IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. DA 21-0416

---

JESS ROMO; BEAU ANDERSON; TY ANDERSON; BEARS COULEE RANCH, LLC; BERWICK FARMS, LLC; DSF LOGISTICS, INC.; DAVE GRANLEY; WAGNER HARMON; CHRIS HANSEN; NOLAN NELSON; CHASE PICARD; DAVID PICARD; ROMO BROS, LLP; TERRY TRAEGER; WYATT HANDY; KEITH KYLE GROH; NELSON FARMS; PAYDON NELSON; ENANDER SEED FARM, LLP; BRYAN PREVOST; AMBER ANDERSON; STEPHANIE ANDERSON; DAVID ANDERSON; LOREN SCHLEDEWITZ; GY SALVEVOD,

Plaintiffs/Appellees,

vs.

USA BIOFUELS, LLC, Utah Limited Liability Corporation; VITALITY NATURAL 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

---

On Appeal from the Montana Fifteenth Judicial District Court,
Roosevelt County, Cause No. DV-18-45
Honorable Katherine Bidegaray, District Court Judge

---

# APPELLEES' ANSWER BRIEF

---

APPEARANCES:

Ben A. Snipes
Ross T. Johnson
ODEGAARD KOVACICH SNIPES, P.C.
P.O. Box 2325
Great Falls, MT 59403
(406) 761-5595
(406) 761-5805 - fax
ben@mtlawyers.com
ross@mtlawyers.com

***Attorneys for Plaintiffs/Appellees***

Mark D. Parker
Michael L. Dunphy
PARKER, HEITZ & COSGROVE, PLLC
P.O. Box 7212
Billings, MT 59103
(406) 245-9991
(406) 245-0971 - fax
markdparker@parker-law.com
mdunphy@parker-law.com

***Attorneys for Defendants/Appellants Kent Hoggan, Owen Kenney, Corey Shirley, and Surety Land Development, LLC***

Robert J. Phillips
GARLINGTON, LOHN & ROBINSON, PLLP
P.O. Box 7909
Missoula, MT 59807
(406) 523-2500
(406) 523-2595 - fax
rjphillips@garlington.com

***Attorneys for Defendant David Rendimonti, who did not appeal the Judgment***

## TABLE OF CONTENTS

## TABLE OF CONTENTS (continued)

## TABLE OF CONTENTS (continued)

## TABLE OF AUTHORITIES

### CASES

## TABLE OF AUTHORITIES (continued)

## TABLE OF AUTHORITIES (continued)

## TABLE OF AUTHORITIES (continued)

**RULES**



**STATUTES**

## ISSUES PRESENT FOR REVIEW

1. Whether Defendants' breach of contract absolved them of tort liability for subsequent wrongful conduct.
2. Whether the summary judgment ruling is appropriate for review, and if so, if the corporate veil was appropriately pierced in summary judgment.
3. Whether the verdict is commensurate with the conduct alleged and proven.
4. Whether the Court properly instructed the jury.
5. Whether Defendants' contested version of their conduct absolves them of liability.

## STATEMENT OF THE CASE

Between July 24 - August 1, 2018, the first Complaints in this matter against USA Biofuels were filed in Roosevelt, Sheridan, Richland, and McCone Counties for USA Biofuels' breach of contract. See Dkt. 1-21, Complaints. The suits were consolidated by stipulation. Dkt. 292, Order for Consolidation.

On June 5, 2019, Plaintiffs/Appellees ("Farmers") filed a motion and brief in support to amend their original complaint. Dkt. 305, 306. The motion was granted on August 29, 2019. Farmers then filed their Amended Complaint, adding Defendants and claims for tortious conduct occurring after the filing of the original Complaint. Dkt. 328.

Trial was held from June 21-25, 2021, in Roosevelt County. At trial, Mark Parker represented Defendants Surety Land Development, LLC ("Surety"), Kent Hoggan ("Hoggan"), Owen Kenney ("Kenney") and Corey Shirley ("Shirley") and Robert Phillips represented defendant David Rendimonti ("Rendimonti"). All Plaintiffs' exhibits were admitted without objection. Tr. 182-183. After Farmers rested their case, Defendants called no witnesses and presented no evidence in their case in chief. Tr. 1153. After deliberation, the jury found Defendants to have committed the torts as alleged and acted in concert. The jury also rendered compensatory damages, individualized sums for emotional damages, and punitive damage awards to be assessed against each defendant individually. Dkt. 527, Special Verdict Form; Dkt. 528, Punitive Verdict Form. Judgment was entered against Defendants consistent with the jury's verdict on tort damages. Dkt. 533, Final Judgment. Defendants Rendimonti, Vitality Natural Health, LLC ("Vitality"), and Eureka 93 Inc. ("Eureka") did not appeal the final judgment entered against them.

## STATEMENT OF FACTS

Appellees agree that the record is huge and the documentary evidence piles high. However, as evidenced by glaring omissions in Appellants' Opening Brief and arguments contained therein, Appellees cannot agree there are "virtually no disputed material facts." Appellants' Opening Br. 3.

## I. Introduction of the Parties

Farmers are a large group of farmers who cultivate crops in Northeastern Montana. Defendants/Appellants, consist of individuals Hoggan, Kenney, and Shirley, and a Utah LLC Surety ("Defendants"). In the spring of 2018, Plaintiff Beau Anderson learned about an opportunity to grow industrial hemp through his brother, Plaintiff Ty Anderson. Tr. 185-186. Beau learned the company was looking for a large amount of acres, so he reached out to other of farmers in the area. Tr. 186. Farmers met with Greg Ranger ("Ranger") at the Legion Hall in Bainville. Tr. 188. Ranger indicated he was working for a company called USA Biofuels. Tr. 188. At the meeting, Ranger affirmed that the company was "solid" and has "plenty of funds" to pay the Farmers under a prospective contract. Tr. 188.

## II. Contracting

Following the meeting, Farmers and USA Biofuels entered into a series of identical contracts. For simplicity, Farmers examine Beau Anderson's contract ("Contract") for its terms. App. 1-5. Per the Contract, Farmers were required to seed, raise, harvest, and bale hemp. App. 1-5. In turn, USA Biofuels was required to provide the seed and pay Farmers on a per acre basis, $500/acre for dryland and $700/acre for irrigated crop. App. 3. USA Biofuels was to pay an initial $100/acre to Farmers after seeding. App. 3. The rest would come after the crop was harvested,

baled, and ready to ship, with half due upon being ready to ship and the rest 30 days later. App. 3. The Contract determined that because Buyer is "supplying the seed," "the hemp crop and any excess Seed will at all times be owned by Buyer." App. 3. None of the defendants paid the Canadian seed company for the seed provided to the Farmers. Tr. 1002.

## III. Farming Season

Farmers received hemp seed and planted it in the spring and early summer of 2018. Tr. 190. Farmers then notified Ranger of the completion of seeding and requested payment. App. 10. Payment did not come. Greg Ranger emailed Farmers on July 21, 2018, and attached a letter from Kent Hoggan, "one of the Principles of the company." App. 16. The letter, written on USA Bio-Fuels LLC letterhead, addresses the "Bainville/Culbertson Area Farmers" payment concerns. App. 29-30. Therein, Hoggan expresses cash flow bumps that he is happy to report are ending, stating "I want to assure you that you will be paid every dime that is owed to you under for[sic] farming contract with our company," and expects the $100/acre payment to be made within the week. App. 29-30.

Payment did not come, prompting the filing of these lawsuits in late July and early August for breach of contract. Dkt. 1-21. As of August 19, 2018, Farmers remained unpaid. App. 14. Shortly thereafter, Farmers received the seeding payment

per the Contract. Although late, Farmers took the seeding payment as a positive sign. Tr. 196, 681, 889.

In September, Farmers harvested and baled the hemp crop and requested payment. App. 7. The crop grown and harvested by Farmers was substantial, encompassing 18,000 acres of Montana farm ground. Tr. 619.

## IV. Defendants String Farmers Along

Defendants failed to notify this Court of the serial misrepresentations made to the Farmers following the breach, a damning omission. Instead of payment, Ranger and Shirley made repeated misrepresentations of fact about the existence of money to pay the Farmers coupled with promises to pay, and unsubstantiated excuses as to why payment did not occur. In response to Farmers' requests for payment, on September 21, 2018, Ranger emailed Farmers, stating "Corporate has confirmed the funds are in place and ready to go," but that there was an "unanticipated delay in the release process on the Canadian side." App. 8. On October 19, Shirley represented to the Farmers that they are "waiting on the next tranche of funds to arrive from our Canadian Head Office." App. 9. These are clear representations of fact purporting *the money actually exists* and that *defendants actually have it*. At trial, Shirley confirmed that yes, his email indicated to Farmers a tranche of funds existed and was available for them. Tr. 589-90. Shirley made factual excuses explaining

non-payment, citing deadlines for wires as a reason why payment was not made. App. 12. Shirley also represented to Farmers that he "received notices from his lender" about the receipt of loans to pay Farmers. App. 11. At trial, Defendants provided no evidence of any such notices or correspondence confirming that funding was actually available or ever existed. When asked whether Shirley thought it was competent for representatives of a company to direct employees to make untrue statements, Shirley was unable to answer. The Court directed him to answer, he failed to answer, and the Court instructed "I guess if he can't answer, I think failure to answer gives you an answer." Tr. 614-616. Defendants refused to ask Shirley any questions at trial. Tr. 623. In addition to these factual representations, Shirley made subsequent promises to pay in November and December, 2018. App. 11, 12.

In the fall of 2018, Farmers were threatened with suit should they try to sell the crop. Tr. 201-202. Defendants representation of fact, threats to sue, and the fact that Defendants previously paid the seeding payment, albiet late, convinced Farmers to do nothing to try to obtain and sell the hemp crop. Tr. 201-202, 941-944.

Instead of payment, Defendants finally released the crop to Farmers in September of 2019. Tr. 943-944. After a year of sitting idle on their properties, the bales were infested with "mice and mold," and the market for the hemp had "tanked." Tr. 944, 607-608; App. 44.

## V. Defendants' Interaction With the State of Montana

During the summer of 2018, Shirley was working with the Montana Department of Agriculture to obtain a commodities dealer license. App. 18. At trial, Bob Ballensky of the Department of Agriculture testified about interactions with Vitality, including Kenney and Shirley. Tr. 379-380. Shirley was identified as "lead" and "COO" of Vitality. App. 19. On June 29, 2018, Shirley submitted a signed commodity dealer application for Vitality. App. 38-40. On the bottom of page 1, he identified himself as the COO. He also identified Owen Kenney as the Applicant and Director of the company. App. 38-40; Tr. 393-394. As part of the application process, the Department requires bonding, which is dependent on statements of capital and equity. App. 20-21; Tr. 407-408. Shirley provided Vitality's financial statements to the department via email on September 11, 2018. App. 22. Shirley specifically mentioned a discussion of this matter with Kenney prior to sharing Vitality's financial statement. App. 23. In the financial statement, Vitality "estimates a conservative value of the unprocessed Industrial Hemp biomass crop at $400 million" and that Vitality, "an affiliate of USA Biofuels LLC is the sole recipient of all of the biomass under an intercompany transfer agreement." App. 34.

On September 19, 2018, the Department approved Vitality's license on the condition it pay Farmers "prior to delivery to you or your taking ownership of the

hemp..." App. 24. Vitality agreed. App. 25. Ballensky's October 2, 2018 email shows that Shirley and Vitality represented the fact of an "existing $12 million line of credit" to use to pay farmers. App. 26. Ballensky again confirmed the agreement that Vitality could not take ownership until Farmers were paid. App. 26. The same day, Shirley informed him that Vitality's "access to the $12M line of credit" did not come together. App. 27. Effective February 1, 2019, the Department suspended Vitality's commodity dealer license. App. 28. Consistent with Shirley's misrepresentations to the Department, Court Jensen, attorney for the Department, testified that Vitality was not "completely candid with us on their ability to pay." Tr. 1107.

## VI. Farmers' Emotional Distress

Farmers testified about their farming legacies, and their intention to pass the family farm down to the next generation. Tr. 317, 953. Farmers testified about how the hemp rotted at the edge of their properties and became infested with mice. Tr. 728, 944. Driving by the piles of rotting bales made them physically sick. Tr. 906. Some were forced to sell a portion of the family farm. Tr. 881-882. Most were subject to shame and embarrassment of uncomfortable conversations with bankers. Tr. 826-827.

Farmers provided compelling and individualized testimony about their family farms. For example, Farmer Groh testified that his family had been in the area "since the early teens," and that he is "probably fifth generation." Tr. 978-979. Groh brought his eldest son into the courtroom for his testimony "because he suffered too." At trial, Groh testified that the bales sat rotting on property he used to lease. Tr. 982. He was unable to make rent and keep the lease. Tr. 982. Groh lost his operating loan, was unable to refinance, and nearly went bankrupt. Tr. 983. Groh hoped to pass the operation down to his sons someday, but was unsure if he could due to inability to obtain operating loans. Tr. 985. Groh was forced to abandon his dream to keep his family farming. Tr. 985-986.

## VII. Corporate Structure

Defendants' claim that they had nothing to do with the control and operation of these businesses as they relate to Farmers was flatly rejected by the jury, the District Court, and should also be rejected by this Court.

At the time of contracting, USA Biofuels had no bank account and no assets. Tr. 568-571. USA Biofuels was a shell company created as a special purpose vehicle that may or may not have any operations itself, but can be used to affect the transaction. Tr. 572-573. USA Biofuels' plan was to pay Farmers "through personal investment from Owen Kenney and Kent Hoggan." Tr. 574. On August 1, 2018,

Surety was the only listed registered principal and manager. App. 42. To prepare for the USA Biofuels 30(b)(6) deposition, Shirley spoke to Kenney and Hoggan. Tr. 564. Pre-merger documents identified Surety as a "Key Financing Provider, able to influence company strategy." App. 51. Kenney worked directly with the seed provider to obtain the seed. Tr. 995-996.

At trial, and again on appeal, Kenney claimed he had no managerial responsibility over Vitality. In 2017, Kenney organized and created Vitality. App. 45-46. At trial, Shirley testified that Kenney gave him "no direction after March 2018 as it relates to these farmers and their contracts." Tr. 558-559. Shirley's testimony necessitated impeachment, whereby Shirley's deposition testimony was read. It revealed that "Owen Kenney directed" Shirley to execute wire transfers to the Farmers in 2018. Tr. 560. When asked whether Ranger was getting instruction from Kenney in the summer of 2018, Shirley testified that he "couldn't say" and he didn't know. Tr. 560. Again, on impeachment, Shirley confirmed that Kenney gave Ranger instructions, which Ranger then relayed to Farmers. Tr. 561. Shirley finally admitted that Kenney's denial of managerial involvement with Vitality was "inconsistent" with Kenney's testimony at trial. Tr. 560. Similarly, Hoggan and Kenney's characterization of themselves as mere shareholders is suspect. Prior to the merger,

Hoggan and Kenney were listed as directors of the company and far and away the largest shareholders, each owning over 40% of Vitality. App. 49.

One of the goals of Vitality's merger was to conduct an Initial Public Offering "IPO" on the NASDAQ in the summer of 2019 at an expected list price of $11.10 per share. App. 48. After the merger, Kenney and Hoggan were each to own more than 17 million shares in the resulting company, valued at $180 million each. App. 50. At the time of the merger, Vitality's largest asset was the "$20.7 million estimated fair value for the harvested hemp biomass." App. 52. An investment brochure highlights this asset front and center in efforts to spark interest in the newly formed company. App. 35-37. Kenney and Hoggan had the most to gain by convincing Farmers to wait. If Farmers had initiated action to obtain and sell the hemp, Kenney and Hoggan's IPO, and $180 million each, would have been jeopardized.

## STANDARD OF REVIEW

Whether there was sufficient evidence to support a jury verdict is reviewed by this Court *de novo*. *Giambra v. Kelsey*, 2007 MT 158, ¶ 26, 338 Mont. 19, 162 P.3d 134. "The function of this Court is not to agree or disagree with the jury's verdict." *Covey v. Brishka*, 2019 MT 164, ¶ 42, 396 Mont. 362, 376, 445 P.3d 785, 795. The Court "will affirm the jury's verdict if there is substantial credible evidence to support the verdict." *Interstate Production Credit Ass'n v. DeSaye*, 250 Mont. 320, 322–23,

820 P.2d 1285, 1287 (1991). Substantial credible evidence is "evidence a reasonable mind might accept as true and can be based on weak and conflicting evidence." *Cechovic v. Hardin & Assocs., Inc.*, 273 Mont. 104, 112, 902 P.2d 520, 525 (1995). "When [the Court] determine[s] whether substantial evidence supports the jury's verdict, [it] review[s] the evidence in a light most favorable to the party who prevailed at trial. If the evidence at trial conflicts, the jury's role is to determine the weight and credibility of the evidence." *Cechovic*, 902 P.2d at 525. The prevailing party is entitled to any reasonable inference that can be drawn from the facts. *Sandman v. Farmers Ins. Exch.*, 1998 MT 286, ¶ 41, 291 Mont. 456, 469, 969 P.2d 277, 285. Further, while a plaintiff's burden to prove punitive damages at trial is "clear and convincing," the Court reviews a jury's verdict on punitive damages using the same substantial credible evidence standard. *Sandman*, ¶ 39.

A district court's rulings on issues of jury instructions and whether to alter or uphold a punitive damages award are reviewed for abuse of discretion. *Faulconbridge v. State*, 2006 MT 198, ¶ 22, 333 Mont. 186, 192, 142 P.3d 777, 783; *Blue Ridge Homes, Inc. v. Thein*, 2008 MT 264, ¶ 70, 345 Mont. 125, 191 P.3d 374. "A district court abuses its discretion only if it acts arbitrarily without employment of conscientious judgment or exceeds the bounds of reason." *Faulconbridge*, ¶ 22.

Finally, the Court is not obligated to "guess at [an appellant's] precise position." *In re Estate of Bayers*, 1999 MT 154, ¶ 19, 295 Mont. 89, 983 P.2d 339; Rule 12(g), M.R.App.P.

## SUMMARY OF ARGUMENT

Defendants' principal argument–that a party's breach of contract immunizes their liability for subsequent torts–has been consistently rejected by this Court and was appropriately rejected by the District Court. Further, in their Opening Brief, Defendants mischaracterize the evidence presented at trial, failing to recognize the substantial credible evidence of serial misrepresentations made to Farmers and selfish and reckless business decisions made to prevent Farmers from enforcing their interests in the hemp crop while it was still marketable. Farmers submitted substantial evidence of Defendants' tortious conduct, completely separate from any contractual duty and occurring after Defendants breached the contracts. Defendants' position is contrary to the facts as presented to the jury, well-settled Montana law, and the jury's verdict. Defendants arguments were properly rejected by the District Court. See Dkt. 557.

The District Court's piercing of the corporate veil applied only to a judgment for breach of contract. Those claims were not included in the final judgment. Thus, this issue is not properly before this Court. Additionally, because Farmers'

extra-contractual tort claims prevail, the final judgment should not be altered to include breach of contract.

Finally, Defendants' generalized argument that the facts do not support the jury's verdict fails to specifically identify which torts Farmers failed to prove, let alone which elements were factually deficient. Neither Farmers nor this Court should carry the burden of guessing at Defendants' precise argument. Regardless, Farmers proved their claims at trial with substantial credible evidence and the jury's verdict reflects as much.

## ARGUMENT

### I. Defendants' Breach of Contract Did Not Grant Them a License to Freely Commit Torts.

#### A. Defendants' Tortious Misrepresentations are Actionable.

"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, 179, 325 P.3d 1236, 1239 (citing *Billings Clinic v. Peat Marwick Main & Co.*, 244 Mont. 324, 338, 797 P.2d 899, 908 (1990)). However, "a ground of liability in tort may coexist with a liability in contract, giving the injured party the right to elect which form of action he will pursue." *Garden City Floral Co. v. Hunt,* 126 Mont. 537, 543, 255 P.2d 352, 356 (1953); *accord Corp. Air*

*v. Edwards Jet Ctr., Mont., Inc.*, 2008 MT 283, ¶ 49, 345 Mont. 336, 190 P.3d 1111. "Liability imposed under statute or common law exists independent of contractual duties concerning the same subject matter." *Dewey*, ¶ 8. Tort claims and breach of contract claims are distinct and separate claims and can be plead separately, even if based upon the same facts. *Deichl v. Savage*, 2009 MT 293, ¶ 11, 352 Mont. 282, 216 P.3d 749. When a party can proceed on either claim independently of the other, a "tort claim is not 'interrelated with and dependent upon' his claim for breach of contract." *Deichl*, ¶ 11.

Defendants' reliance on *Dewey* is misplaced, and their argument omits the applicable holding. As noted by the District Court, *Dewey* stands for the tenet that a party can bring and prove at trial claims of negligence, fraud, and deceit when a party breaches duties independent of those set forth in contract. Dkt. 557, Order Re Defs.' Post Trial Motions, p. 10. In *Dewey*, Jennifer Dewey ("Dewey") entered into a buy-sell agreement for the purchase of her home with Kenneth Stringer ("Stringer"). *Dewey*, ¶ 3. In addition to the buy-sell agreement, the parties agreed that Stringer would occupy the home until closing, pay monthly rent, and maintain the property. *Dewey*, ¶ 3. Prior to closing, Stringer moved out and notified Dewey he decided not to buy the house. *Dewey*, ¶ 3. Dewey alleged that Stringer negligently caused damage to the property. *Dewey*, ¶ 21. Dewey sued Stringer for breach of contract,

constructive fraud, deceit, and negligence. The district court dismissed Dewey's tort claims on the ground that "her injuries resulted strictly from Stringer's breach of contract." *Dewey*, ¶ 11. This Court reversed, unanimously recognizing that duties arising out of common and statutory law are not nullified because the defendant also breached a contract—"[P]rohibitions on fraudulent and deceitful conduct under Montana law are not negated simply because the parties have entered into a contract concerning the same subject matter." *Dewey*, ¶ 15.

Similarly, Defendants' reliance on *Davis v. Church of Jesus Christ of Latter Day Saints*, 258 Mont. 286, 293, 852 P.2d 640, 644 (1993), overruled by *Gliko v. Permann*, 2006 MT 30, 331 Mont. 112, 130 P.3d 155, is inapposite. There, the plaintiff was injured at a property owned by the Church of Jesus Christ of Latter Day Saints ("LDS"). LDS attempted to dissuade her from filing suit against them by allegedly promising to pay for her medical bills if she saw their doctor. *Davis*, 852 P.2d at 644. There, plaintiff's claims, including fraudulent inducement to contract, were based solely on this promise to pay and nothing more. *Davis*, 852 P.2d at 644. Because the promise to pay in the future alone was not a "representation of an existing fact," plaintiff could not satisfy the elements of her tort claims. *Davis*, 852 P.2d at 644.

The facts here are readily distinguishable from *Davis*. Unlike *Davis*, Farmers' claims are not for fraudulent inducement but stem from post-contract conduct.[1] Defendants made serial misrepresentations of fact after the breach, inducing Farmers not to act on breach remedies available to them. Defendant Vitality confirmed that "funds are in place and ready to go" due to a "significant fund raising." App. 8. Vitality also represented the existence of an "unanticipated delay." App. 8. Likewise, Defendant Shirley claimed to have actual, existing "tranches" of money available to pay Farmers for the services they rendered. Tr. 589.

A representation that a person or company has, in their possession, money to satisfy an already-lapsed obligation is different than a contractual promise to pay. Likewise, a representation that a payment was not made due to "wiring delays" is not a promise to pay, it is a factual representation explaining why something did not occur. While such representations could be made contemporaneous with a promise to pay, they are not the same. The District Court correctly distinguished between the two:

> Besides promises to pay, Defendants made representations to induce Plaintiffs to wait on their rights. Specifically, Plaintiffs alleged that Defendants told them "tranches" of money were available and that

[1]Nor did Farmers assert claims for bad faith as the plaintiffs did in *Story v. City of Bozeman*, 242 Mont. 436, 791 P.2d 767 (1990). Defendants' bad faith and fraudulent inducement arguments are straw men.

> payments ultimately failed because of "wiring delays." The Plaintiffs relied upon the representations made by Defendants and did not pursue legal remedies so they could sell the crop.

Dkt. 557, p. 3. The District Court correctly recognized that a party's breach of contract does not relieve them of tort liability for negligent, fraudulent, or deceitful misrepresentations that harm others.

**B. Defendants' Negligent Conduct is Actionable.**

"Every person is bound, without contract, to abstain from injuring the person or property of another or infringing upon any of another person's rights." *Dewey*, ¶ 17 (citing § 28-1-201, MCA). The District Court correctly instructed the jury on negligence:

> Negligence is the failure to use reasonable care. Negligence may consist of action or inaction. A person is negligent if he/she fails to act as an ordinarily prudent person would act under the circumstances.

Tr. 1357. The District Court also properly instructed the jury on the elements necessary to prove negligent misrepresentation. Tr. 1359. Defendants did not appeal on these issues.

Farmers agree that a breach of contract alone does "not constitute the sort of active negligence or misfeasance necessary to impose liability under tort law." Appellants' Opening Br., p. 17 (citing *Plakorus v. Univ. of Mont.*, 2020 MT 312, ¶ 16, 402 Mont. 263, 477 P.3d 311). Defendants' breach of contract, in of itself, does not

impose liability under tort law. At trial, Defendants attempted to paint Farmers' claims as breaches of contract and nothing else, repeatedly asking each if they would be at trial if Defendants had just paid per the subject contract. Each Farmer answered that they would not be at trial if the Defendants had not breached. See, e.g., Tr. 341-42, 1196. This line of questioning highlights Defendants' inability to recognize that breaches of duties and other tortious conduct committed outside of a contract are actionable. Of course, **if Defendants had paid after harvest per the contracts, the parties would not have had any reason to interact with each other any further**. It was Defendants' need for the hemp as an asset on their books that necessitated continued interaction with Farmers after non-payment. The breach merely kept the parties locked in the same room, where Defendants made serial misrepresentations of fact to Farmers and acted unreasonably to keep Farmers from enforcing their interests in the hemp crop.

As any person or entity would be, Defendants were bound, without contract, to act in accordance with the requisite standard of care—as an ordinarily prudent person or entity would, given the circumstances. Here, some of the circumstances included:

- Farmers had seeded, raised, and harvested hundreds of bales of industrial hemp. App. 31-32;

- Defendants failed to pay for the seed. Tr. 1002;
- At the time of harvest, the crop was marketable and had considerable value. App. 34;
- Following non-payment, Defendants refused to release the crop so that Farmers could salvage something for their efforts. Tr. 201-202, 941-944;
- Defendant Vitality agreed that it could not take ownership of the hemp prior to paying Farmers. App. 25;
- Instead, after a year of weathering, rodent infestation, and a fresh 2019 hemp crop, Defendants released it to Farmers. Tr. 944, 607-608; App. 44;
- Defendants' motivation for withholding the hemp crop and stringing Farmers along was demonstrated by their need to keep it as an asset of Eureka 93 for an upcoming initial public offering ("IPO"). App. 48, 50; App. 35-37;
- Defendants stood to benefit greatly—some to the tune of hundreds of millions of dollars—if Eureka 93 had a successful IPO. App. 48, 50; and,

- Hoggan admitted that the crop should have been released sooner, when the bales were marketable and in good condition. Tr. 791-792.

These facts and circumstances supported the jury's verdict that Defendants acted unreasonably and breached their duties to act reasonably to the Farmers.

### C. Defendants' Fraudulent and Malicious Conduct Subjects Them to Liability for Punitive Damages.

Just as the existence of a contract does not absolve Defendants of liability for tortious conduct, it does not absolve them of punitive liability from fraudulent and malicious conduct. Defendants fail to cite any case in support of its argument that § 27-1-220(2)(a), MCA, is a broad shield that prevents a jury from leveling damages to punish defendants and deter intentional, malicious, and fraudulent conduct in cases where there is also breach of contract. The District Court properly rejected Defendants' characterization of this lawsuit as a "pure contract case:"

> Those Defendants therefore assert that this is a pure contract case and that punitive damages are barred pursuant to §27-1-220(2)(a)(i)-(iii), MCA. This Court disagrees that this is a pure contract case. The torts that the Plaintiffs Contend, in the Pre-Trial Order, remain independent of the Breach of Contract claim that this Court has already addressed.

Dkt. 521, Order Re: Pre-Trial Issues, pp. 4-5.

Consistent with the District Court's ruling, this Court has upheld awards of punitive damages in tort in conjunction with breach of contract claims. In *Grenfell*

*v. Anderson*, 2002 MT 225, ¶ 80, 311 Mont. 385, 56 P.3d 326, this Court specifically affirmed that tort type damages, including punitive damages, may be available for contract-related torts, including fraud, despite the language of § 27-1-220(2)(a), MCA. See also *Daniels v. Dean*, 253 Mont. 465, 474, 833 P.2d 1078, 1084 (1992) ("The proven facts demonstrated the defendant breached the contract and entitling him to contract damages, and also that defendant tortiously interfered with plaintiff's business entitling him to punitive damages."). Section 27-1-220(2)(a), MCA, does not shield Defendants from punitive damages.

## II. The Court Need Not Address the District Court's Piercing of the Corporate Veil.

### A. The Piercing Order Does Not Apply to the Final Judgment Entered.

Per Rule 6(1), M.R.App.P., "a party may only appeal from a final judgment." Defendants admit the District Court's ruling with regards to piercing the corporate veil is inapplicable to the final judgment entered on Farmers' stand-alone tort claims. See Appellants' Opening Br., p. 21. Because there is no final judgment entered on the breach of contract claims, this issue is unripe and not subject to appeal.

### B. Defendants Acted in Concert and are Jointly and Severally Liable for Compensatory Damages.

Defendants are jointly and severally liable for compensatory damages based upon the jury's finding that they acted in concert, not because of the District Court's

piercing of the corporate veil. See § 27-1-703(3), MCA; Dkt. 527, p. 3. Defendants did not appeal any issue pertaining to the acting in concert instruction or the jury's verdict therefrom.

### C. Even if the Court Had to Address the Piercing of the Veil Nonissue, the District Court Correctly Pierced USA Biofuels' Corporate Veil.

Summary judgment is appropriate when the moving party demonstrates an absence of any genuine issue of material fact and its entitlement to judgment as a matter of law. *Walden v. Yellowstone Elec. Co.*, 2021 MT 123, ¶ 13, 404 Mont. 192, 487 P.3d 1. The party opposing the motion must come forward with substantial evidence raising a genuine issue of material fact. Rule 56(e), M.R.Civ.P. Such evidence must be in proper form and conclusions of law will not suffice; the "proffered evidence must be material and of a substantial nature, not fanciful, frivolous, gauzy or merely suspicious." *Morales v. Tuomi,* 214 Mont. 419, 424, 693 P.2d 532, 535 (1985). "Summary judgment may be appropriate when reasonable minds 'could not draw different conclusions from the evidence.'" *Walden*, ¶ 14.

Under Montana law, a person or other company is liable for a company's conduct if that company is their alter ego and it was used as a "subterfuge to defeat public convenience, justify wrong or to perpetrate fraud." *E.C.A. Envtl. Mgmt. Servs., Inc. v. Toenyes*, 208 Mont. 336, 347, 679 P.2d 213, 219 (1984). Failure to comply

with statutory requirements, commingling of personal funds with corporate funds, whether the address of the corporation is the same as the defendant's, and undercapitalization are all factors which tend to prove that a company is the alter ego of a defendant. *Peschel Family Tr. v. Colonna*, 2003 MT 216, ¶ 26, 317 Mont. 127, 134, 75 P.3d 793, 797. The district court in *Peschel* pierced a corporate veil, relying on facts eerily similar to those here, and this Court affirmed its ruling. In *Peschel*, the defendant had loaned significant sums of money to their alter ego corporation. Further, the corporation was "undercapitalized" and "unable to meet" its liabilities and obligations standing alone. *Peschel*, ¶¶ 40-41. The corporation was set up by the defendant, controlled by the defendant, and provided the defendant with the opportunity to engage in suspect corporate transactions. *Peschel*, ¶¶ 6, 41.

Again, in their argument, Defendants omit key admitted facts to undermine the District Court's ruling. Farmers did not contend veil piercing was appropriate from undercapitalization alone as suggested by Defendants. Appellants' Opening Br., p. 25. There is a laundry list of evidence relied on by the District Court in determining USA Biofuels was the alter ego of Defendants Surety, Kenney, and Hoggan including:

- Documents filed by Surety in 2017 and 2018 unequivocally demonstrated that Surety formed USA Biofuels and that it was the sole

manager during all times relevant hereto. Dkt. 415, Pls.' Cross Mot. Summ. J. Re: Piercing USA Biofuels' Corp. Veil & Duty, Ex. F. Their corporate addresses were the same, and the agent for both was David Steffensen.[2] *Id*.

- USA Biofuels' 30(b)(6) representative, Defendant Shirley, testified that at the time of contracting with Farmers, USA Biofuels had no money, no assets, and no bank account. Dkt. 415, Ex. A (Shirley depo.), p. 42.
- USA Biofuels' sole purpose was to obtain and execute farming contracts via the investment of its owners, Kenney and Hoggan. *Id*. Crucially, Shirley admitted USA Biofuels was a shell company "created as a special purpose vehicle that may or may not have any operations itself, but can be used to affect the transaction." *Id*., pp. 116-119.
- When it came time to pay the seeding portion of the contract entered into by USA Biofuels, co-Defendant Vitality paid. Vitality is yet another spin-off Kenney and Hoggan operation that was formed by

[2]At the summary judgment hearing, Farmers pointed out that Mr. Steffensen was also practicing law before the Montana District Court without a license. *See* Dkt. 442, p. 2. He was subsequently cited for contempt. Dkt. 479, Contempt Citation David Steffenson. Surety failed to make a lawful appearance before the District Court in violation of § 37-61-210, MCA, and was also cited by the Court. Dkt. 478, Contempt Citation David Cowan. Thus, Surety failed to make any lawful objection to Plaintiffs' motion.

Kenney on August 4, 2017. Dkt. 415, Ex. B. Again, Utah attorney David Steffensen was listed as the registered agent. *Id*.

- USA Biofuels was formed four days after Vitality Natural Health. Dkt. 415, Ex. F. Decisions about whether or not to pay Farmers on behalf of USA Biofuels were being made by Kenney for Vitality. Dkt. 415, Ex. A to Plaintiff's Cross Motion, Shirley Depo., p. 169.

The Court also noted USA Biofuels failed to register to do business in Montana. Dkt. 442, Order Den. Defs.' Mot. & Grant. Pls.' Mot. Summ. J. Re: Piercing the Corp. Veil, p. 3. Thus, the District Court ruled:

> As admitted by Shirley, the purpose of USA Biofuels was nothing more than a shell company buffer between Farmers and Defendants. Using a shell company to avoid contractual obligations, as is the case here, is bad faith conduct justifying piercing of the corporate veil.

*Id.*, p. 4.

The District Court also held that Defendants' failed to provide substantial evidence raising a genuine issue of material fact, finding only a "gauzy story about how [Defendants] sold USA Biofuels down the road to other companies in which they also have a significant ownership stake in."[3] *Id*.

[3]At the time Defendants were attaching self-serving documents to the District Court to oppose summary judgment, they were also withholding relevant documentation from Farmers in discovery. *See* Farmers' Mots. Compel against Defendants Hoggan and Surety (Dkt. 401, 402) granted via District Court Orders (Dkt. 433, 443, respectively).

The District Court's determination given the circumstances above was proper and should not be disturbed. Regardless, the issue is not ripe and is moot, as the final judgment contemplates recoverable tort damages only.

## III. The Jury's Verdict Should Stand.

"[W]ide latitude is allowed for the exercise of the judgment of the jury and unless it appears that the amount awarded is so grossly out of proportion as to shock the conscience" of the Court, a jury award should stand. *Gibson v. W. Fire Ins. Co.*, 210 Mont. 267, 290, 682 P.2d 725, 738 (1984). Excessiveness of the verdict in and of itself is not grounds to grant a new trial. *Kelley v. John R. Daily Co.*, 56 Mont. 63, 181 P. 326, 332 (1919). Defendants sought to make hundreds of millions of dollars, all arising from Farmers' soil and labor. When Defendants' house of cards collapsed, it caused immense and rippling harm to farming families over the span of five counties in northeast Montana. The jury's specific compensatory and punitive verdicts reflect a careful consideration of the totality of the evidence submitted and are commensurate with the extensive harms caused. The District Court appropriately analyzed Defendants' conduct in light of each factor set forth in § 27-1-221(7)(c), MCA, in upholding the jury's verdict. Dkt. 557, pp. 21-30. It is noteworthy that Defendants' brief does not object to any specific portion of the Court's rationale in analyzing § 27-1-221(7)(c), MCA.

### A. Defendants Failed to Provide Accurate Calculations of Their Net Worth.

The punitive damages cap set forth in § 27-1-220(3), MCA, limits punitive damages assessed against a defendant to ten million dollars ($10 million) or three percent (3%) of a defendant's net worth. However, "§ 27-1-220(3), MCA, prohibits punitive damage awards in excess of 3% of a defendant's net worth only if the defendant first meets his burden of demonstrating an accurate calculation of his net worth." *Blue Ridge Homes, Inc.*, ¶ 70. In reviewing a jury's determination of punitive damages, the district court decides whether a defendant has provided sufficient evidence to prove net worth. *Harrell v. Farmers Educ. Co-op Union of Am., Mont. Div.*, 2013 MT 367, 92, 373 Mont. 92, 314 P.3d 920. The standard of review for application of § 27-1-220(3), MCA, is whether the district court abused its discretion. *Blue Ridge Homes, Inc.*, ¶ 70.

During the punitive damages phase of trial, Defendants failed to offer any documentary evidence or financial statements indicating their net worth. Instead, only Kenney testified. He claimed he and his cohorts were broke, based on his familiarity with their finances and a series of failed business schemes. Tr. 1452. Kenney's testimony included a recounting of a failed hand sanitizer scheme to take advantage of market conditions caused by the COVID-19 pandemic whereby he lost

"four and a half million dollars." Tr. 1454. Kenney also testified as to Surety's net worth—claiming he knew Surety was broke from a conversation with David Cowan, who, like Hoggan and Shirley, also did not testify. Tr. 1451-1457.

Consistent with *Harrell* and the indisputably weak evidence from Kenney only, the District Court found that "none of the remaining Defendants credibly calculated his or its net worth" and thus the Defendants "waived any claim that the statutory limit on punitive damages based on net worth should be applied to awards assessed against them." Dkt. 557, p. 34. Aside from David Rendimonti, none of the remaining non-appealing defendants provided the District Court any evidence of net worth at trial as they did not appear or participate. The District Court did not abuse its discretion when it refused to apply the 3% net worth cap of § 27-1-220(3), MCA.

Further, the District Court's findings sustaining the jury's assessment of punitive damages against Eureka 93 and USA Biofuels, is not irreconcilable with the evidence presented because there was no net-worth evidence presented on behalf of these companies. Certainly, none of the Defendants provided certified financial statements evidencing the financial condition of Eureka 93 or USA Biofuels at trial. The District Court's order piercing USA Biofuels' corporate veil does not relieve Defendants of their burden in proving net worth either. While USA Biofuels' undercapitalization at the time of contracting with Farmers in 2018 was a factor in

demonstrating alter-ego, it does not prove what USA Biofuels' assets were at the time of trial. Notably, Eureka 93 and USA Biofuels did not appeal the judgment against them. The District Court did not abuse its discretion when it determined it had insufficient evidence to apply a net worth cap to Defendants per § 27-1-220(3), MCA.

### B. Defendants' Collaboration in Committing Torts Against Farmers Does Not Entitle Defendants to a Combined Tort Cap Reward.

"When interpreting a statute, this Court will not look beyond its plain language if the language is clear and unambiguous." *State v. Lamoureux*, 2021 MT 94, ¶ 25, 404 Mont. 61, 485 P.3d 192, 200. Section 27-1-220(1), MCA, states that a jury may award "damages for the sake of example and for purposes of punishing a defendant." The statute does not include any express or implied provisions which lump individual defendants into one entity for purposes of applying the caps in § 27-1-220(3), MCA. Defendants rely on an unreported decision from the Federal District Court in Montana, *Hull ex rel. Senne v. Ability Ins. Co.*, No. CV-10-116-BLG-RFC, 2012 WL 6083614, at *2 (D. Mont. Dec. 6, 2012), for the proposition that the total punitive damages assessed in this case cannot exceed $10 million for the Defendants collectively. Appellants' Opening Br., p. 30. *Hull* is readily distinguishable from the facts of this case. In *Hull*, the plaintiffs sought punitive damages against all defendants as collective malicious actors—in a single amount that the defendants

were jointly liable for. *Hull* at *1. When the jury assessed a single punitive damage award against all the defendants jointly, the plaintiffs then attempted to proceed under the theory that the punitive damages cap should be applied on an individual defendant basis, and the court rejected that theory. *Hull* at *1.

In this case, Farmers did pursue a theory of acting in concert and joint liability as to negligence in the compensatory phase of the trial. However, as to punitive damages, Farmers proceeded against all Defendants individually. This was evident in the Special Verdict Form given to the jury that asked the jury to find each individual Defendant liable or not liable for punitive damages for each's own fraudulent or actually malicious conduct. Dkt. 527, p. 8. Defendants were given ample opportunity to review the Special Verdict Form before jury deliberations and they made no objections to Farmers' pursuit of punitive damages claims as to each Defendant individually. The jury found each Defendant individually liable for punitive damages and assessed a punitive damage award against each individual Defendant in separate amounts based on each Defendant's conduct for their participation in the scheme that injured Farmers. Dkt. 528, Punitive Damage Verdict Form.

The statutory cap on punitive damages should apply to each individual Defendant as they were each individually liable in their own conduct. The District Court agreed:

> Defendants' attempt to circumvent the jury's findings by claiming that the statutory cap should be applied to them collectively only after they were all individually found liable of actual malice or actual fraud is not supported by *Hull*.

Dkt. 557.

Defendants' mention of joint and several liability highlights another significant problem with their argument. First, acting in concert for purposes of joint and several liability is necessary to comply with apportionment requirements for negligence in § 27-1-703(3), MCA. Defendants' conduct warranting punitive damages logically stems from the fraud, constructive fraud, and deceit they were all found individually liable for—not negligence. If the Defendants' interpretation of the law was correct, the jury would have to apportion the $10M cap amongst the defendants based upon each's reprehensible conduct. No such special punitive damage form was argued for or offered by Defendants at trial.

Finally, if the Legislature wished to limit the total amount recoverable for punitive damages in any action regardless of the amount or conduct of defendants, it would have expressly done so. Defendants' attempt to circumvent the jury's findings

and the Legislature's will by claiming that the statutory cap should be applied to them collectively only after they were all individually found liable of actual malice or actual fraud is particularly concerning. Defendants should not be able to retroactively receive the benefit of a collective cap on the amount they are liable for after the individual award amounts, when totaled together, are in excess of $10 million. Further, if Defendants' proffered theory is applied, fraudulent actors would benefit from reduced liability under Montana law by utilizing multiple companies to commit torts under a collective scheme. Such a result is absurd, and such an interpretation cannot be reached from the plain language of the statute—it directly contravenes the expressly stated intent of punitive damages: deterrence and punishment.

### C. Section 27-1-310, MCA, Does Not Apply to Farmers' Independent Tort Claims of Fraud, Constructive Fraud, Deceit, Negligent Misrepresentation, and Negligence.

Section 27-1-310, MCA, is expressly limited to claims for breaches of "obligation[s] or duty arising from contract." The jury did not decide any claims for breach of contract. Dkt. 527, Special Verdict Form. Section 27-1-310, MCA, does not bar emotional distress damages arising from fraud, constructive fraud, deceit, negligent misrepresentation, and negligence.

### D. Farmers' Damages for Mental and Emotional Suffering and Distress are Recoverable.

When emotional distress damages are sought as an element of damages to other claims, a plaintiff does "not have to demonstrate the heightened standard of proof required for an independent, stand-alone claim of negligent or intentional infliction of emotional distress." *Childress v. Costco Wholesale Corp.*, 2021 MT 192, ¶ 9, 405 Mont. 113, 117, 493 P.3d 314, 316. Emotional distress damages are recoverable in personal property damage claims when a "subjective relationship with the property [exists] on a personal identity level." *Childress*, ¶ 14. With respect to real property, loss of use and enjoyment of land is a unique property interest that qualifies for emotional distress damages. *Childress*, ¶ 11 (citing *Maloney v. Home & Inv. Ctr., Inc.*, 2000 MT 34, ¶ 69, 298 Mont. 213, 994 P.2d 1124). A tortious act against real property "is the kind of interest invaded that, as a policy matter, is believed to be of sufficient importance to merit protection from emotional impact, that is critical." *Maloney*, ¶ 67.

In *Maloney*, plaintiffs brought claims against defendants for tortious interference with plaintiffs' contractual right to purchase a seventy-plus (70+) acre parcel near Glacier Park. *Maloney*, ¶ 4. During a bench trial, a special master determined that the plaintiffs' unhonored right of first refusal interest in real property

resulted in damages for economic loss, punitive damages, and $100,000 in emotional distress damages. *Maloney*, ¶ 25. There, plaintiffs' submitted evidence of their painful experience in watching the eventual buyer of the property build a house in the precise location where they wished to build their dream home and then sell the property for six times what the plaintiffs would have paid for it if their option to purchase had been honored. *Maloney*, ¶ 70. This Court affirmed, holding that plaintiffs' "subjective" and "personal identity" relationship with the property supported the district court's award of emotional distress damages. *Maloney*, ¶ 71.

Here, the facts are even more compelling than those in *Maloney*. Farmers testified about:

- Their decades-long connection with the land on which they lived and worked. Tr. 317, 953;
- Their hopes to one day pass their family farms onto their children. Tr. 317, 953;
- How they despaired as they watched the hemp crop they dedicated their land and efforts to rot on their land and become infested with rodents and mold. Tr. 728, 944;
- Annoyance and physical sickness at the inconvenience of having to drive around the rows of deteriorating hemp bales. Tr. 906, 907;

- How, at the same time the crop was rotting away, they faced stressful and embarrassing discussions with the bankers administering their operating loans. Tr. 985;
- How some had to sell off lease rights or portions of the land they owned. Tr. 985-986, 881-882; and
- How some were unable to properly feed their families. Tr. 881-882.

The individualized emotional distress sums awarded highlight the jury's careful consideration of each Farmer and their family's experience. Dkt. 527, p. 7. Beyond the plaintiffs' damages in *Maloney*, Farmers' emotional damages here stem from interference with real property that many actually owned, some leased, but all relied on for their livelihoods. Every Farmer's personal and familial identity was intrinsically intertwined with the land they nurtured and cared for—the real property Defendants tortiously interfered with by denying Farmers any sort of recovery for the hemp crop they dedicated their hard work and substantial acres to. Defendants even went so far as to threaten legal consequences if Farmers tried to sell the hemp crop or otherwise remove it from the Farmers' own land. Farmers are entitled to any reasonable inference that can be gleaned from the facts, and the individualized sums for each Farmer illuminate the fact-finder's careful consideration of the circumstances each Farmer and their family faced.

*Childress* is readily distinguishable from this case. There, the plaintiffs sought to recover emotional distress damages for a stolen gun and ammunition. The plaintiffs offered no facts or evidence that these items had distinct personal value to them or that they were "intrinsically intertwined" with their family dynamic or personal identities. *Childress*, ¶ 14. Thus, the Court held that where there is no proven value to property beyond its utility, emotional distress damages are not appropriate. *Childress*, ¶ 14. Unlike the plaintiffs in *Childress*, Farmers presented considerable evidence demonstrating they and their families' suffered mental anguish. Working their land, including farming this hemp crop, was and is intrinsically intertwined with who they are as people. All reasonable inferences from the evidence presented supports the emotional distress damages for these families as awarded by the jury. The judgment should be upheld.

## IV. The Jury was Properly Instructed.

A district court's refusal to give proffered jury instructions is reviewed for abuse of discretion. *Faulconbridge*, ¶ 22. Legal concepts "which have some significance to lawyers and judges, [should] not be allowed to confuse jurors by the inclusion of those terms in jury instructions." *Busta v. Columbus Hosp. Corp.*, 276 Mont. 342, 372, 916 P.2d 122, 140 (1996).

Defendants sought the inclusion of their Jury Instruction #8, which stated:

> USA Biofuels was under no legal duty to surrender the bales of hemp to the plaintiffs.

Dkt. 522, Refused Jury Instrs. This instruction was properly refused because it is both confusing and a misstatement of the law as it pertains to this case.

First, the inclusion of the vague term "legal duty" conflates contractual obligations with other legal duties Defendants owed to Farmers.[4] The District Court specifically rejected Defendants' claim that tort duties were abrogated by the existence of a contract:

> Plaintiffs' [Farmers'] claims stem from the Defendants' obligation to Plaintiffs [Farmers] to exercise the level of care that a reasonable prudent person would under these circumstances. These obligations bind Defendants "without contract." Mont. Code Ann. § 28-1-201. Defendants were allowed to argue to the jury they had no obligation, per the Contracts admitted into evidence, to release the crop.

Dkt. 557, p. 13. In addition to allowing Defendants to discuss what the Contract says or does not say, the Court also allowed the following instruction, Jury Instruction No. 17:

> A party who executes a written contract is presumed to have read and understood the contract and assented to its terms.

Dkt. 526, Given Jury Instrs.

---

[4]Farmers contest that the District Court ruled that Defendants had no obligation to release the crop or that the instruction was an accurate statement of the law. The District Court merely questioned why Farmers did not act sooner to obtain ownership. Farmers responded by citing misrepresentations intended to induce inaction. *See* Tr. 1141-1142.

Defendants' argument that Farmers' actions in planting, nurturing, and growing crops gave them only the rights of unsecured general creditors "without a lien or ownership interest in the bales," while inaccurate,[5] further highlights the importance of Defendants' misrepresentations. Farmers relied on the promises and misrepresentations of fact being fed to them following harvest of the hemp crop, and as a result, took no legal action to enforce their interests in the bales. Also, Defendants had a duty to pay Farmers before Defendants' ownership occurred. Defendants' proposed instruction is directly contrary to the agreement Vitality made with the State of Montana. Vitality specifically agreed that it was "not to take ownership" in the hemp without first paying the Farmers. App. 25.

The jury was accurately instructed on the law and could take the obligations set forth in the language of the subject contracts into consideration when determining whether Defendants adhered to their other legal duties, including a duty to act reasonably given the circumstances. USA Biofuels' and, subsequently, the other corporate entities' retention of ownership of the hemp crop pursuant to the contracts was a circumstance to be considered by the jury in light of the other facts presented. In fact, the Defendants maintaining their ownership in the hemp crop for so long,

[5] Farmers had a lien for services rendered in the hemp crop per § 71-3-1201(2)(a), MCA, as they maintained possession of the bales and rendered services to Defendant in making, improving, and storing the hemp.

despite having no apparent intention of actually paying Farmers, is one of the major factors rendering their conduct so unreasonable. The contracts were entered as Exhibits 1-23 and the jury was instructed that Farmers were presumed to have read and understood them. The Court acted well within its discretion in refusing to instruct the jury on the legal concept of duty.

## V. Defendants are Individually Liable for Their Wrongful Conduct.

"A person who assumes to act as an agent is responsible to third persons as principal for acts...when the agent's acts are wrongful in their nature. § 28-10-702, MCA. Negligent misrepresentation constitutes an act wrongful in nature subject to personal liability. *Williams v. DeVinney*, 259 Mont. 354, 361, 856 P.2d 546, 551 (1993). "It is clearly established that a director or officer of a corporation is individually liable for fraudulent acts or false representations of his own or in which he participates even though his action in such respect may be in furtherance of the corporation's business. This personal liability attaches regardless of whether liability also attaches to the corporation." *Poulsen v. Treasure State Indus., Inc.*, 192 Mont. 69, 82, 626 P.2d 822, 829 (1981) (internal citations omitted). Additionally, a blanket argument that the verdict is unsupported by facts without identifying precise issues (i.e. which specific elements are factually deficient) unfairly shifts the burden to the appellee and this Court in violation of Rule 12(g), M.R.App.P.

The jury was properly instructed on the elements of fraud, constructive fraud, deceit, and negligent misrepresentation. Farmers presented evidence demonstrating all Defendants participated in the decision making of the defendant companies during the time in which misrepresentations were being conveyed and the crop was being withheld. Farmers presented evidence regarding the formation of these companies and these Defendants' extensive control over them and their agents, including Ranger. See Plaintiffs' Statement of Facts, sections IV and VI. Farmers also provided evidence of specific representations made by Hoggan and Shirley directly to the Farmers, including misrepresentations made by Shirley. The Jury found each individual defendant to have committed these torts. The Court should reject Defendants' generalized and uncited plea for absolution, as it is irreconcilable with facts presented at trial and the jury's verdict.

## CONCLUSION AND RELIEF SOUGHT

Defendants' failure to accept well settled Montana law that holds tortfeasors accountable for their actions–including when a tortfeasor has also breached a contract–is fatal to their position. This Court need not be wary of the "specter of 'floodgates of litigation from upholding this verdict.'" Instead, the Court should be wary of nefarious "businessmen" and their companies who would seek to prey on Montana's agricultural community. The jury's verdict is a clear indication that such

conduct is unwelcome in Montana. Affirmation from this Court of the verdict and judgment is an affirmation that Montana law does not favor unreasonable or dishonest conduct. Farmers respectfully request that the Court affirm the jury's verdict and the District Court's entry of it as the final judgment in this matter.

Respectfully submitted this 5th day of August, 2022.

ODEGAARD KOVACICH SNIPES, P.C.

By: /s/ *Ross T. Johnson*

Ross T. Johnson
P.O. Box 2325
Great Falls, MT 59403
Attorneys for Plaintiffs/Appellees

## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced except for footnotes and for quoted and indented material; and the word count, calculated by WordPerfect X3, is not more than 10,000 words, excluding table of contents, table of authorities, certificate of service, certificate of compliance, and any appendix containing statutes, rules, regulations, and other pertinent matters.

DATED this 5th day of August, 2022.

ODEGAARD KOVACICH SNIPES, P.C.

By: /s/ *Ross T. Johnson*
Ross T. Johnson
P.O. Box 2325
Great Falls, MT 59403
Attorneys for Plaintiffs/Appellees

## CERTIFICATE OF SERVICE

I, Ross Thomas Johnson, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 08-05-2022:

Mark D. Parker (Attorney)
401 N. 31st St., Ste. 805
P.O. Box 7212
Billings MT 59103
Representing: Kent Hoggan, Owen Kenney, Corey Shirley, Surety Land Development LLC
Service Method: eService

Robert J. Phillips (Attorney)
Garlington, Lohn & Robinson, PLLP
P.O. Box 7909
Missoula MT 59807
Representing: David Rendimonti
Service Method: eService

Michael L. Dunphy (Attorney)
401 No. 31st Street
P.O. Box 7212
Billings MT 59103
Representing: Kent Hoggan, Owen Kenney, Corey Shirley, Surety Land Development LLC
Service Method: eService

Electronically signed by Dawnell Komac on behalf of Ross Thomas Johnson
Dated: 08-05-2022