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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court Case No. 20220068

Scotty Fain, Sr., Scotty Fain, Jr., and Kris Durham,	)
Plaintiffs and Appellants,	)
v.	)
Integrity Environmental, LLC, Andrea Vigen, Lewis Vigen, and Kelly Harrelson,	)
Defendants and Appellees.	)

APPEAL FROM THE *FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR JUDGMENT*, DATED DECEMBER 23, 2021, AND THE *JUDGMENT*, DECEMBER 29, 2021, BY THE HONORABLE JUDGE PAUL W. JACOBSON, NORTHWEST JUDICIAL DISTRICT, WILLIAMS COUNTY, CASE NO. 53-2020-CV-00920

BRIEF OF APPELLEES

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STATEMENT OF THE CASE

[¶2] Appellees Integrity Environmental, LLC ("Integrity Environmental"), Andrea Vigen ("Andrea"), Lewis Vigen ("Lewis"), and Kelly Harrelson ("Kelly") (collectively "Appellees"), submit this brief in response to *Appellants' Brief,* dated August 5, 2022. Appellants Scotty Fain, Sr. ("Scotty Sr."), Scotty Fain, Jr. ("Scotty Jr."), and Kris Durham ("Kris"), (collectively "Appellants") appeal the District Court's *Findings of Fact, Conclusions of Law, and Order for Judgment*, dated December 23, 2021, and *Judgment*, dated December 29, 2021. (R141); (R158). The District Court found in favor of Appellees and dismissed Appellants' breach of contract and breach of fiduciary duty claims. (Id.)

[¶3] The dispute giving rise to this action involves negotiations between the parties of a business venture that never came to fruition. The negotiations began in 2019 when Lewis, Kelly, and Scotty Sr. discussed a potential business arrangement whereby the parties would form a new business entity to utilize Integrity Environmental's "Tier 1" status with the Mandan Hidatsa and Arikara ("MHA") Nation's Tribal Employment Rights Office (TERO) as a doorway for obtaining work on the reservation. (R141:2:¶3); (R192:168:10-25, 169:1-5). The original business arrangement contemplated by the parties was included in an Operating Agreement, dated June 20, 2019, which required specific capital contributions from all parties. (R24). However, the parties subsequently abandoned the Operating Agreement because the inclusion of non-Native American owners (such as Appellants and Defendant Kelly Harrelson) would have destroyed Integrity Environmental's Tier 1 status and substantially diminished the company's business. (R141:2:¶5).

[¶4] In an effort to formalize a business arrangement, the parties continued negotiations and discussed adopting several alternative agreements, which were never implemented by the parties. (R141:3:¶6). Kris Durham provided Integrity Environmental with funds in the amount of $150,000 ($50,000 in June 2019 and $100,000 in July 2019); however, these funds were treated as a loan, not a capital contribution. (R141:2:¶5). It is undisputed the full amount of the loan was repaid to Kris and was deposited in his account in October 2019. (Id.) No other money was exchanged between the parties to this action. (Id.)

[¶5] Appellants commenced this action in July 2020. (R1). In their Amended Complaint, dated August 3, 2020, Appellants asserted claims for breach of contract (Count I) and breach of fiduciary duty (Count II). (R20). Importantly, both claims are premised upon the existence of an Operating Agreement between the parties under which Appellants attempt to establish an ownership interest in Integrity Environmental. (Id.) Appellees deny the existence of a valid and enforceable Operating Agreement between the parties, or that anyone other than Andrea has ever held an ownership interest in Integrity Environmental. (R45); (R192:195:7-12); (R193:21:6-10).

[¶6] On November 8-9, 2021, a bench trial was held before the Honorable Paul W. Jacobson at the Williams County Courthouse in Williston, North Dakota. The District Court's *Findings of Fact, Conclusions of Law, and Order for Judgment* was entered on December 23, 2021. (R141). The District Court concluded the following: (1) the Operating Agreement, dated June 20, 2019, is not a valid contract due to lack of mutual consent; (2) there was no consideration for the Operating Agreement because the $150,000 was returned to Appellants; (3) the Operating Agreement did not convey ownership in Integrity Environmental; (4) the Operating Agreement is unenforceable for failure of consideration;

(5) Appellants' claims fail as a matter of law under the principles of accord and satisfaction; (6) Appellants waived their right to enforce the Operating Agreement when they accepted reimbursement of the $150,000; (7) Appellants' claims fail under the principle of novation; (8) there was no mutual mistake by the parties justifying reformation of the Operating Agreement; and (9) without a valid and enforceable contract, Appellants' breach of fiduciary duty claim fails as a matter of law. (Id.) The District Court entered its judgment on December 29, 2021. (R158).

STATEMENT OF FACTS

[¶7] Integrity Environmental, LLC was formed in 2016 by Andrea. (R141:1:¶2). Her status as the sole owner of the company and a member of the MHA Nation has allowed Integrity Environmental to qualify as a Tier-1 Certified Indian Company since its inception. (Id.); (R192:169:6-12). Integrity Environmental is a remediation company for oilfield waste and spills. (R192:164:2-7). Tier-1 companies, such as Integrity Environmental, are given preference on the MHA reservation under TERO rules as a preferential hire. (R192:169:1-5). Integrity Environmental works both on and off the reservation; however, in June 2019, sixty percent (60%) of its work was completed on the MHA reservation. (R192:13-16). A non-Native American owned company can work on the reservation only if it enters into a preferred partnership agreement with a Tier-1 company. (R192:169:1-5).

[¶8] In May 2019, Lewis and Kelly began discussing forming a new company with the Appellants. (R192:34:1-4). Their plan was to utilize Integrity Environmental's Tier-1 status as a gateway for the new company to obtain work on the reservation. (R192:168:10-25). This new company was to be called "American Environmental." (Id.)

[¶9] Around this time, Lewis and Kelly learned of a potential $10M radioactive material clean-up project with Clean Harbors. (R192:171:3-12). There was an urgency to take on this project to ensure this business opportunity would not be lost to a competitor. (R192:172:9-16). Because it would have taken the parties months to start a new company, obtain insurance and a work license, starting a new company was no longer a viable option. (R192:179:18-25). Lewis and Kelly did not want to lose this substantial business opportunity, but they needed money to pay subcontractors and purchase equipment for the project. (R192:171:17-25). They discussed this project with Appellants, who agreed to provide them with a loan to take on projects, and to continue discussions about starting a new company together. (R192:172:3-8).

[¶10] On June 20, 2019, the parties signed an Operating Agreement that required the following contributions: (1) Andrea Vigen ($100); (2) Lewis Vigen ($100); (3) Kelly Harrelson ($100); (4) Scotty Fain, Sr. ($100); Kris Durham ($75,000); and Scotty Fain, Jr. ($75,000). (R24:22). Scotty Sr. testified that his son, Scotty Jr., an attorney in Georgia drafted this agreement. (R192:104:4-11). The Operating Agreement identifies the company name as Integrity, LLC, and is clear from the language of the agreement the parties intended to form a new company together. (R141:2:¶4). Scotty Sr. testified that the agreement was created for a business entity called Integrity, LLC, which does not exist as a legal entity. (R192:104:22-25, 105:1-3). Scotty Sr. stated he was aware that Integrity Environmental was previously formed and operating as a business prior to the parties' business negotiations and the execution of the June 2019 Operating Agreement. (R192:106:19-25).

[¶11] As indicated above, Kris provided Integrity Environmental with $50,000 in June 2019, and $100,000 in July 2019. (R141:2:¶5). These amounts were treated as a loan, and not as the required capital contributions under the Operating Agreement. (Id.) Again, it is undisputed that the full amount of this loan was repaid to Kris and deposited into his account in October 2019. (Id.) The parties did not exchange any other money. (Id.) Scotty Sr. testified that Integrity Environmental never received any funds from Scotty Sr. nor Scotty Jr. (R192:110:2-6). None of the Appellees contributed funds under the Operating Agreement either. (R192:185:16-18); (R193:5:24-25,6:1,31:2-4).

[¶12] Because the parties were aware that the addition of non-Native American owners (such as the Appellants) would have destroyed Integrity Environmental's Tier-1 status and substantially diminished the company's business, they abandoned the Operating Agreement and continued negotiations in an effort to formalize a different business arrangement. (R141:2:¶5,3:¶6). A Loan Agreement was drafted by the parties with the effective date of June 26, 2019, which was only six (6) days after the initial Operating Agreement. (See R175). The agreement provided that Kris Durham (as the Lender) would provide Integrity Environmental (as the Borrower) with a loan in the amount of $150,000 to be paid back on or before December 26, 2019. (R175:1). The parties did not sign the Loan Agreement; however, as stated above, the parties treated the $150,000 provided by Kris as a loan. (R141:2:¶5). Kris' text message to Lewis on July 17, 2019 further shows the parties intent to form a debtor-creditor relationship. (R177); ("Hey Lewis, just wanted to let you know that I put a call into the bank to start the process to get the additional $100k LOC sent over to you and Andrea."). Kris testified during the trial that "LOC" means the

line of credit (i.e., the $150,000) he provided to Integrity Environmental. (R192:148:24-25, 149:2-8).

[¶13] The parties continued business negotiations in the hope that they would finalize a business arrangement under which they could operate. Eventually, Appellants provided Appellees with an Amended Operating Agreement which listed Integrity Environmental, LLC, in place of Integrity, LLC. (R192:120:16-19). The Amended Operating Agreement removes Appellants and Kelly as members and designates them as the board of governors. (R174). The purpose of this proposed agreement was to preserve Integrity Environmental's Tier-1 status as a Native American owned company. (R192:121:11-13). However, the parties never signed the Amended Operating Agreement. (R174:26-27).

[¶14] In July 2019, Appellants presented yet another agreement to Appellees. (R141:3:¶6). This was in the form of a Consulting Agreement identifying Appellants and Kelly as consultants to Integrity Environmental, in exchange for fifty percent (50%) of Integrity Environmental's earnings before interest, taxes, depreciation, and amortization (EBITDA). (R178:1). Scotty Sr. testified that he had his attorney, Malcolm Pippin, draft this agreement, which was created to replace the initial Operating Agreement. (R192:81:16-18). Appellants signed the Consulting Agreement; however, Appellees never signed the agreement because the arrangement would have been detrimental to Integrity Environmental's sustainability. (R192:82:2-3, 186:1-5).

[¶15] In September 2019, the parties had a meeting in which they discussed the Consulting Agreement and whether the parties should continue their business relationship. (R141:3:¶6). At trial, Appellants entered Exhibit 37 into the record which is a recording of the September 2019 meeting between the parties. (R185). The recording shows the parties'

inability to reach a resolution on their business arrangement and demonstrates their intention to continue negotiations in September 2019, which was months after the Operating Agreement at issue in this case was executed by the parties. (Id.) Further, Scotty Sr. admits in the recording that Appellants provided Appellees with a $150,000 interest free loan for six (6) months. (Id. at 4:08-4:33). At the end of the recording Scotty Sr. acknowledges that Integrity Environmental is not his company (i.e., he is not an owner of Integrity Environmental). (Id. at 35:55-36:03).

[¶16] In December 2019, Andrea sent a letter to Appellants on behalf of Integrity Environmental. (R141:3:¶7); (R172). The letter discussed the parties' unsuccessful business arrangement and enclosed an interest check in the amount of $3,000 payable to Kris as the signor of the $150,000 loan. (Id.)

[¶17] It was clear Appellants did not participate in the management or ownership of Integrity Environmental. (R141:3:¶8). The District Court found that there was no sale or transfer of any ownership interest in Integrity Environmental from Andrea to any other person. (Id.) Membership interests in Integrity Environmental were never issued to anyone else, and Andrea has remained the sole owner of the company since its creation. (Id.)

[¶18] The District Court entered its Order and Judgment in this case in December 2021. (R141); (R158). As stated above, the court concluded the Operating Agreement, dated June 20, 2019, is not a valid or enforceable contract under North Dakota law. (Id.) Subsequently, the District Court dismissed Appellants' claims. (Id.)

LAW AND ARGUMENT

I. The District Court correctly found the Operating Agreement, dated June 20, 2019, is not a valid contract.

[¶19] "Whether a contract exists is a question of fact for the trier of fact." Northwest Grading, Inc. v. North Star Water, LLC, 2020 ND 47, ¶ 17, 939 N.W.2d 512 (citing Jones v. Pringle & Herigstad, P.C., 546 N.W.2d837, 842 (N.D. 1996)). "The trier of fact determines whether a contract is intended to be a complete, final, and binding agreement." Id. This Court will not set aside a district court's findings regarding the existence of a contract unless its findings are found to be clearly erroneous. Id. A finding of fact is clearly erroneous "if it is induced by an erroneous view of the law, if no evidence exists to support it, or if, on the entire record, we are left with a definite and firm conviction a mistake has been made." Id. (citing Lonesome Dove Petroleum, Inc. v. Nelson, 2000 ND 104, ¶ 15, 611 N.W.2d 154). Under North Dakota law, a valid contract requires: (1) parties capable of contracting; (2) consent; (3) a lawful object; and (4) consideration. Matter of Estate of Harris, 2017 ND 35, ¶ 8, 890 N.W.2d 561 (citing N.D.C.C. § 09-01-02).

A. Lack of Mutual Consent

[¶20] One of the essential elements of a contract is the consent of the parties. Hildenbrand v. Capital RV Center, Inc., 2011 ND 37, ¶ 21, 794 N.W.2d 733 (citing N.D.C.C. § 9-03-16). "Consent must be free, mutual, and communicated by each party to the other party." RTS Shearing, LLC v. BNI Coal, Ltd., 2021 ND 170, ¶ 19, 965 N.W.2d 40 (citing N.D.C.C. § 9-03-01). Under N.D.C.C. § 9-03-16, consent is not mutual unless all the parties to the contract agree on the same thing in the same sense. Id. "It is the words of the contract and the objective manifestations of assent that govern, not the secret intentions of the parties." Id. The parties' conduct and the surrounding circumstances are relevant in determining whether the parties intended to form a binding legal contract. Kruger v. Goossen, 2021 ND

88, ¶ 8, 959 N.W.2d 847 (citing B.J. Kadrmas, Inc. v. Oxbow Energy, LLC, 2007 ND 12, ¶ 14, 727 N.W.2d 270).

[¶21] Prior to signing the Operating Agreement, the parties were aware of Integrity Environmental's Tier-1 status, and that it had to be a Native American owned company to maintain its priority on the reservation. (R192:11-18). Scotty Sr. admitted at trial that he was aware that the business arrangement could conflict with Integrity Environmental's Tier-1 status, and that he knew he could not be an owner of a Tier-1 company. (R192:121:23-25, 122:1). The parties signed the Operating Agreement as a placeholder until a new business arrangement was formalized. (R193:7:7-11). In the meantime, Kris provided Integrity Environmental with a loan so it could take on projects, and promised additional funding in the future. (R192:172:3-8). After the initial Operating Agreement was signed (which did not reflect the name Integrity Environmental), the parties continued to negotiate a business arrangement. Appellants subsequently engaged counsel to prepare two additional agreements (an Amended Operating Agreement and a Consulting Agreement) to replace the initial Operating Agreement. (R192:120:16-19); (R141:3:¶6). At trial, Scotty Sr. testified that it was Appellants' intention to replace the Operating Agreement with the Consulting Agreement. (R192:81:16-18). Notably, Appellants signed the Consulting Agreement. (R192:82:2-3). Scotty Sr. himself characterized the Consulting Agreement as a "stalled negotiation that never went anywhere," and further testified that the subsequent agreements "were ways to get out of the initial Operating Agreement." (R192:81:3-6, 82:7-8).

[¶22] Under Kruger v. Goossen, the parties' conduct and the surrounding circumstances are relevant in determining whether the parties intended to form a binding legal contract

and here, the parties' conduct clearly shows a lack of mutual consent regarding the business arrangement. 2021 ND 88 at ¶ 8. Further, the recording played at trial also shows the parties' inability to come to a mutual understanding as to the business arrangement months after the Operating Agreement was signed. (R185). In sum, the consent requirement was not met in this case, and the District Court's determination that the Operating Agreement is not a valid contract under North Dakota law was not clearly erroneous.

B. Lack of Consideration

[¶23] A contract must be supported by consideration. N.D.C.C. § 09-01-02. Contract consideration consists of a benefit conferred or a detriment suffered. Frontier Fiscal Servs., LLC v. Pinky's Aggregates, Inc., 2019 ND 147, ¶ 19, 928 N.W.2d 449 (citing Molbert v. Kornkven, 2018 ND 120, ¶ 15, 910 N.W.2d 888). A contract which lacks consideration means an enforceable contract was never formed to begin with. Brash v. Gulleson, 2013 ND 156, ¶ 13, 835 N.W.2d 798 (citing Harrington v. Harrington, 365 N.W.2d 552, 555 (N.D. 1985)). "Whether consideration for a contract exists is a question of law." Finstad v. Ransom-Sargent Water Users, Inc., 2014 ND 146, ¶ 21, 849 N.W.2d 165.

[¶24] In this case, there was no consideration to form a valid or enforceable contract under North Dakota law. At trial, Appellants sought to enforce the initial Operating Agreement requiring specific capital contributions from Andrea Vigen ($100), Lewis Vigen ($100), Kelly Harrelson ($100), Scotty Fain, Sr. ($100), Scotty Fain, Jr. ($75,000), and Kris Durham ($75,000). (R24:22). However, the parties subsequently abandoned the Operating Agreement as the inclusion of non-Native American owners would have destroyed Integrity Environmental's Tier-1 status, an integral component to its business operations. (R141:2: ¶¶5-6). The $150,000 provided by Kris was considered by the parties to be a loan.

(R141:2:¶5). This is also supported by Kris' text message to Lewis, the September 2019 recording played at trial, and testimony that Scotty Sr.'s accountant, Susan Wyman, stated that the money was a loan that needed to be repaid to Kris. (R177); (R185 at 4:08); (R193:10:24-25). It is undisputed by all parties that the $150,000 was paid back to Kris Durham in October 2019. (R141:2:¶5). Moreover, Scotty Sr. testified that Appellants did not make the entire amount of the capital contributions required by the Operating Agreement to begin with. (R192:110:2-6).

[¶25] In their brief, Appellants attempt to distinguish between the characterization of a shareholder's capital contribution to a company and a shareholder loan provided to the company. Appellants cite to Smith v. NRC Inspection & Testing, LLC, (District Court Case No. 53-2020-CV-00488) which provides a non-exhaustive list of factors considered by courts in evaluating the characterization of the transfer of funds to a company:

> (1) the names given to the documents that would be evidence of the purported loans; (2) the presence or absence of a fixed maturity date; (3) the likely source of repayment; (4) the right to enforce payments; (5) participation in management as a result of the advances; (6) subordination of the purported loans to the loans of the corporation's creditors; (7) the intent of the parties; (8) the capitalization of the corporation; (9) the ability of the corporation to obtain financing from outside sources; (10) thinness of capital structure in relation to debt; (11) use to which the funds were put; (12) the failure of the corporation to repay; and (13) the risk involved in making the transfers.

[¶26] However, these factors weigh heavily in favor of the formation of a loan arrangement between the parties. Within a week after the Operating Agreement was signed, the parties drafted a document entitled "Loan Agreement" whereby Kris Durham agreed to provide Integrity Environmental with a $150,000 loan. (R175). Further, there is considerable evidence that the parties intended the funds provided by Kris to be a loan.

Kris sent a text message to Lewis in which he stated that the funds he provided were a line of credit ("LOC"). (R177); (R192:148:24-25, 149:2-8). Susan Wyman also told Appellees that the money was a loan that needed to be repaid to Kris. (R185 at 4:08); (R193:10:24-25). In the September 2019 recording, Scotty Sr. admits that Appellants provided Appellees with a $150,000 interest free loan for six (6) months. (R185 at 4:08-4:33). Yet, for the first time at trial and now on appeal, Appellants claim there was a verbal agreement for Appellants to be reimbursed the $150,000 out of the profits of the company. (*Appellants' Brief* at ¶ 26). Appellants' claim that the $150,000 was to be returned first from profits is conspicuously absent from the Operating Agreement which the Appellants have attempted to enforce. (R24). In fact, this first-in, first-out arrangement directly contradicts Section 8.1.1, Profits and Losses, of the Operating Agreement which states "[s]ubject to the allocation rules of Section 8.2, Profits for any Fiscal Year shall be allocated among the Members in proportion to the Percentage Interests." (R24:11); (R192:117:10-24). Additionally, this alleged arrangement does not match multiple sworn statements presented by Appellants during this lawsuit. For example, in a previous sworn statement Scotty Sr. stated "I have never consented to the Defendants returning any Member's Capital Contributions, as required by the Operating Agreement." (R67:2:¶5). **Appellants' sworn testimony regarding the $150,000 changed multiple times throughout this lawsuit, and the District Court determined their claim that the $150,000 would be returned first, from profits, was not credible.**

[¶27] In sum, the capital contributions required by the Operating Agreement were not made and there has been no consideration for the Operating Agreement in question. Such lack of consideration precludes the formation of a valid contract under North Dakota law,

and is fatal to Appellants' claims. Therefore, the District Court's determination that there was no consideration for the Operating Agreement should be affirmed.

II. The District Court correctly found the Operating Agreement does not convey ownership in Integrity Environmental, LLC.

[¶28] Contract interpretation is governed by Chapter 9-07, N.D.C.C. When interpreting contracts, the primary purpose is to ascertain and effectuate the parties' intent. Big Pines, LLC v. Baker, 2020 ND 64, ¶ 7, 940 N.W.2d 616 (internal citations omitted). This Court's analysis on contract interpretation has long been established:

> The parties' intent is ascertained from the writing alone if possible. The language of a contract is to govern its interpretation if the language is clear and explicit and does not involve an absurdity. When the parties' intent can be determined from the contract language alone, interpretation of a contract presents a question of law. When an agreement has been memorialized in a clear and unambiguous writing, extrinsic evidence should not be considered to ascertain intent. **When a contract's language is plain and unambiguous and the parties' intentions can be ascertained from the writing alone, extrinsic evidence is not admissible to alter, vary, explain, or change the contract.** If a contract is ambiguous, extrinsic evidence may be considered to determine the parties' intent, and the contract terms and parties' intent become questions of fact.

Id. (emphasis added).

[¶29] Appellants do not dispute the fact that the Operating Agreement is unambiguous. In fact, Appellants claim that the parties' intent can be determined from the language of the contract alone, and no extrinsic evidence is needed to determine the contract terms or the parties' intent. (*Appellants' Brief* at ¶ 44). It is clear from the plain language, or within the four corners of the agreement, that its purpose was to form a **new** company called Integrity, LLC. The following language in the Operating Agreement supports this assertion:

> "Company" means Integrity, LLC the limited liability company **formed** and continued under and pursuant to the North Dakota Act and **this Agreement**.
> …
> "Certificate" means the **Certificate of Formation of the Company** and any and all amendments to the Certificate of Formation and restatements of the same filed on behalf of the Company with the office of the Secretary of State of North Dakota pursuant to the North Dakota Act.
> …
> **2.1. Formation.**
> (i) **The Members have formed the Company as a limited liability company** under and pursuant to the provisions of the North Dakota Act…
>
> 2.2. Name. The name of the Company is **Integrity, LLC**.
>
> 2.3. Term. **The term of the Company shall commence on the date the Certificate is filed in the office of the Secretary of State of North Dakota** and shall continue perpetually, unless the Company is dissolved before such date in accordance with the provisions of this Agreement. The existence of the Company as a separate legal entity shall continue until cancellation of the Certificate in the manner required by the North Dakota Act.
>
> 3.1. Purpose. **The Company is formed** for the object and purpose of, and the nature of the business to be conducted and promoted by the Company is, engaging in any lawful act or activity for which limited liability companies may be formed under the North Dakota Act…

(R24:1-5) (emphasis added).

[¶30] Even Appellants' attorney intended for the parties to form a new company entitled Integrity, LLC upon the execution of the Operating Agreement, dated June 20, 2019. In a letter to Andrea Vigen, dated December 27, 2019, Malcolm Pippin stated:

> I represent Scotty Fain, Sr., Scotty Fain, Jr., and Kris Durham. I take this opportunity to respond to your recent undated letter to the three of them whereby, in essence, **an attempt is made to throw each of them out of the company Integrity, LLC, in violation of North Dakota**

> **Law as well as the signed contractual operating agreement of <u>Integrity, LLC</u>.**
> …

(R169) (emphasis added).

[¶31] Here, it is uncontested that the Operating Agreement lists Integrity, LLC as the company name, not Integrity Environmental. (R24). Further, it is undisputed that the Operating Agreement was never amended by the parties. (R192:116:13-21). Based on the four corners of the agreement, it was the intention of the parties to form a new company, entitled Integrity, LLC, under the Operating Agreement. Therefore, the District Court correctly interpreted the Operating Agreement as a matter of law in finding the agreement did not convey ownership in Integrity Environmental.

[¶32] If the Court finds the Operating Agreement is ambiguous, there is extrinsic evidence that shows the parties' intended to form a new company and preserve Integrity Environmental's Tier-1 status. Even Scotty Sr. testified that he knew he could not be an owner of a Tier 1 company. (R192:121:23-25, 122:1). Both parties testified that Integrity Environmental was operating as a business prior to any business negotiations in this matter. (R192:106:19-25). As stated earlier, the parties were attempting to start a new company together and were using the Operating Agreement as a placeholder until they could execute formalized documents. (R193:7:7-11). Appellants were aware that the Operating Agreement would destroy Integrity Environmental's Tier-1 status and its ability to be a preferential hire on the reservation. (R141:2:¶5). Appellants met with their attorney to resolve this issue by drafting new agreements (i.e., the Amended Operating Agreement and the Consulting Agreement). (R192:81:16-18, 120:16-19, 121:11-13). These new agreements are proof that the parties intended an arrangement which protected Integrity

Environmental's Tier 1 status. Under North Dakota law, any ambiguous language in a contract must be interpretated against the drafter. Northstar Founders, LLC v. Hayden Capital USA, LLC, 2014 ND 200, ¶ 47, 855 N.W.2d 614 (citing Hilligoss v. Cargill, Inc., 649 N.W.2d 142, 148 (Minn. 2002)). Because Appellants drafted the Operating Agreement at issue in this case, this Court should construe any ambiguous language against Appellants and find Appellants' actions and testimony show the parties never intended to transfer ownership interests in Integrity Environmental.

[¶33] Moreover, after hearing testimony and reviewing evidence in the record, the District Court found:

> Appellants did not participate in the management or ownership of Integrity Environmental. There was never a sale or transfer of any ownership interest in Integrity Environmental from Andrea to any other person. No shares or membership interests were ever issued to anyone else; no stock or share transfer agreement was entered; and no bill of sale or assignment was drafted.

(R141:3:¶8); (See also R192:127:1-25, 128:1-2). As stated above, if this Court finds the Operating Agreement is ambiguous, extrinsic evidence may be considered to determine the parties' intent, **and the contract terms and parties' intent become questions of fact.** Big Pines, 2020 ND 64, ¶ 7, 940 N.W.2d 616. The District Court weighed the credibility of the witnesses and evidence at trial in this matter and determined the Operating Agreement did not convey ownership in Integrity Environmental. (R141:5:¶13). Accordingly, this Court should hold the District Court's findings of fact were not clearly erroneous.

III. The District Court correctly found there was no mutual mistake by the parties justifying reformation of the Operating Agreement.

[¶34] "A mutual mistake justifying reformation requires that, at the time of execution of the agreement, both parties intended to say something different from what was said in the

document." Dixon v. Dixon, 2017 ND 174, ¶ 16, 898 N.W.2d 706 (citing Freidig v. Weed, 2015 ND 215, ¶ 11, 868 N.W.2d 546). A party seeking reformation of a contract has the burden of proving by clear and convincing evidence that the written contract does not "fully or truly state the agreement the parties intended to make." Id. (citing Freidig, 2015 ND 215, ¶ 12, 868 N.W.2d 546). A court can consider the surrounding circumstances and take into consideration all facts which reveal the intention of the parties in considering whether or not a mutual mistake exists. Id. "Whether a contract contains a mistake sufficient to support a reformation claim is a question of fact." Goodall v. Monson, 2017 ND 92, ¶ 15, 893 N.W.2d 774 (internal citations omitted). A district court's findings of fact are reviewed under the clearly erroneous standard of review. Continental Resources, Inc. v. Armstrong, 2021 ND 171, ¶ 8, 965 N.W.2d 57 (internal citations omitted).

[¶35] As mentioned above, it is uncontested by the parties that the Operating Agreement lists Integrity, LLC, not Integrity Environmental. (R192:105:18-21). Appellants claim that the company name in the Operating Agreement was a mutual mistake by all the parties. (*Appellants' Brief* at ¶ 42). The District Court found there was no mutual mistake as to the company name listed in the agreement. (R141:11:¶27). When the parties executed the agreement, the parties intended to form a new company which is apparent on the face of the Operating Agreement itself. (Id.) Furthermore, the Operating Agreement was never amended by the parties. (R192:116:13-21). Section 7.1 of the Operating Agreement provides "[a]ny amendment to this Agreement shall be adopted and be effective as an amendment to the Agreement if it receives the affirmative vote of all of the Members, provided that such amendment be in writing and executed by all of the Members." (R24:10). Instead of amending the Operating Agreement, Appellants decided to draft

several other agreements to replace the initial agreement. The Amended Operating Agreement drafted and presented by Appellants includes Integrity Environmental as the company; however, this agreement was never signed by the parties. (R141:11:¶27); (R174). Next, Appellants drafted a Consulting Agreement which also included Integrity Environmental as the company. (R178). Appellants even signed this agreement and admitted they intended it to replace the initial Operating Agreement. (R192:81:16-18). The District Court found that the fact that other agreements were drafted and another loan arrangement was negotiated, it was evident the parties never intended to follow the initial agreement. (R141:11:¶27).

[¶36] In their brief, Appellants claim that because Andrea and Kelly requested that the company name in the Operating Agreement be changed to Integrity Environmental, there was a mutual mistake by the parties. (*Appellants' Brief* at ¶ 42). However, Appellants fail to consider the fact that the initial Operating Agreement was never amended by the parties. (R192:116:19-21). Scotty Sr. himself admitted at trial that there needed to be an affirmative vote by **all** the parties to amend the agreement. (R192:116-13-18). Furthermore, Appellants' argument on appeal fails to take into account the fact that Appellants drafted two new agreements to replace the initial Operating Agreement, and Scotty Sr. admitted these agreements were ways to get out of the initial agreement so that Integrity Environmental could maintain its Tier-1 status. (R192:81:3-6). The truth is that all parties intended to preserve Integrity Environmental's Tier-1 status, and there was no mutual mistake of the parties establishing otherwise. As explained above, there is sufficient evidence supporting the District Court's finding there was no mutual mistake by the parties justifying reformation of the Operating Agreement, and is not clearly erroneous.

IV. Even if a valid contract was formed by the parties, the District Court correctly found the Operating Agreement was unenforceable as a matter of law.

A. Failure of Consideration

[¶37] The District Court correctly found the Operating Agreement is unenforceable for failure of consideration. (R141:7:¶18). Failure of consideration is distinguishable from lack of consideration. As an affirmative defense, failure of consideration occurs when "a valid contract has been formed, but the performance bargained for has not been rendered." Brash, 2013 ND 156, ¶¶ 13-14, 835 N.W.2d 798 (citing Harrington, 365 N.W.2d 552, 555 (N.D.1985)). "When there is a failure of consideration, a contract, valid when formed, becomes unenforceable because the performance bargained for has not been rendered." Id. (citing First Nat'l Bank of Belfield v. Burich, 367 N.W.2d 148, 152 n. 3 (N.D.1985)). "Whether there has been a failure of consideration is a question of fact which will not be disturbed unless it is found to be clearly erroneous." Brash, 2013 ND 156, ¶ 14, 835 N.W.2d 798.

[¶38] Even if a valid contract was formed by the parties (one was not) and capital contributions were made by the Appellants (they were not), Appellants' claims still fail due to failure of consideration. The District Court concluded "[w]hile the Plaintiffs argue the funds provided by Kris Durham should be treated as capital contributions, it is undisputed that all such amounts were repaid in October 2019." (R141:7:¶18). Such constitutes a complete failure of consideration on the part of Appellants precluding the enforceability of the alleged contract under North Dakota law, and is fatal to Appellants' claims. The Court should uphold the trial court's findings as they were not clearly erroneous.

B. Accord and Satisfaction

[¶39] Moreover, the District Court correctly determined Appellants' claims fail as a matter of law under the principles of accord and satisfaction. An "accord and satisfaction" is a method of discharging a contract or cause of action by which the parties agree to give and accept something different in extinction of a claim or demand of one against the other, where they thereafter perform such agreement. See State by Workforce Safety & Ins. v. Oden, 2020 ND 243, ¶ 44, 951 N.W.2d 187 (citing Campbell v. Beaton, 117 N.W.2d 849, 850 (N.D. 1962)). "Accord and satisfaction is an affirmative defense to a claim." (Id.) (citing N.D.R.Civ.P. 8(c)(1)).

> N.D.C.C. § 9-13-04 defines accord as, 'an agreement to accept in extinction of an obligation something different from or less than that to which the person agreeing to accept is entitled.' N.D.C.C. § 9-13-05 defines satisfaction as, '[a]cceptance by the creditor of the consideration of an accord extinguishes the obligation and is called satisfaction.' The 'accord' is the agreement and the 'satisfaction' is its execution or performance.

Peterson v. Ramsey Cty., 1997 ND 92, ¶ 9, 563 N.W.2d 103 (internal citations omitted). Whether there is an accord and satisfaction is a question of fact, subject to the clearly erroneous standard of review. Matter of Estate of Sande, 2020 ND 125, ¶ 13, 943 N.W.2d 826 (citing Wheeler v. Southport Seven Planned Unit Dev., 2012 ND 201, ¶ 22, 821 N.W.2d 746).

[¶40] As explained above, the parties planned to form a new company; however, this plan was abandoned. (R141:3:¶6). Instead, the parties used Integrity Environmental, an already established company, to meet the needs of the substantial business projects at the time. (R192:172:3-8, 9-16). Therefore, the funds provided by Kris Durham were treated by the parties as a loan to Integrity Environmental until they could formalize a business

arrangement. (R141:2:¶5). Such constitutes an "accord" under North Dakota law whereby the parties agreed to something different (i.e., the loan arrangement) instead of proceeding with the Operating Agreement. (R141:8:¶20). In furtherance of the loan arrangement, the loan which had been provided was repaid in full in October 2019. (R141:2:¶5). Such constitutes a "satisfaction" under North Dakota law in the execution/performance of the loan arrangement. (R141:8:¶20). The accord and satisfaction between the parties is fatal to the Operating Agreement and Appellants' claims based thereon. Accordingly, the District Court's decision that Appellants' claims fail under the principles of accord and satisfaction is not clearly erroneous.

C. Waiver

[¶41] In addition, the District Court correctly found Appellants waived their right to enforce the Operating Agreement when they accepted the reimbursement of the $150,000. (R141:8:¶21). "A waiver occurs when a person voluntarily and intentionally relinquishes a known right or privilege." Pfeifle v. Tanabe, 2000 ND 219, ¶ 18, 620 N.W.2d 167 (citing Hanson v. Cincinnati Life Ins. Co., 1997 ND 230, ¶ 13, 571 N.W.2d 363). "Waiver may be established either by an express agreement **or by inference from acts or conduct**." Id. (emphasis added). Waiver may be found from an unexplained delay in enforcing contractual rights **or accepting performance different than called for by the contract**. Id. (citing Dangerfield v. Markel, 252 N.W.2d 184, 191 (N.D.1977) (emphasis added). "When parties conduct themselves in a manner which clearly constitutes a waiver, they cannot later claim they did not know their actions amounted to a voluntary and intentional waiver of their rights, because one who consents to an act is not wronged by it." Lawrence v. Delkamp, 2006 ND 257, ¶ 8, 725 N.W.2d 211 (quoting Gale v. N.D. Bd. Of Podiatric

Med., 2001 ND 141, ¶ 14, 632 N.W.2d 424). "Generally, the absence or existence of waiver is a question of fact, subject to the clearly erroneous standard of review." Matter of Estate of Sande, 2020 ND 125, ¶ 19, 943 N.W.2d 826 (citing Wachter Dev., Inc. v. Martin, 2019 ND 202, ¶ 22, 931 N.W.2d 698).

[¶42] Appellants waived their claimed interest in the alleged contract by their actions in accepting alternative performance under the parties' loan arrangement. In the recording played at trial, the parties discussed abandoning the original business arrangement in which Kelly, Lewis, and Appellants would start a new company together, and using Integrity Environmental, an already established company, as a gateway onto the reservation. (R185 at 1:26). After the initial Operating Agreement failed, the parties proceeded in treating the funds advanced by Kris Durham as a loan accepting performance under the loan arrangement and repayment of all such amounts. Scotty Sr. admitted in the recording that these funds were supposed to be a $150,000 interest free loan for the first six months. (Id. at 4:08-4:33). Moreover, it is clear from all of the parties' testimony that they wanted to maintain Integrity Environmental's Tier-1 status and taking on non-Native American owners would have destroyed that. (R192:121:11-13, 133:11-18). Appellants were not involved in the business operations of Integrity Environmental, they never had access to Integrity Environmental's bank accounts, and did not request a bill of sale for their alleged shares in the company nor membership certificates. (R192:127:7-25, 128:1-2). Such conduct by the Appellants, who claim to be longtime business owners, does not align with their claims in this case. Appellants' acceptance of performance different than called for by the Operating Agreement via the loan arrangement constitutes a waiver of any claimed contractual rights under the agreement. Appellants' waiver is fatal to the alleged contract

and Appellants' claims based thereon. Accordingly, the District Court's determination that Appellants waived their right to enforce the Operating Agreement is not clearly erroneous.

D. Novation

[¶43] Lastly, the District Court correctly determined Appellants' claims fail under the principle of novation. "Novation is the substitution of a new obligation for an existing one." N.D.C.C. § 9-13-08. Novation is created by contract, and is made by the substitution of:

> **1. A new obligation between the same parties with intent to extinguish the old obligation;**
> 2. A new debtor in the place of the old one with intent to release the latter; or
> 3. A new creditor in place of the old one with intent to transfer the rights of the latter to the former.

N.D.C.C. §§ 9-13-09; 9-13-10. (emphasis added). The concept of novation includes the parties' intention to terminate the original contract and substitute it with a new contract. Erickson v. Brown, 2008 ND 57, ¶ 49, 747 N.W.2d 34. The substituted contract becomes the binding agreement between the parties, and the only remedy for a breach thereof is to sue under the substituted contract. (Id.) The intent to create a novation can be shown by the terms of the contract, the character of the transaction, and the facts and circumstances surrounding the transaction. Jedco Development Co., Inc. v. Bertsch, 441 N.W.2d 664, 666 (N.D. 1989). "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." Matter of Estate of Murphy, 554 N.W.2d 432, 437 (N.D. 1996) (internal citations omitted).

[¶44] Under the circumstances of this case, it is clear the parties intended to abandon the first Operating Agreement (which would destroy Integrity Environmental's Tier-1 status) in favor of a $150,000 loan. (R141:2:¶5). The District Court found it was clear from the recording played in court that Appellants were providing a $150,000 interest free loan for

six (6) months. (R141:10:¶24); (R185 at 4:08-4:33). All of the parties were aware of the Tier-1 status and they wanted to preserve Integrity Environmental's preferential hiring on the reservation. (R192:133-11-18); (R141:2:¶5). Scotty Sr. stated in the recording that Malcolm Pippin had told them that the Operating Agreement would destroy Integrity Environmental's Tier-1 status and that they needed to go back to Malcolm Pippin to "tell him how it needs to be drawn up." (R185 at 26:17, 32:30). This supports Appellees' assertion that the parties abandoned the Operating Agreement in favor of a loan arrangement, and conducted further business negotiations. Appellants' intent to substitute the Operating Agreement with a loan arrangement is fatal to their argument that this Court should enforce it. The District Court's finding that Appellants' claims fail under the principle of novation is not clearly erroneous.

V. The District Court correctly found Appellants' breach of fiduciary duty claim fails as a matter of law.

[¶45] Appellants' causes of action for breach of contract and breach of fiduciary duty are both based upon the existence of a valid contract under which Appellants claim ownership interest in Integrity Environmental. (R20). Therefore, Appellants' breach of fiduciary duty claim fails without the existence of a valid and enforceable contract. In their Amended Complaint, Appellants allege the existence of fiduciary duties arising under the Operating Agreement and the North Dakota Uniform Limited Liability Act. (R20:¶37). The District Court determined that because there is no valid and enforceable contract under which Appellants became owners of Integrity Environmental, there are no contractually-imposed fiduciary duties nor the duties imposed by Chapter 10-32.1. (R141:11-12:¶28). Without the existence of a fiduciary duty, there can be no breach thereof. Accordingly, the trial court properly denied Appellants' breach of fiduciary duty claim.

CONCLUSION

[¶46] For the foregoing reasons, Appellees respectfully request this Court to affirm the District Court's *Findings of Fact, Conclusions of Law, and Order for Judgment*, dated December 23, 2021, and *Judgment*, dated December 29, 2021.

ORAL ARGUMENT REQUESTED

[¶47] Appellees request oral argument in this matter. Oral argument is appropriate due to the number and complexity of the issues presented for review.

Dated: September 2, 2022.

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CERTIFICATE OF COMPLIANCE

[¶48] The undersigned certifies that the Brief of Appellees complies with Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure and contains a total of 33 pages.

Dated: September 2, 2022.

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CERTIFICATE OF SERVICE

[¶49] I hereby certify that a true and correct copy of the foregoing Brief of Appellees was filed electronically with the Clerk of the North Dakota Supreme Court on the 2nd day of September, 2022, and e-mailed to H. Malcolm Pippin (malcolm@pippinlawfirm.com) and Emily M. Ramage (emily@ndrglaw.com).

Dated: September 2, 2022.

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