IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 30698

CRAIG NELSON and AMY FREED,
as Co-Personal Representatives
of the Estate of Earl Nelson,

Appellants,

vs.

GARY TINKCOM, as Personal Representative
of the Estate of William Tinkcom, EDDIE WELCH,
and MERE COIN COMPANY, LLC,
d/b/a COINS & COLLECTABLES,

Appellees.

Appeal from the Circuit Court
Second Judicial Circuit
Minnehaha County, South Dakota

THE HONORABLE DOUGLAS P. BARNETT, CIRCUIT COURT JUDGE

APPELLANTS' BRIEF

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JURISDICTIONAL STATEMENT

The Estate of Earl Nelson (the "Nelson Estate") appeals from the trial court's Memorandum Decision and Order Granting Defendants' Motion for Judgment on the Pleadings dated March 28, 2024, which dismissed the Nelson Estate's First Amended Complaint. (APP. 2-17, S.R. 170-185.) The Order and Judgment of Dismissal with Prejudice and Notice of Entry of Order were filed April 3, 2024. (APP. 1, S.R. 186-186.) The Notice of Appeal was filed May 2, 2024. (S.R. 190-191.) This Court has jurisdiction to hear this matter under SDCL § 15-26A-3.

STATEMENT OF THE LEGAL ISSUES PRESENTED

1. Whether the trial court erred by construing Defendants' dispositive motions as motions for judgment on the pleadings, construing facts and resolving factual disputes in Defendants' favor although they were the moving parties, and resolving a statute of limitations defense in Defendants' favor other than with reference to a responsive pleading.

   Yes. The trial court improperly granted Defendants' dispositive motions. Under South Dakota law, Defendants' motions for judgment on the pleadings were premature; the trial court failed to accept all facts in the First Amended Complaint as true, failed to resolve all factual disputes and doubts in the Nelson Estate's favor and failed to reserve questions of fact for a fact-finder; and the trial court erroneously granted a statute of limitations defense improperly raised before Defendants filed responsive pleadings.

   Jucht v. Schulz, 2024 S.D. 46.

   Fodness v. City of Sioux Falls, 2020 S.D. 43, 947 N.W.2d 619.

   Guthmiller v. Deloitte & Touche, LLP, 2005 S.D. 77, 699 N.W.2d 493.

   SDCL § 15-6-12(b)

   SDCL § 15-6-12(c)

   SDCL § 15-2-1

2. Whether the trial court erred by holding the Nelson Estate's Business Interest claims automatically accrued upon the occurrence of Dr. Earl Nelson's death on March 13, 2013, solely because he was dissociated from a partnership on that date.

   Yes. Under SDCL § 15-2-13, the statute of limitations commences upon "accrual" of a claim, which requires a plaintiff to have notice of their claim. The trial court erred by holding, as a matter of law, that South Dakota partnership law caused the Nelson Estate's Business Interest claims to automatically accrue because Dr. Nelson was dissociated from the business upon the occurrence of his death on March 13, 2013.

   Huron Center, Inc. v. Henry Carlson Co., 2002 S.D. 103, 650 N.W.2d 544.

   Wissink v. Van De Stroet, 1999 S.D. 92, 598 N.W.2d 213.

   East Side Lutheran Church of Sioux Falls v. NEXT, Inc., 2014 S.D. 59, 852 N.W.2d 434.

   Pitt-Hart v. Sanford USD Medical Center, 2016 S.D. 33, 878 N.W.2d 406.

   SDCL § 15-2-13

   SDCL § 48-7A-405

   SDCL § 48-7A-701

3. Whether the trial court erred by holding that the Nelson Estate's conversion claims accrued based upon the occurrence of Dr. Nelson's death on March 13, 2013, under a South Dakota probate statute.

   Yes. Under South Dakota law, SDCL § 15-2-13(4) applies to accrual of conversion claims. The First Amended Complaint pled that Dr. Nelson and the Nelson Estate kept property with William Tinkcom at the business pursuant to an agreement with him. The First Amended Complaint pled that after William Tinkcom's death in 2022, they discovered that certain valuables kept with Tinkcom during his life were missing and Defendants were asserting title over the property. The trial court's ruling to the contrary, based on a South Dakota probate statute, is at odds with South Dakota law governing accrual of claims, which requires notice of a legal wrong to cause accrual of a statute of limitations.

   Huron Center, Inc. v. Henry Carlson Co., 2002 S.D. 103, 650 N.W.2d 544.

   Wissink v. Van De Stroet, 1999 S.D. 92, 598 N.W.2d 213.

East Side Lutheran Church of Sioux Falls v. NEXT, Inc., 2014 S.D. 59, 852 N.W.2d 434.

Pitt-Hart v. Sanford USD Medical Center, 2016 S.D. 33, 878 N.W.2d 406.

SDCL § 15-2-13

SDCL § 29A-3-709

4. Whether the trial court erred by failing to hold that, under the appropriate standard governing a motion to dismiss or motion for judgment on the pleadings, Defendants were equitably estopped and barred by fraudulent concealment from asserting a statute of limitations defense as a basis for dismissal, in part because the trial court adopted Defendants' erroneous argument that the Nelson Estate was asserting equitable tolling as a ground for relief.

   Yes. The Nelson Estate argued that the distinct doctrines of equitable estoppel and fraudulent concealment applied to bar Defendants from obtaining dismissal on a motion to dismiss or motion for judgment on the pleadings. Defendants incorrectly asserted in response that the Nelson Estate was arguing that "equitable tolling" applied, and the trial court erroneously construed the Nelson Estate's argument as one for equitable tolling, instead of equitable estoppel and fraudulent concealment. Alternatively, the trial court's observation about whether the Nelson Estate's reliance on Tinkcom's promises was "reasonable" constitutes a factual dispute that a jury should resolve, and equitable estoppel and fraudulent concealment's requirements of showing intent demonstrates the need for discovery and the impropriety of resolving equitable estoppel and fraudulent concealment at the motion to dismiss stage.

   Dakota Truck Underwriters v. South Dakota Subsequent Injury Fund, 2004 S.D. 120, 689 N.W.2d 196.

   Sander v. Wright, 394 N.W.2d 896, 899 (S.D. 1986).

   Cooper v. James, 2001 S.D. 59, 627 N.W.2d 784.

   Yankton Cnty. v. McAllister, 2022 S.D. 37, 977 N.W.2d 327.

STATEMENT OF THE CASE

This case arises from a friendship between Dr. Earl Nelson ("Dr. Nelson") and William "Bill" Tinkcom ("Tinkcom"), who co-owned Coins & Collectables (the "Business"). After Dr. Nelson died in 2013, Tinkcom repeatedly promised Dr. Nelson's

adult children (the "Nelson children") that he would pay them for their father's interest in the Business when he sold the Business or died. (APP. 20, S.R. 60, First Amended Complaint ¶ 17.) Tinkcom died in January 2022. (APP. 21, S.R. 61, First Amended Complaint ¶ 18.) Despite initially including the Nelson Estate in negotiations to sell the Business, the Estate of William Tinkcom (the "Tinkcom Estate") eventually sold the Business to Eddie Welch ("Welch"), but excluded the Nelson Estate from receiving any of the sale proceeds. (APP. 21, S.R. 61, First Amended Complaint ¶¶ 20-24.) After Tinkcom's death, the Nelson children also discovered valuables stored at the Business under an agreement with Tinkcom during his lifetime were missing and that Welch and the Tinkcom Estate claimed title to the valuables. (APP. 22, S.R. 62, ¶¶ 25-29.) On May 27, 2022, the Tinkcom Estate's attorney confirmed they sold the Business to Welch without sharing the sale proceeds with the Nelson Estate. (APP. 23, 63, SR. 63, 103; First Amended Complaint ¶ 34, Ex. E.)

Craig Nelson and Amy Freed, as co-personal representatives of the Nelson Estate, commenced this lawsuit against Gary Tinkcom as the personal representative of the Tinkcom Estate, Welch, and MERE Coin Company, LLC, d/b/a Coins & Collectables (collectively referred to as the "Defendants") on June 20, 2023. (S.R. 1.) The Nelson Estate filed a First Amended Complaint on August 18, 2023. (APP. 18, S.R. 58.) The Nelson Estate's First Amended Complaint asserted eight counts related to their exclusion from the sale proceeds in early 2022 (the "Business Interest" claims), and a conversion claim for the missing valuables Dr. Nelson's children entrusted to Tinkcom for safekeeping. The First Amended Complaint also asserted claims for tortious interference

with a business relationship or expectancy and civil conspiracy against the Tinkcom Estate and Welch.

Without filing Answers to the Nelson Estate's First Amended Complaint, Defendants filed nearly-identical motions entitled "Motion for Judgment on the Pleadings and Motion to Dismiss" and "Motion for Judgment on the Pleadings" on August 30 and September 1, 2023, respectively, alleging that a statute of limitations defense barred the Nelson Estate's claims as a matter of law. (S.R. 108-138.) The Nelson Estate filed a brief opposing the dispositive motions on September 27, 2023, arguing the motions were procedurally improper and the claims were brought before the applicable statutes of limitations expired, or alternatively, that dismissal was inappropriate because Defendants were equitably estopped or barred by fraudulent concealment from asserting a statute of limitations defense. (S.R. 139-154.) Welch filed a reply brief supporting his motion on October 2, 2023; the Tinkcom Estate filed a concurrence with Welch's reply brief the next day. (S.R. 155-167.) Notably, Welch's brief wrongfully mischaracterized the Nelson Estate's arguments regarding equitable estoppel and fraudulent concealment as arguments for "equitable tolling" of the statute of limitations, and argued equitable tolling did not apply. Welch did not otherwise respond to the Nelson Estate's equitable estoppel or fraudulent concealment arguments. (S.R. 161-2.) The motions were heard by Judge Douglas P. Barnett of the Second Judicial Circuit, at the Minnehaha County Courthouse

at two hearings: the first on October 4, 2023, and the second on October 23, 2023.[1] (S.R. 276, 294.)

The trial court entered its Memorandum Opinion and Order Granting Defendants' Motion for Judgment on the Pleadings on March 28, 2024, and Judgment of Dismissal was filed on April 3, 2024. (APP. 1-17, S.R. 170-186.) The trial court held that the Nelson Estate's Business Interest claims were barred by the six-year statute of limitations under SDCL § 15-2-13. (APP. 10, 12; S.R. 178, 180.) The trial court held that South Dakota Partnership law caused the Business Interest claims to automatically accrue on the occurrence of Dr. Nelson's death on March 13, 2013. (*Id.*) The trial court held that the conversion claim automatically accrued on April 30, 2013, because that was when two of the Nelson children were named co-personal representatives of the Nelson Estate after Dr. Nelson died. (APP. 12-13, S.R. 180-81.) Finally, the trial court accepted as accurate Welch's argument that the Estate had argued for "equitable tolling," and held that equitable tolling did not apply because the Nelson childrens' reliance on Tinkcom's assurances was not "reasonable or made in good faith," and because it "declined to apply" the doctrine of equitable tolling. (APP. 13-15, S.R. 181-183.)

In making these rulings, the trial court accepted as true several allegations made by one of the Defendants' attorneys in an e-mail attached to the Amended Complaint, even though the attorney's allegations flatly contradicted several paragraphs of the Amended Complaint. (APP. 4, 57; S.R. 172, 97.) And, because the trial court erroneously adopted Welch's mischaracterizations, it did not even address the Nelson

[1] The trial court held two hearings because Defendants scheduled a 30-minute hearing for October 4, which was insufficient time to hear the parties' full arguments. (S.R. 290-292; 10/4/2023 Hearing, 15:18-16:24.) The hearing resumed on October 23, 2023.

Estate's equitable estoppel or fraudulent concealment arguments. The Nelson Estate appeals from the trial court's rulings.

STATEMENT OF THE FACTS

1. The Nelson Estate's Business Interest and Tinkcom's promises to compensate them.

In November 2005, Tinkcom purchased a partial ownership interest in the Business. (APP. 19, S.R. 59, First Amended Complaint ¶ 7.) Tinkcom's close friend Dr. Nelson paid $50,000 on Tinkcom's behalf, thereby funding Tinkcom's entire up-front payment for the Business. (APP. 19, S.R. 59, First Amended Complaint ¶ 8.) In consideration of the payment, Tinkcom granted Dr. Nelson a fifty-percent interest in the Business (the "Agreement"). (APP. 19, S.R. 59, First Amended Complaint ¶ 9.) Tinkcom and Dr. Nelson memorialized their Agreement in a written "Acknowledgement of Contribution to Purchase of Business" on November 25, 2005, which Tinkcom signed. (APP. 19-20, 32-33; S.R. 59-60, 72-73; First Amended Complaint ¶ 10, Ex. A.)

Tinkcom later acquired ownership of 100 percent of the interest in the Business, subject to his Agreement with Dr. Nelson granting Dr. Nelson a fifty-percent interest in the Business. (APP. 20, S.R. 60, First Amended Complaint ¶ 11.) Tinkcom managed the day-to-day activities of the Business, but procured several short-term loans from Dr. Nelson to keep the business afloat. (APP. 20, S.R. 60, First Amended Complaint ¶ 12.) Dr. Nelson did not charge interest on the loans or receive any pecuniary benefit from them. (APP. 20, S.R. 60, First Amended Complaint ¶ 13.) Dr. Nelson also contributed to the Business by purchasing and providing merchandise for the Business to sell, advising Tinkcom, and helping him with the business's day-to-day operations, among other things.

(APP. 20, S.R. 60, First Amended Complaint ¶ 12.) Dr. Nelson had business cards for the Business with his name printed on them. (*Id.*)

Dr. Nelson died on March 13, 2013. (APP. 20, S.R. 60, First Amended Complaint ¶ 16.) Tinkcom continued to operate the Business until his death on January 25, 2022. (APP. 20-21, S.R. 60-61, First Amended Complaint ¶¶ 17-18.) In the intervening years between the partners' deaths, Tinkcom and Dr. Nelson's children, including Craig Nelson and Amy Freed, kept in touch. (APP. 20, S.R. 60, First Amended Complaint ¶ 17.) Throughout the nine years before his death, Tinkcom repeatedly acknowledged to the Nelson children that their father was a part owner of the Business; accordingly, he promised to pay them for Dr. Nelson's interest in the Business when he sold the Business or died. (*Id.*) Based on Tinkcom's assurances and promises, the Nelson children agreed to wait to be paid until one of those occurrences. (S.R. 151.)

2. Negotiations to sell the Business and the Nelsons' exclusion from the deal and sale proceeds.

Unbeknownst to the Nelson children, shortly before Tinkcom's death on January 25, 2022, Welch, a longtime employee of the Business, attempted to purchase the Business from Tinkcom. (APP. 21, S.R. 61, First Amended Complaint ¶ 19.) After Tinkcom's death, Welch began negotiating with the Tinkcom and Nelson Estates to buy the Business. (APP. 21, S.R. 61, First Amended Complaint ¶ 20.) These negotiations included two proposed Asset Purchase Agreements, both of which included the Nelson Estate as a "Seller" of the Business and repeatedly acknowledged the Nelson Estate's interest in the Business. (APP 21, 34, 36, 37, 43, 46, 48, 52; S.R. 61, 74, 76, 77, 83, 86, 88, 92; First Amended Complaint ¶ 21 Exs. B, C.) Despite these negotiations and acknowledgements of the Nelson Estate's interest in the Business, the Tinkcom Estate

and Welch abruptly ceased contact with the Nelson Estate and summarily excluded the Nelson Estate from the sale proceeds. (APP. 21, S.R. 61, First Amended Complaint ¶¶ 22, 24.). The Nelson Estate remained unaware of the status of the Business sale negotiations until May 27, 2022, when the Tinkcom Estate's attorney confirmed that a sale between Welch and the Tinkcom Estate for the Business had been completed without including the Nelson Estate. (APP. 62-63, S.R. 102-103.) The Nelson Estate never received any proceeds from the sale of the Business in recognition of Dr. Nelson's or his Estate's ownership interest or contributions to the Business. (APP. 21, S.R. 61, First Amended Complaint ¶ 24.)

3. Missing valuables entrusted to Tinkcom for safekeeping during his lifetime.

Separate from Dr. Nelson's Business Interest, Dr. Nelson, and the Nelson children after Dr. Nelson's death, kept certain valuables at the Business for safekeeping pursuant to agreements with Tinkcom during his lifetime. (APP. 22, S.R. 62, First Amended Complaint ¶¶ 25, 26.) After Tinkcom's death, the Nelson children discovered some of these valuables were missing including, but not limited to, gold Krugerand coins. (APP. 22, S.R. 62, First Amended Complaint ¶¶ 27-29.) The Nelson children also learned that Defendants were asserting title to the valuables. (*Id.*) This lawsuit followed.

ARGUMENT

The Court should reverse the trial court's order dismissing the Nelson Estate's First Amended Complaint and remand the case for further proceedings and discovery on each of the Nelson Estate's claims. The trial court erroneously held that the Nelson Estate's claims against Defendants automatically accrued upon Dr. Nelson's death in

2013, and that the applicable statutes of limitations expired seven years thereafter.[2] However, as pled in the First Amended Complaint, the Nelson Estate's claims could not have accrued earlier than January 25, 2022, when *Tinkcom* died, meaning the Nelson Estate brought its claims well within the six-year statute of limitations for those claims. SDCL § 15-2-13. Respecting the Nelson Estate's Business Interest claims, the Nelson Estate did not have notice of their claims sufficient to cause the statute of limitations to accrue until they were wrongfully excluded from the sale proceeds of the Business. Respecting the Nelson Estate's conversion claims, the Nelson Estate's First Amended Complaint pled the Nelson Estate did not have notice of their claims until they discovered missing valuables sometime after Tinkcom's death. Even if the Nelson Estate's claims accrued sooner than early 2022, which they did not, Tinkcom's conduct before his death estops or otherwise bars the Defendants from arguing the statutes of limitations for the Nelson's claims expired.

I. This Court's de novo standard of review is critical and dispositive.

The parties disputed the type of motions brought by Defendants. Before filing Answers, Defendants filed motions entitled "Motion for Judgment on the Pleadings" and "Motion for Judgment on the Pleadings and Motion to Dismiss," raising expiration of the applicable statutes of limitations as a defense.[3] (S.R. 108-138.) Because the motions

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[2] The trial court held that the six-year statute of limitations for the Nelson Estate's claims under SDCL § 15-2-13 were tolled for one year by operation of estate and probate law, citing SDCL § 29A-3-109. (APP. 10, S.R. 178.)

[3] Defendants raising a statute of limitations defense before filing an Answer was improper under South Dakota law. "The objection that the action was not commenced within the time limited *can only be taken by answer or other responsive pleading.*" SDCL § 15-2-1 (emphasis added); *see also* SDCL 15-6-8(c) (characterizing a statute of limitations defense as an affirmative defense that must be pled). In *Guthmiller v. Deloitte*

were filed before Defendants filed their Answers, it was improper for the trial court to construe the Motions as motions for judgment on the pleadings and not as motions to dismiss. (APP. 5-6, S.R. 173-74.) *See* SDCL § 15-6-12(c) ("*After the pleadings are closed* but within such time as not to delay the trial, any party may move for judgment on the pleadings.") (emphasis added); *see also* SDCL § 15-6-7(a) (defining "pleadings"); *see also Healy Ranch P'ship v. Mines*, 2022 S.D. 44, ¶ 31, n. 8, 978 N.W.2d 768, 777 n. 8 (construing an untimely motion to dismiss as a motion for judgment on the pleadings).

Regardless, the legal standards governing both types of motions are identical. This Court reviews "a ruling granting a motion for judgment on the pleadings *de novo*." *Slota v. Imhoff & Assocs., P.C.*, 2020 S.D. 55, ¶ 12, 949 N.W.2d 869, 873 (*citing N. Am. Truck & Trailer, Inc. v. M.C.I. Commc'n Servs., Inc.*, 2008 S.D. 45, ¶ 6, 751 N.W.2d 710, 712 (discussing *de novo* standard of appellate review for motions to dismiss under SDCL § 15-6-12(b)). Under a *de novo* standard of review, "no deference [is] given to the trial court's legal conclusions." *Fodness v. City of Sioux Falls*, 2020 S.D. 43, ¶ 9, 947 N.W.2d 619, 624 (internal quotation omitted).

South Dakota's Rules of Civil Procedure "are modeled after the Federal Rules of Civil Procedure[.]" *Healy Ranch P'ship*, 2022 S.D. at ¶ 32 (*citing Sisney v. Best Inc.*, 2008 S.D. 70, ¶ 7, 754 N.W.2d 804, 808). Importantly, SDCL § 15-6-12(c) is

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& Touche, LLP, this Court reversed a trial court's decision granting a motion to dismiss based on a statute of limitations defense. 2005 S.D. 77, ¶ 8, 699 N.W.2d 493, 497. The Court held that a statute of limitations defense is an affirmative defense on which a defendant bears the burden of proof, that a motion to dismiss is not a responsive pleading under SDCL § 15-2-1, and noted that no responsive pleading had been filed in the case. *Id.* The trial court committed reversible error by granting a motion to dismiss based on a statute of limitations defense. Like the defendants in *Guthmiller*, Defendants did not raise their statute of limitations defense in a responsive pleading, as required by SDCL § 15-2-1, so the trial court erred by granting Defendants' motion.

substantively identical to FED. R. CIV. P. 12(c) and (d). Thus, Defendants' motions for judgment on the pleadings under South Dakota law should have been adjudicated as they would be under the Federal Rules.

When considering a motion for judgment on the pleadings, a court "view[s] all facts pleaded by the nonmoving party as true and grant[s] all reasonable inferences in favor of that party." *Poehl v. Countrywide Home Loans, Inc.*, 528 F.3d 1093, 1096 (8th Cir. 2008). "A motion for judgment on the pleadings is evaluated under the same standard as a Rule 12(b)(6) motion to dismiss for failure to state a claim." *Treimert v. Cnty. of Washington*, 2015 WL 999869 at *3 (D. Minn. Mar. 5, 2015); *see also Flandreau Santee Sioux Tribe v. Gerlach*, 162 F.Supp.3d 888, 891-2 (D.S.D. 2016) (holding a motion for judgment on the pleadings is "analyzed under the same rubric as a Rule 12(b)(6) motion," and "the factual allegations of a complaint are assumed true and construed in favor of the plaintiff, 'even if it strikes a savvy judge that actual proof of those facts is improbable.'"). "Courts follow a 'fairly restrictive standard' in ruling on 12(c) motions, as 'hasty or imprudent use of this summary procedure by the courts violates the policy in favor of ensuring to each litigant a full and fair hearing on the merits of his or her claim or defense.'" *Wellin v. Wellin*, 2014 WL 234216 at *2 (D.S.C. Jan. 22, 2014) (*citing Wright and Miller* § 1368 (3d ed.2011)). "Ultimately, 'a defendant may not prevail on a motion for judgment on the pleadings if there are pleadings that, if proved, would permit recovery for the plaintiff.'" *Id.* (citation omitted).

Accordingly, Defendants' untimely motions for judgment on the pleadings—which are legally equivalent to motions to dismiss—are subject to this Court's well-established disfavor of motions to dismiss. "[A motion to dismiss] is viewed with

disfavor and is rarely granted." *Guthmiller*, 2005 S.D. at ¶ 4. South Dakota's Rules of Civil Procedure "favor the resolution of cases upon the merits by trial or summary judgment." *N. Am. Truck.*, 2008 S.D. at ¶ 6. "When reviewing orders on a motion to dismiss, this Court accepts the facts alleged in the complaint as alleged as true and construes them in the light most favorable to the pleader." *Jucht v. Schulz*, 2024 S.D. 46, ¶ 8 (*quoting Paul v. Bathurst*, 2023 S.D. 56, ¶ 2, 997 N.W.2d 644, 647).

Regardless of what the Defendants called their motions, the trial court was required to assume that all facts pled in the Nelson Estate's First Amended Complaint were true, and resolve all reasonable inferences and doubts based on those facts in favor of the Nelson Estate. Instead, the trial court questioned the veracity of the facts pled by the Nelson Estate, construed inferences against the Nelson Estate by adopting as true facts alleged by Defendants that were contrary to facts pled by the Nelson Estate, and resolved factual disputes in Defendants' favor. *See Slota*, 2020 S.D. at ¶ 12 ("[Judgment on the pleadings] is only an appropriate remedy to resolve issues of law when there are no disputed facts.") (quoting *Loesch v. City of Huron*, 2006 S.D. 93, ¶ 3, 723 N.W.2d 694, 695). By questioning the veracity of the allegations pled in the operative pleading, adopting factual allegations made by one of the Defendants' lawyers in an e-mail attached to the pleading, and resolving factual disputes in Defendants' favor, the trial court failed to apply the appropriate legal standard. As discussed further below, this failure led the trial court to reach the incorrect decision in every possible way.

II. The trial court failed to assume the First Amended Complaint's allegations were true, and failed to draw all factual inferences and resolve all factual disputes in the Nelson Estate's favor.

The trial court particularly erred by adopting unsupported assertions made by the Tinkcom Estate's attorney in an e-mail attached to the First Amended Complaint and resolving that the Nelson Estate was unreasonable in its actions, contrary to this Court's standard of review. *See Jucht*, 2024 S.D. at ¶ 8. Further, and dispositively, the trial court's rulings were contrary to the pleadings in the First Amended Complaint.

A. The trial court erroneously adopted the moving parties' allegations, which were contrary to those stated in the First Amended Complaint, and improperly construed facts in their favor.

When a court considers a motion to dismiss or motion for judgment on the pleadings, it is authorized to consider documents embraced by the pleadings, including exhibits attached to the Complaint. *See Darymple v. Dooley*, 2014 WL 1246476 at *1 (D.S.D. Mar. 25, 2014) (observing that when considering a motion for judgment on the pleadings, "[t]he court may consider the pleadings themselves, materials embraced by the pleadings, exhibits attached to the pleadings, and matters of public record."); *see also Kaiser Trucking, Inc. v. Liberty Mut. Fire Ins. Co.*, 2022 S.D. 64, ¶ 16 n. 4, 981 N.W.2d 645, 651 n. 4 (considering document embraced by the pleadings on a motion to dismiss without converting it to a motion for summary judgment). But "a plaintiff is not required to 'adopt as true the full contents of any document attached to a complaint or adopted by reference.'" *WINBCO Tank Co. v. Palmer & Cay of Minn., L.L.C.*, 435 F.Supp.2d 945, 955 (S.D. Iowa 2006) (internal quotations omitted). "Rather than accepting as true 'every word in a unilateral writing by a defendant and attached by a plaintiff to a complaint,' a

court must consider such factors as, 'why a plaintiff attached the documents, who authored the documents, and the reliability of the documents.'" *Id.* (citation omitted).

The Nelson Estate attached five exhibits to their First Amended Complaint: a signed copy of the Acknowledgement and cover letter (First Amended Complaint ¶ 10, Exhibit A); two Asset Purchase Agreements where the Defendants listed the Nelson Estate as a "Seller" (First Amended Complaint ¶ 21, Exhibits B, C); an Inventory filed during Tinkcom's probate proceedings showing the value of the business (First Amended Complaint ¶ 23, Exhibit D); and an e-mail chain between the Tinkcom Estate's lawyer and one of the lawyers for the Nelson Estate to establish that the Tinkcom Estate breached a contract by anticipatory repudiation (First Amended Complaint, ¶ 34, Exhibit E). (APP. 20-23, 32-64; S.R. 60-63, 72-104.)

In its Memorandum Opinion, the trial court erroneously adopted as true several allegations made by the Tinkcom Estate's lawyer in a series of self-serving e-mails that were part of the e-mail chain in Exhibit E of the First Amended Complaint. (APP. 4, 57; S.R. 97, 172.) But the Nelson Estate obviously did not attach Exhibit E for the purpose of adopting an opposing party's lawyer's self-serving allegations, nor was it required to. Indeed, the allegations adopted by the trial court directly contradict the matters pled by the Nelson Estate in the First Amended Complaint. *See Jucht*, 2024 S.D. at ¶ 8.

Nevertheless, the trial court adopted the Tinkcom Estate's lawyer's allegations to observe that "[n]othing in the probate of [Dr. Nelson's] estate indicated that he had an ownership interest in the Business or a partnership with Tinkcom." (APP. 3-4, 57, 59-60; S.R. 171-172, 97, 99-100.) The trial court also adopted his allegations about Gary Tinkcom finding a "death bed sales contract" between Tinkcom and Welch, the 2005

Agreement, and a ledger showing a $50,000 loan from Dr. Nelson to Tinkcom that was later paid off. (*Id.*)[4] The trial court adopted the assertions to hold that "Gary did not find anything in either Tinkcom's or the Business's paperwork showing there was a partnership between Tinkcom and Nelson." (*Id.*) Further, the trial court adopted the assertions to hold that Gary, "out of an abundance of caution and under the advisement of his attorney, . . . attempted contact with Plaintiffs and their attorney on several occasions. Plaintiffs did not respond." (*Id.*) By material contrast, the trial court did not analyze or adopt any of the other exhibits attached to the First Amended Complaint, including Exhibits A, B, and C, which evidenced the Nelson Estate's interest in the Business.

By adopting one of the Defendants' attorney's version of facts underlying the lawsuit, the trial court demonstrably failed to construe the facts pleaded in the Nelson Estate's favor, but did precisely the opposite. The Nelson Estate's First Amended Complaint directly alleged that Dr. Nelson paid Tinkcom $50,000.00 to fund the down payment for the initial purchase of the Business in consideration for a fifty-percent interest in the Business. (APP. 19, S.R. 59, First Amended Complaint ¶¶ 8, 9.) The First Amended Complaint did not allege the payment was a loan, or that it was paid back, instead directly alleging that the "Nelson Estate did not receive any compensation for Dr. Nelson's interest in the business." (APP. 21, S.R. 61, First Amended Complaint ¶ 24.) The direct pleadings in the Nelson Estate's First Amended Complaint are contrary to any implication that the Nelson Estate did not have an interest in the Business. The Nelson

[4] The trial court's erroneous adoption of the assertion that the loan was repaid, for example, led the trial court to erroneously determine that the Nelson Estate's cause of action "accrued at the time Tinkcom repaid the startup loan," even though that assertion was flatly contradicted by the First Amended Complaint. (APP. 012.)

Estate was entitled to have these facts deemed true. Instead, the trial court erroneously adopted one of the Defendants' attorney's versions of events when ruling on Defendants' dispositive motion. This was error.

B. The trial court improperly resolved the factual dispute whether the Nelsons' reliance on Tinkcom's promises was reasonable or in good faith.

The trial court's failure to assume the pleaded facts as true led it to impermissibly make a crucial factual determination when concluding that the Nelson childrens' reliance on Tinkcom's promises to pay them for Dr. Nelson's interest in the business was not "reasonable or made in good faith." (APP. 14, S.R. 182.) But, a question of reasonableness is a "question of fact for a properly instructed jury, not a question of law." *Janis v. Finch Co.*, 2010 S.D. 27, ¶ 24, 780 N.W.2d 497, 505. The trial court also speculated on things the Nelson Estate could have done to "protect their alleged interests in the Business," such as by making a written demand for payment under the partnership statutes, retaining legal counsel, and attempting to get Tinkcom's "alleged oral promises in writing." (*Id.*). As demonstrated in more detail below, the trial court's substitution of its judgment of reasonableness for that of a jury's was reversible error. *Id.* The trial court's resolution of this factual issue, standing alone, warrants reversal.

III. The Nelson Estate's claims accrued no earlier than January 25, 2022.

Most critically, the trial court's failure to apply the correct legal standard led it to err in holding that the Nelson Estate's Business Interest and conversion claims accrued in 2013.[5] (APP. 12, S.R. 11.) Under SDCL § 15-2-13, actions "can be commenced only

[5] The parties do not dispute that South Dakota's six-year statute of limitations under SDCL § 15-2-13 governs the Nelson Estate's claims. (S.R. 114, 116.)

within six years after the cause of action shall have accrued[.]" The parties dispute when and how the Business Interest and conversion claims accrued. The trial court erred by dismissing the Nelson Estate's Business Interest and conversion claims because the parties' disputes about the dates of accrual constitute questions of fact and because the Nelson Estate's claims accrued no earlier than when Tinkcom died on January 25, 2022.

A. The trial court improperly resolved the parties' factual disputes about when the Nelson Estate's claims accrued; and the First Amended Complaint establishes those claims accrued no earlier than January 25, 2002.

The parties' disputes regarding when the Nelson Estate's claims accrued are questions of fact for the jury. Under SDCL § 15-2-13, "[w]hile the question of *what* constitutes accrual is one of law, the question of *when* accrual occurred is one of fact generally reserved for trial." *Huron Center, Inc. v. Henry Carlson Co.*, 2002 S.D. 103, ¶ 11, 650 N.W.2d 544, 548 (*Wissink v. Van De Stroet*, 1999 S.D. 92, ¶ 11, 598 N.W.2d 213, 215-16) (emphases in original). "Because the point at which a period of limitations begins to run must be decided from the facts of each case, statute of limitations questions are normally left for a jury." *E. Side Lutheran Church of Sioux Falls v. NEXT, Inc.*, 2014 S.D. 59, ¶ 11, 852 N.W.2d 434, 438 (*quoting Strassburg v. Citizens State Bank*, 1998 S.D. 72, ¶ 7 581 N.W.2d 510, 513). Resolving a factual dispute about a claim's accrual date at the motion to dismiss or motion for judgment on the pleadings stage is therefore reversible error.

In *Wissink v. Van De Stroet*, for example, this Court considered whether claims for breach of contract, conversion, unjust enrichment, and breach of partnership obligations accrued under SDCL § 15-2-13. 1999 S.D. at ¶ 8. Like the Defendants in this case, the

defendants in *Wissink* moved to dismiss based on the statute of limitations.[6] *Id.* The parties disputed the date on which the claims accrued. *Id.* at ¶ 15. The plaintiff, Wissink, argued that the claims accrued when the defendants breached their agreement by withdrawing money from the business. *Id.* at ¶¶ 13, 15. The defendants claimed that the claims accrued earlier, when the plaintiff failed to exercise an option to purchase property, or alternatively, when he stopped receiving financial information about the business. *Id.* Observing that claims under SDCL § 15-2-13 accrue upon actual or constructive notice to a plaintiff, this Court held the parties' "disputed time of notice is sufficient to establish that genuine issues of material fact still exist regarding the date of accrual." *Id.* at ¶ 15. Accordingly, the Court held that summary judgment was improper and a finder of fact should decide the date of accrual. *Id.*

Similarly, in *Huron Center*, this Court held that the parties' disagreement about when the plaintiff "should have known that Defendants committed a breach[]" constituted a genuine dispute of material fact and remanded the case "for a determination of when [plaintiff] should have known of Defendants' alleged breach." 2002 S.D. at ¶¶ 18-19. Further, in *E. Side Lutheran*, a church sued its construction manager in July 2010 based on water leaks in the church's roof that began immediately after its construction was completed. 2014 S.D. at ¶ 3. The construction manager argued the statute of limitations under SDCL § 15-2-13 expired because the church had notice of the leaks seven years earlier. *Id.* at ¶ 6. This Court held that issues of material fact about the church's notice of construction defects and design errors precluded summary judgment because "it is up to

[6] In *Wissink*, the trial court construed the defendants' motion as a motion for summary judgment. 1999 S.D. at ¶ 8.

the trier of fact to determine whether [the church's] actual notice of the water infiltration constitutes a sufficient circumstance" to constitute notice of the construction and design defect claims. *Id.* at ¶ 15. Accordingly, the Court held that "[o]n remand, the trier of fact must parse out which alleged deficiencies have a sufficient relationship to the water infiltration to put [the church] on actual or constructive notice of the alleged deficiency." *Id.*

How this Court in *E. Side Lutheran* determined that some claims were barred by the statute of limitations, and some were not, is particularly instructive here. The church's claims that were *directly* related to water damage infiltration were precluded because the church undisputedly had notice of the possible water infiltration problems when the water infiltration occurred, but the church's construction defect and design errors claims were not barred, because the water infiltration did not necessarily provide notice of the construction and design defect claims. 2014 S.D. at ¶ 12. The Nelson Estate's claims are distinguishable from East Side Lutheran's water infiltration claims, but analogous to East Side's construction defects and design errors claims. For example, if the Nelson Estate's claims were directly related to Dr. Nelson's death, such as a wrongful death claim, they would likely have notice of claims. Just as a party would have notice of a potential water infiltration claim once the party knew about the water infiltration itself, it would also have notice of a potential wrongful death claim upon the occurrence of the death itself. Instead, the Nelson Estate's claims are, at most, tangentially related to Dr. Nelson's death and only by operation of law, like East Side Lutheran's construction and design defects claims, which required a jury to decide when

a plaintiff has sufficient notice for accrual of a claim. *See E. Side Lutheran*, 2014 S.D. at ¶ 15.

In sum, the parties' disputes about when the Nelson Estate's Business Interest and conversion claims accrued constitute questions of fact, which a jury should resolve. The Nelson Estate's claims accrued in early 2022, when Tinkcom's Estate failed to fulfill Tinkcom's promise to pay the Nelson Estate any proceeds from the sale of the Business. Defendants argued (and the trial court erroneously ruled) that the Business Interest claims automatically accrued on March 13, 2013, and the conversion claims on April 13, 2013, based on when Dr. Nelson died. (APP. 12-13, S.R. 180-81.) But the parties' genuine disputes of fact about the dates of accrual preclude dismissal based on a motion for judgment on the pleadings or motion to dismiss. *See Wissink*, 1999 S.D. at ¶ 15. As such, the Court erred by granting Defendants' dispositive motions despite these material disputes.

B. The Nelson Estate's Business Interest claims could not accrue until they suffered harm and had notice of it.

Even setting aside the parties' disputes about the time of accrual, the trial court erred by holding that the Nelson Estate's claims undisputedly accrued on the occurrence of Dr. Nelson's death under South Dakota Partnership law. (APP. 12, S.R. 180.) Under SDCL § 15-2-13, "[a]n action accrues when 'the plaintiff has actual notice of a cause of action or is charged with notice.'" *Wissink*, 1999 S.D. at ¶ 15 (*quoting Strassburg*, 1998 S.D. at ¶ 10). "Actual notice consists in express information of a fact." *E. Side Lutheran*, 2014 S.D. 59 at ¶ 10 (*quoting* SDCL § 17-1-2). "Constructive notice is notice imputed by law to a person not having actual notice." *Id.* (*quoting* SDCL § 17-1-3). "Statutes of

limitation begin to run when plaintiffs first become aware of facts prompting a reasonably prudent person to seek information about the problem and its cause." *Id.* at ¶ 14 (*quoting Strassburg*, 1998 S.D. at ¶ 13). "In all events, a claim accrues and limitations become its course when a person 'has some notice of his cause of action, an awareness either that *he has suffered an injury or that another person has committed a legal wrong which ultimately may result in harm to him.*'" *Spencer v. Estate of Spencer*, 2008 S.D. 129, ¶ 16, 759 N.W.2d 539, 544 (emphasis added) (*quoting Haberer v. First Bank of South Dakota*, 429 N.W.2d 62, 68 (S.D. 1988)).

1. The Nelson Estate did not have notice of its claims until Tinkcom's promise to the Nelson children was breached and the Nelson Estate became aware of the breach.

Under these established principles, the Nelson Estate's claims could not have accrued, and did not accrue, until after they had notice in early 2022 that the Business was sold without them, and without their receipt of any of the sale proceeds. (APP. 21, S.R. 61, First Amended Complaint ¶¶ 22, 24.) Until then, the Nelson Estate could not have been aware that they had "suffered an injury or that another person [had] committed a legal wrong which ultimately may result in harm to him" because no injury or legal wrong had harmed them. *See Spencer*, 2008 S.D. at ¶ 16. Before the sale, no one, including Tinkcom, Welch, or the Tinkcom Estate, had taken any adverse actions against the Nelson Estate's Business Interest or repudiated that interest. Even if they had, the Nelson Estate did not have notice of it until after Tinkcom's death. (APP. 20-21, 23, 63; S.R. 60-61, 63, 103; First Amended Complaint ¶¶ 17, 24, 34, Ex. E.) Therefore, the claims did not accrue, and the Nelson Estate did not have notice of such claims until 2022, after Tinkcom's death and the subsequent sale of the Business.

Despite these assumed true facts, the trial court erroneously held, as a matter of law, that the Nelson Estate's Business Interest claims automatically accrued when Dr. Nelson died on March 13, 2013, based on the purported operation of South Dakota partnership law. (APP. 12, S.R. 180.) The trial court ruled that Dr. Nelson and Tinkcom's business relationship was an implied partnership under SDCL § 48-7A-202. (APP. 7, S.R. 175.) The trial court then specifically held that SDCL § 48-7A-701(e) triggered accrual of the Business Interest claims, wrongly asserting that the statute is self-executing, and automatically requires a dissociated partner to demand that the partnership purchase the partner's interest when the partnership does not dissolve and wind up. (APP. 9-12, S.R. 177-180.) The trial court's holding is error.

South Dakota's partnership statutes generally provide that a partner may maintain a lawsuit against the partnership or another partner, including for a dissociated partner to have his interest in the partnership purchased. SDCL § 48-7A-405(b)(2)(ii). However, the same statute explicitly states that "*[t]he accrual of*, and *any time limitation on*, a right of action for a remedy under this section *is governed by other law*." SDCL § 48-7A-405(c) (emphases added). As such, the accrual rules under South Dakota's statute of limitations and repose statutes in SDCL Ch. 15-2 govern the accrual of claims and limitations durations for South Dakota Partnership law. *See Bertelsen v. Allstate Ins. Co.*, 2009 S.D. 21, ¶ 13, 764 N.W.2d 495, 499 (holding that clear statutory language controls interpretation of statutes). For this reason alone, the trial court's holding that the Partnership statutes govern accrual and time limitations for the Nelson Estate's claims despite the statutory mandate that "other law" governs accrual and time limitations on rights of action under the Partnership statutes is error. (APP. 10, S.R. 178.)

Nevertheless, the trial court erroneously held that the Nelson Estate was required to initiate a buyout or assert a claim for its Business Interest within seven years of Dr. Nelson's death. (APP. 12, S.R. 180.) Even if partnership law operated to affect the statute of limitations for the Business Interest claims, which it does not, it did not do so because the conditions for triggering the time limits in the partnership statutes did not occur and were not pled in the First Amended Complaint.

Under South Dakota Partnership law, the death of a putative partner like Dr. Nelson has the legal effect of causing the partner's dissociation.[7] SDCL § 48-7A-601(7)(i). If the dissociation causes dissolution and winding up of the partnership business, Article 8 of the Partnership statutes applies. SDCL § 48-7A-603(a). If not, Article 7 of the Partnership statutes applies. *Id.* Here, Article 7 applies because there is no allegation that the Partnership was dissolved and wound up after the dissociation.[8] Therefore, Article 7 of the partnership statutes governs the legal effect of Dr. Nelson's dissociation from the partnership upon his death.

Contrary to the trial court's holding, Article 7 does not fix any specific time limits for a dissociated partner to bring a claim against the remaining partner or partnership for a buyout, as authorized by SDCL § 48-7A-405(b)(2)(ii). Instead, Article 7 delineates a mandatory buyout process to purchase the dissociated partner's interest (SDCL § 48-7A-701), limits the dissociated partner's ability to bind the partnership (SDCL § 48-7A-702),

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[7] The parties do not dispute that Dr. Nelson was dissociated upon his death under SDCL § 48-7A-601(7)(i), if Dr. Nelson's and Tinkcom's business arrangement was a partnership.
[8] SDCL § 48-7A-801 delineates events that cause the automatic dissolution and subsequent winding up of a partnership; none of those occurrences are alleged to have happened here. Instead, the First Amended Complaint alleges, and the parties do not dispute, that the Business continued to operate after Dr. Nelson died.

and dictates the partners' liability to third parties (SDCL § 48-7A-703). Contrary to South Dakota law governing the accrual of claims, the trial court held that SDCL § 48-7A-701 controlled to cause accrual of the Nelson Estate's claims because they had a *right* to a buyout upon Dr. Nelson's dissociation by death. (APP. 12, S.R. 180.) The trial court held that because of the Nelson Estate's mere right to a buyout upon Dr. Nelson's death and dissociation under SDCL § 48-7A-701, they were required to bring their claim for a buyout within seven years of that date.

But on the contrary, the plain text of SDCL § 48-7A-701 does not contain any time limits if the dissociated partner or the remaining partner and partnership do not initiate the buyout process. Instead, the statute sets deadlines that are triggered *only after* at least one of the parties—whether the dissociated partner *or* the remaining partner and partnership—decide to initiate the buyout process. Under SDCL § 48-7A-701(i), the remaining partner or partnership may initiate the dissociated partner's buyout by tendering payment or an offer to pay the dissociated partner. *See also* SDCL § 48-7A-701(a) ("the partnership shall cause the dissociated partner's interest in the partnership to be purchased for a buyout"). Such payment or offer to pay triggers a 120-day deadline for the dissociated partner to commence a lawsuit against the partnership if the dissociated partner does not want to accept the offer. *Id.* Importantly, there is no deadline in SDCL § 48-7A-701 or any of the partnership statutes for the remaining partner or partnership to make such a payment or offer. It is undisputed no such offer was ever made to the Nelson Estate. (S.R. 304, 10/23/23 Hearing Transcript (11:13-20.)

Alternatively, the dissociated partner may tender a written demand for payment of the buyout for the interest. SDCL § 48-7A-701(e) and (i). If, after such a demand, the

parties cannot agree on a buyout price within 120 days after the written demand for payment is tendered, the remaining partner or partnership "shall pay, or cause to be paid, in cash" the estimated buyout price, subject to interest and any applicable offsets. SDCL § 48-7A-701(c). In turn, the remaining partner or partnership's payment or offer to pay triggers another 120-day deadline for the dissociated partner to commence a suit if they do not want to accept the payment or offer to pay. SDCL § 48-7A-701(i). Alternatively, if the partnership fails to make such a payment, the dissociated partner must commence a lawsuit within one year after tendering the written demand for payment. SDCL § 48-7A-701(e). Here, too, there is no deadline in SDCL § 48-7A-701 or any of the partnership statutes for the dissociated partner to make such a written demand. It is undisputed the Nelson Estate made no such written demand. (S.R. 304, 10/23/23 Hearing Transcript (11:13-20.)

Here, the First Amended Complaint does not allege that either of the triggering events listed in SDCL § 48-7A-701 occurred. The Nelson Estate did not initiate the buyout process by tendering a written demand for payment; nor did Tinkcom pay or offer to pay the Nelson Estate a buyout. Indeed, the assumed-true facts are that Tinkcom assured the Nelson children he would initiate a buyout later—either upon his death or the sale of the Business. As such, the applicable deadlines in SDCL § 48-7A-701 to bring a lawsuit were not triggered, even assuming SDCL § 48-7A-701 controls accrual and commencement of the statute of limitations, which it does not. Instead, the parties declined to initiate the buyout process until, as Tinkcom asserted during his lifetime, Tinkcom sold the Business or died. Tinkcom died on January 25, 2022. (APP. 21, 61, First Amended Complaint ¶ 18.) The Business was subsequently sold sometime before

May 27, 2022. (APP. 63, S.R. 103.) As such, the Nelson Estate was under no obligation to bring a lawsuit until their claim accrued by their interest being improperly sold in early 2022. Even if South Dakota Partnership law applied to set a limitations period to bring a claim, none of the circumstances required to trigger a limitations period for a claim occurred here.

2. The trial court erroneously applied the applicable statute of limitations as if it was a statute of repose.

The trial court acknowledged that "Article 7 does not provide a time limit within which a partner must make the requisite written demand for buyout," demonstrating the trial court appreciated the plain language of SDCL § 48-7A-701. (APP. 9, S.R. 177.) Nevertheless, the trial court made the inconsistent finding that, because the Nelson Estate's *right* to demand payment arose at the same time Dr. Nelson's would have, i.e., on his death, "[the Nelson Estate's] cause of action accrued on March 13, 2013, the date of [Dr. Nelson's] death and dissociation." (APP. 12, S.R. 180.)

This ruling, namely, that the Nelson Estate's claim automatically accrued on the date of Dr. Nelson's death and dissociation, without regard to the other facts the Nelson Estate pled, i.e., those related to the Nelson Estate's notice of their claims and Tinkcom's representations regarding when the Nelson children would be paid, were inconsistent with the rule that statutes of limitations defenses are resolved on the specific facts of each case, not simplistic bright-line rules. *See E. Side Lutheran Church of Sioux Falls*, 2014 S.D. 59 at ¶ 11, 852 N.W.2d at 438. Because the trial court ignored these other facts, it effectively converted the statute of limitations articulated by SDCL § 15-2-13 into a statute of repose. This is error.

"[T]he differences between statutes of limitation and statutes of repose are substantive, not merely semantic." *Pitt-Hart v. Sanford USD Medical Center*, 2016 S.D. 33, ¶ 17, 878 N.W.2d 406, 413. "A statute of limitations creates a 'time limit for suing in a civil case, based on the date when the claim accrued.'" *Id.* at ¶ 18 (*quoting CTS Corp. v. Waldburger*, 134 S.Ct. 2175, 2182 (2014)). Meanwhile, a statute of repose is measured not from the date of accrual, but from the occurrence of the defendant's last culpable act or omission. *See id.*; *see also* SDCL § 15-2-14.1 (setting date of commencement of period of repose from the last culpable act or omission); *see also* SDCL § 15-2A-1 (setting date of commencement of period of repose from date of substantial completion of construction). In *Pitt-Hart*, this Court held that the reason the statute of repose for medical malpractice actions "is an occurrence rule, however, is simply because it is a statute of repose, which by definition begins running upon the occurrence of a specified event rather than the discovery of a cause of action." *Id.* at ¶ 19 (*discussing* SDCL § 15-2-14.1).

Contrary to Defendants' argument and the trial court's holding, the plain language of SDCL § 15-2-13 and this Court's holdings about the same clearly demonstrate that SDCL § 15-2-13 is a statute of limitations and not a statute of repose. SDCL § 15-2-13 ("the following civil actions . . . can be commenced only within six years after the cause of action shall have accrued[.]"); *see also Wissink*, 1999 S.D. at ¶¶ 11, 12 (discussing SDCL § 15-2-13 as a statute of limitations); *see also E. Side Lutheran*, 2014 S.D. at ¶ 9 ("The parties agree that the six-year statute of limitations prescribed by SDCL § 15-2-13 controls East Side's claims.").

As such, the Nelson Estate's claims accrued when they had notice of their claims, which happened no earlier than 2022 when the Tinkcom Estate failed to follow through on the promises Tinkcom made to the Nelson children during his life, not immediately upon the occurrence of Dr. Nelson's death and dissociation in 2013. Even if South Dakota Partnership law applied to limit the claims, none of the events contemplated by the buyout statute, which the trial court held applied to cause the Nelson Estate's claims to accrue, had occurred. More importantly, the harms that occurred, i.e., the Nelson children not being paid as Tinkcom promised, and conversion, could not have accrued until after Tinkcom, not Dr. Nelson, had died. Therefore, as a matter of law, the Nelson Estate's claims accrued only after they suffered a legal injury when Defendants sold the Business without sharing the sale proceeds with them, and when the Nelson Estate had notice of the injury.

C. The Nelson Estate's conversion claims did not accrue until they had notice of the missing valuables and that the Defendants claimed title to them.

Next, the trial court erred by holding the statute of limitations expired for the Nelson Estate's conversion claims related to property entrusted to Tinkcom for safekeeping.[9] The trial court erred by holding, as a matter of law, that the conversion claims accrued on April 30, 2013, on the occurrence of Craig Nelson and Amy Freed being named co-personal representatives of the Nelson Estate, one month after Dr. Nelson's death, under a South Dakota probate statute. (APP. 12-13, S.R. 180-81.)

[9] The parties do not dispute SDCL § 15-2-13(4) applies to the Nelson Estate's conversion claims. (S.R. 116.)

"Conversion is the unauthorized exercise of control or dominion over personal property in a way that repudiates an owner's right in the property or in a manner inconsistent with that right." *Johnson v. Markve*, 2022 S.D. 57, ¶ 59, 980 N.W.2d 662, 678 (citation omitted). "[T]he foundation for a conversion action 'rests upon the unwarranted interference by defendant with dominion over the property of the plaintiff from which injury to the latter results.'" *Id.* (citation omitted). Here, the Nelson Estate was not aware, and could not be aware, of whether Tinkcom was exercising unauthorized control or dominion over their personal property and repudiating their rights to the interest in it before he died. As pled in the First Amended Complaint, the Nelson Estate entrusted certain valuables to Tinkcom for "safe keeping" at the Business. (APP. 22, S.R. 26, First Amended Complaint ¶ 26.) The First Amended Complaint did not plead that Tinkcom did anything other than keep the property at the Business for the benefit of the Nelson Estate. It did not plead that Tinkcom repudiated the Nelson Estate's interest in the valuables. As such, the Nelson Estate's conversion claims did not accrue until after Tinkcom died in 2022, when they discovered the valuables were missing, and Defendants wrongfully asserted title to the valuables.

The trial court erroneously adopted Defendants' argument that South Dakota's probate statutes automatically caused the Nelson Estate's conversation claims to accrue—the same error it made regarding the Business Interest claims. (APP. 12-13; S.R. 180-81.) The trial court erroneously held that SDCL § 29A-3-709 caused the Nelson Estate's claims to automatically commence on a certain date, instead of when they had notice of claims. (*Id.*) As demonstrated above, accrual under SDCL § 15-2-13 does not occur on the set date of an occurrence or event, but rather, when a plaintiff has notice of their

claims. *See Wissink*, 1999 S.D. at ¶ 15. Second, the trial court's interpretation of SDCL § 29A-3-709 is improper. Under SDCL § 29A-3-709, a personal representative "shall take possession or control" of the decedent's property. (emphasis added). Here, although the Nelson Estate did not take physical possession of the valuables, they maintained control of the items by choosing to keep them in the Business's safe under an agreement with Tinkcom. The First Amended Complaint does not plead that the Nelson Estate ceded control of the valuables to Tinkcom for him to do whatever he pleased with them. Instead, the Nelson Estate kept the valuables there for "safekeeping." (APP. 22, S.R. 26, First Amended Complaint ¶ 26 (emphasis added).) The trial court's holding is contrary to the plain language of SDCL § 29A-3-709, and is inconsistent with South Dakota law governing accrual of claims under SDCL § 15-2-13. The Nelson Estate did not lose its possessory interest in the valuables by agreeing with Tinkcom to keep the valuables at the Business. Rather, the Nelson Estate's claims accrued when Defendants wrongfully asserted the valuables were not the Nelson Estate's and the Nelson Estate discovered they were missing.

IV. Tinkcom's promised to the Nelson children after Dr. Nelson's death estopped or otherwise barred Defendants from asserting a statute of limitations defense.

Finally, the trial court erred by holding "equitable tolling" did not apply to toll the expiration of the statute of limitations. (APP. 15, S.R. 183.) The trial court's holding was erroneous primarily because the Nelson Estate did not argue for "equitable tolling." Instead, the Nelson Estate argued that the distinct doctrines of equitable estoppel and fraudulent concealment applied to bar Defendants from even asserting expiration of the statute of limitations as a defense. (S.R. 150-152.) Defendants wrongfully construed the

Nelson Estate's equitable estoppel and fraudulent concealment arguments as arguments for "equitable tolling." (S.R. 161-162.) The trial court's adoption of Defendants' argument related to equitable tolling was erroneous, as was the trial court's failure to consider the Nelson Estate's distinct equitable estoppel and fraudulent concealment arguments.

The doctrines of fraudulent concealment and equitable estoppel, and the doctrine of equitable tolling, are distinct in their operation and in the underlying purposes of their application. In *Dakota Truck Underwriters v. S. Dakota Subsequent Inj. Fund*, this Court distinguished the doctrines, recognizing their differing elements. 2004 S.D. 120, ¶¶ 19-32, 689 N.W.2d 196, 202-04. The doctrine of equitable tolling applies to "extend" a statute of limitations period by tolling it. *See id* at ¶¶ 1, 7, 14, 29, 31 (discussing equitable tolling in terms of "extending" the expiration of a statute of limitations). The doctrine of equitable tolling extends the expiration of a statute of limitations when "inequitable circumstances not caused by the plaintiff . . . prevent the plaintiff from timely filing." *Matter of Estate of French*, 2021 S.D. 20, ¶ 22, 956 N.W.2d 806, 811-12 (*citing Anson v. Star Brite Motel*, 2010 S.D. 73, ¶ 16, 788 N.W.2d 822, 826). The threshold considerations for equitable tolling focus on the *plaintiff's* conduct, while considering prejudice to a defendant: timely notice of suit to a defendant, lack of prejudice to the defendant, and reasonable good-faith conduct on the part of the plaintiff. *See Dakota Truck*, 2004 S.D. at ¶ 24. The inquiry to apply equitable tolling focuses on whether a diligent plaintiff is caught in an "arcane procedural snare" preventing timely filing of a lawsuit against a blameless defendant. *Id.* at ¶¶ 20, 28. This "plaintiff-

focused" nature of equitable tolling caused the trial court to erroneously make a "reasonableness" determination regarding the Nelson Estate's conduct.

Conversely, equitable estoppel and fraudulent concealment estop or bar defendants from raising a statute of limitations defense based on the *defendants'* conduct preventing discovery of a cause of action. "Under certain circumstances, a defendant may be estopped from raising the statute of limitations defense." *Sander v. Wright*, 394 N.W.2d 896, 899 (S.D. 1986). "An estoppel arises where one party, by acts or conduct, induces another party to do that which he would not otherwise have done, and is thereby prejudiced." *Cooper v. James*, 2001 S.D. 59, ¶ 16, 627 N.W.2d 784, 789 (abrogated on other grounds specific to statute of repose for malpractice claims). Therefore, equitable estoppel and fraudulent concealment do not affect how South Dakota's statutes of limitation operate or extend an otherwise expired statute of limitations; they merely prevent a defendant from asserting the defense when the defendant engaged in conduct that caused a delay in filing suit. *See Anson*, 2010 S.D. at ¶ 38 (J. Konenkamp, concurring) (questioning application of equitable tolling based on language of statute of limitations statutes). Resolving equitable estoppel constitutes a question of fact for the jury. *Sander*, 394 N.W.2d at 899.

The elements of equitable estoppel are (1) representations or concealment of facts exist, (2) the party to whom the representations or concealment was made must have been without knowledge of the real facts, (3) the representations or concealment must have been made with the intention that it should be acted upon, and (4) the party to whom the representations or concealment was made must have relied thereon to his prejudice or injury. *Dakota Truck*, 2004 S.D. at ¶ 32.

Here, as pled in the First Amended Complaint, Tinkcom repeatedly assured the Nelson children that he would compensate the Nelson Estate for its interest in the business when he sold the business or died. (APP. 20, S.R. 60, First Amended Complaint ¶ 17.) Relying on Tinkcom's assurances, the Nelson children waited for the buyout of the Nelson Estate's interest until one of those occurrences. If Tinkcom never planned to buy out the Nelson Estate's interest, the Nelson children were unaware of it, and the Nelson children relied on his representations. (*Id.*) The same applies for the Nelson Estate's conversion claim, as Tinkcom led them to believe they had an ongoing agreement for safekeeping of the valuables. (APP. 22, S.R. 62, First Amended Complaint ¶ 26.) If that was not the case, Tinkcom misled the Nelson children, thereby estopping Defendants from raising a statute of limitations defense.

Alternatively, fraudulent concealment bars Defendants from raising a statute of limitations defense. For fraudulent concealment to apply, "there must be some affirmative act or conduct on the part of the defendant designed to prevent, and which does prevent, the discovery of the cause of action." *Yankton Cnty. v. McAllister*, 2022 S.D. 37, ¶ 34, 977 N.W.2d 327, 339 (citation omitted). If a fiduciary, trust, or confidential relationship exists between the parties, "mere silence by the one under that duty constitutes fraudulent concealment." *Id.*

Under fraudulent concealment, Tinkcom's conduct bars Defendants from raising a statute of limitations defense regardless of whether he owed a fiduciary duty to the Nelson Estate.[10] As pled by the First Amended Complaint, Tinkcom promised to the

[10] As pled by the First Amended Complaint, under the Nelson Estate's claim for breach of fiduciary duty, Tinkcom owed a fiduciary duty to Dr. Nelson. In the context of

Nelson Estate that he planned to compensate them for their interest in the business. (APP. 20, S.R. 60, First Amended Complaint, ¶ 17.) Relying on this representation, the Nelson Estate did not file suit until they discovered that the Tinkcom Estate excluded it from the final negotiations to the sell the business to Welch and any of the sale proceeds in 2022. Similarly, based on Tinkcom's conduct, the Nelson Estate was led to believe they had an ongoing agreement for the safekeeping of their valuables. (APP. 22, S.R. 62, First Amended Complaint ¶ 26.)

As such, Tinkcom's repeated representations to the Nelson Estate over the years after Dr. Nelson's death estopped or otherwise barred Defendants from asserting a statute of limitations defense. Even under the trial court and Defendant's theory that South Dakota Partnership and probate law applied to cause the Nelson Estate's claims to accrue in 2013, when Dr. Nelson died, Tinkcom's representations prevented the Nelson Estate from initiating the buyout process or filing a lawsuit. Therefore, the trial court's holding that equitable tolling did not apply was error, because the Nelson Estate did not even raise that argument. Moreover, the trial court did not rule on whether equitable estoppel and fraudulent concealment apply. The trial court's decision should be reversed and remanded so a jury can decide whether equitable estoppel and fraudulent concealment apply.

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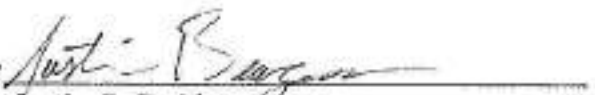
dissociation of a partner because of death, a surviving partner's fiduciary duty transfers to the deceased partner's heirs and estate. "[A] partner's fiduciary duties extend to the estate of a deceased partner. . . . A surviving partner's fiduciary obligations extend to the deceased partner's heirs and beneficiaries." *Matter of Est. of Thomas*, 532 N.W.2d 676, 683-4 (N.D. 1995) (citations omitted).

CONCLUSION

The trial court erred by dismissing the Nelson Estate's First Amended Complaint. The Nelson Estate's claims accrued after Tinkcom died and Defendants committed legal wrongs and injured the Nelson Estate by excluding them from the sale proceeds of the Business and converting certain valuables entrusted to Tinkcom, and when the Nelson Estate had notice of those injuries. Ultimately, the parties' disputes of material fact about the dates of accrual for the Nelson Estate's claims must be resolved by a jury. Alternatively, Defendants are estopped or otherwise barred from asserting the statute of limitations as a defense, given Tinkcom's promises and representations to the Nelson children. The trial court's decision should be reversed and the case should be remanded so the parties can conduct discovery and proceed to a trial on the merits.

Dated this 3rd day of September, 2024.

WOODS, FULLER, SHULTZ & SMITH P.C.

By 

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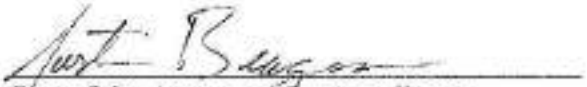
CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word 2013, Times New Roman (12 point) and contains 9,847 words, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues, certificates of counsel, and appendix. I have relied on the word and character count of the word-processing program to prepare this certificate.



One of the Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of September, 2024, I electronically filed and served Appellants' Brief through the Odyssey File and Serve system upon the following:

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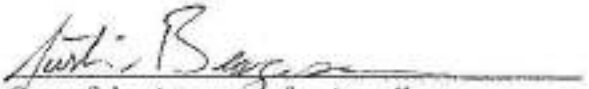

One of the Attorneys for Appellants

APPENDIX

STATE OF SOUTH DAKOTA) : SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
CRAIG NELSON and AMY FREED, as Co-Personal Representatives of the Estate of Earl Nelson, Plaintiff, vs. GARY TINKCOM, as Personal Representative of the Estate of William Tinkcom, EDDIE WELCH, and MERE COIN COMPANY, LLC, d/b/a COINS & COLLECTABLES, Defendant.	49 CIV. 23-1684 **ORDER AND JUDGMENT OF DISMISSAL WITH PREJUDICE**

The Court filed its Memorandum Opinion and Order Granting Defendants' Motion for Judgment on the Pleadings dated March 28, 2024 ("Opinion and Order"). Pursuant to the Court's Opinion and Order, the contents of which are hereby incorporated by this reference, and for good cause shown, it is hereby

ORDERED, ADJUDGED, and DECREED that Plaintiff's First Amended Complaint is dismissed with prejudice and Judgment of Dismissal is entered in favor of Defendants.

BY THE COURT:

Honorable Douglas P. Barnett
Circuit Court Judge

4/2/2024 6:16:51 PM

Attest:
Russell, Lisa
Clerk/Deputy

STATE OF SOUTH DAKOTA) : SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
CRAIG NELSON and **AMY FREED**, as Co-Personal Representatives of the Estate of Earl Nelson, Plaintiffs, v. **GARY TINKCOM**, as Personal Representative of the Estate of William Tinkcom, **EDDIE WELCH**, and **MERE COIN COMPANY, LLC**, d/b/a **COINS & COLLECTABLES**, Defendants.	49CIV23-1684 **MEMORANDUM OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS**

The above-entitled matter came before the Court on the 4th and 20th days of October, 2023 upon the *Motion for Judgment on the Pleadings* submitted by Defendant Gary Tinkcom, and the *Motion for Judgment on the Pleadings and Motion to Dismiss* submitted by Defendants Eddie Welch and Mere Coin Company[1]. The Plaintiffs were represented by their attorneys, Justin G. Smith and Justin A. Bergeson of Woods, Fuller, Shultz & Smith P.C. Defendant Gary Tinkcom, as Personal Representative of the Estate of William Tinkcom, was represented by his attorney, Daniel J. Nichols of Nichols & Rabuck, P.C., and Defendants Eddie Welch and Mere Coin Company, LLC, d/b/a Coins & Collectables, were represented by their

[1] As these separate motions contain substantively the same arguments, the Court will address them as one.

attorney, Joel R. Rische of Davenport, Evans, Hurwitz and Smith. After having considered the submissions and arguments of the parties, the Court issues this *Memorandum Opinion and Order Granting Defendants' Motion for Judgment on the Pleadings.*

FACTUAL AND PROCEDURAL BACKGROUND

On November 23, 2005, William Tinkcom ("Tinkcom") purchased an ownership interest in Coins & Collectables (the "Business"), located in the Empire Mall in Sioux Falls. Dr. Earl Nelson ("Nelson") provided Tinkcom with $50,000 for the upfront payment, in exchange for a fifty percent stake in the Business. Tinkcom and Nelson memorialized this agreement in writing.

Tinkcom later purchased the Business in full. From that point on, according to Craig Nelson and Amy Freed, co-personal representatives of the Estate of Earl Nelson ("Plaintiffs"), the Business was owned by Tinkcom and Nelson as equal partners. Plaintiffs assert that Nelson demonstrated his joint ownership in various ways, including by extending numerous short loans, purchasing and providing merchandise, printing business cards, advising Tinkcom, and otherwise supporting the Business. Plaintiffs also claim that, during this time, Nelson kept certain valuables at the Business.

Nelson died on March 13, 2013. Nothing in the probate of his estate indicated that he had an ownership interest in the Business or a partnership with Tinkcom. Despite this, Plaintiffs allege that at the time of Nelson's death, Tinkcom made several oral promises that Nelson's estate would receive fifty percent of the sale

proceeds whenever Tinkcom sold the Business, to reflect Nelson's fifty percent ownership stake.

Tinkcom operated the Business until he died on January 25, 2022. His brother, Defendant Gary Tinkcom ("Gary"), was named personal representative of the Estate of William Tinkcom. During the probate of the estate, Gary found a death bed sales contract between Tinkcom and his longtime employee, Defendant Eddie Welch ("Welch"), for the sale of the Business. He also uncovered the 2005 agreement between Nelson and Tinkcom, along with a 2009 profit and loss statement for the Business which showed that a loan had been paid to Nelson in the amount of $50,000. Additionally, a check ledger statement reflected two payments from Tinkcom to Nelson: $20,000 in October 2009 and $30,000 in December 2009. Gary did not find anything in either Tinkcom's or the Business's paperwork showing there was a partnership between Tinkcom and Nelson.

The Business was ultimately sold to Welch. Gary asserts that during the sale negotiations, out of an abundance of caution and under the advisement of his attorney, he attempted contact with Plaintiffs and their attorney on several occasions. Plaintiffs did not respond. Plaintiffs state that Welch initially included them in the negotiations for the sale of the Business. Welch, however, contends that he did not know about Nelson's alleged ownership interest until after the sale was final. Welch later transferred the assets of the Business to Defendant Mere Coin Company, LLC ("Mere Coin Company"), of which he is a member and manager.

On June 20, 2023, Plaintiffs commenced a civil action against Gary, in his capacity as personal representative of Tinkcom's estate, Welch, and Mere Coin Company (collectively, "Defendants"). Plaintiffs filed their *First Amended Complaint* on August 18, 2023, as permitted under SDCL § 15-6-15(a). Plaintiffs assert that they are entitled to proceeds from the sale of the Business based on Nelson's ownership interest. They list nine independent theories of recovery: breach of contract; breach of covenant of good faith; breach of implied contract; unjust enrichment; promissory estoppel; breach of fiduciary duty; tortious interference with business relationship or expectancy; civil conspiracy; and conversion.

On August 30, 2023, Welch and Mere Coin Company submitted a *Motion for Judgment on the Pleadings and Motion to Dismiss*. On September 1, 2023, Gary filed a *Motion for Judgment on the Pleadings*. Plaintiffs filed a response brief on September 27, 2023, to which Welch and Mere Coin Company, with Gary joining, replied on October 2, 2023.

LAW AND ANALYSIS

South Dakota law permits any party to move for judgment on the pleadings "[a]fter the pleadings are closed but within such time as not to delay the trial[.]" SDCL § 15-6-12(c). "Judgment on the pleadings provides an expeditious remedy to test the legal sufficiency, substance, and form of the pleadings." *Korstad-Tebben, Inc. v. Pope Architects, Inc.*, 459 N.W.2d 565, 567 (S.D. 1990) (citing *Hauck v. Bull*, 110 N.W.2d 506, 507 (1961)). "However, it is only an appropriate remedy to resolve issues of law when there are no remaining issues of fact." *Id.* (citing *Hauck*, 110 N.W.2d at 507).

"When a party moves for judgment on the pleadings, he not only for the purposes of his motion admits the truth of all the allegations of his adversary, but must also be deemed to have admitted the untruth of all his own allegations which have been denied by his adversary." *Hauck*, 110 N.W.2d at 507 (citation omitted). Thus, in ruling on the motion, "[t]he court may consider the pleadings themselves, materials embraced by the pleadings, exhibits attached to the pleadings, and matters of public record." *Dalrymple v. Dooley*, No. CIV. 12-4098-KES, 2014 WL 1246476, at *1 (D.S.D. Mar. 25, 2014) (citing *Clemons v. Crawford*, 585 F.3d 1119, 1124 (8th Cir. 2009)).

This matter ultimately turns on the timeliness of Plaintiffs' claims. "The purpose of a statute of limitations is a speedy and fair adjudication of the respective rights of the parties." *Merkwan v. Leckey*, 376 N.W.2d 52, 53 (S.D. 1985). In *Merkwan*, our Supreme Court stated: "A defense predicated upon the statute of limitations is meritorious and is not to be disregarded with disfavor[.]" *Id.* at 54 (citing *Arbach v. Gruba*, 86 S.D. 591, 199 N.W.2d 697, 700 (1972)). Generally, statute of limitations questions are left for the jury. *Wissink v. Van De Stroet*, 1999 S.D. 92, ¶ 11, 598 N.W.2d 213, 215 (citing *Strassburg v. Citizens State Bank*, 1998 S.D. 72, ¶ 7, 581 N.W.2d 511, 513). "However, '[d]eciding what constitutes accrual of a cause of action ... entailing statutory construction presents an issue of law.'" *Id.* (quoting *Strassburg*, 1998 S.D. 72, ¶ 7, 581 N.W.2d at 513).

Plaintiffs assert that, at his death, Nelson had an ownership interest in the Business via his partnership with Tinkcom. Taking these allegations as true for the

purpose of Defendants' motions, the Court must first turn to partnership law in order to determine the statute of limitations that governs Plaintiffs' claims.

Under the Revised Uniform Partnership Act ("RUPA"), adopted by South Dakota in 2001, a partnership is defined as "the association of two or more persons to carry on as co-owners a business for profit forms a partnership," regardless of whether that was the parties' intention. SDCL § 48-7A-202. RUPA replaced South Dakota's version of the Uniformed Partnership Act, and, relevant to this matter, introduced the concept of " 'dissociation' ... to denote the change in the relationship caused by a partner's ceasing to be associated in the carrying on of the business." Rev. Unif. P'ship Act § 601 cmt. 1. Previously, the death of any partner resulted in dissolution, or the termination, of the partnership. Unif. P'ship Act § 31(4) (1914). Under RUPA, however, a partner's death results in dissociation of that individual partner, rather than dissolution of the entire partnership. Rev. Unif. P'ship Act § 601 cmt. 8. The practical effect of the change is that a partner's dissociation will always result in either a buyout of the dissociated partner's interest or a dissolution and winding up of the business. *See* Rev. Unif. P'ship Act § 603(a) cmt. 1 ("Section 603(a) is a 'switching' provision. ... after a partner's dissociation, the partner's interest in the partnership must be purchased pursuant to the buyout rules in Article 7 unless there is a dissolution and winding up of the partnership business under Article 8.").

Defendants argue that, assuming Tinkcom and Nelson were partners, Nelson's dissociation caused the dissolution of the partnership by law. They cite what appears to be the only case in our jurisdiction directly on point to this issue. Nearly sixty years

ago, our Supreme Court held that the death of one partner necessarily dissolved a two-person partnership. *State for Use of Farmers State Bank v. Ed Cox & Son*, 81 S.D. 165, 179, 132 N.W.2d 282, 290 (1965). The Court stated that the surviving partner's authority to act for the partnership was terminated, "[e]xcept so far as may be necessary to wind up partnership affairs or to complete transactions begun but not then finished." *Id.* Although a small number of modern courts still follow this logic, *Farmers State Bank* was decided long before the enactment of RUPA. Current law indicates that the departure of the penultimate partner from a partnership no longer automatically triggers a winding up of the business under Article 8.

As a general rule, when a partner's dissociation coincides with the partnership's dissolution, the dissociated partner is entitled to a distribution of his share of the surplus of partnership assets. SDCL § 48-7A-807. This liquidation is part of the winding up process and happens before the partnership is officially terminated. *Id.* However, when the event causing a partner's dissociation is the partner's death, even if dissolution of the partnership results, "the deceased partner's transferable interest in the partnership passes to his estate and must be bought out under Article 7." Rev. Unif. P'ship Act § 801 cmt. 5.; *see also* Rev. Unif. P'ship Act § 601 cmt. 8 ("Normally, under RUPA, the deceased partner's transferable interest in the partnership will pass to his estate and be bought out under Article 7."). Thus, even in Article 8 dissolutions, a deceased partner's interest is subject to the dissociation rules within Article 7.

Under South Dakota law, a dissociated partner is entitled to the value of his interest in the partnership. SDCL § 48-7A-701(a). Plaintiffs' assertion that the partnership must initiate this buyout appears misguided. Indeed, SDCL § 48-7A-701(a) provides that "the partnership *shall cause* the dissociated partner's interest in the partnership to be purchased for a buyout price determined pursuant to subsection (b)." SDCL § 48-7A-701(a) (emphasis added). Plaintiffs highlight "shall cause" in support of their argument, but that language "is intended to accommodate a purchase by the partnership, one or more of the remaining partners, or a third party." Rev. Unif. P'ship Act § 701 cmt. 2.

The buyout process actually begins when the *dissociated partner* makes a *written demand* to the partnership. SDCL § 48-7A-701(e) (emphases added). This written demand triggers the partnership's purchase obligation under SDCL § 48-7A-701(a) and creates timelines for actions brought by the dissociated partner. If the dissociated partner disputes the buyout amount tendered by the partnership, he has 120 days from the date of the written demand in which to commence an action in court to determine the price of his interest. SDCL § 48-7A-701(i). On the other hand, if the partnership neither tenders payment nor offers to pay the buyout price after a written demand has been made, the dissociated partner has one year from the date of the demand to file suit. *Id.*

Significant to this matter, RUPA's Article 7 does not provide a time limit within which a partner must make the requisite written demand for a buyout. Moreover, Article 7 does not address the effect of a partner's failure to make the

written demand entirely, as is the case here. However, Article 4, which governs actions by partnerships and partners, dictates that "[t]he accrual of, and any time limitation on, a right of action for a remedy under this section is governed by other law." SDCL § 48-7A-405(c). Therefore, because RUPA does not answer the specific question as to when a written demand under Article 7 must be made, other law applies.

At the heart of a partnership agreement is a contract. Indeed, the claims brought by Plaintiffs are based in contract law. An action upon a contract "can be commenced only within *six years after the cause of action shall have accrued*" unless a different limitation is prescribed by statute. SDCL § 15-2-13(1) (emphasis added). This means that Plaintiffs had six years from the date that their cause of action accrued in which to commence a lawsuit on their claims related to the partnership agreement. That is, on the first eight counts of their *First Amended Complaint*. Also applicable to the facts of this case, and not disputed by the parties, is the one-year tolling of the statute of limitations provided within SDCL § 29A-3-109[2]. Thus, the ultimate question in this matter centers on when Plaintiffs' cause of action accrued, thereby commencing the statutory seven-year time period.

A limitations period ordinarily does not begin to run until the plaintiff has a "complete and present cause of action." *Rawlings v. Ray*, 312 U.S. 96, 98 (1941). A

[2] "The running of any statute of limitations on a cause of action belonging to a decedent which has not been barred as of the date of death is suspended for one year following the decedent's death but resumes thereafter unless otherwise tolled." SDCL § 29A-3-109.

cause of action does not become "complete and present" until the plaintiff can file suit and obtain relief. *See Reiter v. Cooper*, 507 U.S. 258, 267 (1993). Put simply, "a cause of action accrues when the right to sue arises, which occurs when a person has some notice of an action, an awareness either he has suffered an injury or that another person has committed a legal wrong which may ultimately result in harm to him." *Matter of Est. of French*, 2021 S.D. 20, ¶ 16 n.5, 956 N.W.2d 806, 810 n.5 (citation omitted).

Contrary to Plaintiffs' arguments, after Nelson died, his estate did not replace him as a partner. Rather, Nelson's death triggered his dissociation, and his estate became a transferee of his interest in the partnership. A buyout was required, prompted by a written demand from Nelson's estate. *See* Rev. Unif. P'ship Act § 701 cmt. 2 ("The buyout is mandatory."). Accordingly, under Article 7 of RUPA, Plaintiffs' right to sue and cause of action would normally arise only after the required written demand for Nelson's partnership buyout was made, and then, under two specific situations. *See* SDCL § 48-7A-701(e) and (i). However, Plaintiffs did not adhere to the rules prescribed in Article 7, and never made a written demand for payment. As a result, they were able to avoid the 120-day and one-year statutory deadlines prescribed by RUPA for bringing actions involving the buyout provision.

Nevertheless, Plaintiffs failure to make a written demand does not insulate them from any deadlines in bringing an action related to Nelson's interest in the partnership. In the absence of a guiding RUPA timeline for making Article 7 written demands, South Dakota contract law provides the applicable statute of limitations:

Six years after the cause of action accrued. SDCL § 15-2-13(1). As the representatives of Nelson's estate, Plaintiffs' rights to make the required demand for payment arose at the same time Nelson's right to do so would have—when he was dissociated. Therefore, Plaintiffs' cause of action accrued on March 13, 2013, the date of Nelson's death and dissociation. The statute of limitations on Plaintiffs' claims commenced on March 13, 2013, so, with one year tolled by SDCL § 29A-3-109, they had until March 13, 2020—seven years after the accrual of their cause of action—to bring suit. Because Plaintiffs failed to file an action until more than three years after the statute of limitations had run, their claims are barred.

Even if Tinkcom and Nelson were simply parties to a completed contract, as Defendants assert, Nelson's cause of action, and, consequently, his estate's cause of action, accrued at the time Tinkcom repaid the startup loan. In that circumstance, Plaintiffs would have had until late 2016 to assert a breach of contract action, again pursuant to SDCL §§ 15-2-13(1) and 29A-3-109.

Plaintiffs' conversion claim, although independent of the alleged partnership or contractual agreement between Tinkcom and Nelson, is likewise barred. *See* SDCL § 15-2-13(4) (prescribing a six-year statute of limitations for bringing "[a]n action for taking, detaining, or injuring any goods or chattels, including actions for specific recovery of personal property."). For conversion actions, accrual occurs when the plaintiff establishes a possessory interest in property greater than that of the defendant. *Western Consolidated Coop v. Pew*, 2011 S.D. 9, ¶ 11, 795 N.W.2d 390, 397. Plaintiffs' possessory interest in Nelson's property arose on April 30, 2013, when

they were named co-personal representatives of his estate. Therefore, and with the tolling provided by SDCL § 29A-3-109, an action to recover Nelson's property had to be brought by April 30, 2020.

Finally, Plaintiffs argue that even if the statute of limitations has run, the doctrine of equitable tolling operates to preserve their claims. Equitable tolling allows a plaintiff to "sue after the statutory time period has expired if he has been prevented from doing so due to inequitable circumstances." *Dakota Truck Underwriters v. South Dakota Subsequent Injury Fund*, 2004 S.D. 120, ¶ 19, 689 N.W.2d 196, 202. South Dakota "ha[s] not officially adopted the equitable tolling doctrine for civil cases, ... and as Justice Konenkamp has noted, there are serious questions about whether it could be incorporated into our decisional law[.]" *French*, 2021 S.D. 20, ¶ 20, 956 N.W.2d at 811 (citing *Anson v. Star Brite Inn Motel*, 2010 S.D. 73, ¶¶ 15 n.2, 36-40, 788 N.W.2d 822, 825, n.2) (Konenkamp, J., concurring) (internal citations omitted).

Nevertheless, "[t]he threshold for consideration of equitable tolling is inequitable circumstances not caused by the plaintiff that prevent the plaintiff from timely filing." *French*, 2021 S.D. 20, ¶ 22, 956 N.W.2d at 811-12 (quoting *Anson*, 2010 S.D. 73, ¶ 16, 788 N.W.2d at 826). The doctrine should be applied "where a party acts diligently, 'only to find himself caught up in an arcane procedural snare.' " *Dakota Truck*, 2004 S.D. 120, ¶ 20, 689 N.W.2d at 202 (quoting *Warren v. Dep't of Army*, 867 F.2d 1156, 1160 (8th Cir. 1989)). The level of diligence required of a plaintiff seeking relief under equitable tolling is a showing that "reasonable efforts" were made to file on time. *Anson*, 2010 S.D. 73, ¶¶ 25-26, 788 N.W.2d at 829. Reasonable efforts are

not demonstrated merely by retaining and relying on counsel when such reliance results in imprudent legal practice. *See Peterson v. Holm*, 2000 S.D. 27, ¶¶ 16-18, 607 N.W.2d 8, 13-14; *Anson*, 2010 S.D. 73, ¶ 32, 788 N.W.2d at 830.

Here, Plaintiffs have not established that they made reasonable efforts to file the claims at issue. For nearly a decade, Plaintiffs did nothing to protect their alleged interests in the Business. They did not make a written demand of payment, as is required under SDCL § 48A-7A-701(e). They did not attempt to get Tinkcom's alleged oral promises in writing or seek legal counsel in the matter. In short, they did not act reasonably under any theory of recovery. Plaintiffs' position requires a holding that the verbal assurances of a later-deceased individual tolls the statute of limitations in these cases for an undefined amount of time—but at least nine years—regardless of the inaction of the plaintiff in pursuing their own rights. The Court cannot find this unqualified reliance reasonable or made in good faith.

Moreover, our Supreme Court has consistently held that "compliance with statutes of limitations is strictly required and doctrines of substantial compliance or equitable tolling are not invoked to alleviate a claimant from a loss of his right to proceed with a claim." *Murray v. Mansheim*, 2010 S.D. 18, ¶ 21, 779 N.W.2d 379, 389 (citing *Dakota Truck*, 2004 S.D. 120, ¶ 17, 689 N.W.2d at 201). Statutes of limitations are not mere technicalities; rather, they are "in place to prevent the prosecution of stale claims and to punish litigants who sleep on their rights[.]" *Id.* (citing *Moore v. Michelin Tire Co.*, 1999 S.D. 152, ¶ 25, 603 N.W.2d 513, 521). Against this backdrop were Justice Konenkamp's doubts formed as to the judiciary's authority to adopt

equitable tolling in the face of the Legislature's clear intent to enact strict time limits for bringing certain civil actions. *Anson*, 2010 S.D. 73, ¶ 36, 788 N.W.2d at 831 (Konenkamp, J., concurring); *see* SDCL § 1-1-23(5) (common law abrogated when in conflict with sovereign power); *see also United States v. Beggerly*, 524 U.S. 38, 48 (1998) (holding that equitable tolling will not apply if it is "inconsistent with the text of the relevant statute").

The South Dakota Legislature has prescribed clearly defined time parameters for bringing claims that arise out of partnership agreements and other contractual relationships. Finding equitable tolling as a relief for the failure to meet those statutes of limitations appears to contradict the Legislature's intent in creating them, which the Supreme Court is wary to do. Accordingly, the Court declines to apply the doctrine of equitable tolling to preserve Plaintiffs' untimely claims.

DECISION AND ORDER

After fully reviewing the authorities, pleadings, and written submissions of the parties, having fully considered the written and oral arguments of the parties, viewed in the light most favorable to Plaintiffs, the Court finds that the asserted claims in this action are barred by the applicable statute of limitations.

Here, Nelson was entitled to a buyout of his interest in the partnership at the time of his dissociation from it, pursuant to South Dakota partnership law. Since Nelson's dissociation was triggered by his death, his rights and obligations regarding the buyout of his partnership interest passed to his estate. Because the representatives of Nelson's estate—Plaintiffs—did not make the required written

demand for payment pursuant to Article 7 of RUPA, codified in SDCL § 48-7A-701(e), the statute of limitations for bringing a related action against the partnership for that payment is governed by South Dakota contract law. Plaintiffs' rights to demand the buyout accrued on the same day that Nelson's would have—March 13, 2013. Accordingly, and including a one-year tolling period, Plaintiffs had seven years from that date to commence the present proceedings. The statute of limitations on the first eight counts in their *First Amended Complaint* ran out on March 13, 2020; Plaintiffs missed their window by more than three years. Plaintiffs' conversion claim is similarly barred by SDCL § 15-2-13. Finally, there are no grounds for a finding of equitable tolling here, as the doctrine is not supported by South Dakota precedent and Plaintiffs did not demonstrate reasonable efforts in asserting their rights.

It is hereby **ORDERED, ADJUDGED, AND DECREED** that both the *Motion for Judgment on the Pleadings* submitted by Defendants Eddie Welch and Mere Coin Company, LLC, d/b/a Coins & Collectables, and the *Motion for Judgment on the Pleadings* submitted by Defendant Gary Tinkcom, as Personal Representative of the Estate of William Tinkcom, are **GRANTED**. Based on this ruling, the Court does not address the sufficiency of the *Motion to Dismiss* filed by Defendants Eddie Welch and Mere Coin Company, LLC, d/b/a Coins & Collectables.

Dated this 28th day of March, 2024.

Douglas P. Barnett
Circuit Court Judge

ATTEST:
Angelia Gries, Clerk of Courts

By: _____
Deputy

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

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CRAIG NELSON and AMY FREED, as co-Personal Representatives of the Estate of Earl Nelson Plaintiff, v. GARY TINKCOM, as Personal Representative of the Estate of William Tinkcom, EDDIE WELCH, and MERE COIN COMPANY, LLC, D/B/A COINS & COLLECTABLES, Defendants.	:	49CIV23-1684 **FIRST AMENDED COMPLAINT**

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Plaintiffs Craig Nelson and Amy Freed (collectively, "Plaintiffs"), as co-Personal Representatives of the Estate of Earl Nelson, state and allege as follows in support of their First Amended Complaint, as authorized by SDCL § 15-6-15(a):

PARTIES

1. Plaintiff, Craig Nelson, is a co-Personal Representative of the Estate of Earl Nelson ("Nelson Estate").

2. Plaintiff, Amy Freed, is the other co-Personal Representative of the Nelson Estate.

3. Defendant, Gary Tinkcom, is the Personal Representative of the Estate of William Tinkcom ("Tinkcom Estate").

4. Probate of the Tinkcom Estate is being conducted in the Second Judicial Circuit, South Dakota. (49PRO. 22-36.)

5. Defendant, Eddie Welch ("Welch"), is an individual believed to reside in Minnehaha County, South Dakota, and owns MERE Coin Company, LLC, a South Dakota LLC d/b/a Coins & Collectables.

6. Defendant, MERE Coin Company, LLC, d/b/a Coins & Collectables, is a limited liability company organized and existing under the laws of South Dakota, with its principal place of business in Sioux Falls, South Dakota.

FACTS

7. On or about November 23, 2005, William Tinkcom ("Tinkcom") purchased an ownership interest in Coins and Collectables (the "Business") from Richard Stelzer ("Stelzer").

8. Dr. Earl Nelson ("Dr. Nelson") paid $50,000.00 to Tinkcom to cover the entire up-front payment toward the purchase by Tinkcom of the ownership interest in the Business from Stelzer.

9. In consideration for the payment of $50,000 by Dr. Nelson, Tinkcom agreed Dr. Nelson "[would] become a 50% owner with [Tinkcom] of that certain business in Sioux Falls, South Dakota, known as 'Coins and Collectables;'" Tinkcom further agreed to execute documents necessary to form a business entity with Dr. Nelson and to evidence Dr. Nelson's ownership in the Business.

10. The agreement between Dr. Nelson and Tinkcom, conferring to Dr. Nelson a fifty (50) percent ownership interest in the Business, is memorialized in writing in the Acknowledgement of Contribution to Purchase of Business ("Acknowledgement"), signed by

Tinkcom on November 25, 2005. A true and correct copy of the Acknowledgement signed by Tinkcom is attached as **Exhibit A.**

11. Tinkcom ultimately purchased the entirety of the ownership interest in the Business, at which point Tinkcom and Dr. Nelson were equal owners of the Business, each owning a fifty (50) percent interest.

12. During Tinkcom and Dr. Nelson's joint ownership of the Business, Dr. Nelson contributed to the Business in various ways including, but not limited to, extending numerous short-term loans to the Business, purchasing or providing merchandise for the Business to sell, working with and advising Tinkcom on running the Business, and printing business cards with his name on them, among other contributions.

13. Dr. Nelson did not charge interest or receive any pecuniary benefit from providing the numerous loans to the Business; rather, the loans helped the Business stay afloat.

14. Dr. Nelson's contributions, including his funding of the initial purchase of the Business and short-term loans, were provided because of Dr. Nelson's joint ownership in the Business and at the request of Tinkcom.

15. Dr. Nelson believed he owned a fifty (50) percent interest in the Business.

16. Dr. Nelson died on March 13, 2013.

17. After Dr. Nelson's death, Tinkcom verbally confirmed to Dr. Nelson's heirs on multiple occasions that Dr. Nelson, and by extension the Nelson Estate, owned a fifty (50) percent interest in the Business, and that Tinkcom would pay half the value of the Business to the Nelson Estate when Tinkcom sold the Business or died.

18. Tinkcom died on January 25, 2022.

19. Shortly before Tinkcom's death, Defendant Welch attempted to purchase the Business from Tinkcom.

20. After Tinkcom's death, Defendant Welch began negotiating with both the Tinkcom and Nelson Estates to buy the Business from them.

21. Defendant Welch's negotiations included at least two proposed Asset Purchase Agreements, which include the Nelson Estate as a seller and acknowledge the Nelson Estate's interest in the Business. True and correct copies of two such Asset Purchase Agreements are attached as **Exhibits B and C**.

22. Despite these negotiations and the Tinkcom Estate's and Welch's acknowledgement of the Nelson Estate's ownership interest, the Tinkcom Estate and Defendant Welch abruptly excluded the Nelson Estate from Defendant Welch's purchase of the Business and any resulting sale proceeds.

23. An Inventory filed in the probate of the Tinkcom Estate reveals the Business was sold to Welch, the Business's value at Tinkcom's death was $358,547.78, and the Business held $356,092.78 in a checking account at Tinkcom's death. A true and correct copy of the Inventory is attached as **Exhibit D**.

24. The Nelson Estate did not receive any compensation for Dr. Nelson's interest in the Business or for his contributions to the Business, before or after his death, before or after the death of Tinkcom, or after the sale of the Business to Defendant Welch.

25. Dr. Nelson kept certain valuable coins and collectible items at the premises of the Business, including gold Krugerands, which are a type of South African coin, and other gold coins and valuable items.

26. The Nelson Estate entrusted the valuables referred to in Paragraph 25 at the premises of the Business for safe keeping after Dr. Nelson's death.

27. Some of the valuables referred to in Paragraph 25 are now missing despite being kept at the Business premises for safekeeping.

28. One or more Defendants wrongfully asserts it holds title to certain property referred to in Paragraph 25, including but not limited to gold Krugerands.

29. Upon information and belief, one or more of the Defendants impermissibly converted the property referred to in Paragraph 25, either keeping it in their possession, selling it, or otherwise giving it away without compensating the Nelson Estate.

30. The Tinkcom Estate has not published a Notice to Creditors or sent written notice of any probate proceedings to the Nelson Estate. SDCL § 29A-3-803.

CLAIMS

COUNT I
BREACH OF CONTRACT

31. Plaintiffs restate and reallege the allegations in the preceding paragraphs as though fully set forth herein.

32. The Acknowledgement is a legally valid, binding, and enforceable contract whereby Tinkcom transferred a fifty (50) percent ownership interest in the Business in exchange

for Dr. Nelson paying $50,000 to cover the entire up-front payment toward the purchase of the Business from Stelzer. (Exhibit A.)

33. Tinkcom's and the Tinkcom Estate's failure to pay Dr. Nelson or the Nelson Estate for its fifty percent ownership interest in the Business is a breach of that contract.

34. In the alternative, the Tinkcom Estate breached the contract through anticipatory repudiation by excluding the Nelson Estate from Defendant Welch's purchase of the Business and by their counsel unequivocally stating in e-mail correspondence to the Nelson Estate's attorney that the Tinkcom Estate intentionally excluded the Nelson Estate out of the sale of the Business. A true and correct copy of the e-mail correspondence is attached as **Exhibit E.**

35. The breaches by Tinkcom or the Tinkcom Estate are material and remain uncured.

36. As a direct and proximate result of the breaches by Tinkcom or the Tinkcom Estate, the Nelson Estate is entitled to an award of damages in an amount to be determined at trial.

COUNT II
BREACH OF THE COVENANT OF GOOD FAITH

37. Plaintiffs restate and reallege the allegations in the preceding paragraphs as though fully set forth herein.

38. Under the Acknowledgement, Tinkcom and Dr. Nelson agreed Dr. Nelson was a fifty (50) percent owner of the Business.

39. Tinkcom or the Tinkcom Estate's conduct preventing Nelson or the Nelson Estate from receiving half the value of the Business upon its sale, or alternatively, on the death of Tinkcom, is a breach of the covenant of good faith and fair dealing contained in every contract.

40. Tinkcom or the Tinkcom Estate's breaches are material and remain uncured.

41. As a direct and proximate result of the breaches by Tinkcom or the Tinkcom Estate, the Nelson Estate is entitled to an award of damages in an amount to be determined at trial.

COUNT III
BREACH OF IMPLIED CONTRACT (QUANTUM MERUIT)

42. Plaintiffs restate and reallege the allegations in the preceding paragraphs as though fully set forth herein.

43. Dr. Nelson provided funds and services, at Tinkcom's request, to help Tinkcom purchase, operate, and keep the Business open and solvent.

44. Dr. Nelson provided funds and services to purchase and operate the Business, and keep it open and solvent because he understood he was the fifty (50) percent owner of the Business and would be compensated for half of the value of the Business upon Tinkcom's death or the sale of the Business; additionally, all of Dr. Nelson's contributions were provided at the request of Tinkcom.

45. It would be inequitable for Dr. Nelson's contributions to be uncompensated.

46. Tinkcom and the Tinkcom Estate voluntarily accepted Dr. Nelson's funds and services, but have failed to compensate Dr. Nelson or the Nelson Estate.

47. As a direct and proximate result of Tinkcom's or the Tinkcom Estate's failure to compensate Dr. Nelson or the Nelson Estate, the Nelson Estate is entitled to an award of damages in an amount to be determined at trial.

COUNT IV
UNJUST ENRICHMENT

48. Plaintiffs restate and reallege the allegations in the preceding paragraphs as though fully set forth herein.

49. Tinkcom and the Tinkcom Estate received and retained the benefit of Dr. Nelson's financial contribution to cover the entire up-front payment toward the purchase of the Business.

50. Tinkcom and the Tinkcom Estate received and retained the benefit of Dr. Nelson's contributions to the Business during his lifetime including, but not limited to, extending numerous interest-free loans to help the Business stay open and work at the Business.

51. Tinkcom was aware he was receiving, or alternatively acquiesced in, the benefit of Dr. Nelson's contributions.

52. It would be inequitable to allow the Tinkcom Estate to retain the benefit of Dr. Nelson's contributions without compensating the Nelson Estate.

53. As a direct and proximate result of Tinkcom's or the Tinkcom Estate's unjust enrichment, the Nelson Estate is entitled to an award of damages in an amount to be determined at trial.

COUNT V
PROMISSORY ESTOPPEL

54. Plaintiffs restate and reallege the allegations in the preceding paragraphs as though fully set forth herein.

55. The Acknowledgement constitutes a promise for Dr. Nelson to assume a fifty (50) percent ownership in the Business.

56. In reliance on Tinkcom's promise, Dr. Nelson suffered a substantial economic detriment by contributing $50,000 to Tinkcom for the purchase of the Business.

57. Dr. Nelson and the Nelson Estate suffered a substantial economic detriment because Dr. Nelson's interest in the Business remains unpaid.

58. It was foreseeable to Tinkcom or the Tinkcom Estate that failure to pay Dr. Nelson or the Nelson Estate would cause loss to them.

59. Dr. Nelson and the Nelson Estate reasonably and justifiably relied on Tinkcom's promises.

60. Injustice can be avoided only by enforcement of Tinkcom's promises to Dr. Nelson and the Nelson Estate.

61. As a direct and proximate result of Dr. Nelson's and the Nelson Estate's reliance on Tinkcom's promises, the Nelson Estate is entitled to an award of damages in an amount to be determined at trial.

COUNT VI
BREACH OF FIDUCIARY DUTY

62. Plaintiffs restate and reallege the allegations in the preceding paragraphs as though fully set forth herein.

63. The Business was carried on as a for-profit business and was co-owned by Tinkcom and Dr. Nelson as partners.

64. Tinkcom owed a fiduciary duty to the Business, Dr. Nelson, and the Nelson Estate by virtue of Tinkcom's position as a partner in the Business.

65. Tinkcom breached his fiduciary obligations by failing to compensate Dr. Nelson or the Nelson Estate for Dr. Nelson's share of the ownership in the Business.

66. As a direct and proximate result of the breaches by Tinkcom and the Tinkcom Estate, the Nelson Estate is entitled to an award of damages in an amount to be determined at trial.

COUNT VII
TORTIOUS INTERFERENCE WITH
BUSINESS RELATIONSHIP OR EXPECTANCY
(Against both the Tinkcom Estate and Welch)

67. Plaintiff restates and realleges the allegations in the preceding paragraphs as though fully set forth herein.

68. Dr. Nelson and the Nelson Estate had a valid business expectancy that they would be paid half the value of the Business based on Dr. Nelson's and Tinkcom's contract, Dr. Nelson's contributions to the Business, and the numerous verbal confirmations Tinkcom made to the Nelson heirs that he would pay half the value of the Business to the Nelson Estate when Tinkcom sold the Business or died.

69. Tinkcom, the Tinkcom Estate, and Welch knew of Dr. Nelson's and the Nelson Estate's expectancy to be paid half of the Business's value, either on its sale or Tinkcom's death.

70. The Tinkcom Estate and Welch were aware of the Nelson Estate's ownership interest, as evidenced by the Asset Purchase Agreements prepared by Welch's attorney. (Exhibits B and C.)

71. The Tinkcom Estate's attorney confirmed in writing he and his client were aware of the Nelson Estate's ownership interest. (Exhibit D.)

72. Despite their knowledge of the Nelson Estate's ownership interest in the Business under the Acknowledgment, the Tinkcom Estate and Welch abruptly excluded the Nelson Estate from negotiations for Welch to purchase the Business, and ultimately from the sale proceeds. (Exhibit D.)

73. As a result of the Tinkcom Estate's and Welch's conduct, the Nelson Estate was not compensated for its ownership interest in the Business or Dr. Nelson's contributions to the Business during his lifetime.

74. As a direct and proximate result of the Tinkcom Estate's and Welch's conduct interfering with their business expectancy, the Nelson Estate is entitled to an award of damages in an amount to be determined at trial.

COUNT VIII
CIVIL CONSPIRACY
(Against both the Tinkcom Estate and Welch)

75. Plaintiffs restate and reallege the allegations in the preceding paragraphs as though fully set forth herein.

76. The Tinkcom Estate and Welch agreed to tortiously interfere with the Nelson Estate's business relationship or expectancy by moving forward with the sale and purchase of the Business without the Nelson Estate.

77. By virtue of their agreement to interfere with the Nelson Estate's business relationship or expectancy, the Tinkcom Estate and Welch are jointly and severally liable.

COUNT IX
CONVERSION
(Against all Defendants)

78. Plaintiffs restate and reallege the allegations in the preceding paragraphs as though fully set forth herein.

79. Defendants the Tinkcom Estate, Eddie Welch, or MERE Coin Company, LLC, ("MERE") possess, or possessed, certain personal property of Dr. Nelson and the Nelson Estate, including but not limited to gold coins and gold Krugerrands.

80. Defendants the Tinkcom Estate, Eddie Welch, or MERE have wrongfully asserted title to such property, maintained possession of such personal property, or sold it, and did not compensate the Nelson Estate for the property.

81. The Nelson Estate is entitled to the return of such personal property that remains in Defendants' possession.

82. In addition, or the alternative, the Nelson Estate is entitled to an award of damages, plus interest, for such personal property in an amount to be determined at trial.

WHEREFORE, the Nelson Estate prays for judgment:

(1) For a judgment against the Tinkcom Estate on Counts I and II, awarding the Nelson Estate an amount adequate to compensate for Dr. Nelson's interest in the Business;

(2) Alternatively, for a judgment against the Tinkcom Estate on Counts III, IV, V and VI in an amount to be determined by the finder of fact;

(3) For a judgment against the Tinkcom Estate and Defendant Welch on Counts VII and VIII in an amount to be determined by the finder of fact;

(4) For a judgment against Defendant Welch or MERE requiring the return of unsold personal property belonging to the Nelson Estate and a damage award in an

amount equal to the proceeds received for such property sold and not distributed to the Nelson Estate under Count IX;

(5) For allowable pre- and post-judgment interest;

(6) For the allowable attorneys' fees and costs incurred in pursuing this matter;

(7) For such additional relief the Court deems just.

PLAINTIFFS DEMAND A TRIAL BY JURY

Dated this 18th day of August, 2023.

WOODS, FULLER, SHULTZ & SMITH, P.C.

By /s/ Justin G. Smith
Justin G. Smith
Justin A. Bergeson
PO Box 5027
300 South Phillips Avenue, Suite 300
Sioux Falls, SD 57117-5027
Phone (605) 336-3890
Fax (605) 339-3357
Justin.Smith@woodsfuller.com
Justin.Bergeson@woodsfuller.com
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of August, 2023, a true and correct copy of the foregoing *First Amended Complaint* was served via Odyssey File & Serve which will automatically send e-mail notification of the service of such pleading to the following individuals:

Daniel J. Nichols
Nichols & Rabuck, P.C.
427 N. Minnesota Ave., Ste. 101
Sioux Falls, SD 57104
dan@nicholsrabuck.com
Attorneys for Defendant Gary Tinkcom, as Personal Representative of the Estate of William Tinkcom

Joel R. Rische
Davenport, Evans, Hurwitz & Smith, LLP
PO Box 1030
Sioux Falls, SD 57101
jrische@dehs.com
Attorneys for Defendants Eddie Welch and MERE Coin Company, LLC, d/b/a Coins & Collectables

/s/ Justin G. Smith
One of the attorneys for Plaintiffs

Exhibit A

LAW OFFICE
GARY B. WARD
P.O. BOX 497
VIBORG, SOUTH DAKOTA 57070-0497
FAX 605-326-5283
TELEPHONE 605-326-5282

November 23, 2005

Earl G. Nelson, MD
Box 88846
Sioux Falls, SD 57109

Re: Coins & Collectibles Purchase

Dr. Nelson:

Enclosed is the acknowledgement I prepared which should serve to document your claim to 50% of the Coins & Collectibles business in exchange for your payment of $50,000. A notary of Bill's signature is not absolutely required but if it can be accomplished, it is preferable. Let me know if you need anything else on this.

Sincerely,

Gary B. Ward
Attorney at Law

GBW:mc

Enclosures

ACKNOWLEDGEMENT OF CONTRIBUTION TO PURCHASE OF BUSINESS

The undersigned, William Tinkcom, of Sioux Falls, South Dakota, acknowledges receipt from Earl G. Nelson, MD, of PO Box 88848, Sioux Falls, SD 57109, of the sum of Fifty Thousand and No/100 Dollars ($50,000.00) to apply to the purchase of that certain business in Sioux Falls, South Dakota, known as "Coins & Collectibles."

The undersigned further acknowledges and agrees that as consideration for this payment, Earl G. Nelson, MD, will become a 50% owner with the undersigned of that certain business in Sioux Falls, South Dakota, known as "Coins and Collectibles."

The undersigned further acknowledges and agrees that he will execute all other documents necessary in cooperation with Earl G. Nelson, MD, to form the entity under which the business shall continue to operate and to evidence the 50% ownership fo Earl G. Nelson, MD, in said business entity.

Dated this 25 day of November, 2005.

William L. Tinkcom

William Tinkcom

STATE OF SOUTH DAKOTA
SS
COUNTY OF TURNER

On this the _____ day of November, 2005, before me, the undersigned officer, personally appeared William Tinkcom, known to me or satisfactorily proven to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same for the purposes therein contained.

In witness whereof, I hereunto set my hand and official seal.

Notary Public - South Dakota

(SEAL)

My commission expires:_____

AMENDED AND RESTATED ASSET PURCHASE AGREEMENT

THIS AMENDED AND RESTATED ASSET PURCHASE AGREEMENT (this "**Agreement**") is made and entered into as of the ____ day of February, 2022 (the "**Effective Date**" and the "**Closing Date**"), by and between the ESTATE OF WILLIAM L. TINKCOM (the "**Tinkcom Estate**"), of 440 West Ivey Road, Huachuca City, Arizona 85616, the ESTATE OF EARL G. NELSON (the "**Nelson Estate**, and together with the Tinkcom Estate, the "**Seller Parties**" and each individually a "**Seller**"), of 14149 Crocus Way, Rosemount, Minnesota 55068, and EDWARD K. WELCH ("**Buyer**"), of 701 South Phillips Avenue, Sioux Falls, South Dakota 57104. Buyer and the Seller Parties are sometimes referred to herein as the "**Parties**" and each individually as a "**Party**."

WITNESSETH:

WHEREAS, the Seller Parties own a retail coins and collectables store doing business under the name Coins & Collectables (the "**Business**") located at 1300 W. Empire Mall Pl., Sioux Falls, South Dakota 57106 (the "**Business Location**");

WHEREAS, Buyer and William L. Tinkcom ("**Tinkcom**") executed that certain Business Purchase Agreement dated January 21, 2022 (the "**Original Agreement**"), pursuant to which Buyer agreed to purchase, and Tinkcom agreed to sell, substantially all of the assets of the Business;

WHEREAS, Tinkcom subsequently died on January 25, 2022;

WHEREAS, the Seller Parties wish to sell, and Buyer wishes to purchase, substantially all of the assets of the Business pursuant to the terms and subject to the conditions set forth in this Agreement;

WHEREAS, Buyer is not assuming any liabilities of the Seller Parties, except as may be specifically set forth herein below, and the Purchased Assets shall be conveyed free and clear of all liabilities, liens, claims and encumbrances; and

WHEREAS, the Parties mutually desire to amend and restate the Original Agreement as set forth in this Agreement.

NOW, THEREFORE, for and in consideration of the premises and of the mutual covenants, conditions, and agreements set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereby agree as follows:

1. **Purchase and Sale of Assets**. The Seller Parties hereby agree to assign, sell, transfer, convey and deliver to Buyer, free and clear of all liens, security interests, encumbrances, and restrictions, and Buyer hereby agrees to purchase and take from the Seller Parties, substantially

all of the assets utilized in the operation of the Business (all of which assets are herein collectively referred to as the "**Purchased Assets**") including the following:

(a) All equipment and supplies of Seller Parties used by the Business and located at the Business Location as of the Effective Date, including without limitation the furniture, decorations, display cases, fixtures, equipment, lighting, electronic devices, computers, and supplies;

(b) Two safes located at the Business Location;

(c) All permits, licenses and approvals related to the Business;

(d) Seller Parties' intangible business assets and intellectual property, to include web domains, mailing lists used for email newsletters, web content, social media pages, logos, marketing materials, copyrights and trademarks (if any), and all rights associated with the Business name Coins & Collectables;

(e) Business, financial and tax records necessary for the operation of the Business;

(f) Inventory of the Business on hand and on order as of the Closing Date. For purposes of this Agreement, the term "**Inventory**" shall refer to all coins, bullion bars, paper currency, paintings, sculptures, other artwork, precious metals, scrap gold and silver, watches, silverware, junk silver, collectables, antiques, and all other inventory items of the Business, whether such inventory is currently offered for sale in the operation of the Business or placed in storage at the Business Location;

(g) All contracts with vendors of the Business, if any;

(h) All office and maintenance supplies, if any;

(i) The business phone number 605-361-0005, facsimile numbers, websites, e-mail addresses, and related information pertaining to the Business; and

(j) All goodwill of Seller Parties associated with the Business.

2. **Excluded Assets**. Buyer and the Seller Parties agree that the Purchased Assets do not include, and shall exclude the First National Bank Checking Account #30204514, and any other assets located at the Business Location but described in Exhibit A.

3. **Assumed Liabilities; Allocation of Liabilities**.

(a) Except as expressly provided in this Agreement, Buyer is not assuming, and shall not be deemed to have assumed, any liabilities or obligations of the Seller Parties of any kind whatsoever, including without limitation, any obligation of the Seller Parties on the Closing Date for (i) accounts payable; (ii) employee wages or any employee benefits or deferred compensation plan of Seller; (iii) (a) any sales, use, excise taxes, income taxes, taxes based on or measured by income, or franchise

taxes attributable to periods or events occurring or ending prior to the Closing Date, or (b) any other taxes, legal, accounting, brokerage, finder's fees, or other expenses of whatsoever kind or nature incurred by the Seller Parties or any affiliate, stockholder, director or officer of the Seller Parties as a result of the consummation of the transactions contemplated by this Agreement, (iv) rent or utilities attributable to periods occurring or ending prior to the Closing Date, or (v) liabilities arising out of any action, suit, or proceeding based upon any event occurring or a claim arising (a) prior to the Closing Date or (b) after the Closing Date and attributable to acts performed or omitted by the Seller Parties prior to the Closing Date.

(b) Subsequent to the Closing Date, Buyer shall be responsible for taxes, utilities (including all charges for electricity, water, telephone charges for the business phone number 605-361-0005, sewer, and internet), and similar items and expenses arising from the operation of the Business after the Closing Date (the "**Assumed Liabilities**").

(c) The Seller Parties acknowledge that Buyer shall not be required to reimburse the Seller Parties for any prepaid expenses of the Business pertaining to rent or utilities charges corresponding with the month of February of 2022.

4. **Purchase Price**. The purchase price for the Purchased Assets shall be Three Hundred Thousand Dollars ($300,000.00) (the "**Purchase Price**"), with such payment to the Seller Parties occurring as follows:

(a) Half of the Purchase Price, in amount of $150,000, will be paid to the Nelson Estate and the other half of the Purchase Price, in an amount of $150,000, will be paid to the Tinkcom Estate as set forth in paragraph (c) below.

(b) On or before April 15, 2022, Buyer shall deliver to the Nelson Estate One Hundred and Fifty Thousand Dollars ($150,000.00) in cash, check, or other immediately available funds.

(c) Buyer will deliver to the Tinkcom Estate, at the address first listed above, thirty equal, monthly payments of principal only and no interest and in the amount of Five Thousand Dollars ($5,000.00) per month, with the first such payment being due May 1, 2022, and subsequent payments being due on the first date of each month thereafter, and with the final payment of any and all remaining principal being due and payable on October 1, 2024. Buyer shall have the right to fully or partially prepay the principal balance due at any time without penalty.

5. **Allocation of Purchase Price**. For tax purposes, Buyer and the Seller Parties have agreed to allocate the purchase price among the Purchased Assets by filing IRS Form 8594, on their respective tax returns, in accordance with Exhibit B attached hereto. After the Closing, the parties shall make consistent use of the allocation, including the reports required to be filed under Section 1060 of the Internal Revenue Code. In any proceeding related to the determination of any tax, Buyer and the Seller Parties shall not contend or represent that such allocation is not a correct

allocation.

6. **Representations and Warranties of the Seller Parties**. Each Seller makes the following representations and warranties to Buyer, and each Seller further represents that the same shall be true as of the Closing Date:

(a) Each Seller represents that the Seller Parties are the true and correct owners of all right, title, and interest in and to the Purchased Assets, that such Seller owns a fifty percent (50%) interest in the Purchased Assets, that no other person other than the Seller Parties have any ownership interest in the Purchased Assets or the Business, and that such Seller has all requisite power and authority to own such assets and to conduct the Business as it is now conducted.

(b) Each Seller represents that it holds title to the Purchased Assets free and clear of all liens, encumbrances, claims, and security interests. Each Seller has full legal right to transfer and convey absolute ownership of the Purchased Assets to Buyer. Upon delivery of the Assets, Buyer will have good title to such Purchased Assets free and clear of all liens, claims and encumbrances.

(c) Each Seller represents and warrants that after its receipt of such Seller's share of the Purchase Price, such Seller shall have no further rights to the Business or the Purchased Assets, and such Seller shall completely release Buyer from any liability arising out of this Agreement or with respect to the Business or the Purchased Assets.

(d) Each Seller represents that it nor the Business are a party to any litigation, action or proceeding affecting any of the Seller Parties, the Business, or the Purchased Assets. Each Seller represents that it has received no notice of any pending or threatened litigation, investigation, judgment, execution, bankruptcy, or proceeding relating to or affecting any material aspect of the Business or the Purchased Assets, nor is such Seller subject to any existing judgment, order or decree which would prevent or impede the consummation of the transactions contemplated in this Agreement.

(e) This Agreement constitutes the legal, valid and binding obligation of each Seller in accordance with the terms hereof. The personal representative signing on behalf of each Seller represents that it has all requisite power and authority, to execute, perform, carry out the provisions of and consummate the transactions contemplated in this Agreement.

(f) Each Seller represents that it has filed in a timely manner all tax returns which are required to have been filed by such Seller and such Seller has paid all taxes required to be paid in respect of the periods covered by such returns.

(g) Each Seller represents that it is aware of no developments or threatened developments that would materially affect the Business. Specifically, but not by

way of limitation, each Seller represents that it is not aware of any existing or threatened warranty or product liability issues that affect the Business or the Purchased Assets.

(h) Each Seller represents that it is unaware of any other information or facts which are of an adverse nature with respect to the Business, the Purchased Assets, or ownership of the Purchased Assets, or which Buyer would reasonably be expected to consider or that a reasonable person would expect to be disclosed in an arms-length transaction of the kind contemplated by this Agreement.

7. **Representations and Warranties of Buyer**. Buyer represents that this Agreement constitutes the legal, valid, and binding obligation of Buyer in accordance with the terms hereof. Buyer has all requisite power and authority, to execute, perform, carry out the provisions of, and consummate the transactions contemplated in this Agreement.

8. **Closing**. The closing of the transaction contemplated by this Agreement shall occur on the Effective Date of this Agreement and contemporaneously with the execution of this Agreement (the "**Closing Date**"). The effective time of closing shall be 12:01 a.m. on the Closing Date. Buyer shall be entitled to possession of the Purchased Assets from and after the Closing Date.

9. **Deliverables**. The Parties agree to make the following deliveries to each other on the Closing Date:

(a) On the Closing Date, each Seller shall deliver to Buyer an executed assignment and bill of sale in a mutually agreeable form, sufficient to transfer the Purchased Assets and Assumed Liabilities;

(b) Each Seller shall deliver to Buyer such other documents as Buyer may reasonably request for the purpose of assigning, transferring, granting, conveying, and confirming to Buyer or reducing to Buyer's possession the Purchased Assets;

(c) Buyer shall deliver to the Seller Parties such other documents as the Seller Parties may reasonably request to carry out the transactions contemplated under this Agreement;

10. **Conditions of Closing**. The obligations of Buyer and the Seller Parties to close on the transactions contemplated by this Agreement are subject to the satisfaction or waiver, on or prior to the Closing Date, of all of the following conditions:

(a) Truth of Representations and Warranties and Compliance with Obligations. The representations and warranties of Buyer and the Seller Parties herein shall be true in all material respects on the Closing Date with the same effect as though made at such time. Buyer and the Seller Parties shall have performed all material obligations and complied with all material covenants and conditions prior to or as of the Closing Date.

(b) Required Consents. All required consents shall have been received from any other parties whose approval is required to consummate the transaction contemplated herein. In the event that such approval is not obtained within 30 days after the Closing Date, this Agreement shall terminate, the Purchased Assets shall be returned to the Seller Parties, and the Buyer and Seller Parties shall be released from all obligations and liability under this Agreement.

(c) New Lease. The Empire Mall must enter into a new lease agreement with Buyer through which Buyer will lease the Business Location. In the event that such lease is not entered into within 30 days after the Closing Date, this Agreement shall terminate, the Purchased Assets shall be returned to the Seller Parties, and the Buyer and Seller Parties shall be released from all obligations and liability under this Agreement.

(d) Delivery of Documents. Each Party shall have delivered all documents required to be delivered at Closing.

11. **Post-Closing Obligations**. At any time and from time to time after the Closing Date, each of the Parties shall, upon request of any other Party hereto, execute, acknowledge and deliver all such further and other conveyances, assurances, records, and documents, and will take such actions consistent with the terms of this Agreement, as may be reasonably requested to carry out the transactions contemplated herein and to permit each of the Parties to enjoy its rights and benefits hereunder.

12. **Employees**. The Parties acknowledge that Buyer is the only employee of the Business. Buyer shall not be legally required to employ or assume any obligations or liabilities with respect to any employees of the Seller Parties, if any such employees exist.

13. **Indemnification; Remedies**.

(a) The Seller Parties. Subject to the other terms and conditions of this Section 13, the Seller Parties shall indemnify, defend, hold harmless Buyer from and against any and all losses, damages, liabilities, deficiencies, actions, judgments, interest, awards, penalties, fees, taxes (whether state, federal, or municipal), debts, obligations, fines, costs or expenses of whatever kind, including reasonable attorneys' fees and costs and expenses of litigation (collectively, "**Indemnified Liabilities**"), incurred or sustained by, or imposed upon, Buyer based upon, arising out of, with respect to or by reason of:

(i) the operation of the Business and the conduct thereof prior to the Closing Date;

(ii) the Seller Parties' use or ownership of the Purchased Assets prior to the Closing Date;

(iii) the Seller Parties' creditors, claimants, customers, suppliers, lessors,

lenders, employees or obligees (other than the Assumed Liabilities);

(iv) any inaccuracy in or breach of any of the representations or warranties of Seller contained in this Agreement; and

(v) any breach or non-fulfillment of any covenant, agreement or obligation to be performed by any Seller pursuant to this Agreement.

(b) Buyer. Subject to the other terms and conditions of this Section 13, Buyer shall indemnify, defend, and hold harmless the Seller Parties from and against any and all Indemnified Liabilities incurred or sustained by, or imposed upon, the Seller Parties based upon, arising out of or with respect to:

(i) Buyer's operation of the Business and the conduct thereof from and after the Closing Date;

(ii) Buyer's use or ownership of the Purchased Assets from and after the Closing Date;

(iii) Buyer's creditors, claimants, customers, suppliers, lessors, lenders, employees or obligees (including the Assumed Liabilities);

(iv) any inaccuracy in or breach of any of the representations or warranties of Buyer contained in this Agreement; and

(v) any breach or non-fulfillment of any covenant, agreement or obligation to be performed by Buyer pursuant to this Agreement.

(c) Nothing in this Section 13(c) shall limit any Party's right to seek and obtain any legal or equitable relief to which such Party shall be entitled.

(d) Buyer may, without notice, offset amounts owed by any of the Seller Parties to Buyer against amounts owed by Buyer to any of the Seller Parties under this Agreement or any other agreement between the parties.

14. **Miscellaneous**.

(a) Survival. All covenants, warranties, and representations made by the Parties hereunder, including specifically the indemnification obligations and the representations and warranties set forth in Sections 6 and 7 of this Agreement, shall survive closing and shall continue to remain in full force and effect thereafter.

(b) Notice. Any notice provided for or permitted herein or that may otherwise be appropriate may be delivered in person to any other Party or may be sent by United States certified mail, postage prepaid, at the address of the Parties as listed in the

introductory paragraph of this Agreement. Notice by certified mail shall be considered delivered 72 hours following the deposit thereof in any United States Post Office. A Party may change its address for notice by giving appropriate notice thereof in writing to the other Parties.

(c) Counterparts. This Agreement may be executed in any number of counterparts, each of which when executed and delivered shall be an original, and which may be submitted between the Parties through electronic mail or facsimile, but all the counterparts shall together constitute one and the same instrument. This Agreement shall be effective and binding upon all parties hereto as of the date hereof when all of the Parties have executed a counterpart of this Agreement.

(d) Successors and Assigns. None of the Seller Parties shall assign or transfer any of its rights or obligations hereunder without the prior written consent of Buyer. Buyer may assign its interest hereunder without the prior written consent of the Seller Parties to a corporation or limited liability company in which Buyer holds an ownership interest so long as such assignment does not release the initially-named Buyer from its obligations hereunder. This Agreement shall be binding upon and shall inure to the benefit of the parties hereto, their successors and assigns.

(e) Transaction Costs. Buyer will be responsible for all fees and expenses (including all fees of finders, attorneys and accountants) which are incurred by Buyer in connection with the transactions contemplated hereby. The Seller Parties will be responsible for all fees and expenses (including but not limited to the costs and fees of any attorneys, accountants or finders) incurred by the Seller Parties in connection with the transactions contemplated hereby.

(f) Governing Law. This Agreement and the legal relations between the parties shall be governed by and construed in accordance with the laws of the State of South Dakota, without giving effect to any choice or conflict of law provision or rule (whether of the State of South Dakota or any other jurisdiction) that would cause the application of the laws of any jurisdiction other than the State of South Dakota.

(g) Benefit. Nothing in this Agreement, express or implied, is intended to confer on any person other than the parties to this Agreement or their permitted successors or assigns, any rights, remedies, obligations or liabilities under or by reason of this Agreement.

(h) Invalid Provisions and Waiver. If any term, restriction, or covenant of this Agreement is deemed illegal or unenforceable, a court of competent jurisdiction shall have the power to modify such terms, restrictions, and covenants to the extent necessary to permit their enforceability and, in any event, all other terms, restrictions and covenants hereof shall remain unaffected to the extent permitted by law. No waiver of any provision of this Agreement shall be deemed to be a waiver of subsequent performance of the same provision of this Agreement or a waiver of any other provision of this Agreement.

(i) Entire Agreement; Waiver. This instrument, any Exhibits attached hereto, and any instruments or agreements to be delivered pursuant to the terms hereof (each of which is incorporated herein by this reference) contains the entire agreement of the parties. It may not be changed orally but only by an agreement in writing signed by the party against whom the enforcement of any waiver, change, modification, extension or discharge is sought. A waiver of any term or provision shall not be construed as a waiver of any other term or provision or as waiver of subsequent performance of the same provision of this Agreement.

[Signature page follows]

IN WITNESS WHEREOF, each of the parties hereto has caused this Amended and Restated Asset Purchase Agreement to be executed in the manner appropriate to each, to be effective as of the date first above written.

SELLER PARTIES:

ESTATE OF WILLIAM L. TINKCOM

_____

By: Gary Tinkcom, Personal Representative

ESTATE OF EARL G. NELSON

_____

By: Craig Nelson, Personal Representative

BUYER:

EDWARD K. WELCH

_____

Exhibit A

Excluded Assets

Exhibit B

Purchase Price Allocation

Furniture, Fixtures, Safes, and Equipment other than inventory	$25,000.00
Company Goodwill	$15,000.00
Inventory	$260,000.00

PURCHASE AGREEMENT

THIS PURCHASE AGREEMENT (this "**Agreement**") is made and entered into as of the ____ day of _____, 2022, by and between the ESTATE OF WILLIAM L. TINKCOM (the "**Tinkcom Estate**"), of 440 West Ivey Road, Huachuca City, Arizona 85616, the ESTATE OF EARL G. NELSON (the "**Nelson Estate,** and together with the Tinkcom Estate, the "**Seller Parties**"and each individually a "**Seller**"), of 14149 Crocus Way, Rosemount, Minnesota 55068, and EDWARD K. WELCH ("**Buyer**"), of 701 South Phillips Avenue, Sioux Falls, South Dakota 57104. Buyer and the Seller parties are sometimes referred to herein as the "**Parties**" and each individually as a "**Party**".

WITNESSETH:

WHEREAS, the Seller Parties own a retail coins and collectables store doing business under the name Coins & Collectables (the "**Business**") located at 1300 W. Empire Mall Place, Sioux Falls, South Dakota 57106 (the "**Business Location**");

WHEREAS, Buyer and William L. Tinkcom ("**Tinkcom**") executed that certain Business Purchase Agreement dated January 21, 2022 (the "**Original Agreement**"), pursuant to which Buyer agreed to purchase, and Tinkcom agreed to sell, substantially all of the assets of the Business;

WHEREAS, Tinkcom subsequesntly died on January 25, 2022; and further the Original Agreement did not include 50% Owner Earl Nelson Estate.

WHEREAS, the Seller Parties wish to sell, and Buyer wishes to purchase, substantially all of the assets of the Business pursuant to the terms and subject to the conditions set forth in this Agreement alone.

NOW, THEREFORE, for and in consideration of the premises and of the mutual covenants, conditions, and agreements set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereby agree as follows;

1. **Purchase and Sale of Assets.** The Seller Parties hereby agree to assign, sell, transfer, convey and deliver to Buyer. Buyer hereby agrees to purchase and take from the Seller the assets and liabilities of the "business" as set out below.

(a) All equipment and supplies of Seller Parties used by the Business and located at the Business Location as of the Effective Date, including without limitation the furniture, decorations, display cases, fixtures, equipment, lighting, electronic devices, computers, and supplies;

(b) Two safes located at the Business Location;

(c) All permits, licenses and approvals related to the Business;

(d) Seller Parties' intangible business assets and intellectual property, to include web domains, mailing lists used for email newsletters, web content, social media pages, logos, marketing materials, copyrights and trademarks (if any), and all rights associated with the Business name Coins & Collectables;

(e) Inventory of the Business on hand and on order as of the Closing Date. For purposes of this Agreement, the term **"Inventory"** shall refer to all coins, bullion bars, paper currency, painting, sculptures, other artwork, precious metals, scrap gold and silver, watches, silverware, junk silver, collectables, antiques, and all other inventory items of the business, whether such inventory is currently offered for sale in the operation of the business or placed in storage at the Business Location;

(f) All contracts with vendors of the Business, if any;

(g) All office and maintenance supplies, if any;

(h) The business phone number 605-361-0005, facsimile numbers;

2. **Excluded Assets.** Buyer and the Seller Parties agree that the Purchased Assets do not include, and shall exclude the First National Bank Checking Account #30204514, and any other assets located at the Business Location but described in Exhibit A. Buyer shall not negotiate any checks written on the account after January 21, 2022 and shall reimburse and pay to Seller Tinkcom the total amount of any and all checks negotiated after January 21, 2022.

3. **Assumed Liabilities; Allocation of Liabilities.**

(a) Except as expressly provided in the Agreement, Buyer is not assuming, and shall not be deemed to have assumed, any liabilities or obligations of the Seller Parties of any kind whatsoever, including without limitation, any obligation of the Seller Parties on the Closing Date for (i) accounts payable; (ii) employee wages or any employee benefits or deferred compensations plan of Seller; (iii) (a) any sales, use, excise taxes, income taxes, taxes based on or measured by income, or franchise taxes attributable to periods or evenst occurring or ending prior to the Closing Date.

(b) Subsequent to the Closing Date, Buyer shall be responsible for taxes, utilities (including all charges for electricity, water, telephone charges for the business phone number 605-361-0005, sewer, and internet), and similar items and expenses arising from the operation of the business after the Closing Date (the **"Assumed Liabilities"**).

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(c) The Seller Parties acknowledge that Buyer shall not be required to reimburse the Seller Parties for any prepaid expenses of the Business pertaining to rent or utilities charges corresponding with the months of February and March of 2022.

4. **Purchase Price.** The purchase price for the Purchased Assets shall be Three Hundred Thousand Dollars ($300,000.00) (the **"Purchase Price"**), with such payment to the Seller Parties occurring as follows:

(a) Half of the Purchase Price, in amount of $150,000.00, will be paid to the Nelson Estate and the other half of the Purchase Price, in an amount of $150,000.00 will be paid to the Tinkcom Estate as set forth in paragraph (c) below.

(b) On or before April 15, 2022, Buyer shall deliver to the Nelson Estate One Hundred and Fifty Thousand Dollars ($150,000.00) in cash, check, or other immediately available funds.

(c) Buyer will deliver to the Tinkcom Estate, at the address first listed above, thirty equal, monthly payments of principal only and no interest and in the amount of Five Thousand Dollars ($5,000.00) per month, with the first such payment being due May 1, 2022, and subsequent payments being due on the first date of each month thereafter, and with the final payment of any and all remaining principal being due and payable on June 1, 2026. Buyer shall have the right to fully or partially prepay the principal balance due at any time without penalty.

5. **Additional Purchase Price.** Buyer shall pay to Seller Tinkcom the total amount of checks written on the excluded account First National Bank Checking Account #30204514 (whether signed by Bill Tinkcom or Edward Welsh, dated and negotiated after January 21, 2022). As of this writing these total over $100,000.00. Once the total sum is determined that sum shall be added to the total sum to be paid to Seller Tinkcom in installments of $5,000.00 per month.

6. **Securing for Payments to be made to the William Tinkcom Estate.** Buyer shall create and execute a Security Agreement in favor of the Wiliam Tinkcom Estate granting the estate a secured interest in all of the business assets of the business as set out in Section 1 of this agreement and execute and file the necessary UCC documents to perfect said security interest in the collateral.

7. **Representations and Warranties of the Seller Parties.** Each Seller makes the following representations and warranties to Buyer, and each Seller further represents that the same shall be true as of the Closing Date:

(a) Each Seller represents that the Seller Parties are the true and correct owners of all right, title, and interest in and to the Purchases Assets, that such Seller owns a fifty percent (50%) interest in the Purchased Assets, that no other person other than the Seller Parties have any ownership interest in the Purchased Assets or the Business, and that such Seller has all

requisite power and authority to own such assets and to conduct the Business as it is now conducted.

(b) Each Seller represents that it holds title to the Purchased Assets free and clear of all liens, encumbrances, claims and security interests. Each Seller has full legal right to transfer and convey absolute ownership of the Purchased Assets to Buyer. Upon delivery of the Assets, Buyer will have good title to such Purchased Assets free and clear of all liens, claims and encumbrances.

(c) The Sellers are transferring all of their right title and interests in the business assets as is, with no warranties, guarantees or indemnification made either express or implied.

8. **Representations and Warranties of Buyer.** Buyer represents that this Agreement constitutes the legal, valid, and binding obligation of Buyer in accordance with the terms hereof. Buyer has all requisite power and authority, to execute, perform, carry out the provisions of, and consummate the transactions contemplated in this Agreement.

9. **Closing.** The closing of the transaction contemplated by this Agreement shall occur on the Effective Date of this Agreement and contemporaneously with the execution of this Agreement (the **"Closing Date"**). The effective time of closing shall be 12:01 a.m. on the Closing Date. Buyer shall be entitled to possession of the Purchased Assets from and after the Closing Date.

10. **Deliverables.** The Parties agree to make the following deliveries to each other on the Closing Date:

(a) On the Closing Date, each Seller shall deliver to Buyer an executed assignment and bill of sale in a mutually agreeable form, sufficient to transfer the Purchased Assets and Assumed Liabilities;

(b) The Buyer shall deliver to Seller Tinkcom an executed and signed Security Agreement and requested UCC documents.

11. **Conditions of Closing.** The obligations of Buyer and the Seller Parties to close on the transactions contemplated by this Agreement are subject to the satisfaction or waiver, on or prior to the Closing Date, of all of the following conditions:

(a) Truth of Representations and Warranties and Compliance with Obligations. The representations and warranties of Buyer and the Seller Parties herein shall be true in all material respects on the Closing Date with the same effect as though made at such time. Buyer and the Seller Parties shall have performed all material obligations and complied with all material covenants and conditions prior to or as of the Closing Date.

12. **PostClosing Obligations.** At any time and from time to time after the Closing Date, each of the Parties shall, upon request of any other Party hereto, execute, acknowledge and deliver all such further and other conveyances, assurances, records, and documents, and will take such actions consistent with their terms of this Agreement, as may be reasonably requested to carry out the transactions contemplated herein and to permit each of the Parties to enjoy its rights and benefits hereunder.

13. **Employee.** The Parties acknowledge that the Buyer is the only employee of the Business.

(a) Buyer. Subject to the other terms and conditions of this Section 13, Buyer shall indemnify, defend, and hold harmless the Seller Parties from and against any and all Indemnified Liabilities incurred or sustained by, or imposed upon, the Seller Parties based upon, arising out of or with respect to:

(i) Buyer's operation of the Business and the conduct thereof from and after the Closing Date; and his misconduct before Closing Date;

(ii) Buyer's use or ownership of the Purchased Assets from and after the Closing Date;

(iii) Buyer's creditors, claimants, customers, suppliers, lessors, lenders, employees or obligees (including the Assumed Liabilities);

(iv) any inaccuracy in or breach of any of the representations or warranties of Buyer contained in this Agreement; and

(v) any breach or non-fulfillment of any covenant, agreement or obligations to be performed by Buyer pursuant to this Agreement.

14. **Miscellaneous.**

(a) Notice. Any notice provided for or permitted herein or that may otherwise be appropriate may be delivered in person to any other Party or may be sent by United States certified mail, postage prepaid, at the address of the Parties as listed in the introductory paragraph of this Agreement. Notice by certified mail shall be considered delivered 72 hours following the deposit thereof in any United States Post Office. A Party may change its address for notice by giving appropriate notice thereof in writing to the other Parties.

(b) Counterparts. This Agreement may be executed in any number of counterparts, each of which when executed and delivered shall be an original, and which may be submitted between the Parties through electronic mail or facsimile, but all the counterparts shall together constitute one and the same instrument. This Agreement shall be effective and binding upon all parties

hereto as of the date hereof when all of the Parties have executed a counterpart of this Agreement.

(c) Successors and Assigns. None of the Seller Parties shall assign or transfer any of its rights of obligations hereunder without the prior written consent of Buyer. Buyer may assign its interest hereunder without the prior written consent of the Seller Parties to a corporation or limited liability company in which Buyer holds a controlling interest as long as such assignment does not release the initially-named Buyer from its obligations hereunder. This Agreement shall be binding upon and shall inure to the benefit of the parties hereto, their successors and assigns.

(d) Transactin Costs. Buyer will be responsible for all fees and expenses (including all fees of finders, attorneys and accountants) which are incurred by Buyer in connection with the transactions contemplated hereby. The Seller Parties will be responsible for all fees and expenses (including but not limited to the costs and fees of any attorneys, accountants or finders) incurred by the Seller Parties in connection with the transactions contemplated hereby.

(e) Governing Law. This Agreement and the legal relations between the parties shall be governed by and construed in accordance with laws of the State of South Dakota, without giving effect to any choice or conflict of law provision or rule (whether of the State of South Dakota or any other jurisdiction) that would cause the application of the laws of any jurisdiction other than the State of South Dakota.

(f) Benefit. Nothing in this Agreement, express or implied, is intended to confer on any person other than the parties to this Agreement or their permitted successors or assigns, any rights, remedies, obligations or liabilities under or by reason of this Agreement.

(g) Invalid Provisions and Waiver. If any term, restriction, or covenant of this Agreement is deemed illegal or unenforceable, a court of competent jurisdiction shall have the power to modify such terms, restrictions, and covenants to the extent necessary to permit their enforceability and, in any event, all other terms, restrictions and covenants hereof shall remain unaffected to the extent permitted by law. No waiver of any provision of this Agreement shall be deemed to be a waiver of subsequent performance of the same provision of this Agreement or a waiver of any other provision of this Agreement.

(h) Entire Agreement; Waiver. This instrument, any Exhibits attached hereto, and any instruments or agreements to be delivered pursuant to the terms hereof (each of which is incorporated herein by this reference) contains the entire agreement of the parties. It may not be changed orally but only by an agreement in wiring signed by the party against whom the enforcement of any waiver, change, modification, extension or discharge is sought. A waiver of any term or provision shall not be construed as a waiver of any other term or provision or as waiver of subsequent performance of the same provision of this Agreement.

IN WITNESS WHEREOF, each of the parties hereto has caused this Amended and Restated Asset Purchase Agreement to be executed in the manner appropriate to each, to be effective as of the date first above written.

SELLER PARTIES:

ESTATE OF WILLIAM L. TINKCOM

_____

By: Gary Tinkcom, Personal Representative

ESTATE OF EARL G. NELSON

_____

By: Craig Nelson, Personal Representative

BUYER:

EDWARD K. WELCH

_____

EXHIBIT A

Excluded Assets

First National Bank Checking
Account #30204514

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Exhibit D

STATE OF SOUTH DAKOTA) :SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
In the Matter of the Estate of WILLIAM LEROY TINKCOM, Deceased.	49PRO. 22-36 INVENTORY

The following is an inventory of the property owned by the Decedent at the time of death, together with the type and amount of any encumbrance existing with reference to any item. Where applicable, the name and address of appraisers who have appraised items on the Inventory are listed.

Item No.	Description of Asset	Fair Market Value at Date of Death
1)	Household goods	$ 1,000.00
2)	Personal art objects	$ 3,500.00
3)	Coins & Collectibles Checking Acct: First National Bank in Sioux Falls	$356,092.78
4)	*Coins & Collectibles Business Sale	$358,547.00
	Total Beginning Assets	$719,139.78
Other Assets		
	**(5) Krugerand Gold Coins, each 1 oz. Carol Nelson has in her possession which she has not returned	$ 8,945.00
		$728,084.78

*Coins and Collectibles business was sold 20% down and the remainder in 60 installments, ending in May, 2027

**Gold Coins not yet recovered from Carol Nelson

GROSS VALUE OF DECEDENT'S ESTATE $728,084.78

Mortgages, Liens, and Other Encumbrances (List encumbrances on any of the items set forth above and specifically reference the item subject to the encumbrance)

$ -0-

Ref. Item Appraised	Appraiser(s)	Address
	Not Applicable	

NET VALUE OF DECEDENT'S ESTATE $728,084.78

Dated: 7/25/2022

Gary Tinkcom PR

Gary Tinkcom - Personal Representative

Daniel J. Nichols
Attorney for Personal Representative
Nichols & Rabuck, P.C.
427 N. Minnesota Ave. #101
Sioux Falls, SD 57104-2444
(605)332-6803

From: Justin Smith
To: "Dan Nichols"
Cc: Anna Wojciechowski
Bcc: Justin A. Bergeson; "Craig Nelson"; "afreed2020@gmail.com"; ctmbethmd@gmail.com
Subject: RE: Estate of William Tinkcom / Estate of Earl Nelson
Date: Tuesday, June 21, 2022 10:12:00 AM
Attachments: image001.png
image002.png
image003.png
image004.png
image005.png
image006.png
image007.png
J.Smith Email.pdf
image008.png
image009.png
image010.png
image011.png

Dear Dan,

I was out of the office last week, but have now reviewed your e-mail. I appreciate the records you provided, particularly the Tinkcom Profit and Loss Statement for 2009. It would be helpful to also have copies of the following records:

- Tinkcom Profit and Loss Statements for 2005-2008
- Checks 10643 and 10778 from 10/12/2009 and 12/03/2009, respectively
- William Tinkcom Income Tax Returns (complete) for 2005-2009
- Bank records showing payments of any kind from Earl Nelson to William Tinkcom in 2005 (including copies of any check(s) written by Nelson to Tinkcom)

The content of these additional records may provide more detail on the "Repayment of Loan" items in the records you provided last week. As to the balance of the items raised in your e-mail, I will discuss with my clients and get back to you ASAP. Thank you.

avatar

Justin G. Smith

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www.woodsfuller.com

From: Dan Nichols [mailto:dan@nicholsrabuck.com]
Sent: Thursday, June 16, 2022 11:33 AM
To: Justin Smith <Justin.Smith@woodsfuller.com>
Subject: Re: Estate of William Tinkcom / Estate of Earl Nelson

I talked to my client about your requests for documents. I enclose a copy of the Department of Revenue Sales Tax license showing licensing for Coins and Collectibles using William Tinkcom's name issued 1/23/2006, the front page of William Tinkcom's 2006 tax return, showing no partnership; second hand goods license, the profit and loss statement for 2009 which under expenses shows a loan paid in the amount of $50,000.00, to Earl Nelson and a check ledger statement showing $20,000.00 paid in October 2009 and $30,000.00 paid in December of 2009, paying Earl in full. There is no mention of Earl Nelson in any of the other business documents found by my client at Bill's residence or place of business. Regarding your statement that the estate acknowledged co-ownership by the Nelsons of Coins and Collectibles, here is some background. The personal representative, Gary Tinkcom, is the deceased's brother. He lives in the Tucson area. He and his brother were not close and Bill Tinkcom did not share with his brother how he ran his business and who was involved with the business. When Gary came to Sioux Falls, he knew where his brother lived and where his business was and not much more than that. Going through his brother's papers, he came across two documents, one a copy of the 2005 document that you have and the death bed sales contract Bill made with Eddie Welsh for Eddie to buy the business. When he showed the 2005 document to me, we decided that for now we would include the Nelsons in the discussions with Eddie. Eddie told Gary that Bill had never mentioned to him while he was employed there that he had a partner. During negotiations with Eddie, my client made several attempts to contact Craig and Carol Nelson. He left messages but no replies. We contacted Gary Ward, Nelsons' attorney, but still no response.

In the meantime, trying to get Bill's tax returns prepared and talking with Gene Mogen, Bill's tax preparer, Gary was told that Bill had never filed a partnership return. All the returns were individual as sole proprietor, with a Schedule C. This information, plus the Nelsons not returning calls or responding to requests for information, got Gary to thinking maybe Earl wasn't a partner after all. When the probate file and the Will were reviewed and there was no mention of an interest in the Coins and Collectible business in the Will or the probate file, that sparked a review of Bill's business records which revealed that Bill paid off a debt in 2009 of exactly the amount owed Earl. Which explains why Earl did not mention any interest in Coins and Collectibles in his Will and why there is no mention of it in his estate documents. Earls representatives did not file the required Inventory. The estate was not closed except by the Clerk because of no activity.

One final matter, Carol Nelson went into the Coins and Collectibles store before it was sold to Eddie and made threats that the Nelsons would sue Eddie and otherwise make his life miserable if he didnt give her something right then and there. So to get her out of the store and under duress he gave her 5 gold Krueggerand coins. Just one problem, those coins weren't Eddies to give. Since the sale to Eddie was not finalized at that point, those coins belonged to the Bill Tinkcom's estate. Please ask your client to return them to this office. Dan N

NICHOLS & RABUCK, P.C.

Daniel J. Nichols, Partner
427 N. Minnesota Ave.
Sioux Falls, SD 57104
phone: (605) 332-6803
fax: (605) 332-3692
www.nicholsrabuck.com

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On Wed, Jun 8, 2022 at 6:27 AM Justin Smith <Justin.Smith@woodsfuller.com> wrote:

> Dear Dan,
>
> The probate for the Estate of Earl Nelson remains open. It was never closed pursuant to the Uniform Probate Code (SDCL Ch. 29A-3). Regardless, I represent the heirs to Earl Nelson, as well as the Estate.
>
> I have requested copies of the records on which the Tinkcom Estate relies in alleging that Earl Nelson's ownership interest was terminated. You have referred specifically to a record of some payment from Mr. Tinkcom to Mr. Nelson around 2009. In your e-mail below, you also seem to reference the following:

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- Personal tax returns of William Tinkcom from 2005 – 2021
- Business tax returns for Coins & Collectibles from 2005 – 2021 (if applicable)
- Business licensing records for Coins & Collectibles
- Lease Agreement for Coins & Collectibles (Empire Mall)

Is the Tinkcom Estate prepared to share copies of the pertinent records at this time? Despite formerly acknowledging co-ownership by the Nelson Estate, including in February of this year, it now appears the Tinkcom Estate will oppose paying anything to the Nelson Estate. My clients and I may be left with no choice but to initiate litigation. Thank you.

avatar

Justin G. Smith

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P (605) 978 0634 F (605) 339 3357
300 S Phillips Ave., Suite 300, Sioux Falls, SD 57104
www.woodsfuller.com

From: Dan Nichols [mailto:dan@nicholsrabuck.com]
Sent: Monday, June 6, 2022 11:31 AM
To: Justin Smith <Justin.Smith@woodsfuller.com>
Subject: Re: Estate of William Tinkcom / Estate of Earl Nelson

Justin: Have you reopened the estate? It was administratively closed by the Clerk several years ago, so to our knowledge there is no estate to represent. Are you representing any of Earl Nelson's children? I agree that this matter could be handled informally. But I need to know specifically who the opposing parties are and if the estate has been reopened, if that is even possible. Earl's "ownership interest" in Coin's and Collectibles is not mentioned in his will, which he

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executed in January of 2013, just two months before he died. He did mention duck decoys and two walnut headboards and nightstands, but not a 50% interest in Coins and Collectibles? Seems kinda odd to me. Also if he did own this interest, why weren't partnership returns prepared all these years. And why didn't he share the income tax and payroll tax liability of the company. Eddie Welsh, Bill Tinkcom's employee for a few years before Bill's death has/had no knowledge that Earl was an owner of the business. Earl's name does not appear on any licensing for Coins and Collectibles. Earl's name did not appear on the lease at the Empire Mall. The Mall requires all ownership to be on the lease. This and many other circumstances leads us to believe that if Earl was an owner that status ended some time ago. Dan N

NICHOLS & RABUCK, P.C.

Daniel J. Nichols, Partner
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Sioux Falls, SD 57104
phone: (605) 332-6803
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On Mon, Jun 6, 2022 at 10:11 AM Justin Smith <Justin.Smith@woodsfuller.com> wrote:

Dear Mr. Nichols,

Filed: 8/18/2023 11:12 AM CST Minnehaha County, South Dakota 49CIV23-001684

I apologize if my e-mail below was unclear. I have been retained by the Estate of Earl Nelson in this matter. We are requesting copies of the records I have outlined as part of the evaluation of this matter. There appears to be ample evidence of the co-ownership of the business, even beyond the Acknowledgement signed by William Tinkcom in 2005. However, when we spoke by phone, it sounded like all parties agreed Earl Nelson had owned half of Coins & Collectibles (at least at one time). The dispute you raised was whether that co-ownership terminated sometime between 2005 and the death of Mr. Tinkcom. Does the Tinkcom Estate now dispute that Earl Nelson ever owned half of the business?

I do not consider my requests to be a "fishing expedition." We have asked for all of the records and information informally to potentially save the parties time and expense. If the Tinkcom Estate had provided some type of authoritative evidence, litigation may not have been pursued. However, your e-mail indicates you require formal proceedings before providing any materials. Even then, you indicate the Tinkcom Estate may not provide relevant materials and information. With this in mind, my clients and I are likely left with no choice but to pursue formal proceedings. Thank you.

avatar

Justin G. Smith

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From: Dan Nichols [mailto:dan@nicholsrabuck.com]
Sent: Sunday, June 5, 2022 7:07 PM
To: Justin Smith <Justin.Smith@woodsfuller.com>
Subject: Re: Estate of William Tinkcom / Estate of Earl Nelson

Filed: 8/18/2023 11:12 AM CST Minnehaha County, South Dakota 49CIV23-001684

Dear Mr. Smith: Have you been retained by the Nelsons and if so by whom? I do not provide materials from clients unless you have been formally retained and note your appearance,if then. I have already discussed this matter with you informally. I do not not accommodate fishing expeditions. What does your client(s) have to substantiate his/their claim of ownership of the business other than the 17 year old document. Please advise. Dan Nichols

NICHOLS & RABUCK, P.C.

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On Fri, Jun 3, 2022 at 4:32 PM Justin Smith <Justin.Smith@woodsfuller.com> wrote:

Dear Mr. Nichols,

You and I spoke on May 27, 2022, regarding the Estates of William Tinkcom and Earl Nelson. I have delved deeper into the background of this matter since our call. As we discussed, Earl Nelson owned a fifty-percent interest in Coins & Collectibles. When we spoke by phone, you said the Tinkcom Estate now disputes that the Nelson Estate still has any ownership interest in the business. In particular, you referenced a notation in some type of record

allegedly showing a payment by Mr. Tinkcom to Mr. Nelson. I requested copies of this and any other records on which your client relies to support the position that the Nelson Estate has no further interest in Coins & Collectibles. You said you would talk with Gary Tinkcom, the Personal Representative of his brother's estate, about providing me with the records. I have not heard from you since our call.

During our call, you also told me that the Estate of William Tinkcom "made its own deal with Edward Welch" to unilaterally sell the business. It appears that unilateral deal was made without permission or input from the Nelson Estate. I presume this also means your client does not intend to include the Nelson Estate in any sale proceeds from the business. My clients had been included in all the negotiations and draft agreements related to this sale, with all parties agreeing the Nelson Estate owns half the business. Now they have learned the Nelson Estate was cut out without notice or explanation.

From my review of this matter, it appears the Nelson heirs are entitled to half the value of the business. However, before asserting formal claims through litigation, I wanted to informally request additional information. Please send me copies of any records purportedly showing that the Estate of Earl Nelson no longer owns an interest in Coins & Collectibles. It would also be helpful to have copies of any other records you feel weigh against any claims by Mr. Nelson's Estate. For example, it is my understanding that Mr. Nelson had valuables stored at the business that later went missing. The more records and information we receive, the better my clients can evaluate whether and to what extent to make claims against the Tinkcom Estate.

If the Tinkcom Estate is unwilling to share information and discuss this matter informally, we will pursue discovery after filing suit. I look forward to hearing from you. Thank you.

avatar

Justin G. Smith

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Filed: 8/18/2023 11:12 AM CST Minnehaha County, South Dakota 49CIV23-001684

South Dakota Codified Laws
Title 15. Civil Procedure
Chapter 15-2. Limitation of Actions Generally (Refs & Annos)

SDCL § 15-2-13

15-2-13. Contract obligation or liability--Statutory liability--Trespass--Personal property--Injury to noncontract rights--Fraud--Setting aside corporate instrument

Currentness

Except where, in special cases, a different limitation is prescribed by statute, the following civil actions other than for the recovery of real property can be commenced only within six years after the cause of action shall have accrued:

(1) An action upon a contract, obligation, or liability, express or implied, excepting those mentioned in §§ 15-2-6 to 15-2-8, inclusive, and subdivisions 15-2-15(3) and (4);

(2) An action upon a liability created by statute other than a penalty or forfeiture; excepting those mentioned in subdivisions 15-2-15(3) and (4);

(3) An action for trespass upon real property;

(4) An action for taking, detaining, or injuring any goods or chattels, including actions for specific recovery of personal property;

(5) An action for criminal conversation or for any other injury to the rights of another not arising on contract and not otherwise specifically enumerated in §§ 15-2-6 to 15-2-17, inclusive;

(6) An action for relief on the ground of fraud, in cases which heretofore were solely cognizable by the court of chancery;

(7) An action to set aside any instrument executed in the name of a corporation on the ground that the corporate charter had expired at the time of the execution of such instrument.

Credits
Source: SDC 1939, § 33.0232 (4); SL 1941, ch 151; SL 1945, ch 144; SL 1945, ch 145, § 1; SL 1947, ch 153, § 2; SL 1953, ch 198, § 1.

Editors' Notes

COMMISSION NOTE

The Code Commission changed "subdivisions 15-2-15(4) and (5)" to "subdivisions 15-2-15(3) and (4)" near the end of subdivisions (1) and (2) of this section. Former subdivision 15-2-15(3) was repealed in 1976, and in 1984 subdivisions 15-2-15(4) and (5) were renumbered as subdivisions 15-2-15(3) and (4). The changes to this section reflect that renumbering.

Notes of Decisions (154)

S D C L § 15-2-13, SD ST § 15-2-13
Current through the 2024 Regular Session, Ex. Ord. 24-1, and Supreme Court Rule 24-04

End of Document

South Dakota Codified Laws
Title 15. Civil Procedure
Chapter 15-6. Rules of Procedure in Circuit Courts (Refs & Annos)
III. Pleadings and Motions
15-6-12--Defenses and Objections (Refs & Annos)

SDCL § 15-6-12(c)

15-6-12(c). Motion for judgment on the pleadings

Currentness

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in § 15-6-56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by § 15-6-56.

Credits

Source: SDC 1939 & Supp 1960, § 33.1002; SD RCP, Rule 12 (c), as adopted by Sup. Ct. Order March 29, 1966, effective July 1, 1966.

Notes of Decisions (20)

S D C L § 15-6-12(c), SD ST § 15-6-12(c)
Current through the 2024 Regular Session, Ex. Ord. 24-1, and Supreme Court Rule 24-04

End of Document

South Dakota Codified Laws
Title 48. Partnerships (Refs & Annos)
Chapter 48-7a. Uniform Partnership Act (Refs & Annos)
Article IV. Relations of Partners to Each Other and to Partnership

SDCL § 48-7A-405

48-7A-405. Actions by partnership and partners

Currentness

(a) A partnership may maintain an action against a partner for a breach of the partnership agreement, or for the violation of a duty to the partnership, causing harm to the partnership.

(b) A partner may maintain an action against the partnership or another partner for legal or equitable relief, with or without an accounting as to partnership business, to:

(1) Enforce the partner's rights under the partnership agreement;

(2) Enforce the partner's rights under this Act, including:

(i) The partner's rights under § 48-7A-401, 48-7A-403, or 48-7A-404;

(ii) The partner's right on dissociation to have the partner's interest in the partnership purchased pursuant to § 48-7A-701 or enforce any other right under Article 6 or 7; or

(iii) The partner's right to compel a dissolution and winding up of the partnership business under § 48-7A-801 or enforce any other right under Article 8; or

(3) Enforce the rights and otherwise protect the interests of the partner, including rights and interests arising independently of the partnership relationship.

(c) The accrual of, and any time limitation on, a right of action for a remedy under this section is governed by other law. A right to an accounting upon a dissolution and winding up does not revive a claim barred by law.

Credits
Source: SL 2001, ch 249, § 405.

Notes of Decisions (1)

S D C L § 48-7A-405, SD ST § 48-7A-405
Current through the 2024 Regular Session, Ex. Ord. 24-1, and Supreme Court Rule 24-04

End of Document

South Dakota Codified Laws
Title 48. Partnerships (Refs & Annos)
Chapter 48-7a. Uniform Partnership Act (Refs & Annos)
Article VII. Partner's Dissociation when Business Not Wound up

SDCL § 48-7A-701

48-7A-701. Purchase of dissociated partner's interest

Currentness

(a) If a partner is dissociated from a partnership without resulting in a dissolution and winding up of the partnership business under § 48-7A-801, the partnership shall cause the dissociated partner's interest in the partnership to be purchased for a buyout price determined pursuant to subsection (b).

(b) The buyout price of a dissociated partner's interest is the amount that would have been distributable to the dissociating partner under subsection 48-7A-807(b) if, on the date of dissociation, the assets of the partnership were sold at a price equal to the greater of the liquidation value or the value based on a sale of the entire business as a going concern without the dissociated partner and the partnership were wound up as of that date. Interest must be paid from the date of dissociation to the date of payment.

(c) Damages for wrongful dissociation under subsection 48-7A-602(b), and all other amounts owing, whether or not presently due, from the dissociated partner to the partnership, must be offset against the buyout price. Interest must be paid from the date the amount owed becomes due to the date of payment.

(d) A partnership shall indemnify a dissociated partner whose interest is being purchased against all partnership liabilities, whether incurred before or after the dissociation, except liabilities incurred by an act of the dissociated partner under § 48-7A-702.

(e) If no agreement for the purchase of a dissociated partner's interest is reached within one hundred twenty days after a written demand for payment, the partnership shall pay, or cause to be paid, in cash to the dissociated partner the amount the partnership estimates to be the buyout price and accrued interest, reduced by any offsets and accrued interest under subsection (c).

(f) If a deferred payment is authorized under subsection (h), the partnership may tender a written offer to pay the amount it estimates to be the buyout price and accrued interest, reduced by any offsets under subsection (c), stating the time of payment, the amount and type of security for payment, and the other terms and conditions of the obligation.

(g) The payment or tender required by subsection (e) or (f) must be accompanied by the following:

(1) A statement of partnership assets and liabilities as of the date of dissociation;

(2) The latest available partnership balance sheet and income statement, if any;

(3) An explanation of how the estimated amount of the payment was calculated; and

(4) Written notice that the payment is in full satisfaction of the obligation to purchase unless, within one hundred twenty days after the written notice, the dissociated partner commences an action to determine the buyout price, any offsets under subsection (c), or other terms of the obligation to purchase.

(h) A partner who wrongfully dissociates before the expiration of a definite term or the completion of a particular undertaking is not entitled to payment of any portion of the buyout price until the expiration of the term or completion of the undertaking, unless the partner establishes to the satisfaction of the court that earlier payment will not cause undue hardship to the business of the partnership. A deferred payment must be adequately secured and bear interest.

(i) A dissociated partner may maintain an action against the partnership, pursuant to subsection 48-7A-405(b)(2)(ii), to determine the buyout price of that partner's interest, any offsets under subsection (c), or other terms of the obligation to purchase. The action must be commenced within one hundred twenty days after the partnership has tendered payment or an offer to pay or within one year after written demand for payment if no payment or offer to pay is tendered. The court shall determine the buyout price of the dissociated partner's interest, any offset due under subsection (c), and accrued interest, and enter judgment for any additional payment or refund. If deferred payment is authorized under subsection (h), the court shall also determine the security for payment and other terms of the obligation to purchase. The court may assess reasonable attorney's fees and the fees and expenses of appraisers or other experts for a party to the action, in amounts the court finds equitable, against a party that the court finds acted arbitrarily, vexatiously, or not in good faith. The finding may be based on the partnership's failure to tender payment or an offer to pay or to comply with subsection (g).

Credits
Source: SL 2001, ch 249, § 701.

S D C L § 48-7A-701, SD ST § 48-7A-701
Current through the 2024 Regular Session, Ex. Ord. 24-1, and Supreme Court Rule 24-04

End of Document

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 30698

CRAIG NELSON AND **AMY FREED**, AS CO-PERSONAL REPRESENTATIVES OF THE ESTATE OF EARL NELSON

Plaintiffs and Appellants,

VS.

GARY TINKCOM, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF WILLIAM TINKCOM, **EDDIE WELCH,** AND **MERE COIN COMPANY, LLC.** D/B/A **COINS & COLLECTIBLES,**

Defendants and Appellees.

APPEAL FROM THE SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE DOUGLAS P. BARNETT
CIRCUIT COURT JUDGE

BRIEF OF APPELLEES

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Filed: 11/4/2024 1:28 PM CST Supreme Court, State of South Dakota #30698

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JURISDICTIONAL STATEMENT

Appellants Craig Nelson and Amy Freed, as Co-Personal Representatives of the Estate of Earl Nelson, appeal the Circuit Court's Order and Judgment of Dismissal with Prejudice dated April 2, 2024, and filed on April 3, 2024. Notice of Entry of the Order and Judgment of Dismissal with Prejudice was filed on April 3, 2024, and Notice of Appeal was filed by Appellants on May 2, 2024, and served on Appellees the same day.

STATEMENT OF THE ISSUES

I. Whether the Circuit Court may rule on a defendant's motion for judgment on the pleadings when it was filed prior to an answer.

The Circuit Court properly ruled on the Motion for Judgment on the Pleadings, as moved by the Defendants. The standard applied when a defendant moves for judgment on the pleadings is functionally identical to a motion to dismiss for failure to state a claim upon which relief may be granted. The Circuit Court properly assumed all facts alleged by the plaintiffs that were material to the ruling were true, but determined the facts as alleged in the Plaintiffs' First Amended Complaint showed Plaintiffs' claims were barred by the applicable statute of limitations.

SDCL § 15-6-12(c)

SDCL § 15-6-12(b)(5)

Slota v. Imhoff & Assoc., P.C., 2020 S.D. 55, ¶ 12, 949 N.W.2d 869, 873

Guthmiller v. Deloitte & Touche, LLP, 2005 S.D. 77, ¶ 5, 699 N.W.2d 493, 496

Poehl v. Countrywide Home Loans, Inc., 528 F.3d 1093, 1096 (8th Cir. 2008)

II. Whether the statute of limitations expired on a dissociated partner's claim for a buyout of his interest in the partnership or a distribution of his share of partnership when his claims were not asserted for more than ten years after his dissociation from the partnership.

The Circuit Court properly held a dissociated partner's claim accrues at the time of dissociation, and the six-year statute of limitations expired prior to commencement of the action asserting the dissociated partner's claims.

SDCL § 48-7A-701

SDCL § 48-7A-807(b)

SDCL § 48-7A-405(b)(2)

SDCL § 15-2-13

In re Estate of French, 2021 S.D. 20, ¶ 16 n.5, 956 N.W.2d 806, 810 n.5

Spencer v. Estate of Spencer, 2008 S.D. 129, ¶ 16, 759 N.W.2d 539, 544

III. Whether the statute of limitations expired prior to a personal representative commencing an action on behalf of the decedent's estate to recover personal property left at a premises when the personal representative failed to assert the claim for more than ten years following appointment as personal representative.

The Circuit Court held the statute of limitations expired no later than seven years after the personal representatives were appointed and therefore the conversion claims were barred by the applicable statute of limitations.

SDCL § 15-2-13(4)

SDCL § 29A-3-709

Estate of Thacker v. Timm, 2023 S.D. 2, ¶ 41, 984 N.W.2d 679, 691

Strassburg v. Citizens State Bank, 1998 S.D. 72, ¶ 9, 581 N.W.2d 510, 514

IV. Whether a plaintiff may obtain equitable relief from enforcement of a statute of limitations for payment of a dissociated partner's buyout interest when the plaintiff was aware of the right to payment but was told by the remaining partner the plaintiff would be paid at some indeterminate time in the future.

The Circuit Court held the plaintiffs had not alleged facts that would support finding equitable doctrines excused enforcement of the applicable statute of limitations.

SDCL § 15-2-13

In re Estate of French, 2021 S.D. 20, ¶ 20, 956 N.W.2d 806, 811

Anson v. Star Brite Inn Motel, 2010 S.D. 73, ¶¶ 37–38, 788 N.W.2d 822, 831–32 (Konenkamp, J., concurring)

Spencer v. Estate of Spencer, 2008 S.D. 129, ¶¶ 19–21, 759 N.W.2d 539, 545

STATEMENT OF THE CASE

This appeal is from a decision by the Second Judicial Circuit Court, Minnehaha County, the Honorable Douglas P. Barnett presiding. The order being appealed granted the motion for judgment on the pleadings filed by Defendants Eddie Welch, Mere Coin Company, LLC, and Gary Tinkcom, personal representative of the Estate of William Tinkcom. The order dismissed Plaintiffs Craig Nelson and Amy Freed's claims with prejudice.

STATEMENT OF FACTS[1]

In November 2005, William "Bill" Tinkcom purchased a 50% interest in Coins & Collectibles ("the Business") from Richard Stelzer. First Amended Complaint ¶ 7 (S.R. 59) (hereinafter "Amended Complaint"). Dr. Earl Nelson ("Nelson") allegedly provided $50,000.00 for Tinkcom's purchase of the ownership interest. Amended Complaint ¶ 8 (S.R. 59). Tinkcom agreed to make Nelson a 50% owner in the Business in exchange for the payment. Amended Complaint ¶ 9 (S.R. 59). The parties memorialized the agreement in writing in an "Acknowledgement of Contribution to Purchase of Business"

[1] Due to the procedural posture of this matter, on appeal from the Circuit Court's grant of a motion for judgment on the pleadings, the Statement of Facts includes allegations as pleaded in Plaintiffs' and Appellants' First Amended Complaint. Recitation of these allegations is not intended by Welch or any Appellee as an admission of the truth of such pleadings.

dated November 25, 2005. Amended Complaint ¶ 10, Ex. A (S.R. 59–60, 72–73). This agreement made nearly twenty years ago between Nelson and Tinkcom is at the heart of the dispute in this action.

Following the purchase of the business, Nelson and Tinkcom owned the Business as equal partners. Amended Complaint ¶ 11 (S.R. 60). Tinkcom managed the day-to-day activities of the Business and accepted several short-term loans from Nelson to keep the Business active. Amended Complaint ¶ 12 (S.R. 60). Nelson also contributed to the Business by purchasing merchandise for the Business to sell, advising Tinkcom, and helping Tinkcom with conducting day-to-day operations. Amended Complaint ¶ 12 (S.R. 60).

Nelson died on March 13, 2013. Amended Complaint ¶ 16 (S.R. 60). Plaintiffs and Appellants Craig Nelson and Amy Freed ("Nelson Children") were appointed co-personal representatives of Nelson's estate ("Nelson Estate"). Amended Complaint ¶¶ 1–2 (S.R. 58). Tinkcom operated the Business after Nelson's death, and he had multiple verbal discussions with the Nelson Children. Amended Complaint ¶ 17 (S.R. 60). According to the Nelson Children, Tinkcom told them their father was a 50% owner of the Business, and that when Tinkcom sold the business or died he would pay the Nelson Estate their father's share. Amended Complaint ¶ 17 (S.R. 60).

Tinkcom operated the Business until his death on January 25, 2022. Amended Complaint ¶¶ 17–18 (S.R. 60–61). Prior to Tinkcom's death, he negotiated with Eddie Welch ("Welch"), a longtime employee of the Business, for the sale of the Business. Amended Complaint ¶ 19 (S.R. 61). The sale of the Business had not closed at the time Tinkcom died, and after Tinkcom's death, Welch purchased the business from the

Tinkcom Estate. Amended Complaint ¶ 23 (S.R. 61). Welch subsequently transferred the Business to Appellee Mere Coin Company, LLC, an entity of which he is an owner.[2] The Nelson Estate received no payments or proceeds from the sale, either before or after Tinkcom's death. Amended Complaint ¶ 24 (S.R. 61).

In addition, Nelson kept "certain valuable coins and collectible items," including gold Krugerrands (a South African gold coin) at the Business for safekeeping. Amended Complaint ¶¶ 25, 26 (S.R. 62). After Nelson's death, the Nelson children "entrusted the valuables . . . at the premises of the Business for safe keeping." Amended Complaint ¶ 26 (S.R. 62). After Tinkcom died, the Nelson children discovered "some" of these unspecified valuables, including gold Krugerrands, were missing, and that Welch or the Tinkcom Estate were asserting title to them. Amended Complaint ¶¶ 27–29 (S.R. 62).

The Nelson children, as co-personal representatives of the Nelson Estate, served a Complaint on Welch on June 20, 2023. Welch Admission of Service (S.R. 52, 55). Gary Tinkcom, as personal representative of the Tinkcom Estate, was served on August 11, 2023. Tinkcom Admission of Service (S.R. 105). The Nelson Estate then filed its First Amended Complaint on August 18, 2023. Amended Complaint (S.R. 58).

The Amended Complaint pled nine counts in total. The first six counts were asserted against the Tinkcom Estate:

- Count 1: Breach of contract seeking Nelson's alleged fifty percent interest in the Business;
- Count 2: Breach of covenant of good faith seeking the value of Nelson's alleged ownership interest in the Business;
- Count 3: Breach of implied contract seeking compensation for Nelson's alleged contribution to the Business;

[2] Mere Coin Company and Welch collectively are referred to as "Welch."

- Count 4: Unjust enrichment seeking disgorgement of the benefit of Nelson's alleged contributions to the Business;
- Count 5: Promissory estoppel seeking damages arising out of Nelson's alleged contributions to the Business;
- Count 6: Breach of fiduciary duty seeking damages for Tinkcom's alleged failure to compensate Nelson or his Estate for Nelson's alleged interest in the Business.

Amended Complaint at 5–9 (S.R. 62–66). The Nelson Estate pled two additional counts against all defendants alleging interference with Nelson or the Nelson Estate's expectancy with respect to his interest in the business:

- Count 7: Tortious interference with Nelson's business expectancy for his interest in the business;
- Count 8: Civil conspiracy to interfere with Nelson's business expectancy for this interest in the business.

Amended Complaint at 10–11 (S.R. 67–68). Count 9 of the Amended Complaint alleged conversion against all defendants for the recovery of or damages relating to the valuables allegedly left at the premises of the business. Amended Complaint at 12 (S.R. 69).

Welch moved for judgment on the pleadings and alternatively for dismissal for failure to state a claim on August 30, 2023. Motion for Judgment on the Pleadings and Motion to Dismiss (S.R. 108). Two days later, the Tinkcom Estate filed a motion for judgment on the pleadings on the same grounds as Welch. Motion for Judgment on the Pleadings (S.R. 124). The Circuit Court heard argument on the motions in two hearings in October 2023 and issued its Memorandum Decision and Order Granting Defendants' Motion for Judgment on the Pleadings on March 28, 2024. Opinion and Order Granting Defendants' Motion for Judgment on the Pleadings (S.R. 170) (hereinafter, "Memorandum Opinion"). The Nelson Estate appealed, and the defendants request this Court affirm the Circuit Court's decision.

ARGUMENT

I. Defendants Properly Raised of the Statute of Limitations Defense

The Circuit Court found the applicable statutes of limitations barred the Nelson Estate's claims against Appellees and properly granted Welch's Motion for Judgment on the Pleadings. The Circuit Court could have just as easily granted the Motion to Dismiss for Failure to State a Claim. It makes no difference whether the Circuit Court found its authority to dismiss the Nelson Estate's Complaint in SDCL § 15-6-12(b)(5) (the provision for a motion to dismiss) or SDCL § 15-6-12(c) (the provision for a motion for judgment on the pleadings) because, as the Nelson Estate acknowledges, the legal standard applied in either motion is essentially "identical." Appellants' Brief at 11. The claim the Circuit Court could not grant the Motion for Judgment on the Pleadings elevates form over substance. The substantive basis for the Circuit Court's decision is the same, and the Circuit Court correctly applied the law.

Welch contemporaneously moved the Circuit Court to dismiss the First Amended Complaint in two alternative motions: (1) judgment on the pleadings and (2) failure to state a claim. Motion for Judgment on the Pleadings and Motion to Dismiss (S.R. 108). The Tinkcom Estate also moved for judgment on the pleadings. Motion for Judgment on the Pleadings (S.R. 124). The Circuit Court addressed the motions "as one" because they contained "substantively the same arguments," Memorandum Opinion at 1 n.1 (S.R. 170), but technically granted the motion for judgment on the pleadings. Order and Judgment of Dismissal at 1 (S.R. 186).

A motion for judgment on the pleadings "provides an expeditious remedy to test the legal sufficiency, substance, and form of the pleadings." *Slota v. Imhoff & Assoc.*,

P.C., 2020 S.D. 55, ¶ 12, 949 N.W.2d 869, 873. When a party moves for judgment on the pleadings, the court "view[s] all facts pleaded by the nonmoving party as true and grant[s] all reasonable inferences in favor of that party." *Poehl v. Countrywide Home Loans, Inc.*, 528 F.3d 1093, 1096 (8th Cir. 2008). So, when a defendant moves for judgment on the pleadings, the court views the facts pled by the plaintiff as true and grants all reasonable factual inferences in favor of the plaintiff. *Id.* Likewise, a motion to dismiss under SDCL § 15-6-12(b)(5) tests the sufficiency of the pleading (*i.e.* the plaintiff's complaint), and a court treats the facts pled by the plaintiff as true and grants all reasonable factual inferences in favor of the plaintiff. *Guthmiller v. Deloitte & Touche, LLP*, 2005 S.D. 77, ¶ 5, 699 N.W.2d 493, 496.

Because there is no difference between the standards by which the Circuit Court evaluates the motions, the substantive analysis is the same. The Circuit Court found the Nelson Estate's claims were barred by the applicable statutes of limitations based on the allegations in the Complaint. Memorandum Opinion at 14 (S.R. 183). If it was technically an error for the Circuit Court to grant the Motion for Judgment on the Pleadings instead of the Motion to Dismiss, it does not alter the substantive legal determination of when the Nelson Estate's claims accrued. This Court may affirm the decision because the outcome on the Motion to Dismiss would be the same. *Krier v. Dell Rapids Twp.*, 2006 S.D. 10, ¶ 12, 709 N.W.2d 841, 845 ("We will affirm the trial court if there is any legal basis to support its ruling."). There was no procedural error with how the Circuit Court evaluated Welch's and the Tinkcom Estate's motions, and therefore Welch respectfully requests this Court affirm the Circuit Court's ruling.

II. The Circuit Court Properly Determined the Nelson Estate's Business Interest Claims Arose at the Time of Nelson's Death

Nelson passed away on March 13, 2013, and his claims asserting an interest in the business[3] arose at that time, and the statute of limitations began to run. The Nelson Estate had until no later than March 13, 2020, to bring those claims under the applicable statute of limitations. Because the lawsuit was commenced after that date, the Business Interest Claims are barred as a matter of law. Without viable Business Interest Claims, the Nelson Estate had no enforceable interest in the Business, and its claims against Welch and the Tinkcom Estate for interference with the business expectancy[4] are also barred.

A. The Nelson Estate's Business Interest Claims Accrued Upon Nelson's Death

The facts pled in the Nelson Estate's Amended Complaint show as a matter of law the Business Interest Claims accrued when Nelson died. A court decides "what constitutes accrual of a cause of action" as a matter of law. *One Star v. Sisters of St. Francis, Denver, Colo.*, 2008 S.D. 55, ¶ 12, 752 N.W.2d 668, 675 (quoting *Peterson v. Hohm*, 2000 S.D. 27, ¶¶ 7-8, 607 N.W.2d 8, 10-11). "A cause of action accrues when the right to sue arises." *Spencer v. Estate of Spencer*, 2008 S.D. 129, ¶ 16, 759 N.W.2d 539, 544. In other words, "a claim accrues and limitations become its course when a person has some notice of his cause of action, an awareness either that he has suffered an injury

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[3] Counts 1 through 6, inclusive, of the Amended Complaint assert claims against the Nelson Estate based on Nelson's claimed partnership interest in the business. Those claims are referred to collectively as the "Business Interest Claims."

[4] Counts 7 and 8 of the Amended Complaint allege all defendants interfered with the Nelson Estate's business expectancy and engaged in a Civil Conspiracy to do the same. These claims are referred to collectively as the "Interference Claims."

or that another person has committed a legal wrong which ultimately may result in harm to him." *Id.* (quoting *Haberer v. First Bank of S.D.*, 429 N.W.2d 62, 68 (S.D. 1988)); *In re Estate of French*, 2021 S.D. 20, ¶ 16 n.5, 956 N.W.2d 806, 810 n.5. Because the Business Interest Claims all arise out of Nelson's alleged interest in the Business, the rights the Nelson Estate are asserting are controlled by South Dakota business laws—specifically South Dakota Partnership laws as stated in South Dakota's enactment of the Uniform Partnership Act ("UPA") contained in SDCL Ch. 48-7A. SDCL § 48-7A-103.

The Nelson Estate alleges Nelson was an owner in the business, but it makes no other allegations regarding formation of an entity. Amended Complaint ¶¶ 7–12 (S.R. 59–60). When two or more people associate "to carry on as co-owners a business for profit" a partnership is formed, "whether or not the persons intend to form a partnership." SDCL § 48-7A-202. By default, based on the Nelson Estate's allegations, Nelson's interest in the Business would be considered a partnership and controlled by the UPA. *Id.* Therefore, the substantive rights the Nelson Estate seeks to enforce through its claims are grounded in the UPA and any accrual analysis requires analysis of the rights provided a dissociated partner by the UPA.

Under the UPA, Nelson's cause of action for a share of the partnership accrued upon the time of his dissociation. A partner who is an individual is dissociated upon their death. SDCL § 48-7A-601(7)(*i*). Because Nelson died while allegedly a partner, Nelson became dissociated when he died on March 13, 2013. Dissociation is a turning point for the partnership and alters the rights and obligations between the dissociated partner and the partnership. *E.g.*, SDCL § 48-7A-603. Following a partner's dissociation, a

partnership either winds up its business or it carries on and buys out the dissociated partner's interest in the partnership. *Id.*

Arguably, when a partner in a two-person partnership dies, the partnership must wind up and dissolve. *See* SDCL § 48-7A-101(6) (defining a partnership as an association of "two or more persons"); *State for Use of Farmers State Bank v. Ed Cox and Son*, 132 N.W.2d 282, 290 (S.D. 1965) (death of one of two partners required winding up of partnership). Even if dissolution is not required, the dissociated partner's buyout rights, including the distribution to which he is entitled (if any), are determined by calculating what the dissociated partner would have received had the partnership been wound up and sold *at the time of dissociation*. SDCL § 48-7A-701(b). Thus, the buyout a dissociated partner may be entitled to is the same as what his distribution would have been had the partnership been wound up at the time of dissociation. In short, dissociation is the point in time at which the nature of the relationship between the former partners is changed and the point of reference for their rights to a buyout or a distribution.

Following dissociation, a dissociated partner has a right upon which he can sue the partnership. A "*dissociated partner* may maintain an action against the partnership . . . to determine the buyout price of [the dissociated] partner's interest." SDCL § 48-7A-701(i) (emphasis added). Thus, regardless of whether dissociation of a partner leads to winding up and dissolution of the partnership, dissociation is the triggering date at which the dissociated partner's rights to a buyout are set and accrue. *See Spencer*, 2008 S.D. 129, ¶ 16, 759 N.W.2d at 544 ("A cause of action accrues when the right to sue arises."). If Nelson did in fact own an interest in the Business

immediately prior to his death, his claim for a buyout of that interest accrued when he died.

Nelson's death directly led to his dissociation from the alleged partnership and in turn accrual of his right to sue to force a buyout of his interest at that time. Because there is no factual dispute about when Nelson died, the Court can determine as a matter of law that the Nelson Estate's Business Interest Claims accrued on the day Nelson died.

B. The Pleadings Show the Nelson Estate's Business Interest Claims and Interference Claims Are Barred

The Business Interest Claims assert rights relating to Nelson's alleged rights as a partner in the Business. *See supra* Statement of Facts at 5–6; Amended Complaint (S.R. 58). The facts set forth in the Amended Complaint show the Nelson Estate's Business Interest Claims are barred by the applicable statute of limitations as a matter of law. In turn, the Interference Claims are barred because the Nelson Estate had no valid business expectancy when Welch bought the Business.

1. The Business Interest Claims are Barred by the Statute of Limitations

The Business Interest Claims assert rights created by Nelson's claimed interest in the Business. The statute of limitations on the Business Interest Claims is six years under SDCL § 15-2-13 because they allege breaches of an express or implied contract and violations of the Nelson's right to buyout created by statute (the UPA). SDCL § 15-2-13(1)-(2). As discussed above, Nelson's Business Interest Claims accrued on the date of Nelson's death on March 13, 2013. Amended Complaint ¶ 16 (S.R. 60). State law, however, suspends the running of a statute of limitations on a decedent's claim for one year, following which time it resumes. SDCL § 29A-3-109. Therefore, the Nelson

Estate had seven years—from the time of his death to March 13, 2020—to assert the Business Interest Claims.

The Nelson Estate failed to assert its Business Interest Claims prior to March 13, 2020. The Complaint was filed and signed on June 16, 2023. Complaint at 12 (S.R. 12). The action was commenced when Service of Process was admitted on June 20, 2023, by Welch and on August 11, 2023, by the Tinkcom Estate. Welch Admission of Service (S.R. 52, 55); Tinkcom Admission of Service (S.R. 105). As such, the Nelson Estate's Business Interest Claims were commenced more than three years *after* the statute of limitations expired, and those claims are barred as a matter of law. The Circuit Court correctly dismissed the Business Interest Claims with prejudice on that basis.

The facts the Nelson Estate argues were improperly adopted by the Circuit Court do not alter the statute of limitations analysis. Whether the Circuit Court acknowledged, for example, that the 2005 loan was subsequently repaid or that Nelson's estate documents failed to identify an interest in the Business makes no difference—the statute of limitations analysis does not turn on those facts. The Circuit Court assumed the partnership interest for purposes of the motion, and the dates of Nelson's death and the commencement of the action are undisputed.

Moreover, because this Court reviews *de novo* a decision on a motion for judgment on the pleadings, it gives "no deference to the circuit court's determination." *Torgerson v. Torgerson*, 2024 S.D. 50, ¶ 13, 11 N.W.3d 50, 56. Thus, the Nelson Estate's assertion the Circuit Court erred by "adopting as true allegations asserted by the Tinkcom Estate's lawyer" is immaterial. This Court can affirm if there is any legal basis for doing so. *Krier*, 2006 S.D. 10, ¶ 12, 709 N.W.2d at 845.

2. *The Nelson Estate Cannot Assert Interference with Nonexistent Rights*

Because the statute of limitations expired on March 13, 2020, the Nelson Estate had no enforceable rights with respect to the Business after that date. With no enforceable rights against the Tinkcom Estate, the Nelson Estate cannot assert its tortious Interference Claims against Welch or the Tinkcom Estate.

The tortious expectancy claim requires the Nelson Estate to hold a "valid business relationship or expectancy." *Dykstra v. Page Holding, Co.*, 2009 S.D. 38, ¶ 39, 766 N.W.2d 491, 499. The Nelson Estate held no enforceable business interest or expectancy in the alleged partnership after expiration of the statute of limitations on March 13, 2020. Welch finalized his purchase of the Business in 2022 long after the statute of limitations on the Nelson Estate's Business Interest Claims expired. Amended Complaint ¶¶ 20–23 (S.R. 61). No valid business relationship or expectancy existed with which to interfere at that time. Both the tortious interference and civil conspiracy claims against Welch and the Tinkcom Estate fail as a matter of law.

C. A Dissociated Partner May Not Indefinitely Defer Buyout

The Nelson Estate argues there are no "time limits for a dissociated partner to bring a claim against the remaining partner or partnership for a buyout." Appellants' Brief at 24. Specifically, the Nelson Estate asserts no claim for a buyout accrues until demand for payment of the buyout or tender of payment (or an offer for payment) is made under SDCL § 48-7A-701. Appellants' Brief at 24–25. If neither the dissociated partner nor the partnership initiate that process, then, under the Nelson Estate's theory, the claim never accrues, at least not until the dissociated partner or his successors in

interest find out the partnership is sold to a third party. That argument incorrectly interprets the UPA and ignores the purpose of a statute of limitations.

Regardless of whether the Court interprets accrual under Article 7 or 8 of the UPA (*i.e.*, buyout or dissolution procedures), dissociation is the triggering point at which a dissociated partner's rights are set and enforceable, and therefore when his claim accrues. The buyout price of a dissociated partner under Article 7 is based on what would have been distributed to Nelson *had the business been wound up* under Article 8. SDCL § 48-7A-701(b). The value is determined as of the date of dissociation, with interest payable from that date. *Id.* Thus, Nelson's alleged right to buyout arose upon dissociation (his death), and as of that time, the Nelson Estate had the right to assert claims to have the buyout or distribution determined and paid. SDCL §§ 48-7A-405(b)(2)(ii), -701(i); *e.g.*, *Strassburg v. Citizens State Bank*, 1998 S.D. 72, ¶ 9, 581 N.W.2d 510, 514 (the statute of limitations begins to run when a complete cause of action exists, which occurs when a plaintiff "can file suit and obtain relief").

The demand and tender procedure set forth in SDCL § 48-7A-701 is simply a process to expedite resolution of the buyout between a dissociated partner and the partnership, not a precondition to a claim. *See generally*, SDCL §§ 48-7A-701(e), (g), (i). A dissociated partner may invoke the procedure by making a demand, after which the partnership must tender the buyout within 120 days. *Id.* §§ 48-7A-701(e). If the partnership tenders payment (with or without a demand), then the dissociated partner must commence any action to determine the adequacy of buyout within 120 days. *Id.* § 48-7A-701(i). If the partnership fails to tender payment following a demand, then the dissociated partner must commence an action within one year of the demand. *Id.*

Nothing in the text of SDCL § 48-7A-701 requires demand or tender occur before starting a lawsuit to enforce a buyout. *See, e.g.*, SDCL § 48-7A-701(i) (stating a "dissociated partner may maintain an action" against the partnership to determine buyout price, but not requiring the dissociated partner to have made a demand or rejected a tender). The statute outlines a process to initiate *prompt resolution* of buyout claims brought by a dissociated partner. To argue the very same statute allows the Nelson Estate to *indefinitely* defer asserting its buyout claim by withholding a demand for payment turns the clear purpose of the statute on its head and leads to an absurd result. *See Argus Leader Media v. Hogstad*, 2017 S.D. 57, ¶ 9, 902 N.W.2d 778, 782 (noting that "statutes must be construed according to their intent" from the statute as a whole and "it is presumed that the legislature did not intend an absurd or unreasonable result."). The Nelson Estate cannot indefinitely defer accrual by declining to make a written demand for its alleged buyout interest.

Indeed, the Nelson Estate's arguments illustrate its claim for payment arose at the time of dissociation. The Nelson Estate admitted during argument before the Circuit Court that the valuation of the business interest it is claiming is set "at the time of dissociation" and that the Nelson Estate's buyout claim would be accruing interest on the buyout price from that time. (App. 4, Oct. 23, 2023 Hearing Transcript at 28:6–24). Thus, by the Nelson Estate's own admission, all the elements of a claim for the buyout of its alleged business interest were set (and accruing interest) at the time of Nelson's dissociation: (1) the alleged business interest; (2) the right to buyout; and (3) the basis for the buyout price. If not, what would a dissociated partner demand payment of under

SDCL § 48-7A-701? A claim for a buyout must accrue at dissociation, otherwise there would be nothing to demand.

Likewise, the Nelson Estate's argument that it was not injured until it learned Tinkcom had sold the business to Welch is incorrect. The Nelson Estate had been aware for nearly a decade that no buyout had been paid. If Tinkcom's supposed promise to pay the buyout amount due at some indeterminate future date could delay the injury and therefore accrual of the Nelson Estate's claim, then any debtor could avoid a collection action indefinitely simply by promising to pay his creditor later. *See Spencer*, 2008 S.D. 129, ¶ 16, 759 N.W.2d at 544 ("A cause of action accrues when the right to sue arises.")

The fact that Welch purchased the Business did not materially change the Nelson Estate's position. If the Nelson Estate ever had a right to a share of the business, its rights were based on the Business as it existed on March 13, 2013. The Business as it existed when Welch bought it nine years later does not affect the calculation of the Nelson Estate's buyout interest. *See* SDCL § 48-7A-701 (stating the buyout interest, if any, should be calculated using, in part, the value of the assets as of and on the date of dissociation). Welch's purchase of the Business could not cause any injury to the Nelson Estate.

The Nelson Estate's alleged right to a buyout arose at the time Nelson died and was dissociated from the alleged partnership. The statute of limitations on those claims began to run at that time, and expired seven years later, on March 13, 2020. In turn, because the Nelson Estate had no enforceable interest in the business at the time Welch purchased it, and because Welch's purchase of the Business affected none of the Nelson

Estate's rights, Welch could not have tortiously interfered with a business expectancy of the Nelson Estate or participated in a civil conspiracy against the Nelson Estate.

III. The Circuit Court Properly Dismissed the Nelson Estate's Conversion Claim

The Nelson Estate's conversion claim fails as well. The tort of conversion is the "unauthorized exercise of control or dominion over personal property in a way that repudiates an owner's right in the property or in a manner inconsistent with that right." *Estate of Thacker v. Timm*, 2023 S.D. 2, ¶ 41, 984 N.W.2d 679, 691 (quoting *Wyman v. Terry Schulte Chevrolet, Inc.*, 1998 S.D. 96, ¶ 32, 584 N.W.2d 103, 107). To adequately plead conversion, a plaintiff must allege (1) they owned or had a possessory interest in the property; (2) their interest in the property was greater than the defendant's; (3) the defendant exercised dominion or control over or seriously interfered with the plaintiff's interest in the property; and (4) such conduct deprived the plaintiff of their interest in the property. *Id.* ¶ 41, 984 N.W.2d at 691–92 (quoting *Western Consol. Coop. v. Pew*, 2011 S.D. 9, ¶ 22, 795 N.W.2d 390, 397).

The Nelson Estate alleges Nelson, prior to his death, "kept certain valuable coins and collectible items *at the premises of the Business*, including gold Kruger[r]ands, which are a type of South African coin, and other gold coins and valuable items." Amended Complaint ¶ 25 (S.R. 63) (emphasis added). The Nelson Estate further alleges "[t]he Nelson Estate *entrusted the valuables* referred to in Paragraph 25 *at the premises of the Business* for safe keeping after Dr. Nelson's death." *Id.* ¶ 26 (S.R. 63) (emphasis added). Finally, the Nelson Estate alleges "[s]ome of the valuables are missing," and "[o]ne or more Defendants wrongfully asserts it holds title to certain property referred to in Paragraph 25, including but not limited to gold Kruger[r]ands." *Id.* ¶¶ 27–28 (S.R. 63).

The Nelson Estate's possessory interest in the property allegedly left at the Business by Nelson turns on the Nelson Children's rights and duties as co-personal representatives of the Estate. As co-personal representatives of the Estate, the Nelson Children had both the right and obligation to take "possession or control of" Nelson's property, including the valuables allegedly left at the business premises. SDCL § 29A-3-709. A personal representative may leave tangible personal property with the person "presumptively entitled thereto unless or until" the property is necessary for administration of the estate. *Id.* Once appointed as personal representatives, the Nelson Children had the authority to maintain an action to recover such property. *Id.* The Nelson Children were appointed personal representatives of the Estate on April 30, 2013. So, their cause of action for recovery of the property accrued at that time. *See Strassburg*, 1998 S.D. 72, ¶ 9, 581 N.W.2d at 514 (the statute of limitations begins to run when a complete cause of action exists, which occurs when a plaintiff "can file suit and obtain relief.").

The statute of limitations for recovery of personal property is six years after accrual. SDCL § 15-2-13(4). Thus, any action to recover possession of the valuables allegedly left at the Business was required to be brought by April 30, 2019. *Id.* The Nelson Estate failed to commence an action to recover the valuables by that time, and therefore has no enforceable possessory interest in the valuables allegedly left at the Business.

The allegations in the conversion claim are nothing more than a re-hash of the elements of conversion. The conversion allegations are too vague to identify specifically what and how many "valuables" were allegedly left at the business, which are missing

and which are not, or whether any of Nelson's alleged "coins and collectible items" remained at the Coins & Collectables business premises until 2022. The Nelson Estate does not allege that, in the more than ten years between Nelson's death and commencement of this action, the Nelson Estate took any action to assert a possessory interest in any of the unspecified coins and collectibles. If it had, the Nelson Estate would be able to identify with at least a modicum of specificity what and how many "valuables" were allegedly left with Tinkcom. Instead, the conversion claim is a thinly veiled attempt to skirt the statute of limitations problems with the Business Interest Claims and is designed to leave the door open to assert an interest in any particular coin or collectible item at Coins & Collectables.

For the first time, the Nelson Estate asserts it stored the valuables at the Business premises "under an agreement with Tinkcom," thereby "maintaining control" over them. Appellants' Brief at 31. Although the Court is required to treat the allegations in the Amended Complaint as true and draw *reasonable* inferences in favor of the Nelson Estate, it is not required to abandon common sense. *Nygaard v. Sioux Valley Hosp. & Health Sys.*, 2007 S.D. 34, ¶ 9, 731 N.W.2d 184, 190 ("[T]he court is free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations." (quoting *Wiles v. Capital Indem. Corp.*, 280 F.3d 868, 870 (8th Cir. 2002))). "The pleading must contain something more than a statement of facts that merely creates a suspicion of a legally cognizable right of action on the assumption that all the allegations in the complaint are true (even if doubtful in fact.)" *Hernandez v. Avera Queen of Peace Hosp.*, 2016 S.D. 68, ¶ 15, 886

N.W.2d 338, 344. The Nelson Estate's position goes beyond an allowable interpretation of the Amended Complaint.

The First Amended Complaint fails to establish there was an agreement (such as a bailment) between the parties that Tinkcom would keep the (yet unspecified) valuables for "safekeeping." It states only that the Nelson Estate "entrusted the valuables . . . *at the premises of the Business* for safekeeping,"—not with anyone in particular. Amended Complaint ¶ 26 (S.R. 63). The Nelson Estate does not claim it controlled access to the valuables or otherwise kept track of, monitored, or accounted for them. As such, a court cannot reasonably infer the Nelson Estate asserted or maintained control over the alleged valuables. Rather, the reasonable interpretation is the Nelson Estate *left* unspecified coins and collectibles at Coins & Collectables.

Because the Nelson Children were appointed co-personal representatives of the Estate, they were required to affirmatively act to take possession or control of the property. SDCL § 29A-3-709. From the time the co-personal representatives of the Nelson Estate were appointed in that role, they had six years start an action to recover possession of the personal property allegedly left at the business premises. Instead, they sat idly for ten years, and now assert a conversion claim as a last-ditch effort to cloud title to any particular coin or collectible at the Business.

"The purpose of a statute of limitations is a speedy and fair adjudication of the respective rights of the parties." *Merkwan v. Leckey*, 376 N.W.2d 52, 53 (S.D. 1985). The Nelson Estate waited a decade to adjudicate Nelson's alleged rights—only after Tinkcom had died. There is nothing speedy or fair about that. Any rights the Nelson Estate may have had to the Business, its assets, or proceeds therefrom, expired with the

statute of limitations years ago. Neither Welch nor the Tinkcom Estate interfered with those rights or converted any property relating to them in 2022. Without a possessory interest in the valuables, the Nelson Estate's conversion claim fails as a matter of law, and the Circuit Court properly dismissed Count 9 as a result. *Western Consol. Coop.*, 2011 S.D. 9, ¶ 22, 795 N.W.2d at 397.

IV. Equitable Doctrines Do Not Save the Nelson Estate's Claims

The doctrine of equitable tolling—even if this Court were to determine it *could* apply—does not save the Nelson Estate's claims from dismissal as untimely. This Court has not held equitable tolling may provide relief from the express statutory language of SDCL § 15-2-13. *In re Estate of French*, 2021 S.D. 20, ¶ 20, 956 N.W.2d 806, 811 (recognizing South Dakota has "not officially adopted" equitable tolling in civil cases and noting there are "serious questions whether it could be incorporated into our decisional law"); *but see Dakota Truck Underwriters v. S.D. Subsequent Injury Fund*, 2004 S.D. 120, ¶ 31, 689 N.W.2d 196, 204 (holding equitable tolling extended the filing deadline contained in a worker compensation statute that had been previously repealed and then reinstated to allow certain previously barred claims to be processed). Even if this Court were to determine the text of SDCL § 15-2-13 left room for equitable tolling to apply in the right circumstances, the Nelson Estate did not plead circumstances justifying that relief.

As an initial matter, SDCL § 15-2-13 leaves no room for the court-created equitable exceptions the Nelson Estate argues apply: "Except where, in special cases, a different limitation *is prescribed by statute*, the following civil actions . . . can be commenced only within six years after the cause of action shall have accrued . . .." *Id.*

(emphasis added). The plain language of the statute allows for exceptions *only* when prescribed by statute. *See id.* Because the doctrines urged by the Nelson Estate are court created equitable doctrines and not created by state statute, they cannot alter the time limitations set forth in SDCL § 15-2-13. *See Anson v. Star Brite Inn Motel*, 2010 S.D. 73, ¶¶ 37–38, 788 N.W.2d 822, 831–32 (Konenkamp, J., concurring) (citing authority stating equitable tolling does not apply when "inconsistent with the text of the relevant statute").

Assuming equitable doctrines are not absolutely barred by SDCL § 15-2-13, given this Court's "serious questions" about equitable tolling in general and its history of declining to apply the doctrine, it is clear that equitable tolling would only be applied in inequitable circumstances "truly beyond the control of the plaintiff" that prevent the plaintiff from timely filing an action. *See Anson*, 2010 S.D. 73, ¶ 15, 788 N.W.2d at 826. A party seeking relief from a statute of limitations through equitable tolling must show: "(a) timely notice, (b) lack of prejudice to the defendant, and (c) reasonable good faith conduct on the part of the plaintiff." *Dakota Truck Underwriters*, 2004 S.D. 120, ¶ 24, 689 N.W.2d at 202. The Nelson Estate failed to allege circumstances that would satisfy those elements and show circumstances truly beyond its control prevented timely filing its claims.

Nothing outside the control of the Nelson Estate prevented it from timely filing an action to assert the Nelson Estate's alleged Business Interest Claims or the conversion claim. The factual allegation on which the Nelson Estate bases its equitable tolling claim alleges:

> After Dr. Nelson's death, Tinkcom verbally confirmed to Dr. Nelson's heirs on multiple occasions that Dr. Nelson, and by extension the Nelson Estate, owned a fifty (50) percent interest in the Business, and that Tinkcom would pay half the value of the Business to the Nelson Estate when Tinkcom sold the Business or died.

Amended Complaint ¶ 17 (S.R. 60). Those allegations, as a matter of law, do not support relief from application of the statute of limitations.

The Nelson Estate's right to a buyout of Nelson's partnership interest, if any, is set forth by state law. *See supra,* Part II. The Nelson Estate admits in the Amended Complaint it had knowledge of Nelson's alleged business interest, that he died, and that it may be entitled to a buyout of that alleged interest as a result. Amended Complaint ¶ 17 (S.R. 60). In other words, it was aware of all the alleged facts and circumstances establishing its claimed right to a buyout immediately after Nelson's death and while Tinkcom was still alive. Tinkcom's alleged statements did not obscure any of those facts. Yet, the Nelson Estate did nothing to enforce that right or secure a buyout in the nearly nine years between Nelson's death and Tinkcom's death. Now, after the other party to the supposed agreement has died, the Nelson Estate finally asserts Nelson's alleged interest in the Business. No circumstances outside the Nelson Estate's control prevented it from asserting the claims in 2013 or the years that followed.

Moreover, Welch and the Tinkcom Estate have been unfairly prejudiced by the Nelson Estate's unforced delay. In the years since the Nelson Estate's claims accrued, Tinkcom has died and can no longer testify about the 2005 transaction or his interactions with the Nelson Children. Nor can he assist in identifying relevant documents or witnesses. Even if witnesses are found, their memories of the transaction nearly two

decades ago have undoubtedly faded. Equitable considerations should not allow the Nelson Estate to gain a tactical advantage through its own delay.

Finally, the Nelson Estate cannot establish it acted reasonably and in good faith with respect to its claims. Statutes of limitations "promote justice by preventing surprises through revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Dakota Truck Underwriters*, 2004 S.D. 120, ¶ 30, 689 N.W.2d at 203. The Nelson Children, as Personal Representatives of the Nelson Estate, had not only the right but the *duty* to identify and gather Nelson's property to satisfy any remaining obligations and his testamentary intent. *See generally*, SDCL §§ 29A-3-701 *et seq*. By their own allegations, they failed to do that, and the Nelson Estate left its Business Interest Claims slumbering indefinitely. No reasonable fact finder could determine the Nelson Estate acted in good faith.

The doctrines of equitable estoppel and fraudulent concealment likewise do not bar Welch's and the Tinkcom Estate's statute of limitations defenses. For either doctrine to apply, there must be concealment or misrepresentation of facts material to the plaintiff's claim. *Spencer*, 2008 S.D. 129, ¶¶ 19–21, 759 N.W.2d at 545. There are no allegations Tinkcom concealed or misrepresented facts material to the existence of the Nelson Estate's claim. Indeed, the Nelson Estate pleads it was aware of the Nelson's alleged business interest, aware of Nelson's death and consequent claim for a buyout, and aware no buyout was made for the nine years between his death and Tinkcom's death. Amended Complaint ¶¶ 17, 24 (S.R. 60–61).

Moreover, Tinkcom's alleged statement he would pay the Nelson Estate at some point if he sold the Business in the future is a representation of a future event, not a

statement of an existing material fact on which the Nelson Estate was entitled to rely. *Meyer v. Santema*, 1997 S.D. 21, ¶ 12, 559 N.W.2d 251, 255 ("Generally, representations as to future events are not actionable and false representations must be of past or existing facts."). Similarly, the Nelson Estate could not reasonably rely on a verbal promise to distribute an interest in the Business when Tinkcom died. *See Niesche v. Wilkinson*, 2013 S.D. 90, ¶ 29, 841 N.W.2d 250, 258 (holding a verbal promise to convey land in a will is unenforceable without a writing satisfying the will statutes). By the Nelson Estate's own allegations, there is no basis to support a finding equitable estoppel or fraudulent concealment protects the Nelson Estate from enforcement the applicable statutes of limitations in this case.

The Nelson Estate waited too long, and the statute of limitations expired. It cannot now spring its claims on Welch and the Tinkcom Estate when the commencement of this action has been within its control for more than ten years.

CONCLUSION

Appellees' motions for dismissal of the Nelson Estate's claims were procedurally proper. The Nelson Estate, if it ever had any rights to the Business, its property, or Nelson's alleged property, should have asserted those rights years ago. The Nelson Estate cannot now, ten years after Nelson's death, bring claims against Defendants asserting Nelson is due a share of the proceeds from the sale of the Business. No equitable doctrine prevents the statute of limitations from expiring. The Nelson Estate's claims are barred as a matter of law, and therefore Appellees respectfully request this Court affirm the Circuit Court's Order and Judgment of Dismissal With Prejudice.

Dated at Sioux Falls, South Dakota, this 4th day of November, 2024.

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

CRAIG NELSON and AMY FREED, as co-Personal Representatives of the Estate of Earl Nelson Plaintiffs/Appellants, vs. GARY TINKCOM, as Personal Representative of the Estate of William Tinkcom, EDDIE WELCH, and MERE COIN COMPANY, LLC, D/B/A COINS & COLLECTABLES, Defendants/Appellees.	Appeal No. 30698 **CERTIFICATE OF SERVICE**

I, Joel R. Rische, attorneys for the Appellees Eddie Welch and Mere Coin Company, LLC, hereby certify that a true and correct copy of the foregoing *Brief of Appellee* was served by U.S. Mail, first-class, postage prepaid, and Odyssey File & Serve this 4th day of November, 2024, upon:

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I further certify that on the 4th of November, 2024, I emailed the foregoing *Brief of Appellee* to:

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JOEL R. RISCHE

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I certify that this Brief of Appellee complies with the type volume limitation provided for in the South Dakota Codified Laws. This Brief contains 7,093 words and 36,415 characters ***with no spaces.*** I have relied on the word and character count of our word processing system used to prepare this Brief.

Dated at Sioux Falls, South Dakota, this 4th day of November, 2024.

DAVENPORT, EVANS, HURWITZ & SMITH, L.L.P.

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APPENDIX

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

CRAIG NELSON and AMY FREED, as co-Personal Representatives of the Estate of Earl Nelson Plaintiffs/Appellants, vs. GARY TINKCOM, as Personal Representative of the Estate of William Tinkcom, EDDIE WELCH, and MERE COIN COMPANY, LLC, D/B/A COINS & COLLECTABLES, Defendants/Appellees.	Appeal No. 30698 **NOTICE OF JOINDER IN APPELLEE BRIEF**

Appellee Gary Tinkcom, as Personal Representative of the Estate of William Tinkcom, through the undersigned counsel, hereby joins in the Appellee Brief filed by Appellees Eddie Welch and Mere Coin Company, LLC d/b/a Coins & Collectables, in its entirety, pursuant to SDCL § 15-26A-67.

Dated at Sioux Falls, South Dakota, this 14th day of November, 2024.

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Codified Laws

48-7A-701. Purchase of dissociated partner's interest.

(a) If a partner is dissociated from a partnership without resulting in a dissolution and winding up of the partnership business under § 48-7A-801, the partnership shall cause the dissociated partner's interest in the partnership to be purchased for a buyout price determined pursuant to subsection (b).

(b) The buyout price of a dissociated partner's interest is the amount that would have been distributable to the dissociating partner under subsection 48-7A-807(b) if, on the date of dissociation, the assets of the partnership were sold at a price equal to the greater of the liquidation value or the value based on a sale of the entire business as a going concern without the dissociated partner and the partnership were wound up as of that date. Interest must be paid from the date of dissociation to the date of payment.

(c) Damages for wrongful dissociation under subsection 48-7A-602(b), and all other amounts owing, whether or not presently due, from the dissociated partner to the partnership, must be offset against the buyout price. Interest must be paid from the date the amount owed becomes due to the date of payment.

(d) A partnership shall indemnify a dissociated partner whose interest is being purchased against all partnership liabilities, whether incurred before or after the dissociation, except liabilities incurred by an act of the dissociated partner under § 48-7A-702.

(e) If no agreement for the purchase of a dissociated partner's interest is reached within one hundred twenty days after a written demand for payment, the partnership shall pay, or cause to be paid, in cash to the dissociated partner the amount the partnership estimates to be the buyout price and accrued interest, reduced by any offsets and accrued interest under subsection (c).

(f) If a deferred payment is authorized under subsection (h), the partnership may tender a written offer to pay the amount it estimates to be the buyout price and accrued interest, reduced by any offsets under subsection (c), stating the time of payment, the amount and type of security for payment, and the other terms and conditions of the obligation.

(g) The payment or tender required by subsection (e) or (f) must be accompanied by the following:

(1) A statement of partnership assets and liabilities as of the date of dissociation;

(2) The latest available partnership balance sheet and income statement, if any;

(3) An explanation of how the estimated amount of the payment was calculated; and

(4) Written notice that the payment is in full satisfaction of the obligation to purchase unless, within one hundred twenty days after the written notice, the dissociated partner commences an action to determine the buyout price, any offsets under subsection (c), or other terms of the obligation to purchase.

(h) A partner who wrongfully dissociates before the expiration of a definite term or the completion of a particular undertaking is not entitled to payment of any portion of the buyout price until the expiration of the term or completion of the undertaking, unless the partner establishes to the satisfaction of the court that earlier payment will not cause undue hardship to the business of the partnership. A deferred payment must be adequately secured and bear interest.

(i) A dissociated partner may maintain an action against the partnership, pursuant to subsection 48-7A-405(b)(2)(ii), to determine the buyout price of that partner's interest, any offsets under subsection (c), or other terms of the obligation to purchase. The action must be commenced within one hundred

twenty days after the partnership has tendered payment or an offer to pay or within one year after written demand for payment if no payment or offer to pay is tendered. The court shall determine the buyout price of the dissociated partner's interest, any offset due under subsection (c), and accrued interest, and enter judgment for any additional payment or refund. If deferred payment is authorized under subsection (h), the court shall also determine the security for payment and other terms of the obligation to purchase. The court may assess reasonable attorney's fees and the fees and expenses of appraisers or other experts for a party to the action, in amounts the court finds equitable, against a party that the court finds acted arbitrarily, vexatiously, or not in good faith. The finding may be based on the partnership's failure to tender payment or an offer to pay or to comply with subsection (g).

Source: SL 2001, ch 249, § 701.

References

AMENDED ORIGINAL

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

****

CRAIG NELSON and AMY FREED, as Co-Personal Representatives of the Estate of Earl Nelson,

Plaintiffs,

49CIV.23-1684

OTHER HEARING

-vs-

GARY TINKCOM, as Personal Representative of the Estate of William Tinkcom, EDDIE WELCH, and MERE COIN COMPANY, LLC, d/b/a COINS & COLLECTABLES,

Defendants.

****

BEFORE: The Honorable **Douglas P. Barnett**
Circuit Court Judge
Sioux Falls, South Dakota.
October 23, 2023

APPEARANCES: Mr. Justin Smith
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operate, there was never under 701 either a payment or a tender of an offer in pay to buyout the Nelsons or a written demand for payment from the Nelsons. Those are the two triggers under 701 that require the dissolution and winding up of the business and the buyout.

Our legislature has said, yes, we will set the valuation of the business at the time of dissociation. We don't deny that. We also don't deny that the, Earl Nelson and his heirs were dissociated from the partnership at the time of Earl Nelson's death. From that point forward, under the statutes, they had no right to participate in the management and governance of the business. They didn't. But they were being told over and over and over again you have this ownership interest. We don't deny that interest was accruing on the buyout price, which was locked in at the time of Karl Nelson's death, but that's the remedy the legislature put in place. In order to trigger --

THE COURT: -- locked in in terms of the value of the business, whatever it would have been determined as?

MR. SMITH: Correct, Your Honor. And, again, that's discovery that --

THE COURT: -- and that, that interest being secured by the $50,000 that Dr. Nelson gave Mr. Tinkcom?

MR. SMITH: Correct, Your Honor. Yes. So, at the end of the day, if they're going to argue that fifty -- 15-2-13

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 30698

CRAIG NELSON and AMY FREED,
as Co-Personal Representatives
of the Estate of Earl Nelson,

Appellants,

vs.

GARY TINKCOM, as Personal Representative
of the Estate of William Tinkcom, EDDIE WELCH,
and MERE COIN COMPANY, LLC,
d/b/a COINS & COLLECTABLES,

Appellees.

Appeal from the Circuit Court
Second Judicial Circuit
Minnehaha County, South Dakota

THE HONORABLE DOUGLAS P. BARNETT, CIRCUIT COURT JUDGE

APPELLANTS' REPLY BRIEF

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Notice of Appeal Filed May 2, 2024

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Defendants' brief demonstrates why the trial court's dismissal of the Nelson Estate's lawsuit was improper. On the whole, Defendants spend their appellate brief ignoring the arguments and authority put forth by the Nelson Estate, or Defendants argue against strawmen. Defendants have failed to effectively defend this appeal or the decision below. The Nelson Estate respectfully requests the Court reverse the trial court's dismissal and remand the case.

I. The trial court erred by granting a disfavored motion and construing facts and inferences against the Nelson Estate.

On appeal, Defendants confirm the Nelson Estate's showing that motions for judgment on the pleadings and motions to dismiss are construed identically. Namely, the parties agree that a motion for judgment on the pleadings is "analyzed under the same rubric as a Rule 12(b)(6) motion," meaning "the factual allegations of a complaint are assumed true and construed in favor of the plaintiff, 'even if it strikes a savvy judge that actual proof of those facts is improbable.'" *Flandreau Santee Sioux Tribe v. Gerlach*, 162 F.Supp.3d 888, 891-2 (D.S.D. 2016). Although the parties agree the standard of review for motions for judgment on the pleadings and motions to dismiss[1] is identical, Defendants fail or refuse to recognize this Court's well-established disfavor of motions to dismiss, which are "rarely granted" and "seldom prevail." *See Guthmiller v. Deloitte &*

[1] Under South Dakota law, a statute of limitations defense cannot be raised before an answer or responsive pleading is filed. SDCL § 15-2-1. This Court has held that granting a motion to dismiss based on a statute of limitations defense is reversible error. *Guthmiller*, 2005 S.D. at ¶ 8.

Touche, LLP, 2005 S.D. 77, ¶ 4, 699 N.W.2d 493, 496; *see also N. Am. Truck & Trailer, Inc. v. M.C.I. Commce'n Servs., Inc.*, 2008 S.D. 45, ¶ 6, 751 N.W.2d 710, 712.

Accordingly, it was error for the trial court to construe facts *against* the Nelson Estate when considering Defendants' dismissal motion. The trial court improperly construed several disputed facts directly against the Nelson Estate by adopting self-serving assertions made by one of Defendants' attorneys in an e-mail attached to the First Amended Complaint. These improper adoptions led the trial court to grant Defendants' motion for judgment on the pleadings by finding that, among other things, the Nelson Estate presumptively did not hold an interest in the Business, that Dr. Nelson's contribution to the up-front payment for the Business was a mere "loan" that was later paid off by Tinkcom, that the Nelson Estate did not respond to one of the Defendants' attempts to contact them, and that the Nelson children's reliance on Tinkcom's assertions were "not in good faith" and "unreasonable." (APP. 3-4, 14, 57, 59-60; S.R. 171-172, 182, 97, 99-100.)

Defendants argue the trial court's findings were proper, or in the alternative, harmless. However, in making this argument, Defendants incorrectly assume that the only pertinent dates in this matter are Dr. Nelson's death and dissociation, and the commencement of the action. (Appellees' Brief, ps. 12-13.) On the contrary, the facts improperly construed by the trial court would be considered under a proper accrual determination "[b]ecause the point at which a period of limitations begins to run must be decided from the facts of each case." *E. Side Lutheran Church of Sioux Falls v. NEXT, Inc.*, 2014 S.D. 59, ¶ 11, 852 N.W.2d 434, 438. The trial court erred by failing to

consider facts pertinent to notice of an injury or legal wrong, and merely assigning the date of dissociation as the date of accrual. As such, the trial court's improperly applying its standard of review was not harmless and warrants reversal; conversely, this Court should properly consider the facts as alleged in the First Amended Complaint, unlike the trial court.

II. South Dakota's generic accrual law governs the Nelson Estate's business interest claims.

This appeal is about accrual of the Nelson Estate's business interest and conversion claims. Under South Dakota law, what constitutes accrual is a question of law; however, when accrual occurs is a question of fact for the jury. *Huron Center, Inc. v. Henry Carlson Co.*, 2002 S.D. 103, ¶ 11, 650 N.W.2d 544, 548. The parties dispute the law governing what constitutes accrual, and accordingly, when accrual for the claims occurred.

"In all events, a claim accrues and limitations become its course when a person 'has some notice of his cause of action, an awareness either that he has suffered an injury or that another person has committed a legal wrong which ultimately may result in harm to him." *Spencer v. Estate of Spencer*, 2008 S.D. 129, ¶ 16, 759 N.W.2d 539, 544. In other words, accrual always requires some notice of an injury or legal wrong for a statute of limitations to commence. Here, the injury and legal wrong the Nelson Estate seeks to redress is their exclusion from the sale proceeds of a business in which they held a legal interest, which occurred in 2022. (APP. 22, S.R. 61, First Amended Complaint, ¶ 24.) Defendants do not substantively respond to the Nelson Estate's arguments about accrual (*see* Appellants' Brief, ps. 17-22), which are supported by binding South Dakota case

law, instead, Defendants rely on their own improper interpretation of, and resulting improper inferences about, South Dakota Partnership law.

A. Dissociation of a partner does not constitute accrual because it is not an injury or legal wrong; Partnership law explicitly does not govern accrual of claims.

Defendants argue that, by operation of law, dissociation of a partner automatically constitutes accrual.[2] Defendants' argument ignores South Dakota case law governing accrual of claims, which requires notice of an injury or legal wrong, while also ignoring the South Dakota Partnership statutes on which they attempt to rely. Tellingly, Defendants carefully avoid characterizing dissociation as an "injury" or "legal wrong" in their briefing, instead referring to the legal operation of dissociation of a partner alternatively as "a *turning point* for the partnership and alters the rights and obligations between the dissociated partner and the partnership," a "*point in time* at which the nature of the relationship between the former partners is changed," a "*point of reference*," and a "*triggering date*."[3] (Appellees' Brief, ps. 10, 11 (emphases added).) There is no dispute that dissociation of a partner changes the legal relationship of the parties involved in a partnership. However, under the mandate of South Dakota law, a mere "turning point," "point in time," "point of reference," or "triggering date" is insufficient to cause accrual

---

[2] As demonstrated in Appellants' first brief, deeming the date of dissociation as accrual improperly applies a statute of limitations like a statute of repose. (*See* Appellants' Brief, ps. 27-29.) Defendants failed or refused to respond to this argument in their briefing.

[3] Defendants correctly identify that interest applies to the dissociated partner's buyout price based on the date of dissociation. SDCL § 48-7A-701(b). Despite recognizing the interest provision, Defendants argue that dissociated partners should not be able to "indefinitely defer buyout." (Appellees' Brief at p. 16.) Contrary to Defendants' argument, the interest provision incentivizes the partnership and remaining partners to prevent a deferred buyout by tendering an offer to the dissociated partner to stop interest from accruing. SDCL § 48-7A-701(i).

of claims. Under South Dakota law, accrual requires notice of an injury or legal wrong. *See Spencer*, 2008 S.D. 129, ¶ 16.

Despite their careful wording to avoid properly analyzing accrual as requiring notice of an injury or legal wrong, Defendants briefly address the true legal standard for accrual in their brief. (Appellees' Brief at p. 17.) But Defendants wrongly equate accrual as knowledge of Tinkcom's promise of a buyout, observing "[t]he Nelson Estate had been aware for nearly a decade that no buyout had been paid."[4] (*Id.*) But knowledge of Tinkcom's offer of a buyout does not constitute notice of an injury or legal wrong; knowledge of *denial* of such a buyout would be notice of an injury or legal wrong. That denial and notice occurred in 2022 when Defendants failed or refused to pay the Nelson Estate for their ownership interest in the Business. Even if the Nelson Estate's knowledge of a right to a buyout could constitute notice of an injury or legal wrong, which it does not, it is for a jury to decide whether it constitutes sufficient notice to constitute or cause accrual. *See, e.g., E. Side Lutheran*, 2014 S.D. at ¶ 15 (holding that trier of fact must determine whether relationship between alleged deficiencies in construction held a "sufficient relationship" to put plaintiffs on actual or constructive notice of claims).

[4] To support this argument, Defendants renew an argument they raised during one of the trial court hearings that "any debtor could avoid a collection action simply by promising to pay his creditor later." (Appellees' Brief at p. 17.) Contrary to the point Defendants attempt to make with the analogy, this Court recently held that a debtor can be estopped from raising a statute of limitations defense if his conduct delays the creditor from filing a lawsuit. *Work v. Allgier*, 2018 S.D. 56, ¶¶ 23-27, 915 N.W.2d 859, 864-65. As such, under Defendants' own analogy, they cannot avoid a lawsuit based on conduct delaying the Nelson Estate from filing a lawsuit against them.

This Court's recent decision in *Johnson v. Johnson* is especially instructive because it demonstrates the type of conduct and notice that constitute accrual of claims under SDCL § 15-2-13. 2024 S.D. 69. The conduct in *Johnson* constituting notice of an injury or legal wrong, causing accrual of claims, shows the Nelson Estate's claims did not accrue until 2022. In *Johnson*, the counterclaim plaintiff's claims were barred because he failed to timely bring a lawsuit after his claims accrued at the time he received a letter in 2008, which "unequivocally expressed [the counterclaim defendant's] intent to breach the oral agreement." *Id.* at ¶ 17. This Court observed that receipt of the letter was the "clarion moment" the counterclaim plaintiff had notice of his injury, causing accrual of his claims. *Id.* Succinctly, this Court held that the counterclaim plaintiff's "breach of contract claim accrued when he received [the counterclaim defendant's] 2008 letter, advising him that she was breaching the oral agreement[.]" *Id.* at ¶ 22 (*see also Id.* at ¶ 29 (observing a jury could find that the 2008 letter did not constitute accrual) (Devaney, J., concurring in part and dissenting in part)).

The *Johnson* decision shows precisely why the Nelson Estate's claims did not accrue when Dr. Nelson died and was dissociated. Unlike in *Johnson*, the Nelson children did not have the benefit of a letter or other statement "unequivocally express[ing]" an intent to breach an agreement around the date of dissociation; instead, the Nelson Estate received notice of their injury in 2022, when Defendants informed them they would not honor Dr. Nelson's partnership interest. *See id.* at ¶ 17. The Nelson Estate promptly brought their lawsuit within two years of such notice. Unlike in *Johnson*, the Nelson children had been reassured, repeatedly, that the agreement would

be honored. (APP. 20, S.R. 60, First Amended Complaint ¶ 17.) Thus, the *Johnson* case shows that the Nelson Estate's claims did not accrue until 2022, when they received notice that they would not receive a buyout for their interest in the Business; alternatively, the question of accrual is a fact question for a jury. *E. Side Lutheran*, 2014 S.D. at ¶ 15.

Further, and dispositively, the plain language of South Dakota Partnership law further contradicts the Defendants' argument about dissociation causing accrual of claims. Under SDCL § 48-7A-405(c), "[t]he accrual of, and any time limitation on, a right of action for a remedy under this section *is governed by other law*." (emphasis added). Tellingly, Defendants have never addressed this explicit statutory language, whether before the trial court or this Court. *See State ex rel. Dep't of Transp. v. Clark*, 2011 S.D. 20, ¶ 10, 798 N.W.2d 160, 164 ("We presume the Legislature never intends to use surplusage in its enactments, so where possible the law must be construed to give effect to all its provisions."). As a matter of plain statutory language, dissociation cannot govern accrual because Partnership law explicitly does not govern accrual of claims.

Therefore, Dr. Nelson's death and dissociation did not automatically cause the Nelson Estate's claims to accrue and commence the statute of limitations in 2013. On the contrary, as the Nelson Estate has always argued, the claims accrued when they received notice of an injury or legal wrong by Defendants in 2022. Alternatively, it is for a jury to decide whether Dr. Nelson's death and dissociation were sufficient notice to constitute accrual of the Nelson Estate's business interest claims. *See E. Side Lutheran*, 2014 S.D. at ¶ 15. The trial court's holding otherwise is error and warrants reversal.

B. Partnership law's process for a mandatory buyout does not govern accrual; even if it did, the Nelson Estate's claims did not accrue.

Defendants also clearly misconstrue the Nelson Estate's argument respecting the buyout process in SDCL § 48-7A-701. Defendants state that "[s]pecifically, the Nelson Estate asserts no claim for a buyout accrues until demand for payment or tender of payment (or an offer of payment) is made under SDCL § 48-7A-701." (Appellees' Brief, p. 14.) On the contrary, the Nelson Estate has never argued that the parties were required to follow the process delineated in SDCL § 48-7A-701 for their claims to accrue. Instead, the Nelson Estate has consistently argued that generic accrual law, not South Dakota Partnership law, governs the accrual of the business interest claims in this matter. *See, e.g.*, SDCL § 48-7A-405(c).

Defendants conflate the Nelson Estate's arguments with the trial court's erroneous Opinion and Order. The trial court improperly held that the parties were required to strictly follow the buyout process in SDCL § 48-7A-701, ultimately wrongly holding that the Nelson Estate was required to make a written demand for payment to the partnership to obtain a buyout. (APP. 11, S.R. 179, Opinion and Order, p. 10 ("Accordingly, under Article 7 of RUPA, Plaintiff's right to sue and cause of action would normally arise only after the required written demand for Nelson's partnership buyout was made, and then, under two specific situations.").) In contrast, Defendants argue that "[t]he demand and tender procedure set forth in SDCL § 48-7A-701 is simply a process to expedite resolution of the buyout between a dissociated partner and the partnership, not a precondition to a claim." (Appellees' Brief at p. 15.) The Nelson Estate agrees. (*See* S.R. 148, Plaintiff's Response, p. 10 ("Ultimately, the Nelson Estate had no statutory

duty to enforce or demand a buyout, and that they did not do so does not govern accrual of their claims."); *see also* Appellants' Brief, p. 25 ("Instead, the statute sets deadlines that are triggered *only after* at least one of the parties—whether the dissociated partner *or* the remaining partner and partnership—decide to initiate the buyout process.").)

True, SDCL § 48-7A-701 contains a process with deadlines to expedite resolution of a buyout after dissociation, but its provisions do not govern accrual of claims. *See* SDCL § 48-7A-405(c). As shown by the plain language of SDCL § 48-7A-701, the deadlines only apply under certain circumstances, none of which are alleged to have happened here. (*See* Appellants' Brief, ps. 25-26.) Regardless of procedure, the Nelson Estate's claims instead arise from Defendants' refusal in 2022 to pay the Nelson Estate. As such, even under the trial court's improper holding, the Nelson Estate's claims did not accrue upon Dr. Nelson's death and dissociation.

In sum, the Partnership statutes unequivocally do not govern accrual of claims. Generic accrual law governs accrual of claims. Under the governing law, the Nelson Estate's claims did not accrue until 2022, but it is ultimately for a jury to decide when the claims accrued. Defendants have failed to substantively respond to the Nelson Estate's well-supported arguments, including applicable statutes directly contradicting their arguments. *See* SDCL § SDCL 48-7A-405(c). As such, dismissal of the Nelson Estate's claims was error and should be reversed.

III. South Dakota's generic accrual law, not probate law, governs the Nelson Estate's conversion claims; Appellants inappropriately hold the Nelson Estate to a heightened pleading standard.

Similarly, the Nelson Estate's conversion claims accrued when the Nelson Estate had notice that they were injured or Defendants committed a legal wrong when they learned that certain valuables they entrusted to Tinkcom were missing, or that Defendants wrongfully claimed title to the valuables. Defendants failed to substantively respond to the Nelson Estate's showing that their conversion claims accrued on the date they learned the valuables were missing or that Defendants wrongfully claimed them. Defendants instead inappropriately replace accrual law with probate law and improperly hold the Nelson Estate to a heightened pleading standard for conversion claims. Defendants' arguments are misplaced.

On a motion to dismiss, a Court "accept[s] the material allegations as true and construes them in a light most favorable to the pleader to determine whether the allegations allow relief." *Kaiser Trucking, Inc. v. Liberty Mut. Fire Ins. Co.*, 2022 S.D. 64, ¶ 13, 981 N.W.2d 645, 650. "[U]nder notice pleading principles, we require 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Hallberg v. S. Dakota Bd. of Regents*, 2019 S.D. 67, ¶ 28, 937 N.W.2d 568, 577. A complaint must only "put 'a person of common understanding' on notice[.] *Id.* "[D]etailed factual allegations are not necessary," but a complaint is required to "set forth 'a statement of circumstances, occurrences, and events in support of [a] claim.'" *Id.*

Despite these well-established standards supporting the sufficiency of the Nelson Estate's allegations, Defendants argue that they are "vague." (Appellees' Brief, p. 19.) Defendants argue that the Nelson Estate was required to specifically itemize each

converted item, use the terms "agreement" or "bailment," and identify Tinkcom by name when describing their arrangement for safekeeping of the valuables at the Business. (*Id.*, ps. 19-21.) Defendants also baselessly accuse the Nelson Estate of using their conversion claim as a "thinly veiled attempt to skirt the statute of limitations problems with the Business Interest Claims and is designed to leave the door open to assert any interest in any particular coin or collectible item at Coins & Collectables." (*Id.*, p. 20.)

Contrary to Defendants' argument, the Nelson Estate's conversion claim is sufficiently pled to put Defendants, or "a person of common understanding," on notice of the claims against them. *Hallberg*, 2019 S.D. at ¶ 28. Instead, Defendants' argument that the Nelson Estate was required to specifically itemize the converted valuables or use magic words to support their claims improperly holds the Nelson Estate to a heightened pleading standard. Defendants do not cite any support for their proposed heightened standard. Notably, conversion is not required to be pled with particularity or a heightened pleading standard under South Dakota law. SDCL § 15-6-9.

Additionally, the Nelson Estate did not merely recite the elements of a conversion claim. *See Est. of Thacker v. Timm*, 2023 S.D. 2, ¶ 41, 984 N.W.2d 679, 691-2. Under those elements, the First Amended Complaint pled that Dr. Nelson, and the Nelson Estate after his death, "entrusted" their "certain valuable coins and collectible items" at the business premises for "safekeeping," and that all or some of the Defendants now wrongfully assert title to the items. *See Johnson v. Markve*, 2022 S.D. 57, ¶ 59, 980 N.W.2d 662, 678. (APP. 22, 29; S.R. 62, 69; First Amended Complaint, ¶¶ 25-29, 78-82.) Moreover, notice pleading principles do not require the Nelson Estate to

specifically list each converted item in the First Amended Complaint. Additionally, notice pleading principles do not require the Nelson Estate to specifically identify Tinkcom because it is reasonable to infer from the First Amended Complaint that the Nelson Estate "entrusted"[5] valuables to Tinkcom for safekeeping at the business he operated. In contrast, Defendants' interpretation of the Nelson Estate's pleading—that they left the items at the business but "not with anyone in particular"—is unreasonable. (Appellees' Brief at p. 21.) Nothing in the First Amended Complaint suggests that the Nelson Estate abandoned or ceded control of the items despite Defendants' misgivings that the Nelson Estate did not specifically plead that they "kept track of, monitored, accounted for . . .[or] asserted or maintained control" of the valuables. (Appellees' Brief, p. 21.). Accordingly, the Nelson Estate's conversion claim is sufficiently pled. Further, Defendants' reliance on SDCL § 29A-3-709 is misplaced not only because that statute does not apply to govern accrual of claims, but also because the Nelson Estate did not cede control of the items. (Appellants' Brief, p. 30-31.) Therefore, the trial court's dismissal of the Nelson Estate's conversion claim should be reversed.

[5] By definition, the word "entrust" means to "give *(a person)* the responsibility for something." ENTRUST, Black's Law Dictionary (12th ed. 2024) (parenthetical in original, emphasis added). Therefore, the word "entrust" in the First Amended Complaint means the Nelson Estate arranged for the safekeeping of the valuables with a person.

IV. Equitable estoppel and fraudulent concealment apply to estop Defendants from asserting a statute of limitations defense due to Tinkcom's repeated assurances to the Nelson children.

Finally, even if the Nelson Estate's business interest claims accrued and expired before they commenced their lawsuit against Defendants, which they did not, equitable estoppel and fraudulent concealment estop Defendants from asserting a statute of limitations defense. As demonstrated in the Nelson Estate's first brief, the Nelson Estate argued for application of equitable tolling or fraudulent concealment before the trial court, but not equitable tolling. The trial court erred by holding the doctrine of equitable tolling did not apply, while ignoring the distinct doctrines of equitable estoppel and fraudulent concealment. Defendants fail to show that equitable estoppel and fraudulent concealment do not, or should not, apply to estop them from asserting statute of limitations defenses. On the contrary, equitable estoppel and fraudulent concealment apply because Tinkcom repeatedly assured the Nelson children he would pay them or their interest in the business, causing them to delay filing a lawsuit or initiating a buyout.

Defendants argue that what they call "equitable doctrines" do not apply to statutes of limitation because equitable tolling is purportedly impermissible under South Dakota law. *See Anson v. Star Brite Inn Motel*, 2010 S.D. 73, ¶¶ 36-38, 788 N.W.2d 822, 831 ("I question whether we are authorized to adopt the equitable tolling doctrine for civil actions.") (Konenkamp, J., concurring) (citing SDCL § 15-2-1). This argument is unfounded, because unlike equitable tolling, the doctrines of equitable estoppel and fraudulent concealment are well-recognized by this Court. The critical distinction between the doctrines, recognized by this Court and broadly among other jurisdictions, is that equitable estoppel and fraudulent concealment *estop* a Defendant from asserting a

statute of limitations defense based on his culpable conduct, while equitable tolling *tolls* a statute of limitations to extend its expiration. *Compare Dakota Truck Underwriters v. S. Dakota Subsequent Inj. Fund*, 2004 S.D. 120, ¶ 31, 689 N.W.2d 196, 203 (observing that equitable tolling "extends" expiration of a statute of limitations); *with Sander v. Wright*, 394 N.W.2d 896, 899 (S.D. 1986) ("Under certain circumstances, a defendant may be estopped from raising the statute of limitations defense."); *see also Johnson*, 2024 S.D. at ¶ 20 n. 7 (observing that counterclaim plaintiff did not "argue that the statute of limitations should be equitably tolled or that Mary should be estopped from asserting it as a defense[.]"); *see also Work*, 2018 S.D. at ¶ 27 (denying motion for summary judgment based on statute of limitations due to fact disputes showing defendant could be estopped from raising the defense); *see also Evans v. Wright*, 554 P.3d 591, 601 (Idaho 2024) ("Equitable estoppel does not eliminate, toll, or extend the statute of limitations. It only bars a party from asserting the statute of limitations as a defense for 'a reasonable time after the party asserting estoppel discovers or reasonably could have discovered the truth."); *see also Skadburg v. Gately*, 911 N.W.2d 786, 798 (Iowa 2018) (holding fraudulent concealment, as a form of equitable estoppel, "does not affect the running of the statutory limitations period. Rather, it estops a defendant from raising a statute-of-limitations defense 'when it would be inequitable to permit the defendant to do so.'"). In other words, fraudulent concealment and equitable estoppel do not impermissibly modify the expiration of a statute of limitations; rather, the defendant is prevented from raising

the defense for an otherwise expired limitations period. The distinct operations of the separate equitable doctrines is critical, even though they may lead to similar results.[6]

On the merits, Defendants fail to rebut the Nelson Estate's showing that equitable estoppel and fraudulent concealment apply to estop Defendants from raising a statute of limitations defense. (*See* Appellees' Brief, p. 25.) Instead, Defendants assert that "[t]here are no allegations Tinkcom concealed or misrepresented facts material to the existence of the Nelson Estate's claim." (*Id.*) On the contrary, the First Amended Complaint pleads that Tinkcom represented to the Nelson children, for years, that he would compensate them for Dr. Nelson's business interest when Tinkcom died or sold the Business, but that when he died, the opposite occurred. (APP. 20-21, S.R. 60-61, First Amended Complaint ¶¶ 17, 24.) As pled, Tinkcom's representations that he would honor the business interests of the Nelson Estate, and then the opposite happening, constitutes a concealment or misrepresentation. *See Dakota Truck*, 2004 S.D. at ¶ 32; *see also Yankton Cnty. v. McAllister*, 2022 S.D. 37, ¶ 34, 977 N.W.2d 327, 339. Additionally, Defendants ignore that even Tinkcom's mere silence constitutes a fraudulent concealment. *See* 2022 S.D. at ¶ 34 ("[I]f a trust or confidential relationship exists between the parties, which imposes a duty to disclose, 'mere silence by the one under that duty constitutes fraudulent concealment.'"); *see also Matter of Est. of Thomas*, 532 N.W.2d 676, 683-4 (N.D. 1995).

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[6] The Nelson Estate has never argued in their briefing that equitable tolling applies to their claims. Nevertheless, Defendants spend nearly four pages of their brief arguing against the application of equitable tolling. (Appellees' Brief, ps. 22-25.) By contrast, Defendants discuss equitable tolling and equitable estoppel for one paragraph. (*Id.*, p. 25.)

Next, Defendants cite two inapplicable cases to support their arguments that fraudulent concealment and equitable estoppel do not apply. For the first time, Defendants argue that "representations as to future events are not actionable and false representations must be of past or existing facts." *Meyer v. Santema*, 1997 S.D. 21, ¶ 11 559 N.W.2d 251, 255 (citing *Mobridge Cmty. Indus., Inc. v. Toure, Ltd.*, 273 N.W.2d 128, 133 (S.D. 1978). Although Defendants recite the "general rule" for the tort of negligent misrepresentation, they ignore its exception, as stated in *Mobridge*: "[A]n exception comes into existence when the misrepresentation of a future event is in regard to a matter which is peculiarly within the speaker's knowledge.'" 273 N.W.2d at 133. Here, if Tinkcom did not intend to pay the Nelson Estate for their interest in the business, such a plan was peculiarly within his knowledge. Second, the rule does not apply because the tort of negligent misrepresentation is distinguishable from equitable estoppel and fraudulent concealment. *See Meyer*, 1997 S.D. at ¶ 9 (discussing legal standard to prove the "tort of negligent misrepresentation"). Third, even if the standards for fraud claims applied to fraudulent concealment and equitable estoppel, as Defendants implicitly argue, the doctrines are not barred because "a false statement of a present intent to do a future act may serve as the predicate for an action in fraud." *Schinkel v. Maxi-Holding, Inc.*, 30 Mass. App. Ct. 41, 48, 565 N.E.2d 1219, 1224 (1991).

Respecting the second case, Defendants impermissibly invite the Court to make a reasonableness determination as a matter of law, arguing that the Nelson children's reliance on Tinkcom's representations was unreasonable because the representations were not in writing. *Niesche v. Wilkinson*, 2013 S.D. 90, ¶ 29, 841 N.W.2d 250, 258.

Defendants' reliance on *Niesche* is misplaced because the issue in that case is limited to a purported succession contract for inheriting land. *Id.* The Nelson Estate has never argued that they were inheriting their business interest from Tinkcom—on the contrary, this suit is about a buyout for a separate interest not owned by Tinkcom or any of the Defendants. Defendants' implicit argument that Tinkcom's representations needed to be in writing for the Nelson children to reasonably believe them is meritless.

Therefore, even if the Nelson Estate's claims accrued in 2013, which they did not, the doctrines of fraudulent concealment and equitable estoppel estop Defendants from raising a statute of limitations defense based on Tinkcom's representations to the Nelson children. Additionally, it was improper for the trial court to resolve the issues through a motion to dismiss because statutes of limitations, fraudulent concealment, and equitable estoppel are fact-based inquiries. *See Guthmiller*, 2005 S.D. at ¶ 8, *Work*, 2018 S.D. at ¶ 23. As such, Defendants cannot benefit from Tinkcom's wrongdoing by raising a statute of limitations defense.

CONCLUSION

As demonstrated by the parties' briefing before this Court, the trial court erred by dismissing the Nelson Estate's First Amended Complaint. South Dakota law governing the accrual of claims, not South Dakota Partnership law or probate law, governs accrual of the Nelson Estate's claims. The Nelson Estate's claims accrued when they had notice of injuries caused by the legal wrongs of the Defendants when Defendants wrongfully refused to pay the Nelson Estate for their ownership interest in the Business in 2022 and claimed ownership to certain valuables. Further, the trial court's failure to assume the Nelson Estate's pleadings were true and construe all inferences in their favor was

reversible error, and Defendants improperly raised a statute of limitations defense before filing an Answer or responsive pleading. Finally, equitable estoppel and fraudulent concealment apply to bar Defendants from raising statute of limitations defenses.

Therefore, the trial court's decision should be reversed and the case should be remanded so the parties can conduct discovery and proceed to a trial on the merits.

Dated this 4th day of December, 2024.

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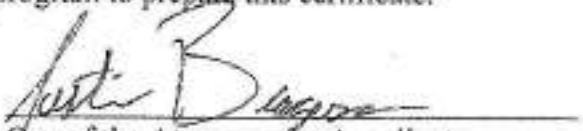
CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), I certify that this reply brief complies with the requirements set forth in the South Dakota Codified Laws. This reply brief was prepared using Microsoft Word 2013, Times New Roman (12 point) and contains 4,991 words, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues, and certificates of counsel. I have relied on the word and character count of the word-processing program to prepare this certificate.



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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of December, 2024, I electronically filed and served Appellants' Reply Brief through the Odyssey File and Serve system upon the following:

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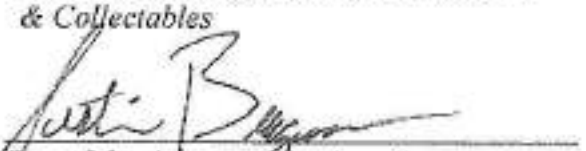

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