STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS.	
COUNTY OF PENNINGTON	)	SEVENTH JUDICIAL CIRCUIT
Expedition League, Inc., Plaintiff, v. Badlands Big Sticks Baseball Club, LLC, owner of Badlands Big Sticks, and Dave Ouellette; .402 Sports and Entertainment, LLC, owner of Fremont Moo, and Chad Miller and Daniel Cyza; Frew Enterprises, LLC, owner of Hastings Sodbusters, and Bryan Frew and Scott Galusha; Diamond Enterprises, LLC, owner of Spearfish Sasquatch, and Eric Schmidt, Rory Maynard, Rodney Schatz and Roger Riley; CH Baseball, LLC, owner of Hub City Hotshots, and Charles Heeman and Mayra Heeman; HA Baseball, LLC, owner of Casper Horseheads, and Charles Heeman and Mayra Heeman; HF Baseball, LLC, owner of Western Nebraska Pioneers, and Charles Heeman and Mayra Heeman Defendants.	)	51CIV22-000150 **MEMORANDUM DECISION AND ORDER**

Before the Court is Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction, as well as Defendants' Motions to Dismiss: (i) noncompete-related claims in Counts I, II, IV, V, VI, and VII as to all Defendants; (ii) individual defendants Chad Miller and Daniel Cyza; and (iii) all claims against Scott Galusha. The Court held a hearing to address the matter on May 12, 2022. The Court being familiar with the entire file, and having considered the briefs, affidavits, and arguments of the parties, it is hereby

ORDERED, that Plaintiff's Motion for Temporary Restraining Order is **DENIED**; it is further **ORDERED**,

that Plaintiff's Motion for Preliminary Injunction is **DENIED**; it is further **ORDERED**,

that Defendants' Motion to Dismiss noncompete-related claims in Counts I, II, IV, V, VI, and VII is **GRANTED**; it is further **ORDERED**,

that Defendants' Motion to Dismiss individual defendants Miller and Cyza is **DENIED in part, and GRANTED in part**; it is further **ORDERED**,

that Defendants' Motion to Dismiss with prejudice all claims against defendant Galusha is **GRANTED**.

BACKGROUND

Plaintiff, Expedition League, LLC, is a Florida corporation with its principal address in Sioux Falls, South Dakota. Defendants (hereinafter "Affiliates") are various recreational baseball teams and their owners as individuals and LLCs, located in South Dakota, North Dakota, Nebraska, and Wyoming. Plaintiff developed summer collegiate baseball league ("Expedition League") in 2015, operating in South Dakota, North Dakota, Nebraska, Wyoming, Montana, Idaho, and Manitoba, Canada. The Affiliates joined the Expedition League at different times. According to Plaintiff, the Affiliates were to enter into contracts with Plaintiff ("Affiliate Agreements") upon joining the league. At the end of the 2021 season some of the Affiliates, Defendants named in this action, left the Expedition League after giving notice of intent to do so in approximately October 2021.

Plaintiff commenced this action in January 2022, bringing claims of breach of contract, breach of guaranty, breach of fiduciary duty and loyalty, unjust enrichment, tortious interference, civil conspiracy, and usurpation of corporate opportunity, seeking declaratory judgments, injunctive relief, and damages. Defendants have moved to dismiss: (i) noncompete-related claims in Counts I, II, IV, V, VI, and VII as to all Defendants; (ii) individual defendants Chad Miller and Daniel Cyza; and (iii) all claims against Scott Galusha.

DISCUSSION

I. Motion to dismiss standard

"A motion to dismiss under SDCL 15-6-12(b) tests the legal sufficiency of the pleading, not the facts which support it. For purposes of the pleading, the court must treat as true all facts properly pled in the complaint and resolve all doubts in favor of the pleader." *Nygaard v. Sioux Valley Hosp. & Health Sys.*, 2007 SD 34, ¶ 9, 731 N.W.2d 184, 190 (citing *Guthmiller v. Deloitte & Touche, LLP*, 2005 SD 77, ¶ 4, 699 N.W.2d 493, 496). "A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *N. Am. Truck & Trailer, Inc. v. M.C.I. Commc'n Servs., Inc.*, 2008 S.D. 45, ¶ 6, 751 N.W.2d 710, 712 (quoting *Thompson v. Summers*, 1997 S.D. 103, ¶ 5, 567 N.W.2d 387, 390). "[W]hile the court must accept

allegations of fact as true when considering a motion to dismiss, the court is free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations." *Nygaard*, 2007 S.D. 34, ¶ 9, 731 N.W.2d at 190 (quoting *Wiles v. Capitol Indem. Corp.*, 280 F.3d 868, 870 (8th Cir. 2002)). "The rules 'contemplate a statement of circumstances, occurrences and events in support of the claim presented.'" *Gruhlke v. Sioux Empire Fed. Credit Union, Inc.*, 2008 S.D. 89, ¶ 17, 756 N.W.2d 399, 409 (quoting *Sisney v. Best*, 2008 S.D. 70, ¶ 7, 754 N.W.2d 804, 808). Whether the complaint states a valid claim for relief is viewed "in the light most favorable to the plaintiff" and examined "to determine if the allegations provide for relief on any possible theory." *Fodness v. City of Sioux Falls*, 2020 S.D. 43, ¶ 10, 947 N.W.2d 619, 624 (quoting *Osloond v. Farrier*, 2003 S.D. 28, ¶ 4, 659 N.W.2d 20, 22).

II. Defendants' Motions to Dismiss noncompete-related claims in Counts I, II, IV, V, VI, and VII as to all Defendants

Defendants move to dismiss noncompete-related claims in Counts I, II, IV, V, VI, and VII of Plaintiff's complaint. The clearest indicator of legislative intent is a statute's plain language. Therefore, the starting point when interpreting a statute must always be the language itself. *See Puetz Corp. v. S.D. Dep't of Revenue*, 2015 S.D. 82, ¶ 16, 871 N.W.2d 632, 637. "[I]f the words and phrases in the statute have plain meaning and effect, we should simply declare their meaning and not resort to statutory construction." *Dale v. Young*, 2015 S.D. 96, ¶ 6, 873 N.W.2d 72, 74.

SDCL § 53-9-8 declares void "[a]ny contract restraining exercise of a lawful profession, trade, or business" with the exception of the provisions contained in SDCL §§ 53-9-9 to 53-9-12, inclusive.[1] The South Dakota Supreme Court has delineated a simple three-part test – which essentially amounts to a reading of the statute's plain language – to assess whether a contract is an unlawful restraint on trade:

> First, we review whether "the conduct of the parties concern[s] a lawful profession, trade or business." If this prerequisite is met, we review whether "there has been a material restraint upon exercising that lawful profession, trade or business." Finally, we assess whether any of the statutory exceptions apply.

[1] The exceptions permit contractual restrictions on competition in certain, statutorily defined circumstances, they include: a seller of a business's good will may restrict buyer from carrying on a similar business, SDCL § 53-9-9; partners may agree not to carry on similar business of the partnership upon its dissolution, SDCL § 53-9-10; employment contracts limiting an employee from working in the same profession as the employer, SDCL § 53-9-11; limitations on covenants not to compete with respect to health care providers, SDCL § 53-9-11.1; and covenants not to compete with respect to independent contractor insurance provides who are captive agents, SDCL § 53-9-12.

Aqreva, LLC v. Eide Bailly, LLP, 2020 S.D. 59, ¶ 25, 950 N.W.2d 774, 784 (internal citations omitted).

a. *Whether "reasonableness" is a factor under SDCL § 53-9-8*

The Court must first consider Plaintiff's contention that the noncompete provisions may be enforced because they are "reasonable." In doing so, Plaintiff relies on *Lien v. Northwestern Eng'g Co.*, 39 N.W.2d 483 (S.D. 1949), which involved an agreement wherein a landowner contracted with a lessee to quarry rock on its land, with the restriction that it not lease adjacent land to competing business. *Lien*, 39 N.W.2d at 488. The South Dakota Supreme Court upheld a restrictive covenant that "was not unreasonably restrictive on the rights of the appellants and did not contravene public policy." *Id.* Defendants contend the noncompete provisions are unenforceable under South Dakota statute and case law.

While a predecessor[2] to SDCL § 53-9-8 is cited in the *Lien* opinion, it was not actually relied upon by the Court in arriving at its decision. *Lien*, 39 N.W.2d at 487 ("This statute is not relied upon by appellants, and a contention that the covenant herein is void as in violation of its terms would clearly be untenable."). In fact, the Court distinguishes the restrictive lease provision at issue as outside the ambit of the restraint on trade statute. *See Id.* ("Decisions of this court considering the validity of contracts thereunder relate to the sale of the good will of a business or profession or the dissolution of a partnership . . . and no consideration therein is given to the validity and effect of a covenant similar to the one in the instant case against leasing other property for a competing business.") (Internal citations omitted). The Court's analysis, couched in "reasonableness," instead contemplates the relevant provision as a restrictive covenant. *See id.* (citing *Smith v. San Francisco & N.P. Ry. Co.*, 47 P. 582, 589 (Cal. 1897)) ("'The rule invalidating contracts in restraint of trade does not include every contract of an individual by which his right to dispose of his property is limited or restrained.'"). Citing to a California case, which commented on California's restraint of trade statute from which South Dakota's was derived, the *Lien* Court notes that the statute which "'makes void every contract by which one is restrained from "exercising a lawful profession, trade, or business," except in certain instances . . . is far different from a contract limiting his right to dispose of a particular piece of property except upon certain conditions.'" *Id.* (quoting *Smith v. San Francisco & N.P.*

[2] *See* SDC 10.0706.

Ry. Co., 47 P. 582, 589 (Cal. 1897)). The Court's analysis is framed as an assessment of the reasonableness of the restriction as it relates to "the use to be made out of the premises." *Id.* at 488. In fact, central to its holding that the restrictive covenant was not unreasonable, the Court notes that the appellants "did not agree not to engage in the business of quarrying or selling rock, but only that they would not lease any contiguous or adjacent land 'to third parties for the production of sand or gravel, or other similar materials.'" *Id.* at 488.

South Dakota courts have since commented on the *Lien* court's analysis. Then Chief Justice Miller addressed the *Lien* holding with respect to the "reasonableness" analysis:

> The California case of *City Carpet–Beating, Etc., Works v. Jones*, 102 Cal. 506, 36 P. 841 (1894), the *Lien* majority was relying on had been repudiated. *See Lien*, 73 S.D. at 107, 39 N.W.2d at 495 (Hayes, J., dissenting). In *Merchants' Ad–Sign Co. v. Sterling*, 124 Cal. 429, 57 P. 468, 470 (1899), the California Supreme Court held that unless a contract restraining exercise of a lawful trade is incidental or ancillary to a transaction expressly excepted by statute from the general rule, the contract is void. This notion that the old common law test of reasonableness has been specifically replaced by statute comports with our own statutory scheme. SDCL 53-9-8 provides that "*[e]very* contract restraining exercise of a lawful profession trade or business is void to that extent, except as provided by §§ 53-9-9 to 53-9-11, inclusive." (Emphasis added.) This statute is very clear and only provides for a few exceptions, none of which apply to the agreement between [the parties].

Commc'n Tech. Sys., Inc. v. Densmore, 1998 S.D. 87, ¶ 38, 583 N.W.2d 125, 132 (Miller, C.J., concurring).[3] The United States District Court for the District of South Dakota has had occasion to interpret SDCL § 53-9-8, as well, and opined that it "leaves no room for application of a common law 'reasonableness' test." *Boyer v. Piper, Jaffray & Hopwood, Inc.*, 391 F. Supp. 471, 474 (D.S.D. 1975). The District Court noted that the statute "prescribes a rule more stringent than the common law on provisions restraining competition" which "applies to every contract restraining exercise of a lawful profession, trade or business" and "makes unlawful any such restraint." *Id.*

A "reasonableness" analysis appears to only occasionally factor into a court's determination with respect to covenants not to compete when looking at the exception to the restraint of trade statute regarding employment contracts found in SDCL § 53-9-11.

> This court has held that "reasonableness" does not enter into the analysis except in limited situations. *Compare American Rim & Brake, Inc. v. Zoellner*, 382 N.W.2d 421, 424 (S.D.1986) ("SDCL 53-9-11 allows employers and employees to make

[3] In 2005, SDCL § 53-9-8 was amended to apply to "[a]ny contract" as opposed to "[e]very contract[.]" *See* 2005 S.D. Sess. Laws ch. 254, § 1.

> exactly the kind of agreement entered into between American and defendants, without a further showing of reasonableness."), with *Central Monitoring Serv., Inc. v. Zakinski*, 1996 SD 116, ¶¶ 42-49, 553 N.W.2d 513, 519-21 (drawing a distinction between 1) employees who quit or who are fired for cause and 2) those who are fired through no fault of their own. As to the latter, the trial court must balance the competing interests of the former employee, the employer, and the public to determine whether the noncompete agreement is reasonable).
>
> Here, there are at least two reasons for not requiring a "reasonableness" determination. First, there is no finding in the record regarding the circumstances of Ward's departure from Midcom. Second, the agreement was executed in conjunction with a stock repurchase agreement and is therefore subject to analysis under SDCL 53-9-9 (sale of good will), not SDCL 53-9-11 (employment contracts).

Ward v. Midcom, Inc., 1998 S.D. 10, ¶ 15, n. 10, 575 N.W.2d 233, 239. Considering the foregoing, the Court will not read a "reasonableness" test into the unambiguous statutory language of SDCL § 53-9-8 and will then next consider the three-part test as set forth by the South Dakota Supreme Court in recent applications of the statute.

b. *Whether the conduct concerns a lawful profession, trade, or business*

The first part of the test requires the court review whether "the conduct of the parties concern[s] a lawful profession, trade or business." *Aqreva*, 2020 S.D. 59, ¶ 25, 950 N.W.2d at 784 (internal citations omitted). There is no question, and both parties agree, that the conduct of the parties constitutes a "lawful profession, trade, or business." Plaintiff is a corporation; Defendants are all limited liability companies, conducting the business of the baseball teams, and the teams' respective owners. The conduct leading up to this dispute involved profit-making endeavors stemming from ticket and merchandise sales. The first test is met.

c. *Whether there has been a material restraint upon exercising that lawful profession, trade, or business*

A court next reviews whether "there has been a material restraint upon exercising that lawful profession, trade or business." *Id.* Here, the agreement contains a material restraint on Defendants' lawful profession, trade, or business. By the terms of the affiliation agreement, "[n]either affiliate, nor its shareholders, partners . . . will . . . on their own account . . . own, operate, lease, franchise, conduct, engage in, be connected with, have any interest in or assist any person or entity in any capacity . . . in any professional or other baseball team . . . within a one-hundred mile (100) radius of the Stadium in which the Affiliate plays its home games . . . without the express written consent of the League[.]" Plaintiff's Exhibit to Complaint, ex. B.

As counsel for Defendants indicated at the hearing on the motion, many if not all the Affiliate teams subject to this provision operate in rather small communities across the northern Midwest which are often home to only a single suitable facility to host an amateur baseball game or league play. The provision broadly restrains any Affiliate from engaging in any capacity with any baseball team. Additionally, as all Defendant-Affiliates here have continued to pursue operating a baseball team within a league, the restraint contained in the Agreements would operate to effectively eliminate the ability of a Defendant-Affiliate to conduct its team's business where it is located. The second test is met.

d. *Whether the provisions of the affiliate agreements fall under the "sale of good will" statutory exception to SDCL § 53-9-8*

Lastly, a court is to consider whether any statutory exceptions apply. *Aqreva*, 2020 S.D. 59, ¶ 25, 950 N.W.2d at 784 (internal citations omitted). The South Dakota Supreme Court has held that "the exceptions listed in SDCL 53-9-8 'must be construed narrowly so as to promote the prohibition against contracts in restraint of trade.'" *Densmore*, 1998 S.D. 87, ¶ 15, 583 N.W.2d at 128 ((citing *American Rim & Brake, Inc. v. Zoellner*, 382 N.W.2d 421, 424 (S.D. 1986)). In the alternative to their "reasonableness" argument with respect to the noncompetition clauses, Plaintiff argues that the noncompetition clauses are enforceable as part of a sale of good will under the statutory exception found in SDCL § 53-9-9. The South Dakota Code defines the good will of a business as "the expectation of continued public patronage, but it does not include a right to use the name of any person from whom it was acquired. The good will of a business is property, transferable like any other." *See* SDCL§ 43-35-6. SDCL § 53-9-9 allows a non-compete agreement when a person sells the good will of a business, and provides:

> Any person who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city, or other specified area, as long as the buyer or person deriving title to the good will from the seller carries on a like business within the specified geographical area.

The agreements at issue do not contemplate a sale to Defendants, or Affiliates, as much as perhaps a fee arrangement. From the face of its complaint and through representations by its counsel at the hearing, Plaintiff does not assert that a sale of its business to any Defendant took place. Plaintiff asserts that it "is engaged in the development and promotion of summer collegiate baseball teams[.]" Even by the terms of the Agreement, the good will referenced is done so with respect to the "League Service Marks," which the Agreement explicitly maintains are solely and exclusive owned by the Expedition League, whereas the Affiliates are the owners

of the "Affiliate Service Marks," subject to the League's licensing rights. "Affiliate shall not have or acquire rights in League Service Marks other than the right of use as provided herein. Affiliate shall have the right to use League Service Marks only in the manner prescribed, directed and approved by EL, on behalf of League." Affiliation Agreement, Plaintiff's Exhibit B. As such, there was not a "sale" of Plaintiff's business as much as there was a fee collected by them in exchange for Plaintiff's performance of certain activities such as scheduling and marketing baseball games. At most, this arrangement may tangentially implicate Plaintiff's "good will" by association, but even the Agreement negates any notion that its good will was sold. Even if a sale of good will had happened, the restraint is on the seller, not the buyer.

e. *"Blue penciling" inapplicable where amending the invalid provision will not make it statutorily compliant*

At a hearing held on the matter, Plaintiff's counsel argued that were this Court to find the noncompete provision invalid as a matter of law, it may "blue pencil," or amend, the provision to make it statutorily compliant. The South Dakota Supreme Court has previously brought noncompetition agreements into compliance by partial enforcement. However, it has done so where the limitations of a contract in restraint of trade exceeded the scope permitted by statute, but where the contract otherwise complies with one of the statutory exceptions. *See, e.g.*, *Simpson v. C & R Supply, Inc.*, 1999 S.D. 117, ¶ 16, 598 N.W.2d 914, 920; *Ward*, 1998 S.D. 10, ¶ 17, 575 N.W.2d at 239; *Loescher v. Policky*, 84 S.D. 477, 481-82, 173 N.W.2d 50, 53 (1969).

> It is believed that the rule for partial enforcement is the better rule and should be applied in any case in which nothing is wrong with the agreement except that the parties have agreed upon a restraint that is somewhat in excess of what protection of the good will requires.

Ward, 1998 S.D. 10, ¶ 14, 575 N.W.2d at 238 (quoting 6A Corbin on Contracts § 1388; *Igoe v. Atlas Ready-Mix, Inc.*, 134 N.W.2d 511, 518 (N.D. 1965)). Here, as discussed above, the noncompetition provision in the affiliate agreements does not comport with a statutory exception to South Dakota's rule invalidating restraints of trade. Therefore, the Court declines to "blue pencil" a provision which, if amended, would still not qualify under one of the exceptions to the restraint on trade statute.

f. *Conclusion*

Construing the pleadings in a light most favorable to the plaintiff, and accepting the allegations of fact as true, the counts pled in the complaint which rely upon the noncompetition provisions contravene the plain, unambiguous language of South Dakota's statute and the case

law applying it. Claims arising, therefore, pursuant to the noncompetition agreements in Plaintiff's complaint do not have an adequate legal sufficiency and cannot proceed. Plaintiff's noncompete-related claims in Counts I, II, IV, V, VI, and VII, as to all Defendants, in its complaint are dismissed for failure to state a claim upon which relief can be granted.

III. Defendants' Motion to Dismiss individual defendants Chad Miller and Daniel Cyza

Chad Miller and Daniel Cyza are co-owners of the Fremont Moo team, which is also owned by .402 Sport and Entertainment, LLC, and is organized in Nebraska. Plaintiff asserts that, although Miller and Cyza never signed the Agreement, they "began performing" the obligations set forth in the Affiliation Agreement by making two payments of $15,000 each in accordance with the Affiliation Fee. Plaintiff alleges Miller and Cyza agreed to pay Plaintiff league dues and a percentage of revenue, which Plaintiff claims they have now wrongfully withheld in the amount of $360,350.00. Plaintiff argues despite not signing the Agreement, Miller and Cyza have accepted its terms by their conduct. Miller and Cyza have moved to dismiss the claims made against them based on never having signed the Affiliation Agreement or any guaranty documents, and additionally for lack of personal jurisdiction. Unlike the other Affiliation Agreements, that which purports to belong to the Fremont Moo does not contain a "Personal Guarantee" provision.

a. *Personal jurisdiction*

Defendants Miller and Cyza argue they are not subject to personal jurisdiction in South Dakota on the basis that they did not sign the Agreement and Plaintiff has failed to plead either Defendant having sufficient minimum contacts with South Dakota. Plaintiff contends Defendants' conduct satisfies South Dakota's long-arm statute and that the agreement's forum selection clause provides this Court with personal jurisdiction over Miller and Cyza.

South Dakota courts must consider two questions to determine whether they possess "personal jurisdiction over a nonresident defendant." *Kustom Cycles, Inc. v. Bowyer*, 2014 S.D. 87, ¶ 9, 857 N.W.2d 401, 406. "The first inquiry is whether the legislature granted the court jurisdiction pursuant to South Dakota's Long Arm Statute . . ." *Id.* (quoting *Daktronics, Inc. v. LBW Tech Co., Inc.*, 2007 S.D. 80, ¶ 4, 737 N.W.2d 413, 416); *see also* SDCL § 15-7-2. "Second, the assertion of jurisdiction must 'comport with federal due process requirements.'" *Id.* (quoting *Daktronics*, 2007 S.D. 80, ¶ 4, 737 N.W.2d at 416). South Dakota's long-arm statute includes, among its subsections, the following bases for the assertion of personal jurisdiction:

> (1) The transaction of any business within the state; (2) The commission of any act which results in accrual within this state of a tort action; . . . (5) Entering into a contract for services to be rendered . . . in this state by such person; . . . (10) Entering into negotiations with any person within the state with the apparent objective of contracting for services to be rendered or materials to be furnished in this state; (11) Commencing or participating in negotiations, mediation, arbitration, or litigation involving subject matter located in whole or in part within the state[.]

SDCL § 15-7-2.

In determining whether a non-resident defendant's actions provide sufficient minimum contacts to support the constitutional assertion of personal jurisdiction, the South Dakota Supreme Court has delineated the following three-part test:

> First, the defendant must purposefully avail himself of the privilege of acting in the forum state, thus invoking the benefits and protections of its laws. Second, the cause of action must arise from [the] defendant's activities directed at the forum state. Finally, the acts of [the] defendant must have substantial connection with the forum state to make the exercise of jurisdiction over [the] defendant a reasonable one.

Marschke v. Wratislaw, 2007 S.D. 125, ¶ 15, 743 N.W.2d 402, 407 (quoting *Daktronics*, 2007 S.D. 80 ¶ 6, 737 N.W.2d at 417). Personal jurisdiction is appropriate "where the defendant 'deliberately' has engaged in significant activities within a State, or has created 'continuing obligations' between himself and residents of the forum[.]" *Kustom*, 2014 S.D. 87, ¶ 12, 857 N.W.2d at 408 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985)). Personal jurisdiction over a defendant does not vest in a forum simply because the defendant is party to a contract formed in the forum. *See Marschke*, 2007 S.D. 125, ¶ 16, 743 N.W.2d at 408 ("[T]he existence of a contract is not dispositive of the issue [of minimum contacts]."). However, "'even a single act can support jurisdiction' if it 'creates a "substantial connection"' with the forum.'" *Daktronics*, 2007 S.D. 80 ¶ 14, 737 N.W.2d at 419 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 n. 18 (1985)).

Here, dismissal of these Defendants for want of jurisdiction at this juncture would be premature where Plaintiff has pleaded enough facts to find that a court of this state has personal jurisdiction over Miller and Cyza. Defendants, as owners of an Affiliate team, negotiated with, made payments to, and communicated with Plaintiff corporation headquartered in South Dakota. In addition, Defendants engaged in business which operated and played various baseball games in the forum state. Even outside the alleged contractual relationship, discussed below, Defendants' conduct running a business whose team played games pursuant to scheduling arrangements and promotion by Plaintiff indicate deliberate activity or continuing obligations

between themselves and the forum state sufficiently so as to conclude that the assertion of jurisdiction does not offend "traditional notions of fair play and substantial justice." *Daktronics*, 2007 S.D. 80 ¶ 14, 737 N.W.2d at 419 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

b. *Breach of contract*

The question of whether a contract exists is a question of law for the court to decide. *Harvey v. Regional Health Network, Inc.*, 906 N.W.2d 382, 397 (S.D. 2018). A valid contract requires parties capable of contracting, their consent, a lawful object, and sufficient cause or consideration. *See* SDCL § 53-1-2. Consent of the parties must be free, mutual, and communicated to each other. *See* SDCL § 53-3-1. Mutual assent means there has been a meeting of the minds on all essential elements or terms in order to form a binding contract. *Winegeart v. Winegeart*, 910 N.W.2d 906 (S.D. 2018). Where an offer specifies that it may be accepted by doing a specified act, the contract becomes effective upon the performance of the act. *Sulzbach v. Town of Jefferson*, 155 N.W.2d 921, 923 (S.D. 1968); SDCL § 53-7-7. If an offer prescribes conditions concerning the offeree's communication of its acceptance, the offeror is not bound unless the offeree conforms to those conditions. SDCL § 53-7-5. Where an offer specifies the performance of certain acts in order to accept, any conduct which is not in conformity with the performance specified in the offer does not constitute acceptance. *Sulzbach*, 155 N.W.2d at 923; SDCL §§ 53-7-5, 53-7-7.

In this case, Paragraph 39 of the Agreement associated with Miller, Cyza, and the Fremont Moo, titled "Acceptance by EL" states "This Agreement shall be binding upon Affiliate at the time it is signed by Affiliate, and delivered to EL at its address set forth on the cover hereof. This Agreement shall not be binding upon EL until it is accepted in writing by the President of EL." Plaintiff's Exhibit D. Parties agree, and Plaintiff avers in its complaint, that neither Miller nor Cyza signed the Agreement. A duplicate signature page, that is an identical copy of the unsigned signature page of the Agreement, is signed by the Expedition League president Steven Wagner, and is appended to the Agreement. Plaintiff's Exhibit D. Regardless, Plaintiff sets forth in its pleadings, Miller and Cyza "accepted the benefits of the Affiliation Agreement" by operating the Fremont Moo team for three seasons within the Expedition League, making some of the required affiliate payments to Plaintiff, and attending the Annual Owners' Meeting in Rapid City in 2019 and 2020.

Both parties agree that neither Miller nor Cyza signed the Affiliation Agreement. The agreement expressly defines as one of its terms that the Affiliate is not bound until they sign the contract. An express contract cannot have arisen according the terms of the agreement limiting acceptance to requiring Miller and Cyza's signatures.

Although the parties did not have an express contract, "[t]he absence of an express contract does not . . . foreclose the possibility of a contractual relationship, because the parties may, by their acts and conduct, create an implied contract." *Jurrens v. Lorenz Mfg. Co. of Benson, Minn.*, 578 N.W.2d 151, 154 (S.D. 1998). The South Dakota Supreme Court has held that

> A contract is implied in fact where the intention as to it is not manifested by direct or explicit words by the parties, but is to be gathered by implication or proper deduction from the conduct of the parties, language used, or acts done by them, or other pertinent circumstances attending the transaction.

Weller v. Spring Creek Resort, Inc., 477 N.W.2d 839, 841 (S.D. 1991) (quoting *Mahan v. Mahan*, 121 N.W.2d 367, 369 (S.D. 1963)). "[T]he totality of the parties' conduct [is examined] to learn whether an implied contract can be found." *In re Regennitter*, 589 N.W.2d 920, 924 (S.D. 1999). The "'facts are viewed objectively and if a party voluntarily indulges in conduct reasonably indicating assent he may be bound even though his conduct does not truly express the state of his mind.'" *Id.* (quoting *Federal Land bank of Omaha v. Houck*, 4 N.W.2d 213, 219-20 (S.D. 1942)). And unlike the existence of an express contract which is a question of law, "'[t]he existence and governing terms of an implied contract present questions of fact to be decided by a jury.'" *Holland v. FEM Elec. Ass'n, Inc.*, 637 N.W.2d 717, 719 (S.D. 2001) (quoting *Jurrens*, 578 N.W.2d at 154).

Despite not pleading the existence of an implied in law contract, under the motion to dismiss standard a court is to "determine if the allegations provide for relief on any possible theory." *Fodness*, 2020 S.D. 43, ¶ 10, 947 N.W.2d at 624. Plaintiff alleges in its complaint that Miller and Cyza, as owners of the Fremont Moo team, made certain payments to Plaintiff, ostensibly as dues owed for multiple seasons of participation in the league. In their assertions regarding an agreement with Plaintiff to remove a guaranty provision from their agreement, Miller and Cyza evince in their responsive pleadings some level of contractual negotiation having taken place.

In adhering to the deference to be given to the pleadings under such a standard, sufficient allegations of conduct are pleaded so that an implied contract cause of action may exist for

appropriate resolution by trial or summary judgment proceeding. Plaintiff has pleaded facts constituting a statement of circumstances, occurrences, and events that would support claims of breach of contract. Miller and Cyza's alleged acceptance of a benefit under the agreement by their conduct and their alleged failure to pay dues owed under the contract, if proven to be true, could constitute a breach of implied contract. *See Gul v. Ctr. for Family Med.*, 2009 S.D. 12, ¶ 10, 762 N.W.2d 629, 633 (stating the "elements that must be met in a breach of contract claim are: (1) an enforceable promise; (2) a breach of the promise; and (3) resulting damage."); *see also Weller*, 477 N.W.2d at 841-42.

c. *Breach of Guaranty*

"A guaranty is a promise to answer for the debt, default, or miscarriage of another person." SDCL § 56-1-1. To be valid and enforceable, a guaranty must be in writing and signed by the guarantor. SDCL § 56-1-4. Exceptions to the writing requirement are list in SDCL §§ 56-1-5 to 56-1-9, inclusive. Plaintiff has cited to the exception in SDCL § 56-1-5 which provides the following:

> A promise to answer for the obligation of another is deemed an original obligation of the promiser and need not be in writing where the promise is made by one who has received property of another upon an undertaking to apply it pursuant to such promise, or by one who has received a discharge from an obligation in whole or in part in consideration of such promise.

A guaranty is a contract on the part of one person which is collateral to the principal obligation of another. *Robbins & Stearns Lumber Co. v. Thatcher*, 453 N.W.2d 613, 615 (S.D. 1990). "The liability of a guarantor will not be enlarged beyond the plain and certain import of the guaranty contract and any ambiguous or uncertain terms in a guaranty will be interpreted most strictly against the party who prepared it." *Id.* Because there is no enforceable express contract between Plaintiff and Miller or Cyza, there can be no valid and enforceable guaranty pursuant to the express agreement. Not only was the guaranty provision specifically removed from the Fremont Affiliate Agreement pursuant to the parties negotiations, but Plaintiff also fails to assert in its pleadings how the exception to the writing requirement found in SDCL § 56-1-5 applies to Miller and Cyza. No facts are plead which would substantiate a claim under a breach of guaranty claim, therefore Defendant's motion to dismiss in that regard must be granted.

d. *Conclusion*

For the reasons above, Defendants' Motion to Dismiss as Individual Defendants, Chad Miller and Daniel Cyza, is denied in part, and granted in part. The motion to dismiss for lack of

personal jurisdiction is denied; the motion to dismiss for failure to state claim upon which relief can be granted with respect to the breach of contract claim is denied; the motion to dismiss with respect to the breach of guaranty is granted.

IV. Claims against Scott Galusha

The Court was informed at the May 12, 2022, hearing that both parties consented to the dismissal of Scott Galusha. Defendant Galusha's Motion to Dismiss all claims against him is therefore granted with prejudice.

V. Injunctive relief sought by Plaintiff

a. *Temporary restraining order*

By statute, a temporary injunction may be either a temporary restraining order or a preliminary injunction. *See* SDCL § 21-8-1. "'The recognized purpose of a temporary restraining order is to suspend proceedings until the court can determine whether an injunction should issue.'" *Long Prairie Packing Co. v. United Nat. Bank, Sioux Falls*, 338 N.W.2d 838, 841 (S.D. 1983) (quoting *Golden v. Oahe Enterprises, Inc.*, 240 N.W.2d 102, 111 (S.D. 1976)). "When the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order." SDCL § 15-6-65(b). "In other words, its office is merely to preserve the status quo until there can be a hearing upon the question of whether or not to grant an injunction–such order does not rise to the dignity of an injunction." *Beers v. City of Watertown*, 176 N.W. 149, 150 (S.D. 1920) (discussing temporary restraining orders). For these reasons, a temporary restraining order in this matter is inapposite and Plaintiff's motion therefor is denied.

b. *Preliminary injunction*

"Several guiding factors assist courts in deciding whether to grant or deny injunctive relief." *New Leaf, LLC v. FD Dev. of Black Hawk LLC*, 2010 S.D. 100, ¶ 15, 793 N.W.2d 32, 35. Those factors include:

> (1) Did the party to be enjoined cause the damage? (2) Would irreparable harm result without the injunction because of lack of an adequate and complete remedy at law? (3) Is the party to be enjoined acting in bad faith or is the injury-causing behavior an innocent mistake? (4) In balancing the equities, is the hardship to be suffered by the enjoined party . . . disproportionate to the . . . benefit to be gained by the injured party?

Id. (quoting *Knodel v. Kassel Twp.*, 1998 S.D. 73, ¶ 9, 581 N.W.2d 504, 507). Whether a preliminary injunction should be granted involves consideration of "(1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." *Dacy v. Gors*, 471 N.W.2d 576, 579 (S.D. 1991) (quoting *Dataphase Sys., Inc. v. CL Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981)).

> The likelihood that plaintiff ultimately will prevail is meaningless in isolation. In every case, it must be examined in the context of the relative injuries to the parties and the public. If the chance of irreparable injury to the movant should relief be denied is outweighed by the likely injury to other parties litigant should the injunction be granted, the moving party faces a heavy burden of demonstrating that he is likely to prevail on the merits. Conversely, where the movant has raised a substantial question and the equities are otherwise strongly in his favor, the showing of success on the merits can be less.

Dataphase, 640 F.2d at 113.

Further, "[a] suit for injunction is inherently an equitable action." *Knodel*, 1998 S.D. 73, ¶ 8, 581 N.W.2d at 507. "A party seeking equity in the court must do equity, including entering the court with clean hands." *Id.* (quoting *Talley v. Talley*, 1997 S.D. 88, ¶ 29, 566 N.W.2d 846, 852). "An essential element to equitable relief is the lack of an adequate remedy at law." *Id.* Thus, to obtain a preliminary injunction, the movant must show a likelihood of success on the merits. *Dacy*, 471 N.W.2d at 579.

Plaintiff requests Defendants be enjoined from using Defendants' team marks, symbols, names, and logos that Plaintiff claims are associated with the Expedition League, and to be further enjoined from competing with the Expedition League "in violation of their contracts." Plaintiff asserts it will be irreparably harmed by Defendants' playing in another league and by using the same logos in the new league, which Plaintiff cites as going against the Affiliation Agreements. Plaintiff also cites to *Raven Indus. v. Lee* for the proposition that "the use of secret, confidential, or proprietary information results in irreparable harm as long as defendants continue to use such information." Plaintiff's Brief, p. 8 (citing *Raven Indus. v. Lee*, 783 N.W.2d 844, 852 (S.D. 2010).

Plaintiff's motion for a preliminary injunction fails, at minimum, to show a likelihood of success on the merits. Plaintiff's argument that the Court issue a preliminary injunction on the basis of the noncompete provisions lacks merit where the noncompete provisions are unenforceable under South Dakota law. Plaintiff has additionally failed to demonstrate how

Defendants' use of their own Affiliate Service Marks, which the Affiliate Agreement defines as "the exclusive property of the Affiliates," will cause irreparable harm, or is in any way "secret, confidential, or proprietary information" of Plaintiff. The chance of irreparable injury to the movant should relief be denied is outweighed by the likely injury to other parties litigant should the injunction be granted, therefore the moving party faces a heavy burden of demonstrating that he is likely to prevail on the merits. Plaintiff has failed to meet its burden for a preliminary injunction to issue, and its motion is therefore denied.

ORDER

For the reasons set forth above, it is hereby:

ORDERED, that Plaintiff's Motion for Temporary Restraining Order is **DENIED**;
it is further **ORDERED**,
that Plaintiff's Motion for Preliminary Injunction is **DENIED**;
it is further **ORDERED**,
that Defendants' Motion to Dismiss noncompete-related claims in Counts I, II, IV, V, VI, and VII is **GRANTED**;
it is further **ORDERED**,
that Defendants' Motion to Dismiss individual defendants Miller and Cyza is **DENIED in part, and GRANTED in part**;
it is further **ORDERED**,
that Defendants' Motion to Dismiss with prejudice all claims against defendant Galusha is **GRANTED**.

Dated this 20th day of May 2022.

BY THE COURT:

Stacy L. Wickre

THE HONORABLE STACY WICKRE
CIRCUIT COURT JUDGE

ATTEST:
RANAE TRUMAN
CLERK OF COURTS

By:_____
Deputy

(SEAL)