge agreements under 8 C.F.R. 204.6.

COUNT III

Declaratory Judgment Action Regarding Estoppel

80.

Plaintiffs reallege the preceding paragraphs and incorporate them as if set forth fully herein.

81.

Pursuant to SDCL § 21-24 *et. seq.*, Plaintiffs seek a declaration that the Defendants are estopped from enforcing the personal guarantees and pledge agreements signed by the Plaintiffs.

82.

Defendant Bollen, acting in his capacity as director of SDIBI; as director of SDRC, as part-owner, manager, president and registered agent of SDRC, Inc.; as partner and/or registered agent of SDIF Limited Partnership 2, and as manager of SD Investment Fund LLC2, represented to Tentexkota that the personal guarantees were required for the lending of EB-5 funds.

83.

Acting in his capacity as director of SDIBI; as director of SDRC, as part-owner, manager, president and registered agent of SDRC, Inc.; as partner and/or registered agent of SDIF Limited Partnership 2, and as manager of SD Investment Fund LLC2, Defendant Bollen represented to Tentexkota that the EB-5 funds had to be secured by a personal guarantee with the intention that Tentexkota members should sign the personal guarantees.

84.

Plaintiffs relied upon the representations made by Defendant Bollen acting in his capacity acting as director of SDIBI; as director of SDRC, as part-owner, manager, president and registered agent of SDRC, Inc.; as partner and/or registered agent of SDIF Limited Partnership 2, and as manager of SD Investment Fund LLC2 to its prejudice and injury.

85.

Accordingly, Plaintiffs seek this Court's declaration that Defendants are estopped from asserting the validity of the personal guarantees.

COUNT IV

Declaratory Judgment Action Regarding Waiver

86.

Plaintiffs reallege the preceding paragraphs and incorporate them as if set forth fully herein.

87.

Pursuant to SDCL § 21-24 *et. seq.*, Plaintiffs seek a declaration that the Defendants have waived their right to enforce the personal guarantees and pledge agreements signed by the members of Tentexkota.

88.

A waiver of a contractual right occurs "where one in possession of any [contractual] right ... and of full knowledge of the material facts, does or forbears the doing of something inconsistent with the existence of the right or of his intention to rely upon it[.]" A-G-E Corp. v. State, 2006 S.D. 66, ¶ 22, 719 N.W.2d 780, 787.

89.

Upon information and belief the sixty-five alien investors have received or are in the process of receiving conditional lawful permanent resident status as a result of their investments in Tentexkota through the EB-5 program.

90.

As such, the Defendants represented to the United States Government that the money invested by the alien immigrants was legally invested under 8 C.F.R. 204.6.

91.

For the funds to be legally invested under 8 C.F.R. 204.6, the funds must have been placed "at risk".

92.

In order for the funds to be placed at risk, they could not be secured by personal guarantees.

93.

The United States Government issued or is in the process of issuing conditional lawful permanent resident status based upon the Defendants' representations.

94.

Defendants knew the funds were not placed "at risk".

95.

Defendants' representations to the United States government are inconsistent with the right to take and hold Plaintiff's security or collateral to secure Plaintiff's obligation to repay EB-5 funds.

96.

Accordingly, Plaintiffs seek this Court's declaration that Defendants waived their contractual right under the personal guarantees.

WHEREFORE, Plaintiffs respectfully pray for damages against the Defendants as follows:

1. Declaratory relief as specified above;
2. Plaintiff's costs and attorneys' fees incurred in this action pursuant to SDCL §§ 21-24-11 and 58-12-3;
3. Grant such other and further relief to Plaintiff as the Court deems just and equitable.

Dated this 8th day of November, 2016.

HEIDEPRIEM, PURTELL & SIEGEL, L.L.P.

BY _____
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DEMAND FOR JURY TRIAL

Plaintiffs hereby respectfully demands a ~~trial by~~ jury on all issues so triable.

Scott N. Heidepriem

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

SDIF LIMITED PARTNERSHIP 2, a South Dakota Limited Partnership,

Plaintiff,

vs.

TENTEXKOTA, L.L.C. a South Dakota Limited Liability Company, W. KENNETH ALPHIN, TIMOTHY J. CONRAD, MICHAEL R. GUSTAFSON, GEORGE D. MITCHELL, DALE MORRIS, MARC W. OSWALD, RONALD W. WHEELER, and DWIGHT P. WILES,

Defendants and Third-Party Plaintiffs,

vs.

JOOP HOLLEN, SDRC, INC., a South Dakota Corporation, SD INVESTMENT FUND LLC2, a South Dakota Limited Liability Company; and JOHN DOE 1-75,

Third-Party Defendants.

Civ. No. 1:17-cv-01002-CBK

DEPOSITION OF: RONALD WHEELER 30(b)(6)

DATE: March 27, 2018 at 10:42 a.m.

PLACE: Deadwood Mountain Grand
1906 Deadwood Mountain Drive
Deadwood, South Dakota

Reported By: Jacqueline K. Perli
Registered Professional Reporter
Black Hills Reporting
1601 Mt. Rushmore Rd., Ste. 3280
Rapid City, SD 57701
605.721.2600

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ALSO PRESENT: Marc Oswald, Mike Gustafson

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EXHIBITS

REQUESTS OF COUNSEL: PAGE 69, LINE 16

MR. OBERG: We'll go back on the record. We're continuing with the 30(b)(6) deposition of Tentexkota, and Ron Wheeler has been identified as the designee with respect to various matters.

RONALD WHEELER,

called as a witness herein, having been first duly sworn, was examined and testified as follows:

EXAMINATION BY MR. OBERG:

Q Mr. Wheeler, would you please state your name.

A Ronald Wesley Wheeler.

Q And where do you live, sir?

A I live in Denton, Texas.

Q All right. And how long have you lived in Denton?

A About four months.

Q Okay. And prior to that time, did you live in South Dakota?

A No. I lived for four years in Key West, Florida.

Q Okay. And you had a home there in Key West?

A Yes.

Q And you -- have you sold that home --

A Yes.

Q -- and you're now in Texas full-time?

A That's correct.

dedicated highway funds. It comes from tax dollars or federal -- or, you know, federal highway funds.

Q So you became Secretary of Transportation when?

A I believe it was in 1995, but I'm not exact on that. I don't know.

Q All right. And also became Commissioner of Economic Development in the same year?

A No. That was about -- about two years later, maybe.

Q Okay. And both were cabinet-level positions?

A That's correct. Concurrently.

Q And were you known then as the Secretary or -- it was Commissioner that was the title for the Economic Development?

A Yeah. I actually held both concurrently, so.

Q Was that a new cabinet that Governor Janklow created?

A No. It had been there for a number of years, I believe.

Q Okay. And to this day, you're the only individual to ever hold those two cabinet positions concurrently?

A To my knowledge, yes.

Q And how long did you do that?

A Four years.

Q And at least as of the date of this confidential offering memorandum, Exhibit 8, you were the president and CEO of BHL Capital Corporation?

A That's correct.

Q What -- so what time were you president and CEO of BHL Capital Corporation?

A Well, I left -- dates, I've got to try and get straight in my mind. I left state government when Janklow left, which would have been, I think, in 2001 or '02, whatever the cycle is. And I then went to work for BHL Capital company, so it would have been in the 2002/'03 time frame.

Q And what was BHL Capital Corporation?

A Actually, it's an acronym for Bruce H. Lien Capital, and so Bruce Lien actually had a company that invested some of his money.

Q In real estate, apparently?

A Mostly. I wish it would have only been real estate. Bruce had a fondness for oil and gas leases, too.

Q Okay. And did you move out here to the Black Hills, the Deadwood area then, when you became president and CEO of BHL Capital Corporation?

A I actually had built a home out here while I was still in Pierre. But then I moved out here full-time at that time, yes.

Q Okay. And so that was in the 2002 time frame. And how long did you work for BHL Capital Corporation?

A Until Governor Rounds asked me to take over the lab as executive director. So that would have been in, like, 2007, perhaps.

Q All right. Were you an owner of BHL Capital Corporation?

A No.

Q Didn't have any shares?

A No.

Q So Governor Rounds asked you to become the head of the underground lab?

A Yes.

Q What was your title there?

A Executive director.

Q How long did you do that, Ron?

A A little over five years, I believe.

Q Okay. Up until, like, what time frame?

A 2012, I think, is when I retired. And then still serve on the board.

Q I used to, when I was a younger lawyer, always be amazed that people couldn't remember years and dates. It's -- I've gained some empathy.

A Well, as you get older, it gets harder, too.

Q It does get harder.

In any event, the information that's contained in Exhibit 8 with respect to your biographical data is generally accurate, it looks like.

A Generally, yes.

Q Maybe it's somewhat abbreviated. But this information, I assume, was provided by you or someone on behalf of Tentexkota so that it could be incorporated into the confidential offering memorandum. Is that a fair assumption on my part?

A I think it's a fair assumption.

Q And would you have provided this then to either Tentexkota or to the -- Joop Bollen or the SDRC so that it could be put in this confidential offering memorandum?

A I believe that we actually, in the information we provide to Joop, it had sort of a bio on the partners at that time. I think it was myself included, and so we would have probably provided

that.

I hesitate only because I'm finding out that a lot of times these bios are just taken from previous bios that came off of -- for example, if you went on the state website, you might find a bio, so.

Q Right. Whose idea was it to build the Deadwood Mountain Grand initially? How did the idea come to be?

A It goes to a gentleman named Bill McDavid, who was from Texas, and he was very enamored and involved with the music industry, friends with Willie Nelson, people like that.

He -- he moved up here. They bought a home when I met them in Deadwood, and he always had this vision, when he saw this Slime Plant sitting up here on the hill, that it would make a great place for a music venue. And so it was, without a doubt, his entire idea.

He hired a gentleman named Spencer Taylor, who had been instrumental in Billy Bob's down in Dal- -- or Fort Worth in the stockyards there. So he was an old honky-tonker, if you can say that.

And so Bill worked on it for quite a number

of years, so he was -- he was really the guy who had the vision to make this into what it is.

Q So your connection was the fellow that lived here, but --

A Casual -- casual friend.

Q Casual friend?

A Uh-huh.

Q How did you start talking? Just ran into him and just met him and started talking about the concept?

A Well, he -- he loved to talk about the concept, and so it was a lot of that kind of conversation. It was generally, you know, over a beer or whatever, and that's how I met him.

Q Okay. And what time frame would the -- would you have first discussed the concept of the Deadwood Mountain Grand?

A Boy, I'm guessing probably would have been around 2005 that he -- and it wasn't called the Deadwood Mountain Grand, either.

Q No, I understand.

A Not sure what he called it, but that was his vision. But probably in that time frame.

Q And you said he worked on it for a number of years?

A That's correct.

Q What do you mean, worked on it?

A Well, he -- like I said, he actually got Spencer Taylor to come up here and start putting plans together. He worked with an architectural firm. I know the architect, Richardson, I think in Rapid originally, and started developing some concept plans, that sort of thing.

And I know he tried to finance it. I'm not familiar with the exact things he did, but I know that he was looking at -- for a number of years, he was trying to find a way to finance it.

Q Okay. Kind of what was the precipitating thing then that happened from that -- taking it from that concept to something a little more concrete or definite?

A Well, at the end -- at the end of the day, he could not get the project done. And it actually sat idle for, oh, at least a year or two. And then some of the people that became partners from Nashville in Tentexkota actually were familiar with Bill, knew him, and they actually worked out the deal to buy the project from him.

Q Okay. And so what time frame are we talking

about where they bought the project from him?

A If I had to guess, I -- I honestly don't know exact dates. I think --

Q It's not --

A -- it was in probably 2007 time frame to 2008, right in that time frame.

Q Then how did you get together with Marc and the others?

A Well, they wanted some local involvement. And so they approached, I believe -- I don't know if it was Mike Gustafson and Tim Conrad who had what is in the documents Original Deadwood Partners.

And then George Mitchell and I actually joined Original Deadwood Partners, and they actually agreed to take a 20 percent stake in Tentexkota.

Q What was the Original Deadwood Partners? What is it?

A It's -- before I joined, I have no idea. I -- I think we could probably find that out, but I -- I think it was just a limited liability company that was available to do transactions.

Q Okay. Did it own any casino or --

A No, not to my knowledge.

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 28825

SDIF LIMITED PARTNERSHIP 2, a South Dakota Limited Partnership,

Plaintiff,

vs.

TENTEXKOTA, L.L.C., a South Dakota Limited Liability Company,
W. KENNETH ALPHIN,
TIMOTHY J. CONRAD,
MICHAEL R. GUSTAFSON,
GEORGE D. MITCHELL,
DALE MORRIS,
MARC W. OSWALD,
RONALD W. WHEELER, and
DWIGHT P. WILES,

Defendants.

Certified Question from the United States
District Court, District of South Dakota, Northern Division
Honorable Charles B. Kornmann, Presiding Judge

SDIF LIMITED PARTNERSHIP 2'S BRIEF REGARDING CERTIFIED QUESTIONS

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CERTIFIED QUESTION ACCEPTED JANUARY 3, 2019

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JURISDICTIONAL STATEMENT

By Order dated December 7, 2018, the United States District Court for the District of South Dakota, Northern Division, certified three questions to this Court, pursuant to SDCL § 15-24A-1. The Court accepted certification by Order dated January 3, 2019. The Court's jurisdiction is pursuant to SDCL Ch. 15-24A .

LEGAL ISSUES

I. Does SDCL § 47-34A-303 Bar Enforcement of the Guarantees?

Kubican v. The Tavern, LLC, 752 S.E.2d 299, 305 (W.Va. 2013)
Total Merchant Services, Inc. v. Rhinehart, No. 15-1327, 2015 WL 7428521 (C.D. Ill. Nov. 20, 2015)
N.E.N.H., LLC v. Brousard-Baehr Holdings, LLC, 142 So.3d 91 (La. Ct. App. 2014)
2 RIBSTEIN AND KEATINGE ON LTD. LIAB. COS. § 12:5

II. Did Section 7.6 of Borrower's Operating Agreement Require a Vote of the Majority to Permit its Members to Give Their Guarantees?

Nygaard v. Sioux Valley Hosps. v. Health Sys., 2007 S.D. 34, ¶ 13, 731 N.W.2d 184

STATEMENT OF THE CASE

This case began as a simple effort by SDIF Limited Partnership 2 ("Lender" or "SDIF LP2") to collect on defaulted loans it made to Tentexkota, LLC ("Borrower" or "Tentexkota"), that were personally guaranteed by eight individuals, four of whom were Tentexkota members and four of whom were not members (collectively "Guarantors).

The District Court granted Lender's motion for summary judgment against Borrower and ruled against the Guarantors on most of the defenses raised. However, the District Court *sua sponte* raised a question whether SDCL § 47-34A-303 bars enforcement of the guarantees. That statute provides that members of a limited liability company ("LLC") are shielded from vicarious liability for company debt that is based solely on their status as members, unless they affirmatively "opt-in" to such status-based liability via language in the LLC's articles of organization.

Borrower's articles of organization do not include such opt-in language, but that is irrelevant, because Lender does not seek to impose liability on the Guarantors based on their status as LLC members. Rather, Lender seeks to enforce contracts each Guarantor voluntarily made in his individual capacity.

The agreements at issue here are typical commercial guarantees and the relevant facts are similar to and typical of LLC loan transactions; thus, the Court's decision is of critical importance to the lending industry in South Dakota.

STATEMENT OF FACTS

Borrower is a limited liability company, organized under the laws of South Dakota. *See* Doc. 134, ¶ 2; Doc. 151, ¶ 3. Lender made two loans to Borrower, documented by promissory notes and other loan documents. *See* Docs. 134-1 through 134-18. As inducement for the loans, the Guarantors, consisting of Tentexkota members Kenneth Alphin, Timothy Conrad, Dale Morris, and Marc Oswald, along with non-members, Michael Gustafson, George Mitchell, Ronald Wheeler and Dwight Wiles, executed Guaranty and Pledge Agreements (the "Guarantees"), which are identical in form. *See* Docs. 134-2 through 9 and 134-11 through 18. The non-member Guarantors owned or controlled other entities that were members, but such entities did not sign guarantees. Thus, not all Guarantors are members of Tentexkota (*see* Doc. 163-3, pp. 2, 4, 5, 6), and several members of Tentexkota never signed a Guarantee. *See id*., pp. 5-6. All Guarantors are experienced businessmen as reflected in their résumés. *See* Doc. 34-1, pp. 20-24. It is undisputed that Lender conditioned the loans upon execution of the Guarantees. *See* Docs. 134-2 through 9 and 134-11 through 18.

The Guarantors executed the Guarantees in their individual, not their representative capacity. In the preamble of each Guarantee, each Guarantor wrote in his name, identifying himself as the "Guarantor." *See e.g.* Doc. 1-1, Ex. B (Guarantee). In each Guarantee, the term "Guarantor" was defined to mean the person signing the Guarantee, "*as an* individual." *See id.* (Guarantee, Section 1(d)). Each Guarantor signed his individual name. *See id.* (Guarantee, Section

5(b)). In each Guarantee, recital B states that "Guarantor, as member of Borrower, has a substantial financial stake in borrower" and will benefit from the Loan. *See id.* Each Guarantor represents that his Guarantee constitutes the legal, valid and binding obligation of Guarantor (not Tentexkota), enforceable against Guarantor. *See id.* Each Guarantor warrants to provide his (not Tentexkota's) updated financial statements by May 1st of each year. *See id.* (Guarantee, Section 5(d)). Upon default, the Guarantees provide that Lender may proceed to recover the full amount directly from each Guarantor without first proceeding against Tentexkota. *See id.* (Guarantee, Section 7(a)).

After Borrower and Guarantors defaulted, Lender brought suit to recover the amounts due. Defendants' initial Answer and Counterclaim alleged defenses and counterclaims based on a number of theories ultimately rejected by the District Court and not relevant here. *See* Doc. 9. It did not include any counterclaim or defense based upon SDCL § 47-34A-303, or even refer to that statute. *See id.*

There followed a series of motions and cross-motions for summary judgment and related discovery motions. In none of the pleadings did the Guarantors raise SDCL § 47-34A-303 as a defense or even mention the statute. *See* Doc. 36. After the District Court raised the issue *sua sponte* (Doc. 43), Defendants then filed an Amended Answer, Counterclaim and Third-Party Complaint, raising SDCL § 47-34A-303 as a defense for the first time. *See* Doc. 67.

The District Court later raised another issue *sua sponte*, pointing out that Section 7.6 of Tentexkota's Operating Agreement states: "The members may also be required by vote of the Majority to personally guarantee the obligations of the Company." Doc 96. Defendants then again amended their Answer, asserting that the Guarantees were invalid under Section 7.6 of the Operating Agreement, since no such vote had occurred. *See* Doc. 151, p. 8, ¶ 3.

Eventually, the District Court granted summary judgment against Tentexkota, ruled against the Guarantors on all of their defenses except for those related to SDCL 47-34A-303 and Section 7.6 of the Operating Agreement, and certified the following questions to this Court:

> (1) Does SDCL § 47-34A-303 invalidate personal guarantees signed by members of an LLC in their capacity as members (a) if that LLC has not amended its articles of organization to state that its members are liable for the LLC debts, obligations, and/or liabilities in their capacity as members and (b) members have not consented in writing to the adoption of any such provision or to be bound by such a provision?
>
> (2) Does SDCL § 53-9-1 apply so as to prohibit plaintiff from recovering under the guarantees if the guarantees violate SDCL 47-34A-303?
>
> (3) What is the legal effect of the LLC's operating agreement permitting members to personally guarantee corporate debts but only by a "vote" of the majority of members when there is no evidence of any such "vote"?

Doc. 207.

ARGUMENT AND AUTHORITIES

Reformulation of Certified Questions

This Court can and should reformulate the certified questions. Certifying courts sometimes ask the wrong questions or phrase the questions incorrectly. *See* WRIGHT AND MILLER, 17A FED. PRAC. & PROC. JURIS. § 4248 (3d ed. 2018). 4248 (3d ed. 2018). Lender believes that has happened in this case because:

- Lender's claims are based on the Guarantees, not on the Guarantors' status as LLC members. Lender has sued only the eight men – both members and non-members – who executed Guarantees. It is critical to distinguish between liability imposed on a member solely because he is a member ("status-based liability") and liability imposed on a member based on that member's personal contract in his own name. SDCL §47-34A-303 addresses only status-based liability. Lender has not sued any members who did not sign Guarantees.

- The District Court's first question could be read to suggest that the Guarantors signed the Guarantees in a representative capacity as members on behalf of Borrower. The wording of the Guarantees plainly shows they signed as individuals.

- The provision of Borrower's Operating Agreement referenced in the third of the District Court's Certified Questions addresses how members may be *required* by a vote to personally guarantee company obligations, not when they are "permitted" to guaranty those obligations, and is therefore irrelevant, since the Guarantors admit they executed the Guarantees voluntarily.

Wright and Miller explain that it is "common practice of many courts, when certifying, to emphasize that the particular phrasing used in the certified question is not to restrict the state court and that the state court is free to reformulate the question as it sees fit. State courts have availed themselves of this freedom whether or not it is expressly stated in the certificate." *Id.* For example, in

Helicopter Services, Inc. v. Rogerson Aircraft Corp., 811 P.2d 627, 633-34 (Or. 1991), the court noted "the majority rule, endorsed by the Ninth Circuit and agreeable to us, is that this court (the deciding court) has the discretion to reframe the questions and is not bound to answer the question as certified."

Similarly, in *Penn Mutual Life Ins. v. Abramson*, 530 A.2d 1202, 1207 (D.C. Ct. App. 1987), the court considered and addressed its proper scope of review on certification, explaining:

> [O]ur authority on certification is limited to answering "questions of law" put to us by the certifying court. To that end, the certifying court is required to set forth in its certification order the question(s) of law to be answered, as well as a "statement of all facts relevant to the questions certified and the nature of the controversy in which the questions arose." . . . However, the statute does not say whether this court is confined in its analysis to the legal issues as articulated by the certifying court. Nor does it prescribe how we are to review the certifying court's statement of facts in conjunction with the issues presented and all other material of record. . . . Moreover, as these correlative concerns call to attention, the statute does not inform us how to proceed if and when our view of the issues and pertinent facts in a case differs from the view of the certifying court expressed in its certification order. With regard to the questions of law designated by the certifying court, we may exercise our prerogative to frame the basic issues as we see fit for an informed decision. Although the statute contains language which seemingly constrains this court to answer the questions as certified [], similar statutes have not precluded other courts from permitting such reformulation of the issues as is necessary. . . . Common sense also militates in favor of allowing reformulation of the issues where required. . . . Thus, we will adhere to the commonly held rule permitting latitude in the consideration of non-designated questions and the reformulation, if necessary, of those questions as certified.

Id. (internal and other citations omitted). The court also explained: "[W]hile the statement of facts required from the certifying court may prove helpful to our

analysis on the merits, or indeed, be on its face determinative of the issues, we are not bound by the statement. Rather, we may consider as necessary whatever is contained in the record transmitted on certification, as well as the entire record before the certifying court." *Id*. at 1208.

This Court has inherent authority to reformulate the questions certified to it by the District Court. *See id.* The goal is to answer questions of state law that are relevant under the undisputed facts to assist the District Court in resolving the case. *See id.* Accordingly, Lender respectfully asks this Court to answer the following reformulated questions:

1. Does SDCL § 47-34A-303(a) bar enforcement of the Guarantees?

2. Does Section 7.6 of Borrower's Operating Agreement require a vote of the majority to permit its members to give their Guarantees?

If the Court answers the certified questions as framed by the District Court, Lender respectfully asks the Court to also answer the foregoing questions.

Standards of Review

This Court applies the same legal standards when considering a question of law certified by another court as it would apply on appeal. *See Gronseth v. Chester Rural Fire Protection District*, 2010 S.D. 16, ¶ 6, 779 N.W.2d 158, 160 n. 1 ("we employ the same legal standards for this analysis that we use when reviewing appellate cases.").

The certified questions here involve statutory construction, presenting a question of law. *See id.* at ¶ 10, 779 N.W.2d at 161. Statutes are construed "'in

accord with legislative intent. Such intent is derived from the plain, ordinary and popular meaning of statutory language.'" *Id.* (other citation omitted). When a statute's language is clear, certain and unambiguous, the Court recognizes that its function confines it to declare the meaning as plainly expressed. *Id*. *See also Aman v. Edmunds Cent. Sch. Dist. No.* 22-5, 494 N.W.2d 198, 200 (S.D. 1992) ("The legal maxim '*expressio unius est exclusio alterius*' means 'the expression of one thing is the exclusion of another.'") (other citations omitted).

The Court also "presume[s] the Legislature never intends to use surplusage in its enactments, so where possible the law must be construed to give effect to all its provisions." *Wiersma v. Maple Leaf Farms,* 1996 S.D. 16, ¶ 5, 543 N.W.2d 787, 789. This canon of statutory construction is particularly significant here, and other authorities have explained its importance:

> It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word will be superfluous, void, nugatory, or insignificant. A clause or phrase may be excised from a statute only if it is certain that the legislature could not have intended the words to be in the statute, and if a rejection of those words serves to correct careless language in order to give effect to the true intention of the legislature. Courts are loath to read statutes in a manner that would render parts of them entirely superfluous, meaningless, or inoperative. Thus, words in a statute should not be construed as surplusage if there is a reasonable construction that will give them meaning.

82 C.J.S. *Statutes* § 433 (footnotes omitted). *See also* 2A SUTHERLAND STATUTORY CONSTRUCTION § 46:6 (7th ed.). Further, "it is presumed that the

legislature did not intend an absurd or unreasonable result." *Moss v. Guttormson*, 1996 S.D. 76, ¶ 10, 551 N.W.2d 14, 17.

The certified questions also involve contract interpretation. Interpretation of a contract is also a question of law. *See Gores v. Miller*, 2016 S.D. 9, ¶ 8, 875 N.W.2d 34, 36-37 (holding contract interpretation is a legal question). This Court has stated, "In order to ascertain the terms and conditions of a contract, we examine the contract as a whole and give words their plain and ordinary meaning." *Nygaard v. Sioux Valley Hosps. v. Health Sys*., 2007 S.D. 34, ¶ 13, 731 N.W.2d 184, 191.

The power to declare a contract void must be used sparingly, as this Court has also stated: "Yet, as this Court has cautioned ever since territorial days, "The power of courts to declare a contract void for being in contravention of sound public policy, is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt." *Law Capital, Inc. v. Kettering*, 2013 S.D. 66, ¶ 13, 836 N.W.2d 642, 646 (other citations omitted). As the Court in *Law* reiterated, "[c]ontractual obligations should not dissolve on such flimsy substance. . . . 'Until firmly and solemnly convinced that an existent public policy is clearly revealed." *Id.* (other citations omitted). *See also Bartron v. Codington Cty.*, 2 N.W.2d 337, 344 (S.D. 1942) (holding "'the right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce contracts than to enable parties thereto to escape from

their obligation on the pretext of public policy, unless it clearly appear that they contravene public right or the public welfare.'").

Question No. 1: Does SDCL § 47-34A-303(a) Bar Enforcement of the Guarantees?

SDCL § 47-34A-303 provides in relevant part:

> Liability of members and managers. (a) Except as otherwise provided in subsection (c), the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, are solely the debts, obligations, and liabilities of the company. A member or manager is not personally liable for a debt, obligation, or liability of the company *solely* by reason of being or acting as a member or manager.
>
> * * *
>
> (c) All or specified members of a limited liability company are liable *in their capacity as members* for all or specified debts, obligations, or liabilities of the company if:
>
> (1) A provision to that effect is contained in the articles of organization; and
>
> (2) A member so liable has consented in writing to the adoption of the provision or to be bound by the provision.

SDCL § 47-34A-303 (emphasis added).

Lender submits that the statute has no application to this case. It clearly has no application to guarantees by persons who are not members of Borrower, and it is undisputed that Guarantors Gustafson, Mitchell, Wheeler and Wiles were never members of Borrower.

As to the member-Guarantors, Lender does not contend they agreed to assume "status-based liability" for Tentexkota's debts, as addressed by § 303(c).

Lender is *not* seeking to hold them liable because they are members. Instead, the issue presented is their contractual liability under their personal Guarantees. Thus, subparagraph 303(c) is irrelevant; only subparagraph 303(a) is relevant here.

SDCL § 47-34A-303(a) does not prohibit an LLC member from personally guaranteeing company debt. The language of the statute is clear and unambiguous, obviating any need for consideration of the type of legislative history recited in Defendants' Brief. *See* Defendants' Brief, pp. 9-13. The statute only proscribes personal liability for the debts, obligations, and liabilities of a limited liability company arising "*solely*" by reason of such membership. Giving this provision of the statute its plain meaning, and giving effect to the word "solely," the statute clearly allows for the liability of members of a LLC *in other circumstances*. *See Wiersma,* 1996 S.D. 16, ¶ 5, 543 N.W.2d 789 (court must give effect to all provisions of a statute and words used are not mere surplusage). Lender does not dispute that a member can be held vicariously liable *by virtue of such membership*, only if the requisites in paragraph 303(c) are met. But, SDCL § 47-34A-303 in no way prohibits the enforcement of personal guarantees, either explicitly or implicitly.

Guarantors ignore the distinction between contractual liability and status–based liability. They frame their arguments as if Lender were claiming they are liable for the loans because of their status as members, rather than addressing Lender's actual claim that they are liable for breach of contract.

1. The Guarantors were acting in their individual capacities.

One may sign a contract in an individual capacity to bind oneself, or in a representative capacity to bind another. As discussed in the Statement of Facts above, the terms of the Guarantees show that the Guarantors signed in an individual capacity. Under Section 3 of the Guarantees, Guarantors' obligations are secured by pledges of their membership interests, which would not make sense if they were signing in a representative capacity for the Borrower. In Section 4(h), Guarantors expressly subordinate any indemnity claims against the Borrower arising from their payment of the guaranteed debt to payment in full thereof. They would have no such claims if they were signing the Guarantees as representatives of Borrower.

In Section 5(b) the Guarantors warrant that their Guarantees are "the legal, valid and binding obligation *of Guarantor* [not Borrower] and are enforceable *against Guarantor* [not Borrower] in accordance with the terms hereof." (emphasis added). In Section 7(a), Guarantors agree that upon default, Lender may proceed directly against them to collect the Loans, without first proceeding against Borrower.

Guarantee Recital B notes that as individual members, the Guarantors will benefit financially from the loan they are guaranteeing. Such a statement of consideration would not be needed if they were signing as representatives on behalf of the Borrower. It is also noteworthy that the individual Guarantors' financial statements were submitted in support of the Guarantees, and they were required to update them, confirming the point that they were signing in an

individual capacity, in order to provide Lender an alternate source of repayment. *See* Doc. 187-15. All of this is contrary to the notion that the Guarantors were signing the Guarantees in a representative "capacity as members" (to use the District Court's phraseology in its first certified question).

2. Guarantors' obligations under the Guarantees are their own independent debts, not debts of the Borrower.

The first sentence of SDCL § 47-34A-303(a) provides: "the debts, obligations, and liabilities of a limited liability company… are solely the debts, obligations, and liabilities of the company." Even read in isolation, that provision would not prohibit enforcement of the Guarantees, because the debts arising under the Guarantees are the Guarantors' own debts. Even if the Borrower discharged the loans in bankruptcy, the secondary obligations due under the Guarantees would remain in full force because they are the Guarantors' own independent obligations, not debts of the LLC. *See In re Gentry*, 807 F.3d 1222 (10th Cir. 2015); *In re Sure-Snap Corp.*, 983 F.2d 1015, 1019 (11th Cir. 1993); *F.D.I.C. v. Municipality of Ponce*, 904 F.2d 740, 748 (1st Cir. 1990); *In re Sandy Ridge Dev. Corp.*, 881 F.2d 1346, 1351 (5th Cir. 1989).

3. The law in South Dakota and in states with identical statutes supports Lender's position.

While not specifically addressing this precise issue, the Court in *Baatz v. Arrow Bar*, 452 N.W.2d 138, 141 (S.D. 1990), recognized that "the personal guarantee creates individual liability for a corporate obligation." *See also Addy v. Myers*, 616 N.W.2d 359, 362 (N.D. 2000) ("A limited liability company is a

separate business entity and its owners or members are not exposed to personal liability for the entity's debts *unless there are personal guarantees*.") (emphasis added) (other citations omitted).

The official comments to Section 303 of the 1996 Uniform Limited Liability Company Act, on which South Dakota's law is based, support Lender's position: "A member or manager is responsible for acts or omissions to the extent those acts or omissions would be actionable in contract or tort against the member or manager if that person were acting in an individual capacity." The Guarantors in this case were acting in an individual capacity when they made the Guarantees, and this case is an action in contract on those Guarantees.

Defendants note that four other states have laws identical to SDCL § 47-34A-303: West Virginia, Illinois, Hawaii and South Carolina. *See* Defendants Brief, p. 11). No court in any of those states has invalidated a member's personal guarantee based on the arguments advanced by Defendants, and the case law in those states supports Lender's position.

In *Kubican v. The Tavern, LLC,* 752 S.E.2d 299, 305 (W.Va. 2013), the West Virginia Supreme Court construed a statute identical to SDCL § 47-34A-303. In that case, the court found the language in subsection (a) unambiguous insofar as it declares that, with the exception noted in subsection (c), "[a] member is not personally liable for a debt, obligation or liability of the company solely by reason of being or acting as a member or manager." *Id.* Of significance, the court recognized that, "[b]y proscribing liability on the sole basis of being a member or

manager of an LLC, the Legislature implicitly has left intact the prospect of an LLC *member or manager being liable on grounds that are not based solely on a person's status as a member or manager* of an LLC. Our reasoning is supported by the maxim *expressio unius est exclusio alterius,* the express mention of one thing implies the exclusion of another, applies." *Id.* (citations omitted) (emphasis added).

In *Total Merchant Services, Inc. v. Rhinehart*, No. 15-1327, 2015 WL 7428521 at *3 (C.D. Ill. Nov. 20, 2015), the Illinois district court stated that "Defendant Nelson acted in his personal capacity when he signed as guarantor for [the LLCs]. Therefore, the 'debt, obligation, or liability' is not 'one of the company,' and the Act does not shield Defendant from liabilities associated with a guaranty agreement he executed in his personal capacity." In numerous other Illinois cases, the courts enforced member-guarantees without any concern for the Illinois analog to SDCL § 47-34A-303, indicating by negative implication that § 303 is not relevant. *See e.g. BMO Harris Bank, N.A. v. K&K Holdings, LLC,* 59 N.E.3d 807 (Ill. Ct. App. 2016); *Lyons Lumber and Building Center, Inc. v. 7722 North Ashland, LLC,* 59 N.E.3d 830 (Ill. Ct. App. 2016); *Hollywood Boulevard Cinema, LLC v. FPC Funding II, LLC,* 23 N.E.3d 381(Ill. Ct. App. 2014); *Bank of America v. Freed*, 983 N.E.2d 509 (Ill. Ct. App. 2012).

Defendants try to support their arguments by citing the Illinois cases of *Dass v. Yale*, 3 N.E.3d 858 (Ill. Ct. App. 2013) and *Puelo v. Topel,* 856 N.E.2d 1152 (Ill. Ct. App. 2006). However, *Dass* involved claims *based on torts*

committed by a member acting in his capacity as member, not to enforce the member's independent contract. The *Puleo* court ruled only that an individual manager/member of an involuntarily dissolved LLC was not vicariously liable for obligations incurred by the entity after it had been dissolved by the Secretary of State. Neither case, as admitted by Guarantors in their Brief, involved personal guarantees. Neither case has anything to do with whether the LLC statute limits a member's liability under his own contract.

In *Dutch Fork Development Group II v. SEL Properties, LLC*, 753 S.E.2d 840 (S.C. 2012), the South Carolina Supreme Court stated: "[B]y personally guaranteeing the development loan, Appellant became personally liable for the repayment of that particular financial obligation." The court cited *Hester Enters., Inc. v. Narvais*, 402 S.E.2d 333, 335 (Ga. Ct. App. 1991), for the proposition that "a corporate officer who does personally guarantee an obligation may be personally liable for the performance of *that* particular obligation, but such a personal guarantee does not render him personally liable on *any and all* corporate obligations." *See also First South Bank v. Rosenberg*, 790 S.E.2d 919 (S.C. Ct. App. 2016) (South Carolina Court of Appeals enforced the personal guarantee of an LLC member without even discussing the LLC statute).

Similarly, in the present case, applying this Court's established rules of construction to what the Legislature said, SDCL § 47-34A-303 merely protects LLC members from vicarious liability based solely on their membership. *See Wiersma,* 1996 S.D. 16, ¶ 5, 543 N.W.2d at 789. The Legislature did not

proscribe member liability based on other grounds, such as the personal guarantees at issue. *See Kubican*, 752 S.E.2d at 305; *Gronseth*, 2010 S.D. 16, ¶ 6, 779 N.W.2d at 161; *Aman*, 494 N.W.2d at 200.

4. The case law in states with similar statutes supports Lender's position.

Section 303(a) of the 1996 Uniform Limited Liability Company Act, upon which South Dakota's statute is based, and sections 304(a) of the 2006 Revised Act and 2013 Amended Act, are substantially identical. Section 304(a) of the Uniform Limited Liability Company Act of 2006 (Amended 2013), provides: "A debt, obligation, or other liability of a limited liability company is solely the debt, obligation, or other liability of the company. A member or manager is not personally liable, directly or indirectly, by way of contribution or otherwise, for a debt, obligation, or other liability of the company *solely by reason of being or acting as a member or manager*." (emphasis added) The only real difference in the Acts is that the Revised and Amended Acts omitted the option to "opt-in" to status-based liability (as provided in SDCL § 47-34A-303(c)). However, since Borrower's members did not "opt-in," and since Lender is not seeking to impose status-based liability, the absence of subsection (c) has no significance here.

Despite that, Guarantors argue that cases decided in states adopting the later Acts are not persuasive authority. However, their arguments simply assume that the *distinction* between the statutes (i.e., whether or not there is an opt-in provision like 303(c)) makes a *difference* in this case, without any cogent reason why. Because the language in subsection (a) of each of the Uniform Acts is

substantially identical, cases upholding LLC members' liability under personal guarantees under the 2006 or 2013 Acts provide persuasive authority for interpretation of the South Dakota statute. These cases uniformly support Lender's position.

For example, in *N.E.N.H., LLC v. Brousard-Baehr Holdings, LLC*, 142 So.3d 91, 95 (La. Ct. App. 2014), the court affirmed summary judgment in favor of the lender against the LLC and its member, concluding the individual member was not protected from personal liability for the note, because she was a personal guarantor. In so concluding, the court held the protections under the limited liability laws "do not extend to her signature in the capacity as a personal guarantor to the promissory note." *Id.*

In *R.L.R. Investments, LLC v. Wilmington Horsemens Group, LLC*, 22 N.E.3d 233, 241 (Ohio Ct. App. 2014), the court held the individual members of the defendant LLC liable for breach of their guarantee of the LLC's lease. *See also Regions Bank v. Louisiana Pipe and Steel Fabricators*, 80 So.2d 1209, 1214 (La. Ct. App. 2011) (affirming summary judgment for lender and concluding the LLC's debt was individual member's obligation because he signed a guarantee); *Creative Resource Mgmt., Inc. v. Soskin*, No. 01A01-9808-CH-00016, 1998 WL 813420 at *3 (Tenn. Ct. App. 1998) (reversing summary judgment in favor of member of LLC, concluding member was individually liable for debt of LLC because member signed agreement as a personal guarantor); *Ervin v. Turner*, 662 S.E.2d 721, 724 (Ga. Ct. App. 2008) (concluding member's "liabilities arose from

her contractual obligations as a party to the Contribution Agreement and as a personal guarantor" and not "on account of her interest in the LLC."). *Cf. White v. Longley,* 244 P.3d 753, 760 (Mont. 2010) ("individual liability limitation is an aspect of the LLC form of business organization," but there is "widespread acknowledgement that individual members of an LLC may be subjected to personal liability. . . . This is reflected in both the Uniform Limited Liability Company Act (1996), § 303 and the Revised Uniform Limited Liability Company Act (2006)."). *See also Derges v. Hellweg*, 128 S.W.3d 186, 191 (Mo. Ct. App. 2004) (holding the guarantee agreement, and not the LLC's operating agreement, was determinative of issue of members' obligations). *See also* Annotation, 47 ALR 6th 1, § 11 (citing *In re Gonzalez*, 2009 WL 531866 (Bankr. D. Ariz. 2009) (holding "an LLC officer's personal liability can be based on known waiver or a written guaranty of the corporate debt").

In addition to these cases, there are a number of cases supporting Lender's position by negative implication. *See* 47 ALR 6th 1, § 55; *Harada v. Doiron*, No. 2:04–CV–1320, 2007 WL 983843 (D. Nev. 2007) (LLC member could not be held personally liable because there was "no evidence that the LLC's articles of organization provided that members were personally liable for the company's debts" and "no evidence that the LLC member personally guaranteed the loan or otherwise agreed to be personally responsible for the loan."). *See also Milk v. Total Pay and HR Solutions*, Inc., 634 S.E.2d 208 (Ga. Ct. App. 2006) (member was not liable for debt of LLC when there was no evidence the member

guaranteed payment under the contract); *Silman's Printing, Inc. v. Velo Int'l*, No. 2004CA00095, 2005 WL 100963 at *4 (Ohio Ct. App. 2005) (president of corporation could not be liable for corporate debt, absent evidence he personally guaranteed payment).

Lender could find no case in *any* state holding that the personal guarantee of an LLC member is prohibited by any of the LLC Acts, or that such a guarantee is not fully enforceable. Defendants have cited no such authority.

5. The commentary supports Lender's position.

Defendants also rely on a treatise authored by Ribstein and Keatinge, but ignore the authors' fundamental point:

> LLC members may choose to opt out of limited liability by contracting with creditors to guarantee the firm's debts or to obligate themselves personally on the contract. . . .
>
> * * *
>
> It is important to distinguish guarantees given by individual members, and the members' liability as such. The formalities [i.e. the formalities required to opt-in under 303(c)] should be interpreted as relating only to the latter type of liability.

2 RIBSTEIN AND KEATINGE ON LTD. LIAB. COS. § 12:5. *See also* Thomas E. Rutledge, *Limited Liability (or Not): Reflections on the Holy Grail*, 51 S.D. L. REV. 417, 428 ("Note that this [i.e. waiver under 303(c)] is an ab initio waiver of limited liability, and as such it must be contrasted with a personal guarantee of entity obligations.").

6. The Guarantees are not unlawful under SDCL § 53-9-1.

SDCL § 53-9-1 provides: "A contract provision contrary to an *express* provision of law or to the policy of *express* law, though not expressly prohibited or otherwise contrary to good morals, is unlawful." (emphasis added). The Guarantees did not violate the express provisions of SDCL § 47-34A-303. They were not in any form or fashion *illegal*.

Nor did they violate the express policy of the LLC Act. The overarching purpose of the Act is to enable persons to engage in business in companies that protect them against status-based liability, just like shareholders in a corporation, but which are taxed like a partnership. The policy of "limited status-based liability" is for the sole benefit of LLC members; it does not have some broader social purpose. Allowing individual members to guarantee particular company debts is completely consistent with the general policy of protecting them from status-based liability. Moreover, it is a fundamental policy of the Act "to give maximum effect to the principles of freedom of contract." SDCL § 47-34A-114. Interpreting section 303 as limiting LLC members from agreeing voluntarily to guarantee particular debts of their LLC would fly in the face of that policy.

This Court has recognized that it is its "duty [] 'to maintain and enforce contracts [rather] than to enable parties thereto to escape from their obligation on the pretext of public policy.'" *Law Capital*, 2013 S.D. 66, ¶ 13, 836 N.W.2d at 646; *Bartron*, 2 N.W.2d at 344 (holding "'the usual and most important function of courts of justice is rather to maintain and enforce contracts than to enable parties thereto to escape from their obligation on the pretext of public policy,

unless it clearly appear that they contravene public right or the public welfare.'") (other citations omitted). There being nothing in the law or in any policy of our State to suggest that the personal Guarantees are not wholly lawful, the Court should find them enforceable against the Defendants/Guarantors.

Indeed, it would be a significant blow to South Dakota commercial lenders and borrowers alike if LLC members were not permitted to guarantee company debts without the need to amend Articles of Organization. Many existing loan obligations and credit extensions currently include member guarantees of the repayment of LLC debt. The interpretation advanced by Defendants is contrary to the plain terms of the statute at issue, contradicts the express public policy favoring freedom of contract, and would deal a blow to LLC financing in our State. These concerns have been clearly expressed in the written opinions of Lender's expert witnesses, disclosed to Defendants in the proceeding before the District Court.[1] *See* attached Appendix, pp. 1 to 14. These unchallenged expert opinions[2] from experienced commercial lenders demonstrate that Defendant's interpretation of SDCL § 47-34A-303 is contrary to the practices of the commercial lending business. These expert opinions also reveal that such an interpretation would have consequences not foreseen by parties contracting for

[1] Because discovery is not filed in the District Court, Plaintiff's Designation of Expert Witnesses is not part of the underlying record. However, it was served on Defendants on or about March 5, 2018.

[2] Although Defendants served their own Expert Witness Disclosure, Defendants provided no expert opinions to contradict those of Mr. Christoffer and Mr. Messer.

commercial loans in our State – absurd and unreasonable consequences that the Court can avoid by applying the plain meaning of the statute. *See Moss*, 1996 S.D. 76, ¶ 10, 551 N.W.2d at 17.

Because there is nothing illegal about the member and non-member Guarantors' agreements at issue, none of the cases cited by Defendants in regard to the issue are on point. For example, Defendants rely on *Norbeck & Nicholson Co. v. State*, 142 N.W. 847, 848 (S.D. 1913), in which the court invalidated a contract that was unlawful because it was "expressly prohibited by the Constitution, the highest law of the state." *Id.* The contract found void in *City of Tyndall v. Schuurmans*, 56 N.W.2d 693, 698 (S.D. 1953), was likewise in violation of a state constitutional provision. In *Minnesota, D. & P. Ry. Co. v. Way*, 148 N.W. 858, 859 (S.D. 1914), the Court held the contract was unenforceable because the consideration was against public policy. In *Beverage Co. v. Villa Marie Co.*, 13 N.W.2d 670, 671 (S.D. 1944), the Court found the contract unenforceable because "the consideration for the original note and mortgage . . . was illegal." And, in *Nature's 10 Jewelers v. Gunderson*, 2002 S.D. 80, ¶ 12, 648 N.W.2d 804, 807, the Court expressly found the agreement was in violation of South Dakota law (SDCL § 37-5A-6), and was accordingly void.

The authorities relied upon by Defendants stand only for the proposition that a contract made *in violation of established law* is void, a proposition that has no applicability here. No law, statutory or otherwise, prohibits or restricts LLC members (let alone non-members) from agreeing to answer for the debt of another

by way of personal guarantees. Indeed, such guarantees are commonplace. *See e.g. Baatz*, 452 N.W.2d at 141.

Question No. 2: Did Section 7.6 of Borrower's Operating Agreement require a vote of the majority to permit its members to give their Guarantees?

This question, also raised *sua sponte* by the District Court, raises the issue of whether Tentexkota's Operating Agreement "permits" or "allows" personal guarantees by members if a vote of the majority has not been taken. The court was referencing Section 7.6 (Mandatory "Capital Calls") of the Operating Agreement; however, that Section only relates to whether a guarantee may be required: "The Members may also be *required* by vote of the Majority to personally guarantee the obligations of the Company." Doc. 163-2, pp. 20-21 (emphasis added). Guarantors are not contending they were "required" by Tentexkota to execute their Guarantees. They indisputably signed their Guarantees voluntarily in order to obtain loans that benefitted the company in which they had a financial interest. Dwight Wiles admitted that he was not "required" to sign his Guarantee. *See* Doc. 163-3, p. 6. He did so voluntarily, and he intended to be bound, as did the rest of them. Several members of Borrower did not sign guarantees – additional evidence that members were not so required.

Section 7.6 is not relevant to this case for the simple reason that it does not require a majority vote to *permit* or *allow* a member to guarantee a company debt and it does not prohibit a member from voluntarily giving a personal guarantee absent such a vote. The word used in the Operating Agreement is "required."

Contracts are properly interpreted by giving words used their "plain and ordinary meaning." *Nygaard*, 2007 S.D. 34, ¶ 13, 731 N.W.2d at 191. And of course, since an Operating Agreement is merely a contract between the company and its members, even if the Guarantees *had* been given in breach of that agreement, that would not render them unenforceable by Lender, which is not a party to the Operating Agreement. *See* Doc. 163-2, p. 29.

CONCLUSION

For all these reasons, Lender respectfully requests that the Court find the Guarantees at issue are fully enforceable, and that it answer the certified questions as follows:

1. Does SDCL § 47-34A-303(a) bar enforcement of the Guarantees? No. SDCL § 47-34A-303(a) only protects LLC members from liability for company debts based solely upon their status as members of the company. It does not limit their liability under the Guarantees, which were made in their individual capacity and which are their own, independent obligations. The Guarantors' liability is contractual, and has nothing to do with whether they were or were not members of the Borrower. The Guarantees do not violate either the express provisions of SDCL § 47-34A-303 or the policy of the LLC Act or other public policy; therefore, SDCL § 53-9-1 does not apply.
2. Did Section 7.6 of Borrower's Operating Agreement require a vote of the majority to permit its members to give their Guarantees? No. Section 7.6

provides that a majority of members may, by vote, *require* the members to personally guarantee the obligations of the company. Section 7.6 does not require a member to obtain permission from the other members or the company, through a majority vote or otherwise, to personally guarantee a company debt.

Respectfully submitted this 22nd day of February, 2019.

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.

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CERTIFICATE OF COMPLIANCE

This Brief is compliant with the length requirements of SDCL § 15-26A-66(b). Proportionally spaced font Times New Roman 13 point has been used. Excluding the cover page, Table of Contents, Table of Authorities, Certificate of Service and Certificate of Compliance, Brief of Appellants contains 6,722 words as counted by Microsoft Word.

/s/ Haven L. Stuck
Haven L. Stuck

CERTIFICATE OF SERVICE

Haven L. Stuck, of Lynn, Jackson, Shultz & Lebrun, P.C., hereby certifies that on the 22nd day of February, 2019, he electronically filed the foregoing document with the Clerk of the Supreme Court via e-mail at SCClerkBriefs@ujs.state.sd.us, and further certifies that the foregoing document was also e-mailed to:

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The undersigned further certifies that the original and two (2) copies of the SDIF Limited Partnership 2's Brief Regarding Certified Question in the above-entitled action were mailed by United States mail, postage prepaid to Ms. Shirley A. Jameson-Fergel, Clerk of the Supreme Court, State Capitol, 500 East Capitol, Pierre, SD 57501 on the above-written date.

/s/ Haven L. Stuck
Haven L. Stuck

APPENDIX

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IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

SDIF LIMITED PARTNERSHIP 2, a South Dakota Limited Partnership, Plaintiff, vs. TENTEXKOTA, L.L.C., a South Dakota Limited Liability Company, W. KENNETH ALPHIN, TIMOTHY J. CONRAD, MICHAEL R. GUSTAFSON, GEORGE D. MITCHELL, DALE MORRIS, MARC W. OSWALD, RONALD W. WHEELER, and DWIGHT P. WILES, Defendants and Third-Party Plaintiffs, vs. JOOP BOLLEN, SDRC, INC., a South Dakota Corporation, SD INVESTMENT FUND LLC2, a South Dakota Limited Liability Company; and JOHN DOE 1-75, Third-Party Defendants.	Civ. No. 1:17-cv-01002-CBK **PLAINTIFF'S DESIGNATION OF EXPERT WITNESSES**

Comes now the Plaintiff, SDIF Limited Partnership 2, a South Dakota limited partnership, by and through its attorneys of record and hereby discloses its expert witnesses pursuant to Fed. R. Civ. P. 26(a)(2).

PRELIMINARY STATEMENT

1. Plaintiff reserves the right to supplement its expert witnesses' disclosure to include any opinions in response to Defendants and Third-Party Plaintiffs' experts' opinions, which, as of this date, have not been disclosed.

2. Plaintiff also reserves the right to name rebuttal expert(s) in response to Defendants and Third-Party Plaintiffs' experts' opinions, to the extent allowed by the rules.
3. Plaintiff further reserves the right to supplement its expert witnesses' disclosure in accordance with the Court's Scheduling Order and Rule 26(e), to include any opinions that are in response to evidence, information, deposition testimony, or documents that have not yet been disclosed or taken.
4. Finally, Plaintiff reserves the right to develop demonstrative aids to illustrate its experts' opinions.

EXPERT WITNESSES

1. **Daniel S. Klienberger**
   Professor Emeritus, Mitchell Hamline School of Law
   St. Paul, Minnesota

Daniel S. Klienberger's curriculum vitae is attached hereto as Exhibit A and incorporated herein by reference. It is anticipated that Mr. Klienberger will testify regarding his opinions that are set forth in the Affidavit of Daniel S. Klienberger, which is attached hereto as Exhibit B and incorporated herein by reference. The amount to be paid to Mr. Klienberger is set forth on Exhibit C, which is attached hereto and incorporated herein by reference.

2. **Todd Christoffer**
   Executive Vice President and Regional Loan Officer (Senior Lender)
   First National Bank of Pierre
   Pierre, South Dakota

Todd Christoffer's curriculum vitae is attached hereto as Exhibit D and incorporated herein by reference. It is anticipated that Mr. Christoffer will testify regarding his opinions that are set forth in the expert report attached hereto as Exhibit E and incorporated herein by reference. The amount to be paid to Mr. Christoffer is set out in Exhibit E.

3. **Rick Messer**
   Senior Vice President/Manager
   Pioneer Bank & Trust
   Rapid City, South Dakota

Rick Messer's curriculum vitae is attached hereto as Exhibit F and incorporated herein by reference. It is anticipated that Mr. Messer will testify regarding his opinions that are set forth in the expert report attached hereto as Exhibit G and incorporated herein by reference. The amount to be paid to Mr. Messer is set out in Exhibit G.

4. **Zachary H. Bryant**
   Attorney
   TDKnowles & Associates, PLLC
   Bellingham, Washington

Zachary Bryant's curriculum vitae is attached hereto as Exhibit H and incorporated herein by reference. It is anticipated that Mr. Bryant will testify regarding his opinions that are set forth in the expert report attached hereto as Exhibit I and incorporated herein by reference. The amount to be paid to Mr. Bryant is set forth in Exhibit H.

5. **Carolyn S. Lee**
   Partner
   Miller Mayer LLP
   Ithaca, New York

Carolyn Lee's curriculum vitae is attached hereto as Exhibit J and incorporated herein by reference. It is anticipated that Ms. Lee will testify regarding her opinions that are set forth in the expert report attached hereto as Exhibit K and incorporated herein by reference.

Dated this 5th day of March, 2018.

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.

By: _____

Haven L. Stuck
Steven J. Oberg
Eric R. Kerkvliet
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Sioux Falls, SD 57104
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Attorneys for Plaintiff

Steve Oberg
Lynn, Jackson, Shultz & Lebrun, PC
909 St. Joseph Street, 9th Floor
PO Box 8250
Rapid City, SD 57709

February 28, 2018

re: fee for expert testimony

Mr. Oberg;

Please accept this correspondence as billing for providing the Letter Report and Affidavit with regards to the questions relating to applicability of SDCL47-34A-303 on [personal guarantees from members of South Dakota Limited Liability Companies. The fee for the service is $350.00 payable to Todd Christoffer, 5291 Conifer Ln, Rapid City, South Dakota, 57702.

Should you need me to provide expert testimony in deposition for any court proceedings, the rate would be at $250.00 per hour plus reasonable travel expenses and meal reimbursement.

If you have any questions please feel free to contact me at 605-391-8705.

Sincerely,

Todd Christoffer

FIRST NATIONAL BANK

February 27, 2018

Re: SDCL 47-34A-303

Dear Mr. Oberg:

I am a resident of Rapid City, South Dakota, and am employed by First National Bank. I obtained a Bachelor of Science in Business Administration from the University of South Dakota in 1990. I have attended numerous banking related educational schools, seminars and continuing education classes. I have been in the banking business since 1987 and directly involved in the business of lending in South Dakota since 1990. Since 2010, I have held the position of Executive Vice President and Regional Loan Officer (Senior Lender) for First National Bank of Pierre, SD. Before that, I was Branch President of First National Bank in Rapid City, from 2001 – 2010, during which I was responsible for all commercial lending functions at the branch. Prior to that, from 1997-2001 I was a commercial loan officer for FM Bank (now Great Western Bank), in Watertown and Aberdeen SD.

In my current position, I oversee 12 branch banking offices and an approximately $600 million loan portfolio, consisting primarily of commercial, commercial real estate and agriculture loans varying in size up to $26 million per loan. In addition, I oversee the credit administration as well as the credit analysis functions of the bank. In doing so, one of my responsibilities is to train and administer loan personnel on the systems and requirements to properly document the borrower and guarantor's obligations to the loan. Further, I conduct loan document reviews for all of our banks' loans originated in amounts equal to or over $1.5 million, in order to check for accuracy and proper documentation prior to origination. I also conduct post closing reviews of our loans as well as file review for other bank offices in our ownership group. I am attaching a copy of my professional resume'.

Most of our larger loans are commercial loans either to corporations or limited liability companies. This will confirm that you have asked me to review SDCL §47-34A-303, and

to review examples of the commercial loans made by our banks to limited liability companies secured by personal guarantees of their members, and based on my knowledge of the manner in which such loans are originated, documented, and secured, and if commercial lenders such as First National Bank verify that the articles of organization of the borrowing entity explicitly provide for personal guarantees, and whether in fact the articles of our limited liability company borrowers typically even address the question.

This will confirm that I have not previously been retained or offered expert opinions in any court of law. However, I am very familiar with the practice of loan origination and documentation as it relates to the loan transactions involving limited liability companies within our bank. For any significant loan to a limited liability company, we would and do ordinarily require personal guarantees. Almost without exception, where a limited liability company borrows money from our banks, loan guarantees are signed by the members of the limited liability company.

In the ordinary course of business, we also request and obtain a copy of the limited liability company's articles of organization. I am familiar with both the form and substance of the guarantees required by our banks, and with the form and substance of articles of organization of limited liability companies who borrow from us. The short answer to your questions are "no." We do not verify that a borrowing limited liability company's articles of organization provide for the liability of its members on their personal guarantees. Further, it does not appear that the articles of organization for those limited liability companies that do borrow from our banks explicitly address or provide for personal liability of members who sign personal guarantees to secure the limited liability company's debt. I have reviewed several representative examples of the articles of organization provided by limited liability companies that comprise some of our larger accounts. For the accounts and the examples I have reviewed, I have also verified that personal guarantees have been required and provided by the members as security for the underlying obligations of the limited liability company. I have further verified that in each of these, the articles of organization are silent with regard to the authority of or the effect of personal guarantees signed by members of the limited liability company. I am not aware of any instance in which our banks have ever required that a limited liability company borrower amend its articles of organization, in order to explicitly address, authorize, or effectuate the personal guarantees of the borrower's members.

I am advised that a question has arisen in the pending lawsuit referenced above, as to the proper interpretation of SDCL §47-34A-303, and whether the statute can be interpreted so as to require that the articles of organization of a limited liability company be written or amended to authorize and/or effectuate personal guarantees of members to secure a debt of the limited liability company in which they are members. I am not a lawyer, but I do not read the statute as shielding members of a limited liability company from their personal guarantees of the debt of the entity of which they are a member, absent an

explicit provision for such guarantees in the articles of organization. In practice, that is certainly not the manner in which our banks have applied the law. I am not aware of our banks ever requiring or ever receiving articles of organization that explicitly address personal guarantees by a member of a limited liability company. Furthermore, this issue has never been raised or brought to my attention by the South Dakota Banking Association, or by any other banking association, or by any lawyer or law firm associated with this organization or any other trade association.

If personal guarantees of limited liability company members were nullified by S.D.C.L. §47-34A-303 absent explicit language authorizing such personal guarantees in a limited liability company's articles of organization, then based on what I know from my experience in the commercial lending business in our state, personal guarantees securing a very significant portion of limited liability company debt would be nullified in South Dakota. If so, then the potential repercussions for our bank and most if not all commercial lenders in our state, and for our customers operating as limited liability companies, would be very far reaching and profound. Credit would likely come to a halt, at least temporarily, until this issue was addressed and resolved with respect to all outstanding loans and all new credit applications involving limited liability companies. For most sizeable loans to limited liability companies, secured by guarantees, I would expect that the terms would likely have to be renegotiated, at great additional expense to all involved.

Respectfully,

Todd Christoffer
Division President

Richard V. "Rick" Messer
4853 Skyview Dr., Rapid City, SD 57702
Phone: 605-391-6310

Professional Objective

To fulfill the mission of Pioneer Bank & Trust through a strategy that includes long term profitability and value to shareholders while maintaining excellence in standards of trust, safety and soundness.

Education & Training

- MBA – University of South Dakota. Completed August 1992
- BA – Chadron State College. Completed May 1980. Major – Business Administration.
- Graduate School of Banking – Boulder, CO. Completed July 2005
- Have also completed extensive bank training including the College of Commercial Credit at Norwest University as well as numerous seminars including topics such as sales, credit analysis, loan documentation, financial management of the closely held business, time management, stress management, dealing with difficult employees and diversity.

Employment

PIONEER BANK & TRUST October 1997 – Present

Senior Vice President/Manager – January 2000 to Present
Currently Rapid City Market Manager overseeing two banks with total assets of approximately $280 Million and total loans of approximately $155 Million. I also serve as a Board Member of the Pioneer Bank & Trust Board of Directors.

Vice President – Business Banking – October 1997 to January 2000
Responsible for new business development and administration of a $7mm loan portfolio.

NORWEST BANK SOUTH DAKOTA, N.A. September 1980 – October 1997

Vice President – Business Banking – May 1995 to October 1997
Managed a $32MM portfolio. Responsibilities included the sale of all business banking products with a goal to achieve 100% of each clients business. Also responsible for the analysis and presentation of new credit relationships as well as the administration of the existing relationships.

Employment (con't.)

District Credit Officer – February 1994 to May 1995

Position based in Rapid City with responsibilities including credit process review, credit training and chair of the local and district credit committees. Credit process review included the review of banks throughout the entire state of South Dakota and Southwest Minnesota.

Business Banking Officer – May 1989 to February 1994

Position based in Spearfish, SD. Managed a $12MM commercial loan portfolio. Responsible for new business development and administration of the portfolio. This position was also considered the "second in command" and served as a resource person for other bankers in the office.

Credit Analyst – February 1989 to May 1989

Based in the regional office in Sioux Falls, SD; responsible for spreading financial statements for business bankers and preparation of reports related to large commercial credits for the Board of Directors.

Consumer Credit Underwriter – May 1987 to February 1989

Moved to the Sioux Falls regional office to assume a newly created position underwriting consumer loans of all types for 31 branches throughout the state of South Dakota and the underwriting of dealer paper for auto dealers throughout the state of South Dakota and Southwest Minnesota.

Personal Banking Officer (Spearfish, SD) – May 1983 to May 1987

Moved from Rapid City to the Spearfish office. In addition to personal lending responsibilities, I was cross-trained in residential real estate originations and handled approximately $1mm in commercial loans.

Personal Banking Officer (Rapid City, SD) – September 1981 to May 1983

Responsibilities included direct installment lending and the collection of delinquent accounts. Also purchased and collected indirect installment contracts and completed monthly floor plan inspections.

Management Trainee – September 1980 to September 1981

Received training in all areas of the bank including the Commercial Credit Department, Controllers Department and Retail Banking.

<u>Past/Present Activities</u>

Treasurer, Spearfish Jaycees, 1985
President, Spearfish Jaycees, 1986
District Director, SD Jaycees, 1987
Vice President, Spearfish Optimists, 1990
President, Spearfish Optimists, 1991
Board of Directors, Spearfish Optimists, 1990–1993
Vice President, Spearfish Economic Development Corporation, 1993
Board Member, Spearfish Economic Development Corporation, 1990–1993

Past/Present Activities (con't.)

Liaison between Spearfish Economic Development Board and Spearfish Chamber, 1993
Spearfish Mayor's Economic Revolving Fund Committee, 1991-1993
Rapid City Noon Optimist Club Treasurer, 1995
Leadership Rapid City Graduate, 1994
Leadership Rapid City Board, 1995-1998
RC Chamber of Commerce Military Affairs Honorary Commander, 1999-2001
Rapid City Chamber Economic Development Retention & Expansion Committee, 1997-2004
YMCA Capital Campaign Volunteer, 1996, 2000 & 2008
YMCA Fiscal Committee, 1998-2010
YMCA Board of Directors, 1999-2010
YMCA Board Secretary, 2000
YMCA Board VP, 2001
YMCA Board President, 2002
YMCA Endowment Development Committee, 2002-2009
YMCA Investment Committee, 2003-2010
YMCA Board Treasurer 2006-2010
Behavior Management Systems Board of Directors, 2005-2009
Behavior Management Systems Board President, 2007
United Way Board of Directors, 2004-2006
Canyon Lake Little League Board, 2011-2013
Rimrock E Free Church Financial Secretary, 2011-2012
Rimrock E Free Church Board Treasurer, 2013-2015, 2017 - present
Rapid City Chamber of Commerce Board of Directors, 2014 - 2017
Black Hills Works Board of Directors, August 2014 to present

Key Competencies

I have always had the ability to relate well to my co-workers and my customers and to project a confident, professional image. I also have the ability to prioritize work and I believe that I have proven that I can lead a team to work toward common goals. I understand that a leader needs to surround himself with capable, ethical people to be successful. My credit background has been extensive over the last 37 years. My experience on the Senior Management team and Board of Directors with a high quality organization has been extremely beneficial.

From:	Rick Messer <RickM@pioneerbankandtrust.com>
Sent:	Wednesday, February 28, 2018 11:14 AM
To:	Steve Oberg
Subject:	Letter regarding SDCL 47-34A-303
Attachments:	DOC022818-02282018110448.pdf

Hello Steve – attached is my letter regarding the above referenced statute. I am happy to provide this letter at no charge. If there is a need for my time in a deposition the charge would be the Federal Minimum Wage per hour. If there were travel expenses they would be billed as incurred. Please let me know if you have any questions.

Sincerely,

Rick Messer
Senior Vice President / Manager
NMLS #703942

Pioneer Bank & Trust

Pioneer Bank & Trust
PO Box 9189
2001 West Omaha St.
Rapid City, SD 57709
Phone 605-341-2265
Fax 605-341-7425

Pioneer Bank & Trust

Member FDIC

Local.

Re: SDCL 47-34A-303 & Personal Guarantees

Dear Mr. Oberg:

As you know, I am a resident of Rapid City, South Dakota, and am employed by Pioneer Bank & Trust. I received an MBA at the University of South Dakota in 1992, and completed a Graduate School of Banking degree in Boulder, Colorado in 2005. Since 2000, I have served as Senior Vice President/Manager. I oversee two banks with total loans of approximately $155 Million and serve on the Pioneer Bank & Trust Board of Directors. I attach a copy of my resume.

Many of the larger loans we have outstanding involve commercial loans to businesses operating as corporations or limited liability companies under South Dakota law. I am familiar with the practice of loan origination and documentation as it relates to the loan transactions involving limited liability companies who borrow from our bank. For any significant sum borrowed by a limited liability company at our bank, we require personal guarantees. Loan guarantees are often signed by members of a limited liability company seeking to borrow money from our bank.

As part of the process, we typically request and obtain copies of a limited liability company's articles of organization, and I am generally familiar with the articles of organization of those limited liability companies who borrow from our bank. I have also reviewed several specific representative examples of articles of organization provided by limited liability companies who represent some of our larger accounts. I have also verified that personal guarantees were required and provided by members of the limited liability company borrowers, as security for the underlying obligations of the limited liability companies borrowing money from Pioneer Bank & Trust. For these accounts, I have verified that in each instance, the articles of organization were and remain silent with regard to the authority of or the effect of personal guarantees signed by the limited liability company members. I am not aware of any instance in which our bank has ever required that a limited liability company borrower alter or amend its articles of organization, in order to explicitly require a statement of authority for personal guarantees of the members.

I am advised that, in the referenced litigation in which you are involved, a question has arisen regarding an interpretation of SDCL 47-34A-303, and whether the statute would nullify personal guarantees executed by the members to secure the debt of a limited liability company, absent express authorization of such personal guarantees in the articles of organization for the company. You have asked me about the process of loan origination involving limited liability companies that borrow from our banks. Specifically, you asked if we require that our borrowers provide articles of organization that authorize or provide for personal guarantees of limited liability company debt.

The answer is no. To my knowledge, we have never required nor am I aware that our bank has ever required that articles of organization of a limited liability company borrowing from us be written or amended so as to explicitly address, authorize, or give effect to personal guarantees of members of a limited liability company, who wish to personally guaranty the debt as required as a part of the loan origination process involving a loan transaction to a limited liability company. Nor have I previously heard anyone suggest that S.D.C.L. 47A-34A-303 requires a specific provision, within a limited liability company's articles of organization, to authorize or validate personal guarantees signed by a member of a limited liability company. I am not aware of any commercial lender that has interpreted the statute as requiring that the articles of organization be amended in order to authorize personal guarantees. Based on my personal experience in the commercial lending business, commercial lenders of our State and their customers have not applied and are not applying this statute as if it requires explicit authorization of personal guarantees of members within the articles of organization of a limited liability company, as a condition of the validity of such personal guarantees.

In my opinion, if S.D.C.L. 47-34A-303 were now interpreted as requiring explicit authorization of personal guarantees by members of a limited liability company in order to validate those personal guarantees that secure the debt of a limited liability company, credit currently offered and available to limited liability companies would be disrupted and there would be a scramble to renegotiate the terms of outstanding loans, both at our bank and others. This would likely have a detrimental effect on both commercial lenders and their customers, on credit, and on business in our state generally.

Dated this 14th day of February, 2018.

Rick Messer
Senior Vice President/Manager

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 28825

SDIF LIMITED PARTNERSHIP 2, a South Dakota Limited Partnership,

Plaintiff,

vs.

TENTEXKOTA, L.L.C., a South Dakota Limited Liability Company,
W. KENNETH ALPHIN,
TIMOTHY J. CONRAD,
MICHAEL R. GUSTAFSON,
GEORGE D. MITCHELL,
DALE MORRIS,
MARC W. OSWALD,
RONALD W. WHEELER, and
DWIGHT P. WILES,

Defendants.

Certified Question from the United States
District Court, District of South Dakota, Northern Division
Honorable Charles B. Kornmann, Presiding Judge

REPLY OF DEFENDANTS TENTEXKOTA, L.L.C., as South Dakota Limited Liability Company, W. KENNETH ALPHIN, TIMOTHY J. CONRAD, MICHAEL R. GUSTAFSON, GEORGE D. MITCHELL, DALE MORRIS, MARC W. OSWALD, RONALD W. WHEELER, AND DWIGHT P. WILES

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Certified Question Accepted January 3, 2019

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REPLY ANALYSIS

I. REFORMULATION OF A CERTIFIED QUESTION MAY ONLY BE DONE BY THE DECIDING COURT.

SDIF LP2 omits an important section of law related to reformulation of the certified questions. While SDIF LP 2 is correct that the majority rule allows the deciding court to reformulate a certified question, the Oregon Supreme Court went on to hold that reformulation of a certified question by the deciding court "should be exercised with reserve, ordinarily after consultation with the certifying court, and for the primary purpose of facilitating a resolution of the actual question of law posed by the case in which certification is sought." *Western Helicopter Servs., Inc. v. Rogerson Aircraft Corp.* 811 P.2d 627, 633–34 (Ore. 1991). SDIF LP2 also fails to disclose that on December 11, 2018, it wrote to the District Court requesting the reformulation of the certified questions as follows:

> This Court hereby certifies sua sponte to the Supreme Court of the State of South Dakota the following questions of law: (1) Does SDCL 47-34A-303 invalidate personal guarantees signed by members of an LLC (a) if that LLC has not amended its articles of organization to state that its members are liable for the LLC debts, obligations, and/or liabilities and (b) *(no change suggested in part (b) or in question 2 as set forth in the Order).* 3. Does the provision in Section 7.6 of the Operating Agreement stating "The Members may also be required by vote of the Majority to personally guarantee the obligations of the Company" effect the enforceability of the separate guarantees voluntarily signed by members?
>
> Plaintiff submits that these changes reflect the record in this case.

Doc. 208. SDIF LP2's request was denied by the District Court on December 18, 2018. Doc. 211. Thus SDIF LP2's reformulation is improper.

II. SDIF LP2'S ARGUMENT IGNORES THE CONDITIONS PRECEDENT TO LIABILITY.

The central flaw in SDIF LP2's argument is that it focuses solely on status-based liability while summarily dismissing the conditions precedent to imposing liability under South Dakota law. While it is true that many states have adopted legislation allowing members to automatically waive liability protection, South Dakota has not. Instead, South Dakota, along with a handful of other states, has adopted unique conditions precedent to imposing liability on members of an LLC. *See* SDCL 47-34A-303(c).

Contrary to SDIF LP2's argument that the language doesn't make a "*difference* in this case", this Court holds that the true intention of the law "is to be ascertained primarily from the language expressed in the statute," and "determined from what the legislature said, rather than what the courts think it should have said[.]" *Martinmaas v. Engelman,* 2000 S.D. 85, ¶ 49, 612 N.W.2d 600, 611 (quoting *Moss v. Guttormson*, 1996 S.D. 76, ¶ 10, 551 N.W.2d 14, 17); *see also State v. Livingood*, 2018 S.D. 83, ¶ 33, 921 N.W.2d 492, 499. Specifically, "the court must confine itself to the language used." *Martinmaas*, 2000 S.D. 85, ¶ 49, 612 N.W.2d at 611. SDCL 2-14-13 provides:

> [w]henever a statute appears in the code of laws enacted by § 2-16-13 which, from its title, text, or source note, appears to be a uniform law, it shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

Citing this statute, this Court has previously noted: "we are statutorily mandated to interpret uniform laws such as the [UPC] 'to effectuate its general purpose to make uniform the law of those states which enact it.'" *In re Estate of Jetter*, 1997 S.D. 125, ¶11, 570 N.W.2d 26, 29 (citations and quotations omitted). Thus, precedent compels this

Court to interpret and construe SDCL 47-34A-303(c) as adopted, and not as the uniform law on which it is based, was subsequently amended and interpreted by other states.

Confined to the language of SDCL 47-34A-303(c), the law of Louisiana, Ohio, Tennessee, Georgia, Missouri, and Nevada is not relevant. The only relevance these states have is to demonstrate that other state legislatures have adopted alternative solutions for member guarantees. *See N.E.N.H., LLC v. Vrousard-Baer Holdings, LLC*, 142 So. 3d 91 (La Ct. App. 2014); *R.L.R. Investments, LLC v. Wilmington Horsemens Grp., LLC*, 22 N.E.3d 233 (Ohio Ct. App. 2014); *Regions Bank v. La. Pipe and Steel Fabricators,* 80 So. 3d 1209 (La Ct. App. 2011); *Creative Res. Mgmt., Inc. v. Soskin,*No. 01A01-9808-CH-00016, 1998 WL 813420 (Tenn. Ct. App. Nov. 25, 1998); *Ervin v. Turner,* 662 S.E.2d 721 (Ga. Ct. App. 2008)*; White v. Longley*, 244 P.3d 753 (Mont. 2010); *Derges v. Hellweg*, 128 S.W.3d 186 (Mo. Ct. App. 2004); *Harada v. Doiron,* No. 2:04-CV-1320-PMP-RJJ, 2007 WL 983843 (D. Nev. March 30, 2007); *Milk v. Total Pay and HR Sols., Inc.* 634 S.E.2d 208 (Ga. Ct. App. 2006); *Silman's Printing, Inc. v. Velo Int'l,* No. 2004CA00095, 2005 WL 100963 (Ohio Ct. App. Jan. 18, 2005).

West Virginia does, however, have a statute similar to SDCL 47-34A-303. In *Kubican v. The Tavern LLC*, 752 S.E.2d 299 (W.Va. 2013), the court stated: "One of the principal reasons to use an L.L.C. is that the owners and managers, if the owners so elect, have limited liability from **contract and tort claims** of third parties." *Id.* at 311 (emphasis added). The *Kubican* court also held that a claimant must pierce the corporate veil in order to impose liability upon the members of an LLC, in the absence of the written provisions of section 303(c). *See id.* at 305–06. The holding in *Kubican* undermines SDIF LP2's argument that there is a distinction between contractual liability

and status-based liability. *See* SDIF LP2 brief at 11. In this case, SDIF LP2 has not sought to pierce Tentexkota's corporate veil, and the absence of the section 303(c) provisions here precludes imposing liability upon the members.

Plaintiff also misapplies *Baatz v. Arrow Bar*, 452 N.W.2d 138 (S.D. 1990) in attempting its end-run around section 303(c). In *Baatz,* two individuals were injured in a roll over collision caused by an uninsured drunk driver. 452 N.W.2d at 140. The plaintiffs alleged that the Arrow Bar had overserved the at-fault driver. *Id.* Because the owners had previously executed a promissory note guaranteeing the balance of the purchase price and corporate debts of Arrow Bar, Inc., the plaintiffs argued that the court should pierce the corporate veil and impose personal liability upon the owners for their injuries. *Id.* at 141. The South Dakota Supreme Court held that personal guarantees are contractual obligations and cannot be enlarged to impose tort liability. *Id. Baatz* does not address the validity of guarantees under the facts presented in this matter, nor the impact of SDCL 47-34A-303(c) on guarantees executed in the absence of that section's written requirements and is of no use in resolving the questions currently before this Court.

A. North Dakota does not have an "identical" statute to South Dakota.

SDIF LP 2 errs when it describes North Dakota as a state with an identical statute to South Dakota. North Dakota's member liability shield differs from SDCL 47-34A-303(c). The North Dakota statute provides as follows:

> 1. The debts, obligations, or other liabilities of a limited liability company, whether arising in contract, tort, or otherwise:
>
> a. Are solely the debts, obligations, or other liabilities of the company; and
>
> b. Do not become the debts, obligations, or other liabilities of a member, manager, or governor solely by reason of the member acting as a member, manager acting as a manager, or governor acting as a governor.

> 2. The failure of a limited liability company to observe formalities relating exclusively to the management of its internal affairs is not a ground for imposing liability on the members, managers, or governors for the debts, obligations, or other liabilities of the company.
>
> 3. Except as relates to the failure of a limited liability company to observe any formalities relating exclusively to the management of its internal affairs, the case law that states the conditions and circumstances under which the corporate veil of a corporation may be pierced under North Dakota law also applies to limited liability companies.

NDCC 10-32.1-26. North Dakota's statute does not contain the written requirements of section 303(c) and therefore case law interpreting North Dakota's statute is not instructive here.

In addition to the different statutes, SDIF LP2's reliance on *Addy v. Myers*, 616 N.W.2d 359 (N.D. 2000) in support of its arguments is further misplaced based upon the distinct financing arrangement at issue in that case. In *Addy*, certain owners of the LLC borrowed money in their personal capacities and lent that money to the LLC in order to fund the operations of a restaurant the company owned. *See Addy*, 616 N.W.2d at 364 ("The corporation was never and is not now indebted to the bank for the funds discussed in the opinion. Addy and Hutchens were. They indebted themselves to the bank personally because the corporation could not at that time obtain a line of credit on its own, being a new business.") (Glaser, Surrogate. J., dissenting). In contrast, the guarantees at issue in this matter were executed on behalf of a debt which Tentexkota had itself incurred.

B. While Illinois has a similar statute to South Dakota, the cases cited by SDIF LP2 are of little value.

While SDIF LP2 is correct that the decisions in *Puleo v. Topel*, 856 N.E.2d 1152 (Ill. App. Ct. 2006) and *Dass v. Yale*, 3 N.E.3d 858 (Ill. App. Ct. 2013) do not involve

guarantees, SDIF LP2 misses the context provided by both cases. In *Puleo* and *Dass*, like the present case, the parties were directly litigating the applicability of section 303(c). Both the *Puleo* and *Dass* courts engaged in a thorough examination of the legislative history of the statute in reaching the conclusion that the written requirements of section 303(c) are the paramount consideration when determining member liability. *Dass*, 3 N.E.3d at 866 (quoting *Puleo*, 856 N.E.2d at 1156). Both courts stressed the importance of legislative history when dealing with section 303. *Id.*

The case law SDIF LP2 relies on from Illinois is of little value in this case as none of the cases cited address the applicability of section 303. SDIF LP2's argument that Illinois courts do not find section 303 relevant to member liability is incorrect in light of the *Dass* and *Puleo* holdings and is unsubstantiated by any of the cases discussed below.

The holding of *Total Merchant Services, Inc. v. Rhinehart et. al. Entertainment Group, LLC*, No. 15-1327, 2015 WL 7428521 (C.D. Ill. Nov. 20, 2015) does not apply to the circumstances in this case. In *Total Merchant Services,* the court was faced with a motion to dismiss and a motion for a more definite statement, rather than determining the ultimate liability of the defendant. *Id.* at *2. The court relied upon the language of the contract to find that the defendant had sufficient notice of the plaintiff's claims to prepare a response. *Id.*

In *BMO Harris Bank, N.A. v. K&K Holdings, LLC*, the court addressed whether subsequent lawsuits based upon the same guaranty constituted res judicata. 59 N.E.3d 807, 810 (Ill. App. Ct. 2016). The opinion does not address whether the parties followed the proper formalities to impose liability in the underlying litigation making its application in this case moot. Without knowing whether the corporate formalities were

followed, or whether the court had the opportunity to consider the issue in the underlying case, the analysis in *BMO* provides no analytical guidance.

Similarly off-point is *Lyons Lumber & Building. Center, Inc. v. 7722 North Ashland, LLC.* 59 N.E.3d 830 (Ill. App. Ct. 2016). In *Lyons,* the defendant failed to answer the plaintiff's complaint. *Id*. at 832. After the plaintiff moved for default judgment, the defendant appeared *pro se* with counsel later appearing and then becoming unreliable during litigation resulting in default judgment against the defendants. *Id.* 832–33. Subsequently, new counsel appeared on behalf of the defendants and moved to vacate the default judgment. *Id.* Again, the opinion does not discuss whether the defendant followed the proper formalities to impose liability under section 303(c), but instead only addresses the statement by the defendant that he did not understand the document he was signing. *Id.*at 838. Thus, *Lyons* also provides this Court with no analytical guidance in answering the district court's certified questions.

Hollywood Boulevard. Cinema, LLC v. FPC Funding II, LLC, has no relevance to the certification issues before this Court as that case addresses whether a guaranty can be assigned from one creditor to another. 23 N.E.3d 381 (Ill. Ct. App. 2014). The court ultimately dismissed the case, finding that the guarantor was not a party to the assignment contract and lacked standing to object. *Id.* at 390.

The focus on carve-out provisions of guaranty agreements discussed in *Bank of America, N.A. v. Freed*, 983 N.E.2d 509, 515 (Ill. Ct. App. 2012) is also not relevant. In *Bank of America,* the defendants defaulted on a loan resulting in foreclosure proceedings. *Id.* at 511. During foreclosure, defendants also contested the appointment of a receiver. *Id.* Plaintiff then sought to enforce guaranty agreements based upon the carve-out that

prevented borrower from contesting the appointment of a receiver. *Id.* Again, *Bank of America,* does not discuss the organizational documents of the limited liability company and thus is not instructive here. The *Bank of America* court was not asked to determine the validity of personal guarantees that were executed in violation of section 303(c), nor does that case discuss any other issue relevant to the certified questions now before this Court.

While at first blush *Dutch Fork Development Group II, LLC. v. SEL Properties, LLC*, 753 S.E.2d 840 (S.C. 2012) appears to be on point, there is an important distinguishing characteristic which renders it inapplicable here. The guarantor in *Dutch Fork* was the manager of the LLC, not a member. South Carolina's version of section 303(c) only pertains to member liability, thus preventing the court from analyzing the case through the lens of South Carolina's section 303(c). *See* S.C. Code Ann. 33-44-303(c), *see also Dutch Fork*, 753 S.E.2d at 843. As section 303(c) only pertained to members, the court's analysis was restricted to the manager's liability as a guarantor under section 303(a). *Id*. Additionally, the central question at issue was whether the manager could be held liable for the tort of tortious interference with a contract, a question which turned on whether he was acting within the scope of his authority as manager while engaging in the allegedly tortious conduct. *Id.* at 844–46.

III. SDIF LP2'S POLICY ARGUMENT ASSUMES THAT ALL LOAN TRANSACTIONS FAIL TO COMPLY WITH SECTION 303(C).

SDIF LP2's policy argument that compliance with section 303(c) would deal a blow to the South Dakota banking industry presupposes that lenders and LLCs do not already comply with the requirements of section 303(c). By requiring liability of the LLC members be documented in the articles of organization, all potential creditors are placed

on notice as to whether members can incur liability personally. In this case, Tentexkota's articles of organization were on file with the Secretary of State on November 20, 2006, four years prior to the signing of the guaranty and pledge agreements. *See* Doc. 93-8

When addressing the applicability of section 303 and piercing the corporate veil, the *Kubican* court held the analysis is "fact based and must be applied to LLCs on a case-by-case basis." 232W. Va. 268, 311. Similarly, this Court's holding that "[d]ecisions about whether the pierce the corporate veil must be decided in accordance with the unique, underlying facts of each case" is equally applicable here. *Brevet Inter., Inc. v. Great Plains Luggage Co.*, 2000 SD 5, ¶ 25, 604 N.W.2d 268, 274.

SDIF LP2's argument ignores the ambiguities found in the contracts it drafted. The agreements themselves define the guarantor as a member of Tentexkota and state that the contract is made in furtherance of the loan between SDIF LP2 and Tentexkota, LLC. *See* Doc. 93-8. Some members even signed "member" or "president" under their signature at the end of the document. *See* Docs. 93-5; 93-9.

Professor Ronald H. Filler opines that under the facts in this case the "Individual Defendants named in this matter clearly executed the Guaranty and Pledge Agreements in their capacity as Members of Tentexkota." Doc.82-1. Professor Filler also opines that due to SDCL 47-34A-303(c) the "LLC shield thus prevents its members from incurring liability under these circumstances." *Id.* SDIF LP2 incorrectly states that the opinions of their expert witnesses are unchallenged. SDIF LP2 also incorrectly states that it is "undisputed that Guarantors Gustafson, Mitchell, Wheeler and Wiles were never members of Borrower" as stated by SDIF LP2. *See* SDIF LP2 brief at 10; see Doc. 180. In fact, as noted above, the guarantees themselves specifically state that each of the

guarantors is a member of Tentexkota. *See* Doc. 134-8. Furthermore, because the issue of membership status is not before this Court as part of the certified questions, this argument by SDIF LP2 is irrelevant to this Court's analysis.

Professor Filler opines directly upon the applicability of section 303(c) to the facts in this case and finds that all the individual Defendants signed the guaranty and pledge agreements as members. Doc. 82-1. Unsurprisingly, the unsworn statements of bankers provided by SDIF LP2 reach the conclusions that the guarantees are enforceable regardless of the failure to comply with the relevant statutory requirements. However, Professor Filler's opinion, based upon a lifetime of objective experience, is far more persuasive than these self-interested assessments.[1] Requiring the lending industry to properly comply with South Dakota's LLC statutes does not lead to absurd or unreasonable consequences as SDIF LP2 argues. Rather, to allow lenders to by-pass statutory requirements would render the liability shield meaningless.

IV. THE GUARANTEES VIOLATE SDCL 47-34A-303(c) AND ARE THEREFORE INVALID UNDER SDCL 53-9-1.

SDIF LP2's argument that invalidation under SDCL 53-9-1 requires a contract to be expressly prohibited by a statute fails under the plain language of SDCL 53-5-3, which states that "[w]here a contract has but a single object and such object is unlawful in whole or in part, or wholly impossible of performance, or so vaguely expressed as to be wholly unascertainable, the entire contract is void." SDCL 53-5-3; *see also* SDCL 20-2-2;

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[1] Moreover, the expert opinions SDIF LP2 relies upon have not been subjected to cross-examination, nor have they been sufficiently tested under *Daubert*. *See Daubert v. Merrell Dow Pharmaceuticals, Inc,* 509 U.S. 579, 597, 113 S.Ct. 2786, 2799, 125 L.Ed.2d 469 (1993).

Willers v. Wettestad, 510 N.W.2d 676, 680 (S.D. 1994) ("It is the general rule that a contract which is contrary to statutory or constitutional law in invalid and unenforceable.").

By failing to follow the proper procedures to impose personal liability, the parties entered into contracts that violate the express provisions of SDCL 47-34A-303(c). Any injury to SDIF LP2 by virtue of the guarantees being void is mitigated by the fact that SDIF LP2 has other remedies, including the mortgage on the property and against the LLC entity under the credit agreement. The guarantees in question here were in violation of SDCL 47-34A-303(c), and thus South Dakota law and the precedent of this Court render them unlawful and unenforceable. *See* SDCL 53-5-3, 53-9-1; *Willers*, 510 N.W.2d at 680.

V. THE LEGAL EFFECT OF TENTEXKOTA'S OPERATING AGREEMENT PROVES THE REQUIREMENTS OF SDCL 47-34A-303(c) WERE UNMET.

SDIF LP2 reformulated the District Court's third question to address whether Section 7.6 of the Operating Agreement requires a majority vote for the membership to incur liability. While the answer to SDIF LP2's reformulated question is "yes", the reformulated question confuses the issues in this case. The District Court seeks guidance on the **legal effect** of the LLC's operating agreement, specifically whether, member liability is allowed only through a majority membership vote. Meaning the District Court seeks guidance on how the lack of a vote under the requirements of the Operating Agreement impacts the outcome under Section 303(c), not whether a vote was required as presented by SDIF LP2. This distinction is important as it is undisputed that no vote was taken by the membership, which is specifically stated in the District Court's certified question.

To determine the legal effect of the Operating Agreement, it must be read in conjunction with SDCL 47-34A-303(c) and the Articles of Organization. Tentexkota's Articles of Organization provide that no member may be personally liable for the company debts under SDCL 47-34A-303(c). Section 7.6 of the Operating Agreement permits personal liability only through a vote of the majority, which would amend its Articles of Organization and constitute the required written consent under SDCL 47-34A-303(c)(2). As this vote was never taken, the requirements of SDCL 47-34A-303(c) were not met and the members did not waive their liability protection. By failing to obtain the necessary vote required by the Operating Agreement, the requirements of SDCL 47-34A-303(c) were unmet making the debt that of the company and not the individual members.

In addition to the legal effect under SDCL 47-34A-303(c), the lack of majority vote also proves membership intent to act on behalf of the LLC and not waive corporate liability protection. This is further supported by Dwight Wiles testimony, which SDIF LP2 takes out of context. Mr. Wiles testified as follows:

> Q. You're not testifying under oath that you were required to sign a **personal guarantee**; isn't that true?
>
> A. That is correct.

Doc. 163-3; at 6. Mr. Wiles stated he didn't sign a guarantee in his personal capacity. He never testified that he did so voluntarily, intending to be personally bound, as SDIF LP2 states. *See* SDIF LP2 brief at 24. SDIF LP2 improperly expands Mr. Wiles testimony to reach their desired result.

CONCLUSION

SDCL 47-34A-303(c)'s unique provisions are designed to protect members from being individually liable for an LLC's debt unless certain conditions are met. As those

conditions were not met in this case, the members cannot be held personally liable for the debt of the LLC. SDIF LP2 requests this Court to ignore these requirements to allow personal judgment against the members, rather than to pursue its proper remedies under the credit agreement.

The answer to the District Court's questions, which are properly before this Court, are: "yes", SDCL 47-34A-303 invalidates personal guarantees if the proper procedures are not met; "yes", SDCL 53-9-1 does apply to prohibit SDIF LP2 from recovery under the guarantees; and because the operating agreement was not complied with to allow the members to personally guarantee the debt of the company, those members are not liable for those debts.

Dated this 11th day of March, 2019.

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This Brief was prepared using Microsoft Word, and contains 3745 words from the Reply Analysis through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

Dated this 11th day of March, 2019.

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