ORIGINAL (E-filed)

20070044

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

John D. Erickson, Richard B. Dregseth, and Jon A. Ramsey,

Plaintiffs/Appellants,

vs.

Randy Brown and Capital Harvest, Inc.,

Defendants/Appellees.

Supreme Court No. 20070044

BRIEF OF DEFENDANTS/APPELLEES

ON APPEAL FROM (1) ORDER PARTIALLY GRANTING MOTION TO DISMISS; (2) ORDER PARTIALLY GRANTING SUMMARY JUDGMENT; AND (3) FINAL JUDGMENT ENTERED JANUARY 26, 2007. CIVIL NO. 18-05-C-00812
IN DISTRICT COURT NORTHEAST JUDICIAL DISTRICT GRAND FORKS COUNTY
THE HONORABLE KAREN K. BRAATEN PRESIDING

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TABLE OF CONTENTS

Paragraph

TABLE OF AUTHORITIES

Paragraph(s)

NORTH DAKOTA SUPREME COURT CASES:

OTHER CASES:

STATUTES AND RULES **Paragraph(s)**

I. STATEMENT OF FACTS

A. Background

¶1 In 1998, Appellee, Randy Brown (Brown), acquired ownership of AGSCO, Inc. (AGSCO) a retailer and distributor of farm products to growers in North Dakota, South Dakota, Montana and Minnesota. Appendix of Appellees Brown and Capital Harvest (BCH A. at 1). Larry Brown, Brown's grandfather started the family business in1934. Id. In 1999, Brown recognized an opportunity to better structure AGSCO's extended credit and be competitive with financing in the industry. Id. Through conversations with his banker, Appellant, John Erickson (Erickson), Brown and Erickson developed a plan to create a finance company. Id. Erickson, dissatisfied with his employment at Bremer Bank, told Brown that he could make a finance company profitable if it was able to secure enough capital to finance all of AGSCO's extended credit and similar companies' extended credit. (BCH A. at 2)

B. Brown hires Erickson and Dregseth

¶2 In early August of 1999, Erickson and Brown discussed Erickson obtaining a potential interest in the yet-to-be formed finance company. (Trial Transcript ("Tr." 965)). Prior to coming to an agreement with Brown Erickson left Bremer "to pursue several opportunities outside the banking industry." (Tr. 873). Erickson had received other offers for employment from John Botsford, a Grand Forks brokerage business and from Jim Karley. (Tr. 874). In late August, Erickson and Brown agreed that Erickson would work to create a captive finance company. (Tr. 971).

¶3 As a condition of employment with the finance company Erickson insisted that Brown hire Appellant, Rick Dregseth (Dregseth), to help with the project. (Tr. 972).

Dregseth worked with Erickson at Bremer as the regional CFO for Bremer Bank. Id. The Plaintiffs argued that Dregseth agreed with Brown to work for the finance company in return for an eight percent interest in Capital Harvest and a salary. (App. 9). Brown testified that he never had any agreement with Dregseth to transfer any interest in Capital Harvest. (Tr. 975). The jury returned a verdict determining that Brown and Dregseth never had an agreement. (App. 55). Erickson negotiated with Dregseth that he would receive $58,000 and an eight percent interest in the yet to be formed finance company. (Tr. 974). Dregseth agreed to help create the finance company, which they eventually named Capital Harvest, Inc. (Tr. 976).

¶4 On September 13, 1999, Erickson started work. (App. 9). On Erickson's first day Brown gave him a document detailing how Erickson would earn his interest in the finance company. (Tr. 601-2, Ex. 8, App. 91-92). The document (hereinafter Exhibit 8) stated Brown would transfer shares to Erickson based on December 31, pre-tax audited financials. (App. 92). The document lists pre-tax profits in one column with the corresponding ownership interest to be earned adjacent. Id. The document reads, "Total available ownership to be transferred will not exceed 25%. The transfer will be to John Erickson as long as he remains V. Pres. John at his discretion can transfer any portion of what he has been given to other employees of the finance company." Id. Erickson accepted the agreement and never discussed it with Brown. (Tr. 884, 886-7).

¶5 Erickson contends that he was surprised that he had to earn his share in the company. In his deposition Erickson stated:

> Q. Did you accept that, at that point in time, did you accept that your first contract with Randy was gone at that point in time?
>
> A. I would call it a twist.

Q. I guess what I'm getting at, you're not claiming that you should have a 50 percent ownership interest in Capital Harvest?

A. No. No.

Q. It's the, the 25 percent that you were to earn was to take place of the 25 percent that you were supposed to get when you walked in the door. Is that correct?

A. Yeah, I would say that's fair. (BCH A. 4-5).

Erickson went on, "And I. really, logically, the earning it, the way Randy sold it to me with the Mark Holm reference and, you know, I, I didn't really see that that was unreasonable." (BCH A. 6). Erickson also stated, " . . . the $25.000 increments of, of earning the. the ownership interest seemed that it was reasonable to me." (BCH A. 3). He went on to further state, "I mean, we're going to make this, we can make this happen and, and that it was, you know, earning it was, was – there was some logic to it." (BCH A. 8).

¶6 On October 18, 1999, Dregseth started work for Brown after agreeing with Erickson to receive part of Erickson's potential share of Capital Harvest. (App. 10). Dregseth first learned about Exhibit 8 on his first day. (Tr. 610). He stated in his deposition:

Q. . . . John Erickson said you'll get eight percent when you walk in the door of Capital Harvest, or the captive finance company, and then you learn, when you get there, that you have an opportunity to earn an interest through John Erickson. You didn't think you had two opportunities did you?

A. No I did not.

(BCH A. 12-13).

Dregseth upon learning of what Erickson called a "twist" stated,

"I was a little surprised, but as, as John [Erickson] was supporting the position that -, and I. I definitely could understand. I mean eight percent

> of, of nothing is nothing unless we make it work. And I don't believe that either one of us thought that we couldn't make this thing succeed."

When specifically asked about the terms of the "Exhibit 8" contract Dregseth: "Q. And so you accepted those terms then? A. Yes, I did." (BCH A. 9). Dregseth also stated, "I listened to what, what the reason was, why it would have to be earned, I saw the schedule, I figured we could do that and I would get my ownership." (BCH A. 10).

¶7 Erickson and Dregseth never brought up to Brown the issue with regard to what they contend was a change in the contract. (Tr. 274, 884). Dregseth states that after he learned about the terms of Exhibit 8 he never discussed it with Brown. (Tr. 274). His discussions were with John Erickson. (Tr. 274-5). Dregseth never complained to Brown that he was upset about the terms of Exhibit 8, Erickson. (Tr. 275).

C. Operating Capital Harvest and the Hiring of Jon Ramsey

¶8 When Capital Harvest was first created Erickson and Dregseth produced an income forecast for Capital Harvest. (Tr. 277, Ex. 202, BCH A. 22-25). The forecast indicated that Erickson and Dregseth believed that Capital Harvest could make $182,364 in its first year and $360,407 in its second year. (BCH A. 23) The forecast made the assumption that Capital Harvest would make its income on the spread – the difference between the rate at which Capital Harvest could borrow funds and the rate at which they would loan those funds. (Tr. 280). The appellants did not consider charging a discount fee. (Tr. 278). A discount fee typically is a fee paid when a company buys debt from another company. The company buying the debt assumes the risk that the debtors will not pay. The company selling the debt, while foregoing opportunity to make interest income, receives cash and eliminates their risk.

¶9 At the time Capital Harvest was created Erickson and Dregseth did not consider discount fees as a source of revenue for Capital Harvest. Dregseth in his deposition explained that he was not aware of discount fees at the time Capital Harvest was conceived. (Tr. 875). When asked why discount fees were not considered a potential source of income Erickson stated, "We didn't know what we were doing when it came – we didn't – I didn't have experience in, in captive or, or credit card type financing models, my experience was in banking. So we were looking at a, we were looking at a spread on our outstandings." (BCH A. 8).

¶10 Sometime in 2000, Dregseth approached Erickson about Capital Harvest's finances. (Tr. 133). It was clear that Capital Harvest was losing a significant amount of money. (Tr. 132). Dregseth told Erickson that Capital Harvest should charge AGSCO a discount fee. (Tr. 133). In reviewing Capital Harvest's income it was clear that Capital Harvest was not going to produce enough income to make a profit by only supplying financing to AGSCO's customers on the spread. (Tr. 132-3). Erickson agreed with Dregseth that Capital Harvest should charge AGSCO a discount fee. (Tr. 136). Erickson and Dregseth approached Brown and suggested that Capital Harvest should be paid a discount fee from AGSCO. (Tr. 136). Brown disagreed. (Tr. 1006). He argued that Capital Harvest was essentially just managing AGSCO's extended receivables. (Tr. 1006-11). When AGSCO made a sale, Capital Harvest would simply give AGSCO an IOU. (Tr. 1009). Capital Harvest would only pay AGSCO when AGSCO's customers would pay. (Tr. 1010). Capital Harvest, with virtually no assets of its own could not reduce AGSCO's risk or provide AGSCO with cash. (Tr. 1006-11). During the 2000,

Capital Harvest did not charge AGSCO a discount fee. (Tr. 181). Capital Harvest showed a net loss in 2000 of $84,341. (Tr. 182).

¶11 In November of 2000, the plaintiffs brought Jon Ramsey (Ramsey) on board to work as the general manager of Capital Harvest. (App. 10). Ramsey had worked at Bremer as AGSCO's banker and had taken over for Erickson. (Tr. 335). Ramsey received a letter from Erickson indicating the terms upon which he was hired. (Tr. 342, Ex. 33. BCH A. 21). He was to receive a salary of $60,000 and a potential interest in Capital Harvest upon Erickson and Dregseth receiving an interest in Capital Harvest. (BCH A. 21, App. 10). The salary was to come from Capital Harvest and the interest in Capital Harvest was to come from Erickson and Dregseth. Id. Erickson would give Ramsey 2.72 percent and Dregseth agreed to give Ramsey 1.28 percent. (App. 10). Brown and Ramsey had no agreement. (BCH A. 21, App. 10). Prior to Ramsey coming to work for Capital Harvest he was told about the alleged change in contract. (Tr. 906). As AGSCO's banker Ramsey knew that Capital Harvest was losing money in 2000, and was not charging AGSCO a discount fee. (Tr. 298).

¶12 In 2001, Capital Harvest again lost money. The appellants approached Brown and suggested that Capital Harvest should receive a discount fee from AGSCO. (Tr. 193). Once again, Brown disagreed. Id. During this time the focus for Capital Harvest was increasing the amount of money AGSCO was able to borrow and attempting to gain other sources of income. (Tr. 203). In 2001, Capital Harvest did not charge AGSCO a discount fee. (Tr. 204) Capital Harvest showed a net loss in 2001 of $78,351. Id.

D. Talks with Alerus and the Plaintiffs leave work at Capital Harvest

¶13 In late 2001, Erickson approached Alerus Financial about establishing a relationship with Capital Harvest. (Tr. 699). During the course of the next year, the two parties talked several times. (Tr. 701-05). In October of 2002, Erickson suggested a proposal to Alerus that would require Brown's approval. (Tr. 704, 708). As part of the proposal Brown would receive cash for 51 percent of his share in Capital Harvest. (Tr. 704). The appellants would receive collectively 25 percent interest in Capital Harvest and Brown would be left with 24 percent. (Tr. 704. 708). Additionally, AGSCO would be required to pay discount fees to Capital Harvest and guarantee loans though Capital Harvest in the amount of at least twenty-five million dollars a year. (Tr. 709, 898). Brown disagreed with the terms of the proposal and was unwilling to commit AGSCO to these terms. (Tr. 1031). Erickson and Ramsey left Capital Harvest after the proposal was rejected. (App. 12). Dregseth resigned his position in the summer of 2003. Id. In 2002, Capital Harvest had a net gain of $4,291. (Tr. 249). Brown never transferred any shares of Capital Harvest to the plaintiffs because Capital Harvest never made the necessary profit.

¶14 Count VI of the plaintiffs' complaint alleging that Brown breached the contract where Erickson could earn an interest in Capital Harvest hinges on whether AGSCO should have paid Capital Harvest a discount fee. (App. 16). The appellants alleged that Brown breached the terms of the written contract with Erickson by using improper and incorrect accounting practices. Id. The only "improper accounting practices" alleged is that AGSCO did not pay Capital Harvest a discount fee. (App. 12). Dregseth, in charge of setting up the accounting process for Capital Harvest, signed off on all the financial information for Capital Harvest. (BCH A. 2). The appellants acknowledged that the only

way for them to prevail was to argue that Capital Harvest's income should have been much higher due to added discount fee income. (App. 12). With the added income they would have earned an interest under the terms of the Exhibit 8 contract. (Tr. 250-1) The question presented to the jury was whether Brown breached the contract by preventing Capital Harvest from charging a discount fee to AGSCO. (Tr. 1316). The jury determined that the Exhibit 8 contract was not breached. (App. 54).

E. Pleadings

¶15 Many of appellants claims against Capital Harvest were dismissed based upon the pleadings. The appellants in their complaint alleged:

- Brown proposed to give a 25 % ownership interest to John D. Erickson in a to-be-formed captive finance company. (App. 8)
- Brown proposed to give Dregseth a 5% interest in the to-be-formed captive finance company. Erickson negotiated with Dregseth for a higher salary and an 8% interest in the to-be-formed captive finance company. (App. 9).
- On August 18, 1999, Erickson quit his job at Bremer Bank. (App. 8).
- On or about September 13, 1999, Brown reneged on his promise to give either Erickson or Dregseth an ownership interest in the company. Brown told Erickson that instead of "just giving" them an interest in the to-be-formed company, they would have to earn it. Brown gave Erickson Exhibit 8 to plaintiffs' complaint detailing how they could earn an interest in the company and it included a provision where Dregseth could only earn his interest through Erickson. (App. 9).

- On October 13, 1999, after Brown allegedly breached his contract to give Erickson and Dregseth ownership interests in the to-be-formed company, Brown formed Capital Harvest and gave himself 100% of the stock. (App. 10).
- On October 15, 1999, after the initial ownership contract had been supposedly breached, Dregseth left his employment and began working for Capital Harvest on October 18, 1999. Id.
- When Dregseth started, Erickson agreed to give Dregseth an ownership interest out of his own share. Id.
- In November 2000, well over a year after Brown allegedly breached his agreements, Erickson and Dregseth, with Brown's knowledge and consent, approached Plaintiff Jon A. Ramsey ("Ramsey"), and offered him a position at Capital Harvest, promising to give him some of the ownership interest they hoped to earn – 2.72 percent from Erickson and 1.28 percent from Dregseth. Id.
- Brown refused to agree to a proposal with Alerus financial and at the same time, Brown stated he was not going to honor any of his agreements. (App. 11).
- Capital Harvest's financial failure was due to AGSCO not paying Capital Harvest a discount fee. Had this fee been paid Capital Harvest would have shown income such that Erickson would have met the earned ownership schedule. (App. 11-12).
- Sometime before July of 2003, almost four years after Brown breached his promise to give them stock, and almost four years after Brown made himself sole shareholder, the Plaintiffs terminated their employment with Capital Harvest, never having received stock in the company. (App. 12).

- (Breach of Contract) Brown breached the initial oral agreements with Erickson and Dregseth. (App. 12-13).
- (Fraud) Brown misrepresented to Erickson and Dregseth that they would receive stock in Capital Harvest if they would work for the company in order to induce them into agreeing to work for Capital Harvest. (App. 13-14).
- (Deceit) Brown deceived Erickson and Dregseth into believing they would receive an interest in Capital Harvest if they would work for the company in order to induce them into agreeing to work for Capital Harvest. (App. 14-15).
- (Promissory Estoppel) Brown promised to Erickson and Dregseth that they would receive an interest in Capital Harvest if they came to work for Capital Harvest. (App. 15-16).
- (Equitable Estoppel) Brown's actions as the sole shareholder of AGSCO and Capital Harvest were intended to convey to the plaintiffs that they would receive a share in Capital Harvest. These actions were a misrepresentation. (App. 16).
- (Breach of Contract) Brown breached the terms of the Schedule Contract Agreement by using improper accounting methods and refusing to give Erickson 25% of his stock in Capital Harvest. Erickson agreed to give Dregseth an 8% interest in Capital Harvest from his stock. Erickson and Dregseth agreed to give Ramsey a 4% interest in Capital Harvest from their stock. Brown breached his agreement with Erickson and thus also breached the agreement with respect to Dregseth and Ramsey. (App. 16-17).

¶16 In August of 2004, Plaintiffs brought this lawsuit against Brown and Capital Harvest. In 2005, the defendants brought a motion to dismiss. The Court ordered all

Counts against Capital Harvest dismissed with the exception of Count VII. Count IX was dismissed against all parties. Counts I and VI were dismissed with regard to Jon Ramsey. The matter was brought to trial and tried for seven days. The jury determined that Erickson and Brown had an oral agreement that was replaced by a novation – Exhibit 8. (App. 53). The jury found that Brown did not breach this contract. (App. 54). The jury found that Dregseth and Brown did not have a contract to give an ownership interest in Capital Harvest. (App. 55). The jury also found and that Brown did not commit fraud was against Erickson. (App. 54-5). The plaintiffs have now appealed this matter to the North Dakota Supreme Court.

II. ARGUMENT

A. The District Court properly dismissed various claims against Capital Harvest

¶17 Plaintiffs' claims center on the alleged actions of the Appellee Randy Brown. Plaintiffs' claims concern alleged representations made by Brown about Plaintiffs receiving stock in Capital Harvest, which were made before Capital Harvest was formed. Plaintiffs' claims against Capital Harvest are unsustainable and were properly dismissed with prejudice.

1. Standard of Review.

¶18 The Court has put forth the standard for review for motions to dismiss for failure to state a claim:

> Upon a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(5) of the North Dakota Rules of Civil Procedure, we recognize that a complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief . . .

Brakke v. Rudnick, 409 N.W.2d 326, 332 (N.D. 1987). The Court went on to elaborate:

> The court's inquiry is direct to whether or not the allegations constitute a statement of a claim under Rule 8(a), N.D.R.Civ.P., which sets forth the requirements for pleading a claim and calls for 'a short and plain statement of the claim showing that the pleader is entitled to relief.' 'The complaint is to be construed in the light most favorable to the plaintiff, . . . and the allegations of the complaint are taken as true . . . The motion for dismissal of the complaint should be granted only if it is disclosed with certainty the impossibility of proving a claim upon which relief can be granted . . .'

Id. (Citations omitted). Additionally while Rule 8(a) requires only a "concise and non-technical" complaint, the complaint still must be sufficient to notify and inform the opponent and the court of the claim. Id.

2. The pleadings do not allege Capital Harvest caused any of the Plaintiffs' alleged injuries.

¶19 The plaintiffs' complaint states that Brown breached his contract with Erickson; that Brown deceived Erickson and Dregseth and defrauded them; that Brown broke promises to Erickson and Dregseth and that he should be estopped from not keeping those promises; that Brown's actions lead the plaintiffs to believe that they would receive interest in Capital Harvest; that Brown breached the terms of the Schedule Contract Agreement and thus breached agreements with Dregseth and Ramsey; and that Brown as majority shareholder violated the plaintiffs' rights as minority shareholders. (App. 12-18). Nowhere other than with regard to the plaintiffs' unjust enrichment claims does the complaint allege that Capital Harvest caused any injury to the plaintiffs. "When a defendant is named in the caption of a complaint but is not specifically claimed to have caused the plaintiff injury, the complaint fails to state a cause of action against that defendant." Brakke, 409 N.W.2d at 332 (citing Potter v. Clark 497 F.2d 1206 97th Cir. 1974).

¶20 The facts in this case are similar to those in Brakke. In Brakke, the plaintiffs brought an action for the unlawful repossession of a tractor. Id. at 327. The plaintiffs brought the action against the sheriff, the states attorney, several deputy sheriffs, the bank upon whose behalf the tractor was repossessed and several bank officers amongst others. Id. At 326. The plaintiff alleged criminal trespass, armed robbery, assault, conspiracy and violations of civil rights and due process. Id. at 328. The court found that several of the defendants while named in the caption of the complaint, they were not specifically claimed to have caused any injury to the plaintiff. Id. at 332. The Court concluded that the trial court acted properly in dismissing the plaintiffs' complaint against those individuals because there were no allegations that those defendants harmed the plaintiffs. Id. at 333. The Court went on to state "Although we recognize the complaint does contain generic allegations that the 'defendants' conspired to deny the plaintiffs due process of law, the allegations are merely conclusory statements unsupported by allegations of factual circumstances specifically relating to any of the defendants. We do not believe those generic allegations are sufficient to state a cause of action as to any specific defendants." Id. at 333 (citations omitted).

¶21 The facts with regard to the pleading in the present case are similar. In this case, Capital Harvest is mentioned many times but there are no allegations that Capital Harvest acted in a way to harm the plaintiffs. All the counts of the complaint state that Brown harmed the plaintiffs.

¶22 Count I of Plaintiffs' Complaint asserts breach of contract, yet Plaintiffs concede the alleged promises that supposedly induced their reliance were made by Brown prior to the formation of Capital Harvest. (App. 12-13, 10). Indeed, according to the complaint

Erickson and Dregseth were hired to assist Brown in "developing" Capital Harvest. (App. 12-13). Plaintiffs further concede that it was Erickson and Dregseth – not Brown or Capital Harvest – who made representations to Ramsey. (App. 10).

¶23 Counts II and III of Plaintiffs' Complaint allege fraud and deceit, respectively. (App. 13-14). The representations that allegedly induced Plaintiffs to act were, according to the complaint made by Brown before Capital Harvest was even formed. Id.

¶24 Counts IV and V of Plaintiffs' Complaint allege promissory and equitable estoppel. (App. 15-16). According to the complaint, it was Brown, and not Capital Harvest, who made statements, intended to induce their detrimental reliance. Id. These claims are made with respect to alleged statements made by Brown, prior to the formation of Capital Harvest. Id. Plaintiffs claim the stock they were allegedly promised belonged to Brown and would come from him directly. (App. 16-17).

¶25 Count VI of Plaintiffs' Complaint alleges breach of contract with respect to the Exhibit 8 agreement. (App. 16-17). Plaintiffs concede that it was Brown who owned the interest they allegedly were to receive, and Brown who would transfer the interest. Id. With regard to Ramsey, Plaintiffs further allow that the promise upon which Ramsey purports to rely were received from Erickson and Dregseth, (which were allegedly based upon statements made by Brown). (App. 10). The alleged promise from Brown was made prior to the formation of Capital Harvest. (App. 9).

¶26 Count VIII of Plaintiffs' Complaint alleges breach of fiduciary duty allegedly owed by Brown to Plaintiffs on the theory that Plaintiffs are "rightfully minority shareholders," while Brown is a majority shareholder, in Capital Harvest, a closely held

corporation. (App. 18). Obviously, this claim cannot be made with respect to Capital Harvest.

¶27 "When a defendant is named in the caption of a complaint but is not specifically claimed to have caused the plaintiff injury, the complaint fails to state a cause of action against that defendant." Brakke, 409 N.W.2d at 332. The complaint here fails to claim that Capital Harvest injured the plaintiffs. Furthermore, it would be impossible for Capital Harvest to commit fraud or deceit by inducing performance of a contract, which did not exist at the time it was incorporated. Nor can Capital Harvest be estopped from denying liability on an alleged contract to which it was not a party. The trial court properly dismissed Counts I, II, III, IV, V, VI and VIII of the plaintiffs' complaint with regard to Capital Harvest. The complaint simply failed to state any claim whereby Capital Harvest injured the plaintiffs.

3. The plaintiffs' complaint fails to state a claim against Capital Harvest based upon promoter liability.

¶28 The plaintiffs argue their complaint is sufficient because Brown was acting as the promoter of Capital Harvest. The Complaint does not support liability against Capital Harvest on the theory that Brown was its promoter. Recognizing the deficiency in their pleadings, Plaintiffs attempt to retroactively supply both factual allegations and a theory to support their claims. Yet Plaintiffs failed to plead this theory or the facts in their Complaint. It is the allegations of that Complaint which fail to support Plaintiffs' claims, but it is that Complaint on which Plaintiffs must depend in opposing Defendants' motion to dismiss. Rule 8(a), N.D.R.Civ.P

¶29 First and foremost, at the time Capital Harvest was incorporated, by Plaintiffs' own admissions, Brown had supposedly breached his alleged promise to "just give"

ownership interest in Capital Harvest to Plaintiffs. Thus, there was no contract remaining in existence from Capital Harvest to assume or ratify. With regard to the second contract, the Complaint fails to allege that Brown was acting, or even that Plaintiffs believed Brown was acting on behalf of Capital Harvest when he made the alleged promise to Erickson and Dregseth. The Complaint does not allege that Capital Harvest ratified, adopted, or otherwise accepted the pre-incorporation contract made by Brown. Ratification or adoption of the contract is critical to a claim for promoter liability. Graham v. First Nat. Bank of Dickinson, N.D., 175 F.Supp. 81, 82 (D.C.N.D. 1959).

¶30 Additionally, it is clear from the basis of Plaintiffs' Complaint that any interest in Capital Harvest they might receive would be from brown individually as sole shareholder of Capital Harvest. (App. 12-13, 16-17). It was Brown who was going to "just give" them some of *his* ownership interest in Capital Harvest. (App. 13). According to the complaint, the stock agreement was reached "between Brown and Erickson" and "Brown failed to give Erickson a 25% interest." (App. 12-13). Likewise, the agreement with Dregseth "was reached between Brown and Dregseth" and "Brown failed to give Dregseth an 8% interest in Capital Harvest." Id. In other words, Erickson and Dregseth do not allege that they were to receive original issue stock form Capital harvest; instead, they would acquire their ownership interest directly from Brown. The complaint is specific in that Brown was the sole shareholder and that the stock was to come from Brown. (App. 10, 12-13). The complaint instead of allowing for the possibility of promoter liability specifically claims facts that make it impossible. The plaintiffs could have moved to amend their complaint to include allegations relevant to promoter liability after the order to dismiss, but they chose not to.

4. Any error was not prejudicial to the Plaintiffs.

¶31 Finally, the underlying issue of whether this contract was breached has been tried to a jury. The plaintiffs had the opportunity to fully litigate the issue of whether any or all of these contracts were breached. The jury found that Erickson and Brown had an oral contract but that the oral contract was extinguished by a novation – the second contract. (App. 53). The jury found that Brown did not breach the second contract. (App. 54). Additionally, the jury found that Brown did not commit fraud by inducing Erickson into entering into the contract. (App. 54-55) The jury found that Dregseth and Brown did not have contract for the transfer of share is Capital Harvest. (App. 55). Even if Capital Harvest had assumed the second contract, a jury has already determined that it was not breached. "An appealing party has the burden 'of establishing not only that the trial court erred but that such error was highly prejudicial to his cause.'" Olander Contracting Co., v. Gail Wachter Investments, 2002 ND 65, ¶ 26; 643 N.W.2d 29 (quoting Filloon v. Stenseth, 498 N.W.2d 353, 356 (N.D. 1993). Dismissing the various counts against Capital Harvest was not prejudicial to the plaintiffs.

B. The District Court Properly Dismissed Dregseth and Ramsey's Claims for Deceit

1. Standard of Review

¶32 Summary judgment is procedural device for promptly and expeditiously disposing of an action without a trial if either party is entitled to judgment as a matter of law and no dispute exists as to either the material facts or the reasonable inferences to be drawn from undisputed facts or resolving the factual disputes will not alter the result.

Iglehart v. Iglehart, 2003 ND 154, ¶ 9, 670 N.W.2d 343.

> Although the party seeking summary judgment has the burden of showing that there is no genuine issue of material fact the party resisting the motion may not simply rely upon unsupported, conclusory allegations. The

> resisting party must present competent admissible evidence by affidavit or other comparable means which raises an issue of material fact and must, if appropriate, draw the court's attention to relevant evidence in the record by setting out the page and line in depositions or other comparable documents containing testimony or evidence raising an issue of material fact.

2. Dregseth's claim for deceit was properly dismissed in summary judgment as he claims that he was promised something to induce him into entering into a contract to work for Capital Harvest

¶33 Dregseth in his complaint contends that Brown misrepresented that he would give Dregseth an interest in Capital Harvest causing him to enter an agreement to work for him at Capital Harvest. Damages in deceit are awarded for the harm caused when a party changes his or her position based upon a misrepresentation. N.D.C.C. § 9-10-03. "It is well established that a party fraudulent induced into entering a contract may either rescind the contract and recover any money paid or property delivered pursuant to the contract, or affirm the contract, take the benefits of it, and recover damages for the injuries sustained because of the misrepresentations." Land Office Co. v. Clapp-Thomssen Co., 442 N.W.2d 401, 405 (N.D. 1989). Deceit applies where there is no contract between the parties. Olson v. Fraase, 421 N.W.2d 820, 827 fn. 3 (N.D. 1988). An action for fraud is appropriate with regard to parties to a contract. The allegation in Dregseth's claim for deceit and fraud was that Brown induced Dregseth to enter into a contract. The action for fraud is applicable because the alleged deceit was one to induce Dregseth into entering into a contract.

¶34 Dregseth alleges in his complaint that Brown agreed to give him a percentage interest in a yet to be formed finance company if he would agree to work for him. Capital Harvest had not yet been formed. The contract that Dregseth was allegedly induced into was with Brown. While the jury determined that Brown never had a

contract to give shares to Dregseth, the jury never determined that Brown and Dregseth had *no* contract. Dregseth and Brown had a contract. The contract was that Dregseth would come to work for him for a salary. The only thing the jury determined was that Brown never made any misrepresentation to Dregseth that he would receive an unqualified interest in the yet to be formed captive finance company. To allow Dregseth the opportunity to try a claim of deceit would be disregard the jury's determination that Dregseth was never promised any shares in the captive finance company in the first place. Additionally, the basis for Erickson's case against Brown for fraud is identical to Dregseth's basis for deceit. The jury determined that Brown did not defraud Erickson. It is a stretch to suggest that Brown did not lie to Erickson yet lied to Dregseth. There is no prejudice to Dregseth as the issue of whether Brown deceived both Erickson and Dregseth was fully tried to the jury. Olander, 2002 ND 65 at ¶ 26.

¶35 The trial court correctly understood that Dregseth's allegation -- that he was induced to enter into this contract -- was an action for fraud. If the jury had found that Dregseth had a contract to receive shares in Capital Harvest, they might have found that Brown committed fraud in inducing Dregseth to agree to work for him. However, because the jury found that no contract existed between Brown and Dregseth *promising Dregseth an interest in the yet to be formed finance company* the basis for the fraud and any deceit is absent. Thus, the special verdict form correctly followed the law.

3. The district court properly dismissed Ramsey's claim for deceit in summary judgment as there was no deceit alleged by Ramsey.

¶36 The plaintiffs' complaint makes no allegations with regard to Ramsey being deceived by Brown. The complaint only alleges that Brown misrepresented to Dregseth and Erickson that they would receive an interest in Capital Harvest. (App. 14-15).

Ramsey could not have been affected by any alleged misrepresentation because he did not start to work for Capital Harvest until well after the alleged misrepresentation occurred. Ramsey knew that any ownership interest was a potential ownership interest and was based upon the performance of Capital Harvest. (Tr. 903). Ramsey stated in his deposition that the only promise Brown ever made to him was kept. (BCH A. 19). Furthermore, Ramsey knew about the alleged misrepresentation by Brown and that Capital Harvest was not charging a discount fee to AGSCO. (Tr. 903). The facts simply do not bear out Ramsey's claim for deceit.

¶37 Ramsey now claims that he has a valid claim for deceit because Brown should have told him that he never intended to give Erickson an interest in Capital Harvest. This statement is simply a conclusory statement. The plaintiffs attempt to demonstrate Brown never intended to give Erickson an interest in Capital Harvest by pointing out that Brown did not allow Capital Harvest to charge a discount fee to Capital Harvest. Ramsey knew that Capital Harvest was not receiving a discount fee when he agreed to start work. The whole issue of whether Brown breached the second contract by failing to allow Capital Harvest to charge a discount fee was fully tried to the jury. The jury determined that Brown did not breach the contract. The jury did not find that Brown breached the contract by not allowing Capital Harvest to charge a discount fee. The jury rejected the very means by which the plaintiffs attempt to show that Brown's intent was to never give an interest in Capital Harvest. There is no prejudice to Ramsey. Olander, 2002 ND 65 at ¶ 26.

C. The District Court Properly Dismissed Plaintiffs' Equitable Claims in Summary Judgment.

1. The trial court correctly determined that Dregseth's claim for promissory estoppel was premised on the same factual basis as his claim for breach of contract and was thus inapplicable.

¶38 The North Dakota Supreme Court has stated:

> Before the doctrine of promissory estoppel can be invoked four elements must be established 1) a promise which the promisor should reasonably expect will cause the promise to change his position; 2) a substantial change of the promisee's position through action, or forbearance; 3) justifiable reliance on the promise; and 4) injustice which can only be avoided by enforcing the promise.

University Hotel Development, LLC v. Dusterhoft Oil, Inc., 2006 ND 121, ¶ 11, 715 N.W.2d 153. However, once it is established that a contract exists between the parties, then a party may no longer recover under the theory of promissory estoppel. World Championship Wrestling, Inc. v. GJS International., Inc., 13 F.Supp.2d 1305 (D. Kan. 1998). In O'Connell v. Entertainment Enterprises, Inc., 317 N.W.2d 385, 389 (N.D. 1982) the North Dakota Supreme Court stated that both equitable estoppel and promissory estoppel are intended "to prevent inequities that may result when an agreement is void or unenforceable because of inadequate consideration or the statute of frauds and one of the parties has acted to his detriment because of a representation or promise made by the other person." The Court in O'Connell addressed the issue of estoppel only after determining that the plaintiff had foregone his argument that a contract existed. Id.

¶39 Dregseth claimed that he and Brown had an oral contract. (App. 12-13). The alleged promise is that Dregseth would come to work for Brown and he would give Dregseth an interest in Capital Harvest. Id. Had this promise been made Brown and Dregseth would have had a contract. Had this promise been made and a contract formed promissory estoppel is inapplicable. O'Connell, 317 N.W.2d at 389. If there was no

promise made – as was determined by the jury -- then promissory estoppel is also inapplicable. University Hotel Development, LLC, 2006 ND 121 at ¶ 11. The trial court correctly determined that the basis for the promissory estoppel and the contract were the same and thus a determination by the jury that no contract to give an unqualified interest in the captive finance company also meant that promissory estoppel was inapplicable.

¶40 The facts in this case do not even allege that Brown made this promise to Dregseth. Rather it is alleged that Erickson made the promise to Dregseth on Brown's behalf. Before promissory estoppel can be invoked, a promise must be "clear, definite, and unambiguous as to essential terms." Id. The issue of whether a promise was made to Dregseth was fully tried to the jury in this case. The jury rejected the idea that Brown promised to give Dregseth an eight percent interest in Capital Harvest. The jury determined that Brown and Dregseth did not have a contract to give Dregseth an interest in Capital Harvest. Dregseth is not prejudiced by the trial court's dismissal of his promissory estoppel claim. Olander, 2002 ND 65, ¶ 26.

2. The district court correctly dismissed Ramsey and Dregseth's claim for equitable estoppel

¶41 The plaintiffs in their complaint allege that Brown's actions created a misrepresentation that is actionable under equitable estoppel. (App. 16). The North Dakota Supreme Court has addressed the applicability of equitable estoppel and promissory estoppel. In O'Connell the court stated: "There are two forms of estoppel; equitable estoppel and promissory estoppel. Equitable estoppel applies when a person makes a representation as to a present or past fact. Promissory estoppel, on the other hand, applies when a person makes a representation as to future events." 317 N.W.2d at

389. Equitable estoppel was developed to prevent inequities where there is no contract. See id.

¶42 The plaintiffs' complaint alleges that Brown's "*actions* constitute a misrepresentation . . ." Dregseth when asked about what actions Brown took that constituted a misrepresentation he responded that is was Brown's alleged promises to him. (BCH A. 15-18). When Jon Ramsey was asked about what actions Brown took that made him think he would get an ownership interest in Capital Harvest, Ramsey cited his conversation he had with Brown prior to starting with Capital Harvest and Brown's indication that he was pleased with Capital Harvest's performance, thought the future looked promising and he was excited to have him on the team. (BCH A. 19-20).

¶43 All of the plaintiffs' claims with regard to equitable estoppel are without merit as each individual had a contract for employment and a contract under which they could receive an interest in Capital Harvest, Inc. Equitable estoppel was "developed to prevent inequities that may result when an agreement is void or unenforceable because of inadequate consideration or the statute of frauds and one of the parties has acted to his detriment because of a representation or promise made by the other person." O'Connell, 317 N.W.2d at 389. Ramsey had a specific agreement with Capital Harvest as to his compensation. (BCH A. 21). Additionally, it is undisputed that Ramsey also had an agreement with both Erickson and Dregseth as to how he would receive his interest in Capital Harvest. (App. 10). Ramsey is not alleging that his contract with Capital Harvest, Erickson and Dregseth was void or unenforceable. In fact the jury in this case determined that Erickson's contract with Brown to receive an interest in Capital Harvest

was not breached. (App. 54). Ramsey's claim for equitable estoppel is invalid because he has an enforceable contract. Id.

¶44 Dregseth had a contract with Erickson and Capital Harvest. Dregseth received a salary from Capital Harvest and had an agreement with Erickson that he would receive an interest from Erickson once Erickson received his interest from Brown. (Tr. 99, 106-7). Dregseth is not arguing that these contracts were void or unenforceable. The jury determined that Erickson rightly never received his interest from Brown because Capital Harvest never produced enough income. Dregseth's contract with Erickson is still valid but not breached because Erickson never received an interest in Capital Harvest. Dregseth's claim for equitable estoppel is invalid because he has an enforceable contract and an adequate legal remedy. O'Connell, 317 N.W.2d at 389.

¶45 Even if equitable estoppel were applicable where the parties had enforceable contracts their claims still fail. Dregseth's claim is also invalid as the action that he alleges he relied upon is a representation as to future events. Dregseth claims that the basis for his equitable estoppel argument is Brown's alleged promise. Clearly, these promises for future actions fall within the realm of promissory estoppel and not equitable estoppel. Id. Additionally, the jury has determined that the promise upon which Dregseth relies was never made. Dregseth was not prejudiced by the dismissal of his equitable estoppel claim. Olander, 2002 ND 65, ¶ 26.

¶46 Jon Ramsey claim for equitable estoppel fails upon both the facts and upon the law. The party asserting equitable estoppel must show "(1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction

based thereon, of such a character as to change the position of status of the party claiming the estoppel to his injury, detriment, or prejudice." O'Connell, 317 N.W.2d at 389. Ramsey claims in his brief that Brown concealed from him that he did not intend to ever give any interest in Capital Harvest to Erickson. However, Ramsey knew of the alleged change in the terms of the contract. (Tr. 903). He knew that Erickson's interest was tied to the performance of Capital Harvest. Id. He knew Capital Harvest was not going to make a profit in 2000 when he joined. (Tr. 298). He knew, as the banker for Brown and his corporations, that Capital Harvest was not receiving a discount fee. (Tr. 298). Ramsey did not lack knowledge or the means of knowledge of the truth as to whether Erickson would ultimately receive an interest in Capital Harvest. O'Connell, 317 N.W.2d at 389. The issue of Brown's intent to transfer shares to Erickson was also decided by the jury. The jury determined that Brown did not breach the contract. Ramsey is not prejudiced by the dismissal of his equitable estoppel claim. Olander, 2002 ND 65, ¶ 26.

3. The district court properly dismissed the plaintiffs' claims of unjust enrichment against Brown and Capital Harvest as the parties all had contracts and adequate legal remedies.

¶47 The plaintiffs claim in their complaint that Brown and Capital Harvest were unjustly enriched by the plaintiffs' actions. "Unjust enrichment is an equitable doctrine, applied in the absence of an express or implied contract, to prevent a person from being unjustly enriched at the expense of another." Zuger v. North Dakota Insurance Guaranty Association, 494 N.W.2d 135, 138 (N.D. 1992). A plaintiff must prove five elements to prove unjust enrichment:

> (1) an enrichment; (2) an impoverishment; (3) a connection between the enrichment and the impoverishment; (4) absence of a justification for the

> enrichment and impoverishment; and (5) an absence of a remedy provided by law.

Id. Jon Ramsey and Rick Dregseth's' claims for unjust enrichment fail as they both have adequate remedies provided by law.

¶48 When Jon Ramsey started employment for Capital Harvest he received a letter outlining the terms of the agreement he reached with Capital Harvest. (BCH A. 21). Under the agreement with Capital Harvest Ramsey would receive $60,000 in compensation, a $5,000 signing bonus from Capital Harvest. Id. Additionally, Ramsey agreed with both Erickson and Dregseth that upon Erickson and Dregseth receiving their interest in Capital Harvest he would receive a 2.72% interest from Erickson and a 1.28% interest from Dregseth. (App. 10). Dregseth also had an express agreement with Erickson. When Erickson would receive his interest in Capital Harvest Dregseth would receive his interest eight percent interest from Erickson. (App. 10). When Dregseth started, Erickson told him that he would make good on the eight percent out of his interest. Id. Ramsey and Dregseth's express agreements provide them with adequate remedies at law precluding equitable relief. See In re estate of Hill, 492 N.W.2d 288. 295 (N.D. 1992). Ramsey and Dregseth knew their interest in Capital Harvest was tied to Erickson. While their legal remedy was not with Brown it still is an adequate remedy. See D.C. Trautman Co. v. Fargo Excavating Co. Inc., 380 N.W.2d 644, 645-6 (N.D. 1986) (finding that plaintiff had an adequate remedy against a defendant contractor precluding their unjust enrichment claim against a co-defendant).

¶49 Additionally, Dregseth and Ramsey both had agreements to work for Capital Harvest. Ramsey's agreement with Capital Harvest is expressly set forth in the letter he received from Erickson. (BCH A. 21). Ramsey claims that he is without a remedy to

enforce this contract because the trial court dismissed his claim with regard to Capital Harvest. However, the basis for dismissing Ramsey's claim against Capital Harvest did not make his contract unenforceable. Ramsey's contract simply does not guarantee him an interest in Capital Harvest. Ramsey does not even appeal this issue. Having an adequate remedy does not guarantee that the remedy will ultimately succeed. Ramsey's rights with regard to Capital Harvest are determined by his contract with Capital Harvest.

¶50 Dregseth additionally had a contract to work for Capital Harvest. He received a salary for his employment. (Tr. 99). While Dregseth claims that because the jury found that he did not have a contract with Brown to get an ownership interest in Capital Harvest he should be allowed to assert unjust enrichment against Capital Harvest, he still had an adequate legal remedy against Erickson to get an interest in Capital Harvest. Dregseth and Ramsey had express contracts with Capital Harvest, which controlled the amount they received with regard to wages. No unjust enrichment lies where the parties have an express contract. In re estate of Hill, 492 N.W.2d at 295. An employment agreement with regard to wages is an express agreement precluding unjust enrichment. Any other reading of the law would open every employer to endless claims of unjust enrichment.

¶51 For all the reasons stated above equitable arguments are not applicable where the parties have a valid legal remedy. This case is really about whether the parties have a valid contractual claim. Their rights should be determined by the interpretation of contract law. A contracting party should be able to assume when he or she enters into a contract that they will be bound by the terms of that contract. A party who enters into a bad contract should not be able to sidestep the contract's terms by appealing to equity unless there is some equitable reason. Entering into a bad contract or one that later turns

out not to be as favorable as one would like is not an equitable reason to discard the terms of the contract.

D. The Trial Court Properly Instructed the Jury on the Theory of Novation and Contract by Omitting Instructions Regarding Accord and Satisfaction and Good Faith under the Uniform Commercial Code

1. Standard of Review

¶52 Jury instructions must fairly and adequately inform the jury of the applicable law. Parties are entitled to instructions on their theory of the case, but a trial court is not required to instruct the jury in the specific language requested by a party, if the court's instructions fairly and adequately inform the jury of the law. On appeal, we review jury instructions as a whole, and if they fairly and adequately advise the jury of the law, they are sufficient although parts of them, standing alone, may be erroneous or insufficient.

Wolf v. Estate of Seright, 1997 ND 240, ¶ 3, 573 N.W.2d 161. However,

> [n]o error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice.

Rittenour v. Gibson, 2003 ND 14, ¶ 15, 656 N.W.2d 691.

2. The trial court did not commit reversible error by excluding jury instructions with regard to accord.

¶53 The plaintiffs argue that the trial court erred by failing to instruct the jury on accord. However, the facts in this case reveal that Erickson and Brown agreed to a second contract, which replaced the first contract. The plaintiffs allege in their complaint that the Exhibit 8 was a contract and do not allege it was an accord. (App. 16-17). Erickson testified at trial that he understood that this second contact replaced the first contract:

Q. Okay. And so at this time, you accept this new Exhibit 8 as the way that you are going to get your interest in Capital Harvest?

A. We were working under this agreement.

Q. Okay. You didn't think you had two opportunities at this point in time, to earn an interest in Capital Harvest?

A. No. No.

Q. So you were relying on Exhibit 8 as your – the way in which you were going to get your interest, at that time?

A. And I had made a commitment to Rick that he would get his 8 percent.

Q. And.

A. So that came out of my share.

Q. But you were relying on this Exhibit 8 as to how you were going to get your interest?

A. Right.

(Tr. 886-7). Erickson never testified that he considered the first agreement still valid or that he looked upon the first agreement as a way in which he would receive an interest in Capital Harvest.

¶54 This Court in Herb Hill Insurance, Inc. v. Radtke, 380 N.W.2d 651, 652 n. 1 (N.D. 1986) defined the difference between an accord and a novation:

> The difference between an accord and a novation is explained in *Sergeant v. Leonard*, 312 N.W.2d 541, 545-46 (Iowa 1981).
> "Two principal legal situations may arise when a contract obligation is modified, an accord or a substituted contract [novation]. With an accord the parties intend that the original contract obligation remains viable but that it is suspended pending performance by the debtor of the modification.

Erickson presented no evidence that he considered the first contract obligation to remain viable. Accord is inapplicable under the facts presented at trial. The jury was instructed on novation but specifically that ". . .the parties must intend to extinguish the old obligation . . ." (Tr. 1317). The jury's determination that the second contract was a novation is in accordance with the evidence.

¶55 Even if the trial court erred in not giving the instruction on accord it was harmless error. The jury determined that the second contract was a novation. "The question of whether there has been a novation is a question of fact which will not be overturned on appeal unless it is clearly erroneous." Schmitt v. Berwick Tp., 488 N.W.2d 398, 401 (N.D. 1992). It is immaterial whether an instruction could have been given regarding accord. The jury determined as a matter of fact that the second contract was a novation and that the parties intended to extinguish the original contract. The plaintiffs do not appeal the jury's finding. The second agreement cannot be an accord *and* a novation. The jury determination of this fact is conclusive and the plaintiffs are not prejudiced by this determination. The jury's determination was not clearly erroneous and should not be overturned. Id.

¶56 Even if it could be argued that this was an accord the plaintiffs' argument that the accord was not satisfied was without merit. A satisfaction is simply accepting of the consideration. Erickson accepted Brown's promise to give an interest in Capital Harvest based upon the terms of the second contract. Brown's promise was the consideration. The jury determined this contract was not breached. Therefore, even if it was an accord the accord was satisfied by Brown's promise to give Erickson an interest in Capital Harvest. Erickson accepted Brown's agreement to give shares upon Capital Harvest

reaching certain benchmarks. "Acceptance by the creditor of the consideration of an accord extinguishes the obligation and is called satisfaction." N.D.C.C. § 9-13-05. The fact that Erickson accepted this second contract without conditioning it upon some other promise only goes to show why this was a novation and not an accord.

3. The plaintiffs were not entitled to an instruction on good faith under the Uniform Commercial Code where there was no duty under the Uniform Commercial Code and where the issue was never plead and first brought up at trial.

¶57 The plaintiffs claim that they wee prejudiced because the Court did not allow an instruction as to good faith under North Dakota Century Code chapter 41-08. While North Dakota Century Code section 41-08-03 defines a security under that chapter as "[a] share or similar equity interest issued by a corporation . . ." the plaintiffs do not claim that there is an action under chapter 41-08. The plaintiffs cite N.D.C.C. § 41-08-02 , which was recently repealed, as a standard of good faith. The plaintiffs then try to make a cause of action out of North Dakota Century Code section 41-01-13: "[e]very contract or duty within this title imposes an obligation of good faith and fail dealing in its performance or enforcement." The plaintiffs go no further in attempting to allege an underlying cause of action.

¶58 Article eight of the Uniform Commercial Code regulates the issuance, transfer, registration, security entitlements of investment securities. N.D.C.C. ch. 41-08. Part three of article eight deals with the transfer of shares under article eight. There is nothing in this chapter that would touch upon an employment agreement wherein the employee can potentially earn an interest in a company. N.D.C.C. §§ 41-08-27 through 33. Additionally, the agreement between Brown and Erickson was never characterized as the sale of goods or security investments but rather more appropriately an employee contract.

This court has previously rejected a claim for a breach of an implied covenant of good faith and fair dealing into the employment context. Jose v. Norwest Bank North Dakota, N.A., 1999 ND 175, ¶ 14, 599 N.W.2d 293. "In order to establish a breach of the good faith obligation the party must first establish a contract or duty owing under the Uniform Commercial Code to which the good faith obligation can attach." Jerry Harmon Motors, Inc. v. First Nat. Bank & Trust, 472 N.W.2d 748, 755 (N.D. 1991). The plaintiffs failed to make a case that there was a UCC duty or contract upon which good faith obligations could attach. Id.

¶59 Additionally in this case, the issue of good faith under the UCC was never plead addressed in discovery or at trial. Parties should not be allowed to claim prejudicial error on the failure "to instruct on an issue that was not made an issue by the pleadings or by the consent of the parties during the course of the trial." Ternes v. Farmers Union Central Exchange, 144 N.W.2d 386, 393 (N.D. 1966). The rules of civil procedure were constructed to prevent this sort of surprise. Id. Any error by the court was harmless error.

E. The trial court did not abuse its discretion when it sustained the defendant's objection to the introduction of evidence of a non-parties' accounting practices which had no bearing on whether Capital Harvest should have received a discount fee.

1. Standard of Review

¶60 The plaintiffs appeal the trial court's ruling that the probative value of evidence regarding an accounting practice of AGSCO was outweigh by its prejudicial effect, Rule 403 vest wide discretion in the trial court to control the introduction of evidence. "The trial court's determination of admissibility under Rule 403 is entitled to great deference . .

." Lacher v. Anderson, 526 N.W.2d 108, 110 (N.D. 1994). The Court will only reverse on appeal where the trial court has abused its discretion. Id.

2. The trial court properly weighed the evidence of AGSCO's accounting practices against its prejudicial effect.

¶61 The plaintiffs wished to offer evidence with regard to a practice AGSCO, non-party to this case, used to account for sales called Merchandise Stored at AGSCO (MSA). Farmers would essentially pre-pay for product in the current year and that merchandise would be stored at AGSCO until the following year when it would be delivered to the customer. When the practice was first initiated, the sales numbers for that particular year would be inflated. However, each subsequent year the sales figures would not include those sales. The plaintiffs alleged that the practice was improper. Brown maintains that the practice was not improper.

¶62 AGSCO's accounting practice had nothing to do with whether it should have paid a discount fee to Capital Harvest. AGSCO did not pay a discount fee because it did not receive any cash from Capital Harvest and because Capital Harvest did not reduce AGSCO's risk in the receivables. (Tr. 1006-11). This was not an improper accounting function. The defendant Dregseth set up the accounting for Capital Harvest when he first started. (BCH A. 2). Dregseth and Erickson were the ones who did not know that finance companies generally charge discount fees. (Tr. 875-6). In their business plan for Capital Harvest they planned, that Capital Harvest would make money off the spread and not from discount fees. (BCH A. 22-25). It was only once they learned that Capital Harvest was not making money that they went to Brown seeking a discount fee. (Tr. 133). There was no plan or scheme by Brown to corrupt the accounting department to get them not to include a discount fee for Capital Harvest. Dregseth was in charge of the

accounting for Capital Harvest, and he and Erickson were responsible for discount fees not being included in their plan. Whether discount fees were included had nothing to do with improper accounting but rather the plaintiffs' failure to work out an agreement with AGSCO.

¶63 AGSCO's practice of MSA's had nothing to do with the plaintiffs' allegation that Brown was preventing the plaintiffs from earning their interest in Capital Harvest. Whether Capital Harvest was paid a discount fee had nothing to do with accounting. Similarly, AGSCO's sales figures had nothing to do with whether a contract was formed and breached. A discussion of AGSCO's accounting practices and opinions as to Generally Accepted Accounting Procedures served only to sidetrack and confuse the jury. The trial court properly determined that the probative value of the accounting practice was substantially outweighed by the prejudice and confusion it would cause the jury. The trial court did not abuse its discretion.

III. CONCLUSION

¶64 Appellees respectfully request that the Judgment of the Trial Court and jury be affirmed.

Respectfully submitted this 7th day of June 2007.

By: _____

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20070044

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

John D. Erickson, Richard B. Dregseth, and Jon A. Ramsey,	)	
Plaintiffs/Appellants,	)	
vs.	)	Supreme Court No. 20070044
Randy Brown and Capital Harvest, Inc.,	)	
Defendants/Appellees.	)	

AFFIDAVIT OF FILING AND SERVICE BY E-MAIL

David J. Eilertson, being first duly sworn, deposes and says that on the 7th day of June, 2007, he filed by e-mail the attached BRIEF OF DEFENDANT/APPELLEES and APPELLEES SUPPLEMENTAL APPENDIX according to the N.D. Sup. Ct. Admin. Order 14 upon:

Supclerkofcourt@ndcourts.com

David J. Eilertson, being first duly sworn, deposes and says that on the 7th day of June, 2007, he served by e-mail the attached BRIEF OF DEFENDANT/APPELLEES and APPELLEES SUPPLEMENTAL APPENDIX according to the N.D. Sup. Ct. Admin. Order 14(D)(1). in Adobe PDF format (document formatting and page numbering may be slightly different than Word), upon:

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Dated this 7th day of June, 2007.

DAVID J. EILERTSON

Subscribed and sworn to before me this 7th day of June, 2007.

BRAD COSTELLO
NOTARY PUBLIC
STATE OF NORTH DAKOTA
My Commission Expires: Nov. 27, 2009

Notary Public, North Dakota
My commission expires: November 27, 2009

20070044

IN THE SUPREME COURT

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John D. Erickson, Richard B. Dregseth, and Jon A. Ramsey,	)	
Plaintiffs/Appellants.	)	Supreme Court No. 20070044
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Randy Brown and Capital Harvest, Inc.,	)	
Defendants/Appellees.	)	

AFFIDAVIT OF FILING AND SERVICE BY E-MAIL

David J. Eilertson, being first duly sworn, deposes and says that on the 12th day of June, 2007, he filed by e-mail the attached corrected BRIEF OF DEFENDANT/APPELLEES according to the N.D. Sup. Ct. Admin. Order 14 upon:

Supclerkofcourt@ndcourts.com

David J. Eilertson, being first duly sworn, deposes and says that on the 12th day of June, 2007, he served by e-mail the attached corrected BRIEF OF DEFENDANT/APPELLEES according to the N.D. Sup. Ct. Admin. Order 14(D)(1), in Adobe PDF format (document formatting and page numbering may be slightly different than Word), upon:

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Timothy G. Richard
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Dated this 12th day of June, 2007.

DAVID J. ELERTSON

Subscribed and sworn to before me this 12th day of June, 2007.

BRAD COSTELLO
NOTARY PUBLIC
STATE OF NORTH DAKOTA
My Commission Expires: Nov. 27, 2009

Notary Public, North Dakota
My commission expires: November 27, 2009