IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 31191

SHADRACH HOWIE, and ALPHA LAND COMPANY, LLC, a South Dakota limited liability company,

Plaintiffs/Appellants,

v.

GARY HOWIE and GORDON HOWIE,

Defendants/Appellees.

Appeal From the Circuit Court
Seventh Judicial Circuit
Pennington County, South Dakota
The Honorable Matthew M. Brown

BRIEF OF APPELLANTS

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PRELIMINARY STATEMENT

Citations to the record are designated as "CR" followed by the appropriate page number(s). Citations to the appendix are designated as "App." followed by the appropriate page number(s). Plaintiff, Shadrach Howie, is referred to by his first name "Shad" or "Plaintiff" and Alpha Land Company, LLC is referred to as "Alpha" or collectively as the "Plaintiffs". Defendant, Gary Howie, is referred to as "Gary" and Defendant, Gordon Howie, is referred to "Gordon", or collectively as "Defendants". Shad, Gary and Gordon are collectively referred to as the "Parties" or the "Partners".

JURISDICTIONAL STATEMENT

Plaintiffs appeal from a final Judgment entered in this action on June 25, 2025, and Notice of Entry was filed on June 26, 2025. Plaintiffs also appeal from all adverse orders from the action, including the court's Order Regarding Defendants' Motion for Partial Summary Judgment entered on January 21, 2025, and Notice of Entry filed on January 24, 2025, and the court's Order Regarding Defendants' Motion for Summary Judgment entered on April 28, 2025, and Notice of Entry filed on April 29, 2025. Plaintiffs timely filed Notice of Appeal on July 24, 2025.

LEGAL ISSUES

I. Whether the Circuit Court Erred in Granting Summary Judgment on Plaintiff's Claims for Breach of Contract.

The court entered its order on January 21, 2025, finding no genuine issues of material fact and dismissing Plaintiff's breach of contract claims.

Pankratz v. Hoff, 2011 S.D. 69, 806 N.W. 2d 231
LaMore Restaurant Group, LLC v. Akers, 2008 S.D.32, 748 N.W.2d 756
J. Clancy, Inc v Khan Comfort, LLC, 2021 S.D. 9, 955 N.W. 2d 382
In re Estate of Neiswender, 2003 S.D. 50, 660 N.W.2d 249
SDCL 53-1-2.
SDCL 53-3-3

II. Whether the Circuit Court Erred in Granting Summary Judgment on Plaintiff's Claims for Fraud in the Inducement and Negligent Misrepresentation.

The court entered its order on January 21, 2025, finding no genuine issues of material fact and dismissing Plaintiff's claims for Fraud in the Inducement and Negligent Misrepresentation.

Poeppel v. Lester, 2013 S.D. 17, 827 N.W.2d 580
SDCL 53-4-5

III. Whether the Circuit Court Erred in Granting Summary Judgment on Plaintiff's Claims for Promissory Estoppel and Unjust Enrichment.

The court entered its order on January 21, 2025, finding no genuine issues of material fact and dismissing Plaintiff's promissory estoppel claim. On April 28, 2025, the court entered a second order finding no genuine issues of material fact and dismissing Plaintiff's unjust enrichment claims.

Jed Spectrum, Inc. v. Stoakes, 2025 S.D. 31
Action Mechanical, Inc. v. Deadwood Historical Preservation Commission, 2002 S.D. 121, 652 N.W.2d 742

IV. Whether the Circuit Court Erred in Granting Summary Judgment on Plaintiffs' Derivative Claims for Breach of Fiduciary Duty.

The court entered its order on January 21, 2025, finding no genuine issues of material fact and dismissing Plaintiff's claims for breach of fiduciary duty.

Hayes v. Northern Hills General Hospital, 1999 S.D. 28, 590 N.W.2d 243
SDCL 47-34A-409

V. Whether the Circuit Court Erred in Granting Summary Judgment on Plaintiff's Direct Claim for Minority Oppression.

The court entered its order on January 21, 2025, finding no genuine issues of material fact and dismissing Plaintiff's direct claim for minority oppression.

Mueller v. Cedar Shore Resort, Inc., 2002 S.D. 38, 643 N.W.2d 56
Landstrom v. Shaver, 1997 S.D. 25, 561 N.W.2d 1

VI. Whether the Circuit Court Erred in Granting Summary Judgment on Plaintiff's Unjust Enrichment Claim Regarding Unpaid Labor and Services

The court entered its order on April 28, 2025, finding no genuine issues of material fact and dismissing Plaintiff's unjust enrichment claim regarding his unpaid labor and services.

Action Mechanical, Inc. v. Deadwood Historical Preservation Commission, 2002 S.D. 121, 652 N.W.2d 742

VII. Whether the Circuit Court Erred in Granting Summary Judgment on Defendants' Counterclaims for Judicial Expulsion and Repayment of Money Loaned.

The court granted summary judgment on Defendants' counterclaims for judicial expulsion and repayment of money loaned by Alpha Land Company, LLC on January 21, 2025.

SDCL 47-34A-601(6).

VIII. Whether the Circuit Court Failed to Comply with SDCL 15-6-56(d).

The circuit court entered summary judgment without making the findings required by SDCL 15-6-56(d).

SDCL 15-6-56(d)

IX. Whether the Circuit Court Erred in Finding a Claim for Recission is Barred as a Matter of Law.

On January 21, 2025, the circuit court held that Plaintiff's alternative claim for rescission was barred as a matter of law.

SDCL 15-6-8(a)

STATEMENT OF THE CASE

Plaintiff brought claims for breach of contract, fraud, negligent misrepresentation, promissory estoppel, unjust enrichment, and minority oppression, along with a derivative claim on behalf of Alpha Land Company, LLC for breach of fiduciary duties. (CR:18-24). Defendants counterclaimed for barratry, judicial expulsion, and an alleged unpaid loan. (CR:53-56).

On October 3, 2024, Defendants moved for partial summary judgment on all of Shad's claims and for summary judgment on their counterclaims for judicial expulsion and repayment of money loaned. They also sought judicial determination that Shad had elected rescission as his sole remedy and, whether he was entitled to recission as a matter of law. (CR:121,160).

On January 21, 2025, the circuit court granted summary judgment on all of Shad's claims except unjust enrichment and the issue of whether he elected rescission as his sole remedy. The court also granted summary judgment on both of Defendants' counterclaims. As a result, the only issues left pending after the order were Shad's unjust enrichment claims and Defendants' barratry counterclaim. (CR:1595).

On March 6, 2025, Defendants moved for summary judgment seeking to summarily dismiss Shad's remaining claim of unjust enrichment. On April 28, 2025, the circuit granted the motion, concluding that no genuine issues of material fact existed. (CR:1605,1979).

On March 14, 2025, Defendants moved for a pretrial ruling permitting punitive damages discovery on their barratry counterclaim. The court denied the motion finding that Defendants failed to present clear and convincing evidence establishing willful, wanton, or malicious conduct. (CR:1693,2046).

On May 28, 2025, Defendants moved to voluntarily dismiss their barratry counterclaim and on June 25, 2025, the Court granted the motion and entered final judgment consistent with its prior summary judgment rulings. (CR:2047,2068-2071)

Plaintiffs now appeal the final judgment and all prior summary judgment rulings.

STATEMENT OF THE FACTS

Shadrach Howie ("Shad") is a general contractor in Rapid City, South Dakota, where he lives with his wife, Holly Howie ("Holly"), and their four children. Gordon Howie ("Gordon") is Shad's father. Gordon previously held a real estate broker's license and now ranches. Gary Howie ("Gary") is Gordon's brother and Shad's uncle. Gary is a retired mobile home park owner and manager who also now ranches. Kelly Howie ("Kelly") is Shad's half-brother and Gordon's son. Kelly is a real estate agent in Rapid City. (CR:3,39–40).

In early 2019, Shad identified a promising development opportunity in Box Elder, South Dakota. He first located a 121.6-acre parcel listed by the Sullivans. (CR:386,3-4). Anticipating growth from the planned expansion of Ellsworth Air Force Base, Shad believed the property had strong development potential but would require a secondary access point. *Id.* To secure that access, he approached William Gikling, who owned adjacent unlisted parcels. Shad ultimately negotiated the purchase of the Sullivan property for nearly half its listing price, along with the surrounding Gikling properties, through a combination of cash and a contract for deed arrangement. *Id.*

Shad consulted an engineer to assist him in creating a plan for the development and presented it to the City of Box Elder. City officials expressed support for the project. (CR:4,388). Shad's vision for the development was deeply personal and spiritual. He proposed a 3,000-home development serving Ellsworth Air Force Base, designed to honor God through its street names and architectural standards and to provide discounts to veterans. (CR:4).

Shad informed his long-time business associate, Donahue Williamson, about the properties he planned to purchase and asked if he was interested in joining the investment. (CR:5,428,383). According to Shad, Mr. Williamson was eager, telling him, "I'm here for you and we can write a check tomorrow, but get it locked up." (CR:428). Around this time, Gary learned of Shad's efforts to purchase the property while speaking with Gordon about the sale of his mobile home park and expressed interest in potentially purchasing the property as part of a 1031 exchange. (CR:647–648).

According to Shad, Gary and Gordon contacted him expressing interest in the property; an opportunity Shad viewed at the time as "his deal." (CR:389). He agreed to meet with them to discuss a potential partnership to purchase and develop the property. Shad shared his vision and plans, and he maintains that the promises Gary and Gordon made during these discussions persuaded him to walk away from a partnership with Donahue and instead join them in the venture. (CR:5–7,382–383,378–379,386,389,648).

What the parties discussed and ultimately agreed upon is disputed. Shad asserts that Gary and Gordon made several promises that induced him to purchase and develop the property with them rather than pursue other opportunities, assuring him it would be a "sweet deal" for him. (CR:428). Shad claims they agreed: (1) to be equal parters in a partnership entity that would own and develop the property, sharing equally in all profits; (2) their interests would be held jointly with rights of survivorship; (3) Shad would lead site development and be paid for his work; (4) the development would use noncorrosive rebar; (5) Shad would have the opportunity to build homes with company financing; (6) all members could use and benefit from the raw land; (7) members would receive upfront money or "walking money" as they called it, to help with personal finances; and (8) the streets would be named to honor God. (CR:6-7). The parties also agreed that Shad's brother Kelly would receive an exclusive listing to market the development. *Id.* Gary and Gordon claim that Shad was promised only an equal share of the net profits from development. (CR:648,1611).

After reaching an agreement with Gary and Gordon, Shad proceeded to execute four purchase agreements with the landowners to acquire approximately 1,200 contiguous acres for $4,293,150.00 (the "Property"). (CR:41). The purchase would require Shad to pay a combined $2,154,500 cash at closing and execute a $2,138,650 Contract for Deed payable to Gikling (the "CFD"). Shad's closings on these purchases were scheduled for October 25, 2019. (CR:8,44).

The parties agreed the acquisition of the property would be financed through a tax-deferred exchange of like-kind property, funded by Gary (the "1031 exchange"). (CR:648). To design and implement the 1031 exchange, the parties consulted CPA James Postma ("Postma") and Pennington County Title. Postma agreed to provide advice to both minimize the tax impact of the 1031 exchange to Gary and to provide general business and tax advice for the new development project. (CR:912).

In June 2019, Gary informed Postma that he was selling his Virginia mobile home park and that he, Shad, and Gordon were structuring a 1031 exchange to purchase a development property and was seeking his input. (CR:1286). In the months that followed, emails were exchanged detailing how the exchange would be facilitated, which entities would be involved, and the sequence of steps necessary to avoid several tax risks identified by Postma. (CR:1271-1284). The Virgina property Gary was selling as part of the 1031 exchange was owned by his limited partnerships, Ridgewood Motel and Manor, LP, and HP Park, LP (collectively, "Gary's LPs").

On September 11, 2019, one month before Shad was scheduled to purchase the Property, Postma emailed Gary summarizing the 1031 exchange plan the parties had devised and agreed upon. Postma wrote to Gary:

> As I understood our "plan"? — that was the first step of the matter is that Shad would initially form an LLC for legal protections to initially purchase the property [i.e. Step 1]
>
> Then, [Step 2] you were to become the 100% owner of each of the 2 LP's through spousal gifting. Step 3 would have then been to form an LLC as an umbrella over your 2 LP's, Step 4 would then to have had this new LLC [your LLC] enter into the 1031 exchange with Shad . . . Step 5 would then bring in Shad [held through his LLC presumably with or without Kelly] and Gordon into [your] LLC created in Step 3.

(CR:1294).

Put simply, Postma described a sequence in which Shad would first form an LLC to purchase the Property. Gary would form a new "umbrella LLC" to hold both his LPs and the umbrella LLC would purchase the Property from Shad (or Shad's LLC). After the exchange, Shad and Gordon would be admitted as members of Gary's umbrella LLC. Under the parties' plan, the umbrella LLC would hold title to the Property following the exchange, with Gary, Gordon, Shad and possibly Kelly as its members. This plan is consistent with Shad's claim that the parties agreed to own and develop the Property through a common partnership entity. Postma, however, went on to flag the potential tax risks of this proposed structure and suggested an alternative. Postma continues:

> However, I believe a preferable alternative here would be to create yet another LLC in which Shad LLC [Step 2] and your LLC [Step 3] are partners along with Gordon [either as an individual or through an LLC he forms] and at which point is *the operational entity for development*.

Id. (emphasis added).

Here Postma is suggesting that the parties form a separate operational entity for development, owned equally by Gary, Shad and Gordon. Postma continues:

> The rationale for that would be to try to avoid the appearance that Shad is doing an exchange with himself— which would arguably be the case through "attribution" because of the Father-Son relationship with Gordon. In other words, if Shad does an exchange with your LLC which initially is 100% owned by you [through your 2 100% owned LP's] and then immediately after, both Shad and Gordon **join** your LLC as 1/3rd member each — making you each 1/3rd, Then arguably speaking, under the ***step transaction doctrine***, Gordon and Shad together have an attributed 66.66% ownership stake meaning that Shad could now being deemed to have done an exchange with an entity he has more than 50% ownership in [which would be true due to attribution of Gordon's interest]. Therefore to help tamp down this appearance of Step transaction doctrine, IF the exchange occurs just between nephew and uncle through their respective LLC's— which is fully permissible—***and then after the exchange you then enter into an operational agreement to develop the property between the 3 parties in your respective roles*** — it might be cleaner to have this done through a separate legal entity.
>
> I am describing this out in this manner to help illustrate why I think this might be a "safer" option. Could then LLC consisting of your 2 LP's just take on Gordon and Shad as members post exchange? Well, yes, BUT after how long? The next day? 2 weeks later? 6 months later? Point being that if it is too immediate, then under scrutiny it could appear that Shad has really then NOT done an exchange with you, but instead has in reality done an exchange with You/His Dad/And Himself—and you can't do a 1031 exchange with yourself OR with an entity that you have 50%+ control, which is tainted from Shad's standpoint by Gordon given that due to attribution their respective ownership interest are combined making it greater than 50%. *Which is why I think it would be preferable to have another legal entity involved which brings together all of the parties—and your contribution to that entity is the contribution of the property which your LLC obtained from Shad. Could the Step transaction still be argued? Yes, but now it would be a somewhat weaker argument because of the* ***different legal entity involved—formed for a different purpose*** *[at least, in my opinion — although I suppose other CPA's/attorneys could differ on that point and still state you essentially have the same risk].* So, sorry for the long answer to your question— but *this is understandably a very tricky/thorny area—there is no easy way to get around that*. Jim.

(CR:1294-1295)(emphasis added).

Postma proposed this as a "safer" alternative. Instead of having Shad and Gordon "join" Gary's umbrella LLC immediately after the exchange, which could invite an argument that Shad effectively exchanged with himself through attribution, he recommended forming a separate operational entity. That entity would be a different legal entity formed for a different purpose, which in his view would weaken any step-transaction claim. He acknowledged that the parties' original plan could still work and that reasonable professionals could view the risk as essentially the same but in his opinion the revised structure posed less risk. *Id.*

On September 17, 2019, Postma emailed Gary and his attorney Mark Walters further explaining the need for a separate operational LLC and the ways the LLC could obtain title to the Property. Postma writes:

> At this point, Gary Howie's LLC will EITHER bring in the property along with when it enters the Alpha Omega operational LLC as a Member
> *OR*
> Gary's LLC with [sic] enter into an agreement with the Alpha Omega LLC [of which he himself is part of] to sell subdivided portions of the exchange property to Alpha Omega as it being developed.
>
> [There are pro's and cons to this choice—which I realize will need to be decided on in the relatively near future—*although I am increasingly thinking that having Gary's LLC enter into an agreement with the Alpha Omega LLC may be the overall better and cleaner option.* [for various reasons which I won't detail now for overall summary purposes].]
>
> Mark—this is a rather complex issue and am not sure that what extent you are in the loop—so that's why I am giving a brief summary version here [forgive me if you already knew this]—to make sure we are all on the same page. Jim.

(CR:1296)(emphasis added).

In summary, under Postma's alternative plan, after the exchange, the parties would form an operational company, then referred to as Alpha Omega, in which Gary, Gordon, and Shad would be equal members. Postma outlined two ways for the LLC to obtain title to the Property: either Gary's umbrella LLC could contribute the property when it joins Alpha Omega as a member, or it could contract to sell subdivided portions to Alpha Omega as developed. He noted pros and cons but was leaning towards the sale approach as the cleaner option for reasons he does not detail. *Id.*

Gary's attorney Mark Walters was tasked with forming the umbrella LLC for Gary but shortly thereafter advised Gary that the transaction's complexity exceeded his expertise and available time (CR:648). Gary asked Postma whether this posed a problem and Postma responded while the umbrella LLC was preferable, its absence was not "the end of the world". *Id.* Gary proceeded to purchase the Property through his two LPs and Shad proceeded to sell the Property in his individual capacity. Kelly Howie drafted the 1031 exchange purchase agreement between Shad and Gary's LPs (the "Exchange PA") and on October 25, 2019, emailed it to the parties and Postma for review stating:

> In our meeting with Jan Kirch, it was discussed that *the goal for this agreement in its current form is to simply get through the closing tomorrow with enough funding needed to complete the purchase.* The current amount down is 50% of the purchase price ($2,465,962.00). Because Shad needs $2,148,585.72 to close, the remaining $317,376.28 will be held at Pennington Title in Shad's name to be dispersed as needed for development expenses. This will leave $327,312.00 in the exchange account for Gary.
>
> We will address. . . any language needed for future partial releases and any other concern in the form of an amendment to this agreement prior to closing in April.

(CR:1306)(emphasis added).

The Exchange PA Kelly drafted was straightforward. Gary's LPs agreed to purchase the Property from Shad for $4,931,924.00. Upon execution of the agreement, Gary's LPs would pay Shad a non-refundable down payment of $2,465,962.00 and at closing assume the Gikling Contract for Deed ("CFD"). The 1031 exchange closing was scheduled for April 7, 2020. On its face, the agreement contained no other material terms. (CR:28-30).

Postma responded to Kelly's email and Gary's concerns stating:

> . . . we only need to get through close today. You are certainly bringing up some very good points however they do not all need to be addressed today because for example *your contract with Shad as Kelly has currently drafted up will change—not might change—it will change.*
>
> In terms of your immediate concern whether the additional funds to Shad would cause income to him? No. it will not. You are just paying him more then what he needs to close on his end today—with the understanding that additional money is going to be used to add "basis" on to his holding—which will then serve to reduce the subsequent gain he will show on his sale to you.
>
> . . . The unusual aspect of this situation is that you're meeting your 45 day identification period with a purchase agreement containing a non-refundable down payment which in turn naturally allow Shad to complete his transaction. That's what's unorthodox about this. Under "normal" circumstances you would never Dream of doing this.
>
> . . . However, I don't see from my perspective anything that needs to be altered prior to today's close that can't be addressed after today. *For example the terms of the agreement that you will have with the operational entity is completely apart from today's transaction.*

(CR:1305-1306)(emphasis added).

Postma confirmed that the group's immediate goal was simply to close and reminded them that the contract "will change" not "might change" and that a separate contract would be executed "completely apart" from the transaction." *Id.*

Although the Exchange PA recited that Shad would receive $4,931,924.00 from Gary's LPs, the parties separately agreed Shad would not retain any proceeds and instead they would be paid to the parties' yet-to-be-formed operational entity. (CR:916). They agreed the excess down payment funds would be placed in escrow and released only for approved development expenditures to add "basis". (CR:8-9,1305). The parties also agreed the entity would pay any tax liability incurred by Shad and they would execute an agreement between Gary's LPs and the operational entity after the sale. (CR:9,916,1296,1305).

On October 25, 2019, the Exchange PA was executed and Shad received the down payment. That same day, Shad closed on the Sullivan and Gikling properties using the down payment for the cash and personally assumed the $2,138,650.00 Gikling Contract for Deed ("CFD"). Shad took legal title to the Property and held such title until April 6, 2020, when the sale to Gary's LPs closed. The first installment on the CFD was not due until May 2020. (CR:9,28,1443).

The Exchange PA was the only written contract executed by the parties until the formation of the operational entity. Relying on their oral agreement, Shad proceeded with the mutual understanding that title to the Property would subsequently transfer to the operational entity either by contribution or sale as explained earlier by Postma, and it would develop the Property under a separate contract between the parties. (CR:1296,1294,1305). Upon such reliance, Shad accepted personal risk by taking title, remaining liable on the CFD, and incurring a personal tax liability of $219,000.00. (CR:1296,9).

The Exchange PA was intentionally drafted to omit certain material terms of the parties' agreement, which included in part: 1) formation of the equally owned operational entity, 2) the terms by which the operational entity would acquire and develop the property, 3) use of excess downpayment funds to be held in escrow for development, 4) sale proceeds transferred to operational entity at closing, 5) liability of Shad's taxes, and 6) the execution of a separate development contract. (CR:28,916). In his affidavit, Postma explains Gary's tax risks and why the parties intentionally kept these terms out of the agreement, stating:

> My personal understanding of the step transaction threat Gary faced is this: if a taxpayer undergoes a series of transactions or steps that might not otherwise make sense to undertake unless the purpose of the steps was to circumvent what otherwise would be the intended tax results then, in that situation, the IRS could choose to bypass those steps for tax purposes—with the result being that the intended tax position would be altered in a way that presumably benefits the IRS.
>
> This specific threat naturally goes to the validity of the 1031 exchange. So, if there is concern about a step transaction threat to one's tax position, then you would not want to give the IRS a road map on the steps that you are undertaking. This would be tantamount to an invitation for them to come to that conclusion. *Gary's Purchase Agreement as drafted reduces this risk. The purchase agreement didn't include several of the terms the parties had agreed to about the sale, including that Alpha Land would get the proceeds and not Shad.*

(CR:916)(emphasis added).

According to Postma, these omissions were intentional and made to reduce Gary's step-transaction exposure by not giving the IRS a "road map" of the planned steps. *Id.*

At this time, Shad was actively advancing site development consistent with the parties' agreement. A surveyor was engaged, construction documents prepared, architects and earth contractor were on board, and a traffic study in the works. (CR:644,12). Shad took the lead in obtaining bids, coordinating the design team, and initiating work, and making draws from escrow to fund early development tasks (CR:1840,644,12,660). By late August 2019, Shad had circulated proposed non-corrosive rebar covenants to Gary, Gordon, and Kelly, to which they did not object. (CR:1249).

Once the 1031 exchange phase was underway and Shad held title to the Property, the parties turned to forming the operational entity and deciding how that entity would acquire and develop the land. As explained, Postma outlined two paths: Gary's umbrella LLC could "contribute" the property to the operational entity, or Gary's LLC could contract to sell subdivided parcels to the entity as development progressed. (CR:1296). Postma recommended the sale approach as the "better and cleaner option" for Gary's exchange. *Id.* Postma did not comment on whether this option would be better for the other partners. He did explain, however, that the second option would require the operational entity to capitalize through mortgaged financing and a separate development contract. (CR:915,1294).

Next, the parties formally organized the operational entity. The parties had anticipated naming it Alpha Omega, LLC but instead decided on Alpha Land Company, LLC ("Alpha"). When forming Alpha, Postma flagged several tax risks that again materially influenced the LLC's design and documentation including: the "related-party risk"; the "step-transaction risk" (previously explained) and the "developer" risk. (CR:1294,1296,916-917).

From the outset, the parties agreed that the partnership entity would be owned one-third each by Gary, Gordon, and Shad, while Kelly would receive an exclusive listing to market the property. (CR:1890-1899).

However, as the 1031 structure took shape, Postma alerted the parties to the "related party" risk. In an email on November 12, 2019, Postma explained that if Gary's ownership in the yet-to-be formed operational entity, now Alpha, exceeded 50% after applying related party attribution rules (brothers are related, uncles and nephew are not), Alpha could be treated as a related party to Gary. (CR:1271). In that event, if Alpha disposed of exchanged property within two years, Gary's preferential (deferred) installment-sale treatment would be lost and he would be deemed to have received the full contract price at signing, regardless of payment timing. *Id.*

Because Gordon's one-third would be attributed to Gary, Gary and Gordon's combined interests would exceed 50% in the three-member structure, Postma suggested adding Kelly as a 4th member. If ownership were split four ways, 25% each, Gary and Gordon's combined interest would not exceed 50%. Postma therefore recommended that Kelly have a 25% ownership interest to "tamp down" Gary's exchange risk. (CR:1271,917).

Shad objected to granting Kelly ownership in Alpha because the parties had agreed to an equal three-way partnership and that Kelly would only receive an exclusive listing. (CR:7). It was decided that the Alpha Land Company, LLC Operating Agreement (the "OA") would give Kelly a 25% "non-ownership" interest coupled with an exclusive listing right. (CR:1890-1899). However, Postma cautioned that "Kelly's non-ownership might not satisfy a non-related party exchange". (CR:917).

This uncertainly carries risk should the IRS deem Alpha a related party to Gary. Alpha purchased its first parcel from Gary on March 12, 2021, less than two years after Gary acquired the property. (CR:1202). Therefore, if Kelly's 25% non-ownership interest in Alpha does not satisfy related party rules, Gary's installment treatment failed as a result of the sale. (CR:1271).

Postma admits that he prepared Alpha's 2020 tax return showing Kelly as a 25% owner in the company and claims he did so at Gordon's direction. (CR:917-918). At no time has Kelly been a 25% owner of Alpha.

Postma further cautioned Gary about his developer's risk explaining that if the IRS deemed him a developer either directly or via attribution, he would have been prohibited from doing the 1031 exchange. (CR:918). Considering that Gary and Gordon's combined interest in Alpha could be deemed greater than 50%, it was safer for Gary if Alpha was not viewed as a developer of the Property and was instead formed for a "different purpose" outside the exchange. (CR:1294,918).

Postma later claims to have become increasingly uncomfortable with the tax positions Gary was proposing. He expresses these concerns in his affidavit:

> Gary had initially proposed a 100% loss allocation to himself since it was his money going into the project at this point. I felt that would both substantially weaken his 1031 exchange position and increase the perception that he was functioning as a 'developer' on this project. Further weakening his positions if not undermining it. . . Despite the risk, the Alpha Land Company 2021 tax return showed a specially allocated 100% loss to Gary. I did not prepare any returns for Alpha Land after 2020.

(CR:914-915).

On January 6, 2020, just before Alpha's formation, Postma clarified the structure and documents he anticipated in forming Alpha and its purchase of the Property from Gary stating:

> I realize that apart from this proposed sale [sale of property to Alpha Land] *and* the operating agreement of the Alpha Land Company, LLC, *there will also be a separate legal contract* [which still needs to be drafted] between Gary's LPs and Alpha Land Company, LLC."

(CR:1276)(emphasis added).

Again, Postma reiterates the need for a separate legal contract and that it would be in addition to both the purchase agreement *and* the Alpha Land Operating Agreement (the "OA"). Postma previously described this contract as an "operational agreement to develop the property between the three parties in [their] respective roles". (CR:1294).

Consistent with this structure, the OA makes no mention of the underlying Property or its development; it assigns no member roles or compensation framework; it contains no terms of development; it grants no development rights; it does not define "net proceeds" from development or how to calculate; and it provides no terms or expectations regarding development financing. (CR:1890-1899). It does, however, clearly state that membership interests are jointly held with rights of survivorship. (CR:1897).

When Shad signed the OA on January 10, 2020, he did so with a mutual understanding a separate contract would be forthcoming, and it would address these terms of the agreement. (CR:1294,1296,1305).

The final written contract in this case is the Alpha Land Purchase Agreement (the "Alpha PA"). This was the transfer mechanism Postma had recommended in lieu of Gary "contributing" the property through his ownership interest in Alpha. (CR:1296).

When the Alpha PA was signed on January 14, 2020, Shad held legal title to the Property, personally carried the CFD in his name, and had been advancing site work as agreed; no writing yet memorialized any promises he claims were made to him. (CR:12,32-36).

Alpha was to pay the same purchase price Gary paid to Shad and Alpha was given possession of the Property dating back to November 1, 2019 (CR:32-36). Of particular importance is the Addendum to the agreement. The Addendum provides:

> 1) The execution of this purchase shall be in parcels, the size and location of which shall be determined by the Buyer, at a price equal to $3,710.00 per acre. The Buyer also agrees to pay the Seller an amount equal to one third of the net profit from sales of property as portions are developed and re-sold by the Buyer;
>
> 2) The Buyer will be responsible to pay *all* taxes, interest and insurance on the entire property;
>
> 3) Buyer acknowledges that Seller owes a contract balance on the property. Buyer agrees to make *all* payments related to the contract. Any principle paid by Buyer during the term of this agreement will be reduced from the balance owed to Seller;

4) This Agreement is contingent upon Buyer and Seller *approval of final contract*;

5) This Agreement is contingent upon the following: (a). Buyer and Seller approval of final contract; (b) Completion of the purchase of subject property by Ridgewood Motel and Manor, LC and HP Park, LP from Shadrach Howie.

(CR:36)(emphasis added).

Similar to the other contracts, the Alpha PA was intentionally structured in this way. First, it placed all financial responsibility, including the CFD payments, on Alpha, while giving Alpha possession dating back to November 1, 2019. (CR-32-36). This only makes commercial sense if Alpha was sufficiently capitalized, and the parties agreed Alpha would leverage its equitable interest in the Property to obtain development financing and to refinance the CFD. Whether this was a mutually agreed upon term of the parties' agreement is a critical and genuinely disputed material fact.

Defendants assert Alpha holds no interest in the property and therefore cannot use it to obtain financing. (CR:697). Shad maintains the parties agreed Alpha would do exactly that, and it was material to their agreement that Alpha would acquire and develop the Property. (CR:915,380).

Postma, the independent and unbiased hired professional, strongly corroborates Shad claim while directly contradicting that of the Defendants:

> "It was my understanding that Alpha Land's right to purchase and possess the property gave Alpha Land an equitable interest in the property. It was *very much* my understanding based upon my discussions with Gary, Gordon and Shad that Alpha Land would be the borrowing entity. It was my understanding based upon my discussions with Gary, Gordon and Shad that *Alpha Land would use its equitable interest in the property to borrow money to refinance the contract for deed and/or finance development.*

(CR:915)(emphasis added).

Second, the Addendum's parcel-by-parcel execution was designed so Gary could unwind his exchange over time. Postma, however, cautioned that while it provided a mechanism for Gary to slowly unwind his 1031 exchange he called it unorthodox, "I have never been part of a 1031 exchange that conscientiously plans to unwind the exchange almost immediately upon inception," which "would add further risk to the validity of the exchange." (CR:918). Evidently it was Postma's understanding that the unwinding would be immediate.

Lastly, the Alpha PA is contingent on the parties approving and executing the separate and "final" contract. Postma repeatedly insisted this contract was essential and the Alpha PA made it a requirement. Gary admits that the parties intended to execute this final contract but failed to do so. (CR:667,669).

The sale from Shad to Gary's LPs closed on April 6, 2020, and the sale to Alpha occurred soon thereafter (CR:506). At closing, Shad received $299,855.33 plus the balance of the escrow funds which he immediately transferred to Alpha consistent with the parties' agreement. (CR:1840). As a result of the sale, Shad incurred an individual federal tax liability of $219,000.00, which Alpha failed to pay for two years. (CR:9).

Consistent with the parties' agreement, Shad immediately began construction on the first two homes funded through Alpha. On April 30, 2020, Shad received a check from Alpha for $150,000.00. (CR:1441-1442). Gary deposited $150,000.00 into Alpha on April 6, 2020, to fund the loan, but Shad was paid though Alpha. *Id.* Also on April 30, 2020, Alpha made the first semiannual CFD payment in the amount of $92,545.58. (CR:1443). The CFD would, however, remain in Shad's name for the following 2 years. (CR:699).

Also consistent with Shad's account of the parties' agreement, Kelly reached out to Banner Capital Bank ("Banner Capital") on May 11, 2020, to begin Alpha's refinancing of the CFD. (CR:1207). At this time, the parties were working to finalize covenants, including the non-corrosive rebar (VROD) covenant Shad claims was promised. (CR:1242).

On January 3, 2020, Kelly proposed a version stating, "Note that Dad will work with the city to address the specifics of the items regarding VROD". *Id.* Kelly attached a draft that mandated its use in all concrete footing, walls and flatwork. *Id.*

In the year following the sale to Alpha, Alpha and its members equally shared in access, use and profit of the raw land. (CR:692,321).

At this point, everything was proceeding consistent with the parties' agreement according to Shad and the parties had a solid working relationship. It wasn't until the development ran into a major problem with the City of Box Elder ("the City") that things would start to unravel.

Before the final platting of Phase 1, the City declined to sign the final plat and required Alpha to fund approximately $1.6 million in off-site improvements to Sunnydale Road as a condition of approval. (CR:12). This halted the development's immediate launch. (CR:12-13). The City's abrupt reversal in support of the project created a large rift among the partners, namely Shad against Gary and Gordon. Believing the City's position was unlawful, Shad urged immediate action and proposed retaining counsel to attend meetings and, if necessary, litigate. *Id.* Although Gary and Gordon agreed the City's actions were unfair, they opposed Shad's approach and preferred to wait. Gary summarized his position on moving the development forward, stating:

> ...if external pressure is too great to justify our development on the basis of the value we bring to Box Elder and the community, then this is simply the wrong time for development. In that case, at some future time after Box Elder has solved the existing problems at their own expense we may still be interested... our project will not be held hostage to unworkable and unrealistic demands... I do not personally need this project to live the remainder of my life in comfort. Moreover, I am unwilling to sell or commit additional assets to fund projects that are Box Elder's responsibility. Should our project proceed, most of my hoped for income will go to charitable organizations.

(CR:1215).

Unlike Gary and Gordon, Shad faced immediate financial pressure and had been relying on income from the development to support his family. As the impasse with the City dragged on, Shad continued to propose numerous ideas to his partners on ways to move the development forward that were met with silence, "Nearly all my emails have gone unanswered like this one from back in March... I find it grossly unfair to expect anything other than frustration from me when no answers are ever given." (CR:1495).

Meanwhile, Alpha's refinance with Banner Capital was halted and without funding the company would be unable to satisfy its financial obligations and fund development. (CR:11-12).

By late 2021, tensions were high. Meetings increasingly devolved into heated arguments. Shad pressing for action and expressing his frustration; Gary and Gordon preferring to wait and objecting to Shad's tone and demeanor. (CR:1215). The dynamic became unproductive, and Shad decides to stop attending meetings. He has his wife Holly attend in his place as a neutral intermediary to facilitate better communication. (CR:278).

Holly testified, "Shad was upset about not being able to develop, not making money, spending money, getting all this push back from Box Elder. He had been bringing ideas to Kelly about marketing listings," she explains that Shad is "very passionate and boisterous" when speaking with others, particularly family, and noted that people often communicate differently with family than they would with strangers. (CR:325). Gordon is his business partner, but first he is his father.

Holly became emotional during her deposition, explaining that everyone was being difficult and stubborn. She testified that Gary and Gordon made unkind remarks to Shad, criticizing his finances, work, and religious beliefs, and telling him he was "wet behind the ears" and had "a lot to learn." (CR:326). She added that Shad "didn't really have an option" because whenever he suggested something, they either ignored him or told him no. (CR:280).

The tipping point came when Shad and Kelly got in a heated argument during a meeting that resulted in Kelly pulling all of Shad's real estate listings and told him he would never work for him. (CR:325).

Around this time, Gary unilaterally decided to refinance the CFD through his personal LPs rather than Alpha. (CR:1318). An action Shad claims materially breached their agreement.

On November 29, 2021, Gary reached out to Banner Capital to reinitiate the refi process. (CR:1315). Gary writes, "We would now like to proceed with refinancing the 779 acre tract. . . We do not anticipate any problems with the appraisal and would like to borrow $3,500,000.00 if possible." *Id.* Alpha paid $7,500 on January 5, 2022 for the Banner appraisal that valued 779 acres of the Property at $5.2 million. (CR:1503,1506,1449).

Banner Capitol's Richard Braithwaite, responded to Gary on December 16, 2021. The pertinent parts of his email read:

> Gary, I have poured over all of your emails and documentation you sent on the cash out refinance of the779 acre track in Box Elder . . . Will the entire 779 acres be vested into the name of Alpha Land Company, LLC and the borrower on our Note (Loan) will be Alpha Land Company, LLC? . . . For our Loan, I need to know if the Bank will be taking all 779 acres as collateral . . . *We have to have clear title in first lien position to provide a loan and we would expect all 779 acres to vest over to Alpha Land Company, LLC to make this happen.* The requested loan amount is $3,500,000.00 . . . *that would provide $1,480,469.57 available for accrued interest, closing costs, and funds for future development . . .* Our legal lending limit to an individual or an LLC . . . is $3.5 million. *We have already lent you funds to refinance your ranch and build your new home and that loan is under your name. As long as Alpha Land Company, LLC is the new borrower we should not have a problem with lending Alpha Land Company, LLC $3.5 million.*

(CR:1320-1321)(emphasis added).

Braithwaite's email and Postma's affidavit confirm that Alpha not only had the ability to refinance the CFD but had, up to that point, always been the intended borrower. Braithwaite stated, "Alpha Land Company, LLC should have no problem borrowing $3,500,000.00." *Id.* His email also reveals that Gary had been pursuing his own personal refinance with Banner, while Alpha's refinance had remained previously unpursued. *Id.*

Despite Banner Capital's willingness to loan Alpha the money and despite being material to the parties' agreement, Gary directed Braithwaite to change the borrower to his LPs explaining, "sale of the land directly [to Alpha Land] would trigger significant tax consequences that were avoided by the exchange. Alpha Land does have the obligation to be responsible for the payments, however, as part of the contract." (CR:1318)(emphasis added).

As a result, Alpha lost nearly $1.5 million in development funding and title to over half the Property. Despite Alpha's deteriorating financial position and its inability to meet its obligations, including Shad's outstanding tax liability, Gary withdrew Alpha's loan to avoid a personal tax consequence. *Id.*

The decision to withdraw Alpha as the borrower coincided with Gary, Gordon, and Kelly decision to contact Attorney Jeff Hurd to amend the OA. (CR:2129-2130). Shad, feeling threatened, engaged attorney Stephanie Trask ("Trask") to represent him. (CR:2022). Negotiations over acceptable revisions failed, and amendments were adopted by majority vote over Shad's objections. *Id.* The amendments removed the right of survivorship, eliminated Shad's ability to meaningfully participate in company governance, and added an attorney fee provision that favored the majority. (CR:1264-1265,1268-1269).

Despite the amended OA being adopted in May 2022, Shad continued to work with Trask to try and resolve the parties' disagreements and avoid litigation (CR:2022,1261). Gary sent the following letter to Trask explaining how he could extinguish Shad's interest in the Property leaving him with nothing. It reads in pertinent part:

> . . . The terms of the contract by which Alpha Land Company agreed to purchase the rights to develop the land have already been breached, so the contract could at this point be declared null and void, thereby completely eliminating an operating agreement which we agree has some inherent flaws . . . *Should the contract be declared null and void, Shadrach's position would in the process be extinguished, and Shadrach's value would be equal to the cash he invested in purchasing the property. Exactly zero.*

(CR:1325,1669)(emphasis added).

Negotiations ultimately failed and Trask told Shad she was not able to litigate the case due to her current workload. (CR:2022).

On April 26, 2022, Alpha held a meeting to which Gary, Gordon and Holly were present. It was at this meeting that the Alpha PA was declared in default for failing to meet its financial obligations and stating that Gary has personally had to pay several hundred thousand dollars to cover its costs. (CR:509).

Gary and Gordon continued to mortgage the Property. They cosigned two loans with Bank West receiving one loan for $500,000 in November 2022 and one for $5,000,000 in March 2023. In September of 2022, Banner Capital approved Gary for a $2,300,000 loan. (CR:669-670,1453-1488).

On February 10, 2023, Defendants executed a new Alpha Land Purchase Agreement that again placed all financial liability for the property and project on Alpha. Unlike the prior version, however, this agreement expressly requires Alpha to make all payments on the seller's existing and any replacement financing, while eliminating the requirement that the parties execute the separate, "final" contract. (CR:1800).

Alpha is now subject to these mortgages despite having no access or control over the loan funds. During discovery, Shad requested a full accounting of all loan proceeds secured by the Property, supported by bank statements and check images, but Defendants only produced Alpha's own bank records that didn't include the requested information. (CR:670).

In early 2023, Shad retained counsel to represent him in a potential lawsuit against Gary and Gordon. On April 13, 2023, Gordon contacted Attorney Roger Tellinghusen regarding a letter Defendants received from Shad's attorney. (CR:1925). Defendants inquired whether it would be appropriate to inform Shad's attorney that Defendants intended to declare the Alpha PA void for nonperformance and then proposed forming a new LLC excluding Shad as a partner and entering into a new purchase and development agreement with that entity, offering Shad only a residual profit interest if he agreed to "refrain from ANY future litigation." *Id.* Tellinghusen took no issue with the plan, so long as the termination was handled in accordance with the purchase agreement. (CR:1926).

In May 2023, Kelly's company, UniMax, entered into a purchase agreement to buy 129 lots. (CR:1794). UniMax is now building and selling homes on these lots, while Shad has not been permitted to build anything in the development beyond the first two homes. (CR:698).

The value of the Property has increased dramatically since Shad acquired it and contributed to its development. When he transferred the property to Gary in 2020, the total purchase price was $4,931,924.00. (CR:28-30).

Several undisputed facts confirm a significant increase in value. First, the City approved $14 million in public infrastructure improvements through TIF funds which Gary claims requires, "no obligation to us other than they would like us to build as fast as possible." (CR:1214). Second, the project received a $3 million housing and infrastructure grant from the SD Housing Development Authority. (CR:1333). Third, the sale of 129 lots to Unimax for $8,012,000.00. (CR:1794). Finally, Defendants currently have 229 acres listed for sale at a combined asking price of $15,920,284.00. (CR:1805).

To date, Alpha's members have received only $22,000 in distributions. (CR:665-666). Shad's share has been assigned to Gary and applied toward his $150,000 construction loan. (CR:67). Other than building two homes in the development, Shad has received no income or benefit from his contributions to the Property's purchase, development, improvement and maintenance. In addition to his development work, he performed numerous tasks that benefited the Property and Defendants personally, including interseeding alfalfa and triticale, applying prairie dog control, building fences, hauling garbage, cleaning dams, feeding cattle for Gary, hauling hay for Gary and Gordon, performing construction work on Gary's home, and excavating and installing a water line. (CR:1923,17). Defendants have never compensated Shad for his labor and services. (CR:17).

Shad filed suit on December 16, 2023, and in response, Defendants sought judicial expulsion and counterclaimed for barratry and monies they claim Shad owes Alpha.

ARGUMENT

A. The Circuit Court Erred in Granting Summary Judgment on Plaintiff's Claims for Breach of Contract:

This case arises from an oral agreement between Shad and the Defendants to form a partnership, or joint venture, for the acquisition and development of the Property. Yet, the parties now dispute nearly every material term of that original agreement, each offering sharply conflicting accounts of what was promised, how those promises were to be carried out, and whether the written contracts reflect the complete and integrated agreement of the parties.

A document is "not fully integrated when the parties might naturally make additional terms or agreements as a separate agreement." *Pankratz v. Hoff,* 2011 S.D. 69, ¶ 14, 806 N.W. 2d 231, 236. Extrinsic evidence may be considered if the written agreement is not a fully integrated document. *Pankratz,* 2011 S.D. at ¶ 13.

In this case, there is no written contract that fully integrates all the terms of the parties' agreement. Instead, the transaction unfolded across time and through multiple writings; each drafted at a different stage and for a different purpose. None of which captured the entire agreement. The drafting process was deliberately manipulated to minimize Gary's tax exposure, necessarily distorting the written agreements and leaving key terms unstated or deferred to a "final contract" that was never executed.

Shad acknowledges that the mechanics of carrying out the agreement evolved to minimize various tax risks as they surfaced; however, Shad was repeatedly assured by Postma and the Defendants that these changes would not alter the agreed upon outcome, only the steps required to achieve it. Shad claims Defendants then used these changes as a way to back out of the deal.

As time went on, Postma continued to identify more risks in the exchange. Understanding these risks, and the proposed steps to avoid them, would have challenged even a seasoned tax professional, let alone someone with little experience in 1031 exchanges. Gary's own attorney declined to participate due to its complexity. (CR:648). Shad had no prior understanding of 1031 exchange rules and relied on Postma and the Defendants for their expertise to ensure it was handled properly. Shad testified that Defendants told him they "were going to, in their expertise, facilitate the 1031 and not to worry about it; this is what they do for a living." (CR:384).

Even Postma acknowledged he became increasingly uncomfortable with the positions being taken and admitted there were real risks involved (CR:914-918). He claims to have explained these risks, and ultimately it was Gary who decided to assume them. *Id.*

Viewing the facts in the light most favorable to Shad, the following account reflects his version of events. While Shad was in the process of securing a deal with Mr. Williamson to acquire the property, Gary was simultaneously seeking a replacement property for his 1031 exchange. (CR:383,428,5). Recognizing the development's potential, Gary and Gordon "wooed" Shad with promises of a family venture that would give him equal ownership and development rights, along with opportunities to earn income through multiple revenue streams. (CR:386,6-7). In reliance on those assurances, Shad declined other avenues to purchase the property, forewent other investment and employment opportunities and agreed to partner with Defendants. (CR:7,383)

According to Shad, the mutually agreed-upon terms of their agreement were as follows: through a jointly owned entity, they would acquire, own, and develop the property together, and the partnership would remain closed among the three of them with rights of survivorship. Shad was promised additional income through site development, home construction, use of the raw land, walking money (initial upfront cash paid to partners from the project) and profits from the mandated use of VROD noncorrosive rebar to which he was a main distributor. Because Shad viewed the project as divinely inspired and intended to bless his family, he sought to dedicate the development to God through street names. A reasonable jury could conclude from the record that Gary and Gordon, as Shad's father and uncle, desired to give him these opportunities and made such promises to induce his participation. (CR:6-7)(App.188-201).

When Postma was engaged to structure the 1031 exchange, he recommended abandoning the parties' original plan, which would have cleanly allowed Shad and Gordon to "join" Gary's umbrella LLC after the exchange thereby fulfilling their original agreement to own and develop the Property as equal partners. (CR:1294). Instead, Postma proposed a more cumbersome structure requiring the creation of a separate operating entity outside the exchange which complicated the agreement's execution. Postma believed this option was safer but still acknowledged that reasonable professionals could view the risk as essentially the same. *Id.* Even under this revised approach, Postma indicated that Gary would either contribute the property to the LLC or the LLC would purchase it, which reasonably satisfied Shad's expectation that the entity would ultimately hold title to the property despite the chosen method. (CR:1296).

Postma ultimately advised selling the Property to Alpha in parcels as developed. Again, opting for the more cumbersome structure that required several additional steps. A key component of which was that Alpha would refinance the CFD and mortgage the property to fund development and meet its financial obligations under the purchase agreement. (CR:915). Postma said it was "very much" his understanding that the parties agreed to execute this part of the plan. *Id.* It would make no commercial sense for Alpha to assume financial obligations it could not pay, thereby ensuring its own default. The record shows that Alpha applied for, paid for, and was approved for a $3.5 million refinance loan with Banner Capital demonstrating both its capacity to mortgage the property and the parties' intent to do so. (CR:1320,1449). This evidence directly refutes Defendants' sworn answers that Alpha lacked the ability to obtain such financing or that the parties intended to fund payments and development solely through future lot sales. (CR:668).

Postma admitted that the Exchange PA deliberately omitted certain terms of the parties' agreement to minimize step-transaction risks and avoid giving the IRS a "road map" of the steps being taken. (CR:916). On its face, the agreement states that Shad, an unrelated party, sold the Property to Gary and retained the proceeds. In reality, however, the parties agreed that the proceeds would be transferred to an LLC in which Gary, through attribution, held a majority interest—one of the very steps that, if disclosed, may have "invited" IRS scrutiny. *Id.*

Defendants would have the Court believe that Shad was merely a "strawman" in Gary's exchange. A label they use to imply he played no meaningful role and held no real interest in the transaction. Postma, however, more accurately described Shad as the "sacrificial lamb." (CR:10,387). A term reflecting personal risk and financial exposure, not nominal participation. Shad was not simply a temporary placeholder. He personally assumed a $2.1 million CFD that remained in his name for two years; held legal title to the property for six months; performed work and improvements while he owned it; and ultimately incurred a personal tax liability of $219,000—an obligation the IRS pursued for two years through repeated notices of levy. (CR:9,699). Importantly, the IRS deemed him a legitimate seller, not a strawman. Contrary to Defendants' assertion, Shad never assigned any purchase interest to any party.

The written contracts, individually or collectively, do not fulfill either side's asserted version of the agreement. They neither create a structure under which the parties would jointly own, develop, and profit from the property through a common entity, as Shad contends, nor do they secure a guaranteed one-third share of net development profits for Shad, as Defendants claim. Without both the right and the financial means to develop and purchase the Property, Defendants have rendered Shad's ownership interest in Alpha worthless.

The OA was drafted to avoid related party and developer risks and therefore omitted any reference to the property or its development. It was intended only as a vehicle through which the property could be purchased, with the parties' development terms to be set forth in the unexecuted development contract. The Alpha PA was likewise dependent on the parties approving and executing that contract and imposed significant financial obligations that Alpha could meet only through the agreed upon financing rights and terms.

Within a month of closing, Alpha had only $282,019 in remaining proceeds while facing semiannual CFD payments of $92,545, substantial development costs, and Shad's unpaid tax liability. (CR:1443). With or without lot sales, Alpha needed to mortgage the property to meet its ongoing financial obligations and develop the Property. Defendants' deliberate actions preventing financing directly caused Alpha's default. Combined with their refusal to execute the development contract, Shad has been left with no means to realize any benefit from the parties' agreement. Compounding the harm, Defendants amended the OA to materially alter Shad's company ownership and strip him of any meaningful right to participate in the company, while also denying him the other revenue streams they had promised. In short, Defendants have ensured that Shad is guaranteed nothing; any benefit he could receive depends entirely on their discretion. This is not merely Shad's contention—Gary confirmed this in his letter to Attorney Trask and in the plan he later presented to Attorney Tellinghusen, who raised no objection. (CR:1325,669,1925-1926).

Shad submits that genuine issues of material fact exist regarding the mutually agreed upon terms of the parties' overall agreement, whether those terms were ever reduced to a final and complete writing, and whether Defendants breached the agreement causing Shad damages. Because the writings are not fully integrated, contain uncertain and ambiguous terms, and reserve material terms for an unexecuted separate contract, the Court may consider extrinsic evidence to determine the parties' actual agreement and intent, including oral promises, separate agreements, course of performance and dealing, and evidence of fraud or illegality. See *Pankratz v. Hoff*, 2011 S.D. 69, 806 N.W. 2d 231, 236 (S.D. 2011) and *LaMore Restaurant Group, LLC v. Akers*, 2008 S.D.32, ¶30, 748 N.W.2d 756, 765.

If the existence and terms of a contract are in dispute, these are questions of fact to be determined by a fact finder. *J. Clancy, Inc v Khan Comfort, LLC*, 2021 S.D. 9, ¶ 18, 955 N.W. 2d 382, 389. The elements essential to the existence of a contract are: (1) parties capable of contracting; (2) their consent; (3) a lawful object; and (4) sufficient cause or consideration. SDCL 53-1-2. To form a contract, there must be mutual assent on all essential terms. *J. Clancy, Inc*, 2021 S.D. at ¶ 18. Consent is not mutual unless the parties agree upon the same thing in the same sense. SDCL 53-3-3. "The question of whether mutual assent exists may present disputed questions of fact. This is particularly the case when there are disputed facts concerning the existence of an oral contract." *J. Clancy, Inc*, 2021 S.D. at ¶ 18.

Capacity is not disputed. Consideration, however, is. The consideration as stated by Shad including locating and purchasing the property, assembling the deal, performing development work, improvements he made to the property and forgoing other opportunities in exchange for the numerous promises the Defendants made to him is sufficient to support a binding contract.

Defendants' assertion that Shad's one-third ownership in Alpha satisfies his share of the development profits amounts to no consideration at all, as Alpha is a defunct entity with no assets, no right or ability to develop, and is in perpetual default under its purchase agreement. (CR:1611,345).

The stated object of the overall agreement, to acquire and develop the property, is lawful. Whether the steps taken by Gary to minimize his tax risks were carried out by means that render the transaction's purpose unlawful is a question for the fact finder.

Mutual assent is highly disputed. Shad maintains that multiple promises were made to him—the core promise being equal members in owning and developing the Property. When the exchange structure was modified to require a separate operational entity to purchase the Property, the parties agreed that Alpha would obtain title through financing and a separate development contract would set forth development terms including Shad's role, compensation, and other expectations.

Defendants, however, maintain that the written agreements, namely the OA, constitute the entire agreement. Defendants contend that the OA is the operative, controlling agreement that fully integrates the parties' agreement. (CR:1606). This argument fails for two primary reasons. First, the OA makes no reference to the Property, and Postma made it clear that all terms relating to development and the parties' respective roles were to be included in the separate, but never executed, development agreement. Second, even under Defendants' own theory of the agreement, the OA grants Shad no enforceable right to one-third of net development profits. It entitles him only to one-third of Alpha's profits and Alpha has no right to develop the Property. And even if Alpha had the right to purchase and develop the property, it lacks the financial means to do so because of Defendants' breach. Any continued ability to develop depends entirely on Gary's willingness to "rescue" Alpha from default, ironically through loans originating from the very financing Alpha was supposed to obtain and is now obligated to repay. The OA therefore cannot be viewed as a complete and final expression of the parties' agreement.

Additionally, Shad submits that the addendum language regarding "net profit" is ambiguous and inconsistent with the parties' agreement. It provides that:

> The Buyer also agrees to pay the Seller an amount equal to one-third of the net profit from sales of property as portions are developed and re-sold by the Buyer.

(CR:36).

On its face, this language suggests that the Seller, Gary's LPs, is to receive one-third of Alpha's development profits and that Alpha's own development costs are deducted in calculating that amount. For example, if Alpha develops a parcel for $5,000, purchases it from Gary's LPs for $10,000, and sells it for $20,000, it is unclear whether "net profit" means $20,000 minus both $10,000 and $5,000 or $20,000 minus the $10,000 purchase price. Without this provision, the calculation would be straightforward. Alpha would sell the parcel for $20,000, pay $10,000 to Gary's LPs, and retain the remaining $10,000. The mere inclusion of this language introduces uncertainty and ambiguity. Its inclusion makes sense only if the calculation was intended to include Alpha's development costs. This provision is entirely contrary to the parties' agreement, as Postma confirms in his affidavit. (CR:918).

<u>Additional Terms of the Agreement</u>: If the Court finds that the written contracts do not fully represent or integrate the parties' agreement, then identifying the actual terms becomes a factual inquiry. Shad has presented substantial evidence that Defendants made

additional promises concerning both his development role and the multiple ways he was to derive financial benefit from the project. These promises have been identified in this brief and the factual basis for each is detailed on pages 57–70 of Plaintiff's Brief in Opposition to Defendants' Motion for Partial Summary Judgment. (CR:835). The relevant portions have been included in the appendix. (App.188-201). Due to volume limitations, those facts and arguments are incorporated herein by reference. As this Court has recognized, "The existence of mutual consent is determined by considering the parties' words and actions." *In re Estate of Neiswender*, 2003 S.D. 50, ¶20, 660 N.W.2d 249, 253. The promises identified by Shad are corroborated by the parties' subsequent conduct and communications, which evidence their mutual assent or at minimum, present genuine issues of material fact.

Breach and Damages: Defendants have materially breached their agreement with Shad in every respect. They denied and refused to allow Alpha to refinance the CFD and obtain subsequent financing necessary for development and they refused to execute the separate development contract. These breaches left the parties' partnership entity without title to the property and without any right or ability to develop it. In doing so, Defendants eliminated their own claimed consideration to Shad.

Defendants further breached the agreement by refusing to implement the agreed upon noncorrosive rebar covenant, by refusing to finance continued home construction, by failing to provide Shad walking money once funds were available, by excluding him from site development, and by not honoring commitments related to biblical street names. In short, Defendants breached every promise they made to him.

As a result, Shad has received only nominal financial benefit since 2019 and has been left with a one-third interest in a defunct company that Defendants can abandon leaving Shad with nothing. Nothing for identifying and securing the property, creating and advancing the development, assuming personal and financial risk (i.e. the sacrificial lamb), and dedicating years of work and forgone income to the project. Shad turned away other ready investors to honor the family agreement. Gary ultimately paid only $4.9 million for the Property, and it is now worth several times that amount. It has since received $14 million in TIFF funding, $3 million in infrastructure grants, sold 129 lots for $8 million and current listings of only 229 acres total $15,920,284.00. (CR:1214,1805,1333,1794).

Today, Gary, Gordon, and Kelly stand to make substantial profits from the very development Shad envisioned and made possible, while he is left with whatever Defendants choose to give him and given their current relationship and stated intentions, that appears to be nothing.

As his father, Gordon, once acknowledged, "Shad is responsible for the idea of what has become Alpha Omega. His vision and work put together the package of properties that made it possible for the project to exist." (CR:1905). More than five years later, Shad is still waiting to see any return on his efforts. In seeking to obtain what was promised to him, Defendants have in return sued him for barratry and for monies they claim *he* owes to Alpha and asked the court that he dissociated from the company.

B. The Circuit Court Erred in Granting Summary Judgment on Plaintiff's Claims for Fraud in the Inducement or Negligent Misrepresentation:

"Fraud as an inducement to enter a contract is a question of fact for the jury. Actual fraud is always a question of fact." *Poeppel v. Lester*, 2013 S.D. 17, ¶ 20, 827

N.W.2d 580, 585 (citing SDCL 53-4-5). Parol or extrinsic evidence is admissible to prove fraud, and "[t]here is very little that the parties can do in their agreement to prevent the use of extrinsic evidence to attack the written agreement on grounds of fraud." *Id.* Evidence of misrepresentation is admissible even if the agreement is completely integrated. *Id.*

To establish fraud, Shad must show that Defendants; 1) Suggested as a fact that which was not true by one who did not believe it to be true; 2) Positively asserted as true, without reasonable basis, that which was not true; 3) Suppressed a material fact known to be true; 4) Made a promise without intent to perform it; or 5) Engaged in any other act designed to deceive. *Poeppel,* 2013 S.D. at ¶26.

A reasonable jury could find that Defendants fraudulently induced Shad to enter the partnership and that their efforts to mislead him continued throughout the course of the venture. The record shows the parties' original intent was for the partnership entity to own the Property following Gary's 1031 exchange. Defendants now claim that they never agreed to that structure. Based on Postma's communications, a jury could find this untrue and that Defendants represented to Shad that their partnership entity would own the Property either knowing that was untrue, or without reasonable basis to believe it, or they never intended for it to happen and thereby induced Shad's participation.

Similarly, the evidence overwhelmingly shows that Alpha was to refinance the CFD and was approved for a $3.5 million loan that would have conveyed ownership in 779 acres. In his sworn Answer, Gary now claims that Alpha could not obtain financing because it held no interest in the Property and therefore had no collateral to mortgage. (CR:697). In light of Postma's testimony and Banner's loan approval, a jury could find that Defendant are being untruthful and represented to Shad that Alpha would obtain such financing knowing it to be untrue, or without reasonable basis to believe such, or they never intended for it to happen and thereby falsely convinced Shad that Alpha would hold title to the property and have the funds to meet its obligations.

The record also shows that the parties agreed to execute a separate development contract. Defendants admit as much, yet they never executed it and instead deliberately chose to eliminate it from the 2023 revised Alpha PA. (CR:667,1800). A jury could reasonably conclude that Defendants never intended to execute this contract.

Finally, Shad claims he was fraudulently induced into signing the Operating Agreement based on Defendants' representations and assurances that it could not be amended without his consent as to material matters. Due to volume limitations, the supporting facts for this claim can be found on pages 30-31 in Plaintiff's Response to Defendants' Partial Motion for Summary Judgment, the relevant portions of which have been included in the appendix and are hereby incorporated by reference. (App.202-203).

Genuine issues of material fact exist as to whether Defendants knowingly made false representations, suppressed material facts, or made promises they never intended to perform. The evidence viewed in Shad's favor supports multiple inferences of fraudulent inducement. These issues turn on credibility, intent, and the parties' understanding at formation, all of which are questions for the jury. Summary judgment was therefore improper.

C. The Circuit Court Erred in Granting Summary Judgment on Plaintiff's Claims for Promissory Estoppel and Unjust Enrichment:

Shad pleaded promissory estoppel and unjust enrichment as alternative causes of action. Each provides an equitable avenue for relief where Defendants' conduct and the incomplete or unexecuted agreements leave no adequate remedy at law. Promissory estoppel addresses Defendants' unfulfilled promises on which Shad reasonably relied to his detriment; unjust enrichment addresses the substantial benefits Defendants retained from Shad's uncompensated contributions. Both doctrines rest on well-established equitable principles designed to prevent injustice and both present genuine issues of material fact precluding summary judgment.

The elements of these causes of action can be found in *Jed Spectrum, Inc. v. Stoakes*, 2025 S.D. 31 (promissory estoppel), and *Action Mechanical, Inc. v. Deadwood Historical Preservation Commission*, 2002 S.D. 121, ¶ 21, 652 N.W.2d 742, 750 (unjust enrichment). The same core facts discussed above apply equally here.

As to Shad's overall unjust enrichment claim, he contends that Defendants were unjustly enriched by acquiring and retaining ownership and control of the property and by profiting from its development through Shad's efforts, risk, and performance. In reliance on Defendants' promises of an equal partnership to own, develop, and share in the project's profits, Shad set aside other business opportunities and invested significant time, expertise, and resources to identify, negotiate, and secure the property and advance its development, all without fair compensation. Shad also maintains a separate unjust enrichment claim for specific unpaid labor and services, addressed later in this brief.

D. The Circuit Court Erred in Granting Summary Judgment on Plaintiff's Derivative Claims for Breach of Fiduciary Duty.

Members of a limited liability company owe duties of loyalty and care to the company and to one another. SDCL 47-34A-409. In *Hayes v. Northern Hills General Hospital*, 1999 S.D. 28, ¶52, 590 N.W.2d 243, 253, this Court found that, "[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". The duty between partners is "characterized by a loyalty of the highest order". *Hayes,* 1999 S.D. at ¶54. "There is a long-established rule in South Dakota that partners are in a fiduciary relationship to each other," and "Application of these principle presents a question of fact as to whether the defendants breached their fiduciary duty as partners." *Hayes,* 1999 S.D. at ¶55.

Gary and Gordon, as controlling members of Alpha, breached these duties through repeated acts of self-dealing, mismanagement, and diversion of corporate opportunities.

Alpha's $3.5 million loan with Banner Capital would have paid off the CFD still in Shad's name, satisfied his delinquent IRS liability, provided $1.5 million in development capital, and conveyed Alpha title to 779 acres of the Property. (CR:1320). The record unequivocally establishes that the parties agreed Alpha would perform this refinance. Yet Gary, acting in his own self-interest, instructed Banner Capital to change the borrower to his personal LPs explaining that a refinance through Alpha would personally cause him a tax consequence while acknowledging that Alpha will remain responsible for the loan payment as part of the contract. (CR:1318). In other words, Alpha remained liable for the debt but was denied the benefits of ownership, capital, and equity.

By this time, Alpha had become dependent on loans from Gary to meet its basic obligations. (CR:345,364). Receiving $1.5 million in development funds from Banner would have stabilized Alpha's finances, yet Gary's self-interested decision blocked the funding. This single act crippled Alpha's ability to operate and perform its obligations under the purchase agreement and constitutes the most egregious and damaging breach of fiduciary duty to both Alpha and Shad. As a result, the Alpha PA was declared in default shortly thereafter. (CR:345).

Gary and Gordon further breached their fiduciary duties by encumbering the development property with substantial new debt and concealing the use of loan proceeds. They obtained a $500,000 line of credit and an additional $5 million mortgage guaranteed by both Gary and Gordon. (CR:669-670,1453-1488).

Under the loan terms, proceeds from each lot sale are first applied to the interest, principal, and release fees on these loans. Those proceeds would otherwise belong to Alpha, which bears the financial risk of repayment without any control over how the borrowed funds are used.

Interrogatory 49 and Request for Production 1, ask Defendants to identify all bank accounts for which loan proceeds have been deposited and to produce all bank statements, and check/deposit images. In response, Defendants only produced Alpha's own bank records, to which Shad already had access. (CR: 670). As a result, Alpha is responsible for debt obligations its members cannot audit or oversee. This violates both the duty of loyalty by concealing potential self-dealing and the duty of care by depriving the company of the ability to ensure that its funds are applied to legitimate development expenses.

As the sole recipients and controllers of these loans, Gary and Gordon decide when, if ever, Alpha may receive or use the funds. This control over Alpha's finances leaves the company unable to function independently. Defendants' control over Alpha's finances is further illustrated by their diversion of the grant funds intended for Alpha's benefit. When Alpha received the infrastructure grant, Gary and Gordon immediately paid a substantial portion to BankWest to satisfy their own loans. Alpha was left with barely $31,000 in its account after receiving the grant. (CR:1328-1331). These disbursements again demonstrate Defendants' domination of Alpha's finances and their ability to extract the benefits of development for their own advantage while leaving the company undercapitalized. To date, Gary and Gordon have approved only two distributions to Alpha members. In September 2023, Shad's distributions of $10,000 and $12,000 were both assigned to Gary as loan repayment. (CR: 665-666,67).

The inequity is compounded by the terms of the Alpha PA as it fails to define "net profit," creating ambiguity easily manipulated by those controlling both the Property and the books.

Although Gary claims Alpha receives an "interest-free" loan, the Alpha PA credits Alpha only for principal, while Alpha's proceeds are first used to pay interest and release fees on Gary's loans. (CR:1219,1453-1488,668). Thus, Alpha bears the interest cost of Defendants' financing without any offset in Alpha's purchase obligation whereby shifting financing costs to the company.

Defendants also breached their fiduciary obligations by failing to execute the separate development agreement required by the Alpha PA. This document was intended to formalize Alpha's development rights and protect its interests, yet Defendants never executed it leaving Alpha completely unprotected.

In addition, Alpha has been deprived of its ability to generate income from the raw undeveloped property, even though it bears the costs of taxes, insurance, and mortgage payments. When asked whether it was his position that Alpha must pay all expenses related to the Property but is not entitled to any income from its use or rental because Alpha has agreed that income should go to Gary; Gary replied, "Yes." (CR: 692).

Taken together, every material decision Defendants made after the 1031 exchange, from refusing to execute the development contract, to blocking the refinance, to diverting grant funds and income, was calculated to protect their own financial interests while crippling Alpha's independence and rendering Shad's ownership, participation, and control effectively worthless.

Defendants have reduced Alpha to an empty shell. Stripped of assets and authority, Alpha is left carrying debt it cannot repay, obligations it cannot meet, and a purchase agreement perpetually in default—all while Defendants extract the benefits of the very development Alpha was created to pursue.

Shad has provided sufficient evidence that genuine issues of material fact exist to establish Defendants breached their duties of loyalty and care to Alpha precluding summary judgment as a matter of law.

E. The Circuit Court Erred in Granting Summary Judgment on Plaintiff's Direct Claim for Minority Oppression:

Oppression arises when the minority member's expectations were "both reasonable under the circumstances and were central to the decision to join the venture." *Mueller v. Cedar Shore Resort, Inc.*, 2002 S.D. 38, ¶14, 643 N.W.2d 56, 63. "Mere disappointment in the results of a venture is not sufficient. Rather, the statutory protection is more dramatic, and oppression should be deemed to arise only when the majority conduct substantially defeats expectations that, objectively viewed, were both reasonable under the circumstances and were central to the [minority shareholder's] decision to join the venture." *Landstrom v. Shaver*, 1997 S.D. 25, ¶39, 561 N.W.2d 1, 8 (S.D. 1997). Moreover, "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,* 1997 S.D. at ¶42.

The record clearly shows that the parties agreed at formation to a closed, three-member venture. The OA speaks for itself. Shad testified that this was absolutely fundamental to his decision to join stating, "under no circumstance would we ever be dealing with anybody other than one of us three... And without those details, this deal would not have happened." (CR:387). Holly testified that Shad would never have agreed to be in the partnership if it meant he would have to be partners with Kelly, or Gary's wife, or anyone else. (CR:329). Postma likewise confirmed this understanding. (CR:919). Gary admits that the members discussed not wanting to be partners with their wives and that this understanding was reflected in the language of the first operating agreement. (CR:693). The original OA was drafted by an attorney who would have understood the implications of a right of survivorship, and Defendants admit they understood and voluntarily signed it.

Gary and Gordon later amended the OA to eliminate the right of survivorship and allow each member to designate replacement members. There are no restrictions on who those replacements may be, nor do they require unanimous approval of the remaining members. (CR:1268). Gary concedes that these amendments "significantly changed the members' ownership rights and interests," and could require surviving members to work with individuals they never agreed to. (CR:694).

This is not "mere disappointment." It fundamentally altered Shad's ownership rights and substantially defeated a central, objectively reasonable expectation that Alpha would remain a closed, three-member venture where ownership would pass only among the founders.

Additionally, the original OA gave each member one vote. The amendments changed that structure by vesting voting authority solely in two elected managers, Gary and Gordon, thereby stripping Shad of his reasonable expectation of meaningful participation in company affairs. (CR:1264).

Shad also contends that Defendants' intentional consolidation of control over development financing left Alpha effectively powerless. Although Defendants describe Alpha as a development company, it is a company with no assets or independent capital. Even if the members vote to take a particular development action, whether it can occur ultimately depends on whether Gary decides to loan Alpha the money to fund it. True governance over development therefore rests with Gary and Gordon, who control both the property and the financing. Shad certainly didn't expect this kind of abuse of control and power when he agreed to join the venture.

Taken together, and considering the totality of the circumstances, these actions constitute oppression under *Mueller* and *Landstrom*, or at the very least raise genuine issues of material fact precluding summary judgment.

F. The Circuit Court Erred in Granting Summary Judgment on Plaintiff's Unjust Enrichment Claim Regarding Unpaid Labor and Services

Shad claims that Defendants were unjustly enriched by accepting the benefits of his uncompensated labor and services. Beyond facilitating the acquisition of the property, Shad dedicated years of work to further the project's development, making improvements to the land and providing services personally for both Gary and Gordon. (CR:17,1923). He performed these services in reliance on Defendants' promises and with the reasonable expectation that he would be compensated. Defendants accepted the benefit of Shad's efforts without compensation and now seek to disclaim any obligation to pay him. *Id.*

Throughout the course of the project, Shad provided substantial, uncompensated labor and services that directly benefited the development of the property. *Id.* Shad remains uncompensated for his work overseeing site work, managing contractors, and coordinating with engineers to advance infrastructure planning and development. *Id.* In addition, Shad personally performed extensive physical labor on the property, including land improvements such as road construction, fence installation, creek crossings, dam clean-outs, trash removal, and prairie dog control. He also dedicated significant time and resources to property maintenance, equipment operation, and excavation services. *Id.*

He also performed various services that personally benefited Gary and Gordon such as feeding livestock, hauling hay, assisting with Gary's home plans and basement excavation, and other labor-intensive tasks. *Id.*

Shad undertook these tasks on his own initiative without a verbal agreement to do so, yet Defendants were fully aware he was doing it and knowingly accepted the benefits. (CR:479,1223-1225).

Shad testified that he performed these services in good faith, believing that as a member of Alpha he would ultimately share in the benefit of the property's improvement. (CR:479).

In addition to the specific services he performed, the time commitment and opportunity cost to Shad were significant. Holly testified that Shad spent 2019 and 2020 working on the project to the exclusion of other work and had limited income as a result. (CR:321).

The improvements Shad made to the property directly enhanced its value and development potential.

Unjust enrichment occurs when a party confers a benefit on another, who accepts or acquiesces in that benefit, making it inequitable to retain the benefit without payment. *Action Mechanical,* 2002 S.D. 121 at ¶21. The record shows that Shad provided years of labor and services that directly benefited Defendants and the Property with the reasonable expectation of compensation. Defendants knowingly accepted and retained the benefits of Shad's work without payment. (CR:1618). These facts, viewed in the light most favorable to Shad, establish a clear basis for his unjust enrichment claim.

Defendants argue that Shad's unjust enrichment claims are barred by the existence of an express contract, asserting that the OA governs the subject matter of his claims. This defense fails for two reasons. First, Shad's efforts and contributions benefited the landowners, not Alpha. Second, the OA does not control because it omits the rights and obligations at issue. The parties intended those to be in the separate development contract that was never executed.

Plaintiff has already detailed how Defendants systematically stripped Alpha leaving it a non-functioning entity. The operative question is who has actually benefited from Shad's work and improvements to the Property. Shad would submit that his services and labor have benefitted the owner of the property and those in control of its continued development, the Defendants. Any funds available to compensate Shad for his labor and services would be controlled by Gary and Gordon, not in their capacity as members of Alpha, but as the owners of the loan proceeds. Gary's suggested plan to abandon Alpha altogether and form a new entity without Shad is further evidence of how Shad's unpaid work has only benefitted the Defendants. (CR:1925).

Second, as previously explained, the OA was never intended to define the parties' obligations regarding the development. Postma made clear that those terms were to be incorporated into a separate written contract that was never executed. The OA does not reference the Property or the development. Because no valid contract governs compensation for the work Shad performed, unjust enrichment is an appropriate equitable remedy for his unpaid labor.

Additionally, Defendants argue that Shad forfeited this claim based on Attorney Trask's April 7, 2022 letter, which they interpret as stating the work was gratuitous. That assertion misrepresents the record. The letter responded to Gary's April 4, 2022 email acknowledging Shad's efforts and offering him $10,000 in payment for work performed on the ranch, his home, and the Property. (CR:1223-1225). Ms. Trask's letter did not address, nor could it have waived, Shad's claim for the hundreds of thousands of dollars of services he provided.

The record presents clear factual disputes regarding the nature and extent of Shad's services, the benefits conferred on Defendants, and whether compensation was expected or provided. Viewing the evidence in the light most favorable to Shad, a reasonable jury could find that Defendants accepted and retained the benefits of his extensive labor and services without payment, making summary judgment improper.

G. The Circuit Court Erred in Granting Summary Judgment on Defendants' Counterclaims for Judicial Expulsion and Repayment of Money Loaned

1. Alpha's Claim for Repayment of Money Loaned:

Defendants assert a counterclaim on behalf of Alpha alleging that Shad owes $30,704.84 for construction funds "advanced" to him. This claim fails both factually and legally. First, Alpha is not the lender in fact.

In April 2020, Shad received a check from Alpha for $150,000 to construct the first home; however, Gary claims he advanced these funds to Alpha and therefore, Shad owes him on this loan. (CR:1441-1442,351). In fact, Gary had Shad sign a personal promissory note to him, not to Alpha, acknowledging the $150,000 as a loan from Gary despite Shad actually receiving the money from Alpha. (CR:351). Consistent with this arrangement, all of Shad's distributions have been assigned to Gary as repayment for this personal loan. (CR:67).

Defendants now claim that Alpha loaned Shad an additional $30,704.84 for construction costs. The record, however, shows that these payments occurred in early 2022, when Alpha was dependent on Gary's personal advances. (CR:345). Consistent with the earlier $150,000 construction loan, these funds were disbursed by Alpha but advanced by Gary. Shad asserts that this advance, like the prior one, was to be repaid through his future distributions. In an email dated May 21, 2023, Holly confirmed this understanding, "I have a question about the $30,000 bill that was presented to Shad during the meeting. It was my understanding that all money owed to Alpha was going to be repaid through the 1/3 profit of lot sales." (CR:1222).

Shad testified that he found the invoice for $30,704.84 "laughable" in light of the extensive uncompensated work and value he had contributed to the Property. (CR:485). Shad itemized over $300,000 in services he performed for Gary, Gordon, and Alpha, none of which Defendants ever paid. They readily accepted those benefits for free, yet now seek to pursue a $30,000 claim only after Shad initiated this litigation.

Genuine issues of material fact exist as to whether the alleged debt was owed to Alpha and what the parties agreed would be the repayment, if any.

2. <u>Counterclaim for Expulsion by Judicial Determination:</u>

Due to volume limitations, it is not possible to address each of Defendants' allegations regarding Shad's conduct and purported grounds for dissociation. These claims generally include threats of litigation, threats of liens and a lis pendens, Shad's demeanor during depositions, his attendance at a 2023 City Council meeting, and his alleged impact on Kelly's participation in the company. All such issues have been fully briefed and can be found in the record. Shad incorporates by reference the facts and arguments presented on pages 11–16 of his Response in Opposition to Defendants' Motion for Pretrial Ruling on Punitive Damages and pages 44–46 of his Brief in Opposition to Defendants' Motion for Summary Judgment. The relevant portions of such briefs are included in the appendix. (App.204-212). The circuit court denied Defendants' pretrial motion, finding no evidence of malicious conduct. Discovery in this case has been limited to written discovery and the depositions of Shad and Holly; the only non-party affidavit is from CPA James Postma.

Defendants have not produced any undisputed evidence that Shad engaged in wrongful conduct that materially and adversely affected Alpha's business, that he willfully or persistently breached the OA. There is no evidence that Shad caused injury to Alpha, impeded development, or damaged its relationships with the City or other professionals. Defendants' accusations rest on speculation and personal grievances, not undisputed evidence. When meetings became contentious, Shad appropriately sent Holly to reduce conflict. After Defendants amended the OA to remove his voting rights and consolidate control to themselves, Shad had little reason to participate in meetings that had become unproductive and hostile.

Defendants never sought to expel Shad while the alleged conduct occurred. Only after he retained counsel and filed suit did they act. Defendants admit that they warned Shad if he filed suit, they would dissociated him. (CR:701). Similar to their barratry counterclaim, this dissociation effort is retaliatory.

The record instead shows that Defendants engaged in conduct that created a business environment that made it no longer reasonably practicable for Shad to carry on the business with them. They amended the OA over his objections, stripped his voting rights, excluded him from management, and breached their promises that he would lead site development and build homes on the property. (CR:698). Their later attempt to formalize that exclusion through judicial dissociation only compounds the inequity, particularly as the amended agreement now gives the majority sole control over the timing and disposition of profits owed to Shad as a dissociated member. (CR:1265-1268)

These facts create genuine issues of material fact that must be resolved by a jury, not on summary judgment.

H. The Circuit Court Erred by Failing to Comply with SDCL 15-6-56(d):

The circuit court did not dispose of all claims or grant all relief requested in Defendants' first summary judgment motion. Accordingly, SDCL 15-6-56(d) required the court to specify which material facts were without substantial controversy and which remained in dispute. The statute provides that when judgment is not rendered upon the whole case, the court "shall... make an order specifying the facts that appear without substantial controversy... and directing such further proceedings as are just." *Id.* The court entered no such order. Because no findings were made identifying which facts were established and which remained contested, the partial summary judgment order failed to comply with SDCL 15-6-56(d).

The circuit court's order failed to specify which facts remained in controversy, depriving Plaintiff of notice as to which factual issues were preserved for later proceedings and which the court treated as resolved. In the absence of such findings, Defendants were able to advance later motions treating certain facts as undisputed without knowing if the court had made such determination. This uncertainty undermined the fairness of subsequent proceedings and frustrates appellate review. Neither the parties nor this Court can discern what the first order actually decided. The omission was therefore not harmless. It materially affected the framing of later issues, the second summary judgment ruling, and the final judgment.

I. The Circuit Court Erred in Finding That Plaintiff's Alternative Claim for Recission Is Barred as a Matter of Law:

Defendants argue that Shad unequivocally elected rescission, foreclosing compensatory damages and tort claims, even though rescission was pleaded only in the alternative. (CR:160). Their argument misstates Shad's deposition testimony and ignores the circuit court's express finding of a factual dispute. The court correctly denied

Defendants' motion on election, but Defendants have sought review from this Court. In light of this, Shad appeals the court's alternative finding that rescission would not be available as a matter of law.

Defendants presented no undisputed evidence establishing when Shad discovered the facts giving rise to rescission or that he knowingly failed to act. While Shad acknowledges that literal unwinding of the transaction may no longer be possible with exact precision, that impossibility is the result of Defendants' wrongful and fraudulent conduct. Equity does not allow wrongdoers to profit from their misconduct, and the court may fashion monetary or other equitable relief to achieve fairness.

CONCLUSION

Plaintiffs respectfully request that this Court reverse the circuit court's summary judgment orders and final judgement dismissing their claims and granting Defendants' counterclaims; hold that the court failed to comply with SDCL 15-6-56(d) and that rescission is not barred as a matter of law; and remand for trial on all of Plaintiff's claims, Defendants' counterclaims and all factual disputes improperly resolved on summary judgement.

Dated this 25th day of November, 2025.

PETERSON LAW, PLLC

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Attorney for Plaintiffs/Appellants

REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests oral argument on this matter.

CERTIFICATE OF COMPLIANCE

This Brief is compliant with the length requirements of SDCL § 15-26A-66(b). Proportionally spaced font Times New Roman 12 point has been used. Excluding the Cover Page, Table of Contents, Table of Authorities, Preliminary Statement, Jurisdictional Statement, Legal Issues, Request for Oral Argument, Certificate of Compliance, Certificate of Service, and the Appendix, Appellants' Opening Brief contains 14,988 words as counted by Microsoft Word.

/s/ Kelly M. Peterson
Kelly M. Peterson

CERTIFICATE OF SERVICE

Kelly M. Peterson, of Peterson Law, PLLC hereby certifies that on the 25th day of November, 2025, she electronically filed the foregoing document with the Clerk of Court through Odyssey File & Serve, and that Odyssey File & Serve will serve an electronic copy upon the following:

WHITING HAGG & DORSEY, Prof. LLC
JOHN S. DORSEY
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Rapid City, SD 57709-8008
Attorney for Defendants and
Counterclaimants/Appellees
john.dorsey@amatteroflaw.com

The undersigned further certifies that the original Brief of Appellants in the above-entitled action was mailed by United States mail, postage prepaid to Ms. Shirley A. Jameson-Fergel, Clerk of the Supreme Court, State Capitol, 500 East Capitol, Pierre, SD 57501 on the above-written date.

/s/ Kelly M. Peterson
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APPENDIX TABLE OF CONTENTS

STATE OF SOUTH DAKOTA	))SS.	IN CIRCUIT COURT
COUNTY OF PENNINGTON	)	SEVENTH JUDICIAL CIRCUIT

SHADRACH HOWIE, and ALPHA LAND COMPANY, LLC, a South Dakota limited liability company, Plaintiffs, vs. GARY HOWIE and GORDON HOWIE, Defendants.	)	File No. 51CIV23-001344 **JUDGMENT**

This matter having come before the Court on June 25, 2025, and the parties having been represented by their respective counsel of record, this court finds that all claims, rights and liabilities of the parties have been adjudicated save Defendants' claim for costs and disbursements pursuant to SDCL § 15-6-54(d)(1) and Defendants' claim for reasonable attorneys' fees and nontaxable expenses pursuant to SDCL § 15-6-54(d)(2). This Court further finds that all issues joined by the pleadings not otherwise having been voluntarily dismissed, have been duly heard and adjudicated and notice of this Court's orders on summary judgments filed January 24, 2025 and April 29, 2025 have been served and filed. Accordingly, it is hereby

ORDERED and ADJUDGED that consistent with this Court's orders on summary judgment, Plaintiff, Alpha Land Company, LLC, recover of Plaintiff Shadrach Howie a money judgment in the sum of $39,704.84 at the category "F" rate of fifteen percent (15%) per year as provided by SDCL § 54-3-5 (interest on moneys after they become due); and further, that Plaintiff Shadrach Howie be dissociated by judicial determination from Alpha Land Company, LLC and that he take nothing on the causes of action alleged in his Verified Complaint and that same be dismissed as a matter of law; and it is further,

ORDERED and ADJUDGED that Defendants shall be allowed their costs and disbursements as a prevailing party and must file an application for taxation of costs as provided in SDCL § 15-6-54(d)(1); and it is further

ORDERED and ADJUDGED that claims for attorneys' fees and related nontaxable expenses shall be made by motion after entry of judgment as provided in SDCL § 15-6-54(d)(2).

Dated: 6/25/2025

BY THE COURT:

Honorable Matt Brown
Circuit Court Judge

Attest:

/s/

Amber Watkins, Clerk of Courts

By

Deputy Clerk

FILED
Pennington County, SD
IN CIRCUIT COURT

JUN 25 2025

Amber Watkins, Clerk of Courts
By ______ Deputy

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTY OF PENNINGTON	)	SEVENTH JUDICIAL CIRCUIT
	)	
SHADRACH HOWIE, ALPHA LAND CO., LLC, a South Dakota Limited Liability Company,	)	FILE NO. 51 CIV 23-1344
Plaintiffs,	)	**ORDER REGARDING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT**
v.	)	
GARY HOWIE and GORDON HOWIE	)	
Defendants.		

Defendants filed a Motion for Partial Summary Judgment on October 3, 2024. On December 2, 2024, Plaintiff filed their Brief in Opposition of Defendant's Motion for Partial Summary Judgment. On December 6, 2024, Defendants filed their Reply to Plaintiff's Brief in Opposition of Defendants' Motion for Partial Summary Judgment. The Court held a hearing on the matter on December 10, 2024.

Having reviewed the motions, notices, and other submissions by parties, having heard arguments by parties, and being otherwise familiar with the record, Defendants Gary Howie and Gordon Howie's Motion for Partial Summary Judgment is **GRANTED in part** and **DENIED in part.**

ANALYSIS

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." SDCL § 15-6-56(c). "A disputed fact is not material unless it would affect the outcome of the suit under the governing substantive law." *Niesche v. Wilkinson*, 2013 S.D. 90, ¶ 9, 841 N.W.2d

250, 253-54. "In summary judgment proceedings, '[t]he burden is on the moving party to clearly show an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law.'" *City of Sioux Falls v. Strizheus*, 2022 S.D. 81, ¶ 18, 984 N.W.2d 119, 124 (quoting *Gail M. Benson Living Tr. v. Physicians Off. Bldg., Inc.*, 2011 S.D. 30, ¶ 9, 800 N.W.2d 340, 343). "The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party. The nonmoving party, however, must present specific facts showing that a genuine, material issue for trial exists." *Saathoff v. Kuhlman*, 2009 S.D. 17, ¶ 11, 763 N.W.2d 800, 804 (quoting *Pellegrino v. Loen*, 2007 SD 129, ¶ 13, 743 N.W.2d 140, 143).

"The party resisting summary judgment must present 'sufficient probative evidence that would permit a finding in [their] favor on more than mere speculation, conjecture, or fantasy.'" *Lammers v. State by and through Department of Game, Fish and Parks*, 2019 S.D. 44, ¶ 9, 932 N.W.2d 129, 133. *See also Davies v. GPHC, LLC*, 2022 S.D. 55, ¶ 29, 980 N.W.2d 251, 261. "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." *Strizheus*, 2022 S.D. ¶ 27, 984 N.W.2d at 127 (quoting *Dakota Indus., Inc. v. Cabela's.com, Inc.*, 2009 S.D. 39, ¶ 11, 766 N.W.2d 510, 513).

Here, Defendants have moved for summary judgment on ten grounds, namely:

I. Whether a fiduciary duty was owed to Plaintiff either before or after the LLC's formation, and if so, whether any oppression of Plaintiff as a minority member, or fiduciary duty of loyalty or due care was breached?

II. Whether Plaintiff renounced his claim for compensatory damages and elected to pursue rescission.

III. Whether Plaintiff is entitled to rescission as a remedy.

IV. Whether Plaintiff's claim of a breach of oral contract fails as a matter of law.

V. Whether the statute of frauds renders Plaintiff's claim to a 1/3 ownership interest in 1,333 acres of real property unenforceable.

VI. Whether the doctrine of promissory estoppel operates to preclude Defendants from denying the existence of a contract to transfer a 1/3 interest in the property to Plaintiff.

VII. Whether Plaintiff can meet the elements of fraud (deceit) and negligent misrepresentation.

VIII. Whether Plaintiff's claims for unjust enrichment, compensatory damages, and punitive damages should be dismissed.

IX. Whether Plaintiff owes Alpha Land Company, LLC, $30,704.84 for money advanced to him.

X. Whether Plaintiff's expulsion from Alpha Land Company, LLC, by judicial determination is warranted.

The Court, having considered all filings, as well as arguments of counsel at a hearing held December 10, 2024, issues the following Order:

IT IS HEREBY ORDERED that Defendants' Motion for Partial Summary Judgment is **GRANTED in part** regarding Issues I (Fiduciary Duty), III (Rescission as a Remedy), IV (Breach of Oral Contract), V (Statute of Frauds), VI (Promissory Estoppel), VII (Fraud and Negligent Misrepresentation), IX (Defendants' Counterclaim), and X (Dissociation by Judicial Determination), as there are no genuine issues of material fact and Defendants are entitled to judgments as a matter of law.

IT IS FURTHER ORDERED that Defendants' Motion for Partial Summary Judgment is **DENIED in part** regarding Issues II (Election of Remedies) and VIII (Unjust Enrichment), as there are genuine issues of material facts.

Dated this 21st day of January 2025.

BY THE COURT:

Matt Brown

The Honorable Matt Brown
Circuit Court Judge
Seventh Judicial Circuit

ATTEST:

AMBER WATKINS
CLERK OF COURTS

By: Heather Sian
Deputy
(SEAL)

FILED
Pennington County, SD
IN CIRCUIT COURT

JAN 24 2025

Amber Watkins, Clerk of Courts
By ________ Deputy

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
)SS
COUNTY OF PENNINGTON) SEVENTH JUDICIAL CIRCUIT

SHADRACH HOWIE, ALPHA LAND CO., LLC, a South Dakota Limited Liability Company,

Plaintiffs,

v.

GARY HOWIE and GORDON HOWIE

Defendants.

FILE NO. 51 CIV 23-1344

ORDER REGARDING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants filed a Motion Summary Judgment on March 6, 2025. On April 2, 2025, Plaintiff filed their Brief in Opposition of Defendant's Motion for Summary Judgment. On April 9, 2025, Defendants filed their Reply to Plaintiff's Brief in Opposition of Defendants' Motion for Summary Judgment. The Court held a hearing on the matter on April 16, 2025.

Having reviewed the motions, notices, and other submissions by parties, having heard arguments by parties, and being otherwise familiar with the record, Defendants Gary Howie and Gordon Howie's Motion for Summary Judgment is **GRANTED**.

ANALYSIS

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." SDCL § 15-6-56(c). "A disputed fact is not material unless it would affect the outcome of the suit under the governing substantive law." *Nesche v. Wilkinson*, 2013 S.D. 90, ¶ 9, 841 N.W.2d 250, 253-54. "In summary judgment proceedings, '[t]he burden is on the moving party to clearly show an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law.'" *City of Sioux Falls v. Strizheus*, 2022 S.D. 81, ¶ 18, 984 N.W.2d 119, 124 (quoting *Gail M. Benson Living Tr. v. Physicians Off. Bldg., Inc.*, 2011 S.D. 30, ¶ 9, 800 N.W.2d 340, 343). "The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party. The nonmoving party, however, must present specific facts showing that a genuine, material issue for trial exists." *Saathoff v. Kuhlman*, 2009 S.D. 17, ¶ 11, 763 N.W.2d 800, 804 (quoting *Pellegrino v. Loen*, 2007 SD 129, ¶ 13, 743 N.W.2d 140, 143).

"The party resisting summary judgment must present 'sufficient probative evidence that would permit a finding in [their] favor on more than mere speculation, conjecture, or fantasy.'" *Lammers v. State by and through Department of Game, Fish and Parks*, 2019 S.D. 44, ¶ 9, 932 N.W.2d 129, 133. *See also Davies v. GPHC, LLC*, 2022 S.D. 55, ¶ 29, 980 N.W.2d 251, 261. "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." *Strizheus*, 2022 S.D. ¶ 27, 984 N.W.2d at 127 (quoting *Dakota Indus., Inc. v. Cabela's.com, Inc.*, 2009 S.D. 39, ¶ 11, 766 N.W.2d 510, 513).

The Court, having considered all filings, as well as arguments of counsel at a hearing held April 16, 2025, issues the following Order:

IT IS HEREBY ORDERED that Defendants' Motion for Summary Judgment is **GRANTED** because there are no genuine issues of material fact as to whether Plaintiff can pursue a claim of unjust enrichment against Defendants. Therefore, Defendants are entitled to judgment as a matter of law.

[LEFT INTENTIONALLY BLANK]

Dated this 28th day of April 2025.

BY THE COURT

Matt Brown

The Honorable Matt Brown
Circuit Court Judge
Seventh Judicial Circuit

ATTEST:

AMBER WATKINS
CLERK OF COURTS

By: Heather Shaw
Deputy

UNIFIED JUDICIAL SYSTEM
JUSTICE
STATE OF SOUTH DAKOTA

FILED
Pennington County, SD
IN CIRCUIT COURT

APR 28 2025

Amber Watkins, Clerk of Courts
By HG Deputy

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS.	
COUNTY OF PENNINGTON	)	SEVENTH JUDICIAL CIRCUIT

SHADRACH HOWIE, and ALPHA LAND COMPANY, LLC, a South Dakota limited liability company,	)	File No. 51CIV23-001344
Plaintiffs,	)	**DEFENDANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF PARTIAL MOTION FOR SUMMARY JUDGMENT**
vs.	)	
GARY HOWIE and GORDON HOWIE,	)	
Defendants.	)	

Pursuant to SDCL 15-6-56(c)(1), Defendants submit this separate, short, and concise statement of the material facts as to which they contend there is no genuine issue to be tried. Each material fact is presented in a separately numbered paragraph with citation to the record in this case.

Parenthetical references to the record are identified below and in Defendants' supporting brief, where necessary, as follows:

- Reference to the Plaintiff's Verified Complaint is identified as "VC" followed by the numbered paragraph "¶". Likewise, Defendants' paragraphs in the responsive Answer are so identified.
- References to the depositions of Shadrach "Shad" Howie "SH" and Holly Howie "HH" are followed by their appropriate page. Shad's deposition was continued over a three-day period and the pagination is not consecutive; rather it renews at page 1 each consecutive day. Therefore, his deposition will be referenced as "1SH" for the testimony taken June 27, 2024, "2SH" for testimony taken June 28, 2024 and "3SH" for testimony on the concluding day of July 12, 2024, followed by its page number.
- Deposition Exhibits are referenced by the deponent's initials, followed by the Exhibit number and page. ("SH Ex ___, p. ___").
- Pages referenced from the deposition testimony, exhibits and discovery identified herein have been appended to the Affidavit of Defense Counsel.
- Defendants have each responded to Plaintiff's discovery which includes answering 120 Interrogatories, 32 Requests for Production and 45 Requests for Admission (and where sought, explanations for denials). The discovery propounded upon each defendant was nearly identical. With some exceptions to each defendant's personal knowledge, Gordon's answers are, for the most part identical to Gary's. Accordingly,

Defendants' Statements of Undisputed Material Fact will parenthetically identify the discovery documents produced[1]. These documents are attached to the Affidavit of Defendants' counsel. For example, ("Gary's Answer to Interrogatory No. ___").

- Over 5,000 pages of documents have been exchanged in discovery. Answers to discovery (interrogatories and requests for admission) and selected supporting bates stamped documents produced in discovery are appended to the Affidavit of John Stanton Dorsey, undersigned defense counsel. Plaintiff produced documents marked "PL" followed by the bates number. Defendants produced documents marked "G" followed by the bates number. Gary's answers to discovery reference numerous pages which were bates numbered by either defendant or plaintiff and referenced as (G-0000) or (PL0000). Selected pages were identified in Shad's deposition in Exhibits 10 and 11. Exhibit 10 consisted of pages 001-114 and Exhibit 11 consisted of pages 001 to 182; only relevant and referenced documents from those exhibits are appended to the Affidavit of John Stanton Dorsey. Those documents bear the discovery bates number as well as a sequential number by exhibit and will be so identified: e.g. (Alpha Omega Subdivision Off-Site Improvements, SH Ex 10, 002).

UNDISPUTED MATERAL FACTS

1. Plaintiff Shadrach Howie, age 40, (hereinafter, "Shad") is the son of Defendant Gordon Howie, age 75 (Gordon) and nephew of Defendant Gary Howie, age 79 (Gary). (1SH p. 92). Gordon and Gary are brothers. (VC ¶1). Kelly Howie is a son of Gordon Howie, and half-brother to Shad Howie.

2. Gordon ranches in Rapid City. (VC ¶1)

3. Before buying a ranch property and moving to New Underwood, South Dakota in Gary had lived in Virginia. Gary, along with his wife, Trish, are members of Virginia limited partnerships ("LPs") which owned land and managed a mobile home park (HP Park, LP), and managed and owned property known as Ridgewood Motel and Manor, LP. Gary retired from being a mobile home park owner and manager and moved back to South Dakota. (VC ¶4).

4. Shad has been a general contractor in Rapid City "since 2005 specializing in residential developments." (VC ¶ 5). Shad is married to Holly. Shad's half-brother is Kelly Howie, a Rapid City realtor.

5. Shad's company "Homes by Shadrach Howie" a/k/a "HBSH, LLP" had no employees. (HH pp. 10-12) Shad is the only member of that entity. (1SH p. 138). Shad has been working in property development a long time according to his wife, Holly. (HH p. 14).

[1] In response to the discovery requests of Plaintiff, Defendants have produced 3,337 pages of documents along with 68 pages received from Pennington Title pursuant to a subpoena. Defendants' discovery has, thus far, been limited to sending Plaintiff 31 Requests for Production to which Plaintiff produced 1,869 pages of documents. Pursuant to a confidentiality agreement after counsel met and conferred, additional documents which were not initially disclosed by Defendants have been produced, but are not referenced as they were only produced following the depositions of Holly and Shad.

6. Since 2005, Shad has been actively involved in building and development of residential housing. (HH p. 10; 1SH p. 149).

7. Toward the end of 2018, Shad was looking for "his next property to develop" and located "a promising property in Box Elder." (VC ¶ 6). It was Shad who had what he describes as a "vision" for the property to be named "Alpha Omega Development" where 3,000 single family and multi-family units could be built with all street names named after characteristics of God. (VC ¶ 20; HH pp. 19-20) Holly testified: "he said God had shown him" (HH p. 21). Further, she explained: "if you don't want to believe in divine intervention, you could look at it as like the Field of Dreams. He – it was like Kevin Costner and the Field of Dreams, you know, if they build it, they will come. It was something he saw clearly in his mind." (HH p. 20). Shad felt the project was meant "to be for his life and his family" and nobody else. (HH pp. 20-21; 87).

8. Financially strapped, Shad was unable to purchase the property on his own. (HH p. 270). To purchase the property, Shad "went looking for investors" knowing the project would be "very lucrative." (VC ¶ 24; 1SH p. 226) According to his wife, when Shad signed the purchase agreements "it wasn't like he had to give cash that day. In his mind he was going to find the money somewhere." (HH p. 25).

9. Shad shared the idea to purchase property with his father, who in turn discussed the "investment opportunity" with Gary who expressed interest in investing. (VC ¶¶ 20, 24, 29, 30). Shad brought the deal to Gordon—not the other way around. (1SH p. 215).

10. Four contiguous parcels of land of approximately 1,333 acres were identified as possibly being available for purchase. One parcel was owned by the Sullivans, the other three were owned by William "Bill" Gikling or Gikling related entities. (VC ¶¶ 11, 13, 16, 17, 18)

11. Shad agreed that lenders often require and secure an appraisal of property so they will have collateral to secure their loan. (2SH pp. 25-26). No appraisals were generated in connection with the purchase from the Giklings or Sullivans. (2SH pp. 25).

12. Shad, Gordon and Gary met in what was described as an "initial meeting" sometime in the Spring of 2019. (VC ¶¶ 33, 35). This followed a meeting Shad whereat he had proposed the deal to his friend, Donavan Williamson, in early March of 2019. (2SH p. 55; SH Exhibit 15, Response to Request for Production #5).

13. On March 13, 2019, David Olsen, a realtor at Coldwell Banker, attached Sullivan listings and emailed them to Shad. Olsen was to call Bill Gikling to see if there was interest in selling. (PL 000177). On March 26, 2019, Shad emailed Kelly Howie. (PL 000613).

14. On April 11, 2019, Shad discussed with Gordon having "verbal agreements" with Sullivan and Gikling. (PL000176). Shad used the term "verbal" understanding he would need a written agreement to lock up the deal "contractually." (1SH pp. 26, 61).

15. Gordon and Gary met with Shad to discuss the potential of a 1031 exchange. (VC ¶ 31) Gary considered a 1031 exchange of the property owned by his Virginia LPs a great option if the exchange were viable. (VC ¶31; Answer, ¶15).

16. Gary, Gordon and Shad met with James Postma, a CPA, of Rapid City to discuss how the property could be purchased and then developed. (HH p. 47) If a 1031 exchange was

viable, Gary's LPs would purchase the land. Then, an LLC would be formed which would, in turn, purchase parcels of the property from Gary's LPs as the property was developed and lots were sold. (Answer, ¶15).

17. Regarding CPA James Postman, Holly testified that "I feel like James Postma was the expert in this matter. He advised him—he was like their adviser in the whole matter on how it could or should or would work." (HH p. 52).

18. On June 5, 2019, Shad signed a Buyers Agency Agreement with David Olsen of Coldwell Banker identifying himself, "Buyer" under the moniker "Shadrach Howie and or assigns." (PL 000058; 1SH p. 175-177).

19. Gary supplied Shad with the earnest money for the purchase of the four parcels. (HH 26) The money was deposited in Shad's business bank account and when he executed purchase agreements as buyer, the required earnest money was provided to the seller. (HH 26)

20. Shad executed four (4) purchase agreements as "Shadrach Howie and/or assigns."

a. On June 12, 2019, the Sullivan purchase agreement for 121.6 acres at a price of $425,600. (PL 000098)

b. On July 19, 2019, GLM Land Corp's Purchase agreement for 119.5 acres was signed at a price of $597,700 (PL 000087)

c. On July 19, 2019, Wm Gikling Family LP's Purchase agreement for 648.46 acres was signed at a price of $2,338,650 along with a Financing Addendum to the Purchase Agreement (PL000096) Contract for Deed.

d. On July 22, 2019, Wm Gikling and Gikling Family LP's purchase agreement for 264.37 acres for a price of $931,200 was signed. (PL 000091)

(VC ¶¶ 15, 16, 17, 18, 19).

21. Closing of all four purchase agreements was to occur on or before October 25, 2019 and did occur on that date. (1SH pp. 54-55; 57, 60-61, 64)

22. Gary financed the 1,333 acres purchase through the 1031 tax exchange using the properties of his LPs as planned with the CPA and professionals at Pennington Title. (1SH p. 50, 61).

23. Shadrach Howie knew that he was not purchasing the property himself; rather he was acting as a strawman in the transaction. (1SH pp. 174-177; 207; 2SH p. 27) This was explained to him in meetings with James Postma, CPA, two of which he recalled being present. (1SH pp. 64, 179) Holly confirmed that Gary, Gordon and Shad all had met with Postma "a couple times to talk about the tax exchange." (HH p. 47)

24. Shad's Verified Complaint states: "The plan, as explained to Shadrach, was that he would purchase the property from the landowner, and then Gary would purchase the property from Shadrach as part of his 1031 exchange, and Alpha Land would purchase the property from Gary." (HH p. 19; VC ¶ 61)

25. Shad and Holly both trusted Postma to provide accounting advice and, according to Holly, Postma had been preparing Shad's taxes as early as 2006. (HH p. 47)

26. Closing on the purchase of the Gikling and Sullivan properties occurred October 25, 2019 at the price of $4,293,150. (VC ¶ 64,). Final closing documents with Gikling entities and Sullivans show that Shad signed as "Shadrach Howie and/or assigns." Shad signed a number of documents to facilitate the purchase of the 1,333 acres consistent with the plan discussed with Postma prior to that date. (1SH pp. 64-65)

27. Consistent with the plan, Shad simultaneously entered into a purchase agreement to sell the property to Gary's LPs on October 25, 2019. (1SH pp. 60-61; VC ¶¶ 64, 65). That latter deal was to close on or before April 7, 2020 and in fact did close on April 6, 2020. (2SH p. 20).

28. Shad was a strawman described as a "sacrificial lamb" by James Postma, CPA. (1SH p. 177) As a strawman, Shad did not personally come up with any funds to purchase the property; however, given the position he occupied in the transaction, any taxable consequences on gains were attributed to him. (1SH pp. 178-181). This was explained to Shad in meetings with Postma and the title company and confirmed by Postman in an email on January 6, 2020. (1SH pp. 178-181; SH Exhibit 6, p. PL1160)

29. The plan was that the operational entity later to be formed would pay the tax obligation to Shad as a result of his facilitating the 1031 exchange. (1SH pp. 19-23).

30. The purchase by "Shadrach Howie and/or assigns" was funded through a non-refundable down payment from Gary's LPs in the amount of $2,465,062. (VC ¶ 66; Defendants' Answer ¶¶ 24, 25, 26). This non-refundable down payment was a term of the October 25, 2019 purchase agreement between Shad and the LPs. (V.C. "Exhibit A" Paragraph 20.a.) The remaining balance of $2,138,650 was carried by Gikling entities on a Contract for Deed with "Shadrach Howie and/or assigns." (Defendants' Answer ¶ 26; 2SH p. 22)

31. The Purchase Agreement and Addendum provided that the LPs would assume the Contract for Deed. (V.C. "Exhibit A", Paragraph 20.b.) Finally, as Seller, Shad acknowledged in the Purchase Agreement that it was the LP's intention to complete a 1031 exchange and that the LPs rights "may be assigned to an Intermediary of the Buyer's choice for the purpose of completing such an exchange." Id. As Seller, Shad "agrees to cooperate with the Buyer and the Intermediary in a manner necessary to complete the exchange." (V.C. "Exhibit A" Paragraph 20.c.).

32. Shad acknowledged that he received a copy of the Notice of Assignment from the LPs on October 25, 2019, providing that all of the rights and interest in the purchase agreement of October 25, 2019 had been assigned to the intermediary, Pennington Title Company, as "Accommodator." (V.C. "Exhibit A" "Notice of Assignment" appended to Purchase Agreement; 1SH p. 120).

33. The purchase agreement between Shadrach Howie and the LPs provided that on or before April 7, 2020, the LPs would complete the purchase of all the property. (V.C. "Exhibit A"; Answer, ¶24; 1SH pp. 120-125)).

34. Contemporaneously on October 25, 2019, Shad as "seller" entered into a purchase agreement with Gary's LPs as "buyer" for the property at a price of $4,931,924. (1SH pp. 120-125) Postma, who, at the time, was in San Diego, replied to an inquiry about the transaction he self-described as "unorthodox" but said: "the terms of the agreement that you will have with the operational entity is completely apart from this transaction." (PL 001151). The operational entity agreement would become the operating agreement of the yet to formed LLC.

35. On November 12, 2019, the operational entity, then being described as "Alpha Omega LLC," was discussed with Postma and its relationship to Gary's 1031 exchange (PL001200).

36. Discussions were held with regard to the pricing of lots in the proposed development. Kelly was a source of information for the group relative to marketing and listing. On December 18, 2019, Shad emailed Kelly on MLS (multiple listing service) regarding a price for lots and Kelly replied regarding competing buyers in the market (PL 001000). On December 20, 2019, Shad concedes Kelly's approach on pricing is a "more practical one . . ." (PL 000999).

37. Shad was financially in debt. He had exhausted his $100,000 personal line of credit and was unable to borrow more money. On December 20, 2019, Shad was looking to purchase 100 bred cows suggesting to his bank that he would pledge the real estate intended for development by his partners as collateral for his personal line of credit. (1SH p. 156); PL 000349). On December 21, 2019, Gary e-mailed Shad reminding Shad that the land for development that Shad had promised to transfer to the LPs on or before April 7, 2020, was not an asset against which he could borrow money. (PL 000349).

38. Shadrach did not personally contribute any money toward the purchase of property—"zero dollars." (HH p. 271, 1SH p.169). He admitted he contributed no money toward the purchase of the 1,333 acres. (1SH p. 97). The financing of the land's purchase was facilitated by Gary's LPs through his sale of the property in Virginia and Gary's contribution of the earnest money as the group had agreed. (1 SH pp. 47-48; 61) Shad admitted: "That's what we agreed to do." (1SH p. 61).

39. Prior to the purchase of the property from Sullivans and the Gikling Groups, Shad had been involved in various projects and, independently, had made offers to purchase large parcels of land. -

- One project, called Trailwood, involved 24 townhomes in a development that Shad had valued at approximately $6.4 million. (HH p. 13)
- On December 9, 2019, Shad made an offer of $15,494,000 for the purchase of Speer S Ranch. HH p. 13)
- In July and August of 2020 Shad was making offers to purchase the Cheyenne River Ranch for $3.2 million down with $18 million to be paid over five years. (HH p. 13).
- On September 11, 2019, Shad sent his brother, Kelly, an email to list and advertise homes he needed to build or sell lots in a project known as Cedar Gulch. (PL 000611).

40. Along with his experience in constructing homes (including his own personal home) and development, Shad kept livestock, did haying, fencing, spraying and various

agricultural work. (HH p. 16). Shad explained how he could "pencil things out" on developing property and investing. (1SH pp. 155-162).

41. In addition to home construction and development, in 2017 Shad began promoting the sale of noncorrosive rebar called V-rod on his business website. (HH p. 16-17). Shad employed the non-corrosive fiberglass like product when building homes including monolithic slabs. (Gary's Answer Interrogatory No. 5, p. 7 of 72; 1SH p. 114-115)

42. Shad received loans in the amount of $62,762 from Gordon, to purchase sticks of V-rod in April and May of 2018. (1SH pp. 42-43, 114; 2SH pp. 119-133); HH p. 126; HH Ex. 2- Statement V-Rod Loan: $69,978.41)).

43. By 2020, Shad's wife, Holly Lahren, a/k/a Holly Howie, had secured her real estate license having already earned a bachelor's degree in interdisciplinary studies and a master's in human services. (HH pp. 4, 8). Holly explained that Shad told her his vision for the property was divinely inspired and that "this property and this development opportunity was meant to be for his life and his family" and nobody else. (HH pp. 20-21). Holly testified: "[h]e said God had shown him." (HH p. 21).

44. On January 6, 2020, Gordon sent Gary, Kelly and Shad the LLC paperwork for "review/comments" which included the Operating Agreement and Articles of Organization of Alpha Land Company, LLC. (SH Ex. 10, p. 056). Gordon's text said: "Let me know your thoughts. As soon as I get your input I will proceed to have the LLC completed. Id.

45. James Postma's email of January 6, 2020 explained in detail how the 1031 exchange would work. Postma's email explained that when Alpha Land Company, LLC would be formed, it would agree to buy parcels from Gary's LPs. (1SH pp. 178-181). Postma's explanation was a recitation of the very Purchase Agreement and Addendum that was executed on January 14, 2020. (1SH p. 179). Postma's email of January 6, 2020, confirmed that which had been previously discussed, namely that Alpha Land Company would only be purchasing parcels of the property from the LPs, not the entirety as Shad claims. (1SH p. 179-183). Shad claims that "what we had addressed would be formulated into a document, and it did not happen that way." (1SH p. 181). Yet, this is what the email said and this is what the final January 14, 2020, Purchase Agreement and Addendum provided. ("Exhibit B" to V.C.).

46. When asked if he had read Postma's January 6, 2020 email, Shad testified: "I don't know if I did, honestly. I wasn't super involved in that. Not that I couldn't care less, but it's not where I focus my energy." (1SH p. 182). Holly testified that she told her husband he had problems with his memory and told him he had ADHD (Attention Deficit Hyperactivity Disorder) and sometimes did not read things thoroughly. (HH pp. 193-194).

47. On January 10, 2020, Gary, Gordon, Shad and Kelly signed the Operating Agreement and Articles of Organization and formed Alpha Land Company, LLC. The operating agreement is attached as "Exhibit #4" to Defendants' Answer to V.C. Kelly was identified as a member with no ownership, but having the exclusive right to be paid for listings and marketing of the property. Id.

48. Shad understood that an operating agreement of an LLC regulates the affairs of the company, and the conduct of the business, and the relationship among the members. (2SH p. 38). Shad agreed an Operating Agreement is a contract, like a constitution. (1SH p. 99).

49. Shad's opinions of what the contract should have said is not reflected in any of the written documents including the original Operating Agreement (See, Exhibit 4 to Defendants' Answer). Shad conceded and admitted the following facts:

- that nothing in the original operating agreement spelled out the role of the members and in particular, Shad's role in site development and site oversight. (2SH p. 37).
- that there was nothing "within the four corners" of the original operating agreement that said anything about compensating Shad for site development or site oversight. (2SH p. 37).
- Shad agreed that there was nothing said in the original operating agreement about payment of compensation to him or any of the members of the LLC in terms of a specific salary or wage or anything like that-nobody in the Company was promised any compensation or salary or a particular wage or salary. (2SH pp. 37-38). The only thing said in the operating agreement about receiving any money was that it would be paid as a distribution if there was a net profit. Id.
- The operating agreement said nothing about a promise or obligation on the part of the company to implement covenants, let alone a non-corrosive rebar covenant. (2SH p. 39)
- The operating agreement said nothing about a promise that Shad could build residential and commercial offerings throughout the duration of the project. (2SH p. 39).
- The operating agreement (which Shad himself described at this point in his testimony as "the contract") said nothing about equal profits from raw, undeveloped land. (2SH pp. 39- 40).
- The contract/operating agreement did not say anything about a promise that Shad would receive "walking money." (2SH p. 40)
- The Operating Agreement says nothing about street names. (See "Exhibit 4" to Defendants' Answer to V.C.).

50. With regard to the question of whether the operating agreement provided that Shad would have or be transferred a one-third ownership interest in the property, Shad at first said that the contract "implies ownership all over every page" and then he backed away from that statement and said: "I'll just leave that as I don't know." (2SH p. 40).

51. There is no mention of any transfer of any interest in any part of the 1,333 acres either to Alpha Land Company or any of its members in the operating agreement. The document says nothing in this respect. (Defendants' Answer, "Exhibit 4").

52. Shad admitted that the oral "material terms" [(items A through G) of his "First Cause of Action" denominated "breach of oral contract" were "outside of the contract." (2SH pp. 39-40).

53. Shad agreed that the operating agreement would have been a good place to include those promises and material terms he claims were made to him. (2SH p. 41) In this context, Shad was asked the following questions and gave the following responses:

> Q: Would you agree that it would have been a lot cleaner if those material terms and promises that you are claiming were put in the document?
>
> A: There is no argument there. Absolutely, I agree with that.
>
> Q: Okay. So it must have struck you as strange when reading it that none of those terms you claim to exist were in that document.
>
> A: Not at all because I have spent my life doing it this way with Gordon Howie and, in some capacity, Gary Howie.
>
> Q: Did you ever propose any language be incorporated into that final document concerning those material terms that we reviewed that are not in it? Did you ever suggest, "Hey, we need to—we need to put those in there"?
>
> A: Not until later, but I did bring up all my concerns in the initial meeting. They were addressed and I was pacified. I was baited, and I was lied to, and I was deceived.
>
> Q: Okay.
>
> A: And, obviously, that's my opinion

(2SH pp. 40-41).

54. On January 14, 2020, the LPs entered into a purchase agreement and addendum with Alpha Land so the LLC could purchase parcels. The newly formed LLC was not buying the entirety of the property. (1SH p. 207). The addendum addressed how land would be sold to the LLC—namely in parcels, "the size and location of which shall be determined by the buyer, at a price equal to $3,710 per acre. The buyer also agrees to pay the seller amount equal to one third of the net profit from sales of property as portions are developed and re-sold. (Verified Complaint, Exhibit "B"; 1SH pp. 121-123).

55. Shad admitted in his testimony that he knew that he would be selling to the LPs as the sacrificial lamb as part of the 1031 exchange. (1SH pp. 122, 125; 198, 207). Shad also admits that he knew Alpha Land would only be purchasing parcels. (1SH pp. 207-208).

56. On April 6, 2020, Shad transferred by warranty deed the land to the LPs as he had previously agreed in the written purchase agreement. ("Exhibit #2" to Defendants' Answer to V.C.) That same day, Gary loaned $150,000 to Shad under terms set forth in a Construction Loan Agreement which, among other things, spelled out a process allowing Shad to build homes upon lots and draw down money for his own use during projected periods that both agreed would

be needed to help foster the development. (Construction Loan Agreement, SH Ex 11, p. 54; 2SH p. 3). The $150,000 was deposited into Shad's personal bank account (SH Ex 24).

57. Holly testified that she had concerns about the project and the company's ability to make it work. Holly did not understand how the group was going to come up with the money to kick off a big development. (HH p. 29; 1SH p. 183). She testified: "[e]ven if they had the money to buy the property, how or where would they get the money to pay for the development?" (HH p. 30). Shad agreed that his wife's concerns were expressed before April 6, 2020, the date he transferred by warranty deed all interest and title to the 1,333 acres. (1SH p. 183-185)

58. Holly testified that she read the original Operating Agreement and she told Shad: "It appears to me that you don't actually own the property. Don't you have a problem with that? (HH p.32). And Holly further testified: "I pointed that out to him, and I don't think he understood that." Id. While Shad agreed that "she probably did" tell her husband this, he went on to say: "[m]y wife is not an expert . . ." (1SH p. 186).

59. In regard to having what he claims were material terms memorialized in a written agreement, Shad testified he was "comfortable with a handshake." Further, Shad admitted under oath: "And my wife was right. And I was wrong. Should have had a contract that buttoned it up a little tighter." (1SH p. 188).

60. Shad testified in his deposition that he did not understand the distinction between owning a membership interest in the LLC and having an ownership interest in real property. His admission was revealed in the following questions and answers:

> Q: Back in 2019, did you understand there was a difference between having a membership interest in the LLC and an ownership interest in land? Did you understand that there could be a distinction between those two things?
>
> A: No. The way they presented it—because I brought that up. And the way they presented it was no, the real estate is physical—look right here at the PA [Purchase Agreement]. So my understanding is they would be hand in hand. Essentially different language, same purpose.

61. Shad agreed that if Alpha Land Company could have afforded to buy the 1,333 in "one fell swoop" it could have been done. (1SH p. 105). However, the entity was not capitalized to borrow. (Gary's Answers to Interrogatories, No. 41 p. 27 of 72). Although he claimed Alpha Land was given an equity interest in the property at closing on April 6, 2020, Shad conceded he did not understand how equity could be acquired. (1SH pp. 209-213).

62. Shad agrees that Gary's LPs sold investment properties in Virginia. (V.C., ¶ 63; 2SH p. 19). Shad agrees that as seller, he signed the Purchase Agreement on October 25, 2019 agreeing to sell the properties to Gary's LPs to close on April 6, 2020. (V.C., ¶65; 2SH p. 20). Shad agrees that the non-refundable down payment on the 1,333 acres in the amount of $2,465,962 was provided by Gary as the documents reflect; yet in the same breath, Shad claimed he did not know where the money came from. (2SH p. 20-21). Shad further agreed that he did not contribute any of the non-refundable down payment; it came from Gary. (2SH pp. 21-22). Shad agreed that Gary's bringing the down payment money to the table "was part of our deal . . . I would not argue that." (2SH p. 22). In fact, Shad's Verified Complaint confirms that Gary's

LPs would assume the contract for deed and testified "but it was years later." (2SH p. 23; V.C. ¶74).

63. Shad was privy to all of the documents as they were being generated in 2019, namely: the Operating Agreement, and the later Purchase Agreement documents. (1SH pp. 234-240) In fact, when the company was looking to refinance the contract for deed with Banner Capital in March of 2022, Shad was copied with an excellent description of how ownership of the property was acquired and how it was to be funded in Simpson's March 10, 2022 appraisal for Banner. (2SH pp. 15-21).

64. Shad agreed that in 2019 he understood that interest in land are transferred by way of a deed. (1SH p. 105).

65. In 2019, Shad understood that a contract for the sale of land needed to be in writing; but believed that a handshake with a family member (Gordon) was sufficient. (1SH p. 43). Shad testified "if it wasn't for my brother Kelly, there wouldn't be a document to my knowledge. It would have been a handshake deal." (1SH p. 133).

66. Shad testified that he worried about not having a written document confirming his claim that he would be transferred an interest in land. (1SH p. 46).

67. Shad admitted that under "normal circumstances" a deed would have been recorded to transfer an interest in land; yet he offered that in this case "we are dealing with family." (1SH p. 105). Shad claimed that he did not understand that if he was to receive an interest in land to be held in joint tenancy with right of survivorship, the language would show up on the deed. (1SH pp. 104-109). "Because of family," Shad's position is that no writing was necessary, that a handshake was sufficient. (1SH p. 55).

68. No writing signed by Gary, Gordon, Alpha Land Company, LLC or any other person or entity has been produced that memorializes an agreement, promise, deed or contract to transfer to Shad a one-third interest in the 1,333 acres of land. No document, memorandum or writing signed by Gary, Gordon, Alpha Land Company, LLC or any other party exists which transfers any ownership interest in the property to Shad. (HH p. 268).

69. As Shad had promised in the October 25, 2019 purchase agreement, upon his execution of the warranty deed on April 6, 2020, any recorded right or ownership interest in the 1,333 acres of real estate was transferred to Gary's LPs to effectuate the 1031 exchange. ("Exhibit #2" to Defendants' Answer to V.C.).

70. Shad admitted: "[w]ell, initially the deed would all go to me, but then I agreed that it would go to Alpha Land." (1SH p. 50). The documents do not show that "it would all go to Alpha Land" but rather that the land would all go the LPs. Claiming he was ignorant of the meaning "Shadrach Howie and/or assigns" and what that meant (1SH pp. 49, 173-174), he nonetheless testified: "I didn't see a problem with [the language]." (1SH p. 29). From the outset of the realtor's engagement (Dave Olsen/Coldwell Banker) through and until the warranty deed transfer to the LPs on April 6, 2020, Shad was signing documents which represented the transaction as one in which an assignment would take place to transfer the interest in the real estate. (1SH pp. 174-185).

71. Shad conceded in his deposition that he knew the language "and/or assigns" "implies there's an assigner" (sic) (1SH p. 174). Moreover, he knew his role as assignor was as a strawman/sacrificial lamb as CPA Postma explained and that there would be a tax consequence. (1SH pp. 177-182). The fact that the warranty deed he signed transferred all of the interest to Gary's LPs is self-evident in the document. The warranty deed states this very fact. (1SH pp. 50—51; "Exhibit #2" to Defendants' Answer to V.C.). Confronted with the facts that his own actions were consistent with exactly how the plan's sequence was explained to all the members by the CPA as memorialized in the January 6, 2020 email and transactions documents (1SH pp. 178-182), Shad retreated to a position in his deposition that he was "very hands off." (1SH p. 182).

72. Asked about CPA Postman's email of January 6, 2020, and if he had read it, Shad testified: "I don't know if I did, honestly. I wasn't super involved in that. Not that I couldn't care less, but it's not where I focus my energy." (1SH pp. 181-182).

73. Shad had the opportunity to read the company's Operating Agreement before he signed it. (1SH p. 234-235). Shad read it before signing it. Id. He claims to have pointed out contradictions in the document and claims he was pacified to sign it by their assurances. (1SH p. 235). When pressed to identify the contradictions, Shad was unable to do so. (1SH pp. 235-23). Shad was not forced to sign the operating agreement, in fact, he conceded: "I didn't have a problem with the operating agreement until they decided that it was inadequate." (1SH p. 240)

74. Paragraph 15 of the original Operating Agreement provided: "This agreement and the articles of organization may be amended by a majority vote of the members except that any provision in this agreement or in the articles of organization that specifies a membership voting or consent requirement of greater than a majority, may be amended only by a membership vote that is equal to the voting or consent requirement specified in the provision sought to be amended." (1SH p. 236; "Exhibit #4" to Defendants' Answer to V.C.).

75. Shad claimed that the documents he read, understood and signed said one thing, but that he was told differently—or was not in the manner he understood them. (1SH p. 181). Shad testified: "So this is a smoke and mirror scenario where I was told one thing, but it reads a different way, John." (1SH p. 238).

76. Shad had his own LLC, (HBSH, LLC), but had never had partners before. (HH p. 80). Likewise, Shad had never been in any business organization with anyone else. (HH p. 81)

77. Shad agreed that he could have sought independent legal counsel as the original operating agreement stated, but he did not get independent advice. (1SH p. 245)

78. Shad concedes that he read paragraph 15 of the Operating Agreement regarding amending the document by majority vote. (1SH p. 245).

79. Alpha Omega lots did not sell in 18 months as Shad and the others had hoped. (1SH p. 90). Delays occurred. Many issues with the City of Box Elder were encountered. (1SH p. 230). Holly testified that the company had "a lot of trouble" with Box Elder and that the City was "trying to blackmail them." This was not only Shad's belief, but Holly's as well. (HH pp. 53-54). They believed that the City was requiring the company to do things not required of other developers. (HH p. 55).

80. Just three months after Alpha Land Company was formed, the City of Box Elder submitted the company with a document called: "Alpha Land Subdivision Off-Site Improvement" – a list of "to dos" among which required that Sunnydale Road (which would run through the development) be extended and improved. (1SH pp. 72-73). (SH Ex 10, p. 002). Initially, the City wanted the entire expense to be shouldered by Alpha Land Company. Id.

81. The company's engineer projected a cost to Alpha Land at $1.6 million for the road; an expense that was not projected nor anticipated. (1SH pp 73; SH Ex 10, p. 3). Shad agreed with Gary's characterization to the members that the City's position was a "stunningly unwelcome surprise." (1SH p. 73).

82. Shad agreed that the City's directive on Sunnydale and resulting impact causing delay could not have been predicted by anyone at Alpha Land without a "crystal ball." Shad testified that he felt the City was "blackmailing" the company and felt that the approach to be taken by the company was to sue the City. (1SH p. 74).

83. Ultimately, with cooperation, Holly conceded that the company was not forced to expend any money for the road because Gary and Gordon cooperated with the city. (HH p. 56)

84. Lots did not sell as planned in the first 18 months. (1SH p. 90). After a year and a half, Shad believed Alpha Land's own engineer (KTM) was "working directly with the City" and "taking the long way around." (1SH p. 76-77).

85. Gary's confidence in Shad's abilities to complete projects in a timely manner worsened as time progressed. (Gary's Interrogatory Answer No. 23, pp. 21-22 of 72). Shad was getting behind on projects "borrowing from Peter to pay Paul." Id. Shad delivered a financial statement to Gary on February 19, 2020 which explained he was unable to "borrow to build." Id.

86. The same day that Shad transferred his ownership in the property by warranty deed, Gary loaned Shad $150,000 under strictures outlined in a Construction Loan Agreement dated April 6, 2020. (Gary's Interrogatory Answer No. 23, pp. 21-22 of 72). Throughout the project, Shad would refer to his financial struggles including liens and unpaid invoices for work on homes he was constructing, including his own. Id. Gary recounted the issues with Shad's lien holders, Shad's financial pressures, and how Shad became more adversarial and abusive to Gordon and Kelly and in spite of many attempts to help Shad with loans, advice and efforts to correct his behavior. (Gary's Answer to Interrogatory Nos. 23, 25, pp. 21-23 of 72).

87. On March 3, 2021, Shad was "irritated" in the direction he believed the City of Box Elder was taking in a move eastward rather than in Alpha Omega's direction. So, he authored a letter he proposed to send to "make available to every Box Elder official" which outlined his chronology of the development and irritation noting that the City was requesting $5.8M in funds to expand sewer to the East (away from Alpha Omega). (SH Ex 10, p. 006). Shad's proposed letter revealed his state of mind and suggested that Alpha Land's bringing of 3,500 homes to Ellsworth and "countless commercial businesses" would be the solution for the City's problems. Id.

88. On August 17, 2021, Shad listed five things he wanted the company to do including firing the company's engineer. (SH Ex 10, p. 008) Shad felt the City was "stonewalling" the development and giving them the "runaround" rather than doing their job "outside of the good old boy system." Id.

89. On October 2, 2021, Shad sent an email titled: "forward" which stated: "BE gives the runaround or does simply not reply, KTM (the company's engineering firm) purposely misleads us and provides garbage engineering and advise. I hope to have two items resolved next week." Shad went on to write: "Other than impatience, persistence is my best quality and I am still ranting. We must clearly fight for our exposure and purpose or we lose. So far the blame is Shadrach first, BE second and KTM third for our failures." (SH Ex 10, p. 012).

90. Shad wanted to sue the City of Box Elder because of what he deemed to be unfair treatment. (HH p. 56). Gordon and Gary did not. (HH p. 57).

91. Shad displayed poor behavior at company meetings dominating discussions, demanding that the project was his to develop and failing to be a team player. (See Gary's Interrogatory Answer Nos. 23, 56) His wife, Holly attended one of the meetings lasting two hours which she testified: "[a]nd at that meeting Shad dominated the conversation and he did most of the talking." (HH p. 190).

92. On October 1, 2021, Kelly emailed Gordon and Gary and expressed his frustration with Shad's conduct and Shad's apparent belief that the project was his, and his alone, to develop. (SH Ex 10, p. 010). Kelly email stated: "Shad is very literally the reason that we have no traction with the City of Box Elder, our qualified but alienated engineering firm that has proven difficult to replace (again, because of the relationships he's killed at every level), and is the sole wedge in his own partnership which cannot effectively meet as a result of his high regard for his own abilities that have been proven exactly nowhere." Id. Kelly's email explained that he was unwilling to "sit through another meeting with Shad present." (SH Ex 10, p. 011).

93. Kelly's October 1, 2021, email pointed out that materials for homes [508 and 512 W. Sunnydale] which Shad had been allowed to build upon two lots fronted to him by the company were "laying on the ground" which "continue to weather" as Shad pursued the "next big deal that he's unable to fund." (SH Ex 10, p. 011). Kelly explained that he had paid Shad's invoices before Knecht's pursued criminal action and that he had paid in excess $90,000 on Shad's behalf. Id. Shad admitted Kelly paid lienholder's to complete and close deals to the tune of $90,000. (1SH p. 158). Kelly's email expressed his dissatisfaction with Shad's conduct stating: "it's time that Shad is put in his place and eradicate the unbelievably unacceptable way that he has chosen to treat us in every meeting and in every personal conversation." Id.

94. Shad wanted to fight the City of Box Elder. His proposed method was to engage an attorney to threaten legal action. Shad's email of October 25, 2021, titled "victory" to Gordon, Gary, Kelly and Holly, said that "my fight is with Box Elder not with you three however." (SH Ex 10, p. 028).

95. To force the action he alone wanted from the City of Box Elder, Shad suggested the company engage an attorney to submit a proposal for 300 homes with no Sunnydale improvement and not establishing a secondary access until after 250 homes were completed. [This was not what the City's directive had been]. (SH Ex 10, p. 028).

96. Shad's "victory" email proposed: "We give Box Elder 30 days to reply before legal action is taken." (SH Ex 10, p. 028).

97. Likewise, Shad recommended that an agreement be finalized "by forcing Box Elder to identify RR improvements and create signed agreements." (SH Ex 10, p. 028). "This also needs to be done by an attorney with 30 days to reply before legal action is taken." Id.

98. Shad agreed that Gary and Gordon had a much different approach to dealing with the City of Box Elder. (1SH pp. 69-71, 74-78). They were trying to reach agreements rather than threaten litigation or hire lawyers to take legal action if Shad's demands were not met in 30 days. (Gary's Answer to Interrogatory No. 50; Defendants' Answer ¶ 46. A schism existed between Gordon and Gary on one side and Shad on the other. Kelly aligned with his father and uncle. Shad remained on the fight. Shad quit talking to his father and uncle. Shad quit coming to meetings. (HH p. 96).

99. Shad suggests that Gary and Gordon intentionally wanted to delay the project. He testified: "they wanted to wait" and to "manufacture a breach. To steal what they're trying to steal. That's why." (1SH p. 165) In Shad's mind, Gary sold his Virginia LP property to finance a $4.9 million purchase and, with his brother, intended to delay the project so Alpha Land could default on its obligations. Id. To carry out Shad's "logic" Gary, along with his brother, Gordon, developed delay as a "strategy" because in Shad's mind, "they needed to run out of money." (1SH pp. 165-166).

100. Shad recognized that Alpha Land Company, LLC had no exclusive dealings agreement with the Gary's LPs. (HH Depo p. 76).

101. Unlike Shad, Gary contributed hundreds of thousands of dollars to Alpha Land Company, LLC from loans he made on behalf of the LPs to keep Alpha Land afloat. (HH Depo p. 90). Likewise, Gordon along with Gary, signed personal guarantees of loans and proceeded to obtain funding through Banner Capital of $2.3 million to refinance the Gikling contract for deed and sought funding through grant applications. (Gary's Answer to Int. No. 48). Shad did not personally guarantee any loans nor did he pledge any assets as collateral to secure capital for the fledgling development LLC. (1SH pp. 89, 97-98).

102. Shad's October 25, 2021 email he titled "victory" (SH depo Ex 10, p. 028) reminded the members that he had threatened to leave and quit the partnership. Further, he recognized the costs associated with development and that he was not receiving any monies. Shad complained that sales of lots would pay back interest on the contract for deed "meaning initial profits are already gone." Id. Yet his victory email outlined a multitude of disagreements with the business judgment and decisions of the majority. (SH Ex 10, p. 061). Among these were choosing an engineering firm which he wanted to hold accountable stating: "[e]verything

they did has been incorrect and unusable and should be recompensed." Id. He complained that he had been "led to believe" that "not only would we sell parts of Alpha Land to have development funds and walking money[,] I have been limited and restricted by not only creating marketable listings but also in all aspects of project oversight, project representation, project planning, project finance, project exposure and even general correspondence with members." Upset that the company had not yet paid his taxable consequence on the 1031 exchange, he complained "Why is my Tax Deferred Exchange not resolved? I am in financial ruin and our LLC is making it worse not better." Id.

103. Gary replied to Shad's "victory" email on October 25, 2021. Expressing that he had become "increasingly alarmed at what is happening in our family," Gary warned Shad that "what you are doing has to change. You are alienating people who have been helping you and who want to continue to help. You are reacting from extreme financial pressure, but in order to solve the financial problems you have to look in a mirror and recognize who is responsible." Id. Gary went on to explain how Gordon and Kelly had supported Shad in a number of ways. Id. Gary reminded Shad that Gordon had invested about $80,000 in V-rod to support an idea that "has not panned out yet" and had sold Shad land at below market value to help get a house. Kelly had provided around $90,000 to keep Shad out of financial and legal trouble. (SH Ex 10, p. 031).

104. Shad replied to Gary on October 25, 2021 and said "I do not disagree with hardly anything you wrote." (SH Ex 10, p. 031).

105. Shad's reply further explained he was having health issues. (SH Ex 10, p. 031). Shad said he was "bleeding out of my skin over stress" but he was doing his best to communicate. Id. In his testimony, Shad explained he did not see a doctor for this condition specifically which he related to stress likened to a phenomenon which Jesus experienced in the Garden of Gesthsemane. (1SH pp. 242-243). But, he did get a "total comprehensive analysis" and a CAT scan. Id.

106. Holly Howie confirmed Shad had received a CAT scan in a later email dated March 29, 2022, she sent to both Gary and Gordon, but she claimed that nothing wrong could be found. However, Holly's email stated: "he is supposed to have an ADHD or psysiological (sic) analysis done . . .but commented on her observations of a "change in attitude and some of this paranoia" linking it to when he was "tazered (sic) in Wind Cave." (HH Ex 1, p. 72). "He told me that he fell and hit the back of his head when the cop shot him with the taser gun. I think that could possibly be an explanation for the why, behind the abnormal thinking." Id.; See also, HH pp. 189-196).

107. During her deposition, Holly explained that she had told her husband he had ADHD and was having trouble with his memory and thought something was wrong. (HH pp. 193-194). She agreed that Shad probably does not read things thoroughly sometimes. (HH p. 194).

108. Gary emailed Shad on October 26, 2021. (SH Ex 10, p. 034). Gary explained that his last two emails dealt with partnership problems, but suggested that there was more to the

"picture" sharing with his nephew his observations and telling Shad: "You may not realize it, but the way you think, your accomplishments, and the way you approach problems represent wrestling with a very significant handicap." Gary suggested that "[t]he undiagnosed handicap you have been dealing with your entire life is consistent with attention deficit disorder….People with attention deficit disorder react impulsively, which often gets them into both legal and financial trouble. They want immediate results, which can make them difficult to work with." (Gary's Answer to Interrogatory No. 50).

109. Shad's response to Gary thanked him for "the encouragement." Before referencing Exodus and a story about Moses, Shad conceded: "Me in a partnership was a bad idea. You are most likely entirely right." (Email 10/25/21, SH Ex 10 p. 034).

110. Gordon likewise received a threatening text from Shad. In an email of October 25, 2021, to Gary, Kelly and Shad, Gordon characterized Shad' text as "disappointing" and "having a threatening tone to it." (SH Ex 10, p. 030) Gordon said he would "set aside a response to that text, as well as responses to emails that propose the "fight" attitude, which I believe will only propel us in a very backward direction." Id.

111. The balance of Gordon's email was a summary of moving forward and included the change of engineering firms from KTM to Hermanson Egge. Id. Likewise, Gordon updated the members on discussions between the company's engineering team and Box Elder "which have been optimistic." Id. Gordon warned: "It would be very detrimental if our Alpha Land team does anything that could compromise the progress our engineers seem posed to make." Id. Gordon further addressed the company's payment of real estate taxes, the 2nd annual payment to the Gikling contract for deed—all things to a loan from Gary to Alpha Land Co, LLC. Id. Gordon explained that the current account balance of the company was at $500, "which means we many need another injection of cash sometime soon. I will be willing to help as I am able as well." Id.

112. Gordon ended the email noting the "potential refinance" of the contract for deed and that "Gary and I have had numerous discussions between the two of us and Banner Capital. The hard reality is that there were plenty of financial obstacles that had to be dealt with before a re-finance could be pursued. Now those have been overcome, so we are now pursuing that re-finance." Id.

113. Documents produced in discovery confirm that Shad's actions were a substantial factor of causing increasing friction in the company and family schism. Shad had first proposed that the company hire a lawyer to threaten legal action (See USMF #84, supra). By October of 2021, Shad wanted to take it a step further suggesting he would hire his own engineer and attorney to get what he wanted. (SH Ex 10., p. 58). Shad said he was independently preparing "a proposal for 300 homes off Sunnydale with no improvements and a 150 PUD off Reservoir Rd to connect to Sunnydale via gravel." Among other things, Shad said he would "no longer bow to every unreasonable whim" [of the City] and "with the help of my engineer and attorney" expected "consideration by partners." (SH Ex 10, p. 58).

114. On October 20, 2021, Kelly wrote an email to Gordon and Gary addressing an email Gary had written in response to Shad's claim that Box Elder was "erroneously" interpreting governing ordinances and that the City's directive to fund the West Sunnydale road had been included in a 2006 TIF (tax increment financing). (SH Ex 10, p. 057-058). Gary then sent the email to Gordon and Kelly explaining that he had researched Shad's claim about the "2006 TIF" and could find no information that it included Sunnydale. Id. Kelly's response to Gary's email warned that Shad was engaging his own engineering firm and an attorney "which may complicate our intended revision to the partnership agreement. The way I read this message is a clear threat that he will do whatever he chooses, with funds he does not possess, and that he also has an expectation that we fall in line with whatever direction he provides us. . . . He is absolutely toxic right now. Every action he takes is counterproductive to our project and his personal relationships with his partners. It may also jeopardize the willingness of Mike [Albertson] and [Larry] Hermanson [engineers] to even participate further. (SH Ex 10, p. 057).

115. Kelly's email, was prescient of Shad's present claim to an ownership interest in the property: "Correct me if I'm wrong, but Alpha Land Company does not own any property in Box Elder. If that is the case, Shad has literally no authority by which to engage an engineer or attorney." Id.

116. On October 29, 2021, Shad wrote a long email titled "comprehensive plan" which was copied to Gordon, Gary, Kelly and Holly. Quoting statutes and recounting Box Elder's "lack of leadership and apathy for consistent planning and development principles" Shad's email professed, among other things, that "Alpha Omega Development addresses and solves every single issue, objective and Goal outlined in The City of Box Elder's comprehensive plan." (SH Ex 10, p. 035-036). Shad suggested that "if our group cowers now and compromises on West Sunnydale reconstruction rather than expose the underlying problems we will also rebuild Radar Hill road and Cheyenne Boulevard and continue a legacy of systematic extortion to the highest degree." Id.

117. As part of an oral contract, Shad claims he made it clear that the Project needed to provide him with work and income to support his family and that Shad would have a key role in all site development and development oversight and receive compensation for this work. (See VC, ¶¶ 39, 40). When pressed for details of payment under the purported oral contract, he agreed "[w]e didn't ever agree on a figure. We just talked about how walking money would alleviate that . . ." (1SH p. 251).

In regard to an income he would require, Shad was asked:

Q: Did you quote them a price?

A: No. It was to be determined.

(1SH p. 253).

Shad explained that "[i]t was never determined what that would look like in dollar form or a specific format." (1SH p. 254). On this subject, the following questions revealed the following responses:

Q: And that's because you didn't know what the future would hold in terms of lots and how quickly they would be development and exactly what kind of equipment you would need and when; is that fair?

A: I would say that is fair. A good developer is a reactive one.

(1SH p. 254).

Shad agreed that payment for site development and oversight would be dependent upon future events as platting happened, as phases were developed and things moved forward. (1SH p. 255). As to the claim that such a "promise" about development and oversight was breached, Shad conceded that he took draws from the $318,161.28 that was placed in Pennington Title's escrow to spend on the development of the property; in fact he was allowed to claim this on his tax return to reduce his tax liability on the sale to the LPs. (V.C. ¶69; 2SH p. 27). As draws were distributed for development purposes, Shad admitted that: "I was operating in my role—in my capacity—which was development oversight." (2SH p. 29). Further he explained: ". . . Gordon was to pay bills, so I did operate in that capacity." Shad confirmed he was doing the work "voluntarily" and did receive "some help and support from the other members." (2SH p. 29). In spite of what he claims was a promise to pay him a salary or wage for development, he admitted that he did not ask to be paid. (2SH p. 30)

118. Shad claims he was orally promised that he was to have a "key role in site development and site oversight and receive compensation for this work." (VC, ¶40). When asked the amount of compensation to be paid, Shad said: "it depends." (1SH p. 252). Shad conceded: "Never did we ever discuss a dollar amount." (1SH p. 252). Shad was asked:

Q: So that was left pretty vague?

A: Fair.

(1SH p. 252).

119. Shad claimed that he would have the opportunity to build and sell residential homes and commercial buildings throughout the duration of the project and that the construction would be financed by the parties' development company. (V.C., ¶41; 1SH p. 255-257). Shad agreed that he was not promised to be the only builder and seller of residential homes or commercial buildings. (1SH p. 256). Likewise, he agreed that the promises of financing the construction was based upon future events, down the road, when enough parcels were sold. (1SH p. 256). Shad agreed that from the beginning, on April 6, 2020, Gary and Gordon had set him up with the $150,000 loan with a draw. (1SH pp. 256-257). In fact, he was fronted two lots to build upon and was unable to complete the homes at 508 and 512 West Sunnydale in a timely manner. (1SH pp. 163-164). Nonetheless, Shad admitted that he was given the opportunity to profit from his own construction. (1SH p. 162).

120. Regarding Shad's claims that "walking money" was promised in the beginning; however, neither the amount nor when it would be paid was ever identified. (1SH pp. 258,261). Shad agreed that the terms were vague as to the timeline and amount. Id. "We talked about hundreds of thousands." (1SH p. 259). Shad's figure of walking money became a moving target during his deposition—he first said it was hundreds of thousands, then settled on $200,000 which

"was a later figure" but "on the front end of it—it was a substantial sum of money but not specifically identified." (1SH pp. 259-260). As more questions were asked of Shad the $200,000 was not described as walking money, but a loan. (1SH p. 261). All of the terms were, by his own admissions, vague. Id. In reality, on April 6, 2020, Shad was funded a $150,000 personal loan from Gary. (See Statement of Undisputed Material Facts No. 56)

121. Beyond James Postma, CPA, Greg Wick and Jan Kirch of Pennington Title, his wife, Holly, and two representatives from Banner Capital (Braithwaite and Peterson), Shad was unable to identify any other persons that would have personal knowledge of the oral contract which was the subject of his First Cause of Action. (2SH p. 5). Likewise, he was unable to identify any other persons to support the remaining causes of action in his Verified Complaint. (2SH pp. 6-8). Holly admitted most of her knowledge was what her husband told her. She had no personal knowledge of many claims as she was not present. (HH depo, 04/30/24, p. 40 and 06/06/24 pp. 262-263).

122. When asked if he really believed that Gary was going to do a 1031 exchange and just transfer a third interest in land to Shad and a third interest to Gordon for nothing in return, Shad replied: "that's an asinine question." (1SH p. 188) He claimed that Alpha Land would pay Gary back. When pressed for what Gary was to get in exchange from Shad for transferring him a one-third ownership interest in the real property, Shad replied to counsel: "Are you kidding me?"…."You are not kidding. I guess maybe I'm naïve because I don't think you're stupid; I think your acting stupid" (1SH p. 188-189). His diatribe and name-calling was a means to avoid answering a simple question. Calling defense counsel a "joker," in the final analysis, Shad was unable to provide an answer for what consideration was exchanged for the purported one-third ownership interest he was to receive. (1SH pp. 189). The truth as established by the conduct, actions and documents was that there never was a promise to transfer Shad a 1/3 ownership interest in the property. Shad admittedly had contributed no money into the deal—"zero dollars." (1SH p. 169). In fact, ignoring the loans and 1/3 membership interest and opportunities granted him, he erroneously claimed: "I'm unaware of any benefit that I've had thus far." Id.

123. The records produced in discovery show that two years after Alpha Land Company was formed, Banner Capital was involved with a non-revolving promissory note and loan to Gary's LPs for $2.3 million. (2SH pp. 14-15; SH Ex 22, pp G-2029 - 2039).

124. Gary signed on behalf of both LPs on March 29, 2022 which refinanced the contract for deed held by Gikling on the 779 acres. (2SH p. 15).

125. As part and parcel of the Banner loan process, Ken Simpson, MAI, SRA, R/W-AC, a certified real estate appraiser generated an appraisal which Shad was provided by Gary contemporaneously with the transaction. (2SH p. 15). Shad understood the loan was to refinance the contract for deed with Gikling which had been assumed and was fully informed. Id. Yet, Shad claimed that the way in which Gary and Gordon took out the contract for deed "was contrary to our agreement," yet conceded the Banner refinance that Gary undertook did reduce the cost of the borrowed funds and mortgaged 779 acres of the 1,333. (2SH pp. 15-17). In fact, Shad agreed that he had suggested that the contract for deed needed to get paid off to help reduce the cost to the company. (2SH p. 21).

126. The records of Pennington Title Company include a settlement statement when the $2.3M in funds from Banner were released to pay off the contract for deed the borrower was

identified as the LPs, not Alpha Land Company. (2SH p. 17). Shad testified that "what Pennington Title did not disclose is the equitable role in the company by yours truly." Id. This was because having contributed "zero dollars," Shad did not have equity in the property. (1SH P. 169).

127. Ken Simpson's appraisal opinion and report for Banner Capital's refinance of the contract for deed recounts a "history of the property" situated in the northeast quadrant of Rapid City, within the limits of the City of Box Elder. (Simpson Report, PL000231). Simpson's March 10, 2022, report to Richard Braithwaite, VP of Commercial Lending at Banner Capital Bank recounts:

> "Shadrach's purchase of the various parcels was the initial transaction that "combined" the property in its entirety. The funding for this purchase was in part a contribution on the same day from the LPs as a down payment to Shadrach. A sale was then completed from Shadrach to the LP's which allowed for the necessary funding for the purchase and also served to allow the LP's to complete a 1031 exchange for the sale of some property in Virginia. The managing member of the LP's is Gary Howie. From there, Alpha Land Company which includes both Shadrach and Gary were formed as an entity that would purchase parcels from the LP's as the property is developed." Id.

> Simpson's report went on to explain that:

> "According to the borrower, total cost expended since October, 2019 is $391,439.83, which likely includes the other parcels not involved in this assignment. This amount reportedly includes mostly engineering expenses as well as some grading, overall master plan design, legal fees and some miscellaneous expenses relating to fencing repairs, etc." (Simpson Report, PL000231-PL000232, PL000251). Per Simpson, the 779 acres as of January 17, 2022, had an appraised value of $5,190,000. Id.

Simpson's report reflects that Shad did not own any part of the 779 acres being refinanced to take out the contract for deed as a matter of recorded title. (PL000250; 2SH pp. 15, 23-25). Shad was provided Simpson's report and its contents would have confirmed for him his "role in the company" and his lack of ownership of a one-third interest in the real estate. (1SH pp. 88-89). Yet, when pressed about the refinance and the Banner proceeds of $2.3 million loaned to the LPs, Shad agreed that he had no knowledge of what happened or the "nature of how that was done" (2SH p. 18). Still he professed Gary and Gordon defrauded him. Shad's continuing theme was that he trusted his family and that he was "manipulated." (1SH pp. 36, 84; 2 SH pp 17, 43).

128. Although he did not know how much of the company's money he had expended in the initial phases of the development exercising his "role," Shad agreed that the company was "on a shoestring budget" of limited capital. (2SH, p. 30). Shad was allowed to show $220,000 of expenses on his tax return to reduce his tax obligation and increase his basis in that for the short period of time, he was the titled owner of the property until it would be transferred to the LPs as had been discussed with CPA Postma long before Alpha Land Company was formed. (2SH p. 33)

129. When pressed that Shad's own conduct was a reason that the majority of members voted to change the operating agreement, Shad conceded that he and his half-brother, Kelly had "got crossways . . .That's when stuff started really turning toward a new direction." (1SH p. 244). Shad agreed Kelly was given exclusive right to market. (1SH p. 147).

130. Regarding Shad's "discovery" of the fraud and deceit he claims was perpetrated upon him, Shad testified that his "aha moment" was in three "red flag" experiences as described below:

a. The first "red flag" was when he received an email from Gordon regarding Banner Capital. Shad agreed in his testimony that Banner Capital was not involved until the refinance of the contract for deed with Gikling until March of 2022. According to Shad, Gordon had told Shad that Banner Capital needed to change the LLC's operating agreement for their lending requirements. (1SH p. 192) Shad claims he then called Banner Capital's president who informed him they were ready to lend which made Shad believe that the change in the operating agreement was not driven by Banner's needs; but something nefarious was occurring and a "blatant deception." (1SH p. 193). Shad claims, he was promised $200,000 and had to sign a document under threat and that if it was paid, that he had to "stay out of our way." (1SH p. 193). What Shad described as a "blackmail" attempt revealed in a document has not been disclosed in discovery. (1SH p. 194) When asked if there was such a document in existence, Shad claimed it did exist. (1SH p. 194). No such document has been produced.

b. The second "red flag" moment was when Shad was provided a revised operating agreement draft prepared by the Bangs McCullen firm attorneys. Shad described the operating agreement as a "crap burger." (1SH p. 193). The documents show that Attorney Jeff Hurd communicated the company's intent to modify the agreement. If agreement could not be reached, attorney Hurd explained that a majority would make the decision. (Shad said he read through it all and claims that the revised agreement surrendered all of his rights. (1SH p. 193). This prompted Shad to hire an attorney. Somehow, being provided notice that the majority of members were changing the document and providing the information to Shad was a "deception." The documents relating to Hurd's January 29, 2022, communications are found at SH Exhibit 10, pp. 38-39.

c. The third "red flag" moment was what Shad described as the "salute shit burger" which generated the amended operating agreement. (1SH p. 194). This amended operating agreement was drafted over a course of time following Hurd's attempt by Gary and notice was provided to all members that it would be voted upon. The minutes of the company meetings clearly show a history of why the operating agreement was being changed. (HH Ex 1, pp. HH 02-03; HH 11-12, HH-13-14, HH-15-16) Rather than a request by Banner, the reason for the changes to the original operating agreement was that Shad's escalating conduct and unilateral actions were out of control, against the business judgment of the majority, and were threats to the company which needed to cooperate with the various players in development. (HH Ex 1 p. 12). Gary's concern was that in its original form, the operating agreement permitted any member to bind the company. (See, Ex. 4 to Defendants' Answer to Verified Complaint and Counterclaim, Operating Agreement ¶4). Shad was acting unilaterally, without coordinating with his partners. (Gary's Answers to Interrogatory Nos. 50, 71).

131. Regarding his claim that Gary and Gordon promised Shad that he would receive a one-third ownership interest in the land, Shad conceded that in his meetings with Postma, Wick and Kirch prior to the formation of Alpha Land Company he never expressed that he was to have a one-third ownership interest in the property. (1SH p. 196) Shad also conceded that Alpha Land Company would only acquire ownership in parcels; "that was how it was going to work." (1SH p. 207). Shad agreed that he knew that Alpha Land would only be purchasing parcels as the land was being developed and that the four corners of the documents provided that information. (1SH p. 208). Yet, he still suggested that "material terms" were not in the documents and said: "And if we're going to get into a pissing match about what is there and what's not, we're not getting anywhere." (1SH p. 209). Frustrated by the fact that the documents, words and actions revealed facts contrary to his subjective belief of having an ownership interest, Shad said not to "take his word for it" but that "experts" would explain that his belief would be mirrored by their "testimonies." Id.

132. Named as his "experts" were Wick, Kirch, and Postma. (1SH p. 208-209). In Shad's words, they were like "eyewitnesses of Jesus Christ. You can refute it all you want, but they saw it." (1SH p. 209). No testimony has been produced from these individuals supporting Shad's claims.

133. On January 29, 2022, attorney Jeff Hurd wrote a letter to the members of Alpha Land and Kelly Howie regarding "Reorganization of Alpha Land Company." (SH Ex. 10, p. 038). Kelly had requested Hurd to help the company amend the original operating agreement "to more closely match how you intend the Company to function." Id. Relative to the provisions of the original operating agreement and amendment by a majority, Hurd explained that he did not represent any of the members individually and that "[i]f you disagree on the terms of those documents, then we will act on the instruction of the majority of members." Id. (Later, as Shad was threatening legal action against Gary and Gordon, on May 31, 2022, attorney Roger Tellinghuisen replied to an inquiry by Gordon regarding Shad's conduct and his expulsion for misconduct or engaging in conduct which thwarts the company's purpose. (SH Ex 10, p. 053). Shad had insisted that Gary and Gordon's change to the operating agreement was illegal citing state statutes. (SH Ex 10, p. 054). To this Tellinghuisen conferred with his partner regarding amendment by majority vote (SH Ex 10, p. 055). His partner, attorney Curtis Jensen, replied and opined: "Operating agreement controls. Chapter 47-34A is just the default if there is no operating agreement or if operating agreement is silent as to the particular matter. Just certain fiduciary duties can't be waived by the operating agreement." Id. Tellinghuisen sent the response to Gordon and advised: "You're good to go—the Operating Agreement controls." (SH Ex. 10, p. 53).

134. Shad was upset with the proposed changes to the operating agreement which had been generated by Hurd's office. So, Shad hired independent legal counsel in Stephanie Trask, an attorney who had called Hurd and conveyed that her client "is concerned about the direction

the Company is headed, particularly with regard to Company management between the Members. (HH Ex 1, HH-08). On March 15, 2022, Trask wrote:

> Regardless of the imprecise and contradictory language in the original Operating Agreement, it has become apparent to Shadrach that his two fellow Owner-Members, Gordon Howie and Gary Howie, also have no intention of **honoring the intent of the original Agreement**." (Letter dated March 15, 2022; HH Ex 1, HH-08)(bold emphasis added).

Trask proposed that Shad would accept one of two options, namely: 1) a buy-out of "his one-third (1/3) ownership interest in the Company, reflecting a value of $45 million" or a "discount" to $36 million conditioned upon "the Company will execute a written agreement to implement and maintain all covenants that have already been developed for the subject property development, including street names, or 2) the members would determine a method for valuing the company, a value would be established and each Member's value would be defined with a 1/3 ownership and an Amended Operating Agreement would be created and executed. Id.

135. The proposal set out in the Trask March 15, 2022, letter was rejected. Trask apparently did not appreciate that Alpha Land Company did not own the land or had been told by Shad what he wanted Trask to believe was the case. An ownership and encumbrance report from a title company would have shown who was the titled owner and the transactions from Gikling and Sullivan.

136. On March 21, 2022, Shad authored and sent an email to Gary, Gordon and the attorney he had hired (Stephanie Trask) in what he self-described as an effort to "mediate" the "ongoing potential risks we saw and based upon my partners' behaviors. . ." (1SH p. 197; SH Exhibit 8, PL00665; also found at SH Ex. 11, p. 178). Five enumerated topics were listed by Shad and he titled his email as "Developers/Operating Agreement." (SH Ex 9, PL00665; 1SH p. 197-198).

137. In his March 21, 2022 email, Shad's proposed **"honoring original intent by specific definition: Example: 1,333 acres owned by HP Park LP is designed solely and unequivocally for future development by Gordon Howie, Gary Howie and Shadrach Howie with all net proceeds split evenly 33.333 percent."** (SH Ex 9, PL00665; 1SH p. 197-198)(bold emphasis added).

138. The words "honoring original intent" were Shad's words. Id. Sending the email to the other members was his conduct. The March 21, 2022, email was written some two years after Alpha Land Company had been formed and nearly two years after he had transferred all interest to the LPs on April 6, 2020. The email was written nearly two years after Gary had loaned him $150,000 for the purpose of constructing homes, a task he admits he was unable to timely complete. The email was written after repeated issues Gary and Gordon had with Shad not agreeing to cooperate with their plans together with conflicts not only with them, but also with Kelly, the City of Box Elder, and the company's own engineers. Shad was asked the following question and gave the following response:

> Q: When you said "honoring original intent," that was the original intent that you understood it to be from the very beginning, correct?

A: No.

(1SH p. 198)

However, when pressed for an explanation of his term "original intent," Shad said that his placement of the colon in the email was a "mistake" and that the sentence was "a run-on sentence.[2]" (1SH pp. 201-202).

The discussion continued and Shad was asked:

Q: So when you use the term "original intent," aren't you referring to something in the past? The "original intent" of what we intended to do?

A: That's correct, but what you are implying is that this is that original intent. This is a new scope that I was willing to give a little ground on that would still honor it.

(1SH p. 201-202).

At this point, defense counsel pointed out that in his "honoring original intent" email of March 21, 2022, he said nothing about a one-third ownership interest in 1,333 acres. (1SH p. 202). Shad's email was copied to his counsel, Trask. (1SH p. 204). So, Trask would have had proof of her client's original intent. Item #4 in Shad's March 21, 2022 email referenced covenants which he acknowledged still had not been completed. (SH Ex 9, PL00665; 1SH pp. 202-205). The documents show that over time, while discussed, covenants were never adopted. (See, Gary's Answers to Interrogatories, Nos. 5 and 6).

139. Shad's wife revealed that Shad was told by his attorney, Stephanie Trask, that in her professional opinion, Shad had no protection from being kicked out of the partnership or being replaced. (1SH pp. 247-250; HH p. 8; HH Exhibit 1, HH 05-06). Holly listed two conversations over speaker phone which she, in turn, related to Gary and Gordon in a message on March 29, 2022. Id. Shad conceded he was told this by Trask to whom Shad had provided the pertinent documents. (1SH p. 250).

140. By April 1, 2022, the members were still not getting along. (HH p. 58). Holly went to a company meeting and as reflected in the minutes (HH Ex 1, HH 01), she attended trying to be, in her words, a "mediator." (HH p. 58).

141. Holly knew that Gary's LPs owned the land and that Shad had issues with what he believed was the majority's ability to "kick him out" of the company and sell the property and he would be left with nothing. (HH p. 74). Holly explained the big problem was that "we think that it is not legal for them to change the Operating Agreement. They are saying they can do it

[2] Regardless of his use of punctuation i.e. placement of a colon; or use of the King's English, Shad's intent is revealed by the words in the message. Shad wanted a development agreement to honor the original intent which, as he explains in his own words, was the mechanism struck between Alpha Land and the LPs as embodied in the written agreements from the start. None of Shad's claimed oral "material terms" appear in his effort to strike an agreement which "honors original intent." The same holds true for Attorney Trask's efforts to "fix" what was clearly a business in which one member's way was not being followed by the majority in their business judgment.

with two votes, which leaves Shad the third guy out." (HH pp. 77-78). Holly conceded she did not know if a change in the original operating agreement by the majority of members was legal or not. (HH p. 78). That said, Holly agreed that when she later reviewed the discovery produced in the case, she saw emails from attorneys Roger Tellinghuisen and Curtis Jensen that in their professional opinion, the changes to the operating agreement could in fact be made. (HH p. 79; compare SH Ex. 10, p. 53).

142. Holly was privy to discussions her husband had with his attorney and what was told him in the Spring of 2022. (HH p. 79). Sitting next to her husband, on two occasions Holly overheard conversations on a speaker phone between Shad and his attorney, Trask. (HH p. 82-83). The attorney and Shad discussed the original Operating Agreement and language about redrafting it. (HH p. 82). Holly listened to Trask tell Shad that the original Operating Agreement was valid. (HH pp. 83-84)

143. The communication between Shad and Trask lost its "privilege" when Holly sent Gary and Gordon an email on March 29, 2022, which related her husband's attorney/client communications with Trask. (HH p. 79-86; HH Ex 1, p. HH 05). Holly's email to Gary and Gordon states in relevant part:

> I do have to tell you that every agreement Shadrach has sent to the lawyer. In her professional opinion, she is telling Shadrach that he has no protection from being kicked out of this partnership or being replaced. She is telling him that those documents are poorly structured and aren't in his favor. I'm sharing this with you so that you may understand where some of his suspicions are coming from. You will need to decide if you believe [Trask] to be a snake that is whispering in his ear, or if she is right. . . .I know that your (sic) all have good intentions but it is important to Shadrach to protect and secure what he believes to be a part of his destiny. Fundamentally his attitude has been hard to deal with but I don't think his intention is wrong or evil.

(HH Ex 1, p. HH 05).

144. Shad conceded that the original operating agreement provided an equal and even distribution of net proceeds and losses split evenly at 33 1/3 percent. (1SH p. 204).

145. On April 1, 2022, a company meeting was held. (HH pp. 63-67; HH Ex 1, p. HH-01). Gary and Gordon attended. Shad did not. Holly was present in Shad's place and suggested they listen to a phone call from "Bruce of Consolidated Const." about a prospective undisclosed buyer "for the entire project." Id. Discussion was also held to consider street names which had been submitted by Shad and the following names were approved on Holly's motion: "El Shaddai, Emmanuel, Iatros, Yatsar, Yahweh, Magen, Miglol, & Abba." A motion was made by Holly that buyers would be asked to consider using V Rod rebar, and to consult with Shad to "learn the merits of V Rod." Id. "IF buyers choose not to use V Rod, they would be asked to sign a waiver of liability." This motion was unanimously approved. Id. Holly made another motion to approve a sale of 60 acres located at Cheyenne Boulevard, subject to negotiations with partners. This motion also unanimously carried. Id. A third motion was made by Holly which was approved unanimously "that any offer on the entire project from Bruce/Consolidated Construction include "provisions acceptable to Shad." Id.

146. Holly initially testified that Shad didn't have an option to be an active member of the business and that "every time [Shad] would suggest something, they [Gary and Gordon] would either not reply to him or they would tell him no." However, when forced to admit that every motion she made on Shad's behalf at the April 1, 2022 meeting was approved, she backed off the suggestion. (HH pp. 66- 67).

147. As his personal finances and attention to a myriad of other projects distracted him, Shad's conduct and actions progressively worsened in spite of warnings from members. Emails he wrote reveal him to be unhinged and, at times, removed from the reality self-proclaiming that the project was his alone. In his email of April 4, 2022, titled "Perspectives suck" he scolded Gary and Gordon and raved of how he was being unappreciated and mistreated financially regarding a number of properties unrelated to the project. (HH Ex 1, p. HH 10). In particular, with regard to Alpha Omega, his state of mind is revealed when he wrote:

> "**This property will never be developed by you. This is meant for me to develop.** And time will clearly show your methods produce loss, not progress. You are an expert in losing real estate. I have done everything I can to bless and enrich your life, but you are just a realtor to the soul. Prove me wrong. I doubt it." (HH Ex 1, p. HH 10)(bold emphasis added).

Shown the "Perspectives suck" email at his deposition, Shad reluctantly admitted he was its author and that it was his "intention to communicate (his) thoughts at the time with regard to a number of different properties including the Alpha Omega." (1SH pp. 20-22).

148. On April 8, 2022 another meeting of the company was held. Shad was not present. Holly was present and was approved as Shad's proxy. (HH Ex 1, p. HH 02). It was agreed unanimously that progress of the development would be reviewed on May 1, 2023. Id. The minutes state: "If by that date, no acceptable progress has been made, the group will consult legal counsel to review all options available. It was agreed that Stephanie Trask would be a good candidate to legally represent and advise the group." Id. A version of the operating agreement drawn by Gary was presented for consideration which the group agreed to review. Id. Amendments of sections were proposed and voted upon, all of which were subject to change by a majority vote. Additional items of discussion included street names, to which Shad was to "submit a list of proposed street names for each phase as it is developed." Id. The minutes recorded that "[m]embers will vote on street names, with Shadrach given the opportunity to submit names for approval." Id. Covenants for the property were briefly discussed and "[i]t was agreed that should be a topic for discussion at a later meeting." Id.

149. Minutes of the April 8, 2022, meeting were sent to the members for approval. (HH Ex 1, p. HH 04). Concerned that the minutes did not include a topic of previous language suggested by Gary, Holly wrote to make sure the topic of how parcels would be sold was not forgotten. Id. Holly wanted to make sure that a matter of unanimous agreement adopted at the meeting was an accurate statement and that it spoke to the intentions of all the partners, namely:

> *Although the Alpha Land Company, LLC, Operating Agreement allows various investments and operational activities, the primary function is to develop land purchased from RW Motel and Manner, LP, and Ridgewood Park, LP. To that extend, the overriding and most important function of this LLC is to guarantee that the net income from development goes in*

> *equal proportions to Gordon Howie, Shadrach Howie, and Gary Howie, and/or their estates and beneficiaries. And that the marketing income from this development goes to Kelly Howie and/or his estate or beneficiaries. It is each partner's responsibility to ensure that this happens.*

(HH pp. 70-73; 77; HH Ex 1, pp. HH 02-03).

150. The reason Holly made sure the above language was adopted in the company's minutes was as stated in her email of April 9, 2022: "I think by specifying the intent that includes the land, this will make it more specific and less suspicious." (HH Ex. 1, p. HH 04). Conspicuous by its absence is a reference to Shad's claims to a one-third ownership interest in the property or any of the other "material terms" he now suggests in his lawsuit which were orally promised.

151. Holly testified that she had told Gary and Gordon that Shad was "suspicious" of their actions as they worked to revise the operating agreement and that the above language, adopted in the April 8, 2022, meeting gave her more comfort and would be "more specific and less suspicious." (HH pp. 73-74) As Shad's proxy, Holly felt that "he would be okay and on board with those decisions and those things." (HH pp. 73-74). Holly confirmed that prior to the meeting, Holly had visited with Shad about the concepts. Holly testified as follows:

> Q: So you had visited with [Shad] about the fact that Alpha Land didn't own the 1,333 acres, that he didn't have a one-third interest in those, only that Alpha Land could buy the parcels from Gary's LPs, correct?
>
> A: Correct.
>
> Q: And one of the problems that I assume Shadrach was having was that there was no exclusive dealings set forth with any of [the] documents that said that Gary was obligated to do this for as long as he owned the 1,300 - 1,333 acres, right?
>
> A: Yes.

(HH p. 76).

152. Shad did not believe that Gary and Gordon could get the development completed and that it was meant for him to develop. (HH p. 87; 1SH pp. 22-23). In spite of Gary and Gordon fronting all of the money for the purchase of the ground, Holly testified that "Shad felt like they were stealing his dream, stealing his idea, and kicking him out" . . . "that's the way he felt." (HH p. 88). This was, according to his wife, Shad's state of mind, even though he had not put any money into the project. Id.

153. Holly agreed that Shad's beliefs that Gary and Gordon were stealing his dream was not "rational" given the assistance that his father and uncle had provided to Shad. (HH pp. 88-89). Holly agreed that when the company was in default, it was Gary who came up with the money personally to pay company expenses and ongoing interest and costs. (HH p. 89) Holly did not view that Gary or Gordon were stealing Shad's ideas or stealing something from Shad by that conduct. (HH p. 90). Holly agreed that it was Gary who funded Alpha Land to pay Shad's

tax obligation to the IRS of $220,000 which was the consequence of his sacrificial lamb involvement in the 1031 exchange. (HH p. 92).

154. Shad's actions and conduct compromised Alpha Land. The conduct and detriment are detailed in Gary's Response to Interrogatory No. 71 in twenty-nine bullet points. (See Gary's Answers to Interrogatories, No. 50, pp. 30-34 of 72; No. 71, pp. 42-47 of 72). It was Shad's conduct which prompted the revisions to the original operating agreement by majority vote. Id.

155. On April 29, 2022, Shad communicated that he was again "broke" and needed more money. Shad proposed that Gary provide him with yet another loan. (See Gary's Answer to Request for Admission No. 37, page 55 of 72). Gary had previously funded Shad with the $150,000 personal loan (Construction Loan Agreement) two years previously as an impetus to construct homes at 508 and 512 W. Sunnydale. Not having been timely completed by Shad and given the negative financial returns, Gary nonetheless offered Shad another $50,000. (HH 04/30/24 depo p.141). Shad immediately refused the offer on May 2, 2022 and said he was terminating all dealings with Gary. (Gary's Answer to Request for Admission 37, page 55 of 72; See also HH pp. 144-146).

156. Development delays were due to a myriad of causes and obstacles. Lots were not being sold in the first two years and the company was without sufficient funds to meet its obligations. (Gary's Answers to Interrogatories Nos. 70, 72).

157. During the two years from the formation of Alpha Land Company and its agreement with Gary's LPs, expenses for engineering and infrastructure were required. These costs were able to be paid with Gary's financial assistance. (Gary's Answer Interrogatory Nos. 70, 72). The contract for deed had been refinanced with Gary and Gordon's personal guarantees providing a lower interest rate. Loans of $500,000 and $5,000,000 were secured through Bank West by the LPs with Gordon and Gary cosigning on notes which encumber the Tract 1 of the Alpha Omega Subdivision. (Gary's Answer to Interrogatory No. 48).

158. In March of 2022, Banner Capital loaned the LPs $2,300,000 with a monthly payment of $76,704.48. Id. This "refi," along with application for grant funds and continued cooperation with Box Elder got things moving for the company; but still distributions of net profits did not pass to members until September 2, 2023 of $10,000 per member. (See, Gary Answer Interrogatory No. 74).

159. Gary explained his accurate understanding that an LLC is not able to make distributions if the company would not be able to pay its debts as they become due in the ordinary course of business. (See Gary's Answers to Interrogatories Nos. 83, 84, 85). [SDCL § 47-34A-406(a)(1)].

160. Minutes of the company meeting held April 26, 2022, record that members Gary and Gordon were present and Holly was approved as "official representative for Shad as partner of Alpha Land Co., LLC." (HH Ex 1, p. HH 11). A number of issues were presented including:

- Shad's Spec House expenses,
- the January 14, 2020, Purchase Agreement between Gary's LPs and Alpha Land Co.,

- Income Tax and allocation of expenditures,
- Street names,
- an updated operating agreement,
- progress on the project with Box Elder
- and a recent email from Shad's attorney.

(HH Ex 1, p. HH 11).

161. At the April 26, 2022, company meeting, both the updated operating agreement and the purchase agreement were copied to all in attendance. Id. The minutes reflect that as the purchase agreement was reviewed, all members recognized that Alpha Land Co. was in default of that agreement and that Gary had agreed to personally contribute several hundred thousand dollars to pay costs. Holly moved that the expenses for that past year be allocated to Gary for tax purposes per CPA Postma's agreement that the process was acceptable. Id. (The same treatment Shad had received in 2020). Also discussed was information received by members that Shadrach had discussed blocking a potential sale of 60 acres, contrary to the unanimous approval of that sale at a company meeting on April 16, 2022. (HH Ex 1, p. HH 12). Likewise, the information suggested that Shadrach was "stopping or killing" the Cheyenne Blvd. TIF[3] with the City—actions which as recorded "could be very detrimental to ongoing progress with Box Elder and others instrumental to our success." Id. A year before, on April 8, 2022, Shad had agreed to allow Gary and Gordon until May 1, 2023 to succeed with negotiations with Box Elder. Id. His conduct in the minutes of April 26, 2022, was characterized in the minutes as "completely inappropriate and unacceptable." Id. Further that "[i]t is a serious breach of fiduciary responsibility to the Alpha Land partnership and clear violation of the General Standards of Conduct of Alpha Land Co. (Section 11 of operating agreement)." Id. The minutes further reflect that the majority of meeting's time was devoted to the actions of Shad and "how to appropriately deal with them" and that important issues would need to be tabled to a later meeting. (HH Ex 1, p. HH 12).

162. Gary and Gordon continued to work on amending the original operating agreement following Attorney's Hurd's attempts. Gary drafted revisions and exchanged it among the members including Shad throughout April of 2022. Id.

163. The minutes of Alpha Land Company confirm that notice was sent to the company members that a May 2, 2022, meeting would be called to vote upon the amended and restated Operating Agreement. (HH Ex 1, p. HH 15). The meeting did not get called to order until 7:40 p.m. "after waiting to give all members every opportunity to arrive." Id. The minutes reflect "[t]he official purpose of the meeting was to consider proposals for amended operating agreements presented by members. All members were invited to submit proposals." Id. After an update of progress of the company made in fourteen bullet points, the only proposal offered was the "Amended and Restated Operating Agreement" which was included to the members in the

[3] Tax Increment Financing.

formal notice of the meeting. Id. After roll call, the vote was recorded and the motion to approve the new operating agreement passed by majority.

164. Neither Shad nor Holly attended the May 2, 2022, meeting. Holly testified: "[w]e didn't go because we knew—like basically Shad felt like he-he didn't have a voice anymore; that they had already made up their mind on what they were going to do, and they were going to do what they wanted to do no matter what." (HH p. 96). According to Holly, Shad has harbored this belief to the present time and testified that she did not think he could remain in business with them with that belief and attitude. (HH p. 96-97).

165. In addition to the $150,000 loaned to Shad by Gary Howie, Alpha Land Company, LLC advanced $30,704.84 following its formation to Shad to complete construction work on the project. (HH pp. 170-175; HH Ex 1, pp. 054-55).

166. The dates, check numbers and sums totaling $30,704.84 advanced to Shad were issued upon the checking account of Alpha Land Company, LLC and were presented for discussion at the April 11, 2023 company meeting and later identified in Holly's testimony (HH pp. 171-175; HH Ex. 1, pp. 57, 59-62) as follows:

January 20, 2022	Check #1115	$ 710.00 (loan)
January 20, 2022	Check #1116	$ 1,274.83 (Pella Windows)
January 20, 2022	Check #1117	$ 2,455.35 (Cat Equip)
January 24, 2022	Check #1118	$ 582.50 (Crane)
January 24, 2022	Check #1119	$ 21.81 (City of B.E. utilities)
January 25, 2022	Check #1120	$ 300.00 (Supplies/Lowes)
January 26, 2022	Check #1121	$ 366.05 (Sires Trucking)
February 10, 2022	Check 1123	$22,816.11 (Spec 2 Loan)
February 17, 2022	Check 1125	$ 2,200.00 (Spec 2 loan)

(See also, Defendants' Counterclaim, ¶ 10).

167. Holly had asked Gary to provide "a spreadsheet of what Shadrach's debt to you and Alpha Land is and what payment has been credited." (HH p. 171; HH Ex 1, p. 57). Gary's responsive email outlined the list showing the itemized checks (as set out above) along with the amounts, check number which totaled $30,704.84. (HH Ex 1, p. 75).

168. In spite of notice and demand requesting repayment at the company meeting held on April 11, 2023, and same having been made part and parcel of Defendants' counterclaim, Shad admitted in his deposition that he has not repaid Alpha Land Company, LLC any portion of the monies loaned, the total of which is the amount of $30,704.84. (2SH pp. 191-192; 193).

169. Likewise, Holly admitted that the $30,704.84 is owed to the company, and testified: "It's owed to them" . . . "[t]here is no dispute." (HH pp. 175).

170. Shad agreed "[the $30,704.84] was simply a loan." Asking and answering his own question, Shad revealed: "Do I owe it? Yes, I owe it." (2SH pp. 191-192; 193).

171. When asked why he had not yet paid the money back, his answer was "because I'm in litigation with members of Alpha Land . . . and further explained that "the counterclaim is laughable, in my opinion." (2SH p. 192). "It's laughable to the level that they have extorted and robbed me to come back with something petty like that." (2SH p. 192).

172. Pressed for a time frame when the $30,704.84 would be paid, Shad made the disclosure that it would have to take a judgment from a court to pay the money back "because right now I do not have the ability to pay that right now." (2SH p. 194)

173. Shad demonstrated his outward hostility to the Box Elder staff when he attended a meeting of the planning and zoning group on March 23, 2023, and expressed concerns erroneously representing himself as having a "one third ownership" in the Alpha Land project. (2SH pp. 211-215). Telling the staff that the City used terrible planning regarding a secondary road that Shad deemed necessary and that there was not a "qualified city planner" in the process, Shad's comments included:

i. "My powder is dry, but it's a big cannon."

ii. He was "[a]bout ready to light the fuse" with regard to traffic concerns.

iii. "I don't want to be the guy to litigate you, but I'm giving you fair warning: If you guys don't do it, you will be forced to do it, and it might be yours truly. I've held back as long as I am willing to hold back."

(2SH p. 212).

Shad agreed that his comments to the City were made at a time when the company needed to cooperate with the City. Id. Shad agreed that his uncle had to write an apology for Shad's conduct. Unremorseful, he confessed: "What it did was exactly what I knew it would do, and it would get a response out of my uncle. It got exactly what I needed." (2SH p. 213).

174. Shad testified that got the "clarification" he "needed" from his threats to the City staff, namely, that the majority of members were not going to force the City's hand. (2SH p. 214). To this day, Shad remains defiant and ready to sue the City. As late as his June 28, 2024, deposition, Shad said: "I would be happy to take Box Elder on" with the right "group of attorneys" stating: "[y]ou would be in a position to force Box Elder to do what they're required to do." Id. In spite of the company having worked in cooperation with the City of Box Elder, Shad remains certain that Box Elder is still involved with the "pay to play" game of extortion he opines to exist. Id.

175. On April 7, 2022, Shadrach's attorney, Stephanie Trask, sent an email to Gary, Shadrach and Hollie Howie writing: "I do appreciate your acknowledgement (in other correspondence) of the many uncompensated contributions that Shad has made for the benefit of the partners and the partnership; Shad has advised me that his contributions were meant to be **gestures of gratitude**, and commitment to the family venture, **and he does not wish to accept compensation.**" (SH Ex.13, p.G-0159). Trask had been asked to assist in reviewing and proposing amendments to the company's operating agreement. Review of the correspondence confirms that Trask was trying her best to mediate the disputes between Shad and the members of the company. Yet, through the words of his own attorney, Shadrach clearly, decisively and unequivocally expressed he wanted no compensation for the work and materials.

176. To confirm the extent of damages claimed in this lawsuit, Defendant's Request for Production (2SH Ex 14) asked that Shad provide documents which established his claim for personal labor and cost of material. (2SH p. 155-166). A list was produced in discovery which totaled the sum of $648,000 which included $299,855 of funds "due at closing" and other materials and labor costs. In response to questions about whether these monies were being claimed as his damages, Shad testified: "I'm not claiming as damages." (2SH p. 161). Shad was then asked if any of the sums listed were due him for his role in development and he testified that "all of them are not." (2SH p. 162). For further clarification defense counsel asked the following questions and received the recorded testimony:

> Q: So these are values of things that you did, but they are not claims that you're making for damages in the case, is that right?
>
> A: That is fair.

(2SH p. 163).

177. Geotechnical engineering reports generated on August 12, 2022, required engineered fill for new structures on the property (SH Ex 11, p. 069). When this information was released (SH Ex 11, p. 179), Shad's early announced plans to buy 1.5 million bars of V-rod rebar from his Canadian source and mandating their use on the Alpha Omega property were in jeopardy. (2SH p. 95; See recommendations of American Engineering Testing, Inc., (AET) by Reports dated 11/25/19 at SH Ex 11, pp. 16-18 and 08/12/22 at SH Ex 11, pp. 69-71). During his testimony, Shad admitted that there was nothing in the geotechnical report with which he disagreed. (2SH p. 96). Claiming the AET report had nothing to do with monolithic slabs on the homes he had built at 508 and 512 Sunnydale, Shad wanted to move on to another subject during his deposition. (2SH p. 97). Of course, the project contemplated more than just two lots and homes rather thousands of lots.

178. The documents produced in discovery show that upon release of the AET report, Shad was vehemently disagreeing with the recommendations of the geotechnical engineers representing that his "value engineering" would solve all issues with subsurface moisture and settling. (See SH Ex. 11, pp. 167, 169-177); Gary's Answers to Interrogatory Nos. 5, 6, pp. 7-13 of 72). Shad attempted to have Mike Albertson, a civil engineer bless the use of V-rod and ignore the engineered fill requirements regarding 129 lots that were ready in May of 2023 for sale. (SH Ex 11, p. 182). Albertson was unwilling to provide an opinion to Shad regarding geotechnical recommendations as it was outside the scope of his expertise and he was not wanting to take the role of mediator given the disputes he was seeing between Gary and Shad. (SH Ex 11, p. 182)

179. Alpha Land Company had a number of reservations about Shad's demand mandating V-rod in covenants. (Gary's Answers to Interrogatory Nos. 5, 6, pp. 7-13 of 72). Risks were noted in company minutes of a meeting held on June 8, 2022. (SH Ex 11, p. 168). Shad was communicating that Gary and Gordon had "sold out" to the company's experts. Id. From the beginning, Shad wanted to mandate that engineered fill not be required (2SH p. 113) By August of 2022, the geotechnical information had been provided and the company felt Shad's suggestions were reckless. If followed, failure to follow recommendations and imposing engineered fill requirements could expose the company to liability in the future. (Gary's Answer Interrogatory No. 71, p. 42 of 72). Yet, Shad still insisted that V-rod be required. (See Gary's

Response to Request for Admission No. 8). Shad never provided any geotechnical report to confirm his methods of using non-corrosive rebar would be appropriate to solve the engineered fill issues in the Alpha Omega subdivision. (Gary's Answer to Interrogatory Nos. 5, 6, pp. 8-12, and 13-14 of 72).

180. Shad did not accept the advice the company's engineers offered regarding engineered fill requirements. (Gary's Answer to Interrogatory Nos. 5 & 6). Shad had pressed the company for a covenant mandating the V-rod because he believed it would resolve the need to require expensive engineered fill in spite of what the engineers said. Id.

181. The bottom line was that while the non-corrosive rebar could be used (and still can be used), the necessity for engineered fill remains a requirement on all homes build on Alpha Omega. (Gary's Answers Interrogatory Nos. 5 & 6). Undoubtedly, Shad would have benefited financially from sales of his projected 1.5 million rods of V-rod and he admittedly was motivated to profit from what might happen in the future. (2SH pp. 107-113; 124-127; See also, Gary's Answer to Interrogatory No. 91). However, Shad's anticipated source of profit from sales of the V-rod product were threatened when the company elected not to mandate any such covenant and the "no engineered fill" he had promoted in May of 2019. Id. The use of non-corrosive re-bar by any contractor has never been prohibited on the project; it simply was never agreed by the company that it should be mandated for the reasons articulated. (Gary's Answers to Interrogatory No. 6, p. 13 of 72). This was the business judgment of the majority clearly supported by professional input.

182. Shad agrees he personally owes Gordon for the V-rod: "I agree I owe the money" although it was not part of the present lawsuit. (2SH pp. 134-135). He testified: "I can't wait to pay him off and never see him again." (2SH p. 131). Holly testified that the balance owed Gordon for the money loaned to Shad for the V-rod was $69,738.41. (HH pp. 125-126, HH Ex 2).

183. It was the business judgment that a covenant requiring non-corrosive rebar not be adopted. (Gary' Answers to Interrogatory Nos. 5 & 6). Ultimately, no covenants ever were finally adopted as matters changed. (2SH pp. 115). Like a contract for the sale of real estate, Shad knew that covenants had to be in writing, "[t]here is no way around that." (2SH p. 116)

184. Shad was asked about his alternative claim for rescission in the lawsuit. While trying to pin Shad down if a notice to rescind was ever given in advance of the lawsuit, Shad testified: "I'm not asking for a monetary sum." (3SH p. 29). Shad elected rescission. Shad confirmed that which he had confirmed earlier under oath that he is not making a claim for damages. (3SH p. 29; 2SH pp. 161-162).

185. On December 7, 2022, Shad sent a text which stated: "Please be advised I am placing liens on every parcel of real estate in Alpha Omega tomorrow to secure my one-third interest." (2SH pp. 78-79; HH p. 176, HH Ex 1, p. 65). Holly agreed that this was a threat by Shad. (HH p. 177). Shad wanted his lawyer to litigate, but she was not prepared or qualified to litigate. (2SH p. 80). Shad admitted he "was pretty sore" and was using the threat of placing liens as "a way to bring them to the table. . ." (2SH p. 80). At this point in his testimony, he said the text was sent to Gary who had "blackmailed" him on 512 Sunnydale. Shad viewed that when he was unable to pay Gary the $150,000 two years after he had borrowed under the April 6, 2020 Construction Loan Agreement, that Gary's actions to obtain the assignment ("Exhibit #3" to

Defendants' Answer to V.C., "Assignment of Interest") was "blackmail" and that he was "blackmailed" into signing both documents. (2SH pp. 80-90). Yet, Shad could not account for his use of the $150,000 when pressed; but admitted "I burned up that 150 very quickly." (2SH pp. 91, 93-94). Shad could not explain where the money went or why it took 11 months to finish the home—just that he was "dissatisfied with the direction we were going" and ran out of money. (2SH pp. 91, 93-94)

186. After all that Shad had put the company through, Shad testified that it was his father and uncle who were both "corrupt." In Shad's view by changing the operating agreement to include provisions for attorney fees and costs to the prevailing party he was being bullied. (Answer Exhibit #5, Amended and Restated Operating Agreement, ¶ 17) (2SH pp. 76-77). Shad claims he was unable to appreciate why Kelly would want the operating agreement changed. Id. Of course, it was Kelly, the experienced realtor, who from the beginning was non-ownership member and held a financial interest and would be "paid per listing/marketing on individual properties." ("Exhibit 4" to Defendants' Answer to V.C., Original Operating Agreement, ¶5). Shad viewed Kelly as wicked and hypocritical. (2SH p. 197). In the Amended Operating Agreement, marketing income from the development would go to Kelly and/or his estate or beneficiaries." ("Exhibit #5" to Defendants' Answer to V.C., "Amended and Restated Operating Agreement", ¶ 3). Shad's conduct threatened that which had been promised Kelly and created internal strife in the company. (2SH pp. 196-197).

187. After Shad commenced the lawsuit, on November 20, 2023, he sent a draft of a *lis pendens* to Kelly Howie's partners in Unimax, Tyler Tribby and Cody Work as well as James Postma and Greg Wick. (HH pp. 177-178; SH Ex. 21; 2SH pp. 65-67) According to Holly, Shad intended to let the partners know there was a lawsuit filed. Id. But Holly, a realtor, agreed that a *lis pendens* encumbers title and that "it could potentially tie up future sales." (HH p. 179). Shad acknowledged that he had received correspondence from Defendants' counsel which warned against filing the document, which was rejected by the register of deeds, but nonetheless was sent by Shad. (2SH pp. 68-69). (See Counsel's letter of February 15, 2024, to Attorney Peterson, attached to Affidavit of John Stanton Dorsey).

188. When asked about the reasons for the attempted *lis pendens* filing, Shad still threatened to involve Kelly and UniMax in litigation. (2SH p. 68). Shad suggested that he still might file the *lis pendens* stating: "I don't know if I'm doing it or not." Then, he threatened: "I'm hopeful that I will still see some clarity in the direction you are taking this, and I will clobber you from whatever direction you decide it to." (2SH p. 71). Then Shad offered that "my counsel advised me that that was a bad move" and that he did not advise the folks he sent the draft *lis pendens* to that it had been rejected for filing. (2HS, p. 71).

189. Shad viewed his obvious unadvised and legally misplaced attempt to tie up the property owned by the LPs in litigation in which the LPs were not a party as merely "shining a light" on his case. (2SH p. 77). Of course the *lis pendens* was rejected by the register of deeds and Shad knew it when he sent the draft to UniMax, Postma and Wick. Alpha Land Company, LLC did not own the land, Gary's LPs did.

190. In May of 2023, Alpha Land Company, LLC entered into a purchase agreement with UniMax, LLC for $8,012,000 in exchange for 129 lots Alpha Land Company agreed to plat. (See Amended Purchase Agreement 7/3/23, G2528-G2537 attached to counsel's Affidavit). Of the 129 lots, UniMax has paid Alpha Land Company, LLC for 10 lots at $45,000/lot and

received title to Lots 8-13 and Lots 4-7 of Block 4 of Alpha Omega subdivision. (Gary's Answer to Interrogatory Nos. 100, 101, 102, pp. 58-59 of 72). UniMax is building homes on the lots and intends to build on all lots purchased. (Gary's Answer to Interrogatory Nos. 103, 104). The agreement contemplates that after the first 10 lots are closed, every six months and additional 20 lots would be sold at a scheduled price.

191. Shad viewed the deal with Alpha Land and UniMax as a "clown show" a "total joke," and "a sham." (2SH p. 75) He acknowledged that he understood the deal was an $8 million agreement; but downplayed it as "relatively a break-even proposition at best . . . based on the way they've done it." (2SH p. 76). Again, when pressed about the particulars of the deal and why he took the position he did, Shad retreated saying: "I have tried to quit thinking about this case. I just want to go to court." (2SH p. 75).

192. As he did throughout the development stages, Shad continued to profess at his deposition that he could save the company money, but did not want to divulge and "give away" his "secrets." (2SH p. 104-105). He testified: "I don't want anything to do with them, and they are not getting anything else out of me. I've had enough." (2SH p. 105). Shad agreed that his statements followed a pattern of conduct—promising recommendations and solutions conditioned upon getting things the way he wanted. (2SH p. 105). This description of his *modus operandi*, by his own admission was "absolutely correct." (2SH p. 105).

193. Saying he was not "here to crucify my dad" but providing how a deal worked with his father, Shad's vitriol surfaced repeatedly in his deposition. (2SH p. 134). Gordon, who provides ministry at his church, Shad claimed he had been attacked by Gordon from the pulpit in a televised program at his church (Faith Temple) (2SH p. 132-134). Shad testified: "I can't stand to listen to his hypocrisy." (2SH p. 133). Shad professed: "I've have built everything this man can see or touch for free simply because I can. I've done everything for Gordon Howie and I'm balked at." (SH p. 133). Shad continued: "And I'm ridiculed, and then I'm put on the chopping block. The man has no shame." (2SH p. 133).

194. With regard to rescission as a remedy, Shad was asked to assume that if everything was moved back to a time before the land was purchased, how would current development continue? His response: "I would have to speculate on that. That's my objective is to—is to rescind this mess that they've created in some capacity." (2SH p. 72).

Dated this 3rd day of October, 2024.

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STATE OF SOUTH DAKOTA : SS
COUNTY OF PENNINGTON

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

SHADRACH HOWIE, and ALPHA LAND COMPANY, LLC, a South Dakota limited liability company,

Plaintiffs,

vs.

GARY HOWIE, and GORDON HOWIE,

Defendants.

51CIV23-001344

PLAINTIFF'S RESPONSES IN OPPOSITION TO DEFENDANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS

COMES NOW, Plaintiff by and through his attorney of record and hereby submits the following Responses to Defendants' Statement of Undisputed Material Facts.

1. Plaintiff Shadrach Howie, age 40, (hereinafter, "Shad") is the son of Defendant Gordon Howie, age 75 (Gordon) and nephew of Defendant Gary Howie, age 79 (Gary). Gordon and Gary are brothers. Kelly Howie is a son of Gordon Howie, and half-brother to Shad Howie.

RESPONSE: Undisputed.

2. Gordon ranches in Rapid City.

RESPONSE: Undisputed.

3. Before buying a ranch property and moving to New Underwood, South Dakota Gary had lived in Virginia. Gary, along with his wife, Trish, are members of Virginia limited partnerships ("LPs") which owned land and managed a mobile home park (HP Park, LP), and managed and owned property known as Ridgewood Motel and Manor, LP. Gary retired from being a mobile home park owner and manager and moved back to South Dakota.

RESPONSE: Undisputed.

4. Shad has been a general contractor in Rapid City since 2005 specializing in residential developments. Shad is married to Holly. Shad's half-brother is Kelly Howie, a Rapid City realtor.

RESPONSE: Undisputed.

5. Shad's company "Homes by Shadrach Howie" a/k/a "HBSH, LLP" had no employees. Shad is the only member of that entity. Shad has been working in property development for a long time according to his wife, Holly.

RESPONSE: Disputed that HBSH, LLC has never had employees. Undisputed that HBSH, LLC didn't have employees during the timeframe Holly testified to. (HH p10-12). The remainder of the statement is undisputed.

6. Since 2005, Shad has been actively involved in building and development of residential housing.

RESPONSE: Undisputed

7. Toward the end of 2018, Shad was looking for "his next property to develop" and located "a promising property in Box Elder." It was Shad who had what he describes as a "vision" for the property to be named "Alpha Omega Development" where 3,000 single family and multi-family units could be built with all street names named after characteristics of God. Holly testified: "he said God had shown him". Further, she explained: "if you don't want to believe in divine intervention, you could look at it as like the Field of Dreams. He — it was like Kevin Costner and the Field of Dreams, you know, if they build it, they will come. It was something he saw clearly in his mind." Shad felt the project was meant "to be for his life and his family" and nobody else.

RESPONSE: Undisputed

8. Financially strapped, Shad was unable to purchase the property on his own. (HH p.270). To purchase the property, Shad "went looking for investors" knowing the project would be "very lucrative." (VC ¶24; 1SH p.226) According to his wife, when Shad signed the purchase agreements "it wasn't like he had to give cash that day. In his mind he was going to find the money somewhere." (HH p.25).

RESPONSE: Disputed to the extent that the record cited does not state that Shad was "financially strapped". It is undisputed that Shad needed investors to help him purchase the property and that he actively sought out investors. It is undisputed that Shad believed the project would be very lucrative.

9. Shad shared the idea to purchase property with his father, who in tum discussed the "investment opportunity" with Gary who expressed interest in investing. Shad brought the deal to Gordon not the other way around.

RESPONSE: Disputed. Shad shared with his father that he was putting together the purchase of the property and his development idea. Gordon told Gary about it on a phone call the two of them were having about Gary potential selling his Virgina property. (VC 29)(Gary's Answer to Interrog. 2, p.6).

10. Four contiguous parcels of land of approximately 1,333 acres were identified as possibly being available for purchase. One parcel was owned by the Sullivans, the other three were owed by William "Bill" Gikling or Gikling related entities.

RESPONSE: Disputed. Shad identified four contiguous parcels of land totaling approximately 1,333 acres with the potential to purchase and develop. Only the Sullivan property was listed for sale at approximately $6,000.00 per acre. (VC 6-19) (1SHp.58, VC #6-7). Shad negotiated the purchase of the Sullivan property at nearly half its listing price and he negotiated the purchase of the surrounding Gikling properties that were not listed for sale. *Id.*

11. Shad agreed that lenders often require and secure an appraisal of property so they will have collateral to secure their loan. No appraisals were generated in connection with the purchase from the Giklings or Sullivans.

RESPONSE: Undisputed with clarification. There wasn't bank financing in the purchase of Gikling and Sullivan properties so appraisal was required.

12. Shad, Gordon and Gary met in what was described as an "initial meeting" sometime in the Spring of 2019. This followed a meeting Shad whereat he had proposed the deal to his friend, Donavan Williamson, in early March of 2019.

RESPONSE: Disputed in part. Shad made it clear in his testimony that his dates may not be exact. (2SH p.56-57). It is not disputed that the "initial meeting" between Shad, Gordon and Gary occurred in the Spring of 2019 and that Shad's meeting with Donahue William pre-dated the initial meeting and the two meetings were no more than a month apart. (2SH p.56-57)

13. On March 13, 2019, David Olsen, a realtor at Coldwell Banker, attached Sullivan listings and emailed them to Shad. Olsen was to call Bill Gikling to see if there was interest in selling. (PL 000177). On March 26, 2019, Shad emailed Kelly Howie. (PL 000613).

RESPONSE: Undisputed. Additionally, Shad's email to Kelly Howie on March 26, 2019 notified Kelly that Sullivans had accepted Shad's offer of $3,500 per acre contingent on access via railroad crossing and the adjoining property purchase. Shad further indicated that he was in the process of negotiating the RR crossing and that Gikling was willing to entertain an offer of $3,500 per acre for the surrounding properties. He ended the email by saying "lots of exciting perks to this development." (PL000613)

14. On April 11, 2019, Shad discussed with Gordon having "verbal agreements" with Sullivan and Gikling. Shad used the term "verbal" understanding he would need a written agreement to lock up the deal "contractually."

RESPONSE: Undisputed.

15. Gordon and Gary met with Shad to discuss the potential of a 1031 exchange. Gary considered a 1031 exchange of the property owned by his Virginia LPs a great option if the exchange were viable.

RESPONSE: Undisputed

16. Gary, Gordon and Shad met with James Postma, a CPA, of Rapid City to discuss how the property could be purchased and then developed. If a 1031 exchange was viable, Gary's LPs would purchase the land. Then, an LLC would be formed which would, in turn, purchase parcels of the property from Gary's LPs as the property was developed and lots were sold.

RESPONSE: Undisputed that Gary, Gordon and Shad met with James Postma to discuss how the property could be purchased and then developed. The remaining statement is disputed. The 1031 exchange strategy devised by Gary, Postma and Pennington Title was continually changing and did not take its final form until the Alpha Land Purchase Agreement was signed. The initial plans proposed by Gary were consistent with the parties agreement but where changed later. (Postma Affidavit)(G-0054, 0056).

17. Regarding CPA James Postma, Holly testified that "I feel like James Postma was the expert in this matter. He advised him—he was like their adviser in the whole matter on how it could or should or would work."

RESPONSE: Undisputed to the extent that this statement reflects an opinion of Holly. Undisputed that Postma offered the parties advice on Gary's 1031 exchange. Postma's affidavit reflects his role in the 1031 exchange. (Postma Affidavit).

18. On June 5, 2019, Shad signed a Buyers Agency Agreement with David Olsen of Coldwell Banker identifying himself, "Buyer" under the moniker "Shadrach Howie and or assigns."

RESPONSE: Undisputed.

19. Gary supplied Shad with the earnest money for the purchase of the four parcels. The money was deposited in Shad's business bank account and when he executed purchase agreements as buyer, the required earnest money was provided to the seller.

RESPONSE: Undisputed.

20. Shad executed four (4) purchase agreements as "Shadrach Howie and/or assigns."

   a. On June 12, 2019, the Sullivan purchase agreement for 121.6 acres at a price of $425,600.

   b. On July 19, 2019, GLM Land Corp's Purchase agreement for 119.5 acres was signed at a price of $597,700

   c. On July 19, 2019, Wm Gikling Family LP's Purchase agreement for 648.46 acres was signed at a price of $2,338,650 along with a Financing Addendum to the Purchase Agreement (PL000096) Contract for Deed.

   d. On July 22, 2019, Wm Gikling and Gikling Family LP's purchase agreement for 264.37 acres for a price of $931,200 was signed. (PL 000091)

RESPONSE: Undisputed to the extent that the Purchase Agreements speak for themselves.

21. Closing of all four purchase agreements was to occur on or before October 25, 2019 and did occur on that date.

RESPONSE: Undisputed.

22. Gary financed the 1,333 acres purchase through the 1031 tax exchange using the properties of his LPs as planned with the CPA and professionals at Pennington Title.

RESPONSE: Disputed. Per the terms of the purchase agreement, Gary paid Shad a non-refundable down payment and Shad used the down payment funds to then purchase the properties from Sullivan and Gikling. Shad also purchased more than ½ of the property on a contract for deed. (VC Exhibit A).

23. Shadrach Howie knew that he was not purchasing the property himself; rather he was acting as a strawman in the transaction. (1SH pp. 174-177; 207; 2SH p. 27) This was explained to him in meetings with James Postma, CPA, two of which he recalled being present. (1SH pp. 64, 179) Holly confirmed that Gary, Gordon and Shad all had met with Postma "a couple times to talk about the tax exchange." (HH p. 47)

RESPONSE: Disputed. Shad purchased the properties per the terms of the purchase agreements. (VC Exhibit A) Shad purchased the properties from the landowners. He negotiated the sales and was the buyer in each of those transactions. He purchased approx. half of the property on a contract for deed, to which he was personally liable, and he paid cash for the remainder. (PL000087, PL000098, PL000096, PL000091) (VC 8,13). It is not disputed that the cash Shad used to purchase the property came from the non-refundable down payment Gary paid him as part of his purchase agreement with Shad. It is undisputed that Postma discussed the tax exchange with Shad, Gary and Gordon and that this was all part of the overall 1031 exchange plan that was devised.

24. Shad's Verified Complaint states: "The plan, as explained to Shadrach, was that he would purchase the property from the landowner, and then Gary would purchase the property from Shadrach as part of his 1031 exchange, and Alpha Land would purchase the property from Gary."

RESPONSE: Undisputed.

25. Shad and Holly both trusted Postma to provide accounting advice and, according to Holly, Postma had been preparing Shad's taxes as early as 2006.

RESPONSE: Undisputed.

26. Closing on the purchase of the Gikling and Sullivan properties occurred October 25, 2019 at the price of $4,293,150. Final closing documents with Gikling entities and Sullivans show that Shad signed as "Shadrach Howie and/or assigns. Shad signed a number of documents to facilitate the purchase of the 1,333 acres consistent with the plan discussed with Postma prior to that date. (1SH pp. 64-65)

RESPONSE: Undisputed with clarification. Shad did not assign his buyer's rights in the purchase agreements.

27. Consistent with the plan, Shad simultaneously entered into a purchase agreement to sell the property to Gary's LPs on October 25, 2019. That latter deal was to close on or before April 7, 2020 and in fact did close on April 6, 2020.

RESPONSE: Undisputed

28. Shad was a strawman described as a "sacrificial lamb" by James Postma, CPA. (1SH p. 177) As a strawman, Shad did not personally come up with any funds to purchase the property; however, given the position he occupied in the transaction, any taxable consequences on gains were attributed to him. (ISH pp. 178-181). This was explained to Shad in meetings with Postma and the title company and confirmed by Postma in an email on January 6, 2020.(1SH pp. 178-181; SH Exhibit 6, p.160)

RESPONSE: Disputed. (See responses 22 and 23). Undisputed that Shad incurred a tax consequence as a result of the sale and that the parties orally agreed that Alpha Land would be responsible for paying the tax liability. Undisputed that James Postma referred to Shad as a "sacrificial lamb". Per the parties' oral agreement, Shad was not permitted to keep any of the proceeds but personally incurred the tax consequence. The parties agreed that Shad would contribute all the proceeds to Alpha Land, LLC and Alpha Land, LLC would be responsible for paying his tax obligation.

29. The plan was that the operational entity later to be formed would pay the tax obligation to Shad as a result of his facilitating the 1031 exchange. (ISH pp. 19-23).

RESPONSE: Disputed. Per the parties' agreement, the operational entity later to be formed would pay Shad's tax obligation. (VC 61-71).

30. The purchase by "Shadrach Howie and or assigns" was funded through a nonrefundable down payment from Gary's LPs in the amount of $2,465,062. (VC 66; Defendants' Answer 24, 25, 26). This non-refundable down payment was a term of the October 25, 2019 purchase agreement between Shad and the LPs. (VC "Exhibit A" Paragraph 20a.) The remaining balance of $2,138,650 was carried by Gikling entities on a Contract for Deed with "Shadrach Howie and/or assigns." (Defendants' Answer 26; 2SH p. 22).

RESPONSE: Disputed. (See responses 22 and 23). Undisputed to the extent that Shad signed "as/or" assigned. Disputed that the Gikling Contract for Deed was assigned to Gary's LPs. It remained in Shad's name until it was refinanced by Gary's LPs in breach of the parties' agreement. (Gary's Answers p.58, Admission 38)

31. The Purchase Agreement and Addendum provided that the LPs would assume the Contract for Deed. (VC "Exhibit A", Paragraph 20b.) Finally, as Seller, Shad acknowledged in the Purchase Agreement that it was the LP's intention to complete a 1031 exchange and that the LPs rights "may be assigned to an Intermediary of the Buyer's choice for the purpose of completing such an exchange." Id. As Seller, Shad "agrees to cooperate with the Buyer and the Intermediary in a manner necessary to complete the exchange." (VC "Exhibit A" Paragraph 20c.).

RESPONSE: Undisputed to the extent that the Addendum provided that the LPs were supposed to assume the Contract for Deed. Undisputed that Gary's LPs assigned all its rights and interests in the purchase agreement to an intermediary, as part of Gary's 1031 exchange. Shad's rights and interests in the purchase agreement as the seller, however, were never assigned. Defendants have provided no evidence that Shad assigned his rights.

32. Shad acknowledged that he received a copy of the Notice of Assignment from the LPs on October 25, 2019, providing that all of the rights and interest in the purchase agreement of October 25, 2019 had been assigned to the intermediary, Pennington Title Company, as "Accommodator."

RESPONSE: Undisputed with clarification. This assignment only pertains to the rights of the buyer, Gary's LPs.

33. The purchase agreement between Shadrach Howie and the LPs provided that on or before April 7, 2020, the LPs would complete the purchase of all the property.

RESPONSE: Undisputed.

34. Contemporaneously on October 25, 2019, Shad as "seller" entered into a purchase agreement with Gary's LPs as "buyer" for the property at a price of $4,931,924. (1SH pp. 120-125) Postma, who, at the time, was in San Diego, replied to an inquiry about the transaction he self-described as "unorthodox" but said: 'the terms of the agreement that you will have with the operational entity is completely apart from this transaction." (PL 001151). The operational entity agreement would become the operating agreement of the yet to be formed LLC.

RESPONSE: Undisputed to the extent that the email speaks for itself and represents opinions of Postma. Disputed to the extent that the operational entity agreement Postma refers to is the operating agreement of the yet to be formed LLC. Postma states in his email January 6, 2020, that "I realize that apart from this proposed sale **and the operating agreement** of the Alpha Land Company, LLC there will also be a separate legal contract [which still needs to be drafted] between Gary's LPs and Alpha Land Company, LLC" (PL001160)(emphasis added). Clearly it was his understanding that the operating agreement would not be the separate entity agreement identified in the Alpha Land Purchase Agreement Addendum.

35. On November 12, 2019, the operational entity, then being described as "Alpha Omega LLC," was discussed with Postma and its relationship to Gary's 1031 exchange (PL001200).

RESPONSE: Disputed. At this point in time the parties were discussing the possibility of more than one LLC and one of those was referred to Alpha Omega, LLC. Postma's email (sent after Shad sold the property) also explains that Kelly Howie, Shad's brother, will need to be added as a member to the LLC to pass IRS scrutiny. Without him as a member, the LLC would be considered a related party for purposes of the 1031 exchange. (PL001200)(Postma Affidavit)

36. Discussions were held with regard to the pricing of lots in the proposed development. Kelly was a source of information for the group relative to marketing and listing. On December 18, 2019, Shad emailed Kelly on MLS (multiple listing service) regarding a price for lots and Kelly replied regarding competing buyers in the market (PL 001000). On December 20, 2019, Shad concedes Kelly's approach on pricing is a "more practical one . . . " (PL 000999).

RESPONSE: Undisputed to the extent that the emails (PL001000 and PL000999) speak for themselves.

37. Shad was financially in debt. He had exhausted his $100,000 personal line of credit and was unable to borrow more money. On December 20, 2019, Shad was looking to purchase

100 bred cows suggesting to his bank that he would pledge the real estate intended for development by his partners as collateral for his personal line of credit. (1SH p. 156); PL 000349). On December 21, 2019, Gary e-mailed Shad reminding Shad that the land for development that Shad had promised to transfer to the LPs on or before April 7, 2020, was not an asset against which he could borrow money. (PL 000349).

RESPONSE: Disputed. The record cited by the Defendants (1SH p.156 and PL 000349) makes no mention of Shad's financial status, his debt, his personal line of credit or his ability to borrow money. He was also not suggesting that he would pledge the real estate as collateral. The December 20, 2019 email cited by the Defendants is yet another example of how Shad was a "sacrificial lamb" in the parties' agreement as he was prevented from getting otherwise available financing as a result of owning the property. In an effort to bring in additional income, Shad was working with the FSA to help him finance the purchase a 100 head of cows. However, his ownership in the 1,331 acres caused him to fail the FSA's "test for credit". The property was considered an asset of Shad's that disqualified him from FSA financing. Shad writes in his December 19, 2019 email to Gary (PL000349):

> "Since I currently have the 1,331 acres in my name as an individual, the FSA would not be able to get past the test for credit since if that land was pledged for security they know other credit would be available, this is the roadblock I have at this point."

Meaning, as the owner of the property, Shad could use the property as collateral for other financing thus disqualifying him. Gary responds to Shad's email on December 21, 2019 (PL000349):

> "Shad, although you currently own that land, you can point out that you have a contract to sell the land in April at no profit so the land is not really an asset which you could borrow money? You will have 1/3 non-saleable and non-lienable interest in a development LLC which is intended to generate income but for which the income is unknowable and will be based entirely on the market response."

Gary was suggesting to Shad that he could explain this to the FSA and potentially still qualify for a loan. This is yet another example of how owning the land in name only caused a detriment to Shad. Additionally, Gary is telling Shad to tell the FSA that the property is going to be sold at no profit to him, which is not true. Shad did make a profit on the sale, which is why the IRS taxed him.

38. Shadrach did not personally contribute any money toward the purchase of property "zero dollars." (HH p. 271, 1SH p. 169). He admitted he contributed no money toward the purchase of the 1,333 acres. (1SH p. 97). The financing of the land's purchase was facilitated by Gary's LPs through his sale of the property in Virginia and Gary's contribution of the earnest money as the group had agreed. (1SH pp. 47-48; 61) Shad admitted: "That's what we agreed to do." (1SH p. 61).

RESPONSE: Disputed. (See responses 22 and 23) Shad purchased the 1,331 acres for $4,293,150 and turned around and sold it to Gary's LPs at a profit. Shad did purchase one half of the property on a contract for deed and the proceeds he received from the sale were transferred from his account to Alpha Land, LLC. Just as Shad said, this is what the parties had agreed to do. This was one of many terms of the agreement that could not be in writing. Had the actual terms of the agreement been in writing, Gary would have had an increased risk for an IRS challenge as being a "step transaction". (Postma Affidavit).

39. Prior to the purchase of the property from Sullivans and the Gikling Groups, Shad had been involved in various projects and, independently, had made offers to purchase large parcels of land:

One project, called Trailwood, involved 24 townhomes in a development that Shad had valued at approximately $6.4 million. (HH p. 13)

On December 9, 2019, Shad made an offer of $15,494,000 for the purchase of Speer S Ranch. HHp. 13)

In July and August of 2020 Shad was making offers to purchase the approveenne River Ranch for $3.2 million down with $18 million to be paid over five years. (HH p. 13).

On September 11, 2019, Shad sent his brother, Kelly, an email to list and advertise homes he needed to build or sell lots in a project known as Cedar Gulch. (PL 000611).

RESPONSE: Disputed to the term "prior to the purchase" of the property which occurred on October 25, 2019.

40. Along with his experience in constructing homes (including his own personal home) and development, Shad kept livestock, did haying, fencing, spraying and various agricultural work. Shad explained how he could "pencil things out" on developing property and investing.

RESPONSE: Undisputed.

41. In addition to home construction and development, in 2017 Shad began promoting the sale of noncorrosive rebar called V-rod on his business website. Shad employed the non-corrosive fiberglass like product when building homes including monolithic slabs.

RESPONSE: Undisputed.

42. Shad received loans in the amount of $62,762 from Gordon, to purchase sticks of V-rod in April and May of 2018.

RESPONSE: Undisputed.

43. By 2020, Shad's wife, Holly Lahren, a/k/a Holly Howie, had secured her real estate license having already earned a bachelor's degree in interdisciplinary studies and a master's in human services. Holly explained that Shad told her his vision for the property was divinely inspired and that "this property and this development opportunity was meant to be for his life and his family" and nobody else. Holly testified: "[h]e said God had shown him."

RESPONSE: Undisputed.

44. On January 6, 2020, Gordon sent Gary, Kelly and Shad the LLC paperwork for "review comments" which included the Operating Agreement and Articles of Organization of Alpha Land Company, LLC. (SH Ex. 10, p. 056). Gordon's text said: "Let me know your thoughts. As soon as I get your input I will proceed to have the LLC completed.

RESPONSE: Undisputed.

45. James Postma's email of January 6, 2020 explained in detail how the 1031 exchange would work. Postma's email explained that when Alpha Land Company, LLC would be formed, it would agree to buy parcels from Gary's LPs. (1SH pp. 178-181). Postma's explanation was a recitation of the very Purchase Agreement and Addendum that was executed on January 14, 2020. (ISH p. 179). Postma's email of January 6, 2020, confirmed that which had been previously discussed, namely that Alpha Land Company would only be purchasing parcels of the property from the LPs, not the entirety as Shad claims. (1SH p. 179-183). Shad claims that "what we had addressed would be formulated into a document, and it did not happen that way." (1SH p. 181). Yet, this is what the email said and this is what the final January 14, 2020, Purchase Agreement and Addendum provided. ("Exhibit B" to VC.)

RESPONSE: Disputed. James Postma's email of January 6, 2020 (PL0001160) explains and discusses the terms of the purchase agreement between Alpha Land company as the buyer and Gary's LPs as the seller. The email consists of Postma's comments on how to draft this agreement and his suggestions. Shad does not dispute the language in the Addendum to the Alpha Land Purchase Agreement that states,

> "the execution of this purchase agreement shall be in parcels, the size and location of which shall be determined by the Buyer (Alpha Land Company), at a price equal to $3,710.00 per acre. The Buyer also agrees to pay the Seller (Gary's LPs) an amount equal to 1/3 of the net profit from sales of the property as portions are developed and re-sold by the Buyer".

The Addendum is dated January 4, 2020, which Gary claims was an error and the date was actually January 14, 2020. The language in the addendum clearly states that the size of each parcel to be purchased will be determined by the buyer (Alpha Land). There is nothing that prohibits Alpha Land, LLC from purchasing the entire parcel. The parties agreed that Alpha Land would immediately take possession of the property and have an exclusive right to purchase the property and develop it. It was agreed that Alpha Land would refinance the Gikling contract for deed and leverage the property for development funds (Postma Affidavit)

Undisputed that Shad said "what we had addressed would be formulated into a document, and it did not happen that way." A contingency in the Addendum was execution of a final agreement. (VC Exhibit A). This agreement was never drafted or signed as Gary admits in discovery.

46. When asked if he had read Postma's January 6, 2020 email, Shad testified: "I don't know if I did, honestly. I wasn't super involved in that. Not that I couldn't care less, but it's not where I focus my energy." (1SH p. 182). Holly testified that she told her husband he had problems with his memory and told him he had ADHD (Attention Deficit Hyperactivity Disorder) and sometimes did not read things thoroughly. (HH pp. 193-194).

RESPONSE: Disputed to the extent that record cited (HHp.193-194) was Holly's testimony regarding her concerns about changes in Shad's behavior well after he signed the purchase agreements and operating agreement. The email Mr. Dorsey questioned her about (HH Exhibit 72) was dated March 29, 2022. Mr. Dorsey in his questioning wrongfully asserts that the email was sent March 29, 2020. (HH p.196, HH Exhibit 72). The rest of the statement is undisputed.

47. On January 10, 2020, Gary, Gordon, Shad and Kelly signed the Operating Agreement and Articles of Organization and formed Alpha Land Company, LLC. The operating agreement is attached as "Exhibit 4" to Defendants' Answer to V.C. Kelly was identified as a member with no ownership, but having the exclusive right to be paid for listings and marketing of the property.

RESPONSE: Undisputed.

48. Shad understood that an operating agreement of an LLC regulates the affairs of the company, and the conduct of the business, and the relationship among the members. (2SH p. 38). Shad agreed an Operating Agreement is a contract, like a constitution. (1SH p. 99).

RESPONSE: Disputed. Shad did not understand the terms of the operating agreement as he read them he understood them as they were explained to him.

49. Shad's opinions of what the contract should have said is not reflected in any of the written documents including the original Operating Agreement (See, Exhibit 4 to Defendants' Answer). Shad conceded and admitted the following facts:

a. that nothing in the original operating agreement spelled out the role of the members and in particular, Shad's role in site development and site oversight. (2SH p. 37)

b. that there was nothing "within the four corners" of the original operating agreement that said anything about compensating Shad for site development or site oversight. (2SH p. 37).

c. Shad agreed that there was nothing said in the original operating agreement about payment of compensation to him or any of the members of the LLC in terms of a specific salary or wage or anything like that-nobody in the Company was promised any compensation or salary or a particular wage or salary. (2SH pp. 37-38). The only thing said in the operating agreement about receiving any money was that it would be paid as a distribution if there was a net profit. Id..

d. The operating agreement said nothing about a promise or obligation on the part of the company to implement covenants, let alone a non-corrosive rebar covenant. (2SH p. 39)

e. The operating agreement said nothing about a promise that Shad could build residential and commercial offerings throughout the duration of the project. (2SH p. 39).

f. The operating agreement (which Shad himself described at this point in his testimony as 'the contract") said nothing about equal profits from raw, undeveloped land. (2SH pp. 39- 40).

g. The contract/operating agreement did not say anything about a promise that Shad would receive "walking money." (2SH p. 40)

h. The Operating Agreement says nothing about street names. (See "Exhibit 4" to Defendants' Answer to V.C.).

RESPONSE: Undisputed to the extent that the operating agreement did not contain any of the above terms. Disputed that the parties intended for this agreement to contain these terms (PL000676) (PL0001160) or that it was the proper agreement to do so.

50. With regard to the question of whether the operating agreement provided that Shad would have or be transferred a one-third ownership interest in the property, Shad at first said that the contract "implies ownership all over every page" and then he backed away from that statement and said: "I'll just leave that as I don't know." (2SH p. 40).

RESPONSE: Undisputed that Shad seemed confused by this question. Disputed that, after the final 1031 exchange plan had been devised and explained to Shad, that he believed he would personally receive a 1/3 ownership interest in the property. His ownership would be through his ownership in Alpha Land. When drafting the Alpha Land purchase agreement it was explained to him that purchase agreement had to give Alpha Land the ability to purchase the property in parcels as this would allow Gary the option to slowing unwind his 1031 exchange but also that Alpha Land would refinance the contract for deed. In his complaint, Shad explains that the Alpha Land Purchase Agreement gives it the right to purchase the property and gives Alpha Land possession of the property—creating an equitable interest in the property. (VC 90-95)(Postma Affidavit) Shad, through his 1/3 membership interest in Alpha Land, would own a 1/3 interest in the land upon Alpha Land purchasing it and through his ownership in Alpha Land he has a 1/3 equitable interest in the property so long as the purchase agreement remains valid. *Id.*

51. There is no mention of any transfer of any interest in any part of the 1,333 acres either to Alpha Land Company or any of its members in the operating agreement. The document says nothing in this respect. (Defendants' Answer, "Exhibit 4").

RESPONSE: Undisputed.

52. Shad admitted that the oral "material terms" [(items A through G) of his "First Cause of Action" denominated "breach of oral contract" were "outside of the contract. ' (2SH pp. 39-40).

RESPONSE: Undisputed that the parties' agreement was never reduced to writing. Including these terms in Shad's purchase agreement with Gary's LPs would have provided the IRS with "a road map" to the potential 'step transaction' and increased his risk of an IRS challenge. It was never contemplated to be in the Operating Agreement and the final contract between Alpha Land and Gary's LPs was never executed despite being a contingency in the Alpha Land purchase agreement. (Postma Affidavit)(VC Exhibit A) (PL000676) (PL0001160).

53. Shad agreed that the operating agreement would have been a good place to include those promises and material terms he claims were made to him. (2SH p. 41) In this context, Shad was asked the following questions and gave the following responses:

Q: Would you agree that it would have been a lot cleaner if those material terms and promises that you are claiming were put in the document?
A: There is no argument there. Absolutely, I agree with that.

Q: Okay. So it must have struck you as strange when reading it that none of those terms you claim to exist were in that document.

A: Not at all because I have spent my life doing it this way with Gordon Howie and, in some capacity, Gary Howie.

Q: Did you ever propose any language be incorporated into that final document concerning those material terms that we reviewed that are not in it? Did you ever suggest, "Hey, we need to we need to put those in there"?

A: Not until later, but I did bring up all my concerns in the initial meeting. They were addressed and I was pacified. I was baited, and I was lied to, and I was deceived.

Q: Okay.

A: And, obviously, that's my opinion (2SH pp. 40-41).
RESPONSE: This question is asking Shad to make a legal conclusion. Undisputed to the extent that Shad wanted the terms of their agreement in writing but he trusted his dad and uncle.

54. On January 14, 2020, the LPs entered into a purchase agreement and addendum with Alpha Land so the LLC could purchase parcels. The newly formed LLC was not buying the entirety of the property. (1SH p. 207). The addendum addressed how land would be sold to the LLC—namely in parcels, "the size and location of which shall be determined by the buyer, at a price equal to $3,710 per acre. The buyer also agrees to pay the seller amount equal to one third of the net profit from sales of property as portions are developed and re-sold. (Verified Complaint, Exhibit 1SH pp. 121-123).

RESPONSE: Disputed. See response to #45

55. Shad admitted in his testimony that he knew that he would be selling to the LPs as the sacrificial lamb as part of the 1031 exchange. (1SH pp. 122, 125; 198, 207). Shad also admits that he knew Alpha Land would only be purchasing parcels. (1SH pp. 207-208).

RESPONSE: Disputed to the extent that Shad did not admit that he knew Alpha Land would only be purchasing the property in parcels. His testimony was as follows (1SH p.207):

> **Q:** You knew that Alpha Land would only be purchasing parcels as the land was being developed; right?
> **A:** That is one of the possibilities that we talked about John.

56. On April 6, 2020, Shad transferred by warranty deed the land to the LPs as he had previously agreed in the written purchase agreement. That same day, Gary loaned $150,000 to Shad under terms set forth in a Construction Loan Agreement which, among other things, spelled out a process allowing Shad to build homes upon lots and draw down money for his own use during projected periods that both agreed would be needed to help foster the development. (Construction Loan Agreement, SH Ex 1 1, p. 54; 2SHp. 3). The $150,000 was deposited into Shad's personal bank account (SH Ex 24).

RESPONSE: Undisputed. Gary did loan Shad funds to begin building homes in the Alpha Land Development consistent with the parties' agreement.

57. Holly testified that she had concerns about the project and the company's ability to make it work. Holly did not understand how the group was going to come up with the money to kick off a big development. (HH p. 29; 1SH p. 183). She testified: "[e]ven if they had the money to buy the property, how or where would they get the money to pay for the development?" (HH p. 30). Shad agreed that his wife's concerns were expressed before April 6, 2020, the date he transferred by warranty deed all interest and title to the 1,333 acres. (1SH p.183-185)

RESPONSE: Undisputed to the extent that this statement reflects opinions of Holly

58. Holly testified that she read the original Operating Agreement and she told Shad: "It appears to me that you don't actually own the property. Don 't you have a problem with that? (HH p.32). And Holly further testified: "I pointed that out to him, and I don 't think he

understood that." Id. While Shad agreed that "she probably did" tell her husband this, he went on to say: "[m]y wife is not an expert . . ." (1SH p. 186).

RESPONSE: Undisputed to the extent that the statement reflects Holly's opinions. Shad's testimony, however, more fully represented states:

> A: I was comfortable working at the time with two of my family members on a handshake, John. Obviously, that ship has sailed. And my wife was right. And I was wrong. Should have had a contract that buttoned it up a little tighter.
>
> Q: Did you really think that Gary was going to do this 1031 exchange to buy 1,333 acres for 4.9 million and just transfer a third to you and transfer a third to Gordon?
>
> A: That's an asinine question, and it' leading. That's not what I said. I never said, I never said, that, but I did have - -
>
> Q: So the answer is "No, you didn't think that"?
>
> A: The answer is Alpha Land, and through Alpha Land we would all have - - Gary would be paid back; the contract for deed would be assumed by Alpha Land. The contract for deed was mine. I didn't just sign this over for Gary to use for his own personal benefit. Alpha Land was the vehicle, John. The land - - and I've been through this over and over. So your question is: "Did you think that Gary would give you a third free and clear?" The value is in the land - - he is paid off. So "give me" isn't even part of this. (1SH p186-188)

59. In regard to having what he claims were material terms memorialized in a written agreement, Shad testified he was "comfortable with a handshake." Further, Shad admitted under oath: "And my wife was right. And I was wrong. Should have had a contract that buttoned it up a little tighter." (ISH p. 188).

RESPONSE: Undisputed to the extent that Shad now wishes he had listened to his wife, not have trusted his father and uncle and required a written contract.

60. Shad testified in his deposition that he did not understand the distinction between owning a membership interest in the LLC and having an ownership interest in real property. His admission was revealed in the following questions and answers:

> Q: Back in 2019, did you understand there was a difference between having a membership interest in the LLC and an ownership interest in land? Did you understand that there could be a distinction between those two things?
> A: No. The way they presented it—because I brought that up. And the way they presented it was no, the real estate is physical look right here at the PA [Purchase

Agreement]. So my understanding is they would be hand in hand. Essentially different language, same purpose.

RESPONSE: Undisputed to the extent that the statement represents Shad's statements. Disputed as to the conclusions drawn by Defendants as to the statement.

61. Shad agreed that if Alpha Land Company could have afforded to buy the 1,333 in "one fell swoop" it could have been done. (ISH p. 105). However, the entity was not capitalized to borrow. (Gary's Answers to Interrogatories, No. 41 p. 27 of 72). Although he claimed Alpha Land was given an equity interest in the property at closing on April 6, 2020, Shad conceded he did not understand how equity could be acquired. (1SH pp. 209-213)

RESPONSE: Undisputed Alpha Land can buy the property if it has the money .Undisputed that Alpha Land was never permitted to be capitalized. This was a breach of the parties' agreement. Disputed to the extent that Alpha Land did not have an equitable interest in the property. The parties agreed that Alpha Land would refinance the contract for deed and obtain development financing. (Postma Affidavit).

62. Shad agrees that Gary's LPs sold investment properties in Virginia. (V.C., 63; 2SH p. 19). Shad agrees that as seller, he signed the Purchase Agreement on October 25, 2019 agreeing to sell the properties to Gary's LPs to close on April 6, 2020. (V.C., '65; 2SH p. 20) Shad agrees that the non-refundable down payment on the 1,333 acres in the amount of $2,465,962 was provided by Gary as the documents reflect; yet in the same breath, Shad claimed he did not know where the money came from. (2SH p. 20-21). Shad further agreed that he did not contribute any of the non-refundable down payment; it came from Gary. (2SH pp. 21-22). Shad agreed that Gary's bringing the down payment money to the table "was part of our deal . ..1 would not argue that. " (2SH p. 22). In fact, Shad's Verified Complaint confirms that Gary's LPs would assume the contract for deed and testified "but it was years later. (2SH p. 23; V.C.

RESPONSE: Undisputed.

63. Shad was privy to all of the documents as they were being generated in 2019, namely: the Operating Agreement, and the later Purchase Agreement documents. (1 SH pp. 234240) In fact, when the company was looking to refinance the contract for deed with Banner Capital in March of 2022, Shad was copied with an excellent description of how ownership of the property was acquired and how it was to be funded in Simpson's March 10, 2022 appraisal for Banner. (2SH pp. 15-21).

RESPONSE: Disputed to the extent "all the documents" is vague. Disputed to the extent that the purchase agreements, with the exception of the Alpha Land Purchase agreement, were executed prior to the operating agreement. Disputed to the extent that Alpha Land was looking to refinance the contract for deed with Banner Capital beginning in 2020. Undisputed that Shad was provided a copy of the Banner Capital Appraisal. The appraisal does not indicate that Garys LPs would be the entity refinancing the contract for deed.

64. Shad agreed that in 2019 he understood that interest in land are transferred by way of a deed. (1SH p. 105).

RESPONSE: Undisputed that Shad understood that an "ownership interest" in land is transferred by way of a deed. Plaintiff however asserts that Alpha Land's exclusive agreement to purchase the property and the parties' verbal agreement giving it an exclusive right to develop the property provided Alpha Land with an equitable interest in property.

65. In 2019, Shad understood that a contract for the sale of land needed to be in writing; but believed that a handshake with a family member (Gordon) was sufficient. (1SH p. 43). Shad testified "if it wasn't for my brother Kelly, there wouldn't be a document to my knowledge. It would have been a handshake deal. " (1SH p. 133).

RESPONSE: Disputed to the extent that on 1SH p. 133 Shad was referring to the oral promises made to him to regarding the partnership. He was not referring to the sale of land. The way the property was purchased was part of the agreement. An agreement that couldn't contain the actual terms of the agreement without risking Gary's 1031 exchange (Postma Affidavit).

66. Shad testified that he worried about not having a written document confirming his claim that he would be transferred an interest in land. (1SH p. 46).

RESPONSE: Disputed to the extent that Shad testified that it wasn't until later that he became worried about not having a written document confirming his interest in the land. He stated, "Progressively, yes… over a period of time." (1SH p.46).

67. Shad admitted that under "normal circumstances" a deed would have been recorded to transfer an interest in land; yet he offered that in this case "we are dealing with family." (1SH p. 105). Shad claimed that he did not understand that if he was to receive an interest in land to be held in joint tenancy with right of survivorship, the language would show up on

the deed. (1SH pp. 104-109). "Because of family," Shad's position is that no writing was necessary, that a handshake was sufficient. (1SH p. 55).

RESPONSE: Disputed to the extent that the statement doesn't clearly represent Shad's testimony beginning on 1SHp.104, line 7:

68. No writing signed by Gary, Gordon, Alpha Land Company, LLC or any other person or entity has been produced that memorializes an agreement, promise, deed or contract to transfer to Shad a one-third interest in the 1,333 acres of land. No document, memorandum or writing signed by Gary, Gordon, Alpha Land Company, LLC or any other party exists which transfers any ownership interest in the property to Shad. (HH p. 268).

RESPONSE: Disputed. A purchase agreement was signed and executed along with a warranty deed giving Shad ownership of all 1,333 acres prior to him selling the property to Gary's LPs. Additionally, Alpha Land's Operating Agreement gives him a 1/3 membership interest in the Company and Alpha Land's Purchase Agreement gives it an equitable interest in the property, and therefore, Shad, by way of his 1/3 membership interest in Alpha Land, has a 1/3 equitable interest in the property. (Postma Affidavit)

69. As Shad had promised in the October 25, 2019 purchase agreement, upon his execution of the warranty deed on April 6, 2020, any recorded right or ownership interest in the 1,333 acres of real estate was transferred to Gary's LPs to effectuate the 1031 exchange.

RESPONSE: Disputed as to the last part saying "to effectuate the 1031 exchange". This was done as a result of Shad's sale of the property to Gary's LPs.

70. Shad admitted: "[w]ell, initially the deed would all go to me, but then I agreed that it would go to Alpha Land." (1SH p. 50). The documents do not show that "it would all go to Alpha Land" but rather that the land would all go the LPs. Claiming he was ignorant of the meaning "Shadrach Howie and/or assigns" and what that meant (1 SH pp. 49, 173-174), he nonetheless testified: "I didn't see a problem with [the language]." (1SH p. 29). From the outset of the realtor's engagement (Dave Olsen/Coldwell Banker) through and until the warranty deed transfer to the LPs on April 6, 2020, Shad was signing documents which represented the transaction as one in which an assignment would take place to transfer the interest in the real estate. (1SH pp. 174-185).

RESPONSE: Disputed. The documents show that the property first went to Shad, then Shad sold it to Gary's LPs and on the same day, April 6, 2020, Gary LP's sold the property to Alpha Land and Alpha Land received possession of the property dating back to November 1, 2019 (VC Exhibits A andB). Shad never assigned his rights and interests as seller in the purchase agreement with Gary's LPs. The assignment language allowed Shad to assign his interest in the contract for deed to Gary's LPs but it remained in his name until it was refinanced in 2022. (Gary's Answers p.58, Admission 38). Similarly, Shad never assigned his rights as buyer when purchasing the property. Defendant's have not produced any executed assignments. The "and/or assigns" language is only relevant when a valid written assignment is executed. It is undisputed that Gary's LPs did assign its rights as the buyer to Pennington Title Company as required by the 1031 exchange.

71. Shad conceded in his deposition that he knew the language "and/or assigns' ,"implies there's an assigner" (sic) (ISH p. 174). Moreover, he knew his role as assignor was as a strawman/sacrificial lamb as CPA Postma explained and that there would be a tax consequence.(1SH pp. 177-182). The fact that the warranty deed he signed transferred all of the interest to Gary's LPs is self-evident in the document. The warranty deed states this very fact. (ISH pp. 50—51; "Exhibit #2" to Defendants' Answer to V.C.). Confronted with the facts that his own actions were consistent with exactly how the plan's sequence was explained to all the members by the CPA as memorialized in the January 6, 2020 email and transactions documents (ISH pp.178-182), Shad retreated to a position in his deposition that he was "very hands off." (ISH p. 182).

RESPONSE: Disputed as to Defendant's characterization of what Shad "knew". This is not supported by the testimony cited. Shad didn't assign his rights and he was referred to as a sacrificial lamb because despite not receiving any proceeds from the sale, he incurred the tax liability. Undisputed that Shad was "very hands" off in the 1031 exchange plan devised by Gary, Postma and Penn Title.

72. Asked about CPA Postman's email of January 6, 2020, and if he had read it, Shad testified: "I don't know if I did, honestly. I wasn't super involved in that. Not that I couldn't care less, but it's not where I focus my energy." (1SH pp. 181-182).

RESPONSE: Undisputed.

73. Shad had the opportunity to read the company's Operating Agreement before he signed it. (1SH p. 234-235). Shad read it before signing it. He claims to have pointed out contradictions in the document and claims he was pacified to sign it by their assurances. (1SH p.235) When pressed to identify the contradictions, Shad was unable to do so. (1SH pp. 235-23). Shad was not forced to sign the operating agreement, in fact, he conceded: "I didn't have a problem with the operating agreement until they decided that it was inadequate. 't (1SH p. 240).

RESPONSE: Disputed as to the characterization of Shad's testimony which should be read in its entirety. (1SH p.235)

74. Paragraph 15 of the original Operating Agreement provided: "This agreement and the articles of organization may be amended by a majority vote of the members except that any provision in this agreement or in the articles of organization that specifies a membership voting or consent requirement of greater than a majority, may be amended only by a membership vote that is equal to the voting or consent requirement specified in the provision sought to be amended."

RESPONSE: Undisputed.

75. Shad claimed that the documents he read, understood and signed said one thing, but that he was told differently—or was not in the manner he understood them. (1SH p. 181). Shad testified: "So this is a smoke and minor scenario where I was told one thing, but it reads a different way, John." (1SH p. 238).

RESPONSE: Undisputed

76. Shad had his own LLC, but had never had partners before. Likewise, Shad had never been in any business organization with anyone else.

RESPONSE: Undisputed.

77. Shad agreed that he could have sought independent legal counsel as the original operating agreement stated, but he did not get independent advice. (ISH p. 245)

RESPONSE: Undisputed. Shad completely trusted his father and his uncle and never considered consulting with an attorney. He had worked with his father all his life and had no reason not to trust both of them completely (VC 58).

78. Shad concedes that he read paragraph 15 of the Operating Agreement regarding amending the document by majority vote. (1SH p. 245).

RESPONSE: Undisputed that he read paragraph 15 of the Operating Agreement; however, he also testified that that he understood it as it was presented to him (1SH p.245) and that he was told by Gary and Gordon that its like a constitution. He relays the statements that Gary and Gordon made to him on p.245 1SH, "the constitution can't be changed, Shadrach, but we can out vote you. For instance - - and they had analogies - - if we are going to vote, I am outvoted, I can't do a dang thing about it, but you can't go in and change the material terms without the consent of all the parties." Shad further stated on pg. 240 1SH, "I believe unequivocally now that it was - - it was a direct deceptive tactic to tell me what I wanted to hear, knowing they would simply change it later." Dorsey then asked, "but you read it, you understood it, and you signed it?" and Shad responded "I understood it the way it was represented to me." (1SH p.240).

79. Alpha Omega lots did not sell in 18 months as Shad and the others had hoped. (1SH p. 90). Delays occurred. Many issues with the City of Box Elder were encountered. (1SH p. 230). Holly testified that the company had "a lot of trouble" with Box Elder and that the City was "trying to blackmail them." This was not only Shad's belief, but Holly's as well. (HH pp. 53-54). They believed that the City was requiring the company to do things not required of other developers. (HH p. 55).

RESPONSE: Undisputed.

80. Just three months after Alpha Land Company was formed, the City of Box Elder submitted the company with a document called: "Alpha Land Subdivision Off-Site Improvement" — a list of "to dos" among which required that Sunnydale Road (which would run through the development) be extended and improved. (1SH pp. 72-73). (SH Ex 10, p. 002). Initially, the City wanted the entire expense to be shouldered by Alpha Land Company.

RESPONSE: Undisputed.

81. The company's engineer projected a cost to Alpha Land at $1.6 million for the road; an expense that was not projected nor anticipated. (1SH pp 73; SH Ex 10, p. 3). Shad agreed with Gary's characterization to the members that the City's position was a "stunningly unwelcome surprise." (1SH p. 73).

RESPONSE: Undisputed.

82. Shad agreed that the City's directive on Sunnydale and resulting impact causing delay could not have been predicted by anyone at Alpha Land without a "crystal ball." Shad testified that he felt the City was "blackmailing" the company and felt that the approach to be taken by the company was to sue the City. (1SH p. 74).

RESPONSE: Disputed to the extent that Shad's testimony on 1SH p. 74 does not state that he thought the company should sue the City. Defendants have not produced any evidence that Shad met with or engaged an attorney to sue the City or represent Alpha Land in its fight against the City.

83. Ultimately, with cooperation, Holly conceded that the company was not forced to expend any money for the road because Gary and Gordon cooperated with the city. (HH p. 56)

RESPONSE: Undisputed that the company was not forced to expend any money for the road but disputed that it can be attributed to Gordon and Gary's cooperation with the City. Furthermore, Gary and Gordon's approach took several years to get movement on the development, a significant delay that negatively impacted the project, Alpha Land and Shad.

84. Lots did not sell as planned in the first 18 months. (1SH p. 90). After a year and a half, Shad believed Alpha Land's own engineer (KTM) was "working directly with the City" and "taking the long way around." (1SH p. 76-77)

RESPONSE: Undisputed. It is also undisputed that Gary and Gordon agreed with Shad. In an email to Banner Capital Gary states, "We have made some significant changes. The engineering group we were using for Box Elder was giving us low priority and perfunctory service, with little effort to interact on our behalf. Their major client is one of our competitors. We were completely lacking the critical behind the scenes negotiation which has proven to be essential. We now have a new engineering firm that represents just us and has been meeting with Box Elder officials on our behalf. We currently have a proposal going before Box Elder that involves the initial steps in approval for 300 residential lots" (G-3239)

85. Gary's confidence in Shad's abilities to complete projects in a timely manner worsened as time progressed. (Gary's Interrogatory Answer No. 23, pp. 21-22 of 72). Shad was getting behind on projects "borrowing from Peter to pay Paul." Shad delivered a financial statement to Gary on February 19, 2020 which explained he was unable to "borrow to build."

RESPONSE: Undisputed to the extent that the statement represents Gary's Answer to Interrogatory No.23. Also undisputed that Shad was financially unable to "borrow to build", this was something Gary and Gordon knew this before entering into the partnership which is why they agreed that Alpha Land would finance his builds. $150,000.00 did not prove to be a sufficient to complete the build and Shad anticipated receiving additional funds from lot sales in phase one, to which the City denied the final plat (VC# 124).

86. The same day that Shad transferred his ownership in the property by warranty deed, Gary loaned Shad $150,000 under strictures outlined in a Construction Loan Agreement dated April 6, 2020. (Gary's Interrogatory Answer No. 23, pp. 21-22 of 72). Throughout the project, Shad would refer to his financial struggles including liens and unpaid invoices for work on homes he was constructing, including his own. Gary recounted the issues with Shad's lien holders, Shad's financial pressures, and how Shad became more adversarial and abusive to Gordon and Kelly and in spite of many attempts to help Shad with loans, advice and efforts to correct his behavior. (Gary's Answer to Interrogatory Nos. 23, 25, pp. 21-23 of '72).

RESPONSE: Undisputed to the extent that the statement represents Gary's Answers to Interrogatories 23 and 25. Also undisputed that Shad was having financial difficulties during this time. He had anticipated walking money as promised, Alpha Land's refinance of the contract for deed, and to be making income from the property. (G-2115)(Postma Affidavit) (HH p.221)

87. On March 3, 2021, Shad was "irritated" in the direction he believed the City of Box Elder was taking in a move eastward rather than in Alpha Omega's direction. So, he authored a letter he proposed to send to "make available to every Box Elder official" which outlined his chronology of the development and irritation noting that the City was requesting $5.8M in funds to expand sewer to the East (away from Alpha Omega). (SH Ex 10, p. 006). Shad's proposed letter revealed his state of mind and suggested that Alpha Land's bringing of 3,500 homes to Ellsworth and "countless commercial businesses" would be the solution for the City's problems.

RESPONSE: Undisputed to the extent that Shad sent this email with proposed suggestions on how to handle the situation with the City. Defendants have produced no evidence that any such proposal was ever sent to the City.

88. On August 17, 2021, Shad listed five things he wanted the company to do including firing the company's engineer. (SH Ex 10, p. 008) Shad felt the City was "stonewalling" the development and giving them the "runaround" rather than doing their job "outside of the good old boy system. "

RESPONSE: Undisputed. Also undisputed that Gary and Gordon agree with Shad.

In an email to Banner Capital Gary states, "We have made some significant changes. The engineering group we were using for Box Elder was giving us low priority and perfunctory service, with little effort to interact on our behalf. Their major client is one of our competitors. We were completely lacking the critical behind the scenes negotiation which has proven to be essential. We now have a new engineering firm that represents just us and has been meeting with Box Elder officials on our behalf. We currently have a proposal going before Box Elder that involves the initial steps in approval for 300 residential lots" (G-3239)

89. On October 2, 2021, Shad sent an email titled: 'forward" which stated: "BE gives the runaround or does simply not reply, RTM (the company's engineering firm) purposely misleads us and provides garbage engineering and advise. I hope to have two items resolved next week." Shad went on to write: "Other than impatience, persistence is my best quality and I am still ranting. We must clearly fight for our exposure and purpose or we lose. So far the blame is Shadrach first, BE second and KTM third for our failures." (SH Ex 10, p. 012).

RESPONSE: Undisputed (See Response 88)

90. Shad wanted to sue the City of Box Elder because of what he deemed to be unfair treatment. (HH p. 56). Gordon and Gary did not. (HH p. 57).

RESPONSE: Undisputed to the extent that the statement reflects Holly's testimony; however, Shad wanted to hire an attorney to help Alpha Land work with the City not necessarily litigate. Shad testified on p.231, "I think having an attorney deal with an attorney in this specific case would have been beneficial to both the City and the to the developing LLC". Defendants have produced no evidence that Shad ever engaged an attorney to sue the City or represent Alpha Land in its fight against the City.

91. Shad displayed poor behavior at company meetings dominating discussions, demanding that the project was his to develop and failing to be a team player. (See Gary's Interrogatory Answer Nos. 23, 56) His wife, Holly attended one of the meetings lasting two hours which she testified: "[a]nd at that meeting Shad dominated the conversation and he did most of the talking." (HH p. 190).

RESPONSE: Undisputed to the extent that the statement reflects Gary's Answer to Interrogatory 23 and Holly's testimony on p. 190 and reflects their opinions

92. On October 1, 2021, Kelly emailed Gordon and Gary and expressed his frustration with Shad's conduct and Shad's apparent belief that the project was his, and his alone, to develop. (SH Ex 10, p. 010). Kelly email stated: "Shad is very literally the reason that we have no traction with the City of Box Elder, our qualified but alienated engineering that has proven difficult to replace (again, because of the relationships he's killed at every level), and is the sole wedge in his own partnership which cannot effectively meet as a result of his high regard for his own abilities that have been proven exactly nowhere. " Kelly's email explained that he was unwilling to "sit through another meeting with Shad present." (SH Ex 10, p. 011).

RESPONSE: Undisputed to the extent that the above statements are opinions Kelly Howie. Also undisputed is that Holly testified to heated argument that broke out between Kelly and Shad at a meeting.

"Shad was upset about not being able to develop, not making money, spending money, getting all this push back from Box Elder. He had been bringing idea to Kelly about marketing listings. They were telling him, no, it won't work because of X, Y, Z. And then so there was some kind of argument. And I guess and I don't know what Shad said. I guess I'm probably sure—he's very passionate when he talks to people and very boisterous so like it's family that he's talking to so that makes it even more emotional. Like you can sit there and talk to your mom a little bit different than you would talk to a stranger. And Kelly got mad at Shad and said, "Don't talk to my dad that way, you little asshole". (HH p.239) It was after this meeting that Kelly pulled all Shad's real estate listings and said I'm never gong to work for you." (HH p.239).

Kelly has also been named as Gordon's replacement in the Amended Operating Agreement. He advocated to amend the operating agreement, giving him 10% ownership in addition to his commissions.

93. Kelly's October 1, 2021, email pointed out that materials for homes [508 and 512 W. Sunnydale] which Shad had been allowed to build upon two lots fronted to him by the company were "laying on the ground" which "continue to weather" as Shad pursued the "next big deal that he's unable to fund." (SH Ex 10, p. 011). Kelly explained that he had paid

Shad's invoices before Knecht's pursued criminal action and that he had paid in excess $90,000 on Shad's behalf. Id. Shad admitted Kelly paid lienholder's to complete and close deals to the tune of $90,000. (1SH p. 158). Kelly's email expressed his dissatisfaction with Shad's conduct stating: "it's time that Shad is put in his place and eradicate the unbelievably unacceptable way that he has chosen to treat us in every meeting and in every personal conversation.

RESPONSE: Undisputed to the extent that the above statements are opinions of Kelly. Shad repaid Kelly for this loan.

94. Shad wanted to fight the City of Box Elder. His proposed method was to engage an attorney to threaten legal action. Shad's email of October 25, 2021, titled "victory" to Gordon, Gary, Kelly and Holly, said that "my fight is with Box Elder not with you three however." (SH Ex 10, p. 028).

RESPONSE: Undisputed as to Shad's statement in his October 25, 2021 email. The remainder of the statement is disputed as a misstatement of the record. Shad's testimony was as follows:

> Q: And did that mean hiring a lawyer and threatening them with certain things to get it the way you wanted it?
>
> A: I don't think "threatening" is the right terminology.
>
> Q: What term would you use?
>
> A: I think having and attorney to deal with an attorney in this specific case would have been beneficial to both the City and to the developing LLC.
>
> (1SH p.230-231)

95. To force the action he alone wanted from the City of Box Elder, Shad suggested the company engage an attorney to submit a proposal for 300 homes with no Sunnydale improvement and not establishing a secondary access until after 250 homes were completed. [This was not what the City's directive had been]. (SH Ex 10, p. 028).

RESPONSE: Undisputed to the extent that Shad was making suggestions to his partners of ways to move the project along. Defendant's have provided no evidence that Shad engaged an attorney for this purpose.

96. Shad's "victory" email proposed: "We give Box Elder 30 days to reply before legal action is taken." (SH Ex 10, p. 028).

RESPONSE: Undisputed to the extent that Shad was making suggestions to his partners of ways to move the project long. Defendants have produced no evidence that this proposal was ever sent to the City or legal action taken.

97. Likewise, Shad recommended that an agreement be finalized "by forcing Box Elder to identify RR improvements and create signed agreements." (SH Ex 10, p. 028). "This also needs to be done by an attorney with 30 days to reply before legal action is taken.

RESPONSE: Undisputed to the extent that Shad was making suggestions to his partners of ways to move the project long. Defendants have produced no evidence that this proposal was ever sent to the City or legal action taken.

98. Shad agreed that Gary and Gordon had a much different approach to dealing with the City of Box Elder. (ISH pp. 69-71, 74-78). They were trying to reach agreements rather than threaten litigation or hire lawyers to take legal action if Shad's demands were not met in 30 days. (Gary's Answer to Interrogatory No. 50; Defendants' Answer 46. A schism existed between Gordon and Gary on one side and Shad on the other. Kelly aligned with his father and uncle. Shad remained on the fight. Shad quit talking to his father and uncle. Shad quit coming to meetings. (HH p. 96).

RESPONSE: Disputed to the extent that Shad used the term "threaten", see previous responses to this statement. Disputed to the extent that Gary and Gordon's strategy was to reach agreements with the City. Gary and Gordon's approach was to wait it out and make the City come to them. They had no issue with waiting. (G-2662).

99. Shad suggests that Gary and Gordon intentionally wanted to delay the project. He testified: "they wanted to wait" and to "manufacture a breach. To steal what they're trying to steal. That's why." (1SH p. 165) in Shad's mind, Gary sold his Virginia LP property to finance a $4.9 million purchase and, with his brother, intended to delay the project so Alpha Land could default on its obligations. To carry out Shad's "logic" Gary, along with his brother, Gordon, developed delay as a "strategy" because in Shad's mind, "they needed to run out of money. „(1SH pp. 165-166).

RESPONSE: Undisputed that Gary and Gordon were willing to wait to develop. (G-2662).Undisputed that Gary and Gordon allowed Alpha Land to default on the purchase agreement and created or "manufactured" the breach. A default allowed Shad to get nothing and Gary and Gordon get it all. Disputed as to what defendants think was in Shad's mind. (Gary's A, #45, p.61).

100. Shad recognized that Alpha Land Company, LLC had no exclusive dealings agreement with the Gary's LPs. (HH Depo p. 76).

RESPONSE: Disputed. Alpha Land Company, LLC has an exclusive right to purchase and possess the property and Alpha Land Company has the exclusive right to develop the property per the parties' agreement per the parties' agreement

101. Unlike Shad, Gary contributed hundreds of thousands of dollars to Alpha Land Company, LLC from loans he made on behalf of the LPs to keep Alpha Land afloat. (HH Depop. 90). Likewise, Gordon along with Gary, signed personal guarantees of loans and proceeded to obtain funding through Banner Capital of $2.3 million to refinance the Gikling contract for deed and sought funding through grant applications. (Gary's Answer to Int. No. 48). Shad did not personally guarantee any loans nor did he pledge any assets as collateral to secure capital for the fledgling development LLC. (ISH pp. 89, 97-98).

RESPONSE: Disputed to the extent that Shad personally guaranteed the Contract for Deed from October 19, 2019 to March 29, 2022. Shad also contributed his proceeds from the sale of the property to Gary's LPs. Undisputed as to the remainder of the statement.

102. Shad's October 25, 2021 email he titled "victory" (SH depo Ex 10, p. 028) reminded the members that he had threatened to leave and quit the partnership. Further, he recognized the costs associated with development and that he was not receiving any monies. Shad complained that sales of lots would pay back interest on the contract for deed "meaning initial profits are already gone. " Id. Yet his victory email outlined a multitude of disagreements with the business judgment and decisions of the majority. (SH Ex 10, p. 061). Among these were choosing an engineering firm which he wanted to hold accountable stating: "[e]verything they did has been unusable and should be recompensed." He complained that he had been "led to believe" that "not only would we sell parts of Alpha Land to have development funds and walking money[,] I have been limited and restricted by not only creating marketable listings but also in all aspects of project oversight, project representation, project planning, project finance, project exposure and even general correspondence with members. „Upset that the company had not yet paid his taxable consequence on the 1031 exchange, he complained "Why is my Tax Deferred Exchange not resolved? I am in financial ruin and our LLC is making it worse not better." Id..

RESPONSE: Undisputed to the extent that the email speaks for itself. See previous responses that showing that Gary and Gordon agree with Shad regarding their engineering firm.

103. Gary replied to Shad's "victory" email on October 25, 2021. Expressing that he had become "increasingly alarmed at what is happening in our family," Gary warned Shad that "what you are doing has to change. You are alienating people who have been helping you and who want to continue to help. You are reacting from extreme financial pressure, but in order to solve the financial problems you have to look in a mirror and recognize who is responsible. Gary went on to explain how Gordon and Kelly had supported Shad in a number of ways. Gary reminded Shad that Gordon had invested about $80,000 in V-rod to support an idea that "has not panned out yet" and had sold Shad land at below market value to help get a house. Kelly had provided around $90,000 to keep Shad out of financial and legal trouble. (SH Ex 10, p. 031)

RESPONSE: Undisputed to the extent that the email speaks for itself and the statements represent Gary's opinions.

104. Shad replied to Gary on October 25, 2021 and said "I do not disagree with hardly anything you wrote." (SH Ex 10, p. 031).

RESPONSE: Undisputed to the extent that the email speaks for itself.

105. Shad's reply further explained he was having health issues. (SH Ex 10, p. 031). Shad said he was "bleeding out of my skin over stress" but he was doing his best to communicate. Id. In his testimony, Shad explained he did not see a doctor for this condition specifically which he related to stress likened to a phenomenon which Jesus experienced in the Garden of Gesthsemane. (1SH pp. 242-243). But, he did get a 'total comprehensive analysis' ,and a CAT scan. Id.

RESPONSE: Undisputed to the extent that the email speaks for itself. Shad also testified that the results showed nothing wrong with him but attributed his symptoms to stress. (1SH pp. 242-243).

106. Holly Howie confirmed Shad had received a CAT scan in a later email dated March 29, 2022, she sent to both Gary and Gordon, but she claimed that nothing wrong could be found. However, Holly's email stated: "he is supposed to have an ADHD or psysiological (sic) analysis done . . .but commented on her observations of a "change in attitude and some of this paranoia" linking it to when he was tazerred (sic) in Wind Cave." (HH Ex 1, p. 72). "He told me that he fell and hit the back of his head when the cop shot him with the taser gun. I think that could possibly be an explanation for the why, behind the abnormal thinking. u. ; See also, HH pp. 189-196).

RESPONSE: Undisputed to the extent that the statements represent opinions of Holly. Holly also testified that "at the end of everything, they [doctors] basically said to him that he seems fine and that he is just probably very stressed." HH p269-270.

107. During her deposition, Holly explained that she had told her husband he had ADHD and was having trouble with his memory and thought something was wrong. (HH pp.193-194). She agreed that Shad probably does not read things thoroughly sometimes. (HH p. 194).

RESPONSE: Disputed. See response to statement #46.

108. Gary emailed Shad on October 26, 2021. (SH Ex 10, p. 034). Gary explained that his last two emails dealt with partnership problems, but suggested that there was more to the "picture" sharing with his nephew his observations and telling Shad: "You may not realize it, but the way you think, your accomplishments, and the way you approach problems represent wrestling with a very significant handicap." Gary suggested that "[t]he undiagnosed handicap you have been dealing with your entire life is consistent with attention deficit disorder. ... People with attention deficit disorder react impulsively, which often gets them into both legal and financial trouble. They want immediate results, which can make them difficult to work with. (Gary's Answer to Interrogatory No. 50).

RESPONSE: Undisputed to the extent that the email speaks for itself and the statements represent Gary's opinions. Gary also states in this email that Shad is very impressive; that he admires Shad and what he has been able to accomplish. Gary tells Shad that he has incredible energy and is amazingly efficient. (SH Ex 10, p. 034).

109. Shad's response to Gary thanked him for 'the encouragement." Before referencing Exodus and a story about Moses, Shad conceded: "Me in a partnership was a bad idea. You are most likely entirely right." (Email 10 25 21, SH Ex 10 p. 034)

RESPONSE: Undisputed to the extent that the email speaks for itself.

110. Gordon likewise received a threatening text from Shad. In an email of October 25, 2021, to Gary, Kelly and Shad, Gordon characterized Shad' text as "disappointing" and "having a threatening tone to it." (SH Ex 10, p. 030) Gordon said he would "set aside a response to that text, as well as responses to emails that propose the "fight" attitude, which I believe will only propel us in a very backward direction. "

RESPONSE: Disputed as to Defendants' characterization of the text and Shad's statements as "threatening". Undisputed to the extent that the email speaks for itself and the statements represent Gordon's opinions.

111. The balance of Gordon's email was a summary of moving forward and included the change of engineering firms from RTM to Hermanson Egge. Likewise, Gordon updated the members on discussions between the company's engineering team and Box Elder "which have been optimistic." Gordon warned: "It would be very detrimental if our Alpha Land team does anything that could compromise the progress our engineers seem posed to make. Gordon further addressed the company's payment of real estate taxes, the 2nd annual payment to the Gikling contract for deed—all things to a loan from Gary to Alpha Land Co, LLC. Gordon explained that the current account balance of the company was at $500, "which means we many need another injection of cash sometime soon. I will be willing to help as I am able as well." Id.

RESPONSE: Undisputed to the extent that the email speaks for itself and the statements represent Gordon's opinions.

112. Gordon ended the email noting the "potential refinance" of the contract for deed and that "Gary and I have had numerous discussions between the two of us and Banner Capital. The hard reality is that there were plenty of financial obstacles that had to be dealt with before a re-finance could be pursued. Now those have been overcome, so we are now pursuing that refinance." Id.

RESPONSE: Undisputed to the extent that the email speaks for itself and the statements represent Gordon's opinions. Neither Gary or Gordon provide what those "obstacles" are.

113. Documents produced in discovery confirm that Shad's actions were a substantial factor of causing increasing friction in the company and family schism. Shad had first proposed that the company hire a lawyer to threaten legal action (See USMF #84, supra). By October of 2021, Shad wanted to take it a step further suggesting he would hire his own engineer and attorney to get what he wanted. (SH Ex 10., p. 58). Shad said he was independently preparing "a proposal for 300 homes off Sunnydale with no improvements and a 150 PUD off Reservoir Rd to connect to Sunnydale via gravel." Among other things, Shad said he would "no longer bow to every unreasonable whim" [of the City] and "with the help of my engineer and attorney" expected "consideration by partners." (SH Ex 10, p. 58).

RESPONSE: Disputed as to Defendants characterization of the documents produced in discovery. Disputed to the extent that most of these statements have already been previously made and responded to including, what Shad has said about wanting to hire an attorney, getting another engineer, Gary and Gordon agreeing, and proposals he wanted to send to the City but never did. Defendant's have produced no evidence that any of these actions were taken.

114. On October 20, 2021, Kelly wrote an email to Gordon and Gary addressing an email Gary had written in response to Shad's claim that Box Elder was "erroneously" interpreting governing ordinances and that the City's directive to fund the West Sunnydale road had been included in a 2006 TIF (tax increment financing). (SH Ex 10, p. 057-058). Gary then sent the email to Gordon and Kelly explaining that he had researched Shad 's claim about the "2006 TIF" and could find no information that it included Sunnydale. Kelly's response to Gary's email warned that Shad was engaging his own engineering and an attorney "which may complicate our intended revision to the partnership agreement. The way I read this message is a clear threat that he will do whatever he chooses, with funds he does not possess, and that he also has an expectation that we fall in line with whatever direction he provides us absolutely toxic right now. Every action he takes is counterproductive to our project and his personal relationships with his partners. It may also jeopardize the willingness of Mike [Albertson] and [Larry] Hermanson [engineers] to even participate further. (SH Ex 10, p. 057).

RESPONSE: Undisputed to the extent that those were opinions of Kelly that he stated in an email and the email speaks for itself. Shad never took the actions described above.

115. Kelly's email, was prescient of Shad's present claim to an ownership interest in the property: "Correct me if I'm wrong, but Alpha Land Company does not own any property in Box Elder. If that is the ease, Shad has literally no authority by which to engage an engineer or attorney."

RESPONSE: Undisputed to the extent that those were opinions expressed by Kelly.

116. On October 29, 2021, Shad wrote a long email titled "comprehensive plan" which was copied to Gordon, Gary, Kelly and Holly. Quoting statutes and recounting Box Elder's "lack of leadership and apathy for consistent planning and development principles" Shad 's email professed, among other things, that "Alpha Omega Development addresses and solves every single issue, objective and Goal outlined in The City of Box Elder's comprehensive plan." (SH Ex 10, p. 035-036). Shad suggested that "if our group cowers now and compromises on

WestSunnydale reconstruction rather than expose the underlying problems we will also rebuild Radar Hill road and Cheyenne Boulevard and continue a legacy of systematic extortion to the highest degree."

RESPONSE: Undisputed to the extent that this was an email Shad sent to his partners and it speaks for itself. The fist statement Shad makes is, "Exposing the underlying problems while offering clear solutions creates the environment for developers and cities to thrive". The in the email Shad relays information he has discovered and offers suggestions and possible solutions to his partners in a respectful manner. He ends by saying "Realize these are new challenges that require new tactics. (SH Ex 10, p. 035-036)

117. As part of an oral contract, Shad claims he made it clear that the Project needed to provide him with work and income to support his family and that Shad would have a key role in all site development and development oversight and receive compensation for this work. (See VC, 39, 40). When pressed for details of payment under the purported oral contract, he agreed "[w]e didn't ever agree on a figure. We just talked about how walking money would alleviate that . (1SH p. 251). In regard to an income he would require, Shad was asked:

Q: Did you quote them a price?

A: No. It was to be determined.

(1SH p. 253).

Shad explained that "[i]t was never determined what that would look like in dollar form or a specific format." (1SH p. 254). On this subject, the following questions revealed the following responses:

Q: And that's because you didn't know what the future would hold in terms of lots and how quickly they would be development and exactly what kind of equipment you would need and when; is that fair?
A: I would say that is fair. A good developer is a reactive one.
(1SH p. 254).

RESPONSE: Disputed to the extent that Gary/Gordon had to approve the disbursement of all funds from the escrow account and that those funds were only to be used to make improvements to the land for the purpose of adding basis to the property and reducing the tax obligation Alpha Land had to pay . Undisputed that during this time Shad was operating in his role in development oversight. This was consistent with the parties' agreement. Disputed to the extent that Shad did not agree to work "voluntarily" on the project. Shad testified that "to this point, I hadn't personally done any work." And that "for sitework, I did have specific things that were done both voluntarily and hired out, so that is a – I don't know if I should say "yes" to that. I did receive some help and support from the other members." (2SH p.29) It is important to note that he is referring to a time when he still owned the property and he had not sold the property to Garys LPs. This was during the time that the money was being held in escrow and Alpha Land hadn't received the remaining proceeds from the sale (2SH p.28). Shad testifies, "I knew we were on a shoestring budget… and my objective was to get this thing off the ground." (2SH p.30) It would make sense that since the sale hadn't closed and the funds weren't available that Shad wouldn't being asking for compensation for the initial and minimal sitework he was doing to get the project off the ground.

118. Shad claims he was orally promised that he was to have a "key role in site development and site oversight and receive compensation for this work. (VC, '40). When asked the amount of compensation to be paid, Shad said: "it depends. " (1SH p. 252). Shad conceded: "Never did we ever discuss a dollar amount." (ISH p. 252). Shad was asked:

Q: So that was left pretty vague?

A: Fair.

(ISH p. 252).

RESPONSE: Disputed to the extent that Shad also testified that "it depends on the scope of that specific task." (1SH p.252)

119. Shad claimed that he would have the opportunity to build and sell residential homes and commercial buildings throughout the duration of the project and that the construction would be financed by the parties' development company. (V.C., 1141; ISH p. 255-257). Shad agreed that he was not promised to be the only builder and seller of residential homes or commercial buildings. (ISH p. 256). Likewise, he agreed that the promises of financing the construction was based upon future events, down the road, when enough parcels were sold. (1SH p. 256). Shad agreed that from the beginning, on April 6, 2020, Gary and Gordon had set him up with the $150,000 loan with a draw. (ISH pp. 256-257). In fact, he was fronted two lots to build upon and was unable to complete the homes at 508 and 5 12 West Sunnydale in a timely manner. (1SH pp. 163-164). Nonetheless, Shad admitted that he was given the opportunity to profit from his own construction. (ISH p. 162).

RESPONSE: Disputed to the extent that it mispresents Shad's testimony as to what he agreed to. (1SH p.256) Disputed to the extent that it misrepresents Shad's testimony regarding the timeliness of the homes (1SH p.163-164).

120. Regarding Shad's claims that "walking money" was promised in the beginning; however, neither the amount nor when it would be paid was ever identified. (1 SH pp. 258,261). Shad agreed that the terms were vague as to the timeline and amount. "We talked about hundreds of thousands." (1SH p. 259). Shad's figure of walking money became a moving target during his deposition he first said it was hundreds of thousands, then settled on $200,000 which "was a later figure" but "on the front end of it was a substantial sum of money but not specifically identified." (1SH pp. 259-260). As more questions were asked of Shad the $200,000 was not described as walking money, but a loan. (1SH p. 261). All of the terms were, by his own admissions, vague. In reality, on April 6, 2020, Shad was funded a $150,000 personal loan from Gary. (See Statement of Undisputed Material Facts No. 56)

RESPONSE: Disputed as to how defendants characterize Shad's testimony in its entirety. Gary admitted that walking money was promised. (Gary's A, I#84, p.54).

121. Beyond James Postma, CPA, Greg Wick and Jan Kirch of Pennington Title, his wife, Holly, and two representatives from Banner Capital (Braithwaite and Peterson), Shad was unable to identify any other persons that would have personal knowledge of the oral contract which was the subject of his First Cause of Action. (2SH p. 5). Likewise, he was unable to identify any other persons to support the remaining causes of action in his Verified Complaint. (2SH pp. 6-8). Holly admitted most of her knowledge was what her husband told her. She had no personal knowledge of many claims as she was not present. (HH depo, 04/30/24, p. 40 and 06 06 24 pp. 262-263).

RESPONSE: Undisputed to the extent that those were the names Shad identified in his deposition.

122. When asked if he really believed that Gary was going to do a 1031 exchange and just transfer a third interest in land to Shad and a third interest to Gordon for nothing in return, Shad replied: 'that's an asinine question." (1SH p. 188) He claimed that Alpha Land would pay Gary back. When pressed for what Gary was to get in exchange from Shad for transferring him a one-third ownership interest in the real property, Shad replied to counsel: "Are you kidding me?".. .."You are not kidding. I guess maybe I'm naive because I don't think you're stupid; I think your acting stupid" (ISH p. 188-189). His diatribe and name-calling was a means to avoid answering a simple question. Calling defense counsel a "joker," in the final analysis, Shad was unable to provide an answer for what consideration was exchanged for the purported one-third ownership interest he was to receive. (ISH pp. 189). The truth as established by the conduct, actions and documents was that there never was a promise to transfer Shad a 1/3 ownership interest in the property. Shad admittedly had

contributed no money into the deal 'zero dollars." (1SH p. 169). In fact, ignoring the loans and 1/3 membership interest and opportunities granted him, he erroneously claimed: "I'm unaware of any benefit that I've had thus far."

RESPONSE: Disputed. Shad testified (1SH p 188):

A: I was comfortable working at the time with two of my family members on a handshake, John. Obviously, that ship has sailed. And my wife was right. And I was wrong. Should have had a contract that buttoned it up a little tighter.

Q: Did you really think that Gary was going to do this 1031 exchange to buy 1,333 acres for 4.9 million and just transfer a third to you and transfer a third to Gordon?

A: That's an asinine question, and it' leading. That's not what I said. I never said, I never said, that, but I did have - -

Q: So the answer is "No, you didn't think that"?

A: The answer is Alpha Land, and through Alpha Land we would all have - - Gary would be paid back; the contract for deed would be assumed by Alpha Land. The contract for deed was mine. I didn't just sign this over for Gary to use for his own personal benefit. Alpha Land was the vehicle, John. **The land - - and I've been through this over and over. So your question is: "Did you think that Gary would give you a third free and clear?" The value is in the land - - he is paid off. So "give me" isn't even part of this.**

Remainder of statements have been disputed in above responses.

123. The records produced in discovery show that two years after Alpha Land Company was formed, Banner Capital was involved with a non-revolving promissory note and loan to Gary's LPs for $2.3 million. (2SH pp. 14-15; SH Ex 22, pp G-2029 - 2039).

RESPONSE: Undisputed. This was a breach of the parties' agreement as Alpha Land was supposed to refinance the contract for deed. (Postma Affidavit)

124. Gary signed on behalf of both LPs on March 29, 2022 which refinanced the contract for deed held by Gikling on the 779 acres. (2SH p. 15).

RESPONSE: Undisputed.

125. As part and parcel of the Banner loan process, Ken Simpson, MAI, SRA, R/WAC, a certified real estate appraiser generated an appraisal which Shad was provided by Gary contemporaneously with the transaction. (2SH p. 15). Shad understood the loan was to refinance the contract for deed with Gikling which had been assumed and was fully informed. Yet, Shad claimed that the way in which Gary and Gordon took out the contract for deed "was contrary to our agreement," yet conceded the Banner refinance that Gary undertook did reduce the cost of the borrowed funds and mortgaged 779 acres of the 1,333. (2SH pp. 15-17). In fact, Shad agreed that he had suggested that the contract for deed needed to get paid off to help reduce the cost to the company. (2SH p. 21).

RESPONSE: Undisputed.

126. The records of Pennington Title Company include a settlement statement when the \$2.3M in funds from Banner were released to pay off the contract for deed the borrower was identified as the LPs, not Alpha Land Company. (2SH p. 17). Shad testified that "what Pennington Title did not disclose is the equitable role in the company by yours truly. Id. This was because having contributed "zero dollars," Shad did not have equity in the property. (1 SH P. 169).

RESPONSE: Disputed as to "zero dollars" comment as this has been responded to many times same as the statement about Shad not having an equitable interest in the property. See previous responses. Remainder undisputed.

127. Ken Simpson's appraisal opinion and report for Banner Capital's refinance of the contract for deed recounts a "history of the property" situated in the northeast quadrant of Rapid City, within the limits of the City of Box Elder. (Simpson Report, 1). Simpson's March 10, 2022, report to Richard Braithwaite, VP of Commercial Lending at Banner Capital Bank recounts:

> "Shadrach's purchase of the various parcels was the initial transaction that "combined" the property in its entirety. The funding for this purchase was in part a contribution on the same day from the LPs as a down payment to Shadrach. A sale was then completed from Shadrach to the LP's which allowed for the necessary funding for the purchase and also served to allow the LP's to complete a 1031 exchange for the sale of some property in Virginia. The managing member of the LP's is Gary Howie. From there, Alpha Land Company which includes both Shadrach and Gary were formed as an entity that would purchase parcels from the LP's as the property is developed. "

Simpson's report went on to explain that:

> "According to the borrower, total cost expended since October, 2019 is \$391,439.83, which likely includes the other parcels not involved in this assignment. This amount reportedly includes mostly engineering expenses as

well as some grading, overall master plan design, legal fees and some miscellaneous expenses relating to fencing repairs, etc." (Simpson Report, 1PL000232, PL000251). Per Simpson, the 779 acres as of January 17, 2022, had an appraised value of $5,190,000. Id..

Simpson's report reflects that Shad did not own any part of the 779 acres being refinanced to take out the contract for deed as a matter of recorded title. (PL000250; 2SH pp. 15, 23-25). Shad was provided Simpson's report and its contents would have confirmed for him his "role in the company" and his lack of ownership of a one-third interest in the real estate. (1 SH pp. 88-89). Yet, when pressed about the refinance and the Banner proceeds of S2.3 million loaned to the LPs, Shad agreed that he had no knowledge of what happened or the "nature of how that was done" (2SH p. 18). Still he professed Gary and Gordon defrauded him. Shad's continuing theme was that he trusted his family and that he was "manipulated. (ISH pp. 36, 84; 2 SHpp 17, 43).

RESPONSE: Disputed to the extent that it infers that Alpha Land had to own the property to refinance the contract for deed. Defendant's have produced no evidence that Alpha Land was not able refinance the contract for deed or use the property as collateral to obtain financing. This was the parties agreement and Banner Capital willing and able to refinance the contract for deed with Alpha Land (G-3234-3235) (Postma Affidavit). Remainder undisputed.

128. Although he did not know how much of the company's money he had expended in the initial phases of the development exercising his "role," Shad agreed that the company was "on a shoestring budget" of limited capital. (2SH, p. 30). Shad was allowed to show $220,000 of expenses on his tax return to reduce his tax obligation and increase his basis in that for the short period of time, he was the titled owner of the property until it would be transferred to the LPs as had been discussed with CPA Postma long before Alpha Land Company was formed. (2SH p. 33)

RESPONSE: Undisputed; however, Alpha Land was obligated to pay the tax consequence so it was to Alpha Land's benefit not Shad.

129. When pressed that Shad's own conduct was a reason that the majority of members voted to change the operating agreement, Shad conceded that he and his half-brother, Kelly had "got crossways . . . That's when stuff started really turning toward a new direction." (1SH p. 244). Shad agreed Kelly was given exclusive right to market. (1SH p. 147).

RESPONSE: Disputed as to Defendant's characterization of Shad's testimony. Undisputed that Shad and Kelly "got crossways" and that prompted Kelly to push Gary and Gordon into amending the operating agreement. See previous responses.

130. Regarding Shad's "discovery" of the fraud and deceit he claims was perpetrated upon him, Shad testified that his "aha moment" was in three "red flag" experiences as described below:

a. The first "red flag" was when he received an email from Gordon regarding Banner Capital. Shad agreed in his testimony that Banner Capital was not involved until the refinance of the contract for deed with Gikling until March of 2022. According to Shad, Gordon had told Shad that Banner Capital needed to change the LLC's operating agreement for their lending requirements. (1SH p. 192) Shad claims he then called Banner Capital's president who informed him they were ready to lend which made Shad believe that the change in the operating agreement was not driven by Banner's needs; but something nefarious was occurring and a "blatant deception." (1SH p. 193). Shad claims, he was promised $200,000 and had to sign a document under threat and that if it was paid, that he had to "stay out of our way." (1SHp. 193). What Shad described as a "blackmail" attempt revealed in a document has not been disclosed in discovery. (1SH p. 194) When asked if there was such a document in existence, Shad claimed it did exist. (ISH p. 194). No such document has been produced.

b. The second "red flag" moment was when Shad was provided a revised operating agreement draft prepared by the Bangs McCullen attorneys. Shad described the operating agreement as a "crap burger. ' (1SH p. 193). The documents show that Attorney Jeff Hurd communicated the company' s intent to modify the agreement. If agreement could not be reached, attorney Hurd explained that a majority would make the decision. (Shad said he read through it all and claims that the revised agreement surrendered all of his rights. (1SH p. 193). This prompted Shad to hire an attorney. Somehow, being provided notice that the majority of members were changing the document and providing the information to Shad was a "deception." The documents relating to Hurd's January 29, 2022, communications are found at SH Exhibit 10, pp. 38-39.

c. The third "red flag" moment was what Shad described as the "salute shit burger" which generated the amended operating agreement. (1SH p. 194). This amended operating agreement was drafted over a course of time following Hurd's attempt by Gary and notice was provided to all members that it would be voted upon. The minutes of the company meetings clearly show a history of why the operating agreement was being changed. (HH Ex 1, pp. HH 02-03; HH 11-12, HH-13-14, HH-15-16) Rather than a request by Banner, the reason for the changes to the original operating agreement was that Shad's escalating conduct and unilateral actions were out of control, against the business judgment of the majority, and were threats to the company which needed to cooperate with the various players in development. (HH Ex 1 p. 12). Gary's concern was that in its original form, the operating agreement permitted any member to bind the company. (See, Ex. 4 to Defendants' Answer to Verified Complaint and Counterclaim, Operating Agreement 14). Shad was acting unilaterally, without coordinating with his partners. (Gary's Answers to Interrogatory Nos. 50, 71).

RESPONSE: Disputed as to defendants' characterization of Shad's testimony and opinions of it. Undisputed to the extent that Shad's testimony in its entirety speaks for itself.

131. Regarding his claim that Gary and Gordon promised Shad that he would receive a one-third ownership interest in the land, Shad conceded that in his meetings with Postma, Wick and Kirch prior to the formation of Alpha Land Company he never expressed that he was to have a one-third ownership interest in the property. (ISH p. 196) Shad also conceded that Alpha Land Company would only acquire ownership in parcels; 'that was how it was going to work.' ,(ISH p. 207). Shad agreed that he knew that Alpha Land would only be purchasing parcels as the land was being developed and that the four corners ofthe documents provided that information. (ISH p. 208). Yet, he still suggested that "material terms" were not in the documents and said: "And if we're going to get into a pissing match about what is there and what's not, we're not getting anywhere." (1SH p. 209). Frustrated by the fact that the documents, words and actions revealed facts contrary to his subjective belief of having an ownership interest, Shad said not to 'take his word for it" but that "experts" would explain that his belief would be minored by their 'testimonies."

RESPONSE: Disputed to the extent that Shad's claim regarding his expected interest in the property has been explained many times in previous responses. Undisputed that the material terms of the agreement were not in the purchase agreement he signed with Garys LPs. They could not be as explained in previous response.

132. Named as his "experts" were Wick, Kirch, and Postma. (1SH p. 208-209). In Shad's words, they were like "eyewitnesses of Jesus Christ. You can refute it all you want, but they saw it." (1SH p. 209). No testimony has been produced from these individuals supporting Shad's claims.

RESPONSE: Disputed. An affidavit has been filed on behalf of James Postma.

133. On January 29, 2022, attorney Jeff Hurd wrote a letter to the members of Alpha Land and Kelly Howie regarding "Reorganization of Alpha Land Company." (SH Ex. 10, p. 038). Kelly had requested Hurd to help the company amend the original operating agreement 'To more closely match how you intend the Company to function. " Relative to the provisions of the original operating agreement and amendment by a majority, Hurd explained that he did not represent any of the members individually and that "[i]f you disagree on the terms of those documents, then we will act on the instruction of the majority of members." Id. (Later, as Shad was threatening legal action against Gary and Gordon, on May 31, 2022, attorney Roger Tellinghuisen replied to an inquiry by Gordon regarding Shad 's conduct and his expulsion for misconduct or engaging in conduet which thwarts the company's purpose. (SH

Ex 10, p. 053). Shad had insisted that Gary and Gordon's change to the operating agreement was illegal citing state statutes. (SH Ex 10, p. 054). To this Tellinghuisen conferred with his partner regarding amendment by majority vote (SH Ex 10, p. 055). His partner, attorney Curtis Jensen, replied and opined: "Operating agreement controls. Chapter 47-34A is just the default if there is no operating agreement or if operating agreement is silent as to the particular matter. Just certain fiduciary duties can't be waived by the operating agreement." Tellinghuisen sent the response to Gordon and advised: "You're good to go—the Operating Agreement controls." (SH Ex. 10, p. 53).

RESPONSE: Undisputed to the extent that the documents speak for themselves and are opinions of those who made the statements.

134. Shad was upset with the proposed changes to the operating agreement which had been generated by Hurd's office. So, Shad hired independent legal counsel in Stephanie Trask, an attorney who had called Hurd and conveyed that her client "is concerned about the direction the Company is headed, particularly with regard to Company management between the Members. (HH Ex 1, HH-08). On March 15, 2022, Trask wrote:

> Regardless of the imprecise and contradictory language in the original Operating Agreement, it has become apparent to Shadrach that his two fellow Owner-Members, Gordon Howie and Gary Howie, also have no intention of **honoring the intent of the original Agreement**. (Letter dated March 15, 2022; HH Ex 1, emphasis added).

Trask proposed that Shad would accept one of two options, namely: 1) a buy-out of "his one-third (1/3) ownership interest in the Company, reflecting a value of S45 million" or a "discount" to $36 million conditioned upon 'the Company will execute a written agreement to implement and maintain all covenants that have already been developed for the subject property development, including street names, or 2) the members would determine a method for valuing the company, a value would be established and each Member's value would be defined with a 1/3 ownership and an Amended Operating Agreement would be created and executed.

RESPONSE: Undisputed.

135. The proposal set out in the Trask March 15, 2022, letter was rejected. Trask apparently did not appreciate that Alpha Land Company did not own the land or had been told by Shad what he wanted Trask to believe was the ease. An ownership and encumbrance report from a title company would have shown who was the titled owner and the transactions from Gikling and Sullivan.

RESPONSE: Disputed as to Defendants' speculation of what Shad told Trask and what she thought.

136. On March 21, 2022, Shad authored and sent an email to Gary, Gordon and the attorney he had hired (Stephanie Trask) in what he self-described as an effort to "mediate" the "ongoing potential risks we saw and based upon my partners' behaviors. . . " p. 197; SH Exhibit 8, PL00665; also found at SH Ex. 11, p. 178). Five enumerated topics were listed by Shad and he titled his email as "Developers Operating Agreement. (SH Ex 9, PL00665, ISH p. 197-198).

RESPONSE: Undisputed in that the documents speak for themselves

137. In his March 21, 2022 email, Shad's proposed **"honoring original intent by specific definition: Example: 1,333 acres owned by HP Park LP is designed solely and unequivocally for future development by Gordon Howie, Gary Howie and Shadrach Howie with all net proceeds split evenly 33.333 percent."** (SH Ex 9, PL00665; ISH p. 197-198)(bold emphasis added).

RESPONSE: Undisputed

138. The words "honoring original intent" were Shad's words. Sending the email to the other members was his conduct. The March 21, 2022, email was written some two years <u>after</u> Alpha Land Company had been formed and nearly two years <u>after</u> he had transferred all interest to the LPs on April 6, 2020. The email was written nearly two years <u>after</u> Gary had loaned him $150,000 for the purpose of constructing homes, a task he admits he was unable to timely complete. The email was written <u>after</u> repeated issues Gary and Gordon had with Shad not agreeing to cooperate with their plans together with conflicts not only with them, but also with Kelly, the City of Box Elder, and the company's own engineers. Shad was asked the following question and gave the following response:

Q: When you said "honoring original intent," that was the original intent that you understood it to be from the very beginning, correct?
A: No.

(1SH p. 198)

However, when pressed for an explanation of his term "original intent," Shad said that his placement of the colon in the email was a "mistake" and that the sentence was "a run-on sentence. (1SH pp. 201-202). The discussion continued and Shad was asked:

Q: So when you use the term "original intent," aren 't you referring to something in the past? The "original intent" of what we intended to do?
A: That's correct, but what you are implying is that this is that original intent. This is a new scope that I was willing to give a little ground on that would still honor it.

(1SH p. 201-202).

At this point, defense counsel pointed out that in his "honoring original intent" email of March 21, 2022, he said nothing about a one-third ownership interest in 1,333 acres. (1SH p. 202). Shad's email was copied to his counsel, Trask. (1SH p. 204). So, Trask would have had proof of her client's original intent. Item #4 in Shad's March 21, 2022 email referenced covenants which he acknowledged still had not been completed. (SH Ex 9, PL00665; ISH pp. 202-205). The documents show that over time, while discussed, covenants were never adopted. (See, Gary's Answers to Interrogatories, Nos. 5 and 6).

RESPONSE: Disputed to as to the statement that Shad did not cooperate with their plans, and that he had conflict with Box Elder and the company engineers. Defendants have not produced any evidence that Shad had any conflicts directly with the City of Box Elder, or their engineers or that he didn't cooperate with their plans. Shad was vocal to the other members that he disagreed with their decision to wait and do nothing and that he wanted to take certain actions, all of which he did not take. Shad was vocal to the other members about his feelings towards Box Elder but have produced no evidence that he interacted with Box Elder in anyway that compromised Box Elder's cooperation in the project. Shad's claim regarding what was promised to him by way of ownership in the property has been explained several times in these responses. (#50, 68)

139. Shad's wife revealed that Shad was told by his attorney, Stephanie Trask, that in her professional opinion, Shad had no protection from being kicked out of the partnership or being replaced. (1SH pp. 247-250; HH p. 8; HH Exhibit 1, HH 05-06). Holly listed two conversations over speaker phone which she, in turn, related to Gary and Gordon in a message on March 29, 2022. Id. Shad conceded he was told this by Trask to whom Shad had provided the pertinent documents. (1SH p. 250).

RESPONSE: Undisputed.

140. By April 1, 2022, the members were still not getting along. (HH p. 58). Holly went to a company meeting and as reflected in the minutes (HH Ex 1, HH 01), she attended trying to be, in her words, a "mediator." (HH p. 58).

RESPONSE: Undisputed.

141. Holly knew that Gary's LPs owned the land and that Shad had issues with what he believed was the majority's ability to "kick him out" of the company and sell the property and he would be left with nothing. (HH p. 74). Holly explained the big problem was that "we think that it isn ot legal for them to change the Operating Agreement. They are saying they can do it with two votes, which leaves Shad the third guy out." (HH pp. 77-78). Holly conceded she did not know if a change in the original operating agreement by the majority of members was legal or not. (HH p. 78). That said, Holly agreed that when she later reviewed the discovery produced in the case, she saw emails from attorneys Roger Tellinghuisen and Curtis Jensen that in their professional opinion, the changes to the operating agreement could in fact be made. (HH p. 79; compare SH Ex. 10, p. 53).

RESPONSE: Emails from attorneys are undisputed to the extent that they are opinions. Remainder undisputed.

142. Holly was privy to discussions her husband had with his attorney and what was told him in the Spring of 2022. (HH p. 79). Sitting next to her husband, on two occasions Holly overheard conversations on a speaker phone between Shad and his attorney, Trask. (HH p. 8283). The attorney and Shad discussed the original Operating Agreement and language about redrafting it. (HH p. 82). Holly listened to Trask tell Shad that the original Operating Agreement was valid. (HH pp. 83-84)

RESPONSE: Undisputed to the extent that this was Hollys testimony.

143. The communication between Shad and Trask lost its "privilege" when Holly sent Gary and Gordon an email on March 29, 2022, which related her husband's attorney/client communications with Trask. (HH p. 79-86; HH Ex 1, p. HH 05). Holly's email to Gary and Gordon states in relevant part:

> I do have to tell you that every agreement Shadrach has sent to the lawyer. In her professional opinion, she is telling Shadrach that he has no protection from being kicked out of this partnership or being replaced. She is telling him that those documents are poorly structured and arent in his favor. I'm sharing this with you so that you may understand where some of his suspicions are coming from. You will need to decide if you believe [Trask] to be a snake that is whispering in his ear, or if she is right. . . .1 know that your (sic) all have good intentions but it is important to
> Shadrach to protect and secure what he believes to be a pan of his destiny. Fundamentally his attitude has been hard to deal with but I don't

think his intention is wrong or evil.

(HH Ex 1, p. HH 05).

RESPONSE: Undisputed to the extent that this was an email sent by Holly expressing her opinions.

144. Shad conceded that the original operating agreement provided an equal and even distribution of net proceeds and losses split evenly at 33 1/3 percent. (1SH p. 204).

RESPONSE: Undisputed.

145. On April 1, 2022, a company meeting was held. (HH pp. 63-67; HH Ex 1, p. HH01). Gary and Gordon attended. Shad did not. Holly was present in Shad's place and suggested they listen to a phone call from "Bruce of Consolidated Const." about a prospective undisclosed buyer "for the entire project." Id. Discussion was also held to consider street names which had been submitted by Shad and the following names were approved on Holly's motion: "El Shaddai, Emmanuel, Iatros, Yatsar, Yahweh, Magen, Miglol, & Abba." A motion was made by Holly that buyers would be asked to consider using V Rod rebar, and to consult with Shad to "learn the merits of V Rod." Id. "IF buyers choose not to use V Rod, they would be asked to sign a waiver of liability." This motion was unanimously approved.

Holly made another motion to approve a sale of 60 acres located at Cheyenne Boulevard, subject to negotiations with partners. This motion also unanimously carried. Id. A third motion was made by Holly which was approved unanimously "that any offer on the entire project from Bruce/Consolidated Construction include "provisions acceptable to Shad."

RESPONSE: Undisputed.

146. Holly initially testified that Shad didn't have an option to be an active member of the business and that "every time [Shad] would suggest something, they [Gary and Gordon] would either not reply to him or they would tell him no." However, when forced to admit that every motion she made on Shad's behalf at the April 1, 2022 meeting was approved, she backed off the suggestion. (HH pp. 66- 67).

RESPONSE: Undisputed to the extent that Holly's testimony speaks for itself and express her opinions. Dispute Defendants characterization that she backed off the suggestion.

147. As his personal finances and attention to a myriad of other projects distracted him, Shad's conduct and actions progressively worsened in spite of warnings from members. Emails he wrote reveal him to be unhinged and, at times, removed from the reality self-proclaiming that the project was his alone. In his email of April 4, 2022, titled "Perspectives suck" he scolded Gary and Gordon and raved of how he was being unappreciated and mistreated financially regarding a number of properties unrelated to the project. (HH Ex 1, p. HH 10). In particular, with regard to Alpha Omega, his state of mind is revealed when he wrote:

> **"This property will never be developed by you. This is meant for me to develop.** And time will clearly show your methods produce loss, not progress. You are an expert in losing real estate. I have done everything I can to bless and enrich your life, but you are just a realtor to the soul. Prove me wrong. I doubt it." (HH Ex 1, p. HH 10)(bold emphasis added).

Shown the "Perspectives suck" email at his deposition, Shad reluctantly admitted he was its author and that it was his "intention to communicate (his) thoughts at the time with regard to a number of different properties including the Alpha Omega. " (1 SH pp. 20-22).

RESPONSE: Disputed as to Defendants opinions and characterizations unsupported by the record. Shad explains in his testimony that his role was in development and this statement was made in reference to the promise that was made to him--that his role was in development. This is what he means when he says "it was meant" for him to develop. That was the agreement. He also explained that the statement "this property will never be developed by you" was in regards to Shad's belief that Gary and Gordon are in capable of developing at a profit. They simply don't know how to do it. Shad explains that his dad outsources everything and "when you hire everything out, your profits are out the door". Shad believes in doing as much in-house work as possible to save costs. Defendants are taking Shad's words out of context, implying that he thought the project was his alone. The knew that they all had important roles to play, his however was in overseeing the site development and he worked in that capacity, never compensated as promised, until the defendants decided to take it away.(1SH 21-23)

148. On April 8, 2022 another meeting of the company was held. Shad was not present. Holly was present and was approved as Shad's proxy. (HH Ex 1, p. HH 02). It was agreed unanimously that progress of the development would be reviewed on May 1, 2023. The minutes state: "If by that date, no acceptable progress has been made, the group will consult legal counsel to review all options available. It was agreed that Stephanie Trask would be a good candidate to legally represent and advise the group." Id. A version of the operating agreement drawn by Gary was presented for consideration which the group agreed to review. Amendments of sections were proposed and voted upon, all of which were subject to change by a majority vote. Additional items of discussion included street names, to which Shad was to "submit a list of proposed street names for each phase as it is developed. The minutes recorded that "[m]embers will vote on street names, with Shadrach given the

opportunity to submit names for approval." Id. Covenants for the property were briefly discussed and "[i]t was agreed that should be a topic for discussion at a later meeting. "

RESPONSE: Undisputed.

149. Minutes of the April 8, 2022, meeting were sent to the members for approval. (HH Ex 1, p. HH 04). Concerned that the minutes did not include a topic of previous language suggested by Gary, Holly wrote to make sure the topic of how parcels would be sold was not forgotten. Id. Holly wanted to make sure that a matter of unanimous agreement adopted at the meeting was an accurate statement and that it spoke to the intentions of all the partners, namely:

> *Although the Alpha Land Company, LLC, Operating Agreement allows various investments and operational activities, the primary function is to develop land purchased from RWMotel and Manner, LP, and Ridgewood Park, LP. To that extent, the overriding and most important function of this LLC is to guarantee that the net income from development goes in equal proportions to Gordon Howie, Shadrach Howie, Gary Howie, and/or their estates and beneficiaries. And that the marketing income from this development goes to Kelly Howie and/or his estate or beneficiaries. It is each partner's responsibility to ensure that this happens.*

(HH pp. 70-73; 77; HH Ex 1, pp. HH 02-03).

RESPONSE: Undisputed

150. The reason Holly made sure the above language was adopted in the company's minutes was as stated in her email of April 9, 2022: "I think by specifying the intent that includes the land, this will make it more specific and less suspicious. 't (HH Ex. 1, p. HH 04). Conspicuous by its absence is a reference to Shad's claims to a one-third ownership interest in the property or any of the other "material terms" he now suggests in his lawsuit which were orally promised.

RESPONSE: Undisputed as to Hollys statement "I think by specifying the intent that includes the land, this will make it more specific and less suspicious. 't (HH Ex. 1, p. HH 04). The remainder is disputed as it makes inferences and commentary not supported by the record..

151. Holly testified that she had told Gary and Gordon that Shad was "suspicious" of their actions as they worked to revise the operating agreement and that the above language, adopted in the April 8, 2022, meeting gave her more comfort and would be "more specific and less suspicious." (HH pp. 73-74) As Shad's proxy, Holly felt that "he would be okay and on board with those decisions and those things." (HH pp. 73-74). Holly confirmed that prior to the meeting, Holly had visited with Shad about the concepts. Holly testified as follows:

> Q: So you had visited with [Shad] about the fact that Alpha Land didn't own the 1,333 acres, that he didn't have a one-third interest in those, only that Alpha Land could buy the parcels from Gary's LPs, correct?
>
> A: Correct.
>
> Q: And one of the problems that I assume Shadrach was having was that there was no exclusive dealings set forth with any of [the] documents that said that Gary was obligated to do this for as long as he owned the 1,300 - 1,333 acres, right?
>
> A: Yes.

(HH p. 76).

RESPONSE: Undisputed to the extent that it is Holly's testimony and reflects her opinions.

152. Shad did not believe that Gary and Gordon could get the development completed and that it was meant for him to develop. (HH p. 87; ISH pp. 22-23). In spite of Gary and Gordon fronting all of the money for the purchase of the ground, Holly testified that "Shad felt like they were stealing his dream, stealing his idea, and kicking him out" . "that's the way he felt." (HH p. 88). This was, according to his wife, Shad's state of mind, even though he had not put any money into the project.

RESPONSE: Disputed as to Shad's statement that it was meant for him to develop. See previous response. Undisputed to the extent that it states Shad and Hollys testimony and opinions. Disputed as to the statement "even though he had not put any money into the project." As responded to previously.

153. Holly agreed that Shad's beliefs that Gary and Gordon were stealing his dream was not "rational" given the assistance that his father and uncle had provided to Shad. (HH pp. 88-

89). Holly agreed that when the company was in default, it was Gary who came up with the money personally to pay company expenses and ongoing interest and costs. (HH p. 89) Holly did not view that Gary or Gordon were stealing Shad's ideas or stealing something from Shad by that conduct. (HH p. 90). Holly agreed that it was Gary who funded Alpha Land to pay Shad's tax obligation to the IRS of $220,000 which was the consequence of his sacrificial lamb involvement in the 1031 exchange. (HH p. 92).

RESPONSE: Undisputed to the extent that Holly's testimony speaks for itself. She also testified that she didn't think Gary and Gordon fulfilled their promises to Shad. (HH P.261)

154. Shad's actions and conduct compromised Alpha Land. The conduct and detriment are detailed in Gary's Response to Interrogatory No. 71 in twenty-nine bullet points. (See Gary's Answers to Interrogatories, No. 50, pp. 30-34 of 72; No. 71, pp. 42-47 of '72). It was Shad's conduct which prompted the revisions to the original operating agreement by majority vote. Id.

RESPONSE: Denied. Defendant's have not provided any evidence that Shad did anything that caused the City to delay in approving the project.

155. On April 29, 2022, Shad communicated that he was again "broke" and needed more money. Shad proposed that Gary provide him with yet another loan. (See Gary's Answer to Request for Admission No. 37, page 55 of 72). Gary had previously funded Shad with the $150,000 personal loan (Construction Loan Agreement) two years previously as an impetus to construct homes at 508 and 512 W. Sunnydale. Not having been timely completed by Shad and given the negative financial returns, Gary nonetheless offered Shad another $50,000. (HH 04 30 24 depo p. 141). Shad immediately refused the offer on May 2, 2022 and said he was terminating all dealings with Gary. (Gary's Answer to Request for Admission 37, page 55 of 72; see also HH pp. 144-146).

RESPONSE: Undisputed that these are Gary's claims. Shad was loaned money to build the homes because that was the agreement and the funds loaned were not sufficient and promised walking money didn't come

156. Development delays were due to a myriad of causes and obstacles. Lots were not being sold in the first two years and the company was without sufficient funds to meet its obligations. (Gary's Answers to Interrogatories Nos. 70, 72).

RESPONSE: Undisputed. Alpha Land had the ability to capitalize using the land but was not, see previous responses

157. During the two years from the formation of Alpha Land Company and its agreement with Gary's LPs, expenses for engineering and infrastructure were required. These costs were able to be paid with Gary's financial assistance. (Gary's Answer Interrogatory Nos. 70, 72). The contract for deed had been refinanced with Gary and Gordon's personal guarantees providing a lower interest rate. Loans of $500,000 and $5,000,000 were secured through Bank West by the LPs with Gordon and Gary cosigning on notes which encumber the Tract 1 of the Alpha Omega Subdivision. (Gary's Answer to Interrogatory No. 48).

RESPONSE: Undisputed. This was done in breach of parties agreement.

158. In March of 2022, Banner Capital loaned the LPs $2,300,000 with a monthly payment of $76,704.48. Id. This "refi," along with application for grant funds and continued cooperation with Box Elder got things moving for the company; but still distributions of net profits did not pass to members until September 2, 2023 of $10,000 per member. (See, Gary Answer Interrogatory No. 74).

RESPONSE: Undisputed.

159. Gary explained his accurate understanding that an LLC is not able to make distributions if the company would not be able to pay its debts as they become due in the ordinary course of business. (See Gary's Answers to Interrogatories Nos. 83, 84, 85).

RESPONSE: Disputed. Alpha Land should have had the ability to meet its financial obligations had their agreement not been breached.

160. Minutes of the company meeting held April 26, 2022, record that members Gary and Gordon were present and Holly was approved as "official representative for Shad as partner of Alpha Land Co., LLC." (HH Ex 1, p. HH 11). A number of issues were presented including:

Shad's Spec House expenses, the January 14, 2020, Purchase Agreement between Gary's LPs and Alpha Land Co., Income Tax and allocation of expenditures, Street names, an updated operating agreement, progress on the project with Box Elder and a recent email from Shad's attorney.
(HH Ex 1, p. HH 11).

RESPONSE: Undisputed.

161. At the April 26, 2022, company meeting, both the updated operating agreement and the purchase agreement were copied to all in attendance. The minutes reflect that as the

purchase agreement was reviewed, all members recognized that Alpha Land Co. was in default of that agreement and that Gary had agreed to personally contribute several hundred thousand dollars to pay costs. Holly moved that the expenses for that past year be allocated to Gary for tax purposes per CPA Postma's agreement that the process was acceptable. Id. (The same treatment Shad had received in 2020). Also discussed was information received by members that Shadrach had discussed blocking a potential sale of 60 acres, contrary to the unanimous approval of that sale at a company meeting on April 16, 2022. (HH Ex 1, p. HH 12). Likewise, the information suggested that Shadrach was "stopping or killing" the Cheyenne Blvd. TIF [1] with the City actions which as recorded "could be very detrimental to ongoing progress with Box Elder and others instrumental to our success." A year before, on April 8, 2022, Shad had agreed to allow Gary and Gordon until May 1, 2023 to succeed with negotiations with Box Elder. His conduct in the minutes of April 26, 2022, was characterized in the minutes as "completely inappropriate and unacceptable. " Further that "[i]t is a serious breach of fiduciary responsibility to the Alpha Land partnership and clear violation of the General Standards of Conduct of Alpha Land Co. (Section 11 of operating agreement). Id. The minutes further reflect that the majority of meeting's time was devoted to the actions of Shad and "how to appropriately deal with them" and that important issues would need to be tabled to a later meeting. (HH Ex 1, p. HH 12).

RESPONSE: Undisputed to the extent that the meeting minutes speak for themselves and they reflect opinions of the members.

162. Gary and Gordon continued to work on amending the original operating agreement following Attorney's Hurd's attempts. Gary drafted revisions and exchanged it among the members including Shad throughout April of 2022.

RESPONSE: Undisputed.

163. The minutes of Alpha Land Company confirm that notice was sent to the company members that a May 2, 2022, meeting would be called to vote upon the amended and restated Operating Agreement. (HH Ex 1, p. HH 15). The meeting did not get called to order until 7:40 p.m. "after waiting to give all members every opportunity to arrive." The minutes reflect "[t]he official purpose of the meeting was to consider proposals for amended operating agreements presented by members. All members were invited to submit proposals." Id. After an update of progress of the company made in fourteen bullet points, the only proposal offered was the "Amended and Restated Operating Agreement" which was included to the members in the formal notice of the meeting. Id. After roll call, the vote was recorded and the motion to approve the new operating agreement passed by majority.

RESPONSE: Undisputed to the extent that the meeting minutes speak for themselves and they reflect opinions of the members.

164. Neither Shad nor Holly attended the May 2, 2022, meeting. Holly testified: "[w]e didn't go because we knew—like basically Shad felt like he-he didn 't have a voice anymore; that they had already made up their mind on what they were going to do, and they were going to do what they wanted to do no matter what." (HH p. 96). According to Holly, Shad has harbored this belief to the present time and testified that she did not think he could remain in business with them with that belief and attitude. (HH p. 96-97).

RESPONSE: Disputed, Holly answered yes the to the question, do you think its hard for him to remain in business with them, not that he couldn't. (HH p. 96-97).

165. In addition to the $150,000 loaned to Shad by Gary Howie, Alpha Land Company, LLC advanced $30,704.84 following its formation to Shad to complete construction work on the project. (HH pp. 170-175; HH Ex l, pp. 054-55).

RESPONSE: Undisputed.

166. The dates, check numbers and sums totaling $30,704.84 advanced to Shad were issued upon the checking account of Alpha Land Company, LLC and were presented for discussion at the April 1 1, 2023 company meeting and later identified in Holly' s testimony (HH pp. 171-175; HH Ex. 1, pp. 57, 59-62) as follows:

January 20, 2022	Check #1115	$ 710.00 (loan)
January 20, 2022	Check #1116	$ 1,274.83 (Pella Windows)
January 20, 2022	Check #1117	$ 2,455.35 (Cat Equip)
January 24, 2022	Check #1118	$ 582.50 (Crane)
January 24, 2022	Check #1119	$ 21.81 (City of B.E. utilities)
January 25, 2022	Check #1120	$ 300.00 (Supplies/Lowes)
January 26, 2022	Check #1121	$ 366.05 (Sires Trucking)
February 10, 2022	Check 1123	$22,816.1 1 (Spec 2 Loan)
February 17, 2022	Check 1125	$ 2,200.00 (Spec 2 loan)

(See also, Defendants' Counterclaim, 10).

RESPONSE: Undisputed.

167. Holly had asked Gary to provide "a spreadsheet of what Shadrach's debt to you and Alpha Land is and what payment has been credited." (HH p. 171; HH Ex 1, p. 57). Gary's responsive email outlined the list showing the itemized checks (as set out above) along with the amounts, check number which totaled $30,704.84. (HH Ex 1, p. 75).

RESPONSE: Undisputed.

168. In spite of notice and demand requesting repayment at the company meeting held on April 1 1, 2023, and same having been made part and parcel of Defendants' counterclaim, Shad admitted in his deposition that he has not repaid Alpha Land Company, LLC any portion of the monies loaned, the total of which is the amount of $30,704.84. (2SH pp. 191-192; 193).

RESPONSE: Disputed. Shad and Holly were led to believe that these funds would be paid back in the same manner as the loan for $150,000. G-3331

169. Likewise, Holly admitted that the $30,704.84 is owed to the company, and testified: "It's owed to them" . . . "[t]here is no dispute." (HH pp. 175).

RESPONSE: Disputed. She above response.

170. Shad agreed "[the $30,704.84] was simply a loan." Asking and answering his own question, Shad revealed: "Do I owe it? Yes, I owe it." (2SH pp. 191-192; 193).

RESPONSE: Disputed. See responses to 168 and 169

171. When asked why he had not yet paid the money back, his answer was "because I'm in litigation with members of Alpha Land . . . and further explained that "the counterclaim is laughable, in my opinion." (2SH p. 192). "It's laughable to the level that they have extorted and robbed me to come back with something petty like that." (2SH p. 192).

RESPONSE: Undisputed to the extent that it represents a portion of Shad's testimony.

172. Pressed for a time frame when the $30,704.84 would be paid, Shad made the disclosure that it would have to take a judgment from a court to pay the money back "because right now I do not have the ability to pay that right now." (2SH p. 194)

RESPONSE: Undisputed to the extent that it represents a portion of Shad's testimony.

173. Shad demonstrated his outward hostility to the Box Elder staff when he attended a meeting of the planning and zoning group on March 23, 2023, and expressed concerns erroneously representing himself as having a "one third ownership" in the Alpha Land project. (2SH pp. 211-215). Telling the staff that the City used terrible planning regarding a secondary road that Shad deemed necessary and that there was not a "qualified city planner" in the process, Shad's comments included:

> "My powder is dry, but it's a big cannon.',
>
> He was "[a]bout ready to light the fuse" with regard to traffic concerns.
>
> "I don't want to be the guy to litigate you, but I'm giving you fair warning: If you guys don't do it, you will be forced to do it, and it might be yours truly. I've held back as long as I am willing to hold back.,,

(2SH p. 212).

Shad agreed that his comments to the City were made at a time when the company needed to cooperate with the City. Id. Shad agreed that his uncle had to write an apology for Shad's conduct. Unremorseful, he confessed: "What it did was exactly what I knew it would do, and it would get a response out of my uncle. It got exactly what I needed. (2SH p. 213).

RESPONSE: Undisputed to the extent it represents a portion of Shad's testimony but does not give context for why those statements were made and this statement was made after the City had approved development. Shad agreed that his uncle wrote an apology not that he agreed he needed to.

174. Shad testified that got the "clarification" he "needed" from his threats to the City staff, namely, that the majority of members were not going to force the City's hand. (2SH p. 214). To this day, Shad remains defiant and ready to sue the City. As late as his June 28, 2024, deposition, Shad said: "I would be happy to take Box Elder on" with the right "group of attorneys" stating: "[y]ou would be in a position to force Box Elder to do what they're required to do." In spite of the company having worked in cooperation with the City of Box Elder, Shad remains certain that Box Elder is still involved with the "pay to play" game of extortion he opines to exist. Id..

RESPONSE: Disputed to the term "threats". Undisputed that Shad believes Box Elder engaged in unfair practices and should be held accountable but he has not taken any such action

175. On April 7, 2022, Shadrach's attorney, Stephanie Trask, sent an email to Gary, Shadrach and Hollie Howie writing: "I do appreciate your acknowledgement (in other correspondence) of the many uncompensated contributions that Shad has made for the benefit of the partners and the partnership; Shad has advised me that his contributions were meant to be **gestures of gratitude**, and commitment to the family venture, and **he does not wish to accept compensation.**" (SH Ex. 13, p.G-0159). Trask had been asked to assist in reviewing and proposing amendments to the company's operating agreement. Review of the correspondence confirms that Trask was trying her best to mediate the disputes between Shad and the members of the company. Yet, through the words of his own attorney, Shadrach clearly, decisively and unequivocally expressed he wanted no compensation for the work and materials.

RESPONSE: Undisputed to the extent the email speaks for itself and that this email was part of negotiations and mediation efforts on behalf of Shad

176. To confirm the extent of damages claimed in this lawsuit, Defendant's Request for Production (2SH Ex 14) asked that Shad provide documents which established his claim for personal labor and cost of material. (2SH p. 155-166). A list was produced in discovery which totaled the sum of S648,000 which included $299,855 of funds "due at closing" and other materials and labor costs. In response to questions about whether these monies were being claimed as his damages, Shad testified: "I'm not claiming as damages." (2SH p. 161). Shad was then asked if any of the sums listed were due him for his role in development and he testified that "all of them are not." (2SH p. 162). For further clarification defense counsel asked the following questions and received the recorded testimony:

> Q: So these are values of things that you did, but they are not claims that you're making for damages in the case, is that right?
> A: That is fair.

(2SH p. 163).

RESPONSE: Disputed. Misrepresents Shad's testimony. It is unclear what values Shad was referring to when he said that is far.

177. Geotechnical engineering reports generated on August 12, 2022, required engineered fill for new structures on the property (SH Ex 11, p. 069). When this information was released (SH Ex 11, p. 179), Shad's early announced plans to buy 1.5 million bars of V-rod rebar from his Canadian source and mandating their use on the Alpha Omega property were in jeopardy. (2SH p. 95; See recommendations of American Engineering Testing, Inc., (AE T) by Reports dated 11 25 19 at SH Ex 11, pp. 16-18 and 08/12/22 at SH Ex 11, pp. 69-71). During his testimony, Shad admitted that there was nothing in the geotechnical report with which he disagreed. (2SH p. 96). Claiming the AET report had nothing to do with monolithic slabs on the homes he had built at 508 and 512 Sunnydale, Shad wanted to move on to another subject during his deposition. (2SH p. 97). Of course, the project contemplated more than just two lots and homes rather thousands of lots.

RESPONSE: Disputed that Shad was in jeopardy with Vrod. This nothing in the evidence to suggest that. The AET reports did not prevent the use of noncorrosive rebar.

178. The documents produced in discovery show that upon release of the AET report, Shad was vehemently disagreeing with the recommendations of the geotechnical engineers representing that his "value engineering" would solve all issues with subsurface moisture and settling. (See SH Ex. 11, pp. 167, 169-177); Gary's Answers to Interrogatory Nos. 5, 6, pp. 7-13 of 72). Shad attempted to have Mike Albertson, a civil engineer bless the use of V-rod and ignore the engineered fill requirements regarding 129 lots that were ready in May of 2023 for sale. (SH Ex 11, p. 182). Albertson was unwilling to provide an opinion to Shad regarding geotechnical recommendations as it was outside the scope of his expertise and he was not wanting to take the role of mediator given the disputes he was seeing between Gary and Shad. (SH Ex 11, p. 182)

RESPONSE: Undisputed that Shad disagreed with the fill requirements but the report does not prevent the use of rebar so long as it meets the requirements of the report.

179. Alpha Land Company had a number of reservations about Shad's demand mandating V-rod in covenants. (Gary's Answers to Interrogatory Nos. 5, 6, pp. 7-13 of 72). Risks were noted in company minutes of a meeting held on June 8, 2022. (SH Ex 1 1, p. 168). Shad was communicating that Gary and Gordon had "sold out" to the company's experts. From the beginning, Shad wanted to mandate that engineered fill not be required (2SH p. 113) By August of 2022, the geotechnical information had been provided and the company felt Shad s suggestions were reckless. If followed, failure to follow recommendations and imposing engineered fill requirements could expose the company to liability in the future. (Gary's Answer Interrogatory No. 71, p. 42 of 72). Yet, Shad still insisted that V-rod be required. (See Gary's Response to Request for Admission No. 8). Shad never provided any geotechnical report to confirm his methods of using non-corrosive rebar would be

appropriate to solve the engineered fill issues in the Alpha Omega subdivision. (Gary's Answer to Interrogatory Nos. 5, 6, pp. 8-12, and 13-14 of72).

RESPONSE: See above response.

180. Shad did not accept the advice the company's engineers offered regarding engineered fill requirements. (Gary's Answer to Interrogatory Nos. 5 & 6). Shad had pressed the company for a covenant mandating the V-rod because he believed it would resolve the need to require expensive engineered fill in spite of what the engineers said. Id.

RESPONSE: Undisputed that he disagrees with the fill requirement but the report does not prevent rebar.

181. The bottom line was that while the non-corrosive rebar could be used (and still can be used), the necessity for engineered fill remains a requirement on all homes build on Alpha Omega. (Gary's Answers Interrogatory Nos. 5 & 6). Undoubtedly, Shad would have benefited financially from sales of his projected 1.5 million rods of V-rod and he admittedly was motivated to profit from what might happen in the future. (2SH pp. 107-113; 124-127; See also, Gary's Answer to Interrogatory No. 91). However, Shad's anticipated source of profit from sales of the V-rod product were threatened when the company elected not to mandate any such covenant and the "no engineered fill" he had promoted in May of 2019. Id. The use of non-corrosive re-bar by any contractor has never been prohibited on the project; it simply was never agreed by the company that it should be mandated for the reasons articulated. (Gary's Answers to Interrogatory No. 6, p. 13 of 72). This was the business judgment of the majority clearly supported by professional input.

RESPONSE: Disputed to the extent that it was a business judgment rule. The promise made was that VRd would be used. Holly testified

"the material term to my husband was to use VROD rebar. Whether they have to dig 8 feet, 20 feet, four feet, whether you have to fill it with Jello, rock, you know, so I just want to reiterate that point." (HH p.66)

182. Shad agrees he personally owes Gordon for the V-rod: "I agree I owe the money" although it was not part of the present lawsuit. (2SH pp. 134-135). He testified: "I can't wait to pay him off and never see him again." (2SH p. 131). Holly testified that the balance owed Gordon for the money loaned to Shad for the V-rod was $69,738.41. (HH pp. 125-126, HH Ex 2).

RESPONSE: Undisputed.

183. It was the business judgment that a covenant requiring non-corrosive rebar not be adopted. (Gary' Answers to Interrogatory Nos. 5 & 6). Ultimately, no covenants ever were finally adopted as matters changed. (2SH pp. 115). Like a contract for the sale of real estate, Shad knew that covenants had to be in writing, "[t]here is no way around that. (2SH p. 116)

RESPONSE: Disputed that it was a business judgment rule. See above. Undisputed that no covenants were implemented.

184. Shad was asked about his alternative claim for rescission in the lawsuit. While trying to pin Shad down if a notice to rescind was ever given in advance of the lawsuit, Shad testified: "I'm not asking for a monetary sum." (3SH p. 29). Shad elected rescission. Shad confirmed that which he had confirmed earlier under oath that he is not making a claim for damages. (3SH p. 29; 2SH pp. 161-162).

RESPONSE: Disputed as a complete misrepresentation of the record. Shad said many times to refer to the complaint, he didn't know what the court would do, it's a mess. Shad has not elected recission as his remedy as set forth in Plaintiff's brief.

185. On December 7, 2022, Shad sent a text which stated: "Please be advised I am placing liens on every parcel of real estate in Alpha Omega tomorrow to secure my one-third interest." (2SH pp. 78-79; HH p. 176, HH Ex 1, p. 65). Holly agreed that this was a threat by Shad. (HH p. 177). Shad wanted his lawyer to litigate, but she was not prepared or qualified to litigate. (2SH p. 80). Shad admitted he "was pretty sore" and was using the threat of placing liens as "a way to bring them to the table. . ." (2SH p. 80). At this point in his testimony, he said the text was sent to Gary who had blackmailed" him on 512 Sunnydale. Shad viewed that when he was unable to pay Gary the $150,000 two years after he had borrowed under the April 6, 2020 Construction Loan Agreement, that Gary's actions to obtain the assignment ("Exhibit to Defendants' Answer to V.C., "Assignment of Interest") was "blackmail" and that he was "blackmailed" into signing both documents. (2SH pp. 80-90). Yet, Shad could not account for his use of the $150,000 when pressed; but admitted "I burned up that 150 very quickly." (2SH pp. 91, 93-94). Shad could not explain where the money went or why it took 11 months to finish the home just that he was "dissatisfied with the direction we were going" and ran out of money. (2SH pp. 91, 93-94)

RESPONSE: Undisputed that Shad wanted to place liens on the property. Undisputed that $150,000 didn't go far to build the two homes and it took longer to build them as expected.

186. After all that Shad had put the company through, Shad testified that it was his father and uncle who were both "corrupt." In Shad's view by changing the operating agreement to include provisions for attorney fees and costs to the prevailing party he was being bullied. (Answer Exhibit #5, Amended and Restated Operating Agreement, 17) (2SH pp. 76-77). Shad claims he was unable to appreciate why Kelly would want the operating agreement changed. Jd. Of course, it was Kelly, the experienced realtor, who from the beginning was non-ownership member and held a financial interest and would be "paid per listing/marketing on individual properties." ("Exhibit 4" to Defendants' Answer to V.C., Original Operating Agreement, "5). Shad viewed Kelly as wicked and hypocritical. (2SH p. 197). In the Amended Operating Agreement, marketing income from the development would go to Kelly and/or his estate or beneficiaries." ("Exhibit #5" to Defendants' Answer to V.C., "Amended and Restated Operating Agreement", '13). Shad's conduct threatened that which had been promised Kelly and created internal strife in the company. (2SH pp. 196-197).

RESPONSE: Undisputed that he called his father corrupt for all he had put Shad through. Disputed as Kelly dissociated from the LLC so he wouldn't have an interest in the amendments being made.

187. After Shad commenced the lawsuit, on November 20, 2023, he sent a draft of a *lis pendens* to Kelly Howie's partners in Unimax, Tyler Tribby and Cody Work as well as James Postma and Greg Wick. (HH pp. 177-178; SH Ex. 21; 2SH pp. 65-67) According to Holly, Shad intended to let the partners know there was a lawsuit filed. (d. But Holly, a realtor, agreed that a lis pendens encumbers title and that "it could potentially tie up future sales." (HH p. 179). Shad acknowledged that he had received correspondence from Defendants counsel which warmed against filing the document, which was rejected by the register of deeds, but nonetheless was sent by Shad. (2SH pp. 68-69). (See Counsel's letter of February 15, 2024, to Attorney Peterson, attached to Affidavit of John Stanton Dorsey).

RESPONSE: Undisputed that Shad filed a lis pendens which was proper given the claims in his lawsuit. Undisputed that the filing was rejected due to a discrepancy in the legal description. Undisputed that Shad decided not to refile the lis pendens after defendants threatened to challenge it and Shad wanted to refrain from further litigation and focus on the lawsuit at hand. The letter he sent was during a time when he believed the lis pendens was being filed.

188. When asked about the reasons for the attempted lis pendens filing, Shad still threatened to involve Kelly and UniMax in litigation. (2SH p. 68). Shad suggested that he still might

file the lis pendens stating: "I don't know if I'm doing it or not. " Then, he threatened: "I'm hopeful that I will still see some clarity in the direction you are taking this, and I will clobber you from whatever direction you decide it to." (2SH p. 71). Then Shad offered that "my counsel advised me that that was a bad move" and that he did not advise the folks he sent the draft lis pendens to that it had been rejected for filing. (2HS, p. 71).

RESPONSE: Undisputed

189. Shad viewed his obvious unadvised and legally misplaced attempt to tie up the property owned by the LPs in litigation in which the LPs were not a party as merely "shining a light" on his ease. (2SH p. 77). Of course the lis pendens was rejected by the register of deeds and Shad knew it when he sent the draft to UniMax, Postma and Wick. Alpha Land Company, LLC did not own the land, Gary's LPs did.

RESPONSE: Disputed. It was not an illegal attempt to tie up the property and his letter was sent prior to knowing of it not being filed.

190. In May of 2023, Alpha Land Company, LLC entered into a purchase agreement with UniMax, LLC for $8,012,000 in exchange for 129 lots Alpha Land Company agreed to plat. (See Amended Purchase Agreement 7 3 23, G2528-G2537 attached to counsel's Affidavit). Of the 129 lots, UniMax has paid Alpha Land Company, LLC for 10 lots at S45,000/lot and received title to Lots 8-13 and Lots 4-7 of Block 4 of Alpha Omega subdivision. (Gary's Answer to Interrogatory Nos. 100. 101, 102, pp. 58-59 of 72). UniMax is building homes on the lots and intends to build on all lots purchased. (Gary's Answer to Interrogatory Nos. 103, 104). The agreement contemplates that after the first 10 lots are closed, every six months and additional 20 lots would be sold at a scheduled price.

RESPONSE: Undisputed documents speak for themselves. Unimax is a company owned in part by Kelly Howie.

191. Shad viewed the deal with Alpha Land and UniMax as a "clown show" a "total joke," and "a sham." (2SH p. 75) He acknowledged that he understood the deal was an $8 million agreement; but downplayed it as "relatively a break-even proposition at best . . based on the way they've done it." (2SH p. 76). Again, when pressed about the particulars of the deal and why he took the position he did, Shad retreated saying: "I have tried to quit thinking about this case. I just want to go to court." (2SH p. 75).

RESPONSE: Undisputed to the extent its Shad's testimony.

192. As he did throughout the development stages, Shad continued to profess at his deposition that he could save the company money, but did not want to divulge and "give away" his "secrets." (2SH p. 104-105). He testified: "i don't want anything to do with them, and they are not getting anything else out of me. I've had enough." (2SH p. 105). Shad agreed that his statements followed a pattern of conduct—promising recommendations and solutions conditioned upon getting things the way he wanted. (2SH p. 105). This description of his modus operandi, by his own admission was "absolutely correct." (2SH p. 105).

RESPONSE: Undisputed that these were statements by Shad at his deposition

193. Saying he was not "here to crucify my dad' but providing how a deal worked with his father, Shad's vitriol surfaced repeatedly in his deposition. (2SH p. 134). Gordon, who provides ministry at his church, Shad claimed he had been attacked by Gordon from the pulpit in a televised program at his church (Faith Temple) (2SH p. 132-134). Shad testified: "l can't stand to listen to his hypocrisy." (2SH p, 133). Shad professed: "I've have built everything this man can see or touch free simply because I can. I've done everything for Gordon Howie and I'm balked at." (SH p. 133). Shad continued: "And I'm ridiculed, and then I'm put on the chopping block. The man has no shame." (2SH p. 133)

RESPONSE: Undisputed that these were statements by Shad at his deposition

194. With regard to rescission as a remedy, Shad was asked to assume that if everything was moved back to a time before the land was purchased, how would current development continue? His response: "l would have to speculate on that. That's my objective is to—is to rescind this mess that they've created in some capacity." (2SH p. 72).

RESPONSE: Disputed as a misrepresentation of the record. Shad said many times to refer to the complaint, he didn't know what the court would do, it's a mess. Shad has not elected recission as his remedy as set forth in Plaintiff's brief and represented in his full testimony.

Dated this 2nd day of December, 2024.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true and correct copy of the above **PLAINTIFF'S RESPONSES TO DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS** was served in the following manner and on the following person, by placing the same in the service indicated, postage prepaid as applicable, addressed as follows:

Odyssey File and Serve
John Dorsey
Attorney for Defendants
john.dorsey@amatteroflaw.com

Dated this 2nd day of December, 2024.

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STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS.	
COUNTY OF PENNINGTON	)	SEVENTH JUDICIAL CIRCUIT

SHADRACH HOWIE, and ALPHA LAND COMPANY, LLC, a South Dakota limited liability company, Plaintiffs, vs. GARY HOWIE, and GORDON HOWIE, Defendants.	)	51CIV23-001344 **PLAINTIFF'S STATEMENT OF DISPUTED MATERIAL FACTS**

COMES NOW Plaintiff by and through his attorney of record and hereby submits this Statement of Disputed Material Facts in response to Defendant's Partial Motion for Summary Judgment.

References to the record in are identified below and in Plaintiff's supporting brief as follows:

1. Reference to the Plaintiff's Verified Complaint is identified as "VC" followed by the numbered paragraph. (VC #___)

2. Reference to Defendants' Answer to the Complaint is identified as "Answer" followed by the numbered paragraph. (Answer #__).

3. Reference to the depositions of Shad Howie "SH" and Holly Howie "HH" and followed by the page # (HH p.__). Shad's testimony taken on 6/27/2024 is referenced as "SH1" followed by the page number (SH1 p.___); Shad's testimony on 6/7/2014 is referenced as "SH2" followed by the page number (SH2 p.____); and Shad's testimony on 7/12/2024 is referenced "SH3" followed by the page number (SH3 p. ____).

4. Deposition Exhibits are referenced by the deponent's initial, followed by the Exhibit number and page ("SH Ex___,p.____).

5. Defendants' Answers to Interrogatories are referred to as "Garys" then either "A" for admission or "I" for interrogatory followed by the paragraph # and page number. (Gary's, A#___, p.____)

6. Defendants' documents produced in discovery are referred to as, "G" followed by the page number and Plaintiff's documents produced in discovery are referred to as "PL" followed by the page number.

7. Plaintiff's exhibits are referred to as "P Exhibit" followed by the page number.

8. Affidavit of James Postma is referred to "Postma Affidavit"

DISPUTED MATERIAL FACTS

1. Shadrach Howie ("Shad") is a general contractor in Rapid City, South Dakota. Shad has specialized mainly in residential development since 2005 (VC #5). Shad lives in Rapid City with his wife Holly Howie ("Holly") and their four children. Holly is a real estate agent (HH p.14).

2. Gordon Howie ("Gordon") is Shad's father. Gordon held a real estate broker's license but it is no longer active and he currently ranches (Answer #5).

3. Gordon's brother, Gary Howie ("Gary") moved back to South Dakota after retiring as a mobile home park owner and manager in Virginia. Gary and his wife have since purchased a ranch in New Underwood, South Dakota. (SUMF #3).

4. Gary, Gordon and Shad are collectively referred to herein as the "Parties" or the "Partners".

5. Kelly Howie ("Kelly") is Shad's half-brother and Gordon's son. Kelly is also real estate agent in Rapid City. (SUMF #1).

6. In early 2019, Shad was looking for a new property to develop. He came across a promising 121.6-acre property in Box Elder, South Dakota (the "Sullivan Property"). The Sullivan Property was listed for sale at approx. $6,600.00 per acre (1SHp.58, VC #6-7).

7. Initially, Shad thought about developing 3 to 15-acre sites (1SH p.58). Shad contacted the Sullivan's realtor, Dave Olson to discuss a potential sale. The Sullivans wanted to know more information about Shad—was he a family man, what was his vision for the property, etc. *Id.* After researching the property and discussing the sale with Olson and the Sullivan's, Shad offered a purchase price of $3,500.00 per acre (nearly half the listing price) which the Sullivans were agreeable to. *Id.*

8. Shad then turned his attention to researching the property's feasibility. (1SH p.58). Shad determined that a secondary access point would be necessary for development and he reached out to William Gikling ("Gikling") who owned the adjoining three properties (he owned one parcel with a partner in GLM Land Corp and two parcels with the Gikling Family LP) (VC #9-13, 1SH p.58-59).

9. Shad discussed with Gikling the possibility of buying his adjoining properties, totally approx. 1,200-acres, that were not listed for sale (the "Gikling Property"). *Id.* It took some effort on Shad's part, but Gikling eventually agreed to sell his properties to Shad. Shad initially offered Gikling a price of $2,200.00 an acre if it was a cash sale. (1SH p.59) Shad also discussed the possibility of purchasing the property on a contract for deed, either in whole or in part. *Id.* Gikling was open to cash a offer for the whole property or carrying some of the property on a contract for deed. Shad's main objective was to get the sale locked up and make it work, no matter how the purchase was structured. *Id.*

10. In doing his due diligence, Shad met with the City of Box Elder (the "City") a few times prior to purchasing the property (1SH p.66). In the first meeting, Shad presented the City with a master plan he had developed with engineer Kill McNaboe. *Id.* The City was very supportive of the potential development proposed by Shad, stating, "We really need this Shadrach" (1SH p.68)

11. Kristi Vetri, the City's attorney, mentioned that the City had been interested in buying the Sullivan Property. (1SHp.66).

12. Shad had a vision for the property that he believed was divinely inspired. (HH p. 20). He believed that God blessed him with an amazing opportunity and in tribute to God, he named the development Alpha-Omega. His vision was to create a development serving Ellsworth Air Force base consisting of 3,000 single and multi-family homes. (VC #20). In honor of God, it was very important to Shad that all street names be names or characteristics of God, that the highest construction standards be mandated, and the development cater directly to Veterans with discount incentives. *Id.*

13. Shad was confident in the development's potential especially with the impeding expansion of the air force base. (VC #24; 1SH p214).

14. The Sullivan Property and the Gikling Properties combined would open access from Elk Vale Road to Radar Hill Road (from East to West) and from Reservoir Road to West Gate and interstate I-90 (from North to South). (VC #25) There was potential for utilities on three sides of the property with a TIFF water line already in the ground across the Property. (VC #26).

15. Being satisfied with the development's feasibility, Shad moved onto the next stage—finding a trustworthy investor willing to partner with him in creating his vision of the Alpha-Omega Development (hereinafter referred to also as "the development" and/or "the project") (VC#21-24).

16. Shad first approached his longtime business partner, Donahue Williamson, and his brother Donovan Williamson with the investment opportunity. (VC #27, 1SH p.47, 59; 228).

17. Mr. Williamson was eager and on board to invest. He had the borrowing power necessary and he recognized the financial potential of the project. (VC #28, 1SH p.228-229). Shad testified that Donahue told him to "Just get it locked in. Just make the deal happen". Donahue told him "whatever you need, Shadrach, I'm here for you, and we can write a check tomorrow, but get it locked up". (1SH p.228)

18. Naturally, Shad told his father Gordon about his new and exciting development opportunity. Gordon and Shad had a close relationship. They were neighbors and talked everyday. (HH p.192; VC #29; Answer #14). They also have a long history of working together (Answer #16).

19. Gordon later told his brother Gary about the land purchase Shad was putting together. This occurred during a phone call Gordon had with Gary about the potential sale of his mobile home park in Virgina. (Gary's A, I#2 p.6). At the time, Gary was looking for a 1031 investment property and Gary expressed an interest in the deal Shad was putting together. Gary thought it could be a great option if it could satisfy the requirements of his 1031 exchange. (Answer #15).

20. In the Spring of 2019, Gary, Gordon, and Shad met to discuss the possibility of the three of them being partners in the purchase and development of the property and Gary told Shad he would be buying the property as part of a 1031 exchange. (Gary's A, I#4 p.7).

21. Shad already had a partner wanting to invest but given Gary and Gordon's interest in the property, Shad wanted to explore the option of partnering with his family. (VC #32, 1SH 57-58; 229).

22. If they could agree on terms satisfactory to Shad, he was willing to forego his partnership opportunity with Donahue and partner with Gary and Gordon instead. (VC #32; 1SH 228-229; 47; 58)

23. Gary, Gordon and Shad first met to discuss and agree on the terms of their partnership at what has been referred to as the "initial meeting" and it took place at the Flying J Truck Stop in Rapid City. (1SH p.45).

24. During the parties' initial meeting Shad claims they all agreed to be equal partners in an entity that would purchase, own and develop the property with interests held in joint tenancy with a right of survivorship, and each member would contribute to the project in his area of expertise. (VC #33).

25. Over the next several months, the parties continued to negotiate and solidify the remaining details of the agreement. (VC #34).

26. According to Shad, Gary and Gordon were "wooing" him and trying to persuade him to "go with them versus anybody else". (1SH p.58).

27. It was during this time that Shad claims Gary and Gordon made several promises to him regarding the project, including his role in the project and the ways he would profit from the

project. It was these promises and those made during the parties' initial meeting that induced Shad to enter into a partnership agreement with Gary and Gordon. (VC #35).

28. These promises included: Shad would have a key role in site development and development oversight and that he would be paid for the work he did for the partnership; that the partners would implement a noncorrosive rebar covenant; that Shad would have the opportunity to build as many houses and commercial buildings as he wanted and their development company would finance his builds; that he could create marketable listings; that they would all be able to use and benefit from the raw undeveloped land; they would get "walking money" early on in the project to help with their personal finances; and that the development would honor God by naming all streets after characteristics or names of God. (VC #33-50)

29. These promises were material to Shad. Gary and Gordon led Shad to believe that the partnership would be a "sweet deal" for him (VC #33-35; 1SH 228).

30. The parties' agreed to have defined roles in the Project and Shad's role was in site development and development oversight. (1SH p.23)(VC#40).

31. It was also Holly's understanding that Shad would be heavily involved in the development of the project and that he would be paid for the work he did. (HH p.257-258).

32. Shad was also promised that he would have the opportunity to build as many homes and commercial buildings as he wanted. He never expected to be the only builder, only that he would be given the opportunity to build homes as he pleased and that his construction would be financed by the parties' development company and lots fronted to him (1SH p.256)(VC #41).

33. Gary and Gordon knew that Shad was and is an out-of-pocket builder meaning he doesn't get conventional loans to build. Typically, the lots are fronted to him and Shad uses his own money to build. He also works with contractors with whom he has a good relationship and who are willing to carry him until the build is complete. Once the lot sells, the lot is paid for and the contractors that carried him during the construction are paid. (HH p.134-135).

34. Shad testified at his deposition "I was told by my partners that Alpha Land was going to finance the construction. . . Gary oohed and awed about townhomes and apartments, and possibility building to own, and buying equipment, and 'boy we're just going to make this thing so sweet for you' So that's what I was promised". (1SH p. 256).

35. Consistent with their agreement, Shad was loaned $150,000.00 to build the first home in the development and the lot was fronted to him. The loan was made to Shad on April 6, 2020, the same day Gary's LPs purchased the property. (DSUMF)

36. Evidence provides that an oral agreement existed between the parties outside of any written contract and they were following the terms of this agreement.

37. Another promise made to Shad was that the development would require the use of non-corrosive rebar throughout the development and that they would implement a non-corrosive rebar covenant to enforce this. (VC #42).

38. Gary admits that in their initial discussions with Shad, they discussed the use of non-corrosive rebar in the development and he admits that Shad was "intent on using the product" and insisted that non-corrosive rebar, specifically V-ROD, be required is some or all construction within the development." (Gary's A, I#5, p.8 and A#8 p.12).

39. Shad told Gary and Gordon he had an exclusive contract with a V-Rod company in Canada so Gary and Gordon knew Shad intended to personally benefit from the required use of rebar (Gary's Answer I 5 p8-9)

40. Gary and Gordon knew that requiring the use of non-corrosive rebar throughout the development was important to Shad and he was intent on using it. (Gary's A, I#5, p.8 and A#8 p.12).

41. Consistent with their agreement, Shad began working hard gathering information needed on VRod, communicating with his supplier, working with engineers, and communicating with his partners on drafting covenants. (see citations below).

42. On March 31, 2019, Shad sent his partners and email entitled "Covenants" and in it he provides suggested terms for a non-corrosive rebar covenant. (PL000688)

43. On April 25, 2019, Shad communicated with Albert Engineering and asked for input on proposed covenants concerning composite re bar. (Gary's Answer I 5 p8-9).

44. On April 30, 2019, Shad communicated with his Canadian V-Rod company and informed them that "we anticipate implementing over 1,500,000 V Rod #4 bar in this development alone." (Gary's Answer I 5 p8-9).

45. On May 6, 2019, Shad emailed Gary and Gordon links to "you tube" videos and his website with what he described as proposed covenants for future lots. (Gary's Answer I 5 p8-9).

46. On August 27, 2019, Shad re-sends the group his email entitled "Covenants" pushing the issue once again. (PL000686). This time Gary responds stating, "should lot covenants include how many vehicles can be parked on lot, whether a vehicle can be placed on blocks, worked on . ." and so forth never objecting to the use of rebar. (*Id.*) Gordon also weighs in, "those are legitimate concerns what I will do is get a current set of Covenants with basic elements in it and then begin adding some of this stuff as we talked about it." (*Id.*). Also never objecting to a rebar covenant. Kelly responds to the group saying he will pull up a few sets of covenants that address typical concerns giving them a template and starting point. (PL 000686).

47. On January 3, 2020, Kelly emails the group stating that he has met with Gordon and they discussed a few versions from other subdivisions and prepared an attached version. He says please let me know if you have any specific concerns or revisions and "Note that Dad will work

with the city to address the specifics of the items regarding VROD" (PL000680) Kelly attached the draft covenants to the email and they include a section on Concrete Rebar mandating the use of rebar in all concrete footing, walls and flatwork to meet following specifications but adds a note "not sure how to word this". (*Id.*)

48. On January 3, 2020, Shad emailed Gary, Gordon and Kelly stating, "Box Elder indicates they will need engineered drawings by the contractor/developer concerning the implantation of VRod re bar to be used in all concrete reinforcement in Alpha Omega Subdivision" and he attached the engineered drawings and all the basic information and specification for VRod. (PL000924).

49. It seems clear from the parties' email correspondences beginning from their initial discussions that a rebar covenant was discussed and that they agreed to implement one.

50. Gary and Gordon now say they never agreed that rebar would be required in the development. (Gary's A, I#6 p12).

51. Never once in their correspondences with Shad did they tell him that they didn't intend to mandate rebar, that they were uncertain about using rebar, that they were undecided about using rebar or that its use would be contingent upon anything. Their refusal to implement a rebar covenant didn't come until August 2022 when AET issued a geotechnical report that required the use of engineered fill if rebar were to be used. Not surprisingly, this was also during a time when the parties' relationship had deteriorated, and they were not getting along (*Id.*).

52. Holly testified, "But I want to add this too. The V-Rod is another thing where they were all on board verbally with using V-Rod and having it into a covenants until they started disagreeing. And then all of a sudden Gary and Gordon had an issue with mandating it." (HH p.105)

53. Gary and Gordon claim they decided not to implement a rebar covenant because of AET's geotechnical report; however, the geotechnical report does not prevent the use of rebar. Gary states in discovery, "It should be understood that nothing prevents a builder on the development from using non-corrosive rod (V-Rod type) application" only that the geotechnical recommendations as to fill would be required. (Gary's A, I#6, p. 14).

54. Holly testified, "But the geotechnical report, to my knowledge, doesn't say that you can't use VRod rebar, you shouldn't use V-ROD rebar and these are the reason you shouldn't use this rebar. So that—I understand that this turned into like a bigger argument about like how we have to prepare the foundations, but the material term to my husband was to use VROD rebar. Whether they have to dig 8 feet, 20 feet, four feet, whether you have to fill it with Jello, rock, you know, so I just want to reiterate that point." (HH p.66)

55. Gary and Gordon now claim that there are a number of reasons they have refused to implement a rebar covenant including; Alpha Land Company is not a builder, V-Rod is not an industry standard, it might discourage builders, and limited experience with the product. (Gary's A, I#6, p. 13).

56. These reasons, however, were never discussed when the parties were negotiating their agreement nor where they brought up until after the parties were feuding. (Gary's A, I#5-6,).

57. Another promise made to Shad was that the development's name and all street names would honor God and be named after characteristics or names of God. (VC #46)

58. It is evident by the name of the parties' LLC (Alpha Land) and the name of the development (Alpha-Omega) that this was something the parties had discussed and agreed to.

59. Gary admits that Shad was adamant that all street names be names or attributes of God, including the name of the development. (Gary's A, A#11 p.15)

60. Gary admits that many names in the development thus far have been names or attributes of God. (Gary's A, A#11, p.15).

61. Holly testified that "they were all in agreement that the development would have biblical street names" (HH p.102-103). Shad testified, "we discussed that that name would mirror the overall vision of this development, which was biblically themed street names, and, thus, Alpha Omega was born. (1SH p.63).

62. Gary and Gordon began to push back on the use of biblical street names later on in the project at a time when the parties were no longer getting along, "Holly testified, "... Shad just saw them like already starting to push back on what he felt like they agreed to do. And so it—you know, it gave him anxiety and made him think again, well, they're just not going to do what they agreed to. So he started getting fearful. And I'm wondering, now that the development is up and running, none of the names that are currently there are names of God. And so I'm wondering if they do intend to do what they agreed to do." (HH p.103).

63. Gary and Gordon claim they never promised Shad that all street names would be names or attributes of God and that their company was not in a position to make that demand upon the City of Box Elder and that some names could be confusing to emergency responders. (Gary's A, I#9 p.15).

64. Shad does not dispute that the City has the final say on approving names and doesn't disagree that street names should not confuse emergency responders but this is something the parties agreed to and there are many biblical names that are not confusing or difficult to pronounce. There is nothing that would have prevented Alpha Land from submitting biblical names to the City until the City found them acceptable. Gary and Gordon do not give a reason as to why they couldn't have submitted biblical names that would have acceptable to the city. (Gary's A, I#9 p.15).

65. For Shad, believing this development was divinely inspired and a blessing from God, breaching this term of the agreement was significant to him, it was as he said the "straw that broke the camel's back". (1SH p.190).

66. The Parties agreed that each member would have an equal opportunity to profit off any raw undeveloped land and rental properties during the duration of the project—i.e leasing it to run cows, selling hay, or by running their own cows. (VC #47)(1SH p.132)

67. Holly testified to the different ways in which the property can produce income, "So essentially because it's a large pasture, there was other ways that the land itself could have generated income. There are two rentals on the property and then there's hayfields and pastures so you can run cattle on it, rent it out for money for cattle. You can put up hay, sell the hay and then you have those rental properties." (HH p.223-224)

68. When asked if Alpha Land had been able to benefit from the land in anyway of these ways, Holly responded, "So I think the first season they had it they rented it out to someone who brought cattle in. And then the first season they had it, my husband hayed some of it and then basically—I think he gave Gary and Gordon the hay off of it. Since that first season it has not been hayed and Gary has been running cattle on it." (HH p. 224).

69. Shad testified, "We operated in the capacity the first year and had verbally agreed that that would be how it would go down…the whole deal is that three partners would share in all of the benefits of this property and its---and its future". (1Sh p.132).

70. Although Alpha Land is required to pay all the expenses related to the property and it has possession of the property, it is the Defendants position that Alpha Land is not entitled to any of the income produced from the using or renting the property. (Gary's A, I#79, p.51).

71. The tax returns are consistent with an agreement allowing Alpha Land to use the property for things such as cattle, hay, and rentals. The 2020 and 2021 returns both show income from rents and farming (G-2975, 3306). The 2021 tax return shows that Alpha Land had gross farming income in the amount of $179,538.00 in sales of livestock, produce, grains and other products. (G-3306).

72. In 2022, Alpha Land's tax return shows farming income of $1,000 in other income. (G-3045)

73. It appears Alpha Land's ability to continuing making income off the property ceased in 2022, the same time Gary and Gordon decided to change the operating agreement and tensions between the partners were at an all-time high. (G-0648)

74. The parties agreed that the partners would be paid "walking money" as soon as possible. Walking money was understood by the parties to be initial upfront cash to be paid to the partners. (VC #48) (G-2115)

75. In an email sent to his partners on 10/25/2021 (during a time when tensions between the partners were very high) Shad wrote, " I have been led to believe that not only would we sell parts of Alpha Land to have development funds and **walking money** I have been limited and restricted by not only creating marketable listings but also in all aspects of project oversight, project

representation, project planning, project finance, project exposure and even general correspondence with members." (G-2115)(emphasis added).

76. Gary responded to Shad's email stating, "We all hoped that the development would be providing **walking money** by this time." (Gary A's, I#83, p.54)(emphasis added).

77. Gary's statement admits that the parties agreed that the partners would receive "walking money". When asked in discovery, "Have any of the members received any 'walking money'?" Gary replied, "No, because sales of parcels have not generated sufficient revenue" revealing that "walking money" was something they agreed would be paid when possible (Gary's A, I#84, p.54).

78. When asked a question about Alpha Land's ability to purchase the property, Shad testified, "It was a no-brainer. The real estate is the vehicle to borrow against. So to cash flow—so my dad threw out this walking money idea. Once we refi, Shadrach, you're getting walking money and you're going to be - - Alpha Land is going to finance all the construction that you can handle. We're just -- I mean, the whole nine yards, John." (1SH p.95) Shad later testified, "And when they talk "walking money", it is refinancing; plus money to work on; plus, according to them, "walking money". (1SH p.224).

79. When asked if Shad ever shared a figure with Gary and Gordon about how much income he would need each month to support his family, Shad replied, "We didn't ever agree on a figure. We just talked about how walking money would alleviate that, and the tax consequences would be paid right away, and the list goes on." (1SH p.251).

80. Shad testified that Gordon also made it clear that he was in need of walking money as well. (1Sh p.252)

81. The parties agreed to form an LLC that would be given an exclusive right to purchase, owne and develop the property (now knownown as Alpha Land). The partners would each have a 1/3 membership interest in the company held in joint tenancy with the right of survivorship. (VC#50).

82. Joint tenancy with right of survivorship was a fundamental term of the parties' agreement. The parties discussed this term and understood what it meant when they agreed to it prior to forming their partnership. (1SH p.27)(HH p.256, 49)

83. Shad expressed just how important this term was to the agreement. When asked about details discussed at the initial meeting Shad relied, "Very specifically—and I mean very specifically— the number one pillar of this to work, whether I did it or didn't do it, was that fact that I did not want to deal with Trish Scott. I did not want to Gary or Gordon to deal with Holly. And I didn't want Gary to have to deal with Connie. What that means is that under no circumstance would we ever be dealing with anybody other than one of us there three. And, specifically, if Shadrach dies in Alaska getting eaten by a bear, my interest—owner interest in the company and the land is transferrable to the surviving two members. **Very important. And without those details, this deal would not have happened.**" (1SH p.63)(emphasis added).

84. The term Shad has uses to describe it is they agreed to a "closed marriage". (1Sh p.23).

85. When questioned about Gary and Gordon's age, Shad replied, "Do you understand why right of survivorship was the absolute pivotal reason I worked with these two gentlemen… Because realistically speaking, this is a several-lifetime development. And I knew it, and so did they." (1Sh p.93-94).

86. When asked if his wife Holly liked this he said, "I don't think any of our wives did. But Trish is the one that—to my knowledge, was the one raising the most stink. And that is third party information that, you know, I didn't personally have a conversation with her but she hinted at me a few times." (1Sh p.93)

87. Holly testified that she knew "the right of survivorship was very important to him [Shad]." (HH p.49)

88. Holly testified that the issue of right of survivorship came up early in the parties' discussions. (HH. P.255) She testified, ". . . when they initially met, they did not want spouses involved. Like they didn't want to have to work with or be partners with each other's spouses. I don't think Gary was like super like put my foot down on this, but I know that it was very important to Shad and I believe it was important to Gordon that this was handled—this was a partnership between the three of them and there wouldn't be outside people involved." (HH p.256)

89. When asked if she thought Shad would have ever agreed to be in a partnership where he could be forced to be partners with Kelly, his brother, or Gary's wife, or anyone else, Holly testified, "No." (HH p.256).

90. When the operating agreement for Alpha Land Company, LLC was signed on January 10, 2020, a provision was included consistent with what the parties had agreed to and included that the ownership interests would be held in joint tenancy with a right of survivorship.

91. The Operating Agreement was prepared by an attorney. An attorney that presumably understood the implications of owning the interests in joint tenancy with right of survivorship. (Gary's A, I#51, p.34)

92. Despite being under the advisement of legal counsel and getting resistance from their wives, Gary, Gordon, and Shad knowingly included this provision in the Operating Agreement and signed it.

93. It wasn't until the parties' relationship had deteriorated and they were no longer getting along with Shad that Gary and Gordon, and at the insistence of Kelly, decided to amend the operating agreement and eliminate this material term of the parties' original agreement.

94. Based on the promises made, Gary and Gordon led Shad to believe that their partnership would be a "sweet deal" for him (VC #33-35; 1SH 228)

95. Based on the parties' agreement and the promises made to Shad, Shad decided to forego a partnership with Mr. Williamson, as well as other business, investment, and employment opportunities, and enter into a partnership with Gary and Gordon. (VC# 57, 145).

96. The parties agreed that they should include Shad's brother Kelly Howie in the development by giving him an exclusive real estate listing agreement with the LLC. (VC #55).

97. Kelly was reported as a 25% owner on Alpha Land's tax returns (Postma Affidavit)

98. The parties decided to meet with CPA James Postma ("Postma") to help them navigate through the 1031 Exchange process. (Gary's A, I#1, p. 3).

99. The approach ultimately devised would be described as "unorthodox" by Postma. (PL0001151-PL0001152).

100. The mechanics of Gary's 1031 exchange were highly complex, so much so that Gary's Attorney Mark Walters declined further participation. (G-0058).

101. There were many different ideas and versions of a plan that bounced back and forth between Gary and Postma from June 2019 until October 25, 2019, of which Shad was not cc'd. (G-0043-0085) Even after this time, the plan was still being worked through and modified all the way up until Gary and Alpha Land's purchase of the property on April 6, 2020. (PL001160, PL001200).

102. The initial 1031 plans proposed by Gary are consistent with claim on how the property was to be owned and developed. (G-0054, G-0056)

103. Gary's main concern in putting together the plan was reducing his tax liability exposure. (*Id.*).

104. In total, Shad contracted to purchase 1,333.3 contiguous acres of land at a purchase price of $4,293,150.00 (hereinafter collectively referred to as the "Property").

105. Approx. $2,147,804.00 had to be paid at closing and Shad was to carry the remainder of the purchase price on a contract for deed secured by 779 acres of the property. (the "Gikling Contract for Deed").

106. While Shad signed the purchase agreement as "Shadrach Howie and/or Assigns", Shad did not assign his rights in the purchase agreement as the buyer. This language did allow Shad to assign his rights and interests in the Gikling Contract for Deed but it remained in his name until it was refinanced in 2022. (Gary's A, A#38 p.58).

107. The ultimate plan devised and executed to purchase the Property was as follows: Shad executes a purchase agreement with Gary's Limited Partnerships known as Ridgewood Motel and Manor, LP and HP Park, LP ("Gary's LPs). Under the terms of this purchase agreement, referred to as "Gary's Purchase Agreement", Gary's LPs are to pay Shad $4,931,924.00, with a $2,465,962.00 non-refundable down payment paid upon execution of the agreement. With the non-refundable down payment in hand, Shad was able to purchase the Propety (with an additional $318,161.00 remaining) and the remainder of the purchase price was carried by Shad on the Gikling contract for deed. Gary's Purchase Agreement would close six months later at which time the remaining purchase price would be paid to Shad but Shad would transfer all the proceeds to the partnership LLC and Gary's LPs would assume the Gikling Contract for Deed.

108. The remainder of the plan was developed following Shad's purchase of the property and would be executed as follows: After Shad purchases the property, the parties will form their partnership LLC and that LLC will enter into a purchase agreement to buy the property from Gary's LPs. This purchase agreement is referred to as the "Alpha Land Purchase Agreement". The parties planned for this purchase agreement to close on the same day, or next day, as the sale to Gary's LPs for the same purchase price. Alpha Land would then execute a final contract for the development of the property.

109. The initial plans for the 1031 exchange discussed back and forth between Postma and Gary were very different from what was ultimately decided on. (G-0043-0055). Even as late as September 2019, a clear plan for how the property would be purchased and transferred to the LLC had not been solidified. Postma sends Gary an email on 9/17/2019 explaining different options available to the parties for how to do the exchange: (G-0058)(emphasis added)

> "At this point, there is a need from an operational LLC [per Gordon the "Alpha Omega LLC"] which would then consist of the newly formed Gary Howie LLC [or Gary Howie himself or through a separate LLC depending on how they choose to do this] along with Gordon Howie and Shad Howie as 1/3rd each member partners.
>
> At this point, Gary Howie's LLC will either bring in the property along with when it enters the Alpha Omega operational LLC as a Member **OR** Gary's LLC with [sic] enter into an agreement with the Alpha Omega LLC [of which he himself is part of] to sell subdivided portions of the exchange property to Alpha Omega as it being developed.

110. The parties' plan continued to evolve and still had not been completely resolved when the first closing occurred. Postma stated in an email on 10/25/2019, "To somewhat reiterate what Kelly said I think we only need to get through close today. You are certainly bringing up some very good points however they do not all need to be addressed today because for example your contract with Shad as Kelly currently drafted up **will change---not might change---it will change"** (G-0078)(emphasis added).

111. After the 10/25/19 closing, Gary's Purchase Agreement wasn't scheduled to close until April 6, 2020, approximately 6 months after Shad purchased the property and the parties continued to work on the final details of the 1031 transaction. (PL001160, PL001200). Shad owned the property in his name for approximately six months. (VC Exhibits A and B)/

112. Per the parties' oral agreement, during the six-month period Shad owned the property, Shad was not entitled to any of the remaining $318,160.00 down payment. It was agreed that this money would be held in escrow at Pennington County Title ("Pennington Title") and dispersed to Shad upon Gary's approval for the sole purpose of improving the Property, adding basis and reducing Shad's income tax liability. Per the parties' oral agreement Shad's tax liability would be paid by the partnership LLC. (Gary's A, A#24, P.38 and I#66, p.39)

113. Despite not personally receiving any proceeds from the sale, the IRS considered the net proceeds as income to Shad and as a result, Shad incurred a tax liability of approx. $220,000.00 (Gary's A, A, A#23, p.38)

114. The LLC would ultimately not satisfy this obligation until April 6, 2022 (two years later) and in the meantime, Shad received notices of levy from the IRS. (VC #78) (Gary's A, I#65, p.39)

115. The parties finally formed Alpha Land Company, LLC ("Alpha Land") on January 10, 2020. (VC #59). Gary, Gordon, and Shad each owned a 1/3 membership interest in the company.

116. Defendants made misrepresentations about the operating agreement to Shad that induced him to sign it, including the amendment provision and that there would be a separate agreement contain the terms of their agreement. ". (1SH p.236-238)

117. On January 14, 2020, Alpha Land executed a purchase agreement with Gary's LPs for $4,931,924.00 giving Alpha Land possession of the property dating back to November 1, 2019. (VC #72).

118. An addendum was added to the Alpha Land Purchase Agreement that provides in part, "the execution of this purchase shall be in parcels, the size and location of which shall be determined by the Buyer, at a price equal to $3,710.00 per acre." (VC #90, VC Exhibit B).

119. This provision allowed Alpha Land to purchase the property before it was capitalized and provided Gary with a method to slowly unwind his 1031 exchange and spread out his tax liability. (VC #91).

120. The provision, however, does not require that parcels be developed before they can be purchased. The agreement states that "buyer agrees to pay Seller an amount equal to one-third of the net profit from sales of property as portions are developed and re-sold by the buyer". This is an important distinction. (VC Exhibit B).

121. If a parcel of the property is developed and re-sold then Alpha Land is required to pay Gary's LPs one-third of the net profits. It doesn't prevent Alpha Land from buying an undeveloped portion of the property. The agreement says that the property "shall be sold in parcels, the size and location to be determined by the Buyer". A parcel could be half the property. The agreement does not state "parcels can not be sold until the are developed" or that parcels "shall be developed before they are sold". (VC Exhibit B).

122. This provision is also contrary to the parties' agreement and contradicts the Defendant's claim that Shad was promised 1/3 of the net profit from development. (Gary's A#12 p18 Gary). The addendum as written requires 1/3 of the net profits to be paid to the Seller, which is Gary's LPs, not Gary in his capacity as a 1/3 owner in Alpha Land.

123. The way in which Alpha Land was going to buy the property and share in the proceeds was not figured out until days before the closing. (PL001160).

124. When the Alpha Land Purchase Agreement was being explained to Shad, it was explained that while Alpha Land would not have title to the property until Alpha Land paid for it, Alpha Land would have possession of the property and an equitable interest in the property allowing it to obtain financing. (Postma Affidavit).

125. This made Shad comfortable with the fact that the purchase agreement also required Alpha Land to pay all the costs associated with the property including, taxes, interest, insurance and contract for deed payments until the entire property is purchased. (VC #94, VC Exhibit B).

126. It was also agreed that Alpha Land would refinance the contract for deed. Refinancing the Contract for Deed alone would have given Alpha Land title to 779 acre of the property and additional funds for development and to meet Alpha Land's financial obligations. (Postma Affidavit) (G-3234-3235).

127. Gary and Gordon claim that it was never contemplated or agreed to by the parties that Alpha Land would refinance the contract for deed or be able to leverage the property to secure development funds. They claim this would not have been possible. (Gary's A, A#27, p.49-50)

128. On 11/21/2021, around the time that Gary, Gordon and Kelly were looking to amend the operating agreement and had contacted attorney Greg Erlandson to do so, Kelly sent Gary and Gordon an email that reads, "Adding me [Kelly] as a capital contributor will likely be a point that infuriates Shad. It might be important to have reasoning behind doing so. **My understanding is that doing this may strengthen our collective financial picture, which could positively impact our ability to refinance as well as our ability to participate in TIFF financing in the future**. If I am likely to be financially encumbered in ways other than my marketing expense, is it completely out of line to think that a revised profit sharing of 30/30/30/10 might be appropriate. Even approaching this subject will likely further Shad's judgment of my greed." (G-3228-3229).

129. In this email, Kelly is proposing that he be given a 10% ownership interest in Alpha Land to strengthen its financial picture, helping to aid Alpha Land in refinancing the contract for deed. (*Id.*) He would not have proposed this idea only be proposing this idea if the plan was for Alpha Land to refinance the contract for deed. It is apparent that it was not only Postma's understanding, but it was also Kelly's and Shad's understanding as well.

130. On March 10, 2022, Simpson & Associates, Inc. prepared a Market Analysis Appraisal at the request of Banner Capital to assist in refinancing the Gikling Contract for Deed. The appraised value came in $5,190,000.00 for only the back 779 acres of the property (the portion of the property securing the contract for deed) (PL000229-PL000292). On page 18 of the appraisal, Kelly Howie is indicated as being one of the borrowers. (PL000250). Simpson & Associates was also of the understanding that Alpha Land was the borrower as Kelly is a member of Alpha Land and not Gary's LPs. (*Id.*)

131. Additional support for this position comes from Banner Capital itself and its representative Richard Braithwaite. In an email dated 12/16/2021 to Gary, Braithwaite is under a similar impression that Alpha Land would be refinancing the contract for deed. The pertinent parts of his email state:

> "Gary, I have poured over all of your emails and documentation you sent on the cash out refinance of the779 acre track in Box Elder and I have the following questions that need clarification. **The operating agreement and the articles of organization list 4 managers for Alpha Land Company, LLC but only three owners. Is this correct. . .** Who has authority to transact business and sign loan docs for Alpha Land Company, LLC?
>
> Will the entire 779 acres be vested into the name of Alpha Land Company, LLC and the borrower on our Note (Loan) will be Alpha Land Company, LLC? Is this correct? The third REP is for the amount of $4,931,924.00 with the buyer Alpha Land Company, LLC and the seller Ridgewood Motel and Manor, LP and HP Park, LP dated 01/14/2020. **The REP states that this purchase shall be in parcels, the size and location of which shall be determined by the Buyer at a price equal to $3,710.00 per acre.**
>
> For our Loan, I need to know if the Bank will be taking all 779 acres as collateral. Is this correct? If this is not correct, then Ridgewood Motel and Manor, LP and HP Park, LP will have to pledge land still owned by the two LP's, but the problem may be how title in the land is currently vested at the County. **We have to have clear title in first lien position to provide a loan and we would expect all 779 acres to vest over to Alpha Land Company, LLC to make this happen.**
>
> **The requested loan amount is $3,500,000.00.** Per the payment schedule emailed, the principal balance on the Contract for Deed assumption at the end of December 2021 should be $2,019,530.43. . . **for now that would provide $1,480,469.57 available for accrued interest, closing costs, and funds for future development.** Does this match your calculations? Will any of the funds actually pay for development of any lots or will all of the funds be used as working capital to pay for soft costs to get the development approved through the City?
>
> **Will Kelly Howie have an ownership interest in Alpha Land Company, LLC? Will he sign a personal guarantee?**
>
> Do you have any drawn plans for developing the 300 acres that you are working on a permit with Box Elder City? If so, I will need a copy of drawn plans and the development budget for the 300 acres. Will you be developing all 300 acres with this loan? If not, how

many acres and lots will be developed? When will you have a development permit to start the development?

Our legal lending limit to an individual or an LLC or other forms of business registration is $3.5 million. **We have already lent you funds to refinance your ranch and build your new home and that loan is under your name. As long as Alpha Land Company, LLC is the new borrower we should not have a problem with lending Alpha Land Company, LLC $3.5 million."** (G-3234-3235)(emphasis added):

132. Gary responds to Braithwaite's email on 12/16/2021, stating that Alpha Land will NOT be the borrower and informs him that his LPs will be borrowing the money. Gary explains by saying, "the land is still owned by the two limited partnerships used for the trade, so Alpha Land Company does not own the land. They have a contractual right to buy the land as it is developed. **Sale of the land directly would trigger significant tax consequences that were avoided by the exchange. Alpha Land does have the obligation to be responsible for the payments, however, as part of the contract."** (G-3238).

133. It is clear from Braithwaite's email that he understood the terms of Alpha Land's purchase agreement and that Alpha Land was buying the property in parcels, "the size and location of which to be determined by the Buyer at a price equal to $3,710.00 per acre".

134. Braithwaite was fully aware that Gary's LPs owned the property and the terms upon which Alpha Land would be buying it yet this in no way prevented Alpha Land from refinancing the contract for deed with Banner Capital. (G-3234-3235).

135. The decision to withdraw Alpha Land as the borrower came just after Kelly, Gary and Gordon met with Attorney Jeff Hurd to engage him to amend Alpha Land's operating agreement. (G-0648)

136. It was a decision that benefited Gary and Gordon not Alpha Land and Gary admits that while Alpha Land will NOT be borrowing the money it will STILL have the obligation to pay the loan payments. (*Id.*)

137. At this time, Alpha Land still had not gotten approval from the City for the 300 residential lots it was proposing. And without money to make the loan payment, Gary and Gordon's decision to remove Alpha Land as the borrower put Alpha Land in a dire financial position causing it to default on its purchase agreement in April 2022. (DSUMF#161).

138. Additionally, Gary's loan request to Banner Capital was for $3,500,000.00 (G-3239) and Braithwaite stated that, if Alpha Land is the borrower, **"we should have no problem lending Alpha Land Company, LLC $3.5 million" giving it an additional "$1,480,469.57 available for accrued interest, closing costs, and funds for future development.** (G-3234-3235) (emphasis added).

139. For some reason, unknown to Shad, Gary's LPs only borrowed $2,300,000.00. (Gary's A, I#48, p.29).

140. Shad can only speculate but Braithwaite did indicate that "we have already lent you [Gary] funds to refinance your ranch and build your new home" and their "legal lending limit to an individual or an LLC or other forms of business registration is $3.5 million". (G-3234-3235)

141. While Gary did not personally refinance the Gikling contract for deed, his LPs did and there is still a question as to whether the bank's lending limit requirement applies to an entity owned solely by the individual that previously borrowed the money. This is something the Defendants have not addressed.

142. Gary and Gordon denied Alpha Land the ability to have up to $3.5 million of funds readily available not only to make its loan payments and other financial obligations, but it also for much needed development funds, not to mention ownership in 779 acres of the property (G-3238).

143. The parties agreed that Alpha Land would borrow the money from Banner Capital and refinance the contract for deed. This is supported by the evidence and the testimony. Having Gary's LPs borrow this money was a breach of the parties' agreement that caused damages not only to Shad but to Alpha Land. (G-3228-3229), (G-3234-3235), (PL000250), (Postma Affidavit).

144. Gary had a self-interest in securing all the funding that Alpha Land needed to develop. First, he avoided tax consequences (G-3238) and second, Gary's LPs get interest free financing. (VC Exhibit B). Per Gary's Purchase Agreement, Gary's LPs assumed the the Gikling Contract for Deed upon closing. However, Alpha Land, per its purchase agreement, is entirely responsible for paying the interest on Gary's assumed contract for deed and subsequently, the refinanced loan for $2,300,000.00. (VC Exhibits A and B). The Alpha Land purchase agreement only gives Alpha Land credit for principal payments made on the contract for deed. (*Id.*)

145. Not only did Gary's LPs pay well under market value for the property (PL000229) but nearly half of Gary's purchase price was paid by assuming a contract for deed for which he didn't have to pay interest. (VC Exhibit B).

146. Simpson & Associates' March 10, 2022 Appraisal of the back 779 acres of the property appraised at $5,190,000.00. Over double what Gary paid for it and according to Shad, this 779 acres was "the least desirable piece of real estate in the entire development- - hardest to develop, topography, drainage, access, utilities. It's worth substantially less than the balance." (1SH p.26).

147. Shad further testified, "… I think the value of the land as a whole used as collateral would have exponentially given capital to Alpha Land to both develop, pay taxes, and provide all the concessions made to me, and all the parties involved would be happy" (1SH p.26)

148. Tract 1 of the Alpha Omega Subdivision was mortgaged and Gary's LPs received $5,500,000.00 in loans from BankWest based upon an appraisal not provided to Shad but Gary described as "Fantastic". (G3271,G-2459,G-2461).

149. Additionally, Gary revealed in an email to Braithwaite on 8/8/22, "Box Elder had TIF money available and we are getting approx. $14 million worth of infrastructure without obligation to us other than they would like us to build as fast as possible" (G-2025)

150. It can't be undisputed that the property's value has significantly increased from the $4.2 million Gary paid for it. (G-2025) (G3271,G-2459,G-2461) (PL000229).

151. The addendum to the Alpha Land Purchase Agreement also states that the sale is contingent upon a final contract. (Gary's A, I#35, p.26).

152. In an email dated, 10/14/2021, in which Kelly is advocating that Shad be expelled from Alpha Land, Kelly states, "It's worthy of noting that there was never any separate agreement for Alpha Omega. That was a suggestion at one point but never materialized. (G-1907-1908).

153. Postma states in his January 6, 2020 email, "I realize that apart from this proposed sale **and the operating agreement** of the Alpha Land Company, LLC there will also be a separate legal contract [which still needs to be drafted] between Gary's LPs and Alpha Land Company, LLC" (PL001160)(emphasis added).

154. Defendants claim that the operating agreement was intended to be the contract between Gary's LPs and Alpha Land, however, clearly it was not. (*Id*)

155. The Defendants claim the operating agreement is contract that expresses the terms of the parties' agreement but its clear that a separate contract was anticipated and in reviewing the original operating agreement, neither the Alpha Omega Development or the Property is mentioned. The operating agreement has no legal connection to the development of the property whatsoever.

156. The operating agreement needed to vague and "for another" purpose other than developing the property to protect Gary's 1031 exchange. (G-0054)

157. Kelly sent an email on September 21, 2020 to the partner in which he provides suggestions for the LLC's articles of incorporation and operating agreement stating, "Rather than making the operating agreement specific to Alpha Omega Subdivision, I believe it might be more appropriate to create a provision within the agreement that requires an amendment or resolution for each specific project or property… **Meaning that Alpha Land Company would define all the terms of the specific agreement regarding Alpha Omega Subdivision within its own amendment/resolution"**. (PL000676). This did not occur. No such provision was added to the operating agreement that "defined all the terms of the specific agreement" regarding the Alpha Land Development.

158. A final contract was never executed by Gary's LPs and Alpha Land and thus no written agreement exists that secures Alpha Land's agreed upon right to develop the property. (Gary's A, I#35, p.26).

159. It is undisputed that Shad did not receive any proceeds from the sale of the property to Gary's LPs. All the proceeds of the sale went to Alpha Land. This is something the parties had orally agreed to. (Gary's A, A, A#22, p.38)

160. The parties orally agreed that Alpha Land would pay Shad's tax liability. (Gary's A, I#65, p.39)

161. The parties orally agreed that the excess down payment funds would be held in escrow and distributed only for improvement purposes.

162. The terms of Gary's Purchase Agreement do not represent the parties' agreement nor do they represent what actually occurred.

163. Gary's Purchase Agreement provides that Shad will be paid a purchase price of $4,931,924.00 with a non-refundable down payment of $2,465,970.00 and an assumption of the Gikling Contract for Deed in the amount of $2,138,650.00. This did not occur (VC Exhibit A).

164. All sale proceeds went to Alpha Land, some by way of land improvements and the rest in cash. Shad did not get $4.9 million dollars from the sale.

165. Defendants claim that Shad signed the purchase agreement "Shadrach and/or Assigns" however Shad did not assign his rights and interests in the purchase agreement. This is evidenced by the fact that IRS assessed the tax consequence to Shad personally and not to some other party the Defendants seem to imply his rights were assigned to.

166. In fact, Gary's Purchase Agreement could not contain the actual terms of the agreement without compromising Gary's 1031 exchange. (Affidavit Postma).

167. Shad trusted his father and Gary.

168. As things progressed and the 1031 plan started to materialize, Shad began having concerns. He asked Gary and Gordon how are his rights being protected and they responded by "dangling" the Alpha Land Purchase Agreement in front of him, saying this is how you are protected (1SH p.30). At Shad's deposition he testified:

> Q: Well, you're telling me that there is a document that says you get a one-third ownership in this 1,333 acres?
>
> A: So the document John, is—this is how they baited me and part of their fraud. Because when I went through the operating agreement with them, my ---one of my chief concerns, aside from the right of survivorship, was the specific land. And dangled in front of me was a purchase agreement, "See right here, young man, Alpha Land is going to own the property so you're set" So it is a smoke-

and-mirror tactic that they used. It was deceptive. It's dishonest... it was sore misrepresentation of the deal. (1SH p.29-30)

169. Shad went on to testify, "So to be clear, the purchase agreement is what ties Alpha Land to the physical real estate. And we had always, always, always, planned on doing a refi on my contract for deed, which stayed in my name, that was mine . . ." (1SH p.32)

170. By dangling the purchase agreement in front of him and telling him not to worry that his interests were protected Gary and Gordon were pointing to the fact that Alpha Land is purchasing the property, they are going to refinance the contract for deed and we are going to have a final contract setting forth all the terms we agreed to.

171. Holly also became concerned as the 1031 plan materialized. After she looked at the Alpha Land Purchase Agreement, she said she didn't like it and she still does not like it because "it offers absolutely no protection to Shad or Gordon." (HH p.33) Holly testified:

> ". . . when we were trying to mediate with Gary and Gordon, I kept telling them, you know, Shad's frustrated and upset because there is nothing—there is nothing that is securing like your agreement because you're saying you can change the operating agreement if you want to. You are saying you could tear it up. You are saying you could kick him out for a breach. You are saying—and I said, and technically, if the LP owns it, you could just sell the land to anybody you want to and Shad and Gordon would never receive a penny of it.
>
> So I said, is there any way that you can guarantee that like—like his effort and his vision and stuff isn't going to just go to waste. And they're like, Well, we have this purchase agreement. This means Alpha Land Company does own it. And I'm like—and then I had asked several times if they could make like a developer's agreement. And I talked to Gordon about that and he said he would ask Gary. And then I'd get back to him and Gordon would be like, Yeah, maybe that's something we could do, and then they just never did it." (HH p. 34-35).

172. By eliminating Alpha Land's ability to refinance the contract for deed and use the property to secure needed funding, Gary caused Alpha Land to default on its purchase agreement. (G-3238)(DSUMF #161).

173. If Gary decides to terminate the purchase agreement, Alpha Land can no longer profit from the development and Gary has made this very clear.

174. Gary admitted in discover that if Alpha Land defaults on the purchase agreement he can declare the purchase agreement null and void and Shadrach would get nothing. (Gary's A, #45, p.61).

175. Gary sent the following letter to Attorneys Stephanie Trask and John Fitzgerald, both of whom previously represented Shad. In the letter he states,

> 1) Shadrach Howie has exactly NO money invested in the purchase of the property. The money was supplied in its entirety by Gary Howie, his uncle;
>
> 2) The land is all currently owned by two limited partnerships, each of which have been and will continue to be 100% owned by Gary Howie and his wife;
>
> 3) **The terms of the contract by which Alpha Land Company agreed to purchase the rights to develop the land have already been breached, so the contract could at this point be declared null and void, thereby completely eliminating an operating agreement which we agree has some inherent flaws.**
>
> 4) **Should the contract be declared null and void, Shadrach's position would in the process be extinguished, and Shadrach's value would be equal to the cash he invested in purchasing the property. Exactly zero.**
>
> (P's Exhibit #1).

176. When Gary was asked in discovery, "What guarantee does Shad have that he will continue to receive a 1/3 profit from the Alpha Omega Development and what guarantee does he have that the Property will continue to be developed and not sold?" Gary replied, "No member of the company is guaranteed a profit or that the property will be sold." (Gary's A, I#46, p.28).

177. Gary has made it very clear that he can decide any time to "extinguish" Shad's rights "to develop the land" and he would get exactly "Zero". (*Id.*)

178. After Shad hired Mr. Fitzgerald to pursue the current litigation, Gary asks Attorney Roger Tellinghusen in an email if he can declare the purchase agreement void, allow Alpha Land to complete development of phases 1 and 2 despite the default, then create a new LLC with Shad NOT being a partner, enter into a new purchase agreement to sell/develop the property via the new LLC and allow Shad to get a 1/3 profit if he agrees to "refrain from ANY future litigation". (G-0255)

179. Holly states in an email to Gary and Gordon on March 29, 2022:

> Both of you have been involved with creating a LLC before. I do have to tell you that every agreement Shadrach has sent to the lawyer. In her professional opinion, she is telling Shadrach that he has no protection from being kicked out of his partnership or being replaced. She is telling him that those documents are poorly structured and aren't in his favor. (G-3249)

180. Gary's response to Holly's email was "It is a relief that Shad has an attorney who is telling him like it is rather than telling him what he would like it to be" (G-3248).

181. The Defendants have not provided any proof, other than Gary's say so, that Alpha Land can't borrow funds to develop the property with the consent of Gary's LPs. In fact, the evidence in the record shows that this is entirely possible. Braithwaite stated to do this, "Ridgewood Motel and Manor, LP and HP Park, LP will have to pledge land still owned by the two LP's". (G-3234-3235)

182. Despite this being what the parties agreed to, Gary now contends that the land will continue to be owned "100%" by him and his wife. (P's Exhibit #1).

183. Gary's LP's have since placed two additional mortgages on the property with BankWest. The first being a $500,000.00 line of credit (G-2459) and the second being a $5,000,000.00 loan secured by Tract 1 of Alpha Omega Subdivision (G-2461). Both mortgages were guaranteed by both Gary and Gordon. (Gary's A, I#49, p. 29).

184. Gary emailed Holly on 8/4/22 regarding the $5,000,000 loan with BankWest and states:

> The appraisal was fantastic. . .
>
> . . . BankWest wants us to completely pay off the $5 million that we are borrowing before we can take any profit out, so that could be up to two years. . .
>
> . . .the BankWest repayment sucks but that loan will be subject to renegotiation or being taken out by another bank once we have shown that our estimates are good and $5 million was enough. . .
>
> . . .I'm hoping we can sell some land elsewhere in the development to recognize some net profits over which the bank has no control and be able to divide money amongst the partners much sooner. We are working on that. (G-3271).

185. As parcels sell BankWest will get paid release fees.

186. Profits that would otherwise be paid to Alpha Land are now first being used to pay BankWest' release fees

187. This creates a conflict because Alpha Land is being required to pay off loan funds to which it has no access or control.

188. Defendants were asked in discovery if any member of Alpha Land personally or through an entity owned by such member, such as Gary's LPs, had mortgaged the property to obtain a bank loan and for each bank account in which loan proceeds were deposited, produce all bank statements, including all check images and deposit images, beginning from the time the loan proceeds where deposited into the account up to the current date. They were also asked to produce a detailed accounting for each deposit and withdrawal and to identify any withdrawals unrelated to Alpha. (Gary's A, I#48-49, p.28-29).

189. In response to this request, the Defendants produced Alpha Land's bank records and accounting detail. These were not the bank accounts requested. (Gary's A, R#1, P.29)

190. Without this information it is not possible to determine if Alpha Land is paying for Gary or Gordon's personal expenses or for other expenses of Gary's LPs.

191. Alpha Land has no authority to determine how these funds are spent. Gary only loans Alpha Land money as needed to pay its bills and only if he decides he wants to. These funds remain in Gary's bank account under his control and presumably Gordon's control as a guarantor. (G2257-2449).

192. Alpha Land recently received a $3 million housing and infrastructure grant from the South Dakota Housing Authority. (P's Exhibit #3).

193. It appears from recent bank records that $1,948,664.00 was deposited into Alpha Land's bank account from the grant funds and the next day a check was written to BankWest in the amount of $1,505,696.23, and a check written to Pennington Title for $377,783.84 (the memo line is not legible) and a check written to Rapid (what looks like construction but again not legible) for $45,183.93; leaving $31,909.29 in Alpha Land's bank account. (P's Exhibit 2)

194. Kelly was never intended to have an ownership interest in Alpha Land. The parties' agreement was never to include Kelly as a 1/3 partner.

195. As the 1031 plan was being formulated an issue came up with how the sales were being structured and the ownership %s of Alpha Land. If Alpha Land is considered a related party to Gary, the installment sales rules/treatment do not apply to him (PL001200).

196. Postma explains this dilemma in his email to the partners on 11/12/2019 "… as long as the combination of ownership between you [Gordon] and Gary is not greater than 50% . . . then Alpha Omega LLC [Alpha Land] is not a related party". (*Id.*)

197. The percentage of attributed ownership has to be greater than 50% for the party to be considered a related party. Siblings and children are considered attributed ownership. Nephews [Shad and Kelly] are not attributed ownership via the definitional nature of their relationship. So without Kelly as an owner in Alpha Land, Alpha Land is considered a related party. Gordon + Gary at 33.33% ownership each is greater than 50% but Gordon + Gary at 25% ownership each is not greater than 50%.

198. "If Gary were to sell to a related party [Alpha Land] AND the Related party disposes of the purchased property within 2 years, then his disposition causes the preferential [deferred] installment sale treatment to not apply to Gary and he would be deemed to have received payment for the full amount of the contract price at the time of signing, ie. irregardless of actual timing of payments received." Postma's 11/12/2019 email (PL001200).

199. Alpha Land purchased its first parcel of the property, 508 W Sunnydale Rd, on March 12, 2021, less than one year after Gary's LPs purchased the property. (G-3185)

200. If Alpha Land is determined to be a Related Party in Gary's 1031 exchange the installment sale treatment no longer applies to Gary's LPs and he will "be deemed to have received payment for the full amount of the contract price at the time of signing" no matter when the actual payment was received. (PL001200).

201. It was decided by Gary and Gordon that Kelly would be added as a member in name only and with no ownership. (PL000333-PL000334).

202. The Operating Agreement states, "The members, Gordon K. Howie, Gary A. Howie and Shadrach F. Howie shall be issued a Certificate of Membership Interest in the Company where each owns 33.33% interest in the Company. The net profits of the Company shall be divided among the three (3) members (Gordon K. Howie, Gary A. Howie, and Shadrach F. Howie), or their designees or estates, and the net losses of the partnership shall likewise be borne by the (3) members (Gordon K. Howie, Gary A. Howie, and Shadrach F. Howie), or their designees or estates, all in proportion to the respective capital contributions as forth in this agreement." Capital Contributions were $10.00 by each Gary, Gordon and Shad. (PL000333-PL000334).

203. Kelly has no ownership in Alpha Land so applying Postma's example Alpha Land may be considered a related party.

204. Contrary to the Operating Agreement, Alpha Land's 2020 and 2021 tax returns, report Kelly as having a 25% ownership interest in Alpha Land, having contributed 25% of the Company's capital. (G-2970 G-3038).

205. In 2022, Kelly dissociated from Alpha Land and is no longer reported as an owner. Two years after Alpha Land closed on the purchase. (G-3057)

206. As soon as Shad purchased the property in October 25, 2019, he began fulfilling his obligations under the Parties' agreement by working on site development with Lind Exco–providing bids and doing site management as per his role in development. (VC #102).

207. Shad was provided with the opportunity to build the first two houses in the development, financed by Alpha Land on the day that Gary's LPs purchased the property, April 6, 2020. (DSUMF #161).

208. Shad was proposing non-corrosive rebar covenants and street names right after the parties first met for their initial meeting, consistent with the agreement. (PL000692)

209. Shad was working the raw land in 2020. (HH p. 224).

210. The final plat for the lots in phase one were pending approval from Box Elder and Alpha Land had no reason to believe it would not be approved. The two homes Shad was building were approved prior to those in phase one because they were located on two lots that bordered an already existing subdivision. (VC#105).

211. The City of Box Elder never gave any member of Alpha Land any indication that there would be any issues signing off on the final plat prior to it being submitted. (VC#106)

212. The City, however, informed Alpha Land it would have to sign a development agreement requiring Alpha Land to pay for offsite improvements, specifically the reconstruction of Sunnydale Road, in the amount of 1.6 million dollars. (VC#107)

213. This unforeseen demand by the City significantly diminished Alpha Land's development potential and prevented Shad from obtaining the funds he was relying on to complete construction of the 1st two homes. (VC #108).

214. Alpha Land could push back against the City or they would wait it out. (VC#110)

215. This caused a disagreement among the Parties. Gary and Gordon wanted to take a passive approach and wait for the City to come to them, where as Shad wanted to go on the offensive and push back on the city (VC#111)(G-2662)

216. Gary and Gordon had no financial urgency to push the development ahead, where as Shad was under financial pressure and the urgency was great. This development was supposed to be his source of income. (G-3266) (HH p.221)(1SH p. 252)(G-2662).

217. Holly testified: "Well my husband spent a lot of 2019 and all of 2020 working on this project and essentially he didn't do a lot of construction work that year and he didn't do a lot of like side—like, basically, he didn't have much income that year for sure in 2020 because he was like focused so much on the project and getting it going. And that kind of moved in 2021" (HH p. 221).

218. Gary shares in Shad's belief that Alpha Land is being treated unfairly but he is willing to wait them out as he is under no financial pressure and he intends donate his proceeds from development anyway, "To Whom it May Concern": "Box Elder's proposal at the meeting with Blaise came a stunningly unwelcome surprise. . . Apparently Box Elder believes that they have captured a goose that will lay golden eggs and all they have to do is keep squeezing. What they do not understand is that this goose is ready and able to fly. Of the principals of our group at the meeting with Blaise, two and possibly all three are poised for flight. I do not personally need this project to live the remainder of my life in comfort. Moreover, I am unwilling to sell or commit additional assets to fund projects that are Box Elder's responsibility. Should our project proceed, most of hoped for income will go to charitable organizations. . .If external pressure is too great to justify our development on the basis of the value we bring to Box Elder and the community, then this is simply the wrong time for development. In that case, at some future time after Box Elder has solved the existing problems at their own expense we may still be interested. . . Not only would we be expected to step in and do what the city under better previous management should

already have done on Sunnydale and Radar Hill Road, but we may be expected to contribute to the off site solution of the existing Radar Hill Road problems as well. My first response was simply to shut the project down. An emotional response to being forced to negotiate major last minute changes may not be the best response, but our project will not be held hostage to unworkable and unrealistic demands. If we exist, this would be the most expensive agricultural land I have ever purchased." G-2662

219. In an email to Holly, Gary wrote on 7/17/22, "I am currently in a position where I do not need to demand money for the release of land. Gordon and I are each in positions where we do not have to charge for what we do or to be reimbursed for development work." (G-3266)

220. Holly first proposed the idea to hire an attorney to Shad. She said, "I felt like if they had an attorney going with them to these meetings that they City would be less likely to push them around" (HH p. 217)

221. Shad testified on SHp.231, "I think having an attorney deal with an attorney in this specific case would have been beneficial to both the City and the to the developing LLC".

222. Shad testified that he never used the term "threaten" in reference to hiring an attorney when dealing with the City. (1SH p230-231)

223. Shad showed his partners what he believe to be City ordinances and its comprehensive plan guidelines proving how the City was engaging in unfair practices and violating its own ordinances, demonstrating the need to hire an attorney. (VC #111).

224. Gary and Gordon agreed what the City was doing was unfair but they were fine to wait it out. (G-2662)

225. To Shad's knowledge, the City had never required any previous developer to pay to upgrade any existing roads or utilities and it was clearly an unfair "pay to play" situation. (VC #112)

226. Without access through Sunnyvale Road, the project had a limited way forward if any. (VC #113)(G-2662)

227. The stress of the situation created a hostile divide amongst the partners and it put Shad under a tremendous amount of stress. (VC #114) (HH p.270)

228. This divide among the members caused a breakdown in the Parties' relationship and led to many heated arguments. (VC #116)

229. Holly testified to particularly bad dispute that broke out among the members during a company meeting, "I guess when it started is when they—the four of them were at a meeting down at Gary and Gordon's office, Shad was upset about not being able to develop, not making money, spending money, getting all this push back from Box Elder. He had been bringing idea to Kelly about marketing listings. They were telling him, no, it won't work because of X, Y, Z. And then

so there was some kind of argument. And I guess and I don't know what Shad said. I guess I'm probably sure—he's very passionate when he talks to people and very boisterous so like it's family that he's talking to so that makes it even more emotional. Like you can sit there and talk to your mom a little bit different than you would talk to a stranger. And Kelly got mad at Shad and said, "Don't talk to my dad that way, you little asshole". (HH p.239) It was after this meeting that Kelly pulled all Shad's real estate listings and said I'm never gong to work for you." (HH p.239).

230. Holly began to attend company meetings in place of Shad to act as a mediator. (HH p.65-66)

231. Holly testified, "At this point in time I had hope that they could work things out. Honestly, I felt like everybody was being difficult. Everyone was being stubborn. I felt like Shad didn't really have an option because every time he would suggest something, they would either not reply to him or they would tell him no." (HH p.67)

232. In October 2021, the tensions between the parties reached its greatest point as evidenced by the many email exchanges during this time. (SH Depo Ex 10, 8,12,18,5,6,19,7,28,29,34,35,36,37).

233. A review of Shad's emails cited above shows a frustrated member desperately trying to find solutions and offering suggestions for possible ways to move forward with little response. (Id)

234. In August 2021 Shad is advocating that the group engage a new engineer and fire KTM. He thinks they should be held accountable for their incorrect engineering. He suggests meeting with legislators to further the project along. He offers the assistance of his friend Donahue and pushes refinancing the contract for deed. G-1884

235. Positions Gary and Gordon agreed with, in an email sent to Richard Braithwaite Gary agrees with Shad about the previous engineer states, "We have made some significant changes. The engineering group we were using for Box Elder was giving us low priority and perfunctory service, with little effort to interact on our behalf. Their major client is one of our competitors. We were completely lacking the critical behind the scenes negotiation which has proven to be essential. We now have a new engineering firm that represents just us and has been meeting with Box Elder officials on our behalf. We currently have a proposal going before Box Elder that involves the initial steps in approval for 300 residential lots" (G-3239)

236. Gary and Gordon also met with legislators in an attempt to move the project forward. (HH p222)

237. On October 2, 2021, in an email entitled "forward" Shad is asking the group for proposals and marketing options. "I am waiting for your leadership and direction and will continue to give honest feedback/perspective once I have a change to review your proposals and marketing options. I have considerable insight to add to our project once we get this squared up. G-2105

238. On October 12, 2021, in an email entitled "partnership" Shad writes, "My understanding is that Alpha Land is a 3 person partnership. . . At our last meeting we all agreed to clearly define marketing options and parties involvements.. . After asking 12 times "will we resolve to finalize a proposal to BE regarding Westgate/West Sunnydale" I still don't have clarity? I am told I will

have the responsibility later to get bids and manage on site work. This is unacceptable! Partnership so far has allowed me to take on all the tax consequences, have no involvement whatsoever in creating marketable listings, 75% of all my emails have gone unanswered and my role in development has been completely bastadized." G-2107

239. On 10/14/21 in an email entitled "resolution" in which Shad respectfully presents his partners with an email asking them to consider giving to Box Elder. He says, "All, this is the type of letter I would like to make available to every Box Elder official. Please critique and add your thoughts" His proposed letter to the City is non-threatening and asks the City to consider a reasonable maintenance agreement to Sunnydale. G-2110

240. Shad emails the group on 10/14/21 saying "nearly all my emails have gone unanswered like this one from back in March.. . I find it grossly unfair to expect anything other than frustration from me when no answers are ever given" G-2108

241. In an email dated 10/25/21 entitled "victory" Shad emails the group asking them to please answer his very simple, unequivocal and dispositive questions including, 1)why don't we submit a proposal through an attorney for 300 new homes with no Sunnydale improvements and secondary access to be established after completion of 250 homes? 2) What is my involvement in partnership? 3)Why have we paid nearly $400,000 in interest alone on a contract for deed and for what? 4) Why are we not holding KTM accountable? 5) Why is my tax deferred exchange not resolved? 6) Please define what constitutes a willful and substantial breach of agreement and prejudicial conduct... No resolution has been discussed or proposed by members and correspondence has ceased. G-2116

242. All the above questions are reasonable, logical and respectful of questions.

243. The next day on 10/26/21, Gary accuses Shad of having ADHD.

244. 10/29/21 Shad emails the group "exposing the underlying problems while offering clear solutions creates the environment for developers and cities to thrive." The remainder of the email Shad lays out in great detail the reasons he believes what Box Elder is doing is wrong. He cites statutes and ordinances. It is comprehensive and in no way threatening or hostile. It is informative and persuasive. He concludes by saying "Realize these are new challenges that require new tactics. Looking back will you be able to say I did what was right? G-2129

245. Shad never hired an attorney to represent Alpha Land. Shad never sent any proposal or email to the city without the approval of his partners.

246. On 10/14/21 Kelly emailed Gary and Gordon calling for Shad to be expelled from the partnership. G-1906

247. In November of 2011, Gary, Gordon and Shad reached out an attorney to amend the operating agreement. (G-3230)

248. The most notable amendment to the operating agreement was the elimination of joint tenancy with the right of survivorship and the ability for members to appoint replacements. (PL001765)

249. It also added a provision for attorney's fees. (*Id*)

250. Initially Gordon told Shad that Banner Capital needed Alpha Land to amend its operating agreement to meet its lending requirements; however, Shad discovered after calling and speaking with Banner Capital that this was not true. (VC #129)

251. Shad hired attorney Trask to represent him in the amending of the operating agreement. She worked the parties and tried to reach an amicable solution but was unsuccessful (VC #130)

252. The operating agreement was amended by majority vote. (PL001765)

253. Kelly's company, Unimax, LLC has signed a purchase agreement to buy all lots in phase 1 and 2. A sale recently closed on the first portion of lots in phase 1. (VC #126)

254. Unimax is building homes on the lots and Kelly is selling them. Kelly is benefiting from both selling lots and building on them. (VC #127)

255. Shad committed a majority of his time in 2020 and 2021 to doing all sorts of projects for Gary and Gordon with no compensation. (VC #138)

256. Shad made several improvements to the Property that he was not compensated for including interceding Alfalfa, building a new fence, building roads, multiple creek crossings, site work, dam clean outs, trash removal, prairie dog poisonings/control, and demolition and clean up. (VC # 139)

257. Shad was been told that if he initiates any lawsuit he will be expelled from the Company. (VC #141)

Dated this 2nd day of December, 2024.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true and correct copy of the above **PLAINTIFF'S STATEMENT OF DISPUTED MATERIAL FACTS** was served in the following manner and on the following person, by placing the same in the service indicated, postage prepaid as applicable, addressed as follows:

Odyssey File and Serve
John Dorsey
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Dated this 2nd day of December, 2024.

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STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS.	
COUNTY OF PENNINGTON	)	SEVENTH JUDICIAL CIRCUIT

SHADRACH HOWIE, and ALPHA LAND COMPANY, LLC, a South Dakota limited liability company, Plaintiffs, vs. GARY HOWIE and GORDON HOWIE, Defendants.	)	File No. 51CIV23-001344 **DEFENDANTS' SECOND STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT [SDCL 15-6-56(c)]**

Pursuant to SDCL 15-6-56(c)1, Defendants submit the following separate, short and concise statement of material facts as to which they contend no genuine issue exists to be tried with regard to Plaintiff's claim for unjust enrichment. Undisputed material facts will be followed by citations to the record.

As with Defendants' previous Motion for Partial Summary Judgment, parenthetical references to the record will be as follows:

- Reference to the Plaintiff's Verified Complaint is identified as "VC" followed by the numbered paragraph "¶". Likewise, Defendants' paragraphs in their responsive Answer are so identified.
- References to the depositions of Shadrach "Shad" Howie "SH" and Holly Howie "HH" are followed by their appropriate page. Shad's deposition was continued over a three-day period and the pagination is not consecutive; rather it renews at page 1 each consecutive day. Therefore, his deposition will be referenced as "1SH" for the testimony taken June 27, 2024, "2SH" for testimony taken June 28, 2024 and "3SH" for testimony on the concluding day of July 12, 2024, followed by its page number.
- The affidavit of James Postma, CPA was submitted by Plaintiff in response to the Motion for Partial Summary Judgment and that affidavit is referenced as "Postma" followed by the applicable paragraph reference.
- Deposition Exhibits are referenced by the deponent's initials, followed by the Exhibit number and page. ("SH Ex ___, p. ___").

- Pages referenced from the deposition testimony, exhibits and discovery identified herein have been appended to the Affidavit of Defense Counsel filed contemporaneously with Defendants previous Motion for Partial Summary Judgment.

- Many material facts have been referenced in the Defendants' Statement of Undisputed Material Facts dated October 3, 2024 and filed in support of the Defendants' Motion for Partial Summary Judgment. Where indicated, references to that pleading will be made as "SUMF" followed by the appropriate numerical reference. Discovery including interrogatory answers and responses to requests for admissions and production of documents referenced below were submitted to this court in the Affidavit of John Stanton Dorsey, in support of Defendants' Motion for Partial Summary Judgment. Below, the reference to the responses are identified by the number and reference to "Affidavit Dorsey" and the applicable attachment number.

- The Second Affidavit of John Stanton Dorsey is submitted contemporaneously with this pleading. It includes additional discovery produced as referenced below as ("Second Affidavit Dorsey," followed by the relevant stamped and numbered page produced in discovery).

- Because a separate, short and concise statement of material facts as to which no genuine issue exists is required by the rule, and for ease of reference for this Court, Defendants' supporting brief will reference the material facts below as "2MF" followed by the appropriate numerical reference. Because a statement of undisputed material facts was provided to this court in support of Defendants' Motion for Partial Summary Judgment, in the event that reference is made to that document, to be consistent references in Defendants' supporting brief will be identified as "SUMF" followed by the appropriate numerical reference.

DEFENDANTS' SECOND STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Shad had a vision for the 1,333 acres of property that he believed was divinely inspired. (HH. P. 20). He believed that God blessed him with an amazing opportunity and in tribute to God, he named the development Alpha-Omega. His vision was to create a development serving Ellsworth Air Force base consisting of 3,000 single and multi-family homes. (VC ¶20; HH pp. 19-20).

2. Shad was unable to buy the property on his own. (HH p. 270). He went looking for investors knowing the project would be "very lucrative." (VC ¶ 24; 1SH pp. 214, 226). Shad "pitched it to them as a grand slam." (1SH, p. 69).

3. Shad did not promise a return on the investment. (1SH, pp. 226). Nonetheless, based upon his own analysis, from the beginning, he concluded the project would be "very lucrative." (1SH pp. 217, 221). He provided numbers to his partners estimating the costs in terms of site development, engineering, oversight, and infrastructure in reaching his belief. (1SH, pp. 221-222). The plan was to sell 60 lots per year (1SH, pp. 91, 105). The project would take 20-30 years. (1SH, p. 91). Shad projected net profits between $15,000 to $18,000 per lot and

explained: "I had hoped that we would at least be moving lots in about 18 months…" but agreed that his estimate was "highly contingent on what the market is requiring." (1SH pp. 231-232). Shad conceded that "it is still a risk game." (1SH, p. 231). Shad explained that the initial plan projected 3,000 residential sites. (1SH p. 220). At $15,000/lot the net profit over time would be $45,000,000. (1SH, p. 224). Per year, net profits at the rate of 60 lots per year at $15,000, would generate $900,000

4. Shad brought the "opportunity" to his father, Gordon. (1SH pp. 214-215). Gordon discussed the "investment opportunity" with Gary who expressed interest in investing. (VC ¶¶ 20, 24, 29, 30).

5. Shad, Gordon and Gary met in an "initial meeting" in the Spring of 2019. (VC ¶¶ 33, 35). Each partner was to have an equal voice. (1SH, p. 78). "The development was to be a team effort with each party to receive 1/3 of the net profits from development." (Gary's Answer to Interrogatory No. 4, Affidavit of Dorsey, Attachment 19). "All understood our collective experience was greater than any one individual. No specific or formal roles were ever assigned at the beginning; the roles evolved as things moved forward." (Gary's Answer Interrogatory No. 19, Affidavit of Dorsey, Attachment 19).

6. Gary financed the purchase of the 1,333 acres. (1SH, pp. 50, 61). Shad knew he was not purchasing the property himself; rather he was acting as a strawman in the transaction. (1SH pp. 64-65; 174-177; 207; 2SH p. 27).

7. Shadrach's position as a "strawman" in the exchange was explained by James Postma, CPA meetings which Shad attended. (1SH, pp. 64, 179). Postma characterized Shad's position in the 1031 exchange which facilitated the purchase of the land by Gary's limited partnerships ("LPs") was a "sacrificial lamb." (1SH, p. 177).

8. In honor of God, it was very important to Shad that all street names be names or characteristics of God, that the highest construction standards be mandated, and the development cater directly to Veterans with discount incentives." [(Plaintiff's Brief in Opposition to Defendants' Motion for Partial Summary Judgment, filed 12/2/24, p. 3 of 77); *See also*, PR 7]; According to Shad's wife, "[h]e said God had shown him"…"this property and this development opportunity was meant to be for his life and his family" and nobody else. (HH pp. 20-21).

9. The formation of Alpha Land Company, LLC was the vehicle which Shad agreed was to be utilized for regulation of the affairs of the company, the conduct of the business, and the relationship among the members. (1SH, pp. 116-117; 2SH, p. 38).

10. Shad agreed that the Operating Agreement is a contract, like a constitution. (1SH, p. 99).

11. Shad read the Operating Agreement before signing it. (1SH, p. 234-235; SUMF 73). Shad explained is expectations and purpose of the operating agreement and testified: "I expected that the purpose of the contract would be to hold the parties involved to that contract." (1SH p. 84). "What good is the contract that doesn't bind the parties to do what they agreed to do." (1SH p. 85).

12. Shad testified he did not have a problem with the operating agreement until it was amended. (1SH, p. 240).

13. On January 10, 2020, Gary, Gordon, Shadrach and Kelly signed the Operating Agreement and Articles of Organization and formed Alpha Land Company, LLC. (SUMF #47; See Operating Agreement attached as Exhibit 4 to Defendants' Answer). Kelly was identified as a member with no ownership, but having the exclusive right to be paid for listings and marketing of the property. Id.

14. The Operating Agreement provided members net profits to be divided among the three members (Gary, Gordon and Shad) in proportion to their respective capital contributions as set forth in the agreement. (Operating Agreement, ¶ 6). Capital contributions were deemed at 33.33 % for each member. (Operating Agreement, ¶5). Distributions to the three members "shall be made in the amounts, in the manner, and at times determined by the managers. (Operating Agreement, ¶7). (See Exhibit 4 to Defendants' Answer).

15. Shad testified that with regard to the Operating Agreement, no member were promised any compensation, salary or particular wage. (1SH, pp. 38-39). Likewise, nothing was said about receiving money as a member of the LLC until there was a distribution of profits and losses as described in paragraphs 6 and 7. (1SH, pp. 38-39). No member was guaranteed a profit or that property would be sold. (Gary's Answer Interrogatory No. 46; Affidavit Dorsey, Attachment #19).

16. The development was to be a team effort with each party to receive 1/3 of net profits from development. (Gary's Answer Interrogatory No. 4, Affidavit of Dorsey, Attachment 19). "The reasons for the LLC was to facilitate the ability to share profits between the members as contemplated in our early discussions." (Gary's Answer Interrogatory No. 31; Affidavit Dorsey dated October 3, 2024, Attachment # 19). The operating agreement spelled out that each member would enjoy a 1/3 share of net profits or alternatively, a 1/3 share in losses. (Exhibit 4, Defendants' Answer ¶¶ 5, 6)

17. No member was guaranteed a profit or that property would be sold. (Gary's Answer Interrogatory No. 46; Affidavit of Dorsey, Attachment 19). With regard to the risks of land development, Shad agreed that inflation, difficulty working with local governments, and dealing with certain unexpected infrastructure issues were, in his words, "unavoidable." (1SH 219). Insofar as his own risk tolerance, Shad testified that "my risk tolerance is huge." (1SH p. 160). As members in the LLC, at the age of 40, compared with Gordon (75) and Gary (79), Shad

professed: "I'm a young man, that my risk tolerance is much higher than both of them." (1SH, p. 93). Asked to explain how he believed the fledgling company would be able to cash flow payments on the 1,333 acres purchased for $4.9 million, Shad described it as a "no-brainer" believing that that land itself would finance borrowing. (1SH, pp. 93-95).

18. James Postma, a CPA who provided the members with advice, testified: "[i]t was the intention of the parties that they share in the net profit equally through their ownership in Alpha Land Company." (Postma Affidavit, ¶ 46).

19. Shad viewed the project as his, and his alone. He testified it was "my project." (HH pp. 20-21).

20. Shad did not contribute any money toward purchase the 1,333 acres of property. (1SH, p. 169). Shad paid "zero dollars." Id. Shad did not sign on any loans for the land nor did he contribute anything monetarily to capitalization of the LLC. (1SH, p. 98. Shad explained he was only "on paper." Id.

21. Shad did not contribute to payments on the Gikling contract for deed as documented in the Simpson Appraisal for its refinance with Banner Capital which confirmed Shad's role in the company and his lack of ownership in the 1,333 acres. (2SH pp. 15, 18, 23-25). When that contract for deed (779 acres) was refinanced by Banner Capital for $2,300,000, on March 29, 2022, Shad did not sign as debtor or guarantor; rather it was Gary who signed a non-revolving promissory note and loan on behalf of both LPs. (2SH pp. 14-15; SH Ex 22, pp. G-2029-2039; See also, SUMF 123, 124, 126).

22. The 1,333 acres for development was purchased by Gary's LPs and the financing was provided by Gary with Gordon providing later personal guarantees. (Gary's Answers to Interrogatories, No. 13, 14, 15).

23. For Shad's role, he was promised 1/3 of net profits in his partnership with Gordon and Gary which was memorialized in the original operating agreement of Alpha Land Company, LLC, which Shad signed on January 14, 2020). (1SH pp. 38-39; 116-117).

24. Alpha Land Company, LLC has distributed to each member a total of $22,000 when it has declared net profits. Shad's 1/3 share has been distributed both times the company has made a distribution. The first disbursement was on September 2, 2023, and Shad was issued check #1329 in the amount of $10,000 drawn on Alpha Land's checking account. A second distribution was issued to Shad in check #1333 for #12,000. (Gary's Answer to Interrogatory Nos. 29 and 74; Dorsey Affidavit Attachment 19; See also, Second Dorsey Affidavit (copies of checks #1329, #1333).

25. Net profits are dependent upon development expenses which cannot be forecasted with accuracy. (Gary's Answer Interrogatory #102; Dorsey Affidavit Attachment 19).

26. In its initial phases of development, Shad knew that the company was on "a shoestring budget" of limited capital. (2SH, p. 20).

27. Due to limited sales of lots being sold in the first two years, the company was without sufficient funds to meet its obligations. (Gary's Answer Interrogatories No. 70, 72).

28. Gary testified that an LLC is not able to make distributions if the company would not be able to pay its debts as they become due in the ordinary course of business, *citing* SDCL 47-34A-406(a)(1). (Gary's Answer Interrogatory Nos. 83, 84, 85; SUMF 156, 159).

29. Lots did not sell in 18 months as Shad and the other members had hoped. (1SH, p. 90). Delays occurred. Many issues with the City of Box Elder were encountered. (1SH, p. 230). Shad and his wife believed the City was requiring Alpha Land Company to do things that it had not required of other developers and was "blackmailing" them. (HH pp. 53-55).

30. Just three months after formation of the LLC, the City of Box Elder provided the company with a list of "to dos" which included an extension and improvement of a road at a cost projected at $1.6 million to be shouldered by Alpha Land Company. (1SH, pp. 72-73; SH Ex 10, p. 3).

31. Shad agreed that the City's directive and impact upon the company could not have been predicted without a "crystal ball." (1SH p. 74).

32. In his email dated October 25, 2021, Shad recognized the costs associated with the property's development were cutting into any ability to pay net profits. He was upset that he was not receiving any money and understood the reality that sales of lots were paying down interest and correctly stated the consequence: "initial profits are already gone." (SUMF 102; SH depo Ex. 10, p. 028). .

33. As draws were distributed for development purposes, Shad admitted that "I was operating in my role—in my capacity—which was development oversight." (2SH, p. 29). Shad confirmed he was doing the work "voluntarily" and did receive "some help and support from other members." (2SH, p. 29). He admitted that he did not ask to be paid. (2SH, p. 30). "Never did we ever discuss a dollar amount." (1SH, p. 252).

34. Holly agreed Gary contributed hundreds of thousands of dollars to Alpha Land Company, LLC from loans on behalf of the LPs to keep Alpha Land afloat. (HH Depo., p. 90). Gary and Gordon signed personal guarantees of $2.3 million to refinance the Gikling contract for deed. (SUMF #101).

35. Shad was allowed to show $220,000 of expenses of the development on his personal tax return and increase his basis for the short period of time he was the titled owner of

the property in the 1031 exchange as strawman until it would be transferred to the LPs as had been discussed with CPA Postma long before Alpha Land Company was formed. (2SH, p. 33).

36. Shad did not file any mechanics liens for the contributions of service to the project although he threatened to do so. (SUMF 185; 2SH p. 78-79; HH p. 176, HH Ex 1, p. 65). Holly agreed that this was a threat by her husband. (HH p. 177). Shad confessed that he was using the threat of placing liens as "a way to bring them to the table." (2SH, p. 80).

37. Asked in an interrogatory: "[s]pecifically what tasks and responsibilities did [Shad] have and what opportunities did he have to make money?" Gary answered: "Shad would be able to share in 1/3 of the net profits of the sale of parcels by Alpha Land Company, LLC. Beyond the 1/3 net profit opportunity, we discussed his ability to build homes with the construction loan provided by Gary." (See Gary's Answer to Interrogatory No. 26, Dorsey Affidavit Attachment 19).

38. Gary provided a construction loan of $150,000 to Shad but shad could not account for the use of the funds agreeing "I burned up that 150 very quickly." (2SH pp. 91, 93-93; SUMF 185). Shad was out of money and could not borrow money himself. (2SH, p. 90).

39. Alpha Land was never formed to purchase the entire parcel (1,333 acres). (Gary's Answer Interrogatory No. 21).

40. No member was guaranteed a profit or that property would be sold. (Gary's Answer Interrogatory No. 46; Affidavit Dorsey, Attachment #19).

41. Shad had a deep emotional attachment and spiritual connection to the property and believes that "[t]he purchase of the property and [its] development were Shad's creation." (Plaintiff's Brief in Opposition to Defendants' Motion for Partial Summary Judgment, filed 12/2/24, p.72 of 77; See also PR 7).

42. Shad's actions and conduct compromised Alpha Land. (Gary's Answer Interrogatory No. 71 (29 bullet points); (See also Answers Interrogatories No. 50).

43. The Operating Agreement was amended and restated because of Shad's conduct and threatening behavior. (Gary's Answers Interrogatories No. 50, 71). The Amended and Restated Operating Agreement is attached as Exhibit 5 to Defendants' Answer. The change in the operating agreement did nothing to change a member's share in net profits.

44. The Amended and Restated Operating Agreement did not change the provisions regarding equal share of net profits and distributions. (Compare Exhibit 4 and Exhibit 5 to Defendants' Answer at paragraphs 6 and 7).

52. Shad demonstrated hostility to Box Elder staff at a meeting on March 23, 2023, with threatening terms for which the company had to apologize. (SUMF 173; 2SH pp. 211-215).

53. Shad remained defiant and ready to sue the City when he was deposed on June 28, 2024. (2SH, p. 214; SUMF 174).

54. James Postma provided the members of the LLC advice in his capacity as CPA prior to the company's formation which ultimately took the form of the LLC. James Postma's Affidavit, states: "[i]t was the intention of the parties that they share in the net profit equally through their ownership in Alpha Land Company." Absent in Postma's affidavit is any suggestion that Shadrach's contributions of service to the company were due compensation beyond the 1/3 share of net profits. Postma stated: "I believed Shad was taking a position that I believed was beyond what his role in the company was supposed to be…." (Postma Affidavit, ¶ 11).

55. From Alpha Land Company, LLC's formation until the present date, Shadrach Howie has remained a member of the company per the terms of the company's operating agreements event after his dissociation by judicial determination. (Answer Exhibits 4 (Original Operating Agreement) and 5 (Amended and Restated Operating Agreement).

Dated this 6th day of March, 2025.

WHITING HAGG & DORSEY, Prof. LLC

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STATE OF SOUTH DAKOTA : SS
COUNTY OF PENNINGTON

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

SHADRACH HOWIE, and ALPHA LAND COMPANY, LLC, a South Dakota limited liability company,

Plaintiffs,

vs.

GARY HOWIE, and GORDON HOWIE,

Defendants.

51CIV23-001344

PLAINTIFF'S RESPONSES IN OPPOSITION TO DEFENDANTS' SECOND STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPOT OF MOTION FOR SUMMARY JUDGMENT

COMES NOW, Plaintiff by and through his attorneys of record and hereby submits the following Responses to Defendants' Second Statement of Undisputed Material Facts.

References to the record in are identified below and in Plaintiff's supporting brief as follows:

1. Reference to the Plaintiff's Verified Complaint is identified as "VC" followed by the numbered paragraph. (VC #___)

2. Reference to Defendants' Answer to the Complaint is identified as "Answer" followed by the numbered paragraph. (Answer #__).

3. Reference to the depositions of Shad Howie "SH" and Holly Howie "HH" and followed by the page # (HH p.__). Shad's testimony taken on 6/27/2024 is referenced as "SH1" followed by the page number (SH1 p.___); Shad's testimony on 6/7/2014 is referenced as "SH2" followed by the page number (SH2 p.____); and Shad's testimony on 7/12/2024 is referenced "SH3" followed by the page number (SH3 p. ____).

4. Deposition Exhibits are referenced by the deponent's initial, followed by the Exhibit number and page ("SH Ex___,p.____).

5.Defendants' Answers to Interrogatories are referred to as "Garys" then either "A" for admission or "I" for interrogatory followed by the paragraph # and page number. (Gary's, A#___, p.____)

6. Defendants' documents produced in discovery are referred to as, "G" followed by the page number and Plaintiff's documents produced in discovery are referred to as "PL" followed by the page number.

7. Plaintiff's exhibits are referred to as "P Exhibit" followed by the page number.

8. Affidavit of James Postma is referred to "Postma" followed by the paragraph #.

1. Shad had a vision for the 1,333 acres of property that he believed was divinely inspired. (HH. P. 20). He believed that God blessed him with an amazing opportunity and in tribute to God, he named the development Alpha-Omega. His vision was to create a development serving Ellsworth Air Force base consisting of 3,000 single and multi-family homes. (VC 1120; HH pp. 19-20).

RESPONSE: Undisputed.

2. Shad was unable to buy the property on his own. (HH p. 270). He went looking for investors knowing the project would be "very lucrative." (VC 24; 1SH pp. 214, 226). Shad "pitched it to them as a grand slam." (1SH, p. 69).

RESPONSE: Disputed. At her deposition, Holly was asked, "And although Alpha Omega may have been Shad's idea, he couldn't do it without financing, is that fair," and Holly's response was, "Yes". (HH p. 270). Defendants' statement that Shad was unable to buy the property "on his own", was not Holly's testimony. Holly's testimony was that Shad "couldn't do Alpha Omega without financing". She did not testify that Shad could not have obtained personal financing from either a bank or by personally executing a contract for deed. In fact, Shad purchased 779 acres of the property on a contract for deed he personally executed. (PL000096). It is also disputed that Shad could not buy the property without the assistance of the Defendants. (1SH p.228). Shad testified, "These guys approached me, and I let them dictate how they wanted to facilitate this to their benefit." (1SH p.226) Shad did not need to buy the property in cash up front. Shad had negotiated most parcels on contract for deed and he also had a commitment from Donahue Williamson to help financially buy the real estate via partnership. (1SH p.228). Shad only agreed to share his deal with Gary and Gordon because of the promise they made to him.

3. Shad did not promise a return on the investment. (1SH, pp. 226). Nonetheless, based upon his own analysis, from the beginning, he concluded the project would be "very lucrative." (1SH pp. 217, 221). He provided numbers to his partners estimating the costs in terms of site development, engineering, oversight, and infrastructure in reaching his belief. (1SH, pp. 221-222). The plan was to sell 60 lots per year (1SH, pp. 91, 105). The project would take 20-30 years. (1SH, p. 91). Shad projected net profits between $15,000 to $18,000 per lot and explained: "I had hoped that we would at least be moving lots in about 18 months.. ." but agreed that his estimate was "highly contingent on what the market is requiring." (1SH pp. 231-232). Shad conceded that "it is still a risk game." (1SH, p. 231). Shad explained that the initial plan projected 3,000 residential sites. (1SH p. 220). At $15,000/lot the net profit over time would be $45,000,000. (1SH, p. 224). Per year, net profits at the rate of 60 lots per year at $15,000 would generate $900,000.

RESPONSE: Undisputed that Shad did not promise a return on the investment and that he concluded the project would be very lucrative. Remainer of the statement is undisputed as to Shad's testimony regarding estimated cost projections, sale projections, and profit projections; however, throughout Shad's testimony he reiterates that his projections were "preliminary" and "speculative" stating "…there again, this is speculative. My data sheets aren't something you want to take to the bank…" (1Sh p.220; 1Sh p.217-218; SH1 p.227).

4. Shad brought the "opportunity" to his father, Gordon. (1SH pp. 214-215). Gordon discussed the "investment opportunity" with Gary who expressed interest in investing. (VC 20, 24, 29, 30).

RESPONSE: Undisputed.

5. Shad, Gordon and Gary met in an "initial meeting" in the Spring of 2019. (VC 33, 35). Each partner was to have an equal voice. (1SH, p. 78). "The development was to be a team effort with each party to receive 1/3 of the net profits from development." (Gary's Answer to Interrogatory No. 4, Affidavit of Dorsey, Attachment 19). "All understood our collective experience was greater than any one individual. No specific or formal roles were ever assigned at the beginning; the roles evolved as things moved forward." (Gary's Answer Interrogatory No. 19, Affidavit of Dorsey, Attachment 19).

RESPONSE: Disputed. At the parties' initial meeting the parties agreed to be equal partners in owning and developing the property and sharing equally in all profits. (VC#33). In addition to this promise, Gary and Gordon also made several promises to Shad regarding the Project, his involvement in the Project and the ways he would profit from the Project. It was these promises that induced Shad to enter into the agreement and accept Gary and Gordon as his partners. (VC #33-50). The promises are detailed in Plaintiff's Verified Complaint #33-#50. Formal roles were assigned at the beginning. (VC #36-38).

6. Gary financed the purchase of the 1,333 acres. (1 SH, pp. 50, 61). Shad knew he was not purchasing the property himself; rather he was acting as a strawman in the transaction. (1SH pp. 64-65; 174-177; 207; 2SH p. 27).

RESPONSE: Disputed. Shad negotiated the sales of the various properties and personally signed the purchase agreements. Shad closed on these sales and held legal title to the property for six months before selling the property to Gary. In purchasing the property, Shad had to execute a contract for deed that he was personally liable for (VC #17). A contract that stayed in his name until it was refinanced by Gary in 2022. (VC #74) In selling the property to Gary, Shad incurred a personal tax liability of $220,000 that went unpaid for two years until Gary refinanced the contract for deed then loaned money to Alpha Land to pay it (VC #77). During these two years Shad carried this debt in his name and received notices to Levy from the IRS. (VC #78). Despite contrary terms in the purchase agreement, it was the parties oral agreement that Shad would not personally keep the proceeds in selling the property to Gary. This is why the term "sacrificial lamb" used by Postma is more fitting than "strawman". Shad carried the financial risk but received none of the profit. Defendants cite no authority defining a "strawman" in the context of a 1031 exchange, nor how Shad's involvement would satisfy such a definition. They provide no evidence, statutory authority, or case law in support of this position. Shad would argue that his involvement in the sale was anything but that of a strawman.

Shad would submit that the term "strawman" typically refers to a party who holds title in name only, without financial risk or economic interest in the property— a temporary place holder. That definition does not apply here. The IRS itself did not deem Shad a strawman when it accessed him personal tax liability— it recognized him as the seller in a legitimate arms-length exchange with Gary.

7. Shadrach's position as a "strawman" in the exchange was explained by James Postma, CPA meetings which Shad attended. (1SH, pp. 64, 179). Postma characterized Shad's position in the 1031 exchange which facilitated the purchase of the land by Gary's limited partnerships ("LPs") was a "sacrificial lamb." (1 SH, p. 177).

RESPONSE: Disputed. See Response to Statement #6.

8. In honor of God, it was very important to Shad that all street names be names or characteristics of God, that the highest construction standards be mandated, and the development cater directly to Veterans with discount incentives." [(Plaintiffs Brief in Opposition to Defendants' Motion for Partial Summary Judgment, filed 12/2/24, p. 3 of 77); See also, PR 7]; According to Shad's wife, "[h]e said God had shown him".. ."this property and this development opportunity was meant to be for his life and his family" and nobody else. (HH pp. 20-21).

RESPONSE: Undisputed with the understanding that the mention of "family" includes Gary and Gordon. (SH1 p.229).

9. The formation of Alpha Land Company, LLC was the vehicle which Shad agreed was to be utilized for regulation of the affairs of the company, the conduct of the business, and the relationship among the members. (1SH, pp. 116-117; 2SH, p. 38).

RESPONSE: Disputed

Shad's testimony at 1SH p. 116-117 reads:

Q: So its fair to say in the initial period of time, a lot of the details and material terms were left to be negotiated, including what business entity would be; right? Whether it be an LLC or corporation or whatnot?

A: Well, its fair to say they were ongoing. A lot of them had been determined at that point.

This testimony does not support the statement, "The formation of Alpha Land Company, LLC was the vehicle which Shad agreed was to be utilized for regulations of the affairs of the company…."

The evidence establishes that the parties agreed to be equal members in a partnership company that would own, develop, and share in the profits from the development. (G-0054, VC #33) The evidence further shows that the Defendants systematically and strategically altered the terms of that agreement over time to protect Gary from tax liability—beginning with the structure of Gary's 1031 exchange and continuing through their refusal to allow Alpha Land to obtain the promised development funding. (G-0054, PL001160; Postma #23-25; G-3234-3238) Throughout this process, Shad relied on his partners' representations and trusted that they would honor their promises, despite the contractual language and corporate structure that were tailored to accommodate Gary's exchange.(SH1 p.4)

10. Shad agreed that the Operating Agreement is a contract, like a constitution.

RESPONSE: Undisputed. Defendants explained to Shad that the Operating Agreement was like a constitution and that "the material terms" could not be changed "without the consent of all parties". (1SH p.237-238). It is Shad's claim that the operating agreement was amended in a way that substantially defeated his reasonable expectations and changed materials terms of the parties' agreement that were central to his decision to join the venture, specifically the elimination of the right of survivorship and allowing for members to name replacements. (VC #188-189). This fact is in dispute.

11. Shad read the Operating Agreement before signing it. (1SH, p. 234-235; SUMF 73). Shad explained his expectations and purpose of the operating agreement and testified: "I expected that the purpose of the contract would be to hold the parties involved to that contract." (1SH p. 84). "What good is the contract that doesn't bind the parties to do what they agreed to do. (SH p. 85).

RESPONSE: Shad does not dispute that he read through the Operating Agreement before signing it. He disputes the remainder of the statement. The purpose of the Operating Agreement is expressly set forth in Section 3 of the Agreement. Shad's understanding of the agreement was based on representations made by Defendants in response to questions he raised while reviewing it. Shad contends that Defendants made misleading statements regarding the terms of the agreement, which induced him to sign it. Accordingly, this fact is disputed. The following is evidence in the record that supports Shad's claim:

Prior to Alpha Land, Shad had never been in any kind of business organization (HH p.80), whereas Gary and Gordon have been in many. Shad explained in his testimony that he understood the terms of the agreement as they were presented to him by his partners. (SH1 p.245; p.235). Shad testified that when he asked Gary and Gordon about the amendment provision Gary told him, 'that's just language in there. Don't pay any mind to it. I do these all the time, and it's not important". (SH1 p.236). Shad and his father have a long history working together (Answer #16) and Shad trusted his father and his uncle. Shad testified that in regard to the operating agreement, the Defendants compared it to a Constitution explaining to Shad, "The Constitution can't be changed, Shadrach, but, we can outvote you. For instance—and they had analogies—if we are going to vote, I am outvoted, I can't do a dang this about it, but you can't go in and change the material terms without the consent of all the parties." (SH1 p.237-238). Shad testified, "there is no contract if the contract can be changed and manipulated and thrown out the window.

What good is the contract that doesn't bind the parties to do what they agreed to do." (SH1 p.84-85). As to his understanding of how the company would be operated by its managers Shad testified, "I understood it in the way that they verbalized it because it was different than – because the agreement contradicts itself. So, I brought up those contradictions, and the way that they pacified me was enough for me to sign the document because of the way they assured me. (SH1 p.235).

Gordon emailed attorney Tellinghuisen on 3/17/23 asking him if the Alpha Land Operating Agreement could be legally amended by a majority vote and Tellinghuisen responded the same day, "Below is the response I received from one of my partners. You're good to go—the Operating Agreement controls. **As Gary said, Shadrach didn't read far enough.** I apologize for my initial knee jerk response, the question caught me off guard." (G-2054A-2045B)(emphasis added).

12. Shad testified he did not have a problem with the operating agreement until it was amended. (1SH, p. 240).

RESPONSE: Undisputed. Shad did not have a problem with the original operating agreement until he learned that the Defendants could amend the agreement to alter material terms central to his decision to join the venture, without his consent.

13. On January 10, 2020, Gary, Gordon, Shadrach and Kelly signed the Operating Agreement and Articles of Organization and formed Alpha Land Company, LLC. (SUMF #47; See Operating Agreement attached as Exhibit 4 to Defendants' Answer). Kelly was identified as a member with no ownership, but having the exclusive right to be paid for listings and marketing of the property.

RESPONSE: Undisputed.

14. The Operating Agreement provided members net profits to be divided among the three members (Gary, Gordon and Shad) in proportion to their respective capital contributions as set forth in the agreement. (Operating Agreement, 6). Capital contributions were deemed at 33.33 % for each member. (Operating Agreement, 115). Distributions to the three members "shall be made in the amounts, in the manner, and at times determined by the managers. (Operating Agreement, 117). (See Exhibit 4 to Defendants' Answer).

RESPONSE: Undisputed.

15. Shad testified that with regard to the Operating Agreement, no members were promised any compensation, salary or particular wage. (1SH, pp. 38-39). Likewise, nothing was said about receiving money as a member of the LLC until there was a distribution of profits and

losses as described in paragraphs 6 and 7. (1SH, pp. 38-39). No member was guaranteed a profit or that property would be sold. (Gary's Answer Interrogatory No. 46; Affidavit Dorsey, Attachment #19).

RESPONSE: Disputed. Shad's cited testimony at 1SH p.38-39 does not mention compensation, salary or wages. Shad, however, does not dispute that the operating agreement does not expressly provide any member compensation, a salary, or a wage from the LLC. The remainder of the statement is disputed. Shad was guaranteed equal ownership in an LLC that would own and develop the property and share in the profits. (VC #50) among other promises.

Shad further disputes that parties intended for the operating agreement to control terms related to the development of the property including how each party was to be compensated for such work.

Postma recommended that the new LLC (later formed as Alpha Land) be formed for a different purpose (non-development) and enter into a separate legal contract with Gary's LPs to avoid the 1031 "developers risk" (PL001160)(Postma #45). This separate legal contract was intended to define and secure the rights, "to develop the property between the 3 parties in [their] respective roles," as Postma explained. (G-0054). It was Postma's understanding that each member would have a role in the development—Shad's being "significant construction work in developing the property". (Postma #48). This agreement, despite being an express term of the Alpha Land purchase agreement was never executed.

The original Operating Agreement contained no reference to the Alpha Omega Development or the underlying property, and it lacked all material terms governing the development of the Alpha Omega property, the members' roles in the development, and their compensation for such work. (G-2866)

The operating agreement was created quickly without much thought. Kelly Howie explained that, "We got through these and signed so that we could establish an account for the LLC quickly." Explaining that he had intended to suggest revisions after the agreement was signed but that he "neglected to do". 10/14/21 (G-2727).

The operating agreement was not intended by the parties to set forth terms related to development of the property or how the parties would be compensated for such work. This fact is in dispute.

Shad also claims that his unpaid labor and services benefited the property and the development. Neither of which is owned or controlled by Alpha Land or its operating agreement. Alpha Land has no valid contract or legal interest in the Alpha Omega Development or the property.

16. The development was to be a team effort with each party to receive 1/3 of net profits from development. (Gary's Answer Interrogatory No. 4, Affidavit of Dorsey, Attachment 19). "The reasons for the LLC was to facilitate the ability to share profits between the members as contemplated in our early discussions." (Gary's Answer Interrogatory No. 31; Affidavit Dorsey dated October 3, 2024, Attachment # 19). The operating agreement spelled out that each member would enjoy a 1/3 share of net profits or alternatively, a 1/3 share in losses. (Exhibit 4, Defendants' Answer 5,6)

RESPONSE: Disputed as to Shad's promised consideration. See response to Statement # 5. Additionally, it was the parties' original intent to be equal partners in an LLC that would own and develop the property, with each member receiving an equal share of the profits.(VC # 33; G-0054; SH1 p.28) This plan changed when Postma suggested that is "could" have negative tax implications for Gary. Postma proposed a safer plan to create a separate legal entity, one that didn't participate in the 1031 exchange, and would be owned equally by Shad, Gary and Gordon. This entity was to be created for a "different purpose". Under this new plan suggested by Postma, he still intended for Gary to contribute or transfer the property to the new entity after the exchange; however, this was never done. The plan was changed again (to benefit Gary) to have Alpha Land execute a development agreement and purchase agreement with Gary that would secure Alpha Land's right to develop and purchase the property from Gary. This new plan was based on the agreement that Alpha Land would be allowed to use the property as collateral to secure funds for development and purchase the property (Postma #25). However, Defendants never executed the development agreement and they denied Alpha Land its right to secure development financing as agreed. As a result, Alpha Land has defaulted on its purchase agreement making it null and void and leaving Alpha Land defunct. (G-3257, G-2049-250)

17. No member was guaranteed a profit or that property would be sold. (Gary's Answer Interrogatory No. 46; Affidavit of Dorsey, Attachment 19). With regard to the risks of land development, Shad agreed that inflation, difficulty working with local governments, and dealing with certain unexpected infrastructure issues were, in his words, "unavoidable." (1SH 219). Insofar as his own risk tolerance, Shad testified that "my risk tolerance is huge." (1 SH p.160). As members in the LLC, at the age of 40, compared with Gordon (75) and Gary (79), Shad professed: "I'm a young man, that my risk tolerance is much higher than both of them." (1 SH, p. 93). Asked to explain how he believed the fledgling company would be able to cash

flow payments on the 1,333 acres purchased for \$4.9 million, Shad described it as a "no-brainer" believing that that land itself would finance borrowing. (1 SH, pp. 93-95).

RESPONSE: Disputed as to "No member was guaranteed a profit or that property would be sold" See responses to Statements #5 #15 and #16. The remainder of the statement is undisputed.

18. Jarnes Postma, a CPA who provided the members with advice, testified: "[i]t was the intention of the parties that they share in the net profit equally through their ownership in Alpha Land Company." (Postma Affidavit, 46).

RESPONSE: Disputed. Postma's testimony that the parties intended to share equally in the net profits through their ownership in Alpha Land Company is based on his further testimony that Alpha Land was to refinance the Contract for Deed and use its equitable interest in the property to obtain development financing. His testimony is also supported by his emails confirming that the parties had agreed to execute a separate development agreement. (Postma #24 and #25) (G-0054; PL001160).

19. Shad viewed the project as his, and his alone. He testified it was "my project." (HH pp. 20-21).

RESPONSE: Disputed. Holly testified that Shad saw the property and development opportunity as meant for Shad and his family. Family including Gary and Gordon. (HH pp20-21). See also response to Statement #8

20. Shad did not contribute any money toward purchase the 1 ,333 acres of property. (ISH, p. 169). Shad paid "zero dollars." Id. Shad did not sign on any loans for the land nor did he contribute anything monetarily to capitalization of the LLC. (I SH, p. 98. Shad explained he was only "on paper."

RESPONSE: Disputed. See response to Statement # 6.

21. Shad did not contribute to payments on the Gikling contract for deed as documented in the Simpson Appraisal for its refinance with Banner Capital which confirmed Shad's role in the company and his lack of ownership in the 1,333 acres. (2SH pp. 15, 18, 2325). When that contract for deed (779 acres) was refinanced by Banner Capital for \$2,300,000, on March 29, 2022, Shad did not sign as debtor or guarantor; rather it was Gary who signed a non-revolving promissory note and loan on behalf of both LPs. (2SH pp. 14-15; SH Ex 22, pp. G-2029-2039•, see also, SUMF 123, 124, 126).

RESPONSE: Undisputed that Shad did not personally make payments on the Gikling contract for deed or that after he sold the property to Gary he held any personal ownership in the property or that Shad personally guaranteed Gary's refinance of the contract for deed.

22. The 1,333 acres for development was purchased by Gary's LPs and the financing was provided by Gary with Gordon providing later personal guarantees. (Gary's Answers to Interrogatories, No. 13, 14, 15).

RESPONSE: Disputed. See response to Statements #6. Undisputed that Gary purchased the property from Shad and breached the parties' agreement when secured loans on the property in name of his LPs—guaranteed by Gordon and Gary.

23. For Shad's role, he was promised 1/3 of net profits in his partnership with Gordon and Gary which was memorialized in the original operating agreement of Alpha Land Company, LLC, which Shad on January 14, 2020). (ISH pp. 38-39; 116-117).

RESPONSE: Disputed. See response to Statements #5.

24. Alpha Land Company, LLC has distributed to each member a total of $22,000 when it has declared net profits. Shad's 1/3 share has been distributed both times the company has made a distribution. The first disbursement was on September 2, 2023, and Shad was issued check #1329 in the amount of $ 10,000 drawn on Alpha Land's checking account. A second distribution was issued to Shad in check #1333 for $12,000. (Gary's Answer to Interrogatory Nos. 29 and 74; Dorsey Affidavit Attachment 19; See also, Second Dorsey Affidavit (copies of checks #1329, #1333).

RESPONSE: Disputed. Plaintiff was unable to locate checks #1329 and #1333 in the record provided. Shad never accepted receipt of any distribution funds as no checks were issued to him. Defendants unilaterally authorized the distributions and assigned Shad's share to Gary without Shad's knowledge or participation.

25. Net profits are dependent upon development expenses which cannot be forecasted with accuracy. (Gary's Answer Interrogatory #102; Dorsey Affidavit Attachment 19).

RESPONSE: Disputed. "Net profits" is not defined in this statement and record cited does not reflect this statement. Shad does not dispute that development expenses cannot always be forecasted with accuracy.

26. In its initial phases of development, Shad knew that the company was on "a shoestring budget" of limited capital. (2SH, p. 20).

RESPONSE: Undisputed. Shad knew that initially the company would be on a "shoestring budget" of limited capital until it was able to secure the agreed upon development financing which the defendants assured would be forthcoming.

27. Due to limited sales of lots being sold in the first two years, the company was without sufficient funds to meet its obligations. (Gary's Answer Interrogatories No. 70, 72).

RESPONSE: Disputed. The company was without sufficient funds to meet its obligations because Defendants did not allow Alpha Land to refinance its contract for deed and secure development loans as agreed. (Postma #23-25; G-3238; Ps Exhibit 8)

28. Gary testified that an LLC is not able to make distributions if the company would not be able to pay its debts as they become due in the ordinary course of business, citing SDCL 47-34A-406(a)(1). (Gary's Answer Interrogatory Nos. 83, 84, 85; SUMP 156, 159).

RESPONSE: Undisputed that an LLC has to pay its debts in accordance with South Dakota Law

29. Lots did not sell in 18 months as Shad and the other members had hoped. (1 SH p. 90). Delays occurred. Many issues with the City of Box Elder were encountered. (ISH, p. 230). Shad and his wife believed the City was requiring Alpha Land Company to do things that it had not required of other developers and was "blackmailing" them. (HH pp. 53-55).

RESPONSE: Undisputed.

30. Just three months after formation of the LLC, the City of Box Elder provided the company with a list of "to dos" which included an extension and improvement of a road at a cost projected at $1.6 million to be shouldered by Alpha Land Company. (1 SH, pp. 72-73; SH Ex 10).

RESPONSE: Undisputed.

31. Shad agreed that the City's directive and impact upon the company could not have been predicted without a "crystal ball." (ISH p. 74).

RESPONSE: Undisputed.

32. In his email dated October 25, 2021, Shad recognized the costs associated with the property's development were cutting into any ability to pay net profits. He was upset that he was not receiving any money and understood the reality that sales of lots were paying down

interest and correctly stated the consequence: "initial profits are already gone." (SUMF 102; SH depo Ex. 10, p. 028).

RESPONSE. Disputed. Shad was upset that interest on the contract for deed has been allowed to accumulate to nearly $400,000 and Shad says, "and for what". It is Shad's claim that the refinance should have immediately been done as agreed which would have avoided unnecessarily high interest to accrue and provided Alpha Land much needed funds to operate and develop. (G-0455; Postma #24)

33. As draws were distributed for development purposes, Shad admitted that "I was operating in my role in my capacity—which was development oversight." (2SH, p. 29). Shad confirmed he was doing the work "voluntarily" and did receive "some help and support from other members." (2SH, p. 29). He admitted that he did not ask to be paid. (2SH, p. 30). "Never did we ever discuss a dollar amount." (ISH, p. 252).

RESPONSE: Disputed. Shad's testimony on 2SH p.29 is referring to the time when he still owned the property between October 25, 2019 and April 6, 2020 and the excess funds from the downpayment were being held in escrow at Pennington Title and controlled by Gordon. Sale proceeds from his sale to Alpha Land had not been disbursed yet. Shad testified that "to this point, I hadn't personally done any work." And that "for sitework, I did have specific things that were done both voluntarily and hired out, so that is a – I don't know if I should say "yes" to that. I did receive some help and support from the other members." Shad testifies, "I knew we were on a shoestring budget… and my objective was to get this thing off the ground. "When asked if he ever asked for compensation for that work Shad replied, "For what work, though? Yes and no… " (2SH p.28-20).

34. Holly agreed Gary contributed hundreds of thousands of dollars to Alpha Land Company, LLC from loans on behalf of the LPs to keep Alpha Land afloat. (HH Depo., p. 90). Gary and Gordon signed personal guarantees of $2.3 million to refinance the Gikling contract for deed. (SUMF #101).

RESPONSE: Undisputed that Gary has loaned hundreds of thousands of dollars to Alpha Land from the monies Defendants obtained by placing mortgages on the property and personally guaranteeing them. This was in breach of the parties' agreement that Alpha Land would refinance the contract for deed and borrow money against the property to fund development allowing it to fulfill its financial obligation under the purchase agreement and stay out of default. (Postma #24-25; SH1 p37, Ps Exhibit 8)

35. Shad was allowed to show $220,000 of expenses of the development on his personal tax return and increase his basis for the short period of time he was the titled owner of the property

in the 1031 exchange as strawman until it would be transferred to the LPs as had been discussed with CPA Postma long before Alpha Land Company was formed. (2SH, p. 33).

RESPONSE: Disputed. Shad was not a strawman in Gary's 1031 as explained in response to Statement #6. The funds in escrow were proceeds Shad received as part of the sale to Gary. It was the parties' agreement that Shad would use the excess funds in escrow to add basis to the property, ie improvements, in an effort to reduce his eventual capital gains on the sale to Gary in an effort to reduce his personal tax liability (P's Exhibit 7; Pl001160). A tax liability that Alpha Land had agreed to pay. A tax liability that went unpaid for 2 years until the contract for deed was refinanced by Gary. Defendants refused to follow through with Alpha Land's refinance as agreed. (G-3238) Kelly initiated the refinance on behalf of Alpha Land immediately after the sale of the property to Gary. May 4, 2020. Banner capital began the loan process, requesting Alpha Land's documents. On May 11, 2020, Kelly scheduled Banner' capital's tour of the property to occur at the end of May. (G-0455)

36. Shad did not file any mechanics liens for the contributions of service to the project although he threatened to do so. (SUMF 185; 2SH p. 78-79; HH p. 176, HH Ex 1, p. 65). Holly agreed that this was a threat by her husband. (HH p. 177). Shad confessed that he was using the threat of placing liens as "a way to bring them to the table." (2SH, p. 80).

RESPONSE: Undisputed.

37. Asked in an interrogatory: "[s]pecifically what tasks and responsibilities did [Shad] have and what opportunities did he have to make money?" Gary answered: "Shad would be able to share in 1/3 of the net profits of the sale of parcels by Alpha Land Company, LLC. Beyond the 1/3 net profit opportunity, we discussed his ability to build homes with the construction loan provided by Gary." (See Gary's Answer to Interrogatory No. 26, Dorsey Affidavit Attachment 19).

RESPONSE: Disputed. Shad was promised more than 1/3 of the net profits of the sale of parcels by Alpha Land and the ability to build homes with loans provided by Gary. See Response to Statement #5.

38. Gary provided a construction loan of $150,000 to Shad but Shad could not account for the use of the funds agreeing "I burned up that 150 very quickly." (2SH pp. 91, 93-93; SUMF 185). Shad was out of money and could not borrow money himself. (2SH, p. 90).

RESPONSE: Disputed as a mischaracterization of the record. Shad testified, "I burned up the 150 very quickly. And I made up the difference at closing with capital I had made on other projects. . .my father wrote all the checks... Gordon Howie is the accountant. You'll have to ask him" (SH2 p91).

39. Alpha Land was never formed to purchase the entire parcel (1 ,333 acres). (Gary's Answer Interrogatory No. 21).

RESPONSE: Disputed. See response to Statement #16. The plan to have Gordon and Shad join Gary's LLC after the exchange was abandoned. (G-0054; PL00160) The plan shifted to creating a new separate LLC and Gary contributing the property to this LLC (Alpha Land). *Id.* The plan was then changed again (to benefit Gary) and instead Alpha Land was to purchase the property from Gary. The purchase agreement allows Alpha Land to purchase any size parcel it chooses. It does not prohibit a purchase of the entire parcel. Doing so, however, would cause a tax consequence to Gary.

40. No member was guaranteed a profit or that property would be sold. (Gary's Answer Interrogatory No. 46; Affidavit Dorsey, Attachment #19).

RESPONSE: Disputed. See responses to Statements # 5, 15, 16, and 17.

41. Shad had a deep emotional attachment and spiritual connection to the property and believes that "[t]he purchase of the property and [its] development were Shad's creation." (Plaintiff's Brief in Opposition to Defendants' Motion for Partial Summary Judgment, filed 12/2/24, p.72 of 77; see also PR 7).

RESPONSE: Undisputed

42. Shad's actions and conduct compromised Alpha Land. (Gary's Answer Interrogatory No. 71 (29 bullet points); (See also Answers Interrogatories No. 50).

RESPONSE: Disputed. There is no evidence in the record to support Gary's allegations is his Answer to Interrogatory 71. Shad disputes that any of his actions or conduct compromised Alpha Land. It is Shad's claim, however, that Defendants actions have been proven to compromise Alpha Land. Specifically, denying Alpha Land its right to secure the agreed refinance and subsequent development loans (G-3238, Postma #24-25, Ex#8), as well as, refusing to execute Alpha Land's contractually obligated development agreement (HH p. 34-35). Both of which have stripped Alpha Land's rights to profit from the property and its development, rendering it a defunct company.

43. The Operating Agreement was amended and restated because of Shad's conduct and threatening behavior. (Gary's Answers Interrogatories No. 50, 71). The Amended and Restated

Operating Agreement is attached as Exhibit 5 to Defendants' Answer. The change in the operating agreement did nothing to change a member's share in net profits.

RESPONSE: Undisputed that this is the Defendants; claim. Disputed as to their claim regarding Shad's conduct. See response to Statement #42.

44. The Amended and Restated Operating Agreement did not change the provisions regarding equal share of net profits and distributions. (Compare Exhibit 4 and Exhibit 5 to Defendants' Answer at paragraphs 6 and 7).

RESPONSE: Disputed in that the provisions 6 and 7 in the original agreement are not the same as provisions 6 and 7 in the amended operating agreement. Changes to these provisions were made. Undisputed the share of net profits remains equal to the member's capital contributions in both agreements.

45. Before April 6, 2020, Shad was well aware that he was not being paid any compensation, wages, or salary for his contributions to the project. (HH, pp. 32, 221; ISH pp. 185-187. As early as October 25, 2021, he knew that initial profits were gone due to lot sales paying down interest. (SUMF 102; SH Depo. Ex. 10, p. 028). Yet he delayed in bringing his lawsuit until October of 2023, claiming inter alia, unjust enrichment. (See V.C. dated October 16, 2023

RESPONSE: Disputed. See response to Statement #33. Before April 6, 2020, Shad owned the property. During this time only limited funds were available, being held in escrow and controlled by Defendants. Theses funds were limited to making improvements to the property to add basis. (PL0001160). Shad knew that initially the company would be on a "shoestring budget" of limited capital until it was able to secure the agreed upon development financing. Shad testifies, "I knew we were on a shoestring budget… and my objective was to get this thing off the ground." "When asked if he ever asked for compensation for that work Shad replied, "For what work, though? Yes and no… " (2SH p.28-20). Shad knew that the company would need to capitalize before it could compensate him for anything. You can't get money from a company that has no money. Shad was waiting for and relying on the Alpha Land contract for deed refinance or other financing loans to provide that capital. Defendants continued to delay the refinance. (Ps Exhibit 8) Up until the point when the Defendants hired an attorney to amend the operating agreement Shad continued to trust the defendants and their promises. (3SH p.20.)

46. On April 7, 2022, Stephanie Trask delivered an email writing "I do appreciate your acknowledgement (in other correspondence) of the many uncompensated contributions that Shad has made for the benefit of the partners and the partnership; Shad has advised me that his

contributions were meant as "gestures of gratitude and commitment to the family venture" and concluded "he does not wish to accept compensation." (SH Ex. 13, p. G0159; SUMF 175).

RESPONSE: Disputed as it is being used to mischaracterize the record. Trask was responding to an email from Gary regarding the services Gary acknowledged Shad had performed and was willing to pay for. Shad has documented over $300,000 of services he performed to improve Gary's properties and services he performed personally for Gary and Gordon. (PL001861) In Gary's letter he proposed paying Shad $10,000.00 for his services. This argument has already been presented to the Court and ruled on. Defendants are now attempting to relitigate it.

47. After Shad commenced his lawsuit, on November 20, 2023, he sent a draft of a lis pendens to Kelly Howie's partners in UniMax as well as James Postma and Greg Wick of Pennington Title Company. (HH pp. 177-178; SH Ex 21; 2SH pp. 65-67). A realtor, Holly, agreed that a lis pendens encumbers title and "it could potentially tie up future sales." (HH, p. 179). When asked about his reasons for the attempted lis pendens filing, Shad suggested that he still might file it (regardless of the fact that the property is not owned by any of the parties to the action, but rather Gary's LPs). (2SH, p. 68).

RESPONSE: Disputed. Shad did not send a draft of a lis pendens. After Shad filed this litigation he decided to file a *lis pendens* to protect his rights in the property, which given the nature of his claims at that time—he would have had legal merit to do so. His filing was rejected as the result of a legal description error. He sent out notices of the lis pendens before he knew the filing had been rejected. Before refiling it he received a letter from Defendants counsel and he decided not to re-file and instead focus on the litigation. Shad testified that he didn't want to give the appearance that he was being malicious and decided not to refile it (2SH p.69-71). Shad testified, "So I have held off even though I am fully aware that the objective is to sell the property and trying to force Shadrach into another lawsuit. That is what Kelly has—and by Kelly's account—that's what he wants to do so that –what he calls my wife and I 'The ankle biter" –I would have to initiate a new lawsuit, which is further fraud… I've involved Kelly or Unimax, and I'm prepared to do so, but I really don't want to. I want to settle this so I can and be done with these gentleman." Shad's testimony does not indicate that he plans to file a lis pendens or is threatening Kelly with a lawsuit.
Shad's desire to file a *lis pendens* would not be to damage the defendants but to legally protect his rights in the property as a result of the Defendants' breach of the parties' agreement.

48. Shad threatened to involve Kelly Howie and UniMax in litigation during his deposition. (2SH, p. 68; SUMF 187, 188).

RESPONSE: Disputed. See Response to Statement #47.

49. In May of 2023, Alpha Land Company, LLC entered into a purchase agreement with UniMax, LLC for $8,012,000 in exchange for 129 lots Alpha Land Company agreed to plat. (SUMF 190; Gary's Answer Interrogatory Nos. 103, 104).

RESPONSE: Undisputed.

50. Shad knew that an adequate remedy existed to secure any monies he claimed were due him for materials and/or service as he threatened to file liens against the property on December 7, 2022. (SUMP, 185). During the third day of his deposition, he again threatened to file liens and testified: " . . .1 will put a lien on everything that Gordon Howie owns that 1 have done for free. And it would probably be close to probably a million dollars with interest." (bold emphasis added) (3SH, p 46)

RESPONSE: Disputed as a mischaracterization of the record. Shad testified:

"Now, I have a partner, who happened to by my father, who maintained that he was in it to help me, that he maintained that this was—this was a scratch my back, I scratch you back scenario. And John, if you want me to bring in a list of services and—you know, **if I want to play by Gary Howie's rules,** I will put a lien on everything that Gordon Howie own that I have done for free. And it would be close to probably a million dollars and with interest." (2SH p.46, emphasis added). Shad was saying that if he wanted to "play" like Gary he would do this but he was not threatening to do it. Shad has never wanted to be in litigation with his family. He didn't want to place liens on their properties for work he did. He chose to trust them and trust their promises he did so until it was made very clear that they were not going to honor them.

51. Shad did not believe that Gary and Gordon could get the development completed and that it was meant for him to develop. (HH, p. 87; ISH pp. 22-23). While he felt that Gary and Gordon were "stealing his dream, stealing his idea, and kicking him out" his wife agreed that her husband's beliefs in this regard were not "rational. (HH, -p. 88-89). Holly agreed that when the company was in default, it was Gary who came up with the money personally to pay company expenses and ongoing interest and costs. (HH, p. 89). Holly did not view that Gary or Gordon were stealing Shad's ideas or stealing something from Shad by that conduct. (HH, p. 90).

RESPONSE: Disputed. Shad explains in his testimony that his role was in development and this statement was made in reference to the promise that was made to him--that his role was in development. This is what he means when he says "it was meant" for him to develop. That was the agreement. He also explained that the statement "this property will never be developed by you", this statement was regarding Shad's belief that Gary and Gordon are incapable of developing at a profit. Shad explains that his dad outsources everything and "when you hire everything out, your profits are out the door". Shad believes in doing as much in-house work as possible to save costs. Defendants are taking

Shad's words out of context, implying that he thought the project was his alone. They knew that they all had important roles to play, his however was in overseeing the site development and he worked in that capacity, never compensated as promised, until the defendants decided to take it away.(1SH 21-23)

Undisputed that Shad believes that Defendants are stealing his dream, stealing his idea, and kicking him out. Holly testified that she didn't think Gary and Gordon fulfilled their promises to Shad. (HH P.261) Undisputed that Gary denied Alpha Land its agreed upon rights to refinance the contract for deed and secure development financing (Postma 23-25) and as a result Alpha Land had to rely on him to loan it money. Dispute Defendants' claim that Gary was helping Alpha Land. His actions are what financially crippled the company.

52. Shad demonstrated hostility to Box Elder staff at a meeting on March 23, 2023, with threatening terms for which the company had to apologize. (SUMF 173; 2SH pp. 211-215).

RESPONSE: Disputed. The Defendants' decision to apologize was their own and unnecessary under the circumstances and likely influenced by the ongoing litigation. Shad was asked to attend the meeting by an adjoining neighbor asking for his support in advocating that the City remedy a dangerous traffic concern in Box Elder. Shad testified, "I think that you have a situation where if someone like me doesn't step up, you are going to have a serious accident over there. You've got thousands of people going in and out one way, and now you have got an event center built with only one way in and one way out.. . I'm the guy that is standing up saying 'ladies and gentlemen' the problem exists, and it is getting worse. If you don't address it, something is-- I mean you can't go on this way before the cancer kills you. Okay?" (SH p. 211-215) Shad was clearly passionate about a situation in which he felt peoples' safety was in danger and he could possibly make a difference.

53. Shad remained defiant and ready to sue the City when he was deposed on June 28, 2024. (2SH, p. 214; SUMP 174).

RESPONSE: Disputed as a mischaracterization of the record. When asked if would litigate the City's inaction to remedy the dangerous traffic situation at the Box Elder event center Shad testified, "I would be happy to take Box Elder on". (SH2 p.214).

54. James Postma provided the members of the LLC advice in his capacity as CPA prior to the company's formation which ultimately took the form of the LLC. James Postma's Affidavit, states: "[i]t was the intention of the parties that they share in the net profit equally through their ownership in Alpha Land Company." Absent in Postma's affidavit is any

suggestion that Shadrach's contributions of service to the company were due compensation beyond the 1/3 share of net profits. Postma stated: "I believed Shad was taking a position that I believed was beyond what his role in the company was supposed to be.. .." (Postma Affidavit, Il 11).

RESPONSE: See response to Statement #18 with regard to Postma's statement regarding the parties' intention on sharing net profits through Alpha Land. Remainder of statement undisputed.

55. From Alpha Land Company, LLC's formation until the present date, Shadrach Howie has remained a member of the company per the terms of the company's operating agreements event after his dissociation by judicial determination. (Answer Exhibits 4 (Original Operating Agreement) and 5 (Amended and Restated Operating Agreement).

RESPONSE: Undisputed.

Dated this 2nd day of April, 2025

PETERSON LAW, PLLC

<u>/s/ Kelly M. Peterson</u>
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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true and correct copy of the above **PLAINTIFF'S RESPONSES TO DEFENDANT'S SECOND STATEMENT OF UNDISPUTED MATERIAL FACTS** was served in the following manner and on the following person, by placing the same in the service indicated, postage prepaid as applicable, addressed as follows:

Odyssey File and Serve
John Dorsey
Attorney for Defendants
john.dorsey@amatteroflaw.com

Dated this 2nd day of April, 2025.

PETERSON LAW, PLLC

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STATE OF SOUTH DAKOTA)		IN CIRCUIT COURT
)SS.		
COUNTY OF PENNINGTON)		SEVENTH JUDICIAL CIRCUIT

SHADRACH HOWIE, and ALPHA LAND COMPANY, LLC, a South Dakota limited liability company, Plaintiffs, vs. GARY HOWIE, and GORDON HOWIE, Defendants.	)	51CIV23-001344 **PLAINTIFF'S SECOND STATEMENT OF DISPUTED MATERIAL FACTS**

COMES NOW Plaintiff by and through his attorneys of record and hereby submits this Second Statement of Disputed Material Facts in response to Defendant's Motion for Summary Judgment.

References to the record in are identified below and in Plaintiff's supporting brief as follows:

1. Reference to the Plaintiff's Verified Complaint is identified as "VC" followed by the numbered paragraph. (VC #___)
2. Reference to Defendants' Answer to the Complaint is identified as "Answer" followed by the numbered paragraph. (Answer #__).
3. Reference to the depositions of Shad Howie "SH" and Holly Howie "HH" and followed by the page # (HH p.__). Shad's testimony taken on 6/27/2024 is referenced as "SH1" followed by the page number (SH1 p.___); Shad's testimony on 6/7/2014 is referenced as "SH2" followed by the page number (SH2 p.____); and Shad's testimony on 7/12/2024 is referenced "SH3" followed by the page number (SH3 p. ____).
4. Deposition Exhibits are referenced by the deponent's initial, followed by the Exhibit number and page ("SH Ex___,p.____).
5. Defendants' Answers to Interrogatories are referred to as "Garys" then either "A" for admission or "I" for interrogatory followed by the paragraph # and page number. (Gary's, A#___, p.____)
6. Defendants' documents produced in discovery are referred to as, "G" followed by the page number and Plaintiff's documents produced in discovery are referred to as "PL" followed by the page number.
7. Plaintiff's exhibits are referred to as "P Exhibit" followed by the page number.
8. Affidavit of James Postma is referred to "Postma" followed by the #.

Plaintiff's previously submitted Statement of Disputed Facts in response to Defendants' Motion for Partial Summary Judgment provides additional support for Plaintiff's response filings to Defendants' Motion for Summary and is, hereby, incorporated by reference.

DISPUTED MATERIAL FACTS

1. Shad's expertise and efforts lead him to find a property in Box Elder that he believed would have significant development potential (Alpha Omega Property). He first discovered a 121.6-acre parcel for sale, the Sullivan Property (1SHp.58, VC #6-7). Initially, Shad thought about developing 3 to 15-acre sites (1SH p.58). Shad contacted the Sullivan's realtor, Dave Olson to discuss a potential sale. The Sullivans wanted to know more information about Shad—was he a family man, what was his vision for the property, etc. *Id.* After discussing the sale with Olson and the Sullivan's, Shad offered a purchase price of $3,500.00 per acre (nearly half the listing price) which the Sullivans were agreeable to. *Id.*

2. Shad devoted a considerable amount of time and effort into researching the property and used his expertise to determine the development's feasibility and potential. (1SH p.58). Shad determined that a secondary access point would be necessary for development to be feasible and he had the idea to reach out to William Gikling ("Gikling") who owned the adjoining three properties—these properties were not for sale (VC #9-13, 1SH p.58-59).

3. Through his efforts and persistence Shad was able to negotiate a purchase of the Gikling property on favorable terms. Shad initially offered Gikling a price of $2,200.00 an acre if it was a cash sale. (1SH p.59) Shad also discussed the possibility of purchasing the property on a contract for deed, either in whole or in part. *Id.* Gikling was open to cash a offer for the whole property or carrying some of the property on a contract for deed. Shad's main objective was to get the sale locked up and make it work, no matter how the purchase was structured. *Id.*

4. After negotiations with Shad, Gikling agreed to sell the property to Shad, and Shad worked out terms that included both a cash offer and the option of a contract for deed. A sale that was negotiated by Shad at below market price (VC #9-13, 1SH p.58-59)(PL000232).

5. Shad devoted considerable time and effort, using his expertise, to research the property's potential for development and ensure its feasibility—extending beyond his efforts to successfully secure a second access point through the purchase of the Gikling property. These efforts included researching utilities, consulting with engineers, and ultimately creating a

master plan for the development that included a 3,000-home development serving Ellsworth Air Force Base, designed to honor God through its street names and architectural standards and to provide discounts to veterans (1SH p.66-68)(VC #20).

6. In his efforts to secure the development's success, Shad sought the City's approval and presented his vision for the development and a master plan to the City of Box Elder. City officials supported the project (1SH p.66-68).

7. Shad met with the City a few times prior to purchasing the property (1SH p.66). In the first meeting, Shad presented the City with a master plan he had developed with engineer Kale McNaboe. *Id.* The City was very supportive of the potential development proposed by Shad, stating, "We really need this Shadrach" (1SH p.68). Kristi Vetri, the City's attorney, mentioned that the City had been interested in buying the Sullivan Property. (1SHp.66).

8. Shad was confident in the development's potential especially with the impeding expansion of the air force base and the City's approval. (VC #24; 1SH p214) And because the Sullivan and Gikling Properties combined would open access from Elk Vale Road to Radar Hill Road (from East to West) and from Reservoir Road to West Gate and interstate I-90 (from North to South). (VC #25) There was also potential for utilities on three sides of the property with a TIFF water line already in the ground across the Property. (VC #26).

9. Being confident with the development's feasibility and potential, Shad began looking for potential investors—finding a trustworthy investor willing to partner with him in creating his vision of the Alpha-Omega Development (hereinafter referred to also as "the development" and/or "the project") (VC#21-24)(1SH p.47, 59; 228).

10. Shad initially approached his longtime business associate Donahue Williamson and his brother Donovan. (VC #27, 1SH p.47, 59; 228). The Williamsons had the borrowing power necessary and recognized the financial potential of the project. (VC #28, 1SH p.228-229). Shad testified that Donahue told him to "Just get it locked in. Just make the deal happen". Donahue told him "whatever you need, Shadrach, I'm here for you, and we can write a check tomorrow, but get it locked up". (1SH p.228)

11. Shad told his father Gordon about the development he putting together. Gordon and Shad had a close relationship. They were neighbors and talked everyday. (HH p.192; VC #29; Answer #14). They also have a long history of working together (Answer #16).

12. Gordon later told his brother Gary about the land purchase Shad was putting together. This occurred during a phone call Gordon had with Gary about the potential sale of his mobile home park in Virgina. (Gary's A, I#2 p.6). At the time, Gary was looking for a 1031

investment property and Gary expressed an interest in the deal Shad was putting together. (Answer #15). Gary stated, "I recall Gordon mentioning that Shadrach had a friend he was considering telling about the property. Gordon told me that he had encouraged Shadrach to wait until we knew whether my sale of the mobile home park (LPs) would go through." (Gary's A, I#3 p.6).

13. In the Spring of 2019, Gary, Gordon, and Shad met to discuss the possibility of the three of them being partners in the purchase and development of the property. Shad claims they all agreed to be equal partners in an entity that would purchase, own and develop the property and each member would contribute to the project in his area of expertise. (VC #33).

14. Shad claims Gary and Gordon made several promises to him regarding the project, including his role in the project and the ways he would profit from the project. It was these promises and those made during the parties' initial meeting that induced Shad to enter into a partnership agreement with Gary and Gordon. (VC #35).

15. According to Shad, Gary and Gordon were "wooing" him and trying to persuade him to "go with them versus anybody else". (1SH p.58). Shad claims that Gary and Gordon persuaded him to walk away from any deal with Donahue and instead partner with them. (1SH2 p41)

16. The promises Defendants made to Shad include: The parties would purchase, own, develop the property as equal partners—sharing equally in the profits; their ownership would be held in joint tenancy with a right of survivorship; Shad would have a key role in site development and development oversight and that he would be paid for the work he did for the partnership; that the partners would implement a noncorrosive rebar covenant; that Shad would have the opportunity to build as many houses and commercial buildings as he wanted and their development company would finance his builds; that he could create marketable listings; that they would all be able to use and benefit from the raw undeveloped land; they would get "walking money" early on in the project to help with their personal finances; and that the development would honor God by naming all streets after characteristics or names of God. (VC #33-50)

17. These promises were material to Shad. Gary and Gordon led Shad to believe that the partnership would be a "sweet deal" for him (VC #33-35; 1SH 228).

18. Shad's promised consideration was not limited to a 1/3 share in net proceeds from development. *Id.*

19. Shad's promised consideration was not limited to a 1/3 membership interest in a company with no ownership rights, no development rights, no financing rights and no ability to make a profit. *Id.* (Postma 23-35)(G-0054; PL001160; G-3234-3238)

20. The parties agreed to have defined roles in the Project and Shad's role was in site development and development oversight. (1SH p.23)(VC#40).

21. It was also Holly's understanding that Shad would be heavily involved in the development of the project and that he would be paid for the work he did. (HH p.257-258).

22. Shad was also promised that he would have the opportunity to build as many homes and commercial buildings as he wanted. He never expected to be the only builder, only that he would be given the opportunity to build homes as he pleased and that his construction would be financed by the parties' development company and lots fronted to him (1SH p.256)(VC #41).

23. Gary and Gordon knew that Shad was and is an out-of-pocket builder meaning he doesn't get conventional loans to build. Typically, the lots are fronted to him and Shad uses his own money to build. He also works with contractors with whom he has a good relationship and who are willing to carry him until the build is complete. Once the lot sells, the lot is paid for and the contractors that carried him during the construction are paid. (HH p.134-135).

24. Shad testified at his deposition "I was told by my partners that Alpha Land was going to finance the construction. . . Gary oohed and awed about townhomes and apartments, and possibility building to own, and buying equipment, and 'boy we're just going to make this thing so sweet for you' So that's what I was promised". (1SH p. 256).

25. The Parties agreed that each member would have an equal opportunity to profit off any raw undeveloped land and rental properties during the duration of the project—i.e leasing it to run cows, selling hay, or by running their own cows. (VC #47)(1SH p.132)

26. Shad testified, "We operated in the capacity the first year and had verbally agreed that that would be how it would go down…the whole deal is that three partners would share in all of the benefits of this property and its---and its future". (1Sh p.132).

27. Although Alpha Land is required to pay all the expenses related to the property and it has possession of the property, it is the Defendants position that Alpha Land is not entitled to any of the income produced from the using or renting the property. (Gary's A, I#79, p.51).

28. The tax returns are consistent with an agreement allowing Alpha Land to use the property for things such as cattle, hay, and rentals. The 2020 and 2021 returns both show income from rents and farming (G-2975, 3306). The 2021 tax return shows that Alpha Land had gross farming income in the amount of $179,538.00 in sales of livestock, produce, grains and other products. (G-3306). In 2022, Alpha Land's tax return shows farming income of $1,000 in other income. (G-3045) Alpha Land's ability to continuing making income off the property ceased in 2022, the same time Gary and Gordon decided to change the operating agreement and tensions between the partners were at an all-time high. (G-0648).

29. The parties agreed that Alpha Land would use its equitable interest in the property to refinance the Gikling Contract for deed and secure development financing to develop and purchase the property. (Postma 23-25; 1Sh p. 95) Shad testified, "It was a no-brainer. The real estate is the vehicle to borrow against. So to cash flow—so my dad threw out this walking money idea. Once we refi, Shadrach, you're getting walking money and you're going to be - - Alpha Land is going to finance all the construction that you can handle. We're just -- I mean, the whole nine yards, John." (1SH p.95) Shad later testified, "And when they talk "walking money", it is refinancing; plus money to work on; plus, according to them, "walking money". (1SH p.224).

30. The parties agreed to be equal partners in an LLC that would own and develop the property. The partners would each have a 1/3 membership interest in the company held in joint tenancy with the right of survivorship. (VC#50) (G-0054; PL001160)

31. The parties decided to meet with CPA James Postma ("Postma") to help them navigate through the 1031 Exchange process. (Gary's A, I#1, p. 3).

32. The approach ultimately devised would be described as "unorthodox" by Postma. (PL0001151-PL0001152).

33. Gary Howie's 1031 exchange was highly complex and carried substantial tax risk, including the "step transaction" risk, the "developer risk", and the "related party" risk. (Postma #20-45)

34. To protect Gary from potential IRS scrutiny, key aspects of the parties' original plan to purchase, own, and develop the property as equal partners were altered along the way. (Postma #42,23-25)(G-0054, PL001160).

35. On September 17, 2019—just one month before Shad closed on the Sullivan and Gikling properties—Postma sent Gary an email outlining the multi-step 1031 exchange plan the parties had put together and how he understood it. According to Postma, the plan was as follows:

1. Shad would form an LLC to purchase the property;
2. Gary would become 100% owner of his two LPs through spousal gifting;
3. Gary would form an umbrella LLC over his LPs;
4. That umbrella LLC would acquire the property from Shad or Shad's LLC through a 1031 exchange; and
5. After the exchange, Shad (through his LLC) and Gordon would be added as members of Gary's umbrella LLC. (G-0054)

36. The parties' 1031 exchange plan just weeks before closing supports Shad's claim that the parties agreed to be equal members in the entity that would own and develop the property. *Id.*

37. Postma raised concerns that this plan, however, could trigger IRS scrutiny under the "step transaction" doctrine, which could invalidate Gary's 1031 exchange and to mitigate this risk, Postma suggested a "safer" alternative—create a separate legal entity, distinct from Gary's umbrella LLC into which Gary would "contribute" the property and which would be the operational vehicle for development. *Id.* This entity would then be jointly owned by Gary, Shad, and Gordon, each in equal shares.

38. Postma explained to Gary, "I think it would be preferable to have another legal entity involved which brings together all of the parties and your contribution to that entity is the contribution of the property which your LLC obtained from Shad." Id. He admitted that while the original plan might still be legally viable, he believed the alternative offered a "somewhat weaker argument" for any IRS challenge because the new entity would be "formed for a different purpose." *Id.*

39. Postma acknowledges that the IRS's interpretation of a fact pattern is subjective so Postma could only speculate on what he thought would be the best plan. (Postma #29).

40. The plan that Gary would transfer or contribute the property to Alpha Land as suggested by Postma never occurred. (VC Ex.B)

41. The plan was complex and constantly evolving—so complex, in fact, that Gary's own attorney, Mark Walters, withdrew from the matter, claiming the transaction exceeded his expertise. (G-0058)(Postma 42).

42. One of Postma's primary concerns with Gary's Purchase Agreement was the risk that the IRS could characterize the series of transactions as a "step transaction"— jeopardizing Gary's tax-deferred status. (Postma #26-28)

43. As Postma explained in his affidavit, "If the IRS believed that the taxpayer was engaging in a series of transactions or steps that might not otherwise make sense unless the purpose was to

circumvent what otherwise would be the intended tax results, then the IRS could choose to bypass those steps for tax purposes." *Id* at 27. Postma continues, "This specific threat naturally goes to the validity of the 1031 exchange. If there is concern about a step transaction threat, then you would not want to give the IRS a road map on the steps that you are undertaking. This would be tantamount to an invitation for them to come to that conclusion." *Id* at 28

44. To minimize this risk, Postma admits that certain material terms were excluded from Gary's Purchase Agreement. *Id.* In his affidavit, Postma confirms, "Gary's Purchase Agreement as drafted reduced this risk. The purchase agreement didn't include several of the terms the parties had agreed to about the sale, including that Alpha Land would get the proceeds and not Shad." *Id* (emphasis added).

45. Gary's Purchase Agreement contains illusory terms and consideration. It states that Shad would receive $4,931,924.00 for the property but Shad never actually received this amount. (VC Exhibit A).

46. Per the terms of the parties' actual agreement, omitted from the contract, the excess downpayment funds were held in escrow and used exclusively to improve the property while Shad owned it and upon closing, Shad paid his proceeds to Alpha Land (VC #69-69, 75).

47. Shad was not simply a strawman in Gary's 1031 exchange. Shad personally found, negotiated and closed on the acquisition of the property, purchased the property by way of cash *and* by assuming personal liability on a $2.1M contract for deed. (VC #73). Shad held legal title to the property for over six months; remained personally liable on the contract for deed even after the sale; performed worked on the property while he owned it; (VC #69) and ultimately incurred a personal tax liability of approximately $220,000 as a result of the sale.

48. Defendant's claim that Shad did not "sign on any debt" is false. Shad was personally obligated on the contract for deed from 2019 until 2022. (VC #74).

49. Shad's consideration was the totality of representations made to him by Gary and Gordon—including owning, developing and profiting the property as equal partners, a led role in development, and several other financial and employment opportunities. (VC #33-50, SH1 p.28).

50. Critical terms of the transaction were never reduced to writing—including Alpha Land's obligation to pay Shad's personal tax liability and Shad's obligation to transfer his sale proceeds to Alpha Land. (Postma #28).

51. Shad's personal tax liability went unpaid for two years, during which time he endured the stress of repeated IRS notices and threats of levy. (VC #78) The Gikling Contract for deed remained in his name until it was refinanced in 2022.

52. When the parties ultimately decided to form Alpha Land Postma raised additional concerns about the risk that the IRS could classify Gary as a "developer." (Postma #20, 45). In response to these risks, structural changes were made at Postma's direction to protect Gary's tax position. *Id.*

53. Postma proposed forming a separate LLC—distinct from the entities used in the exchange—that would serve as the development entity. He wrote that "after the exchange you then enter into an operational agreement to develop the property between the 3 parties in your respective roles" and advised that "it would be preferable to have another legal entity involved which brings together all of the parties," specifically one "formed for a different purpose." (G-0054)

54. Postma confirmed this approach in a subsequent email, "I realize that apart from this proposed sale **and** the operating agreement of the Alpha Land Company, LLC, there will also be a separate legal contract [which still needs to be drafted] between Gary's LPs and Alpha Land Company, LLC." (PL001160) (emphasis added).

55. Postma recommended that the new LLC (later formed as Alpha Land) be formed for a different purpose (non-development) and enter into a separate legal contract with Gary's LPs (PL001160). This separate legal contract was intended to define and secure the rights, "to develop the property between the 3 parties in [their] respective roles," as Postma explained. (G-0054).

56. The separate legal contract or "final contract" was material to the parties' agreement, executing it became an express term and requirement of the Alpha Land purchase agreement. (VC Exhibit B).

57. The separate legal contract or final contract was never executed. (Gary's A, I#47, p.28)

58. The original operating agreement makes no mention of the Alpha Omega Development or the underlying property, and it lacks all material terms governing the development of the Alpha Omega property, the members' roles in the development, and their compensation for such work. (G-2866-2874). These terms were purposefully omitted. (G-0054; Postma 20, 45)

59. These terms were meant to be included in the separate agreement. (Postma #45-46)(G-0054;PL001160).

60. The Alpha Land Operating Agreement was prepared quickly and primarily as a formality. As Kelly Howie acknowledges this in his email dated October 14, 2021, "A couple notes regarding our governing documents from my perspective. . . We got through these and signed so that we could establish an account for the LLC quickly." Explaining he had intended to suggest revisions after the agreement was signed but that he "neglected to do". (G-2727.) Kelly further confirmed that "there was never any separate agreement for Alpha Land" and acknowledged, "while I know it's our intent that Alpha Land Company would purchase parcels from Gary's LLP's, I don't believe any specific provision or agreement has been executed for that purpose." (G-2727.)

61. The Alpha Land purchase agreement was executed on January 14, 2020. The agreement provided that Alpha Land would purchase the property in parcels at $3,710 per acre, with the size and timing of each acquisition to be determined by Alpha Land. (VC Ex. B)

62. Postma validated that the purchase agreement gives Alpha Land an equitable interest in the property that was intended to be used to refinance the contract for deed and secure additional development financing using the property as collateral. (Postma #23, 25).

63. Postma explained that this "unorthodox" structure of the Alpha Land purchase agreement also carried IRS risk stating, "I have never been part of a 1031 exchange that conscientiously plans to unwind the exchange almost immediately upon inception… [it] would add further risk to the validity of the exchange." (Postma #44).

64. The purchase agreement required Alpha Land to assume *all* financial obligations related to the property—taxes, insurance, and the contract for deed payments—despite holding no legal title. (VC Ex. B).

65. Postma's unbiased testimony states, "It was my understanding that Alpha Land's rights to purchase and possess the property gave Alpha Land an equitable interest in the property. It was very much my understanding based upon my discussions with Gary, Gordon and Shad that Alpha Land would be the borrowing entity… and would use its equitable interest in the property to borrow money to refinance the contract for deed and/or finance development." (Postma #23-25)

66. Shad relied on this assurance, as he explained at his deposition, "The value in the land as a whole used as collateral would have exponentially given capital to Alpha Land to both develop, pay taxes, and provide all the concessions made to me." (1SH p.26).

67. This understanding was supported by Banner Capital's readiness to loan Alpha Land up to $3.5 million, based on its belief that Alpha Land would hold title and be the borrower—not Gary. Banner's Richard Braithwaite confirmed this in an email on December 16, 2021, writing, "We have already lent you funds to refinance your ranch and build your new home and that loan is under your name. As long as Alpha Land Company, LLC is the new borrower we should not have a problem with lending Alpha Land Company, LLC $3.5 million." (G-3234-3235)

68. Had Defendants followed through, the refinancing would have immediately transferred title of approximately 779 valuable acres to Alpha Land. (G3234-3235).

69. Today just 160 acres of that land is currently listed for sale at nearly $7 million—all 779 acres were purchased for $2.1M. (P Exhibit #6; PL000234).

70. Alpha Land's refinance would have allowed it to pay off the $2 million contract for deed, eliminate Shad's personal $220,000 tax liability, and access nearly $1.5 million in critical capital to continue development and perform under the terms of its purchase agreement. As Braithwaite confirmed, "for now that would provide $1,480,469.57 available for accrued interest, closing costs, and funds for future development". (G3234-3235).

71. Despite being the parties' agreement, in December 2021, Gary informed Banner Capital that his LPs—not Alpha Land—would remain the borrower. Gary admitted to Braithwaite a sale of the land to Alpha Land would "trigger significant tax consequences" for him that the exchange had avoided. (G-3238) (emphasis added).

72. Shas was promised that Alpha Land would refinance the contract for deed. Shad testified, "To be clear, the purchase agreement is what ties Alpha Land to the physical real estate. And we had always, always, always, planned on doing a refi on my contract for deed, which stayed in my name, that was mine . . ." (1SH p.32).

73. Without the ability to use the property to refinance and secure development funds Alpha Land could not meet in financial obligation under the purchase agreement and subsequently defaulted.(G-3257).

74. Gary has the ability to terminate the agreement. Gary wrote, "The terms of the contract by which Alpha Land Company agreed to purchase the rights to develop the land have already been breached, so the contract could at this point be declared null and void, thereby completely eliminating an operating agreement which we agree has some inherent flaws.

Should the contract be declared null and void, Shadrach's position would in the process be extinguished, and Shadrach's value would be equal to the cash he invested in purchasing the property. Exactly zero." (Plaintiff's Exhibit #1)

75. Defendants have since been asked to execute the promised development agreement and Defendants have refused. (HH p. 34-35).

76. Defendants revised the Alpha Land purchase agreement to eliminate the requirement of a development contract. On February 10, 2023, Defendants executed a new Alpha Land Purchase Agreement. This agreement again imposes all financial liability for the property and the project on Alpha Land—this time expressly requiring Alpha Land to be responsible for all payments related to the Seller's existing mortgage or any replacement financing, while also eliminating the requirement that the parties execute the critical development agreement. (P Exhibit #5).

77. Defendants have proposed a plan to abandon Alpha Land and start a new LLC without Shad to continue in the purchase and development of the property. (G-2049)

78. The addendum to the agreement states that Gary's LPs—as the seller—shall receive 1/3 of net profits from each sale while Alpha Land is to receive the other 2/3 share. This would result in the members of Alpha Land sharing in only 2/3 of the net profits (not each receiving 1/3) thereby increasing Gary's share and diminishing Shad's below a third. (VC Ex. B). This contradicts the parties' agreement and Postma confirms that this provision is contrary to their agreement in his affidavit. (Postma #46). Defendants, however, knowingly carried this same provision into the revised purchase agreement executed in 2023. (P Exhibit #5)

79. The Alpha Land Purchase Agreement only credits Alpha Land for principal payments made on the contract for deed, and subsequent mortgages. Defendants are, therefore, receiving the benefit of an interest-free loan at Alpha Land's expense. (VC Ex B).

80. Gary and Gordon have further encumbered the property with significant debt including a $500,000.00 line of credit and a $5 million mortgage—both personally guaranteed by Gary and Gordon. (G3271,G-2459,G-2461). Under the loan terms, proceeds from the sale of each lot are first applied to interest, principal, and release fees associated with these loans. *Id.*

81. Defendants were asked in discovery to produce an accounting of how the loan proceeds were spent, along with supporting financial records. They failed to do so. (Gary's A, I#48-49, p.28-29). Alpha Land is responsible for loan funds to which it has no control and as a member of Alpha Land, Shad has no ability to ask for an accounting of those funds have been spent.

82. Alpha Land received a $3 million housing and infrastructure grant from the South Dakota Housing Authority and the funds were immediately diverted to satisfy Gary and Gordon's loans. (P's Exhibit #3). Within one day of receiving the grant funds, $1.5 million was paid to BankWest, $377,000 to Pennington Title, and $45,000 to a third party, leaving Alpha Land with a balance of just over $31,000. (P's Exhibit 2).

83. The value of the development property has increased dramatically since Shad acquired it and contributed to its development. When Shad transferred the property to Gary in 2020, the total purchase price was $4,931,924.00. Of that amount, approximately $2.4 million was paid in cash, $618,016.00 was used to fund development costs and make payments on the underlying contract for deed, and the remaining balance was carried on the contract for deed. (VC Ex. A)

84. Since that time, the property's value has grown substantially as a direct result of the acquisition, planning, development, and infrastructure work that Shad initiated and contributed to. Gary's August 8, 2022 email demonstrates the property's increase in value. Gary acknowledges that the City of Box Elder approved approximately $14 million in public infrastructure improvements for the development through Tax Increment Financing (TIF) funds, with "no obligation to us other than they would like us to build as fast as possible." (G-2025)

85. All single-family and townhome lots in Phases 1 and 2 of the development have sold to Unimax for $8,012,000.00. (P's Exhibit 4).

86. Most recently, Defendants have listed several parcels of the property for sale, totaling approximately 229 acres—only fraction of the full 1,300-acre property. These listings alone carry a combined asking price of $15,920,284.00, including:
    - 160 acres on Cheyenne Blvd. listed at $6,969,600.00 (MLS#169189)
    - 38 acres on Alpha Ave listed at $4,138,200.00 (MLS#172038)
    - 3.66 acres on Alpha Ave listed at $637,720.00 (MLS#172036)
    - 10 acres on Alpha Ave listed at $1,500,000.00 (MLS#172037)
    - 0.16 acres on Northern Lights Blvd listed at $55,500.00 (MLS#169354)
    - 13.72 acres on Alpha Ave listed at $2,091,751.00 (MLS#163678)
    - 3.46 acres on Northern Lights Blvd listed at $527,513.00 (MLS#163676) (P's Exhibit #6)

87. Throughout the course of the project, Shad provided substantial, uncompensated labor and services that directly benefited the development of the property and personally benefited Gary and Gordon. (VC #102, PL001861).

88. After purchasing the property, Shad immediately began fulfilling his development obligations under the parties' agreement—overseeing site work, managing contractors like Lind Exco, and coordinating with engineers to advance infrastructure planning. (VC #102).

89. Shad personally performed extensive physical labor on the property, including land improvements such as road construction, fence installation, creek crossings, dam clean-outs, trash removal, and prairie dog control. He also dedicated significant time and resources to property maintenance, equipment operation, and excavation services. (PL001861)(VC #139)

90. Beyond work on the property itself, Shad performed various services that personally benefited Gary and Gordon—such as feeding livestock, hauling hay, assisting with home plans and excavation, concrete work, and other labor-intensive tasks. *Id.*

91. Defendants did not reject or decline Shad's services. Instead, they knowingly accepted the benefit of his work. (Defendant's 2nd Brief p.13). Shad has not been compensated for this work.

92. Defendants purposefully delayed in refinancing the Gikling contract for deed. The parties had agreed to refinance right away. Just one month after Gary purchased the property—Kelly Howie contacted Banner Capital to begin the refinance process. Banner toured the property and requested documentation from Alpha Land to move the loan process forward. (G-0455).

93. Shad testified that Banner Capital's Richard Braithwaite told him Banner was "waiting on Gary" and that the timing was not right for Gary to proceed. (SH1, 88:8). Emails reveal that Gary was focused at the time on refinancing his personal ranch and new home. (G-3234-3235). In addition, the record reflects that completing the refinance and transferring title to Alpha Land would have had tax consequences for Gary, something that further complicated and delayed the process. (G-3238).

94. Gordon prepared a letter for Shad on 12/23/2021 to provide to his bank stating, Alpha Land is responsible for payment of $202,514.00 of the tax liability shown on Shadrach Howie's tax return. We are in the process of funding our account to pay that tax obligation. It is our expectation that this should be accomplished within the next 60 days, most likely be the end of January." (P's Exhibit 8).

95. Shad only became aware of the Defendants intent not to honor their deal or their promises to him when they made the decision to hire an attorney to amend the Alpha Land Operating Agreement and take steps to fundamentally alter the terms of their agreement. (3SH p.20.)

96. Shad was unaware that Gary himself refinanced the Alpha Land contract until after it was done and. Gary continued to take out mortgages on the property as late as September 2023 (G-2029.)

97. Defendants were fully aware of the dispute and the likelihood of litigation. Shad had hired Attorney Trask after Defendants started efforts to amend the operating agreement. As early as May 2022, Gordon emailed their attorney acknowledging that Shad believed Defendants had acted illegally or criminally. (G-2045.) In May 2023, Kelly suggested further amendments to the Operating Agreement to remove protections for expelled members and to revise the attorneys' fees provision by eliminating the term "prevailing party" from the attorney's fees sections saying, "the rationale being that if we did not prevail on all points within a specific suit, it could potentially be arguable which party actually "prevailed" (G-2052).

98. Defendants recently listed approximately 229 acres of the property for sale for over $15 million—clear evidence that they have not suffered harm as a result of any alleged delay by Shad.

99. Prior to litigation the parties actively pursued various mediation and settlement attempts. (G-1514.)

Dated this 2nd day of April, 2025

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true and correct copy of the above **PLAINTIFF'S SECOND STATEMENT OF DISPUTED FACTS** was served in the following manner and on the following person, by placing the same in the service indicated, postage prepaid as applicable, addressed as follows:

Odyssey File and Serve
John Dorsey
Attorney for Defendants
john.dorsey@amatteroflaw.com

Dated this 2nd day of April, 2025

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testified, "Honestly, I felt like everybody was being difficult. Everybody was being stubborn. If felt like Shad didn't really have an option because every time he would suggest something, they would either not reply to him or they would tell him no." (HH p66-67).

The stress was certainly wearing on Shad. He spent a lot of 2019 and all of 2020 working on the project and not making any income. (HH 221). Without lots to sell and build on and when the promised walking money never came, Shad found himself in a difficult financial situation. (unlike Gary, who intends to give his proceeds to charity, G-2662) This motivated him to find solutions and when those solutions were met with resistance it caused frustration, stress and anger. Gary controlled the land, he controlled the money, he controlled the project, and he controlled whether Alpha Land existed.

In addition to the amendments made to the operating agreement Shad argues that he has been oppressed by Gary and Gordon's actions to have exclusive control over Alpha Land's development funds in breach of their agreement and their fiduciary duties to the company. The money being used to develop the property is not Alpha Land's money. Alpha Land doesn't actually have a say in anything. Gary never signed any contract with Alpha Land giving it the right to develop the property and it can't develop the property without money. At the end of the day, Alpha Land could vote to approve a development plan but if Gary isn't willing to pay for it, Alpha Land is powerless. This is not a reasonable expectation of the minority shareholder and the defendants conduct is "burdensome, harsh and wrongful".

REMAINING PROMISES IN BREACH OF ORAL CONTRACT CLAIM

As previously discussed, the parties dispute the existence of an oral contract. It is Shad's claim that an oral contract was formed with the intent to formalize its terms at a later time, however, this didn't happen for the reasons previously set forth in this brief. In addition to the promise that parties would be equal partners in owning and developing the property in a closed partnership, Shad claims additional considerations were made to him. The defendants were aware of Shad's financial situation prior to their partnership. Shad is not retired, he is a father supporting four children who needs to work to provide for his family. A project of this size a nature is a huge undertaking that requires a considerable amount of time and work. Postma saw Shad as "doing a significant amount of the construction work in developing the property", as did Holly and Shad. (Postma Affidavit). Defendants claim Shad was motivated by greed. (Def B p.100). Shad was not motivated by greed, the development was Shad's creation, his idea—an idea he believed to be divinely inspired and blessed upon his family by God. He chose to partner with Gary and Gordon, he didn't have to. He chose to forego a partnership with his long time business partner and friend and he chose to forego other business ventures and employment opportunities because was led to believe the this project would be a "sweet deal" for him and that it would provide him income from the very start, whether it was through Gary's promised "walking money", or through company financed home builds, or through the promised use of non-corrosive rebar to which he was an exclusive distributor, or through working the raw land and running cows, or whether it was through the work he would provide the companying in overseeing the site development. Shad did not believe that the property was his alone to develop. Shad understood he was in a partnership and each partner played an important role in the development but Shad's role with overseeing and managing site development—boots on the ground, actually doing the work—getting bids, working with contractors, engineers—everyday working on the project as his job. He is not retired and he wasn't expecting to sit back and hire work he himself was capable of doing. It is reasonable to believe that Gordon, a father, would promise his son these opportunities rather than outsource them to other developers and other contractors. Defendants knew that Shad was passionate about non-corrosive rebar and believed it to be a superior alternative to concreate reinforced with steel. Shad provided the defendants with an abundance of information on the product and it superior benefits. Based on the parties discussions and actions, it is reasonable to believe that Gary and Gordon shared in this belief and promised Shad that non-corrosive rebar would be used. As the defendants point out, Gordon also had financial stake in the use of non-corrosive rebar and so it is reasonable to believe that Gordon was advocating for it use as well. Shad had already named the development Alpha Omega before Gary and Gordon were involved. Each company meeting begins with a bible verse. Shad was adamant in his negotiations with Gary and Gordon that the development honor god and that all streets be named after God. Shad testified that Gary and Gordon seemed to be "wooing" him and telling him what a "sweet deal" this would be for him. There is genuine issue of material fact in dispute as to whether the Defendants did in fact make these promises to Shad in an effort to convince him to be partners with them and nobody else or perhaps because he was family and they promised these things because they wanted them for him.

Each one of the promises will be briefly addressed below to show that a genuine issue of material fact exists as to each promise being made. "The elements essential to the existence of a contract are: (1) parties capable of contracting; (2) their consent; (3) a lawful object; and (4) sufficient cause or consideration." SDCL 53-1-2. "Consent of the parties to a contract has be: (1) free, (2) mutual, and (3) communicated by each to the other." SDCL53-3-1. The only element in dispute in this case is mutual consent. "The parties' words and actions are considered when determining the existence of mutual consent," *In re Estate of Neiswender*, 660 NW 2d 249, 253 (SD 2003).

Promise of a Non-Corrosive Rebar Covenant

Shad was promised that the Alpha Omega development would require the use of non-corrosive rebar throughout the development and that they would implement a non-corrosive rebar covenant to enforce this. (VC #42).

Gary admits that in their initial discussions with Shad, they discussed the use of non-corrosive rebar in the development and he admits that Shad was "intent on using the product" and insisted that non-corrosive rebar, specifically V-ROD, be required is some or all construction within the development." (Gary's A, I#5, p.8 and A#8 p.12).

Shad told Gary and Gordon he had an exclusive contract with a V-Rod company in Canada so Gary and Gordon knew Shad intended to personally benefit from the required use of rebar (Gary's Answer I 5 p8-9).

Consistent with their agreement, Shad began working hard gathering information needed on VRod, communicating with his supplier, working with engineers, and communicating with his partners on drafting covenants.

Almost immediately after their initial meeting, on March 19, 2020, Shad emailed Gary and Gordon proposed terms for a non-corrosive rebar covenant, suggesting a promise had been made. On April 25, 2019, Shad asked Albert Engineering for professional input on his proposed covenants. On April 30, 2019, Shad communicated with his Canadian V-Rod company and informed them that "we anticipate implementing over 1,500,000 V Rod #4 bar in this development alone." On May 6, 2019, Shad emailed Gary and Gordon links to "you tube" videos and his website with what he described as proposed covenants for future lots. On August 27, 2019, Shad re-sends the group his email entitled "Covenants" pushing the issue once again. Gary responds "should lot covenants include how many vehicles can be parked on lot, whether a vehicle can be placed on blocks, . ." and so forth never objecting or voicing concerns over Shad's proposed rebar covenant . Gordon weighed in, "those are legitimate concerns" and offers to get a basic set of covenants and begin adding "some of this stuff as we talked about". Also never objecting or voicing concerns about a rebar covenant. Kelly responds that he will pull up a few sets of covenants that address typical concerns giving them a template and starting point. (PL 000686).

On January 3, 2020, Kelly emails a proposed version of covenants. He says please let me know if you have any specific concerns or revisions and "Note that Dad will work with the city to address the specifics of the items regarding VROD" (PL000680) Kelly attached draft covenants including a section on Concrete Rebar mandating the use of rebar in all concrete footing, walls and flatwork to meet following specifications but he adds a note "not sure how to word this". (*Id.*)

On January 3, 2020, Shad emailed Gary, Gordon and Kelly stating, "Box Elder indicates they will need engineered drawings by the contractor/developer concerning the implantation of VRod" (PL000924).

The parties' email correspondences and actions to this point provide reasonable evidence that a rebar covenant was discussed and that they agreed to implement one.

Gary and Gordon claim they never agreed that rebar would be required in the development or that they would implement such a covenant (Gary's A, I#6 p12).

From March 2020 to August 2022, the defendants can not provide any evidence that the defendants didn't support and agree to a rebar covenant. After the operating agreement had been amended and after the parties' relationship deteriorated they claim it was never agreed to and they don't think it would be good for the company. Defendants claim they objected to its use for several reasons the first being a report they received from American Engineering and Testing that requires the use of engineered fill when using the rebar. The report does not say that rebar can't be used, only that fill would be required. Defendants cite this as one reason they refuse to implement the covenant. Shad did disagree with AET's report. He doesn't think fill is necessary but that doesn't change the fact that rebar can still be used. Holly testified, ". . . to my knowledge, [it] doesn't say that you can't use VRod rebar or you shouldn't use V-ROD rebar . . . the material term to my husband was to use VROD rebar. Whether they have to dig 8 feet, 20 feet, four feet, whether you have to fill it with Jello, rock, you know, so I just want to reiterate that point." (HH p.66) Holly also testified, "But I want to add this too. The V-Rod is another thing where they were all on board verbally with using V-Rod and having it into a covenants until they started disagreeing. And then all of a sudden Gary and Gordon had an issue with mandating it." (HH p.105).

Gary and Gordon now claim that there are a number of reasons they have refused to implement a rebar covenant including; Alpha Land Company is not a builder, V-Rod is not an industry standard, it might discourage builders, and limited experience with the product. (Gary's A, I#6, p. 13). All these reasons, however, were never discussed when the parties were negotiating their agreement nor where they brought up until after the parties were feuding.

Defendants claim their decision not to use rebar is a business judgment rule. As previously argued in this brief, Shad was the one fraudulently induced into signing the operating agreement and it was never intended to be the parties' written agreement memorializing the terms of their agreement, that agreement, the "final contract" was conveniently never signed.

Any claim by the defendants that an agreement to implement a covenant has to be in writing or it violates the statute of frauds should be defeated by promissory estoppel in this case. The Supreme Court has stated that promissory estoppel requires 1) a promise, 2) that a detriment suffered in reliance on the promise was substantial in an economic sense, 3) that the loss to the promisee was foreseeable by the promisor, and 4) that the promisee acted reasonably in justifiable reliance on the promise made. *Durkee v. Van Well*, 654 NW 2d 807, 815. A genuine issue of material facts exists as to whether these elements have been met. Shad argues that a promise was made, he relied on that promise to his economic determent, that his loss was foreseeable and he acted in reasonable reliance. The actions by the parties provide evidence of the promise. The initials covenants drafted by Kelly include a rebar covenant. The covenant would have been very lucrative for Shad as a dealer of the product, and the defendants knew this. He acted with reasonable reliance by reaching out to the city, meeting with engineers and other professionals, working with his supplier, drafting covenants, and promoting the product.

Promise of Mutual Use and Benefit of Raw Land

Shad claims that the parties agreed that each member would have an equal opportunity to profit off any raw undeveloped land. i.e leasing it to run cows, selling hay, or by running their own cows. (VC #47)(1SH p.132). Holly explained, "because it's a large pasture, there was other ways that the land itself could have generated income. There are two rentals on the property and then there's hayfields and pastures so you can run cattle on it, rent it out for money for cattle. You can put up hay, sell the hay and then you have those rental properties." (HH p.223-224) According to Holly, "the first season they had it, my husband hayed some of it and then basically—I think he gave Gary and Gordon the hay off of it. Since that first season it has not been hayed and Gary has been running cattle on it." (HH p. 224). Shad testified, "We operated in the capacity the first year and had verbally agreed that that would be how it would go down…the whole deal is that three partners would share in all of the benefits of this property and its---and its future". (1Sh p.132). It seems that until the parties' relationship deteriorated this was agreement. In 2022, this changed, "Dad and Gary, as we work toward a operating agreement that honors your intention I would like to point out that my distorted understanding of a partnership allowed me to someday benefit from the property. The clear understanding of Shadrach running cows in box elder has apparently also left the table" (G-3287) Gary responds, "It is amazing to think that you believe you can arbitrarily have control over the land or can commit ANYTHING without approval of the partnership and especially without my approval." (G-3285) Gary believes it is his land and he can use it as he pleases… but Alpha Land pays, the taxes and insurance, etc.

There is a genuine issue of material fact as to whether this promise was made to Shad and breached.

Promise of Walking Money

The parties agreed that the partners would be paid "walking money" as soon as possible. Walking money was understood by the parties to be initial upfront cash to be paid to the partners. (G-2115). In an email sent to his partners on 10/25/2021 (during a time when tensions between the partners were very high) Shad wrote, " I have been led to believe that not only would we sell parts of Alpha Land to have development funds and **walking money** I have been limited and restricted by not only creating marketable listings but also in all aspects of project oversight, project representation, project planning, project finance, project exposure and even general correspondence with members." (G-2115)(emphasis added). Gary responded to Shad's email stating, "We all hoped that the development would be providing **walking money** by this time." (Gary A's, I#83, p.54)(emphasis added). Gary's statement admits that the parties agreed that the partners would receive "walking money". When asked in discovery, "Have any of the members received any 'walking money'?" Gary replied, "No, because sales of parcels have not generated sufficient revenue" revealing that "walking money" was something they agreed would be paid when possible (Gary's A, I#84, p.54).

Shad testified . . ."Once we refi, Shadrach, you're getting walking money and you're going to be - - Alpha Land is going to finance all the construction that you can handle. We're just -- I mean, the whole nine yards, John." (1SH p.95) Shad later testified, "And when they talk "walking money", it is refinancing; plus money to work on; plus, according to them, "walking money". (1SH p.224). Shad testified that he was told walking money would alleviate his financial problems and pay this tax obligation from the sale.(1SH p.251).

There is a genuine issue of material fact as to whether the parties agreed to walking money. The project is now selling lots and making money. It has received $5.5 million in loans and $3 million in grants, defendants have not demonstrated why the partners have not been paid walking money.

Promise to Honor God with Biblical Street Name

Another promise made to Shad was that the development's name and all street names would honor God and be names or characteristics of God. (VC #46) It is evident by the name of the parties' LLC (Alpha Land) and the name of the development (Alpha-Omega) that this was something the parties had discussed and agreed to at the inception of their agreement. Gary admits that Shad was adamant that all street names be names or attributes of God, including the name of the development. (Gary's A, A#11 p.15) Gary also admits that many names in the development thus far have been names or attributes of God. Holly testified that "they were all in agreement that the development would have biblical street names" (HH p.102-103). Shad testified, "we discussed that that name would mirror the overall vision of this development, which was biblically themed street names, and, thus, Alpha Omega was born. (1SH p.63).

Similar to all the other promises made to Shad, when things between the parties started to deteriorate, Gary and Gordon began to push back on the use of biblical street names. "Holly testified, "… Shad just saw them like already starting to push back on what he felt like they agreed to do. And so it—you know, it gave him anxiety and made him think again, well, they're just not going to do what they agreed to. So he started getting fearful. And I'm wondering, now that the development is up and running, none of the names that are currently there are names of God. And so I'm wondering if they do intend to do what they agreed to do." (HH p.103).Gary and Gordon claim they never promised Shad that all street names would be names or attributes of God and that their company was not in a position to make that demand upon the City of Box Elder and that some names could be confusing to emergency responders. (Gary's A, I#9 p.15).

Shad does not dispute that the City has the final say on approving names and doesn't disagree that street names should not confuse emergency responders but this is something the parties agreed to and there are many biblical names that are not confusing or difficult to pronounce. There is nothing that would have prevented Alpha Land from submitting biblical names to the City until the City found them acceptable. Gary and Gordon do not give a reason as to why they couldn't have submitted biblical names that would have acceptable to the city. (Gary's A, I#9 p.15). Shad bring this up in his testimony, "Just for the record, there is, like, over 400 names of God, and undoubtedly some of them are – are comparable and have the same word. And the promises made to me on the street names – this is just a hurdle used to spite me.

For instance, picking Northern Lights Boulevard throughout the entirely of the property just to spite me." (SH 1 p60).

For Shad, believing this development was divinely inspired and a blessing from God, breaching this term of the agreement was significant to him, it was as he said the "straw that broke the camel's back". (1SH p.190).

There is a genuine issue of material fact as to whether this promise was made and breached. The business judgment rule would not apply for the same reasons set forth previously.

Promise to Financing Shad's Construction

Shad was promised that he would have the opportunity to build as many homes and commercial buildings as he wanted. He never expected to be the only builder, only that he would be given the opportunity to build homes and that his construction would be financed by the company with lots fronted to him and paid for when they sold. (1SH p.256). Gary and Gordon knew that Shad is an out-of-pocket builder meaning he doesn't get conventional loans to build. Typically, the lots are fronted to him and Shad uses his own money to build. He also works with contractors with whom he has a good relationship and who are willing to carry him until the build is complete. Once the lot sells, the lot is paid for and the contractors that carried him during the construction are paid. (HH p.134-135). Shad testified at his deposition "I was told by my partners that Alpha Land was going to finance the construction. . . Gary oohed and awed about townhomes and apartments, and possibility building to own, and buying equipment, and 'boy we're just going to make this thing so sweet for you' So that's what I was promised". (1SH p. 256).

Consistent with their agreement, the day that Alpha Land purchased the property Shad was loaned $150,000.00 to build the first two homes and the first lot was fronted to him. Shad took this on with the understanding that money would be available to him, either through company financing, lot sales, refinancing the contract for deed, or the walking money that he was promised. The final plat for 60 lots in phase one was pending approval from Box Elder. As an out-pocket builder he was relying on these funds to build the houses. When Box Elder didn't approve the plat, and his partners didn't continue forward with the contract for deed refinance, there was no money for him to build. Alpha Land didn't have the money and the City had stopped development. Gary agreed to loan Shad the money but $150,000.00 was not enough to make it happen. Also at this time, Shad's $100,000.00 line of credit was coming due and he had planned on lots sales and walking money to get it paid. Defendants claim that Shad proved to be an incompetent builder and didn't get the houses done fast enough. Defendants know Shad is not an incompetent builder. Gordon has watched him build houses his whole life and Gary asked Shad to build his house. If they thought he was incompetent, they wouldn't have asked him to build the first two houses in the development.

There wouldn't be more lots available for Shad to build on until the City allowed the development to proceed at the end of 2022 and by this time the parties were no longer getting along. Gary and Gordon claim that Shad was not offered a chance to build on these lots because of poor performance on the first two houses. But in reality, they were fighting and they were angry with him. In May of 2023, Kelly's company UniMax entered into a purchase agreement to buy 129 lots and intends to build on all lots purchased. (DSUMF 161).

Shad also claims the parties agreed they would each play a role in the development. Shad claims his role was to be in site development oversight and management. Gary was the initial investor, Gordon was to run public relations, administration, advertising, and bookkeeping, and Kelly was the realtor. (VC #36).

It was Holly's understanding that Shad would be heavily involved in the development of the project and that he would be paid for the work he did. (HH p.257-258). As soon as Shad purchased the property on October 25, 2019, he began his work in site development. He worked with Lind Exco–providing bids and doing site management. (VC #102). Shad continued in this role until development was halted by the City shortly after Alpha Land purchased the property. Defendants claim the parties never agreed on how much he would be paid but that it would depend on future events such as platting and as phases were developed. Shad does not dispute that an exact wage was not agreed upon but the agreement was that he would be paid. The defendants claim Shad offered to do this work voluntarily but Shad was not in a position to work without pay so that wouldn't make any sense. Shad testified it wasn't a "mystery" that he intended to be paid. It would be unfair for his partners to expect that he would work for the company and not be compensated when he had a family to support and could be working on other projects. After the parties' relationship had deteriorated, the defendants hired Gordon's long-time friend and business associate Steve Ringgaard to fill Shad's role in the development. He was hired to assist and consult in the construction of development infrastructure. Defendants claim he is experienced in many phases of building and development. Ringgaard was paid $45 per hour to work on the project. (Gary's A, #93, p. 57).

Ringgaard was brought in to replace Shad in site development, getting paid $45hr and Kelly is getting paid a commission on each lot sale and now making money building homes. Every way that Shad was supposed to make money from this development has been taken from him. No Vrod, no site development, and all the lots are now going to Kelly to both build and sell.

When Shad refers to the defendants as having "bastardized" their agreement it is understandable why he uses this word. Every promise that was made to Shad has been broken. The promise to finance and build as many homes as he wants—gone, given to Kelly. The promise for a management position in development—gone, given to Ringgaard and probably others. The promise to implement a noncorrosive rebar covenant and to profit as a main distributor—gone, we no longer think it's a good idea. The promise to run cows and hay the property—gone, given to Gary. The promise that the development will honor God through street names—gone, its up to the City. The promise to be a 1/3 partner in a company that is going own and develop valuable land—gone, Alpha Land is in default and we can tear up the purchase agreement. All gone as soon as the parties started having disagreements and heated arguments about how to deal with the City and feelings got hurt.

What defendants sold to Shad as a "sweet deal" turned into years of hard work with no pay, countless hours putting together the project, working with city officials, engineers, contractors, legislators, coming up with idea after idea to push development forward, frustration with partners who don't have the same need or desire to move things along quickly, waiting for a refinance to pay the $220,000 tax liability looming over him as the IRS sends him notices of levy, extreme stress, family strife, no profits from development in almost five years, all to be told by Gary, I can tear up this purchase agreement and you will get nothing and this operating agreement, we change however we want.

<u>Conclusion on entire oral contract claim:</u>

There are genuine issues of material fact in dispute as to the parties' entire oral contract including all the promises made to Shad that have been set forth in this brief.

Claim for Fraud in the Inducement—Operating Agreement

Shad's first claim for fraudulent inducement is in regards the operating agreement. Shad claims he was fraudulently induced into signing this contract.

"Fraud as an inducement to enter a contract is a question of fact for the jury. "Actual fraud is always a question of fact." SDCL 53-4-5. And parol or extrinsic evidence is admissible to prove fraud." *Poeppel v Lester,* 827 NW 2d 580, 587 (SD 2013). "There is very little that the parties can do in their agreement to prevent the use of extrinsic evidence to attack the written agreement on 'grounds of fraud'. Additionally, 'evidence of misrepresentation is admissible even in the agreement is completely integrated". (*Id.*).

"Promoting honesty in contractual relations forms part of the rationale: 'We continue to believe that parties to contracts, whether experienced in business or not, should deal with each other honestly, and that a party should not be permitted to engage in fraud to induce the contract'." (*Id* at 586).

To establish fraud, a Shad must prove that defendants committed any of the following acts: (1) The suggestion as a fact of that which is not true by one who does not believe it to be true; (2) The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true; (3) The suppression of that which is true by one having knowledge or belief of the fact; (4) A promise made without any intention of performing it; or (5) Any other act fitted to deceive. (*Id* at 587).

Here, Shad alleges that defendants represented to him that the majority vote provision of the operating agreement applied to day-to-day functions and not to material terms of the agreement. Prior to Alpha Land, Shad had never been in any kind of business organization (HH p.80), whereas Gary and Gordon have been in many. When Shad asked Gary and Gordon about the amendment provision Gary told him, 'that's just language in there. Don't pay any mind to it. I do these all the time, and it's not important'". Shad and his father have a long history working together (Answer #16) and Shad trusted his father and his uncle to protect his interests in their partnership. "A fiduciary relationship is founded on a 'peculiar confidence' and trust placed by on individual in the integrity and faithfulness of another. When such a relationship exists, the fiduciary has 'duty to act primarily for the benefit' of the other". *Ward v. Lange* 553 NW 2d 246, 250 (SD 1996) This was not a normal arm's length business relationship.

Gary and Gordon both knew that they could together change the terms of the operating agreement and that this applied to all provisions in the operating agreement. Unlike Shad, who believed that "if a contract can be changed and manipulated and thrown out the window. What good is a contract that doesn't bind the parties to do what they agreed to do." Gary and Gordon knew better. If explained to Shad that this contract was not final, that the terms could be changed, and the terms of their original agreement "thrown out the window" Shad would never have signed it.

By Gary's own admissions, they contemplated changing the right of survivorship provision shortly after they signed the agreement. (Garys A, I#50, p.30).

Shad accepted the truth of the defendants' assertions and defendants knowingly misrepresented the terms of the operating agreement, with a promise that it wasn't important and it didn't apply to material terms of the agreement, these misrepresentation fraudulently induced Shad into signing the agreement.

Shad was also fraudulently induced into signing the operating agreement based upon a promise that Alpha Land would execute a final contract with Gary's LPs. The evidence establishes that Postma explained to the partners, including Shad, that a final contract would be property—shows they understood that his claims were real and consequential. It is not credible to argue now that those same claims were frivolous, malicious, or worthy of punishment.

4. Shad's Text About Filing Liens Does Not Satisfy the Barratry Standard for Malice as Defendants Claim:

Defendants really stretch to characterize a single text message—sent nearly a year before this lawsuit was filed and never acted upon—as evidence of malice under the barratry statute. In a single text message sent on December 7, 2022, Shad stated he was "placing liens on every parcel of real estate in Alpha Omega" to "secure [his] one-third interest." But when the full context is considered, the message was not malicious—it was a frustrated and reactive statement made in response to Defendants' own coercive tactics, particularly Gary's use of a lien to pressure Shad into surrendering his position, what Shad described as "blackmail". (2SH p.80).

In 2020, the parties' agreement was still intact—Alpha Land would front lots and finance Shad's construction and provide early "walking money" distributions to the members once the planned refinance was completed. (1SH p.224). When Alpha Land was unable to finance construction of the first spec home due to delays in the refinancing process, Gary agreed to personally loan Shad $150,000 as a temporary solution. The understanding was that this loan would bridge the gap until Alpha Land secured refinancing and could fund construction and pay distributions as originally promised. *Id.* However, the record now shows that Gary abandoned this material term of the agreement—first diverting resources and time to refinance his personal ranch causing delay and ultimately abandoning Alpha Land's refinance altogether, cutting both the company and Shad out of any future profit. (G-3234-3235).

When Shad later questioned Gary and Gordon about the promised refinance and walking money distributions, Gary responded by placing a lien on Shad's second spec home which Shad claims was an attempt to pressure him. It was at this time that the Defendants were actively in the process of amending the operating agreement to which Shad was resisting. When asked about the text Shad testified, "I was pretty sore.... because Gary put a lien in an effort to cause distress and essentially blackmail me on the Sunndydale house." (2SH p.80). Gary told Shad he would only release the lien if Shad agreed to execute the assignment which redirected his share of the future lot sale proceeds to Gary in repayment. Shad agreed, again relying on assurances that the refinance was underway and it would be temporary. Defendants now mischaracterize this assignment as Shad's ratification of the amended operating agreement—a document Shad never agreed to and explicitly refused to sign.

It was only after Gary filed a lien on Shad's property, and Shad felt blackmailed into signing the assignment, and had spent years contributing substantial, uncompensated contributions and labor to the project that Shad expressed his frustration in a single text message saying he is going to file liens of his own. By that point, mediation had failed and Defendants were telling Shad he stood to get "zero" from the project. (Ps Exhibit #1) Shad's text message was not a calculated act of malice; it was a spontaneous and emotional reaction to feeling cornered, misled, and threatened with total financial exclusion.

Importantly, Shad never followed through on the threat. Despite having ample justification to file liens—just as Gary had done—Shad chose not to. His restraint underscores the absence of malice. At one point in Shad's testimony he said, "... if I want to play by Gary Howie's rules, I will put a lien on everything Gordon owns that I have done for free..." (SH3 p.46). His point was clear: filing liens as leverage was Gary's tactic, not his. Shad's choice not to retaliate in kind highlights that his conduct was driven by frustration—not malice.

Filing a lien to protect one's financial interest in real property is a lawful and commonly used remedy. Shad's contemplation of filing a lien against Gary's property—particularly in light of his strong underlying claim for unjust enrichment based on unpaid labor that directly improved that property—is not evidence of malice or improper purpose. It was a reasonable, if frustrated, response to Gary having filed a lien against him. Rather than showing malicious intent, Shad's statements reflect the actions of someone reasonably trying to secure his rightful interest after Defendants made clear they intended to cut him out entirely.

5. **Lis Pendens Was a Lawful Attempt to Protect Shad's Legal Rights—Not an Act of Malice:** Shad's attempt to file a lis pendens was not an act of malice—it was a lawful and reasonable act grounded in Shad's alternative claim for rescission. In fact, his decision not to refile it after learning of Defendants' objection shows a lack of malice.

Among the remedies Shad sought in his complaint was rescission of the parties' agreement—a well-established equitable remedy that, if granted, would unwind the transaction and affect title to the real estate. Shad consulted with his attorney about the option of filing a lis pendens, and was advised that, based on the pleadings and the relief requested, it was a legally permissible course of action

Shad felt it was important to protect his interest in the property, so his counsel prepared and submitted a lis pendens to the Register of Deeds. The filing was initially accepted, and based on that understanding, Shad reasonably believed the lis pendens was effective. Acting on that belief, he sent a copy of the recorded document to the title company and to UniMax—his brother Kelly Howie's company, which had a pending offer to purchase a portion of the property.

Defendants now claim that Shad's act of sending a copy of the lis pendens to UniMax and the title company supports their barratry claim. This argument is yet again a stretch and fails for several reasons.

First, a lis pendens does not prevent a sale; it merely provides notice of litigation that may affect title. (HH p.179). UniMax was already fully aware of the lawsuit and the nature of Shad's claims. Kelly Howie—a member of UniMax and a central figure in the underlying dispute—had actual knowledge not just of the claims, but of the facts giving rise to them. He lived the events as an integral part of the partnership and was well-positioned to evaluate the potential impact of the litigation on title. The fact that the transaction was still set to proceed toward closing, even with this knowledge, makes clear that UniMax would not have been deterred by the lis pendens—filed or not. To suggest otherwise misrepresents both the legal effect of a lis pendens and the practical realities at play.

Second, the lis pendens was sent because Shad reasonably believed it had been successfully filed. It was only later rejected by the Register of Deeds due to a clerical error in the legal description—something Shad did not know at the time. Once Shad was informed of the rejection, and despite believing that he had every right to refile it, he declined to do so. As Shad testified, he chose not to refile the lis pendens specifically to avoid even the appearance of acting with malice. (2SH p.69–71.)

Shad's conduct demonstrates caution, not hostility. He consulted counsel, pursued a lawful remedy based on a valid rescission claim, and ultimately withheld further action out of concern for propriety. The fact that he chose not to refile the lis pendens, despite continued risks to his interests and ongoing efforts by Defendants to remove him from the project, further undermines any suggestion of malice. This is not the conduct of a party acting in bad faith—but rather one carefully asserting and attempting to protect his rights within the bounds of the law.

6. Shad's Deposition Does Not Support a Finding of Malice

Shad's emotionally charged deposition testimony—delivered in the context of a deeply personal dispute with family members after years of uncompensated work and unfulfilled promises—does not establish malice. Being frustrated, upset, or passionate during sworn testimony is not the legal standard for barratry.

At various points in his testimony, Shad stated that his father and uncle had "extorted and robbed" him (SH1, p.165), accused them of manipulating him into signing the operating agreement through a "bait and switch" (2SH, p.43), and referred to them as "crooks." These statements were not part of any campaign to malign Defendants through the legal system—they were expressions of the very claims Shad brought in this lawsuit. He sued them for fraud and misrepresentation based on what he genuinely believed to be true. It is not malicious to testify to facts that form the basis of their legal claims.

Expressing a belief or feeling, no matter how harsh, is not evidence that Shad brought this lawsuit out of ill will or for an improper purpose. It reflects the emotional strain of having been excluded from a project he helped create by individuals he trusted most.

Taken together, the evidence overwhelmingly rebuts any suggestion that this action was instituted with malice. To the contrary, it reflects a party who tried to resolve the dispute privately, who believed he had been seriously wronged, and who turned to the courts only after all other avenues failed.

7. Shad's Past Statements Regarding Potential Litigation Do Not Constitute Malice or Support a Barratry Claim

Lastly, Defendants argue that Shad has a history of using litigation threats to get what he wants, citing his comments regarding the City of Box Elder. However, the record does not support this narrative. Shad never threatened to sue the City in connection with the Alpha Omega Development. Rather, he expressed to his partners that, given the City's unfair treatment—something they all acknowledged—it would be wise for Alpha Land to retain legal counsel to help navigate the situation.

The evidence makes clear that Shad was not proposing litigation as a first resort, nor was he acting out of personal animus or attempting to weaponize the legal system. His stated position was that legal counsel could facilitate more effective communication and resolution. As Shad testified, "I think having an attorney deal with an attorney in this specific case would have been beneficial to both the City and to the developing LLC." (2SH p.231). At no point did Shad retain an attorney to initiate litigation against the City.

Further undermining Defendants' argument is the fact that Gary and Gordon shared Shad's belief that the City was acting improperly. In an email, Gary wrote: "Box Elder's proposal at the meeting with Blaise came as a stunningly unwelcome surprise... Apparently Box Elder believes that they have captured a goose that will lay golden eggs and all they have to do is keep squeezing... My first response was simply to shut the project down." (G-2662). Gary expressed frustration over the City's unreasonable demands and questioned whether the development should continue at all—hardly a ringing endorsement of the City's conduct. Defendants cannot credibly claim that Shad's concern was baseless or malicious when they themselves admitted the City was behaving inappropriately.

Shadrach did not ratify the amended operating agreement by accepting distributions. To date, each member of Alpha Land has received a total of $22,000 in distributions. Shad neither approved the amended operating agreement nor the distributions. He never accepted receipt of any funds as no check was issued to him. Defendants unilaterally authorized the distributions and assigned Shad's share to Gary without Shad's knowledge or participation.

Defendant's characterization of Shad's testimony relating to the operating agreement is taken out of context and is misleading. When Shad testified, " I expected that the purpose of the contract would be to hold the parties involved to that contract." . . . "[what good is the contract that doesn't bind the parties to do what they agreed to do" Shad was discussing his dissatisfaction with the Defendants' ability to amend the operating agreement to remove the joint tenancy with right of survivorship language and change other provisions in the agreement. He didn't understand the purpose of a contract if terms the parties agreed to could be changed without his consent.

In an email Kelly sent on January 22, 2022 to Gary and Gordon, he discusses why he wants to disassociate from Alpha Land, and he begins by saying:

> "It occurs to me that one of the bigger struggles with adequate partnership documents is that my role in the partnership is not easily defined or documented. It's relatively easy to determine the disposition of shares if something happens to a partner with ownership. I think I need to come to terms with the fact that if something were to happen to me, Alpha Land Company would need to hire another agent that would expect to be paid for their services. That thought brings me all the way back around to the understanding that I really don't hold a "partnership" role. What I have is whatever I can perform on for as long as I can perform. If something were to happen to me tomorrow, there is no benefit that would pass along to my estate. I still see it as an extraordinary opportunity nonetheless... my current role doesn't need to include a partnership role. It is nothing more than a marketing agreement that I would like to solidify.... Here is what I propose... 1. Remove me entirely from Alpha Land Company partnership, 2. Create a binding Marketing Agreement that outlines commission rates for various circumstances..." (G-0709).

It appears Kelly had the same concern as Shad-- wanting an agreement with Gary's LPs in writing that protected his rights. Defendants want to make it appear as if Kelly's only reason for leaving Alpha Land was due to Shad but clearly it is not.

After Shad filed this litigation he decided to file a *lis pendens* to protect his rights in the property, which given the nature of his claims at that time—he would have had legal merit to do so. His filing was rejected as the result of a legal description error and before refiling it he received a letter from Defendants counsel and he decided not to re-file and instead focus on the litigation. Shad testified that he didn't want to give the appearance that he was being malicious and decided not to refile it (2SH p.69-71). Shad testified, "So I have held off even though I am fully aware that the objective is to sell the property and trying to force Shadrach into another lawsuit. (2SH p.69-71). Shad's desire to file a *lis pendens* is not to damage the defendants but to legally protect his rights in the property as a result of the Defendants breach of the parties' agreement.

With regard to the City meeting Shad attended—Shad was asked to attend the meeting by an adjoining neighbor asking for his support in advocating that the City remedy a dangerous traffic concern in Box Elder. Shad strongly believed that the traffic situation was placing people in immediate harm so he agreed attend. Shad testified, "I think that you have a situation where if someone like me doesn't step up, you are going to have a serious accident over there. You've got thousands of people going in and out one way, and now you have got an event center built with only one way in and one way out.. . I'm the guy that is standing up saying 'ladies and gentlemen' the problem exists, and it is getting worse. If you don't address it, something is-- I mean you can't go on this way before the cancer kills you. Okay?" (SH p. 211-215). Shad is clearly passionate about this issue as he feels people's safety is being put at risk. Defendants have provided no evidence that Shad's attendance at this meeting caused any harm to the property's development.

With regard to Defendants' claim that Shad threatened to file liens. Shad's testimony, left out by Defendants, was that if he "wanted to play by Gary Howie's rules" he would put a lien on everything that Gordon Howie owns that he has done for free. Shad has never wanted to be in litigation with his family. He didn't want to place liens on their properties for work he did. He loved them and trusted them and wanted to work things out without resorting to litigation.

CONCLUSION

Summary judgment is inappropriate because genuine issues of material fact exist as to whether Defendants were unjustly enriched by retaining the benefits of Shad's labor, services, and risk without compensation. Shad has presented evidence that he conferred a benefit upon Defendants, that Defendants accepted and retained that benefit, and that it would be inequitable for them to do so without payment. Viewing the facts in the light most favorable to Shad, a reasonable factfinder could conclude that Defendants were unjustly enriched. Accordingly, Defendants' motion for summary judgment should be denied.

Dated this 2nd day of April, 2025

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true and correct copy of the above **PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** was

SHAD HOWIE and ALPHA LAND COMPANY, LLC,
a South Dakota limited Liability Company,
Appellants

vs.

GARY HOWIE AND GORDON HOWIE,
Appellees

Appeal No. 31191

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE MATTHEW M. BROWN,
CIRCUIT COURT JUDGE

BRIEF OF APPELLEES

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NOTICE OF APPEAL FILED JULY 24, 2025

NOTICE OF REVIEW FILED AUGUST 11, 2025 (31192)

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JURISDICTIONAL STATEMENT

Appellees Gary and Gordon Howie ("Gary" and "Gordon") affirm that Appellants' Notice of Appeal from the Circuit Court's orders on summary judgment (January 21, 2025, and April 28, 2025) and final judgment entered June 26, 2025, was timely filed on July 24, 2025. Appellees' Notice of Review was filed on August 11, 2025 (31192) as respects the circuit court's order denying Defendants' Motion for Partial Summary Judgment relative to waiver and election of remedies.

PRELIMINARY STATEMENT

References to the settled record as reflected by the Clerk's Index are cited as (R.) with the applicable page.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not necessary in this appeal.

STATEMENT OF LEGAL ISSUES

I. Was summary judgment proper on Shad's breach of oral contract cause of action? The circuit court granted summary judgment dismissing that cause of action.

- SDCL 53-1-2, SDCL 53-8-2(3), SDCL 53-8-5; SDCL 47-34A-112, SDCL 47-34A-404.1, SDCL 47-34A-403(d)
- J. Clancy. Inc., v. Khan Comfort, LLC, 2021 S.D. 9, 955 N.W.2d 382
- Ziegler Furniture and Funeral Home, Inc., v. Cicmanec, 2006 S.D. 6, 709 N.W.2d 350
- Pankratz v. Hoff, 2011 S.D. 69, 806 N.W.2d 231
- Tolle v. Lev, 2011 S.D. 65, 804 N.W.2d 440

II. Was summary judgment proper on Shad's causes of action for breach of fiduciary duties, minority oppression, LLC member-member duties of loyalty and due care? The circuit court granted summary judgment dismissing those causes of action.

- SDCL 47-34A-103, SDCL 47-34A-201, SDCL 47-34A-409
- Landstrom v. Shaver, 1997 S.D. 25, 561 N.W.2d 1
- Mueller v. Cedar Shore Resort, Inc., 2002 S.D. 38, 643 N.W.2d 56
- Expansion Capital Group, LLC, v. Patterson, 514 F.Supp.3d 1095 (D.S.D. 2021)
- Trigger Energy Holdings, LLC v. Stevens, 2025 S.D. 72, 2025 WL 3717147

III. Was summary judgment proper on Shad's unjust enrichment cause of action?
The circuit court granted summary judgment dismissing that cause of action.

- Trigger Energy Holdings, LLC v. Stevens, 2025 S.D. 72, 2025 WL 3717147
- Johnson v. Larson, 2010 S.D. 20, 779 N.W.2d 412
- Dowling Family Ptshp. v. Midland Farms, 2015 S.D. 50, 865 N.W.2d 854
- Bunta v. Superior VacuPress, LLC, 171 Ohio St.3d 464, 218 N.E.3d 838 (2022)

IV. Was summary judgment proper on the statute of frauds defense to Shad's claim to an ownership interest in land?
The circuit court granted summary judgment dismissing Shad's claim.

- SDCL 53-8-2(3)
- LaMore Rest. Gp. LLC v. Akers, 2008 S.D. 32, 748 N.W.2d 756

V. Was summary judgment proper on the Shad's cause of action that the doctrine of promissory estoppel applied as an exception to the application of the statute of frauds defense?
The circuit court granted summary judgment dismissing Shad's cause of action.

- Durkee v. Van Well, 2002 S.D. 150, 654 N.W.2d 807
- Biegler v. Kraft, 924 F.Supp.2d 1074 (D.S.D. 2013)

VI. Was summary judgment proper on Shad's claim to rescission as a remedy?
The circuit court granted summary judgment.

- SDCL 53-11-3, SDCL 53-11-4, SDCL 53-11-5
- Knudsen v. Jensen, 521 N.W.2d 415 (S.D. 1994)
- First State Bank of Sinai v. Hyland, 399 N.W.2d 894 (S.D. 1987)

VII. Was summary judgment proper on Shad's causes of action for fraud (deceit) and negligent misrepresentation?
The circuit court granted summary judgment on those causes of action.

- SDCL 53-4-5
- Bayer v. PAL Newcomb Partners, 2002 S.D. 40, 643 N.W.2d 409
- Meyer v. Santema, 1997 S.D. 21, 559 N.W.2d 251
- Doyon v. Fogleson, 46 S.D. 290, 192 N.W. 752 (1923).

VIII. Was summary judgment proper granting Alpha Land Company, LLC's counterclaim for a money judgment?
The circuit court granted summary judgment on the counterclaim.

- SDCL 20-1-1
- SDCL 20-5-6
- SDCL 20-6-1

IX. Was summary judgment ordering Shad's expulsion by judicial determination from Alpha Land Company, LLC proper?

The circuit court granted summary judgment for expulsion by judicial determination.

- SDCL 47-34A-601(6)(iii)
- IE Test, LLC v. Carroll, 226 N.J. 166, 140 A.3d 1268 (Sup.Ct., App. Div. 2016).

X. Given Shad's election to pursue rescission did the circuit court improperly deny Gary and Gordon's motion for summary judgment as to his tort claims?
The circuit court denied the motion for summary judgment.

- Stabler v. First State Bank of Rosco Dakota Corp., 2015 S.D. 44, 865 N.W.2d 466

XI. Having renounced his claim to monetary damages and compensation for his contributions did the circuit court improperly deny Gary and Gordon's motion for summary judgment based upon waiver?
The circuit court denied the motion for summary judgment.

- Granite Buick GMC, Inc. v. Ray, 2015 S.D. 93, 872 N.W.2d 810

STATEMENT OF THE CASE

Plaintiffs' Verified Complaint was filed on October 16, 2023, in Pennington County Circuit Court, Seventh Judicial Circuit, on behalf of Shad Howie (hereinafter "Shad"), and Alpha Land Company, LLC, a South Dakota limited liability company against Gary Howie (hereinafter "Gary") and Gordon Howie (hereinafter "Gordon.") (R. 2-36). The complaint alleged causes of action for (1) "Breach of Oral Contract," (2) 'Promissory Estoppel," (3) "Unjust Enrichment," (4) "Fraud," (5) "Negligent Misrepresentation," (6) "Breach of Fiduciary Duties and Minority Oppression," and (7) "Breach of Loyalty and Duty of Care." (R. 18-24).

On October 3, 2024, Gary and Gordon filed a motion for partial summary judgment (R. 121-123) on all of Plaintiffs' causes of action as well as Defendants' two counterclaims on behalf of Alpha Land Company, LLC for the dissociation by judicial determination of Shad and judgment for money owed. (R. 53-55). Shad's response failed to argue or present any legal authority to rebut four of the issues presented for disposition, namely: (1) whether Plaintiff was entitled to rescission as a remedy, (2) whether the statute of frauds rendered the Plaintiff's claim to a 1/3 ownership interest in 1,333 acres of real property unenforceable, (3) whether the doctrine of promissory estoppel operated to preclude Defendants from denying the existence of a contract to transfer a 1/3 interest in the property to the Plaintiff, and (4) whether the Plaintiff could meet the elements of his tort causes of action for fraud (deceit) and negligent misrepresentation. (R. 1576, 2284-2285).

On December 10, 2024, hearing on the motion for partial summary judgment was held at the Pennington County Courthouse before the Honorable Matt Brown. (R. 728). On January 21, 2025, the circuit court granted summary judgment in part to Gary and Gordon on the issues of Fiduciary Duty, Rescission as a Remedy, Breach of Oral Contract, Statute of Frauds, Promissory Estoppel, Fraud and Negligent Misrepresentation, Defendants' Counterclaim for money owed Alpha Land Company, LLC in the amount of $30,704.84, and Dissociation by Judicial Determination. (R. 1595-1598). Finding that there were genuine issues of material facts, the circuit court denied the motion with respect to Election of Remedies and Unjust Enrichment. (R. 1597).

On March 6, 2025, Gary and Gordon filed a motion for summary judgment relative to Shad's equitable claim of unjust enrichment. (R. 1605). On April 16, 2025, hearing was held at the Pennington County Courthouse before the Honorable Matt Brown. (R. 1689). On April 28, 2025, the circuit court granted summary judgment to Gary and Gordon. (R. 1979-1981). Pending before the circuit court is Defendants' motion for attorney's fees and nontaxable costs. (R. 2096).

Shad has appealed the circuit court's dismissal of all his causes of action as well as the order granting Alpha Land Company, LLC money judgment and dissociation from the LLC of Shad by judicial determination. (R. 2176). Gary and Gordon have noticed for review the circuit court's denial of their motions regarding election of remedies and waiver. (Appeal No. 31192).

STATEMENT OF FACTS

Shad told his wife God had shown him a divine vision for land development. (R. 130). If land he located in Box Elder could be purchased, lots for 3,000 residential homes could be developed. (R. 400, 426). The vision was his "destiny" -- "for his life and family" and "no one else." (R. 285).

No stranger to home construction, Shad estimated costs of engineering and infrastructure and drew up a plan. (R. 426-427). Shad projected that lots would be "build-ready" for sale in 18 months. (R. 394, 429). Offering the investment opportunity as "very lucrative," Shad estimated that selling 60 lots per year at $15,000 net profit per lot would generate $900,000 in annual net revenue. (R. 425, 427, 429).

Shad had a high risk tolerance but was low on money. (R. 426). He knew real estate development was not without risk. (R. 426). Sales of lots would be market dependent. (R. 429). Unable to buy the land himself, he needed an investor for what he believed was "his project." (R. 14, 386).

While Shad considered another investor, he believed he had a "sweet deal" with his family who would benefit. (R. 428). Shad brought the investment opportunity to his father, Gordon. (R. 425). Gordon's brother, Gary, held majority interest in two limited partnerships (LPs) which owned property in Virginia. (R. 705). The LPs could provide the wherewithal to finance the land's purchase and Gary expressed interest. (R. 386).

Shad, Gordon and Gary met in the Spring of 2019 and discussed how the land might be acquired and then developed. (R. 386-387). Gary agreed that if a 1031 exchange were viable, his LPs could sell property in Virginia and those funds could be used to purchase the land. Gordon's son, Kelly Howie, a real estate broker and half-brother to Shad, became involved in the planning. (R. 387).

Over the next year, professional advice was sought, provided and followed. (R. 406, 409). A plan evolved. Negotiations merged into a number of contracts. Purchase agreements, entity formation and a construction loan agreement (CLA) brought the project forward in a series of staged transactions.

The conduct of those involved and the documents contemporaneously generated between them reflect that Gary, Gordon, Shad and Kelly accomplished both of the group's intended goals. First, the acquisition by Gary's LPs of four contiguous parcels of land of approximately 1,333 acres. (R. 407). Second, the formation of a member-managed LLC to develop lots from parcels purchased from Gary's LPs. (R. 391, 393, 423).

In September of 2019, James Postma, CPA for the group suggested an option whereby the exchange property would be sold in subdivided portions by Gary's entity to Alpha as it was developed. (R. 1296). The CPA suggested an agreement between Gary's entity and Alpha would be "the overall better and cleaner option." (R. 1296).

Gary's LPs purchased the land. Acquisition for the price of $4,931.924 was accomplished through a 1031 exchange. Gary's LPs sold property in Virginia providing the earnest money and down payment for the South Dakota land deals to close on

October 25, 2019. (R. 28-30). Of the 1,333 contiguous acres, 779 acres were financed on a contract for deed by the LPs. (R. 143).

Shad agreed to be the placeholder and cooperate in the 1031 exchange. (R. 30, 644). Shad understood his role and attended three meetings with the CPA and title company who was the accommodator in the exchange process. (R. 913). The placeholder would buy the land and then agree to assign and sell it to the LPs in the time frame required under the 1031 exchange rules. (R. 387).

As "strawman," Shad's role as placeholder was identified in purchase agreements and the contract for deed as "Shadrach Howie and/or assigns." (R. 385). Not personally obligated on any of the debt, he merely occupied a position the group's CPA called a "sacrificial lamb." (R. 387). It was agreed that taxable gains attributed to Shad in the property's transfer would be paid[1] by the entity later formed to develop the property.

On October 25, 2019, the land was sold to "Shadrach Howie and/or assigns" as placeholder for the LPs. (R. 128). Contemporaneously as placeholder, Shad executed a Purchase Agreement. (R. 30). Therein, he agreed to cooperate with the 1031 exchange transferring all interest and title to the LPs on or before April 7, 2020. (R. 30)

By December of 2019, Shad had exhausted his $100,000 personal line of credit telling his bank he could pledge the development property as collateral. (R. 129). This he could not do. Gary reminded Shad that the property was not an asset against which he could borrow. (R. 120).

By January of 2020, the CPA recommended an operating entity be formed to develop the land. (R. 1294). As suggested in September, that entity would be buying

[1] Alpha paid $219,000 of gains attributed to Shad on April 6, 2022. (R. 579, 1450)

only parcels of the land from the LPs. (R. 1296). Postma's plan was explained to Shad and the others in the CPA's email of January 6, 2020.[2] (R. 182). The purpose of Postma's email was "to help ensure that we all are on the same page in terms of understanding the overall deal." (R. 1276).

On January 10, 2020, Alpha Land Company, LLC ("Alpha") was formed as a "member-managed" company and its Operating Agreement ("OA") was signed by Shad, Gordon, Gary and Kelly as members. (R. 68-76, 658). Alpha was not capitalized upon its formation and had no assets or equity. (R. 133). Any excess cash in the 1031 transfer was to be used for initial development. (R. 1317). Per Postma's plan, parcels would be purchased from the LPs and sold by Alpha as deals for lots were made with lot buyers. (R. 130).

On January 14, 2020, the LPs entered into its contract ("Purchase Agreement and Addendum") with Alpha to sell the LLC parcels as lots were developed. (R. 130, 1276, 1296). Absent in the January 14, 2020, contract was any written provision promising that the LPs would provide Alpha parcels in perpetuity under an exclusive dealings arrangement. (R. 32-36).

From its formation, Shad contributed no money to Alpha's capitalization. (R. 273, 395, 477). Nor did Shad contribute any funds to the purchase of the land by Gary's LPs.

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[2] The CPA's email (R. 1276) reflects that the separate legal contract still needed to be drafted between Alpha and the LPs to resolve what Postma labeled as "redundancy" given the Addendum's reference that as Buyer, Alpha agreed to pay Seller (Gary's LPs) "an amount equal to one third of the net profit from sales of property as portions are developed and re-sold by the Buyer." The "redundancy" Postma identified was that Gary was to have a 33.33 % member ownership interest in Alpha Land Company per the Operating Agreement as well as the contact for parcel sale. In other words, both documents referenced a one-third interest in net profits which required final approval.

(R. 384). As agreed, Shad as placeholder, transferred all title and interest in the 1,333 acres by warranty deed to the LPs on April 6, 2020. (R. 64, 384). Shad knew that Alpha would only be purchasing parcels. (R. 132, 423).

Operating Agreement Provisions

Alpha's Operating Agreement ("OA") reveals the members' intent relative to management, compensation and distributions. (R. 68-76). The OA include provisions for general standards of conduct (¶12), meetings and voting rights (¶9), distributions of net profits (¶ 7), compensation of managers [to be agreed upon by majority vote of members] (¶ 4), division of profits and losses (¶ 6), and amendment of the OA by majority rule (¶ 15). Importantly, the OA was to conduct its business and exercise the powers granted by SDCL Chapter 47-34A (¶3K). (R. 68-76).

Two of the company's seventeen enumerated purposes were: '[t]o acquire, manage and develop real estate" and to "[p]urchase, sell, rent, manage, and otherwise generally deal in and with real estate, construction and improvement of same." (R. 68). Relative to defining duties, at ¶ 3L, the OA provided the members would "[e]lect managers and appoint officers, employees, and agents of the limited liability company, define their duties, fix their compensation, and lend them money and credit, or otherwise assist its members." (R. 70). This provision of the OA mirrors SDCL 47-34A-112 (9).

Pursuant to OA Paragraph 4, each member was to have "an equal voice in the operation and management of the Company." (R. 71). The paragraph provided: "[e]xcept as otherwise provided in this agreement, questions related to Company matters, shall be determined by a majority vote of the managers." (R. 71).

Beyond distributions of net profits, Shad conceded that no promise of compensation, salary or wage was promised any member of the LLC in the OA. (R. 448). At ¶ 6 the OA spelled out that profits and losses would be borne by the three (3) members in proportion to their respective capital contributions. (R. 72). Kelly was identified as a member with no ownership, but having the exclusive right to be paid for listings and marketing of the property. (R.72). Distributions to the three members having ownership under ¶7 "shall be made in the amounts, in the manner, and at the times determined by the managers." (R. 72).

OA ¶13 directed that upon the death of a member "the deceased member's interest in the Company shall be transferred to the surviving member in equal shares…as joint tenants with rights of survivorship and not as tenants in common." (R. 74). Finally at ¶16, the parties agreed "[t]he agreement shall be binding upon the members, their heirs, personal representatives, assigns and successors in interest." (R. 75).

Shad agreed the OA was a contract and that he read it before signing it. (R. 135, 430-431). Specifically, he conceded he read paragraph 15 regarding amendments by majority vote. (R. 135). In fact, when deposed, he testified he had no problem with the OA until it was later amended. (R. 135). Shad understood that an LLC's operating agreement regulates the affairs of the company, the conduct of its business, and the relationship among the members. (R. 131). Shad agreed that an operating agreement is like a "constitution." (R. 131).

Shad was not dissuaded by Gary's December admonition. On February 6, 2020, and unbeknownst to Gary, or the other members of Alpha, Shad emailed his personal banker trying to increase his line of credit to $450,000. He told the bank he would have "build ready lots" in April "and due to available cash will be selling lots to other builders." (R. 703).

As in December of 2019, the land was not Shad's to pledge. Yet, Shad informed his bank: "I am in a position to give First Interstate a 1st lien on 10-15 lots in an effort to up current line of credit allowing me to build multiple homes at the same time and purchase more cows." Id.

On February 19, 2020, Shad delivered his financial statement to Gary and explained he was unable to "borrow to build." (R. 293, 352, 662). When the City provided a list of "Off-Site Improvements" required of Alpha in March of 2020, the projections of "build ready" lots was delayed. (R. 389). The list included the City's proposal that Alpha shoulder various infrastructure expenses including the costs to construct Sunnydale Road projected at $1.6M. (R. 389, 1511).

Unable to "borrow to build," on April 6, 2020, Gary loaned Shad $150,000 under terms set forth in a Construction Loan Agreement (CLA). (R. 132, 136, 351, 1119). The CLA provided Shad with a means to both build homes and sell them while drawing against the loan up to $6,000 for his personal needs. (R. 459). Alpha fronted Shad two lots. (R. 136).

Shad testified he could build a home in 30 days. (R. 412). The CLA's terms were tailored for Shad's benefit as well as Alpha's. Per the contract, Shad was to build a marketable house within two months. Once Shad sold the home, another home could be started regenerating income to both to Shad and Alpha. (R. 351, 461).

Shad was given the opportunity to build and price the first homes on the development. (R. 137). However, rather than finishing the first house at 508 W.

Sunnydale Road in two months, it took Shad eleven. (R. 295). Asked why he had stopped working on the home, he blamed "being hit from both angles from people I thought were on my team and a municipality that was borderline gestapo." (R. 412). Shad said Box Elder's staff were "Karens"—"gestapo-minded" who "followed protocol to the book." (R. 409-410).

The second house at 512 took Shad ten and one-half months to complete. (R. 299). Materials were left unattended at the site. (R. 299). Holly, a realtor and Shad's administrative assistant, listed 512 for sale. (R. 267). Holly was unable to account for his drawing down $14,000 (beyond the agreed $6,000) for personal expenses during the period. (R. 295).

Additional Unanticipated Impediments to Development

Alpha encountered unanticipated issues with the City which delayed the project. Shad admitted Box Elder was an unexpected "hurdle" to easily "jump if done correctly." (R. 429). But Shad did not want to follow the majority's approach to deal with the City. Lots did not sell in the first 18 months as Shad had hoped. (R. 394, 429).

Shad believed the City was "blackmailing" Alpha. Shad's solution was to threaten litigation wanting Alpha to sue the City. (R. 277, 390). Gary and Gordon disagreed with Shad's approach. (R. 278, 671-675, 680-683, 695, 698, 702-704).

When problems were encountered and projected net profits did not materialize, Shad began to make demands upon the company. (R. 138, 671-675). Shad often professed he had solutions but would condition their revelation upon getting what he wanted from the majority. (R. 136, 464, 481, 651, 653-655). On August 17, 2021, Shad listed five things he wanted the company to do including firing the company's engineer. (R. 515).

Shad thought the City was "stonewalling" the development and giving the company the "runaround" in a "good old boy system" providing preference to other developers. (R. 390, 515, 518). Further disagreements on how best to work with the City and the direction the company should take left Gary and Gordon on one side and Shad on the other.

Discord polarized Shad from his father, uncle and Kelly. (R. 136). Time attributed to tamping down Shad's mistrust of the City was distracting. In the majority's view, Shad was hampering the company's business from moving forward. (R. 610, 663).

"Shad's" Project

Shad's unwillingness to accept the will of the majority only served to escalate his obstreperous conduct with members and others compromising the project. (R. 683-688). At company meetings when his approach was not accepted, he dominated discussions. (R. 311). Demanding the project was his alone to develop, Shad proved he was not a team player. (R. 311, 661-663, 677).

A meeting was held on September 3, 2021, to promote Alpha's project and Gordon led the conversation. (R. 489, 685). Shad publicly confronted Box Elder's mayor asking if he would "champion our project or not." (R. 489, 685).

The mayor did not answer Shad which to Shad, indicated the mayor would not support the project. (R. 489-490). Shad characterized the mayor as a "puppet" who was "stonewalling" the project. (R. 489-490).

Shad said he was "essentially" telling the mayor: "We're here to help change the face of Box Elder and solve the problems that this municipality has and its going to continue to have until someone like me steps in and has a plan to fix it." (R. 489). Shad could not understand why he did not get an answer. (R. 490). Shad's testimony provides insight into Shad's grandiose sense of self-importance that he alone would manage and conduct the company's business.

By October of 2021, he believed the company's engineering firm was purposely misleading the company and providing "garbage engineering." (R. 390). Shad not only wanted to hire his own engineer but also his own attorney to get what he wanted from the City. (R. 537-538). He told the members he would "no longer bow to every unreasonable whim" [of the City]. Id.

Kelly emailed Gordon and Gary on October 1, 2021, expressing his frustration with Shad's conduct and Shad's inability to complete the homes at 508 and 512. Kelly had paid Shad's materials invoices in excess of $90,000 to avoid threatened criminal action against Shad. (R. 137, 411, 517). Kelly was unwilling to "sit through another meeting with Shad present." (R. 517).

Shad wanted to threaten legal action. In his October 25, 2021 "Victory" email (R. 519), Shad proposed to have an attorney submit a plan for 300 homes upon the condition that the City delay its planned road improvements until 250 homes were completed. (R. 519). Legal action, or its threat, was Shad's solution "by forcing Box Elder to identify RR improvements and create signed agreements." (R. 137-138, 519). The "Victory" email outlined a multitude of disagreements with the business judgment and decisions of Alpha's majority. (R. 539).

Gary, Gordon and Kelly became concerned with Shad's expressed intentions to take matters in his own hands. (R. 137). "Forcing" a municipality to stand down would be an impediment to future dealings. (R. 138, 682). Secondary roads necessary for emergent responder access and were part of planned development. (R. 136, 155). The majority wanted to cooperate with the City. (R. 682).

Kelly disapproved of Shad's announced plans pointing out that "Alpha Land Company does not own any property in Box Elder." Kelly concluded "Shad has literally no authority by which to engage an engineer or attorney." (R. 537). Kelly read Shad's message as a "clear threat that he will do whatever he chooses, with funds he does not possess, and that he also has an expectation that we fall in line with whatever direction he provides us….He is absolutely toxic right now. Every action he takes is counter-productive to our project and his personal relationships with his partners." (R. 537).

Gordon characterized Shad's e-mail as "disappointing," "having a threatening tone to it." (R. 521). The "fight" attitude was wrong -- Gordon told the others: "I believe [Shad's approach] will only propel us in a very backward direction." (R. 521).

Shad's "Victory" email reminded members that he had threatened to leave and quit the partnership. (R. 139, 539). Gary replied to Shad at length explaining that he was alienating those who were trying to help him. (R. 139, 522). Shad responded: "I do not disagree with hardly anything you wrote." (R. 139, 522). Upset he was not making money but spending it, (R. 325) Shad was having stigmata-like issues; literally "bleeding out of my skin over stress." (R. 139, 432).

In November of 2021, Gary pursued refinancing of the LP's Contract for Deed securing the 779 acres with Banner Capital Bank ("Banner"). (R. 1315-1319). By the end of December, the scheduled pay off due was $2,019,530.43. (R 1318). Gary secured the loan using the LP's property as collateral. (R. 1322).

During January and February of 2022, Alpha loaned money to Shad on six checks drawn on the company's checking account totaling $30,704.84. (R. 55). Shad agreed it was not okay to walk off building the spec homes for six months but professed "I was in a hard spot, and I had partners that I –I was not believing." (R. 488). The company's advance allowed Shad to finish the incomplete work on the homes he finally sold at 508 and 512 West Sunnydale. (R. 55).

Attorney Hurd was contacted in January of 2022 to revise the OA. (R. 145, 529-530). Changes were proposed given the unilateral actions taken and/or threatened by Shad and the majority's desire to change the right of survivorship provisions. (R. 145-146, 338-339, 347). Shad was made aware of Hurd's involvement; but he did not believe the company could modify the OA by majority vote. (R. 340-341, 343-344).

Hurd opined the OA could be amended by majority vote and so advised all the members. (R. 145). Wanting to make an "offensive move" Shad and Holly hired attorney, Stephanie Trask (R. 334) who, according to Holly, "made it sound like there was a legal action Shad could take." (R. 284).

<u>Shad's $45M Buyout Offer & Proposed "Developer's Operating Agreement"</u>

On March 15, 2022, Trask wrote Hurd and demanded Shad be paid $45,000,000 for his "interest." (R. 343-344). The offer was rejected two days later. (R. 147). On March 21, 2022, Shad proposed to "mediate" enumerating five topics in an email he entitled: "Developers/Operating Agreement." (R. 420-421, 510).

Therein, Shad proposed an exclusive dealings provision; a provision he testified was a "new scope" that would be "honoring original intent by specific definition." (R. 510, 420-421, 486-488). Shad and Trask were proposing an exclusive dealings arrangement that "solely and unequivocally" provided the 1,333 acres for development. Id.

Trask had told Shad the OA was valid. (R. 284). Trask also told Shad he had no protection from being "kicked out" or being replaced. (R. 183-285, 341-342, 433-434). On March 29, 2022, Holly sent Gary and Gordon an email relating Trask's opinions and legal advice. (R341-342).

Holly had experience with family Operating Agreements (R. 274). She understood that Alpha did not own the 1,333 acres. (R. 271-272). She knew as placeholder Shad assigned the land to the LPs not Alpha. (R. 291). Holly did not like Alpha's contract with the LPs "because it offers absolutely no protection to Shad or Gordon." (R. 272).

When asked if the parties intended to sign a "developers' agreement," Holly testified: "[t]hey never spoke of a developers' agreement" and although she "eventually kept asking" to put one together none was ever competed. (R. 323-324).

Before April 6, 2020, Holly had pointed out to Shad that he did not actually own the property (R. 271, 417-418). Whether he did not understand his wife, or simply refused to listen, Shad went ahead with the transfer as placeholder. Holly testified that Shad did not like her "trying to tell him what to do;" but when she pressed him for a "business plan" Shad told her to "stay out of it." Shad explained: "my wife is not an expert…." (R. 271, 418).

By April of 2022, Holly confirmed Shad felt that "they were stealing his dream" but agreed that given all that had been contributed by Gary and the majority members, Shad's notions were "probably not" rational. (R. 285).

Shad sent Holly to the company meeting on April 1, 2022. She offered herself as a "mediator" in the conflict. (R. 278-280). There, her motions were passed. Id.

On April 4, 2022, Shad authored an email titled "Perspectives Suck" wherein he said: "This property will never be developed by you. This is meant for me to develop and time will clearly show your methods produce loss, not progress." (R. 377).

At the meeting of April 8, 2022, Holly (now Shad's proxy) suggested the partners agree to hire Shad's attorney, Trask, to "advise the entire group" and draft a "developer's agreement." (R. 281, 338-339). The majority agreed. (R. 281). Trask later proposed a version of an amended operating agreement which, among other things, required "major decisions" to be unanimously approved by all members and a "Dispute Resolution Procedure" leaving disputes to mediation and arbitration rather than the courts. (R. 2132, 2158-2159, 2163-2164).

In a meeting held April 26, 2022, Alpha's advanced expenses to Shad for spec homes were agenda items along with amending the purchase agreement with the LPs, expenditure allocation and street names. Shad did not attend. He said meetings were "a clown show" and "very fruitless." (R. 488). Holly's "mediation efforts" included conversations with Gordon and Gary trying to convince them to modify their business arrangement to protect Shad. (R. 272, 288, 323).

On April 29, 2022, Shad said he was "broke" and asked Gary for another loan. (R. 358). Holly was unable to track where the loaned funds intended to build 512 W.

Sunnydale went. (R. 359). Gary offered to loan another $50,000 upon the condition the money only be used for house construction. Shad rejected the offer. (R. 299, 359-360).

Amendment of Operating Agreement

In large part due to Shad's conduct and actions, an Amended and Restated Operating Agreement was adopted by majority vote on April 8, 2022. (R338-340). Shad's proposed amended operating agreement prepared by Trask was presented at 3 ½ hour company meeting attended by Holly and Shad on May 4, 2022. There, point by point, Shad argued his position, but ultimately, Shad's proposals were not accepted. (R. 288, 323, 349, 2163-2164).

Gary and Gordon signed the amended OA on May 25, 2022. (R. 77-85, 281, 338-340). The amendments did nothing to change a member's equal share in net profits. (R. 1640). However, the majority did included the exact language Holly had proposed as Shad's proxy to assuage her husband's suspicions regarding net profits, to-wit:

> The "primary function is to develop land purchased from RW Motel and Manor LP and Ridgewood Park LP. To that extent the overriding and most important function of this LLC is to guarantee that the net income from development goes in equal proportions to "Gordon Howie, Shad Howie, and Gary Howie and/or their estates or beneficiaries, and that the marketing income from this development goes to Kelly Howie and/or his estate or beneficiaries. It is each partner's responsibility to ensure that this happens[3]."

The Amended OA's language said nothing about an exclusive dealings deal with Gary's LPs. Nor did Gary's LPs ever agree to an exclusive dealings provision. (R. 150-151, 282, 305).

[3] This is the exact language which Shad's proxy wanted incorporated into the minutes of the April 8, 2022 meeting. (R. 281, 338-340).

Rather than sue his nephew for failing to pay on the CLA, Gary took an assignment from Shad on August 4, 2022. (R. 67). Therein, Shad agreed that his share of distributable net proceeds from Alpha Land Company would be assigned to Gary (loan plus interest) with payment for the fronted lot to go to the LLC. (R. 67). By its terms, Shad would then have clear title to the house he had completed so it could be sold.

Shad sold the spec homes, but he did not repay the company's advance of $30,704.84. Demand was made at Alpha's April 11, 2023, meeting but the loan went unpaid. (R. 154). Shad agreed he owed the sum but could not pay. (R. 485).

Between 2020 and 2023, matters other than the Alpha project had required Shad's time and money. In 2020, Shad built his friend a house providing the labor and materials. (R. 407-408). Shad was also building his own home and financing projects like digging a dam and building a walleye fishery. (R. 295-296). An out-of-state on a job ran over budget putting him behind. (R. 293, 352). Promoting V-rod in his own construction LLC, Shad said: "I have enough irons in the fire." (R. 475). Shad went on a sabbatical to Isreal in June of 2023. (R. 291).

Meanwhile, Alpha was covering Shad's costs for equipment rentals, supplies and expenses providing Shad with financial assistance associated with his service on the project. (R. 298-299, 355). Alpha loaned Shad $28,000 to pay off a line of credit with a lumberyard. (R. 355-356, 661-662). In spite of the financial assistance from Kelly, Gary and Alpha, Shad was unable to get ahead. Shad's projection that sales of lots would occur in 18 months had long passed.

On August 12, 2022, the release of geotechnical engineering revealed that soil conditions required engineered fill on lots for homes. (R. 156). Shad did not disagree with the findings but advanced the notion that his "value engineering" would solve all issues with subsurface moisture. (R. 156).

Well before the formation of Alpha, Shad expected he would profit from selling lots in 18 months and selling V-Rod, a Canadian non-corrosive product used in monolithic slab and foundations. (R. 130). Shad, a self-proclaimed "pioneer" of V-Rod in South Dakota had an exclusive dealing agreement in the tri-state region for the product. (R. 475). Shad had represented to the V-rod company that "his project" would require 1,500,000 rods. (R. 157, 469). Shad stood to independently profit if he could convince the majority to mandate V-rod for builders of homes on the project in a covenant.

Shad pressed Alpha members for a covenant mandating, among other things, that contractors be required to use non-corrosive "V-Rod." When he learned of the Geotech report, Shad pressed the majority for a mandate that engineered fill not be required in the development. (R. 156-157). Shad was not an engineer. Gary reminded Shad of the engineer's Geotech report cautioning upward pressures caused by expansive soils. (R. 475). But mandating "V-Rod" was what Shad called his "value engineering" solution to foundation and concrete stability. (R. 469).

Disregarding engineering advice was thought to be reckless by the majority. The majority considered that mandating non-corrosive rebar, in lieu of engineered fill, presented potential liability issues for Alpha as a developer. (R. 156-157). A V-rod covenant was not adopted. Having once counted upon selling V-Rod for the entire project, Shad's anticipated stream of income would not flow through any covenants mandating non-corrosive rebar.

On December 7, 2022, Shad threatened to file liens on the land. (R. 157)

On February 10, 2023, Alpha and the LPs entered into a second Purchase Agreement and Addendum. (R. 58-63). The second agreement between those two entities was a mirror image of the first with the exception that the addendum was modified to eliminate the contingency language of the Buyer and Seller's approval of a "final contract." The contract also referenced the fact that Alpha would make payments to the LPs relating to its refinance of the contract for deed to include the costs to secure the loan. (R. 63).

Shad testified he didn't have a problem with the original operating agreement "until they decided that it was inadequate." (R. 431, 1637). Regardless of Shad's disagreement with the OA changes, Shad received net profit distributions (offsetting money he owed the LLC). (R. 1638).

Before he signed the OA, Shad thought his father was a "crook." Shad testified he possessed personal knowledge of a long history of "extortion practices" "screwing people over" "day in and day out." (R. 1055). Shad testified "the collaboration with his brother [Gary] is wicked." (R. 1054).

On March 23, 2023, representing himself as a one-third owner of Alpha, he threatened litigation against Box Elder in a public city meeting. Gary was compelled to write an apology. (R. 155). Shad quit talking to Gordon. Attorney Tellinghuisen advised the majority that they would be within their rights to dissociate Shad as a member. (R. 706). Shad quit coming to meetings. (R. 138).

Alpha contracted with UniMax in May of 2023 for $8,012,000 in exchange for 129 lots Alpha agreed to plat. (R. 158, 717).

After suing his father and uncle, against his wife's advice (R. 308), Shad sent his counsel's[4] draft of a *lis pendens* to the partners of UniMax and others. Shad admits the *lis pendens* was "filed" with the Register of Deeds but "rejected." (R. 1128). The action suggested the land would be tied up with litigation, Shad failed to inform those he sent the *lis pendens* that it had been rejected. (R. 158).

With regard to being in business with his uncle and father in the future, Shad testified: "I don't want anything to do with them, and they are not getting anything else out of me. I've had enough." (R. 159).

STANDARD OF REVIEW

Summary judgment is reviewed *de novo* and "[i]nferences that lack a sufficient factual basis and instead rely upon speculation and guesswork are insufficient" to defeat a motion for summary judgment. Godbe v. City of Rapid City, 2022 S.D. 1, ¶28, 969 N.W.2d 208, 215.

ARGUMENT

I. SHAD'S FAILURE TO ARGUE FOUR ISSUES TO THE CIRCUIT COURT WAIVES HIS ABILITY TO ARGUE THEM ON APPEAL

Of the ten enumerated issues presented to the circuit court for partial summary judgment, four were unopposed by Shad, namely: 1) "Whether as a matter of law Shad is entitled to rescission as a remedy" (Issue III), 2) "Whether the Statute of Frauds renders Shad's claim to a 1/3 ownership interest in 1,333 acres of real property unenforceable?" (Issue V), 3) "Whether the doctrine of promissory estoppel operates to preclude Gary and Gordon from denying the existence of a contract to transfer a 1/3 interest in the property to Shad?" (Issue VI) and 4) "Even if Shad's tort claims survive his election to rescind,

[4] Counsel of record at that time was John M. Fitzgerald. (R. 502).

whether as a matter of law, Shad cannot meet the elements of fraud (deceit) and negligent misrepresentation?" (Issue VII).

Defendants' counsel brought the failure to oppose the four issues to the attention of the circuit court. (R. 1576, 2284-2285). Having abandoned argument before the circuit court, Shad waived his ability to argue the issues on appeal. Weber v. Weber, 2023 S.D. 64, ¶ 25, 999 N.W.2d 230, 236.

II. SHAD'S BRIEF DOES NOT ACCURATELY SET FORTH THE EVIDENCE OF RECORD

Many of the statements contained in Shad's brief lack a basis in fact supported by the record. Others suggest inferences that rely upon innuendo, speculation or guesswork. Some statements rest upon allegations in Shad's verified complaint. Many statements are hyperbole; however, others highlighted below beg correction as "[t]he facts must be fairly stated, with complete candor…." SDCL 15-26A-60(5)[5].

Banner Capital's "Approval" of $3.5M to Alpha

Shad states as fact: "[the record shows that Alpha applied for, paid for, and was approved for a $3.5 million refinance loan with Banner Capital demonstrating both its capacity to mortgage the property and the parties' intent to do so." (Shad's Brief, p. 31). To be very clear, Alpha was not approved for a $3.5 million refinance loan by Banner. (R. 1317-1318).

Shad's sole source for his claim that Banner approved Alpha for a $3.5M loan is a December 16, 2021, email inquiry to Gary from Richard Braithwaite of Banner Capital.

[5] "A lawyer must distinguish a fact from an inference he seeks to press on the court. It is unprofessional conduct to represent inferences as facts." Skycom Corp v. Telstar Corp., 813 F.2d 810, 819 (7th Cir. 1987). "Selective omission of relevant information… 'exceeds the bounds of zealous advocacy and is wholly inappropriate.'" In re Discipline of Dorothy, 2000 S.D 23, ¶ 51 605 N.W.2d 493, 509 (cleaned up).

Shad's reference is to a sentence in Braithwaite's letter which states, in part: "...we should not have a problem with lending Alpha Land Company, LLC $3.5 million."

Shad selectively omits the complete exchange between the two men. (R. 1317-1318). The banker's email sought clarification of who owned the 779 acres which would collateralize the loan being sought.[6] (R. 1317-1318). The banker explained the bank's lending limit to any person or entity was $3.5M assuming Alpha was the "new borrower." (R. 1319).

Gary replied telling the banker: "The borrowing entities should be the two LPs rather than Alpha Land Company." (R. 1319). Gary's LPs were seeking to borrow money and pay off the contract for deed for 779 of the 1,333 acres—not Alpha. Gary explained: "Alpha Land Company was formed for the purpose of development and does not own any land." (R. 1318).

Gary informed Braithwaite that "[t]he land is still all owned by the two limited partnerships used for the [1031] trade, so Alpha Land Company does not own any land. They have a contractual right to buy the land as it is developed. Sale of the land directly would trigger significant tax consequences that were avoided in the exchange." (R. 1318). Gary also tells Braithwaite "...Shad purchased the property with the right to assign. By purchasing the property from Shad at an increased price we were able to have cash from the exchange available for initial development." (R. 1317).

[6] Gary provided answers to Braithwaite's questions in a format typing in his response below each question returning an email. Shad selectively omits this information. (R. 1317-1330). Shad selectively references only Banner's questions. (R. 1319-1320). By failing to include Gary's replies, Shad advances a false statement that Alpha was "approved" for a loan of $3.5M. That is not true.

Alpha was not approved by Banner for a $3.5M loan. No land was "vested" in Alpha as Gary explained. Nor did Shad "personally assume" the CFD. Pennington Title Company records confirm the CFD obligor was the LPs not Shad. (R. 143-144). Shad admitted he had no documents to show that Alpha Land had equity to borrow the money to acquire the property. (R. 405).

Shad testified his first "aha come to Jesus" awareness of the "fraud" perpetrated against him and his right to rescind the oral promise for an interest in the land was the Banner refinance.[7] (R. 145, 419-420). Here, the representation that Alpha was "approved" for a loan of $3.5M leads Shad to conclude that it "would have paid off the CFD still in Shad's name, satisfied his delinquent IRS liability, provided $1.5 million[8] in development capital, and conveyed Alpha title to 779 acres of Property" (Shad's Brief, p. 42). With hindsight, Shad improvises an unsupported inference that: "receiving $1.5 million in development funds...would have stabilized Alpha's finances...and [t]his single act (being approved for $3.5 million) crippled Alpha's ability to operate and perform its obligations...and constitutes the most egregious and damaging breach of fiduciary duty to both Alpha and Shad." (Shad's Brief, pp. 42-43).

Even if Alpha had the equity or capital to have been approved for a $3.5M loan, that amount would not have secured the entirety of the land then owned by the LPs. Of the 1,333 acres, 779 acres represents 58%, leaving 554 acres. In 2019, the 1,333 contiguous acres were purchased by the LPs for $4.9 million. Two years later, 779 acres

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[7] The record established that even before April 6, 2020, Holly told him that in her review of the documents, Shad did not have a one-third ownership interest in the property. (R. 271, 417-418).

[8] $1,480,469.57 is the figure referenced in Braithwaite's email (R. 1318).

were appraised at $5.2 million. It is reasonable to infer that the remaining acres (approximately 554) appreciated accordingly. Simple math shows their value would have been approximately $3.7M.[9]

Alpha could not have financed the property's purchase. It had no capital and no equity so to do. Under the "Banner refinance" theory, Shad could attain only a 1/3 ownership interest in 779 acres leaving 554 acres owned by the LPs. Setting aside the statute of frauds, Shad's fabrication does not "pencil out." To suggest the parties intended that Alpha could finance a land purchase contradicts the purchase agreements and Shad's own course of conduct. The LPs owned the land.

Neither "crippled" nor "defunct," the facts show that Alpha has managed to execute its business plan. The UniMax contract for $8M to develop 129 lots hardly is demonstrative of a "crippled" development company in crisis. Shad's premise that "the record unequivocally establishes that the parties agreed Alpha would perform [the contract for deed] refinance" (Shad's Brief, p. 42) is trumpery, fantasia, and pure fabrication.

Shad's Claims the Company is "Defunct"

Shad states that "Alpha is a defunct entity with no assets, no right or ability to develop, and is in perpetual default under its purchase agreement" and posits that "steps taken by Gary to minimize his tax risks were carried out by means that render the transaction's purpose unlawful." (Shad's Brief, p. 35). Without attribution, Shad states Gary and Gordon were "concealing the use of loan proceeds." (Shad's Brief, p. 43).

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[9] 779/5,200,000 = 554/x   x = 3,698,000

Pressed for personal knowledge of Gary or Gordon taking distributions when he had not received his share Shad admitted he "can't attest to that." (R. 414). Now, on nothing but innuendo, Shad suggests his father and uncle were violating duties of loyalty and due care by "concealing potential self-dealing." (Shad's Brief, p. 43). Suggesting "potential" self-dealing might exist without any proof is sophistry.

The UniMax deal is one which Shad views as a "clown show" and a "break-even proposition" (R. 158-159). Yet the LLC has both the freedom and "right to develop" granted by South Dakota law. Its ability to do just that is revealed in the UniMax contract. Permits are issued by the City to builders actively building homes on lots sold by Alpha to UniMax. The loans secured from Gary's LPs have allowed Alpha the freedom to contract and move ahead. The company is not "defunct" and is servicing debt.

Shad's discovery asked: "[i]dentify each bank account for which any or all loan proceeds were deposited or transferred." Gary answered that the borrowed funds were deposited at: "First Interstate Bank, Rapid City Branch, Business Checking Account Number 12493531" and that "[a]ll deposits and withdrawals were Alpha Land related…." (R. 670). This fact has not been disputed. "Potential" self-dealing is an accusation, not a fact supported on this record.

If Shad thought Gary's responses to discovery deficient, he failed to move the circuit court for relief. Before he was dissociated, Shad had every right to access company records per SDCL 47-34A-408; but he did not pursue that avenue. Claims that self-dealing was "concealed" and funds were "diverted" are hyperbole.

1031 Carried Out "Unlawfully"

Shad's briefing provides a protracted elaboration of the 1031's evolution. In the end, Shad concedes: "Postma ultimately advised selling the Property to Alpha in parcels as developed." (Shad's Brief, p. 31; R.1296). After weighing "pros and cons" on September 17, 2019, Postma opined that selling "subdivided portions" to Alpha "may be the overall better and cleaner option." (R. 1296). Postma's January 6, 2020, email informed all the members how the plan would work as he reviewed the very contract that would memorialize the deal on January 14, 2020. (R. 1276)

No proof has been offered to suggest that Postma's plan was unlawful. No evidence of impropriety exists relative to the manner in which it was memorialized or carried out by the title company as accommodator. The 1031 did not invite IRS scrutiny.

Shad's Claim that he personally assumed $2.1M of the Contract for Deed

Representing that Shad "personally assumed" the $2.1 million on the contract for deed is less than candid. (Shad's Brief, p. 32). Shad agreed he was just "on paper." (R. 387). To suggest he personally assumed the CFD ignores that which was written and Shad's role as placeholder.

By the terms of the January 14, 2020, contract, the Seller (Gary's LPs) acknowledged it "owes a contract balance on the property" and further that Alpha (as "Buyer") "agrees to make all payments related to the contract." Gary's LPs were the obligor. (R. 32-36).

Aggrandizing Shad's placeholder role does not create a genuine issue of fact that Shad ever had an ownership interest in land. Shad cannot rise above his own testimony: "I was essentially…the sacrificial lamb, but I refer to it kind of as the straw man for this deal they both offered." (R. 385). Shad conceded he did not view gains on the transfer of the property as his. (R. 385).

Undisputed is the fact that Shad contributed "zero" dollars to the land's acquisition. Nor did he contribute any money to capitalizing Alpha. While he was liable for taxable gains, any "sacrifice" was not long lived. As agreed, the company paid the "lamb's" taxes, interest and penalties of $219,000 on gains in full. (R. 324). Shad's conduct was consistent with Postma's plan and confirms Shad was not confused or tricked into the deal he brought to his father and uncle.

Shad's claim of a "separate development contract"

Shad represents that "[w]hen the exchange structure was modified to require a separate operational entity to purchase the property, the parties agreed that Alpha would obtain title through financing and a separate development contract would set forth development terms including Shad's role, compensation and other expectations." (Shad's Brief, p. 35). Shad's reference to an "exchange structure modification" is the Postma plan for the LLC's purchase of parcels from the LPs via the contract of January 14, 2020. (R. 1276, 1296).

Shad knew he had no ownership interest in the land. Wanting a "guarantee" to net profits, he proposed what he called a "new" provision in the form of a "developer's operating agreement." This all occurred two years after he transferred all right, title and interest to Gary's LPs. (R. 64). But only Gary's LPs could have agreed to such a provision; and then, only in writing.

Shad submits that the original OA "...was intended only as a vehicle through which the property could be purchased, with the parties' development terms to be set forth in the unexecuted development contract." (Shad's Brief, p. 33). In reality, the "vehicle" through which Alpha purchased land was the January 14, 2020, contract with the LPs. Postma's plan was executed as intended. The contract for parcels was the only "vehicle" through which equitable interest in parcels could be secured by Alpha until it was amended on February 10, 2023.

Shad and Holly understood that Shad had no "guarantee" of net profits if the LPs chose not to sell to Alpha. Holly agreed that she never saw a written promise to Shad for a one-third ownership interest in the land itself; nor did she have personal knowledge of such an offer from Gary or Gordon. (R. 273).

From the beginning, Shad knew there was not to be a "separate development contract." Shad admitted there was not to be any other written contract for development.

> Q: Is it fair to say that you expected that there be a plan for the development of this property, and it would be reduced somehow to a written document for Alpha Land Company?
>
> A: Well I thought we touched on this. This is no. No. No. I was comfortable with a handshake.

(R. 397).

Regarding the alleged oral promises set out in paragraphs "A through J" of his Verified Complaint in both his breach of oral contract and fraud causes of action, Shad was asked:

> Q: Well, were – these promises that you allege that were made orally, were you expecting that at some point they would be reduced to some kind of document, some kind of writing, some kind of a deal?
>
> A: No, I was not.

(R. 404).

"[A] party cannot assert a better version of the facts than [his] prior testimony and cannot claim a material issue of fact which assumes a conclusion contrary to [his] own testimony." <u>Trigger Energy Holdings, LLC v. Stevens</u>, 2025 S.D. 72, ¶57, 2025 WL 3717147. Consistent with SDCL §47-34A-103, the company's OA was a writing to regulate the affairs of the company and the conduct of its business, and govern the relations among the members, managers and company. Shad understood it as such. (R. 131).

The distinction between the OA and the January 14, 2020, Purchase Agreement is evident. The only parties to the January 14, 2020, contract were the LPs and Alpha, not Shad. In contrast, Shad, Gordon, Gary and Kelly were parties to the OA. To suggest that the claimed "unexecuted development contract" is the "final contract" referenced in the Addendum of the January 14, 2020, contract cannot be reconciled.

It is illogical that Gary's LPs would need to give "final approval" for a compensation package or deal for "walking money" by and between Alpha and any member. The oral terms of a "final contract" Shad now seeks to enforce would vitiate the equal treatment relating to distributions, net profits, compensation and management of the company's affairs in the OA.

Preventing Financing Caused "Default"

Shad's brief offers that "Defendants' deliberate actions preventing financing directly caused Alpha's default." (Shad's brief, p. 33). When Alpha was in default, the minutes of April 26, 2022, note Gary's contributions of hundreds of thousands of dollars to the company prevented Alpha's default. (R.345). Gary's loans kept Alpha in business and there is no proof that Gary or Gordon were engaging in grossly negligent or reckless conduct.

In spite of Shad's conduct and the unforeseen hurdles in the development, the majority persevered. Not only did Shad receive that which he was promised (a third interest in net profits of the LLC), the majority put up with his diatribes, advanced him lots, and loaned him money to complete construction of homes he could sell. (R. 476-477).

Shad's brief goes even further to suggest that not only did the Defendants "prevent financing," (see discussion *supra*) "their refusal to execute the development contract" left Shad "with no means to realize any benefit from the parties' agreement." (Shad's Brief, p. 33).

Shad's "means to realize any benefit" was the deal he made when he signed the original OA. Neither Shad nor Holly could convince Gary that his LPs should sell all its land to Alpha.

Shad's "Original Intent" and "New" Exclusive Dealings Proposal

Two years after the company's formation, and with Shad's knowledge, the majority engaged attorney Hurd to modify the OA. Feeling threatened, Shad hired Trask who emailed Hurd on March 15, 2022, that it had become "apparent to Shad that his two fellow Owner-Members,...have no intention of honoring the intent of the original Agreement." Trask communicated to Hurd that Shad would accept $45,000,000 for his interest (R. 147, 592-593).

On March 17, 2022, Shad's offer was unanimously rejected. (R. 147). Undeterred, Shad emailed Gary and Gordon on March 21, 2022, entitled: "Developers/Operating Agreement." (R. 147-148). Shad proposed to "mediate" and proposed revising the operating agreement. (R. 420).

The first mention of any separate "developer's operating agreement" was Shad's "original intent" email. (R. 281). Shad said his revisions would be "honoring the original intent by specific definition." (R. 420-421). Shad's email acknowledged the property was owned by the LPs. (R. 147, 510). Shad proposed that a "new" agreement be "designed solely and unequivocally for future development by Gary, Gordon, and Shad with all net proceeds split evenly 33.3333 percent." (R. 421).

Shad knew he only had a right to net profits after lots were sold by Alpha. An exclusive dealings provision would bind the LPs to sell all of its land to Alpha. (R. 282). This would "guarantee" net profits (but not an interest in the LPs' land). (R. 282).

Holly's testimony confirms that Shad knew the LPs were not contractually bound to sell parcels only to Alpha. (R. 271, 418) Trask had told Shad her opinion he could be "kicked out" of the partnership as Holly revealed to Gary and Gordon on March 29, 2022. (R. 148-149). Holly said Shad was "suspicious." (R. 282, 342)

Even a unanimous vote by Alpha could not have forced Gary's LPs to provide an exclusive right to parcels. Three reasonable inferences can be drawn from Shad's "original intent" email, Trask's advice and Holly's testimony. First, Shad knew from the beginning he had no ownership interest in any of the property. (R. 282). Second, Shad understood that the LPs were not exclusively bound to sell parcels to Alpha. Id. Third, without an exclusive listings provision, as Holly said, there was no "guarantee that Shad's third interest will be protected." (R. 305).

Shad's one-third interest was in net profits of the LLC, the same as Gary and Gordon. Shad's role as placeholder merely facilitated the finance of the land's purchase by Gary's LPs. The LPs owned the land and could freely sell parcels to any person or entity. On the heels of Shad's demand of $45M, his unpaid loans, and his recent proclamation that the property was meant only for him to develop, it was a reasonable decision for Gary not to bind his LPs to sell Alpha the entirety of the property in perpetuity.

Given the schism, being "kicked out" meant little for Shad if Alpha's "stream for parcels" were to "dry up." But Shad and Holly both knew from Alpha's nascency, the LLC was never the titled owner of the 1,333 acres. When the January 14, 2020, contract's terms were amended on February 10, 2023, there was no exclusive dealings provision adopted. (R. 130).

The second Purchase Agreement and Addendum of February 10, 2023, is the last and "final contract" approved between Alpha and the LPs. (R. 58-63). That contract closes the loop on how Alpha purchases parcels and reflects that the CFD was paid off. Alpha has never had an exclusive dealings right to purchase parcels from the LPs.

Shad's "version" of where all of the oral promises of land ownership, compensation, "walking money," "rebar covenants," "LLC financing for home building, and "raw land use" would reside are not illuminated by any reasonable inferences from evidence in this record.

On summary judgment, the court is not free to "weigh the evidence and determine the matters' truth." Olson v. Berggren, 2021 S.D. 58, ¶ 29, 965 N.W.2d 442. What Shad believes to be true is not for this court to decide. Id. That said, Shad's brief is replete with unsupported inferences based not on facts, but on "speculation and innuendo" which are not enough to raise a genuine issue of material fact. Id. ¶ 37. "Cases of fraud and deceit require a higher degree of specificity in order to avert summary judgment." Id.

III. GARY AND GORDON'S MOTIONS FOR PARTIAL SUMMARY JUDGMENT AND SUMMARY JUDGMENT WERE PROPERLY GRANTED.

Breach of Oral Contract & Doctrine of Merger

Shad argues that multiple oral promises were made to him—"the core promise being equal members in owning and developing the Property." (Shad's Brief, p. 35).

The existence and interpretation of a contract are questions of law which the court reviews *de novo*. J. Clancy, Inc., v. Khan Comfort, LLC, 2021 S.D. 9, ¶ 18, 955 N.W.2d 382. It is well settled that "a contract must be construed as of the date on which it was made, [and] cannot be based upon events occurring subsequent to [its] execution." execution. County of Harding, South Dakota v. Frithiof, 483 F.3d 541, 546 n.5 (8^{th} Cir. 2007).

Shad conceded that all the "material terms" and oral promises he was made predated the execution of the Operating Agreement. In particular, he says the purported promise of a one-third interest in the land occurred at the initial meeting in the Spring of 2019—before Alpha was formed or the LPs purchased the property. (R. 382).

The essential elements of a contract are set out in SDCL 53-1-2. In the absence of disputed facts, the question of whether mutual assent exists to create a contract is a question of law and is to be judged on the objective facts of the particular case. J. Clancy, Inc., ¶ 18. "A party's intentional conduct which constitutes a manifestation of assent will bind a party even though the party's conduct does not truly express his or her state of mind." Amdahl v. Lowe, 471 N.W.2d 770, 774 (S.D. 1991). (cleaned up).

Shad agreed that the OA was a valid contract and that operating agreements regulate the affairs of the company, the conduct of the business, and the relationship among the members. (R. 131). Terms of the OA were stated in words, an express contract. SDCL 53-1-3. Shad's execution of the OA, along with the other members, superseded their oral negotiations concerning development and the rights and obligations between the members. SDCL 53-8-5. "There is a presumption that a written agreement proclaims the ultimate intention of the parties." Singpiel v. Morris, 1998 S.D. 86, 582 N.W.2d 715, 719-720. Shad's signature constituted an unqualified acceptance. J. Clancy, Inc., ¶ 25.

An implied contract is a fiction of the law adopted to achieve justice when no true contract exists. Weller v. Spring Creek Resort, Inc., 477 N.W.2d 839, 841 (S.D. 1991). "If, in fact, a valid express contract exists, which establishes the rights of the contracting parties, no implied contract will be or need be inferred. Id. (cleaned up). Providing the relief Shad requests would render the objective theory of assent[10] meaningless. "To permit a party, when sued on a written contract, to admit that he signed it but to deny that it expresses the agreement he made or to allow him to admit that he signed it but did not read it or know its stipulations would absolutely destroy the value of all contracts." J. Clancy, Inc., 2021 S.D. 9, ¶25, 955 N.W.2d at 391.

The Operating Agreement

Instead of giving maximum effect to the principles of contract and the enforceability of Alpha's operating agreement, Shad asks this court to enforce unwritten oral promises he said would have been found in a "separate development contract." Doing so would be contrary to the very policy of our state so clearly articulated by our Legislature. "It is the policy of this chapter and this state to give maximum effect to the

[10] "'Intent' does not invite a tour through [plaintiff's] cranium, with [plaintiff] as guide. . . Secret hopes and wishes count for nothing." Skycom Corp. v. Tellstar Corp., 813 F.2d 810, 814 (7th Cir. 1987) (Easterbrook.J.).

principles of freedom of contract and to the enforceability of operating agreements." SDCL 47-34A-114.

"A consistent view in other jurisdictions is that a limited liability company is governed by its articles of organization and operating agreement." Kirksey v. Grohmann, 2008 S.D. 76, ¶ 14, 754 N.W.2d 825, 828. Alpha's OA was the complete and final expression of the members' agreement to develop property. In April of 2022, Shad tried but failed to amend the deal. The members' OA was fully integrated and all prior and contemporaneous negotiations are deemed merged in that written agreement. SDCL 53-8-5; Pankratz v. Hoff, 2011 S.D. 69, ¶14, 806 N.W.2d 231, 236.

Shad agreed that each and every oral material term he claims were offered by Gary and Gordon did not appear in the original OA. (R. 448). Explaining their absence, Shad conceded: "Should have had a contract that buttoned it up a little tighter." (R. 133).

The OA is unambiguous. Shad does not identify any of the contract's terms as confusing or that might be capable of more than one interpretation. Ziegler Furniture and Funeral Home, Inc. v. Cicmanec, 2006 S.D. 6, ¶16, 709 N.W.2d 350, 355. Shad points out that the property's description is not found in the OA concluding it to be "uncertain" or "ambiguous." It is hard to fathom how a newly formed real estate development company could identify or forecast with particularity real estate it might acquire and later develop. Even Trask's proposed amended OA did not include the property description; nor was it listed as an asset in Trask's proposed capitalization addendum. (R. 2129-2157).

Agreements to agree do not fix an enforceable obligation. Quam Construction Co. Inc., v. City of Redfield, 770 F.3d 706, 709 (8th Cir. 2014). It is not the function of the court to fix indefinite agreements. Estate of Fisher v. Fisher, 2002 S.D. 62, ¶ 18, 645

N.W.2d 841, 847. All "material terms" and "oral agreements" were based upon future events which were "indefinite, vague and uncertain." Id.

An independent deal for Shad in an unwritten "separate development contract" would vitiate the provisions for distributions, compensation, and management decisions left to the majority in the OA. "Prior conversations or agreements inconsistent with the writing or which tend to substitute a new and different contract from the one evidenced by the writing are incompetent." Pankratz v. Hoff, 2011 S.D. 69, ¶14, 806 N.W.2d at 236 (cleaned up). Compensation for Shad's role in the development are inconsistent with the written provisions of the OA.

Shad's claim that he was orally promised financing from Alpha to build homes is contrary to his conduct. He borrowed $150,000 signing the CLA. He built and sold two homes at 508 and 512 W. Sunnydale. It was not a coincidence that Shad signed both the CLA and warranty deed on April 6, 2020; he needed money both to build and for his personal needs. Had he been entitled to receive "walking money," or financing from Alpha to build, he would have demanded it be done.

Far from fraud, "blackmail" or any wrongful acts on the parts of Gary, Gordon, Kelly or the entity, not only was Shad loaned $150,000 (money he could not previously "borrow to build" from a bank), Shad was "fronted" the two lots by Alpha. Shad could set his own price for homes built on 508 and 512 W. Sunnydale.

"A member is not entitled to remuneration for services performed for a limited liability company, except for reasonable compensation for services rendered in winding up the business of the company." SDCL 47-34A-403(d). SDCL 47-34A-401.1 clarifies that in an LLC, a member's "contributions" include "services performed" and "services to be performed." Shad's quest for remuneration regarding "site development" or "walking money" and efforts related to securing the land and preparing it for development fail by operation of law.

Purchase Agreements, "Shadrach Howie and/or Assigns," & Warranty Deed

Purchase of the land by Gary's LPs and formation of the LLC entity for development of the property were separately staged deals as intended. Postma's plan was executed. Shad concedes that prior to the LLC's formation "Postma ultimately advised selling the Property to Alpha in parcels as developed." (Shad's Brief, p. 31; R. 647-648). As between those two parties, the provision that "approval of by the parties of a "final contract" should be construed as an open term in what was a preliminary contract. Ziegler, ¶ 26, 709 N.W.2d at 357.

Above Shad's signature on the October 25, 2019, Purchase Agreement with the LPs was Shad's acknowledgment of the 1031 exchange and his role as placeholder. In part, ¶ 20 of that contract stated: "Seller agrees to cooperate with Buyer and the Intermediary in a manner necessary to complete the exchange." (R. p. 30). At ¶ 21, the agreement's integration clause provided in part: "This writing contains the entire agreement between the parties and there are no other oral or collateral agreements of any kind except those contained herein." (R. 30).

Pursuant to ¶ 21, the parties' written agreement became the complete and final statement of the parties' obligations. Nothing is provided in that agreement that Alpha or Shad were to receive any ownership interest in the land. (R. 30). Just as planned, Shad's executed the warranty deed on April 6, 2020, and transferred all interest to the LPs. (R. 64-66).

Shad's conduct ratified that which he had promised to do in the Purchase Agreement of October 25, 2019. (R. 30). "Upon delivery and acceptance of an unambiguous deed, all prior negotiations and agreements are deemed merged within." Tolle v. Lev, 2011 S.D. 65, ¶ 14, 804, N.W.2d 440, 445. The principal purpose of the purchase agreement and deed was to convey all title and interest in the 1,333 acres to the LPs. The doctrine of merger bars Shad from claiming any interest in the land.

Alpha's Contract with Gary's LPs

Standing alone, separate and apart from the members' OA, was Alpha's contract with Gary's LPs dated January 14, 2020. Both the LPs and Alpha were bound to their ultimate contractual objective. Between them, it was a "common arrangement" with one open term—namely "approval of a final contract." Ziegler, ¶ 26, 709 N.W.2d at 357.

Shad was not a party to the January 14, 2020, contract. Like the October 25, 2019, purchase agreement, the January 14, 2020, contract said nothing about a separate "development contract" which Shad testified was not contemplated. (R. 30, 32, 397).

Shad's role was that of a disclosed agent as "Shadrach Howie and/or assigns." (R. 135). Shad did not become a party to any contract which would entitle him to any interest in the land. "It is elementary that if a contract is made with an agent acting within the scope of his authority for a disclosed principal, the agent does not become a party to the contract, unless otherwise agreed." Stoefen v. Brooks, 66 S.D. 587, 287 N.W. 330, 332 (1939).

Viewed objectively, Shad's conduct as strawman hardly suggests he was laboring under any mutual agreement that Alpha would be the titled owner of the 1,333 acres. No facts or inferences adduced therefrom could reasonably suggest Alpha would be buying the 1,333 acres or that Shad was intended to have any ownership interest not having contributed to its purchase.

Shad certainly was not tricked. From his admitted role as placeholder and the various meetings with the title company and the CPA's communications, Shad knew full well Gary's LPs were buying the land on or before April 7, 2020, not Alpha. He testified: "There was only one member that [contributed actual money to buy the land]…it was Gary Howie. And that was how we structured this deal, John." (R. 395).

Two years later, when 779 acres of the 1,333 were refinanced, only the LPs could be approved for a loan.

Statute of Frauds -SDCL 53-8-2(3)

There is no writing signed by Gary, Gordon, Gary's LPs or Alpha that satisfies the land provision of our statute of frauds. SDCL 53-8-2(3); LaMore Rest. Gp. LLC v. Akers, 2008 S.D. 32, ¶15, 748 N.W.2d 756, 761 (cleaned up). A "handshake deal" between family members is insufficient to satisfy the statute of frauds. Enforceability requires not only that the contract be in writing and signed by the party who is to be charged, but the writing must contain all the material terms and conditions of the oral agreement between the parties. Id.

Shad understood real estate contracts need to be in writing and signed by the party against whom enforcement was sought. (R. 134, 501).

Any exclusive dealings provision that Shad sought in April of 2022 in the form of a "developer's operating agreement" would have required a writing with Gary's LPs. SDCL 53-8-2(3). The written contracts for parcels could not be modified by oral agreement. Vander Heide v. Boke Ranch, Inc., 2007 S.D. 60, ¶ 25, 736 N.W.2d 824,

833. Even then, Shad would only have right to a one-third interest in net profits under the OA and its amendment.

Shad's claim to an ownership interest in the land reveals what has become an unnecessary, but predictable pattern of prevarication throughout this litigation. But Shad's credibility is not in issue for purposes of a motion for summary judgment. Olson, *supra*. Summary judgment is warranted relative to his claimed ownership interest in real estate because there is no writing which satisfies SDCL 53-8-2(3).

Promissory Estoppel

The elements of the doctrine of promissory estoppel as an affirmative defense to the application of the statute of frauds cannot be met by Shad. Biegler v. Kraft, 924 F.Supp.2d 1074, 1086-1088 (D.S.D. 2013). Shad paid "zero" dollars for the land's acquisition. Shad role as the "sacrificial lamb" in the exchange was one he accepted and executed. Taxable gains attributed to him were satisfied by the company.

Assuming *arguendo* any promise was made to Shad for an interest in the property, any "detriment suffered in reliance on the promise" was not "substantial in an economic sense." Durkee v. Van Well, 654 N.W.2d 807, 815 (S.D. 2002), abrogated on other grounds by Mundhenke v. Holm, 787 N.W.2d 302 (S.D. 2010).

Alpha's Advances of $30,704.84 to Shad

Alpha advanced six checks so Shad could complete the unfinished home construction. Drawn on Alpha's account, Shad admitted owing the company $30,704.84. (R. 154). No legal excuse was offered to excuse liability. SDCL 20-6-1. Admitting that he owed the company the loan of $30,704.84, he testified the company's counterclaim was "laughable" and "petty" because "they have extorted and robbed me." (R. 155).

Reasonable demand for payment was made at a company meeting held April 11, 2023. SDCL 20-5-6. No proof of extortion or robbery was offered then, and none exists on this record to legally excuse Shad's debt to the company. Unable to pay, he testified it would take a judgment from a court to pay the money back. (R. 155). Refusal to pay the obligation admittedly owed demands Shad be found liable. SDCL 20-1-1.

Fraud and Misrepresentation

An "actionable misrepresentation" must relate to a past or existing fact and not a future event." Reitz v. Ampro Royalty Trust, 75 S.D. 167, 61 N.W.2d 201 (1953). An exception to this rule exists where the misrepresentation of a future occurrence is made by one who purports to have superior knowledge of the matter. Id.

Here, the plans for the land's acquisition and development were fully known to Shad and memorialized. Negligent misrepresentation occurs when "in the course of business or any other transaction in which an individual has a pecuniary interest, he or she supplies false information for the guidance of others in their business transactions, without exercising reasonable care in obtaining or communicating the information." Bayer v. PAL Newcomb Partners, 2002 S.D. 40, ¶¶ 11-12, 643 N.W.2d 409, 412 (cleaned up).

It was Shad who agreed that there was no figure or dollar amount agreed to for future development oversight work; compensation would be dependent upon future events. (R. 435). No discussion was had relative to an amount of "walking money" to be paid, or when it would be paid --- only that it would be in the future when funds were available. (R. 142). Shad admitted that any promises of financing for construction were based upon future events down the road when parcels were sold. (R. 142).

Implementing covenants for rebar were rejected based upon informed business judgment. Any promise that any rebar covenant would be adopted was a future event. Use of raw land not yet prepared for lots would change as lots were sold—its available use and the amount thereof, all dependent upon the future.

To be actionable, false representations must be of past or existing facts, not representations as to future events. Bayer, *supra*. This standard applies whether the action is for fraudulent misrepresentation or negligent misrepresentation. Meyer v. Santema, 1997 S.D. 21, ¶9, 559 N.W.2d 251, 254. Even if the myriad oral promises were made, they were "mere expressions of opinion as to what the future would bring forth" and not representations of fact. Doyon v. Fogleson, 46 S.D. 290, 192 N.W. 752 (1923).

Eight street names were adopted as shown in the company minutes. The City of Box Elder had its own ordinances to follow for naming streets (R. 453). Many of Shad's proposed appellations for streets were ancient biblical references which could cause emergency responders hesitation. Assuming *arguendo* a misrepresentation occurred, neither Shad nor the LLC could dictate to the City names for streets. "Misrepresentations of law are not actionable." Meyer, *supra*.

"Failing to disclose a fact is not the same as suppressing a fact." Beals v. AutoTrac, Inc., 2017 S.D. 80, ¶20, 904 N.W.2d 765. No record is cited that Gary or Gordon suppressed financial information or engaged in self-dealing.

Unjust Enrichment & Restitution

Shad entered into the OA, an express contract, free of coercion and with open eyes with advice of a trusted CPA. "Parties entering into a contract assume certain risks with the expectation of a beneficial return; however, when such expectations are not realized, they may not turn to a quasi-contract theory for recovery." County Comm'rs of Caroline County v. J. Roland Dashiell & Sons, Inc., 358 Md. 83, 747 A.2d 600, 607 (2000) *cited with approval* in Johnson v. Larson, 2010 S.D. 20, ¶ 9, 779 N.W.2d 412, 416.

Like the other member-managers, Shad's rights to equal compensation and distributions were controlled by the OA consistent with statute. SDCL 47-34A-4-4.1(a). "[T]he equitable remedy of unjust enrichment is unwarranted when the rights of the parties are controlled by an express contract." Johnson v. Larson, 2010 S.D. 20, ¶ 8, 779 N.W.2d 412, 416; *See also*, Trigger Engergy Holdings, LLC v. Stevens, 2025 S.D. 72, ¶¶83-84. (citation modified). Shad "consciously assumed the risk by deciding to act in the face of a recognized uncertainty." Restatement (Third) of Restitution & Unjust Enrichment § 5(2)(b) (2024); Dowling Family Partnership v. Midland Farms, 2015 S.D. 50, ¶25, 865 N.W.2d 854, 865.

Shad's "risk" was the value of his time and effort as services rendered pre and post formation. There was no legal obligation to pay Shad for pre-formation services to the LLC or services thereafter. SDCL 47-34A- 401.1 and 403(d). A similar claim for services to a newly formed LLC was rejected in Bunta v. Superior VacuPress LLC, 171 Ohio St.3d 464, ¶ 39, 218 N.E.3d 838 (2022). Expecting to be compensated outside the terms of the OA Shad seeks special and unequal treatment in a contract which was never mutually agreed upon or written.

Breach of Fiduciary Duties: Loyalty, Due Care

"The existence of a fiduciary duty and the scope of that duty are questions of law for the court." Estate of Thacker v. Timm, 2023 S.D. 2, ¶ 22, 984 N.W.2d 679, 686,-87. "Whether conduct is 'oppressive' is a legal conclusion." Landstrom v. Shaver, 1997 S.D. 25, ¶ 37, 561 N.W.2d 1, 7. "[T]his court has never imposed a duty to disclose information on parties to an arm's-length business transaction, absent an employment or fiduciary relationship." Beals v. AutoTrac, Inc., 2017 S.D. 80, ¶20, 904 N.W.2d 765, 771.

SDCL 47-34A-103(a) provides that "[a] person that becomes a member of a limited liability company is deemed to assent to the operating agreement." (R. 75). Shad maintains that the majority's amendments to the operating agreement were a breach of their fiduciary duties to him and were oppressive. (R. 23).

Prior to amending the OA, Gary and Gordon counseled with attorneys (Hurd, Tellinghuisen, and Jensen) who all advised the operating agreement could be amended by majority rule. After his $45M offer was rejected, Shad proposed his own "developer's operating agreement" language. Then Trask prepared and offered on Shad's behalf an amended OA. Amending the OA was allowed as provided in ¶ 15 of the OA.

Shad maintains that he was duped, tricked and taken advantage by his father and uncle. His Verified Complaint alleged he "completely trusted his father and uncle and never considered consulting with an attorney or drafting any kind of formal contract." (R. 7). But long before he ever proposed the "very lucrative investment opportunity" to his father and uncle, Shad testified his father had a long history "extortionate business practices" with family and non-family members "screwing people over." (R. 375).

Shad testified that his father was a "crook." (R. 375). Shad professed his father's collaboration with his brother was "wicked" and that he was "terrified for his [father's] eternal salvation" unless he "repents like Zacchaeus[11] did." (R. 374) Yet, it was Shad who brought the deal to Gordon and Gary, and cooperated as placeholder to secure the land accepting the company's payment of his taxable gain. It was Shad who agreed to be a member of a member-managed close corporation, but other than personal services to contribute, he had no financial "skin in the game."

Shad affirmed "my risk tolerance is huge." (R. 411). "I am a young man, that my risk tolerance is much higher than both of them." (R. 394). The facts of the project and its challenges were equally available to all members of the LLC. (R. 129-130). Shad studied the properties, developed a "master plan" after he had "locked up" deals with landowners. (R. 425).

Guided by professionals, there are no facts which suggest that there existed an "inequality, dependence, weakness of age, of mental strength, business intelligence, knowledge of the fact involved or other conditions" giving advantage to Gordon and Gary over Shad. Ward v. Lange, 1996 S.D. 113, ¶12, 553 N.W.2d 246, 250. No reasonable inference can be gleaned from the facts to suggest that the majority engaged in any grossly negligent or reckless conduct. SDCL 47-34A-409(c).

Kelly's patience was exhausted and he left because of Shad. But the majority endured Shad's behavior and advanced him loans. Gary provided opportunity with the CLA. All actions demonstrated a high degree of diligence and due care.

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[11] Zacchaeus admitted to Jesus he had defrauded others and would restore "four fold" that acquired by false accusation. Luke 19:8, *Holy Bible*, King James Version (1957). Gary and Gordon deny defrauding Shad.

Alpha advanced lots and loans to Shad showing the utmost good faith and fairness in their dealing with him as a member. It could be argued Alpha waited too long to seek dissociation.

Oppression, Business Judgment Rule & Dissociation

Shad's demanding "my way or the highway" attitude, toxic conduct and public threats were harmful to the interests of the company. Shad likened the City to the "Gestapo." He believed the company was being "blackmailed."

Shad's conduct polarized him from the majority. Kelly quit. Save Shad's dissociation, the majority's decision to amend the bylaws was a reasonable means to protect the company. He threatened to file liens on the property owned by the LPs.

After he sued, Shad's untethered acts included sending his lawyer's draft of *lis pendens* to UniMax. These were acts intended to thwart Alpha's progress. It is no wonder that an attorney fee provision was included in the amended operating agreement.

'It is not considered oppression when the controlling shareholders seek to control management and the affairs of their corporation.'" Mueller v. Cedar Shore Resort, Inc., 2002 S.D. 38, ¶ 24, 643 N.W.2d 56, 62 (cleaned up). Neither the original OA nor the amended OA eliminated or modified the duties of loyalty, nor did the changes eliminate or modify any obligation of due care or good faith and fair dealing. (R. 68-76, 77-85).

"Limited liability companies are creatures of contract, and the parties have broad discretion to use an LLC agreement to define the character of the company and the rights and obligations of its members." Expansion Capital Group, LLC v. Patterson, 514

F.Supp.3d 1095, 1111-1112 (D.S.D. 2021).[12] The business judgment rule operates both as a procedural guide for litigants and a substantive rule of law. Id. The rule creates an evidentiary "presumption that in making a business decision, the directors of a corporation acted on an informed basis [i.e., with due care], in good faith and in the honest belief that the action taken was in the best interest of the company." Id.

Shad's one-third membership interest was insufficient to control the business decisions of what he believed was his project. A reasonable expectation of a minority shareholder is to be judged in light of the capital committed to the particular enterprise. Landstrom, 1997 S.D. 25, ¶ 38, 561 N.W.2d at 8.

Shad's 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." Trigger Energy, ¶ 77. A balancing test is used to determine whether Shad's expectations were reasonable. Id.

The entire history shows that lots did not sell as planned and Shad's expectations of net profit of $900,000 per year for the development did not come to pass. Two years went by and he realized Alpha had no exclusive dealings provision with Gary's LPs. It is reasonable to infer that by April of 2022, he was enabled to proceed with litigation given the offer his lawyer sent demanding $45M.

No rationale was given for the demand Trask issued; but it is not a coincidence Shad's projected stream of net profits equaled $45M. (3,000 lots x $15,000 net profit/lot = $45M). Shad demanded the entire projected profit stream just two years into the

[12] Judge Lange predicted this Court would adopt the common formulation of the business judgment rule. 514 F.Supp.3d at 1112, n.7 That appears to be the outcome in Trigger Energy, ¶ 77.

project. Shad's grandiose vision and sense of special entitlement that the project was his and his alone were beyond reason.

Holly had no personal knowledge that Gary or Gordon defrauded Shad. (R. 332) She agreed her husband was "overly paranoid" about being expelled. (R. 325) Even his wife did not think Shad's claims of being "screwed" by his father and uncle (R. 495), were rational.

"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.'" Trigger Energy, *supra*. Shad has not established facts to rebut the presumption. Whalen v. Connelly, 593 N.W.2d 147, 154 (Iowa, 1999) (cited with approval in Trigger Energy, 2025 S.D. 72 at ¶ 77).

Shad's belief that Gary and Gordon were trying to "kick him out," or "stealing" his ideas and dream were "probably not" rational per Holly. (R. 285). The majority acted in good faith, informed by legal advice, in the honest belief that they were acting in the best interest of the company. No proof of "fraud, bad faith, or self-dealing in the usual sense of personal profit or betterment" has been shown. Expansion Capital Group, LLC v. Patterson, *supra*.

Balancing the business judgment of the majority against Shad's unreasonable expectations, there are no facts which suggest any oppression of Shad as a minority member. Shad was entitled to no more than that which was promised in the OA and Amended OA.

SDCL 47-34A-601(6)(iii) provides for judicial dissociation when it is not "reasonably practicable to carry on the business" with a member. Interpreting and identical provision to that of South Dakota, New Jersey's Supreme Court held "wrongful conduct" need not be shown, rather only "prospective harm." IE Test, LLC. v. Carroll, 226 N.J.166, 181, 140 A.3d 1268 (Sup. Ct. App. Div. 2016). Faced with Shad's conduct, the majority responsibly sought legal advice. Attorney Tellinghuisen advised the company was well within its rights to dissociate Shad.

When deposed Shad (age 40), conceded that the project was a "several-lifetime development." (R. 394). At that time Gary was 79 and Gordon was 75. Id. Shad admits he cannot continue in a family business with his father and uncle who he says "screw people for a living." (R. 504). It is hard to imagine a future for Alpha management with Shad as a member. James Postma's testified: "I believed that Shad was taking a position that I believed was beyond what his role in the company was supposed to be." (R. 913).

Early in the project, October of 2021, Shad presciently wrote: "[m]e in a partnership was a bad idea." (R. 140, 525). Being in business with Gary and Gordon, Shad testified: "I don't believe I could trust them." (R. 376). Asked to describe the harm to their business relationship, Shad's one word reply was "[i]rreparable". (R. 376). It is not "reasonably practicable" to continue with Shad as a member of the LLC.

Rescission

Equitable relief of rescission, being extraordinary, should never be granted, except where evidence is clear and convincing. Knudsen v. Jensen, 521 N.W.2d 415, 418 (S.D. 1994). Rescission is a remedy, not a cause of action, available in contract cases involving duress, fraud, or undue influence. SDCL 53-11-2. Rescission requires "due promptness" which is a question of law. Knudsen, 521 N.W.2d at 420. The reason for rescission "must not have arisen from want of such care as would be exercised by a person of reasonable prudence where the means of knowledge were readily accessible. Knudsen, *supra*.

Shad did not act with reasonable diligence and promptly rescind. SDCL 53-11-3 and SDCL 53-11-4. Before April 6, 2020, Holly told him he had no ownership interest in the land. On April 6, 2020, he signed the warranty deed and the CLA receiving $150,000 to build homes on lots he was advanced. But not until he sued three and one-half years later did he pursue rescission.

Long before he sued, Shad had legal counsel. Shad agreed he was aware of "red flags" but did not act; rather his failure to disaffirm by itself, ripened into ratification. First State Bank of Sinai v. Hyland, 399 N.W.2d 894 (S.D. 1987). Rather than give notice to rescind with an offer to restore (SDCL 53-11-5), his attorney demanded that $45,000,000 be paid him for his "ownership interest."

This is not a case where equity cries out for relief. There is no way at this late date to return to the *status quo ante*. Sabbaugh v. Prof. & Businessmens' Life Inc., Co., 79 S.D. 615, 116 N.W.2d 513 (1962). Having failed to act with due promptness, Shad's claim for rescission fails as a matter of law.

IV. WAIVER AND ELECTION OF REMEDIES IMPROPERLY DENIED

Waiver & Election of Remedies

"Waiver is a volitional relinquishment, by act or word, of a known, existing right conferred in law or contract." Granite Buick GMC, Inc. v. Ray, 2015 S.D. 93, ¶ 11, 872 N.W.2d 810, 815. When represented, Shad's legal counsel wrote to Gary and Gordon that Shad's "uncompensated contributions" were to be "gestures of gratitude and commitment to the family venture" for the "benefit of the partners and the partnership" and Shad "does not wish to accept compensation." (R. 155,562). Certainly, Trask would have been aware that such a communication on her client's behalf was waiving any right to compensation. After all, she had just demanded $45M on his behalf.

Shad testified he was not seeking monetary damages; rather he wanted to rescind. "Rescission is my objective." (R. 500). "I would like rescission…that's what I would like." (R. 501). Asked to confirm the remedy he was seeking, he testified: "I'm not asking for a monetary sum." (R. 499). "I'm not here for money. I'm here to get the project back and be in the position I was." (R. 501).

"When a plaintiff is defrauded, he may bring a tort action or contract action based on the same facts. But when the remedies result in double recovery, he must elect the remedy. He may affirm the contract and bring a tort action for deceit [seeking monetary damages], or he may repudiate the contract and bring a contract action for rescission or revision." Stabler v. First State Bank of Rosco Dakota Corp, 2015 S.D. 44, ¶ 13, 865 N.W.2d 466, 475.

Shad repeatedly said he was not pursuing compensation or monetary damages, only rescission. Represented by counsel, he made his election to rescind and waived damages.

CONCLUSION

Even viewing the evidence most favorably to Shad, he has failed to substantiate his allegations with sufficient probative evidence that would permit a finding in his favor on more than mere speculation, conjecture, or fantasy. Alpha land is entitled to a money judgment of $30,704.84 and dissociation of Shad by judicial determination and entry of judgment accordingly. This court should affirm the circuit court's grant of summary judgment dismissing all of Shad's causes of action, reverse the circuit court's decision on the issues of waiver and election of remedies and affirm the circuit court's order and grant of summary judgment to Alpha Land Company, LLC on the money judgment and judicial dissociation of Shad as a member of Alpha Land Company, LLC. The case should be remanded for entry of findings and a decision on the pending motion for attorneys' fees and nontaxable costs as prevailing party consistent with the Amended Operating Agreement.

Dated this 30th day of January, 2026.

WHITING, HAGG & DORSEY, Prof. LLC

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CERTIFICATE OF COMPLIANCE

Counsel of record for Appellees hereby certifies that the foregoing Brief of Appellee complies with the type volume limitation and word limitation pursuant to Order dated January 9, 2026. In accordance with SDCL § 25-26A-66(b), the undersigned has used proportionally spaced typeface of Times New Roman font at 12-point in the body of the text and footnotes. The total word count according to the word-processing system used to prepare the brief is 14,998, excluding table of contents, table of cases, jurisdictional statement, statement of legal issues, certificate of service and any addendum material.

DATE: January 30, 2026 WHITING, HAGG & DORSEY, Prof. LLC

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CERTIFICATE OF SERVICE

Pursuant to SDCL § 15-26A-79, undersigned counsel for Appellees hereby certifies that on the date written below he served a true and correct copy of the foregoing BRIEF OF APPELLEES upon:

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by electronic service via South Dakota E-File/Serve to said individuals as counsel of record for Plaintiffs/Appellants. The undersigned further certifies that in addition to electronic submission, the original of the foregoing brief is forwarded by U.S. Mail to the Clerk of the South Dakota Supreme Court on the date below.

Dated this 30th day of January, 2026.

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APPELLEE APPENDIX TABLE OF CONTENTS

REALTOR®

Black Hills Association of REALTORS®
PURCHASE AGREEMENT

EQUAL HOUSING OPPORTUNITY

This is a legal and binding contract between the Buyer and Seller. If not fully understood, seek legal advice.

Agency Disclosure. Buyer and Seller acknowledge that they have received a copy of an agency disclosure.

[X] This is a Limited Agency Transaction. With the knowledge and understanding of the explanation of limited agency, Buyer and Seller authorize and instruct the Broker and Licensees to act as limited agents in this transaction by initialing below:

Buyer initials: GAH Seller initials: SH

1. EARNEST MONEY DEPOSIT – PARTIES TO CONTRACT – PROPERTY: Received from *Ridgewood Motel and Manor, LP and HP Park, LP* Buyer, Earnest Money [ ] Certified Funds or [ ] Check in the amount of (*$0.00*) *No Earnest Money* DOLLARS will be payable to [ ] Listing Company or [ ] Escrow Closing Agent. Upon acceptance of offer, the earnest money must be tendered and deposited no later than the next legal banking day after acceptance of offer. If the agreement to purchase does not close, regardless of the circumstances, all parties must agree to the release of the earnest money. Until such agreement is signed or until entry of appropriate court order, the earnest money shall remain with the Listing Company or Escrow Closing Agent and neither shall be liable for interest or damages relative thereto. The property is legally described as: *See legal description attached*

County: *Pennington*, State: *SD*

also known as: *TBD Sunnyvale Dr*

Seller's name: *Shadrach Howie*

2. PURCHASE PRICE: The total purchase price to be ($ *4,931,924.00*) *Four Million Nine Hundred Thirty-One Thousand Nine Hundred Twenty Four* DOLLARS. After earnest money is credited, the remaining balance is to be paid in full by the Buyer at closing.

3. MULTIPLE OFFERS: Buyer acknowledges when in a multiple offer situation, all responses are directed by the Seller and at their discretion.

4. APPRAISAL: This offer [ ] is or [X] is not subject to the property appraising for at least the purchase price. Appraisal [ ] will be ordered / [ ] will not be ordered until any home inspection contingency is removed.

5. FINANCING: This offer is contingent upon Buyer obtaining a new [ ] VA, [ ] FHA, [ ] Conventional, or [ ] ________, type of loan. A letter of Buyer's loan status from ________ [ ] is attached or [ ] will be delivered by ________ (date). Buyer shall pay the appropriate down payment required with this loan. In lieu of other instructions, Buyer is to pay any loan discount or funding fees, if applicable. Buyer agrees, within seven calendar days, to make application for and diligently and in good faith endeavor to secure a new loan, pay all application fees, and to sign all financing documents without delay. Buyer also agrees to immediately deposit with the lender, at time of loan application, all required funds for credit report and appraisal; and authorizes lender to immediately order, unless otherwise agreed. Buyer reserves the right to obtain alternative financing as long as there are no increased costs to Seller.

[ ] Assumption. See Attached Addendum.

[ ] Contract for Deed/Private Mortgage. See Attached Addendum.

[ ] Cash. This is a cash offer. The remaining balance of $ ________ will be paid at closing by certified check. A letter of verification from ________ regarding the availability of funds [ ] is attached or [ ] will be delivered by ________ (date).

6. HOMEOWNER INSURANCE: Offer [ ] is or [X] is not contingent upon buyer obtaining proof of insurability within ____ calendar day(s) of acceptance of offer, exclusive of the day of acceptance. If so contingent, and if Buyer has not provided written confirmation of such insurability or lack thereof to Seller within the specified time, then this contingency shall expire and all other terms of this agreement shall continue unaffected.

7. PERSONAL PROPERTY: The following items of personal property, free of liens and without warranty of condition, shall be transferred to Buyer by a separate Bill of Sale: *N/A*

8. SALE OF BUYER'S PROPERTY:

A. [X] This offer is not contingent upon the sale or close of property owned by the Buyer.

B. [ ] This offer is contingent upon [ ] the sale and close or [ ] close of the buyer's property located at (address including city & state) ________ [ ] within ________ calendar day(s) of acceptance of offer, exclusive of the day of acceptance or [ ] within the time specified for closing the Seller's property. The Seller shall have the right to continue to offer the property for sale and accept any offers under the following terms: (**NOTE: If offer is contingent, Buyer is to check one of the following:**)

1) [ ] Seller may accept other offers until the contingency clause is removed in writing by the Buyer. If another offer is accepted by the Seller, the Seller will notify the Buyer that the contract is no longer valid and deposits will be returned according to paragraph 1 of this agreement. If the Buyer's property sells within the above stated time, the Buyer agrees to buy and the Seller agrees to sell according to the terms agreed to herein.

Initials: Buyer: GAH Date: 10/25/19 Seller: SH Date: 10/25/19
Buyer: ______ Date: ______ Seller: ______ Date: ______

Exhibit A

2) [ ] Seller may only accept other offers subject to the rights of the Buyer. If the Seller accepts another offer, Seller will give the Buyer written notice of the fact. Within ______ hours of receipt of the notice, the Buyer will provide a written waiver of the contingency on the sale and close of the Buyer's property, or this agreement will terminate without further notice and deposits will be returned according to paragraph 1 of this agreement. Upon waiver of this contingency, Buyer warrants and will demonstrate to the Seller's satisfaction that the funds needed for closing will be available and the Buyer's ability to obtain financing is not contingent upon the sale and/or close of any property.

3) [ ] Seller may accept back-up offers, subject to the rights of the Buyer, until the time period specified in paragraph 8B above has expired. After the above-specified time, this offer becomes void unless an extension is mutually agreed upon in writing.

9. TITLE: Merchantable title shall be conveyed by Warranty Deed or such other conveyance instrument, sufficient to convey good and merchantable title, properly signed and with the necessary State Transfer Fee paid by the Seller at the time of recording. At Seller's expense an owner's [ ] Standard, or [ ] Standard with material and labor lien (mechanic's lien) coverage, or [ ] Full extended coverage policy of title insurance to be provided (includes required full boundary survey). The monetary difference between a standard and full extended policy shall be paid by [ ] Seller or [ ] Buyer. Buyer to take title as: [ ] Married Couple, as joint tenants with rights of survivorship; [ ] Joint Tenants with rights of survivorship; [ ] Tenants in Common and not as joint tenants with rights of survivorship; [ ] Single Person; or [X] *Both purchasing entities are Virginia Limited Partnerships*

10. WALK-THROUGH INSPECTION: Buyer will have the right to conduct a walk-through inspection of the property within 24 hours prior to closing to verify that the mechanical systems are in working order and that the property is in substantially the same condition as on the date this agreement was written. All personal property, including refuse, not included in the purchase price shall be removed by the Seller prior to closing. Seller states that the heating, plumbing and electrical systems will be in working condition on the day of closing unless otherwise stipulated below. *(NOTE: These representations are solely that of the Seller, and no responsibility or liability therefore is accepted by the selling or listing Broker or their agents and employees.)*

11. SELLER'S DISCLOSURE: (select one):
A. [ ] Buyer has received Seller's Property Disclosure Statement. This offer [ ] is / [ ] is not contingent upon Buyer receiving and accepting clarification of the following items within ________ calendar day(s) of acceptance of offer, exclusive of the day of acceptance. ____________________
B. [X] The parties acknowledge that no disclosure statement is required by reason of the following: ____________

12. LEAD-BASED PAINT STATEMENT: If the Seller's property has a residential dwelling, which was built prior to 1978, Buyer is notified that such property may present exposure to lead. See lead-based paint disclosure, if applicable.

13. INSPECTION OF PHYSICAL CONDITION OF PROPERTY: *Buyer and Seller understand the purpose of a property inspection is to inform/educate Buyer of conditions and future maintenance of property and is not designed to be a point of renegotiation of the purchase price.* Buyer acknowledges that Buyer has the option to obtain property inspection services and it is recommended that such services be obtained from a licensed professional.
This offer [ ] is / [X] is not contingent upon Buyer, at Buyer's expense, obtaining a Property Inspection which may include, but not be limited to the physical, structural, mechanical, pest, geological and environmental-contamination conditions relating to the property. These inspection options will be completed and written notice of the results given to the Seller or Seller's agent within ________ calendar day(s) of acceptance of offer, exclusive of the day of acceptance, or the inspection options shall expire and all other terms of this Purchase Agreement shall continue unaffected.
If the inspection(s) reveal conditions unsatisfactory to the Buyer or unknown to the Seller, the parties to this agreement shall have the following options: Buyer will accept the existing condition; Seller will correct the existing condition and provide certification from an inspector that the condition has been remedied; or Buyer and Seller will negotiate a settlement. If no written agreement can be reached on the results of the inspection within ______ calendar day(s) of the date Seller or Seller's Agent is notified of the results of the inspection(s), exclusive of the date of notification, this agreement shall be deemed null and void in its entirety.
[ ] Buyer accepts inspection(s) as provided by Seller, subject to clarification of the following items: ____________
____
[ ] Buyer hereby waives the option to have an independent home inspector assess the condition of the property.
__________ (Buyer Initials)

14. HOME WARRANTY: Buyer and Seller understand there are home warranty plans available and that either party may secure such warranty at their expense.

15. IMPROVEMENT LOCATION EXHIBIT OR SURVEY REQUEST: (Buyer to check one of the following)
[ ] New Improvement Location Exhibit (Seller to provide). *The purpose of an Improvement Location Exhibit is to provide a representation of the information gathered at the time of inspection. It is based on existing but not confirmed boundary evidence and is subject to any inaccuracies that a boundary survey might reveal. No property corners will be set and no warranty as to the location of the true boundary of the subject property is extended to the present or future owners or occupants.*
[ ] Boundary Survey and Improvement Location Exhibit (Seller to provide, however the monetary difference between a location exhibit and a boundary survey shall be paid by the Buyer). *The purpose of a Boundary Survey is to provide verified boundary information as the basis for the improvement location exhibit.*
[ ] Boundary Survey Land Only. Paid by buyer unless otherwise agreed upon herein.
[X] No survey or exhibit is required by Buyer.
[ ] Other ____________________

Initials: Buyer: BAH Date: 10/25/19 Seller: [signature] Date: 10 25 19
Buyer: ________ Date: ________ Seller: ________ Date: ________

16. PRORATIONS:
Taxes, rents and homeowners association fees are:
[X] to be prorated to *October 25, 2019* (date). The tax proration shall be based on the previous year's taxes, or as agreed between Buyer and Seller in paragraph 21 below. (NOTE: Buyer and Seller acknowledge that taxes are computed on assessed valuation and mill levy and these figures change from year to year, determined by changes in city, county and school budgets.) [ ] not to be prorated .

Buyer is aware that residential property taxes may or may not be based upon Owner Occupied Status. Buyer is aware that seller(s) may change the status between November 1, ________ and March 15, ________ unless otherwise agreed upon in writing (see Other Provisions, item 21).

Any fuel oil, or propane stored on the property [ ] will or [ ] will not be prorated or removed.

17. POSSESSION/CLOSING: Possession to go to Buyer *October 25, 2019*. Closing will take place on or before *April 7, 2020* (date). Escrow closing fee is to be paid by Buyer unless required by VA to be paid by Seller.

18. DEFAULT: In the event either party defaults under this agreement the parties shall have all remedies allowed under the law of the State of South Dakota including but not limited to the right to sue for specific performance or forfeiture of earnest money.

19. CHOICE OF LAW: The laws of South Dakota govern this transaction.

20. OTHER PROVISIONS:

a. Non-refundable down payment from Buyer to Seller on October 25, 2019, in the amount of $2,465,962.00.
b. Balance of purchase price payable at closing will include Buyer assumption of existing Contract for Deed.
c. Seller hereby acknowledges that it is the intention of the Buyer to complete an I.R.C. 1031 Exchange, which will not delay the close of Escrow or cause additional expense to the Seller. The Buyer's rights and obligations under this agreement may be assigned to an Intermediary of the Buyer's choice for the purpose of completing such an exchange. Seller agrees to cooperate with the Buyer and the Intermediary in a manner necessary to complete the exchange.

21. INTEGRATION AND MODIFICATION: This writing contains the entire agreement between the parties and there are no other oral or collateral agreements of any kind except those contained herein. This Agreement may be changed only by written agreement signed by the parties.

This is a legal binding contract between the Buyer and Seller, if not understood, seek legal advice.

Dated this October 25, 2019 at 1:00 [ ] a.m. [X] p.m.

This agreement is void if not accepted by the seller before 5:00 [ ] a.m. [X] p.m. on the 25th day of October, 2019

Ridgewood Motel and Manor LP X [signature]
Buyer's Name - Typed or Printed — Buyer's Signature

HP Park LP X [signature]
Buyer's Name - Typed or Printed — Buyer's Signature

The foregoing is [X] accepted, [ ] countered (see attached counter offer) or [ ] not accepted
on this October 25, 2019 at 1:30 [ ] a.m. [X] p.m.

Shadrach Howie X [signature]
Seller's Name - Typed or Printed — Seller's Signature

X
Seller's Name - Typed or Printed — Seller's Signature

The following parties are listed for informational purposes only and they shall not be considered parties to the contract.

RE/MAX Advantage — *Kelly Howie*
Selling Company — Selling Salesperson - [ ] Seller Agent, [ ] Buyer Agent, [X] Limited Agent, [ ] Transaction Broker, [ ] Appointed Agent

RE/MAX Advantage — *Kelly Howie*
Listing Company — Listing Salesperson

Gmail Shadrach Howie <shadrach.howie@gmail.com>

Re: Howie 1031
2 messages

James Postma <jp@jamespostmacpa.com> Mon, Jan 6, 2020 at 10:21 AM
To: gordon howie <gkhowie@yahoo.com>
Cc: Kelly Howie <kelly@kellyhowie.com>, Gary Howie <garyhowie14@icloud.com>, Shadrach Howie <shadrach.howie@gmail.com>

Gordon. [cc Gary Shad Kelly]

Per our conversation noting the following items in looking at this latest purchase agreement between Gary's 2 LP's [Ridgewood Motel and Manor LP and HP Park LP] and the Alpha Land Company. Given the complexity of this arrangement, I am adding a bit more info in my comments to help ensure that we are all on the same page in terms of the understanding of this overall deal.

First note: The purchase price of $4,931,924 for Alpha Land Company from Gary's 2 LP's is the exact same amount as the proposed sale of the property between Shad and Gary 2 LP's. So, there is intentionally no "mark-up" on this sale for Gary -- given that there is a Provision in Item #20 that states that Alpha Land Company LLC will pay the Seller [Gary] an amount equal to one third of the net profit from the sales of property as portions are developed and resold by the buyer.
However, this may be redundant because since Gary is a 33.33% owner of Alpha Land company -- he would "automatically" [so to speak, unless the LLC operating agreement stated differently] receive a 1/3rd profit interest in the gain on subsequent developed properties. I am only saying this since it may not be necessary to have to include this provision as long as Gary is a 33.33% equity owner of Alpha Land Company -- but I suppose it may not hurt to still keep this provision in [?] so will leave that up to you. I realize that apart from this proposed sale and the operating agreement of the Alpha Land Company LLC, there will also be a separate legal contract [which still needs to be drafted] between Gary's LP's and Alpha Land Company LLC which will presumably also address this issue.

Second Note: Item #17: Shows as Possession to go the Buyer November 1, 2019 and Closing TBD. ***[However, in Shad's purchase agreement with Gary 2 LP's it shows possession going to Buyer on Oct 25, 2019 with a Closing date on or before April 7, 2020 therefore I would presume this sale will need to occur at the same or later date]***. Naturally, this Purchase agreement cannot occur until after the Sale between Shad and Gary LP's is completed -- therefore the presumption is that it this close would be on or after April 7, 2020 since we are intentionally buying as much time as possible for Shad to add basis to his purchased property prior to the sale to Gary LP's. Since Gary sold his Property on Oct 10, 2019, he has a 180 day clock running which "expires" on April 7, 2020, thus necessitating this close to occur on or before April 7th.
Also, while I realize that the Sale between Shad and Gary's LP's is apparently giving retroactive dated possession to Gary's LP's, back to Oct 25, 2019 [which actually is a bit odd given that Shad is making basis improvements to this land naturally while under his possession] , presumably Alpha Land Company LLC's possession would not occur until after the close date [?], therefore on or after April 7, 2020.
I would also presume that for legal purposes it would make sense to have the Sale between Shad and Gary LP's and the subsequent sale between Gary LP's and the Alpha Land Company LLC occur on the same day -- ie. back to back [that is, if that is possible to be accommodated by Penn Title -- if not, then presumably the sale between Gary LP's and Alpha Land Company LLC will occur as soon as possible after the sale between Shad and Gary's LP's]

Third Note: Going along with the comments in the Second Note, I would presume that there may need to be language in #20 that this purchase agreement is contingent upon the sale between Shad and Gary's LP's.

Please let me know if anything is incorrect or doesn't conform to you understanding.

On Mon, Jan 6, 2020 at 7:12 AM gordon howie <gkhowie@yahoo.com> wrote:
Good morning Jim,

I am attaching a purchase agreement from Gary's two LPs to our new LLC. Would you please take a look and let me know if this looks ok to you.

Thanks Jin!
gh

PL001160

OPERATING AGREEMENT
OF
ALPHA LAND COMPANY, LLC
(A LIMITED LIABILITY COMPANY)

THIS AGREEMENT, dated and adopted this 16th day of January, 2020, by and between the undersigned members of the Alpha Land Company, a Limited Liability Company (hereinafter "the Company"), a limited liability company organized under the laws of the State of South Dakota, who agree as follows:

1. Names of Members. The names and addresses of the members of the Company are as follows:

Gordon K. Howie 15372 Antelope Creek Road Rapid City, SD 57703	Gary A. Howie 22990 Sharpe Road New Underwood, SD 57761	Kelly G. Howie 6437 Muirfield Drive Rapid City, SD 57702

Shadrach F. Howie
15597 Antelope Creek Road
Rapid City, SD 57703

2. Offices. The address of the principal office of the company is 15372 Antelope Creek Road, Rapid City, SD 57703.

3. PURPOSE. The purpose for which the limited liability company is organized is in general to have and exercise any and all powers that limited liability companies have and may exercise under the laws of the State of South Dakota, as the same now exist, or may be amended from time to time, except such powers that are inconsistent with the express provisions of the Articles of Organization, and

A. To acquire, manage and develop real estate.

B. Purchase, sell, rent, manage and otherwise generally deal in and with real estate, construction and improvement of same;

EXHIBIT #4

C. To enter into and perform all manner and kinds of contracts, agreements, and obligations for any lawful purpose by or with any person, firm, association, corporation, limited liability companies, or governmental division or subdivision;

D. Sue and be sued, and defend in its name;

E. Purchase, receive, lease, or otherwise acquire, and own, hold, improve, use, and otherwise deal with real or personal property, or any legal or equitable interest in property, wherever located;

F. Sell, convey, mortgage, grant a security interest in, lease, exchange, and otherwise encumber or dispose of all or any part of its property;

G. Purchase, receive, subscribe for, or otherwise acquire, own, hold, vote, use, sell, mortgage, lend, grant a security interest in, or otherwise dispose of and deal in and with, shares or other interests in or obligations of any other entity;

H. Make contracts and guarantees, incur liabilities, borrow money, issue its notes, bonds, and other obligations, which may be convertible into or include the option to purchase other securities of the limited liability company, and secure any of its obligations by a mortgage on or a security interest in any of its property, franchises, or income;

I. Lend money, invest and reinvest its funds, and receive and hold real and personal property as security for repayment;

J. Be a promoter, partner, member, associate, or manager of any partnership, joint venture, trust, or other entity including but not limited to limited partnerships and limited liability companies;

K. Conduct its business, locate offices, and exercise the powers granted by SDCL Chapter 47-34A within or without this state;

L. Elect managers and appoint officers, employees, and agents of the limited liability company, define their duties, fix their compensation, and lend them money and credit, or otherwise assist its members;

M. Pay pensions and establish pension plans, pension trusts, profit sharing plans, bonus plans, option plans, and benefit or incentive plans for any or all of its current or former members, managers, officers, employees, and agents;

N. Make donations for the public welfare or for charitable, scientific, or educational purposes; and

O. Make payments or donations, or do any other act, not inconsistent with law, that furthers the business of the limited liability company.

P. To have and exercise all powers necessary or convenient to affect any or all of the purposes for which the company is organized;

Q. To carry on any business whatsoever that this company may deem proper or convenient or that it may deem calculated, directly or indirectly, to improve the interests of this limited liability company.

The foregoing statement of purposes shall be construed as a statement of both purposes and powers, shall be liberally construed and in aid of the powers of this limited liability company, and the powers and purposes stated in each clause shall, except where otherwise stated, be in no way limited or restricted by any term or provision of any other clause.

4. Managers. The company is to be managed by the four (4) members. Their names are Gordon K. Howie of 15372 Antelope Creek Road, Rapid City, South Dakota, 57703; Gary A. Howie of 22990 Sharpe Road, New Underwood, South Dakota, 57761; Kelly G. Howie of 6437 Muirfield Drive, Rapid City, South Dakota, 57702 and Shadrach F. Howie of 15597 Antelope Creek Drive, Rapid City, South Dakota, 57703. Management of the company shall be limited to the

members of the company. Only members can be managers of the Company. The duties of the managers shall include all duties and activities necessary to operate and manage the Company as provided in this agreement. Each manager shall have an equal voice in the operation and management of the Company. The managers shall meet at times upon which they shall determine. Except as otherwise provided in this agreement, questions related to Company matters, shall be determined by a majority vote of the managers. Each manager shall have the authority to represent and bind the Company on all matters except as otherwise provided in this agreement and by law, provided that a manager may not transfer as defined under SDCL §47-34A-101(2) and acts amendatory thereto, an interest in Company property, other than in the normal course of Company business, without the written consent of all members. The Company shall indemnify a manager or member for liabilities and expenses incurred by the manager or member in the ordinary course of conducting Company business to the extent permitted by law. The compensation of the managers shall be as determined by a majority vote of the members. In the event a manager dies, then and in that event the surviving managers may continue to operate the company.

5. **Capital Contributions.** The members shall be deemed to have made the following capital contributions to the Company

Member	Form of Contribution	Value	% of Total
Gordon K. Howie	CASH	$1,000.00	33.33%
Gary A. Howie	CASH	$1,000.00	33.33%
Shadrach F. Howie	CASH	$1,000.00	33.33%

Future capital contributions shall be made by the members in proportion to their existing contributions upon the recommendation of the managers followed by a majority vote of the members. The failure of a member to make such a contribution shall constitute a violation of this agreement. Capital contributions may not be withdrawn except on the vote of the managing members. The members, Gordon K. Howie, Gary A. Howie and Shadrach F. Howie shall be issued a Certificate of Membership Interest in the Company where each owns a 33.33% interest in the Company. Member, Kelly G. Howie shall not have an ownership interest in the Company and is only a member of the Company strictly for purposes of marketing properties and shall be paid per listing/marketing on individual properties.

6. **Profits and Losses.** The net profits of the Company shall be divided among the three (3) members (Gordon K. Howie, Gary A. Howie and Shadrach F. Howie), and the net losses of the partnership shall be borne by the three (3) members (Gordon K. Howie, Gary A. Howie and Shadrach F. Howie), in proportion to their respective capital contributions as set forth in this agreement.

7. **Distributions.** Distributions to the three (3) members (Gordon K. Howie, Gary A. Howie and Shadrach F. Howie), shall be made in the amounts, in the manner, and at the times determined by the managers. Distributions may consist of cash or other property, except that a member whose capital contribution to the Company consists entirely of cash shall be entitled to cash distributions if so demanded.

8. **Membership Changes.** No new member may be allowed in the Company. A member may retire from the Company by delivering ninety (90) days prior written notice of such retirement to the managers and to each member. A member may be expelled from the Company only for cause and only upon the unanimous vote of all other members. Cause includes a willful and substantial breach of this agreement and conduct prejudicial to the Company and its members. A retiring or expelled member shall be compensated as provided in this agreement.

9. **Meetings and Voting Rights.** An annual meeting of the members shall be held

each year on the 1st day of June. Special meetings of the members may be called by the managers or by the members as provided by law. A majority of the members entitled to vote shall constitute a quorum at any meeting. Except as otherwise provided in this agreement, a majority vote of the members shall carry any action proposed or determined at a meeting. A member may waive notice of any meeting and the members may act without meeting to the extent permitted by law. All members are entitled to vote and all members shall have equal voting rights.

10. **Transfers of Interests.** A member may only transfer his or her interest in the Company to the other members the value of which shall be determined in accordance with this agreement which value shall include its book value without goodwill.

11. **Books, Records, and Reports.** The fiscal year of the Company shall be January 1st through December 31st. The Company shall maintain full and accurate books of account, which shall be kept at the Company's principal office, and generally accepted methods of accounting, shall be employed. The company shall maintain one or more bank accounts, and all moneys received by the Company shall be deposited therein. Only the managers shall be authorized to sign Company checks. Each member shall have the right to inspect and copy the books and records of the Company during normal business hours, and copies of the Company's income tax returns shall be made available to the members promptly after becoming available.

12. **General Standards of Conduct.** A member's duty of loyalty and duty of care to this member-managed company and its other members shall be to refrain from competing with the company in the conduct of the company's business before the dissolution of the company and to refrain from dealing with the company in the conduct or winding up of the company's business as or on behalf of a party having an interest adverse to the company, and to account to

the company and to hold as trustee for it any property, profit, or benefit derived by the member in the conduct or winding up of the company's business or derived from a use by the member of the company's property, including the appropriation of a company's opportunity, a member shall discharge the duties to a member-managed company and its other members under South Dakota law or under this operating agreement and exercise any rights consistently with the obligation of good faith and fair dealing.

13. **Continuation of Business.** Upon the death of Gordon K. Howie, Gary A. Howie or Shadrach F. Howie, the deceased member's interest in the Company shall be transferred to the surviving members in equal shares as each member owns an undivided thirty-three and one-third percent (33.33%) interest in the Company as joint tenants with rights of survivorship and not as tenants in common. Upon the retirement, resignation, expulsion, bankruptcy or dissolution of a Gordon K. Howie, Gary A. Howie or Shadrach F. Howie, the business of the Company may, thereafter be continued by the remaining members. A departing member, or bankrupt member, shall be compensated in cash for the membership interest of such member in an amount equal to the member's outstanding capital contribution plus the member's proportionate share of any accrued net Company profits, or less the member's proportionate share of any accrued net Company losses. The assets of the Company shall be valued at book value for purposes of this section, and no value shall be attributed to goodwill.

14. **Termination.** Upon the dissolution of the Company when the business will not be continued as provided in this agreement, the manager(s), shall promptly wind up the business and affairs of the Company. Upon the winding up of the business and affairs of the Company, the assets of the Company shall be distributed as follows:

(a) First, to the creditors of the Company, including members who are creditors, in satisfaction of the liabilities of the Company other than liabilities for distributions to members.

(b) Second, proportionately to members and former members as distributions owed under this agreement.

(c) Third, proportionately to members as distributions for the return of their respective capital contributions.

(d) Fourth, to members as distributions in respect to their membership interests in proportion to their respective interests.

15. **Amendment.** This agreement and the Articles of Organization may be amended by a majority vote of the members, except that any provision in this agreement or in the Articles of Organization that specifies a membership voting or consent requirement of greater than a majority may be amended only by a membership vote that is equal to the voting or consent requirement specified in the provision sought to be amended.

16. **Binding Effect.** The agreement shall be binding upon the members, their heirs, personal representatives, assigns, and successors in interest.

17. **Legal Counsel.** Each member acknowledges they have had the opportunity to obtain their own independent legal counsel prior to executing this operating agreement.

IN WITNESS WHEREOF, the undersigned has executed this agreement as of the date first above appearing.

Dated this 10th day of January, 2020.

Gordon K. Howie
15372 Antelope Creek Road
Rapid City, SD 57703

Dated this 10th day of January, 2020.

Gary A. Howle
22990 Sharpe Road
New Underwood, SD 57761

Dated this 10th day of January, 2020.

Kelly G. Howle
6437 Muirfield Drive
New Underwood, SD 57702

Dated this 10th day of January, 2020.

Shadrach F. Howle
15597 Antelope Creek Road
Rapid City, SD 57703

REALTOR®

Black Hills Association of REALTORS®
PURCHASE AGREEMENT

EQUAL HOUSING OPPORTUNITY

This is a legal and binding contract between the Buyer and Seller. If not fully understood, seek legal advice.

Agency Disclosure. Buyer and Seller acknowledge that they have received a copy of an agency disclosure.

☒ This is a Limited Agency Transaction. With the knowledge and understanding of the explanation of limited agency, Buyer and Seller authorize and instruct the Broker and Licensees to act as limited agents in this transaction by initialing below:

Buyer initials: ______________ Seller initials: ______________

1. **EARNEST MONEY DEPOSIT – PARTIES TO CONTRACT – PROPERTY:**
Received from *Alpha Land Company, LLC* Buyer, Earnest Money ☐ Certified Funds or ☐ Check in the amount of ($*0.00*) ---------------- DOLLARS will be payable to ☐ Listing Company or ☐ Escrow Closing Agent. Upon acceptance of offer, the earnest money must be tendered and deposited no later than the next legal banking day after acceptance of offer. If the agreement to purchase does not close, regardless of the circumstances, all parties must agree to the release of the earnest money. Until such agreement is signed or until entry of appropriate court order, the earnest money shall remain with the Listing Company or Escrow Closing Agent and neither shall be liable for interest or damages relative thereto. The property is legally described as: *Legal Description Attached*

County: *Pennington*, State: *SD*
also known as: *TBD Westgate Rd*
Seller's name: *Ridgewood Motel and Manor, LP and HP Park, LP*

2. **PURCHASE PRICE:** The total purchase price to be ($ *4,931,924.00*) *Four Million Nine Hundred Thousand Nine Hundred Twenty-Four* ---------- DOLLARS. After earnest money is credited, the remaining balance is to be paid in full by the Buyer at closing.

3. **MULTIPLE OFFERS:** Buyer acknowledges when in a multiple offer situation, all responses are directed by the Seller and at their discretion.

4. **APPRAISAL:** This offer ☐ is or ☒ is not subject to the property appraising for at least the purchase price. Appraisal ☐ will be ordered / ☐ will not be ordered until any home inspection contingency is removed.

5. **FINANCING:** This offer is contingent upon Buyer obtaining a new ☐ VA, ☐ FHA, ☐ Conventional, or ☐ ______________, type of loan. A letter of Buyer's loan status from ______________ ☐ is attached or ☐ will be delivered by ______________ (date). Buyer shall pay the appropriate down payment required with this loan. In lieu of other instructions, Buyer is to pay any loan discount or funding fees, if applicable. Buyer agrees, within seven calendar days, to make application for and diligently and in good faith endeavor to secure a new loan, pay all application fees, and to sign all financing documents without delay. Buyer also agrees to immediately deposit with the lender, at time of loan application, all required funds for credit report and appraisal; and authorizes lender to immediately order, unless otherwise agreed. Buyer reserves the right to obtain alternative financing as long as there are no increased costs to Seller.
☐ **Assumption.** See Attached Addendum.
☐ **Contract for Deed/Private Mortgage.** See Attached Addendum.
☒ **Cash.** This is a cash offer. The remaining balance of $ ______________ will be paid at closing by certified check. A letter of verification from *N/A* regarding the availability of funds ☐ is attached or ☐ will be delivered by ______________ (date).

6. **HOMEOWNER INSURANCE:** Offer ☐ is or ☐ is not contingent upon buyer obtaining proof of insurability within _____ calendar day(s) of acceptance of offer, exclusive of the day of acceptance. If so contingent, and if Buyer has not provided written confirmation of such insurability or lack thereof to Seller within the specified time, then this contingency shall expire and all other terms of this agreement shall continue unaffected.

7. **PERSONAL PROPERTY:** The following items of personal property, free of liens and without warranty of condition, shall be transferred to Buyer by a separate Bill of Sale: *N/A*

8. **SALE OF BUYER'S PROPERTY:**
A. ☒ **This offer is not contingent** upon the sale or close of property owned by the Buyer.
B. ☐ **This offer is contingent upon** ☐ the sale and close or ☐ close of the buyer's property located at (address including city & state) ______________ ☐ within ______ calendar day(s) of acceptance of offer, exclusive of the day of acceptance or ☐ within the time specified for closing the Seller's property. The Seller shall have the right to continue to offer the property for sale and accept any offers under the following terms: **(NOTE: If offer is contingent, Buyer is to check one of the following:)**
1) ☐ Seller may accept other offers until the contingency clause is removed in writing by the Buyer. If another offer is accepted by the Seller, the Seller will notify the Buyer that the contract is no longer valid and deposits will be returned according to paragraph 1 of this agreement. If the Buyer's property sells within the above stated time, the Buyer agrees to buy and the Seller agrees to sell according to the terms agreed to herein.

Initials: Buyer: [signature] Date: 1-14-20 Seller: GAH Date: 1-14-20
Buyer: ______ Date: ______ Seller: ______ Date: ______

2) ☐ Seller may only accept other offers subject to the rights of the Buyer. If the Seller accepts another offer, Seller will give the Buyer written notice of the fact. Within ______ hours of receipt of the notice, the Buyer will provide a written waiver of the contingency on the sale and close of the Buyer's property, or this agreement will terminate without further notice and deposits will be returned according to paragraph 1 of this agreement. Upon waiver of this contingency, Buyer warrants and will demonstrate to the Seller's satisfaction that the funds needed for closing will be available and the Buyer's ability to obtain financing is not contingent upon the sale and/or close of any property.

3) ☐ Seller may accept back-up offers, subject to the rights of the Buyer, until the time period specified in paragraph 8B above has expired. After the above-specified time, this offer becomes void unless an extension is mutually agreed upon in writing.

9. **TITLE:** Merchantable title shall be conveyed by Warranty Deed or such other conveyance instrument, sufficient to convey good and merchantable title, properly signed and with the necessary State Transfer Fee paid by the Seller at the time of recording. At Seller's expense an owner's ☐Standard, or ☐Standard with material and labor lien (mechanic's lien) coverage, or ☐Full extended coverage policy of title insurance to be provided (includes required full boundary survey). The monetary difference between a standard and full extended policy shall be paid by ☐ Seller or ☐ Buyer. Buyer to take title as: ☐ Married Couple, as joint tenants with rights of survivorship; ☐ Joint Tenants with rights of survivorship; ☐ Tenants in Common and not as joint tenants with rights of survivorship; ☐ Single Person; or ☒ *A South Dakota LLC - Buyer to pay for any title commitment*.

10. **WALK-THROUGH INSPECTION:** Buyer will have the right to conduct a walk-through inspection of the property within 24 hours prior to closing to verify that the mechanical systems are in working order and that the property is in substantially the same condition as on the date this agreement was written. All personal property, including refuse, not included in the purchase price shall be removed by the Seller prior to closing. Seller states that the heating, plumbing and electrical systems will be in working condition on the day of closing unless otherwise stipulated below. *(NOTE: These representations are solely that of the Seller, and no responsibility or liability therefore is accepted by the selling or listing Broker or their agents and employees.)*

11. **SELLER'S DISCLOSURE: (select one):**

A. ☐ Buyer has received Seller's Property Disclosure Statement. This offer ☐ is / ☒ is not contingent upon Buyer receiving and accepting clarification of the following items within ________ calendar day(s) of acceptance of offer, exclusive of the day of acceptance. ________________

B. ☐ The parties acknowledge that no disclosure statement is required by reason of the following: ________________

12. **LEAD-BASED PAINT STATEMENT:** If the Seller's property has a residential dwelling, which was built prior to 1978, Buyer is notified that such property may present exposure to lead. See lead-based paint disclosure, if applicable.

13. **INSPECTION OF PHYSICAL CONDITION OF PROPERTY:** *Buyer and Seller understand the purpose of a property inspection is to inform/educate Buyer of conditions and future maintenance of property and is not designed to be a point of renegotiation of the purchase price.* Buyer acknowledges that Buyer has the option to obtain property inspection services and it is recommended that such services be obtained from a licensed professional.

This offer ☐ is / ☒ is not contingent upon Buyer, at Buyer's expense, obtaining a Property Inspection which may include, but not be limited to the physical, structural, mechanical, pest, geological and environmental-contamination conditions relating to the property. These inspection options will be completed and written notice of the results given to the Seller or Seller's agent within ________ calendar day(s) of acceptance of offer, exclusive of the day of acceptance, or the inspection options shall expire and all other terms of this Purchase Agreement shall continue unaffected.

If the inspection(s) reveal conditions unsatisfactory to the Buyer or unknown to the Seller, the parties to this agreement shall have the following options: Buyer will accept the existing condition; Seller will correct the existing condition and provide certification from an inspector that the condition has been remedied; or Buyer and Seller will negotiate a settlement. If no written agreement can be reached on the results of the Inspection within ______ calendar day(s) of the date Seller or Seller's Agent is notified of the results of the inspection(s), exclusive of the date of notification, this agreement shall be deemed null and void in its entirety.

☐ **Buyer accepts inspection(s) as provided by Seller, subject to clarification of the following items:** ________________

☐ **Buyer hereby waives the option to have an independent home inspector assess the condition of the property.**
__________ **(Buyer initials)**

14. **HOME WARRANTY:** Buyer and Seller understand there are home warranty plans available and that either party may secure such warranty at their expense.

15. **IMPROVEMENT LOCATION EXHIBIT OR SURVEY REQUEST:** (Buyer to check one of the following)

☐ **New Improvement Location Exhibit** (Seller to provide). *The purpose of an Improvement Location Exhibit is to provide a representation of the information gathered at the time of inspection. It is based on existing but not confirmed boundary evidence and is subject to any inaccuracies that a boundary survey might reveal. No property corners will be set and no warranty as to the location of the true boundary of the subject property is extended to the present or future owners or occupants.*

☐ **Boundary Survey and Improvement Location Exhibit** (Seller to provide, however the monetary difference between a location exhibit and a boundary survey shall be paid by the Buyer). *The purpose of a Boundary Survey is to provide verified boundary information as the basis for the improvement location exhibit.*

☐ **Boundary Survey Land Only.** Paid by buyer unless otherwise agreed upon herein.

☒ **No survey or exhibit is required by Buyer.**

☐ **Other** ________________

Initials: Buyer: [signature] **Date:** 1-14-20 **Seller:** GAN **Date:** 1-14-20
Buyer: ________ **Date:** ________ **Seller:** ________ **Date:** ________

16. PRORATIONS:
Taxes, rents and homeowners association fees are:
[X] to be prorated to *Closing Date* (date). The tax proration shall be based on the previous year's taxes, or as agreed between Buyer and Seller in paragraph 21 below. (NOTE: Buyer and Seller acknowledge that taxes are computed on assessed valuation and mill levy and these figures change from year to year, determined by changes in city, county and school budgets.) [ ] not to be prorated.

Buyer is aware that residential property taxes may or may not be based upon Owner Occupied Status. Buyer is aware that seller(s) may change the status between November 1, ______ and March 15, ______ unless otherwise agreed upon in writing (see Other Provisions, item 21).

Any fuel oil, or propane stored on the property [ ] will or [ ] will not be prorated or removed.

17. POSSESSION/CLOSING: Possession to go to Buyer *November 1, 2019*. Closing will take place on or before *TBD* (date). Escrow closing fee is to be paid by Buyer unless required by VA to be paid by Seller.

18. DEFAULT: In the event either party defaults under this agreement the parties shall have all remedies allowed under the law of the State of South Dakota including but not limited to the right to sue for specific performance or forfeiture of earnest money.

19. CHOICE OF LAW: The laws of South Dakota govern this transaction.

20. OTHER PROVISIONS:

See attached Addendum to Purchase Agreement.

21. INTEGRATION AND MODIFICATION: This writing contains the entire agreement between the parties and there are no other oral or collateral agreements of any kind except those contained herein. This Agreement may be changed only by written agreement signed by the parties.

This is a legal binding contract between the Buyer and Seller, if not understood, seek legal advice.

Dated this Jan 14, 2020 **at** 5:00 [ ] **a.m.** [X] **p.m.**

This agreement is void if not accepted by the seller before ______ [ ]a.m. [ ]p.m. on the ______ day of ______________

See signature page attached X ______________________
Buyer's Name - Typed or Printed — Buyer's Signature

______________________ X ______________________
Buyer's Name - Typed or Printed — Buyer's Signature

The foregoing is [ ] **accepted,** [ ] **countered (see attached counter offer), or** [ ] **not accepted**
on this ______________________ **at** __________ [ ] **a.m.** [ ] **p.m.**

See signature page attached X ______________________
Seller's Name - Typed or Printed — Seller's Signature

______________________ X ______________________
Seller's Name - Typed or Printed — Seller's Signature

The following parties are listed for informational purposes only and they shall not be considered parties to the contract.

RE/MAX Advantage
Selling Company

Kelly Howie
Selling Salesperson - [ ] Seller Agent, [ ] Buyer Agent, [X] Limited Agent, [ ] Transaction Broker, [ ] Appointed Agent

RE/MAX Advantage
Listing Company

Kelly Howie
Listing Salesperson

Signature Page

Buyer(s): Alpha Land Company, LLC
Seller(s): Ridgewood Motel and Manor, LP and HP Park, LP
Property: TBD Westgate Rd
Date of original purchase agreement: 1-4-20

Buyer:
Alpha Land Company, LLC,
a South Dakota limited liability company

By: ____________________
Name: Gordon K Howie
Title: Managing Member

Seller:
Ridgewood Motel and Manor LP,
a Virginia limited partnership,

By: Howie Properties, LLC,
a Virginia limited liability company
General Partner

By: ____________________
Name: Gary Howie
Title: Managing Member

Seller:
HP Park LP
A Virginia limited partnership,

By: Howie Properties, LLC,
a Virginia limited liability company,
General Partner

By: ____________________
Name: Gary Howie
Title: Managing Member

ADDENDUM TO PURCHASE AGREEMENT

Buyer(s): Alpha Land Company, LLC
Seller(s): Ridgewood Motel and Manor, LP and HP Park, LP
Property: TBD Westgate Rd
Date of original purchase agreement: 1-4-20

1. The execution of this purchase shall be in parcels, the size and location of which shall be determined by the Buyer, at a price equal to $3,710.00 per acre. The buyer also agrees to pay the Seller an amount equal to one third of the net profit from sales of property as portions are developed and re-sold by the Buyer.
2. The buyer will be responsible to pay all taxes, interest and insurance on the entire property.
3. Buyer acknowledges that Seller owes a contract balance on the property. Buyer agrees to make all payments related to the contract. Any principle paid by Buyer during the term of this agreement will be reduced from the balance owed to Seller.
4. This agreement is contingent upon Buyer and Seller approval of final contract.
5. This agreement is contingent upon the following:
   a. Buyer and Seller approval of final contract.
   b. Completion of the purchase of subject property by Ridgewood Motel and Manor, LP and HP Park, LP from Shadrach Howie.
   c.

NOTE: ALL OTHER TERMS AND CONDITIONS TO REMAIN THE SAME

Buyer:
Alpha Land Company, LLC,
a South Dakota limited liability company

By: [signature]
Name: Gordon K Howie
Title: Managing Member

Seller:
Ridgewood Motel and Manor LP,
a Virginia limited partnership,

By: Howie Properties, LLC,
a Virginia limited liability company
General Partner

By: [signature]
Name: Gary Howie
Title: Managing Member

Seller:
HP Park LP
A Virginia limited partnership

By: Howie Properties, LLC,
a Virginia limited liability company,
General Partner

By: [signature]
Name: Gary Howie
Title: Managing Member

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April 07, 2020 4:16 PM
$30.00
Pgs: 3

Prepared by:
David Gregory Wick
Pennington Title Company
725 Kansas City Street
Rapid City, SD 57701
Phone: (605)343-5670
P 208773

WARRANTY DEED

Shadrach Howie, Grantor, of 15597 Antelope Creek Road, Rapid City, SD 57703, for and in consideration of One Dollar ($1.00) and other good and valuable consideration, grants, conveys, and warrants an undivided 2/3 interest to HP Park LP, a Virginia Limited Partnership, and an undivided 1/3 interest to Ridgewood Motel & Manor LP, a Virginia Limited Partnership, Grantee, of 22990 Sharpe Road, New Underwood, SD 57761, in and to the following-described real estate located in Pennington County, South Dakota:

See Attached Legal Description Exhibit

together with all improvements and appurtenances thereon and subject to easements, rights-of-way, restrictions, reservations, declarations and covenants of record.

Grantor herein covenants and warrants that neither he nor any member of his immediate family has ever used, claimed, or occupied the subject premises as a homestead.

TRANSFER FEE: $4,932.00

Dated this 6th day of April, 2020.

Shadrach Howie

STATE OF SOUTH DAKOTA)
) SS.
COUNTY OF PENNINGTON)

On this the 6th day of April, 2020, before me, the undersigned officer, personally appeared Shadrach Howie, known to me or satisfactorily proven to be the person whose name is subscribed to the within and foregoing instrument and acknowledged that he executed the same for the purposes therein contained.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

(SEAL)

JAN M. KIRCH NOTARY SEAL PUBLIC STATE OF SOUTH DAKOTA

Notary Public
My Commission Expires: 1-4-2022

EXHIBIT #2

Legal Description Exhibit

THE NORTHWEST QUARTER OF THE NORTHEAST QUARTER (NW1/4NE1/4); THE SOUTH HALF OF THE NORTHEAST QUARTER (S1/2NE1/4); LOT A IN THE NORTHEAST QUARTER OF THE NORTHWEST QUARTER (NE1/4NW1/4), ALL IN SECTION TWENTY-SIX (26), TOWNSHIP TWO NORTH (T2N), RANGE EIGHT EAST OF THE BLACK HILLS MERIDIAN (R8E BHM), PENNINGTON COUNTY, SOUTH DAKOTA

THAT PORTION OF THE NORTHWEST QUARTER (NW1/4) OF SECTION 26, TOWNSHIP 2 NORTH, RANGE 8 EAST OF THE BLACK HILLS MERIDIAN IN THE CITY OF BOX ELDER, LYING SOUTH OF INTERSTATE 90; EXCEPTING THEREFROM RAILROAD RIGHT OF WAY, AS SET FORTH IN INSTRUMENT RECORDED NOVEMBER 21, 1908, IN DEED BOOK 24 ON PAGE 64; AND ALSO EXCEPTING THEREFROM LOT A OF THE NE1/4NW1/4 OF SECTION 26, T2N, R8E, BHM, AS SHOWN ON THE PLAT FILED IN PLAT BOOK 8 ON PAGE 64 IN THE OFFICE OF THE REGISTER OF DEEDS, PENNINGTON COUNTY, SOUTH DAKOTA

TOWNSHIP TWO NORTH, RANGE EIGHT EAST OF THE BLACK HILLS MERIDIAN, PENNINGTON COUNTY, SOUTH DAKOTA:

SECTION 23: LOT A OF SE1/4SW1/4 AND LOT B OF SW1/4SE1/4 AS SHOWN BY THE PLAT RECORDED IN BOOK 4 OF PLATS ON PAGE 87; W300' OF SE1/4SE1/4; E360' OF THE W660' OF SE1/4SE1/4; E 601.26' OF SE1/4SE1/4 LYING SOUTH OF RIGHT-OF-WAY

SECTION 24: W2062.41' OF SW1/4 LYING SOUTH OF RIGHT-OF-WAY

SECTION 26: TRACT A OF NE1/4NE1/4 AS SHOWN BY PLAT RECORDED IN BOOK 10 OF PLATS ON PAGE 236

TOWNSHIP TWO NORTH, RANGE EIGHT EAST OF THE BLACK HILLS MERIDIAN, PENNINGTON COUNTY, SOUTH DAKOTA:

SECTION 25: NW1/4 LYING NORTH AND WEST OF SUNNYDALE ROAD EXCEPTING THEREFROM PRAIRIE OAK SUBDIVISION

SECTION 26: NE1/4NE1/4 LESS TRACT A

TRACT 4 OF PRAIRIE OAK SUBDIVISION, CITY OF BOX ELDER AS SHOWN BY THE PLAT RECORDED IN BOOK 27 OF PLATS ON PAGE 186; EXCEPTING THEREFROM LOTS 7-20 AS SHOWN BY PLAT RECORDED IN BOOK 28 OF PLATS ON PAGE 40 AND ALSO EXCEPTING THEREFROM LOTS 21-33; AS SHOWN BY PLAT RECORDED IN BOOK 28 OF PLATS ON PAGE 116 IN THE OFFICE OF THE REGISTER OF DEEDS, PENNINGTON COUNTY, SOUTH DAKOTA

TOWNSHIP TWO NORTH (T2N), RANGE EIGHT EAST OF THE BLACK HILLS MERIDIAN (R8E BHM), PENNINGTON COUNTY, SOUTH DAKOTA:

SECTION 25: S1/2SW1/4

SECTION 26: N1/2SW1/4; S1/2SW1/4; S1/2SE1/4

SECTION 35: N1/2

AND

TRACTS 1 AND 2 OF PRAIRIE OAK SUBDIVISION, CITY OF BOX ELDER AS SHOWN BY THE PLAT RECORDED IN BOOK 27 OF PLATS ON PAGE 186 IN THE OFFICE OF THE REGISTER OF DEEDS, PENNINGTON COUNTY, SOUTH DAKOTA

AND

Continued

TRACT 3 OF PRAIRIE OAK SUBDIVISION, CITY OF BOX ELDER AS SHOWN BY THE PLAT RECORDED IN BOOK 27 OF PLATS ON PAGE 186 IN THE OFFICE OF THE REGISTER OF DEEDS, PENNINGTON COUNTY, SOUTH DAKOTA

Legal Description

P-200783/04

Shad Construction Loan Agreement

Raven document

20240124_075440_Raven_Scan.pdf 1 of 1 page • 465 kB

Construction Loan Agreement

The parties to this agreement are Gary A. Howie (lender) and Shadrach Howie (borrower)

The purpose of this agreement is to provide cash funds for the construction of a single family residence on proposed Lot one, Block one (lot 1 block 1) of Alpha Omega Subdivision

Amount of loan is ~~$140,000.00~~ 150,000 GAH (one hundred ~~forty~~ fifty GAH thousand dollars)

Terms and conditions:

1.) All of funds go directly for construction. Gordon and/or his staff handles checkbook and makes material and labor payments. The cost of keeping the books is a necessary part of construction, and current books are critical. No labor or material is subordinated. Paying cash should give the maximum opportunity for negotiating price, getting the best deals, and knowing exactly where the project stands.
2.) House plan used is one approved by Gordon, Kelly, and Shad for ease of sale, with house to be built on alpha omega property. This ensures a lot sale which will help in interest payment plus also creates activity and additional PR for our project.
3.) Shad can draw $2,000 per month for three months for personal expenses. Limiting the number of personal draws helps encourage completing the house in as little time as is reasonably possible.
4.) Hopefully a house can be to the point where it is marketable (even if not yet completely finished) within two months so that funds can be regenerated quickly and another new house can be started. Building multiple houses per year with these funds greatly decreases the interest cost per house
5.) Any unused funds remaining can be used to start a second house if approved by Gordon and Kelly, especially if first house is sold and waiting for a closing. With this system, it will be possible to know exactly what the cost of building has been
6.) Repayment is due upon the sale and closing of the home being constructed, including interest at the rate of 10 percent (10%) per annum

Date 4-6-20

Gary A. Howie, Lender

Shadrach Howie, Borrower

Gordon Howie, witness

G-2964

HH-25

AMENDED AND RESTATED
OPERATING AGREEMENT
OF
ALPHA LAND COMPANY, LLC
(A LIMITED LIABILITY COMPANY)

THIS AMENDED AND RESTATED OPERATING AGREEMENT, has been adopted by a majority vote of the members at a meeting of the members noticed for and held on this __day of May, 2022, by and between the undersigned members of the Alpha Land Company, a Limited Liability Company (hereinafter "the Company") organized under the laws of the State of South Dakota. Members hereby agree as follows:

1. **Names of Members.** The names and addresses of the members of the Company are as follows:

Gordon K. Howie 15372 Antelope Creek Road Rapid City, SD 57703	Gary A. Howie 22990 Sharpe Road New Underwood, SD 57761	Shadrach F. Howie 15597 Antelope Creek Road Rapid City, SD 57703

2. **Offices.** The address of the principal office of the company is 15372 Antelope Creek Road, Rapid City, SD 57703.

3. **PURPOSE.** Although the Alpha Land Company LLC Operating Agreement allows various investment and operational activities, the primary function is to develop land purchased from RW Motel and Manor LP and Ridgewood Park LP. To that extent the overriding and most important function of this LLC is to guarantee that the net income from development goes in equal proportions to 'Gordon Howie, Shadrach Howie, and Gary Howie and/or their estates or beneficiaries, and that the marketing income from this development goes to Kelly Howie and/or his estate or beneficiaries. It is each partner's responsibility to ensure that this happens.

This Operating Agreement may be amended from time to time by a majority vote of members. The purpose for which the limited liability company is organized is in general to have

EXHIBIT #5

and exercise any and all powers that limited liability companies have and may exercise under the laws of the State of South Dakota, as the same now exist, or may be amended from time to time, except such powers that are inconsistent with the express provisions of the Articles of Organization, and

A. To acquire, manage and develop real estate.

B. Purchase, sell, rent, manage and otherwise generally deal in and with real estate, construction and improvement of same;

C. To enter into and perform all manner and kinds of contracts, agreements, and obligations for any lawful purpose by or with any person, firm, association, corporation, limited liability companies, or governmental division or subdivision;

D. Sue and be sued, and defend in its name;

E. Purchase, receive, lease, or otherwise acquire, and own, hold, improve, use, and otherwise deal with real or personal property, or any legal or equitable interest in property, wherever located;

F. Sell, convey, mortgage, grant a security interest in, lease, exchange, and otherwise encumber or dispose of all or any part of its property. A member voting to not sell will be given a 30-day first right of refusal;

G. Purchase, receive, subscribe for, or otherwise acquire, own, hold, vote, use, sell, mortgage, lend, grant a security interest in, or otherwise dispose of and deal in and with, shares or other interests in or obligations of any other entity;

H. Make contracts and guarantees, incur liabilities, borrow money, issue its notes, bonds, and other obligations, which may be convertible into or include the option to purchase other securities of the limited liability company, and secure any of its obligations by a mortgage on or a security interest in any of its property, franchises, or income;

I. Lend money, invest and reinvest its funds, and receive and hold real and personal property as security for repayment;

J. Be a promoter, partner, member, associate, or manager of any partnership, joint venture, trust, or other entity including but not limited to limited partnerships and limited liability companies;

K. Conduct its business, locate offices, and exercise the powers granted by SDCL Chapter 47-34A within or without this state;

L. Elect managers and appoint officers from within the three-members or their representatives. Members may also hire employees, and agents of the limited liability company, define their duties, fix their compensation, and lend them money and credit, or otherwise assist its members;

M. Deleted

N. Make donations for the public welfare or for charitable, scientific, or educational purposes; and

O. Make payments or donations, or do any other act, not inconsistent with law, that furthers the business of the limited liability company.

P. To have and exercise all powers necessary or convenient to affect any or all of the purposes for which the company is organized;

Q. To carry on any business whatsoever that this company may deem proper or convenient or that it may deem calculated, directly or indirectly, to improve the interests of this limited liability company.

The foregoing statement of purposes shall be construed as a statement of both purposes and powers, shall be liberally construed and in aid of the powers of this limited liability company, and the powers and purposes stated in each clause shall, except where otherwise stated, be in no way limited or restricted by any term or provision of any other clause.

4. Managers. The company is to be managed by two of the following three (3) members: Gordon K. Howie of 15372 Antelope Creek Road, Rapid City, South Dakota, 57703; Gary A. Howie of 22990 Sharpe Road, New Underwood, South Dakota, 57761; and Shadrach F. Howie of 15597 Antelope Creek Drive, Rapid City, South Dakota, 57703. Management of the company shall be limited to the members of the company. Only members can be managers of the Company. The two managers shall be selected by majority vote of the three members.

The duties of the managers shall include all duties and activities necessary to operate and manage the Company as provided in this agreement. The managers shall meet at times upon which they shall determine. Except as otherwise provided in this agreement, questions related to Company matters shall be determined by a majority vote of the managers. A designated manager shall, with approval by a majority of managers, have the authority to represent and bind the Company on all member approved matters except as otherwise provided in this agreement and by law, provided that a manager may not transfer as defined under SDCL §47- 34A-101(20) and acts amendatory thereto, an interest in Company property, other than in the normal course of Company business, without the written consent of all members. The Company shall indemnify a manager or member for liabilities and expenses incurred by the manager or member in the ordinary course of conducting Company business to the extent permitted by law. In the event a manager dies and/or is replaced due to death or other cause, the active managers may continue to operate the company in accordance with the section on membership change.

5. **Capital Contributions.** The members shall be deemed to have made the following capital contributions to the Company

Member	Form of Contribution	Value	% of Total
Gordon K. Howie	CASH	$10.00	33.33%
Gary A. Howie	CASH	$10.00	33.33%
Shadrach F. Howie	CASH	$10.00	33.33%

Future capital contributions may be made by the members. The failure of a member to make such a contribution shall not constitute a violation of this agreement. Capital contributions may not be withdrawn except by the majority vote of the managing members.

The members, Gordon K. Howie, Gary A. Howie and Shadrach F. Howie shall each own a 33.33% interest in the Company.

6. **Profits and Losses.** The net profits of the Company shall be divided among the three (3) members (Gordon K. Howie, Gary A. Howie and Shadrach F. Howie), or their designees or estates, and the net losses of the partnership shall likewise be borne by the three (3) members (Gordon K. Howie, Gary A. Howie and Shadrach F. Howie), or their designees or estates, all in proportion to the respective capital contributions as set forth in this agreement.

7. **Distributions.** Distributions to the three (3) members (Gordon K. Howie, Gary A. Howie and Shadrach F. Howie), or their designees or estates shall be made in the amounts, in the manner, and at the times determined by the managers.

8. **Membership Changes.** No new member may be allowed in the Company except as a replacement for existing members. A member may retire from the Company by delivering ninety (90) days prior written notice of such retirement to the managers and to each member. A

member may be expelled and replaced only for cause and only upon the unanimous vote of all other members. Cause includes a willful and substantial breach of this agreement, conduct prejudicial to the Company and its members, or the inability to perform his/her job. The estate or beneficiaries of a retiring or expelled member shall share in the profits as if that member were still an active member, with disposition of such profits to be determined by majority vote of the active members.

9. **Meetings and Voting Rights.** An annual meeting of the members shall be held each year on the 1st day of June. Special meetings of the members may be called by the managers or by the members as provided by law with a minimum of two days advance notice unless the members agree otherwise. Notice for any meeting can be given by certified mail when deemed appropriate or by email and must be given when member can reasonably receive said notice.

A majority of the members entitled to vote shall constitute a quorum at any meeting. Except as otherwise provided in this agreement, a majority vote of the members shall carry any action proposed or determined at a meeting. A member may waive notice of any meeting and the members may act without meeting to the extent permitted by law. All active members are entitled to vote and all active members shall have equal voting rights. A member may elect to attend meetings via remote connections.

A member may designate a proxy by written designation delivered to the other members. Any designated proxy shall be entitled to attend meetings of the members and managers and vote on matters submitted to the members. A proxy shall only remain valid for the period of time specified in the written proxy. A member may limit the powers of a proxy by specifying any limitations in such written proxy.

10. **Transfers of Interests.** Without prior approval by all members, a member

may not encumber, transfer, or sell his or her interest in the Company. Any such sale or transfer shall be subject to a right of first refusal by the non-selling members. The value of any such transfer or sale shall be its market value without goodwill as determined by a qualified commercial appraiser. In the event of a dispute in value, the disputing member may hire another appraisal at that member's expense. The value shall be taken as the average of the appraisals but not less than 95% of the high appraisal.

No company assets may be used to secure personal loans or made subject to levy by any member's personal creditors.

11. **Books, Records, and Reports.** The fiscal year of the Company shall be January 1st through December 31st. The Company shall maintain full and accurate books of account, which shall be kept at the Company's principal office, and generally accepted methods of accounting, shall be employed. The company shall maintain one or more bank accounts, and all moneys received by the Company shall be deposited therein. Only a designated manager, as determined by majority vote, shall be authorized to sign Company checks. Each member shall have the right to inspect and copy the books and records of the Company during normal business hours, and copies of the Company's income tax returns shall be made available to the members promptly after becoming available. Completed returns must be made available to members at least thirty calendar days prior to the standard personal tax return date of that member.

12. **General Standards of Conduct.** A member's duty of loyalty and duty of care to this member-managed company and its other members shall be 1) to refrain from competing with the company in the conduct of the company's business before the dissolution of the company, 2) to refrain from dealing with the company in the conduct or winding up of the company's business as or on behalf of a party having an interest adverse to the company, 3) to

account to the company and to hold as trustee for it any property, profit, or benefit derived by the member in the conduct or winding up of the company's business or derived from a use by the member of the company's property, including the appropriation of a company's opportunity, and 4) a member shall discharge the duties owed to a member-managed company and its other members under South Dakota law or under this operating agreement and exercise any rights consistently with the obligation of good faith and fair dealing.

13. **Continuation of Business.** Upon the death of Gordon K. Howie, Gary A. Howie or Shadrach F. Howle, such member's interest in the company shall be transferred to the estate of the deceased member. A deceased member's interest shall be administered by a replacement member previously designated by the member. An expelled members interest in the company shall be transferred to another member selected by the remaining two members. The remaining members shall consider, but not be obligated to appoint, a replacement for an expelled member recommended by the expelled member. Full voting rights shall be transferred to any such replacement. Upon the retirement, resignation, expulsion, bankruptcy or death of a member, the business of the Company may thereafter be continued by the remaining three members, which shall include the replacement members.

14. **Termination.** Upon the dissolution of the Company when the business will not be continued as provided in this agreement, the manager(s), shall promptly wind up the business and affairs of the Company. Upon the winding up of the business and affairs of the Company, the assets of the Company shall be distributed as follows:

(a) First, to the creditors of the Company, including members who are creditors, in satisfaction of the liabilities of the Company other than liabilities for distributions to members.

(b) Second, proportionately to members and former members as distributions owed under this agreement.

(c) Third, proportionately to members as distributions for the return of their respective capital contributions.

(d) Fourth, to members as distributions in respect to their membership interests in proportion to their respective interests.

15. **Amendment.** This agreement and the Articles of Organization may be amended by a majority vote of the members, except that any provision in this agreement or in the Articles of Organization that specifies a membership voting or consent requirement of greater than a majority may be amended only by a membership vote that is equal to the voting or consent requirement specified in the provision sought to be amended.

16. **Binding Effect.** The agreement shall be binding upon the members, their heirs, personal representatives, assigns, and successors in interest.

17. **Legal Action by a Member.** In the event of a member-initiated lawsuit not approved by majority vote and involving the Company, a member of the Company, or someone doing business with the company, the member initiating the legal action shall be liable for the attorney's fees and costs incurred by the prevailing party.

IN WITNESS WHEREOF, the undersigned has executed this agreement as of the date first above appearing.

Gordon K. Howie	5-25-22 Date
Gary A. Howie	5/25/22 Date
Shadrach F. Howie	Date

REALTOR®

Black Hills Association of REALTORS®
PURCHASE AGREEMENT

EQUAL HOUSING OPPORTUNITY

This is a legal and binding contract between the Buyer and Seller. If not fully understood, seek legal advice.

Agency Disclosure. Buyer and Seller acknowledge that they have received a copy of an agency disclosure.
[X] This is a Limited Agency Transaction. With the knowledge and understanding of the explanation of limited agency, Buyer and Seller authorize and instruct the Broker and Licensees to act as limited agents in this transaction by initialing below:
Buyer initials: ____________ Seller initials: ____________

1. **EARNEST MONEY DEPOSIT – PARTIES TO CONTRACT – PROPERTY:**
Received from *Alpha Land Company, LLC* Buyer, Earnest Money [ ] Certified Funds or [ ] Check in the amount of ($*0.00*) ____________ DOLLARS will be payable to [ ] Listing Company or [ ] Escrow Closing Agent. Upon acceptance of offer, the earnest money must be tendered and deposited no later than the next legal banking day after acceptance of offer. If the agreement to purchase does not close, regardless of the circumstances, all parties must agree to the release of the earnest money. Until such agreement is signed or until entry of appropriate court order, the earnest money shall remain with the Listing Company or Escrow Closing Agent and neither shall be liable for interest or damages relative thereto. The property is legally described as:
Legal Description Attached

County: *Pennington*, State: *SD*
also known as: *TBD Westgate Rd*
Seller's name: *Ridgewood Motel and Manor, LP and HP Park, LP*

2. **PURCHASE PRICE:** The total purchase price to be ($ *4,931,924.00*) *Four Million Nine Hundred Thousand Nine Hundred Twenty-Four* ---------- DOLLARS. After earnest money is credited, the remaining balance is to be paid in full by the Buyer at closing.

3. **MULTIPLE OFFERS:** Buyer acknowledges when in a multiple offer situation, all responses are directed by the Seller and at their discretion.

4. **APPRAISAL:** This offer [ ] is or [X] is not subject to the property appraising for at least the purchase price. Appraisal [ ] will be ordered / [ ] will not be ordered until any home inspection contingency is removed.

5. **FINANCING:** This offer is contingent upon Buyer obtaining a new [ ] VA, [ ] FHA, [ ] Conventional, or [ ] ____________, type of loan. A letter of Buyer's loan status from ____________ [ ] is attached or [ ] will be delivered by ____________ (date). Buyer shall pay the appropriate down payment required with this loan. In lieu of other instructions, Buyer is to pay any loan discount or funding fees, if applicable. Buyer agrees, within seven calendar days, to make application for and diligently and in good faith endeavor to secure a new loan, pay all application fees, and to sign all financing documents without delay. Buyer also agrees to immediately deposit with the lender, at time of loan application, all required funds for credit report and appraisal; and authorizes lender to immediately order, unless otherwise agreed. Buyer reserves the right to obtain alternative financing as long as there are no increased costs to Seller.
[ ] **Assumption.** See Attached Addendum.
[ ] **Contract for Deed/Private Mortgage.** See Attached Addendum.
[X] **Cash.** This is a cash offer. The remaining balance of $ ____________ will be paid at closing by certified check. A letter of verification from *N/A* ____________ regarding the availability of funds [ ] is attached or [ ] will be delivered by ____________ (date).

6. **HOMEOWNER INSURANCE:** Offer [ ] is or [ ] is not contingent upon buyer obtaining proof of insurability within ______ calendar day(s) of acceptance of offer, exclusive of the day of acceptance. If so contingent, and if Buyer has not provided written confirmation of such insurability or lack thereof to Seller within the specified time, then this contingency shall expire and all other terms of this agreement shall continue unaffected.

7. **PERSONAL PROPERTY:** The following items of personal property, free of liens and without warranty of condition, shall be transferred to Buyer by a separate Bill of Sale: *N/A*

8. **SALE OF BUYER'S PROPERTY:**
A. [X] **This offer is not contingent** upon the sale or close of property owned by the Buyer.
B. [ ] **This offer is contingent upon** [ ] the sale and close or [ ] close of the buyer's property located at (address including city & state) ____________ [ ] within ______ calendar day(s) of acceptance of offer, exclusive of the day of acceptance or [ ] within the time specified for closing the Seller's property. The Seller shall have the right to continue to offer the property for sale and accept any offers under the following terms: **(NOTE: If offer is contingent, Buyer is to check one of the following:)**
1) [ ] Seller may accept other offers until the contingency clause is removed in writing by the Buyer. If another offer is accepted by the Seller, the Seller will notify the Buyer that the contract is no longer valid and deposits will be returned according to paragraph 1 of this agreement. If the Buyer's property sells within the above stated time, the Buyer agrees to buy and the Seller agrees to sell according to the terms agreed to herein.

Initials: Buyer: *[initials]* Date: *2-10-23* Seller: *[initials]* Date: *2/10/23*
Buyer: ____________ Date: ____________ Seller: ____________ Date: ____________

EXHIBIT #1

2) ☐ Seller may only accept other offers subject to the rights of the Buyer. If the Seller accepts another offer, Seller will give the Buyer written notice of the fact. Within ______ hours of receipt of the notice, the Buyer will provide a written waiver of the contingency on the sale and close of the Buyer's property, or this agreement will terminate without further notice and deposits will be returned according to paragraph 1 of this agreement. Upon waiver of this contingency, Buyer warrants and will demonstrate to the Seller's satisfaction that the funds needed for closing will be available and the Buyer's ability to obtain financing is not contingent upon the sale and/or close of any property.

3) ☐ Seller may accept back-up offers, subject to the rights of the Buyer, until the time period specified in paragraph 8B above has expired. After the above-specified time, this offer becomes void unless an extension is mutually agreed upon in writing.

9. **TITLE:** Merchantable title shall be conveyed by Warranty Deed or such other conveyance instrument, sufficient to convey good and merchantable title, properly signed and with the necessary State Transfer Fee paid by the Seller at the time of recording. At Seller's expense an owner's ☐ Standard, or ☐ Standard with material and labor lien (mechanic's lien) coverage, or ☐ Full extended coverage policy of title insurance to be provided (includes required full boundary survey). The monetary difference between a standard and full extended policy shall be paid by ☐ Seller or ☐ Buyer. Buyer to take title as: ☐ Married Couple, as joint tenants with rights of survivorship; ☐ Joint Tenants with rights of survivorship; ☐ Tenants in Common and not as joint tenants with rights of survivorship; ☐ Single Person; or ☒ *A South Dakota LLC - Buyer to pay for any title commitment*.

10. **WALK-THROUGH INSPECTION:** Buyer will have the right to conduct a walk-through inspection of the property within 24 hours prior to closing to verify that the mechanical systems are in working order and that the property is in substantially the same condition as on the date this agreement was written. All personal property, including refuse, not included in the purchase price shall be removed by the Seller prior to closing. Seller states that the heating, plumbing and electrical systems will be in working condition on the day of closing unless otherwise stipulated below. *(NOTE: These representations are solely that of the Seller, and no responsibility or liability therefore is accepted by the selling or listing Broker or their agents and employees.)*

11. **SELLER'S DISCLOSURE: (select one):**

A. ☐ Buyer has received Seller's Property Disclosure Statement. This offer ☐ is / ☒ is not contingent upon Buyer receiving and accepting clarification of the following items within ________ calendar day(s) of acceptance of offer, exclusive of the day of acceptance. ____________________

B. ☐ The parties acknowledge that no disclosure statement is required by reason of the following: ____________

12. **LEAD-BASED PAINT STATEMENT:** If the Seller's property has a residential dwelling, which was built prior to 1978, Buyer is notified that such property may present exposure to lead. See lead-based paint disclosure, if applicable.

13. **INSPECTION OF PHYSICAL CONDITION OF PROPERTY:** *Buyer and Seller understand the purpose of a property inspection is to inform/educate Buyer of conditions and future maintenance of property and is not designed to be a point of renegotiation of the purchase price.* Buyer acknowledges that Buyer has the option to obtain property inspection services and it is recommended that such services be obtained from a licensed professional.

This offer ☐ is / ☒ is not contingent upon Buyer, at Buyer's expense, obtaining a Property Inspection which may include, but not be limited to the physical, structural, mechanical, pest, geological and environmental-contamination conditions relating to the property. These inspection options will be completed and written notice of the results given to the Seller or Seller's agent within ________ calendar day(s) of acceptance of offer, exclusive of the day of acceptance, or the inspection options shall expire and all other terms of this Purchase Agreement shall continue unaffected.

If the inspection(s) reveal conditions unsatisfactory to the Buyer or unknown to the Seller, the parties to this agreement shall have the following options: Buyer will accept the existing condition; Seller will correct the existing condition and provide certification from an inspector that the condition has been remedied; or Buyer and Seller will negotiate a settlement. If no written agreement can be reached on the results of the Inspection within ______ calendar day(s) of the date Seller or Seller's Agent is notified of the results of the inspection(s), exclusive of the date of notification, this agreement shall be deemed null and void in its entirety.

☐ **Buyer accepts inspection(s) as provided by Seller, subject to clarification of the following items:** ____________

☐ **Buyer hereby waives the option to have an independent home inspector assess the condition of the property.**
________ **(Buyer initials)**

14. **HOME WARRANTY:** Buyer and Seller understand there are home warranty plans available and that either party may secure such warranty at their expense.

15. **IMPROVEMENT LOCATION EXHIBIT OR SURVEY REQUEST:** (Buyer to check one of the following)

☐ **New Improvement Location Exhibit** (Seller to provide). *The purpose of an Improvement Location Exhibit is to provide a representation of the information gathered at the time of inspection. It is based on existing but not confirmed boundary evidence and is subject to any inaccuracies that a boundary survey might reveal. No property corners will be set and no warranty as to the location of the true boundary of the subject property is extended to the present or future owners or occupants.*

☐ **Boundary Survey and Improvement Location Exhibit** (Seller to provide, however the monetary difference between a location exhibit and a boundary survey shall be paid by the Buyer). *The purpose of a Boundary Survey is to provide verified boundary information as the basis for the improvement location exhibit.*

☐ **Boundary Survey Land Only.** Paid by buyer unless otherwise agreed upon herein.

☒ **No survey or exhibit is required by Buyer.**

☐ **Other** ____________

Initials: Buyer: [signature] **Date:** 2-10-23 **Seller:** GAH **Date:** 2/10/23
Buyer: [signature] **Date:** ______ **Seller:** ______ **Date:** ______

16. PRORATIONS:

Taxes, rents and homeowners association fees are:

☒ **to be prorated to** *Closing Date* (date). The tax proration shall be based on the previous year's taxes, or as agreed between Buyer and Seller in paragraph 21 below. (NOTE: Buyer and Seller acknowledge that taxes are computed on assessed valuation and mill levy and these figures change from year to year, determined by changes in city, county and school budgets.) ☐ **not to be prorated** .

Buyer is aware that residential property taxes may or may not be based upon Owner Occupied Status. Buyer is aware that seller(s) may change the status between November 1, ________ and March 15, ________ unless otherwise agreed upon in writing (see Other Provisions, item 21).

Any fuel oil, or propane stored on the property ☐ will or ☐ will not be prorated or removed.

17. POSSESSION/CLOSING: Possession to go to Buyer *November 1, 2019*. Closing will take place on or before *TBD* (date). Escrow closing fee is to be paid by Buyer unless required by VA to be paid by Seller.

18. DEFAULT: In the event either party defaults under this agreement the parties shall have all remedies allowed under the law of the State of South Dakota including but not limited to the right to sue for specific performance or forfeiture of earnest money.

19. CHOICE OF LAW: The laws of South Dakota govern this transaction.

20. OTHER PROVISIONS:

See attached Addendum to Purchase Agreement.

21. INTEGRATION AND MODIFICATION: This writing contains the entire agreement between the parties and there are no other oral or collateral agreements of any kind except those contained herein. This Agreement may be changed only by written agreement signed by the parties.

This is a legal binding contract between the Buyer and Seller, if not understood, seek legal advice.

Dated this February 10, 2023 **at** 11:00 ☒ **a.m.** ☐ **p.m.**

This agreement is void if not accepted by the seller before 12:00 ☐ a.m. ☒ p.m. on the 10th day of February, 2023

See signature page attached X ____________________

Buyer's Name - Typed or Printed — Buyer's Signature

____________________ X ____________________

Buyer's Name - Typed or Printed — Buyer's Signature

The foregoing is ☒ **accepted,** ☐ **countered (see attached counter offer), or** ☐ **not accepted**
on this 10th February, 2023 **at** 11:30 ☒ **a.m.** ☐ **p.m.**

See signature page attached X ____________________

Seller's Name - Typed or Printed — Seller's Signature

____________________ X ____________________

Seller's Name - Typed or Printed — Seller's Signature

The following parties are listed for informational purposes only and they shall not be considered parties to the contract.

RE/MAX Advantage — Selling Company

Kelly Howie — Selling Salesperson - ☐ Seller Agent, ☐ Buyer Agent, ☒ Limited Agent, ☐ Transaction Broker, ☐ Appointed Agent

RE/MAX Advantage — Listing Company

Kelly Howie — Listing Salesperson

Signature Page

Buyer(s): Alpha Land Company, LLC
Seller(s): Ridgewood Motel and Manor, LP and HP Park, LP
Property: TBD Westgate Rd
Date of original purchase agreement: February 10, 2023

Buyer:
Alpha Land Company, LLC,
a South Dakota limited liability company

By: ____________________
Name: Gordon K Howie
Title: Managing Member

Seller:
Ridgewood Motel and Manor LP,
a Virginia limited partnership,

By: Howie Properties, LLC,
a Virginia limited liability company
General Partner

By: ____________________
Name: Gary Howie
Title: Managing Member

Seller:
HP Park LP
A Virginia limited partnership,

By: Howie Properties, LLC,
a Virginia limited liability company,
General Partner

By: ____________________
Name: Gary Howie
Title: Managing Member

LEGAL DESCRIPTION :
THE NORTHWEST QUARTER OF THE NORTHEAST QUARTER (NW1/4NE1/4); THE SOUTH HALF OF THE NORTHEAST QUARTER (S1/2NE1/4); LOT A IN THE NORTHEAST QUARTER OF THE NORTHWEST QUARTER (NE1/4NW1/4), ALL IN SECTION TWENTY-SIX (26), TOWNSHIP TWO NORTH (T2N), RANGE EIGHT EAST OF THE BLACK HILLS MERIDIAN (R8E BHM), PENNINGTON COUNTY, SOUTH DAKOTA

LEGAL DESCRIPTION :
THAT PORTION OF THE NORTHWEST QUARTER (NW1/4) OF SECTION 26, TOWNSHIP 2 NORTH, RANGE 8 EAST OF THE BLACK HILLS MERIDIAN IN THE CITY OF BOX ELDER, LYING SOUTH OF INTERSTATE 90; EXCEPTING THEREFROM RAILROAD RIGHT OF WAY, AS SET FORTH IN INSTRUMENT RECORDED NOVEMBER 21, 1906, IN DEED BOOK 24, ON PAGE 54; AND ALSO EXCEPTING THEREFROM LOT A OF THE NE1/4NW1/4 OF SECTION 26, T2N, R8E, BHM, AS SHOWN ON THE PLAT FILED IN PLAT BOOK 8, ON PAGE 54 IN THE OFFICE OF THE REGISTER OF DEEDS, PENNINGTON COUNTY, SOUTH DAKOTA

LEGAL DESCRIPTION :
TOWNSHIP TWO NORTH, RANGE EIGHT EAST OF THE BLACK HILLS MERIDIAN PENNINGTON COUNTY, SOUTH DAKOTA

SECTION 23: LOTA OF SE1/4SW1/4 AND LOT B OF SW1/4SE1/4 AS SHOWN BY THE PLAT RECORDED IN BOOK 4 OF PLATS ON PAGE 67; W300' OF SE1/4SE1/4; E380' OF THE W680' OF SE1/4SE1/4; E 601.28' OF SE1/4SE1/4 LYING SOUTH OF RIGHT--OF-WAY

SECTION 24: W2062.41' OF SW1/4 LYING SOUTH OF RIGHT-OF-WAY

SECTION 26: TRACT A OF NE1/4NE1/4 AS SHOWN BY PLAT RECORDED IN BOOK 10 OF PLATS ON PAGE 236

LEGAL DESCRIPTION :
TOWNSHIP TWO NORTH, RANGE EIGHT EAST OF THE BLACK HILLS MERIDIAN PENNINGTON COUNTY, SOUTH DAKOTA

SECTION 25: NW1/4 LYING NORTH AND WEST OF SUNNYDALE ROAD EXCEPTING THEREFROM PRAIRIE OAK SUBDIVISION

SECTION 26: NE1/4NE1/4 LESS TRACT A

ADDENDUM TO PURCHASE AGREEMENT

Buyer(s): Alpha Land Company, LLC
Seller(s): Ridgewood Motel and Manor, LP and HP Park, LP
Property: See Attachment A, Legal Description
Date of original purchase agreement: February 10, 2023

1. The execution of this purchase shall be in parcels, the size and location of which shall be determined by the Buyer, at a price equal to $3,710.00 per acre. The buyer also agrees to pay the Seller an amount equal to one third of the net profit from sales of property as portions are developed and re-sold by the Buyer.
2. The buyer will be responsible to pay all taxes, interest and insurance on the entire property from April 6, 2020.
3. Buyer acknowledges that approximately 779 acres +/- of the property were used as collateral for a mortgage against the property. Buyer agrees to make all payments related to Seller's current mortgage or its replacement to include all initial costs associated with obtaining the mortgage and all terms of repayment. Any principle paid by Buyer during the term of this agreement will be reduced from the balance owed to Seller.

NOTE: ALL OTHER TERMS AND CONDITIONS TO REMAIN THE SAME

Buyer:
Alpha Land Company, LLC,
a South Dakota limited liability company

By: ______________________
Name: Gordon K Howie
Title: Managing Member

Seller:
Ridgewood Motel and Manor LP,
a Virginia limited partnership,

By: Howie Properties, LLC,
a Virginia limited liability company
General Partner

By: ______________________
Name: Gary Howie
Title: Managing Member

Seller:
HP Park LP
A Virginia limited partnership

By: Howie Properties, LLC,
a Virginia limited liability company,
General Partner

By: ______________________
Name: Gary Howie
Title: Managing Member

From: Richard Braithwaite <rbraithwaite@bcbank.net>
Sent: Thursday, December 16, 2021 12:54 PM
To: Gary Howle <garyhowle@hotmail.com>
Subject: Development Loan - Box Elder Property

Gary:

I have poured over all of your emails and documentation you sent on the cash out refinance of the 779 acre track in Box Elder and I have the following questions that I need clarification.

Question 1:
The operating agreement and the articles of organization list 4 managers for Alpha Land Company, LLC but only three owners. Is this correct? Yes. Kelly participates in proceeds from Alpha Land Company as the Realtor only, with the net development profits being divided among Gordon, Shad, and me. Managers are Gordon K Howle, Gary A Howle, Kelly G Howle, and Shadrach F Howle. The three owners are Gordon K Howle (33.33%), Gary A Howle, (33.33%), and Shadrach F Howle (33.33%). Who has authority to transact business and sign loan docs for Alpha Land Company, LLC? Note that Alpha Land Company does NOT own the land, but rather has the right to purchase portions of the land as it is developed. Gordon has signing authority for Alpha Land Company as do each of the partners. With respect to the two LPs that own the land and have the assumed debt that we would like refinanced, I have the signing authority as the Managing Member of Howle Properties, LLC, which is the General Partner of the two LPs,

Question 2:
What is labeled Phase II real estate purchase contract dated 07/15/2019 in the amount of $2,338,650 with a legal description labeled Phase II approximately 80.54 acres. I think the confusion there is that the 80.54 acre description is for a portion of one parcel (tax id 60723) and not for the entire Phase II, which includes six other parcels. The seller is William Gikling ETAL and the buyer is Shadrach Howie and/or assigns. My understanding is this purchase was done by $200,000 cash and a Contract for Deed in the amount of $2,138,650 carried by the seller. See the chart below showing my understanding of the two purchase contracts. In order to do a tax-deferred exchange, the purchased property had to be at arms length. The oroperty needed to be purchased while I was in the process of finalizing the sale of the mobile home park owned by the two LPs (sold for $6 million.) A nephew is considered to be at arms length for IRS purposes. Consequently, Shad purchased the property with the right to assign. By purchasing the property from Shad at an increased price we were able to have cash from the exchange available for initial development.

Box Elder Property		
779 acres	*Per email*	
Total purchase price:	$	4,931,924
Phase II		
REP dated 07/15/2019	*Approx 80.54 acres per REP*	
Cash:	$	200,000
Contract for Deed:	$	2,138,650
Total Phase 2:	$	2,338,650
REP dated 10/25/2019	*acres unknown*	
1031 exchange:	$	2,465,962
Cash:	$	-
Assumption:	$	2,138,650
Total Purchase Price:	$	4,604,612

REP is Real Estate Purchase Contract

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Corrections to the above: 1.) The total purchase price of $4,931,924 was for the entire ~1400 acres. The contract for deed was for the southern 779 acres of that purchase.
2.) The 80.54 acres is for tax id 60723, which is one of seven parcels included in the 779 acres.

I have the real estate purchase contract (REP) for the initial purchase in the amount of $4,931,924.00 dated 10/25/2019 with a legal description but no indication of acreage amount. The buyers are Ridgewood Motel and Manor, LP and HP Park, LP. Down payment is $2,465,962.00. The rest of the purchase amount is by assumption of existing Contract for Deed. I assume that the $2,465,962.00 is all 1031 exchange funds. Is this correct? Yes

Your contract to purchase the property from Shadrach does not indicate the number of acreage, but your email says it is 779 acres. I need to make sure I understand correctly that the only existing debt on the entire 779 acres is the Contract for Deed in the amount of $2,138,650. Is this correct? That is correct.

Will the entire 779 acres be vested into the name of Alpha Land Company, LLC and the borrower on our Note (Loan) will be Alpha Land Company, LLC? Is this correct? No. The land is still all owned by the two limited partnerships used for the trade, so Alpha Land Company does not own any land. They have a contractual right to buy the land as it is developed. Sale of the land directly would trigger significant tax consequences that were avoided by the exchange. Alpha Land Company does have the obligation to be responsible for the payments, however, as part of the contract. The third REP is for the amount of $4,931,924.00 with the buyer Alpha Land Company, LLC and the seller Ridgewood Motel and Manor, LP and HP Park, LP dated 01/14/2020. The REP states that this purchase shall be in parcels, the size and location of which shall be determined by the Buyer at a price equal to $3,710.00 per acre. This allows me to pay taxes on the sale of the exchanged property (mobile home park owned by the two LPs) over an extended period of time. The amount of the payment will be more than the cash used for the purchase, which is partial compensation for no interest being charged by the two LPs. .

For our loan, I need to know if the Bank will be taking all 779 acres as collateral. Is this correct? Yes. If this is not correct, then Ridgewood Motel and Manor, LP and HP Park, LP will have to pledge land still owned by the two LPs, but the problem may be how title in the land is currently vested at the County. We have to have clear title in first lien position to provide a loan and we would expect all 779 acres to vest over to Alpha Land Company, LLC to make this happen. The two LPs still own the 779 acres. Alpha Land Company was formed for the purpose of development and does not own any land.

Question 3:
The requested loan amount is $3,500,000. Per the payment schedule emailed, the principal balance on the Contract for Deed assumption at the end of December 2021 should be $2,019,530.43. I know we still need to get an exact payoff amount for when we can get a closing scheduled if we get this loan approved, but for now that would provide $1,480,469.57 available for accrued interest, closing costs, and funds for future development. Does this match your calculations? Yes. The bank has slightly different numbers, and puts the amount at $2,019,987.36 for 12/13/201. We will make up any difference so that this can be the amount of the payoff. Will any of the funds actually pay for development of any lots or will all of the funds be used as working capital to pay for soft costs to get the development approved through the City? Our intent is to use them essentially as a line of credit for items such as infrastructure.

Question 4:
Will Kelly Howie have any ownership in Alpha Land Company, LLC? Will he sign a personal guarantee? Kelly has 1/4 ownership of Alpha Land Company, but Alpha Land Company does not own any land until the brief period when we develop a parcel. Parcells will likely be 20-30 acres at a time. Kelly's ownership entitles him to exclusive marketing. Among other things, Kelly will be responsible for recruiting builders and helping buyers obtain financing. We anticipate that the loan repayments incurred with the financing will be paid from development sales out of gross receipts before determining the net that will be divided three ways.

Question 5:
Do you have any drawn plans for developing the 300 acres that you are working on a permit with Box Elder City? Not at this time. The city is currently exploring a TIF for Cheynne Blvd, with an anticipated completion time of

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about three years. At that time we would begin actively development on the 779 acres, which requires access via Chyenne Blvd. If so, I will need a copy of the drawn plans and the development budget for the 300 acres. Will you be developing all 300 acres with this loan? If not, how many acres and lots will be developed? When will you have a development permit to start the development?

Question 6:
Our legal lending limit to an individual or an LLC or other form of business registration is $3.5 million. We have already lent you funds to refinance your ranch and build your new home and that loan is under your name. As long as Alpha Land Company, LLC is the new borrower we should not have a problem with lending Alpha Land Company, LLC $3.5 million. If we discover that we will have a legal lending limit issue with this new loan request, I will have to seek out loan participation from other lenders to keep the Bank within our lending limits. Do you understand and agree to this participation if we need to go that route? The borrowing entities should be the two LPs rather than Alpha Land Company.

In any event, I will need a plat of where the development of lots is going to start and be located within the 779 acres. Get in touch with me if you have any questions.

Sincerely:

Richard Braithwaite, VP of Commercial Lending
Banner Capital Bank
4007 Greenway Street
Cheyenne, WY 82001
Telephone: 307-433-1555 Ext. 4422
Email: rbraithwaite@bcbank.net

Banner Capital BANK

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 31191

SHADRACH HOWIE, and ALPHA LAND COMPANY, LLC, a South Dakota limited liability company,

Plaintiffs/Appellants,

v.

GARY HOWIE and GORDON HOWIE,

Defendants/Appellees.

Appeal From the Circuit Court
Seventh Judicial Circuit
Pennington County, South Dakota
The Honorable Matthew M. Brown

REPLY BRIEF OF APPELLANTS

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NOTICE OF APPEAL FILED ON JULY 24, 2025

TABLE OF CONTENTS

TABLE OF AUTHORITIES

South Dakota Case Law

Statutory Authorities

ARGUMENT

A. ACCURACY OF THE RECORD

Shad's brief ("SB") accurately cited the record throughout and drew reasonable inferences from the evidence presented. Because Defendants challenge the accuracy of several specific and material facts, Shad addresses those assertions below. Defendants' brief is designated as ("DB") followed by page number.

1. Alpha's Refinance:

Shad reproduced the relevant portions of Braithwaite's email contradicting Defendants' claims that Gary's LPs—not Alpha—were seeking the refinance and that Alpha could not obtain loan funding. The record does not support Defendants' claims, as shown below.

Braithwaite was not seeking clarification of "who owned" the 779 acres as Defendants claim. (DB:25; CR:1320-1321). At that time, the Property remained subject to the Contract for Deed ("CFD"), and legal title had vested in neither Alpha nor the LPs but remained with the original seller until the CFD was satisfied. Any interest held by Alpha or the LPs was therefore equitable, not legal. Gary purchased the 779 acres from Shad by agreeing to assume the CFD, and Alpha immediately closed on its purchase agreement with Gary's LPs, making Alpha contractually liable for the payments.(CR:28-36).

Alpha had a greater equitable interest in the Property. Alpha possessed the Property, carried all its financial obligations, including the CFD, and held the right to purchase it. By contrast, the LPs agreed to assume the CFD but Alpha was ultimately obligated to make the payments. *Id.*

Braithwaite was not confused by the ownership or structure of the purchase agreement. He stated he had "poured over" all the documents and confirmed the terms of Alpha's purchase agreement, yet still concluded Banner was willing and able to lend Alpha $3.5 million. (CR:1320-1321).

Nothing prevented the 779 acres from vesting to Alpha and it was the only entity with a real economic interest in the refinance. When Gary withdrew Alpha as the borrower, Defendants did not correspondingly remove Alpha's payment obligations from the purchase agreement but instead reinforced them by amending the agreement to include the replacement loan obligation.(CR:1800).

Defendants' criticism centers on Shad's use of the word "approved" as shorthand for Braithwaite's earlier statement, whose context Shad had already explained. (SB:24). Shad never represented Braithwaite's statements or Banner's actions as a formally underwritten or executed loan approval.

Defendants have produced no document showing that Shad assigned his interest in the sale. The use of "and/or assigns" in an agreement does not effectuate an assignment. Defendants also claim Shad did not personally assume the CFD despite him signing it when he purchased the property. No assignment, assumption, or release from the CFD has been produced establishing Shad's release from liability. Gary admitted the CFD remained in Shad's name through Old West Escrow until the 2022 refinance. (CR:699).

Defendants rely on the phrase "new borrower" to suggest a change in borrower to Alpha. In context, Braithwaite was explaining Banner's lending limits in light of Gary's recent personal refinance, stating that "as long as Alpha is the new borrower" there should be no problem lending Alpha $3.5 million.(CR:1321).

Defendants' claim regarding the value of the remaining property rests on speculation. Their calculation assumes the remaining 554 acres appreciated proportionally with the 779 acres, but the record contains no such evidence.(DB:26). To the contrary, Shad testified the 779 acres were "the least desirable piece of real estate in the entire development—hardest to develop, topography, drainage, access, utilities. It's worth substantially less than the balance." (CR:1004). The record also shows Gary and Gordon later used the Property to secure more than $5 million in financing. (CR:669–670;1453–1488).

From the outset, the parties pursued the Banner refinance with Alpha as the agreed and intended borrower. Some relevant portions of the record include:

> <u>Postma's Affidavit ¶24-25</u>: It was "very much" Postma's understanding that Alpha would be the borrowing entity and would use its "equitable interest" in the property to refinance the CFD and/or finance development. (CR:915).
>
> <u>Appraisal</u>: Alpha paid $7,500 on 01/05/2022 for the Appraisal. (CR:1503;1506;1449).
>
> <u>Email—05/04/2020:</u> Banner requests Alpha's business plan, corporate documents, and financial statements of its principal owners to begin loan process. (CR:1206).
>
> <u>Email—05/11/2020</u>: Kelly explains that Banner will likely reply on members' personal financial information because Alpha is newly formed LLC. (CR:1206).
>
> <u>Email—11/21/2021:</u> Kelly proposes to Defendants that he be added as capital contributor to Alpha to "strengthen our collective financial picture" and improve Alpha's ability to refinance. (CR:818).

Email—11/28/2021: Gary reinitiates refinancing with Banner; Braithwaite responds requesting Alpha's corporate documents, EIN, and property's legal description. (CR:1315).

Email—01/28/2021: Gordon informs members that Banner suggests review and possible revisions to Alpha's LLC to comply with lending requirements." (CR:1902).

Shad's Testimony: "We had always, always, always, planned on doing a refi on my contract for deed, which stayed in my name." (CR:1059). "Gary manufactured a breach because he refused to refinance what he agreed to refinance and there is multiple facets of fraud". (CR:1060). "I was told we were going refi it. I was told Alpha is going to own it. I was told a whole bunch of lies." (CR:381).

12/23/2021 Letter: Gordon states Alpha responsible for Shad's tax liability and Alpha in the process of funding its account to pay the tax obligation. (CR:1842).

Alpha PAs: Require Alpha make loan payments. (CR:32).

The evidence strongly supports Shad's claim that the parties agreed Alpha would refinance the CFD and pursued that objective from the outset. It is not "pure fabrication" as Defendants now claim. (DB:27).

2. Alpha is a Defunct Company.

Shad does not affirmatively state, as Defendants allege, that the 1031 exchange was unlawful. (DB:27). Rather, Shad presented Postma's affidavit and related emails and stated *whether* the steps taken rendered the transaction's purpose unlawful *is a question for the factfinder*. (SB:35). Defendants omit italicized portion of the statement.

Furthermore, Shad did not claim that Gary or Gordon used loan proceeds for purposes unrelated to the development. Rather, Shad explains that Defendants did not produce the bank records requested in discovery or an itemization of the loan funds.(SB:34). Shad has no right to access the LPs accounts absent discovery. The reference to "potential self-dealing" reflects the natural consequence a lack of transparency creates when records are not provided and cannot be verified. If Alpha is responsible for repaying a loan or carries its financial burden, Alpha's members must have the ability to audit the loan funds. Defendants offer no justification for a structure that requires Alpha to service debt it cannot independently use or verify. Revealing Defendants nonproduction of documents, the lack of transparency created, and Alpha's inability to oversee funds it is obligated to repay is neither "sophistry" nor "hyperbole."

Alpha's sale to UniMAX was not a straightforward $8 million land sale. It is a phased lot-takedown arrangement under which the buyer purchases small groups of finished lots as they become available. The contract presupposes Alpha has the capital to fund the infrastructure necessary to create buildable lots. (CR:717). As a result, the agreement's viability depends on Gary's continued willingness to fund Alpha's development.

UniMAX closed on its first ten lots around August 2023. After the sale, Alpha made its first member distribution of $10,000 after paying the bank. (CR:690). To Shad's knowledge, members have received only $22,000 in distributions to date. (CR:665–666).

Alpha is defunct because its liabilities substantially exceed any assets it may possess. It has no exclusive right to purchase or develop the property and has been declared in default under its purchase agreement. (CR:345). Alpha lacks independent capital and relies on loans from entities it does not control. Even when Alpha receives funds through lot sales or grants, Defendants retain authority to allocate those funds, including paying down the LPs' loans. (CR:690;1328-1331).

If Defendants intended to protect the company and Shad's interest in the project, they could have structured development financing through a defined line of credit between Gary's LPs and Alpha rather than advancing funds at their discretion. Such financing could have ensured Alpha had capital to develop and avoid default. Instead, they reaffirmed Alpha's obligations in the amended Alpha PA despite Alpha not receiving the Banner loan funds, then declared Alpha in default, amended the OA, and threatened to extinguish Shad's interests.(CR:1325).

3. 1031 Exchange.

Defendants insist there was nothing questionable about Gary's 1031 exchange.(DB:29). Postma's statements reflect far less certainty. He acknowledged several risks, expressed discomfort with Gary's tax positions, and did not want to serve as the paid preparer on Gary's return.(CR:912-919).

Postma warned that Kelly's lack of an ownership interest "might not satisfy a non-related party exchange" and recommended Kelly hold a capital interest in Alpha to "tamp down the risks." (CR:917). He also cautioned Gary's decision to allocate 100% of the project's losses to himself increased the appearance Gary was acting as a developer. (CR:915). Postma further identified potential "step transaction" risk and acknowledged that certain terms—including sale proceeds being paid to Alpha rather than the seller—were omitted from the purchase agreement to avoid giving the IRS a "road map" of the transaction.(CR:916).

Postma ultimately stated that whether the IRS would challenge the exchange was "speculation," that review would be "subjective," and that the structure was simply "a risk Gary felt was worth taking."(CR:917). These statements do not reflect a confident assurance the exchange was unquestionably valid or would withstand IRS scrutiny. Nor does the absence of IRS review establish it would have survived examination.

4. Shad Personally Assumed CFD.

Defendants' claim that Shad did not personally assume the $2.1 million CFD and was merely a "placeholder" in the transaction is contradicted by the record. (DB:29). When Shad purchased the property on October 25, 2019, he personally signed the CFD, owned the property for six months, and performed work and improvements during that time. No document shows the CFD holder consented to his release or that the CFD was formally assigned or assumed by Gary's LPs in a manner relieving him of liability. Gary admitted the CFD remained in Shad's name through Old West Escrow until the 2022 refinance. (CR:699).

Omitting terms of the purchase agreement increased Shad's personal risk. After relinquishing the sale proceeds under the parties' oral agreement, he relied on Alpha's ability to pay his tax liability. When Alpha lacked funds, Shad received levy notices before the liability was paid two years later.(CR:680;9). This was not a transaction in which Shad assumed no risk or merely served as a placeholder. Postma's description of Shad as the "sacrificial lamb" is far more fitting.(CR:213).

Defendants incorrectly claim Shad attempted to improperly pledge the Property as collateral to purchase cattle in December 2019.(DB:13). The email they cite shows the opposite. Shad asked Defendants for advice because his ownership of the Property rendered him ineligible for Farm Service Agency financing, "Since I currently have the 1,331 acres in my name as an individual, the FSA would not be able to get past the test for credit since if that land was pledged for security they know other credit would be available, this is the roadblock I have at this point." (CR:630). Gary suggested telling the FSA Shad had a contract to sell the land at no profit and it was not an asset available for borrowing. *Id.* Shad did not benefit from holding title; it prevented him from obtaining otherwise available financing.

5. Separate Development Contract.

The record reflects the parties contemplated a separate development agreement between Gary's LPs and Alpha. Postma repeatedly confirmed the agreement required a separate legal contract between them.(CR:1294;1269;1305;1271;1276)

In his January 6, 2020 email explaining the "overall deal," Postma wrote: "I realize that apart from this proposed sale and the operating agreement of Alpha Land Company, LLC, there will also be a separate legal contract [which still needs to be drafted] between Gary's LPs and Alpha."(CR:1276).

In a footnote, Defendants attempt to minimize this reference by suggesting the contract was merely intended to address a redundancy in the purchase agreement.(DB:8). But Postma's emails make clear the contract was a distinct component of the parties' agreement, not a minor clarification.

In discovery Gary was asked why the LPs and Alpha never executed the contract granting Alpha an exclusive right to develop the property.(CR:669). Gary admitted: "The parties did establish Alpha Land as a development company and intended to execute a final agreement. No such document was created. In the absence of a final agreement, Alpha Land has continued forward under the terms of the signed purchase agreement and addendum in place." *Id.* This admission alone undercuts any claim that the parties never agreed to execute a separate agreement. The "developer's operating agreement" Defendants reference was proposed by Shad during mediation to formalize Alpha's previously agreed development rights.(DB:16). Defendants rejected it.

Shad's cited testimony at DB pg.31 is taken out of context. He was referring to earlier testimony explaining that after the initial meeting he was comfortable with the agreement as a handshake deal, but that changed when Kelly became involved. (CR:387;404).

Defendants claim Shad understood he had no "guarantee of net profits" if the LPs chose not to sell the Property to Alpha. (DB:31). Setting aside Alpha's purchase agreement, this assertion is inconsistent with Defendants' own description of Shad's consideration and implausible as a matter of common business sense. In their Answers, Defendants state Shad was promised one-third of the net development proceeds, a position they now attempt to recast as merely a one-third interest in Alpha.(CR:648;1611). If the LPs were free to simply decline to sell the Property to Alpha, as Defendants suggest, Shad would have received no meaningful consideration for his participation. It is not reasonable to conclude Shad would forgo other investors and business opportunities to join a company with no contractual right to purchase or develop the property.

6. Preventing Financing Caused Default.

Defendants assert that Gary's contributions "prevented Alpha's default."(DB:32). They did not. At the April 26, 2022 meeting, the members agreed Alpha was already in default for failing to meet its financial obligations. Gary's subsequent payment of Alpha's obligations did not cure the default, and Alpha remained in default thereafter.(CR:345;1325;669).

When negotiating amendments to the OA, Gary leveraged Alpha's default by informing Shad that the default allowed him to nullify the agreement, terminate the OA, and extinguish Shad's interest. (CR:1325;669). Alpha remains in default. See Gary's email to attorney Tellinghuisen suggesting formation of a new LLC without Shad. (CR:1925).

7. Original Intent.

Much of the cited testimony and statements (DB:33-35) is presented without the surrounding facts necessary to understand it. Shad addresses the most significant examples below.

Claim: Shad's March 17, 2022 "original intent" email shows he understood the LPs owned the property and that he was entitled only to net development proceeds. (DB:31).

Response: Shad expressly rejected that interpretation. He testified the email was a mediation proposal responding to Defendants' new position and that he was "willing to give a little ground" to resolve the dispute—not describing the parties' original agreement. (R.420–422). His proposed "developer's agreement" sought to preserve the parties' intended development arrangement despite Defendants' refusal to refinance the CFD through Alpha. Id.

Claim: Shad understood Alpha had no exclusive rights to the Property and that Gary was not required to sell to Alpha. (DB:31; 34).

Response: Shad's testimony does not support that claim. (CR 418). When asked about Holly's alleged comments, Shad testified he did not recall those conversations and noted Holly was not an expert. He explained he believed Alpha would be the vehicle through which the parties would own and develop the property, including refinancing the CFD. His testimony does not suggest he understood Gary could refuse to sell the property to Alpha. Holly's testimony at CR:282 likewise does not establish Shad's understanding at formation.

Claim: Shad's "means to realize any benefit" was the deal reflected in the original OA and his only right was to share in net profits after Alpha sold lots.(DB:33).

Response: This characterization ignores the purchase structure Postma outlined in his September 11th email, describing the parties' plan for Gordon and Shad to join Gary's LLC following the exchange. (CR:1294). When that plan was abandoned to reduce Gary's tax risk, the concept of a separate development company emerged. *Id.* The dispute therefore turns on what the parties understood Alpha to be. Shad's position is that Alpha was intended to be a viable development company with rights to purchase and develop the Property, obtain financing, and hold title. Defendants instead argue Shad knowingly joined a company with no development rights, no ability to obtain financing, no assets, and no exclusive right to purchase the property—yet remained financially responsible for the project. These structures are not equivalent, and the conclusion that Shad agreed to the latter is unreasonable.

B. BREACH OF CONTRACT:

Defendants argue Alpha's OA represents the complete and final expression of the parties' agreement.(DB:36). Yet both sides acknowledge the parties agreed Alpha would receive the proceeds from Shad's sale of the Property to Gary, use those funds for development, pay Shad's tax liability, purchase the property, and assume its ongoing obligations, including the CFD payments. Shad further asserts the parties agreed Alpha would refinance the CFD, obtain development financing using its interest in the property, and execute a separate development contract, along with other economic promises related to the project. None of these terms appear in the OA. Their absence—*even considering only the terms both sides acknowledge*—confirms the OA was not intended to capture the parties' entire agreement.

Alpha's OA is a standard governance document.(CR:1890). Such agreements regulate internal affairs, not the entirety of the parties' business relationship or dealings with third parties. They address matters such as membership, voting, distributions, and management. Standing alone, the OA shows only that the parties are equal members of an LLC.

Defendants claim Shad acknowledged he was a placeholder by signing the Exchange PA. (DB:40). The cited language, however, is standard in §1031 exchange agreements and merely requires the parties to cooperate with the intermediary. Similar language appears in the UniMax PA, even though neither party there was acting as a placeholder.(CR:1797).

Defendants also cite language in the Exchange PA as evidence of merger. The integration clause states that "no other oral agreements exist." (DB:40). Yet Defendants themselves acknowledge that oral terms governed the sale and were omitted for the reasons Postma explains.

1. Statute of Frauds Not Applicable.

Defendants argue Shad waived opposition to their Statute of Frauds argument. Shad did not oppose it because it rests on the premise that he seeks to enforce an oral promise conveying a personal ownership interest in land. That has never been his claim. Shad has consistently maintained the parties agreed to participate as equal members in a company that would purchase and develop the Property. He never anticipated personally holding title. Defendants' Statute of Frauds discussion therefore addresses a claim not presented on summary judgment or in this appeal.

2. Promissory Estoppel.

Defendants address promissory estoppel only as an exception to the Statute of Frauds. Shad did not oppose that argument for the same reason he did not oppose the Statute of Frauds. His promissory estoppel claim, however, is not limited to that context. He pleaded it as an independent equitable claim based on promises that induced substantial reliance and caused economic harm. Defendants' argument does not address that theory.

C. ALPHA'S COUNTERCLAIM

Shad does not dispute he received the funds to complete construction. The dispute concerns the nature of the debt—specifically who the lender was and the parties' agreement regarding repayment. As with the earlier $150,000 construction financing, Gary funded Alpha and the check to Shad was issued through Alpha, but Shad executed a promissory note to Gary—not Alpha. (CR:351;1443–1444). Record evidence shows the parties understood such advances would be repaid through assignment of Shad's share of future distributions. (CR:67;1222). Whether the $30,704.84 advance was part of that same financing arrangement with Gary or a separate debt owed to Alpha presents a genuine issue of material fact precluding summary judgment.

D. FRAUD AND MISREPRESENTATION

Defendants' response does not address the core misrepresentations identified in Shad's brief, including representations about the partnership structure, that Alpha would refinance the CFD, and that the parties would execute a development contract governing the project.

Rather than acknowledge the original plan outlined in Postma's email, Defendants now insist the partnership entity was never intended to both own and develop the property. Likewise, despite Gary's admission the parties intended to execute a separate development agreement, Defendants now claim no such agreement was contemplated. The same shift appears with refinancing. Although the record shows Alpha was the proposed borrower, Defendants now assert Gary's LPs—not Alpha—were the intended borrower from the start.

Instead of addressing this evidence, Defendants advance positions contrary to the record. A jury could conclude these statements were untrue and made knowingly, without a reasonable basis, or without intent to perform, thereby inducing Shad's participation in the partnership.

E. UNJUST ENRICHMENT

Defendants argue Shad's unjust enrichment claims are barred because the OA is an express contract governing the parties' rights.(DB:46). But the OA governs only Alpha's internal affairs and does not address development of the property—the parties contemplated a separate development agreement for those matters—nor Shad's uncompensated work, which was not subject to any agreement but was known to and accepted by Defendants.(CR:479;1223-1225). Because no contract governs the services Shad performed or the improvements made to the property, unjust enrichment remains available as an equitable remedy.

The record also shows Shad's uncompensated labor and services directly benefited the landowner. Because Alpha does not own the property, the OA does not control. Defendants do not address this argument, which at minimum creates genuine issues regarding the benefits conferred, to whom they were conferred, and whether retaining them without compensation would be inequitable.

F. BREACH OF FIDUCIARY DUTIES

Shad alleges he was fraudulently induced into signing the OA. (CR:864). He testified that Defendants represented the majority-vote provision applied only to day-to-day operations and not to material terms of the agreement. (CR:430). Regarding the amendment clause, he testified Defendants told him, "that's just language in there. Don't pay any mind to it. I do these all the time, and it's not important." *Id.* Unlike Defendants, Shad had no experience with partnership or LLC agreements and did not believe a contract could be changed without the consent of the parties. (CR:284). As he explained, "What good is a contract that doesn't bind the parties to do what they agreed to do." Shad had a long history working with his father and trusted both his father and uncle. This was not an arm's-length business relationship.

Defendants emphasize that Shad testified his father was a "crook" with a history of "extortionate business practices and screwing people over." What they omit is the context of that testimony. Shad explained that although he had observed such conduct throughout his life, he never expected to become its victim and was shocked that his father "knows no bounds." His statements about repentance and concern for his father's "eternal salvation" were made in reference to the fraud he believes was committed against him. (CR:374).

Defendants fail to respond to the specific fiduciary breaches identified by Shad, including the self-interested refinance decision, the structure placing control of loan proceeds in Gary's entities, manipulation of distributions, diversion of grant proceeds, and the failure to execute the development agreement contemplated by the parties.

G. MINORITY OPPRESSION

Defendants' response does not meaningfully address the central oppression issue: the elimination of the right of survivorship. The record shows the parties agreed Alpha would remain a closed, three-member venture in which ownership would pass only among the founders and that it was fundamental to Shad's decision to join Alpha. (CR:387;329;919;693). See *Mueller v. Cedar Shore Resort, Inc.,* 2002 S.D. 38, 14, 643 N.W.2d 56, 63.

Gary himself admits the amendments "significantly changed the members' ownership rights and interests." (CR:694). Yet Defendants offer no explanation why eliminating survivorship was necessary to protect the business or how the business judgment rule applies to such a change.

The survivorship provision does not affect day-to-day operations; it governs only what happens upon a member's death and prevents the introduction of outside replacement members. Defendants provide no justification for rewriting the company's long-term ownership structure. Their response therefore fails to address the core expectation that Alpha would remain a closed venture among the three founders.

H. ELECTION OF REMEDIES

Defendants mischaracterize both Shad's pleadings and his testimony. In his Verified Complaint, Shad seeks compensatory, general, special, and punitive damages and pleads rescission only in the alternative.(SB:2). A plaintiff may pursue alternative remedies so long as no double recovery is awarded. SDCL 15-6-8(a).

Defendants nevertheless argue that Shad elected rescission during his deposition.(DB:54). The record does not support that characterization. When questioned about rescission, Shad repeatedly referred counsel to the allegations in his Verified Complaint, explained that rescission was only "part" of what he sought, and stated multiple times that he did not know what remedy the court would ultimately order.(CR:495-496; 500-502). Defense counsel repeatedly pressed Shad to specify precisely what remedy the court should impose and whether he was seeking particular ownership interests in the Property. *Id.* Plaintiff's counsel objected that these questions called for legal conclusions, after which defense counsel responded that he would give a standing objection "so we don't have to waste our time with your objections."(CR:496). The questioning nevertheless continued, with repeated attempts to have Shad specify whether he wanted the court to rescind the agreement and return ownership of the entire property.(CR:500-502).

Throughout this exchange, Shad consistently stated that he wanted to be restored as close as possible to the position he was promised but believed the ultimate remedy would be determined by the court. For example, when asked whether he intended to obtain ownership of the entire 1,333 acres, Shad responded: "I don't know what the court is going to do because it has really turned into a mess," and later clarified, "I don't think that is possible."(CR:495).

This testimony does not constitute the type of clear and unequivocal election of remedies required under South Dakota law. The cases cited by Defendants involve formal acts of rescission, such as providing written notice terminating the agreement. See *U.S. Lumber, Inc. v. Fisher*, 523 N.W.2d 87, 89 (S.D. 1994); *S&S Trucking v. Whitewood Motors, Inc.*, 346 N.W.2d 297, 301 (S.D. 1984). By contrast, the South Dakota Supreme Court has recognized that merely amending pleadings does not constitute an unequivocal election of remedies. *Ripple v. Wold*, 1996 S.D. 68, 549 N.W.2d 673, 674–675.

Here, Shad provided no written notice of rescission and made no formal election. At most, his testimony reflects a preference to be restored to the position he was promised if it is possible. Such determinations must ultimately be evaluated under the advice of counsel and the facts developed at trial. Rescission was pleaded in the alternative, and Shad remains entitled to pursue alternative remedies so long as no double recovery is awarded.

I. WAIVER

Defendants' waiver argument rests on Attorney Trask's April 7, 2022 letter suggesting certain work had been performed as a "gesture of gratitude."(CR:562). As explained in Shad's opening brief, the letter was written in response to Gary's offer to pay $10,000 for limited work and did not address, let alone waive, Shad's broader claims for extensive uncompensated services performed for Alpha Land and its members.(CR:1218). At most, the letter creates a factual dispute regarding the scope and purpose of particular services, which cannot be resolved on summary judgment.

J. DISPUTED FACTS RELATING TO DISSOCIATION

The following are claims made by Defendants that Shad disputes or that need further clarification:

1. Shad threatened to file liens on the Property. This claim arises from a single text Shad sent nearly a year before litigation in frustration after Gary filed a lien on Shad's spec home, which Shad believed was intended to pressure or "blackmail" him.(CR:458).

2. Shad sent draft *lis pendens* to UniMax: Shad's counsel prepared and filed the lis pendens and Shad provided it to UniMax believing it had been filed. It was later rejected due to a legal description error, and after consulting with Defendants' counsel, it was not resubmitted.(CR:455-456).

3. Shad's solution was to threaten litigation and sue the City. Shad testified he wanted to hire an attorney to attend meetings and help deal with the city and

sue only under advisement. (CR:429). Holly proposed the idea and agreed an attorney would be helpful.(CR:320). Shad never hired one.

4. Shad thought engineering firm was misleading the company, providing "garbage engineering." Defendants, however, agreed that they were not providing good services to Alpha.(CR:831).

5. Shad thought City was "stonewalling" in a "good old boy system". Gary expressed similar frustration in a "To Whom It May Concern" letter stating the City was being unfair and had "captured the golden goose" and would "keep squeezing." (CR:1215).

6. Shad claimed project his alone to develop: Shad testified that it was "meant" for him to develop because development was his role and "it will never be developed by you" believing Gordon was incapable of developing at profit. (CR:377).

Defendants produced no evidence that Shad's actions caused Alpha to lose grants, TIFs, buyers, or any other opportunity, or that he hired an attorney or attempted any of the actions they claim he threatened.

CONCLUSION

For the reasons stated in Shad's opening brief and this reply, the circuit court's order granting summary judgment should be reversed and the case remanded for trial on Shad's claims.

Dated this 11th day of March, 2026.

PETERSON LAW, PLLC

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CERTIFICATE OF COMPLIANCE

This brief is compliant with the length requirements of SDCL § 15-26A-66(b). Proportionally spaced font Times New Roman 12 point has been used. Excluding the Cover Page, Table of Contents, Table of Authorities, Certificate of Compliance, Certificate of Service, and the Appendix, Appellants' Reply Brief contains 4,898 words as counted by Microsoft Word.

/s/ Kelly M. Peterson
Kelly M. Peterson

CERTIFICATE OF SERVICE

Kelly M. Peterson, of Peterson Law, PLLC hereby certifies that on the 12th day of March, 2026, she electronically filed the foregoing document with the Clerk of Court through Odyssey File & Serve, and that Odyssey File & Serve will serve an electronic copy upon the following:

WHITING HAGG & DORSEY, Prof. LLC
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The undersigned further certifies that the original Brief of Appellants in the above-entitled action was mailed by United States mail, postage prepaid to Ms. Shirley A. Jameson-Fergel, Clerk of the Supreme Court, State Capitol, 500 East Capitol, Pierre, SD 57501 on the above-written date.

/s/ Kelly M. Peterson
Kelly M. Peterson

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

AUG 26 2025

Shirley A. Jameson-Fergel
Clerk

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

SHADRACH HOWIE and ALPHA LAND COMPANY, LLC, a South Dakota limited Liability Company, Plaintiff/Appellant vs. GARY HOWIE AND GORDON HOWIE, Defendant/Appellees.	)	Appeal No. ________ **APPELLEES' NOTICE OF REVIEW**

TO: PLAINTIFFS/APPELLANTS and their counsel of record, KELLY PETERSON AND JOHN RUSCH.

Please take notice that Defendants/Appellees seek review of the Circuit Court's Order Regarding Defendants' Motion for Partial Summary Judgment dated January 21, 2025, and filed on January 25, 2025, wherein the circuit court denied Defendants' request for an order of partial summary judgment rejecting Defendants' legal argument as to the issues set out below:

A) Issue II (Election of Remedies). That Plaintiff renounced his claim for compensatory damages and elected to pursue rescission waiving his tort claims of fraud and negligent misrepresentation. U.S. Lumber, Inc. v. Fisher, 523 N.W.2d 87, 89 (S.D. 1994).

B) Issue VIII (Unjust Enrichment). Plaintiff waived his claim to monetary damages and compensation for his contributions the family venture electing rescission as his remedy and as a matter of law, his claims for unjust enrichment, compensatory and punitive damages should have been dismissed. Granite Buick GMC, Inc. v Ray, 2015 S.D. 93, ¶11, 872 N.W.2d 810, 815.

The Circuit Court determined that there were genuine issues of material fact such that partial summary judgment on the above issues was not granted.

Dated this 11th day of August, 2025.

WHITING HAGG & DORSEY, Prof. LLC

By: ______________________
John Stanton Dorsey
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date written below he served a true and correct copy of the foregoing NOTICE OF REVIEW upon:

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by U.S. Mail, first-class postage prepaid, in envelopes addressed to said individuals as counsel of record for Plaintiffs/Appellants, with courtesy copies sent by E-Mail.

Dated this 11th day of August, 2025.

WHITING, HAGG & DORSEY, Prof. LLC

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SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

AUG 26 2025

Shirley A. Jameson-Fergel
Clerk

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

SHADRACH HOWIE and ALPHA LAND COMPANY, LLC, a South Dakota limited Liability Company, Plaintiffs/Appellants	)	Appeal No. ____________
vs.	)	**APPELLEES' DOCKETING STATEMENT**
GARY HOWIE AND GORDON HOWIE, Defendants/Appellees.	)	

SECTION B.

TIMELINESS OF APPEAL

1. The date the judgment of order appealed from was signed and filed by the trial court: January 21, 2025; January 24, 2025.

2. The date notice of entry of the judgment or order was served on each party: January 24, 2025.

3. State whether either of the following motions was made:

   a. Motion for judgment n.o.v., SDCL 15-6-50(b) ____Yes __x__ No

   b. Motion for a new trial, SDCL 15-6-59: ____Yes __x__ No

NATURE AND DISPOSITION OF CLAIMS

4. State the nature of each party's separate claims, counterclaims or cross-claims and the trial court's disposition of each claim (e.g., court trial, jury verdict, summary judgment, default judgment, agency decision, affirmed/reversed, etc.).

   Defendants' first Motion for Partial Summary Judgment presented ten (10) issues, to-wit:

   I. Whether Plaintiff was owed a fiduciary duty before or after the formation of the LLC and whether any fiduciary duty, if owed, was breached;
   II. Whether Plaintiff renounced his claim for compensatory damages, electing to pursue rescission;

III. Whether Plaintiff is entitled to rescission as a remedy;
IV. Whether Plaintiffs claim of breach of oral contract fails as a matter of law;
V. Whether the statute of frauds renders Plaintiffs claim to a 1/3 ownership interest in 1,333 acres of real property unenforceable;
VI. Whether the doctrine of promissory estoppel precludes Defendants from denying the existence of a contract to transfer /13 interest in property to Plaintiff;
VII. Whether Plaintiff can meet the elements of fraud (deceit) and negligent misrepresentation;
VIII. Whether Plaintiffs claims for unjust enrichment, compensatory damages, and punitive damages should be dismissed;
IX. Whether Plaintiff owes Alpha Land Company LLC $30,704.84 for money advanced to him; and,
X. Whether Plaintiffs expulsion from Alpha Land Company, LLC by judicial determination is warranted.

After briefing, argument of counsel, and hearing on December 10, 2024, the Court entered its Order granting partial summary judgment in favor of Defendants on eight of the ten issues, specifically, I, III, IV, V, VI, VII, IX and X; and the circuit court determined that there were genuine issues of material facts as to Issues II and VIII above.

Defendants' second motion for summary judgment sought review of Plaintiff's remaining claim for restitution for unjust enrichment urging dismissal as Plaintiff's claim for restitution under the theories that: 1) unjust enrichment was subordinate to contract (Johnson v. Larson, 2010 S.D. 20, 779 N.W.2d 412, 416); 2) that Plaintiff had not been inadvertently dispossessed of his services to the LLC (FarmPro Services, Inc., v Finneman, 2016 S.D. 72, 887 N.W.2d 72, 79); and 3) the doctrine of latches barred his claim (Burch v. Bricker, 2006 S.D. 101, 724 N.W.2d 604). After hearing held April 16, 2025, Defendants' second motion for summary judgment as to unjust enrichment was granted.

5. Appeals of right may be taken only from final, appealable orders. See SDCL 15-26A-3 and 4.

a. Did the trial court enter a final judgment or order that resolves all of each party's individual claims, counterclaims, or cross-claims? _x_ Yes ____ No

b. If the trial court **did not** enter a final judgment or order as to each party's individual claims, counterclaims, or cross-claims, did the trial court make a determination and direct entry of judgment pursuant to SDCL 15-6-54(b)? N/A ____Yes _____No

6. State each issue intended to be presented for review. (Parties will not be bound by these statements.)

Although Plaintiffs/Appellants' claim for restitution damages under his theory of unjust enrichment was, on Defendants/Appellees' Second Motion for Summary Judgment dismissed by the trial court, Appellees present the following issues for review, to-wit:

A) Issue II (Election of Remedies). That Plaintiff renounced his claim for compensatory damages and elected to pursue rescission waiving his tort claims of fraud and negligent misrepresentation. U.S. Lumber, Inc. v. Fisher, 523 N.W.2d 87, 89 (S.D. 1994).

B) Issue VIII (Unjust Enrichment). Plaintiff waived his claim to monetary damages and compensation for his contributions the family venture electing rescission as his remedy and as a matter of law, his claims for unjust enrichment, compensatory and punitive damages should have been dismissed. Granite Buick GMC, Inc. v Ray, 2015 S.D. 93, ¶11, 872 N.W.2d 810, 815.

Dated this 11th day of August, 2025.

WHITING HAGG & DORSEY, Prof. LLC

By: ______________________
John Stanton Dorsey
Attorneys for Defendants/Appellees
P.O. Box 8008
Rapid City, SD 57709-8008
Phone: (605) 348-1125
john.dorsey@amatteroflaw.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date written below he served a true and correct copy of the foregoing Appellees' Docketing Statement upon:

Kelly Peterson
Fitzgerald Law Firm, PLC
P.O. Box 1232
Rapid City, SD 57709
Email: Kelly.peterson@centuryco.net

John S. Rusch
Rensch Law Office
832 St. Joseph Street
Rapid City, SD 57701
Email: John.rusch@renschlaw.com

by U.S. Mail, first-class postage prepaid, in envelopes addressed to said individuals as counsel of record for Plaintiffs/Appellants, with courtesy copies all delivered by E-mail.

Dated this 11th day of August, 2025.

WHITING, HAGG & DORSEY, Prof. LLC

By: ______________________
John Stanton Dorsey
Attorneys for Defendants/Appellees
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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

SHADRACH HOWIE, and ALPHA LAND COMPANY, LLC, a South Dakota limited liability company, Plaintiffs/Appellants, vs. GARY HOWIE and GORDON HOWIE, Defendants/Appellees.	APPEAL No: ____________ 51CIV23-001344 ORDER FOR TRANSCRIPTS

TO: KAYLA MARUSKA, COURT REPORTER:

Pursuant to SDCL 15-26A-48, Plaintiff, Shadrach Howie, hereby orders a complete transcript of the entire proceedings in the above-entitled action as indicated below:

DATE OF PROCEEDING	TYPE OF PROCEEDING	NAME OF REPORTER
June 25, 2025	Motion Hearing	Kayla Maruska
April 16, 2025	Summary Judgment Hearing	Kayla Maruska
December 10, 2024	Partial Summary Judgment Hearing	Kayla Maruska

As an ordering party, I hereby certify that the notice of appeal was filed with the trial clerk on the 25th day of July, 2025, and that this Order is timely made within ten (10) days of said filing date. I also certify that pursuant to SDCL 15-26A-48, an original of this order has been transmitted to each Court Reporter who took the requested proceedings; that a copy has been filed with the trial clerk, and that service has been made upon all parties to the action as reflected in the attached certificate of service.

Dated this 28th day of July, 2025

PETERSON LAW, PLLC

/s/ Kelly M. Peterson
Kelly Peterson
343 Quincy Street, Suite 100
Rapid City, SD 57701
605-786-4486
Attorney for Plaintiffs/Appellants

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the of the foregoing **Order for Transcripts** upon the persons herein next designated, on the date below shown, by electronic service through South Dakota Odyssey E-File, to the following individuals as counsel of record for Defendants and Counterclaimants.

WHITING HAGG & DORSEY, Prof. LLC
JOHN S. DORSEY
PO BOX 8008
Rapid City, SD 57709-8008
Attorney for Defendants and Counterclaimants/Appellees
john.dorsey@amatteroflaw.com

RENSCH LAW, Prof. LLC
JOHN S. RUSCH
Co-Counsel for Plaintiffs/Appellants
john.rusch@renschlaw.com

Dated this _____ day of _______________, 2025

PETERSON LAW, PLLC

____
Kelly M. Peterson
343 Quincy Street, Suite 100
Rapid City, SD 57701
Phone: (605) 786-4486
kelly.peterson@centuryco.net
Attorney for Plaintiffs/Appellants

COURT REPORTER'S ENDORSEMENT

I, Kayla Maruska, hereby acknowledge receipt of this order for transcript(s) on 7-28-25. My anticipated date of completion is 9-8-25.

Kayla Maruska
Court Reporter