

STATE OF MICHIGAN
BERRIEN COUNTY TRIAL COURT – BUSINESS DOCKET
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BOSS OUTDOORS, LLC,
Plaintiff,

Case No. 2023-0017-CB

v.

HON. DONNA B. HOWARD

LEE THOMAS KJOS, and
ZACH MEYER,
Defendants,

-and-

LEE THOMAS KJOS, ZACH
MEYER, and KJOS OUTDOORS, LLC,
Third-Party Plaintiffs,

v.

BRANDON CERECKE, DLM HOLDING
GROUP, LLC, and ULTRA-SEAL
INCORPORATED.
Third-Party Defendants.

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OPINION AND ORDER FOR JUDGMENT AFTER NON-JURY TRIAL
PART 2 – KJOS/MEYER THIRD-PARTY COMPLAINT

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At a session of the Berrien County Trial Court, held
On the 10th day of November 2025, in the City of
St. Joseph, Berrien County, Michigan

PRESENT: HONORABLE DONNA B. HOWARD

I. BACKGROUND

This matter needs no introduction. It comes back before the Court for the belated Part 2 of its Judgment after the non-jury trial addressing more specifically the claims remaining of Third-Party Plaintiffs Lee Kjos (“Kjos”) and Zach Meyer (“Meyer”) against Third-Party Defendant Brandon Cerecke (“Cerecke”) from the Second Amended Third-Party Complaint. Specifically, Kjos’s and Meyer’s claims proceeding to trial were: statutory member oppression as it related to the claim of fraud (Count 1), fraud (Count 2), and unjust enrichment (Count 6).¹

As the parties will recall, on or about July 11, 2025, the Court issued its Opinion and Order regarding those claims brought by Plaintiff Boss Outdoors, LLC’s (“Boss”) against Kjos and Meyer. As noted therein (*see*, OpOrder, 7/11/25, p 2, fn 1), for purposes of this Opinion, the Court incorporates by reference the Procedural Overview (Section II) and the Findings of Fact (Section III). With that in mind, the Court issues the following decision, pursuant to MCR 2.517, after further consideration of the pleadings, testimony of all the witnesses, trial and post-trial briefings, the exhibits admitted into evidence, along with the Court’s Opinion and Order entered July 11, 2025. *See, Wright v Wright*, 279 Mich App 291, 299; 761 NW2d 443 (2008)(because case was decided as a bench trial, the court was obligated to determine the weight and credibility of the evidence presented). Also, it remains that the Court apply the standard of proof by a preponderance of the evidence to the parties’ respective claims and/or applicable defenses raised in their pleadings and at trial, *except* where clear and convincing evidence is required as a matter of law. *See, Hi-Way Motor Co v Int’l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976)(fraud not presumed and must be proved by clear and convincing evidence).

¹ Recall, on September 16, 2024, the Court granted in part and denied in part Cerecke’s motion for summary disposition pursuant to MCR 2.116(C)(10). More specifically, the Court granted dismissal of all of the claims or counts asserted against Cerecke from the 2nd Amended Third-Party Complaint except part of Count 1, Count 2 and Count 6 [Cerecke MSD Order, 9/16/24].

II. SUPPLEMENTAL FINDINGS OF FACT

For purposes of supplementation and/or clarification of the July 11, 2025 Findings of Facts incorporated herein by reference, the Court adds the following references to the admitted evidence, most particularly as it related to what Third-Party Plaintiffs claim were misrepresentations and/or concealment by Cerecke as to: i) his inclusion of the repurchase rights provisions of the Operating Agreement; ii) the inter-relationships of Boss operations with Cerecke's other individually-owned businesses, like Third-Party Defendant DLM Holding Group, LLC ("DLM"),² including iii) certain statements in July 2021 when Kjos and Cerecke got into an argument; and iv) the discussions in June 2022 when Kjos and Meyer wanted Cerecke to enter into an exclusivity agreement to add the assets of DLM to the potential sale of Boss [2nd Am 3rd-P Compl, 8/14/23; 3rd-P Proposed Findings, 1/21/25, ¶¶ 96-115, pp 15-21; see also TT Vol 4, pp 1097-1099].

A. Pre-Operating Agreement

First, as the parties should recall Kjos testified that in 2018, when Cerecke and Kjos discussed membership shares, there was no discussion regarding them needing to enter into an operating agreement or that it would contain a repurchase rights provision, to obtain the 60-40 respective ownership in Boss [TT Vol 3, pp 594-595]. Likewise, Meyer also claimed that Cerecke did not tell him ahead of time that the operating agreement would have a repurchase rights provision in it [3rd-Party Pltfs Post-Trial Brf, 1/21/25, ¶ 98, pp 16-17]. At the same time, Kjos acknowledged that he did not ask Cerecke any questions about any terms of how their "deal" would work or express any concerns [TT Vol 5, pp 1125-1126; TT Vol 4, pp 1100-1101]. The Court also finds that when Cerecke was asked about the repurchase rights provision Cerecke testified that, while he didn't say it "specifically in lawyer-speak," as part of those initial discussions with Kjos, and later when Meyer wanted to come on board at Boss, Cerecke did tell them that the deal was "ride or die" and that their memberships would have limitations and restrictions [TT Vol 3, pp 792-794]. The evidence shows that neither Kjos nor Cerecke realized until later (from the Boss attorneys) that corporate documents, such as an Operating Agreement, Joinder Agreement and the like, would be needed [see e.g., TT Vol 2, p 430; TT Vol 3, pp 595, 597, 599, 625]. It is undisputed that neither Kjos nor Meyer requested any documentation of their supposed membership in Boss in 2018 or 2019. Rather, it was at Meyer's request in June 2020 [Exh 122] that the parties began discussing

² Recall, the claims of conversion (Counts 4 and 5) and unjust enrichment (Count 6) against DLM and/or Ultra-Seal were summarily dismissed on or about September 23, 2024 [DLM/US Order, 9/23/24].

formalizing a membership agreement so they could get the equity they had been promised in 2018 [see, Judgment (Part 1), 7/11/2025, pp 7-8]. The evidence is clear that Cerecke did not put Kjos or Meyer off or try to avoid moving forward with formalizing their memberships once Meyer requested same. In fact, when Meyer inquired, Cerecke stated “I’m ready when you guys are.” [Exh 121]. Further, after a couple more months and Cerecke anticipated Boss to be profitable in 2020 [TT Vol 3, pp 596-597], Kjos and Meyer went to Cerecke’s house for a casual meet up to discuss more details of their arrangements. There is no question that on August 26, 2020 at Cerecke’s house, the three partners further negotiated anticipated details to their memberships such that Meyer would become a full-time employee of Boss as President with a salary and benefits, he would move to Michigan, and he would acquire (with Kjos and Cerecke relinquishing) additional shares in Boss, with the first draft of corporate documents being sent shortly thereafter [see, TT Vol 6, p 1439; Exh 90; Exh 93].

As previously found, drafts of the Operating Agreement between the parties were being exchanged between August and November, 2020. It is undisputed that the final version of the Operating Agreement with the repurchase rights provisions was forwarded by Cerecke to Kjos via text on November 9, 2020 [Exh 58(A)]. Importantly, the Court notes again that it was not just the corporate documents being sent to Kjos by Cerecke on November 9th, but as indicated in Exhibit 58(A), Cerecke included the explanation from the Boss attorneys specifically highlighting the fact that there was a revision to the prior version of the Operating Agreement such that now, “if either Lee or Zach are terminated the Company can repurchase their units for the *lesser* of the amount paid to purchase the units or the FMV³.” [Exh 58(A)]. As such, the Court finds that by at least November 9, 2020, Kjos knew or had reasonable opportunity to know of the repurchase rights provisions added to the Operating Agreement.

Similarly for Meyer, it is undisputed that Meyer did not object, raise any concerns or seek modifications to any of the documents either before or even after signing the Membership Interest Purchase Agreement [Exhs 3, 14], Joinder Agreement [Exh 12], and related corporate documents in the fall of 2020, effectuating their respective memberships [see e.g. TT Vol 2, pp 250-251, 256-257, 260, 271-273]. In fact, Meyer had very little recollection concerning if and when he would have reviewed the corporate documents he signed [see e.g. TT Vol 2, pp 256-257, 263-265, 270, 276, 287]. Nevertheless, Meyer does acknowledge that in December 2020, he exchanged emails and personal financial information with Patrick Swem of Honor Credit Union regarding Kjos and

³ FMV = fair market value

Meyer becoming the “two new members” of Boss [TT Vol 2, pp 278-280]. In pertinent part, the emails state:

[Swem] Gentlemen,

First off congratulations on all the success in 2020! In preparation for 2021 we need to get on the same page about **the new ownership structure**, guaranties, and operating lines. In a brief conversation with **Brandon and Zach** Wednesday the general consensus is that you will need operating capital available between \$800,000-\$1,000,000. I’ve copied a list below of all the outstanding items we need from each of you to complete our underwrite for the new operating capital lines. We have Brandon’s information since he was previously the sole holder of all the company’s liabilities. **With the addition of two new owners** you will now be required to supply the same ongoing information annually. . . .

[Meyer] Hey bud,

Here is my hard earned piggy bank. Let me know if I missed anything here or need anything else from me.

[Exh 21 (emphasis added)].

It bears repeating herein that Kjos and Meyer, through the Operating Agreement to which Kjos was clearly a party, and to which Meyer joined and was bound, acknowledged as a Member to Boss that they each “had the opportunity to consult with such Member’s own tax or other advisors with respect to the consequences to such Member of the purchase, receipt or ownership of the Units” and “that none of the Company, its Affiliates, successors, beneficiaries, heirs and assigns and its and their past and present managers, directors, officers, employees, and agents (including, without limitation, their attorneys) makes or has made any representations or warranties to such Member regarding the consequences to such Member of the purchase, receipt or ownership of the Units. . . .” [Op Agr, § 13.10, Exh 8].

Next, Kjos complained that in those initial conversations about their 60-40 partnership that Cerecke did not tell him about DLM; that there would be a separate manufacturing company involved; or that some of the Boss revenue would go to a separate company owned by Cerecke [TT Vol 4, p 927; TT Vol 5, pp 1128; see also, 3rd-Party Pltfs Post-Trial Brf, 1/21/25, ¶¶ 96.c. & 97, p16]. The Court does not find any of these assertions accurate from the evidence. Kjos acknowledged that Cerecke said “I’ll manufacture the shell and you create the brand and do all of the marketing” and the reason the 60-40 split (instead of 50-50) is because Cerecke told him “I have all the money invested in it and I have equipment.” [TT Vol 4, p 927; see also, TT Vol 1, pp 67-

72]. Consistent therewith, the Court finds Cerecke’s testimony credible that he, in fact, did clarify with Kjos early on that:

[T]here were actually two businesses . . . [t]hat there was a manufacturing business and the company that I started. Because of the tax liabilities from ammunition manufacturing, there’s a federal ammunition excise tax that the federal government has in place that is billed out at 11 percent of the first sale of a piece of ammunition.

So I told him that what I was going to do is sell the ammunition wholesale to Boss with low markup to pay the taxes, and then allow Boss to sell the second time to be free of all FAET.

So after I highlighted that, I told him that the company that I started was – it was going to be a long drawn-out process, and I would love to bring him on as an owner of the company, but I laid out the stipulations as to what would preclude that from happening.

* * *

First off, I said it’s a huge investment that I’m taking on. I have got to be able to recapture my expenses. I explained my perspective was if I invested hundreds of thousands of dollars and then I gave him equity with no basis, being that he wasn’t going to put substantial sum of money into the company, I would lose the basis by diluting the ownership out.

I told him that I have been through a partnership before, that you have to be very careful with who[m] you take on as partners. And being that it was my idea and my creation, it was going to be restricted. But at the same time, I knew he was the guy that put Phil Robertson on the box of Federal Ammunition. I knew he was doing work for HEVI-Shot who I deemed to be a competitor to Federal to a much lessor extent because of their size.

That if he would be working or focus more on what we’re doing with Boss than his other work for other clients, then we would be the only ammunition company in his portfolio, that we could really amplify the business and kind of create a synergy of sorts.

* * *

And my thought, the way I felt at the time, he was looking for a really small piece. I saw value in giving a larger share because if he had a larger piece of . . . the ownership, that he would be more committed to do more of the work and really want to make it grow and successful.

[TT Vol 2, pp 412–414]. Kjos also conceded generally that Cerecke “always talked about DLM being for excise tax only and save a certain amount of cents per shell or something and that was the way to do it.” [TT Vol 4, pp 1032-1033].

On cross examination, Cerecke explained in further detail that the discussion of equity in Boss started after Cerecke had asked Kjos for an interim invoice to pay part of the \$75,000 Statement of Work [Exh 115] previously issued from Kjos Outdoors for the branding work, in pertinent part as follows:

[I]t was the second or third time I asked him to give me an invoice for like a pro-rated or a portion of that 75,000 so I could enter it into the accounting software and get everything paid. That's where the discussion of equity came up.

* * *

I told [Kjos] that the investment I was making on **building up the manufacturing capacity in the other company** was getting to be a very large number. . . . I said, "While I'm building all these expenses, I need to make sure I can get you paid so please if you would, send me an [] invoice." . . . So [Kjos] said, "Don't take this the wrong way. I don't want to overstep my bounds, so to speak, but I would like to ask you in trade for me being a hired gun, if I could have a small stake in your company instead of charging you the \$75,000."

* * *

I said that I would be honored to entertain that. I told [Kjos] that I do have concerns of how that would be taking on owners because I have had other partnerships in the past that have not been successful. And I said, "This is all my investment and my idea. It's going to be with boundaries, but if you are fine with how that looks, then I need to make sure the company is going to be profitable so I can take advantage of all of the losses I'm accruing between **both companies**."

[TT Vol 3, pp 589-593 (emphasis added)].

Finally, through the Operating Agreement to which the Court previously found both Kjos and Meyer to be bound, Kjos and Meyer knew, consistent with the above, that Cerecke, as Manager, retained complete management control of Boss. It is necessary to emphasize again that the Operating Agreement expressly provided in pertinent part:

[T]he Manager shall have complete and exclusive control of the management of the Company's business and affairs and the Members shall have no right to participate in the management of the conduct of the Company's business and affairs nor any power or authority to act for or on behalf of the Company in any respect whatsoever. The Manager has the power, on behalf of the Company, to do all things necessary or convenient to carry out the purposes of the Company, including without limitation, the power to:

(b) enter into agreements relating to the operation of the Business

[Op Agr, § 4.1, Exh 8-016].

B. Discussions in 2021

According to Kjos, in the summer of 2021, he had been in the shop working and felt Cerecke was ignoring him so he went up to him, poked Cerecke in the chest, and they eventually went outside for "a chat." [TT Vol 4, p 985]. Kjos testified that the disagreement was regarding Cerecke moving the Boss artwork from Ultra-Seal to Boss. At best, Kjos described it as:

[Cerecke] was going to take care of us on the patent. . . . There was some heavy conversation, personal-type stuff that went on there. He made the claim again about getting out when I wanted to get out.”

[TT Vol 4, pp 999-1000].

Similar to Kjos, Meyer described the heated discussion between Cerecke and Kjos in July 2021, and Meyer having to move them outside by the dumpster after Kjos poked Cerecke in the chest. According to Meyer, at that time Cerecke made assurances as follows:

[Cerecke] said he was going to take care of things, fix things and get with the attorneys, and that was in regards to moving the patent so it was under Boss with our names on it, moving the artwork from Ultra-Seal to Boss.

* * *

It was very emotional. Very emotional.

* * *

[W]e were outside for a long time just talking and it was every range of emotion, and finally got back to the point where everyone got their composure and got it together a little bit where we could actually talk and work through things. I mean it was heavy. It was a lot.

[TT Vol 6, pp 1473-1475]. Meyer testified that Cerecke also said, “We are brothers and we are in it together and here we go.” Meyer described it as “one of those moments where you like you had to be there to like truly feel it.” [TT Vol 6, p 1475]. To highlight, despite all the emotions between them, Meyer described having the sense at the end that it actually “helped everyone understand the general structure or kind of direction of the business. . . .” [TT Vol 1, pp 227-228; see Judgment (Part 1), 7/11/2025, p 16].

There was no showing that Kjos or Meyer took further action as it related to whether the Boss artwork or patent were being transferred from Ultra-Seal to Boss. Rather, as previously discussed, it was business as usual from Kjos and Meyer. That is, Kjos continued to do marketing work and invoice Boss, and/or Boss continued to issue payments to him, through Kjos Outdoors, such as a \$16,548.17 payment in September 2021 for “Advertising and Promotion work, and an additional \$75,000.00 payment that year [Exh 79-001; Exh 41; see Judgment (Part 1), 7/11/2025, p 17].

Interestingly, in September 2021, Cerecke and Meyer complained privately about Kjos’s son, Luke Kjos, asking to get on salary with Boss. It is clear from the discussion that both Meyer and Cerecke thought little of Luke’s contributions to Boss:

[Cerecke] How the F is the luke deal fair? That’s horse sh—man

[Cerecke] If he is worth 60 then we each deserve 60 million

[Meyer] I am going to keep putting more on him and he can take care of all the social. And Move Lee off of it.

[Cerecke] Social media and swag manager. Perfect. When he wants more money Scott can fire him and replace him with another Honor employee.

[Meyer] No f—ing way he is getting more money. That puts a sh—taste in my mouth.

[Cerecke] It does me too.
Its total nepotism.

[Meyer] No time for nepotism with this thing.

[Exh 135-001 (edits for expletives added)].

For Meyer, with no complaints or raised concerns thereafter, it is undeniable that he continued to work and be paid his (\$104,000.00) salary, plus benefits, as President of Boss, and receive reimbursement of various other expenses, as well as, additional fees in the fall of 2021, including a large \$61,538.46 payment on October 28, 2021 for some sort of professional or management fees [Exh 82-001 & 82-002; Judgment (Part 1), 7/11/2025, p 17]. Thus, the Court further finds that despite the heated discussions of July 2021, and the above “very emotional” discussions between Cerecke, Kjos and Meyer, and again without raising any concerns or requests for modifications, Meyer and Kjos still reaffirmed the Operating Agreement and related membership documents in December 2021, when Meyer actually added to his membership shares under such agreements through the exercise of his option to purchase 5% more shares in Boss (for a total of 15% membership in Boss) for \$100,000.00 [Exh 7, Exh 9, Exhs 15-17, Exh 28, Exh 52; TT Vol 2, pp 283-285, 287; TT Vol 6, pp 1436-1438].

Unquestionably, Meyer chose to exercise his option to purchase more shares in Boss without any pressure or rush from Cerecke [TT Vol 2, pp 282-283]. Consistent with the prior corporate documents, Meyer could not recall if he read the December 2021 Notice to Exercise [Exh 7] that he signed, and did not consult with a lawyer, Kjos or Cerecke before he signed it [TT Vol 2, pp 287-288].

C. Discussions of 2022

At the same time, Kjos and Meyer were not unfamiliar with the need and issues surrounding trademarks and copyrights as it related to Boss. For instance, on January 20 and 24, 2022, Cerecke texted Boss CEO, Scott DeFries, with copy to Meyer and then later adding Kjos and his son, Luke,

to the message chain, following up regarding certain copyright activities for one of the Boss lines of shotshells, asking in pertinent part:

January 20, 2022

[Cerecke] Scott where are the lawyers with our copyright stuff?

[Cerecke] Winchester is making a push.

[DeFries] 1:30 call with Attorney today

[Cerecke] So nowhere

[DeFries] We have the list of names and ran them to see what is already taken – will have more info after our call

[Cerecke] What year did we start making Boss Tom?

[Meyer] 19

January 24, 2022

[Meyer] My vote would be to let them sell it for a year and then drop the hammer on them and take them to the cleaners so we can go get all the revenue from their sales.

[Cerecke] Gotta see what the best path forward is. Lets see what the lawyers have to say.

[Exh 134-017 - 134-018].

Again, incorporating that portion of the July 11, 2025 Judgment (see e.g. pp 18-19) regarding the potential sale of Boss, it is still necessary to highlight the trial evidence in more detail for purposes of claims against Cerecke. More specifically, it is noted that after an outside group, Moore Capital, came for a visit and meeting in April 2022 to inquire about purchasing Boss, there were additional discussions between Kjos, Meyer, and Cerecke. However, on May 4, 2022, Kjos, Meyer and Cerecke were texting about how much Cerecke would be considering for some potential value offer on the operations:

[Cerecke] Low side valuation is somewhere around 85M. It only goes up from there. Thats assuming a growth plateau of 6 years at a growth rate of 25% per year using a 5MM profit per year for this year.

[Meyer]⁴ Did they say 85M or is that your calc?

[Cerecke] Thats mine.

⁴ Meyer testified during trial that the reference to “Aaron Mac” in the text messages of Exh 134 is actually Meyer [see, TT Vol 6, 1412].

[Meyer] K

[Exh 134-021].

Then in June of 2022, Kjos testified that he confronted Cerecke about DLM making a profit, and Boss not owning any assets [TT Vol 4, p 1020]. Kjos testified that in response Cerecke said “okay, I’ll move everything over to Boss” and which Kjos took to mean that “if there is DLM and Boss and the patent, everything will be sold at one time and we will all share in the profit per our equity stake in Boss.” [TT Vol 4, pp 1021, 1031]. Kjos testified that around this time, Cerecke directed DeFries to draft up an exclusivity agreement for Cerecke, Kjos and Meyer to sign [TT Vol 4, p 1022; Exh 86]. Meyer similarly testified that he, along with Kjos, DeFries and Cerecke, were present during the June 2022 discussions [TT Vol 6, p 1478].

However, from the June 7, 2022 texts between DeFries, Kjos, Meyer and Cerecke, it appears that Cerecke was no longer as optimistic about the potential sale. They stated in part:

[DeFries] Just to be clear the numbers we were talking tonight were not our actual valuation of the company, wanted to make that clear. . . . Appreciate the candor and chat tonight.

[Cerecke] If he can’t get within 30MM on a valuation he clearly doesn’t know what the f--- he is doing.

I’m over it.

Time to hire Kall and get down to boss sh--.

[Exh 136-002 – 136-003 (edits for expletives added)]. Nevertheless, less than two (2) weeks later, DeFries was asking Meyer if he and Kjos had talked to Cerecke about a new agreement as follows:

[DeFries] How did it go today? Did you guys talk about the agreement?

[Meyer] Went fine. . . Agreement didn’t come up. Lee didn’t mention anything.”

[DeFries] F--- me – this is on the 2 of you – I am not going to push it unless asked [to].

[Meyer] Yep I understand that. Lee said he is the only one to bring it up. We will figure it out. Don’t worry about it. . . .

[Exh 136-003 (edit for expletive added)]. The record evidence shows that whenever Cerecke was later presented with the new exclusivity agreement document, already signed by Kjos and Meyer

[Exh 86], Cerecke refused to sign it and instead made statements about Kjos and Meyer making efforts to buy him out [TT Vol 4, pp 1030, 1033].

In addition to there being no exclusivity agreement signed by all the parties, the Court reiterates its finding that there was also no evidence presented at trial of any offer being tendered by Moore Capital or any other potential purchaser of Boss. More notably, there was no testimony or other evidence from any Moore Capital representative or other credible witness, as to whether any offer made was contingent on the inclusion of assets from DLM, or alternatively, if Moore Capital did not extend an offer because of something relative to what Cerecke allegedly said to Kjos or Meyer. It is undeniable that those negotiations between Kjos, Meyer and Cerecke for a new agreement never came to fruition, and there was no showing of a meeting of the minds as to Kjos, Meyer and Cerecke entering into an exclusivity agreement or otherwise amending the effective corporate documents then in place.

The evidence indicates Kjos, Meyer, and Cerecke again appear for period to have gotten past the disappointment of their discussions in June 2022, with more business as usual between the members. For example, Boss paid Kjos \$75,000.00 on June 15, 2022, and \$39,000.00 in October 2022 [Exh 79-002]. In addition, Kjos and Cerecke both attended the Game Fair in August 2022, and Kjos described the positive event and going out with Cerecke to a gathering of industry “heavy weights.” Upon leaving the party Kjos recalled:

Q: What did Mr. Cerecke say to you?

A: . . . [W]e walked outside, got in the truck and Brandon looked at me, he’s like wow. You know like, what? He goes, man, he goes, I can’t believe how this is going. I never thought anything like this would happen. And then he asked me, he goes, you know, what can derail this?

Q: What was your response?

A: Nothing. Nothing can derail it. Just us. That’s it. It’s a freight train right now. It’s rolling. Just keep feeding the machine now.

[TT Vol 4, pp 1035-1036].

However, despite Kjos’s recall of that positive night at Game Fair with Cerecke, ironically, just a couple months later, rather than “feeding the machine” as Kjos suggested in August 2022, the Court finds that the trial evidence demonstrates that Kjos and Meyer notched a different plan. More specifically, in late September, Kjos and Meyer were again strategizing how to negotiate a new deal with Cerecke for the buy-out of Boss given that another business contact, Pete Angle, had just left his job [Exh 140-017 – 140-018]. Kjos even drafted a version of a text message he

wanted to send Cerecke for Meyer’s review. As indicated, Kjos was going to bring up DLM and that he and Meyer should get the same equity stake in DLM as they have in Boss, as they had discussed after the Moore Capital visit. In his draft text to Cerecke, Kjos made it clear that he understood there was an existing operating agreement, but still wanted a new agreement regarding DLM’s assets:

Hey dude
Thank you guys for the inclusion/transparency on the tax meeting.

* * *

Where are we in regards to our relationship with DLM?
A couple months ago you said we’d make DLM the same equity stake as BOSS.
Has that happened?

* * *

I’m not sure where we stand in comparison to our original agreement. I’m personally not happy with the way things are structured.
I’m quite sure I’ve earned my stake in BOSS.
I’ve given up kjos outdoors to a point it scares the f— out of me an B.
I’m asking you for a new equitable working agreement and date. I can no longer move on in the current arrangement. . . .

[Exh 140-016 – 140-017 (emphasis and edit for expletive added)]. After reviewing it, Meyer advised Kjos not to send the text, but to talk to Cerecke in person because “I don’t think anything good will happen if it is in a text message and will just push him further away.” [Exh 140-016].

In early October, Kjos asked Meyer, “How can we ‘sell’ our shares and then go back in without Brandon?” [Exh 140-011]. The two continued to have behind the scene discussions for several weeks [Exh 140-001 – 140-009]. It merits restating, the Court’s findings that Kjos and Meyer had a clear intent by November 2022 if not before – *i.e.* to take over Boss, including a plan to “Get that piece of [sh--] his money . . . and we’ll run this. Negotiate a new manufacturing agreement and roll. . . . Get as much dirt on Brandon as possible so he’s scared and weakens his position. Then we take over.” [Exh 140 (edit for expletive added); see Judgment (Part 1), 7/11/2025, p 19]. As the strain between the partners became more apparent, on November 22, 2022, Cerecke texted Meyer:

Do you really think I don’t have your best interests at heart?

All this drama and bullsh—is killing me. You know it is too.

Ever time Boss needed money I raked it up. I took the personal guarantees. I had the 2nd mortgages. I had liens on my assets. I finally got the bank to restructure the debt and get it out of my name. That worked for a year. Now I am over a million dollars deep with personal guarantees and the same sh—I sought to avoid overin [sic] DLM. And yet you guys think I’m f—ing you.

That hurts dude. A lot.

Scott told me that DLM shows 1MM in profit or so. I owe 1.2 on a line in sh—that’s for Boss. Powder. Wads. Hulls. There’s 600k in the bank. If I paid you and Lee a Boss equity payout I’d be about 100K upside down. How is that fair? Everyone knew up front the breakdown and how that was set up from Day 1. We held inventory in DLM to help Boss taxes and now that DLM tax year is coming up you want to f--- me by not moving finished inventory over to Boss? That is like playing “Heads I win, Tails you lose.”

* * *

I love you like a brother dude. I think this is why I feel like I do. It f---ing sucks. I never would have encouraged you to move your family to Michigan if I didn’t know it would work for everyone. I encouraged you to pull more salary to cover Em’s so she can raise the kids.

I’m not mad. Don’t take it like that. I just wish that there is a path forward where everyone feels good about the path we are on.

I’m going to leave it to you to figure out. We all know how things will go if Lee comes off the top turnbuckle and I want to avoid that like the plague.

If you guys want me out, just say the word.

[Exhs 126 (edits for expletives added)].

Notwithstanding this apparent plan by Kjos and Meyer (and their potential investors), and Cerecke recognizing Kjos and Meyer wanted to buy him out, importantly, there was no evidence presented at trial that Kjos and/or Meyer, individually or with others, tendered an offer to Cerecke, or that Cerecke accepted an offer, to buy out his shares in Boss and/or his ownership of DLM before their respective terminations from Boss in December 2022, or after for that matter.

III. CONCLUSIONS OF LAW

In light of the incorporated and above factual findings, the Court now turns to the remaining claims at trial asserted by Kjos and Meyer against Cerecke, individually, in the 2nd Amended Third-Party Complaint – member oppression based on fraud (Count I), various fraud claims (Count II), and unjust enrichment (Count VI). Of course, it is well-settled that “the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim.” *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 710-711; 742 NW2d 339 (2007). In this instance, the primary claims against Cerecke sound in fraud, so the Court begins there.

A. Fraud Claims – Count 2

In Michigan, fraud must be established by clear and convincing evidence and is never to be presumed. *Deschane v Klug*, 344 Mich App 744, 750; 2 NW3d 131 (2022). There are essentially three interrelated doctrines of fraud: (1) common law fraud, also known as fraudulent misrepresentation, (2) innocent misrepresentation, and (3) silent fraud, also known as fraudulent concealment. *Titan Ins Co v Hyten*, 491 Mich 547, 555; 817 NW2d 562 (2012); *M&D Inc v WB McConkey*, 231 Mich App 22, 26-27; 585 NW2d 33 (1998). At first glance, Count 2 of the 2nd Amended Third-Party Complaint is entitled “fraud, silent fraud, fraudulent concealment and fraud in the inducement” [2nd Am Compl, Count 2, p 22]. Reviewing the complaint as a whole it is clear that the gravamen of the fraud claims by Kjos and Meyer against Cerecke fall under the theories of common law fraud and/or silent fraud, which includes, in part, their allegations of fraud in the inducement.

For purposes of Kjos and Meyer asserted common law fraud by Cerecke amounting to fraud in the inducement, the Court already largely addressed those specifically as part of its July 11, 2025 Judgment (Part 1). Therefore, it will not repeat the conclusions of law related thereto, and is incorporating same herein by reference [see Judgment (Part 1), 7/11/2025, pp 29-34]. For those same reasons, Kjos and Meyer have failed to demonstrate by clear and convincing evidence that Cerecke made any specific non-hyperbole, material misrepresentations in 2018 through 2020, and also at the July 2021 heated discussions. There was also no showing of bad faith or an intent by Cerecke to induce Kjos and Meyer to enter into the Operating Agreement, and related corporate documents, and/or the later corporate documents when Meyer exercised his option to purchase additional shares from Cerecke and Kjos in December 2021. Additionally, Kjos and Meyer failed to demonstrate that either of them reasonably relied on the alleged statements of Cerecke to their detriment in signing any of those corporate documents.

With that, what remains for this Court’s review and adjudication then are essentially the assertions from Kjos and Meyer at trial (and in post-trial submissions) of: i) silent fraud against Cerecke which allegedly induced them to enter the Operating Agreement, and related membership documents; ii) silent fraud related to discussions in July 2021; and iii) silent fraud and/or fraudulent misrepresentations related to discussion in June 2022. As to the silent fraud, Kjos and Meyer broadly alleged “[w]hat Cerecke intentionally concealed from Kjos and Meyer was that Cerecke intended to pull the rug out from under Kjos and Meyer, squeeze them out, and steal the ‘millions’ from Kjos and Meyer before they would ever receive ‘their money.’” [2nd Am 3rd-P Compl, 8/14/23,

¶ 92, p 23]. Then, post-trial Kjos and Meyer described the allegations of fraud by Cerecke (not fully addressed for purposes of the fraud in the inducement defense to the Boss breach of contract claims) to include a) waiting on becoming members until Boss was profitable; (b) failing to tell Kjos or Meyer that they would need to sign an operating agreement with a repurchase rights provision to obtain their shares in Boss; (c) not telling Kjos that DLM or a separate manufacturing company would be involved in Boss; (d) not telling Kjos that some of the profits from the revenue in Boss shells would go to a separate entity owned by Cerecke; and (e) later promising to move the Boss trademarks into Boss's name [see, 3rd-P Proposed Findings, 1/21/25, ¶¶ 96-99, 106, 108, pp 15-19].

Common law fraud or fraudulent misrepresentation entails a defendant making a false representation of material fact with the intention that the plaintiff would rely on it, the defendant either knowing at the time that the representation was false or making it with reckless disregard for its accuracy, and the plaintiff actually relying on the representation and suffering damage as a result. *Barclae v Zarb*, 300 Mich App 455, 476; 834 NW2d 100 (2013). To prove fraudulent misrepresentation, a plaintiff must show: (1) the defendant made a material representation; (2) the representation was false; (3) the defendant knew it was false or made it recklessly; (4) the defendant intended the plaintiff to rely on it; (5) the plaintiff did rely on it; and (6) the plaintiff suffered damages. *DBD Kazoo LLC v W Michigan LLC*, __ Mich App __, __ NW3d __ (2024) (Docket No. 361299); slip op at 8; see also, MCivJI § 128.01. And recall that the absence of any one of these elements is fatal to recovery under common law fraud. *Titan Ins*, 491 Mich at 555 (quotation marks and citations omitted). “Future promises, which are usually contractual, ‘cannot be the basis of an action for fraud’ because the fraudulent statements must relate to ‘past or existing facts.’” *Deschane*, 344 Mich App at 750–51, quoting *Marrero v McDonnell Douglas Capital Corp*, 200 Mich App 438, 444, 505 NW2d 275 (1993). Further, fraud cannot be perpetrated on a party who has full knowledge that a representation is actually to the contrary. *Titan Ins*, 491 Mich at 555, n 4, citing *Montgomery Ward & Co v Williams*, 330 Mich 275, 284; 47 NW2d 607 (1951). And while there is no duty at common-law to attempt to acquire such knowledge or perform an investigation, a party claiming fraud cannot succeed if given direct information refuting the misrepresentations. *Titan Ins*, 491 Mich at 555, n 4. Said differently, “there is no fraud where means of knowledge are open to the plaintiff and the degree of their utilization is circumscribed in no respect by defendant.” *Coosard v Tarrant*, 342 Mich App 620, 637; 995 NW2d 877 (2022), quoting *Schuler v American Motors Sales Corp*, 39 Mich App 276, 280; 197 NW2d 493 (1972). The Court of Appeals in *DBD Kazoo*, *supra*, even more recently reiterated that “a party’s reliance

on a misrepresentation must still be reasonable, and it does not preclude a finding that a party's reliance will not be reasonable if the party is armed with actual knowledge of facts making any reliance on alleged misrepresentations unreasonable." *DBD Kazoo*, __ Mich App at __; slip op at 9. See also, *UAW–GM Human Resource Ctr*, 228 Mich App 486, 504; 579 NW2d 411 (1998)("Reliance on an oral promise made prior to entering a fully integrated written agreement is per se unreasonable").

Silent fraud is essentially the same as fraudulent misrepresentation, and follows much of the same standards above, except that silent fraud is based on a defendant suppressing a material fact that he was legally obligated to disclose, rather than making an affirmative misrepresentation. *Barclae*, 300 Mich App at 476; see, MCivJI § 128.02. "Thus, while duty is irrelevant in a fraud claim, it is relevant in a silent fraud claim and in order for the suppression of information to constitute silent fraud there must exist a legal or equitable duty of disclosure." *Barclae*, 300 Mich App at 477-478 (brackets, quotation marks and citations omitted). The duty to disclose "may arise by law or by equity; an example of the latter is a buyer making a direct inquiry or expressing a particularized concern. A misleadingly incomplete response to an inquiry can constitute silent fraud." *Id.* at 476. "A fraud arising from the suppression of the truth is as prejudicial as that which springs from the assertion of a falsehood, and courts have not hesitated to sustain recoveries where the truth has been suppressed with the intent to defraud." *Deschane*, 344 Mich App at 751 (quotation marks and citations omitted).

However, to be clear, silent fraud requires more proof than a defendant who failed to disclose something. Rather, there must be a showing that the defendant suppressed a material fact with the intent to defraud and had a legal or equitable duty to disclose it. *Id.*; *Lucas v Awaad*, 299 Mich App 345, 363–364; 830 NW2d 141 (2013). In addition, a plaintiff must show some type of representation by words or actions that was false or misleading and was intended to deceive. *Id.* at 364 (quotation marks and citation omitted).

In *Barclae*, *supra*, the plaintiffs entered into agreement to purchase certain assets of a debtor-printing company, Robot Printing, which had been leveraged as collateral for about \$7 million in loans with a creditor bank, for whom defendant was a senior vice-president. *Id.* at 460. When it came time to proceed with the purchase, plaintiffs did not close because they claimed that a substantial, potentially patentable process had been previously sold as an asset by Robot Printing to pay down some of the debt, and the creditor bank demanded that plaintiffs, in addition to the assets, purchase all the creditor bank's rights (*i.e.* to Robot Printing's debts), including guarantees.

Id. at 460-461. When the plaintiffs sale failed to go through, the creditor bank sold its debt for around \$800,000 to a third party. The plaintiffs sued defendant bank officer alleging fraud and silent fraud by defendant bank officer in large part for failing to disclose to plaintiffs, prior to plaintiffs' purchase agreement being entered, that the key asset had been already sold. *Id.* The Court of Appeals affirmed the trial court summarily dismissing the fraud claims, stating in pertinent part:

Plaintiffs' silent fraud claim must fail for two reasons: they cannot prove that [the defendant] owed them a duty to reveal the information nor can they demonstrate that [the defendant]'s failure to disclose was calculated to defraud plaintiffs. Taking the deposition testimony in a light most favorable to plaintiffs, [the defendant] acknowledged that he was aware that the patented process was important to plaintiffs because plaintiffs believed that the process would generate substantial profits for Robot Printing. That the process was owned by an affiliate of Robot Printing did not keep Robot Printing from utilizing the technology and profiting from it. Additionally, as [the defendant] testified, the bank held an all-asset security interest in Robot Printing, including its intangibles. There is nothing in the record that would indicate that the bank discharged the collateral.

Additionally, plaintiffs cannot demonstrate that their "damages" were the result of the alleged fraud. Before they even met [the defendant], plaintiffs had infused Robot Printing with over \$150,000 in operating capital. Plaintiffs entered into a debt sale contract that required them to purchase accounts receivable that they could not subsequently finance. Their deposition testimony focused on the issue of accounts receivable and whether the bank properly applied Robot Printing's post-April 17 receivables to Robot Defined's operating capital. At no time during Anthony Barclae's or Peter Barclae's deposition do they take issue with "losing" the Robocolor Process. Thus, even if the patented process itself was owned by another company (which was affiliated with Robot Printing), there is no indication from the record that plaintiffs' decision to continuously fund Robot Printing had anything whatsoever to do with the alleged fraud.

Id. at 478-479.

More recently in *DBD Kazoo*, the plaintiff-assignee to a foreclosed \$19 million mortgage loan in a multi-party real estate transaction involving a student housing community near Western Michigan University brought suit, in part, for fraud against the defendant-sellers, their agents, and related others alleging misrepresentations concerning the physical condition of the student housing property, the business and financial affairs of the property, such as tenant delinquencies, and the withholding of such information, which had it been known, would not have resulted in the loan being granted by the plaintiff's assignor, Fortress. *DBD Kazoo*, ___ Mich App at ___; slip op at 1-5. In affirming the grant of summary disposition for the defendants on the fraud claims, the Court of Appeals, quoting *Titan Ins*, 491 Mich at 562, noted that one may not "willfully close his eyes to

that which others clearly see.” *DBD Kazoo*, __ Mich App at __; slip op at 9. Based on the record evidence the Court of Appeal found that during the course of the pertinent transactions of the subject loan and purchase of the property, the requested information and documentation was provided by the sellers and their agents, and there were reasonable opportunities for the plaintiff’s assignor, Fortress, or others on its behalf, to inspect the books, records and the property itself. *Id.* at __; slip op at 10. The Court explained in pertinent part that:

Plaintiff argued to the trial court that the Sellers misrepresented the physical condition. Plaintiff also argued that the Sellers misrepresented the financial condition of the Property by not disclosing tenant delinquencies and bad debt. The record reflects that Fortress had information regarding the physical condition of the Property and its financial condition but chose to ignore it.

* * *

The purchase agreements also made clear that the Sellers made no warranties respecting the physical condition of the Property. The purchase agreement contained the entire agreement of the parties “and no representations, inducements, promises, or agreements, oral or otherwise, between the parties not embodied herein shall be of any force or effect” Fortress had the agreements in its possession and therefore knew or should have known that no representations or warranties of the physical or financial condition of the Property formed the basis of the purchase transaction for its borrower.

* * *

This Court has repeatedly explained that “there can be no fraud where the means of knowledge regarding the truthfulness of the representation are available to the plaintiff and the degree of their utilization has not been prohibited by the defendant.” *Bev Smith, Inc v Atwell*, 301 Mich App 670, 688; 836 NW2d 872 (2013) (quoting *Webb v First of Mich Corp*, 195 Mich App 470, 474; 491 NW2d 851 (1992)). In *Atwell*, this Court explained that, where the plaintiff had documents that disclosed in detail the things about which the plaintiff complained, and had a full and fair opportunity to inspect the vehicle before buying it, but did not do so, “the plaintiff fully possessed the means of discovering the truth or falsity of defendant’s representations, and plaintiff’s ability to utilize these means was never prohibited or impeded by defendant in any way” but chose to ignore it. *Id.* at 689 (citations omitted). This Court held that the plaintiff’s fraud claim failed as a matter of law and the trial court properly granted the defendant summary disposition. That is precisely what happened in the case at bar. Fortress possessed true information that gave it the means of discovering the truth of the alleged misrepresentations. It had accurate information and a full and fair opportunity to inspect the physical and financial condition of the Property. From the inspection reports of the Property and the financial documents provided by the Sellers to SQ, which in turn provided it to Fortress, Fortress possessed the information and had the unimpeded ability to know the truth but chose to ignore it. Fortress, as a matter of law, could not and did not reasonably rely on any alleged misrepresentations by defendants. Plaintiff, as assignee of Fortress, therefore, cannot prevail on its fraud claims.

DBD Kazoo, __ Mich App at __; slip op at 10-12.

Similarly, on the trial court record in this case, the claims of either common law fraud (as it relates to the alleged June 2022 discussions with Cerecke), and/or the whole of the silent fraud claims by Kjos and Meyer have not been proved by clear and convincing evidence. First, as to the remaining common law fraud claim that Cerecke promised Kjos to “move everything over to Boss” and to the extent Meyer overheard that “promise” it is hardly shown to be a material misrepresentation, upon which Kjos, a non-managing member of Boss, could reasonably rely as a clear and definite promise. Recall, *Charter Tp of Ypsilanti v Gen Motors Corp*, 201 Mich App 128, 135; 506 NW2d 556 (1993) (“hyperbole and puffery in seeking an advantage or concession does not necessarily create a promise.”); and *Bodnar v St John Providence Inc*, 327 Mich App 203, 227; 993 NW2d 363 (2019) (“indefinite, equivocal, or not specifically demonstrative of intention respecting future conduct, cannot serve as the foundation for an actionable reliance.”).⁵ Applying the above standards, at best, the trial evidence demonstrates that the June 2022 discussions between Kjos, Meyer and Cerecke were new negotiations for a different or amended membership arrangement than the one then-existing under the corporate documents, which may or may not have facilitated a possible sale of Boss (along with DLM assets) at the time of the Moore Capital visit. By all appearances of the record evidence, the Moore Capital visit and later discussions did not produce a viable offer to sell Boss (and/or DLM). Without any evidence of Moore Capital moving forward with an offer, or what, if anything, was hindering an offer from them relative to Cerecke’s alleged promises to move the patent, trademark or “everything over to Boss,” there is not a sufficient showing of a reasonable reliance or damage arising therefrom.

Next, as to the various allegations of silent fraud, Kjos and Meyer have likewise failed to substantiate their claims through clear and convincing admissible evidence at trial. There is certainly no showing that Cerecke intentionally omitted in 2018 or 2019 that Kjos and Meyer would need to sign corporate documents, such as the Operating Agreement or Joinder Agreement, or that DLM was Cerecke’s separate business for manufacturing ammunition. If anything, as outlined above and previously, there was plenty of information Cerecke provided to Kjos and Meyer for them to know or should have known those things prior to executing the Operating Agreement and/or related corporate documents, especially when it was Meyer who raised the issue of getting formal paperwork in place beginning in June 2020 [see, Exh 122]. Certainly, by signing

⁵ Both these cases and the related discussion were previously addressed more fully in the Court’s prior Judgment (Part 1), 7/11/2025, p 31.

the corporate documents effectuating the operations and membership rights in Boss, there was an acknowledgement, not only that Cerecke was the managing member, and Kjos and Meyer were non-managing members, but that as Manager of Boss, Cerecke could enter into separate agreements in the operation of Boss [Op Agr, § 4.1, Exh 8-016].

Further, as to those discussions occurring after the initial Operating Agreement and/or related corporate documents were executed, Kjos and Meyer have also failed to show a specific legal or equitable duty owed by Cerecke to Kjos or Meyer. All three were experienced in business, all had an opportunity to seek advice of counsel in their respective business dealings, and whether for a potential sale of Boss (and DLM) to Moore Capital, or Kjos and Meyer wanting a new structure to their current express membership arrangement so the two could buy out Cerecke, they were all negotiating at arms-length.

Additionally, as mentioned above, reasonable reliance is an element of all forms of actionable fraud, including silent fraud. See also, *Smith Living Tr. v Erickson Ret Communities*, 326 Mich App 366, 390; 928 NW2d 227 (2018). Here, from the trial record, this Court finds that Kjos and Meyer have also failed to adduce sufficient evidence under the clear and convincing burden of reliance for the alleged fraud arguments. For example, there was simply no evidence that Kjos concerned himself with DLM one way or the other in 2018 through 2020, prior to signing the Operating Agreement, and related corporate documents. Also, Kjos and Meyer undeniably were given or had a reasonable opportunity to acquire copies of the Operating Agreement, and later amendment documents to sign, and from which their business relationship with Cerecke and Boss proceeded for years. All the terms and conditions contained therein, including the repurchase rights provisions, the merger clause, the acknowledgments of reading and/or understanding the documents, etc. were known and/or should have been known to Kjos and Meyer. The fact that Cerecke was the managing member was in those documents. How much equity each member owned effective January 2020 and upon amendment in December 2021, and the fact that Cerecke remained a majority owner, was explicitly addressed in the corporate documents. Even during the time when the parties were discussing the potential sale (e.g. Moore Capital's visit), there were discussions about the multi-millions of dollars Cerecke, as the manager and majority owner of Boss, wanted before considering to sell Boss (and certainly DLM, which was known to be wholly owned by Cerecke). From the evidence presented, there were no viable offers made upon which reasonable reliance could be based.

Moreover, there was nothing in any of the corporate documents ever negotiated between the parties that included any contingent scenario where Kjos or Meyer would gain rights or equity in DLM. The evidence shows that Kjos and Meyer knew that and they, nonetheless, continued content with all the money and benefits of the deal they struck initially becoming members of Boss, and working and/or consulting for Boss, so much so that Meyer obtained more shares in Boss, and Kjos and Cerecke had to relinquish more of their respective equity to make that happen in December 2021. The information surrounding all of Kjos's and Meyer's rights and equities in Boss was available to them. They had the means of discovering the truth regarding DLM, and Boss artwork and trademarks, during any stage of negotiations to join Boss, including the initial corporate documents and later transfer of shares in or about December 2021. They had a full and fair opportunity to conduct their due diligence which Cerecke did not hinder. Just like Fortress, in the *DBD Kazoo* case, when it came to their respective business decisions, Kjos and Meyer "possessed the information and had the unimpeded ability to know the truth but chose to ignore it." See, *DBD Kazoo*, __ Mich App at __; slip op at 12. Kjos and Meyer operated under the deal they struck for months and years, and only became apparently dissatisfied when they wanted even more and didn't want to wait for a sale that was agreeable to Cerecke. They first wanted Boss sold. Then, when that deal did not materialize, Kjos and Meyer wanted all of Boss, and wanted to get rid of Cerecke. Again, there was no evidence of any offers from Kjos and/or Meyer or one of their potential partners, like Paul Angle, to buy out Cerecke's majority share in Boss in late 2022. There was simply no showing of reasonable reliance on alleged representations or omissions to either the detriment of Kjos or Meyer. Count 2 claims for fraud fail.

B. Member Oppression Claim Based Upon Fraud

As the parties will recall, in allowing the above fraud claims of Kjos and Meyer to proceed under a liberal review of their pleadings and finding triable questions of fact from the documentary evidence viewed in a light most favorable to them during the summary disposition challenge, the Court likewise allowed Count 1 for member oppression as it related to fraud to proceed as well [see, Cerecke MSD Order, 9/16/24]. Under MCL 450.4515, a member may bring an action if the acts of the managers or members are "illegal, **fraudulent**, or willfully unfair and oppressive." (emphasis added) For the reasons already discussed previously and here above, Kjos and Meyer have failed to demonstrate fraud by Cerecke, including but not limited to the repurchase rights provision and the creation and maintaining of the business structure. Cerecke's conduct was not shown, by clear and convincing evidence, to be fraudulent

or with bad faith. Consequently, the remaining portion of the member oppression claim (Count 1) fails as well.

C. Unjust Enrichment – Count 6

Lastly, to establish the claim of unjust enrichment against Cerecke (as pled in Count 6), Kjos and Meyer must show that (1) Cerecke received a benefit from Kjos and Meyer, and (2) it would be inequitable for Cerecke to retain the benefit. See, *Belle Isle Grill Corp v City of Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003); *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993). “When unjust enrichment exists, the law operates to imply a contract in order to prevent it.” *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 327-328; 657 NW2d 759 (2002). However, unjust enrichment is not available where an express contract between the parties covers the same subject matter. *Smith Living Trust*, 326 Mich App at 395; *Peabody v DiMeglio*, 306 Mich App 397, 408; 856 NW2d 245 (2014).

Here, the Operating Agreement, joinder, unit, consents and other related corporate documents signed by Kjos, Meyer, and/or Cerecke, and the later amendments thereto, govern the parties’ relationships for their respective work for, membership in, and management of Boss, including what was to happen when Kjos and/or Meyer leave the company. Where there was no finding of fraud that would void the Operating Agreement and remaining corporate documents, there are express contracts covering Kjos’s and Meyer’s rights of recovery. Therefore, as a matter of law, the unjust enrichment claims are barred.

IV. CONCLUSION

In light of the foregoing reasons, and the Court being otherwise advised in the premises, the Court concludes for the 2nd Amended Third-Party Complaint as follows:

IT IS HEREBY ORDERED that on Count 1 for member oppression based upon fraud in the 2nd Amended Third-Party Complaint, upon the findings of fact and conclusions of law by this Court, a judgment of dismissal in favor of Cerecke and against Kjos and Meyer be entered.

IT IS HEREBY FURTHER ORDERED that on Count 2 for the various claims of fraud in the 2nd Amended Third-Party Complaint, upon the findings of fact and conclusions of law by this Court, a judgment of dismissal in favor of Cerecke and against Kjos and Meyer be entered.

IT IS HEREBY FURTHER ORDERED that on Count 6 for unjust enrichment in the 2nd Amended Third-Party Complaint, as an alternative claim, a judgment of dismissal in favor of Cerecke and against Kjos and Meyer be entered.

IT IS HEREBY FINALLY ORDERED that the Court reserves on entry of a final judgment, including a timely request by any prevailing party for allowable taxable costs under

MCR 2.625(A)(1), if any, or have them deemed waived. This provision does not prevent the parties from otherwise timely submitting a stipulation and proposed order for the entry of a final judgment signed by all the parties.

IT IS SO ORDERED. *This is not a final order and does not close the case.*

November 10, 2025
Date

Donna B. Howard
DONNA B. HOWARD (P57635)
Trial Court Judge – Business Docket

Certificate of Service: The undersigned certifies that a copy of the foregoing Opinion and Order was served upon the attorneys and/or parties of record to the above cause by mailing the same to them at their respective addresses as disclosed by the file with postage fully prepaid or interoffice office delivery, if available, and/or email if agreed, on: 11/10/2025.

s// Mica Hutchins
Deputy Clerk/Bailiff