IN THE SUPREME COURT OF THE STATE OF MONTANA
CASE NO. DA 21-0416

JESS ROMO, et al.,

Plaintiffs/Appellees,

v.

USA BIOFUELS, LLC, Utah Limited Liability Corporation; **VITALITY HEALTH, LLC**; **EUREKA 93, INC.**; **GREG RANGER**; **DAVID RENDIMONTI**; **COREY SHIRLEY**; **OWEN KENNEY**; **ROBERT LEAKER**; **SEAN POLI**; **STEPHEN ARCHAMBEAULT**; **KENT HOGGAN**; **VITALITY CBD NATURAL HEALTH PRODUCTS, INC.**; **SURETY LAND DEVELOPMENT, LLC**, Utah Limited Liability Corporation; and **JOHN DOES 11–15**,

Defendants/Appellants.

APPELLANTS' OPENING BRIEF

On Appeal from the Montana Fifteenth Judicial District Court, Roosevelt County, Docket No. DV-2018-45, the Honorable Judge Katherine Bidegaray, Presiding

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I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. WHETHER PLAINTIFFS MAY RECOVER DAMAGES IN TORT FOR CLAIMS ARISING SOLELY FROM CONTRACT AND BREACH OF CONTRACT.

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II. STATEMENT OF THE CASE

In June 2018, the Plaintiffs filed a series of very similar lawsuits in five northeastern Montana counties. (Docs. 1–26, *Complaints*). Each Plaintiff alleged to have been a farmer who had entered into a hemp-growing contract with USA Biofuels, LLC ("USA Biofuels") and that USA Biofuels breached the contract by not paying money. The suits were consolidated by stipulation. (Doc. 292, *Order for Consolidation*).

Procedurally, the long list of Defendants was split into three main categories. There was the class of unserved Defendants who remain unserved, safely north of the 49th parallel. USA Biofuels and its successor, Eureka 93, Inc. ("Eureka 93") were

defaulted. David Rendimonti ("Rendimonti") was served, defaulted, and a fellow judgment debtor. The third class consists of Defendants who were served, made their appearances, and went to trial. Surety Land Development ("Surety Land"), Kent Hoggan ("Hoggan"), Owen Kenney ("Kenney"), and Corey Shirley ("Shirley"), of the third category, appeared and defended the Complaints.

Trial was held in Roosevelt County, June 21–25, 2021, and all Defendants were assessed tort damages and punitive damages that totaled roughly $65 million. (Appx. 118–29, *Final J.*). This brief is being filed and this appeal is being pursued on behalf of four different Defendants—Kenney, Hogan, Surety Land, and Shirley—seeking to reverse this monstrous judgment against them. Kenney, Hoggan, and Surety Land, as minority shareholders in USA Biofuels/Eureka 93, were adjudicated by way of summary judgment the alter ego of USA Biofuels/Eureka 93. (Appx. 32–34, *MSJ Order*). Shirley, having never held an equity interest in the company, escaped this fate.

III. STATEMENT OF THE FACTS

A. Definition of Terms.

Given the number of Plaintiffs and Defendants in this case, it is necessary to group certain parties together for ease of understanding the various relationships.

Shareholder Defendants. The Shareholder Defendants are Hoggan, Surety

Land, and Kenney, and each is a party to this appeal. These Defendants each owned minority interests in the company ultimately referred to as Eureka 93 (Doc. 554, *FOF and Conclusions of Law*, pp. 2–3), collectively did not control a majority of the company, and never, during any relevant time, held power to run the company. (*Id.*; Doc. 409, *Kenney Aff.*, p. 4).

Corey Shirley. Corey Shirley is also a party to this appeal, but never had a financial stake in the outcome of any of these enterprises, other than a salary that did not get paid fully. (Doc. 554, *FOF and Conclusions of Law*, pp. 2–3).

These Defendants. During the course of this brief, the phrase "these Defendants" will refer to all four Defendants which have appealed.

Plaintiffs/Farmers. The terms "Plaintiffs" and "Farmers" will be used interchangeably to reference Appellees—a large group of Montana farmers.

B. Facts.

Although the record in this case is huge and the documentary evidence piles high, there are relatively few facts and virtually no disputed material facts. Around 2018, Hemp became a legal crop, substantially freed from regulatory burdens by the United States Department of Agriculture ("USDA") and the Food and Drug Administration ("FDA"). (Tr. 1110–12). As such, it looked as if the hemp crop could be very valuable to produce materials including CBD oil, an important byproduct of

the hemp that does not carry THC and was trading at extraordinarily high values. Canadian investors apparently thought they could capitalize on this potential by having Montana farmers raise hemp, processing it in Eureka, Montana, through Eureka 93, and marketing the CBD oil at very high prices.

Montana rancher Beau Anderson ("Beau") was one of the Farmers and the self-appointed spokesman for the Plaintiff/Farmer group. (Tr. 211). He had been farming since 2002, received a bachelor's degree in agricultural education, and had taught agriculture and farm ranch management courses in high school and college for many years. (Tr. 183–84). The one to first get the group of Farmers together, Beau arranged a meeting at the American Legion Club in Bainville, Montana. (Tr. 186–87). Beau learned about the hemp opportunities through his brother Ty Anderson. (Tr. 184–85). Because Beau was unwilling to commit the amount of acreage which the hemp industry wanted, he called upon other friends and farmers who he thought might be interested in growing this new crop. (Tr. 185–86).

In Spring 2018, the Farmers entered a series of nearly identical agreements with USA Biofuels to plant hemp. *See, e.g.*, (Appx. 1–4, *Beau Anderson Contract*). Each contract included a section called "**Minimum Acre Guaranty**" in which the Farmers were provided hemp seed and afforded a first payment of $100 per acre to plant the seed. *See, e.g.*, (Appx. 2, *Beau Anderson Contract*, ¶ 8). There was also a second

payment, not characterized as guaranteed, stating that, upon successful raising, harvesting, and baling of the hemp, the Farmers would be paid "$500.00 per acre for dryland or $700.00 per acre irrigated" hemp. *See, e.g.*, (*Id.*, ¶ 7). One-half of these payments would be paid "when the product [wa]s baled and ready for shipment" and one-half thirty (30) days later. *See, e.g.*, (*Id.*). Each contract expressly contained the following provision:

> **6. Ownership of Hemp Crop:** Because Buyer [(USA Biofuels)] is supplying the seed and is contracting Grower through this production service agreement, **the hemp crop and any excess Seed will at all times be owned by Buyer.**

See, e.g., (*Id.*, ¶ 6) (emphasis added).

Summer 2018, the Farmers received the seed they were promised, albeit late, and, likewise, received the payments that were denominated "minimum acre guaranty" payments in the contract—$100 per acre. (Tr. 195, 680). Over the course of the summer and into the fall of 2018, the Farmers harvested and baled the hemp and put it at the edge of their fields, entitling them to $500 per dryland acre, and $700 per irrigated acre under the contracts with USA Biofuels. (Tr. 667, 681–82, 814–16, 878–79). Those monies were promised but never paid.

When delayed, Hoggan communicated that he was helping to secure fulfillment of the "minimum acre guaranty" payments under the contract, with the following description provided by Beau: "[Hoggan] is once again assuring us that we're going

to get paid our $100 acre payment and giving us excuses as to why we haven't received it yet." (Tr. 195). Beau's rendition of the sequence was correct, and the "minimum acre guaranty" payments were made and received three weeks later. (*Id.*).

Beau's history in this case includes numerous conversations with an unserved Defendant named Greg Ranger ("Ranger") (Tr. 200), who signed each of the contracts on behalf of USA Biofuels (*see, e.g.*, Appx. 4, *Beau Anderson Contract*). Ranger was responsible for communication with Beau for the company through September 2017. (Tr. 202). Thereafter, Shirley was hired to be an operating officer and took over the financial discussions with Beau. (*Id.*). Beau summarizes that, in his first discussion with Shirley, Shirley stated "they were struggling to find finances." (*Id.*). Beau testified that, in their second material communication, Shirley stated "Vitality Natural Health will be paying in full for all hemp bales before they are removed from [the Farmers' properties]." (Tr. 203; Ex. 24, p. 5). Shirley never had an executive title beyond chief operating officer and was certainly never in charge of the company's finances. (Tr. 385).

Following Shirley's arrival, David Rendimonti, on behalf of USA Biofuels/Eureka 93, talked to Beau and said the farmers were not going to get paid under the current contractual relationship. (Tr. 217). Beau not only has a recollection of this conversation, it was memorialized in a December 31, 2018, email Beau sent to

everyone in the group of Farmers, which was introduced at trial. (Tr. 217–19; Ex. 24–27). In Beau's words, Rendimonti "made it clear that the present discussion of the situation in which [the Farmer's] were going to get paid [wa]s not going to happen." (Tr. 219).

Attorney Cort Jensen ("Jensen"), for the Montana Department of Agriculture, became the point man in dealing with USA Biofuels and its other entities, Eureka 93 and Vitality. (Tr. 1112–13). Jensen interacted with an attorney and corporate officer, Tim McCunn ("McCunn") from Canada. (Tr. 1113). As for David Cowen (corporate representative of Surety Land, in this case), Kenney, Hoggan, and Shirley, Jensen never met these folks nor dealt with them until the first day of Jensen's testimony at trial in June 2021. (Tr. 1115–16). McCunn was the person with authority to make decisions on behalf of USA Biofuels or its related Canadian entities, and McCunn never mentioned to Jensen that he was reporting to Kenney, Hoggan, or Shirley. (Tr. 1116–17).

Jensen was working on behalf of the State Department of Agriculture to see if USA Biofuels would release the hemp bales to the farmers so they could sell the bales and satisfy part of the debt. (Tr. 1072–73). During trial, an issue came up as to whether or not USA Biofuels or its members had threatened criminal sanctions if the farmers decided to sell the bales. (Tr. 1299–1300). Jensen confirmed that other

companies unrelated to USA Biofuels made that threat, but USA Biofuels had not. (Tr. 1120). Jensen's investigation revealed that, in late 2018, the monies had arrived in the hands of the Canadian investors but, instead of paying the Farmers, the money went to buy a CBD processing plant in New Mexico. (Tr. 1067–68). Jensen opined that the people he was dealing with in Canada for USA Biofuels "weren't candid." (Tr. 1121–23). However, when asked who the liars were, he said mostly McCunn. (*Id.*). But even Jensen described that the core problem was "the lack of timely payment." (Tr. 1122).

Ultimately, by September 2019, USA Biofuels/Eureka 93 abandoned the hemp crop. (Tr. 772, 949–50). Some of the Farmers sold it and some of them did not. (Tr. 944, 950). By that time, the market for CBD oil crashed, thus the value of the hemp in the field crashed. (Tr. 607–08). As their only asset was the raw material for valueless CBD oil—hemp—the value of companies like USA Biofuels and Eureka 93 crashed as well. The few Farmers who took advantage of repossession of the bales did not make much money.

The Farmers filed this suit in mid-2018 when the "minimum acre guaranty" payments were past due and amended their claims after those first payments were made but the subsequent payments became past due. (Doc. 328, *First Am. Compl.*). Although the Farmers were aggravated that they received the first payments and seed

later than agreed, they ultimately sought no remedy nor other relief for these delays. This suit is entirely about the failure to make the second payments under the contracts.

There was no material difference in the experiences of any of the Farmers; they all signed the same contract with Beau as their primary contact, got paid for the first installment but not the second, and—when asked—agreed this lawsuit would never have occurred if the contract had been performed. (Tr. 1196). Furthermore, none of these Defendants were demonstrated to have any direct or indirect involvement with the contract formation nor with marketing the USA Biofuels program to the Farmers. The Farmers had not even heard of these Defendants until litigation began, except a few of the Farmers knew of Shirley only due to Shirley's late involvement in trying to salvage the operation.

The following list comprises nearly every other Plaintiff/Farmer or Plaintiff witness in this case who testified on behalf of himself or his corporation: Wyatt Handy ("Handy"); Tom Enander ("Enander") on behalf of Enander Seed Farm, LLP; Lawrence Romo ("L. Romo"); Jess Romo; Gy Salvevolb ("Salvevolb"); Dusty Berwick ("D. Berwick") on behalf of Bears Coulee Ranch, LLC; Matt Berwick on behalf of Berwick Farms, LLC; Nolan Nelson ("N. Nelson"); Paydon Nelson; Dean Nelson ("D. Nelson") on behalf of Nelson Farms; Brian Prevost ("Prevost"); David Picard ("D. Picard"); Chase Picard; Ty Anderson; Dave Anderson; Dave Granley;

Keith Groh; Loren Schledewitz ("Schledewitz"); Doug Smith ("Smith") on behalf of DSF Logistic; and Chris Hansen ("Hansen").

Those who testified on these issues were virtually unanimous. *See, e.g.*, (Tr. 309–12 (Handy's testimony)); (Tr. 646–49 (Enander confirming "[his] dealings were with USA Biofuels")); (Tr. 661–63 (L. Romo's testimony)); (Tr. 670–72 (Salvevolb's testimony)); (Tr. 688–90 (D. Berwick's testimony)); (Tr. 718–21 (N. Nelson's testimony)); (Tr. 828–32 (D. Nelson's testimony, including that his only clear recollection of being told he could not sell the hemp bales came from his own attorney)); (Tr. 851–53 (Prevost's testimony, including that he did no investigation before entering the contract with USA Biofuels, and did not know where the money was to be coming from or if it was coming at all)); (Tr. 896, 898 (D. Picard's testimony)); (Tr. 874, 877, 882–84 (Schledewitz's testimony)); (Tr. 259, 261–66 (Smith's testimony, including description of what he believed to be dishonest conduct of the Defendants regarding the representations on payment, stating that, if the representations were true, "we'd all been paid by now")).

Chris Hansen was another one of the Farmers who relied on Beau for communication with USA Biofuels. (Tr. 318–19). Hansen pointed out that on December 12, 2018, Shirley, on behalf of USA Biofuels, was forecasting that fifty percent of the necessary money to pay for the crop would be coming through. (Tr.

330–31; Ex. 24–171). In fact, the exact words of the email were "I'm pleased to inform you that we will be issuing the next payment of 50% of your outstanding balances Friday[,]" December 14, 2018. (*Id.*). Just two weeks later, Beau passed along Rendimonti's message that *only* fifty percent of the money would be coming, and the Farmers would have to surrender the bales immediately but agree to take the rest of the money at a later date, under a new contract. The Farmers rejected it. (Tr. 220–23).

Hansen's claimed emotional distress was more extensive than what was alleged by the other Farmers, but similar. He testified that the financial implications of the 2018 hemp experience made it "stressful" (Tr. 335) and that, "[e]motionally[,] it was tough" (*id.*) because they had a new bank at the time and wanted to build a good relationship but the bank started to doubt their ability to perform (Tr. 336). Hansen claimed that he had sleepless nights and tough discussions with his loan officers and with his wife. (*Id*).

However, like the other Farmers, Hansen knew nothing about Kenney, Shirley, Hoggan, nor Surety Land before entering the contracts, he did not rely on these entities in any way to enter the contract (Tr. 340–43), and he heard about Rendimonti for the first time in December 2018, when Rendimonti told Beau and others that money was not on the way (Tr. 343–46). Hansen affirmed what every other farmer

who spoke of the issue did, that if USA Biofuels would have kept its promise and paid the money there would have never been a trial and that everything from this case came from the failure to pay money they promised to pay. (Tr. 341–42, 1196).

On this set of largely undisputed facts, Plaintiffs abandoned any contract claim and secured a tort judgment of about $65 million based on a multitude of theories.

IV. STANDARD OF REVIEW

Whether there was sufficient evidence to support the verdict awarding tort relief is reviewed *de novo*. *Giambra v. Kelsey*, 2007 MT 158, ¶ 26, 338 Mont. 19, 162 P.3d 134 (citations omitted). The granting of a motion for summary judgment, as to the alter ego claim, is reviewed *de novo*. *Hanson v. Water Ski Mania Ests.*, 2005 MT 47, ¶ 11, 326 Mont. 154, 108 P.3d 481.

V. SUMMARY OF THE ARGUMENT

The principal argument advanced by these Defendants is that the relationships and grievances between USA Biofuels/Eureka 93 and the Plaintiffs was purely contractual. Therefore, as the result of the proven breach of the contract, Plaintiffs' proper remedies were contract remedies, only, not tort remedies, and the tort-based jury verdict should be reversed as a matter of law.

The District Court erred in granting summary judgment on the alter ego claim against the shareholder Defendants, Kenney, Hoggan, and Surety Land, because the

"alter ego" determination is always a fact-intensive inquiry and, also, the ruling was substantively incorrect.

If resolution of these two issues does not moot the remaining issues, these Defendants are entitled to a new trial because (a) the verdict was dramatically inconsistent with itself and was the result of passion or prejudice; and (b) the Defendants were denied the right to a properly instructed jury. Toward the end of trial, Defendants offered an instruction which the District Court ruled was a correct statement of the applicable law supported by the facts presented, but the instruction was relegated only to being argued by defense counsel. This was improper because arguments of counsel cannot substitute for instructions by the trial court.

VI. ARGUMENT

Section 25-11-102, MCA, allows a former verdict or other decision to be vacated in a number of instances[1] when the substantial rights of the aggrieved party are materially affected. As further discussed, below, these Defendants' substantial rights were materially prejudiced by multiple errors in law made by the District Court, there was not sufficient evidence presented to support the jury's verdict, and—at any

[1] These enumerated instances include the following:

(5) excessive damages appearing to have been given under the influence of passion or prejudice;
(6) insufficiency of the evidence to justify the verdict or other decision or that it is against law;
(7) error in law occurring at the trial and excepted to by the party making the application.

§ 25-11-102, MCA.

rate—the damages awarded were excessive and without basis in law or fact.[2]

A. THIS MATTER IS A PURE CONTRACT DISPUTE, NOT A TORT CASE OF ANY KIND, AND ONLY CONTRACT DAMAGES ARE AVAILABLE.

1. By Any Measure, This Is A Contract Case.

"As a general rule, when a party's claim is based solely upon a breach of the specific terms of an agreement, the action sounds in contract." *Dewey v. Stringer*, 2014 MT 136, ¶ 8, 375 Mont. 176, 325 P.3d 1236 (citing *Billings Clinic v. Peat Marwick Main & Co.*, 244 Mont. 324, 338, 797 P.2d 899, 908 (1990)). This Court has said, "we will not allow a party's characterization of an issue to eclipse its substance . . . ." *Gottlob v. DesRosier*, 2020 MT 210, ¶ 11, 401 Mont. 50, 470 P.3d 188 (citation omitted). These Defendants are asking the Court to say this again. Plaintiffs' multi-varied attempts to characterize this as a tort case cannot eclipse its substance: it is a contract case. And Plaintiffs have all but admitted this is true in that every witness, when asked, said the dispute would not have gone to court––*at all*—if the contracts with USA Biofuels had been performed. (Tr. 1196).

Under Montana law, some breaches of contract can create a tort claim, even contracts with a promise to pay money, and there are two types of tort claims that may grow from the breach of such a promise. The first large category is statutory, such as

[2] These arguments were raised in Defendants' post-trial motions (Docs. 535, 538–39, 541–42, 544–45, 549) and disregarded by the District Court (Docs. 554, 557).

claims under the Unfair Trade Practices Act ("UTPA"), section 33-18-242, MCA. The other broad category of claims where the breach of a promise to pay money can be seen as tortious are those when a special relationship exists that can create a tortious breach of the implied covenant of good faith and fair dealing. *See Story v. City of Bozeman*, 242 Mont. 436, 451, 791 P.2d 767, 776 (1990), *overruled in part on other grounds by Arrowhead Sch. Dist. No. 75, Park Cty. v. Klyap*, 2003 MT 294, ¶ 54, 318 Mont. 103, 79 P.3d 250 (quoting *Wallis v. Superior Ct.*, 160 Cal. App. 3d 1109, 1118 (Ct. App. 1984)) (adopting five elements in order to find this "special relationship" between contracting parties).

Also, if a person is fraudulently induced into a contract, the aggrieved party can sue on the contract or sue in fraud (or make a similar claim of deceit). *Id.* However, "[n]either the making of a promise to pay money in the future nor the failure to pay constitutes actionable fraud." *Davis v. Church of LDS*, 258 Mont. 286, 293, 852 P.2d 640, 644 (1993), *overruled on other grounds by Gliko v. Permann*, 2006 MT 30, 331 Mont. 112, 130 P.3d 155 (citing *Roberts v. Mission Valley Concrete Indus.*, 222 Mont. 268, 721 P.2d 355 (1986)).

In this case, neither statutory claims nor a claim of a breach of the covenant of good faith and fair dealing were alleged. There has been no allegation of a special relationship and, clearly, no evidence of a special relationship which would salvage

that claim on appeal. Likewise, the Plaintiffs made no effort to prove—in fact, they eschewed the opportunity to prove—fraudulent inducement of the contract or deceit. (Tr. 1219–20).

In *Davis*, this Court affirmed the District Court's summary judgment dismissal of a fraud claim after Davis was injured on church property and the church promised to pay Davis's medical bills but later refused. 258 Mont. at 293, 852 P.2d at 644. The promise to pay money, in *Davis*, was far more surrounded by tort-type atmospherics than the promises made here. In this matter, USA Biofuels promised to pay money and did not keep its promise. This is a breach of contract case, only, and cannot be massaged into a tort claim.

The Plaintiffs recognized in chambers that this is not a fraudulent inducement claim. (Tr. 1300). During the course of settling jury instructions, the Court agreed with the Defendants that the jury should be instructed that their deceit claim did not include a claim that the Plaintiffs were deceived into forming the contracts. (Tr. 1219–20). Plaintiffs' trial concession that they did not have a fraudulent inducement case was not an act of charity. Rather, if the Plaintiffs' damages grew out of fraudulent inducement into the contract, their damages were not traceable to these Defendants. Overall, in addition to the support provided by Plaintiffs' own characterizations, nothing else about this case cries out for treating it as a tort case.

Plaintiffs entered their respective contracts voluntarily. This merely was a business deal gone bad and should be treated as such.

2. The Claim of Negligence Cannot Salvage The Tort Aspect Of This Verdict.

This Court has long recognized the distinction between tort and contract claims and refused to transmute one into the other. In the excerpt quoted below, this Court, in *Plakorus v. University of Montana*, emphasized the "fundamental difference" between a breach of contract and a tort:

> Contract obligations are based on the manifested intention of the parties to a bargaining transaction, whereas tort obligations are imposed by law—apart from and independent of promises made and therefore apart from the manifested intention of the parties—to avoid injury to others. **The breach of a purely contractual duty does not constitute the sort of active negligence or misfeasance necessary to impose liability under tort law.**

2020 MT 312, ¶ 16, 402 Mont. 263, 477 P.3d 311 (quoting *Dewey*, ¶ 22) (emphasis added).

The proof required to advance the negligence, fraud, and other tort claims—that the action was based on events "apart from and independent of promises made"—is wholly lacking. This case's testimony and argument is confined to the grievance that promises to pay money were not kept (Tr. 1196), i.e., "the violation of a specific contractual provision." *Plakorus*, ¶ 16 (quoting *Tin Cup Cnty. Water v. Garden City*

Plumbing & Heating, Inc., 2008 MT 434, 30, 347 Mont. 468, 200 P.3d 60). Thus, under *Plakorus*, this case presents contract claims, only.

3. Punitive Damages Are Barred By Section 27-1-220(2), MCA, In This Case.

The importance of recognizing this is simply a contract case, as the Defendants have and continue to urge, results in the dismissal of all the composite claims and damages of the Plaintiffs except those based in breach of contract. Section 27-1-220(2)(a), MCA, bars punitive damages more than just in claims for breach of contract, but "in any action arising from: (i) contract; or (ii) breach of contract." If the legislature wanted to preclude punitive damage claims arising from breach of contract actions, only, it would not have included in its prohibition *any action arising from contract*. There is no doubt this case is an action arising from contract and a breach of contract. Thus, punitive damages are barred.

4. Emotional Distress Damages Are Barred By Section 27-1-310, MCA, And *Childress v. Costco*.

"In an action for breach of an obligation or duty arising from contract, recovery is prohibited for emotional or mental distress, except in those actions involving actual physical injury to the plaintiff." § 27-1-310, MCA. By some etymological accident, these types of damages have been called "parasitic" emotional distress damages. During the pendency of this case, the Montana Supreme Court, in *Childress v. Costco*,

2021 MT 192, 405 Mont. 113, 493 P.3d 314, unanimously answered the following certified question from the Ninth Circuit Court of Appeals: whether or not "parasitic" emotional distress damages are available in a case where the plaintiff's loss was simply the loss of "personal property."[3]

In answering that question in the negative, this Court noted that while "'some degree' of emotional distress is common in virtually all wrongs" (*Childress*, ¶ 10 (quoting *Sacco v. High Country Indep. Press, Inc.*, 271 Mont. 209, 234, 896 P.2d 411, 426 (1995))), "the proscription against recovery for emotional injury when the underlying harm is economic is nearly universal." *Id.* (quoting *Maloney v. Home & Inv. Ctr., Inc.*, 2000 MT 34, ¶ 65, 298 Mont. 213, 994 P.2d 1124; Leslie Benton Sandor & Carol Berry, *Recovery for Negligent Infliction of Emotional Distress Attendant to Economic Loss: A Reassessment*, 37 ARIZ. L. REV. 1247, 1268 (1995)). Further, "policy concerns such as 'fraudulent claims, a floodgate of litigation[,] and unlimited liability for defendants' generally [weigh] against allowing recovery for emotional distress." *Id.* (quoting *Sacco*, 271 Mont. at 221, 896 P.2d at 418).

In *Childress*, a third party committed theft upon the plaintiff's vehicle left in the defendant's care. *Id.* at ¶ 3. This Court found plaintiff's emotional injury, allegedly due to sentimental value lost from the items stolen, were tied to an underlying claim

[3] This Court—albeit in a somewhat different context—has held that, by definition, money is personal property. *Inman v. Farmers Nat. Co.*, 240 Mont. 182, 185, 783 P.2d 1328, 1330–31 (1989) (citing § 15-1-101(1)(p), MCA).

of merely economic harm, thus emotional distress damages were inappropriate. *Id.* at ¶ 14.

> Nothing in the facts provided to this Court indicate that the handgun was an heirloom, nor were the house keys, documents, or ammunition so intrinsically intertwined with the Childress family dynamic that, without these articles, their "personal identity" would be irreparably impacted. Rather, under the facts as provided, **the Childresses were deprived of fungible property whose value is derived from its utility, not for its intrinsic value.**

Id. (emphasis added).

The Plaintiffs' claims in the present case are far less defensible—as to warrant emotional distress damages—than the claims made in *Childress*, wherein the plaintiff argued, proved, and found no contest to the proposition that an independent tort of negligence had been committed. Here, the existence of a tort claim has been contested from the beginning. As in *Childress*, the Court should find Plaintiffs' damages were purely economic, based on *fungible property with value merely derived from its utility*, and that emotional distress damages are barred.

Each of the Plaintiffs' claims arose from USA Biofuels's failure to pay promised money. This was and remains a case that arose from contract and, if said contracts had been performed, there would be no case. Because this is a breach of contract case, solely, emotional distress damages, in addition to all other non-contract damages, must be precluded.

B. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT TO PLAINTIFFS ON THE ALTER EGO THEORY.

Plaintiffs filed a Cross-Motion for Summary Judgement against the Shareholder Defendants, Hoggan, Surety Land, and Kenney, seeking to adjudicate without trial the "alter ego" issues as to the shareholders. (Docs. 414–15). In response, the Shareholders defended the summary judgment motion with extensive affidavits that, if believed, would have exonerated them. (Docs. 408–10, 418–19). Critical to this appeal, while it did not find its way into the Judgment (*see* Appx. 118–29, *Final J.*), the alter ego finding was used subsequently to attach liability to Surety Land, Hoggan, and Kenney from the breach of contract findings. These Defendants were and remain exposed to liability as a result of the improper summary judgment finding and are entitled to its reversal.

1. The Alter-Ego Determination Is A Fact-Issue And Defendants Hoggan, Surety Land, And Kenney Produced Evidence, Including At The Summary Judgment Hearing, Sufficient To Establish Issues Of Material Fact.

A party is entitled to summary judgment "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Rule 56(c)(3), M.R.Civ.P. At the summary judgment stage, the District Court "does not make findings of fact, weigh the evidence, choose one disputed fact over another,

or assess the credibility of witnesses." *Andersen v. Schenk*, 2009 MT 399, ¶ 2, 353 Mont. 424, 220 P.3d 675; *see also Williams v. Plum Creek Timber Co.*, 2011 MT 271, ¶ 41, 362 Mont. 368, 264 P.3d 1090. Thus, at the stage in question, all reasonable inferences from Kenney's and Hoggan's affidavits and the documents accompanying the affidavits must be viewed in a light most favorable to Kenney and Hoggan, with reasonable inferences drawn in their favor. *See Schmidt v. Washington Contractors Grp., Inc.*, 1998 MT 194, ¶ 7, 290 Mont. 276, 964 P.2d 34 (citing *Kolar v. Bergo*, 280 Mont. 262, 265, 929 P.2d 867, 869 (1996)).

Because an alter ego determination is so fact-intensive, a trial court rarely grants summary judgment to a party asserting the existence of an alter ego, and those few such cases are often reversed. *See, e.g.*, *BP Prod. N. Am., Inc. v. Se Energy Grp., Inc.*, 282 F. App'x. 776 (11th Cir. 2008); *Thomas Berkeley Consulting Eng'r, Inc. v. Zerman*, 911 S.W.2d 692 (Mo. Ct. App. 1995); *Emprise Bank v. Rumisek*, 215 P.3d 621 (Kan. Ct. App. 2009). Further, courts are far less inclined to pierce the corporate veil in contract cases than in tort cases because, in tort, the parties are not in a position to bargain for their respective exposures. *See, e.g.*, *Lucas v. Texas Indus., Inc.*, 696 S.W.2d 372, 374–75 (Tex. 1984) (citations omitted) ("Courts have generally been less reluctant to disregard the corporate entity in tort cases than in breach of contract cases.").

Kenney filed affidavits in response to the Cross-Motion for Summary Judgment in which he swore upon his own personal knowledge that a merger or corporate sale of USA Biofuels and Vitality Natural Health took place in Canada. (Doc. 409, pp. 5–6, ¶¶ 9(j)–(k); Doc. 418, p. 2, ¶ 5). Kenney averred and documented that the resulting corporation had two directors, required to be Robert Leaker and Tim McCunn, and Kenney walked through how the Canadian shareholders had complete control over the corporation. (Doc. 409, pp. 5–6, ¶ 9(l); Doc. 418, pp. 2–3, ¶ 6).

Kenney further established that, from March 23, 2018, the Canadian shareholders were entitled to and, in fact, exerted management control over Serenity Canada, and the wholly owned subsidiaries, Vitality Natural Health, LLC, and USA Biofuels. (Doc. 409, pp. 5–6, ¶ 9(m)–(n); Doc. 418, p. 3, ¶ 7). Kenney and Hoggan, although they were the founders of Vitality Natural Health and had been operators of the Eureka 93 CBD extraction facility, later served only as consultants providing information to the Canadian managers from time to time. (Doc. 418, p. 3, ¶ 8). The Canadians were successful in getting outside funding to advance the hemp operation and pay $1.83 million to the Farmers under the minimum $100/acre guarantee. (*Id*. at p. 4, ¶ 12).

Hoggan filed affidavits on behalf of the Shareholder Defendants establishing these same facts, particularly that control of the corporation was moved to Leaker and

McCunn, and the Canadians controlled the operation of USA Biofuels from and after March 23, 2018. (Doc. 419, pp. 2–3, ¶¶ 6–7).

The District Court's analysis on this issue took one page of transcript at the summary judgment hearing where the court ruled, from the bench, that the corporate veil would be pierced, stating "[i]f it acts like a duck, walks like a duck, talks like a duck, it is." (Appx. 115–16, *MSJ Hr'g Tr.*). This oft-used metaphor describes fact-finding—drawing a factual conclusion from circumstantial evidence. The District Court's finding, here, was improper *inter alia* because the record provided ample evidence to find an issue of material fact.

2. The District Court's Summary Judgment Finding Was Substantively Incorrect.

Due to being a limited liability company, the members of USA Biofuels were to be shielded from direct liability absent a few—seldom successfully invoked—exceptional circumstances under section 35-8-304, MCA. Although the Court made no mention of this controlling statute in its ruling, the statutory protection broadly afforded to members of an LLC under the Montana Code is quoted below:

> [A] person who is a member or manager, or both, of a limited liability company is not liable, solely by reason of being a member or manager, or both, under a judgment, decree or order of a court, or in any other manner, for a debt, obligation, or liability of the limited liability company, whether arising in contract, tort, or otherwise or for the acts or omissions of any other member, manager, agent, or employee of the limited liability company.

§ 35-8-304(1), MCA. The remainder of section 35-8-304 contains no exceptions to this general rule that would apply to the present case.

Plaintiffs protested and the District Court found that, in this case, the vehicle of the LLC was used to defeat public convenience, justify wrong, or perpetuate fraud. (Appx. 92, *MSJ Hr'g Tr.*; Appx. 32–34, *MSJ Order*). However, the evidence is quite to the contrary. USA Biofuels did not have enough money to pay its bills and required investors. (Doc. 418, p. 4, ¶ 12). This is precisely the reason LLCs are formed, for investors to limit their liability to their initial investments.

Plaintiffs' basic argument was that this limited liability company cannot limit its liability because it is undercapitalized. (Doc. 415, *Pls.' MSJ Br.*, pp. 10–12). However, the United States Bankruptcy Appellate Panel of the Ninth Circuit, in *In re Atlantis Water Sols., LLC*, rejected this very analysis as it relates to Montana law. No. 2:18-AP-00016, 2019 WL 4874764, at *6 (B.A.P. 9th Cir. Oct. 1, 2019). Based on "Montana's statutory framework which provides for the creation of alternative business entities to the traditional corporation while maintaining liability protection for the owners of those entities, and [the panel's] review of case law from other jurisdictions with similar statutes that have addressed this issue," the panel concluded "undercapitalization alone is [not] sufficient to establish fraud for purposes of piercing the veil of an LLC." *Id.*

As all agree that money would have solved all problems here, this is a case of "undercapitalization alone," and the District Court erred—on substance and procedure—in allowing this corporate veil to be pierced.

C. AT ANY RATE, THE $65 MILLION VERDICT CANNOT BE SUSTAINED.

"In rare instances, this Court has reversed a jury's verdict and ordered a new trial where the verdict is inconsistent and does not reconcile with the evidence and argument presented at trial." *D.R. Four Beat All., LLC v. Sierra Prod. Co.*, 2009 MT 319, ¶ 41, 352 Mont. 435, 218 P.3d 827; § 25-11-102, MCA. The issue regarding the tremendous size of the punitive and emotional distress damages contained in the jury's verdict is moot because such damages are not available in this breach of contract case. To the extent this Court does not rule that punitive and emotional distress damages are barred in this case, the Court should, nonetheless, vacate the jury's verdict because it is unsupported by the law or facts. These arguments were raised in Defendants' post-trial motions (Docs. 535, 538–39, 541–42, 544–45, 549) and disregarded by the District Court (Docs. 554, 557).

1. This Verdict Simply Cannot Be Reconciled With The Applicable Law Nor With Logic Or The Evidence Presented At Trial.

Here, the District Court properly instructed the jury on section 27-1-220(3), MCA (Doc. 526, *Instruction No. 33*), that in a non-class action lawsuit "[a]n award

for punitive damages may not exceed $10 million or 3% of a defendant's net worth, whichever is less." Plaintiffs successfully argued and the District Court found that Eureka 93 and USA Biofuels were cashless asset companies, undercapitalized to a point that the corporate veil must be pierced or else provide Plaintiffs with no recourse for the LLC's breach of contract. (Doc. 415, *Pls.' MSJ Br.*, pp. 10–12; Appx. 32–34, *MSJ Order*). Plaintiffs' entire case rested on this proposition. However, the verdict indicated USA Biofuels and Eureka 93 were each worth *at least* $330 million, so as to purportedly justify the $10 million punitive damages verdict against each company. (Appx. 128–29, *Verdict Form*).

The fact is, USA Biofuels and Eureka 93 cannot be worthless shells and companies so valuable that 3% of their net worth is $10 million. As the jury was instructed on the three percent (3%) net worth cap on punitive damages—the jury must have implicitly found, also, that the Defendant corporations were very well capitalized. The evidence and argument, at trial and at summary judgment, established that USA Biofuels was penniless. *See* (Appx. 33, *MSJ Order*). This was Plaintiffs' lone claim, and the jury's findings of sufficient net worth to support multiple $10 million verdicts cannot be reconciled.

Additionally, these punitive damages awards cannot be justified under

Montana's statutory guidelines. Section 27-1-221(7)(b), MCA, provides nine factors[4] included in what the judge must consider in her independent review of any punitive damage award. Briefly, not one of these Defendants were even accused of fraud or deceit regarding the initial contract's formation, nor did Plaintiffs make any specific showing of actionable conduct—*at all*—by any of these Defendants. (Tr. 1219–20). The intentions of Plaintiffs and Defendants in this case were certainly innocuous and no secret; they all sought to make money. But these Defendants made no profit and, if we know one thing, these Defendant's simply do not possess wealth nearly to the degree at which one could ever justify the magnitude of this award. (Appx. 33, *MSJ Order*). Under the enumerated factors as well as common sense, there is no legitimate justification for the enormous verdict awarded in this case.

Likewise, the emotional distress damages awarded in this case are wildly inconsistent with the proof presented on this issue at trial. When parasitic emotional

[4] (7)(b) When an award of punitive damages is made by the judge, the judge shall clearly state the reasons for making the award in findings of fact and conclusions of law, demonstrating consideration of each of the following matters:

> (i) the nature and reprehensibility of the defendant's wrongdoing;
> (ii) the extent of the defendant's wrongdoing;
> (iii) the intent of the defendant in committing the wrong;
> (iv) the profitability of the defendant's wrongdoing, if applicable;
> (v) the amount of actual damages awarded by the jury;
> (vi) the defendant's net worth;
> (vii) previous awards of punitive or exemplary damages against the defendant based upon the same wrongful act;
> (viii) potential or prior criminal sanctions against the defendant based upon the same wrongful act; and
> (ix) any other circumstances that may operate to increase or reduce, without wholly defeating, punitive damages.

§ 27-1-221(7)(b), MCA.

distress damages are allowed, they still require some quantum of proof. Admittedly, the Court has set that bar very low, but not non-existent. In this case, there was no testimony even close to suggesting that any tort lead to the claimed emotional distress, nor to what, in fact, the emotional distress was, other than the agony that befell anyone who rebuffed a breath of control in the transaction. Each Plaintiff received a substantial emotional distress award, ranging from $75,000 to $200,000. (Appx. 126, *Verdict Form*). While most of the Plaintiffs testified they were upset about not being paid, two (2) Plaintiffs—Amber and Stephanie Anderson—offered no testimony at all as to their emotional condition but were awarded emotional distress damages, nonetheless. (*Id.*).

Moreover, no witness testified that the continuing problems and reassurances that the money was on its way caused inordinate problems or distress for the Plaintiffs. Rather, Plaintiffs, by their own admissions, were emotionally distressed by Defendants' failure to pay money and by the financial consequences of this failure, only. Each of the many claims in this case began and ended with, or at a minimum arose from, the organic contract issue—USA Biofuels's failure to pay promised money. The facts presented simply do not support the award of emotional distress damages under Montana law.

2. Plaintiffs Are Not Entitled To Any Punitive Damage Award Over $10 Million, Total.

In addition to the award being excessive and entirely inconsistent with the evidence, it was improper for the 3% or $10 million punitive damages cap under section 27-1-220(3) to be applied to each Defendant, individually. Rather, the statutory cap must be applied to the Defendants as one collective enterprise, because the Plaintiffs argued—and the jury found—joint liability.

The Montana Supreme Court has not addressed this issue of whether multiple punitive damage limits can be stacked into an award in excess of $10 million. However, the Federal District Court for the District of Montana ruled, in *Hull ex rel. Senne v. Ability Ins. Co.*, that such stacking is forbidden, especially in a case where there is an adjudication of joint liability or alter ego. No. CV-10-116-BLG-RFC, 2012 WL 6083614, at *2 (D. Mont. Dec. 6, 2012).

In *Hull*, the court held, where a plaintiff makes the case that multiple defendants acted as one entity and each defendant was the alter ego of the others, the "[p]laintiff is estopped from [then] switching theories to apply the punitive damages cap on an individual defendant basis." *Id.* at *2. Reducing the punitive damages verdict to not exceed one $10 million limit for all defendants in the case, the court's opinion stated, "[p]laintiff's theory that the $10 million maximum applies per [d]efendant would lend itself to the idea that plaintiffs in civil cases seeking punitive damages could potentially benefit [merely] by adding defendants . . ." to the case. *Id.* at *3.

Here, as the Plaintiffs' case centers on the idea that the Defendants are alter egos of one another and are liable based on joint conduct, the Court must not tolerate Plaintiffs' attempt to have it both ways in regard to the statutory cap. The current verdict cannot be sustained because the damages awarded are excessive and inconsistent with the evidence and with Montana law. To the extent this Court finds otherwise, punitive damages in this case—just as in *Hull*—still must be assessed against the Defendants jointly, with a single limit at the lesser of 3% of all of the Defendants' net financial worth or $10 million.

D. IF THE JUDGMENT IS NOT REVERSED AS A MATTER OF LAW, A NEW TRIAL IS WARRANTED BECAUSE THE JURY WAS IMPROPERLY INSTRUCTED.

A party is, ordinarily, "entitled to jury instructions adaptable to his theory of the case." *Tope v. Taylor*, 235 Mont. 124, 129, 768 P.2d 845, 848 (1988), *overruled on other grounds by Giambra*, 2007 MT 158) (citations omitted). And "[i]t is the duty of the court to instruct the jury on the law . . . ." *State v. Secrease*, 2021 MT 212, ¶ 16, 405 Mont. 229, 493 P.3d 335 (citing *State v. Kougl*, 2004 MT 243, ¶ 26, 323 Mont. 6, 97 P.3d 1095). "In both the criminal and civil contexts 'that duty cannot be delegated to counsel.'" *Kougl*, ¶ 26 (quoting *Billings Leasing Co. v. Payne*, 176 Mont. 217, 225, 577 P.2d 386, 391 (1978)).

"Closing arguments are not evidence, neither do they substitute for proper jury

instructions." *Id.* (quoting *United States v. Pedigo*, 12 F.3d 618, 626 (7th Cir. 1993)); *see also Secrease*, ¶ 16 ("We have previously rejected the argument that the closing argument of a party can substitute for proper jury instructions, and we reject that argument once again here."); *Taylor v. Kentucky*, 436 U.S. 478, 488–89 (1978) (citation omitted) ("Petitioner's right to have the jury deliberate solely on the basis of the evidence cannot be permitted to hinge upon a hope that defense counsel will be a more effective advocate for that proposition than the prosecutor will be in implying that extraneous circumstances may be considered.").

Numerous times, this Court has plainly held a party's recitation of the applicable law in closing—even when stated correctly—"is not the same as hearing it from the court. This is especially true when it comes in the form of written jury instructions that the jury may read, reread, and reflect on while in deliberation." *Kougl*, ¶ 26; *see also Goles v. Neumann*, 2011 MT 11, ¶ 16, 359 Mont. 132, 247 P.3d 1089 (reasoning that "[j]urors are free to accept or reject the arguments of counsel, but they are specifically informed they *must follow* the instructions of the court") (emphasis in original).

As the case matured, it became clear Plaintiffs' argument that USA Biofuels had some sort of duty to relinquish to the Farmers the property that belonged to USA Biofuels—the hemp bales—so the farmers could sell the bales and make money. In

opening, Plaintiffs stated "[t]he companies claim[ed] that they own[ed] the crop regardless of payment . . ." (Tr. 167) and, even after defaulting on the second payments, "the companies again [told] the farmers that they own[ed] the hemp bales . . ." (Tr. 169). Plaintiffs also argued that if the Farmers had known they were not going to get paid they could have "taken the crop." (Tr. 170). This theme persisted throughout almost every Plaintiff's testimony and into closing, when they again argued that Defendants "unreasonably maintain[ed] the ownership" of the crop. (Tr. 1370).

However, USA Biofuels explicitly owned the bales (*see, e.g.*, Appx. 2, *Beau Anderson Contract*, ¶ 6) and had no obligation to release them under the contracts nor under any statute or common law, and the District Court agreed (Tr. 1141–42). Defendants brought this to the District Court's attention and requested a jury instruction to address their concerns that the Plaintiffs would inappropriately argue, in closing, that Defendants were under this duty. (Appx. 22, *Requested Instruction D8*; Appx. 23–26, *Tr. Jury Instructions Conf.*). Instruction D8 was the proper statement of law on this issue, essentially that the money owed to the Farmers did not give the Farmers any property right in the bales (*see generally, People v. Tufunga*, 21 Cal. 4th 935, 950–56 (Cal. 1999)), a position vital to the Defense's theory of the case.

The District Court agreed it was an accurate statement of the applicable law and

one that conformed with the evidence presented at trial, and did not rule that the Defendants were not entitled to said instruction. (Appx. 26–28, *Tr. Jury Instructions Conf.*). Yet, after extensive argument from counsel, the court refused to instruct on this point but allowed Defendants to argue it, themselves, without the benefit of an instruction. (Appx. 26–29, *Tr. Jury Instructions Conf.* ("**THE COURT:** . . . D's eight I am refusing it with the directive that[,] however, my refusal to give this as an instruction doesn't mean Mr. Parker cannot argue and say exactly what this instruction says.")).

As usual, the jury was instructed that *the law* would come from the bench, and that arguments of counsel were just that—*arguments*—having no bearing beyond being merely rhetorical. (Doc. 526, *Instruction No. 29*). Because no cross-appeal has been filed, the court's ruling that USA Biofuels owned the bales is the law of the case.[5]

For the duration of the trial and with an implicit quasi-endorsement from the judge, Plaintiffs hammered away at the erroneous proposition that there was some special duty, other than the contractual duty to pay, which obligated the companies to dedicate these bales to the farmer debt. Plaintiffs further suggested from time to time that these Defendants, by some alchemy, could and should be held to account for

[5] "Although Rule 14, M.R.App.P., provides for review of matters by cross-assignment of error, it does not eliminate the necessity of filing a cross-appeal." *Marco & Co., LLC v. Deaconess/Billings Clinic Health Sys.*, 1998 MT 26, ¶ 13, 287 Mont. 293, 954 P.2d 1116 (citing *Johnson v. Tindall*, 195 Mont. 165, 169, 635 P.2d 266, 268 (1981)).

managements' failures to fulfill this fictitious duty. Since it owned the bales, USA Biofuels had every right to assert ownership to the exclusion of the Farmers and the other Defendants. But Plaintiffs were given open field running to assert that USA Biofuels somehow nefariously asserted ownership of the bales and wrongfully refused to surrender them to the Farmers.

Defendants were entitled to the instruction—D8—adaptable to Defenses' theory of the case, to explain that the Farmers' money did not give the Farmers any property right in the bales. The trial judge erred when she relegated to counsel the duty to argue this critical instruction after ruling that the instruction fairly stated the applicable law, and this Court has ruled such practice improper for every case in which it has been faced with the issue.

There is no doubt on this record that the court's failure to instruct in plain English that USA Biofuels and the related companies had no duty to release the bales had a material and prejudicial affect on the Defendants' substantial rights, as evidenced by the large verdict and by Plaintiffs arguing that the failure to release the bales was a primary cause of their damages.

A brief analysis of Rendimonti's actions further proves this point. Rendimonti appeared in the case for the first time when, on the last day of 2018, he told the Farmers the absolute truth, that they were not going to get paid. (Tr. 217–19; Ex.

24–27). Rendimonti arrived on the scene in the exact time frame when, taking Plaintiffs' arguments as tenable, Defendants *should have* released the hemp bales to Plaintiffs. Rendimonti had no relevant involvement during the contracts' formations nor their early performance and Rendimonti was clobbered with a $1 million punitive damage award, nonetheless. (Appx. 129, *Verdict Form*). This verdict could only derive from the false idea that the bales were somehow the property of the farmers and that the bales should have been released.

Indeed, jury instructions are most critical when crafted specifically to blunt misconceptions in the law that a jury will be expected to harbor. For example, judges and appellate courts assiduously show care in instructing a jury that a defendant's silence cannot be held against him, to blunt any delusion that *if the defendant had nothing to hide, he would have talked to the cops*. Further, "[a] jury instruction regarding a defendant's ineligibility for parole is proper, because it serves to eliminate a common misconception that a defendant may only serve a small portion of a jury's sentence." *Booker v. Commonwealth*, 661 S.E.2d 461, 464 (Va. 2008) (citing *Fishback v. Commonwealth*, 532 S.E.2d 629, 632–34 (Va. 2000)).

The idea that these farmers were the ones who planted, nurtured, and grew the crops only to become unsecured general creditors, without a lien or ownership interest in the bales, might aggravate a juror's sense of justice, admittedly. This is evidenced

by the many laws that provide special protections for farmers and ranchers in portions of the industry. *See generally*, Packers and Stockyards Act of 1921, 7 U.S.C. §§ 181–229, 9 C.F.R. §§ 201–06; Perishable Agricultural Commodities Act of 1930, 7 U.S.C. §§ 499a–499t. These Defendants were significantly prejudiced by the District Court's failure to properly instruct the jury and a new trial is warranted if the verdict is not reversed as a matter of law.

E. ARGUMENTS AS TO EACH OF THESE DEFENDANTS, INDIVIDUALLY

None of these Defendants can be held to account, individually, because their actions were not outside the scope of their agency relationship with their principal.

> An agent . . . is not liable to third persons for acts performed in the course of his agency unless, with the consent of his principal, he receives personal credit for a transaction, he enters into a written contract in the name of his principal without believing in good faith he has the authority to do so, or his acts are wrongful in their nature.

Crane Creek Ranch, Inc. v. Cresap, 2004 MT 351, ¶ 12, 324 Mont. 366, 103 P.3d 535 (citing § 28-10-702, MCA). In *Cresap*, the plaintiff sued an attorney for incomplete and misleading statements made by the attorney but on behalf of the attorney's client. *Id.* at ¶ 9. The complaint was dismissed because it contained no allegations of independent wrongs committed outside the scope of the agency, attorney-client relationship. *Id.* at ¶ 13.

This same rule of law shielded bank officers from individual liability in *Bottrell*

v. Am. Bank. 237 Mont. 1, 25, 773 P.2d 694, 708 (1989) (finding that actions of the officers were not on behalf of themselves as individuals or for their own pecuniary benefit, were not against the best interests of their employer, were within the scope of their employment, and were in furtherance of corporate interest); *see also Phillips v. Montana Ed. Ass'n*, 187 Mont. 419, 425, 610 P.2d 154, 158 (1980).

Nothing in this record supports a finding that these defendants ventured out on any individual mission for which they could be held individually responsible under Montana law. In the interest of brevity and clarity, these Defendants have been bunched together for purposes of arguing the appeal. However, on this point, each of these Defendants have their own separate facts undergirding each one's arguments advanced briefly, below.

1. Surety Land

Surety Land has, in some respects, a unique and special position in the case because there is no real evidence that it did anything at all. No Plaintiff in this case ever relied on anything Surety Land said or did, nor changed their permission in detrimental reliance thereon (the same goes for Surety Land's corporate representative, in this case, David Cowen). In fact, none of the Plaintiffs ever heard of Surety Land until they were informed of the entity's existence by their own attorneys. Surety Land never made any representations except early on, when it was

involved in seeking and obtaining articles of incorporation in what would essentially be the corporate charter from Utah. In this respect, it put itself down in the early stages as the manager of USA Biofuels. This single document is the only tether Surety Land has to USA Biofuels other than as a creditor that lost millions of dollars. Said connection is insufficient to sustain any verdict against Surety Land, individually.

2. Owen Kenney

Kenney provided unrebutted testimony at trial that he was a creditor, consultant, and investor in USA Biofuels and Eureka 93, and he committed no torts himself. In fact, Kenney was not accused of committing any torts. Eureka 93 entered contracts with USA Biofuels without Kenney's involvement, except as a consultant, and USA Biofuels breached these contracts. There was no evidence that Kenney had any part in breaching these contracts, nor that Kenney had any part in the promises of payment. Thus, Kenney cannot be held individually liable.

3. Kent Hoggan

Hoggan was devoid of any day-to-day responsibilities in the company and he was not part of the original contract formation. He was a cheerleader for the Farmers, expressing hope that they would get paid, and he did what he could to see that the Farmers received payment. All of the Farmers' problems derive from the fact that the

contract was not performed. Hoggan did nothing to cause the Farmers to formulate the contracts, nor did Hoggan's actions cause the contracts not to be performed, and he cannot be held individually liable.

4. Corey Shirley

Shirley sunk an ample amount of sweat and $60,000 of his own money into Eureka 93, for neither of which was he ever paid. He never owned a share of the companies, never exercised anything beyond operational control, and was not part of any decision to withhold payment. Toward the end of this time line, Shirley was also a cheerleader for the Farmers, hoping and promising that they would get paid. But Shirley's promises were simply a repeat of the promises contained in the USA Biofuels contract. He made no new or special promises for which any consideration was paid, nor which could be enforced. Shirley never acted outside of his capacity as agent and he cannot be held individually accountable for the sins of the company.

VII. CONCLUSION/RELIEF SOUGHT

The last arrow in the quiver of an appellant is the "slippery slope" argument which foreshadows the specter of "floodgates of litigation." This argument merits a few sentences in this case. The artful pleader could in all cases characterize the breach of a promise to pay money as an actionable tort. Folks detrimentally rely on a promise of money and, if they do not receive the money, they often believe they have been

deceived. Reasonably prudent persons pay money that they have promised to pay and, unfortunately, being stiffed on a debt always causes *some* mental anguish.

The Defendants pursuing this appeal request for this Court to strike the jury verdict entirely, because the damages therein are singularly the product of tort claims and, as this is purely a contract case, such a verdict is barred under settled Montana law. The District Court refused to dismiss the contract claim, though Plaintiffs refused to prosecute it. (Doc. 557, *Order on Post-Trial Motions*, p. 16). The finding of alter ego must be reversed. Lastly, because Plaintiffs are entitled to contract summary judgment against USA Biofuels for the full approximately $4.4 million (Doc. 467, *Order Declaring Damages*), these Defendants request this Court to enter said judgment or, otherwise, remand for the District Court to do so.

DATED this 9th day of May, 2022.

/s/ Mark D. Parker
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that the foregoing brief is proportionately spaced, with a Times New Roman text typeface of 14 points; is double spaced; and is 9,897 words, excluding certificate of service and certificate of compliance.

/s/ Mark D. Parker
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have filed a true and accurate copy of the foregoing document with the Clerk of the Montana Supreme Court and that I have served true and accurate copies of the foregoing document upon the parties listed as follows:

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