IN THE

Supreme Court

of the

State of South Dakota

No. 30814

TRIGGER ENERGY HOLDINGS, LLC, and
GULF COAST INVESTMENTS, LLC
PLAINTIFFS/APPELLANTS

VS.

KENT STEVENS, as an individual, an officer, and agent;
TCU HOLDINGS, LLC, &
BLUEPRINT ENERGY PARTNERS, LLC,
DEFENDANTS/APPELLEES.

An appeal from the Circuit Court, Second Judicial
Circuit Minnehaha County, South Dakota

The Hon. Douglas Barnett
CIRCUIT COURT JUDGE

APPELLANTS' BRIEF

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Notice of Appeal filed on August 27, 2024

Appellees:
Kent Stevens, as an individual, an officer and agent;
TCU Holdings, LLC; and
Blueprint Energy Partners, LLC

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INTRODUCTION

This appeal asks the question: *What remedies are available when a fiduciary officer threatens to destroy the company unless his fellow shareholders agree to sell him their shares at a deep discount?*

The Parties

The Appellants in this appeal are Trigger Energy Holdings, LLC, ("Trigger") and Gulf Coast Investments, LLC, ("Gulf Coast").

The Appellees include Kent Stevens; his company, TCU Holdings, LLC; and the company which was the subject of the buyout, Blueprint Energy Partners, LLC, ("Blueprint").

From its founding, and prior to the buyout, Blueprint was owned in three equal shares by Trigger, Gulf Coast, and TCU.

The Record

The Circuit Court disposed of this matter following a summary judgment hearing on January 18, 2024, and that Hearing Transcript is referred to by page number as, *e.g.*, [HT 123]. References to the settled record are denoted by, *e.g.*, [R.456].

There were three prior hearings of minimal relevance to this appeal, including on March 9, 2020; September 14, 2020; and March 3, 2023. In

2021, this Court denied an intermediate petition for appeal on a discovery issue, which is likewise of minimal relevance to this appeal. *See*, #29541.

JURISDICTIONAL STATEMENT

Appellants appeal the Circuit Court's grant of summary judgment. A memorandum decision granting summary judgment was issued by the Circuit Court on June 7, 2024. [R.904].[1]

Notice of entry of final judgment was given on July 30, 2024. [R.992]. Appellants filed their notice of appeal on August 27, 2024. [R.1039]. This Court has jurisdiction, per SDCL § 15-26A-3(1).

STATEMENT OF THE CASE & FACTS

This lawsuit arises out of Kent Stevens' forcible takeover of Blueprint Energy Partners, LLC, in 2019.

Blueprint is based in Casper, Wyoming, and provides specialized services and equipment for shale oil extraction. [R.932]. It was formed in 2017 as a start-up venture with three equal owners: Kent Stevens (via his entity, TCU); Trigger Energy; and Gulf Coast Investments. [R.692])

[1] After receiving the memorandum decision, the parties engaged in housekeeping related to the remaining parties and claims. Ultimately, they stipulated to an order which: dismissed the Defendants' counterclaim and third-party complaint; removed the third-party defendant as a party; and amended the caption accordingly. [R.990].

Each of the three partners brought a different set of attributes to the table:

- Kent Stevens brought connections and industry know-how, from his prior job with a similar company in Casper, and, he agreed to run the company as its Operations Manager. [R.705].
- Gulf Coast (via Scott Keogh and a related company, Aladdin Capital) provided start-up capital, equipment leases, and accounting services. *Id.;* and
- Trigger (another Casper-based energy company) brought a broader perspective on the industry, via its owners, Leroy and Waylon. Trigger's partnership share in Blueprint also reflected that it had also helped Kent actualize his business plan, by acting as the match-maker between Kent's idea and Gulf Coast's access to capital. *Id.*

The story of Kent Stevens' forcible takeover of Blueprint is the story of his persistent refusal to honor rules or to be controlled by others.

In 2017, Kent Stevens was working for Certus, where his career with pipe rentals and inspections began, and where he eventually worked his way

into a supervisory role. [R.704]. He was fired from the company for failing to follow company protocols. [*Id.*]. In Kent's retelling, this was the outcome that he wanted, because he was "tired of working for people…I made a lot of people a lot of money and I ultimately wanted to have some sort of say in, you know, all of the decision-making." [R.704].

Kent responded to his termination from Certus by conceiving of a company in which he was an owner and an officer. [R.705].

An oil and gas start-up venture like Blueprint would require a substantial amount of capital for the oil field equipment, as well as a line of credit to buoy the company during its initial period of unprofitability. Gulf Coast (and its related entity, Aladdin) were instrumental in providing a flexible supply of capital. [R.705].

Kent Stevens was appointed as the operations manager, which he conceded was a fiduciary officer, and which was governed by an Operations Manager's Employment Agreement. [R.692]. Kent's role with the company was subject to a non-compete and a non-solicitation agreement. [R.710]. Aladdin Capital was named as the company's manager. [R.692].

The relationship between Kent Stevens and his partners was rocky, with Kent "quitting" one day by throwing his keys at Waylon and walking

away (though he returned the next day), and, by Kent not taking phone calls, and, by Kent bristling any time he was asked to follow company policy. [R.705-706].

In addition, the company was slower than expected in meeting its growth projections. [R.693-94]. This extended the timeframe between start-up and break-even, which resulted in the Company taking on additional debt. [R.694]. All of the additional capital was supplied by Aladdin, in the form of additional equipment leases, and an expanded line of credit. [R.694; 705]. By February of 2019, the Company's debt obligations were almost $6 million. [R.705]. The debt was personally guaranteed by the principals of the various members: Scott Keogh, Waylon Geuke, Leroy Dickinson, and Kent Stevens. [R.710; 713].

After over a year of growth, the new company finally "turned the corner" in late 2018, meaning, that for the first time ever, Blueprint was now creating net revenue instead of going deeper in debt. [R.711-712]. Each month thereafter, the Company posted ever-increasing profits. *Id.* From then until the closing date in August 2019, those profits were largely used to begin retiring its debt obligations. *Id.* In short, from December 2018 to August 2019, the Company's valuation consistently continued to increase,

both as a matter of it being an entity with less debt, and, also as a matter of demonstrating improved profitability. *Id* [2]

Meanwhile, the tensions continued between Kent and his partners. The idea of a buyout was discussed, first in abstract terms, and then with the invitation for Kent to come up with an offer and a plan. [R.694-695].

The delivery of Kent's proposed buyout price took several months...from approximately February to approximately May of 2019. [R.695].

In the intervening weeks and months, prior to revealing his proposed buyout price, Kent made several threatening statements to his business partners to Waylon and Leroy, the owners of Trigger.

Kent began discussing a "dynamite" or "nuclear" option, which was his threat to "blow up" the company if the other two shareholders did not accept a buyout at his proposed price. [R.933]. In connection with this "dynamite" threat, Kent threatened to breach his non-compete; in

[2] The fact that the Company continued to reduce debt and increase profitability meant that its valuation continued to increase each month.; this is a common problem during business sales, and the accepted manner in which to address this 'moving-target' issue was with a "true-up" number to address differences in the Company value between the date of closing and the date the base price is established. This would become an issue during the negotiation phase.

particular, he threatened to take both the customers and the employees of the Company if his partners refused a buyout at his price. [R.933]. And, Kent announced that he was judgment proof for any legal action against him, since he had a net worth of less than $20,000, all of which was in his residence. [R.713].

Waylon and Leroy believed the threats. Waylon and Leroy told Scott Keogh about the threats, but Scott was unconvinced that they were real. [R.616. Scott Keogh Deposition at Pages 66-67, Lines 15-25, Lines 1-8.].

After weeks and months of issuing these threats, Kent finally delivered news of his buyout price, in conversation in late May 2019, with Waylon Geuke. [R.706]. Kent's proposed price was $800,000 per one-third share (which would reflect a company value of $2.4 million overall). [R.935].

In that conversation, Waylon accepted immediately. [R.706]. Kent was surprised he had agreed so easily. [R.706]. When he asked Waylon why he would take it so easily, Waylon explained it was because of the threats. [R.706]. In response, Kent did not attempt to correct Waylon's understanding as to the significance of his comments or to walk back the

threats. [R.706]. Instead, Kent told his other colleagues that he wished he had lowballed even more. [R.707].

Waylon and Leroy had believed the threats from the outset. [R.700]. Scott Keogh, in contrast, refused to believe that the threats were real, and, as a matter of principle, did not even think that any serious businessperson would make such threats. [R.709-711].

After receiving Kent's verbal offer in late May 2019, the parties began drafting documents to put the buyout deal on paper. [R.695]. For this purpose, Kent hired an attorney (Kyle Ridgeway), and Scott Keogh engaged John Mullen, an experienced litigator and transactional attorney, from Sioux Falls, who began drafting a letter of intent [*Id.*]. (Trigger agreed to follow Gulf Coast's lead, meaning, that if Scott arrived at a document he was satisfied with, they would sign the same agreement.)

Although the price used during the drafting of the initial memorandum agreement was $800,000 per share, Scott Keogh continued to disbelieve the threats, and considered the number as still negotiable. [R.697-698]. Scott expected that "every transaction is a negotiation. There's always a negotiation." *Id.*

In early June 2019, Scott booked a flight to Casper in order to negotiate the final number with Kent in person, and then sign the Memorandum. [R.710].

However, shortly before departing for Casper, Kent's lawyer re-conveyed the same threat: "that Kent was willing to use the 'nuclear option' if Scott planned on negotiating the price." [R.711]. This is the point at which Scott Keogh changed his perspective on the seriousness of the threats. When Kent's own lawyer is talking about "using the dynamite option, then I took it seriously." [R.713]. "[A]nyone who would use their own lawyer to convey that kind of threat was serious about following through on it." [R.698].

Scott was astounded: "I mean, we've made good deals and we've made bad deals, but I've never before experienced anything like this where there was no standard business practices applied to this, and nor have I been threatened in this way." [R.713]. As a direct result, Scott flew to Casper and did not attempt to negotiate the price. [R.711].

Objectively, the $800,000 should have been (and could have been) subject to further discussion for two reasons: first, the operating agreement set forth an appraisal method of determining share value if the parties

disagreed; and, second, the value of the company was a moving target, because the Company would be worth more, with less debt, on the date of the closing than it was on the date the parties would sign the letter of intent.

The manner of calculating the Company price is typically as a multiple of the Company's EBITDA (earnings). The manner in which to account for the moving-target problem in ordinary transactions is via a "true-up" number. [R.696; 711].

In testimony, Keogh said he thought an EBITDA multiplier of four was fair, and in the Spring of 2019, this would have meant a share price of around $1.5 million, for each share. [R.711]. And, he also explained that at the rate the Company was retiring debt, the true-up number would mean adding over a half-million per share (reflecting debt reduction of $1.7 million), for a total share value of over $2.0 million. [R.614]. Kent was demanding his partners accept $800,000 instead, or he would destroy the Company.

Kent Stevens testified that he thought the value of the company at this point in time was $10,000,000. [R.711].

Meanwhile, Kent Stevens had convinced a third-party investor (the Galles Group) to buy into Blueprint; Galles would receive a 50% ownership

stake for $2,500,000. [R.712]. Kent did not reveal the details of the Galles transaction to his partners until his deposition in this lawsuit. [*Id.*].

Thus, Kent had orchestrated that on the closing date for Trigger and Gulf Coast's shares, he would buy their 66.6% of shares for $1.6 million; resell 50% of this to Galles for $2.5 million; and pocket the rest of the money, plus the extra 16.6% of the shares. In other words, Kent used his threats to buy out his partners at a $2.4 million valuation, and then immediately resell part of those shares to Galles at a $5 million valuation, while enriching TCU by another 16.6%.

Three weeks following the closing date, Trigger and Gulf Coast brought this lawsuit, seeking a remedy for Kent's wrongdoing.

The Circuit Court rejected all eight legal theories, granting Summary Judgment that led to this appeal. The Circuit Court's decision was largely based on the fact that John Mullen provided counsel and advice to Gulf Coast, by offering a list of four legal theories which the partners might pursue prior to closing, instead of agreeing to Kent's buyout price of $800,000.

Scott Keogh testified that he carefully considered each of them, and, that none of them were viable. In part, pursuing a legal remedy prior to sale

was expected to trigger Kent to carry out his threats and blow up the company, taking the customers and the employees. This would leave the Company to "start from zero" while owing hundreds of thousands of dollars a month in debt obligations. [R.708-709].

In light of the irreparable harm that would arise from Kent carrying out his threats, Scott Keogh concluded that the only option that made any sense was to submit to the duress. The other options "did not make financial sense or any version of sense." [R.624].

Trigger and Gulf Coast appeal, assigning four errors.

LEGAL ISSUES

1.

A claim for economic duress involves three elements: involuntary acceptance of contract terms, under circumstances where there was no reasonable alternative, arising as a result of wrongful, coercive conduct. Here, a fiduciary and co-owner of a company threatened to destroy it and breach his non-compete agreement if his partners refused to accept his lowball buyout offers. ***Did this constitute economic duress?***

The Circuit Court held that this was *not* actionable duress.

- *Dunes Hosp., L.L.C. v. Country Kitchen Int'l, Inc.*, 2001 S.D. 36
- *Zeilinger v. SOHIO Alaska Petroleum Co.*, 823 P.2d 653 (Alaska 1992)
- *W. R. Grimshaw Co. v. Nevil C. Withrow Co.*, 248 F.2d 896 (8th Cir. 1957).
- *Helstrom v. N. Slope Borough*, 797 P.2d 1192 (Alaska 1990)

2.

Although public policy favors the certainty afforded by the settlement of liability claims, an indemnity and release provision for intentional conduct is not enforceable unless it specifically addresses the wrongful, intentional conduct to be released. Here, the release contained only generic language about potential claims. ***Does this release exonerate the intentional wrongdoer?***

The Circuit Court held that the release fully indemnified Kent Stevens and TCU.

- *Flynn v. Lockhart*, 526 N.W.2d 743 (S.D. 1995)
- *Int'l Paper Co. v. Whilden*, 469 So.2d 560 (Ala. 1985)
- *Holzer v. Dakota Speedway, Inc.*, 2000 S.D. 65
- SDCL 53-9-3

3.

Partners in a close corporation, as well as the officers that control them, hold the duty to refrain from intentional misconduct; the duty not to directly compete with the company prior to its dissolution; the duty to transparently disclose the details of business opportunities; and the duty to exercise any rights consistently with the obligation of good faith and fair dealing. Here, Kent Stevens and TCU made threats, brokered a deal to enrich themselves, kept the details of that deal secret, and threatened to dishonor their non-compete. ***Does the law afford remedies in tort and equity for this type of behavior?***

The Circuit Court held that this type of behavior is not actionable.

- *Case v. Murdock,* 488 N.W.2d 885 (S.D. 1992)
- *Mueller v. Cedar Shore Resort, Inc.,* 2002 S.D. 3
- *Mach v. Connors*, 2022 S.D. 48
- *Landstrom v. Shaver,* 1997 S.D. 25

4.

An operating agreement for a limited liability company can provide for an orderly manner by which partners can value their shares during a buyout. It can also provide for attorney's fees in the event of breach. The covenant of good faith and fair dealing is implied in every contract, which prevents a party from preventing or injuring the party's right to receive the benefits of their agreement. Here, Kent Stevens engaged in conduct which intentionally thwarted the share valuation and buyout process, causing damages, and, causing his partners to incur attorney's fees. ***Is this actionable as a breach of the express contract, and/or, as a breach of the implied covenant of good faith and fair dealing?***

The Circuit Court held that this was not a viable claim for breach of contract, or, that the claims were waived.

- *Nygaard v. Sioux Valley Hosps. & Health Sys.*, 2007 S.D. 34
- *Boxa v. Vaughn*, 2003 S.D. 154

STANDARD OF REVIEW

This Court reviews a grant of summary judgment *de novo,* as well as the interpretation of statutes and contractual provisions. *Discover Bank v. Stanley,* 2008 S.D. 111, ¶ 15.

ARGUMENT

1. Trigger and Gulf Coast provide a *prima facie* case of economic duress

Under Count 1 of their Complaint, Trigger and Gulf Coast seek a reformation of the sale price of their membership shares in Blueprint, which is a remedy available for contracts poisoned by duress.

This Court first recognized the doctrine of economic duress in *Dunes Hosp., L.L.C. v. Country Kitchen Int'l, Inc.*, 2001 S.D. 36, ¶ 19. It adopted a commonly-accepted three-pronged test, which can be shorthanded as:

(i) involuntary acceptance of contract terms;

(ii) under circumstances which permitted no reasonable alternative;

(iii) as a result of a coercive, wrongful act.

Id. (further condensing the *Dunes* prongs).

There is a great degree of conceptual overlap among the three prongs, which can make application of the doctrine somewhat confusing, and which is why we offer that further shorthanded notation for the prongs.

We address each prong individually, and we suggest that:

- the first element *subjectively* asks about *the state of mind of the plaintiff*;
- the second element asks *objectively* about *alternate courses of action*; and
- the third element looks to the *wrongfulness* of the conduct, and, searches for a *causal link*.

Using the language of *Dunes,* here is how this Court has expanded upon the three prongs:

i. the Plaintiffs "*involuntarily accepted the terms of the Defendants*;" by which the Plaintiffs "have the burden to go beyond the mere showing of a reluctance to accept [the terms] and of financial embarrassment," and more than mere "acquiescence;"

ii. the "*circumstances permitted no other reasonable alternative*;" under "an objective test [that] depends on the circumstances of each case," and, in light of various factors, such as: "the age and mental ability, financial condition, business expertise, absence of good faith, adequacy of consideration, and the adequacy of a legal remedy of the party seeking relief;" and

iii. *as a result of a coercive, wrongful act,* meaning, that there were "(a) coercive wrongful acts on the part of the other party and

> (b) a causal link between the coercive wrongful acts and the circumstances creating economic duress." Wrongful acts "include those which are criminal or tortious," *Dunes,* ¶ 22, and the common law doctrine nationwide generally regards 'wrongful acts' to include a threat to breach a contract, to withhold performance, and to act in bad faith in the performance of contract duties.

Gulf Coast and Trigger can present a *prima facie* case on all three elements, which we discuss in turn. And in a fourth sub-section below, we distinguish the facts of Blueprint from *Dunes Hospitality.*

(i) Trigger and Gulf Coast involuntarily accepted the terms of the Defendants, i.e., the purchase price of $800,000

The Record demonstrates evidence that is sufficient to sustain this element of *involuntary acceptance.* Involuntary acceptance examines the subjective state of mind of the plaintiff. *Zeilinger v. SOHIO Alaska Petroleum Co.*, 823 P.2d 653, 657 (Alaska 1992) ("In this case, Zeilinger claims she acted involuntarily, and SAPC concedes the point inasmuch as the test is subjective.")[3]

At the outset, we note that this first prong is somewhat confusing to apply. *See,* Defendants' Trial Court brief, at R.540 (analyzing this prong with reference to the wrongfulness of Kent's conduct, which is the third

[3] The *Dunes* Court cited favorably to this Alaska case.

prong, and to Gulf Coast's other options, which is the second prong); *and, see, Pochat v. State Farm Mut. Auto. Ins. Co.*, 772 F. Supp. 2d 1062, 1067 (D.S.D. 2011) (seemingly suggesting that the first element requires "notice or knowledge by [Defendant] of economic duress being imposed on [Plaintiff]" which would also more appropriately be a question as to wrongfulness, rather than the voluntariness of Plaintiffs' acceptance); *and, see, Dunes,* at ¶ 20 (in its discussion of the first element, stating that the duress must have "resulted from the defendant's wrongful and oppressive conduct," even though this seems to be the causation portion of the third element).

As to what involuntary acceptance means, *see,* AMERICAN HERITAGE DICTIONARY, 950 (1992 3d ed) (*involuntary*: "against one's will"); *and, see, Dunes Hospitality,* ¶¶ 20, 28 ("involuntary acceptance" described as "beyond...reluctance"; more than "to merely acquiesce"; and which goes beyond "financial embarrassment" or "dissatisfaction").

In simplest terms, the Record does not demonstrate that this was a case of mere 'financial embarrassment' nor of 'dissatisfaction,' 'reluctance,' or 'mere acquiescence.'

Both Gulf Coast and Trigger explained that their contractual consent was involuntary. They did not discuss financial embarrassment, acquiescence, dissatisfaction, or reluctance. They believed that this was their only option.

There was no specific need for these Plaintiffs to sell their shares. There was no urgency: they had waited months for Kent's proposal, and, the company was now profitable. The Plaintiffs did not need the money from the sale of their shares.

They *hoped* to sell their shares. They *wanted* to sell their shares if the deal made sense. But there was no specific and immediate *need* to accept $800,000 as the price. There is simply no evidence in the Record that would support a conclusion of financial distress or embarrassment.

The Circuit Court suggested that Scott Keogh's concerns about losing millions of dollars were "financial embarrassment." This is a misapplication of this portion of the test. This phrase finds its roots in the original 8th Circuit case that helped create the doctrine of economic duress. *W. R. Grimshaw Co. v. Nevil C. Withrow Co.*, 248 F.2d 896, 904 (8th Cir. 1957). In its original context, this phrase related to the third element, as to the showing of causation: "In order to substantiate the allegation of

economic duress or business compulsion, the plaintiff must go beyond the mere showing of a reluctance to accept and of financial embarrassment. There must be a showing of acts on the part of the defendant which produced these two factors." *Id.*

The Circuit Court's analysis of this element focuses a great deal on Trigger and Gulf Coast's other options. This appears to be error, because the adequacy of their options is the subject of the second element. (An act is not voluntary simply because other options hypothetically exist; the options must be *adequate* in order to create the voluntariness of choice.)

Subjectively, Gulf Coast and Trigger believed they had no other option. Nowhere is this clearer than in Scott Keogh's testimony that he was planning to fly out to Casper and negotiate the final price, but then abandoned the negotiation directly because the "dynamite" threat had been communicated to him via Kent's lawyer.

In a light most favorable to the Plaintiffs, "[i]t was Kent's number" and it was involuntarily accepted because they fully believed Kent's threats. [R. 613; Keogh Depo., 94:23-95:9].

(ii) *Trigger and Gulf Coat had no other* reasonable *alternative*

The second element deals with the adequacy of other paths available to the Plaintiffs, rather than submitting to the duress. It is an objective inquiry. *Dunes,* ¶ 32; 25 AM.JUR.2D DURESS AND UNDUE INFLUENCE § 21 ("from an act that is so coercive as to cause a reasonably prudent person, faced with no reasonable alternative, to agree to an unfavorable contract").

Notably, the *Dunes* case does *not* hinge upon the simple existence of other options. This prong asks whether the other options were "reasonable" under the circumstances. Likewise, the *Dunes* case did *not* ask if there was "*no* choice but to accede," and instead, whether there was "*little choice* but to accede." Id., at ¶ 19.

In this same vein, the standard is not whether the Plaintiffs had '*a* legal remedy.' The standard under *Dunes* is where there was an "*adequate*" legal remedy. *Id.,* ¶ 23. Anyone with a bar license could help a company file a lawsuit.

Thus, we don't ask whether a victim of business duress could state the elements of a claim for relief, but whether such relief would

have been reasonable, *adequate*, timely, and sensible, under a reasonable person standard. The Supreme Court of Alaska on multiple occasions has explained the difference between *available* legal remedies and *adequate* legal remedies:

> [Although] an *available* legal remedy may provide such an alternative, the *adequacy* of the remedy is to be tested by a practical standard which takes into consideration the exigencies of the situation in which the alleged victim finds himself. An *available* alternative or remedy may not be *adequate* where the delay involved in pursuing the remedy would cause *immediate and irreparable loss to one's economic or business interest.*

Helstrom v. N. Slope Borough, 797 P.2d 1192, 1197 (Alaska 1990) (quoting *Totem Marine Tug & Barge, Inc. v. Alyeska Pipeline Serv. Co.*, 584 P.2d 15, 22 (Alaska 1978) (cleaned up)).[4]

The testimony about potential legal remedies and their viability came from Mr. Keogh. He acknowledged that John Mullen provided a list of various paths forward, and, that he carefully considered all of them, and that he concluded that the only one that made any sense was to submit to the duress. The other options "did not make financial

[4] Alaska follows essentially a verbatim version of *Dunes* prongs, and applies subjective standard to the first prong, and an objective standard to the reasonableness of alternatives. *Id.*

sense or any version of sense." R. 624. Keogh Depo., 100:18-19. The various options all failed because of the threat of immediate and irreparable harm to the Company. It was not just a matter of finding staff: Stevens had threatened to breach his non-compete and take all of the employees and customers, leaving the Company to start at zero. *Id.*, 100:1-14.

Keogh deemed that a lawsuit (or injunction) prior to closing was an unreasonable option here, because it would trigger the same type of retaliation that was being threatened.

Further, Mr. Stevens had *bragged* that he was judgment proof, and that he had consulted with a bankruptcy attorney to confirm that there was nothing that a lawsuit could recover from him. At that time, Mr. Stevens had a net worth of $20,000 of equity in his home "and no other meaningful assets...other than [his] shares in [Blueprint]". Stevens Depo., 86-87. The "adequacy" of a breach of contract claim would be measured by the recovery of actual damages, relative to the irreparable harm Kent promised to cause. Here, the Plaintiffs could not have recovered any such damages.

The existence/absence of viable alternatives is informed by the testimony of Scott Keogh, who the Defendants agree is a sophisticated businessman. "I mean, we've made good deals and we've made bad deals, but I've never experienced anything like this where there was no standard business practices applied to this and nor have I ever been threatened in this way." *Id.*, 105:8-12. It was an unusual situation that had no reasonable path forward.

Mr. Keogh is a reasonable, prudent businessman, and, he assessed his options reasonably and prudently. A Jury will apply an objective standard to this, and, can conclude that there were no reasonable alternatives in light of these circumstances.

The Circuit Court improperly weighed the evidence by concluding that Trigger and Gulf Coast had reasonable alternatives. Scott Keogh explained why they were not viable and adequate. The Circuit Court disagreed, but that is not the role of the court on summary judgment. It is not the court's role to decide reasonableness. And, the Circuit Court also ignored the irreparable harm considerations.

Each case must be viewed in light of its own circumstances. Gulf Coast and Trigger can make a *prima facie* showing on the second element.

(iii) *The acts by Kent Stevens were wrongful, coercive, and directly linked to the duress exacted upon Trigger and Gulf Coast*

"[W]rongfulness depends on the particular facts in each case." *Totem Marine Tug & Barge, Inc. v. Alyeska Pipeline Serv. Co.*, 584 P.2d 15, 22 (Alaska 1978).

This Court has explained that "[t]he defense of economic duress will not generally be available absent special, unusual or extraordinary circumstances." *Dunes*, ¶ 33 *(citing Newburn v. Dobbs Mobile Bay, Inc.*, 657 So. 2d 849, 852 (Ala. 1995)). And, business "negotiations inherently involve a certain amount of pressure and coercion." *Dunes,* at ¶ 23.

Various courts across the country have expanded on what constitutes wrongful, coercive conduct. There is uniformity in finding that wrongful conduct includes criminality and tortious conduct; and, it also includes threats to breach a contract or withhold performance; and contractual bad faith.

"[A] threat to breach a contract...may constitute a wrongful act." *Int'l Paper Co. v. Whilden*, 469 So.2d 560, 563 (Ala. 1985) (citing *Totem Marine Tug & Barge, Inc. v. Alyeska Pipeline Service Co.*, 584 P.2d 15, 22 (Alaska 1978) (citing *Hartsville Oil Mill v. United States*, 271 U.S. 43, 49 (1926); *Austin Instrument Inc. v. Loral Corp.*, 272 N.E.2d 533, 535 (N.Y. 1971); *Capps v. Georgia-Pacific Corp.*, 253 Or. 248, 453 P.2d 935 (1969)).

It is also well-accepted that "a threat to withhold performance" that one is contractually obligated to provide can constitute a wrongful threat. *Interpharm, Inc. v. Wells Fargo Bank, Nat. Ass'n*, 655 F.3d 136, 142 (2d Cir. 2011) (citations omitted). The Second Circuit also explained that "wrongful" conduct is conduct that is "outside a party's legal rights." *Id.* "Economic duress may be found in threats, or implied threats, to cut off a supply of goods or services when the performing party seeks to take advantage of the circumstances that would be created by its breach of an agreement." *City of Scottsbluff v. Waste Connections of Nebraska, Inc.*, 809 N.W.2d 725, 744 (Neb. 2011) (citing RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT, § 14, comment g; RESTATEMENT (SECOND) OF CONTRACTS, § 175, comment b).

Wrongful conduct also includes circumstances amounting to contractual "bad faith" on the part of the party exerting the alleged duress. *Int'l Paper Co.*, 469 So. 2d at 563 (citing, *inter alia,* RESTATEMENT (SECOND) OF CONTRACTS, § 318 Comment (e) (1979)).

And, the *Dunes* opinion recognizes that wrongful, coercive conduct includes "acts which are criminal or tortious." *Dunes,* ¶ 22. Section 3 of this Brief, below, provides a longer discussion of the statutory and tortious wrongfulness of Mr. Steven's behavior. Any of those common law and statutory duties would also meet the wrongfulness test here.

In a light most favorable to Gulf Coast and Trigger, Mr. Stevens was actively threatening to destroy a profitable and growing company if the $800,000 share price was not accepted; actively threatening to breach his non-compete agreement; actively threatening to take the customers and his employees; actively threatening that he would ignore his fiduciary duties.

This misconduct of Mr. Stevens was "special, unusual, and extraordinary," and, this coercion was directly linked to the decisions made by Trigger and Gulf Coast to buckle to the duress. It was a breach of Kent's fiduciary duty to make these threats; it was a breach of the duty of loyalty to make these threats; it was an act of contractual bad faith to make these threats. (If this is not wrongful conduct, it is unclear what would be.)

The Plaintiffs can meet this prong, and, thus, can make a *prima facie* case for duress.

(iv) *The facts of* Dunes *are dissimilar from this case*

The *Dunes* case is not an analog to the facts of this case for several reasons. First, Kent Stevens was a business partner and fiduciary of the Company, while Country Kitchen was a third-party...an arms-length manager of the restaurant operations. Second, Kent was subject to a non-compete agreement, while there was no discussion of this in *Dunes.*

Next, Kent was threatening to intentionally destroy the company, while Country Kitchen was merely going to walk away and not renew its management agreement. Finally, Kent was threatening to take the

customers, while the restaurant management company in *Dunes* had no such ability; that business was a restaurant attached to a hotel near an interstate, whose patrons would still be nearby and available as restaurant clientele no matter who the manager was.

In an arms-length transaction, the parties can use hardball tactics. In a close corporation, and among parties who are fiduciaries, there are different rules for what is acceptable. The facts of *Dunes* are an insufficient model for rejecting Blueprint's claims. And, in any event, duress claims must be evaluated based upon all of the facts and circumstances, including the wrongfulness of the conduct and the adequacy of remedies. *Dunes* cannot be used to prove Trigger and Gulf Coast's facts are insufficient.

2. TCU and Mr. Stevens are not protected by the indemnity and warranty provisions of Section 2.03.

As a defense to his wrongful conduct, Kent Stevens claims that the purchase agreements release him from liability for duress.

The first response to this defense is that if the agreements were secured by duress, the indemnity provisions are *per se* unenforceable. *Flynn*

v. Lockhart, 526 N.W.2d 743, 746 (S.D. 1995) ("A release is not fairly made and is invalid if...there was...overreaching conduct.").

But even in the absence of duress, the releases of liability are still unenforceable in two ways: they are insufficiently specific to be enforceable as to intentional wrongdoing; and the indemnity does not extend to Kent personally (because only TCU is a signatory). Summary judgment was incorrect on these issues.

The simplest issue to address is that only TCU is a signatory to the agreements, so, indemnity and warranties would not extend to Mr. Stevens personally. A third-party cannot enforce another party's agreement without an express provision or express intent. *Jennings v. Rapid City Reg'l Hosp., Inc.*, 2011 S.D. 50, ¶ 12 ("a third-party beneficiary must show that the contract was entered into by the parties directly and primarily for his benefit"). And, any claims against Mr. Steven personally appear to fall outside the scope of the language of Section 2.03.

But TCU cannot enforce these provisions, either, because they are non-specific to the wrongdoing that would be released. To be enforceable, such provisions must be specific, because public policy prevents a party from generically contracting away liability for his intentional wrongdoing.

Here, the releases are generic, and arise from a warranty from Gulf Coast and Trigger that "no event has occurred or circumstances exist that may give rise to, or serve as a basis for" an action "relating to or affecting the Membership Interests." *See,* pp. 20-23; Exhibit 2 & 3 to Counterclaim, at Section 2.03. As a matter of public policy, TCU and Stevens are estopped from asserting this as a shield for his wrongful conduct. The general rule is that

> [a]n agreement to indemnify will be construed to encompass an obligation to indemnify the indemnitee against the consequences of its own wrongful conduct *only* if the intent to do so is expressed in clear and unequivocal language

Int'l Paper Co., 469 So. 2d at 564 (Ala. 1985) (Torbert, C.J., concurring) (*citing Indus. Tile, Inc. v. Stewart,* 388 So.2d 171 (Ala.1980)); 42 C.J.S. INDEMNITY § 12 (1944); *Camden Safe Deposit & Trust Co. v. Eavenson,* 145 A. 434 (Pa. 1929).

This general rule follows from the basic principle that contracts which indemnify a party for their own wrongdoing are void as a matter of public policy, and, thus, in order for such a contract to be upheld, the language creating "indemnity against the indemnitee's own wrongs [must be] *expressed in clear and unequivocal language.*" *Indus. Tile, Inc. v. Stewart*, 388 So. 2d 171, 176 (Ala. 1980) (emphasis added).

This appears to be a universal rule. *See, e.g., Martin & Pitz Assocs., Inc. v. Hudson Constr. Servs., Inc.,* 602 N.W.2d 805, 809 (Iowa 1999) (quoting 42 C.J.S. INDEMNITY § 8b, at 85–86 (1991)); *Dion v. City of Omaha*, 973 N.W.2d 666, 689 (Neb. 2022); *McMichael v. Robinson*, 290 S.E.2d 168, 170 (Ga. 1982); *Just. v. Marvel, LLC*, 979 N.W.2d 894, 901–02 (Minn. 2022) (exculpatory clauses are strictly construed, and "must use specific, express language that clearly and unequivocally" recites the parties' intent to include the released party's own misconduct, "regardless of whether the provision is 'so broad' that it necessarily includes [it]"). *See, also,* SDCL 53-9-3 ("All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own…willful injury…or from violation of law whether willful or negligent…are against the policy of the law."); *Holzer v. Dakota Speedway, Inc.,* 2000 S.D. 65, ¶ 16, 610 N.W.2d 787, 793 ("releases that are construed to cover willful negligence or intentional torts are not valid and are against public policy").

Section 2.03 does not contain clear, specific, and unequivocal language sufficient to invoke indemnity. In fact, attorney John Mullen testified that he *expected* that the negotiation process would eventually lead

to an express, specific provision releasing Mr. Stevens and his related parties from wrongdoing for his dynamite option threats.

> I thought and predicted, and turned out to be wrong, that if they [Gulf Coast and Trigger] didn't commence litigation now to enforce the termination and the non-compete that they would face that decision before we successfully closed because I fully anticipated a release of claims, the negotiation of which would collapse the deal. I turned out to be wrong in that prediction.

[R. 587]. John Mullen Depo., 53:25—54:7.

Parties cannot commit wrongdoing and then later escape responsibility via generic contract language. It must be bargained for, expressly.

If Mr. Stevens and TCU wanted to be released from liability for their wrongful conduct, they could have (and should have) spelled out the misconduct and sought an express release.

This was the same conclusion reached by the Chief Justice of the Alabama Supreme Court in one of the duress cases cited by *Dunes*: in that case, the indemnity agreement did not clearly include indemnity of International Paper's own misconduct, and, therefore "International Paper is not entitled to indemnity, *even if* the agreement was not executed under duress." *Int'l Paper Co.*, 469 So. 2d at 564–65 (Torbert, C.J., concurring).

The Circuit Court mishandled the analysis, finding that Section 2.03 was a "waiver" by Trigger and Gulf Coast of its claims arising out of Kent's

wrongdoing, and justifying enforcement of the release because of the "compelling policy reasons [that] support releases under the Uniform Contribution Among Joint Tortfeasors Act [UCAJFA]." (quoting *Flynn v. Lockhart,* 526 N.W.2d 743, 746 (S.D. 1995).

None of the Circuit Court's analysis squarely addresses the problem in this case, which is that Kent and TCU are seeking indemnity for their *intentional* wrongdoing. Clear, unambiguous, and settled law of this Court precludes the construction of releases to include willful misconduct. These are "not valid and are against public policy," regardless of the general public policy in favor of settlements, and regardless of generic arguments about waiver. *Holzer v. Dakota Speedway, Inc.*, 2000 S.D. 65, ¶ 16. In short, a general release of general negligence among tortfeasors is handled differently than intentional wrongdoing.

The Defendants' indemnity theory fails as a matter of law as to TCU and to Kent, and, we ask this Court to so hold.

3. Mr. Stevens is personally liable for his wrongful actions, and, by *respondeat superior,* so are his companies

In contrast to Count 1 which seeks a reformation for duress, Counts 3, 4, 5, 6, and 7 of the Complaint seek relief against Kent Stevens personally, as

well as against TCU (his company), and, the Blueprint entity, for Mr. Steven's misconduct. These other claims sound in tort and equity. [R.16, *et seq.*; "Breach of Fiduciary Duty;" "Tortious Interference;" "Shareholder Oppression;" "Unjust Enrichment/Usurpation;" and "Accounting").

The Circuit Court failed to recognize that tort, statutory duty, and equitable claims arising from this misconduct are *independent* of the duress claims. Instead, the Circuit Court equated its finding of "voluntariness" on the duress issue as an absolution of Kent and TCU on any other legal theory.

That is not the correct analysis. *Even if* the conduct complained of does not meet the definition of economic duress, it could *still* meet the definition of breaches of other legal duties.

In general, the damages are likely the same under any of the theories, and the Plaintiffs would be entitled to just one, full recovery. But, it does not logically (or legally) follow that defeating the duress claim also means that Kent Stevens escapes liability on the tort claims.[5]

[5] Below, Mr. Stevens did not brief *any* substantive argument that TCU should be entitled to summary judgment upon the tort, duty, and equity claims. His briefing on counts 3 through 7 comprised of a syllogism: that "without duress, the remaining counts fall" because they were "warrantied, promised, and guaranteed in the purchase agreements." [R.547].

As to the usurpation claim, the Circuit Court mistakenly concluded that Kent had offered Trigger and Gulf Coast the same opportunity to sell their shares to the Galles Group. There is nothing in the Record to support this. Instead, Kent orchestrated a backroom deal with Galles, without revealing the details, by which he would usurp the benefits of the gap between buying Trigger and Gulf Coast's shares for $1.6 million, and reselling a portion of them to Galles for $2.5 million, while pocketing the remaining 16.6% of the shares as his own.

Although Kent was candid as to the *general* goal of wanting to buy out Gulf Coast and Trigger, there is nowhere in the Record that supports the necessary finding that Kent informed Trigger and Gulf Coast "of the full circumstances of the transaction." *Case v. Murdock,* 488 N.W.2d 885, 890 (S.D. 1992) (quoting 3 FLETCHER CYC. OF CORP., § 861.1, p. 288 (1986)).

Under Kent's and TCU's direction, TCU bought Trigger and Gulf Coast's shares, resold a portion of them the same day for twice their value, while keeping the remaining 16.6% of shares to TCU. This is usurpation of an opportunity. (And, in a close corporation, this is also a breach of the duty of "utmost good faith and fair dealing;" it is the "failure to disclose

information;" it is "surreptitious conduct;" and it is a breach of the duty of "diligence and due care." *See, Mueller v. Cedar Shore Resort, Inc.,* 2002 S.D. 38, ¶¶ 26, 29.)

In its dismissal of the fiduciary duty claims, the Circuit Court invoked SDCL 47-34A-409(c), which limits a member's "duty of care" in a "member-managed company" to conduct which arises to gross negligence and intentional or reckless conduct.

This is a narrow misunderstanding of SDCL 47-34A-409. For example, subsection 409(b) contains express duties of loyalty, and subsection 409(d) creates duties of good faith and fair dealing. These subsections prevented Kent and TCU from acting in a manner "adverse to the company;" it prevented him from "competing with the company...before dissolution of the company;" and prevented Kent and TCU from "appropriation of [the] company's opportunity." *Id.*

(And, even with its limitations, subsection 409(c) still extends the duty of care to preclude "grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of the law." SDCL 47-34A-409(c). In a light most favorable to the non-moving parties, Kent's and TCU's conduct meets this standard, too.)

Kent is personally and legally responsible for his own wrongdoing. Kent was a manager of Blueprint, and, in a manager-managed company, "a manager is held to the same standards of conduct prescribed for members in subsections (b) through (f)" of SDCL 47-34A-409.[6]

"An agent is subject to liability to a third party harmed by the agent's tortious conduct[, and] remains subject to [personal] liability although the actor acts as an agent or an employee...." RESTATEMENT (THIRD) OF AGENCY, § 7.01, *Agent's Liability to Third Party.* Kent made these wrongful threats himself, and, liability immediately flows to him.[7]

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[6] In line with this, Mr. Stevens conceded at his deposition that "as general manager of Blueprint [he] had a duty of loyalty to the company, as well as "the duty

- To act with diligence...,
- To act with due care...,
- To act with utmost good faith and fair dealing...including with the shareholders..., and
- To avoid seeking or gaining any improper personal benefit..."

Stevens Depo., 116:14-25

[7] To the extent that Mr. Stevens is arguing that he didn't do anything "personally," and, instead that only TCU or Blueprint carried out this wrongdoing, then, in that case, there would be justification to pierce the corporate veil. *E.g., Kansas Gas & Elec. Co. v. Ross*, 521 N.W.2d 107, 112 (S.D. 1994) (applying two-part test for piercing: "(1) was there such unity of interest and ownership that the separate personalities of the corporation and its shareholders, officers or directors are indistinct or non-existent; and (2) would adherence to the

"This Court has specifically held that the question of whether the act of a servant was within the scope of employment must, in most cases, be a question of fact for the jury." *Deuchar v. Foland Ranch, Inc.,* 410 N.W.2d 177, 181 (S.D. 1987) (citing *Lovejoy v. Campbell,* 92 N.W. 24, 26 (1902)). *See* RESTATEMENT (SECOND) OF AGENCY § 228, comment d.; *Kirlin v. Halverson*, 2008 S.D. 107, ¶ 16, 758 N.W.2d 436, 445

It is a common-sense and reasonable extension of the law that these duties Mr. Stevens had as manager would also forbid him to *threaten* a breach of any of these duties, especially in order to gain a personal advantage.

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fiction of separate corporate existence sanction fraud, *promote injustice or inequitable consequences or lead to an evasion of legal obligations*").

This Court has held that the purpose of the doctrine is to shield innocent parties who are mere shareholders, while allowing liability to extend and attach to "an actor [whose] course of conduct constitut[ed] the abuse of corporate privilege" and "who uses a corporation merely as an instrumentality to conduct...injustice...on third persons dealing with the corporation." *Kansas Gas*, 521 N.W.2d at 117 (quotations omitted). Mr. Stevens was the alter ego of these companies, and, he used them to facilitate his wrongdoing. All of them are liable, no matter whether this is reviewed as a question of agency, or, as a question of piercing.

For breaches of any such duties, Gulf Coast and Trigger are statutorily permitted to pursue relief against Kent Stevens directly, and, against TCU to the extent that Kent was using his entity to accomplish this misconduct.

"A member may maintain a direct action against another member [or] a manager…to enforce the member's rights and…interests... [provided that the] member maintaining a direct action…plead[s] an actual…injury…that is not solely the result of an injury suffered or threatened by the limited liability company." SDCL 47-34A-1101(a) and (b). The member's "rights and interests" includes those arising "under the operating agreement," or, "under…chapter [47-34A]"; or "arising independently of the membership relationship." SDCL 47-34A-1101(a).

This Court has interpreted the scope of direct actions under SDCL 47-34A-410 as including enforcement of "(1) [t]he member's rights under the operating agreement; (2) [t]he member's rights under [chapter 47-34A]; and (3) [t]he rights and otherwise protect the interests of the member, including rights and interests arising independently of the member's relationship to the company." *Mach v. Connors*, 2022 S.D. 48, ¶ 15 (quoting statute).

And, all of these same facts and circumstances are actionable under a theory of shareholder oppression. *Landstrom v. Shaver,* 1997 S.D. 25, ¶ 37.

The Circuit Court's analysis on this point is thin. Without elaboration, it held that Trigger and Gulf Coast did not have any reasonable expectations that were thwarted by Kent Stevens' conduct. The Circuit Court's analysis is premised on the syllogism that Kent was merely "invoking his negotiating tactics," and, that if this was not duress, it is not actionable oppression. The Circuit Court also assumed that Kent was merely a minority shareholder without the capability of oppressing his other shareholders. This, too, is a narrow misreading of the facts. Gulf Coast and Trigger had a reasonable expectation that their exit from the Company would occur in a reasonable fashion, not at gunpoint. The remedy for shareholder oppression is very similar to the other claims identified in the Complaint, but, it stands on different footing. Trigger and Gulf Coast stated a *prima facie* case for shareholder oppression.

As to the claim of tortious interference, the Circuit Court found that there was not "an identifiable third-party." In support of this, the Circuit Court held as a matter of law that Kent was solely acting as an agent of TCU to negotiate the buyout. If so, then it was TCU which interfered with

Trigger and Gulf Coast's relationship with Blueprint. Or, it can be argued that Kent was acting outside the scope of any reasonable corporate authority, and personally interfered with Trigger and Gulf Coast's relationship with both TCU and Blueprint. In either case, the Circuit Court erred on this because its analysis was too narrow.

All of Mr. Stevens' conduct (and, by extension, the conduct of TCU if used to facilitate his breaches) is actionable. All of those claims survive, *even if there is no duress claim.* And, all of those claims are enforceable against Mr. Stevens and his entities, without distinction.

Summary judgment is not warranted on Counts 3 through 7.

4. The Defendants are not entitled to summary judgment on Counts 2 and 8, relating to breaches of the Operating Agreement

Finally, we are left with Counts 2 and 8, which relate to breaches of the Operating Agreement. Count 2 seeks damages because Kent and TCU prevented the use of the appraisal process; and Count 8 seeks contractual attorney's fees.

The Circuit Court granted summary judgment on these claims because it found no duress, and, because Gulf Coast and Trigger "ratified" the Purchase Agreements by accepting payment.

The Circuit Court's analysis is too narrow. Its holding is that 'unless there was duress, then there could not be a breach.' But contract claims stand on their own footing.

As to claims under Count 2 (thwarting the appraisal process), the correct analysis would be to ask what conduct occurred, and, then ask whether it would amount to a breach of an express contract provision, or, a breach of the implied duty of good faith and fair dealing. "Every contract contains an implied covenant of good faith and fair dealing that prohibits either contracting party from preventing or injuring the other party's right to receive the agreed benefits of the contract." *Nygaard v. Sioux Valley Hosps. & Health Sys.*, 2007 S.D. 34, ¶ 20.

Independent of the duress claim, and independent of his fiduciary duties, Kent's and TCU's prior breaches and lack of good faith prevented Gulf Coast and Trigger from employing the appraisal process to value the shares.[8]

[8] The Operating Agreement provided, in abbreviated form, that "[f]or all Transfers" the purchase price would be determined by an "agreement in writing" or, if such agreement was not reached, then by "appraisal [using a five-part appraisal process, found in Section 14.3(d)(1)(B)(i) through (v).]" Operating Agreement, Section 14.3(d)(1).

Likewise, the attorney's fee remedy under Count 8 would survive if Gulf Coast and Trigger are able to proceed on such claims. *See,* Article 2.8 (i.e., "if a Person violates the terms of this [Operating] Agreement…any Member will be entitled to recover from such Person reasonable attorney's fees and costs incurred in connection with enforcing the terms of this Agreement.")

The Circuit Court also rejected these claims on a theory of waiver. That is an affirmative defense that "must be proven by its proponent," and which cannot be resolved on summary judgment because it asks fact-intensive questions about whether conduct by Trigger and Gulf Coast's meets the test for waiver. *C.f., Boxa v. Vaughn,* 2003 S.D. 154, ¶ 11 ("There are many instances when one could do something inconsistent with a known right without entering into an agreement to waive.")

Defendants were not entitled to summary judgment on Counts 2 and 8. These breaches are questions for the Jury.

CONCLUSION

Summary judgment was improvidently granted to Kent Stevens, TCU, and Blueprint. The law provides several remedies for damages caused by misconduct like this by a fiduciary and partner.

Trigger and Gulf Coast ask this Court to reverse on all counts so that this matter can proceed to trial.

Dated this 31st day of January, 2025.

HOVLAND, RASMUS,
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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellant's Brief does not exceed the word limit set forth in SDCL § 15-26A-66, said Brief containing 8,755 words, exclusive of the Table of Contents, Table of Authorities, any addendum materials, and any certificates of counsel.

/s/ Daniel K. Brendtro
One of the attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of January, 2025, I electronically filed the foregoing via the Odyssey File and Serve system with the Supreme Court Clerk, which will send notice to Appellee's Counsel.

I also hereby certify that on this 31st day of January, 2025, I sent a bound copy of the foregoing to the Supreme Court Clerk at the following address:

Shirley Jameson-Fergel
Supreme Court Clerk
500 East Capitol Avenue
Pierre, South Dakota 57501

/s/ Daniel K. Brendtro
One of the attorneys for Appellants

APPELLANTS' APPENDIX - #30814

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STATE OF SOUTH DAKOTA	IN CIRCUIT COURT
COUNTY OF MINNEHAHA	SECOND JUDICIAL CIRCUIT
TRIGGER ENERGY HOLDINGS, LLC, a Wyoming Limited Liability Company, & GULF COAST INVESTMENTS, LLC, a South Dakota limited liability company, Plaintiffs, v. KENT STEVENS, as an individual, an officer, and agent; TCU, LLC, a Wyoming Limited liability company; TCU HOLDINGS, LLC, a Wyoming limited liability company; and BLUEPRINT ENERGY PARTNERS, LLC, a South Dakota limited liability company, Defendants and Third-Party Plaintiffs, TRIGGER ENERGY, INC., a Wyoming corporation, & ALADDIN CAPITAL INC., a South Dakota Corporation. Third-Party Defendants.	49CIV19-002287 **ORDER ON STIPULATION TO DISMISS COUNTERCLAIM AND THIRD-PARTY COMPLAINT AND TO AMEND CAPTION**

The above-captioned matter came before the Court on the parties' Stipulation to Dismiss Counterclaim and Third-Party Complaint and to Amend Caption. Based on the parties having consented to this Court granting an Order as reflected in the Stipulation, it is hereby:

ORDERED that a final judgment is now entered as to all claims and Defendants may now file its application for costs and disbursements, taxed pursuant to SDCL 15-6-54(d)(1) and any additional recovery, if any, under SDCL 15-6-54(d)(2);

ORDERED that the caption of the case shall be amended as agreed to pursuant to the Stipulation.

7/26/2024 3:07:15 PM

BY THE COURT:

Attest:
Jarrott, Brenda
Clerk/Deputy

Hon. Douglas Barnett
Circuit Court Judge

STATE OF SOUTH DAKOTA)
:SS
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT

SECOND JUDICIAL CIRCUIT

TRIGGER ENERGY HOLDINGS, LLC, a Wyoming Limited Liability Company, and GULF COAST INVESTMENTS, LLC, a South Dakota Limited Liability Company, Plaintiffs, v. **KENT STEVENS, as an individual, an officer, and agent; TCU, LLC, a Wyoming Limited Liability Company; TCU HOLDINGS, LLC, a Wyoming Limited Liability Company; and BLUEPRINT ENERGY PARTNERS, LLC, a South Dakota Limited Liability Company,** Defendants and Third-Party Plaintiffs, v. **TRIGGER ENERGY, INC., a Wyoming Corporation, and ALADDIN CAPITAL, INC., a South Dakota Corporation,** Third-Party Defendants.	49CIV19-2287 **MEMORANDUM DECISION AND ORDER GRANTING DEFENDANTS' AND THIRD-PARTY PLAINTIFFS' (SECOND) MOTION FOR SUMMARY JUDGMENT**

PRELIMINARY STATEMENT

The above-captioned Plaintiffs and Third-Party Defendants are hereinafter referred to as "Plaintiffs." Similarly, the above-captioned Defendants and Third-Party Plaintiffs are hereinafter referred to as "Defendants."

INTRODUCTION

Plaintiffs filed their Complaint alleging numerous claims surrounding a shareholder buy-out agreement. The parties conducted discovery and Defendants subsequently moved for summary judgment. This motion was never ruled on. A trial date and scheduling order was set thereafter. Defendants subsequently moved for summary judgment a second time.

This matter came on for hearing on January 18, 2024, at the Minnehaha County Courthouse in Sioux Falls, South Dakota, before this Court pursuant to Defendant's Second Motion for Summary Judgment. Daniel Brendtro of Hovland, Rasmus & Brendtro appeared on behalf of Plaintiffs and Matthew McIntosh of Beardsley Jensen & Lee appeared on behalf of Defendants.

In considering Defendants' Motion, this Court has considered pre-hearing briefing, affidavits, statements of disputed and undisputed facts, attached exhibits, and oral argument. Shortly after the hearing, the Court reached its decision to grant the Second Motion for Summary Judgment on all counts. The Court notified the parties by email of its decision and its intention to issue a Memorandum Decision and Order at a later date.

FACTUAL BACKGROUND

Blueprint Energy Partners, LLC (Blueprint), an oil and natural gas company, was formed in 2017. Three companies held a 1/3 membership share in Blueprint, including Trigger Energy Holdings, LLC (Trigger), Gulf Coast Investments, LLC (Gulf Coast), and TCU Holdings, LLC (TCU Holdings).

Waylon Geuke (Waylon) was the President, an officer, and director of Trigger. Scott Keogh (Scott) was the Vice President and 49.9% shareholder in Gulf Coast. Scott was also the Vice President and 49.9% shareholder of Aladdin Capital, Inc. (Aladdin). Kent Stevens (Kent) owned TCU, LLC (TCU) and TCU Holdings.

Aladdin, through Scott, was appointed the Manager of Blueprint. Aladdin provided funding for operations of Blueprint through equipment leases and a line of credit. To account for the day-to-day operations, Kent was named the Operations Manager of Blueprint on December 13, 2017.

Kent's career in pipe rentals and inspection dates back to 2014. At the company he worked for prior, Certus Energy Solutions (Certus), Kent maintained a supervisory role. Kent's employment was ultimately terminated in 2017 due to violating company policy. During his time as a supervisor at Certus, Kent

developed a team of employees. A number of these employees left Certus to join Kent at Blueprint, with some gaining high-level management roles. Further, some of the employees also became equity owners in TCU Holdings.

Shortly after its inception, Blueprint, began experiencing adversity and delays, stemming, in part, from Kent's disregard of company policies. Scott expressed concern about this to Kent. Scott had also asserted his concerns of Blueprint's difficulty in meeting its debt obligations to Aladdin. This occurred during one of the monthly meetings the parties had in either Casper, Wyoming or Sioux Falls. Throughout these meetings, Blueprint's status and future were often a point of discussion. Kent saw these discussions as unfruitful and found the parties' communication to be broken. Kent found communication especially difficult when Scott or Waylon commented on daily operations while Kent was the one with experience in the field and the other two were businessmen.

As early as August of 2018, Kent told the others that he did not want to remain in the partnership. Starting around this time and extending throughout the negotiations to come, Kent expressed an intent to "blow up" the company if the other two shareholders did not accept a buyout at his proposed price. Kent further expressed that he would either take his crew, who he had brought from Certus, with him, or his crew would leave on their own if Kent was gone. Additionally, Kent expressed that Blueprint's customers would follow him if he were gone. Kent later relayed that he spoke with his attorney and concluded that he could break his non-compete. He had also warned that he could not be sued because the only equity he obtained was around $20,000 in his home.

Early in the next year, the parties began having serious discussions about TCU Holdings buying the shares of Gulf Coast and Trigger, when Kent proposed the idea in an in-person meeting. At this time, around February 2019, the liabilities of Blueprint amounted to roughly $6 million. A few months after the serious discussions began, Gulf Coast hired attorney John Mullen (Mullen) of Boyce Law Firm in Sioux Falls to represent the company in anticipation of a buy-out. [1] Mullen's law practice is comprised of over thirty years' experience in business transactions and business litigation. Sometime within this representation, Mullen relayed to Kent that Trigger would be acting consistent with the decision that Gulf Coast would make. Because of this, Gulf Coast took initiative in the buyout discussions.

[1] Plaintiffs initially contested the discoverability of Mullen's testimony and actions within the attorney-client relationship. The Court entered a Memorandum Decision on November 20, 2020, finding that the assertion of economic duress waived attorney-client privilege, and ordered Plaintiffs to comply with Defendants' requests for admissions. Plaintiffs moved the Court to reconsider, and the Court denied the Motion.

The negotiations continued into the Summer. Throughout the negotiations of a potential buyout, Mullen began communicating with TCU's then-counsel, Wyoming attorney Kyle Ridgeway (Ridgeway). Mullen proposed to Ridgeway a "true-up" adjustment on the buyout price. Scott was adamant that the "true-up" price should still be negotiated. This calculation accounted for Blueprint's economic changes from formation to the date of closing and represented the company as having a much higher value than what Kent's proposed price represented. Scott believed an EBITDA/EV multiplier [2] of four was reasonable for the "true-up" price.

Ridgeway held firm to this base price, which represented the value of Blueprint, and the shares, at the time it was formed. Because Ridgeway would not consider the "true-up" price, Mullen negotiated consistent with the base price. On June 6, 2019, Mullen and Ridgeway exchanged drafts for Letters of Intent. They had also spoken on the phone and emailed each other continuing to negotiate the terms. In this, Mullen proposed to Ridgeway that if some of his other proposals would be met, then he would continue negotiations without the "true-up" price.

The Letters of Intent were eventually signed. One was signed by Scott, on behalf of Gulf Coast and Aladdin, and another by Waylon, on behalf of Trigger. This took place in Casper, where Scott initially thought the trip would be for the purpose of negotiating the sale price of the buyout. Scott had full intent to do this despite warnings from Waylon and Leroy Dickinson, who was associated with Trigger, that Kent had since been making threats to the parties if they did not accept the buyout. Waylon and Leroy believed Kent's threats from their beginning. Scott disregarded these warnings because he did not believe Kent's threats would be carried through. Scott changed his mind when Ridgeway told Mullen about Kent's "dynamite option." Because an attorney relayed the information, Scott began to believe the likelihood of Kent carrying through with this threat if the buyout did not happen on the base price.

Scott weighed his options with Mullen. Multiple options beyond choosing to sign the agreement were presented by Mullen, including (1) an outright refusal to sell the shares to Kent; (2) removal of Kent as Manager and trigger a buy-sell under Kent's Operations Manager Employment Agreement; (3) fire Kent and hire a replacement crew on Blueprint's site and then sue Kent; or (4) file suit against Kent alleging tortious interference. Mullen explained the consequences of each outcome to Scott, including the likelihood of success of a lawsuit, what jurisdiction the case would be brought in, and the general effect on the business depending on the option chosen. Mullen also gave Scott the ability to make an informed decision. He did not advise him to pick a certain option and stated he would follow whichever path Scott chose.

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[2] "The EBITDA/EV multiple is a financial valuation ratio that measures a company's return on investment (ROI)." Will Kenton, *EBITDA/EV Multiple: Definition, Example, and Role in Earnings*, INVESTOPEDIA (Mar. 29, 2022), https://www.investopedia.com/terms/e/ebitda-ev-multiple.asp.

Almost two months later, on July 30, 2019, Scott and Waylon agreed to the buyout. Scott ultimately determined that none of the additional options provided by Mullen were viable compared to the buyout. Scott was concerned with the potential reality of Kent carrying his threats out and how it would negatively impact the company. For example, Scott found that hiring a replacement crew would be difficult because he and Waylon had no connections or knowledge on who to look for or hire. He applied the same reasoning to the loss of customers, in that he and Waylon would have difficulty finding new clientele based on their lack of experience and knowledge in the field. Scott also found the prospect of suing Kent individually difficult considering his assertions of immunity after discussions with his own counsel. Additionally, Scott was concerned that if the company was "blown up," there would not be a plan for the millions of dollars in liabilities Blueprint had.

Evidencing this agreement on July 30, 2019, Scott and Waylon executed respective Membership Interest Purchase Agreements on behalf of Gulf Coast and Trigger. Waylon again agreed to sign on behalf of Trigger because he had agreed to follow the path of Scott and Gulf Coast. Waylon also signed the same document in respect to Trigger Energy, Inc. as a guarantor. On the same day, Scott signed an Officer's Certificate confirming his authorization to sign the Membership Interest Purchase Agreement on behalf of Gulf Coast. Waylon signed the same for Trigger. On the next day, Gulf Coast and Trigger executed a fourth and final document, the Funds Flow Memorandum.

Kent obtained funding for the buyout through the Jonah Bank of Wyoming and the Galles Group for a total amount of $5.5 million. He lined this up before signing a Letter of Intent, where he intended to purchase the remaining shares of Blueprint at $2.5 million. August 1, 2023, marked the day that Scott and Waylon received the buyout payment. The payment was $800,000 to each company for a total of $1.6 million. Aladdin received $3.2 million upon closing. Twenty days later, Plaintiffs brought the present lawsuit asserting that the agreement was executed due to, *inter alia*, Kent's purported economic duress.

ISSUES

The issues presented by the moving parties, Defendants and Third-Party Plaintiffs, are restated as follows:

(1) Whether Plaintiffs were victims of economic duress requiring reformation of the Purchase Agreement.

(2) Whether Section 2.03 of the Purchase Agreement bars Plaintiffs' remaining claims.

(3) Whether Defendants breached the Operating Agreement.

(4) Whether Kent breached a fiduciary duty as an officer and shareholder of Blueprint.

(5) Whether Defendants actions rise to the level of shareholder oppression.

(6) Whether Defendants were unjustly enriched from the Purchase Agreement.

(7) Whether Defendants Tortiously Interfered with the Business Relationship or Expectancy in Blueprint.

(8) Whether accounting, costs and fees, and injunctive relief may be declined as a matter of law.

DECISION

A motion for summary judgment must be granted:

> if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

SDCL 15-6-56.

When considering a motion for summary judgment, this Court must "view the evidence most favorably to the nonmoving party and resolve reasonable doubts against the moving party." *State by and through Dep't of Transp. v. Legacy Land Co.*, 2023 S.D. 58, ¶ 18, --- N.W.2d ---- (quoting *Yankton Cnty. v. McAllister*, 2022 S.D. 37, ¶ 15, 977 N.W.2d 327, 334). "The nonmoving party . . . must present specific facts showing that a genuine, material issue for trial exists." *Id.* (quoting *Sacred Heart Health Servs., Inc. v. Yankton Cnty.*, 2020 S.D. 64, ¶ 11, 951 N.W.2d 544, 588). "[T]he nonmoving party to a summary judgment motion may not sit idly by where the moving party has established a prima facie case for granting the motion." *Id.* (quoting *Kimball Inv. Land, Ltd. v. Chmela*, 2000 S.D. 6, ¶ 17 n.3, 604 N.W.2d 289, 294 n. 3).

Also, this Court must "credit the evidence offered by . . . the non-moving party, and any reasonable inferences it supports. To do so otherwise would require

[the Court] to weigh conflicting evidence – a practice which is, of course, categorically proscribed for courts considering motions for summary judgment." *Mullenson v. Markve*, 2022 S.D. 57, ¶ 39, 980 N.W.2d 662, 674.

> "[S]ummary judgment is not a substitute for trial; a belief that the non-moving party will not prevail at trial is not an appropriate basis for granting the motion on issues not shown to be a sham, frivolous or unsubstantiated . . . ." *Toben v. Jeske*, 2006 S.D. 57, ¶ 16, 718 N.W.2d 32, 37 (citation omitted). "We view all reasonable inferences drawn from the facts in the light most favorable to the non-moving party." *Luther v. City of Winner*, 2004 S.D. 1, ¶ 6, 674 N.W.2d 339, 343 (citation omitted).
>
> We require those resisting summary judgment to show that they will be able to place sufficient evidence in the record at trial to support findings on all the elements on which they have the burden of proof." *Foster-Naser v. Aurora Cnty.*, 2016 S.D. 6, ¶ 11, 874 N.W.2d 505, 508 (citation omitted). "A sufficient showing requires that '[t]he party challenging summary judgment . . . substantiate his allegations with sufficient probative evidence that would permit a finding in his favor on more than mere speculation, conjecture, or fantasy.'" *Nationwide Mut. Ins. Co. v. Barton Solvents Inc.*, 2014 S.D. 70, ¶ 10, 855 N.W.2d 145, 149 (citation omitted). "Mere speculation and general assertions, without some concrete evidence, are not enough to avoid summary judgment." *N. Star Mut. Ins. v. Korzan*, 2015 S.D. 97, ¶ 21, 873 N.W.2d 57, 63.

Godbe v. City of Rapid City, 2022 S.D. 1, ¶¶ 20-21, 969 N.W.2d 208, 213.

Defendants' Motion contemplates that all of Plaintiffs' claims fail as a matter of law. As an initial matter, this Court addresses the claim of economic duress.

1. Whether Plaintiffs Were Victims of Economic Duress Requiring Reformation of the Purchase Agreement.

Plaintiffs seek to reform the Purchase Agreement based on the doctrine of economic duress. "Reformation is a 'remedy in equity by means of which a written instrument is made or construed to express or conform to the real intention of the parties, when some error or mistake has been committed.'" *Sprang v. Altman*, 2009 S.D. 49, ¶ 9, 768 N.W.2d 507, 509 (quoting *Enchanted World Doll Museum v. Buskohl*, 398 N.W.2d 149, 152 (S.D. 1986)).

> When through fraud or mutual mistake of the parties, or a mistake of one party which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be

> revised on the application of a party aggrieved so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value.

SDCL 21-11-1.

In seeking reformation, Plaintiffs must "overcome the 'presumption [ ] that the writing accurately reflects the intent of the parties." *Sprang*, 2009 S.D. 49, ¶ 12, 768 N.W.2d at 511 (quoting *Enchanted World Doll Museum*, 398 N.W.2d at 152. Plaintiffs must also "prove their 'cause of action by clear, unequivocal and convincing evidence'" with the facts viewed most favorably to them. *Id.* (quoting *Northwestern Nat'l Bank of Sioux Falls v. Brandon*, 88 S.D. 453, 458-59, 221 N.W.2d 12, 15 (1974)).

The South Dakota Supreme Court adopted and applied the doctrine of economic duress in *Dunes Hospitality, LLC v. Country Kitchen International, Inc*:

> [t]he doctrine of economic duress applies only to special, unusual, or extraordinary situations in which unjustified coercion is used to induce a contract . . . under such circumstances that the victim has little choice but to accede.

2001 S.D. 36, ¶ 19, 623 N.W.2d 484, 489 (citing *Newburn v. Dobbs Mobile Bay Inc.*, 657 So.2d 849, 852 (Ala. 1995)).

The test that the Court adopted is a three-prong, elemental test requiring a showing of:

> (1) an involuntary acceptance of contract terms;
> (2) under circumstances which permitted no reasonable alternative; and
> (3) that the circumstances were the result of coercive, wrongful act.

Id. ¶ 19, 623 N.W.2d at 490 (citing *Oskey Gasoline & Oil Co., Inc., v. Continental Oil*, 524 F.2d 1281, 1286 (8th Cir. 1976)) (additional citations omitted).

> All negotiations inherently involve a certain amount of pressure and coercion. However, to satisfy the requirements of economic duress "that pressure must be wrongful and not all pressure is wrongful." A party's actions, rather than motive, govern the determination of wrongful and coercive. A defense of economic necessity cannot be maintained when a party's actions are lawful, or threats to carry out that which the law entitles them to do. Factors to be considered for economic duress include: the age and mental ability, financial condition, business

> expertise, absence of good faith, adequacy of consideration and the adequacy of a legal remedy of the party seeking relief.

Id. ¶ 23, 623 N.W.2d at 490 (quoting 25 Am.Jur.2d *Duress and Undue Influence* § 7 (1996)).

In *Dunes*, the plaintiff brought suit seeking to void a settlement agreement on a claim of economic duress. *Id.* ¶ 5, 623 N.W.2d at 487. The jury found economic duress, and the circuit court denied the plaintiff's motion for judgment notwithstanding the verdict. *Id.* ¶ 6, 623 N.W.2d at 487. The Supreme Court ultimately determined that there was insufficient evidence presented at the trial level to support a verdict of economic duress. *Id.* ¶ 31, 623 N.W.2d at 492. Thus, the Court found that it was error for the circuit court to deny the Defendant's motion for judgment notwithstanding the verdict. *Id.*

Outside of this jurisdiction, the Eighth Circuit Court of Appeals has applied *Dunes* and ruled on a similar situation to this case. In *Rasby v. Pullen*, the Eighth Circuit found that the plaintiff failed to make a sufficient showing of economic duress in selling her shares to another shareholder. 905 F.3d 1097, 1101 (8th Cir. 2018). The plaintiff had considered a buy-out offer substantially below the fair market value of her interests. *Id.* at 1100. She and her attorney discussed various options, including selling her interests to the other shareholder, selling to a third party, and suing the other shareholder for minority shareholder oppression. *Id.* The plaintiff ultimately decided to sell her shares, and her attorney then negotiated the Purchase Agreement with the other shareholder's attorney. *Id.*

In *Absolute Resolutions Investments, LLC v. Citibank, N.A.*, the Southern District of New York applied *Dunes* to an economic duress claim to a release agreement. 22 Civ. 2079 (VM), 2024 WL 325110 (S.D.N.Y. Jan. 29, 2024). The court was presented with a motion to dismiss for failure to state a claim under Fed. R. Civ. Pro. 12(b)(6). 2024 WL 325110, at * 1. The court found that the plaintiff failed to state a claim of economic duress in its amended complaint because the plaintiff failed to make a showing under all three *Dunes* factors. 2024 WL 325110, at * 11-12.

The Western Division of the Federal District Court of South Dakota has applied *Dunes*. *See Pochat v. State Farm Mutual Automobile Insurance Company*, 772 F.Supp.2d 1062, 1068 (W.D.S.D. 2011). In that case, the defendant moved for summary judgment on plaintiffs' claim for breach of their insurance contract, bad faith, and punitive damages. *Pochat*, 772 F.Supp.2d at 1063. The court granted the defendant's motion for summary judgment on the breach of insurance contract claim because it found that the plaintiff failed to establish a genuine dispute of material fact as to all three *Dunes* factors. *Id.* at 1068.

A. Whether Plaintiffs Involuntarily Accepted the Terms of the Purchase Agreement.

To make a showing on the first element, Plaintiffs must "go beyond the mere showing of a reluctance to accept and of financial embarrassment." *Dunes*, ¶ 20, 623 N.W.2d at 490 (quoting *Oskey*, 534 F.2d at 1286). The facts, viewed in light most favorable to the Plaintiffs, must demonstrate Defendants' acts produced economic duress. *Id.* Further, "it must be proven by evidence that the duress resulted from the defendant's wrongful and oppressive conduct and not by plaintiff's necessities." *Id.* (quoting *Oskey*, 534 F.2d at 1286). "The entering into a contract with reluctance or even dissatisfaction with its terms because of economic necessity does not, of itself, constitute economic duress invalidating the contract." *Id.* (quoting *Newburn*, 657 So.2d at 852).

The *Dunes* Court ultimately found that the agreement was entered into voluntarily. The plaintiff business "consisted of sophisticated members and investors, and was well represented by experienced, competent lawyers. [Its] decision to enter into this settlement agreement was the result of an informed and deliberate decision." *Id.* ¶ 32, 623 N.W.2d at 492.

Ruling that the plaintiff failed to establish any element of economic duress under Nebraska law in *Rasby v. Pullen*, the Eighth Circuit noted that the plaintiff failed to "provide evidence that [the buying shareholder's] actions destroyed her free agency to choose whether to enter into the Unit Purchase Agreement." 905 F.3d 1097, 1101 (8th Cir. 2018). The *Rasby* Court found significant that the plaintiff was "a sophisticated professional, represented by an experienced attorney, who considered other options before selling her interests to [the shareholder buying her out] in an agreement that included a broad mutual release of claims." *Id.*

As to this element in *Absolute Resolutions Investments, LLC*, the court found that the agreement was entered into voluntarily. 2024 WL 325110, at * 12. The court rejected the plaintiff's argument that "no party would willingly give up these rights without adequate consideration" and determined that it was a circular argument "that demonstrates only that Absolute sees the Release as unreasonable in hindsight." *Id.* The court also recognized that the Amended Complaint in the case showed that the plaintiff believed the release agreement was an admission and apology by the defendant and the plaintiff hoped that the defendant would resolve the issue. *Id.*

In this case, Plaintiffs were also dealing as experienced, successful businessmen. They were advised by Mullen, an experienced, competent attorney in the field of business transactions and business litigation. Mullen advised the parties of different avenues and the consequences of choosing them. Scott was

given the opportunity to contemplate these options. Waylon voluntarily agreed to follow Scott's decision-making. Scott had initially expressed his desire to Mullen to negotiate the "true-up" price. He was reluctant to accept the terms because he believed the "true-up" price was a more appropriate and fairer representation of Blueprint's value. In turn, Waylon was reluctant to accept the terms because he and Leroy believed Kent's threats from the outset. However, Gulf Coast and Trigger together were ultimately reluctant to accept the terms due to the inadequacy of the additional options provided to them by Mullen. Of these options, Scott expressed concern for financial embarrassment. He hypothesized financial ruin if Kent followed through with his threats to "blow up" the company. Scott noted that millions of dollars in liabilities would be difficult to manage. He also noted the difficulty in obtaining new customers or employees and the unlikelihood of success in suing Kent.

These facts viewed in light most favorable to Plaintiffs show that they accepted the terms of the agreement voluntarily and have thus failed to go beyond the mere showing of a reluctance to accept and of financial embarrassment. Plaintiffs were wholly aware of the nature of the negotiation and the terms. Through this, they knowingly, competently, and voluntarily weighed their options. A calculated choice was made to not pursue the other options provided by Mullen due to the avoidance of a less-favorable financial outcome. Choosing a less-favorable outcome purely on financial strategy is insufficient to rise to the level of involuntariness.

Because this Court reaches the conclusion that Plaintiffs voluntarily accepted the terms of the Purchase Agreement, the elemental test of economic duress fails. Even if the first element is met as a matter of law, the remaining two elements also fail.

B. Whether the Circumstances Permitted Plaintiffs with No Reasonable Alternative.

The second requirement is that the circumstances presented no reasonable alternative to the conduct Plaintiffs agreed to. *Dunes*, ¶ 21, 623 N.W.2d at 490 (citing *Oskey*, 534 F.2d at 1286). "In determining whether a reasonable alternative is available, we employ an objective test." *Id.* (quoting *Zeilinger v. SOHIO Alaska Petroleum Co.*, 823 P.2d 653, 658 (Ala. 1992)). "Therefore, 'the outcome depends on the circumstances of each case.'" *Id.* (quoting *Zeilinger*, 823 P.2d at 658). "The availability of a legal resolution is one such circumstance." *Id.* (citing *Oskey*, 534 F.2d at 1286).

Making its conclusion on this prong, the *Dunes* Court noted that the plaintiff had two options: (1) the option of terminating their affiliation with the defendant; or

(2) filing suit. *Id.* ¶ 32, 623 N.W.2d at 492. The Court also noted that these options were known to and discussed by the plaintiff, because "several of the members urged rejection of the settlement agreement and proposed terminating the management contract and bringing suit" against the defendant. *Id.* The plaintiff did exactly that – two months after making the agreement in question. *Id.* The *Dunes* Court ultimately found that these two options were not unreasonable alternatives. *Id.*

In *Pochat*, the Western Division of the District of South Dakota similarly noted that the plaintiff had another option available, which was declaring an impasse and initiating litigation. *Id.* at 1069. As in *Dunes*, the plaintiff in fact brought suit only after accepting a settlement check. *Id.* The *Pochat* Court concluded that the statements of material fact only permitted one objective finding, that these were reasonable alternatives available to the plaintiff. *Id.*

The *Absolute Resolutions Investments* Court also found that the second element was not satisfied. 2024 WL 325110, at * 12. The court concluded that the plaintiff failed to establish "why there would be no reasonable alternative to signing the Release." *Id.* It reasoned that there was "no suggestion that Absolute could not reasonably and profitably continue its operations in the absence of a commercial relationship with Citibank. Moreover, 'access to an available legal resolution' like litigation effectively precludes Absolute's argument in this respect." *Id.* (quoting *Pochat*, 772 F. Supp. 2d at 1066).

In accordance with this authority, this Court finds that Plaintiffs had reasonable alternatives to entering into the Purchase Agreements. Plaintiffs did not have "little choice but to accede[,]" but had four, reasonable choices other than to accede. *Dunes*, ¶ 19, 623 N.W.2d at 489 (citing *Newburn*, 657 So.2d at 852).

First, as mentioned above, Gulf Coast and Trigger were represented by two experienced, competent businessmen. Gulf Coast hired Mullen to assist with the negotiations and to close the deal. Trigger agreed to follow Gulf Coast's decision-making. Mullen presented Gulf Coast, and effectively Trigger, with four options: (1) an outright refusal to sell the shares to Kent; (2) removal of Kent as Manager and trigger a buy-sell under Kent's Operations Manager Employment Agreement [3]; (3) fire Kent and hire a replacement crew on Blueprint's site and then sue Kent; or (4) file suit against Kent alleging tortious interference.

Option (1) presented Plaintiffs with a scenario of calling Kent's bluff and waiting for the result. This option may not have been reasonable considering the parties' intentions to close the deal and cut ties with each other. However, if

[3] Mullen testified that because Kent would likely oppose this route, that this option would result in litigation and an effort to enforce a non-compete clause. John Mullen Depo. 49:24-25, 50:1-11.

Plaintiffs would have pursued this avenue, and Kent followed through with his threats, Plaintiffs could have initiated actions that are discussed further below.

Option (2) presented the parties with a foreseeable and realistic outcome. Mullen specifically advised Gulf Coast that removing Kent as Operations Manager and triggering a buy-sell agreement would likely result in litigation. Mullen testified that he advised Gulf Coast that it was "possible" for a court, after the initiation of litigation, to find that the for cause termination was appropriate, and that the termination justified a buy-sell event. John Mullen Depo. 51:13-24. He finished by stating to Gulf Coast that a court could then compel Kent's sale of TCU Holdings' interest and enforce a non-compete agreement. [4] *Id.* 51-7-10. Mullen explained that it was possible that a court would rule in Gulf Coast's favor, but he also recognized in his testimony that he told Gulf Coast that there is no assurance that either side would be successful. *Id.* 51:25, 52:1-7. With this, Mullen thoroughly explained how option (2) could come to fruition. There is no indication that this avenue would be near impossible or so detrimental as to leave Plaintiffs with little choice but to accede. To Plaintiffs, this option left them with a reasonable, foreseeable, and realistic choice other than to accede. Yet, Gulf Coast informed Mullen that it planned "to close and later sue Kent." *Id.* 56:7-22.

In reference to the options to sue within options (3) and (4), Plaintiffs were reluctant to sue because Kent asserted that he was judgment proof. The availability to sue alone was sufficient in *Dunes*, *Pochat*, and *Absolute Resolution Investments*. None of these cases discussed the adequacy or likelihood of success of the legal claims. Classifying the ability to bring suit as a reasonable alternative carries the greatest weight when a plaintiff later sues for the claim they initially had. But this Court recognizes that several Counts in the Complaint were not ripe until after the Agreement was executed, namely economic duress, breach of operating agreement, and unjust enrichment/usurpation. However, even when the plaintiff in *Dunes* brought later-ripened claims after the execution of the settlement agreement, i.e., economic duress, the *Dunes* Court did not give this difference any weight. [5] It remains true that Plaintiffs had the options, provided by a competent attorney, to sue Defendants before the additional claims arose.

The inverse of the second element under *Dunes* only requires one reasonable alternative for the element to fail. Under *Dunes*, the option to cut ties with Kent and TCU Holdings and availability to sue them were reasonable alternatives to entering into the Purchase Agreement. Plaintiffs' argument as to the second element therefore fails because they had least two reasonable alternatives.

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[4] Moreover, Plaintiffs never argued in their pleadings that suing TCU Holdings was an unreasonable alternative, considering Kent was the agent of both companies.

[5] In *Dunes*, the original option for suit arose out of concerns of the management agreement with the defendant. 2001 S.D. 36, ¶ 2, 623 N.W.2d at 487. The plaintiff subsequently sued for economic duress in the execution of the settlement on the management agreement issue. *Id.*

Because it is found that Plaintiffs voluntarily accepted the terms of the Purchase Agreement and that there were reasonable alternatives, the elemental test of economic duress fails. Even if the first two elements of the economic duress doctrine are met as a matter of law, the remaining element fails.

C. Whether the Circumstances were the Result of Coercive and Wrongful Acts.

Finally, Plaintiffs must show that Defendants' conduct was coercive and wrongful, and that there was a causal link between the conduct and the circumstances creating economic duress. *Dunes*, ¶ 22, 623 N.W.2d at 490 (citing *Oskey*, 534 F.2d at 1286). Coercive and wrongful acts may include but are not limited to criminal or tortious conduct. *Id.* (citing *Oskey*, 534 F.2d at 1286). However, "[a] claim of economic duress cannot be based upon a claim that one has been the victim of a hard bargain." *Id.* (citing *Newburn*, 657 So.2d at 852). "The party asserting economic duress must establish they were the victim of unlawful or unconscionable pressure." *Id.* (citing *Newburn*, 657 So.2d at 852).

Plaintiffs distinguish *Dunes*, noting several differences in the facts that support their conclusion that Kent acted coercively and wrongfully. They note that in *Dunes*, there was no threat to take customers and employees, *Dunes* did not have a "blow up" form of threat, and *Dunes* did not have a fiduciary or officer making threats and the implications that stem from that.

By way of example, the *Pochat* Court found that the plaintiff failed to make a showing as to the third prong because the full insurance coverage limit was paid toward her medical expenses, and the insurance company promptly responded to her settlement demands and her claim was resolved in a timely manner. *Pochat*, 772 F.Supp.2d at 1068. Additionally, in *Absolute Resolutions Investments*, the Southern District of New York in applying *Dunes* found that the defendant's "mere implication that it would discontinue its business dealings with [the plaintiff] absent a limitation of liability is not plausibly unlawful or unconscionable, especially when [the plaintiff] is a sophisticated party experienced in high-value, complex commercial negotiations." 2024 WL 325110, at * 12. Finally, the *Rasby* Court found that the third element was not met, reasoning that:

> [i]t was neither unfair nor inequitable for [the defendant] to seek to purchase the interest of a minority shareholder who was no longer actively involved in the enterprise. He offered a substantial sum for shares that Rasby acquired without a cash investment, he disclosed the calculations his advisor used in valuing Rasby's interest, and he invited her to consult her own valuation expert. The valuation of small minority

> interests in six different entities is likely to lead to differences of opinion. For litigation purposes, Rasby makes the unlikely assertion that she was paid only twenty percent of her interests' fair value. Far more credible is the testimony of Wells, her attorney in the negotiations, that the ultimate price [the defendant] paid was not unconscionable.

905 F.3d at 1102.

In this case, this Court is unconvinced that Plaintiffs were subject to coercive and wrongful acts. The facts viewed most favorably to the Plaintiffs show only that they were victims of a hard bargain. Nothing in these facts demonstrate that Kent's actions were both coercive and wrongful.

Ultimately, Kent's threats were "to carry out that which the law entitles [him] to do." *Dunes*, ¶ 23, 623 N.W.2d at 490 (quoting 25 Am.Jur.2d *Duress and Undue Influence* § 7 (1996)). Kent had the right to leave his position as Operations Manager. He had the authority to initiate the selling of his companies' shares. Also, he had the authority to request a buy-out. Aside from Kent, his crew in turn had the right to leave their positions. The customers of Blueprint could have turned elsewhere for business, or possibly followed Kent. On the other hand, while Kent and his attorney characterized his potential actions in a negative light, the potential actions were nevertheless foreseeable and realistic to Plaintiffs. They had the authority to terminate his employment for cause and trigger a buy-sell agreement. Plaintiffs could similarly terminate the crew members' employment for cause. Plaintiffs contemplated a non-compete clause in the Operating Agreement. They also had the authority to request a buy-out. While the parties view the alternative avenues in different lights, the processes in which they occur do not change the outcomes.

This Court cannot find that foreseeable and realistic outcomes, framed as threats by the opposing party, are unreasonable merely because the opposing party is using those avenues as ammunition when negotiating. Kent's threats had character of coerciveness, considering the portrayal of his intentions and the gravity of the consequences associated with them. These threats, if they had come to fruition, would have produced additional hurdles or legal action in themselves, but Kent did not present the Plaintiffs with such an ultimatum that rose to the level of wrongfulness.

Plaintiffs' central argument is that the conduct was wrongful because of Kent's status as a fiduciary and that he framed his potential exit as all the above scenarios occurring at once. While it is true that he did so, Plaintiffs' own conduct in the negotiating process dilutes the strength of their claims. It is noteworthy that Plaintiffs nevertheless sought advice from counsel, weighed their options without any swaying of opinion by Mullen, and decided to acquiesce to Kent's price term if

other provisions were met. The facts present hallmarks of a traditional, "hardball" negotiating session. Plaintiffs fell victim to a hard bargain merely because they were reluctant to pursue their other options based on economic strategy.

Plaintiffs have thus failed to show that they were victims of economic duress as a matter of law. Consequently, they are bound to the Agreement and not entitled to reformation because the agreement was entered into voluntarily with a meeting of the minds. There is no genuine issue of material fact as to the claim of economic duress, and Defendants are entitled to a judgment – the enforcement of a valid purchase agreement – as a matter of law. SDCL 15-6-56.

2. Whether Section 2.03 of the Membership Purchase Agreements Bars Plaintiffs' Remaining Claims.

After finding that economic duress was not present as a matter of law, the Eighth Circuit in *Rasby* found that because the mutual release of the purchase agreement was not rendered by fraudulent inducement, it was enforceable and thus barred the plaintiff's additional claims of breach of fiduciary duty and deprivation of a corporate opportunity. 905 F.3d at 1102-1103. Here, the parties presented argument as to the indemnity and warranty provisions in the written agreements. Accepting *Rasby* as persuasive authority because *Dunes* was not presented with this step, this Court next considers whether these provisions released Defendants of liability as to bar Plaintiffs' remaining claims in the Complaint.

Section 2.03 of the Purchase Agreement provides:

> **Legal Proceedings.** There is no claim, action, suit, proceeding or governmental investigation ("**Action**") of any nature pending or, to Seller's knowledge, threatened against or by Seller (a) relating to or affecting the Membership Interests; or (b) that challenges or seeks to prevent, enjoin or otherwise delay the transactions contemplated by this Agreement. No event has occurred or circumstances exist that may give rise to, or serve as a basis for, any such Action.

The sentence at issue is the last sentence, which Plaintiffs argue is not sufficiently explicit or express enough to release Defendants from liability.

"Releases are contractual agreements." *Fenske Media Corp. v. Banta Corp.*, 2004 S.D. 23, ¶ 8, 676 N.W.2d 390 (citing *Parkhurst v. Burkel*, 1996 S.D. 19, ¶ 12, 544 N.W.2d 210, 212). Contract interpretation is a question of law. *Id.* (citing *Auto Owner Ins. Co. v. Enterprise Rent-A-Car Co.-Midwest*, 2003 S.D. 52, ¶ 7, 663 N.W.2d 208, 209-210). "It is well settled that in interpreting a contract, we rely on the language of the contract to ascertain the intent of the parties." *Carstensen*

Contracting, Inc. v. Mid–Dakota Rural Water Sys., Inc., 2002 S.D. 136, ¶ 8, 653 N.W.2d 875, 877. "Where possible, we must give meaning to all the provisions of a contract." *Id.* (citing *Carstensen Contracting, Inc.*, 2002 S.D. 136, ¶ 8, 653 N.W.2d at 877).

> The doctrine of waiver is applicable where one in possession of any right, whether conferred by law or by contract, and with full knowledge of the material facts, does or forbears the doing of something inconsistent with the exercise of the right. To support the defense of waiver, there must be a showing of a clear, unequivocal and decisive act or acts showing an intention to relinquish the existing right.

Action Mechanical, Inc. v. Deadwood Historic Preservation Com'n, 2002 S.D. 121, ¶ 18, 652 N.W.2d 742, 749 (quoting *Norwest Bank South Dakota v. Venners*, 440 N.W.2d 774, 775 (S.D. 1989)).

Both parties' arguments rely on the initial determination of economic duress. Plaintiffs argue that this clause, which would allow for a party's own wrongdoing, is void as a matter of public policy. Defendants argue that economic duress was not present, the Purchase Agreements are valid and enforceable, thus the release properly bars Plaintiffs' remaining claims.

Because this Court has previously found that the Purchase Agreements are valid and enforceable because no economic duress occurred, Section 2.03 on its face is not unfair or invalid. *See Flynn v. Lockhart*, 526 N.W.2d 743, 746 (S.D. 1995) (quoting *Johnson v. Rapid City Softball Ass'n*, 514 N.W.2d 693, 697 (S.D. 1994)) ("A release is not fairly made and is invalid if the nature of the instrument was misrepresented or there was other fraudulent or overreaching conduct.").

The plain language of Section 2.03 supports a waiver of Plaintiffs' right to sue. The Section recognizes the possession of a right to bring an "Action," which includes "suit" as an example. The last sentence of Section 2.03 contemplates the parties mutual understanding that no event or circumstance is present that "may give rise to, or serve as a basis for" suit. Mullen contemplated this release and advised Gulf Coast (and effectively Trigger) of it. John Mullen Depo. 37:6-24. This language clearly and unambiguously exhibits Plaintiffs' recognition and agreement that nothing was present at the time of formation that would give rise or serve as a basis to sue. This of course contemplates Plaintiffs' remaining claims, as they all are alleged to have occurred before or during formation of the Purchase Agreement. This recognition by Plaintiffs is an act contrary to the exercise of the right to bring suit. Because economic duress is not present, and there are no other claims regarding the invalidity of the contract, this Section serves to waive Plaintiffs' right to sue TCU Holdings and TCU, LLC.

Plaintiffs argue that Kent is not absolved from liability "without an express provision or express intent" within Section 2.03. *Jennings v. Rapid City Reg'l Hosp., Inc.*, 2011 S.D. 50, ¶ 12, 802 N.W.2d 918, 923. This Court's conclusion, however, is supported by the general notion that "[c]ompelling policy reasons support releases under the Uniform Contribution Among Joint Tortfeasors Act (SDCL 15–8–11 to 15–8–22):

> The defendant who originally procures the release gains nothing if the plaintiff can sue other joint or concurrent tortfeasors. In such a case, the original defendant is left open to claims for contribution and/or indemnity and may wind up having to litigate the case anyway.

Flynn, 526 N.W.2d at 746 (quoting *Douglas v. United States Tobacco Co.*, 670 F.2d 791, 794 (8th Cir. 1982)).

Plaintiffs have further failed to establish a basis for personal liability or established facts in genuine dispute that support piercing the corporate veil. They recognized in briefing that Kent did not execute the Purchase Agreements in his individual capacity. The South Dakota Supreme Court has adopted a six-factor test for determining when to pierce the corporate veil:

> There are six factors to consider when determining whether equity demands a disregard of the corporate entity: "(1) undercapitalization; (2) failure to observe corporate formalities; (3) absence of corporate records; (4) payment by the corporation of individual obligations; (5) fraudulent misrepresentation by corporate directors; and (6) use of the corporation to promote fraud, injustice or illegality.
>
> The six factors can be grouped into two separate prongs: the 'separate corporate identity' prong and the 'fraud or inequitable consequences' prong. If the four factors under the 'separate corporate identity' prong are present in sufficient number and/or degree, then this Court will consider the two factors under the 'fraud or inequitable consequences' prong.

Paul v. Bathurst, 2023 S.D. 56, ¶ 21, 997 N.W.2d 644, 652-53 (quoting *Brevet Int'l, Inc. v. Great Plains Luggage Co.*, 2000 S.D. 5, ¶ 26, 604 N.W.2d 268, 274).

Here, there are no facts viewed most favorably to the Plaintiffs that an equitable demand to disregard TCU Holdings as a corporate entity. Even if TCU Holdings were to be considered the alter ego of Kent, the Court's previous conclusion that the Purchase Agreements are valid and enforceable show that Kent did not use TCU Holdings to promote fraud, injustice, or illegality.

Thus, Plaintiffs have contractually agreed to not sue Kent, TCU, LLC, and TCU Holdings. Even if Section 2.03 does not waive Plaintiffs' right to sue, Plaintiffs' remaining claims nevertheless fail as a matter of law.

3. Whether Defendants Breached the Operating Agreement.

In this Count, Plaintiffs alleged that Defendants breached the original operating agreement of Blueprint because TCU Holdings did not allow Gulf Coast and Trigger their voluntary transfer of units either via a right of first refusal or a mandatory buy-sell process. Section 9.3 of the Operating Agreement allowed for "substitute members" to be brought into Blueprint "upon the terms and conditions set forth in Articles 14.3 and 14.5." Article 14.1 provided that "no Member may transfer all or any part of its . . . Interest . . . unless the Transfer is . . . Accomplished under the terms and conditions set forth in Article 14.2, 14.3, or 14.4[.]" The Agreement further outlines a process for "voluntary transfer of units" via a right of first refusal in Article 14.2; or a mandatory buy-sell process for certain events under 14.3.

As an initial determination, this Court has previously found that economic duress is not present. The Purchase Agreements are therefore valid and enforceable. Within this determination, the Court found that Plaintiffs voluntarily entered into the Agreement. The parties agreed that the sale was in compliance with the Operating Agreement. Membership Purchase Agreements, p. 3, Section 2.02. The Purchase Agreement clearly and unequivocally contemplates no breach of the Operating Agreement. Plaintiffs cannot supersede the terms of a valid contract purely praying for a more ideal outcome. Plaintiffs' claim thus fails as a matter of law.

Even if the contract was reformable or unenforceable due to duress, Plaintiffs ratified the Purchase Agreements which defeats their claim of breach of the Operating Agreement. "A contract is ratified when 'an act by which an otherwise voidable and, as a result, invalid contract is conformed, and thereby made valid and enforceable.'" *Ziegler Furniture and Funeral Home, Inc. v. Cicmanec*, 2006 S.D. 6, ¶ 31, 709 N.W.2d 350, 358 (quoting 17A CJS Contracts § 138 (1998)). "Ratification can either be 'express or implied by conduct.'" *Id.* (quoting *Bank of Hoven v. Rausch*, 382 N.W.2d 39, 41 (S.D.1986)). "In addition, failure of a party to disaffirm a contract over a period of time may, by itself, ripen into a ratification, especially if rescission will result in prejudice to the other party." *Id.* (quoting *First State Bank of Sinai v. Hyland*, 399 N.W.2d 894, 898 (S.D.1987)).

Plaintiffs ratified the Purchase Agreement by executing the agreement and accepting their respective payments of $800,000 and depositing the checks. This Court finds it "impossible to believe" that Plaintiffs accepted and deposited the

checks "without, in [their] own mind[s]," having mutually assented to the Purchase Agreements and manifested an intent to effectuate its terms. *See First State Bank of Sinai v. Hyland*, 399 N.W.2d 894, 898 (S.D. 1987). Aladdin, which received $3,280,150.94 as part of the transaction, continued to factor invoices until all debt obligations were paid off. Aladdin also released several liens and UCC filings in compliance with the Purchase Agreement. Aladdin, which is Scott's other company, acted on the exact concerns Scott possessed in arguing that Kent's threats would have subjected Aladdin to its debt obligations. In essence, Plaintiffs and Aladdin manifested a willingness to go on with the contract, and by virtue Gulf Coast and Trigger acquiesced to Aladdin continuing to effectuate Plaintiffs' concerns that arose out of negotiations of the contract. As a result, this claim fails as a matter of law.

4. Whether Kent Breached a Fiduciary Duty as an Officer and Shareholder of Blueprint.

The existence of a fiduciary duty and the scope of such duty are questions of law. *Mueller v. Cedar Shore Resort, Inc.*, 2002 S.D. 38, ¶ 11, 643 N.W.2d 56, 62 (citing *Landstrom v. Shaver*, 1997 S.D. 25, ¶ 84, 561 N.W.2d 1, 18). Whether there has been a breach of a fiduciary duty is a fact question determined by the circuit court at summary judgment. *Id.* (citing *Hayes v. N. Hills General Hosp.*, 1999 S.D. 28, ¶ 57, 590 N.W.2d 243, 253).

"Generally, corporation law states that, while directors owe a fiduciary duty to the corporation, shareholders do not owe a fiduciary duty to either the corporation or their fellow shareholders." *Mueller*, 2002 S.D. 38, ¶ 26, 643 N.W.2d at 66 (citing Robert W. Hamilton, *Business Organizations: Unincorporated Businesses and Closely Held Corporations* § 8.35 (1996)). "This standard is different, however, for close corporations. '[I]n almost every state, majority, dominant, or controlling shareholders, or a *group of shareholders acting together* to exercise effective control, are held to owe a fiduciary duty to minority shareholders.'" *Id.* (quoting *Hayes v. N. Hills General Hosp.*, 1999 S.D. 28, ¶ 52, 590 N.W.2d 243, 253). "This fiduciary duty is characterized by a high degree of diligence and due care, as well as the exercise of utmost good faith and fair dealing." *Id.* (citing *Landstrom*, 1997 S.D. 25, ¶ 84, 561 N.W.2d at 18; *Case v. Murdock*, 488 N.W.2d 885, 889–90 (S.D. 1992); *Mobridge Cmty. Indus., Inc. v. Toure, Ltd.*, 273 N.W.2d 128, 133 (S.D. 1978)).

"Hallmark behavior" of breaches of fiduciary duties "includes the failure to disclose information, director or shareholder self-dealing, making fraudulent misrepresentations regarding past or future events, and surreptitious conduct or communications." *Id.* ¶ 29, 643 N.W.2d at 67 (quoting *Hayes*, 1999 S.D. 28 at ¶ 57, 590 N.W.2d at 253) (additional citations omitted).

In this case, the facts viewed in light most favorable to Plaintiffs support a conclusion as a matter of law that Kent did not breach a fiduciary duty. Kent did not fail to disclose information. In fact, he was rather candid and open about his intentions with the future of the company. The facts further do not support a conclusion that Kent was self-dealing, because he was intending on and acting on obtaining outside funds to buy out Gulf Coast's and Trigger's shares. Kent also did not fraudulently misrepresent past or future events, again because he was candid and forthcoming throughout the negotiations. For the same reason, the facts do not show that Kent was acting surreptitiously.

The facts viewed in Plaintiffs' favor also do not support a breach of duty of loyalty because Kent's actions are inapplicable to the governing statute, SDCL 47-34A-409(b). In a similar vein, Count 6 of the Complaint asserts an usurpation of a business opportunity. The doctrine of corporate opportunity "holds that one who occupies a fiduciary relationship to a corporation may not acquire, in opposition to the corporation, property in which the corporation has an interest or tangible property." *Case v. Murdock*, 488 N.W.2d 885, 890 (S.D. 1992).

> If the doctrine of business opportunity is to possess any vitality, the corporation or association must be given the opportunity to decide, upon full disclosure of the pertinent facts, whether it wishes to enter into a business that is reasonably incident to its present or perspective operations. Since a director is under a duty to inform the corporation of the full circumstances of the transaction, mere disclosure of the transaction, without revealing the surrounding circumstances, is not sufficient, and it has been held that the failure to make complete disclosure constitutes constructive fraud, thereby tolling the statute of limitations.

Case, 488 N.W.2d at 890 (quoting 3 *Fletcher Cyc. of Corp.*, § 861.1 p. 288 (1986)).

An exception to this general rule is that "[a] fiduciary of the corporation is allowed to take a business opportunity once the corporation has properly rejected the opportunity or if it is not in a position to take it." *Id.* (quoting *Fletcher* at § 862). The South Dakota Supreme Court discussed limitations and conditions to this exception in *Case v. Murdock*, but those are not applicable to these facts.

Here, the facts viewed most favorably to Plaintiffs do not support a cause of action under the doctrine of corporate opportunity. Plaintiffs entered into this agreement voluntarily. The Purchase Agreements are valid and enforceable. Their claim that a corporate opportunity to have their shares bought at a market rate, Complaint, p. 12, ¶¶ 69-70, fails as a matter of law because they contracted for a different price. In other words, Plaintiffs were "given the opportunity to decide, upon full disclosure of the pertinent facts," what price they were to sell their shares.

Case, 488 N.W.2d at 890 (quoting *Fletcher* at § 861.1). There is also a strong argument that the doctrine does not apply to this case, considering the shareholders of Blueprint were contracting among themselves to restructure ownership. The parties were never considering an outside business opportunity. As an additional conclusion, Plaintiffs would therefore would not be entitled to punitive damages. *See Longwell v. Custom Benefit Programs Midwest, Inc.*, 2001 S.D. 60, ¶ 27, 627 N.W.2d 396, 400 (citing *Grynberg v. Citation Oil & Gas Corp.*, 1997 S.D. 121, ¶ 18, 573 N.W.2d 493, 500) ("Usurpation of corporate opportunity and conversion are independent torts for which South Dakota law allows punitive damages.").

Defendants have also not been alleged to have self-dealt, or otherwise competed with the company. Kent's conduct was not ripe and consisted only of prospective intentions. The Agreements certainly did not create self-dealing or competition with the company, as TCU Holdings was paying millions of dollars to obtain ownership of Blueprint. No competition was present because Kent did not act on his threats and TCU Holdings was a one-third owner of Blueprint.

As to a breach of a duty of care, "[a] member's duty of care to a member-managed company and its other members in the conduct of and winding up of the company's business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law." SDCL 47-34A-409(c); *Mach v. Connors*, 2022 S.D. 48, ¶ 26, 979 N.W.2d 161, 170 (discussing breach of the duty of care). Kent's conduct was not grossly negligent or reckless. He also did not commit intentional misconduct or a knowing violation of law. This is because he simply engaged in hard bargaining to execute the buyout. He was entitled to request a buy out, to initiate the sale of TCU Holdings' interest, and to leave his employment as Operations Manager. The employees were entitled to leave the company. The customers were entitled to seek business elsewhere. Plaintiffs voluntarily and knowingly agreed to the Purchase Agreements.

Finally, Kent exhibited a "high degree of diligence and due care, as well as the exercise of utmost good faith and fair dealing." *Mueller*, 2002 S.D. 38, ¶ 26, 643 N.W.2d at 66. As noted in the economic duress portion of this Decision, Kent's actions had a character of coerciveness, but his objective actions support the conclusion that he did not breach these duties. Both sides of the negotiation were represented by attorneys (or, in Trigger's case, voluntarily following Gulf Coast's decisions based off attorney assistance). The parties negotiated and contracted for the sale of Plaintiffs' shares, which produced valid and enforceable Purchase Agreements. The price was based on a quantitative, objective, and referenceable figure that Plaintiffs voluntarily assented to.

The resulting conclusion is that Kent cannot be found, as a matter of law, to have breached a fiduciary duty as an officer or shareholder of Blueprint.

5. Whether TCU Holdings' Actions Rise to the Level of Shareholder Oppression.

Determining whether conduct arises to shareholder oppression is a question of law. *Mueller*, 2002 S.D. 38, ¶ 14, n. 2, 643 N.W.2d at 62, n. 2 (citing *Landstrom*, 1997 S.D. 25, ¶ 37, 561 N.W.2d at 7). The South Dakota Supreme Court has analyzed shareholder oppression "by considering oppressive actions to refer to conduct that substantially defeats the 'reasonable expectations' held by minority shareholders in committing their capital to the particular enterprise." *Mueller*, 2002 S.D. 38, ¶ 13, 643 N.W.2d at 62 (quoting *Landstrom*, 1997 S.D. 25, ¶ 38, 561 N.W.2d at 8).

If this Court determines that the minority shareholders' expectations are reasonable:

> A court considering a petition alleging oppressive conduct must investigate what the majority shareholders knew, or should have known, to be the petitioner's expectations in entering the particular enterprise. Majority conduct should not be deemed oppressive simply because the petitioner's subjective hopes and desires in joining the venture are not fulfilled. Disappointment alone should not necessarily be equated with oppression.

Id. (quoting *Landstrom*, 1997 S.D. 25, ¶ 38, 561 N.W.2d at 8).

"Reasonable expectations are to be analyzed in light of the entire history of the parties' relationship, and include expectations such as participation in management of corporate affairs." *Id.* ¶ 14, 643 N.W.2d at 62 (quoting *Longwell v. Custom Benefit Programs Midwest, Inc.*, 2001 S.D. 60, ¶ 19, 627 N.W.2d 396, 399). "The determination of whether a stockholder's expectations are reasonable, however, must include a balancing test. The court weighs the minority shareholder's expectations against the 'corporation's ability to exercise its business judgment and run its business efficiently.'" *Id.* (quoting *Longwell*, 2001 S.D. 60, ¶ 19, 627 N.W.2d at 399). "There is a presumption that directors will make decisions 'on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company.'" *Id.* (quoting *Whalen v. Connelly*, 593 N.W.2d 147, 154 (Iowa 1999)). "Even in the context of a close corporation, where the directors may have substantial personal interests, courts are loathe to second guess the business decisions of the directors." *Id.* (quoting Robert W. Hamilton, *Business Organizations: Unincorporated Businesses and Closely Held Corporations* § 9.41 (1996)). "Oppression will only arise where the minority shareholder's expectations were 'both reasonable under the circumstances *and* were

central to the decision to join the venture.'" *Id.* (quoting *Longwell*, 2001 S.D. 60, ¶ 19, 627 N.W.2d at 399).

The facts viewed most favorably to Plaintiffs do not support a legal conclusion of shareholder oppression. TCU Holdings was a minority shareholder and Plaintiffs acting in tandem were majority shareholders. The parties mutually agreed to part ways. The parties entered into the agreement voluntarily. Because no economic duress was present, the Purchase Agreements are valid and enforceable. The only relevant expectation that Gulf Coast and Trigger would have had is the "true-up" price. Kent was aware of this expectation but held firm, invoking his negotiating tactics. Gulf Coast and Trigger weighed their options and voluntarily agreed to Kent's price term if other provisions were met. Plaintiffs were merely disappointed in the outcome of the Agreements. Defendants' conduct did not defeat any reasonable expectations that Gulf Coast and Trigger may have had.

6. Whether Defendants were Unjustly Enriched from the Purchase Agreement.

"Unjust enrichment contemplates an involuntary or nonconsensual transfer, unjustly enriching one party. The equitable remedy of restitution is imposed because the transfer lacks an adequate legal basis." *Johnson v. Larson*, 2010 S.D. 20, ¶ 8, 779 N.W.2d 412, 416. "When there is a valid and enforceable contract, however, liability for compensation or other resolution of the breach is fixed exclusively by the contract." *Id.* ¶ 9, 779 N.W.2d at 416 (citations omitted). "[T]he equitable remedy of unjust enrichment is unwarranted when the rights of the parties are controlled by an express contract." *Id.* ¶ 8, 779 N.W.2d at 416 (citing *Burch v. Bricker*, 2006 S.D. 101, ¶ 18, 724 N.W.2d 604, 609–10). Thus, the "initial question . . . is 'whether, as a matter of law, [a party can] seek the equitable remedy of unjust enrichment when [there is] available to them an adequate remedy at law' for the same alleged wrongdoing." *Mach v. Connors*, 2022 S.D. 48, ¶ 35 n. 5, 979 N.W.2d at 172 n. 5 (alterations original) (quoting *Paweltzki v. Paweltzki*, 2021 S.D. 52, ¶ 40, 964 N.W.2d 756, 769).

This Court has found that economic duress is not present, and the Purchase Agreements are valid and enforceable. It has also found that the parties have entered into the Purchase Agreements voluntarily. There is no wrongdoing. Further, Section 2.03 explicitly limits liability. The language of the Purchase Agreements is operative. The equitable remedy of unjust enrichment does not apply. This Count in the Complaint fails as a matter of law.

7. Whether Defendants Tortiously Interfered with the Business Relationship or Expectancy in Blueprint.

"In general, the tort of intentional interference with contractual relations serves as a remedy for contracting parties against interference from outside intermeddlers." *Gruhlke v. Sioux Empire Federal Credit Union, Inc.*, 2008 S.D. 89, ¶ 7, 756 N.W.2d 399, 404. "To prevail on a claim of tortious interference, 'there must be a 'triangle'—a plaintiff, an identifiable third party who wished to deal with the plaintiff, and the defendant who interfered with' the contractual relations." *Id.* (quoting *Mueller*, 2002 S.D. 38, ¶ 38, 643 N.W.2d at 58). "South Dakota has long recognized this tort." *Id.* (citing *Lien v. Nw. Eng'g Co.*, 73 S.D. 84, 88, 39 N.W.2d 483, 485 (1949)). "Without the protection of the third-party element of the tort, virtually every supervisory decision affecting employment status would be subject to judicial challenge through the Trojan horse of the intentional interference tort." *Id.* ¶ 13, 756 N.W.2d at 406 (quoting John Alan Doran, *It Takes Three to Tango: Arizona's Intentional Interference with Contract Tort and Individual Supervisor Liability in the Employment Setting*, 35 ArizStLJ 477, 508 (Summer 2003)).

"A corporate entity cannot contractually interfere with itself." *Id.* "[W]hen an employee is acting within the scope of the employee's employment, and the employer, as a result, breaches a contract with another party, that employee is not a third party for the tort of intentional interference with economic relations." *Id.* ¶ 13, 756 N.W.2d 406-07 (quoting *McGanty v. Staudenraus*, 321 Or. 532, 901 P.2d 841, 846 (1995). "[A] corporate director cannot be held personally liable under this cause of action for conduct taken under a contract entered into by the corporation because the director can only act in the director's official capacity on behalf of the corporation." *Landstrom*, 1997 S.D. 25, ¶ 76, 561 N.W.2d at 16 (citing *Nelson v. WEB Water Development Ass'n, Inc.*, 507 N.W.2d 691 (S.D. 1993)). "[T]o hold otherwise would make the director liable for interfering with a business expectancy between a plaintiff and a director with no identifiable third party." *Id.* (citing *Nelson*, 507 N.W.2d at 700).

The element that is missing in this case is an identifiable third-party. Kent was the Operations Manager in his employee capacity. Kent negotiated the buyout as an agent of TCU Holdings. Kent cannot be an identifiable third party because he was not wishing to deal with Plaintiffs in his individual capacity, and TCU Holdings would not have interfered with that hypothetical wish. TCU Holdings was a one-third shareholder in the company. It cannot be both the third party and the defendant. Blueprint cannot have intermeddled with itself and tortiously interfered with its own ownership interests in a restructuring of its ownership. *See* Complaint, p. 10, ¶¶ 52-55. This claim fails as a matter of law.

8. Whether accounting, costs and fees, and injunctive relief may be declined as a matter of law.

As a final matter, Counts 7-9 of the Complaint, listed as Accounting, Costs and Attorneys' Fees, and Injunctive Relief, are all rendered moot for the foregoing reasons.

CONCLUSION

Defendants' Motion for Summary Judgment is granted because none of the elements of economic duress are met as a matter of law. Because economic duress was not present, the Purchase Agreements are valid, operative, and enforceable contracts. Within the Purchase Agreements, they both obtain releases of liability, which bars Plaintiffs' remaining claims. Even if the releases of liability do not bar Plaintiffs' claims, the claims nevertheless fail as a matter of law.

ORDER

Based upon the foregoing Memorandum Decision, IT IS HEREBY ORDERED that Defendants' and Third-Party Plaintiffs' (Second) Motion for Summary Judgment is GRANTED in full. This Order specifically incorporates the Court's Memorandum Decision into this Order.

Dated this 7th day of June, 2024.

BY THE COURT:

Douglas P. Barnett
Circuit Court Judge

ATTEST:
ANGELIA M. GRIES,
Clerk of Courts

BY _____
Deputy (Seal)

FILED
JUN 07 2024
Minnehaha County, S.D.
Clerk Circuit Court

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS	
COUNTY OF MINNEHAHA	)	SECOND JUDICIAL CIRCUIT
TRIGGER ENERGY HOLDINGS, LLC, a Wyoming Limited Liability Company, & GULF COAST INVESTMENTS, LLC, a South Dakota limited liability company, Plaintiffs, vs. KENT STEVENS, as an individual, an officer, and agent; TCU, LLC, a Wyoming Limited liability company; TCU HOLDINGS, LLC, a Wyoming limited liability company; and BLUEPRINT ENERGY PARTNERS, LLC, a South Dakota limited liability company, Defendants and Third-Party Plaintiffs. v. TRIGGER ENERGY, INC., a Wyoming corporation, & ALADDIN CAPITAL INC., a South Dakota Corporation. Third-Party Defendants.	)	49CIV19-002287 **DEFENDANTS AND THIRD-PARTY PLAINTIFFS' SECOND STATEMENT OF UNDISPUTED MATERIAL FACTS**

Defendants and Third-Party Plaintiffs, by and through their undersigned attorney of record, pursuant to the provisions of SDCL 15-6-56(c), submit this

short and concise statement of the material facts as to which they contend there is no genuine issue to be tried.

1. Blueprint Energy Partners, LLC ("Blueprint") was formed in 2017 with Trigger Energy Holdings, LLC ("Trigger"), Gulf Coast Investments, LLC ("Gulf Coast"), and TCU, LLC ("TCU") with each holding 1/3 membership share. (*See* Defendants and Third-Party Plaintiffs' Answer, at ¶ 4.)

2. Aladdin Capital, Inc., through Scott Keogh, was appointed the Manager of Blueprint. (Scott Keogh Depo. 21:22-22:3, November 28, 2023.)

3. On December 13, 2017, Kent Stevens, was named the Operations Manager pursuant to an Operations Manager's Employment Agreement. (*Id.* at 71:12-72:5).

4. Gulf Coast admits that Scott Keogh, Vice President and 49.9% shareholder of Gulf Coast, was 48-years-old at the time of the transaction, a sophisticated investor and businessman, and was mentally competent during the duration of 2019. (*Id.* at 13:18-21, 113:25-114:8, Gulf Coast's Responses to Request for Admissions, ¶¶ 19-23.)

5. Scott Keogh is also the Vice President and 49.9% shareholder of Third-Party Defendant, Aladdin Capital, Inc. (*Id.* at 9:19-23).

6. Waylon Geuke, President of Trigger, is a 54-year-old, sophisticated investor and businessman that was mentally competent during the duration of 2019. (Trigger's Responses to Request for Admissions, ¶¶ 19-23)

7. Waylon Geuke is also an officer and director of Third-Party Defendant, Trigger Energy, Inc. (Exhibit 3 to Defendants and Third-Party

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Plaintiffs' Answer, Counterclaim, and Third-Party Complaint, hereinafter "Defendants' Answer" at p. 16).

8. In the beginning, Blueprint failed to meet financial projections with respect to revenue and debt payments which created a bone of contention. (*Id.* at 26:14-27:7).

9. Scott Keogh demanded accountability and was frustrated with the inability of Blueprint to meet its debt obligations owed to Aladdin Capital, Inc. (*Id.* at 37:23-5, 39:12-40:7).

10. The partners held monthly meetings in Casper, Wyoming or Sioux Falls, South Dakota to address issues. (*Id.* at 30:4-13.)

11. These meetings became a point of contention and as early as August of 2018, Kent Stevens, on behalf of TCU, expressed his desire to buy out Trigger's and Gulf Coast's shares in Blueprint. (*Id.* at 36:5-9.)

12. By February of 2019, the parties began having serious discussions about a buyout. (*Id.* at 36:9-10.)

13. Gulf Coast hired attorney John Mullen to represent it in regards to the sale of its interests in Blueprint. (Gulf Coast's Responses to Request for Admissions, at ¶ 11).

14. For over thirty years, Mr. Mullen's legal practice has focused on business transactions and business litigation. (John Mullen Depo. 6:8-15, Aug. 26, 2022).

15. Gulf Coast admits that attorney John Mullen is a partner with Boyce Law Firm, LLP in Sioux Falls, South Dakota and is a competent attorney. (Gulf Coast's Responses to Request for Admissions, at ¶¶ 12-13).

16. Trigger reported, through attorney John Mullen, that it would sign the same type of agreement that Gulf Coast was willing to sign. (Scott Keogh Depo. 69:23-70:3).

17. Therefore, Gulf Coast took the lead and discussed its options with its attorney John Mullen regarding the terms of a buyout of Trigger's and Gulf Coast's shares in Blueprint. (*See id*).

18. Attorney Mullen communicated directly with the attorney for TCU, to negotiate the terms of the buyout agreement. (*See* John Mullen Depo. 16:1-17:12.)

19. Attorney Mullen testified that he attempted to negotiate a "true-up" adjustment on the price to account for the performance of the company between the time of the initial deal and the closing. (*Id.* at 15:17-16:19).

20. When TCU, through its attorney, would not agree to the "true-up," Attorney Mullen testified that he then "continued to negotiate the deal on the – based on those terms." (*Id.* at 19:9-10).

21. Attorney Mullen testified that he and his client then "attempted to put the best deal together we could being told there would be no such adjustments." (*Id.* at 19:11-13).

22. By June 6, 2019, Attorney Mullen exchanged edited drafts of a Letter of Intent, spoke by telephone twice, and exchanged multiple emails

negotiating the terms of the purchase with counsel for TCU. (*Id.* at 19:14-20:4).

23. Attorney Mullen further testified that in his negotiations, he offered to proceed to closing without a "true up" if some of his proposals would be implemented. (*Id.* at 27:7-22).

24. Attorney Mullen testified, "you know how it works, give and take... If you give us the crap we want, we'll walk away from the price adjustment." (*Id.* at 24:6-8).

25. Scott Keough, on behalf of Gulf Coast and Aladdin Capital, Inc., signed the Letter of Intent. (Scott Keogh Depo. 86:14-23, Exhibit 1 to Defendants' Answer at p. 8).

26. Waylon Geuke, on behalf of Trigger, also signed the same Letter of Intent. (*Id.*)

27. Fifty days later, on July 30, 2019, Gulf Coast executed a Membership Interest Purchase Agreement. (Scott Keogh Depo. 106:11-22, Exhibit 2 to Defendants' Answer at p. 16).

28. Scott Keough, also signed the Membership Interest Purchase Agreement as a guarantor on behalf of Aladdin Capital, Inc. (*Id.*)

29. Based on the continued representation that Trigger would sign anything Gulf Coast would sign, Waylon Geuke, on behalf of Trigger, also signed a similar Membership Interest Purchase Agreement that was edited by attorney John Mullen to effectuate the sale of Trigger's interests. (*Id.* at 86:17-23, Exhibit 3 to Defendants' Answer at p. 16).

30. Waylon Geuke also signed the Membership Interest Purchase Agreement as a guarantor on behalf of Trigger Energy, Inc. (*See id. at* 106:23-107:6, Exhibit 3 to Defendants' Answer at p. 16).

31. On the same day, Scott Keough, on behalf of Gulf Coast signed an Officer's Certificate confirming his authorization to sign the Membership Interest Purchase Agreement on behalf of Gulf Coast. (*Id.* at 109:11-110:16, Exhibit 4 to Defendants' Answer at p. 16).

32. Again, Waylon Geuke, on behalf of Trigger, also signed a similar Officer's Certificate. (Exhibit 5 to Defendants' Answer at p. 16).

33. The following day, on July 31, 2019, Gulf Coast and Trigger signed a fourth and final document to finalize the sale of their interest — the Funds Flow Memorandum. (*Id.* at 110:17-111:3, Exhibit 6 to Defendants' Answer).

34. On August 20, 2019, twenty days after receiving $1.6 million for their shares in Blueprint, Mr. Keogh and Mr. Geuke, on behalf of their companies, filed this lawsuit claiming that they signed the four separate documents, which occurred over several months and upon advice of counsel, because of economic duress. (*Id.* at 104:7-105:17, *see* Complaint).

35. The entire basis of Gulf Coast and Trigger's claim of economic duress rests on an allegation that TCU, through Stevens, threatened to blow up Blueprint unless Gulf Coast and Trigger agreed to sell their shares for $800,000." (*See* Complaint, at ¶ 21.)

36. Scott Keogh and John Mullen inferred that blowing the company up would mean that Kent Stevens would quit the company, take his crew, and all the customers. (Keogh Depo. 124:17-24, Mullen Depo. 29:6-30:2)

37. Attorney Mullen testified that one option he presented was that Gulf Coast could have simply refused to sell its interests to Stevens. (John Mullen Depo. at ¶ 31:5-20).

38. Scott Keogh admitted his attorney informed him of this option that Gulf Coast could have simply refused to sell its interests to Stevens. (Keogh Depo. 97:24-98:2).

39. Attorney Mullen also advised his client that it could terminate Stevens as the operations manager which would trigger a mandatory buy-sell under the operating agreement. (Mullen Depo. at ¶ 32:8-17).

40. Scott Keogh admitted his attorney informed him of this option to terminate Stevens as the operations manager which would trigger a mandatory buy-sell under the operating agreement. (Keogh Depo. 98:24-99:12).

41. Attorney Mullen also advised his client that it could hire a crew to come in and replace Stevens and then sue Stevens. (Mullen Depo. at ¶ 33:13-17).

42. Scott Keogh admitted his attorney informed him of this option to hire a crew to come in and replace Stevens and then sue Stevens. (Keogh Depo. 99:20-23).

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43. Attorney Mullen also advised his client that a suit could possibly be made for tortious interference against Stevens. (Mullen Depo. at ¶ 39:21-40:12).

44. In summary, attorney Mullen testified:

> Q: So you provide multiple options to your clients, they ultimately elect the latter to close and sue Stevens and TCU; right?
>
> A: I did advise Gulf Coast of available options other than the option that was chosen. My client, I believe, internally evaluated that and then did make an informed decision, informed me of their decision, and I relayed that -- no, I did not. I was about ready to say I relayed that to Kyle Ridgeway. I did not.
>
> * * *
>
> Q: Let me shift the focus, then. What did you advise your clients to do, then, after providing them the multiple options that you discussed earlier?
>
> A: I advised them they needed to make their decision and then I would follow the instructions. And they're just -- and I followed their instructions once I received that, and my instructions were to negotiate the deal and close it. And that's what I did.

(*Id.* at ¶ 34:1-10, 38:21-39:5).

45. Attorney Mullen even discussed with Gulf Coast the pros and cons of all the options – including which jurisdiction and law would control, the likelihood of success in court, and the ability to prevent the loss of customers. (*Id.* at ¶ 49:17-52:7).

46. However, Keogh ultimately did not pursue any of these options because of economic necessity. In fact, during his deposition, Scott Keogh testified regarding why none of the other options were viable:

> I mean, there were options given to us as to how to handle this. None were viable except for one, and that was closing the transaction. Our concern was solely based on how are we going to live with -- we had no idea what the loss would be if Kent took his crew, took himself, and all of the customers, we had no idea how to calculate it. I mean, what am I going to do with workover rig pipe? I mean, what's it worth? Not much. That was the focus.

(Keogh Depo. 71:2-11).

47. Instead, Gulf Coast and Trigger accepted $800,000 each and Scott Keogh's other company, Aladdin, received $3.2 million dollars upon closing. (Keogh Depo. 111:10-23).

Dated this 11th day of December, 2023.

BEARDSLEY, JENSEN & LEE,
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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of December, 2023, I served copies of **DEFENDANTS AND THIRD-PARTY PLAINTIFFS' SECOND STATEMENT OF UNDISPUTED MATERIAL FACTS** upon the following persons by the following means:

Daniel Brendtro	[ ]	First Class Mail
Hovland, Rasmus, Brendtro & Tryznka	[ ]	Hand Delivery
P.O. Box 2583	[X]	Odyssey System
Sioux Falls, SD 57101	[X]	Electronic Mail

/s/ Matthew J. McIntosh
Matthew J. McIntosh

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STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
::§§§
COUNTY OF MINNEHAHA) SECOND JUDICIAL CIRCUIT

TRIGGER ENERGY HOLDINGS, LLC, & GULF COAST INVESTMENTS, LLC, PLAINTIFFS, V. KENT STEVENS, as an individual, an officer, and agent; TCU, LLC; TCU HOLDINGS, LLC, & BLUEPRINT ENERGY PARTNERS, LLC, DEFENDANTS AND THIRD-PARTY PLAINTIFFS, V. TRIGGER ENERGY, INC., & ALADDIN CAPITAL INC., THIRD-PARTY DEFENDANTS.	49CIV19-002287 **RESPONSES TO DEFENDANTS SECOND STATEMENT OF UNDISPUTED MATERIAL FACTS**

Plaintiffs offer the following responses to the statement of material facts presented by Defendants. What follows here is: (1) a general response; (2) specific responses to Defendants' numbered paragraphs; and (4) additional material facts necessary for evaluating this motion.

1. GENERAL RESPONSE

Mr. Stevens provides a narrow snapshot of this lawsuit. He identifies a series of facts which are largely undisputed on their face, but which fail to tell the complete story. Thus, Mr. Stevens is directing the Court's attention away from the complex set of circumstances present here. We attempt to offer more detailed in Section 2, below,

while responding to Defendants's facts; and in Section 3; and, we offer a series of additional facts.

2. PLAINTIFF'S SPECIFIC RESPONSE TO NUMBERED PARAGRAPHS IN MR. STEVENS' "UNDISPUTED FACTS"

Pursuant to Rule 56(c)(2), a party opposing summary judgment must also "respond to each numbered paragraph in the moving party's statement with a separately numbered response and appropriate citations to the Record." SDCL 15-6-56(c)(2). The Plaintiffs' numbered responses are as follows (**in bold-face type**.)

1. Blueprint Energy Partners, LLC ("Blueprint") was formed in 2017 with Trigger Energy Holdings, LLC ("Trigger"), Gulf Coast Investments, LLC ("Gulf Coast"), and TCU, LLC ("TCU") with each holding 1/3 membership share. (*See* Defendants and Third-Party Plaintiffs' Answer, at ¶ 4.)

Undisputed.

2. Aladdin Capital, Inc., through Scott Keogh, was appointed the Manager of Blueprint. (Scott Keogh Depo. 21:22-22:3, November 28, 2023.)

Undisputed.

3. On December 13, 2017, Kent Stevens, was named the Operations Manager pursuant to an Operations Manager's Employment Agreement. (*Id.* at 71:12-72:5).

Undisputed.

4. Gulf Coast admits that Scott Keogh, Vice President and 49.9% shareholder of Gulf Coast, was 48-years-old at the time of the transaction, a

sophisticated investor and businessman, and was mentally competent during the duration of 2019. (*Id.* at 13:18-21, 113:25-114:8, Gulf Coast's Responses to Request for Admissions, ¶¶ 19-23.)

Undisputed.

5. Scott Keogh is also the Vice President and 49.9% shareholder of Third-Party Defendant, Aladdin Capital, Inc. (*Id.* at 9:19-23).

Undisputed.

6. Waylon Geuke, President of Trigger, is a 54-year-old, sophisticated investor and businessman that was mentally competent during the duration of 2019. (Trigger's Responses to Request for Admissions, ¶¶ 19-23).

Undisputed.

7. Waylon Geuke is also an officer and director of Third-Party Defendant, Trigger Energy, Inc. (Exhibit 3 to Defendants and Third-Party Plaintiffs' Answer, Counterclaim, and Third-Party Complaint, hereinafter "Defendants' Answer" at p. 16).

Undisputed.

8. In the beginning, Blueprint failed to meet financial projections with respect to revenue and debt payments which created a bone of contention. (*Id.* at 26:14-27:7).

Disputed, in part. Here, and in several other 'undisputed facts,' the Defendants do not quote the testimony, and, instead mischaracterize it in a light more favorable to Defendants. In this passage, Keogh specifically stated

"everything was delayed" and did not use the term "failed", with respect to projections. The phrase "bone of contention" is similarly the Defendants' characterization and not used in this testimony. The company, in fact, had turned a corner and was undisputedly profitable prior to the time that a buyout discussion began.

9. Scott Keogh demanded accountability and was frustrated with the inability of Blueprint to meet its debt obligations owed to Aladdin Capital, Inc. (*Id.* at 37:23-5, 39:12-40:7).

Disputed. This is a mischaracterization of his testimony. Keogh does not use the term "frustrated" with respect to debt obligations in his testimony.

10. The partners held monthly meetings in Casper, Wyoming or Sioux Falls, South Dakota to address issues. (*Id.* at 30:4-13.

Undisputed, although in-person meetings did not occur each month.

11. These meetings became a point of contention and as early as August of 2018, Kent Stevens, on behalf of TCU, expressed his desire to buy out Trigger's and Gulf Coast's shares in Blueprint. (*Id.* at 36:5-9.)

Disputed. There is no support in this testimony for the claim that the "meetings" themselves became a point of contention. Undisputed that Stevens proposed a buyout at some point in time.

12. By February of 2019, the parties began having serious discussions about a

buyout. (*Id.* at 36:9-10.

Undisputed.

13. Gulf Coast hired attorney John Mullen to represent it in regards to the sale of its interests in Blueprint. (Gulf Coast's Responses to Request for Admissions, at ¶ 11).

Undisputed. However, Mullen was not hired for at least three months after the "serious" discussions about a sale first began. The jump here (from Undisputed Fact ¶ 12 to ¶ 13) skips over several months of the timeline during which Mr. Stevens began his campaign of duress and wrongful conduct.

14. For over thirty years, Mr. Mullen's legal practice has focused on business transactions and business litigation. (John Mullen Depo. 6:8-15, Aug. 26, 2022).

Undisputed.

15. Gulf Coast admits that attorney John Mullen is a partner with Boyce Law Firm, LLP in Sioux Falls, South Dakota and is a competent attorney. (Gulf Coast's Responses to Request for Admissions, at ¶¶ 12-13).

Undisputed.

16. Trigger reported, through attorney John Mullen, that it would sign the same type of agreement that Gulf Coast was willing to sign. (Scott Keogh Depo. 69:23-70:3).

Undisputed.

17. Therefore, Gulf Coast took the lead and discussed its options with its attorney John Mullen regarding the terms of a buyout of Trigger's and Gulf Coast's

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shares in Blueprint. (*See id*).

Undisputed.

18. Attorney Mullen communicated directly with the attorney for TCU, to negotiate the terms of the buyout agreement. (*See* John Mullen Depo. 16:1- 17:12.)

Undisputed.

19. Attorney Mullen testified that he attempted to negotiate a "true-up" adjustment on the price to account for the performance of the company between the time of the initial deal and the closing. (*Id.* at 15:17-16:19).

Undisputed.

20. When TCU, through its attorney, would not agree to the "true-up," Attorney Mullen testified that he then "continued to negotiate the deal on the – based on those terms." (*Id.* at 19:9-10).

Undisputed, in part, but this overlooks/ignores that there were two components to the sale price: the base price, and the true-up. The base price was intended to represent the business value at the time of the initial agreement; the true-up would then adjust the base price to reflect economic changes to the business between the time the base price was established, and, the date of the closing.

***See*, John Mullen Deposition, Pages 15-16, Lines 7-25, Lines 1-12.**

21. Attorney Mullen testified that he and his client then "attempted to put the best deal together we could being told there would be no such adjustments." (*Id.* at 19:11-13).

See response to #20. Mullen was proceeding without a true-up adjustment, but, as Scott Keogh testified, this did not mean that the price issue was a closed issue, and, Keogh still intended to attempt to negotiate the price at this point.

22. By June 6, 2019, Attorney Mullen exchanged edited drafts of a Letter of Intent, spoke by telephone twice, and exchanged multiple emails negotiating the terms of the purchase with counsel for TCU. (*Id.* at 19:14- 20:4).

See response to #20.

23. Attorney Mullen further testified that in his negotiations, he offered to proceed to closing without a "true up" if some of his proposals would be implemented. (*Id.* at 27:7-22).

See response to #20.

24. Attorney Mullen testified, "you know how it works, give and take... If you give us the crap we want, we'll walk away from the price adjustment." (*Id.* at 24:6-8).

See response to #20.

25. Scott Keogh, on behalf of Gulf Coast and Aladdin Capital, Inc., signed the Letter of Intent. (Scott Keogh Depo. 86:14-23, Exhibit 1 to Defendants' Answer at p. 8).

See response to #20. The Letter of Intent was signed in Casper, Wyoming, at the Blueprint offices. Keogh testified that he was planning to use this trip to Casper to negotiate the sale price with Mr. Stevens. Keogh intended to attempt to negotiate the sale price even though Keogh's business partners (Waylon Geuke and Leroy

Dickinson, who were the principal owners of Trigger) repeatedly warned him that Mr. Stevens was actively threatening to "blow up" the company if Keogh attempted to negotiate the price. Keogh, however, repeatedly dismissed this concerns because he did not believe anyone would do such a thing. Keogh finally changed his mind, however, when Mr. Stevens' own attorney made comments to Keogh's attorney about the "dynamite option" that Mr. Stevens had been planning to use. At this point, Keogh now believed that anyone who would use their own lawyer to convey that kind of threat was serious about following through on it. Accordingly, Keogh abandoned his plan to further negotiate the price, because he believed the threat. After examining the various options available to him, Keogh concluded that the only reasonable option was to submit to the threat and take the $800,000 share price. [Scott Keogh Deposition, Pages 66-67, Lines 15-25, Lines 1-8.]

26. Waylon Geuke, on behalf of Trigger, also signed the same Letter of Intent. (*Id.*)

See response to #25. Geuke believed the threat from the outset. He had already concluded that the only reasonable option was to submit to the threat and take the $800,000 share price.

27. Fifty days later, on July 30, 2019, Gulf Coast executed a Membership Interest Purchase Agreement. (Scott Keogh Depo. 106:11-22, Exhibit 2 to Defendants' Answer at p. 16).

See response to #25.

28. Scott Keough, also signed the Membership Interest Purchase Agreement as a guarantor on behalf of Aladdin Capital, Inc. (*Id.*)

See response to #25.

29. Based on the continued representation that Trigger would sign anything Gulf Coast would sign, Waylon Geuke, on behalf of Trigger, also signed a similar Membership Interest Purchase Agreement that was edited by attorney John Mullen to effectuate the sale of Trigger's interests. (*Id.* at 86:17- 23, Exhibit 3 to Defendants' Answer at p. 16).

See responses to #20-#28.

30. Waylon Geuke also signed the Membership Interest Purchase Agreement as a guarantor on behalf of Trigger Energy, Inc. (*See id. at* 106:23- 107:6, Exhibit 3 to Defendants' Answer at p. 16).

Undisputed.

31. On the same day, Scott Keough, on behalf of Gulf Coast signed an Officer's Certificate confirming his authorization to sign the Membership Interest Purchase Agreement on behalf of Gulf Coast. (*Id.* at 109:11-110:16, Exhibit 4 to Defendants' Answer at p. 16).

Undisputed.

32. Again, Waylon Geuke, on behalf of Trigger, also signed a similar Officer's Certificate. (Exhibit 5 to Defendants' Answer at p. 16).

Undisputed.

33. The following day, on July 31, 2019, Gulf Coast and Trigger signed a fourth and final document to finalize the sale of their interest — the Funds Flow Memorandum. (*Id.* at 110:17-111:3, Exhibit 6 to Defendants' Answer).

Undisputed.

34. On August 20, 2019, twenty days after receiving $1.6 million for their shares in Blueprint, Mr. Keogh and Mr. Geuke, on behalf of their companies, filed this lawsuit claiming that they signed the four separate documents, which occurred over several months and upon advice of counsel, because of economic duress. (*Id.* at 104:7-105:17, *see* Complaint).

The Complaint speaks for itself. However, the duress occurred over several weeks or months, and, finally crystallized by early June 2019. Thereafter, the rest of the documents were simply to follow through on the coerced transaction.

35. The entire basis of Gulf Coast and Trigger's claim of economic duress rests on an allegation that TCU, through Stevens, threatened to blow up Blueprint unless Gulf Coast and Trigger agreed to sell their shares for $800,000." (*See* Complaint, at ¶ 21.)

This mischaracterizes the lawsuit. Mr. Stevens made a series of statements and threats over a several-month period. Mr. Stevens made these threats in various capacities, including as an individual, as the manager of Blueprint, and on behalf of TCU (his company, which was ultimately the purchaser of the shares). Mr. Stevens' business partners believed the threats..

36. Scott Keogh and John Mullen inferred that blowing the company up would mean that Kent Stevens would quit the company, take his crew, and all the customers. (Keogh Depo. 124:17-24, Mullen Depo. 29:6-30:2)

Undisputed but must be read in context of various other facts set forth above, and in ¶¶ 56 *et seq*.

37. Attorney Mullen testified that one option he presented was that Gulf Coast could have simply refused to sell its interests to Stevens. (John Mullen Depo. at ¶ 31:5-20).

Undisputed.

38. Scott Keogh admitted his attorney informed him of this option that Gulf Coast could have simply refused to sell its interests to Stevens. (Keogh Depo. 97:24-98:2).

Undisputed.

39. Attorney Mullen also advised his client that it could terminate Stevens as the operations manager which would trigger a mandatory buy-sell under the operating agreement. (Mullen Depo. at ¶ 32:8-17).

Undisputed.

40. Scott Keogh admitted his attorney informed him of this option to terminate Stevens as the operations manager which would trigger a mandatory buy-sell under the operating agreement. (Keogh Depo. 98:24-99:12).

Undisputed.

41. Attorney Mullen also advised his client that it could hire a crew to come in and replace Stevens and then sue Stevens. (Mullen Depo. at ¶ 33:13- 17).

Undisputed.

42. Scott Keogh admitted his attorney informed him of this option to hire a crew to come in and replace Stevens and then sue Stevens. (Keogh Depo. 99:20-23).

Undisputed.

43. Attorney Mullen also advised his client that a suit could possibly be made for tortious interference against Stevens. (Mullen Depo. at ¶ 39:21-40:12).

Undisputed.

44. In summary, attorney Mullen testified:

Q: So you provide multiple options to your clients, they ultimately elect the latter to close and sue Stevens and TCU; right?

A: I did advise Gulf Coast of available options other than the option that was chosen. My client, I believe, internally evaluated that and then did make an informed decision, informed me of their decision, and I relayed that -- no, I did not. I was about ready to say I relayed that to Kyle Ridgeway. I did not.

* * *

Q: Let me shift the focus, then. What did you advise your clients to do, then, after providing them the multiple options that you discussed earlier?

A: I advised them they needed to make their decision and then I would follow the instructions. And they're just -- and I followed their instructions once I received that, and my instructions were to negotiate the deal and close it. And that's what I did.

(*Id.* at ¶ 34:1-10, 38:21-39:5).

Undisputed.

45. Attorney Mullen even discussed with Gulf Coast the pros and cons of all the options – including which jurisdiction and law would control, the likelihood of success in court, and the ability to prevent the loss of customers. (*Id.* at ¶ 49:17-52:7).

Undisputed.

46. However, Keogh ultimately did not pursue any of these options because of economic necessity. In fact, during his deposition, Scott Keogh testified regarding why none of the other options were viable:

> I mean, there were options given to us as to how to handle this. None were viable except for one, and that was closing the transaction. Our concern was solely based on how are we going to live with -- we had no idea what the loss would be if Kent took his crew, took himself, and all of the customers, we had no idea how to calculate it. I mean, what am I going to do with workover rig pipe? I mean, what's it worth? Not much. That was the focus. (Keogh Depo. 71:2-11).

Disputed, in that the lead-in to this quote mischaracterizes the testimony. Keogh is not saying that the economic necessity was the sole determining factor. See #67, below.

47. Instead, Gulf Coast and Trigger accepted $800,000 each and Scott Keogh's other company, Aladdin, received $3.2 million dollars upon closing.

(Keogh Depo. 111:10-23).

Undisputed.

3. PLAINTIFFS' ADDITIONAL MATERIAL FACTS, IN RESISTANCE OF MOTION FOR SUMMARY JUDGMENT

In order to understand the gaps left by Mr. Stevens' partial rendition of the facts, the Plaintiffs' offer the following, additional material facts, with citations to the Record. For simplicity, the paragraph numbering begins where Mr. Stevens' statement left off. Those facts include:

48. Stevens' career in pipe rentals and inspection began with Certus Energy Solutions ("Certus") in 2014, where he eventually worked his way into a supervisory role. [Kent Stevens Deposition Page 8, 5-20].

49. Kent Stevens was terminated in 2017 by Certus for failing to follow company protocols. [*Id.* at Page 9, 14-24].

50. At this point, he was "tired of working for people…I made a lot of people a lot of money and I ultimately wanted to have some sort of say in, you know, all of the decision-making." [*Id.* at Page 10, 11-15.]

51. "[W]ithin the first two months" of Kent Stevens founding Blueprint, he "picked up some employees" from Certus, including "Joe, Kasey, Shane…Cole…James…Chris…[and] Gary." [*Id.* at Page 12, 8-18.]

52. Certain of these employees who left Certus to join Kent Stevens at Blueprint shortly after its formation now hold high-level management roles in Blueprint: "Joe Flowers is VP of operations. Shane Varnson is VP of

fishing....and Kasey Arima is VP of sales." [*Id.* at Page 15, Lines 9-12.]

53. Joe, Kasey and Shane are now equity owners in TCU Holdings, the entity initially formed by Kent Stevens that owns shares of Blueprint. [*Id.* at Page 12, Lines 22-24.] They remained loyal to Kent throughout. *Id.*

54. Keogh was generally aware of Stevens' departure from Certus, testifying that he believed Stevens "had a plan to start a new company and he got these guys to leave with him before there was any ability to build a business...they jumped off a cliff with him. You know, I don't know what damage it did to the prior company...But they all jumped off the cliff together and then, as luck would have it, we showed up to fund it." [Scott Keogh Deposition, Pages 120-121, Line 25, Lines 1-12.]

55. While Stevens brought know-how, skilled employees and worked directly with customers, the Aladdin Group investors provided funding for operations through equipment leases and a line of credit. In February of 2019, when the parties were negotiating the Letter of Intent, the liabilities "were almost $6 million at that time." [Id. at Page 57, Lines 23-24.]

56. The relationship between Stevens and the other owners was strained because Stevens continued to disregard company policies, including a refusal to verify the purpose of his expenditures on the company credit cards by providing receipts. Keogh expressed concern for Stevens' disregard for company policies, such as credit card receipts. "[T]he IRS requires we keep receipts, and

we demanded that part of the policy was you have to submit a monthly expense report including all receipts. And it was unbelievable how it was disregarded. And it starts at the top…[F]or the majority of the months that it was tracked, Kent was probably the lowest one on the list. It was just total disregard and it was a big bone of contention between the two of us." Id. at Page 37-38, Line 25, Lines 3-24.]

57. At one point, Keogh recalls Stevens "threw his keys at Waylon and walked away, said he was done...Difficulty getting phone calls answered or returned.. I mean, it was just everything." [Id. at Page 43, Lines 2-10.]

58. Stevens even admits that Geuke informed him of the effect that Mr. Stevens' threats were having on the negotiations. Stevens testified when he offered to buy Geuke out, "I actually thought Waylon was going to be hard. With Waylon, everything is hard. So when he immediately said yes, I was again, almost taken back. A couple thoughts. One, maybe I paid too much….Why would he take it so easily. I asked him point-blank. And he said because I told Leroy I'd blow it up. I'll use the term – I don't remember what terms he used, but, you know, this is where we're at. He used dynamite, used nuclear, used bomb, so, you know, that's the reference I'll use." [Id. at Pages 60-61, Lines 18-22, Lines 2-8.]

59. Rather than repairing this issue and clarifying that he did not intend for his comments to be threatening or improper, Stevens claims he then thought he should have paid *even less* because the threat had been so effective: "I went back and talked to my partners and immediately was like, I think I could have

offered way less. I had no idea. You know, I felt like I probably overswung. I should have lowballed it a little bit more man." [Id. at Page 76, 13-18.]

60. Stevens testified that "The way that the three of us [Waylon, Scott and Kent] communicated was ineffective. It was broken," and that he "knew that Waylon often got facts confused and wrong and injected his opinion inside of things that I didn't believe he knew what he was talking about." [Id. at Page 29, Lines 8-13.]

61. Despite testifying he believed that Geuke often got facts confused, when asked what he did to make sure his statements about blowing up the company were not misconstrued by Geuke as a threat, Stevens said he told Geuke, "There's a natural effect. It's like dominoes. Right? It's dominoes. I didn't – I am – when I'm done, I'm done…I quit. That's it. You figure out what happens next. If that's the threat, then so be it." [Id. at Page 80, Lines 9-16.]

62. When asked to clarify what he told Geuke when Geuke expressed concern he would blow up the company, Stevens responded, "Waylon, I'm quitting. I'm not staying in this partnership. Well, that will do this, this, this, and this. So be it." [Id. at Page 81, Lines 4-6.]

63. Stevens was aware of the sway he held over Blueprint employees: "Leroy, like I said, knew what we were getting into when we started. My guys aren't loyal to me for no reason and they weren't not loyal to Scott and Waylon for no reason either…The only reason they were there already was me. It was a

wrap. It was inevitable. It's not a threat. They were going to leave on their own accord. It was—it's an assessment of what will occur between two people." Further, "And the only reason they were there was for me and then it was very, very clear. So Leroy knew that." [Id. at Page 62-64, Lines 22-25, Lines 8-13, Lines 15-17.]

64. Acknowledging the value of company employees, Stevens further said, "the key people in our business are valuable. I mean, they can go find jobs. They were all working for a considerable amount less than they could have made other places at the key levels." [Id. at Page 63, Lines 15-19.]

65. Stevens fostered loyalty in his employees, including through free sodas and candy bars that, cumulatively, cost the company in the realm of $20,000. [Id. at Page 65, Lines 3-5.]

66. Keogh testified "The core [of Blueprint employees] that he brought are 100 percent loyal to Kent." [Scott Keogh Deposition, page 33, Lines 11-12.]

67. When asked if hiring a replacement crew was an option, in the face of threats by Stevens to quit and walk away from the company,

Keogh testified:

> That's not a viable option for us…because we don't have the – if you take away the entire – all the employees, the management, the hands, the works, and you take away the clientele, the folks that had a relationship with Kent that, you know, entrusted Blueprint to do the work, you're starting at zero. It's not just replacing the help, which would be immensely challenging, especially from people that – you know, I know nothing about

> hiring personnel for this type of company, and then having no customers. So it's not – I mean, that's not true. It's much larger than that. In the meantime, there's payments, hundreds of thousands of dollars a month in payments to be made and so on and so forth. It just wasn't a viable option.

[Scott Keogh Deposition, Pages 99-100, Lines 22-25, Lines 1-14.]

68. In addition to making no financial sense, "[t]he commitment of time" made no sense. "If there are no employees and there are no customers, we're literally going to be investing all of our time, certain members of the team, myself, Waylon, I mean, everybody has businesses to run, and no one can afford the time that it would take to pick up the pieces on this." [Id. at Pages 100-101, Lines 22-25, Lines 1-2.]

69. Trigger Energy Holding, LLC's, in its Response to Interrogatories, offers an under-oath narrative of the unfolding negotiations, including the ripe moment when, after months of warning by Geuke, Keogh was forced to face the reality of Stevens' threats when now conveyed by Stevens' own lawyer, and Keogh yielded to the reality that he was, for the first time in his professional career, involved in a business dealing where there would be no discussion.

> The prospect of Kent buying out Gulf Coast and Trigger was first suggested by Kent in February 2019, during an in-person visit. After February 2019, the topics that Scott and Waylon discussed then turned to the time-frame and status of putting the purchase together (meaning, Kent's efforts at putting it together, which were originally represented as something Kent would get wrapped up by May 2019), and, discussions of the price that Kent had declared ($800,000 each), and, the debt that was being retired from cash flow each month.
>
> Waylon also reported to Scott each time that Kent would yet again to

make his threat that they would either sell for $800,000 each, or that he would blow up the company. Waylon also shared with Scott when he learned that Kent had told Leroy Dickinson the same things in person, during a time that Waylon was in Florida. Waylon also shared with Scott when Kent made the claim that Kent had talked to his lawyer and could bankrupt against his non-compete (meaning, nobody could stop him from walking away and starting a new company). The conversations between Scott and Kent soon became almost identical each time, in which a chronic battle was repeated over and over:

Scott would talk about wanting to negotiate a different price; Scott would say that it was clear that $800,000 is a number taken out of thin air, and which was not supported by any actual valuation, and, that the number should be discussed and negotiated to find the right number; that he had never been in a business dealing where there was no discussion; that he believed $800,000 left Gulf Coast shortchanged, especially in light of what it had invested, in light of the risk taken, in light of never saying no to a request during the build-up phase, in light of the present earning power of the company, and, because with each passing month the company was worth more simply by paying down debt, which continued to increase because the transaction continued to get pushed back, and because there are ways to determine value.

In response, Waylon would respond by reminding Scott of the threat that Kent had made several times, namely, that Kent will blow this thing up if there is any pushback on the price; and Waylon's impression that this was a serious and intentional threat, meaning, that Kent would do that before Kent will give you one more penny; that Kent has nothing to lose; that both Scott and Waylon would be left holding nearly $5 million of debt for the company; that Kent has claimed he has all the relationships with the customers and employees; that Kent claimed to have already consulted a bankruptcy attorney who would get him out of his non-compete.

In short, Scott wanted to find the right number, and Waylon slowed Scott down from pushing back. In each conversation, Scott remained unconvinced of Waylon's position that zero negotiations on price were possible; but, Scott agreed to at least hold off on raising the issue. Ultimately, after finally receiving the letter of intent draft from Kent, Scott told Waylon that his plan was to fly out to Casper and finalize the non-compete, including having an actual discussion and negotiation about the price. Waylon continued to say this was going to trigger

> Kent's threat. However, while Scott was in the process of preparing to make that trip to Casper, he learned that Kent's own lawyer was now repeating this same threat to John Mullen: that Kent intended to use the "nuclear" option if Scott planned on negotiating the price. And, at that point, Scott finally concluded that if Kent had audacity to say it to his own lawyer, that it was a true threat; Scott told Waylon this, saying something like: "Ridgeway told Mullen about the 'nuclear option;' you're right, he will blow it up." Scott then agreed with Waylon to change his plan, and, he made the trip to Casper but the price was not discussed.
>
> The LOI was executed. And Scott did tell Waylon that right after the LOI was signed Scott asked Kent how he had arrived at the number; and, Kent's response was something about his gut, that he just thought it was enough. Their "chronic battle" was done, but Scott and Waylon continued to discuss for the next two months that it was clearly not enough, even for the simple reason that the company continued to retire debt with no price adjustment, which in total was over $1 million.

[Plaintiff Trigger Energy Holdings, LLC's, Response to Interrogatories (Amended) 10/23/2020, Pages 2-4, Response 2(d).]

70. As Keogh weighed his options, he "thought [an EBITDA multiplier] of four was fair," and at the time he was preparing an offer, using that multiplier, Keogh testified he would have proposed rounding down to $1.5 million from $1.7 million." [Scott Keogh Deposition, Pages 95-96, Lines 24-25, Lines 1-4)

71. Stevens was aware of EBITDA valuations, generally using a multiplier number "anywhere from three to eight." Id. at Page 98, Lines 16-24.

72. Stevens testified that he thought a $10 million valuation of the company was too low. [Id. at Page 87, Lines 10-13.]

73. In order to line up funding for the purchase of Blueprint shares,

Stevens sought funding through the Galles group at a worth of $5 million for the company. [Id. at Page 95, Lines 22-25.]

74. Stevens lined up this funding in preparation for signing the letter of intent, in which he would purchase Blueprint at a valuation of $2.5 million, slightly less than half the worth applied in the Galles group funding. [*Id.* at Pages 96-97, Lines 5-25, Lines 1-12.]

75. Notably, Dude Butler, a key employee of Blueprint who worked closely with Stevens, was married to a member of the Galles family group that ultimately financed the purchase of Blueprint. [Id. at Page 100, Line 5.]

76. Stevens testified that the Galles group wanted to help, "Because we were all miserable," and "they wanted us out of the relationship we were in and they thought they could ultimately make some money." [Id. at Pages 103-104, Lines 18-19, Lines 5-7.]

77. While Stevens was lining up financing, in the interim, the debt levels were being paid down to his advantage, "So the time gap, frankly, was worth about a half a million dollars per share." [Scott Keogh Deposition, Page 60, Lines 4-13.]

78. Keogh testified he had intended to negotiate the purchase price as late as June of, 2019. "John had brought it up to Ridgeway that I intended on—on talking about the price. But after ---prior to, essentially, that week, I honestly discounted Waylon and Leroy's comments. I couldn't believe it was true that he

would actually blow up the company until I was told essentially the same – different words. – from my lawyer from his lawyer using the dynamite option, then I took it seriously." [Id. at Pages 66-67, Lines 15-25, Lines 1-8.]

79. Beyond the purchase price, "Our concern was what are we going to do with the millions of dollars of liabilities that we have that we're not responsible for." [Id. at Page 70, Lines 19-23.]

80. Keogh was not accustomed to Stevens' behavior, testifying, "I mean, we've made good deals and we've made bad deals, but I've never experienced anything like this where there was no standard business practices applied to this and nor have I ever been threatened in this way." [Id. at Page 105, Lines 8-12.]

81. Keogh's frame of mind with respect to negotiating with Stevens was that, "The most dangerous people are the people that have nothing to lose." [Id. at Page 120, Lines 10-11.]

82. Further of concern was the fact that, like the other shareholders on the hook with personal guarantees totaling several million dollars, Stevens testified, "All I have is a house," with an equity of around $20,000. [Kent Stevens Deposition, Page 86, Lines 3-15.]

83. Most telling, Kyle Ridgeway, the attorney for Stevens' holding company, TCU, informed Attorney Mullen on a phone call on June 6, 2019, "that he was relieved that we, Gulf Coast, were going to relent on our demand for an

adjustment to the purchase price [the true-up], because that then removed the necessity for his client, Kent Stevens, to exercise his dynamite option and to walk away. That's what Kyle Ridgway told me." [John Mullen Deposition, Page 28, Lines 16-23.]

Dated this 28th day of December, 2023.

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I hereby certify the foregoing was electronically filed and served through the Odyssey File and Serve System upon:

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ORIGINAL

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:SS
COUNTY OF MINNEHAHA) SECOND JUDICIAL CIRCUIT

****

TRIGGER ENERGY HOLDINGS, LLC,
& GULF COAST INVESTMENTS, LLC,

Plaintiffs,

49CIV19.2287

-vs-

KENT STEVENS, as an individual, PRETRIAL CONFERENCE
MOTIONS HEARING
an officer, and agent; TCU, LLC;
TCH HOLDINGS, LLC, &
BLUEPRINT ENERGY PARTNERS, LLC,

Defendants and
Third-Party Plaintiffs,

-vs-

TRIGGER ENERGY, INC., &
ALADDIN CAPITAL, INC.,

Third-Pary Defendants.

****

BEFORE: The Honorable Douglas P. Barnett
Circuit Court Judge
in and for the Second Judicial Circuit
State of South Dakota
Sioux Falls, South Dakota,
on January 18, 2024

APPEARANCES: Mr. Daniel Brendtro
Hovland, Rasmus & Brendtro
Sioux Falls, South Dakota

Attorney for Plaintiffs and
Third-Party Defendants;

Mr. Matthew McIntosh
Beardsley, Jensen & Lee
Rapid City, South Dakota

Attorney for Defendants and
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Roxane R. Osborn
605-782-3032

THE COURT: Good afternoon. We're on the record in the matter of Trigger Energy Holdings; and Gulf Coast Investment, plaintiffs, versus Kent Stevens, ah, TCU LLC, and TCU LL, excuse me, TCU Holdings, LLC., defendants and third-party plaintiffs. And also third-party defendants Trigger Energy, Incorporated, and Aladdin Capital, Incorporated.

Would the lawyers, please note their appearances.

MR. BRENDTRO: I'm Dan Brendtro for Trigger Energy Holdings, LLC, Gulf Coast Investments, LLC, and Trigger Energy Inc., and Aladdin Capital, Inc.

MR. MCINTOSH: Matt McIntosh for the defendants and third-party plaintiffs, Your Honor.

THE COURT: This is the time and place set for hearing and pretrial conference. A number of matters that the court understands we're taking up today. We have defendant's motion for summary judgment. Court's reviewed all the filings. I hadn't seen anything come in lately other than, you know, the responsive briefing, and, ah, the initial briefing that came in. Was there anything that's been filed recently?

MR. BRENDTRO: Just my reply, Your Honor.

THE COURT: Yeah. And I've reviewed that, Mr. McIntosh.

MR. MCINTOSH: Thank you, Your Honor.

MR. BRENDTRO: Nothing.

THE COURT: Nothing else, Mr. Brendtro?

MR. BRENDTRO: Correct.

THE COURT: All right. Um, Mr. McIntosh, in terms of your presentation, how do you, do you intend to break these down into counts, or how do, if, if you could just give me a heads up, so I've got several notes here.

MR. MCINTOSH: Sure.

THE COURT: And I just want to make sure I can follow adequately.

MR. MCINTOSH: Yeah. I will address the economic duress argument first and then the remaining claim after that.

THE COURT: Okay. Your motion. Go ahead, Sir.

MR. MCINTOSH: Thank you, Your Honor. Would you prefer that I stay seated?

THE COURT: Whatever you're comfortable doing.

MR. MCINTOSH: Okay.

THE COURT: What I'll tell you is, is obviously, I don't have a court reporter here today. We're on court smart. I need you, and, you know, and that's a good reminder. I need to make sure I pull my e-mail up quick because if for some reason they're not able to hear clearly in the control room, they're going to send me an e-mail.

MR. MCINTOSH: Okay.

THE COURT: Saying that they're not picking up Mr. McIntosh or something of the sort, so…

MR. MCINTOSH: Sure.

THE COURT: So, we want to make certain that everybody's getting, that everyone's being picked up on the record. So, yes, sir, you may remain seated whatever you're comfortable with.

MR. MCINTOSH: Great. Thank you, Your Honor.

THE COURT: Please proceed, Sir.

MR. MCINTOSH: Thank you. This is the defendants and third-party plaintiffs second motion for summary judgment.

THE COURT: You know as long as you said that, too, and I wanted to be abundantly clear. There was never, I saw a March 9th, 2020, hearing, uh, for judgment on the pleadings that was handled, or I should say presided over by Judge Power, and then it appears as though the case went to Judge Damgaard due to a switch in the judicial responsibilities, and then it went to Judge Sogn, and then it, it transferred over to this court pursuant to another change in judicial responsibilities. There was never an actual hearing that took place on your first motion for summary judgment that I saw.

MR. BRENDTRO: Correct (unintelligble).

MR. MCINTOSH: On the judgment for motion on the pleadings?

THE COURT: No, there was a hearing that took place on that.

MR. MCINTOSH: Okay. Thank you.

THE COURT: March 9th of 2020, but you filed an initial motion for summary judgment prior to the depositions being completed of, of like, for example, I believe Mr. Mullen and Mr. Keogh? Keogh? Yeah.

MR. MCINTOSH: I believe that's correct, Your Honor.

THE COURT: Okay. You never had a hearing on your first motion for summary judgment?

MR. MCINTOSH: I don't believe so.

MR. BRENDTRO: Correct.

THE COURT: Okay. I just wanted to make sure I wasn't missing anything.

MR. MCINTOSH: Yeah, no, thank you for clarifying. So, let me begin by setting forth the common law defense of duress, which required that such a constraint is upon a party that that party is forced to act against his own free will, that the free will is overcome by another party. And from there the common law doctrine of duress developed what the *Dunes Hospitality* case refers to a recent outgrowth called economic duress.

The doctrine of economic duress applies only to special, unusual, or extraordinary situations in which unjustified coercion is used to induce a contract under such circumstances that the victim has little choice but to exceed. That's *Dunes Hospital-Hospitality, LLC, versus*

Country Kitchen, Inc -- International, Inc., 20 -- 2001 SD 36. But before I get to *Dunes Hospitality* and the elements that must be proven by the plaintiffs, I want to begin with the direct quote from Attorney John Mullen, who was the representative from Gulf Coast during the transaction. And this is a quote from his transcript that I've attached as Exhibit 13 to my fourth affidavit. "I did advise Gulf Coast of available options other than the option that was chosen. My client, I believe, internally evaluated that, and then did make an informed decision." It is with this quote that we must analyze the plaintiffs' claims in this case, and we're fortunate because we have something that doesn't always happen in the State of South Dakota.

We have a case directly on point with facts squarely on point in which the South Dakota Supreme Court has addressed economic duress and in a factual circumstance that is very similar to this case in front of you. As outlined in my brief, I set aside the facts from *Dunes* compared to the facts of this case, and as you can see on the most relevant points, they're all the same.

And in *Dunes*, the South Dakota Supreme Court tells us that a party asserting economic duress under these circumstances has a difficult burden to overcome. It's at paragraph 33. And as we look at the elements of economic duress, it'll be clear that the plaintiffs have failed to

make a sufficient showing, which is their burden here as an opposition to the motion for summary judgment on all the elements in which they'll carry the burden at trial.

First, the plaintiffs must make a sufficient showing that they involuntarily accepted the terms of TCU. There was a suggestion in the footnote that all's it has to be provided here is a subjective notation that this was involuntary. But that's not what *Dunes* holds. Instead, *Dunes* says that there must be something beyond a showing of reluctancy to accept the term and of financial embarrassment. Instead, it must be proven by evidence that the duress resulted from the defendants wrongful and oppressive conduct and not by plaintiffs necessities. But in plaintiffs' response to this motion, page six of their brief, they stated, quote, "The duress occurred because of the threat to create millions of dollars of problems for the plaintiffs if they refused to accept the amount tendered by Mr. Stevens." End quote.

That is the same position that the plaintiffs have taken throughout this litigation. They were forced to accept the terms or face economic turmoil. This is nothing more than a reluctancy to accept the terms and a financial embarrassment, which is simply not enough under this first element, according to *Dune's Hospitality* and subsequent cases.

Second, moving to the second element, as laid out in

Dunes, in which the South Dakota Supreme Court really focused its opinion on, was whether there was a sufficient showing that no other reasonable alternative existed. The court held in *Dunes* that in determining whether a reasonable alternative is available, we employ an objective test, therefore, the outcome depends on the circumstances of each case, but then states, quote, "The availability of a legal resolution is one such circumstance." That's paragraph 21 in *Dunes*. If we look at the, the plaintiffs' responses to the statements of undisputed material facts. There are no disputes to the following: #38, Scott Keogh admitted his attorney inform- informed him of the option that Gulf Coast could have simply refused to sell their interests to Stevens. #40, Scott Keogh admitted his attorney informed him of his option to terminate Stevens as the operations manager, which would have then triggered a mandatory buy-sell under the operating agreement. 42, Scott Keogh admitted his attorney informed him of his option to hire a crew to come in and replace Stevens and then sue Stevens. And then 43, that Attorney Mullen also advised his client that a suit could possibly be made for tortious interference against Stevens.

Further, the plaintiffs do not dispute that Attorney John Mullen testified, I believe internally, my client internally evaluated and then did make an informed decision.

THE COURT: After he provided all of the options you've

outlined?

MR. MCINTOSH: Correct, Your Honor. Thank you. Therefore, it is undisputed, according to the filings in this case pursuant to the motion for summary judgment, that a competent attorney provided sophisticated businessmen at least four alternatives, including multiple legal resolutions to this matter. The fact that the plaintiffs did not like the options does not make them unreasonable. In fact, some of the options that are presented that were presented by Attorney John Mullen to his client prior to executing four different documents to effectuate the sale of this, of these interests, the case in *Dunes* cites that they had the option to terminate their affiliation with CKI, *Country Kitchen International*, or file suit, that's at paragraph 32. Those are the two options that the South Dakota Supreme Court examined, ultimately holding that those options were obviously known to *Dunes* because they actually filed their suit two months after the agreement was signed. Thus, the court found that the decision to enter the agreement was the result of an informed and deliberate decision, as *Dunes* consisted of sophisticated members and investors and was well represented by experienced, competent attorneys, excuse me, lawyers. As I've outlined, that's the exact factual scenario that we have before this case.

At previous points the plaintiffs have argued this is a

reasonable determination that should be made by a jury, but that isn't something that's necessarily true in this case because although reasonableness and objective those facts may be true as what the standard is. They are the same exact facts that are outloan -- outlined in *Dunes*, and under those exact same circumstances the court said that's not enough. You did not meet your burden on this case, and then the court took away a jury verdict, and two times that the court failed to take it away from the jury and said enter this verdict, not redo it, not go back. That should have never happened. It should have been entered at that point.

THE COURT: You should have ended the case right then?

MR. MCINTOSH: Yes, Sir.

THE COURT: At the conclusion of plaintiffs' evidence?

MR. MCINTOSH: Yes, Sir.

THE COURT: And so isn't would you agree with me that that's akin to what we're here to decide today in terms of the summary judgment action?

MR. MCINTOSH: Absolutely, Your Honor. And, and I would also draw the connection to *Pochat versus State Farm*, which is 772 F.Supp.2d 1062. In that case, contrary to some of the briefing that the plaintiffs have submitted saying this shouldn't be judged on a cold record, that you should be able to sit and listen to the arguments, listen to the testimony --

THE COURT: -- I'm sorry, what was that site again?

MR. MCINTOSH: Yes, Your Honor. *Pochat versus State Farm*, 772 F.Supp.2d 1062. I believe both parties have cited to that as well --

THE COURT: Yeah.

MR. MCINTOSH: -- in our briefing for ya. Let me circle back to what I would say the, the plaintiffs have made the argument that you shouldn't make that determination on a summary judgment motion because at least in *Dunes* they have the opportunity to go through, the court was able to view the testimony, judge credibility. As you've just pointed out, taking it away from the jury is essentially what we're doing here. We're saying this shouldn't go to a jury. This is an issue that is -- they've failed to prove their case. And in *Pochat* that was a case in which the District Court for the Western District of South Dakota did exactly that. On a motion for summary judgment, the court ultimately found that the plaintiff failed to establish the second element, the same one we're talking about here, because the plaintiffs had another option available to her, which was initiate the litigation for breach of contract, bad faith, and punitive damages, and then most importantly, as she did after she accepted the check. So, both in *Dunes Hospitality* and *Pochat* you have the, the two different courts examining the elements of economic duress, and on the second element finding that a

legal resolution is one that provides a reasonable alternative. Some of the arguments that have been made include that this wouldn't have been a viable option because of loss. We would have had a substantial amount of debt. We wouldn't have been able to take over the company. There are things that were preventing us from doing this.

Well, those are the same arguments that all of these things, all of these defendants, excuse me, plaintiffs, make in these cases. Specifically, if you look at *Dunes Hospitality*, the threat was we're out of here. We're going to leave your restaurant. You're going to be stuck without a restaurant that's affixed to your hotel, and we're leaving all the other restaurants in South Dakota without any services. It's the same financial position. The same trouble that they're going to run into in *Pochat versus State Farms*, you have an individual who's injured.

THE COURT: Hardball, but not oppressive.

MR. MCINTOSH: Exactly, Your Honor. And that's, that's exactly --

THE COURT: -- and that's your position?

MR. MCINTOSH: Exactly. And, and so what we have here is we have two cases that are directly on point to tell us under these facts, under these scenarios, if you have a competent attorney, and there's no doubt the plaintiffs admit it, John Mullen is a very competent attorney. He's 30 years

of practice in doing what he's done. He advises his client and says here are your options. The client says, okay, I don't like that. I don't like that. I don't like that. We're going to go ahead and we're going to take the money, and we're going to put that money in our account, and then in 30 days, excuse me, 20 days, we're going to file a lawsuit. That is not economic duress. The over, there's been no overcoming the will of the plaintiffs in this case. They simply made an informed and deliberate decision as testified to by their own attorney. They can't overcome the testimony of their own attorney in which he says that I provided options. I believe they've considered those options and made an informed decision.

There is nothing more here than simply as we just discussed, a hardball and negotiation, and that takes us to the third element, which is that the plaintiff must make a sufficient showing that the circumstances were the result of a coercive wrongful act. And so what we really have here under the elements for economic duress is you have two elements that look at the conduct of the person that allegedly has created the duress. The first element looks at the, the, in this case, Mr. Stevens. And the third element looks at Mr. Stevens, while the second element looks at well, what were the options available with the person claiming duress.

So, for this third element, the plaintiffs must make a sufficient showing that the circumstances were the result of a coercive wrongful act. As you just indicated, being the victim of a hard bargain, the Supreme Court has said that's not enough. Somebody is even nasty, hardball tactics that is not enough to establish economic duress. And further, the threat to carry out something which the law entitles them to do is not wrongful or coercive. And this gets to be complicated because the plaintiffs say that they were the victim of duress because Kent Stevens, we can use whatever term they want because this is our motion, and they get to, they get to say and paint Mr. Stevens in whichever light they would like for this court. Kent Stevens threatened to "blow up" the company dynamite option. Take all the customers, take all the, the crews. Leave them without anybody and essentially them holding a bag full of money or, excuse me, bag full of debt at that point. But Scott Keogh testified in his deposition, and Kent, and Kent Stevens agreed, and I think everybody agrees that it, as an individual working for a business you have the right to quit anytime you want. In fact, Scott Keogh testified it's a free country. I think that was reiterated by Kent Stevens in which he said, yeah, I could quit if I wanted to, but the plaintiffs will argue to the court that there's a big difference between quitting. I'm, I'm out of here. I'm walking away and saying not only

am I quitting, I'm blowing this thing up. I'm taking your customers, and I'm taking all my crews and what are you guys going to do? But it's really trying to have it both ways because the follow-up testimony from Scott Keogh was all of these crews were loyal to him. They were his guys. He brought them in. And all these customers, they were loyal to him because they worked with him. They were directly in the field with him. And so it's hard to understand the plaintiffs' argument on this element because if Kent Stevens can quit, which he's able to, and the natural progression is that his crew leaves and his customers go with him; is that okay? That's, I'm not sure on that, and how their position is on that, but if he says, and he threatens to do the same thing they're saying that's wrongful and coercive, and I think that's trying to have your cake and eat it, too. You can't say that they're going to go no matter what, but he has the right to quit, but because he threatened to do the same thing, that's wrong and coercive. That's not how economic duress works, Your Honor.

The plaintiffs have simply failed to make a sufficient showing the economic duress was present during this, during this transaction. They had an attorney. An attorney that's competent. They're successful, sophisticated businessmen that own multiple companies, including Mr. Keogh, who testified to being the vice president of no less than six

different companies. They're not pushovers. They didn't know, they didn't have any idea of what was going on. They were very experienced. They had competent attorneys. They were provided multiple options, and then they signed a document and accepted the money. That's not economic duress.

What that gets us --

THE COURT: -- and debt was cleared off?

MR. MCINTOSH: And, and in addition, Mr. Keogh received another $3,000,000 that just kind of gets pushed to the side because all of his debt gets paid off. This is something that I touched on.

THE COURT: Because he was a guarantor as I understand it or his, I should say his company was a guarantor. Do I have that correct?

MR. MCINTOSH: You do, Your Honor. And not only was his company a guarantor, his company was doing the factoring of invoices for Blueprint Energy. So, he was getting paid because they almost like a payday loan, I don't want to diminish what he does, but they advance money, then they collect on the invoices so that the --

THE COURT: -- similar to a line of credit. Similar to a line of credit.

MR. MCINTOSH: Exactly.

THE COURT: If you will?

MR. MCINTOSH: Yes, Your Honor. Um, so not only did

$800,000 get transferred to Scott Keogh in his capacity of Blueprint, excuse me, Gulf Coast, and to Waylon Geuke.

THE COURT: Pursuant to the purchase agreement?

MR. MCINTOSH: Yes, Your Honor. And pursuant to the funds flow memorandum which also detailed where do we want this money to go.

THE COURT: And where it all came from?

MR. MCINTOSH: Where it came from, where it was going, and when it was to be there, all of which happened. And then also the parties agreed pursuant to the membership agreement that Scott Keogh's company, Aladdin, would continue to factor these invoices because it was difficult to pull those out and go have them factored with somebody else. Instead, they agreed, well, let's just continue running through these until we get through the invoices you're handling, at that time, we'll no longer use you or we may. They said at that point they actually didn't know if they would continue to use Aladdin to do the financing aspect, but what happens is this gets entered, *this* being the membership interest, the membership interest purchase agreements. They continued to factor, and Scott Keogh thus is making more money at the end of this transaction until they're all paid off. So, everybody is operating under the assumption that all is good here. I got my money. You got your money. I got 3,000,000 more for my financing company, and then here comes a lawsuit

saying we didn't want to sign any of those documents. That's just simply not how economic duress works. And what we are asking the court to do is to find that plaintiffs have made, failed to make a sufficient showing under those elements, and what that does is that that then makes them subject to the membership purchase agreements that they signed.

In those detailed membership purchase agreement, there are a number of clauses which provide specifically the remaining claims that the plaintiffs are making. Specifically, number two and number eight, I will address separately here in a moment, but the other claims that are being made, for example, the breach of the operating agreement. Well, the membership purchase agreement says that by delivering, executing, delivering, and performing, and I am paraphrasing here, Section 2.02 of the Membership Purchase Agreement. The consummation of the transactions do not and will not A) violate or conflict with the Articles of Organization or the LLC agreement defined below. Well, down below, LLC agreement is defined as the December 13th, 2017, LLC agreement. That's the LLC agreement for Blueprint by -- Blueprint. So, they have represented and are bound by the terms that they agreed to in the Membership Purchase Agreement. What they've tried to do and what they've said in their pleadings is well, those don't apply as well because we're unwinding those agreements pursuant to duress.

All of their claims rest on the aspect of duress, and so if duress goes away, they're bound by the membership purchase agreements and that's just a question of, of contract interpretation. And as this court knows, contract interpretation is a question of law for the court to decide not a jury.

And so our position is that there is no duress. They cannot meet the elements of economic duress. This court should take this case from them because then they are bound by the, the representations, the warranties, and the guarantees that they made in the membership purchase agreements.

THE COURT: How do you respond to Mr. Brendtro's argument that those representations and warranties are invalid pursuant to public policy?

MR. MCINTOSH: Well, I think the clearest distinction is Mr. Brendtro through his clients are referring to the indemnity provision.

THE COURT: Yes.

MR. MCINTOSH: And what we're talking about there is indemnity to whether or not they have to pay attorney's fees when this is all said and done. The provision I'm speaking to is no conflicts and consents, which is Section 2.02. That is not an indemnity provision. This is a warranty and a guarantee, which is not in violation of public policy because

they represented, they guaranteed, and they signed.

THE COURT: So, your position is that that's only as to the indemnity?

MR. MCINTOSH: Correct, Your Honor. And what we do know here, and I don't want to skip over this because I don't want it to get lost in the mix, is that Scott Keogh testified that he read this agreement. He understood the terms of the agreement. He signed the agreement. This is not a case in which you have the old common law duress where someone's got a gun to your head. You have a negotiation that begins in February. You have a pickup in the June area of 2019, and then there are multiple documents that are signed, no less than four, and attorneys that are trading drafts back and forth saying I don't like this, can you take that out? Can I add this provision, please remove this provision. Can we negotiate what the plaintiffs will tell the court about a true-up? The time that we decided to agree to this and the time that we actually closed, there were some debt that was paid off and because of that we want more money. Well, that was sent to the attorney for Mr. Stevens. Mr. Stevens said, no. And then back to Attorney Mullen, he said, well, then we're going to negotiate the best deal we can based on that. That is negotiation. That's hardball tactics. That is not economic duress to sit there and say they said, no, what do you want to do? Well, I guess we'll go forward and sign the

document. That is not economic duress. That is negotiation. Hardball or I believe one of the cases says if you got vested in the negotiations, that is not economic duress.

Your Honor, we're asking that the court enter summary judgment pursuant to the failure to make a sufficient showing, and inevitably this case will be appealed to the South Dakota Supreme Court. If it is appealed, then the South Dakota Supreme Court can tell us whether these two cases are directly on point or not, and then we can come back if they say no and try the case. If we go through the entire process, have a trial, and then it gets appealed, we may be back a second time, or it may have been for nothing if the *Dunes Hospitality* or the *Pochat State Farm* case remains true as we suggest it does.

Thank you, Your Honor. Nothing further.

THE COURT: Mr. Brendtro. I guess my first question is why is the conduct of this case worse than what happened in *Dunes*? And that it kind of flows into the first prong of economic duress. You know, how did your clients involuntarily accept these terms and fit it in wherever you want, but those are two questions that I have from the onset, Sir.

MR. BRENDTRO: Okay. So, I'll start there. Well, I'll, I'll start with, I can't fathom why this would get sent back for a second trial. If this court is instructing the court -

- or this court is instructing the jury using the jury instructions that are based upon patterns and, and *Dunes*. This either, what will happen in *Dunes* happens here, meaning they'll vacate the verdict, or they'll affirm the verdict, but we're not going to come back for a second trial. There's no reason that that should be a concern of the court. And that was his final point.

So, Judge, on page six of the reply brief, he included a table with seven or eight comparisons between our case and *Dunes Hospitality*. I was --

THE COURT: One moment, let me turn to it.

MR. BRENDTRO: *He* meaning Mr. McIntosh.

THE COURT: I'm sorry, page what of his reply brief?

MR. BRENDTRO: Page six.

THE COURT: Six. Go ahead, Sir.

MR. BRENDTRO: Judge, I was in the process of actually drafting a sur-reply brief that would have its own table as, as the sur-reply argument, and I decided rather than waste the procedure of that I would just make one and tell you what it says. So, quite simply, yes, you can find comparisons between the two as one would expect between two cases of economic duress. These are the things that are missing from this table.

One, Kent Stevens is threatening to take the customers. There's no such threat like that in the *Dunes* case. It's

attached to a hotel. It's a restaurant. It's available to the public. The customers would continue to come whether or not the management company leaves. That's the difference.

Two, he's threatening to take all the employees. Uh, that's not the case in *Dunes*. *Dunes* is a management company, ah, that would employ waitresses, servers, busboys, whoever, who live in the area. If the management company disappears, those people still need a job, they would be able to come to work. It's the management piece that's missing. That's a distinction here.

Um, he's threatening to, I mean this is the third point. Kent Stevens is threatening implicitly to interfere with the transition. So, meaning that he's not talking about leaving and disappearing. He wants to "blow up" the company. He wants nothing further to happen. *Dunes* isn't that type of case. They're not saying we will destroy your restaurant. You will have no further possibility of, of an ongoing pursuit of, of a business. That's not what's happening there.

Fourth, Kent Stevens, by the way, I, I broke my glasses four days ago. These are readers and so I'm like --

THE COURT: -- take your time.

MR. BRENDTRO: -- doing a lot of adjusting and I apologize.

THE COURT: Take your time.

MR. BRENDTRO: Kent Stevens is an officer and a fiduciary of the entities that are involved here. In the *Dunes Hospitality* case, they're a third-party administrator, ah, of a, of a hotel restaurant system. They are a completely different third-party. They're not owners. They're not officers, which is the, the next point. Kent is a co-owner of the company he's threatening to "blow up". In *Dune's Hospitality*, they're not co-owners. This is literally an armed-length transaction. Judge, if you and I got into a an agreement where you're going to provide services for me, ah, you decide to use sharp negotiation tactics to get out of that negotiation or out of that agreement, that's a different type of case than if you and I co-own a business together, and you're an officer, and you engage in this conduct. None of these factors are present in Dunes.

Next, he's threatening to create a default on the debt. There is nothing in the *Dunes Hospitality* case that even comes remotely close to the idea that this is an implicit threat to ha ha ha, I am indestructible, ah, in bankruptcy. Kent is, is saying these things. Ah, there's nothing that you could do, I'm worth $15,000 net equity in my house. That has no appearance whatsoever in the *Dunes* case.

And, seven, there's a non-compete agreement which Kent is threatening to breach. Um, there's no such thing in the *Dunes* case.

THE COURT: But isn't this also a bargain for exchange in the case at hand?

MR. BRENDTRO: Ah --

THE COURT: -- between the two parties?

MR. BRENDTRO: So, I --

THE COURT: -- or between the multiple parties, I guess.

MR. BRENDTRO: Yeah.

THE COURT: You didn't, I mean what I'm trying to, what I'm trying to get my arms around here in terms of involuntary acceptance, the first prong.

MR. BRENDTRO: Yep.

THE COURT: Is, and I understand the statements and so forth made by Mr. Stevens, and hardball, the term we've been using, but this appeared to be bargained for, bargained for with mutual assent and a contract that was entered into with the advice of counsel, and that counsel giving multiple options as well to your clients.

MR. BRENDTRO: So, yes. If, if I could respond to that. The *Dunes* case talks about the adequacy of other options, not the existence of other options. If I take you up to the top floor of a building, Judge, and use duress, and you've got four windows and the door, and I'm telling you to come with me through the door, you look out the windows and each of the windows would involve a jump of varying distances, and you determine none of those are reasonable jumps, you come with

me, yes, you have appropriately evaluated all five options and chosen the only reasonable one available to you, which is to come with me because I have a gun. In this case, that's the testimony. Mr. Mullen, Mr. Keogh keeps saying the same thing, yes, we're not dumb. We, we looked at everything that we could possibly consider, and the only one that made sense was to go along with this and then sue him afterwards, because anything else is just asking him to "blow up" the company. Every other act of resistance in any way they perceived would trigger him to follow through on the threat. So, yes, options existed, but they were not reasonable, and, ah, legal remedies existed, but they were not adequate because any single one of them they perceived would have resulted in Kent Stevens blowing up the company. That's, that's where we're at.

The, the, the comment that I heard you make during the first part of this, hardball but not oppressive, meaning that's -- you were paraphrasing his, ah, his take on this.

THE COURT: His position.

MR. BRENDTRO: His position. He will tell that to 12 strangers. Hardball but not oppressive. If you're mulling over which one it is, that's not a question for you, that's a question for them. Is it hardball or is it oppressive? Considering all of the factors, meaning all of these on my legal pad on the table. All of these, meaning the table that

he's done, all the rest of the facts, ah, is this, there's a quote in the *Dunes* case, um, it uses the word inherently. Let's see, I want to get it right here.

THE COURT: And you're speaking more towards --

MR. BRENDTRO: -- oh, yeah, and --

THE COURT: -- you're speaking a little more towards the second element in terms of reasonable alternative at this point?

MR. BRENDTRO: Okay. Yep. And, ah, Judge, I, um, I probably will jump between the elements. I had a hard time tracking them in a coherent, logical fashion. They, they seem to refer to each other as we go. The, the court seems to refer back to its multiple elements, and so if I fail to address one, let me know, and I'll, I'll do a better job, but they, they all seem to kind of like --

THE COURT: -- what paragraph are you in in *Dunes*?

MR. BRENDTRO: Ah, so the quote is, ah, the type of pressure, quote, "inherently involved", close quote, in typical negotiations. And I don't know exactly where that comes from. It's in the paragraph 23, I think. Oh, yeah, yep. Negotiations inherently involve a certain amount of pressure and coercion, paragraph 23. Ah, the, the pressure that we're talking about. I would be shocked if any of the jury members would find this to be the type that's inherently involved in a transaction. It, it, it's beyond the pale.

It's, it's conduct that makes no sense. Scott Keogh, ah, I had the opportunity to sit through his deposition and remarkable witness, remarkable businessman. Describes at length how none of this made any sense, that anybody would act this way. He didn't even believe the threats to be true until the very end, when suddenly the attorney for Kent Stevens is parodying the idea of the dynamite option.

This is not the coercion that's, quote, "inherently involved" in a typical business transaction. There is nothing like that. Now, I understand, ah, Mr. McIntosh can make the argument against that, but the fact that we're having this argument here means this is not a question for you, this is a question for, for our neighbors.

Uh, the first prong, ah, they talk about the you know, it's, it's not just reluctance. It's not just embarrassment. I think both of those boil down to bad deal or bad deal. This wasn't reluctance to make a bad deal. This was the inability to negotiate anything different than that price. It was that they knew it was the wrong price, and they knew that they couldn't do anything about that. This was not about financial embarrassment. Keep, keep in mind, the issue here is whether or not it was the right price, $800,000 per share. That's not a matter of embarrassment. The issue is the pressure that's put on it to not only accept the wrong price, but then "blow up" the whole company to make it worse

if you don't accept that.

THE COURT: Well, isn't the issue whether or not your clients voluntary, voluntarily agreed to it under the first prong?

MR. BRENDTRO: Correct. Yeah, and I, I think the testimony and the, all the circumstances are that, no, they didn't.

THE COURT: Well, they agreed to the price?

MR. BRENDTRO: Right. That's, well, they signed an agreement stating that price under the duress that if they didn't accept that price then they would (unintelligble) the company. So, the, umm, the bad faith insurance case, ah, Pachot, P-A-C-H-O-T, um, if, if we're going to use that as a model, we need to consider what circumstances were there, which is a bad faith relationship between you and your insurer.

Um, a, a lawsuit there is always an option and it doesn't necessarily change the course of, of conduct. Here, the simple idea of bringing a lawsuit against Kent meant that he was going to blow the whole thing up and leave, meaning the equivalent would be that if you bring, this, this would be your local insurance agent, State Farm is too big for this to happen, but DeSmet Insurance says if you bring a bad faith insurance claim, we'll "blow up" the insurance company. There'll be no money to pay anybody's claims. That's the

threat in the equivalent manner here. Whatever the threat was in Pachot is, is not similar to here. The fact that you can decide that case on summary judgment is a different facts, different, different circumstances. Um, I, I don't think it's a useful measuring stick for here. Um, one of the, the phrases that Mr. McIntosh used is you can do what the law entitles you to do. Well, the law does not entitle you to breach your noncompete. The law does not entitle you to breach your fiduciary duties to a company. The law does not entitle you to use oppressive conduct. There's lots of things and that's what Counts 2 through 7 are in our complaint and outlining all of the things that the law does not allow you to do. In *Dunes*, the law allows you to not continue to be an operative restaurant. That's, that, that's the end of that case. That is the extent of the, the comparison. Um, the idea of this natural progression, meaning if, if Kent leaves, and then this would be the natural set of dominoes that happens next, that's Kent's spin on this, ah, that if I leave this is just what's naturally going to happen. That's his spin after the fact. When it's going on in real time, what the testimony at least in, in, in favor of my clients for this motion is that he's actively making these threats, not just saying it's like dominoes, um, and, and there's no proof that that was going to happen, just if he decided just to walk away. That's not, that's not what

this is about. The idea that that Aladdin received $3,000,000, that that's principle on a loan. It's not like it's a gift. It's following through on part of the agreement. And so it's, it's not like it's some luxury. It's getting back the principle as a bank. There's, there's nothing about that that's magnanimous, ah, or any, any way related to this. The, the payday loan comment, I, I get the shorthand for that. The evidence at trial will show you that, ah, the, the interest rate that they're charging is basically one percent a month on most things or less. One case it was 15%, but that was because Aladdin had to borrow another $1,000,000 at 15% from its own lender to do that. And so it's not extortionary interest in any way.

Um, Judge, to me this is, this is a case that is so not even close to on all fours with Dunes that it's not worth further analysis. I mean, I've told you everything I think I can tell you about why they're different.

Umm, I will transition into this Section 2.02 discussion, but I am confused, and I would like clarification before I proceed because if we're agreeing that it cannot be used for indemnity because it's not specific enough, my next question is, how is it being applied in this, in this motion here? Like what, what are we talking about then? Is it being used to prove there was no duress? Because that doesn't make sense that you could like prove that there's no

duress by making you sign a document that says there's no duress. And I have some further arguments about that anyway. Or is it being used to say that this doesn't breach the operating agreement, in which case it doesn't, it doesn't say that. That's not what the language says. But I, I would like, if it's possible for the court to turn this back over to Mr. McIntosh to explain what it is we're talking about 2.02 in regards to today, and then I can respond to where it goes next.

THE COURT: Mr. McIntosh.

MR. MCINTOSH: Sure, Your Honor. I, I think I addressed it in in my argument is that the, the provision states that the execution, delivery, and performance by seller of this agreement, and the documents to be delivered hereunder, in the consummation of the transactions contemplated hereby, do not and will not violate or conflict with the Articles of Organization, the LLC Agreement, or other organizational documents of Seller, violate or conflict with any judgment, order, decree, statute, law, ordinance, rule, or regulation applicable to seller, conflict with, or result in, and then it goes on to a number of, of different areas, and it's our position that --

THE COURT: -- what page in your brief are you on?

MR. MCINTOSH: I'm sorry, I'm not in my brief, Your Honor.

THE COURT: Oh.

MR. MCINTOSH: I was reading that directly from the membership purchase agreements.

THE COURT: It's referenced in what page in your brief?

MR. MCINTOSH: It is in there, Your Honor.

THE COURT: At least some of that language is paraphrased in your brief.

MR. MCINTOSH: It is, Your Honor.

THE COURT: I thought I had it marked somewhere.

MR. MCINTOSH: I believe it is page 20 of my initial brief.

THE COURT: Yeah, 20 and 21, it looks like.

MR. MCINTOSH: Yes, Your Honor.

THE COURT: Thank you.

MR. MCINTOSH: Yeah. And as I explained in that brief is that, for example, Gulf Coast that I'm quoting from page 21, and Trigger assert in Count 2 of their complaint, the defendant and third-party plaintiff breached the operating agreement. And I, I failed to touch on that issue, and I, I would like to address that on, on reply as well, um, in my response rebuttal. Uh, but in it they, they say that there is no violation of the operating agreement. And so their claims, and so their claims rests on yeah, but we only signed that because of duress, but if this court finds that there is no duress, then you're bound to the terms of the agreement

you signed. That's as simple as I think I can make it, Your Honor.

THE COURT: Go ahead, Mr. Brendtro.

MR. BRENDTRO: So, there's a couple of problems with that, at least from our, our point of view. If it's being used to prove that there's no duress, that it doesn't make any sense that, that, that would be a way that you could, um, like trick, trick somebody into a, I mean, if you're addressing them in to the contract, you're addressing them in the contract, but the things that are within it can't be used to prove that there's no duress.

The second thing would be to look at Mr. Mullen's testimony about this, these provisions. He, he did not find them to be, ah, meaning what Mr. McIntosh is asserting that they're meaning, um, did not, did not see them in that light as they were drafted and, um, that at least suggests an ambiguity here, which would be an important aspect to discuss. I think you could also get there on the face of, of this language. It's broad and, and inclusive. A lot of commas, a lot of synonyms, but it also doesn't say what he's trying to make it say. Yes, the operating agreement would allow for the transfer of shares. Ah, and, and that's what happens. Yes, these are shares that exist, you know, legally this is a process that's going to take place. Doesn't mean that the operating agreements mechanism by which to decide

the price per share was appropriately followed to get here. If, if that's what they want this section of the agreement to mean, they should have said that, ah, that this is the appropriate price based upon X, Y, and Z.

So, to use this like extremely broad and extremely inclusive language after the fact to shoehorn in the fact that well, by the way, even though there's a process by which to decide a, um, a price when the parties don't agree, therefore, ha ha ha, you've, you've waived that, and it's you're stuck with that. That's, that's not how these agreements work. That's not how the language works. I think it's ambiguous on its face if, if that's what it's being used for. And then as for whether it's as to Count 2, you know, breach of the agreement, you know, I, I don't see that as, as being an argument that that can be trued-up that way. And then as far as an argument for duress, um, you know, we get back to the public policy. Um, it's the, the same idea. If you can indemnify before somebody indemnify you for their own misconduct, you can't, ah, slip a, slip a line into an agreement that says ha-ha there's no duress even though there's duress, with-without being specific.

Um, the, the, the phrase that that he concluded with was he got bested. Um, you know that, that's, that's not what this is. I would be, ah, be shocked if every jury that ever looked at this case would find that this was a case they

would agree where you just got bested. You know, Kent really cleverly figured out a way to, to force you into this. That, that's not, that's not what this case is. This is not what we want anybody doing. This is, you know, if, if we're talking about how we teach the, teach our children about how to be good citizens, how to be good partners, how to be good businessmen. This is not what we would teach our kids to do. This is what we teach our kids not to do, which is why we're seeking punitive damages in this case so that people don't do this next time.

I, I think, I think that addresses what was raised. It sounds like he wants to make further arguments and would like the chance to respond if they're new, but that's, that's our view of the case, Judge. This is one for the jury. You certainly would have the, the ability later on in the case to take it away from the jury, um, via motion for directed verdict. Motion after the, you know, after the whole thing is done when we look at this again, but to me this is substantially dissimilar from *Dunes*. And is, is exactly the kind of thing that the doctrine of economic duress was designed for. Maybe a better way to say it is, we know the doctrine exists. The South Dakota Supreme Court has sanctioned it. And if it doesn't apply to this, I'm not sure what it would apply to.

THE COURT: In terms of the shareholder oppression

count, if you have a bargain for exchange contract that these parties entered into, then flush this out for me a little more, Mr. Brendtro. How is, how are all the elements of shareholder oppression met?

MR. BRENDTRO: Judge, the, um --

THE COURT: -- the --

MR. BRENDTRO: -- the pause in my answer here is because I do not have the, the elements of shareholder oppression committed to memory, and so I'm trying to find a good place to borrow from those.

THE COURT: Take your time, Sir.

MR. BRENDTRO: Okay. So, Judge, do you, this is where you phone a friend. Judge, do you happen to have the elements in front of you?

THE COURT: I don't have them in front of me.

MR. BRENDTRO: Okay. So, to me, that issue wasn't --

THE COURT: -- I can find them quick if you want me to.

MR. BRENDTRO: Yeah. So, my first response would be that wasn't briefed in his motion, but we get around some other issues, but that wasn't specifically briefed, which is why it's not specifically responded to in our brief. Our, our response was a lot more broad because his attack was, was quite broad and, and, and narrow at the same time. So, I don't have a good answer. Um, I, um, so --

THE COURT: -- and if you, if you wish to supplement

that.

MR. BRENDTRO: Yeah.

THE COURT: I'll, I, I don't, I don't mean to put you in an unreasonably awkward position here, if I could use that term.

MR. BRENDTRO: So, I mean, it's, I think for both of us it's highlighting that, ah, there's, there's an instruction that we have not yet fleshed out in, ah, in what we presented so far. Ah, let me see, actually let me try this.

THE COURT: You know, while you're doing that, I'll, I'll give you a few minutes, and I'm going to run, grab another water.

MR. BRENDTRO: Okay.

THE COURT: And we'll just take a brief, take a brief recess. I had a couple of notes in my office I wanted to grab anyway.

(Recess at 3:20 p.m.)

(Proceedings resumed at 3:34 p.m.)

THE COURT: We're back on the record. Go ahead, Mr. Brendtro.

MR. BRENDTRO: Judge, ah, we were able to look, um, jury instruction 130, um, it's, it's an instruction about punitive damages, but in that we offer --

THE COURT: -- you said 130.

MR. BRENDTRO: 130, yes.

THE COURT: Thank you. Couldn't hear you.

MR. BRENDTRO: In that instruction, ah, it's a different purpose there, but that instruction's a punitive damages instruction, but for the purpose of defining the word oppressive, we went in to the cases and found different definitions of oppressive which are all shareholder oppression cases. So, the language then can be found there. I then went and looked at the *Landstrom v. Shaver* case. That is one of the cases cited in, in the footnote there on that bottom of 130. What I would tell you, Judge, is that the, the elements, if you look at paragraphs 42, 52, and 44, um, of *Landstrom v. Shaver* plus those elements or those, ah, those citations and quotations that we have in Instruction 130. You get sort of a parallel set of factors or tests. One conduct that is unreasonably burdensome, unjustly severe, rigorous, or harsh. Or two, conduct that substantially defeats the reasonable expectations held by members of the LLC, ah, when they committed their capital to the enterprise.

Um, there's another phrase that's helpful, a violation of fair play in which shareholders are entitled to rely, um, which is illustrative of, of either of those. The *Landstrom v. Shaver* talks about, um, that there's no bright line for what the conduct is once you look at all the circumstances. They talk about the idea of squeeze-out and freeze-out conduct, which is also then not self-limiting. The fact that

it doesn't match exactly the squeeze-out or freeze-out from a previous case does not, um, is not determinative. And, ah, from that, I guess, here the, the argument would be that you have Kent Stevens as the, ah, the TCU shareholder, um, who is using his various positions and his, his opportunity as a shareholder to defeat the reasonable expectations that the other members had or engaging in unreasonably burdensome, severe, rigorous, or harsh conduct, um, without giving you all the details that we talked about what we think he did wrong. I think what he does wrong also matches those elements.

THE COURT: So, if I were to find that there was not economic duress, therefore, that would be akin to a finding of no wrongdoing?

MR. BRENDTRO: No, Judge.

THE COURT: You don't believe that?

MR. BRENDTRO: No, I don't, and it's because --

THE COURT: Okay. Explain that further.

MR. BRENDTRO: So, and I, I, umm, I've given this a lot of thought.

THE COURT: I have, too.

MR. BRENDTRO: It doesn't mean I'm right.

THE COURT: I've given it a lot of thought.

MR. BRENDTRO: Ah, it's the, ah, it's not exactly the same, but the same idea that, that your insurance company

might not technically be breaching the contract, but they're engaging in conduct that is bad faith. They're, they're different things, testing different conduct under different standards, or maybe the same types of conduct or different standards. And so one is, ah, have you proved that we can initiate this contract and, and modify it because of, of this, this duress, which is its own separate doctrine with its own set of tests. Ah, but independent, if it, even if it's not a duress, it could be a tort. And so, you know, I guess that's what it boils down to, Judge, is why we went in law school to one room to learn about breaches of contract, in another room to learn about torts. The same types of things could be happening, but we addressed them under different tests. So, the simple answer is if it doesn't meet the duress test that doesn't mean it's right, and it doesn't mean it's not a tort. We would then turn to the next the next analysis. Frank Palmershein [spelled phonetically], our, our criminal law professor, had a great way to, to say this. The question ultimately in law is, is this a that, and so is this a that for duress? We will answer that, and we'll move on to the next part. Is this a that for torts, shareholder oppression, but they're not the same thing. Just because it's not a murder doesn't mean it's not a manslaughter.

THE COURT: And so it follows then just being clear then

economic duress then in your opinion, is not dispositive as to the other counts in any way, shape, or form?

MR. BRENDTRO: Any way --

THE COURT: -- based upon your, your comment. You're following my, you following my question?

MR. BRENDTRO: When you, it's the any way, shape, or form where I get nervous, you know, to, to, to say that it's airtight that, that none of these claims have anything to do with economic duress. I believe that's been our, our position.

THE COURT: I glean that from your briefing.

MR. BRENDTRO: Yeah.

THE COURT: But I, I want you to clarify that for me. Is what I'm asking make sense?

MR. BRENDTRO: Yeah. So, and I'm just, I'm being more thorough, ah, than, than necessary probably, but I, I don't believe that that it's dispositive of anything other than its own self. I think that's accurate from, from our position, and if there's something that I've missed maybe I've qualified it somewhere else, I'm happy to, to address that, but I believe that's been our position is that it's, it's, its own standalone and that's that.

THE COURT: Any other argument you wish to make, Mr. Brendtro?

MR. BRENDTRO: No, Judge. I, I, I'm happy to respond

to anything else that comes up that's new, but I, I think you understand where we're coming from on this or at least I've talked enough to, me talking more doesn't serve any purpose.

THE COURT: Mr. McIntosh.

MR. MCINTOSH: Very briefly, Your Honor. I did pull the case that Mr. Brendtro referred to *Landstrom v Shaver* 1997 SD 25 in paragraph 38 that was referenced to. It, it kind of explains why we had some issue. It notes that the code does not define what constitutes oppression, but other courts have defined oppression in the following context: #1, reasonable expectation of the minority shareholder or #2 burdensome, harsh, and wrongful conduct by the majority shareholders. Based on that language alone, this does not apply. All three members were 33.33333% shareholders. There cannot be shareholder oppression based on those factors if all three members are the same. In fact, the two that are being bought out would then be 66.66% shareholders against the minority shareholder in in that regard, Your Honor.

So, one, I don't think the share-shareholder oppression is appropriate in this case; and, two, to get back to your point, one of the findings of wrongful act is the third element of economic duress. And so I do think that a finding of no economic duress would be bearing on the finding as to whether or not there was any other conduct. If we would remove economic duress, then there's an arm length's

transaction that occurred in which they executed multiple documents. There can't be shareholder oppression in that regard.

THE COURT: And you know, I'm going to ask you the same question if you could expand upon it more than what was included in your briefing. And you know, and I, I know what your answer is to the initial question. You know, when I say is economic duress as to the other counts.

MR. MCINTOSH: It is.

THE COURT: And why, and if you could walk me through those.

MR. MCINTOSH: Yes, Your Honor. I, I believe it is, and, and it's for the reasons that I've tried to allude to here is that without economic duress, the parties are bound by the agreement that they signed. I believe I cited it in my brief. I know certainly I cited it in my reply brief in which the basic premise in the law is that when parties reduce the agreement to writing and sign it, that agreement is entitled to enforce them. And that's our position, is that if you take away the economic duress, then why the heck did you sign this, and why make the representations, why make the guarantees, why make the promises in there. Their only defense is, well, we only said that because of economic duress.

Well, if you remove economic duress, it just becomes a

circular argument back and back and back. All of their claims fail under that argument. I would also address, I know Mr. Brendtro would like to say something back in this regard is I did not address, and I believe it is claims two and eight. I may be mis -- misspoken, but essentially they're the arguments that refer to the breach of the operating agreement. So, not only do I believe that the, the removal of economic duress defeats all of the other claims, but I believe that those two claims, as they relate to the breach of the, the operating agreement, also fail on their own because of the statement from, from Scott Keogh in which he said, and to paraphrase the complaint says, that there is a specific valuation process that must be followed for the buyout procedures in this type of scenario. Scott Keogh, the vice president, the owner of Gulf Coast, said that's not what we were doing here. I asked him, what does this mean in your complaint, and he said, I don't know. That's not what we were doing here. This is just two guys negotiating, and that's exactly what happened. You can't have a breach of an operating agreement if the party himself says we weren't using the operating agreement for this. Um, I think it illustrates that you can't have it both ways. You can't make a claim that Kent Stevens violated the operating agreement when then Scott Keogh was also operating outside the operating agreement because they were just informally

negotiating. So, I don't believe that those two counts should be permitted to stand regardless of how the court rules on the rest of the motion.

THE COURT: Essentially, because Mr. Keogh agreed to this, correct?

MR. MCINTOSH: Correct, Your Honor.

THE COURT: Agreed to the sale?

MR. MCINTOSH: Correct. And I, and I --

THE COURT: -- with the advice of counsel?

MR. MCINTOSH: Yes, Your Honor. That's correct. Um, I did want to point out two, two final things. One, there was some discussion about the membership purchase agreements, and how they're broad, and they're complex, and there's a lot of commas. Well, those agreements were drafted in combination between two attorneys. The attorney for Scott Keogh was sending drafts to the attorney for Kent Stevens. So, it's kind of a tie when you have, it's construed against the drafter. I think essentially both attorneys drafted these agreements to which Scott Keogh testified, I read it, I knew what it said, and I signed it. You can't circumvent it now and say that term is too confusing. That doesn't apply to me. That shouldn't apply in this scenario. The only defense they have is the only reason I signed it was because of economic duress.

The last thing I want to touch on, Your Honor, is the

standard in which the party must present evidence to defeat a motion for summary judgment. In my brief, my initial brief, I cite -- I cited a number of cases here, it's on page 10 of my initial brief that the plaintiff is not without his own burden as well. Its own burden as well. Entry of summary judgment is mandated against the party who fails to make a sufficient showing to establish the existence of an essential element to that party's case on which that party will bear the burden of proof at trial. There's a citation, and then it says a sufficient showing requires that the party challenging summary judgment substantiate his allegations with sufficient prohibitive evidence that would permit a finding in his favor on more than mere speculation, conjecture, or fantasy. Throughout this litigation and throughout the arguments today, the statements were, well, he would take the crew. He would, he would take the customers. He would "blow up" the company. All of that is entirely speculation. In fact, during the deposition testimony of Kent Stevens, he said, I don't know if they would have came with me or not. Money talks. And the implication being that if Scott Keogh and Waylon Geuke say, you know what, you guys hang on, we'll pay you some money here. Ultimately, they decided not to do that. That was an option. In fact, the attorney, John Mullen said you can bring in your own replacement crew. Hire your crew and bring it in. But the

plaintiffs also argue that there were no other reasonable alternatives.

Here's the most reasonable alternative. There's a provision that says in the, in the operating agreement, that if Kent Stevens is terminated as the, as the manager, sort of the general manager, it triggers the buy-sell of it. If that happens, then they, they being the plaintiffs in this case, they buyout Kent Stevens. This whole scenario gets flipped on its face and they get to set the value.

THE COURT: They could have elected that alternative?

MR. MCINTOSH: They could have. And they could have set their value and then Kent Stevens would be in the position of trying to file a lawsuit if he didn't agree with the value, but that's not what they elected to do because they didn't like that option. That is not what reasonableness is. The court has two cases in front of it that say when you have a legal remedy like they did here, when you have other options, which included just simply saying no. We're not selling you it, then that is not economic duress. You don't sign four documents. You don't take $800,000 each, put it in your bank account and then file a lawsuit and claim economic dress. That's not what this doctrine is, is for, Your Honor. Thank you.

THE COURT: I did have, you heard the distinguishing factors as provided by Mr. Brendtro relative to the *Dunes*

case?

MR. MCINTOSH: I did, Your Honor.

THE COURT: And do you have any additional comment or argument as to why those distinguishing factors, as outlined by Mr. Brendtro, don't affect your position in terms of economic duress? Why do those distinguishing factors from your perspective not carry the day?

MR. MCINTOSH: Simply because it's a different scenario between a hospitality restaurant, and its managing group versus a company that does oil and gas. It's just a different scenario based on how they're organized. What I did point out was that *Country Kitchen* wasn't just some party that just happened to be working there, they were the managers. They were, I believe under a contract. I believe they were under a contract that they had to breach to walk away, threatened to walk away at that point. I think that's a fair assumption. If that's not stated in there, I believe they, they were under a management agreement. They were signed as the manager to be there. So, they're doing nothing different than what Kent Stevens is doing, threatening to walk away. I believe the statement was the law doesn't allow you to do it. That's not true though. The law does allow you to do it, but it also provides a remedy if you do. And so where our strongest point is, and then I'll be frank with the court is element number two. They cannot prove that they

did not have reasonable alternatives because there are two cases that say under these facts, a reasonable alternative includes a legal resource, a legal recourse. They had those options. They didn't like it. That is not economic duress.

Thank you, Judge.

THE COURT: Mr. Brendtro, final word on summary judgment motion, or actually, I'll, I'll give you the final word, Mr. McIntosh.

MR. MCINTOSH: Okay.

THE COURT: You're the moving party.

MR. BRENDTRO: So, Judge, the, the question I would have for me is how is a 33.33%, ah, member able to exercise oppression if they're not the majority? And the answer is here you have a special circumstance where you have a 33.33% number plus his role as operating manager puts him in a functional equitable equivalent of being the managing partner of the majority, that, that's the answer. That *Landstrom v. Shaver* case in numerous ways talks about how there's no bright line. This is not something where you find the elements, you need it, and you got it. This is, it's an equitable issue. It's an equitable remedy. The court has broad jurisdiction of fashion remedy once you find it. That would be my answer to that, that issue. As to Scott Keogh's testimony about the operating agreement in that particular paragraph or the particular provision about that, if you go

back and look at his testimony, it's clear that Mr. Keogh is not sure whether it applies. He says doesn't this apply to the buy-sell? Rhetorically, ah, he's not clear. He does not have to testify as to the contents of the document. It speaks for itself. The fact that he doesn't understand the document without looking at it or without attorneys doing what we're doing, saying, hey, look at this paragraph, or this, this process there. Um, it doesn't defeat that. I think Scott's testimony fairly can be read as, yeah, there was two guys trying to come to an agreement, right? Which is true for the entire process because Scott's entire process up to a certain point, because Scott believes that his threat is, is nonexistent, that, that they're overblowing this. And so he's ready to fly out to Casper to negotiate the final thing, meaning it's two guys coming to an agreement until that moment that he realizes that Kent is now using his own attorney to convey this dynamite option threat, at which point Scott realizes this is a real threat and that's the end of that.

So, yes, he was using this idea that you don't need any provision of the operating agreement to come to a, a valuation up until the point that he realized that wasn't the case. Meaning once there's the duress, once there's the threat, once he realizes that there's no negotiating to be done, that's the breach of the operating agreement, that

Scott's testimony can be fairly read in that context.

It's, it's not as black and white or as is, is, ah, closing out of, of issues as, as, as it's being made to be. This idea of, of summary judgment and speculation, Judge, I'm going to ask you to sign a summary judgment d-d-d-denial order right now because I'm pointing a loaded gun at you. Okay. But you could speculate that I'm not serious about this. You could speculate it's not really loaded. You could speculate that it might miss or that it might go through you and cause no harm. Yeah, you could speculate all those things, but that doesn't mean the threat wasn't real. Um, that's, that's not what speculation means in the context of summary judgment. That, that our, our folks on this side were receiving the threat and believing it to be true. Ah, yes, they're believing the threat would be carried out. That doesn't require speculation in the context of what summary judgment speculation is. That, that, it's a different type of speculation. Nobody knows what's going to happen in the future. People can make threats and it's whether the threats are believed or not, and that was the ultimate answer here. My folks believed the threats. Trigger believed it from day one. Gulf Coast believed it right before the letter of intent was signed, and from then on.

The, the buy-sell, again, the testimony in this case and the inferences that can be drawn from it is that any option

other than going along with the number and the sale was any other option was not viable because it would elicit the same response. So, no, a buy-sell election is not an adequate remedy. It's not a reasonable remedy. The jury can hear Mr. Keogh explain why it wasn't a reasonable remedy. The jury can hear, ah, Mr. McIntosh argue why it's not, but that's not for this court to decide. Yes, it was an option, but no, it wasn't viable because I mean if you've got a, a bear, and you poke the bear this way instead of that way, what do you think is going to happen? The same thing.

So, um, and then the, the final argument that he's making is what the law allows you to do is to breach your agreements. If that's what that phrase means, what the law allows you to do, ah, as long as you're willing to pay the punishment that phrase means nothing. The law allows you to breach it to, to violate it. The law allows you to commit a crime as long as you're willing to pay the penalty and serve the time. That's not what that phrase means in this context. There are numerous, extensive duties under the law, common law, statutory, the operating agreement, ah, equitable that Kent Stevens was breaching. The law does not allow you to do that stuff. That's the point of what this is. This is not what you're supposed to do. Threatening to do things you're not supposed to do is also not allowed. Ah, if, if we were to take that interpretation of the law allows it, the phrase

would have no meaning and there would literally be nothing, no restraint on anybody. I mean the law allows me to walk in to Fifth Avenue and shoot somebody in the face. Right. As long as I'm willing to then take my chances with the jury, and that's not what that means. That's not what this case is about. So, it doesn't defeat our, our case and it doesn't entitle him to summary judgment.

THE COURT: Anything else?

MR. BRENDTRO: Nothing.

THE COURT: Final word, Mr. McIntosh.

MR. MCINTOSH: Your Honor, I think I have nothing further for the court. I think we've said all we can say at this point.

THE COURT: Okay. Thank you. As to summary judgment, I'm going to take the matter under advisement, and I understand the trial is scheduled February 6, 7, 8 and 9, so I will do my best to get back to the parties sooner than later. I'm going to need a little time to further digest this. I've spent considerable time with it already. I appreciate both of you in terms of your briefing, your arguments.

So, was there anything, uh, that the parties wish to, I know, I know you're done with comment. Was there anything further you wanted to address in terms of any prospective or potential written submissions or are we done?

MR. MCINTOSH: I believe we're done on, with that aspect.

THE COURT: Okay.

MR. MCINTOSH: We have filed our motions in limine and things. I don't know if you want to get to those right now.

THE COURT: Yeah, we're going to take them up.

MR. MCINTOSH: Okay. Perfect.

THE COURT: Yep.

MR. MCINTOSH: That would be --

THE COURT: We're going to get those done today. Do you have, I mean, I know we're only scheduled, I know we're scheduled for two hours, but if we have to go a little longer, do either of you have somewhere you need to be?

MR. BRENDTRO: Not life and death, but it'll start --

THE COURT: -- well, let's see where, how about we do this, we'll keep going.

MR. BRENDTRO: I don't know that it will take much longer though, because --

THE COURT: -- yeah, I mean --

MR. MCINTOSH: -- I don't believe so either.

THE COURT: I, if we end up running a little long, we'll, we'll figure something out, Mr. Brendtro. Okay. Right now it's only three minutes to 4:00. So, let me, uh, switch gears and move to a different portion of my binder. Was there anything else the parties intended to take up

today? I mean, other than how I noted at the top, just some logistics and some housekeeping that I want to cover with both of you?

MR. MCINTOSH: I don't believe so, Your Honor.

MR. BRENDTRO: No, Judge.

THE COURT: Okay. Let's move on. And, Mr. Brendtro, just so I'm abundantly clear, I did not see that you filed any motions in limine; is that correct?

MR. BRENDTRO: That's correct.

THE COURT: Okay. And you don't intend to file any?

MR. BRENDTRO: So, um, there's always stuff that pops up where you have to address it cause it pops up at the moment I don't anticipate so.

THE COURT: Okay. I just wanted to clarify that.

MR. MCINTOSH: That would be our position as well, Your Honor. Sometimes things come up right at the last minute and even the day of unfortunately, but --

THE COURT: -- yeah. And I'll, I'll tell both of you, okay, as we're, as we're rolling down the tracks towards trial if, if as issues such as this or others that pop up, okay. Bring those to my attention if you can. Uh, you know, sooner than later. Give me a little bit of a heads up. Right. Stated another way, if you know of something 3-4 days before trial, that's a potential issue, talk about it. If you can't resolve it, you know, bring it to my attention

rather than waiting until the morning of trial. So I, I think probably any judicial officer would say the same thing.

So, in terms of motions in limine, we'll start, ah, with the preclusion or defendants request for preclusion of any golden rule arguments or testimony. I know Mr. Brendtro indicated that he doesn't have any intention of, of making such an argument, but go ahead, Mr. McIntosh, whatever record you wish to make.

MR. MCINTOSH: Yes, Your Honor. The, the golden rule argument is laid out in my initial motion in limine, and I did file a reply in response and really the only thing that I clarified in my reply is that at no point may you suggest to the jury to put themselves in the shoes of the parties.

THE COURT: And I'm not going to allow that, okay. And I mean, if, if that's the brunt, or if that's the, you know, the main focus of your concern, I'm not going to allow that. And I, I think it's very clear under the law that the golden or that the case law precludes any such characterization.

Mr. Brendtro, would you agree?

MR. BRENDTRO: Ah, yes. Okay. And so but I, I do understand that there may be context in which the golden rule could be at least woven into the record in terms of damages and so forth. But and so here's what I'm going to do. Well, I'm sorry, Mr. Brendtro, I should have allowed you any record or argument you wish to make, Sir.

MR. BRENDTRO: No, Judge.

THE COURT: Okay. So, here's what I'm going to do with this one. And if, if we need to make further clarification, or if we need to make sure we, we clarify it more specifically, I'm happy to do that, and I'm going to task you with drafting this order, Mr. McIntosh, okay. I should have noted that from the top. It's your motion, and I'd ask that you draft it prior to sending it to me. Also, if you would kindly let Mr. Brendtro review all of the language in your proposed order before submitting it via Odyssey as a proposed document.

MR. MCINTOSH: Understood.

THE COURT: And if there's language that you two can't settle on relative to our discussions here today, then bring it to my attention and we'll resolve it, you know, however we need to resolve it.

MR. MCINTOSH: Sure. And, Your Honor, if I may just interrupt.

THE COURT: You may.

MR. MCINTOSH: Very, very briefly. The first, I think 3-4 motions are my standard practice of filing motions in limine, not, certainly not pointing or suggesting that Mr. Brendtro has done or would do any of these. So, I want to make sure that that's clear. Unfortunately, I have encountered these in my trial experience. So, they -- there,

there's a reason that they're there. I think more so it protects all of us on with the record, too. So, I --

THE COURT: -- I didn't and, and I appreciate your clarification, counselor. I didn't glean that it was anything directed at Mr. Brendtro.

MR. MCINTOSH: Okay. Good.

THE COURT: Frankly, I've had the opportunity to, to review your attachments of deposition testimony, and so forth. I, I'd compliment the, and actually the, just the conduct of the parties today, both of you have been extremely professional, polite, and, ah, and professional not only to the court, but to each other. So, this court appreciates that, and I would just ask, and I understand that a trial, it's a, it's an adversarial process and so forth, but I would just appreciate the same professionalism.

MR. MCINTOSH: Understood. Thank you, Your Honor.

THE COURT: And I'll quit interrupting you now, Sir.

MR. MCINTOSH: You're okay. Thank you. I'll move on to my second, my second motion in limine.

THE COURT: I, I should have, I'm sorry. I should have noted my ruling. I'm, I'm technically denying the motion. Okay. On the golden rule, but just because of the caveat as to potential remarks relative to damages, but I would note that there will be no, for example, you know what would you do or placing, you know, attempting to place the jurors in

the shoes of a party. Does that make sense?

MR. MCINTOSH: Yes, Your Honor.

THE COURT: And so what this court would note as the, shall we say the authorities, the general authorities as to the golden rule, yes, that's still in place. And so I don't want to hear any such statements or arguments. Does that make sense?

MR. MCINTOSH: Yes, Your Honor.

THE COURT: Any further clarification as to my ruling?

MR. MCINTOSH: No, Judge.

THE COURT: Same question, Mr. Brendtro.

MR. BRENDTRO: No, Judge.

THE COURT: Uh, settlement negotiations. Mr. McIntosh.

MR. MCINTOSH: I don't believe there is an objection to that from the plaintiffs, just simply 408, just it's not allowed to be brought in. I know there are some exceptions. There have been very little negotiation I think anyway, and I don't know that any of the exceptions would apply.

THE COURT: Mr. Brendtro.

MR. BRENDTRO: So, yeah, with the caveat that things might happen between now and trial where we have to figure out if we're going to settle the case.

MR. MCINTOSH: True.

MR. BRENDTRO: Again, I don't think, I (inaudible, not by a mic) anticipate that's going to happen, but…

THE COURT: I'm sorry, I didn't hear you, Mr. Brendtro.

MR. BRENDTRO: I said I think (inaudible, not by a mic) that's going to happen. I actually think that's going to happen, but --

MR. MCINTOSH: -- as in regards to settlement.

THE COURT: That'll never happen.

MR. MCINTOSH: Never say never.

THE COURT: Well, I, I believe the first hearing that this court conducted, I think we were telephonic, if I remember correctly. The parties made it abundantly clear to the court at that point that they did not anticipate any type of a resolution.

MR. MCINTOSH: I believe I appeared telephonically for that one.

MR. BRENDTRO: I think we both laughed.

MR. MCINTOSH: Yeah, we did.

THE COURT: Okay. I thought you were telephonic as well, Mr. Brendtro.

MR. BRENDTRO: No, I was here, and then we talked about the Diaz.

THE COURT: Oh, okay. Yeah, well, we were in a different courtroom. You know what, now I'm reminded. Thank you. Yeah, you were personally present. Okay. So, I'm, I will, I will grant the motion as to settlement negotiations.

Sequestration of witnesses is the next one, I believe,

Mr. McIntosh.

MR. MCINTOSH: Yes, Your Honor. And, and again, just a matter of course, I filed this motion to ensure that there is no hearing of the testimony of other witnesses. Mr. Brendtro did file his response, and I think there is, it is a little confusing when you have entities versus individuals. I think the rules --

THE COURT: -- are both sides just going to make a designation then and come to an agreement as to who's going to be in the courtroom?

MR. BRENDTRO: Matt, I, I think we should probably take that up. (Inaudible, not by a mic).

MR. MCINTOSH: I think the parties can agree, can reach an agreement on that.

THE COURT: Okay. So, would then are you requesting a ruling from this court just I'll hold in abeyance relative to the agreement of the parties because obviously someone who's a, you know, and, and the way I'm seeing this, everyone who would be the officials, or the representatives, or most everyone who's the representatives from the respective entities would also be witnesses, but to me it would appear that they're parties and they'd probably be allowed to be in here. Now, any other fact witnesses, yes, they should be sequestered. In terms of experts, what I've always done is it's reciprocal as to both sides. You're both are presumably

paying your respective experts. If they want to sit in and listen to the testimony, they can.

MR. MCINTOSH: Understood. Your Honor. I'll, I'll work with counsel to see if we can't --

THE COURT: -- is that the, is that the cleanest way from both of your perspectives to handle this one?

MR. BRENDTRO: What I would suggest that there's probably a very short list of people that will be sequestered because of whatever we come up with. Trigger is Leroy and Waylon. And I don't remember what their ownership percentages are, but they're both like the kind of people that would be entitled to sit through a trial because they both are vested in this. There's two different Trigger entities and so presumably one could be for one or one for the other, but as long as nobody's concerned about Waylon, Leroy, and Scott sitting in as, as the people, I don't think we have an issue. And if the experts are going to sit through then I think it might be Jay Larson might be the guy that gets to sit home.

MR. MCINTOSH: Yeah, I think you're right.

MR. BRENDTRO: So --

MR. MCINTOSH: -- and, and you, you bring up an interesting point because you could just simply designate Scott for, for, or, excuse me, Waylon for Trigger Inc., and Dickinson for LLC.

MR. BRENDTRO: Yeah. Well, and incidentally, and I, I'm not trying to play fast and loose, but Jay is with Aladdin, but you know, I also I think I'd rather not have Jay sit here for trial as well just so that he can come in and say you know so…

MR. MCINTOSH: So, I propose that we hold it in abeyance. Let's see if we can iron this out.

THE COURT: You're in agreeance as to the court's statements regarding experts?

MR. MCINTOSH: Yes. And I think that really helps clarify really the only other issue that I think is out there is, is the potential expert for the plaintiffs.

THE COURT: Well, and I, I read that as to the experts in you know the you know, your motion, your response, and then your response to his response.

MR. MCINTOSH: Sure. And with the court's clarification, I think that the law says that it kind of up to the court.

THE COURT: Yeah.

MR. MCINTOSH: So --

THE COURT: -- my understanding of the case law is I have, I have broad discretion as to that. You agree, Mr. Brendtro?

MR. BRENDTRO: Yes, Judge.

MR. MCINTOSH: Yes, Your Honor.

THE COURT: Okay.

MR. MCINTOSH: So, we can make, we can hold that I believe in abeyance. The parties can reach an agreement on that. We can put it on the record before trial.

THE COURT: Yeah. Note that in your proposed order, too, because that will remind me, Sir, to make sure that we put it on the record.

MR. BRENDTRO: So, partially granted. Partially denied as to experts, and then the rest in abeyance.

MR. MCINTOSH: Yeah. Okay. I'll, I'll come up with something, I'll send it to you anyway.

THE COURT: I'm sorry, Mr. McIntosh, do I need to be more clear?

MR. MCINTOSH: No, Your Honor. I, I think that's perfect. That really, I think, resolves your statement about the experts is really the only other issue I think there would have been so we can craft a sequestration.

THE COURT: Okay. Let's move on to number four. Defendant's request to preclude any evidence or testimony regarding the names of prior criminal charges or convictions. What record do you wish to make there, Counsel, or Mr. McIntosh?

MR. MCINTOSH: Your Honor, thank you, Your Honor. There are very little, limited, I should say, purposes for which a crime can be used for impeachment or other reasons. I, I

think it's clear that the more significant crime that was committed in Mr. Stevens past is inadmissible given the time that has passed. I also believe that there is a balancing test that is required even, even if that is true, and there's just simply it's very prejudicial with very limited probative value, if any. It appears that the plaintiffs had argued in their response that there's maybe a use for intent. Well, that falls under 404(b)(1), um, and it's not able to be used to show that a person's character that they acted in accordance with it. And so I, I don't foresee, I can't imagine a scenario in which Kent Stevens prior convictions should be admissible. It would just be highly prejudicial in this case.

THE COURT: Mr. Brendtro.

MR. BRENDTRO: The way the initial motion was briefed, I believe that my response was accurate. They could go, even if not towards truthfulness, to his disregard of the law. I understand his arguments, um, I, you know, I'll just stand on the briefs, Judge.

THE COURT: Okay. I'm going to grant that motion. I, I do think this just goes to inappropriate, straight to inappropriate potential for character, ah, character evidence. You know this 1996 charge, it's 27 years old, um, doesn't appear to be a crime toward truthfulness, but the other thing that I noted is that it was dismissed. He,

whatever he needed to do to rectify it, um, it was dismissed. It just appears that it's wholly irrelevant to the proceedings. In terms and any probative value relative to that evidence would be outweighed by the danger of unfair prejudice or misleading the jury. It just appears to be straight character evidence. The same thing goes for the DUIs. It just it's completely irrelevant in this court's view. Um, you know, the, the usage of these types of crimes and under these facts just appears to be exactly what the rule against character evidence is trying to prevent. So, I'm going to, I'm going to grant your motion there, Mr. McIntosh.

MR. MCINTOSH: Thank you, Your Honor.

THE COURT: #5, um, the, let me get to the right page in my binder here. The defendants request to preclude any evidence, arguments, or references to any conduct of blueprint after the transfer of Gulf Coasts and Trigger's shares.

MR. MCINTOSH: Yes, Your Honor. We have made this motion arguing that anything that happens after the execution of the membership interest purchase agreements is irrelevant to whether or not at the time that the parties entered into the agreements they were under economic duress, of course, it is also our position that therefore the rest of the claims fail.

THE COURT: And I understand that.

MR. MCINTOSH: It ties into that. So --

THE COURT: -- but you also understand too that it you know, and as I review your motion and Mr. Brendtro's response, and here I am interrupting you, Sir. I, I do see, I, I, I see what you're saying about the economic duress, but I do see scenarios where potentially and some of this will obviously be affected, could be effective relative to the court's ruling on summary judgment, but, and I guess I, I don't have the benefit of seeing how the evidence is going to come in at this point, but that -- those are my concerns at this point, but go ahead, continue.

MR. MCINTOSH: Your Honor, and I'm with you. I think I, I would agree with your statements that it, it really does depend on, on the court's rulings. It, it could potentially foreseeably come in as it applies.

THE COURT: You, I mean, you acknowledge that, Mr. McIntosh, that there is a scenario where this evidence could be admissible?

MR. MCINTOSH: Yes, Your Honor. I, I do understand that.

THE COURT: And based upon that in turn, you probably understand why I'm hesitant at this point to grant a blanket motion relative to your request.

MR. MCINTOSH: I am, Your Honor, I understand that.

THE COURT: Any other argument or record you wish to make?

MR. MCINTOSH: No, Judge.

THE COURT: Mr. Brendtro.

MR. BRENDTRO: For all those reasons, and they did not conduct the balancing test that you would have to do if you were trying to exclude this. Um, it's, it's relevant. All the circumstances is what, um, *Dunes* asks us to look at, and you can't look at circumstances, and then draw a line in the sand as to time and then pretend that you're looking at all the circumstances.

THE COURT: Here's what I'm going to do, ultimately, I'm going to hold it in abeyance, and this may be something that we just need to deal with at trial based upon the evidence presented, and the evidence attempted to be proffered by the parties at least, and we can also address it further after the court's rendered its ruling on summary judgment, we can do that on the record prior to trial if we have to, but that's going to be my ruling for now.

MR. MCINTOSH: Understood.

THE COURT: Any questions?

MR. MCINTOSH: No, Your Honor.

THE COURT: Same question, Mr. Brendtro.

MR. BRENDTRO: No, Your Honor.

THE COURT: And then you withdrew #7, correct?

MR. MCINTOSH: Yes, I, I --

THE COURT: -- Mr. McIntosh?

MR. MCINTOSH: We did skip over #6, Your Honor.

THE COURT: Oh, I did. I apologize. Go ahead, Sir.

MR. MCINTOSH: This is a, a reference to remove any arguments, testimony, references to attorney's fees and costs incurred by Kent Stevens. I have to give this some thought about the counterclaim and third-party complaint. Really the, the, the recovery we seek in the event at trial that we're successful as attorney's fees and costs. I believe that that can be made post-trial depending on the jury's verdict. I have to review my answer and counterclaim. I'm -- it's stated in the form of an answer and counterclaim it's really an affirmative defense. So, I have to give that some thought, but my, my preference, my, as I outlined in my brief, and in my response is that it, it's not something that should be brought to the attention of the jury at this time and it can all be handled in post-trial motions and, and briefs and argument.

THE COURT: Anything else?

MR. MCINTOSH: No, Your Honor.

THE COURT: Mr. Brendtro.

MR. BRENDTRO: This is one that that I find murky and confusing because --

THE COURT: -- my, I'll be blunt with you, my concern is

it could be the same to the jury. You know, and in the, the authorities that I've reviewed it, this appears to be appropriate for sorting out after trial. But, and I'm being just blunt with you up front, um, and I interrupted you. Go ahead, Sir.

MR. BRENDTRO: Um, yeah, I, I think, what my, my trouble with this is that, you know, how do we trigger liability for this and then what is the liability? And if the trigger is presented to the jury and they don't decide it, you do afterwards, it's just this, it, it's confusing for me. I imagine it would be confusing for them, but, yeah, and, and ultimately if the resolution the court chooses is to defer the whole thing to the end, I'm not sure I can, I can object to that. And I, I just, I don't get how --

THE COURT: -- so it's stated another way, you're, you're not objecting now in the same way that you objected to in your responsive brief.

MR. BRENDTRO: No. Yeah, so, um --

THE COURT: -- in your responsive pleading, I should say?

MR. BRENDTRO: Yeah, so the, the caption is, you know, sets forth this, you know, X versus Y versus Z, and if the jury is not going to be hearing Z, then maybe we shorten the caption. We eliminate the fact that there's this indemnity thing, ah, if that's an after the fact thing that the jury is

not deciding, then, then it's out of their hands, but if it's something they're deciding, and it's associated with a dollar amount, then it's something that goes to the jury. That's, that's what I'm struggling with is it sounds like this is a after the fact remedy, but the jury is not going to decide. I, I, I'm struggling trying to figure out how the both of these things can be true at the same time.

THE COURT: Mr. McIntosh.

MR. MCINTOSH: I, I would agree with Mr. Brendtro. It is, it is hard and, and I noted when I was creating jury instructions on how, how do we do that part and, and that brought me to my counterclaim, third-party complaint, which, I think we're moving it from the caption and having it like that and then we do, you know, traditionally a post-trial motion with attorney's fees that you review and consider what's reasonable. You, you can object.

THE COURT: And everybody's submits their invoices.

MR. MCINTOSH: Yeah. Or vice versa based on a post-trial motion for attorney fees and costs.

THE COURT: Or not everybody, but...

MR. MCINTOSH: Yes. To the prevailing party.

THE COURT: To the prevailing party.

MR. MCINTOSH: Um, and I don't, I, I don't know the easiest way to do that. If it's do we change the caption and, and do it that way or are we creating some issues for us

if we -- on appeal. Or do I need to dismiss? Those, the, the counterclaim, the third-party complaint because it is just a post-trial. Really the damages we're seeking are attorney's fees and costs which we're going to argue are pursuant to the, the agreements.

THE COURT: Well, I'm not going to tell you how to run your case, but if you dismiss that portion of your counterclaim, um, then frankly, I think that that, if I'm, if I'm understanding correctly what you're saying, Mr. Brendtro, that resolves any concerns that you have.

MR. BRENDTRO: Right. Yeah, so, the, the, the one that's front and center in my mind right now is that my clients have a South Dakota constitutional right to a jury, ah, trial on claims against them. And so if, if they've done the thing that they've been alleged to have done in whatever these third-party complaints are, a jury gets to decide that, not the court, unless there's some, some mechanism by which to do that. If he's --

THE COURT: -- well, the mechanism that Mr. McIntosh is referring to, and correct me if I'm wrong, would be the prevailing party statute.

MR. MCINTOSH: Yes, Your Honor.

MR. BRENDTRO: And you wouldn't be able to collect that against these defendants unless a jury decides you're the prevailing party against these defendants. Maybe the

prevailing party as to these, these plaintiffs, but they wouldn't be the prevailing party as to these third-party defendants because a jury didn't decide that. That's, that's where I'm struggling with this is how, how this happens. I would agree that that if you pretended that this never happened, I'm covering up the bottom part of the caption, you know, plaintiffs versus defendants and at the end of the case, if there's an attorney's fees provision, you then apply it. How it then gets applied to these other people, I think can only be done by, ah, by a jury deciding that yes, there's a connection between these.

THE COURT: Can't the jury still make that decision?

MR. BRENDTRO: Certainly. And then the question is whether we want them to, whether it's complicated, or you know whether it has to happen in this proceeding. But, again, I don't know the answer.

MR. MCINTOSH: And the reason that the third-party defendants are there is because of their guarantees that they signed to the, to the agreements. So, I'm just thinking out loud as to whether or not you're the prevailing party because they're a party to their signators [sic] to the agreement, but then I think you still have to have them as part of the, the suit then.

MR. BRENDTRO: You know, as I'm sitting here, I'm realizing some of this is maybe more academic than necessary

because my clients listed in the top half of the caption have assets to pay and so the, the guarantee doesn't mean anything unless they don't have assets to pay. So, it's, maybe it's a moot issue. I think even for, for math purpose, I don't even know why, why it would be necessary to have them.

MR. MCINTOSH: It's true.

MR. BRENDTRO: If we're representing that in the event that there's a judgment that these, these folks on the top will pay, have the ability to pay, then, then it's sort of superfluous, but…

MR. MCINTOSH: Your Honor, what I would propose is that we address this issue, Mr. Brendtro and I, and see if we can't figure out a way to clean this up. There, there's another caption issue that we'd like to clean up as well and in the top part with TCU Holdings and TCU, LLC, only one of them is actually there, and I think we can potentially some sort of stipulation that to address this and then get that cleaned up.

THE COURT: That agreeable, Mr. Brendtro?

MR. BRENDTRO: Yeah. And then I'm still waiting to find out what the answer is to how much there is in attorney fees.

MR. MCINTOSH: And I think part of my argument in that regard is if, if we do what we're saying, then that's presented outside of the presence of the jury, that's presented to the court in the form of an affidavit with

invoices versus discoverable evidence presented to the jury.

MR. BRENDTRO: But as far as what I need to tell my clients about the risks that they're facing with this lawsuit, we'd ask for --

MR. MCINTOSH: -- yeah, I got you.

MR. BRENDTRO: -- information about the risks that they're facing.

MR. MCINTOSH: Gotcha.

MR. BRENDTRO: I still don't --

THE COURT: -- now, let's here to the current counterclaim.

MR. BRENDTRO: Still, yeah, I still don't know what the answer is. So, I would like that answer promptly.

MR. MCINTOSH: Are you saying relevant to the counterclaim or it just in general the fees and costs we've incurred to date?

MR. BRENDTRO: Yeah, the, the, amount of fees and costs that you are asserting you would be entitled to.

MR. MCINTOSH: Thank you.

THE COURT: So, Mr. McIntosh, just so we're abundantly clear.

MR. MCINTOSH: Yeah.

THE COURT: Court's going to hold six, and I apologize for getting ahead of myself. Court's going to hold six in abeyance pursuant to the parties reaching an agreement.

MR. MCINTOSH: Understood, thank you, Your Honor. And then with regard to our last motion in limine, I have withdrawn that.

THE COURT: 7 is withdrawn?

MR. MCINTOSH: Yes, Your Honor.

THE COURT: Would you please note that your order as well?

MR. MCINTOSH: Yes, Judge.

THE COURT: And should you know anything arise that we need another hearing prior to trial, you know, let me know right away. The sooner we can address even, and I, I, I get it, you're in Rapid City, Mr. McIntosh. I'll authorize Zoom. I'll authorize telephonic.

MR. MCINTOSH: Great.

THE COURT: You know, any, anything that the parties anticipate is going to be an issue, I like to address those sooner than later if we can. I understand things are going to come up.

MR. MCINTOSH: Yeah.

THE COURT: The day of trial and so forth or days of trial and everyone's still is of the opinion that we can get this done in four days?

MR. BRENDTRO: I think three.

THE COURT: Three. Okay. As far as like witness lists, exhibits, all of that, when do the parties plan on providing

all of that to the court? The other thing, too, as long as we're talking about that, and this gets you have a couple of minutes, Mr. Brendtro? Okay. This gets into housekeeping as well. In terms of trial exhibits, plaintiffs, please use numbers. Defendants, and I know we've got a, a long caption here, but at the top of the caption plaintiffs use numbers, and defendants, please use letters.

MR. MCINTOSH: If I may just briefly interrupt, we, I don't think that exhibits will be a, a real big issue if we use a joint exhibit book, if we can agree to the 20 something exhibits, there might be some more that we need to add and maybe fight over at the end, but I think --

THE COURT: -- okay.

MR. MCINTOSH: if you just use one with Exhibit 1.

THE COURT: You guys have then how you're envisioning this is a, a joint book, and you're stipulating to foundation and all of that?

MR. BRENDTRO: Yes. I, I would say 98% of the exhibits will be in by the end of the close of plaintiff's case by stipulation for foundation and relevance.

THE COURT: Okay.

MR. MCINTOSH: I, I would agree. We'd have to look at all of them, but I think the ones, we have shared exhibit lists and witness lists. And so I think we're on the same page there.

THE COURT: Okay. And if you when, the soon -- the sooner the better if you can provide all of that information to the court, I would appreciate it.

MR. BRENDTRO: Yeah. So, that, yeah, we will, the funny thing about this is our, our lists were so duplicative that we have like 60 exhibits, 30 for him, 30 for me. They're identical, but maybe numbered differently and so we're in the process of --

THE COURT: -- well --

MR. BRENDTRO: -- putting that in a --

THE COURT: -- well, you're saying your witness lists are duplicative. Is there and I, I, I'm not going to get in the way, and I don't mean to appear as though I'm getting in the way of your respective presentations of your case, and your -- of your cases, and strategy, but we can have a discussion, or if you two want to discuss it amongst yourselves in terms of the court offering you both some latitude in terms of direct and cross, and so forth, to streamline the witnesses. For example, if Mr. Brendtro was going to call Judge Barnett as a witness and so is Mr. McIntosh, the, shall we say, leeway, if you will, that would allow you both to take care of your examinations with one trip to the witness stand. Does that make sense, what I'm saying?

MR. MCINTOSH: Yes, Your Honor.

THE COURT: So, you can discuss that if it's an option rather than calling somebody back, it may streamline the process as well. But I, I don't want to get in the way of what your respective presentations are, may be. So, it's an option that I would consider.

MR. MCINTOSH: Sure. We'll, we'll give it some, some thoughts and discussion.

THE COURT: Okay. Um, I'd anticipate seating 13 jurors with one alternate. Um, each side would have three peremptory challenges, I believe; is that correct?

MR. MCINTOSH: Yes, Your Honor.

THE COURT: A standard civil case. Um, so we'd need to pass 19. So, we have 13 at the end. I think the jurors will be reporting around 8:15, you know, and I'd ask that the attorneys be here as well by 8:15 or no later. Some of it's going to depend on what courtroom we end, we end up in, but I would anticipate, you know, we'll have them seated in prenumbered spots, have them have 19 of them in prenumbered spots. Are both of you guys or, excuse me, both of you gentlemen agreeable to a predraw?

MR. MCINTOSH: Yes, Your Honor.

THE COURT: Okay. I'll instruct the, I'll instruct the clerk to do so. I would go through the preliminary questions, the general preliminary questions that customarily the court asks if we've got any of those 19, oh, those

initial 19 that are the first listed on the predraw. Any of those that are excused once I'm done will fill in those seats and then the plaintiff can start voir dire. Normally, I put about an hour limit on each side for voir dire. Is that agreeable, Mr. Brendtro?

MR. BRENDTRO: Umm, I tend to go a little bit longer than that and then the other side generally is a lot shorter than that.

THE COURT: I suspect Mr. McIntosh would be a lot short, shorter, but, umm, can you get it done in an hour?

MR. BRENDTRO: And, and, Judge, I don't know the answer to that.

THE COURT: Okay.

MR. BRENDTRO: I have typically taken about 90 minutes to two hours. The, the things happened in the last couple cases that we, we had to replace, you know, seat number six numerous times, and, and so that just bogs you down. The substantive part of it, yeah, but probably an hour and 15 minutes maybe, but if it starts to get complicated where you can't find people to fill that spot because they each have figured out how to get out of jury duty, then, then it's, yeah, and I wouldn't be stopping at an hour.

THE COURT: That's fair. How about an hour and a half?

MR. BRENDTRO: That, I'm okay with that.

THE COURT: Okay. So, let's do that.

MR. MCINTOSH: That's good.

THE COURT: And, and I suspect you'll be shorter, and then we'll exercise you each can exercise your three. We'll strike it down to 13, and go from there. Um, like I said, at the top, it's probably going to be the week before that we'll know what courtroom we're in, um, that's going to drive the logistics if -- I'll try to see if, I'll reach out and find out if there's any chance we can find out sooner just so you two can plan. Is there any other lawyers that are going to be coming to try the case with you? Any support staff?

MR. BRENDTRO: I'll have probably another attorney. Support staff probably just behind the rail, but I'll have at least one other attorney, and I've got three guys so the, if the options for a larger one, ah, as far as that we've got multiple tables across, that would probably be helpful.

THE COURT: Okay.

MR. MCINTOSH: I would anticipate an attorney and a support staff as well as my client.

THE COURT: Okay. All right. That's good to know. I'm going to write that down. Thank you.

MR. BRENDTRO: Will the, ah, will the clerk be able to tell us, umm, or give us a map of the seats once the courtroom is picked so that we know the one through 19.

THE COURT: Oh, where they're going to be placed?

MR. BRENDTRO: Yeah.

THE COURT: So, you could make a map?
MR. BRENDTRO: Yeah.
THE COURT: Yeah.
MR. MCINTOSH: That would be great.
THE COURT: I'll, I'll ask and see if we can make arrangements for that for both of you.
MR. BRENDTRO: Okay.
THE COURT: And then I think I mentioned this, too, at the top, if you have any technology, do you use like trial director, or do you use a software, specific software program, either one of you?
MR. BRENDTRO: I, ah --
THE COURT: -- I'm talking about projection of exhibits and so forth and I presume there's going to be exhibits you'll want to put on screens and so forth.
MR. MCINTOSH: Yeah. It looks like the technology would be fine for us, if that goes from there to the projection.
THE COURT: I think they're the ones in the floor.
MR. MCINTOSH: And I guess we, we don't know for sure.
THE COURT: Yeah. So, what I'm getting at there is, is when we have an assigned courtroom, umm, we'll just, I'll try to remember to have court admin reach out to you to schedule a time if you want to do a walkthrough or the day before, you know, uh, try to schedule a time that you can get in and, and do a walkthrough on things to make sure everything's working

sufficiently relative to whatever technology you have. Then, and I'm sorry, I'm jumping around a little bit here as to exhibits, you both indicated you'll have like a joint exhibit book. Then any additional exhibits that you can't agree on or that you want to offer in addition, umm, I'm open to suggestions, but I my thought process would be that Mr. Brendtro would use numbers; you would use letters, Mr. McIntosh. Is that agreeable?

MR. MCINTOSH: That sounds fine to me.

THE COURT: Okay. I'm just going through my checklist here. I guess I don't have anything else either one of you have any housekeeping matters at this time?

MR. MCINTOSH: No, Your Honor.

MR. BRENDTRO: No, Judge.

THE COURT: Okay. We're in recess. Thank you.

(Proceedings concluded at 4:38 p.m.)

STATE OF SOUTH DAKOTA)
:SS
COUNTY OF MINNEHAHA)

CERTIFICATE

This is to certify that I, Roxane Osborn, Court Recorder and Notary Public, do hereby certify and affirm that I transcribed the proceedings of the foregoing case, and the foregoing pages 1 - 84, inclusive, are a true and correct transcription from CourtSmart.

Dated at Sioux Falls, South Dakota, this 27th day of November, 2024.

/s/ Roxane R. Osborn
Roxane R. Osborn
Court Recorder
Notary Public - South Dakota
My commission expires: May 9, 2030

IN THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

APPEAL NO. 30814

TRIGGER ENERGY HOLDINGS, LLC, and
GULF COAST INVESTMENTS, LLC

Plaintiffs and Appellants,

vs.

KENT STEVENS, as an individual, an officer, and agent;
TCU HOLDINGS, LLC, &
BLUEPRINT ENERGY PARTNERS, LLC,

Defendants and Appellees

APPELLEES' BRIEF

Appeal from the Circuit Court, Second Judicial Circuit
Minnehaha County, South Dakota

Honorable Douglas Barnett, Circuit Court Judge

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Notice of Appeal Filed August 27, 2024

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PRELIMINARY STATEMENT

Appellants in this appeal are Trigger Energy Holdings, LLC, ("Trigger") and Gulf Coast Investments, LLC, ("Gulf Coast"). Appellees will refer individually to each identity as "Trigger" or "Gulf Coast" and jointly as "Appellants."

Appellees are Kent Stevens ("Stevens"), TCU Holdings, LLC ("TCU"), and Blueprint Energy Partners, LLC ("Blueprint"). Appellees will refer individually to each identity as "Stevens," "TCU" or "Blueprint" and jointly as "Appellees." Appellees will refer to the Record on Appeal as "R:" followed by the page number(s) assigned by the Minnehaha County Clerk of Courts.

JURISDICTIONAL STATEMENT

Appellants appealed from the Memorandum Decision and Order Granting Defendants' and Third-Party Plaintiffs' (Second) Motion for Summary Judgment for which the notice of entry of order was entered on June 7, 2024. (R: 957.) Following a stipulation to dismiss Defendants' counterclaim and third-party complaint and remove the third-party defendant as a party, a notice of entry of a final judgment was entered on July 30, 2024. (R:992.) Appellants filed its Notice of Appeal on August 27, 2024. (R: 1039.)

STATEMENT OF THE LEGAL ISSUES

1. **Whether the Appellants failed to make a sufficient showing that they were the victims of economic duress?**

   After extensively examining all three elements of economic duress, the trial court found that Appellants failed to show that they were the victims of economic duress as a matter of law. Consequently, the trial court held that Appellants were bound to the agreements they signed, pursuant to the advice of counsel, and were not entitled to reformation as the agreements were entered into voluntarily with a meeting of the minds.

   Legal Authority:

   SDCL 21-11-1

   Dunes Hospitality, LLC v. Country Kitchen Intern., Inc., 2001 S.D. 36, 623 N.W.2d 484 (S.D. 2001)

   Pochat v. State Farm Mut. Automobile Ins. Co., 772 F.Supp.2d 1062, 1068 (W.D.S.D. 2011)

2. Whether Section 2.03 of the Membership Purchase Agreements bars Appellants' remaining claims?

Upon finding that there was no economic duress, the trial court held that Section 2.03 on its face was not unfair or invalid. The court found that the plain language of Section 2.03 supports a waiver of Appellants' right to bring suit and that there were no facts, viewed most favorably to Appellants, that would support piercing the corporate veil or otherwise holding Stevens individually liable.

Dunes Hospitality, LLC v. Country Kitchen Intern., Inc., 2001 S.D. 36, 623 N.W.2d 484 (S.D. 2001)

Flynn v. Lockhart, 526 N.W.2d 743 (S.D. 1995)

3. Whether the Appellants failed to show that Stevens and/or TCU breached any duties owed as a shareholder of Blueprint?

The trial court found that Stevens did not breach a fiduciary duty as an officer or member of Blueprint as a matter of law. Because there was no economic duress, the parties mutually agreed to enter into valid and enforceable purchase agreements as both parties were represented by attorneys and negotiated and contracted for the sale of Appellants' shares.

SDCL 47-34A-409(b)

Case v. Murdock, 488 N.W.2d 885 (S.D. 1992)

Mueller v. Cedar Shore Resort, Inc., 2002 S.D. 38, 643 N.W.2d 56 (S.D. 2002)

4. Whether the Appellees breached the operating agreement?

The trial court found that the Purchase Agreements, which were valid and enforceable, indicated an agreement that the sale was in compliance with the Operating Agreement. Second, even if the agreements were not enforceable, the Appellants ratified the Purchase Agreements which defeated a claim of breach of the Operating Agreement. Therefore, the claim failed as a matter of law.

First State Bank of Sinai v. Hyland, 399 N.W.2d 894 (S.D. 1987)

Law Capital, Inc. v. Kettering, 2013 S.D. 66, ¶ 13, 836 N.W.2d 642, 646.

Ziegler Furniture and Funeral Home, Inc. v Cicmanec, 2006 S.D. 6, 709 N.W.2d 350 (S.D. 2006)

STATEMENT OF THE CASE

On August 20, 2019, Gulf Coast and Trigger filed their Complaint against Stevens, TCU, and Blueprint. (R: 9-15.) Stevens, TCU, and Blueprint were served by process server between August 26, 2019, and August 28, 2019. (R: 24-27.) On September 26, 2019, Stevens, TCU, and Blueprint filed their Answer, Counterclaim, and Third-Party Complaint. (R:30-46.) After years of discovery, Stevens, TCU, and Blueprint filed their Second Motion for Summary Judgment and supportive pleadings. (R:524-65.)

On January 18, 2024, the trial court held a hearing on the Second Motion for Summary Judgment and on June 7, 2024, issued a Memorandum Decision and Order Granting Stevens', TCU's, and Blueprint's Second Motion for Summary Judgment. (R: 931-56). Notice of entry of order was entered on June 7, 2024. (R: 957-58.) Following a stipulation to dismiss Stevens', TCU's, and Blueprint's counterclaim and third-party complaint and remove the third-party defendant as a party, a notice of entry of a final judgment was entered on July 30, 2024. (R:992-93.) Gulf Coast and Trigger filed their Notice of Appeal on August 27, 2024. (R: 1039-40.)

STATEMENT OF FACTS

Blueprint was created in 2017 to provide services to the oil and natural gas industry. (R: 932.) Trigger, Gulf Coast, and TCU each held a 1/3 membership interest in Blueprint. (R: 554, ¶ 1.) Aladdin Capital, Inc., through Scott Keogh ("Keogh"), was appointed the Manager of Blueprint. (R: 554, ¶ 2.)

Stevens' career in the oil and gas industry dated back to 2014 when he worked as a supervisor for a company called Certus Energy Solutions. (R: 932.) During his time at

this company, Stevens developed a team of employees who later followed him to Blueprint. (R: 932.) Stevens was named the Operations Manager of Blueprint pursuant to an Operations Manager's Employment Agreement on December 13, 2017. (R: 554, ¶ 3.)

Keogh, Vice President and 49.9% shareholder of Gulf Coast, was 48-years-old at the time of the transaction, a sophisticated investor and businessman, and was mentally competent during the duration of 2019. (R: 554, ¶ 4.) Keogh is also the Vice President and 49.9% shareholder of Aladdin Capital, Inc. (R: 554, ¶ 5.) Similarly, Waylon Geuke ("Geuke"), President of Trigger, was 54-years-old at the time of the transaction, a sophisticated investor and businessman, and was mentally competent during the duration of 2019. (R: 554, ¶ 6).

Initially, Blueprint failed to meet financial projections with respect to revenue and debt payments, which created conflict between the members. (R: 555, ¶ 8.) The members held monthly meetings in Casper, Wyoming, or Sioux Falls, South Dakota, to address issues. (R: 555, ¶ 10.) As early as August of 2018, Stevens, on behalf of TCU, expressed his desire to buy out Trigger's and Gulf Coast's membership interest in Blueprint. (R: 555, ¶ 11.) By February of 2019, the parties began having serious discussions about a buyout. (R: 552, ¶ 12.)

Stevens expressed an intent to "blow up" the company if Trigger and Gulf Coast did not accept a buyout at his proposed price of $800,000 each. (R: 933.) Stevens also expressed that he would either take his crew and customers with him or they would leave on their own if he left the company. (R: 933.) Stevens expressed that he believed he

could break his noncompete agreement and that his personal assets were limited to the value of his home equity — $20,000. (*Id.*)

As the parties started to discuss the buyout, Gulf Coast relied upon its attorney, John Mullen, to represent it in regards to the sale of its interests in Blueprint. (R: 555, ¶ 13.) For over thirty years, Mr. Mullen's legal practice focused on business transactions and business litigation. (R: 555, ¶ 14.) During negotiations, Trigger reported, through attorney Mullen, that it would sign the same type of agreement that Gulf Coast was willing to sign. (R: 556, ¶ 16.) Therefore, Gulf Coast took the lead and discussed its options with attorney Mullen regarding the terms of a buyout of Trigger's and Gulf Coast's membership interest in Blueprint. (R: 556, ¶ 17.)

TCU was also represented by an attorney and attorney Mullen communicated directly with TCU's attorney to negotiate the terms of the buyout agreement. (R: 556, ¶ 18.) Blueprint eventually became profitable and attorney Mullen sought to negotiate a "true-up" adjustment on the price to account for the performance of the company between the time of the initial deal and the closing. (R: 556, ¶ 19.) TCU, through its attorney, would not agree to a "true-up" and attorney Mullen offered to proceed to closing without a "true up" if some of his proposals would be implemented. (R: 557, ¶ 23.) Attorney Mullen described the negotiations, "you know how it works, give and take… If you give us the crap we want, we'll walk away from the price adjustment." (R: 557, ¶ 24.) By June 6, 2019, attorney Mullen exchanged edited drafts of a Letter of Intent, spoke by telephone twice, and exchanged multiple emails negotiating the terms of the purchase with TCU's attorney. (R: 556-57, ¶ 22.)

Keogh, on behalf of Gulf Coast and Aladdin Capital, Inc., signed a Letter of Intent summarizing the principal terms of the buyout, which included the purchase price of $800,000 to each Gulf Coast and Trigger. (R: 47-57, R: 557, ¶ 25) Based on the previous representation that Trigger would sign anything Gulf Coast would sign, Geuke, on behalf of Trigger, signed the same Letter of Intent. (R: 47-57, R: 557, ¶ 26.)

After hearing the "dynamite option," i.e., blow up the company, had been relayed between the attorneys, Keogh claims he then believed Stevens' threats and thus, on behalf of Gulf Coast, began discussing his options with his attorney. (R: 934.) Keogh and attorney Mullen inferred that blowing the company up would mean that Stevens would quit the company, take his crew, and potentially start a competing business with Blueprint. (R: 552, ¶ 36.) Attorney Mullen presented a number of options to his client other than signing a buy-out agreement which included: (1) an outright refusal to sell the membership interests to TCU; (2) removal of Stevens as Manager and trigger a buy-sell under Stevens' Operations Manager Employment Agreement; (3) fire Stevens, hire a replacement crew and then sue Stevens; or (4) file suit against Stevens alleging tortious interference. (R: 934.) Attorney Mullen even discussed with Gulf Coast the pros and cons of all the options — including which jurisdiction and law would control, the likelihood of success in court, and the ability to prevent the loss of customers. (R: 560, ¶ 45.)

In summary, attorney Mullen testified:

> Q: So you provide multiple options to your clients, they ultimately elect the latter to close and sue Stevens and TCU; right?
>
> A: I did advise Gulf Coast of available options other than the option that was chosen. My client, I believe,

> internally evaluated that and then did make an informed decision, informed me of their decision, and I relayed that -- no, I did not. I was about ready to say I relayed that to Kyle Ridgeway. I did not.
>
> * * *
>
> Q: Let me shift the focus, then. What did you advise your clients to do, then, after providing them the multiple options that you discussed earlier?
>
> A: I advised them they needed to make their decision and then I would follow the instructions. And they're just -- and I followed their instructions once I received that, and my instructions were to negotiate the deal and close it. And that's what I did.

(R: 560, ¶ 44.)

Fifty days after signing the Letter of Intent, Gulf Coast executed a Membership Interest Purchase Agreement ("Purchase Agreement") on July 30, 2019. (R: 58-107, R: 557, ¶ 27.) Keogh, also signed the Purchase Agreement as a guarantor on behalf of Aladdin Capital, Inc. (R: 58-107, R: 557, ¶ 28.) Based on the continued representation that Trigger would sign anything Gulf Coast would sign, Geuke, on behalf of Trigger, also signed a similar Purchase Agreement that was edited by attorney John Mullen to effectuate the sale of Trigger's interests. (R: 108-156, R: 557, ¶ 29.) Geuke also signed the Purchase Agreement as a guarantor on behalf of Trigger Energy, Inc. (R: 108-156, R: 558, ¶ 30.)

On the same day, Keogh, on behalf of Gulf Coast signed an Officer's Certificate confirming his authorization to sign the Purchase Agreement on behalf of Gulf Coast. (R: 157, R: 558, ¶ 31.) Again, Geuke, on behalf of Trigger, also signed a similar Officer's Certificate. (R: 158, R: 558, ¶ 32.) The following day, on July 31, 2019, Gulf Coast and Trigger signed a fourth and final document to finalize the sale of their interest

— the Funds Flow Memorandum. (R: 159-168, R: 558, ¶ 33.) The Funds Flow Memorandum recited the terms of the Purchase Agreements and directed the payments to be made to Trigger and Gulf Coast, as well as the source of the funds for the buyout. (R: 159-168.) On August 1, 2019, Trigger and Gulf Coast received their payment of $800,000 each and Aladdin received over $3.2 million. (R: 935.) The amounts were accepted, deposited, and then twenty days later, on August 20, 2019, Trigger and Gulf Coast filed this lawsuit. (R: 558, ¶ 34.)

Trigger's and Gulf Coast's Complaint asserted nine different counts: (1) economic duress, declaratory judgment, and reformation; (2) breach of the operating agreement; (3) breach of fiduciary duties; (4) tortious interference; (5) shareholder oppression; (6) unjust enrichment/usurpation; (7) accounting; (8) costs and attorney's fees; and (9) injunctive relief. (R: 9-23.) Despite the numerous counts, each claim is based upon the same allegation — Stevens' threat to "blow up" Blueprint, take all of Blueprint's customers and employees to a new company, and leave Gulf Coast and Trigger with unmanageable debt if Gulf Coast and Trigger did not agree to the price term of $800,000 each. (*See id.*)

Ultimately, the trial court granted Stevens', TCU's, and Blueprint's second motion for summary judgment. The trial court meticulously addressed each claim in a 26-page memorandum decision. (R: 931-956.) The trial court held that Gulf Coast and Trigger were bound to the agreements they signed, as the agreements were entered into voluntarily with a meeting of the minds. (R: 956.) "Within the Purchase Agreements, they both obtain releases of liability, which bars Plaintiffs' remaining claims" and even

"if the releases of liability do not bar Plaintiffs' claims, the claims nevertheless fail as a matter of law." (*Id.*) This appeal followed.

STANDARD OF REVIEW

This Court reviews a circuit court's entry of summary judgment under the *de novo* standard of review and will affirm a circuit court's granting of a motion for summary judgment when no genuine issues of material fact exist, and the legal questions have been decided correctly. *See Wyman v. Bruckner*, 2018 S.D. 17, ¶ 9, 908 N.W.2d 170, 174 (S.D. 2018). This Court has held,

> [c]ases involving the interpretation of written documents are particularly appropriate for disposition by summary judgment, such interpretation being a legal issue rather than a factual one…We will affirm a circuit court's decision so long as there is a legal basis to support its decision.

Id. (citing *Heitmann v. Am. Family Mut. Ins. Co.*, 2016 S.D. 51, ¶ 8, 883 N.W.2d 506, 509).

ARGUMENT

1. GULF COAST AND TRIGGER FAILED TO MAKE A SUFFICIENT SHOWING THAT THEY WERE THE VICTIMS OF ECONOMIC DURESS

"Entry of summary judgment is *mandated* against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Hass v. Wentzlaff*, 2012 S.D. 50, ¶ 11, 816 N.W.2d 96, 101 (quoting *W. Consol. Coop. v. Pew*, 2011 S.D. 9, ¶ 19, 795 N.W.2d 390, 396) (emphasis added). A sufficient showing requires that "[t]he party challenging summary judgment . . . substantiate his allegations with sufficient probative evidence that would permit a finding in his favor on more than mere speculation, conjecture, or fantasy." *Quinn v. Farmers Ins. Exch.*, 2014 S.D. 14, ¶

20, 844 N.W.2d 619, 624–25 (quoting *Stern Oil Co. v. Brown*, 2012 S.D. 56, ¶ 8, 817 N.W.2d 395, 398).

Under Count 1 of their Complaint, Gulf Coast and Trigger sought reformation of the sales price of their membership interest due to economic duress. SDCL 21-11-1 provides:

> When through fraud or mutual mistake of the parties, or a mistake of one party which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value.

"Reformation is a 'remedy in equity by means of which a written instrument is made or construed to express or conform to the real intention of the parties, when some error or mistake has been committed." *Sprang v. Altman*, 2009 S.D. 49, ¶ 9, 768 N.W.2d 507, 509. Gulf Coast and Trigger must "overcome the 'presumption [ ] that the writing accurately reflects the intent of the parties." *Sprang*, 2009 S.D. 49, ¶ 12, 768 N.W.2d at 511 (citing *Enchanted World Doll Museum v. Buskohl*, 398 N.W.2d 149, 152 (S.D. 1986)).

In South Dakota, the doctrine of economic duress requires a party to establish all three elements:

1. One side involuntarily accepted the terms of another; and
2. That circumstances permit no other reasonable alternative; and
3. That said circumstances were the result of a coercive wrongful act of the opposite party.

See Dunes Hospitality, L.L.C. v. Country Kitchen Intern., Inc., 2001 S.D. 36, ¶ 19, 623 N.W.2d 484, 490. However, this Court warned in *Dunes*:

> [t]he doctrine of economic duress applies only to special, unusual, or extraordinary situations in which unjustified coercion is used to induce a contract ... under such circumstances that the victim has little choice but to accede.

2001 S.D. 36, ¶ 19, 623 N.W.2d at 489 (citing *Newburn v. Dobbs Mobile Bay Inc.*, 657 So.2d 849, 852 (Ala. 1995)). In *Dunes*, this Court held:

> All negotiations inherently involve a certain amount of pressure and coercion. However, to satisfy the requirements of economic duress "that pressure must be wrongful and not all pressure is wrongful." A party's actions, rather than motive, govern the determination of wrongful and coercive. A defense of economic necessity cannot be maintained when a party's actions are lawful, or threats to carry out that which the law entitles them to do. Factors to be considered for economic duress include: the age and mental ability, financial condition, business expertise, absence of good faith, adequacy of consideration and the adequacy of a legal remedy of the party seeking relief.

Id. ¶ 23, 623 N.W.2d at 490 (quoting 25 AmJur2d *Duress and Undue Influence* § 7 (1996)).

A. Gulf Coast and Trigger failed to make a sufficient showing that they involuntarily accepted the terms of the Purchase Agreements.

Under the first element of economic duress, Gulf Coast and Trigger have the burden to "go beyond the mere showing of a reluctance to accept and of financial embarrassment." *Id.* at ¶ 20 (citing *Oskey Gasoline & Oil Co., Inc., v. Continental Oil*, 534 F.2d 1281, 1286 (8th Cir.1976)). "There must be a demonstration of acts on the part of the defendant which produced economic duress." *Id.* It "must be proven by evidence that the duress resulted from the defendant's wrongful and oppressive conduct and not by plaintiff's necessities." *Id.* "The entering into a contract with reluctance or even dissatisfaction with its terms because of economic necessity does not, of itself, constitute economic duress invalidating the contract." *Id.* at ¶ 20 (citing *Newburn*, 657 So.2d at 852).

In *Dunes*, Dunes entered into a management agreement to manage a Country Kitchen restaurant in North Sioux City, South Dakota, for fifteen years. 2001 S.D. 36, ¶ 2, 623 N.W.2d at 487. After frustrations arose over lack of revenue, Dunes began to consider its options, which included firing Country Kitchen, running the restaurant themselves, or filing suit. *Id.* at ¶ 3. Ultimately, the parties entered into a written settlement to resolve the issues. *Id.* at ¶¶ 3-4. However, approximately two months later, Dunes terminated the agreement and filed suit alleging the settlement agreement was procured by fraud and economic duress. *Id.* at ¶ 5. Dunes alleged that Country Kitchen understated accounts payable, forced settlement by an all or nothing approach, threatened complete withdraw from the state, demanded additional cash calls, and would have left Dunes without a location to continue to generate revenue. *Id.*

This Court found the plaintiff's business "consisted of sophisticated member and investors, and was well represented by experienced, competent lawyers" and the decision to enter into the settlement agreement "was the result of an informed and deliberate decision." *Id.* at ¶ 32, 623 N.W.2d at 492. Ultimately, this Court recognized that all "negotiations inherently involve a certain amount of pressure and coercion" and found a directed verdict should have been entered as Dunes failed to establish economic duress under the facts. *See id.* at ¶¶ 23, 31.

The Western Division of the Federal District Court of South Dakota reached a similar conclusion in *Pochat v. State Farm Mut. Auto. Ins. Co.*, 772 F.Supp.2d 1062, 1068 (D.S.D. 2011). In *Pochat*, the Pochats were in an automobile accident with an uninsured motorist. *Id.* at 1065. The plaintiff filed suit against State Farm alleging breach of the insurance contract for failing to pay uninsured motorist benefits in a fair

and reasonable amount. *See id.* at 1066. Plaintiff also alleged bad faith claiming that State Farm "knew the [Pochats] were struggling financially, and used that fact to force an unreasonable UM claim" settlement. *See id.* State Farm filed a motion for summary judgment and the District Court examined the three elements of economic duress from *Dunes*. *See id.*

Under this first element, the plaintiff alleged "she was in dire financial straits," was recently divorced, incurred almost $9,000 in medical bills and State Farm used her situation to coerce her "to agree to accept only a portion of what [her] UM BI claim [was] worth." *Id.* at 1067. The court recognized that the plaintiff had "assistance of competent legal counsel who initiated settlement discussions" and plaintiff continued to negotiate by reducing her settlement demands. *Id.* Ultimately, the Court granted summary judgment finding that plaintiff failed "to show that under any circumstances a jury could find she was a victim of economic duress such that she would be entitled to rescind the settlement of her case" and the "decision to merely 'acquiesce' does not rise to the level of coercion required to prove economic duress." *Id.*

Here, the facts are similar to *Dunes* and *Pochat*. Gulf Coast and Trigger were experienced, successful businessmen and were represented by an experienced, competent attorney. (R: 940.) Attorney Mullen "advised the parties of different avenues and the consequences of choosing them." (R: 940.) Of these options, Keogh "expressed concern for financial embarrassment." (R: 941.) Keogh stated:

> It - - yeah, that - - I mean, that was suggested as an option. I mean, there were options given to us as to how to handle this. None were viable except for one, and that was closing the transaction. Our concern was solely based on how are we going to live with -- we had no idea what the loss would be if Kent took his crew, took himself, and all of the customers, we had no idea

> how to calculate it. I mean, what am I going to do with workover rig pipe? I mean, what's it worth? Not much. That was the focus.

(R: 617.) Keogh "hypothesized financial ruin if [Stevens] followed through with his threats to 'blow up' the company" and "noted that millions of dollars in liabilities would be difficult to manage" as would obtaining new customers or employees. (R: 941.) Keogh testified that his sole concern was about the money.

As the trial court recognized, Gulf Coast and Trigger failed to "go beyond the mere showing of a reluctance to accept and of financial embarrassment." *Dunes*, 2001 S.D. 36, ¶ 20, 623 N.W2d at 490. Gulf Coast's and Trigger's reluctance or even dissatisfaction with its terms of the purchase agreements is insufficient to constitute economic duress invalidating the agreements. *See id.* at ¶ 20 (citing *Newburn*, 657 So.2d at 852). Gulf Coast and Trigger failed to make a sufficient showing to establish this element of their case and thus entry of summary judgment was properly entered in this matter. *See Hass*, 2012 S.D. 50, ¶ 11, 816 N.W.2d at 101.

B. Gulf Coast and Trigger failed to make a sufficient showing that the circumstances permitted no reasonable alternatives.

Under the second element, Gulf Coast and Trigger must make a sufficient showing that the circumstances permitted no other reasonable alternatives. *Dunes*, 2001 S.D. 36, ¶ 21, 623 N.W.2d at 490. In *Dunes*, this Court held that determining whether a reasonable alternative exists requires an objective test with the outcome depending on the circumstances of each case. *See id.* This Court specifically noted in *Dunes*, "[t]he availability of a legal resolution is one such circumstance." *Id.*

In examining the circumstances of the case in *Dunes*, this Court found that Dunes had two options: (1) terminating their affiliation with the defendant; or (2) filing suit.

Dunes, 2001 S.D. 36, ¶ 32, 623 N.W.2d at 492. These options were known to Dunes as several members of Dunes urged rejection of the settlement and proposed terminating the management contract and bringing suit against the defendant. *See id.* "In fact, this is exactly what Dunes did two months after the agreement was signed." *Id.* Ultimately, this Court found that the two options available to Dunes were reasonable alternatives and thus, the decision to enter into the agreement was the result of an informed and deliberate decision. *Id.*

These facts are nearly identical to the facts of this case. Gulf Coast and Trigger are sophisticated investors and businessmen and were represented by a competent attorney during negotiations. (R: 554, ¶¶ 4, 6.) Attorney Mullen testified that he provided multiple legal options to Gulf Coast and Trigger to consider prior to executing any of the documents to effectuate the sale of their interests in Blueprint. (R: 559-60 ¶¶ 37-43.) Attorney Mullen advised Gulf Coast that they could: (1) simply refuse to sell its interest; (2) remove Stevens from his position pursuant to the Operations Manager's Employment Agreement which would trigger the buy-sell agreement; (3) fire Stevens and hire a replacement crew and then sue Stevens; or (4) file suit against Stevens alleging tortious interference. (*Id.*) Attorney Mullen testified:

> I did advise Gulf Coast of available options other than the option that was chosen. My client, I believe, internally evaluated that and then did make an *informed decision*…

(R: 582, Mullen Depo. 34:4-7) (Emphasis added.)

Here, the trial court correctly found that, under "*Dunes*, the option to cut ties with [Stevens] and TCU Holdings and availability to sue them were reasonable alternatives to entering into the Purchase Agreements." (R: 943.) Therefore, because Gulf Coast and

Trigger "voluntarily accepted the terms of the Purchase Agreement and that there were reasonable alternatives, the elemental test of economic duress fails." (*Id.*) Gulf Coast and Trigger failed to make a sufficient showing to establish this element of their case and thus entry of summary judgment was properly entered in this matter. *See Hass*, 2012 S.D. 50, ¶ 11, 816 N.W.2d at 101.

C. Gulf Coast and Trigger failed to make a sufficient showing that the circumstances were the result of coercive and wrongful acts on the behalf of Stevens and TCU.

Under the third element, Gulf Coast and Trigger must make a sufficient showing that the circumstances were the result of a coercive and wrongful act and there must be a causal link between those acts and the circumstances creating economic duress. *Dunes*, 2001 S.D. 36, ¶¶ 21-22, 623 N.W.2d at 490. The "party asserting economic duress must establish they were the victim of unlawful or unconscionable pressure." *Id.* However, a "defense of economic necessity cannot be maintained when a party's actions are lawful, or threats to carry out that which the law entitles them to do." *Dunes*, 2001 S.D. 36, ¶ 23, 623 N.W.2d at 490 (citing 25 AmJur2d *Duress and Undue Influence* § 7 (1996)).

Ultimately, the trial court found that the "facts viewed most favorably to the Plaintiffs show only that they were the victims of a hard bargain." (R: 945.) Stevens had the right to walk away from Blueprint and threatening to carry out that which the law entitled him to do is not a basis for economic duress. The trial court held:

> [Stevens] had the authority to initiate the selling of his companies' shares. Also, he had the authority to request a buy-out. Aside from [Stevens] his crew in turn had the right to leave their positions. The customers of Blueprint could have turned elsewhere for business, or possibly follow [Stevens].

(R: 945.)

"Plaintiffs' own conduct in the negotiating process dilutes the strength of their claim." (R: 945.) Gulf Coast and Trigger "sought advice from counsel, weighed their options without any swaying of opinion by Mullen, and decided to acquiesce to [Stevens'] price term if other provisions were met." (R: 945-46.) Further, it cannot be ignored that the negotiations took place over a period of months with multiple documents being executed by Gulf Coast, Trigger, Keogh, and Geuke. "The facts present hallmarks of a traditional, 'hardball' negotiating sessions." (R: 946.) Stevens' conduct is strikingly similar to the conduct complained of in *Dunes*. Below is a side-by-side comparison of the facts of this case with the facts of *Dunes*.

	Our Case	*Dunes Hospitality*
1	Stevens was hired as the Operations Manager for Blueprint.	Country Kitchen Inc. was hired as the manager of the restaurant in Sioux City, SD.
2	Gulf Coast and Trigger admit that they are sophisticated investors and businessmen	Dunes consisted of sophisticated members and investors
3	Attorney Mullen is a competent attorney with 30 years of experience	Dunes was represented by experienced, competent lawyers.
4	Keogh testified that initially the failure to meet financial projections became a point of contention.	Dunes was frustrated that Country Kitchen Inc. was not meeting revenue expectations.
5	Stevens threatened to blow up the company and take his employees with him which would have left Gulf Coast and Trigger without the ability to run the company.	Country Kitchen Inc. "threatened" to quit which would have left Dunes without service for the hotel which the restaurant was connected.
6	Gulf Coast and Trigger had options to: (1) refuse to sell its shares; (2) terminate Stevens as Manager which would trigger the buy-sell agreement; (3) fire Stevens and hire a replacement crew and then sue Stevens; or (4) file suit against Stevens alleging tortious interference.	Dunes had the options to: (1) terminate Country Kitchen Inc. as manager; or (2) file suit.

7	Gulf Coast and Trigger filed suit 20 days after signing the agreements and receiving their money.	Dunes filed suit two months after they signed the agreement.
8	Attorney Mullen testified the decision to sign the agreements was an informed decision.	The court found the decision to enter into the agreement was the result of an informed and deliberate decision.

As acknowledged by this Court, "a party asserting economic duress under these circumstances has a difficult burden to overcome." *Dunes*, 2001 S.D. 36, ¶ 33, 623 N.W.2d at 492. The testimony unequivocally demonstrates Gulf Coast and Trigger had access to multiple legal resolutions as they sought the advice of counsel, understood the contents of what they were signing, and executed the documents. This is not economic duress. *See Anselmo v. Manufacturers Life Ins. Co.*, 771 F.2d 417, 420 (8th Cir. 1985) (finding no duress when a party was an experienced businessman, took ample time, and took the agreement home and consulted both his wife and an attorney before signing), *First Nat. Bank of Cincinnati v. Pepper*, 454 F.2d 626, 634 (2nd Cir. 1972) (finding that the party seeking to make out a defense of duress had access to "competent and knowledgeable counsel" at the time it entered into the disputed contract which makes it still more difficult to "demonstrate the element of compulsion necessary to find duress"), *Schmalz v. Hardy Salt Co.*, 739 S.W.2d 765 (Mo. Ct. App. 1987) (finding that where an experienced businessman takes sufficient time, seeks advice of counsel, and understands the content of what he is signing, he cannot claim the execution of the release is the product of duress). The facts of *Dunes* are squarely on point with the facts of this case. Gulf Coast and Trigger failed to make a sufficient showing to establish this element of their case and thus entry of summary judgment was properly entered in this matter. *See Hass*, 2012 S.D. 50, ¶ 11, 816 N.W.2d at 101.

2. SECTION 2.03 OF THE MEMBERSHIP PURCHASE AGREEMENTS BARS GULF COAST'S AND TRIGGER'S REMAINING CLAIMS.

Because economic duress fails, Gulf Coast and Trigger are bound by the representations, warranties, and guarantees in the Purchase Agreements they signed. *See Lucero v. Van Wie*, 1999 S.D. 109, ¶ 16, 598 N.W.2d 893, 898 (recognizing the "basic premise in the law is that when the parties reduce an agreement to writing and sign it, that written agreement is entitled to enforcement.") Specifically, Section 2.03 of the Purchase Agreements which provides:

> **Legal Proceedings**. There is no claim, action, suit, proceeding, or governmental investigation ("Action") of any nature pending, or to Seller's knowledge, threatened against or by Seller (a) relating to or affecting the Membership Interests; or (b) that challenges, or seeks to prevent, enjoin or otherwise delay the transactions contemplated by this Agreement. *No event has occurred or circumstances exist that may give rise to, or serve as a basis for, any such Action.*

(R: 60, 110) (Emphasis added.)

"Releases are contractual agreements." *Fenske Media Corp. v. Banta Corp.*, 2004 S.D. 23, ¶ 8, 676 N.W.2d 390 (citing *Parkhurst v. Burkel*, 1996 S.D. 19, ¶ 12, 544 N.W.2d 210, 212). "It is well settled that in interpreting a contract, we rely on the language of the contract to ascertain the intent of the parties." *Carstensen Contracting, Inc. v. Mid-Dakota Rural Water Sys., Inc.*, 2002 S.D. 136, ¶ 8, 653 N.W.2d 875, 877. "Where possible, we must give meaning to all the provisions of a contract." *Id.*

A waiver is "[w]here one in possession of any right, whether conferred by law or by contract, 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 [or her] intention to rely upon it." *Action Mechanical, Inc. v. Deadwood Historic Preservation Com'n*, 2002 S.D. 121, ¶ 18, 652 N.W.2d 742, 749.

The plain language of Section 2.03 supports a waiver of Gulf Coast's and Trigger's right to sue. (R: 947) (citing *Flynn v. Lockhart*, 526 N.W.2d 743, 746 (S.D. 1995)). For example, Section 2.03 recognizes the right to bring an "Action," which includes "suit" as an example. (*See id.*) "The last sentence of Section 2.03 contemplates the parties mutual understanding that no event or circumstance is present that 'may give rise to, or serve as a basis for' suit." (*Id.*) "This language clearly and unambiguously exhibits [Gulf Coast's and Trigger's] recognition and agreement that nothing was present at the time of formation that would give rise or serve as a basis to sue" and "of course contemplates [Gulf Coast's and Trigger's] remaining claims, as they all are alleged to have occurred before or during formation of the Purchase Agreement." (*Id.*) This recognition in the Purchase Agreements "is an act contrary to the exercise of the right to bring suit" and because economic duress is not present, "this Section serves to waive [Gulf Coast's and Trigger's] right to sue." (*Id.*)

In its brief, Gulf Coast and Trigger argue that even if Section 2.03 was clearly and unambiguously stated, this provision does not extend to Stevens because only TCU was a signatory to the Purchase Agreements. (Appellants' Brief, p. 32.) However, as the trial court found, compelling "policy reasons support releases under the Uniform Contribution Among Joint Tortfeasors Act (SDCL 15-8-11 to 15-8-22)." (R: 947, citing *Flynn*, 526 N.W.2d at 746).

> The defendant who originally procures the release gains nothing if the plaintiff can sue other joint or concurrent tortfeasors. In such a case, the original defendant is left open to claims for contribution and/or indemnity and may wind up having to litigate the case anyway.

(*Id.*)

Further, the fact that Stevens was not a signatory to the Purchase Agreements cuts against Gulf Coast and Trigger. In order to hold Stevens personally responsible, Gulf Coast and Trigger must pierce the corporate veil as a corporation is considered a legal entity separate and distinct from its officers, directors, and shareholders. *Kansas Gas & Elec. Co. v. Ross*, 521 N.W.2d 107, 111-12 (S.D. 1994).

Gulf Coast and Trigger "failed to establish a basis for personal liability or established facts in genuine dispute that support piercing the corporate veil." (R: 948) (citing *Paul v. Bathurst*, 2023 S.D. 56, ¶ 21, 997 N.W.2d 644, 652-53.) This is because Gulf Coast's and Trigger's argument for personal liability is based on the same conduct as alleged under other counts — Stevens' threat to blow up the company. Gulf Coast and Trigger presented no genuine disputes alleging undercapitalization, failure to observe corporate formalities, absence of corporate records; or payment by the corporation of individual obligations. Therefore, there is no evidence to support the piercing of the corporate veil and the claims against Stevens in his individual capacity were properly dismissed.

"Even if TCU Holdings were to be considered the alter ego of [Stevens], the Court's previous conclusion that the Purchase Agreements are valid and enforceable show that [Stevens] did not use TCU Holdings to promote fraud, injustice, or illegality." (R: 948.) "Thus, [Gulf Coast and Trigger] have contractually agreed to not sue [Stevens], TCU, LLC, and TCU Holdings." (R: 949.) Gulf Coast and Trigger have failed to make a sufficient showing to the contrary.

3. STEVENS AND TCU DID NOT BREACH ANY DUTIES OWED AS A SHAREHOLDER OF BLUEPRINT.

Gulf Coast and Trigger argue that "*[e]ven if* the conduct complained of does not meet the definition of economic duress, it could *still* meet the definition of breaches of other legal duties" as alleged in counts 3 through 7 of its Complaint. (*See* Appellants' Brief, p. 37) (Emphasis in original.) While Appellants' Brief confusingly jumps around and between Counts 3 to 7, Appellees will address each Count of the Complaint in order.

A. Count 3 – Breach of Fiduciary Duty

In their Complaint, Gulf Coast and Trigger alleged Stevens and TCU

> breached their fiduciary duties towards Plaintiffs by, among other things, seeking to disenfranchise Plaintiffs, enrich themselves at the expense of Plaintiffs, and threaten to financially damage Plaintiffs if Plaintiffs did not agree to Defendants' unreasonable terms.

(R: 17, ¶ 46.)

Gulf Coast and Trigger argue that Stevens and TCU owed duties of loyalty and good faith and fair dealing that prevented Stevens and TCU from acting in a manner adverse to the company or competing with the company before dissolution. (*See* Appellants' Brief, p. 39) Gulf Coast and Trigger also treat Count 3 as a catch-all by arguing that alleged breaches under other counts also serve as general breaches of fiduciary duties. (*See* Appellants' Brief, p. 38 (alleging that a usurpation of an opportunity, which is alleged in Count 6, is "also a breach of the duty of 'utmost good faith and fair dealing…'"))

The existence of a fiduciary duty and the scope of such duty are questions of law. *Mueller v. Cedar Shore Resort, Inc.*, 2002 S.D. 38, ¶ 11, 643 N.W.2d 56, 62 (citing *Landstrom v. Shaver*, 1997 S.D. 25, ¶ 84, 561 N.W.2d 1, 18). Whether there has been a

breach of a fiduciary duty is a fact question determined by the trial court at summary judgment. *Id.* (citing *Hayes v. N. Hills General Hosp.*, 1999 S.D. 28, ¶ 57, 590 N.W.2d 243, 253). Generally, "shareholders do not owe a fiduciary duty to either the corporation or their fellow shareholders." *Mueller*, 2002 S.D. 38, ¶ 26, 643 N.W.2d at 66. However, in close corporations, "majority, dominant, or controlling shareholders, or a group of shareholders acting together to exercise effective control, are held to owe a fiduciary duty to minority shareholders." *Id.* (citing *Hayes*, 199 S.D. 2, ¶ 52, 590 N.W.2d at 253). "This fiduciary duty is characterized by a high degree of diligence and due care, as well as the exercise of utmost good faith and fair dealing." *Id.* (citing *Landstrom*, 1997 S.D. 25, ¶ 84, 561 N.W.2d at 19).

As the trial court noted, "Hallmark behavior" of breaches of fiduciary duties "includes the failure to disclose information, director or shareholder self-dealing, making fraudulent misrepresentations regarding past or future events, and surreptitious conduct or communications." (R: 950) (citing *Mueller*, 2002 S.D. 38, ¶ 26, 643 N.W.2d at 66.) Here, the trial court properly found "the facts viewed in light most favorable to [Gulf Coast and Trigger] support a conclusion as a matter of law that [Stevens] did not breach a fiduciary duty." (R: 951.) First, Stevens did not fail to disclose information, did not act surreptitiously, and did not fraudulently misrepresent past or future events. Instead, the very conduct Gulf Coast and Trigger complain about demonstrated Stevens was candid and open about his intentions with the company. (*Id.*) Further, Stevens was not self-dealing as he was securing outside funds to buy out Gulf Coast's and Trigger's interest. (*Id.*) The trial court also found, the "facts viewed in [Gulf Coast's and Trigger's] favor

also do not support a breach of duty of loyalty because [Stevens'] actions are inapplicable to the governing statute, SDCL 47-34A-409(b)." (*Id.*)

While Gulf Coast and Trigger stress that the "tort, statutory duty, and equitable claims arising from this misconduct are *independent* of the duress claims," the "misconduct" is the same under all of Appellants' claims — Stevens threatened to blow up Blueprint. As the trial court found that Stevens' negotiation tactics did not amount to duress, it accordingly found that the same conduct did not result in a breach of any fiduciary duties.

Further, while Gulf Coast's and Trigger's argument that "*[e]ven if* the conduct complained of does not meet the definition of economic duress, it could *still* meet the definition of breaches of other legal duties" is simply wrong. Without economic duress invalidating the Purchase Agreements, Gulf Coast and Trigger are bound by the terms of their agreements. *See Lucero v. Van Wie*, 1999 S.D. 109, ¶ 16, 598 N.W.2d 893, 898 (recognizing the "basic premise in the law is that when the parties reduce an agreement to writing and sign it, that written agreement is entitled to enforcement").

Under the Purchase Agreements, Gulf Coast and Trigger confirmed that the execution, delivery, and performance under the agreement do not and will not violate the Articles of Organization, the LLC Agreement, or any statues, laws or ordinances. (R: 60, 110, Section 2.02.) Gulf Coast and Trigger admit the Purchase Agreements contain this language but rely on duress to unwind the agreement. (R: 174-80, ¶¶ 9, 42.) Further, the Purchase Agreements also provide "there is no claim, action, suit, proceeding, or governmental investigation ("Action") of any nature pending, or to Seller's knowledge, threatened . . . by Seller (a) relating to or affecting the Membership Interests; or (b) that

challenges, or seeks to prevent, enjoin or otherwise delay the transactions contemplated by this Agreement. No event has occurred or circumstances exist that may give rise to, or serve as a basis for, any such Action." (R; 60, 110, Section 2.03.) Summary judgment was proper to count 3 because without duress, the Purchase Agreements and its terms are entitled to enforcement. *See Lucero*, 1999 S.D. 109, ¶ 16.

B. Count 4 – Tortious Interference

Gulf Coast and Trigger argue that either TCU tortiously interfered or Stevens, acting outside the scope of his authority, tortiously interfered with Gulf Coast's and Trigger's business relationship or expectancy in Blueprint. (Appellants' Brief, pp. 43-44.) However, "the tort of intentional interference with contractual relations serves as a remedy for contracting parties against interference from outside intermeddlers." (R: 983) (citing *Gruhlke v. Sioux Empire Fed. Credit Union., Inc.*, 2008 S.D. 89, ¶ 7, 756 N.W.2d 399, 404.) "To prevail on a claim of tortious interference, 'there must be a triangle' — a plaintiff, an identifiable third party who wished to deal with the plaintiff, and the defendant who interfered with' the contractual relations." (*Id.*) "A corporate entity cannot contractually interfere with itself." (*Id.*) (citing John Alan Doran, *It Takes Three to Tango: Arizona's Intentional Interference with Contract Tort and Individual Supervisor Liability in the Employment Setting*, 35 ArizStLJ 477, 508 (Summer 2003)).

Therefore, "the element that is missing in this case is an identifiable third-party." (*Id.*) Stevens negotiated the buyout as an agent of TCU and TCU was a one-third member in Blueprint. TCU "cannot be both the third party and the defendant." (*Id.*) Similarly, "Blueprint cannot have intermeddled with itself and tortiously interfered with

its own ownership interests in a restricting of its ownership." (*Id.*) Count 4 fails as a matter of law and summary judgment was appropriate.

C. Count 5 – Shareholder Oppression

Gulf Coast and Trigger argue that the alleged violations of fiduciary duties also constitute shareholder oppression. (Appellants' Brief, pp. 43-44.) Gulf Coast and Trigger allege that they had "a reasonable expectation that their exit from the Company would occur in a reasonable fashion, not at gunpoint" and therefore, they "stated a *prima facie* case for shareholder oppression." (*Id.*)

Determining whether conduct arises to shareholder oppression is a question of law. *Mueller*, 2002 S.D. 38, ¶ 14, n.2, 643 N.W.2d at 62 (citing *Landstrom*, 1997 S.D. 25, ¶ 37, 561 N.W. 2d at 7). This Court has considered "oppressive actions to refer to conduct that substantially defeats the 'reasonable expectations' held by minority shareholders in committing their capital to the particular enterprise." *Mueller*, 2002 S.D. 38, ¶ 13, 643 N.W.2d at 62.

TCU, Gulf Coast, and Trigger each held a 1/3 interest of Blueprint. Gulf Coast and Trigger, working in tandem, were majority members. (R: 953.) The trial court properly recognized that shareholder oppression was inapplicable here as TCU was in fact the minority member. (*Id.*) Further, even if applicable, there was no shareholder oppression. If there was no economic duress, the parties mutually agreed to part ways and entered into valid and enforceable Purchase Agreements (*Id.*) The only evidence presented about expectation for Gulf Coast and Trigger was the discussion of a "true-up." However, Stevens declined to negotiate a "true-up" and attorney Mullen testified that he

offered to proceed to closing without a "true up" if some of his proposals would be implemented. (R: 557, ¶ 23.)

Negotiations between parties, while being represented by attorneys, resulting in exchanges of draft agreements, telephone calls by counsel, and the negotiating of terms demonstrated this was not an exit at gunpoint. Therefore, the trial court properly held, the "facts viewed most favorably to [Gulf Coast and Trigger] do not support a legal conclusion of shareholder oppression." (R: 954.) Summary judgment was appropriate.

*D. **Count 6 – Unjust Enrichment/Usurpation***

Gulf Coast's and Trigger's usurpation claim also fails. Generally, "one who occupies a fiduciary relationship to a corporation may not acquire, in opposition to the corporation, property in which the corporation has an interest or tangible property." *Case v. Murdock*, 448 N.W.2d 885, 890 (S.D. 1992). An exception to this general rule is that a "fiduciary of the corporation is allowed to take a business opportunity once the corporation has properly rejected the opportunity or is not in a position to take it." *Id.*

Here, the trial court properly found "the facts viewed most favorably to [Gulf Coast and Trigger] do not support a cause of action" as Gulf Coast and Trigger were "given the opportunity to decide upon full disclosure of the pertinent facts" what price they were to sell their shares. (R: 951.) Gulf Coast and Trigger argue that while Stevens "was candid as to the general goal of wanting to buy out Gulf Coast and Trigger, there is nowhere in the Record that supports the necessary finding that [Stevens] informed Gulf Coast and Trigger 'of the full circumstances of the transaction.'" (Appellants' Brief, p. 38).

This is simply inaccurate. The Funds Flow Memorandum, signed by Gulf Coast and Trigger, detailed the "full circumstances of the transaction" including the parties, the amounts, and the source of funding. (R: 159-168.) Like they did with three prior documents, Gulf Coast and Trigger signed this memorandum upon advice of counsel. Therefore, unless economic duress is present, Stevens met his fiduciary obligations.[1]

E. Count 7 - Accounting

Appellants present no argument under Count 7 and it is unclear from their Complaint exactly what Gulf Coast and Trigger are seeking. Gulf Coast and Trigger already have an accounting of the proceeds of the membership interest sales price, and the simultaneous transactions pertaining to Blueprint's membership interests and asset transfers. The Funds Flow Memorandum recited the terms of the Purchase Agreements and directed the payments to be made to Trigger and Gulf Coast, as well as the source of the funds for the buyout. (R: 159-168.) This may be the reason that Gulf Coast and Trigger presented no argument on this Count.

F. Count 8 – Costs and Attorney's Fees

Count 8 relies upon the success of Gulf Coast's and Trigger's claim of Breach of the Operating Agreement. (R: 13.) For the reasons discussed below, the Breach of Operating Agreement claim fails and thus the request for attorney's fees and costs pursuant to this allegation also fails as a matter of law.

[1] Further, there "is a strong argument that the doctrine does not apply to this case" as this was a restructuring of ownership and not an outside business opportunity. (R: 952.)

*G. **Count 9 – Injunctive Relief***

Gulf Coast and Trigger presented no argument under Count 9 and have not developed any testimony or facts to support a claim for injunctive relief. It appears that Gulf Coast and Trigger have abandoned Count 9 and thus no argument is needed.

4. STEVENS AND TCU DID NOT BREACH THE OPERATING AGREEMENT.

Gulf Coast and Trigger allege that Stevens and TCU breached the Operating Agreement by preventing Gulf Coast and Trigger from utilizing the appraisal process found in the Operating Agreement. (Appellants' Brief, p. 44.) Article 14.1 of the Operating Agreement provided that "no Member may transfer all or any part of its … Interest … unless the Transfer is …Accomplished under the terms and conditions set forth in Article 14.2, 14.3, or 14.4" (R: 794.) The Operating Agreement "further outlines a process for 'voluntary transfer of units' via a right of first refusal in Article 14.2; or a mandatory buy-sell process for certain events under 14.3." (R: 977.)

First, Keogh testified:

> Q: Can you turn to Article 14.3(d) that is on page 21.
>
> A: On page 21?
>
> Q: Yes, sir.
>
> A: All right.
>
> Q: That section is referred to as purchase price; determination of company value and per unit value. Do you know if that's what the complaint is referring to as far as the agreed upon valuation?
>
> A: It's possible. I am not 100 percent, but I would assume because this is in the operating agreement. However, I would note that this is -- this is in conjunction with the buy-sell --

trigger events of the buy-sell agreement. *That's not what we were doing.*

Q: Understood.

A: This wasn't -- you know, we didn't treat it – it probably -- it could have been a trigger potentially, but it wasn't. It wasn't treated that way. It was someone -- Kent expressed interest in buying us out and we expressed interest in selling. *Valuation methods don't matter in terms of determining the price. It's what he's willing to pay or what we're willing to sell for or some combination thereof.*

(*Id.*) (Emphasis added.)

This Court has repeatedly held that, "a party to a lawsuit cannot claim the benefit of a version of relevant facts more favorable to his own contentions than he has given in his own testimony." *Law Capital, Inc. v. Kettering*, 2013 S.D. 66, ¶ 13, 836 N.W.2d 642, 646. Keogh unequivocally testified that the valuation method in the Operating Agreement was inapplicable to this situation. Therefore, summary judgment was appropriate for this reason alone.

In addition, because there is no economic duress, the Purchase Agreements were valid and enforceable. In the Purchase Agreements, the "parties agreed that the sale was in compliance with the Operating Agreement." (R: 60, 110, Section 2.02.) Gulf Coast and Trigger "cannot supersede the terms of a valid contract purely praying for a more ideal outcome" and thus the claim "fails as a matter of law." (R: 977.)

Finally, even if the Purchase Agreements were unenforceable, Gulf Coast and Trigger "ratified the Purchase Agreements which defeats their claim of breach of the Operating Agreement." (*Id.*) "A contract is ratified when 'an act by which an otherwise voidable and, as a result, invalid contract is conformed, and thereby made valid and

enforceable.'" *Ziegler Furniture and Funeral Home, Inc. v. Cicmanec*, 2006 S.D. 6, ¶ 31, 709 N.W.2d 350, 358 (quoting 17A CJS Contracts § 138 1998).

Here, Gulf Coast and Trigger "ratified the Purchase Agreement by executing the agreement and accepting their respective payments of $800,000 and depositing the checks." (R: 977.) In addition, Aladdin, Keogh's other company, "received $3,280,150.94 as part of the transaction, continued to factor invoices until all debt obligations were paid off" and then "released several liens and UCC filings in compliance with the Purchase Agreement." (R: 978.) Gulf Coast, Trigger, and Aladdin "manifested a willingness to go on with the contract" and thus this "claim fails as a matter of law." (*Id.*)

CONCLUSION

Gulf Coast and Trigger entered into binding Purchase Agreements as sophisticated businessmen with the assistance of competent counsel. As such, Gulf Coast's and Trigger's remaining claims must fail pursuant to the terms of the agreements. Further, the remaining claims also fail as Stevens and/or TCU did not breach any duties owed to Gulf Coast and Trigger and there was no breach of the Operating Agreement. Therefore, Summary Judgment was appropriately entered by the trial court and Appellees respectfully request this Court affirm.

Respectfully submitted this 14th day of March, 2025.

BEARDSLEY, JENSEN & LEE,
Prof. L.L.C.

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REQUEST FOR ORAL ARGUMENT

Appellee respectfully requests the Court grant oral argument on the issues presented in the appeal.

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I certify that Appellee's Brief complies with the type volume limitation provided for in the South Dakota Codified Laws. This brief contains 8,468 words and 43,241 characters, excluding the table of contents, table of cases, jurisdictional statement, statement of legal issues, any certificates of counsel, and any addendum materials. I have relied on the word and character count of our processing system used to prepare this Brief. The original Appellee's brief and all copies are in compliance with this rule.

BEARDSLEY, JENSEN & LEE,
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CERTIFICATE OF SERVICE

I certify that on March 14th, 2025, a true and correct copy of the foregoing Appellee's Brief was filed electronically via Odyssey with the Clerk of the South Dakota Supreme Court, and service was made upon Appellant's counsel via e-filing:

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I also hereby certify that on March 14th, 2025, I sent a bound copy of the foregoing to the South Dakota Supreme Court Clerk at the following address:

Shirely Jameson-Fergel, South Dakota Supreme Court Clerk
500 East Capitol Avenue
Pierre, SD 57501

/s/ Matthew J. McIntosh
Matthew J. McIntosh

APPENDIX
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STATE OF SOUTH DAKOTA) :SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
TRIGGER ENERGY HOLDINGS, LLC, a Wyoming Limited Liability Company, and GULF COAST INVESTMENTS, LLC, a South Dakota Limited Liability Company, Plaintiffs, v. **KENT STEVENS, as an individual, an officer, and agent; TCU, LLC, a Wyoming Limited Liability Company; TCU HOLDINGS, LLC, a Wyoming Limited Liability Company; and BLUEPRINT ENERGY PARTNERS, LLC, a South Dakota Limited Liability Company,** Defendants and Third-Party Plaintiffs, v. **TRIGGER ENERGY, INC., a Wyoming Corporation, and ALADDIN CAPITAL, INC., a South Dakota Corporation,** Third-Party Defendants.	49CIV19-2287 **MEMORANDUM DECISION AND ORDER GRANTING DEFENDANTS' AND THIRD-PARTY PLAINTIFFS' (SECOND) MOTION FOR SUMMARY JUDGMENT**

PRELIMINARY STATEMENT

The above-captioned Plaintiffs and Third-Party Defendants are hereinafter referred to as "Plaintiffs." Similarly, the above-captioned Defendants and Third-Party Plaintiffs are hereinafter referred to as "Defendants."

INTRODUCTION

Plaintiffs filed their Complaint alleging numerous claims surrounding a shareholder buy-out agreement. The parties conducted discovery and Defendants subsequently moved for summary judgment. This motion was never ruled on. A trial date and scheduling order was set thereafter. Defendants subsequently moved for summary judgment a second time.

This matter came on for hearing on January 18, 2024, at the Minnehaha County Courthouse in Sioux Falls, South Dakota, before this Court pursuant to Defendant's Second Motion for Summary Judgment. Daniel Brendtro of Hovland, Rasmus & Brendtro appeared on behalf of Plaintiffs and Matthew McIntosh of Beardsley Jensen & Lee appeared on behalf of Defendants.

In considering Defendants' Motion, this Court has considered pre-hearing briefing, affidavits, statements of disputed and undisputed facts, attached exhibits, and oral argument. Shortly after the hearing, the Court reached its decision to grant the Second Motion for Summary Judgment on all counts. The Court notified the parties by email of its decision and its intention to issue a Memorandum Decision and Order at a later date.

FACTUAL BACKGROUND

Blueprint Energy Partners, LLC (Blueprint), an oil and natural gas company, was formed in 2017. Three companies held a 1/3 membership share in Blueprint, including Trigger Energy Holdings, LLC (Trigger), Gulf Coast Investments, LLC (Gulf Coast), and TCU Holdings, LLC (TCU Holdings).

Waylon Geuke (Waylon) was the President, an officer, and director of Trigger. Scott Keogh (Scott) was the Vice President and 49.9% shareholder in Gulf Coast. Scott was also the Vice President and 49.9% shareholder of Aladdin Capital, Inc. (Aladdin). Kent Stevens (Kent) owned TCU, LLC (TCU) and TCU Holdings.

Aladdin, through Scott, was appointed the Manager of Blueprint. Aladdin provided funding for operations of Blueprint through equipment leases and a line of credit. To account for the day-to-day operations, Kent was named the Operations Manager of Blueprint on December 13, 2017.

Kent's career in pipe rentals and inspection dates back to 2014. At the company he worked for prior, Certus Energy Solutions (Certus), Kent maintained a supervisory role. Kent's employment was ultimately terminated in 2017 due to violating company policy. During his time as a supervisor at Certus, Kent

developed a team of employees. A number of these employees left Certus to join Kent at Blueprint, with some gaining high-level management roles. Further, some of the employees also became equity owners in TCU Holdings.

Shortly after its inception, Blueprint, began experiencing adversity and delays, stemming, in part, from Kent's disregard of company policies. Scott expressed concern about this to Kent. Scott had also asserted his concerns of Blueprint's difficulty in meeting its debt obligations to Aladdin. This occurred during one of the monthly meetings the parties had in either Casper, Wyoming or Sioux Falls. Throughout these meetings, Blueprint's status and future were often a point of discussion. Kent saw these discussions as unfruitful and found the parties' communication to be broken. Kent found communication especially difficult when Scott or Waylon commented on daily operations while Kent was the one with experience in the field and the other two were businessmen.

As early as August of 2018, Kent told the others that he did not want to remain in the partnership. Starting around this time and extending throughout the negotiations to come, Kent expressed an intent to "blow up" the company if the other two shareholders did not accept a buyout at his proposed price. Kent further expressed that he would either take his crew, who he had brought from Certus, with him, or his crew would leave on their own if Kent was gone. Additionally, Kent expressed that Blueprint's customers would follow him if he were gone. Kent later relayed that he spoke with his attorney and concluded that he could break his non-compete. He had also warned that he could not be sued because the only equity he obtained was around $20,000 in his home.

Early in the next year, the parties began having serious discussions about TCU Holdings buying the shares of Gulf Coast and Trigger, when Kent proposed the idea in an in-person meeting. At this time, around February 2019, the liabilities of Blueprint amounted to roughly $6 million. A few months after the serious discussions began, Gulf Coast hired attorney John Mullen (Mullen) of Boyce Law Firm in Sioux Falls to represent the company in anticipation of a buy-out. [1] Mullen's law practice is comprised of over thirty years' experience in business transactions and business litigation. Sometime within this representation, Mullen relayed to Kent that Trigger would be acting consistent with the decision that Gulf Coast would make. Because of this, Gulf Coast took initiative in the buyout discussions.

[1] Plaintiffs initially contested the discoverability of Mullen's testimony and actions within the attorney-client relationship. The Court entered a Memorandum Decision on November 20, 2020, finding that the assertion of economic duress waived attorney-client privilege, and ordered Plaintiffs to comply with Defendants' requests for admissions. Plaintiffs moved the Court to reconsider, and the Court denied the Motion.

The negotiations continued into the Summer. Throughout the negotiations of a potential buyout, Mullen began communicating with TCU's then-counsel, Wyoming attorney Kyle Ridgeway (Ridgeway). Mullen proposed to Ridgeway a "true-up" adjustment on the buyout price. Scott was adamant that the "true-up" price should still be negotiated. This calculation accounted for Blueprint's economic changes from formation to the date of closing and represented the company as having a much higher value than what Kent's proposed price represented. Scott believed an EBITDA/EV multiplier [2] of four was reasonable for the "true-up" price.

Ridgeway held firm to this base price, which represented the value of Blueprint, and the shares, at the time it was formed. Because Ridgeway would not consider the "true-up" price, Mullen negotiated consistent with the base price. On June 6, 2019, Mullen and Ridgeway exchanged drafts for Letters of Intent. They had also spoken on the phone and emailed each other continuing to negotiate the terms. In this, Mullen proposed to Ridgeway that if some of his other proposals would be met, then he would continue negotiations without the "true-up" price.

The Letters of Intent were eventually signed. One was signed by Scott, on behalf of Gulf Coast and Aladdin, and another by Waylon, on behalf of Trigger. This took place in Casper, where Scott initially thought the trip would be for the purpose of negotiating the sale price of the buyout. Scott had full intent to do this despite warnings from Waylon and Leroy Dickinson, who was associated with Trigger, that Kent had since been making threats to the parties if they did not accept the buyout. Waylon and Leroy believed Kent's threats from their beginning. Scott disregarded these warnings because he did not believe Kent's threats would be carried through. Scott changed his mind when Ridgeway told Mullen about Kent's "dynamite option." Because an attorney relayed the information, Scott began to believe the likelihood of Kent carrying through with this threat if the buyout did not happen on the base price.

Scott weighed his options with Mullen. Multiple options beyond choosing to sign the agreement were presented by Mullen, including (1) an outright refusal to sell the shares to Kent; (2) removal of Kent as Manager and trigger a buy-sell under Kent's Operations Manager Employment Agreement; (3) fire Kent and hire a replacement crew on Blueprint's site and then sue Kent; or (4) file suit against Kent alleging tortious interference. Mullen explained the consequences of each outcome to Scott, including the likelihood of success of a lawsuit, what jurisdiction the case would be brought in, and the general effect on the business depending on the option chosen. Mullen also gave Scott the ability to make an informed decision. He did not advise him to pick a certain option and stated he would follow whichever path Scott chose.

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[2] "The EBITDA/EV multiple is a financial valuation ratio that measures a company's return on investment (ROI)." Will Kenton, *EBITDA/EV Multiple: Definition, Example, and Role in Earnings*, INVESTOPEDIA (Mar. 29, 2022), https://www.investopedia.com/terms/e/ebitda-ev-multiple.asp.

Almost two months later, on July 30, 2019, Scott and Waylon agreed to the buyout. Scott ultimately determined that none of the additional options provided by Mullen were viable compared to the buyout. Scott was concerned with the potential reality of Kent carrying his threats out and how it would negatively impact the company. For example, Scott found that hiring a replacement crew would be difficult because he and Waylon had no connections or knowledge on who to look for or hire. He applied the same reasoning to the loss of customers, in that he and Waylon would have difficulty finding new clientele based on their lack of experience and knowledge in the field. Scott also found the prospect of suing Kent individually difficult considering his assertions of immunity after discussions with his own counsel. Additionally, Scott was concerned that if the company was "blown up," there would not be a plan for the millions of dollars in liabilities Blueprint had.

Evidencing this agreement on July 30, 2019, Scott and Waylon executed respective Membership Interest Purchase Agreements on behalf of Gulf Coast and Trigger. Waylon again agreed to sign on behalf of Trigger because he had agreed to follow the path of Scott and Gulf Coast. Waylon also signed the same document in respect to Trigger Energy, Inc. as a guarantor. On the same day, Scott signed an Officer's Certificate confirming his authorization to sign the Membership Interest Purchase Agreement on behalf of Gulf Coast. Waylon signed the same for Trigger. On the next day, Gulf Coast and Trigger executed a fourth and final document, the Funds Flow Memorandum.

Kent obtained funding for the buyout through the Jonah Bank of Wyoming and the Galles Group for a total amount of $5.5 million. He lined this up before signing a Letter of Intent, where he intended to purchase the remaining shares of Blueprint at $2.5 million. August 1, 2023, marked the day that Scott and Waylon received the buyout payment. The payment was $800,000 to each company for a total of $1.6 million. Aladdin received $3.2 million upon closing. Twenty days later, Plaintiffs brought the present lawsuit asserting that the agreement was executed due to, *inter alia*, Kent's purported economic duress.

ISSUES

The issues presented by the moving parties, Defendants and Third-Party Plaintiffs, are restated as follows:

(1) Whether Plaintiffs were victims of economic duress requiring reformation of the Purchase Agreement.

(2) Whether Section 2.03 of the Purchase Agreement bars Plaintiffs' remaining claims.

(3) Whether Defendants breached the Operating Agreement.

(4) Whether Kent breached a fiduciary duty as an officer and shareholder of Blueprint.

(5) Whether Defendants actions rise to the level of shareholder oppression.

(6) Whether Defendants were unjustly enriched from the Purchase Agreement.

(7) Whether Defendants Tortiously Interfered with the Business Relationship or Expectancy in Blueprint.

(8) Whether accounting, costs and fees, and injunctive relief may be declined as a matter of law.

DECISION

A motion for summary judgment must be granted:

> if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

SDCL 15-6-56.

When considering a motion for summary judgment, this Court must "view the evidence most favorably to the nonmoving party and resolve reasonable doubts against the moving party." *State by and through Dep't of Transp. v. Legacy Land Co.*, 2023 S.D. 58, ¶ 18, --- N.W.2d ---- (quoting *Yankton Cnty. v. McAllister*, 2022 S.D. 37, ¶ 15, 977 N.W.2d 327, 334). "The nonmoving party . . . must present specific facts showing that a genuine, material issue for trial exists." *Id.* (quoting *Sacred Heart Health Servs., Inc. v. Yankton Cnty.*, 2020 S.D. 64, ¶ 11, 951 N.W.2d 544, 588). "[T]he nonmoving party to a summary judgment motion may not sit idly by where the moving party has established a prima facie case for granting the motion." *Id.* (quoting *Kimball Inv. Land, Ltd. v. Chmela*, 2000 S.D. 6, ¶ 17 n.3, 604 N.W.2d 289, 294 n. 3).

Also, this Court must "credit the evidence offered by . . . the non-moving party, and any reasonable inferences it supports. To do so otherwise would require

[the Court] to weigh conflicting evidence – a practice which is, of course, categorically proscribed for courts considering motions for summary judgment." *Mullenson v. Markve*, 2022 S.D. 57, ¶ 39, 980 N.W.2d 662, 674.

> "[S]ummary judgment is not a substitute for trial; a belief that the non-moving party will not prevail at trial is not an appropriate basis for granting the motion on issues not shown to be a sham, frivolous or unsubstantiated . . . ." *Toben v. Jeske*, 2006 S.D. 57, ¶ 16, 718 N.W.2d 32, 37 (citation omitted). "We view all reasonable inferences drawn from the facts in the light most favorable to the non-moving party." *Luther v. City of Winner*, 2004 S.D. 1, ¶ 6, 674 N.W.2d 339, 343 (citation omitted).
>
> We require those resisting summary judgment to show that they will be able to place sufficient evidence in the record at trial to support findings on all the elements on which they have the burden of proof." *Foster-Naser v. Aurora Cnty.*, 2016 S.D. 6, ¶ 11, 874 N.W.2d 505, 508 (citation omitted). "A sufficient showing requires that '[t]he party challenging summary judgment . . . substantiate his allegations with sufficient probative evidence that would permit a finding in his favor on more than mere speculation, conjecture, or fantasy.'" *Nationwide Mut. Ins. Co. v. Barton Solvents Inc.*, 2014 S.D. 70, ¶ 10, 855 N.W.2d 145, 149 (citation omitted). "Mere speculation and general assertions, without some concrete evidence, are not enough to avoid summary judgment." *N. Star Mut. Ins. v. Korzan*, 2015 S.D. 97, ¶ 21, 873 N.W.2d 57, 63.

Godbe v. City of Rapid City, 2022 S.D. 1, ¶¶ 20-21, 969 N.W.2d 208, 213.

Defendants' Motion contemplates that all of Plaintiffs' claims fail as a matter of law. As an initial matter, this Court addresses the claim of economic duress.

1. Whether Plaintiffs Were Victims of Economic Duress Requiring Reformation of the Purchase Agreement.

Plaintiffs seek to reform the Purchase Agreement based on the doctrine of economic duress. "Reformation is a 'remedy in equity by means of which a written instrument is made or construed to express or conform to the real intention of the parties, when some error or mistake has been committed.'" *Sprang v. Altman*, 2009 S.D. 49, ¶ 9, 768 N.W.2d 507, 509 (quoting *Enchanted World Doll Museum v. Buskohl*, 398 N.W.2d 149, 152 (S.D. 1986)).

> When through fraud or mutual mistake of the parties, or a mistake of one party which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be

> revised on the application of a party aggrieved so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value.

SDCL 21-11-1.

In seeking reformation, Plaintiffs must "overcome the 'presumption [ ] that the writing accurately reflects the intent of the parties." *Sprang*, 2009 S.D. 49, ¶ 12, 768 N.W.2d at 511 (quoting *Enchanted World Doll Museum*, 398 N.W.2d at 152. Plaintiffs must also "prove their 'cause of action by clear, unequivocal and convincing evidence'" with the facts viewed most favorably to them. *Id.* (quoting *Northwestern Nat'l Bank of Sioux Falls v. Brandon*, 88 S.D. 453, 458-59, 221 N.W.2d 12, 15 (1974)).

The South Dakota Supreme Court adopted and applied the doctrine of economic duress in *Dunes Hospitality, LLC v. Country Kitchen International, Inc*:

> [t]he doctrine of economic duress applies only to special, unusual, or extraordinary situations in which unjustified coercion is used to induce a contract . . . under such circumstances that the victim has little choice but to accede.

2001 S.D. 36, ¶ 19, 623 N.W.2d 484, 489 (citing *Newburn v. Dobbs Mobile Bay Inc.*, 657 So.2d 849, 852 (Ala. 1995)).

The test that the Court adopted is a three-prong, elemental test requiring a showing of:

> (1) an involuntary acceptance of contract terms;
> (2) under circumstances which permitted no reasonable alternative; and
> (3) that the circumstances were the result of coercive, wrongful act.

Id. ¶ 19, 623 N.W.2d at 490 (citing *Oskey Gasoline & Oil Co., Inc., v. Continental Oil*, 524 F.2d 1281, 1286 (8th Cir. 1976)) (additional citations omitted).

> All negotiations inherently involve a certain amount of pressure and coercion. However, to satisfy the requirements of economic duress "that pressure must be wrongful and not all pressure is wrongful." A party's actions, rather than motive, govern the determination of wrongful and coercive. A defense of economic necessity cannot be maintained when a party's actions are lawful, or threats to carry out that which the law entitles them to do. Factors to be considered for economic duress include: the age and mental ability, financial condition, business

> expertise, absence of good faith, adequacy of consideration and the adequacy of a legal remedy of the party seeking relief.

Id. ¶ 23, 623 N.W.2d at 490 (quoting 25 Am.Jur.2d *Duress and Undue Influence* § 7 (1996)).

In *Dunes*, the plaintiff brought suit seeking to void a settlement agreement on a claim of economic duress. *Id.* ¶ 5, 623 N.W.2d at 487. The jury found economic duress, and the circuit court denied the plaintiff's motion for judgment notwithstanding the verdict. *Id.* ¶ 6, 623 N.W.2d at 487. The Supreme Court ultimately determined that there was insufficient evidence presented at the trial level to support a verdict of economic duress. *Id.* ¶ 31, 623 N.W.2d at 492. Thus, the Court found that it was error for the circuit court to deny the Defendant's motion for judgment notwithstanding the verdict. *Id.*

Outside of this jurisdiction, the Eighth Circuit Court of Appeals has applied *Dunes* and ruled on a similar situation to this case. In *Rasby v. Pullen*, the Eighth Circuit found that the plaintiff failed to make a sufficient showing of economic duress in selling her shares to another shareholder. 905 F.3d 1097, 1101 (8th Cir. 2018). The plaintiff had considered a buy-out offer substantially below the fair market value of her interests. *Id.* at 1100. She and her attorney discussed various options, including selling her interests to the other shareholder, selling to a third party, and suing the other shareholder for minority shareholder oppression. *Id.* The plaintiff ultimately decided to sell her shares, and her attorney then negotiated the Purchase Agreement with the other shareholder's attorney. *Id.*

In *Absolute Resolutions Investments, LLC v. Citibank, N.A.*, the Southern District of New York applied *Dunes* to an economic duress claim to a release agreement. 22 Civ. 2079 (VM), 2024 WL 325110 (S.D.N.Y. Jan. 29, 2024). The court was presented with a motion to dismiss for failure to state a claim under Fed. R. Civ. Pro. 12(b)(6). 2024 WL 325110, at * 1. The court found that the plaintiff failed to state a claim of economic duress in its amended complaint because the plaintiff failed to make a showing under all three *Dunes* factors. 2024 WL 325110, at * 11-12.

The Western Division of the Federal District Court of South Dakota has applied *Dunes*. *See Pochat v. State Farm Mutual Automobile Insurance Company*, 772 F.Supp.2d 1062, 1068 (W.D.S.D. 2011). In that case, the defendant moved for summary judgment on plaintiffs' claim for breach of their insurance contract, bad faith, and punitive damages. *Pochat*, 772 F.Supp.2d at 1063. The court granted the defendant's motion for summary judgment on the breach of insurance contract claim because it found that the plaintiff failed to establish a genuine dispute of material fact as to all three *Dunes* factors. *Id.* at 1068.

A. Whether Plaintiffs Involuntarily Accepted the Terms of the Purchase Agreement.

To make a showing on the first element, Plaintiffs must "go beyond the mere showing of a reluctance to accept and of financial embarrassment." *Dunes*, ¶ 20, 623 N.W.2d at 490 (quoting *Oskey*, 534 F.2d at 1286). The facts, viewed in light most favorable to the Plaintiffs, must demonstrate Defendants' acts produced economic duress. *Id.* Further, "it must be proven by evidence that the duress resulted from the defendant's wrongful and oppressive conduct and not by plaintiff's necessities." *Id.* (quoting *Oskey*, 534 F.2d at 1286). "The entering into a contract with reluctance or even dissatisfaction with its terms because of economic necessity does not, of itself, constitute economic duress invalidating the contract." *Id.* (quoting *Newburn*, 657 So.2d at 852).

The *Dunes* Court ultimately found that the agreement was entered into voluntarily. The plaintiff business "consisted of sophisticated members and investors, and was well represented by experienced, competent lawyers. [Its] decision to enter into this settlement agreement was the result of an informed and deliberate decision." *Id.* ¶ 32, 623 N.W.2d at 492.

Ruling that the plaintiff failed to establish any element of economic duress under Nebraska law in *Rasby v. Pullen*, the Eighth Circuit noted that the plaintiff failed to "provide evidence that [the buying shareholder's] actions destroyed her free agency to choose whether to enter into the Unit Purchase Agreement." 905 F.3d 1097, 1101 (8th Cir. 2018). The *Rasby* Court found significant that the plaintiff was "a sophisticated professional, represented by an experienced attorney, who considered other options before selling her interests to [the shareholder buying her out] in an agreement that included a broad mutual release of claims." *Id.*

As to this element in *Absolute Resolutions Investments, LLC*, the court found that the agreement was entered into voluntarily. 2024 WL 325110, at * 12. The court rejected the plaintiff's argument that "no party would willingly give up these rights without adequate consideration" and determined that it was a circular argument "that demonstrates only that Absolute sees the Release as unreasonable in hindsight." *Id.* The court also recognized that the Amended Complaint in the case showed that the plaintiff believed the release agreement was an admission and apology by the defendant and the plaintiff hoped that the defendant would resolve the issue. *Id.*

In this case, Plaintiffs were also dealing as experienced, successful businessmen. They were advised by Mullen, an experienced, competent attorney in the field of business transactions and business litigation. Mullen advised the parties of different avenues and the consequences of choosing them. Scott was

given the opportunity to contemplate these options. Waylon voluntarily agreed to follow Scott's decision-making. Scott had initially expressed his desire to Mullen to negotiate the "true-up" price. He was reluctant to accept the terms because he believed the "true-up" price was a more appropriate and fairer representation of Blueprint's value. In turn, Waylon was reluctant to accept the terms because he and Leroy believed Kent's threats from the outset. However, Gulf Coast and Trigger together were ultimately reluctant to accept the terms due to the inadequacy of the additional options provided to them by Mullen. Of these options, Scott expressed concern for financial embarrassment. He hypothesized financial ruin if Kent followed through with his threats to "blow up" the company. Scott noted that millions of dollars in liabilities would be difficult to manage. He also noted the difficulty in obtaining new customers or employees and the unlikelihood of success in suing Kent.

These facts viewed in light most favorable to Plaintiffs show that they accepted the terms of the agreement voluntarily and have thus failed to go beyond the mere showing of a reluctance to accept and of financial embarrassment. Plaintiffs were wholly aware of the nature of the negotiation and the terms. Through this, they knowingly, competently, and voluntarily weighed their options. A calculated choice was made to not pursue the other options provided by Mullen due to the avoidance of a less-favorable financial outcome. Choosing a less-favorable outcome purely on financial strategy is insufficient to rise to the level of involuntariness.

Because this Court reaches the conclusion that Plaintiffs voluntarily accepted the terms of the Purchase Agreement, the elemental test of economic duress fails. Even if the first element is met as a matter of law, the remaining two elements also fail.

B. Whether the Circumstances Permitted Plaintiffs with No Reasonable Alternative.

The second requirement is that the circumstances presented no reasonable alternative to the conduct Plaintiffs agreed to. *Dunes*, ¶ 21, 623 N.W.2d at 490 (citing *Oskey*, 534 F.2d at 1286). "In determining whether a reasonable alternative is available, we employ an objective test." *Id.* (quoting *Zeilinger v. SOHIO Alaska Petroleum Co.*, 823 P.2d 653, 658 (Ala. 1992)). "Therefore, 'the outcome depends on the circumstances of each case.'" *Id.* (quoting *Zeilinger*, 823 P.2d at 658). "The availability of a legal resolution is one such circumstance." *Id.* (citing *Oskey*, 534 F.2d at 1286).

Making its conclusion on this prong, the *Dunes* Court noted that the plaintiff had two options: (1) the option of terminating their affiliation with the defendant; or

(2) filing suit. *Id.* ¶ 32, 623 N.W.2d at 492. The Court also noted that these options were known to and discussed by the plaintiff, because "several of the members urged rejection of the settlement agreement and proposed terminating the management contract and bringing suit" against the defendant. *Id.* The plaintiff did exactly that – two months after making the agreement in question. *Id.* The *Dunes* Court ultimately found that these two options were not unreasonable alternatives. *Id.*

In *Pochat*, the Western Division of the District of South Dakota similarly noted that the plaintiff had another option available, which was declaring an impasse and initiating litigation. *Id.* at 1069. As in *Dunes*, the plaintiff in fact brought suit only after accepting a settlement check. *Id.* The *Pochat* Court concluded that the statements of material fact only permitted one objective finding, that these were reasonable alternatives available to the plaintiff. *Id.*

The *Absolute Resolutions Investments* Court also found that the second element was not satisfied. 2024 WL 325110, at * 12. The court concluded that the plaintiff failed to establish "why there would be no reasonable alternative to signing the Release." *Id.* It reasoned that there was "no suggestion that Absolute could not reasonably and profitably continue its operations in the absence of a commercial relationship with Citibank. Moreover, 'access to an available legal resolution' like litigation effectively precludes Absolute's argument in this respect." *Id.* (quoting *Pochat*, 772 F. Supp. 2d at 1066).

In accordance with this authority, this Court finds that Plaintiffs had reasonable alternatives to entering into the Purchase Agreements. Plaintiffs did not have "little choice but to accede[,]" but had four, reasonable choices other than to accede. *Dunes*, ¶ 19, 623 N.W.2d at 489 (citing *Newburn*, 657 So.2d at 852).

First, as mentioned above, Gulf Coast and Trigger were represented by two experienced, competent businessmen. Gulf Coast hired Mullen to assist with the negotiations and to close the deal. Trigger agreed to follow Gulf Coast's decision-making. Mullen presented Gulf Coast, and effectively Trigger, with four options: (1) an outright refusal to sell the shares to Kent; (2) removal of Kent as Manager and trigger a buy-sell under Kent's Operations Manager Employment Agreement [3] ; (3) fire Kent and hire a replacement crew on Blueprint's site and then sue Kent; or (4) file suit against Kent alleging tortious interference.

Option (1) presented Plaintiffs with a scenario of calling Kent's bluff and waiting for the result. This option may not have been reasonable considering the parties' intentions to close the deal and cut ties with each other. However, if

[3] Mullen testified that because Kent would likely oppose this route, that this option would result in litigation and an effort to enforce a non-compete clause. John Mullen Depo. 49:24-25, 50:1-11.

Plaintiffs would have pursued this avenue, and Kent followed through with his threats, Plaintiffs could have initiated actions that are discussed further below.

Option (2) presented the parties with a foreseeable and realistic outcome. Mullen specifically advised Gulf Coast that removing Kent as Operations Manager and triggering a buy-sell agreement would likely result in litigation. Mullen testified that he advised Gulf Coast that it was "possible" for a court, after the initiation of litigation, to find that the for cause termination was appropriate, and that the termination justified a buy-sell event. John Mullen Depo. 51:13-24. He finished by stating to Gulf Coast that a court could then compel Kent's sale of TCU Holdings' interest and enforce a non-compete agreement. [4] *Id.* 51-7-10. Mullen explained that it was possible that a court would rule in Gulf Coast's favor, but he also recognized in his testimony that he told Gulf Coast that there is no assurance that either side would be successful. *Id.* 51:25, 52:1-7. With this, Mullen thoroughly explained how option (2) could come to fruition. There is no indication that this avenue would be near impossible or so detrimental as to leave Plaintiffs with little choice but to accede. To Plaintiffs, this option left them with a reasonable, foreseeable, and realistic choice other than to accede. Yet, Gulf Coast informed Mullen that it planned "to close and later sue Kent." *Id.* 56:7-22.

In reference to the options to sue within options (3) and (4), Plaintiffs were reluctant to sue because Kent asserted that he was judgment proof. The availability to sue alone was sufficient in *Dunes*, *Pochat*, and *Absolute Resolution Investments*. None of these cases discussed the adequacy or likelihood of success of the legal claims. Classifying the ability to bring suit as a reasonable alternative carries the greatest weight when a plaintiff later sues for the claim they initially had. But this Court recognizes that several Counts in the Complaint were not ripe until after the Agreement was executed, namely economic duress, breach of operating agreement, and unjust enrichment/usurpation. However, even when the plaintiff in *Dunes* brought later-ripened claims after the execution of the settlement agreement, i.e., economic duress, the *Dunes* Court did not give this difference any weight. [5] It remains true that Plaintiffs had the options, provided by a competent attorney, to sue Defendants before the additional claims arose.

The inverse of the second element under *Dunes* only requires one reasonable alternative for the element to fail. Under *Dunes*, the option to cut ties with Kent and TCU Holdings and availability to sue them were reasonable alternatives to entering into the Purchase Agreement. Plaintiffs' argument as to the second element therefore fails because they had least two reasonable alternatives.

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[4] Moreover, Plaintiffs never argued in their pleadings that suing TCU Holdings was an unreasonable alternative, considering Kent was the agent of both companies.

[5] In *Dunes*, the original option for suit arose out of concerns of the management agreement with the defendant. 2001 S.D. 36, ¶ 2, 623 N.W.2d at 487. The plaintiff subsequently sued for economic duress in the execution of the settlement on the management agreement issue. *Id.*

Because it is found that Plaintiffs voluntarily accepted the terms of the Purchase Agreement and that there were reasonable alternatives, the elemental test of economic duress fails. Even if the first two elements of the economic duress doctrine are met as a matter of law, the remaining element fails.

C. Whether the Circumstances were the Result of Coercive and Wrongful Acts.

Finally, Plaintiffs must show that Defendants' conduct was coercive and wrongful, and that there was a causal link between the conduct and the circumstances creating economic duress. *Dunes*, ¶ 22, 623 N.W.2d at 490 (citing *Oskey*, 534 F.2d at 1286). Coercive and wrongful acts may include but are not limited to criminal or tortious conduct. *Id.* (citing *Oskey*, 534 F.2d at 1286). However, "[a] claim of economic duress cannot be based upon a claim that one has been the victim of a hard bargain." *Id.* (citing *Newburn*, 657 So.2d at 852). "The party asserting economic duress must establish they were the victim of unlawful or unconscionable pressure." *Id.* (citing *Newburn*, 657 So.2d at 852).

Plaintiffs distinguish *Dunes*, noting several differences in the facts that support their conclusion that Kent acted coercively and wrongfully. They note that in *Dunes*, there was no threat to take customers and employees, *Dunes* did not have a "blow up" form of threat, and *Dunes* did not have a fiduciary or officer making threats and the implications that stem from that.

By way of example, the *Pochat* Court found that the plaintiff failed to make a showing as to the third prong because the full insurance coverage limit was paid toward her medical expenses, and the insurance company promptly responded to her settlement demands and her claim was resolved in a timely manner. *Pochat*, 772 F.Supp.2d at 1068. Additionally, in *Absolute Resolutions Investments*, the Southern District of New York in applying *Dunes* found that the defendant's "mere implication that it would discontinue its business dealings with [the plaintiff] absent a limitation of liability is not plausibly unlawful or unconscionable, especially when [the plaintiff] is a sophisticated party experienced in high-value, complex commercial negotiations." 2024 WL 325110, at * 12. Finally, the *Rasby* Court found that the third element was not met, reasoning that:

> [i]t was neither unfair nor inequitable for [the defendant] to seek to purchase the interest of a minority shareholder who was no longer actively involved in the enterprise. He offered a substantial sum for shares that Rasby acquired without a cash investment, he disclosed the calculations his advisor used in valuing Rasby's interest, and he invited her to consult her own valuation expert. The valuation of small minority

> interests in six different entities is likely to lead to differences of opinion. For litigation purposes, Rasby makes the unlikely assertion that she was paid only twenty percent of her interests' fair value. Far more credible is the testimony of Wells, her attorney in the negotiations, that the ultimate price [the defendant] paid was not unconscionable.

905 F.3d at 1102.

In this case, this Court is unconvinced that Plaintiffs were subject to coercive and wrongful acts. The facts viewed most favorably to the Plaintiffs show only that they were victims of a hard bargain. Nothing in these facts demonstrate that Kent's actions were both coercive and wrongful.

Ultimately, Kent's threats were "to carry out that which the law entitles [him] to do." *Dunes*, ¶ 23, 623 N.W.2d at 490 (quoting 25 Am.Jur.2d *Duress and Undue Influence* § 7 (1996)). Kent had the right to leave his position as Operations Manager. He had the authority to initiate the selling of his companies' shares. Also, he had the authority to request a buy-out. Aside from Kent, his crew in turn had the right to leave their positions. The customers of Blueprint could have turned elsewhere for business, or possibly followed Kent. On the other hand, while Kent and his attorney characterized his potential actions in a negative light, the potential actions were nevertheless foreseeable and realistic to Plaintiffs. They had the authority to terminate his employment for cause and trigger a buy-sell agreement. Plaintiffs could similarly terminate the crew members' employment for cause. Plaintiffs contemplated a non-compete clause in the Operating Agreement. They also had the authority to request a buy-out. While the parties view the alternative avenues in different lights, the processes in which they occur do not change the outcomes.

This Court cannot find that foreseeable and realistic outcomes, framed as threats by the opposing party, are unreasonable merely because the opposing party is using those avenues as ammunition when negotiating. Kent's threats had character of coerciveness, considering the portrayal of his intentions and the gravity of the consequences associated with them. These threats, if they had come to fruition, would have produced additional hurdles or legal action in themselves, but Kent did not present the Plaintiffs with such an ultimatum that rose to the level of wrongfulness.

Plaintiffs' central argument is that the conduct was wrongful because of Kent's status as a fiduciary and that he framed his potential exit as all the above scenarios occurring at once. While it is true that he did so, Plaintiffs' own conduct in the negotiating process dilutes the strength of their claims. It is noteworthy that Plaintiffs nevertheless sought advice from counsel, weighed their options without any swaying of opinion by Mullen, and decided to acquiesce to Kent's price term if

other provisions were met. The facts present hallmarks of a traditional, "hardball" negotiating session. Plaintiffs fell victim to a hard bargain merely because they were reluctant to pursue their other options based on economic strategy.

Plaintiffs have thus failed to show that they were victims of economic duress as a matter of law. Consequently, they are bound to the Agreement and not entitled to reformation because the agreement was entered into voluntarily with a meeting of the minds. There is no genuine issue of material fact as to the claim of economic duress, and Defendants are entitled to a judgment – the enforcement of a valid purchase agreement – as a matter of law. SDCL 15-6-56.

2. Whether Section 2.03 of the Membership Purchase Agreements Bars Plaintiffs' Remaining Claims.

After finding that economic duress was not present as a matter of law, the Eighth Circuit in *Rasby* found that because the mutual release of the purchase agreement was not rendered by fraudulent inducement, it was enforceable and thus barred the plaintiff's additional claims of breach of fiduciary duty and deprivation of a corporate opportunity. 905 F.3d at 1102-1103. Here, the parties presented argument as to the indemnity and warranty provisions in the written agreements. Accepting *Rasby* as persuasive authority because *Dunes* was not presented with this step, this Court next considers whether these provisions released Defendants of liability as to bar Plaintiffs' remaining claims in the Complaint.

Section 2.03 of the Purchase Agreement provides:

> **Legal Proceedings.** There is no claim, action, suit, proceeding or governmental investigation ("**Action**") of any nature pending or, to Seller's knowledge, threatened against or by Seller (a) relating to or affecting the Membership Interests; or (b) that challenges or seeks to prevent, enjoin or otherwise delay the transactions contemplated by this Agreement. No event has occurred or circumstances exist that may give rise to, or serve as a basis for, any such Action.

The sentence at issue is the last sentence, which Plaintiffs argue is not sufficiently explicit or express enough to release Defendants from liability.

"Releases are contractual agreements." *Fenske Media Corp. v. Banta Corp.*, 2004 S.D. 23, ¶ 8, 676 N.W.2d 390 (citing *Parkhurst v. Burkel*, 1996 S.D. 19, ¶ 12, 544 N.W.2d 210, 212). Contract interpretation is a question of law. *Id.* (citing *Auto Owner Ins. Co. v. Enterprise Rent-A-Car Co.-Midwest*, 2003 S.D. 52, ¶ 7, 663 N.W.2d 208, 209-210). "It is well settled that in interpreting a contract, we rely on the language of the contract to ascertain the intent of the parties." *Carstensen*

Contracting, Inc. v. Mid–Dakota Rural Water Sys., Inc., 2002 S.D. 136, ¶ 8, 653 N.W.2d 875, 877. "Where possible, we must give meaning to all the provisions of a contract." *Id.* (citing *Carstensen Contracting, Inc.*, 2002 S.D. 136, ¶ 8, 653 N.W.2d at 877).

> The doctrine of waiver is applicable where one in possession of any right, whether conferred by law or by contract, and with full knowledge of the material facts, does or forbears the doing of something inconsistent with the exercise of the right. To support the defense of waiver, there must be a showing of a clear, unequivocal and decisive act or acts showing an intention to relinquish the existing right.

Action Mechanical, Inc. v. Deadwood Historic Preservation Com'n, 2002 S.D. 121, ¶ 18, 652 N.W.2d 742, 749 (quoting *Norwest Bank South Dakota v. Venners*, 440 N.W.2d 774, 775 (S.D. 1989)).

Both parties' arguments rely on the initial determination of economic duress. Plaintiffs argue that this clause, which would allow for a party's own wrongdoing, is void as a matter of public policy. Defendants argue that economic duress was not present, the Purchase Agreements are valid and enforceable, thus the release properly bars Plaintiffs' remaining claims.

Because this Court has previously found that the Purchase Agreements are valid and enforceable because no economic duress occurred, Section 2.03 on its face is not unfair or invalid. *See Flynn v. Lockhart*, 526 N.W.2d 743, 746 (S.D. 1995) (quoting *Johnson v. Rapid City Softball Ass'n*, 514 N.W.2d 693, 697 (S.D. 1994)) ("A release is not fairly made and is invalid if the nature of the instrument was misrepresented or there was other fraudulent or overreaching conduct.").

The plain language of Section 2.03 supports a waiver of Plaintiffs' right to sue. The Section recognizes the possession of a right to bring an "Action," which includes "suit" as an example. The last sentence of Section 2.03 contemplates the parties mutual understanding that no event or circumstance is present that "may give rise to, or serve as a basis for" suit. Mullen contemplated this release and advised Gulf Coast (and effectively Trigger) of it. John Mullen Depo. 37:6-24. This language clearly and unambiguously exhibits Plaintiffs' recognition and agreement that nothing was present at the time of formation that would give rise or serve as a basis to sue. This of course contemplates Plaintiffs' remaining claims, as they all are alleged to have occurred before or during formation of the Purchase Agreement. This recognition by Plaintiffs is an act contrary to the exercise of the right to bring suit. Because economic duress is not present, and there are no other claims regarding the invalidity of the contract, this Section serves to waive Plaintiffs' right to sue TCU Holdings and TCU, LLC.

Plaintiffs argue that Kent is not absolved from liability "without an express provision or express intent" within Section 2.03. *Jennings v. Rapid City Reg'l Hosp., Inc.*, 2011 S.D. 50, ¶ 12, 802 N.W.2d 918, 923. This Court's conclusion, however, is supported by the general notion that "[c]ompelling policy reasons support releases under the Uniform Contribution Among Joint Tortfeasors Act (SDCL 15–8–11 to 15–8–22):

> The defendant who originally procures the release gains nothing if the plaintiff can sue other joint or concurrent tortfeasors. In such a case, the original defendant is left open to claims for contribution and/or indemnity and may wind up having to litigate the case anyway.

Flynn, 526 N.W.2d at 746 (quoting *Douglas v. United States Tobacco Co.*, 670 F.2d 791, 794 (8th Cir. 1982)).

Plaintiffs have further failed to establish a basis for personal liability or established facts in genuine dispute that support piercing the corporate veil. They recognized in briefing that Kent did not execute the Purchase Agreements in his individual capacity. The South Dakota Supreme Court has adopted a six-factor test for determining when to pierce the corporate veil:

> There are six factors to consider when determining whether equity demands a disregard of the corporate entity: "(1) undercapitalization; (2) failure to observe corporate formalities; (3) absence of corporate records; (4) payment by the corporation of individual obligations; (5) fraudulent misrepresentation by corporate directors; and (6) use of the corporation to promote fraud, injustice or illegality.
>
> The six factors can be grouped into two separate prongs: the 'separate corporate identity' prong and the 'fraud or inequitable consequences' prong. If the four factors under the 'separate corporate identity' prong are present in sufficient number and/or degree, then this Court will consider the two factors under the 'fraud or inequitable consequences' prong.

Paul v. Bathurst, 2023 S.D. 56, ¶ 21, 997 N.W.2d 644, 652-53 (quoting *Brevet Int'l, Inc. v. Great Plains Luggage Co.*, 2000 S.D. 5, ¶ 26, 604 N.W.2d 268, 274).

Here, there are no facts viewed most favorably to the Plaintiffs that an equitable demand to disregard TCU Holdings as a corporate entity. Even if TCU Holdings were to be considered the alter ego of Kent, the Court's previous conclusion that the Purchase Agreements are valid and enforceable show that Kent did not use TCU Holdings to promote fraud, injustice, or illegality.

Thus, Plaintiffs have contractually agreed to not sue Kent, TCU, LLC, and TCU Holdings. Even if Section 2.03 does not waive Plaintiffs' right to sue, Plaintiffs' remaining claims nevertheless fail as a matter of law.

3. Whether Defendants Breached the Operating Agreement.

In this Count, Plaintiffs alleged that Defendants breached the original operating agreement of Blueprint because TCU Holdings did not allow Gulf Coast and Trigger their voluntary transfer of units either via a right of first refusal or a mandatory buy-sell process. Section 9.3 of the Operating Agreement allowed for "substitute members" to be brought into Blueprint "upon the terms and conditions set forth in Articles 14.3 and 14.5." Article 14.1 provided that "no Member may transfer all or any part of its . . . Interest . . . unless the Transfer is . . . Accomplished under the terms and conditions set forth in Article 14.2, 14.3, or 14.4[.]" The Agreement further outlines a process for "voluntary transfer of units" via a right of first refusal in Article 14.2; or a mandatory buy-sell process for certain events under 14.3.

As an initial determination, this Court has previously found that economic duress is not present. The Purchase Agreements are therefore valid and enforceable. Within this determination, the Court found that Plaintiffs voluntarily entered into the Agreement. The parties agreed that the sale was in compliance with the Operating Agreement. Membership Purchase Agreements, p. 3, Section 2.02. The Purchase Agreement clearly and unequivocally contemplates no breach of the Operating Agreement. Plaintiffs cannot supersede the terms of a valid contract purely praying for a more ideal outcome. Plaintiffs' claim thus fails as a matter of law.

Even if the contract was reformable or unenforceable due to duress, Plaintiffs ratified the Purchase Agreements which defeats their claim of breach of the Operating Agreement. "A contract is ratified when 'an act by which an otherwise voidable and, as a result, invalid contract is conformed, and thereby made valid and enforceable.'" *Ziegler Furniture and Funeral Home, Inc. v. Cicmanec*, 2006 S.D. 6, ¶ 31, 709 N.W.2d 350, 358 (quoting 17A CJS Contracts § 138 (1998)). "Ratification can either be 'express or implied by conduct.'" *Id.* (quoting *Bank of Hoven v. Rausch*, 382 N.W.2d 39, 41 (S.D.1986)). "In addition, failure of a party to disaffirm a contract over a period of time may, by itself, ripen into a ratification, especially if rescission will result in prejudice to the other party." *Id.* (quoting *First State Bank of Sinai v. Hyland*, 399 N.W.2d 894, 898 (S.D.1987)).

Plaintiffs ratified the Purchase Agreement by executing the agreement and accepting their respective payments of $800,000 and depositing the checks. This Court finds it "impossible to believe" that Plaintiffs accepted and deposited the

checks "without, in [their] own mind[s]," having mutually assented to the Purchase Agreements and manifested an intent to effectuate its terms. *See First State Bank of Sinai v. Hyland*, 399 N.W.2d 894, 898 (S.D. 1987). Aladdin, which received $3,280,150.94 as part of the transaction, continued to factor invoices until all debt obligations were paid off. Aladdin also released several liens and UCC filings in compliance with the Purchase Agreement. Aladdin, which is Scott's other company, acted on the exact concerns Scott possessed in arguing that Kent's threats would have subjected Aladdin to its debt obligations. In essence, Plaintiffs and Aladdin manifested a willingness to go on with the contract, and by virtue Gulf Coast and Trigger acquiesced to Aladdin continuing to effectuate Plaintiffs' concerns that arose out of negotiations of the contract. As a result, this claim fails as a matter of law.

4. Whether Kent Breached a Fiduciary Duty as an Officer and Shareholder of Blueprint.

The existence of a fiduciary duty and the scope of such duty are questions of law. *Mueller v. Cedar Shore Resort, Inc.*, 2002 S.D. 38, ¶ 11, 643 N.W.2d 56, 62 (citing *Landstrom v. Shaver*, 1997 S.D. 25, ¶ 84, 561 N.W.2d 1, 18). Whether there has been a breach of a fiduciary duty is a fact question determined by the circuit court at summary judgment. *Id.* (citing *Hayes v. N. Hills General Hosp.*, 1999 S.D. 28, ¶ 57, 590 N.W.2d 243, 253).

"Generally, corporation law states that, while directors owe a fiduciary duty to the corporation, shareholders do not owe a fiduciary duty to either the corporation or their fellow shareholders." *Mueller*, 2002 S.D. 38, ¶ 26, 643 N.W.2d at 66 (citing Robert W. Hamilton, *Business Organizations: Unincorporated Businesses and Closely Held Corporations* § 8.35 (1996)). "This standard is different, however, for close corporations. '[I]n almost every state, majority, dominant, or controlling shareholders, or a *group of shareholders acting together* to exercise effective control, are held to owe a fiduciary duty to minority shareholders.'" *Id.* (quoting *Hayes v. N. Hills General Hosp.*, 1999 S.D. 28, ¶ 52, 590 N.W.2d 243, 253). "This fiduciary duty is characterized by a high degree of diligence and due care, as well as the exercise of utmost good faith and fair dealing." *Id.* (citing *Landstrom*, 1997 S.D. 25, ¶ 84, 561 N.W.2d at 18; *Case v. Murdock*, 488 N.W.2d 885, 889–90 (S.D. 1992); *Mobridge Cmty. Indus., Inc. v. Toure, Ltd.*, 273 N.W.2d 128, 133 (S.D. 1978)).

"Hallmark behavior" of breaches of fiduciary duties "includes the failure to disclose information, director or shareholder self-dealing, making fraudulent misrepresentations regarding past or future events, and surreptitious conduct or communications." *Id.* ¶ 29, 643 N.W.2d at 67 (quoting *Hayes*, 1999 S.D. 28 at ¶ 57, 590 N.W.2d at 253) (additional citations omitted).

In this case, the facts viewed in light most favorable to Plaintiffs support a conclusion as a matter of law that Kent did not breach a fiduciary duty. Kent did not fail to disclose information. In fact, he was rather candid and open about his intentions with the future of the company. The facts further do not support a conclusion that Kent was self-dealing, because he was intending on and acting on obtaining outside funds to buy out Gulf Coast's and Trigger's shares. Kent also did not fraudulently misrepresent past or future events, again because he was candid and forthcoming throughout the negotiations. For the same reason, the facts do not show that Kent was acting surreptitiously.

The facts viewed in Plaintiffs' favor also do not support a breach of duty of loyalty because Kent's actions are inapplicable to the governing statute, SDCL 47-34A-409(b). In a similar vein, Count 6 of the Complaint asserts an usurpation of a business opportunity. The doctrine of corporate opportunity "holds that one who occupies a fiduciary relationship to a corporation may not acquire, in opposition to the corporation, property in which the corporation has an interest or tangible property." *Case v. Murdock*, 488 N.W.2d 885, 890 (S.D. 1992).

> If the doctrine of business opportunity is to possess any vitality, the corporation or association must be given the opportunity to decide, upon full disclosure of the pertinent facts, whether it wishes to enter into a business that is reasonably incident to its present or perspective operations. Since a director is under a duty to inform the corporation of the full circumstances of the transaction, mere disclosure of the transaction, without revealing the surrounding circumstances, is not sufficient, and it has been held that the failure to make complete disclosure constitutes constructive fraud, thereby tolling the statute of limitations.

Case, 488 N.W.2d at 890 (quoting 3 *Fletcher Cyc. of Corp.*, § 861.1 p. 288 (1986)).

An exception to this general rule is that "[a] fiduciary of the corporation is allowed to take a business opportunity once the corporation has properly rejected the opportunity or if it is not in a position to take it." *Id.* (quoting *Fletcher* at § 862). The South Dakota Supreme Court discussed limitations and conditions to this exception in *Case v. Murdock*, but those are not applicable to these facts.

Here, the facts viewed most favorably to Plaintiffs do not support a cause of action under the doctrine of corporate opportunity. Plaintiffs entered into this agreement voluntarily. The Purchase Agreements are valid and enforceable. Their claim that a corporate opportunity to have their shares bought at a market rate, Complaint, p. 12, ¶¶ 69-70, fails as a matter of law because they contracted for a different price. In other words, Plaintiffs were "given the opportunity to decide, upon full disclosure of the pertinent facts," what price they were to sell their shares.

Case, 488 N.W.2d at 890 (quoting *Fletcher* at § 861.1). There is also a strong argument that the doctrine does not apply to this case, considering the shareholders of Blueprint were contracting among themselves to restructure ownership. The parties were never considering an outside business opportunity. As an additional conclusion, Plaintiffs would therefore would not be entitled to punitive damages. *See Longwell v. Custom Benefit Programs Midwest, Inc.*, 2001 S.D. 60, ¶ 27, 627 N.W.2d 396, 400 (citing *Grynberg v. Citation Oil & Gas Corp.*, 1997 S.D. 121, ¶ 18, 573 N.W.2d 493, 500) ("Usurpation of corporate opportunity and conversion are independent torts for which South Dakota law allows punitive damages.").

Defendants have also not been alleged to have self-dealt, or otherwise competed with the company. Kent's conduct was not ripe and consisted only of prospective intentions. The Agreements certainly did not create self-dealing or competition with the company, as TCU Holdings was paying millions of dollars to obtain ownership of Blueprint. No competition was present because Kent did not act on his threats and TCU Holdings was a one-third owner of Blueprint.

As to a breach of a duty of care, "[a] member's duty of care to a member-managed company and its other members in the conduct of and winding up of the company's business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law." SDCL 47-34A-409(c); *Mach v. Connors*, 2022 S.D. 48, ¶ 26, 979 N.W.2d 161, 170 (discussing breach of the duty of care). Kent's conduct was not grossly negligent or reckless. He also did not commit intentional misconduct or a knowing violation of law. This is because he simply engaged in hard bargaining to execute the buyout. He was entitled to request a buy out, to initiate the sale of TCU Holdings' interest, and to leave his employment as Operations Manager. The employees were entitled to leave the company. The customers were entitled to seek business elsewhere. Plaintiffs voluntarily and knowingly agreed to the Purchase Agreements.

Finally, Kent exhibited a "high degree of diligence and due care, as well as the exercise of utmost good faith and fair dealing." *Mueller*, 2002 S.D. 38, ¶ 26, 643 N.W.2d at 66. As noted in the economic duress portion of this Decision, Kent's actions had a character of coerciveness, but his objective actions support the conclusion that he did not breach these duties. Both sides of the negotiation were represented by attorneys (or, in Trigger's case, voluntarily following Gulf Coast's decisions based off attorney assistance). The parties negotiated and contracted for the sale of Plaintiffs' shares, which produced valid and enforceable Purchase Agreements. The price was based on a quantitative, objective, and referenceable figure that Plaintiffs voluntarily assented to.

The resulting conclusion is that Kent cannot be found, as a matter of law, to have breached a fiduciary duty as an officer or shareholder of Blueprint.

5. Whether TCU Holdings' Actions Rise to the Level of Shareholder Oppression.

Determining whether conduct arises to shareholder oppression is a question of law. *Mueller*, 2002 S.D. 38, ¶ 14, n. 2, 643 N.W.2d at 62, n. 2 (citing *Landstrom*, 1997 S.D. 25, ¶ 37, 561 N.W.2d at 7). The South Dakota Supreme Court has analyzed shareholder oppression "by considering oppressive actions to refer to conduct that substantially defeats the 'reasonable expectations' held by minority shareholders in committing their capital to the particular enterprise." *Mueller*, 2002 S.D. 38, ¶ 13, 643 N.W.2d at 62 (quoting *Landstrom*, 1997 S.D. 25, ¶ 38, 561 N.W.2d at 8).

If this Court determines that the minority shareholders' expectations are reasonable:

> A court considering a petition alleging oppressive conduct must investigate what the majority shareholders knew, or should have known, to be the petitioner's expectations in entering the particular enterprise. Majority conduct should not be deemed oppressive simply because the petitioner's subjective hopes and desires in joining the venture are not fulfilled. Disappointment alone should not necessarily be equated with oppression.

Id. (quoting *Landstrom*, 1997 S.D. 25, ¶ 38, 561 N.W.2d at 8).

"Reasonable expectations are to be analyzed in light of the entire history of the parties' relationship, and include expectations such as participation in management of corporate affairs." *Id.* ¶ 14, 643 N.W.2d at 62 (quoting *Longwell v. Custom Benefit Programs Midwest, Inc.*, 2001 S.D. 60, ¶ 19, 627 N.W.2d 396, 399). "The determination of whether a stockholder's expectations are reasonable, however, must include a balancing test. The court weighs the minority shareholder's expectations against the 'corporation's ability to exercise its business judgment and run its business efficiently.'" *Id.* (quoting *Longwell*, 2001 S.D. 60, ¶ 19, 627 N.W.2d at 399). "There is a presumption that directors will make decisions 'on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company.'" *Id.* (quoting *Whalen v. Connelly*, 593 N.W.2d 147, 154 (Iowa 1999)). "Even in the context of a close corporation, where the directors may have substantial personal interests, courts are loathe to second guess the business decisions of the directors." *Id.* (quoting Robert W. Hamilton, *Business Organizations: Unincorporated Businesses and Closely Held Corporations* § 9.41 (1996)). "Oppression will only arise where the minority shareholder's expectations were 'both reasonable under the circumstances *and* were

central to the decision to join the venture.'" *Id.* (quoting *Longwell*, 2001 S.D. 60, ¶ 19, 627 N.W.2d at 399).

The facts viewed most favorably to Plaintiffs do not support a legal conclusion of shareholder oppression. TCU Holdings was a minority shareholder and Plaintiffs acting in tandem were majority shareholders. The parties mutually agreed to part ways. The parties entered into the agreement voluntarily. Because no economic duress was present, the Purchase Agreements are valid and enforceable. The only relevant expectation that Gulf Coast and Trigger would have had is the "true-up" price. Kent was aware of this expectation but held firm, invoking his negotiating tactics. Gulf Coast and Trigger weighed their options and voluntarily agreed to Kent's price term if other provisions were met. Plaintiffs were merely disappointed in the outcome of the Agreements. Defendants' conduct did not defeat any reasonable expectations that Gulf Coast and Trigger may have had.

6. Whether Defendants were Unjustly Enriched from the Purchase Agreement.

"Unjust enrichment contemplates an involuntary or nonconsensual transfer, unjustly enriching one party. The equitable remedy of restitution is imposed because the transfer lacks an adequate legal basis." *Johnson v. Larson*, 2010 S.D. 20, ¶ 8, 779 N.W.2d 412, 416. "When there is a valid and enforceable contract, however, liability for compensation or other resolution of the breach is fixed exclusively by the contract." *Id.* ¶ 9, 779 N.W.2d at 416 (citations omitted). "[T]he equitable remedy of unjust enrichment is unwarranted when the rights of the parties are controlled by an express contract." *Id.* ¶ 8, 779 N.W.2d at 416 (citing *Burch v. Bricker*, 2006 S.D. 101, ¶ 18, 724 N.W.2d 604, 609–10). Thus, the "initial question . . . is 'whether, as a matter of law, [a party can] seek the equitable remedy of unjust enrichment when [there is] available to them an adequate remedy at law' for the same alleged wrongdoing." *Mach v. Connors*, 2022 S.D. 48, ¶ 35 n. 5, 979 N.W.2d at 172 n. 5 (alterations original) (quoting *Paweltzki v. Paweltzki*, 2021 S.D. 52, ¶ 40, 964 N.W.2d 756, 769).

This Court has found that economic duress is not present, and the Purchase Agreements are valid and enforceable. It has also found that the parties have entered into the Purchase Agreements voluntarily. There is no wrongdoing. Further, Section 2.03 explicitly limits liability. The language of the Purchase Agreements is operative. The equitable remedy of unjust enrichment does not apply. This Count in the Complaint fails as a matter of law.

7. Whether Defendants Tortiously Interfered with the Business Relationship or Expectancy in Blueprint.

"In general, the tort of intentional interference with contractual relations serves as a remedy for contracting parties against interference from outside intermeddlers." *Gruhlke v. Sioux Empire Federal Credit Union, Inc.*, 2008 S.D. 89, ¶ 7, 756 N.W.2d 399, 404. "To prevail on a claim of tortious interference, 'there must be a 'triangle'—a plaintiff, an identifiable third party who wished to deal with the plaintiff, and the defendant who interfered with' the contractual relations." *Id.* (quoting *Mueller*, 2002 S.D. 38, ¶ 38, 643 N.W.2d at 58). "South Dakota has long recognized this tort." *Id.* (citing *Lien v. Nw. Eng'g Co.*, 73 S.D. 84, 88, 39 N.W.2d 483, 485 (1949)). "Without the protection of the third-party element of the tort, virtually every supervisory decision affecting employment status would be subject to judicial challenge through the Trojan horse of the intentional interference tort." *Id.* ¶ 13, 756 N.W.2d at 406 (quoting John Alan Doran, *It Takes Three to Tango: Arizona's Intentional Interference with Contract Tort and Individual Supervisor Liability in the Employment Setting*, 35 ArizStLJ 477, 508 (Summer 2003)).

"A corporate entity cannot contractually interfere with itself." *Id.* "[W]hen an employee is acting within the scope of the employee's employment, and the employer, as a result, breaches a contract with another party, that employee is not a third party for the tort of intentional interference with economic relations." *Id.* ¶ 13, 756 N.W.2d 406-07 (quoting *McGanty v. Staudenraus*, 321 Or. 532, 901 P.2d 841, 846 (1995). "[A] corporate director cannot be held personally liable under this cause of action for conduct taken under a contract entered into by the corporation because the director can only act in the director's official capacity on behalf of the corporation." *Landstrom*, 1997 S.D. 25, ¶ 76, 561 N.W.2d at 16 (citing *Nelson v. WEB Water Development Ass'n, Inc.*, 507 N.W.2d 691 (S.D. 1993)). "[T]o hold otherwise would make the director liable for interfering with a business expectancy between a plaintiff and a director with no identifiable third party." *Id.* (citing *Nelson*, 507 N.W.2d at 700).

The element that is missing in this case is an identifiable third-party. Kent was the Operations Manager in his employee capacity. Kent negotiated the buyout as an agent of TCU Holdings. Kent cannot be an identifiable third party because he was not wishing to deal with Plaintiffs in his individual capacity, and TCU Holdings would not have interfered with that hypothetical wish. TCU Holdings was a one-third shareholder in the company. It cannot be both the third party and the defendant. Blueprint cannot have intermeddled with itself and tortiously interfered with its own ownership interests in a restructuring of its ownership. *See* Complaint, p. 10, ¶¶ 52-55. This claim fails as a matter of law.

8. Whether accounting, costs and fees, and injunctive relief may be declined as a matter of law.

As a final matter, Counts 7-9 of the Complaint, listed as Accounting, Costs and Attorneys' Fees, and Injunctive Relief, are all rendered moot for the foregoing reasons.

CONCLUSION

Defendants' Motion for Summary Judgment is granted because none of the elements of economic duress are met as a matter of law. Because economic duress was not present, the Purchase Agreements are valid, operative, and enforceable contracts. Within the Purchase Agreements, they both obtain releases of liability, which bars Plaintiffs' remaining claims. Even if the releases of liability do not bar Plaintiffs' claims, the claims nevertheless fail as a matter of law.

ORDER

Based upon the foregoing Memorandum Decision, IT IS HEREBY ORDERED that Defendants' and Third-Party Plaintiffs' (Second) Motion for Summary Judgment is GRANTED in full. This Order specifically incorporates the Court's Memorandum Decision into this Order.

Dated this 7th day of June, 2024.

BY THE COURT:

Douglas P. Barnett
Circuit Court Judge

ATTEST:
ANGELIA M. GRIES,
Clerk of Courts

BY _____
Deputy (Seal)

FILED
JUN 07 2024
Minnehaha County, S.D.
Clerk Circuit Court

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS	
COUNTY OF MINNEHAHA	)	SECOND JUDICIAL CIRCUIT
TRIGGER ENERGY HOLDINGS, LLC, a Wyoming Limited Liability Company, & GULF COAST INVESTMENTS, LLC, a South Dakota limited liability company, Plaintiffs, vs. KENT STEVENS, as an individual, an officer, and agent; TCU, LLC, a Wyoming Limited liability company; TCU HOLDINGS, LLC, a Wyoming limited liability company; and BLUEPRINT ENERGY PARTNERS, LLC, a South Dakota limited liability company, Defendants and Third-Party Plaintiffs. v. TRIGGER ENERGY, INC., a Wyoming corporation, & ALADDIN CAPITAL INC., a South Dakota Corporation. Third-Party Defendants.	)	49CIV19-002287 **DEFENDANTS AND THIRD-PARTY PLAINTIFFS' SECOND STATEMENT OF UNDISPUTED MATERIAL FACTS**

Defendants and Third-Party Plaintiffs, by and through their undersigned attorney of record, pursuant to the provisions of SDCL 15-6-56(c), submit this

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short and concise statement of the material facts as to which they contend there is no genuine issue to be tried.

1. Blueprint Energy Partners, LLC ("Blueprint") was formed in 2017 with Trigger Energy Holdings, LLC ("Trigger"), Gulf Coast Investments, LLC ("Gulf Coast"), and TCU, LLC ("TCU") with each holding 1/3 membership share. (*See* Defendants and Third-Party Plaintiffs' Answer, at ¶ 4.)

2. Aladdin Capital, Inc., through Scott Keogh, was appointed the Manager of Blueprint. (Scott Keogh Depo. 21:22-22:3, November 28, 2023.)

3. On December 13, 2017, Kent Stevens, was named the Operations Manager pursuant to an Operations Manager's Employment Agreement. (*Id.* at 71:12-72:5).

4. Gulf Coast admits that Scott Keogh, Vice President and 49.9% shareholder of Gulf Coast, was 48-years-old at the time of the transaction, a sophisticated investor and businessman, and was mentally competent during the duration of 2019. (*Id.* at 13:18-21, 113:25-114:8, Gulf Coast's Responses to Request for Admissions, ¶¶ 19-23.)

5. Scott Keogh is also the Vice President and 49.9% shareholder of Third-Party Defendant, Aladdin Capital, Inc. (*Id.* at 9:19-23).

6. Waylon Geuke, President of Trigger, is a 54-year-old, sophisticated investor and businessman that was mentally competent during the duration of 2019. (Trigger's Responses to Request for Admissions, ¶¶ 19-23)

7. Waylon Geuke is also an officer and director of Third-Party Defendant, Trigger Energy, Inc. (Exhibit 3 to Defendants and Third-Party

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Plaintiffs' Answer, Counterclaim, and Third-Party Complaint, hereinafter "Defendants' Answer" at p. 16).

8. In the beginning, Blueprint failed to meet financial projections with respect to revenue and debt payments which created a bone of contention. (*Id.* at 26:14-27:7).

9. Scott Keogh demanded accountability and was frustrated with the inability of Blueprint to meet its debt obligations owed to Aladdin Capital, Inc. (*Id.* at 37:23-5, 39:12-40:7).

10. The partners held monthly meetings in Casper, Wyoming or Sioux Falls, South Dakota to address issues. (*Id.* at 30:4-13.)

11. These meetings became a point of contention and as early as August of 2018, Kent Stevens, on behalf of TCU, expressed his desire to buy out Trigger's and Gulf Coast's shares in Blueprint. (*Id.* at 36:5-9.)

12. By February of 2019, the parties began having serious discussions about a buyout. (*Id.* at 36:9-10.)

13. Gulf Coast hired attorney John Mullen to represent it in regards to the sale of its interests in Blueprint. (Gulf Coast's Responses to Request for Admissions, at ¶ 11).

14. For over thirty years, Mr. Mullen's legal practice has focused on business transactions and business litigation. (John Mullen Depo. 6:8-15, Aug. 26, 2022).

15. Gulf Coast admits that attorney John Mullen is a partner with Boyce Law Firm, LLP in Sioux Falls, South Dakota and is a competent attorney. (Gulf Coast's Responses to Request for Admissions, at ¶¶ 12-13).

16. Trigger reported, through attorney John Mullen, that it would sign the same type of agreement that Gulf Coast was willing to sign. (Scott Keogh Depo. 69:23-70:3).

17. Therefore, Gulf Coast took the lead and discussed its options with its attorney John Mullen regarding the terms of a buyout of Trigger's and Gulf Coast's shares in Blueprint. (*See id*).

18. Attorney Mullen communicated directly with the attorney for TCU, to negotiate the terms of the buyout agreement. (*See* John Mullen Depo. 16:1-17:12.)

19. Attorney Mullen testified that he attempted to negotiate a "true-up" adjustment on the price to account for the performance of the company between the time of the initial deal and the closing. (*Id.* at 15:17-16:19).

20. When TCU, through its attorney, would not agree to the "true-up," Attorney Mullen testified that he then "continued to negotiate the deal on the – based on those terms." (*Id.* at 19:9-10).

21. Attorney Mullen testified that he and his client then "attempted to put the best deal together we could being told there would be no such adjustments." (*Id.* at 19:11-13).

22. By June 6, 2019, Attorney Mullen exchanged edited drafts of a Letter of Intent, spoke by telephone twice, and exchanged multiple emails

negotiating the terms of the purchase with counsel for TCU. (*Id.* at 19:14-20:4).

23. Attorney Mullen further testified that in his negotiations, he offered to proceed to closing without a "true up" if some of his proposals would be implemented. (*Id.* at 27:7-22).

24. Attorney Mullen testified, "you know how it works, give and take... If you give us the crap we want, we'll walk away from the price adjustment." (*Id.* at 24:6-8).

25. Scott Keough, on behalf of Gulf Coast and Aladdin Capital, Inc., signed the Letter of Intent. (Scott Keogh Depo. 86:14-23, Exhibit 1 to Defendants' Answer at p. 8).

26. Waylon Geuke, on behalf of Trigger, also signed the same Letter of Intent. (*Id.*)

27. Fifty days later, on July 30, 2019, Gulf Coast executed a Membership Interest Purchase Agreement. (Scott Keogh Depo. 106:11-22, Exhibit 2 to Defendants' Answer at p. 16).

28. Scott Keough, also signed the Membership Interest Purchase Agreement as a guarantor on behalf of Aladdin Capital, Inc. (*Id.*)

29. Based on the continued representation that Trigger would sign anything Gulf Coast would sign, Waylon Geuke, on behalf of Trigger, also signed a similar Membership Interest Purchase Agreement that was edited by attorney John Mullen to effectuate the sale of Trigger's interests. (*Id.* at 86:17-23, Exhibit 3 to Defendants' Answer at p. 16).

30. Waylon Geuke also signed the Membership Interest Purchase Agreement as a guarantor on behalf of Trigger Energy, Inc. (*See id. at* 106:23-107:6, Exhibit 3 to Defendants' Answer at p. 16).

31. On the same day, Scott Keough, on behalf of Gulf Coast signed an Officer's Certificate confirming his authorization to sign the Membership Interest Purchase Agreement on behalf of Gulf Coast. (*Id.* at 109:11-110:16, Exhibit 4 to Defendants' Answer at p. 16).

32. Again, Waylon Geuke, on behalf of Trigger, also signed a similar Officer's Certificate. (Exhibit 5 to Defendants' Answer at p. 16).

33. The following day, on July 31, 2019, Gulf Coast and Trigger signed a fourth and final document to finalize the sale of their interest — the Funds Flow Memorandum. (*Id.* at 110:17-111:3, Exhibit 6 to Defendants' Answer).

34. On August 20, 2019, twenty days after receiving $1.6 million for their shares in Blueprint, Mr. Keogh and Mr. Geuke, on behalf of their companies, filed this lawsuit claiming that they signed the four separate documents, which occurred over several months and upon advice of counsel, because of economic duress. (*Id.* at 104:7-105:17, *see* Complaint).

35. The entire basis of Gulf Coast and Trigger's claim of economic duress rests on an allegation that TCU, through Stevens, threatened to blow up Blueprint unless Gulf Coast and Trigger agreed to sell their shares for $800,000." (*See* Complaint, at ¶ 21.)

36. Scott Keogh and John Mullen inferred that blowing the company up would mean that Kent Stevens would quit the company, take his crew, and all the customers. (Keogh Depo. 124:17-24, Mullen Depo. 29:6-30:2)

37. Attorney Mullen testified that one option he presented was that Gulf Coast could have simply refused to sell its interests to Stevens. (John Mullen Depo. at ¶ 31:5-20).

38. Scott Keogh admitted his attorney informed him of this option that Gulf Coast could have simply refused to sell its interests to Stevens. (Keogh Depo. 97:24-98:2).

39. Attorney Mullen also advised his client that it could terminate Stevens as the operations manager which would trigger a mandatory buy-sell under the operating agreement. (Mullen Depo. at ¶ 32:8-17).

40. Scott Keogh admitted his attorney informed him of this option to terminate Stevens as the operations manager which would trigger a mandatory buy-sell under the operating agreement. (Keogh Depo. 98:24-99:12).

41. Attorney Mullen also advised his client that it could hire a crew to come in and replace Stevens and then sue Stevens. (Mullen Depo. at ¶ 33:13-17).

42. Scott Keogh admitted his attorney informed him of this option to hire a crew to come in and replace Stevens and then sue Stevens. (Keogh Depo. 99:20-23).

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43. Attorney Mullen also advised his client that a suit could possibly be made for tortious interference against Stevens. (Mullen Depo. at ¶ 39:21-40:12).

44. In summary, attorney Mullen testified:

> Q: So you provide multiple options to your clients, they ultimately elect the latter to close and sue Stevens and TCU; right?
>
> A: I did advise Gulf Coast of available options other than the option that was chosen. My client, I believe, internally evaluated that and then did make an informed decision, informed me of their decision, and I relayed that -- no, I did not. I was about ready to say I relayed that to Kyle Ridgeway. I did not.
>
> * * *
>
> Q: Let me shift the focus, then. What did you advise your clients to do, then, after providing them the multiple options that you discussed earlier?
>
> A: I advised them they needed to make their decision and then I would follow the instructions. And they're just -- and I followed their instructions once I received that, and my instructions were to negotiate the deal and close it. And that's what I did.

(*Id.* at ¶ 34:1-10, 38:21-39:5).

45. Attorney Mullen even discussed with Gulf Coast the pros and cons of all the options – including which jurisdiction and law would control, the likelihood of success in court, and the ability to prevent the loss of customers. (*Id.* at ¶ 49:17-52:7).

46. However, Keogh ultimately did not pursue any of these options because of economic necessity. In fact, during his deposition, Scott Keogh testified regarding why none of the other options were viable:

> I mean, there were options given to us as to how to handle this. None were viable except for one, and that was closing the transaction. Our concern was solely based on how are we going to live with -- we had no idea what the loss would be if Kent took his crew, took himself, and all of the customers, we had no idea how to calculate it. I mean, what am I going to do with workover rig pipe? I mean, what's it worth? Not much. That was the focus.

(Keogh Depo. 71:2-11).

47. Instead, Gulf Coast and Trigger accepted $800,000 each and Scott Keogh's other company, Aladdin, received $3.2 million dollars upon closing. (Keogh Depo. 111:10-23).

Dated this 11th day of December, 2023.

BEARDSLEY, JENSEN & LEE,
Prof. L.L.C.
By: /s/Matthew J. McIntosh
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Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of December, 2023, I served copies of **DEFENDANTS AND THIRD-PARTY PLAINTIFFS' SECOND STATEMENT OF UNDISPUTED MATERIAL FACTS** upon the following persons by the following means:

Daniel Brendtro	[ ]	First Class Mail
Hovland, Rasmus, Brendtro & Tryznka	[ ]	Hand Delivery
P.O. Box 2583	[X]	Odyssey System
Sioux Falls, SD 57101	[X]	Electronic Mail

/s/ Matthew J. McIntosh
Matthew J. McIntosh

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STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
::§§§
COUNTY OF MINNEHAHA) SECOND JUDICIAL CIRCUIT

TRIGGER ENERGY HOLDINGS, LLC, & GULF COAST INVESTMENTS, LLC, PLAINTIFFS, V. KENT STEVENS, as an individual, an officer, and agent; TCU, LLC; TCU HOLDINGS, LLC, & BLUEPRINT ENERGY PARTNERS, LLC, DEFENDANTS AND THIRD-PARTY PLAINTIFFS, V. TRIGGER ENERGY, INC., & ALADDIN CAPITAL INC., THIRD-PARTY DEFENDANTS.	49CIV19-002287 **RESPONSES TO DEFENDANTS SECOND STATEMENT OF UNDISPUTED MATERIAL FACTS**

Plaintiffs offer the following responses to the statement of material facts presented by Defendants. What follows here is: (1) a general response; (2) specific responses to Defendants' numbered paragraphs; and (4) additional material facts necessary for evaluating this motion.

1. GENERAL RESPONSE

Mr. Stevens provides a narrow snapshot of this lawsuit. He identifies a series of facts which are largely undisputed on their face, but which fail to tell the complete story. Thus, Mr. Stevens is directing the Court's attention away from the complex set of circumstances present here. We attempt to offer more detailed in Section 2, below,

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while responding to Defendants's facts; and in Section 3; and, we offer a series of additional facts.

2. PLAINTIFF'S SPECIFIC RESPONSE TO NUMBERED PARAGRAPHS IN MR. STEVENS' "UNDISPUTED FACTS"

Pursuant to Rule 56(c)(2), a party opposing summary judgment must also "respond to each numbered paragraph in the moving party's statement with a separately numbered response and appropriate citations to the Record." SDCL 15-6-56(c)(2). The Plaintiffs' numbered responses are as follows (**in bold-face type.**)

1. Blueprint Energy Partners, LLC ("Blueprint") was formed in 2017 with Trigger Energy Holdings, LLC ("Trigger"), Gulf Coast Investments, LLC ("Gulf Coast"), and TCU, LLC ("TCU") with each holding 1/3 membership share. (*See* Defendants and Third-Party Plaintiffs' Answer, at ¶ 4.)

Undisputed.

2. Aladdin Capital, Inc., through Scott Keogh, was appointed the Manager of Blueprint. (Scott Keogh Depo. 21:22-22:3, November 28, 2023.)

Undisputed.

3. On December 13, 2017, Kent Stevens, was named the Operations Manager pursuant to an Operations Manager's Employment Agreement. (*Id.* at 71:12-72:5).

Undisputed.

4. Gulf Coast admits that Scott Keogh, Vice President and 49.9% shareholder of Gulf Coast, was 48-years-old at the time of the transaction, a

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sophisticated investor and businessman, and was mentally competent during the duration of 2019. (*Id.* at 13:18-21, 113:25-114:8, Gulf Coast's Responses to Request for Admissions, ¶¶ 19-23.)

Undisputed.

5. Scott Keogh is also the Vice President and 49.9% shareholder of Third-Party Defendant, Aladdin Capital, Inc. (*Id.* at 9:19-23).

Undisputed.

6. Waylon Geuke, President of Trigger, is a 54-year-old, sophisticated investor and businessman that was mentally competent during the duration of 2019. (Trigger's Responses to Request for Admissions, ¶¶ 19-23).

Undisputed.

7. Waylon Geuke is also an officer and director of Third-Party Defendant, Trigger Energy, Inc. (Exhibit 3 to Defendants and Third-Party Plaintiffs' Answer, Counterclaim, and Third-Party Complaint, hereinafter "Defendants' Answer" at p. 16).

Undisputed.

8. In the beginning, Blueprint failed to meet financial projections with respect to revenue and debt payments which created a bone of contention. (*Id.* at 26:14-27:7).

Disputed, in part. Here, and in several other 'undisputed facts,' the Defendants do not quote the testimony, and, instead mischaracterize it in a light more favorable to Defendants. In this passage, Keogh specifically stated

"everything was delayed" and did not use the term "failed", with respect to projections. The phrase "bone of contention" is similarly the Defendants' characterization and not used in this testimony. The company, in fact, had turned a corner and was undisputedly profitable prior to the time that a buyout discussion began.

9. Scott Keogh demanded accountability and was frustrated with the inability of Blueprint to meet its debt obligations owed to Aladdin Capital, Inc. (*Id.* at 37:23-5, 39:12-40:7).

Disputed. This is a mischaracterization of his testimony. Keogh does not use the term "frustrated" with respect to debt obligations in his testimony.

10. The partners held monthly meetings in Casper, Wyoming or Sioux Falls, South Dakota to address issues. (*Id.* at 30:4-13.

Undisputed, although in-person meetings did not occur each month.

11. These meetings became a point of contention and as early as August of 2018, Kent Stevens, on behalf of TCU, expressed his desire to buy out Trigger's and Gulf Coast's shares in Blueprint. (*Id.* at 36:5-9.)

Disputed. There is no support in this testimony for the claim that the "meetings" themselves became a point of contention. Undisputed that Stevens proposed a buyout at some point in time.

12. By February of 2019, the parties began having serious discussions about a

buyout. (*Id.* at 36:9-10.

Undisputed.

13. Gulf Coast hired attorney John Mullen to represent it in regards to the sale of its interests in Blueprint. (Gulf Coast's Responses to Request for Admissions, at ¶ 11).

Undisputed. However, Mullen was not hired for at least three months after the "serious" discussions about a sale first began. The jump here (from Undisputed Fact ¶ 12 to ¶ 13) skips over several months of the timeline during which Mr. Stevens began his campaign of duress and wrongful conduct.

14. For over thirty years, Mr. Mullen's legal practice has focused on business transactions and business litigation. (John Mullen Depo. 6:8-15, Aug. 26, 2022).

Undisputed.

15. Gulf Coast admits that attorney John Mullen is a partner with Boyce Law Firm, LLP in Sioux Falls, South Dakota and is a competent attorney. (Gulf Coast's Responses to Request for Admissions, at ¶¶ 12-13).

Undisputed.

16. Trigger reported, through attorney John Mullen, that it would sign the same type of agreement that Gulf Coast was willing to sign. (Scott Keogh Depo. 69:23-70:3).

Undisputed.

17. Therefore, Gulf Coast took the lead and discussed its options with its attorney John Mullen regarding the terms of a buyout of Trigger's and Gulf Coast's

shares in Blueprint. (*See id*).

Undisputed.

18. Attorney Mullen communicated directly with the attorney for TCU, to negotiate the terms of the buyout agreement. (*See* John Mullen Depo. 16:1- 17:12.)

Undisputed.

19. Attorney Mullen testified that he attempted to negotiate a "true-up" adjustment on the price to account for the performance of the company between the time of the initial deal and the closing. (*Id.* at 15:17-16:19).

Undisputed.

20. When TCU, through its attorney, would not agree to the "true-up," Attorney Mullen testified that he then "continued to negotiate the deal on the - based on those terms." (*Id.* at 19:9-10).

Undisputed, in part, but this overlooks/ignores that there were two components to the sale price: the base price, and the true-up. The base price was intended to represent the business value at the time of the initial agreement; the true-up would then adjust the base price to reflect economic changes to the business between the time the base price was established, and, the date of the closing.

***See,* John Mullen Deposition, Pages 15-16, Lines 7-25, Lines 1-12.**

21. Attorney Mullen testified that he and his client then "attempted to put the best deal together we could being told there would be no such adjustments." (*Id.* at 19:11-13).

See response to #20. Mullen was proceeding without a true-up adjustment, but, as Scott Keogh testified, this did not mean that the price issue was a closed issue, and, Keogh still intended to attempt to negotiate the price at this point.

22. By June 6, 2019, Attorney Mullen exchanged edited drafts of a Letter of Intent, spoke by telephone twice, and exchanged multiple emails negotiating the terms of the purchase with counsel for TCU. (*Id.* at 19:14- 20:4).

See response to #20.

23. Attorney Mullen further testified that in his negotiations, he offered to proceed to closing without a "true up" if some of his proposals would be implemented. (*Id.* at 27:7-22).

See response to #20.

24. Attorney Mullen testified, "you know how it works, give and take... If you give us the crap we want, we'll walk away from the price adjustment." (*Id.* at 24:6-8).

See response to #20.

25. Scott Keogh, on behalf of Gulf Coast and Aladdin Capital, Inc., signed the Letter of Intent. (Scott Keogh Depo. 86:14-23, Exhibit 1 to Defendants' Answer at p. 8).

See response to #20. The Letter of Intent was signed in Casper, Wyoming, at the Blueprint offices. Keogh testified that he was planning to use this trip to Casper to negotiate the sale price with Mr. Stevens. Keogh intended to attempt to negotiate the sale price even though Keogh's business partners (Waylon Geuke and Leroy

Dickinson, who were the principal owners of Trigger) repeatedly warned him that Mr. Stevens was actively threatening to "blow up" the company if Keogh attempted to negotiate the price. Keogh, however, repeatedly dismissed this concerns because he did not believe anyone would do such a thing. Keogh finally changed his mind, however, when Mr. Stevens' own attorney made comments to Keogh's attorney about the "dynamite option" that Mr. Stevens had been planning to use. At this point, Keogh now believed that anyone who would use their own lawyer to convey that kind of threat was serious about following through on it. Accordingly, Keogh abandoned his plan to further negotiate the price, because he believed the threat. After examining the various options available to him, Keogh concluded that the only reasonable option was to submit to the threat and take the $800,000 share price. [Scott Keogh Deposition, Pages 66-67, Lines 15-25, Lines 1-8.]

26. Waylon Geuke, on behalf of Trigger, also signed the same Letter of Intent. (*Id.*)

See response to #25. Geuke believed the threat from the outset. He had already concluded that the only reasonable option was to submit to the threat and take the $800,000 share price.

27. Fifty days later, on July 30, 2019, Gulf Coast executed a Membership Interest Purchase Agreement. (Scott Keogh Depo. 106:11-22, Exhibit 2 to Defendants' Answer at p. 16).

See response to #25.

28. Scott Keough, also signed the Membership Interest Purchase Agreement as a guarantor on behalf of Aladdin Capital, Inc. (*Id.*)

See response to #25.

29. Based on the continued representation that Trigger would sign anything Gulf Coast would sign, Waylon Geuke, on behalf of Trigger, also signed a similar Membership Interest Purchase Agreement that was edited by attorney John Mullen to effectuate the sale of Trigger's interests. (*Id.* at 86:17- 23, Exhibit 3 to Defendants' Answer at p. 16).

See responses to #20-#28.

30. Waylon Geuke also signed the Membership Interest Purchase Agreement as a guarantor on behalf of Trigger Energy, Inc. (*See id. at* 106:23- 107:6, Exhibit 3 to Defendants' Answer at p. 16).

Undisputed.

31. On the same day, Scott Keough, on behalf of Gulf Coast signed an Officer's Certificate confirming his authorization to sign the Membership Interest Purchase Agreement on behalf of Gulf Coast. (*Id.* at 109:11-110:16, Exhibit 4 to Defendants' Answer at p. 16).

Undisputed.

32. Again, Waylon Geuke, on behalf of Trigger, also signed a similar Officer's Certificate. (Exhibit 5 to Defendants' Answer at p. 16).

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Undisputed.

33. The following day, on July 31, 2019, Gulf Coast and Trigger signed a fourth and final document to finalize the sale of their interest — the Funds Flow Memorandum. (*Id.* at 110:17-111:3, Exhibit 6 to Defendants' Answer).

Undisputed.

34. On August 20, 2019, twenty days after receiving $1.6 million for their shares in Blueprint, Mr. Keogh and Mr. Geuke, on behalf of their companies, filed this lawsuit claiming that they signed the four separate documents, which occurred over several months and upon advice of counsel, because of economic duress. (*Id.* at 104:7-105:17, *see* Complaint).

The Complaint speaks for itself. However, the duress occurred over several weeks or months, and, finally crystallized by early June 2019. Thereafter, the rest of the documents were simply to follow through on the coerced transaction.

35. The entire basis of Gulf Coast and Trigger's claim of economic duress rests on an allegation that TCU, through Stevens, threatened to blow up Blueprint unless Gulf Coast and Trigger agreed to sell their shares for $800,000." (*See* Complaint, at ¶ 21.)

This mischaracterizes the lawsuit. Mr. Stevens made a series of statements and threats over a several-month period. Mr. Stevens made these threats in various capacities, including as an individual, as the manager of Blueprint, and on behalf of TCU (his company, which was ultimately the purchaser of the shares). Mr. Stevens' business partners believed the threats..

36. Scott Keogh and John Mullen inferred that blowing the company up would mean that Kent Stevens would quit the company, take his crew, and all the customers. (Keogh Depo. 124:17-24, Mullen Depo. 29:6-30:2)

Undisputed but must be read in context of various other facts set forth above, and in ¶¶ 56 *et seq*.

37. Attorney Mullen testified that one option he presented was that Gulf Coast could have simply refused to sell its interests to Stevens. (John Mullen Depo. at ¶ 31:5-20).

Undisputed.

38. Scott Keogh admitted his attorney informed him of this option that Gulf Coast could have simply refused to sell its interests to Stevens. (Keogh Depo. 97:24-98:2).

Undisputed.

39. Attorney Mullen also advised his client that it could terminate Stevens as the operations manager which would trigger a mandatory buy-sell under the operating agreement. (Mullen Depo. at ¶ 32:8-17).

Undisputed.

40. Scott Keogh admitted his attorney informed him of this option to terminate Stevens as the operations manager which would trigger a mandatory buy-sell under the operating agreement. (Keogh Depo. 98:24-99:12).

Undisputed.

41. Attorney Mullen also advised his client that it could hire a crew to come in and replace Stevens and then sue Stevens. (Mullen Depo. at ¶ 33:13- 17).

Undisputed.

42. Scott Keogh admitted his attorney informed him of this option to hire a crew to come in and replace Stevens and then sue Stevens. (Keogh Depo. 99:20-23).

Undisputed.

43. Attorney Mullen also advised his client that a suit could possibly be made for tortious interference against Stevens. (Mullen Depo. at ¶ 39:21-40:12).

Undisputed.

44. In summary, attorney Mullen testified:

Q: So you provide multiple options to your clients, they ultimately elect the latter to close and sue Stevens and TCU; right?

A: I did advise Gulf Coast of available options other than the option that was chosen. My client, I believe, internally evaluated that and then did make an informed decision, informed me of their decision, and I relayed that -- no, I did not. I was about ready to say I relayed that to Kyle Ridgeway. I did not.

* * *

Q: Let me shift the focus, then. What did you advise your clients to do, then, after providing them the multiple options that you discussed earlier?

A: I advised them they needed to make their decision and then I would follow the instructions. And they're just -- and I followed their instructions once I received that, and my instructions were to negotiate the deal and close it. And that's what I did.

(*Id.* at ¶ 34:1-10, 38:21-39:5).

Undisputed.

45. Attorney Mullen even discussed with Gulf Coast the pros and cons of all the options – including which jurisdiction and law would control, the likelihood of success in court, and the ability to prevent the loss of customers. (*Id.* at ¶ 49:17-52:7).

Undisputed.

46. However, Keogh ultimately did not pursue any of these options because of economic necessity. In fact, during his deposition, Scott Keogh testified regarding why none of the other options were viable:

> I mean, there were options given to us as to how to handle this. None were viable except for one, and that was closing the transaction. Our concern was solely based on how are we going to live with -- we had no idea what the loss would be if Kent took his crew, took himself, and all of the customers, we had no idea how to calculate it. I mean, what am I going to do with workover rig pipe? I mean, what's it worth? Not much. That was the focus. (Keogh Depo. 71:2-11).

Disputed, in that the lead-in to this quote mischaracterizes the testimony. Keogh is not saying that the economic necessity was the sole determining factor. See #67, below.

47. Instead, Gulf Coast and Trigger accepted $800,000 each and Scott Keogh's other company, Aladdin, received $3.2 million dollars upon closing.

(Keogh Depo. 111:10-23).

Undisputed.

3. PLAINTIFFS' ADDITIONAL MATERIAL FACTS, IN RESISTANCE OF MOTION FOR SUMMARY JUDGMENT

In order to understand the gaps left by Mr. Stevens' partial rendition of the facts, the Plaintiffs' offer the following, additional material facts, with citations to the Record. For simplicity, the paragraph numbering begins where Mr. Stevens' statement left off. Those facts include:

48. Stevens' career in pipe rentals and inspection began with Certus Energy Solutions ("Certus") in 2014, where he eventually worked his way into a supervisory role. [Kent Stevens Deposition Page 8, 5-20].

49. Kent Stevens was terminated in 2017 by Certus for failing to follow company protocols. [*Id.* at Page 9, 14-24].

50. At this point, he was "tired of working for people…I made a lot of people a lot of money and I ultimately wanted to have some sort of say in, you know, all of the decision-making." [*Id.* at Page 10, 11-15.]

51. "[W]ithin the first two months" of Kent Stevens founding Blueprint, he "picked up some employees" from Certus, including "Joe, Kasey, Shane…Cole…James…Chris…[and] Gary." [*Id.* at Page 12, 8-18.]

52. Certain of these employees who left Certus to join Kent Stevens at Blueprint shortly after its formation now hold high-level management roles in Blueprint: "Joe Flowers is VP of operations. Shane Varnson is VP of

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fishing....and Kasey Arima is VP of sales." [*Id.* at Page 15, Lines 9-12.]

53. Joe, Kasey and Shane are now equity owners in TCU Holdings, the entity initially formed by Kent Stevens that owns shares of Blueprint. [*Id.* at Page 12, Lines 22-24.] They remained loyal to Kent throughout. *Id.*

54. Keogh was generally aware of Stevens' departure from Certus, testifying that he believed Stevens "had a plan to start a new company and he got these guys to leave with him before there was any ability to build a business...they jumped off a cliff with him. You know, I don't know what damage it did to the prior company...But they all jumped off the cliff together and then, as luck would have it, we showed up to fund it." [Scott Keogh Deposition, Pages 120-121, Line 25, Lines 1-12.]

55. While Stevens brought know-how, skilled employees and worked directly with customers, the Aladdin Group investors provided funding for operations through equipment leases and a line of credit. In February of 2019, when the parties were negotiating the Letter of Intent, the liabilities "were almost $6 million at that time." [Id. at Page 57, Lines 23-24.]

56. The relationship between Stevens and the other owners was strained because Stevens continued to disregard company policies, including a refusal to verify the purpose of his expenditures on the company credit cards by providing receipts. Keogh expressed concern for Stevens' disregard for company policies, such as credit card receipts. "[T]he IRS requires we keep receipts, and

we demanded that part of the policy was you have to submit a monthly expense report including all receipts. And it was unbelievable how it was disregarded. And it starts at the top...[F]or the majority of the months that it was tracked, Kent was probably the lowest one on the list. It was just total disregard and it was a big bone of contention between the two of us." Id. at Page 37-38, Line 25, Lines 3-24.]

57. At one point, Keogh recalls Stevens "threw his keys at Waylon and walked away, said he was done...Difficulty getting phone calls answered or returned.. I mean, it was just everything." [Id. at Page 43, Lines 2-10.]

58. Stevens even admits that Geuke informed him of the effect that Mr. Stevens' threats were having on the negotiations. Stevens testified when he offered to buy Geuke out, "I actually thought Waylon was going to be hard. With Waylon, everything is hard. So when he immediately said yes, I was again, almost taken back. A couple thoughts. One, maybe I paid too much....Why would he take it so easily. I asked him point-blank. And he said because I told Leroy I'd blow it up. I'll use the term - I don't remember what terms he used, but, you know, this is where we're at. He used dynamite, used nuclear, used bomb, so, you know, that's the reference I'll use." [Id. at Pages 60-61, Lines 18-22, Lines 2-8.]

59. Rather than repairing this issue and clarifying that he did not intend for his comments to be threatening or improper, Stevens claims he then thought he should have paid *even less* because the threat had been so effective: "I went back and talked to my partners and immediately was like, I think I could have

offered way less. I had no idea. You know, I felt like I probably overswung. I should have lowballed it a little bit more man." [Id. at Page 76, 13-18.]

60. Stevens testified that "The way that the three of us [Waylon, Scott and Kent] communicated was ineffective. It was broken," and that he "knew that Waylon often got facts confused and wrong and injected his opinion inside of things that I didn't believe he knew what he was talking about." [Id. at Page 29, Lines 8-13.]

61. Despite testifying he believed that Geuke often got facts confused, when asked what he did to make sure his statements about blowing up the company were not misconstrued by Geuke as a threat, Stevens said he told Geuke, "There's a natural effect. It's like dominoes. Right? It's dominoes. I didn't – I am – when I'm done, I'm done...I quit. That's it. You figure out what happens next. If that's the threat, then so be it." [Id. at Page 80, Lines 9-16.]

62. When asked to clarify what he told Geuke when Geuke expressed concern he would blow up the company, Stevens responded, "Waylon, I'm quitting. I'm not staying in this partnership. Well, that will do this, this, this, and this. So be it." [Id. at Page 81, Lines 4-6.]

63. Stevens was aware of the sway he held over Blueprint employees: "Leroy, like I said, knew what we were getting into when we started. My guys aren't loyal to me for no reason and they weren't not loyal to Scott and Waylon for no reason either...The only reason they were there already was me. It was a

wrap. It was inevitable. It's not a threat. They were going to leave on their own accord. It was—it's an assessment of what will occur between two people." Further, "And the only reason they were there was for me and then it was very, very clear. So Leroy knew that." [Id. at Page 62-64, Lines 22-25, Lines 8-13, Lines 15-17.]

64. Acknowledging the value of company employees, Stevens further said, "the key people in our business are valuable. I mean, they can go find jobs. They were all working for a considerable amount less than they could have made other places at the key levels." [Id. at Page 63, Lines 15-19.]

65. Stevens fostered loyalty in his employees, including through free sodas and candy bars that, cumulatively, cost the company in the realm of $20,000. [Id. at Page 65, Lines 3-5.]

66. Keogh testified "The core [of Blueprint employees] that he brought are 100 percent loyal to Kent." [Scott Keogh Deposition, page 33, Lines 11-12.]

67. When asked if hiring a replacement crew was an option, in the face of threats by Stevens to quit and walk away from the company, Keogh testified:

> That's not a viable option for us...because we don't have the – if you take away the entire – all the employees, the management, the hands, the works, and you take away the clientele, the folks that had a relationship with Kent that, you know, entrusted Blueprint to do the work, you're starting at zero. It's not just replacing the help, which would be immensely challenging, especially from people that – you know, I know nothing about

> hiring personnel for this type of company, and then having no customers. So it's not – I mean, that's not true. It's much larger than that. In the meantime, there's payments, hundreds of thousands of dollars a month in payments to be made and so on and so forth. It just wasn't a viable option.

[Scott Keogh Deposition, Pages 99-100, Lines 22-25, Lines 1-14.]

68. In addition to making no financial sense, "[t]he commitment of time" made no sense. "If there are no employees and there are no customers, we're literally going to be investing all of our time, certain members of the team, myself, Waylon, I mean, everybody has businesses to run, and no one can afford the time that it would take to pick up the pieces on this." [Id. at Pages 100-101, Lines 22-25, Lines 1-2.]

69. Trigger Energy Holding, LLC's, in its Response to Interrogatories, offers an under-oath narrative of the unfolding negotiations, including the ripe moment when, after months of warning by Geuke, Keogh was forced to face the reality of Stevens' threats when now conveyed by Stevens' own lawyer, and Keogh yielded to the reality that he was, for the first time in his professional career, involved in a business dealing where there would be no discussion.

> The prospect of Kent buying out Gulf Coast and Trigger was first suggested by Kent in February 2019, during an in-person visit. After February 2019, the topics that Scott and Waylon discussed then turned to the time-frame and status of putting the purchase together (meaning, Kent's efforts at putting it together, which were originally represented as something Kent would get wrapped up by May 2019), and, discussions of the price that Kent had declared ($800,000 each), and, the debt that was being retired from cash flow each month.
>
> Waylon also reported to Scott each time that Kent would yet again to

make his threat that they would either sell for $800,000 each, or that he would blow up the company. Waylon also shared with Scott when he learned that Kent had told Leroy Dickinson the same things in person, during a time that Waylon was in Florida. Waylon also shared with Scott when Kent made the claim that Kent had talked to his lawyer and could bankrupt against his non-compete (meaning, nobody could stop him from walking away and starting a new company). The conversations between Scott and Kent soon became almost identical each time, in which a chronic battle was repeated over and over:

Scott would talk about wanting to negotiate a different price; Scott would say that it was clear that $800,000 is a number taken out of thin air, and which was not supported by any actual valuation, and, that the number should be discussed and negotiated to find the right number; that he had never been in a business dealing where there was no discussion; that he believed $800,000 left Gulf Coast shortchanged, especially in light of what it had invested, in light of the risk taken, in light of never saying no to a request during the build-up phase, in light of the present earning power of the company, and, because with each passing month the company was worth more simply by paying down debt, which continued to increase because the transaction continued to get pushed back, and because there are ways to determine value.

In response, Waylon would respond by reminding Scott of the threat that Kent had made several times, namely, that Kent will blow this thing up if there is any pushback on the price; and Waylon's impression that this was a serious and intentional threat, meaning, that Kent would do that before Kent will give you one more penny; that Kent has nothing to lose; that both Scott and Waylon would be left holding nearly $5 million of debt for the company; that Kent has claimed he has all the relationships with the customers and employees; that Kent claimed to have already consulted a bankruptcy attorney who would get him out of his non-compete.

In short, Scott wanted to find the right number, and Waylon slowed Scott down from pushing back. In each conversation, Scott remained unconvinced of Waylon's position that zero negotiations on price were possible; but, Scott agreed to at least hold off on raising the issue. Ultimately, after finally receiving the letter of intent draft from Kent, Scott told Waylon that his plan was to fly out to Casper and finalize the non-compete, including having an actual discussion and negotiation about the price. Waylon continued to say this was going to trigger

> Kent's threat. However, while Scott was in the process of preparing to make that trip to Casper, he learned that Kent's own lawyer was now repeating this same threat to John Mullen: that Kent intended to use the "nuclear" option if Scott planned on negotiating the price. And, at that point, Scott finally concluded that if Kent had audacity to say it to his own lawyer, that it was a true threat; Scott told Waylon this, saying something like: "Ridgeway told Mullen about the 'nuclear option;' you're right, he will blow it up." Scott then agreed with Waylon to change his plan, and, he made the trip to Casper but the price was not discussed.
>
> The LOI was executed. And Scott did tell Waylon that right after the LOI was signed Scott asked Kent how he had arrived at the number; and, Kent's response was something about his gut, that he just thought it was enough. Their "chronic battle" was done, but Scott and Waylon continued to discuss for the next two months that it was clearly not enough, even for the simple reason that the company continued to retire debt with no price adjustment, which in total was over $1 million.

[Plaintiff Trigger Energy Holdings, LLC's, Response to Interrogatories (Amended) 10/23/2020, Pages 2-4, Response 2(d).]

70. As Keogh weighed his options, he "thought [an EBITDA multiplier] of four was fair," and at the time he was preparing an offer, using that multiplier, Keogh testified he would have proposed rounding down to $1.5 million from $1.7 million." [Scott Keogh Deposition, Pages 95-96, Lines 24-25, Lines 1-4)

71. Stevens was aware of EBITDA valuations, generally using a multiplier number "anywhere from three to eight." Id. at Page 98, Lines 16-24.

72. Stevens testified that he thought a $10 million valuation of the company was too low. [Id. at Page 87, Lines 10-13.]

73. In order to line up funding for the purchase of Blueprint shares,

Stevens sought funding through the Galles group at a worth of $5 million for the company. [Id. at Page 95, Lines 22-25.]

74. Stevens lined up this funding in preparation for signing the letter of intent, in which he would purchase Blueprint at a valuation of $2.5 million, slightly less than half the worth applied in the Galles group funding. [*Id.* at Pages 96-97, Lines 5-25, Lines 1-12.]

75. Notably, Dude Butler, a key employee of Blueprint who worked closely with Stevens, was married to a member of the Galles family group that ultimately financed the purchase of Blueprint. [Id. at Page 100, Line 5.]

76. Stevens testified that the Galles group wanted to help, "Because we were all miserable," and "they wanted us out of the relationship we were in and they thought they could ultimately make some money." [Id. at Pages 103-104, Lines 18-19, Lines 5-7.]

77. While Stevens was lining up financing, in the interim, the debt levels were being paid down to his advantage, "So the time gap, frankly, was worth about a half a million dollars per share." [Scott Keogh Deposition, Page 60, Lines 4-13.]

78. Keogh testified he had intended to negotiate the purchase price as late as June of, 2019. "John had brought it up to Ridgeway that I intended on—on talking about the price. But after ---prior to, essentially, that week, I honestly discounted Waylon and Leroy's comments. I couldn't believe it was true that he

would actually blow up the company until I was told essentially the same – different words. – from my lawyer from his lawyer using the dynamite option, then I took it seriously." [Id. at Pages 66-67, Lines 15-25, Lines 1-8.]

79. Beyond the purchase price, "Our concern was what are we going to do with the millions of dollars of liabilities that we have that we're not responsible for." [Id. at Page 70, Lines 19-23.]

80. Keogh was not accustomed to Stevens' behavior, testifying, "I mean, we've made good deals and we've made bad deals, but I've never experienced anything like this where there was no standard business practices applied to this and nor have I ever been threatened in this way." [Id. at Page 105, Lines 8-12.]

81. Keogh's frame of mind with respect to negotiating with Stevens was that, "The most dangerous people are the people that have nothing to lose." [Id. at Page 120, Lines 10-11.]

82. Further of concern was the fact that, like the other shareholders on the hook with personal guarantees totaling several million dollars, Stevens testified, "All I have is a house," with an equity of around $20,000. [Kent Stevens Deposition, Page 86, Lines 3-15.]

83. Most telling, Kyle Ridgeway, the attorney for Stevens' holding company, TCU, informed Attorney Mullen on a phone call on June 6, 2019, "that he was relieved that we, Gulf Coast, were going to relent on our demand for an

adjustment to the purchase price [the true-up], because that then removed the necessity for his client, Kent Stevens, to exercise his dynamite option and to walk away. That's what Kyle Ridgway told me." [John Mullen Deposition, Page 28, Lines 16-23.]

Dated this 28th day of December, 2023.

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CERTIFICATE OF SERVICE

I hereby certify the foregoing was electronically filed and served through the Odyssey File and Serve System upon:

On this 29th day of December, 2023

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IN THE

Supreme Court

of the

State of South Dakota

No. 30814

TRIGGER ENERGY HOLDINGS, LLC, and
GULF COAST INVESTMENTS, LLC
PLAINTIFFS/APPELLANTS

VS.

KENT STEVENS, as an individual, an officer, and agent;
TCU HOLDINGS, LLC, &
BLUEPRINT ENERGY PARTNERS, LLC,
DEFENDANTS/APPELLEES.

An appeal from the Circuit Court, Second Judicial
Circuit Minnehaha County, South Dakota

The Hon. Douglas Barnett
CIRCUIT COURT JUDGE

APPELLANTS' REPLY BRIEF

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Notice of Appeal filed on August 27, 2024

Appellees:
Kent Stevens, as an individual, an officer and agent;
TCU Holdings, LLC; and
Blueprint Energy Partners, LLC

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RESPONSE TO KENT'S STATEMENT OF FACTS

Kent's statement of facts tends to occlude the timing of certain events. The basic sequence of events was as follows:

- In approximately December 2018, Blueprint was cash-flow positive for the first time, meaning that it was now able to pay down its debt, which was $6 million at its peak, and personally guaranteed by Scott, Waylon, and Leroy. [R.711-12].
- Only *after* this profitability point did the buyout talks accelerate, beginning in approximately February 2019. [R.694-95].
- However, meanwhile, the Company continued to be increasingly profitable, and to pay down sizable amounts of debt. With each dollar of debt paid down, the Company was worth a dollar more. [R.711-12]. This continued up until the closing date (July 31, 2019), but there was never a "true-up" calculation so that the purchase price would reflect it. *Id.*
- Kent made his "dynamite option" threats throughout the Spring of 2019. [R933]. Trigger believed them immediately.

[R.706]. Scott Keogh (for Gulf Coast) did not think any reasonable businessperson would make such threats, and planned to fly to Casper in early June 2019 to negotiate the final price. [R.616; R.709-711].

- In early June 2019, Kent's lawyer communicated the "dynamite option" to Gulf Coast's lawyer, John Mullen. At this point, Scott made the trip to Casper but elected not to try and negotiate the price because of the threat. [R.710-713].
- The result of the Casper trip was the June 10, 2019, "Proposal to Purchase," signed by the three partners. [R.47-54; R.711].
- Thereafter, the negotiation process was simply a matter of pulling together the various documents and provisions to effectuate a closing. John Mullen testified that he attempted "to put the best deal together we could [after] being told there would be no [price]adjustments" (including no changes to the purchase price and no attempts at a true-up to reflect the retired debt). [R.578.]

- A "Funds Flow Memorandum" was provided by Kent late in the process, dated July 31, 2019 (the same date as closing). It reveals Galles Group would supply a capital investment of $2.5 million but did not specify for what percentage ownership in Blueprint. [R.159 *et seq*]. And the Galles capital proposal was never offered to Trigger or Gulf Coast.
- In addition to the four options outlined in the Circuit Court's opinion and Kent's brief, John Mullen discussed a fifth option with his Client, which was "the option of closing and suing." [R.582]. Mullen expected that this would not be possible, however, because he expected Kent to demand a specific release of claims, "but we never got to that point because there was no proposed 'release of claims' in the definitive agreement" that excluded this option. [R.583]. (Even if it had been proposed, however, such a release would also be unenforceable if it were obtained by duress.)

ARGUMENT-IN-REPLY

1. Kent misapplies the three elements of economic duress

Kent fails to heed the analytical problem we highlighted: it is easy to conflate the three elements of economic duress. Kent's appellate brief perpetuates this same problem.

Kent also fails to refute our explanation about how each element should be applied. On pages 17 and 18 of our opening brief, and, at the beginning of each of the three sub-sections that followed,[1] we gave a detailed explanation about the underlying nature of the three elements, as well as how each should be applied. He does not address any of that. As a result, Kent's brief and our brief are like ships passing in the night.

Rather than a focused analysis on each element, Kent fires the same shotgun blast at the first and third elements: that Scott, Waylon, and Leroy were sophisticated; that they had legal counsel; and that the facts of *Dunes* are similar to those here. As to the second element,

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[1] *See,* Appellants' Brief at 19-20 (outlining and explaining the first element of "involuntary acceptance"; at 23-24 (outlining and explaining the second element of "reasonable alternatives"); and at 27-29 (outlining and explaining the third element of "wrongful, coercive conduct")

Kent merely parrots the fact that Gulf Coast and Trigger had counsel who provided theoretical options. But Kent omits any discussion about how the factfinder would evaluate whether the options were viable, achievable, adequate, and *reasonable.*

This is insufficient to sustain summary judgment. We address each element, again, in turn. After this, we address the 'advice of counsel' issue in subsection (iv), and the dissimilarities of *Dunes* in subsection (v).

(i) Gulf Coast and Trigger meet the first element of economic duress, which is a *subjective* test asking whether the plaintiff's consent was involuntary

Kent ignores the straightforward holdings of Alaska's economic duress cases, under which the issue of 'involuntariness' is a simple, subjective inquiry. *Zeilinger v. SOHIO Alaska Petroleum Co.*, 823 P.2d 653, 657 (Alaska 1992). *Accord, Berardi v. Meadowbrook Mall Co.*, 572 S.E.2d 900, 906 (W.Va. 2002) (economic duress proved by "subjective state of mind of the plaintiffs" plus "objective evidence [that the claim of duress is] reasonable in light of the objective facts presented").

In all but the rarest of cases, this element is not amenable to summary judgment. *See, City of Scottsbluff v. Waste Connections of Nebraska, Inc.*, 809 N.W.2d 725, 745 (Neb. 2011) ("Whether a plaintiff voluntarily or involuntarily made a payment under a claim of right is a question of fact."); *Newburn v. Dobbs Mobile Bay, Inc.*, 657 So. 2d 849, 851 (Ala. 1995) ("a question of duress is ordinarily a matter for the jury").[2]

Section I(A) of Kent's brief focuses on issues extraneous to the first element, including "acts on the part of the defendant," "the defendant's wrongful and oppressive conduct," and that Gulf Coast and Trigger were helmed by "experienced, successful businessmen and were represented by experienced, competent counsel [who] advised the parties of different avenues." *See,* Appellees' Brief, p. 16. Each of those issues are addressed within *other* elements.

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[2] In other contexts, the question of voluntariness is likewise a *subjective* inquiry for the finder of fact. *See, Frey v. Kouf*, 484 N.W.2d 864, 868 (S.D. 1992) (intentionality for battery means that "an act is done with the intention[,] meaning *he believes* the consequences are substantially certain to result..."); *State v. Almond*, 511 N.W.2d 572, 573–74 (S.D. 1994) ("voluntariness of a person's consent to a search, which involves that person's *subjective understanding*, is a question of fact") (citation omitted).

The other problem with Kent's analysis in Section I(A) is that his brief recites items which are not actually *facts*. Instead, he quotes phrases from the Circuit Court's opinion and passes them off as facts. This includes the Circuit Court's conclusory characterizations that Scott Keogh "expressed concern for financial embarrassment," and that Scott "hypothesized financial ruin." Appellees' Brief, at 16-17 (quoting R.941). The underlying Record does not, in fact, contain actual statements like that. And, neither Kent nor the Circuit Court are permitted to weigh the evidence and find that there was "mere reluctance" rather than "involuntariness." That is a Jury question. "It is well settled that a court is not to weigh the evidence at the summary judgment stage." *Powers v. Turner Cnty. Bd. of Adjustment*, 2020 S.D. 60, ¶ 22 (citing *Hamilton v. Sommers*, 2014 S.D. 76, ¶ 42).

In a light most favorable to them as non-moving parties, the Record demonstrates that Gulf Coast's and Trigger's assent to the $800,000 per share price was *involuntary* because they subjectively believed Kent would follow through on his threats to "blow up" the company, leaving them with millions of dollars in debt.

The evidence shows that Trigger and Gulf Coast arrived at this point at different times, and in their own way. Trigger subjectively believed Kent's threats at all points in time, while Gulf Coast only believed the threats at the last minute, after Kent had used his own lawyer to communicate "the dynamite option," while Scott was preparing to fly to Casper and negotiate the price.

In a light most favorable to Gulf Coast and Trigger, the evidence goes beyond embarrassment or dissatisfaction. Both parties believed Kent's threats, and, believed that submitting to Kent's demand of an $800,000 per share buyout was their only option.

The question of whether Trigger and Gulf Coast had *other*, reasonable options is an objective inquiry, but which is part of the *second* element.

(ii) Trigger and Gulf Coast meet the second element of economic duress, which is an *objective* inquiry as to whether any of its other, theoretical alternatives were *reasonable,* in light of all of the circumstances

On the second element, the finder of fact applies an objective test to determine whether "the circumstances permit no other *reasonable* alternative." *Dunes Hosp., L.L.C. v. Country Kitchen Int'l,*

Inc., 2001 S.D. 36, ¶ 21 (emphasis added).[3] The *possibility* of a lawsuit is not determinative, but instead, is only "*one* such circumstance" to evaluate the existence of reasonable options. *Id.* (emphasis added).

Both Kent and the Circuit Court attempt to resolve this element with an incorrect application of the test, and, by focusing too heavily on the *theoretical* possibility of litigation.

As with the first element, the Circuit Court should not be weighing the evidence at this stage. It is elementary that an objective test about reasonable alternatives is a *jury* question, rather than one which the Circuit Court resolves at a summary judgment hearing. For example, the second element of economic duress is nearly a verbatim version of the test for assumption of the risk. *See, Mack v. Kranz Farms, Inc.*, 1996 S.D. 63, ¶ 15 ("acceptance of a risk is not voluntary if the defendant's tortious conduct has left him no reasonable

[3] In a parallel context, this Court has explained the concept of "procedural unconscionability" in UCC cases, where the buyer lacks "a *meaningful* choice [in] the process of making the contract." *Johnson v. John Deere Co.*, 306 N.W.2d 231, 237 (S.D. 1981) (citing Leff, A., *Unconscionability and The Code: The Emperor's New Clause*, 115 U.PA.L.REV. 485 (1967) (discussing our State's codification of §2-302).

alternative..."); and *Pettry v. Rapid City Area Sch. Dist.*, 2001 S.D. 88, ¶ 11 (availability of reasonable alternatives makes 'assumption of the risk' a jury question). A similar inquiry arises in negligence cases. *E.g., Carlson v. Constr. Co.*, 2009 S.D. 6, ¶ 17 ("*the jury* is to decide whether the Company acted reasonably under the facts shown by the evidence") (emphasis in original). And, in UCC cases, it is a jury question to determine "reasonable substitutes" to cover, and whether the buyer acted "in good faith and in a reasonable manner." *Thorstenson v. Mobridge Iron Works Co.*, 208 N.W.2d 715, 717 (S.D. 1973).

It is sufficient to defeat summary judgment by providing the plaintiffs' own testimony that the other options were not 'reasonable.' *Mack*, 1996 S.D. 63 at ¶ 17.

Further, under *Dunes,* the *possibility* of a lawsuit is not determinative, but instead, is only "*one* such circumstance" to evaluate the existence of reasonable options. *Dunes Hosp., L.L.C. v. Country Kitchen Int'l, Inc.*, 2001 S.D. 36, ¶ 21 (citing *Oskey Gasoline & Oil, Inc. v. Continental Oil,* 534 F.2d 1281, 1286 (8th Cir. 1976)) (emphasis added). *Accord, Johnson v. United Parcel Serv., Inc.*, 2020

S.D. 39, ¶ 47 (in a bad faith case, "reliance on counsel is [not] the sole decisive test of good faith…It is merely one factor to be considered.").

Both Kent and the Circuit Court ignore *every single other fact and circumstance* in their determination that all of John Mullen's four options were 'reasonable.' This is an impermissible weighing at the summary judgment stage.

As part of the factual weighing, it is the Jury who will consider the circumstances of Kent's threat, which was multifaceted: he was threatening to quit his job as operations manager; he was threatening to breach his non-compete; he was threatening to take the customers; he was threatening to take the employees; and, he was flaunting to his partners that he was judgment-proof from any attempt to use the legal process to stop him. A Jury could find that giving into his demand was the only reasonable option.

As counsel, John Mullen evaluated the situation and identified five possible alternatives.[4] Three of his proposed options involved

[4] In addition to the four options outlined in the Circuit Court's opinion and Kent's brief, John Mullen discussed a fifth option, which was "the option of closing and suing." [R.582]. Mullen expected that this would not be possible, however, because he expected Kent to demand a specific release of claims, "but we never got to that

litigation. Even if 'weighing' of facts were permitted at this stage, neither the Circuit Court nor Kent adequately explain how using the legal system against Kent was a 'reasonable' option under these circumstances.

Scott testified that none of these first four options made any practical sense. [R.624]. Indeed, John Mullen himself explained that the legal options (filing suit prior to closing) were not likely to be effective: "[Y]es, we did cover the ability to commence litigation against Kent....I advised them that Kent Stevens and his company would very likely resist [the attempt to use legal avenues] and that there would be protracted litigation regarding that, and that starting a lawsuit to seek injunctive relief is *different than winning a lawsuit for injunctive relief, in a timely and effective manner to preserve the company's business opportunities.*" [R.581-582]. Furthermore, Kent was flaunting that he was judgment proof, meaning that the company's lost business opportunities during litigation would not be compensable.

Kent had created the perfect storm of a problem where neither

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point because there was no proposed 'release of claims' in the definitive agreement" that covered that possibility. [R.583]

injunctive relief nor money damages would work. Kent's entire plan was driven by the reality that a lawsuit could not contain him, *and he bragged about this to his victims.*

The only solution that did not involve litigation was Option One, 'refusing to sell.' The Circuit Court termed this "calling Kent's bluff and waiting for the result." [R.942]. It is incomprehensible how any Jury could find this to be a reasonable option, but, nonetheless the Circuit Court found it to be reasonable *as a matter of law,* because it would either work, or, it would prompt Kent to blow up the Company, at which point Gulf Coast and Trigger could then pursue one of the three the litigation options. [R.942].

In an ordinary (non-business) duress case, this would be like telling a victim of a bomb threat to just call the bluff of the would-be terrorist and see what happens…because you can call the police and ambulances later, after the bomb goes off. That would be unreasonable. It is a similarly unreasonable strategy when millions of dollars are at stake, and your operating manager has threatened to blow up the company.

The Circuit Court's ultimate error was that it attempted to dictate which of these options were "practical." This invaded the Jury's province.

Kent fails to address any of our cited case law that explains that a reasonable solution needs to be viable and "*adequate*," rather than theoretical. The Jury in this case should be instructed that these four options must be weighed for their "practical" effect, "tak[ing] into consideration the exigencies of the situation." *Helstrom v. N. Slop Borough,* 797 P.2d 1192, 1197 (Alaska 1990); *City of Scottsbluff*, 809 N.W.2d at 745 ("no other *practical* source").

A Jury could find that none of these options was reasonable under the circumstances, other than closing the transaction and bringing this lawsuit (which was the most economically efficient option). Granting summary judgment on this element was in error.

(iii) Kent's conduct was unlawful and unconscionable, rather than "that which the law entitled him to do"

The final element of economic duress requires a showing of wrongful conduct. Kent's brief suggests that he was not acting wrongfully because he was acting "lawfully" and "had a right to walk away from Blueprint." *See,* Appellees' Brief, p. 19.

That is quite a claim, suggesting that Kent was doing nothing more than idly discussing the possibility of leaving his job. The Record disagrees. He was *threatening* to quit; he was *threatening* to

breach his non-compete; he was *threatening* to take the customers and employees with him; and he was making these threats as part of a calculated plan to blow up the company if his demands were not met. It was so well-calculated that Kent even came up with a name for his plan: "the dynamite option."

Various courts consider this to be wrongful. *See, Interpharm, Inc. v. Wells Fargo Bank, Nat. Ass'n*, 655 F.3d 136, 144–45 (2d Cir. 2011) ("threatening to withhold performance under its contract [may] evidence a wrongful threat"). "[A] threat of serious financial loss is sufficient to constitute duress and ground for relief where an ordinary suit at law or equity might not be an adequate remedy." *Tri-State Roofing Co. of Uniontown v. Simon*, 142 A.2d 333, 335 (Pa. 1958) (quoting 17A AM.JUR. 564, § 7, DOCTRINE OF BUSINESS OR ECONOMIC COMPULSION (1957)).

"A threatened breach of contract ordinarily is not in itself coercive but *if failure to receive the promised performance will result in irreparable injury to business, the threat may involve duress.*" *Litten v. Jonathan Logan, Inc.*, 286 A.2d 913, 917 (Pa. 1971) (citing *Tri-State*

Roofing Co., 142 A.2d at 335 (quoting Williston on Contracts, Vol. 5, § 1618.) (emphasis added)).

"In South Dakota, 'an injury is irreparable where it cannot be readily, adequately, and completely compensated with money." *Longwell v. Custom Benefit Programs Midwest, Inc.*, 2001 S.D. 60, ¶ 13 (quoting *Maryhouse, Inc. v. Hamilton*, 473 N.W.2d 472, 475 (S.D.1991) (quoting 42 Am.Jur.2d *Injunctions* § 49 (1969)) (cleaned up).

In isolation, Kent Stevens would have been "permitted" to do many of the components of his plan, such as "request a buy-out," and to "leave his position." But he was *not* permitted to breach his non-compete; he was *not* permitted to steal the customers and employees away; and he was *not* permitted to package all of these into a "dynamite option" and bandy it as a threat to demand his own price.

These are "special, unusual, or extraordinary circumstances." *Dunes,* ¶ 33. "Threats to put another out of business or deprive another of his livelihood...made in order to secure another's consent to an undeserved bargain for one's own private benefit, may be sufficiently wrongful to constitute duress." *Jamestown Farmers*

Elevator, Inc. v. Gen. Mills, Inc., 552 F.2d 1285, 1290-91 (8th Cir. 1977) (applying North Dakota law).

In a light most favorable to Trigger and Gulf Coast, a Jury could find this to be "unlawful or unconscionable pressure." *Dunes,* ¶ 22.

(iv) Kent overstates and misconstrues the holdings of his 'advice of counsel' cases

A repeated theme in Kent's brief is that Gulf Coast and Trigger were sophisticated investors who had access to counsel, and, therefore duress cannot be proven here. For this point, Kent cites a string of three cases on page 21. Kent overstates (and in one instance misrepresents) the holdings of those cases.

Two of those cases were brought by terminated employees. Both courts found as a matter of law that they were in at-will employment relationships, which thereby eliminated the necessary element of "wrongfulness." Thus, the employees' access to counsel was not central to the holdings. *See, Schmalz v. Hardy Salt Co.*, 739 S.W.2d 765, 768 (Mo. Ct. App. 1987); *Anselmo v. Manufacturers Life Ins. Co.*, 771 F.2d 417, 420 (8th Cir. 1985). In addition, the plaintiff in *Anselmo* resigned his position on June 28th but waited ten months to bring suit, which was not sufficiently prompt. *Id.*

As to *First Nat. Bank of Cincinnati v. Pepper*, Kent misrepresents the holding altogether. There, the Second Circuit reversed summary judgment and remanded so that the parties alleging duress could pursue their claim. *See,* 454 F.2d 626, 633-34 (2d Cir. 1972). Its holding expressly recognizes that access to counsel was not determinative; instead, the plaintiff/stockholders who were "represented by competent and knowledgeable counsel" need only show "that further resort to legal remedies would have been impracticable or futile in the circumstances and that as a practical matter there was no other means of immediate relief available to them...." *Id.* at 633-34. That is South Dakota's rule, too.

In short, access to counsel is not determinative. There are duress cases where "[n]o amount of lawyer's advice or plaintiffs' business experience could have assisted plaintiffs." *Litten v. Jonathan Logan, Inc.*, 286 A.2d 913, 917 (Pa. 1971). That is the case here. This is also an example of a case where "more time and deliberation" would not have changed things. Gulf Coast and Trigger made an informed decision, which was the only reasonable option available.

(v) *Dunes* is still inapposite

In our opening brief, we explained all of the differences between *Dunes* and the facts of *Blueprint.* Appellants' Brief, pp. 30-31. Kent's brief offers a table of comparable facts, but fails to refute the key differences. Appellees' Brief, pp. 20-21.

Country Kitchen was an arms-length third-party (rather than an officer and shareholder); Country Kitchen did not have a non-compete (Kent did); Country Kitchen was threatening to leave the South Dakota market altogether, and thus could not "take" restaurant customers with it (unlike the shale oil service customers here); and Country Kitchen was not operating the restaurant profitably (while Blueprint had turned the corner and was generating positive cash flow and retiring debt).

Whatever similarities may exist, they are not determinative for summary judgment.

2. Kent fails to address our key arguments about Section 2.03.

Kent does not dispute our argument that if the Court reverses on economic duress, then Trigger and Gulf Coast have adequately stated a challenge to the enforceability of Section 2.03.

Kent sidesteps the problem that Section 2.03 is not "specific, clear, and unequivocal" as to the intentional, wrongful conduct to be released, and thus is unenforceable. His brief merely restates the broad, vague provisions of that section. This is insufficient.

Whatever public policy exists in favor of settlements, countervailing public policy prevents releases for intentional wrongdoing unless they are specific.

Moreover, none of those public policy theories would extend Section 2.03 to Kent, who would remain personally responsible under any analysis.

In short, Kent is not entitled to summary judgment on his Section 2.03 theories.

3. Kent is not entitled to summary judgment on the tort and statutory claims

The Circuit Court was at a disadvantage on its analysis for Counts 3, 4, 5, 6, and 7, because Kent did not thoroughly brief those issues. Kent's only argument below was that "without the defense of economic duress, all of the remaining claims fail...." [R. 548]. This is not hyperbole: Kent's argument was confined to that very narrow premise, along with his *sua sponte* theory that TCU's corporate veil should not be pierced.

On appeal, Kent continues to miss the mark. He also fails to refute our agency arguments. Trigger and Gulf Coast state *prima facie* claims for Counts 3, 4, 5, 6, and 7 against Kent and his principals.

(i) Count 3: Fiduciary Duty

Even now, Kent continues to rely on the syllogism that if his "negotiation tactics did not amount to duress...the same conduct did not result in a breach of any fiduciary duties." Appellees' Brief, p. 27.

Kent fails to address the statutory triggers for the fiduciary duty claims, including "loyalty," "good faith and fair dealing," and prohibitions on acting in a manner "adverse to the company" or "competing with the company...before dissolution." SDCL 47-34A-409. Kent's actions, including individually and on behalf of TCU, are a *prima facie* violation of each of those.

These fiduciary claims are independent of the economic duress claim. *See, Diakiw v. Stites Mgmt., L.L.C.*, 693 S.W.3d 582, 598–99 (Tex. App. 2023), review denied (Sept. 27, 2024) (citations omitted) (finding a breach of fiduciary duty can arise when "a supervisor-manager acts as a 'corporate pied piper' and lures all of his employer's personnel away, thus destroying the business."); *First Natl. Bank of Omaha v. iBeam Sols., L.L.C.*, 61 N.E.3d

740, 756 (Ohio 2016) (" failure to disclose the side deal...and his determination in the end to destroy the company and "screw everyone else" amounted to breach of fiduciary duty to appellees")

Even though Kent's wrongdoing arises from the same facts, Trigger and Gulf Coast are permitted to "pursue alternate legal theories and seek damages." *Wright v. Temple,* 2021 S.D. 15, ¶ 42.

(ii) Count 4: Tortious Interference

The only argument Kent raises on tortious interference is the absence of an identifiable third-party for purposes of the triangle.

Under the original proposal to purchase Gulf Coast and Trigger's shares, TCU was the Buyer, and Gulf Coast and Trigger were the Sellers. [R.47]. This proposed transaction arose out of the long-standing buy-sell provisions agreed on by the three partners. Kent interfered with this transaction. Kent is the identifiable third-party.

(iii) Count 5: Shareholder Oppression

Kent makes only two arguments on this claim: that "without duress" there cannot be oppression; and that TCU was a 'minority' shareholder, and thus the doctrine does not apply.

This Court has not defined shareholder oppression that narrowly. "Oppression is based on the totality of factual circumstances and is not relegated to a bright-line rule or implementation of a checklist. While a single act may not amount to oppression, under the totality of all relevant circumstances of the case, oppression may be found to exist." *Landstrom v. Shaver*, 1997 S.D. 25, ¶ 42 (citations omitted). A broader view of oppression is also supported by this Court's understanding of "the broad powers of equity to create an appropriate remedy" in cases where wrongdoing is proven. *Longwell*, 2001 S.D. 60, ¶ 14.

(iv) Count 6: Unjust Enrichment/Usurpation

Kent's only argument on the claim of usurpation is that he disclosed the "full circumstances of the transaction" via a "Funds Flow Memorandum." Appellees' Brief, p. 31 (citing to R.159-168). This is a new argument on appeal. It is also inaccurate.

The Funds Flow Memorandum was provided very late in the process, on the eve of the closing in July 2019. (It is dated July 31, 2019, which is the same date as the Closing.) At this point, the transaction was a *fait accompli.* But even if it had been disclosed sooner, it does not provide any details.

The Funds Flow Memorandum lists "a $2,500,000 capital contribution from the 'Galles Group.'" But the Memorandum does not explain what percentage of the Company that the Galles Group would acquire for its capital contribution of $2.5 million. Nor does the Memorandum give Trigger and Gulf Coast the ability to accept the capital contribution from Galles as payment for their shares. As a matter of law, neither the Circuit Court nor this Court can find that Trigger and Gulf Coast "properly rejected the opportunity or [were] not in a position to take it."

(v) Count 7: Accounting

An accounting is an equitable remedy that is ancillary to other theories of recovery advanced by Trigger and Gulf Coast. A detailed discussion is unnecessary; if the Circuit Court ultimately holds in favor of Trigger and Gulf Coast on one of its equitable theories, TCU will be held to account for the proceeds it wrongfully received during the wind-up of its affairs with Trigger and Gulf Coast. *Ellenbecker v. Volin*, 71 N.W.2d 208, 210 (S.D. 1955).

We ask this Court to reverse summary judgment on Counts 3, 4, 5, 6, and 7.[5] In addition, the Circuit Court's conclusions about piercing the corporate veil were in error, because its reasoning was that Kent had done nothing wrong. Based upon this Record, Kent is not entitled to summary judgment on any of those theories.

4. Gulf Coast and Trigger state a *prima facie* case for TCU's breach of the duty of good faith and fair dealing

Scott Keogh's testimony about Article 14.3(d) was accurate. When the parties *first* started discussions about a buy-out, the transaction would have fallen *largely* outside the scope of this buy-out provision.[6]

However, once TCU and Kent announced their intention *not* to negotiate the price, then this provision *should* have been triggered. This was no longer a situation where the parties were in "agreement." Thereafter, it was Trigger and Gulf Coast's contractual right to use the appraisal method. By Kent's and TCU's threatened breaches and other misconduct, TCU

[5] Count 8 is part of Section 4, below. Appellants are not pursuing injunctive relief on this appeal.

[6] Although not *entirely*. Scott's testimony cannot change the substance of the provision, which says that "all Transfers" are either to be determined by an "agreement in writing" or via the "appraisal" process. Scott also limited his testimony by explaining that he was not entirely clear about the provision.

failed to act in good faith and allow the appraisal method to be used. This is a breach of the agreement which caused obvious damages.

Gulf Coast and Trigger did not "ratify" the Purchase Agreement, and, instead promptly brought suit within 20 days. Nor did Section 2.02 address or "waive" this kind of breach. That warranty was limited to the statement that the "consummation of the transactions...will not...violate...the LLC Agreement." [R.110]. The transaction itself did not violate the LLC Agreement. It was, nonetheless, the *product of a breach* of the duty of good faith and fair dealing by TCU, which is a situation *not* covered by any of the terms in Section 2.02, and which would be the type of intentional conduct for which express releases are required.

CONCLUSION

The story of Kent Stevens is the story of a man who refuses to honor rules or be controlled by others. When confronted about his threats, Kent did not make amends, and instead wished he had pushed even harder.

The law does not permit a business owner to make calculated threats in order to exploit an undeserved bargain. When someone threatens to destroy his company unless his partners buckle to his demands, the law provides several remedies.

We ask for the Circuit Court's summary judgment to be reversed so that a Jury can hear these claims.

APPELLANTS REQUEST ORAL ARGUMENT

Dated this 14th day of April, 2025.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellant's Reply Brief does not exceed the word limit set forth in SDCL § 15-26A-66, said Brief containing 4,889 words, exclusive of the Table of Contents, Table of Authorities, any addendum materials, and any certificates of counsel.

/s/ Daniel K. Brendtro
One of the attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of April, 2025, I electronically filed the foregoing via the Odyssey File and Serve system with the Supreme Court Clerk, which will send notice to Appellee's Counsel.

I also hereby certify that on this 14th day of April, 2025, I sent a bound copy of the foregoing to the Supreme Court Clerk at the following address:

Shirley Jameson-Fergel
Supreme Court Clerk
500 East Capitol Avenue
Pierre, South Dakota 57501

/s/ Daniel K. Brendtro
One of the attorneys for Appellants