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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Bismarck Financial Group, LLC; Gary Berube, as a member of Bismarck Financial Group, LLC; Doug Buehler, as a member of Bismarck Financial Group, LLC; Bob Johnson, as a member of Bismarck Financial Group, LLC; Matt Puetz, as a member of Bismarck Financial Group, LLC; and Larry Souther, as a member of Bismarck Financial Group, LLC,

Appellants,

v.

James "Jay" Caldwell,

Appellee.

Supreme Court No. 20200005

Appeal from Order Granting Defendant/Appellee's Motion to Dismiss
Entered December 4, 2019
In the District Court, South Central Judicial District
Burleigh County, North Dakota
The Honorable David Reich, Civil Case. No. 08-2019-cv-01793

BRIEF OF APPELLEE
JAMES "JAY" CALDWELL

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

[¶ 1] Pursuant to N.D.C.C. § 10-32.1-47, a member of a limited liability company may dissociate at any time. If the dissociation is "wrongful," the dissociating member may be liable for damages "caused by the dissociation." Appellants alleged Appellee James "Jay" Caldwell wrongfully dissociated from Bismarck Financial Group, LLC ("Bismarck Financial"); however, Appellants did not allege to have suffered any damages caused by Caldwell's dissociation. Did the district court err in dismissing Appellants' wrongful-dissociation theory for lack of alleged damages?

[¶ 2] Under Section 3.08 of Bismarck Financial's Operating Agreement, no member has an obligation "to make additional capital contributions . . . or to fund, advance, or loan monies which may be necessary" to pay company debts. Appellants contend they have been damaged because, due to Caldwell's dissociation, individual Appellants each now contribute one-fifth of Bismarck Financial's expenses, rather than one-sixth. Do Appellants have a claim against Caldwell to compel him to fund a portion of Bismarck Financial's future expenses?

STATEMENT OF THE CASE

[¶ 3] This case involves Bismarck Financial and its individual members attempting to force a dissociated member, Caldwell, to pay a portion of Bismarck Financial's future operating expenses. Appellants bring their suit despite an express provision in Bismarck Financial's

Operating Agreement stating that no member is obligated to make capital contributions or fund operating deficits.

[¶ 4] The individual Appellants are registered representatives with Securities America, a securities broker/dealer, practicing together as Bismarck Financial. (Appx. 39.) In September 2015, Caldwell purchased the book of business of one of Bismarck Financial's then-existing members and began practicing with Appellants. (Appx. 9 at ¶ IX, 21.) In early 2019, Caldwell terminated his relationship with Securities America, dissociated from Bismarck Financial, and joined another broker/dealer. (Appx. 11 at ¶ XXIV; *see also* Doc. Index #17.)

[¶ 5] Following Caldwell's dissociation, Appellants brought suit against Caldwell, seeking to hold Caldwell personally responsible for one-sixth of Bismarck Financial's future operational expenses (specifically, Bismarck Financial's rent, general overhead, and wages to an at-will employee). (Appx. 13 at ¶ XXX, 14 at ¶¶ XXXVI, XL.) Caldwell moved to dismiss the claims for, among other things, failure to state a claim upon which relief may be granted. (Doc. Index #20.) On December 4, 2019, the district court granted Caldwell's motion to dismiss. (Appx. 91.) On January 14, 2020, Appellants filed the present appeal. (Appx. 109.) This Court should affirm the dismissal.

STATEMENT OF THE FACTS

[¶ 6] This being an appeal from a motion to dismiss, the facts are as alleged in the Complaint. *See In re Estate of Dionne*, 2013 ND 40, ¶ 11, 827 N.W.2d 555.[1]

I. The parties are financial-services professionals who previously worked together under the name Bismarck Financial.

[¶ 7] Individual Appellants are registered representatives of Securities America, a securities broker/dealer, but practice together under the name Bismarck Financial Group. (*See* Appx. 39.) In 2015, one of Bismarck Financial's then-existing members, Farrel Carlson, sold his client relationships (or "book of business") to Caldwell. (Appx. 9 at ¶ IX, 21.) Under the terms of the sale, Carlson transferred his clients' accounts and associated rights to Caldwell. In exchange, Caldwell paid Carlson up to $322,000 through an initial down payment and three years of split revenues (i.e., commissions and fees) generated from the book of business. (*See* Appx. 23 at Section III(A).)

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[1] Appellants' recitation of facts includes several new allegations that were not a part of the Complaint and were not raised to the district court. Those allegations should be disregarded. *Spratt v. MDU Resources Group, Inc.*, 2011 ND 94, ¶ 14, 797 N.W.2d 328 (explaining why the court refuses to consider new issues raised on appeal); *Dionne*, 2013 ND 40 at ¶ 40 (noting that the court takes as true "the well-pleaded allegations in the complaint."); *cf. Ziegelmann v. DaimlerChrysler Corp.*, 2002 ND 134, ¶ 4, 649 N.W.2d 556 (dismissing claims because plaintiff failed to allege an cognizable injury, a necessary element of his claim).

[¶ 8] After purchasing Carlson's book of business, Caldwell became a member of Bismarck Financial. (*See* Appx. 9 at ¶¶ XI–XVII.) In January 2016, Bismarck Financial's members, including Caldwell, entered into an Operating Agreement governing the operations and management of Bismarck Financial. (*See* Appx. 10 at ¶ XVI, 74 (Operating Agreement of Bismarck Financial).)[2] The Operating Agreement specifies that members ***are not liable*** for Bismarck Financial's deficits, shortfalls, or other obligations. If, for some reason, a member were to voluntarily provide funds to the company (e.g., money to cover a shortfall or expense), then those amounts would be considered a loan to the company. This is addressed in Section 3.08, which provides that,

> ***No member shall have any obligation*** to make additional capital contributions to the Company or ***to fund, advance, or loan monies which may be necessary to pay deficits, if any, incurred by the Company during the term hereof.*** Members may make loans to the Company from time to time, as authorized by the Board. Any payment or transfer accepted by the Company from a Member which is not a capital contribution complying with Section 3.01 shall be deemed a loan and shall neither be treated as a contribution to the capital of the Company for any purpose hereunder, nor entitle such member (as such) to any increase in such Member's Percentage Interest. Any such loan shall be repaid at such time and with such interest (at rates not to exceed the maximum permitted

[2] The Operating Agreement in the record is unsigned; however, the parties agreed that it was the controlling agreement. (*See* Doc. Index #17, #23; Appx. 67, 74; *see also* Appx. 94 at ¶¶ 13–15 (noting the parties' agreement and pleadings' embrace of the Operating Agreement).)

by law) as the Board and the lending Member shall reasonably agree.

(Appx. 77 at § 3.08 (emphasis added).)

[¶ 9] For the next two-and-a-half years, Caldwell serviced his personal book of business as a registered representative of Securities America. (See Appx. 25; Doc. Index #17.) In early 2019, Caldwell terminated his relationship with Securities America and became a registered representative of another broker/dealer. (*See* Doc. Index #17.)[3] In connection with that transition, Caldwell dissociated from Bismarck Financial. (Appx. 11 at ¶ XXIV.)

II. Following Caldwell's dissociation, Appellants seek to hold him personally liable for a portion of Bismarck Financial's future lease, overhead, and employment expenses. The district court dismisses the claims.

[¶ 10] On June 6, 2019, Appellants filed suit against Caldwell, alleging three amorphous conglomerations of various common-law claims: (1) "breach of contractual and statutory member duties and obligations and other fiduciary duties"; (2) "quantum meruit, equitable estoppel, unjust enrichment and other equitable relief"; and (3) "declaration of wrongful dissociation." (Appx. 15 at ¶¶ XLIV–LVII.) Each claim sought the same relief for Bismarck Financial: to hold

[3] On a motion to dismiss, the court may consider matters of public record. *Riemers v. State ex rel. Univ. of N. Dak.*, 2007 N.D. App. 4, ¶¶ 8–9, 739 N.W.2d 248; *see also Harris v. TD Ameritrade Inc.*, 338 F. Supp. 3d 170, 187 (S.D.N.Y. 2018) (on motion to dismiss, court may consider documents made publicly available by the SEC or FINRA).

Caldwell personally liable for a portion of Bismarck Financial's projected future expenses. (*See* Appx. 18.) Appellants' basic theory was that, because Bismarck Financial's gains and losses were allocated to members for tax purposes, Caldwell was personally obligated to pay the associated expense. (*See* Appx. 10 at ¶ XVII, 14 at ¶ XXXV; *see also* Doc. Index #21 at ¶¶ 5–7.)

[¶ 11] Caldwell moved to dismiss the claims for, among other things, failure to state a claim upon which relief may be granted. (Doc. Index #13.) Caldwell's basic argument was that, although gains and losses are allocated for tax purposes, that does not make individual members personally liable for corporate obligations. (Doc. Index #14 at ¶¶ 22–24 (citing *Addy v. Myers*, 2000 N.D. 165, ¶ 10, 616 N.W.2d 359 and N.D.C.C. § 10-32.1-26).) Furthermore, Appellants' theory was contrary to Bismarck Financial's Operating Agreement, which absolved members of any obligation to fund shortfalls. (*Id.* at 10–11; *see also* Appx. 77–78 at § 3.08.) Caldwell further maintained that Appellants' claims were barred by the statute of frauds, codified at N.D.C.C. § 9-06-04, and Bismarck Financial's obligation to indemnify him pursuant to N.D.C.C. § 10-32.1-40(4). (Doc Index #14 at ¶¶ 37–46.)

[¶ 12] Appellants responded by repeating the "allocation" theory. (Doc. Index #21 at ¶ 5.) According to Appellants, N.D.C.C. § 10-32.1-26 stood for the proposition that Bismarck Financial's expenses were not

those *solely* of Caldwell, but were to be shared among all members. (*Id.* at ¶ 6.) Appellants further argued that Caldwell was liable for such expenses because his dissociation was "wrongful" under N.D.C.C. § 10-32.1-47. (*Id.* at ¶¶ 10–13.)

[¶ 13] In reply, Caldwell maintained Appellants' "allocation" theory had no support in the law. Even if did, Caldwell was no longer a member of Bismarck Financial, rendering Appellants' theory self-defeating. (Doc Index #33 at ¶¶ 4–14.) Caldwell further argued that, even if his dissociation were "wrongful," Appellants had not identified any damages caused by the dissociation. (*Id.* ¶ 16.)

[¶ 14] On December 4, 2019, the district court granted Caldwell's motion to dismiss. (Appx. 91.) The court agreed with Caldwell's read of N.D.C.C. § 10-32.1-26, calling Appellants' position a "tortured interpretation of the statute." (Appx. 98 at ¶ 26.) The court similarly rejected Appellants' "wrongful dissociation" theory because Appellants "do not allege that, as a result of Caldwell's dissociation, Bismarck Financial has lost a business opportunity or been forced to pay higher rent." (Appx. 104 at ¶ 47.) While individual Appellants "now have to pay higher rent and overhead expenses . . . , nothing in the Operating Agreement required Caldwell, or any other member, to be personally responsible for these obligations." (Appx. 104 at ¶ 48.)

[¶ 15] Finally, the court agreed with Caldwell's position that Appellants' claims were barred by the statute of frauds. As the court explained, Appellants "clearly seek to force Caldwell, individually, to answer for the debts and obligations for Bismarck Financial." (Appx. 106 at ¶ 52.) The court rejected Appellants' reliance on the Operating Agreement for support. As the court explained, "the very writing [Appellants] rely on to support their claims, actually defeats their claims. . . . The Operating Agreement . . . in no way personally obligates [the members] to pay or make capital contributions to satisfy company debts or obligations." (Appx. 107 at ¶ 58.)

[¶ 16] On January 13, 2020, Appellants filed the present appeal. (Doc. Index #43.) Caldwell asks the Court to affirm the district court's dismissal of the claims against him.

ARGUMENT

I. Appellants have abandoned their "allocation" theory and now focus exclusively on their "wrongful-dissociation" theory.

[¶ 17] On appeal, Appellants have abandoned their "allocation" theory and instead focus on their "wrongful-dissociation" theory. (*See* Appellants' Br. ¶ 28.) According to Appellants, they have been damaged because Caldwell does not contribute funds necessary to cover Bismarck Financial's expenses. (*Id.* at ¶ 23.) But Appellants' argument is based on a false premise and has no support in the law.

II. Appellants' wrongful-dissociation theory fails because they have not alleged any damages "caused by the dissociation."

[¶ 18] The district court was correct in dismissing Appellants' wrongful-dissociation theory because Appellants failed to allege they had suffered any damages "caused by the dissociation."

[¶ 19] Under North Dakota law, a member of a limited liability company has the power to dissociate at any time. N.D.C.C. § 10-32.1-47(1). A dissociation is considered "wrongful" if it is either: (a) in breach of an express provision of an operating agreement; or (b) occurs before the termination and one of four criteria is met, including withdrawing as a member by express will. N.D.C.C. § 10-32.1-47(2)(b)(1). For purposes of the motion and appeal, Caldwell concedes that, as alleged in the Complaint, his dissociation would be "wrongful."

[¶ 20] But "wrongful" does not mean "liable for future expenses." If a member wrongfully dissociates, then that member "is liable to the limited liability company and . . . to the other members *for damages caused by the dissociation.*" N.D.C.C. § 10-32.1-47(3).

[¶ 21] Therein lies the problem with Appellants' theory; Appellants did not allege they suffered any damages "caused by the dissociation." They did not allege Caldwell's dissociation caused Bismarck Financial's landlord to increase its rent. They did not allege Caldwell's termination entitled Bismarck Financial's employee to a pay raise. Nor did they allege Caldwell's dissociation led to increased

operational expenses.[4] Appellants' obligations are exactly as they were prior to Caldwell's dissociation. The district court correctly cited the lack of alleged damages as the basis for rejecting Appellants' wrongful-dissociation theory. (Appx. 104 ¶¶ 46–49 ("The Court concludes the [Appellants] have not identified any harm or damages that followed form Caldwell's dissociation from the company.").)

[¶ 22] At the district court, and here again on appeal, Appellants repeatedly argue that they have been damaged because Caldwell was obligated to pay one-sixth of Bismarck Financial's expense.[5] (*See*, *e.g.*, Appellants' Br. ¶¶ 13, 17, 23, 31.) This is categorically untrue, and the argument ignores the express terms of Section 3.08 of the Operating

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[4] For the first time on appeal, Appellants suggest that they may have incurred additional "administrative burdens" serving some of Caldwell's former clients who opted not to transfer their accounts to his new broker/dealer. (Appellants' Br. ¶ 9.) Appellants did not make that allegation in the Complaint, did not raise it in opposition to the motion to dismiss, and are not seeking damages for these alleged administrative burdens. (*See* Appx. 13 ¶ XXXIV, 14 at ¶ XXXVIII, 15 at ¶¶ XLI, XLII.) Accordingly, the allegations should be disregarded. *Spratt*, 2011 ND 94 at ¶ 14; *Dionne*, 2013 ND 40 at ¶ 40. Regardless, the new allegations would not save Appellants' claims. Caldwell personally owned his client relationships. (*See* Appx. ¶ 9.) If some of those customers chose not to transfer their accounts to Caldwell's new broker/dealer, that was their choice. Appellants were not obligated to accept them as customers.

[5] Part of Appellants' objection is that Caldwell chose to dissociate, rather than assign his membership to another person. (Appellants' Br. ¶ 23.) To the extent Appellants are upset there are not more members of Bismarck Financial, it is a problem of their own making. Appellants are free to admit new members at any time. (Appx. 76 at § 3.01.) *See also* N.D.C.C. § 10-32.1-27.

Agreement. That Operating Agreement specifically provides that members are *not* obligated to contribute funds to cover Bismarck Financial's shortfalls. Moreover, even if Caldwell did contribute, the contribution would be deemed a loan, thereby offsetting any claim Bismarck Financial would have against him.

[¶ 23] In this sense, Appellants' argument is similar to another case that rejected a wrongful-dissociation theory, *Beane v. Beane*, 856 F. Supp. 2d 280 (D.N.H. 2012). *Beane* involved a dispute between two brothers who at one point co-owned a limited liability company. *Id.* at 284. The sibling-owners had a falling out stemming largely from their company's difficulty satisfying a large customer order. *See id.* at 287. As their relationship deteriorated, one brother repossessed company property and abruptly resigned his membership. *Id.* at 289. That brother did so even though the company's operating agreement "expressly provide[d] that no member has power to withdraw by voluntary act from the Limited Liability Company." *Id.* at 312.

[¶ 24] After the brother's departure, the company failed and began to wind up its affairs. *Id.* at 291. At that point, the company and the remaining brother brought several claims against the departing brother alleging, among other things, "wrongful dissociation." *Id.* at 293. It was undisputed that the departing brother's dissociation constituted a direct violation of the operating agreement—a

consideration not present in this case. Nevertheless, the court *dismissed* the claim because the "wrongful dissociation" did not harm the company. *Id.*

[¶ 25] Much as Appellants argue today, the remaining brother and company argued that they were harmed because the departing brother dissociated "without fulfilling his contribution obligations." *Id.* The court *rejected* the argument because, according to the company's operating agreement, the departing brother did not have an obligation to make future capital contributions. *Id.* While the operating agreement expressly prohibited a member's withdrawal, the company and remaining brother could not identify any harm that flowed directly from the violation of that restriction:

> Alan's real complaint over Glenn's withdrawal seems to be that he "abandon[ed] the company in the middle of its problems with Lovejoy." But there was nothing in the limited liability company agreement—or, for that matter, any other agreement—that obligated Glenn to continue serving as Mii's *employee*, as opposed to its member (a role that, as just discussed, did not come with any obligation to render services to the company). Nor did the limited liability company agreement obligate Glenn to continue serving as Mii's *manager*. Thus, the only provision of the limited liability company agreement that Glenn violated by withdrawing was the prohibition on voluntary withdrawal itself, and Alan has not identified any damages that followed from that withdrawal. Glenn is therefore entitled to summary judgment on Alan's wrongful dissociation claim[.]

Id. at 313 (citations omitted, emphasis in original).

[¶ 26] The exact same can be said of Appellants' arguments. Appellants' objection is that Caldwell is no longer doing something (i.e., making voluntary loans/contributions to Bismarck Financial) that he had no obligation to do in the first instance. Appellants cannot say they were "damaged" by Caldwell's dissociation because they are no worse off than they were before his dissociation. In neither instance could Appellants force Caldwell to pay a portion of Bismarck Financial's future expenses. Appellants' "wrongful dissociation" theory is nothing more than an attempt to impose new obligations on Caldwell that the parties previously agreed neither Caldwell, nor any other member of Bismarck Financial, had.

[¶ 27] This is also why Appellants' citation to N.D.C.C. § 10-32.1-49(2) is unhelpful. That provision merely states that "[t]he dissociation of a person . . . does not of itself discharge the person from any debt, obligation, or other liability to the company or the other members that the person incurred while a member." In this case, Caldwell did not have any "debt, obligation, or other liability" to Appellants, certainly not with respect to Bismarck Financial's future overhead and contractual obligations. Indeed, the parties' Operating Agreement disavowed such an obligation. (Appx. 77 at § 3.08.) Consequently, N.D.C.C. § 10-32.1-49(2) does not warrant reversing the district court's dismissal of Appellants' claims.

III. The district court was correct in holding that Appellants' claims are also barred by the statute of frauds.

[¶ 28] In dismissing Appellants' claims, the district court further held that the claims were barred by the North Dakota statute of frauds, codified at N.D.C.C. § 9-06-04. (Appx. 105 ¶ 50.) The statute of frauds renders certain contracts invalid unless some note or memorandum is in writing and subscribed by the party to be charged or the party's agent. This includes "[a]n agreement that by its terms is not to be performed within a year from the making thereof" and "[a] special promise to answer for the debt, default, or miscarriage of another . . . ."[6] N.D.C.C. § 9-06-04(1), (2).

[¶ 29] Appellants argue that the district court erred by failing to consider their wrongful-dissociation theory. (Appellants' Br. ¶ 29.) But Appellants' analysis is out of order. The statute of frauds negates the basic premise of their entire wrongful-dissociation argument.

[¶ 30] As noted above, Appellants repeatedly argue that Caldwell was obligated to contribute funds needed to cover Bismarck Financial's shortfalls. That purported obligation is not based on the Operating Agreement; Section 3.08 refutes such a contention. (Appx. 77.) Consequently, Appellants' argument must be that some *other* contract compels Caldwell to contribute.

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[6] This section does not apply to certain exceptions set forth in N.D.C.C. § 22-01-05. None of those exceptions apply in this case.

[¶ 31] This is where the statute of frauds comes in. Appellants are attempting to hold Caldwell personally liable for a portion of Bismarck Financial's obligations, and to do so for a period spanning at least thirty-five months. (*See* Appx. 13 at ¶ XXXIV.) That places such an agreement squarely within the statute of frauds. In order to hold Caldwell liable for some unalleged, purported agreement to cover Bismarck Financial's obligations for at least the next three years (as Appellants are attempting to do), Appellants would need to identify a writing, subscribed by Caldwell, binding him to such obligations. N.D.C.C. § 9-06-04(1), (2).

[¶ 32] Appellants have never alleged the existence of such a written agreement. As a result, a basic premise of Appellants' entire wrongful-dissociation theory is negated, and their claims fail as a matter of law. The district court was correct in dismissing Appellants' claims on that basis as well.

IV. Appellants did not allege Caldwell violated any duties under N.D.C.C. § 10-32.1-41.

[¶ 33] Finally, Appellants raise a new argument that they did not raise in the district court. It, too, should be disregarded. *Spratt*, 2011 ND 94 at ¶ 14. But even if the Court were to consider the new argument, it would not warrant reversal.

[¶ 34] Appellants contend the district court did not consider Caldwell's statutory obligations under N.D.C.C. § 10-32.1-41(4). That

subsection provides that a member must "discharge the duties of the member and exercise any rights under this chapter or under the operating agreement consistently with the contractual obligation of good faith and fair dealing, including acting in a manner, in light of the operating agreement, that is honest, fair, and reasonable." Appellants now argue that Caldwell violated these statutory obligations by resigning his membership, citing their own purported and unalleged "understanding" and "expectation" that Caldwell would remain a member or assign his interest to another person. (*But see generally* Appx. 7–19 (making no allegation of purported "understandings" and "expectations"); *see also* Appx. 14 at ¶ XXXV (alleging Caldwell was liable based on obligations under the "Operating Agreement and the Uniform Limited Liability Company Act").)

[¶ 35] Appellants' argument is merely an attempt to circumvent the statute of frauds and the express terms of their own Operating Agreement. The Operating Agreement expressly provides that members would *not* be liable for future expenses. (Appx. 77 at § 3.08.) N.D.C.C. § 10-32.1-41(4) does not apply because Caldwell is acting *consistent* with the Operating Agreement; it is Appellants who want something that is contrary to what the Operating Agreement provides.

[¶ 36] Appellants cannot claim they had a reasonable expectation of mandatory contributions when their Operating

Agreement explicitly states otherwise. *See* N.D.C.C. § 10-19.1-115 (providing that written agreements are "presumed to reflect the parties' reasonable expectation concerning the matters dealt with in the agreement"). (*See also* Appx. 79 at § 7.01 (stating that "No change, modification, or amendment of this [Operating Agreement] shall be valid or binding unless such change, modification or amendment shall be in writing signed by 100% of the Voting Interests.").) Written agreements should be honored to the extent they specifically state the terms of the parties' bargain. *Gunderson v. Alliance of Comp. Profs., Inc.*, 628 N.W.2d 173, 186 (Minn. 2001) (cited with approval in *Kortum v. Johnson*, 2008 ND 154, ¶ 32, 755 N.W.2d). Similarly, Appellants cannot contend they had a reasonable expectation that members would be prohibited from dissociating, when (a) dissociation is contemplated by the Operating Agreement; and (b) the North Dakota Limited Liability Company Act expressly grants members the right to dissociate. N.D.C.C. 10-32.1-47(1). (*See also* Appx. 78–79 at §§ 5.01, 5.02 (addressing business continuation in the event of a member's dissociation).)

[¶ 37] Appellants' characterization of the issue as one of good faith and fair dealing does not change the analysis. In the corporate context, the duty of good faith prohibits parties from using corporate assets preferentially, engaging in oppressive or unfair negotiating

tactics, or acting deceitfully in negotiations. *Kortum*, 2008 ND 154 at ¶ 28 (citing *Gunderson*, 628 N.W.2d at 185). Appellants did not allege Caldwell engaged in any such activity. Appellants merely contend Caldwell stopped making voluntary contributions after dissociating from Bismarck Financial. (*See* Appx. 16 at ¶ XLVIII.)

[¶ 38] Appellants' citation to *Cavendish Farms, Inc. v. Mathiason Farms, Inc.*, 2010 ND 236, ¶ 14, 792 N.W.2d 500, does not help them. *Cavendish* concerned the exercise of a discretionary right in a contract for the sale of goods. *Id.* at ¶¶ 6–7. The court held that parties with discretionary rights must exercise them in a "commercially reasonable manner." *Id.* at ¶ 15. *Cavendish* is inapposite because this case involves a specific statutory right to dissociate. N.D.C.C. § 10-32.1-47. Furthermore, Appellants have not alleged Caldwell behaved in an unreasonable manner. Indeed, Caldwell's actions were fully consistent with the Operating Agreement.

[¶ 39] Had the parties wanted members to be personally liable for future expenses, they could have so provided in their Operating Agreement. They chose the opposite, absolving themselves of any responsibility for such contributions. The Court need not conjecture what the parties would have agreed at the outset of their relationship. They specified their expectations in the Operating Agreement. *See also Kortum*, 2008 ND at ¶ 33 (stating that a claim based on reasonable

expectations will fail if the shareholder agreement "was made at arm's length, the shareholders had a legitimate business reason for agreeing to the provision at issue, and the shareholders all assumed the same risk.").

[¶ 40] Were the Court to give Appellants' argument merit, it would effectively render every shareholder or member agreement meaningless. Every member or shareholder could escape the terms of an agreement merely by proclaiming that he or she expected a different outcome. Such a decision would undermine the very purposes of shareholder and member agreements, negating the stability and predictability they provide. The ruling would be especially pernicious, considering Appellants' purported "understandings" and "expectations" were not alleged in the Complaint and are directly contrary to their own written agreement.

[¶ 41] The parties agreed that members were not personally liable for Bismarck Financial's obligations. Appellants cannot rewrite their agreements or foist new obligations on Caldwell by claiming that they expected something else to occur. Even if the Court were to consider this new argument, it would not warrant reversal.

CONCLUSION

[¶ 42] The district court properly dismissed Appellants' claims. Appellants contend Caldwell's dissociation was wrongful; however,

they did not allege any damages "caused by the dissociation." Their obligations remain exactly as they were before Caldwell's dissociation.

[¶ 43] Appellants' entire argument rests on their contention that Caldwell was obligated to contribute funds to allow Bismarck Financial to cover its shortfalls. It is a contention that is directly at odds with Section 3.08 of the Operating Agreement. Any attempt to circumvent that fact runs squarely into the statute of frauds and North Dakota's enforcement of written agreements among owners.

[¶ 44] For these reasons, and for the reasons correctly articulated by the district court, the Court should reject Appellants' arguments and affirm the district court's dismissal of the Complaint for failure to state a claim upon which relief may be granted.

Dated: May 13, 2020

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CERTIFICATE OF COMPLIANCE

[¶ 45] The undersigned, as attorneys for Appellee in the above matter, and as authors of the above brief, hereby certify in compliance with Rule 32(a) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional 12-point font and equals 24 pages.

Dated: May 13, 2020

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CERTIFICATE OF SERVICE

[¶ 46] I hereby certify that on May 13, 2020, a true and correct copy of the foregoing Brief of Appellee James "Jay" Caldwell was served via email on counsel for Appellants as follows:

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