

FILED

JAN 13 2012

**COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON**
By _____

No. 30096-0-III

COURT OF APPEALS,
DIVISION III
OF THE STATE OF WASHINGTON

A.M. TODD COMPANY, INC., a Michigan corporation,

Respondent,

v.

B & G FARMS, INC., a Washington corporation, and
MICHAEL B. BROWN and MARGIE BROWN,
individually and the marital community composed thereof,

Appellants.

BRIEF OF RESPONDENT

John William O'Leary, WSBA # 33004
Attorney for Respondent

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Kennewick, WA 99336
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D. Should AM Todd also be awarded reasonable attorney's fees and costs if it prevails on appeal?

II. COUNTERSTATEMENT OF THE CASE

A. Counterstatement of Facts

A.M. Todd Company, Inc. (“A.M. Todd”) was established in Michigan in 1869 as a provider of mint essential oils and has grown into one of the largest suppliers of American peppermint and spearmint oils for the oral care, confectionary, and chewing gum industries. (CP 63, ll. 20-23)

Michael and Margie Brown of B&G Farms, Inc. (collectively the “Browns”) are farmers in Royal City, Washington, who grew and supplied A.M. Todd with mint oil. (CP 64, ll. 1-2) On or about March 4, 1999, A.M. Todd and the Browns entered into a mint production agreement (the “Agreement”) for the crop years 1999 through 2006 during the term of which (i) the Browns were required to produce a specified number of pounds of choice mint oil; (ii) the mint was to be sold by A.M. Todd with net revenues distributed between the parties; and (iii) A.M. Todd was to finance the Browns mint growing operation. (CP 64, ll. 3-7; CP 67-77)

The Agreement called for the parties to act independently with neither having the right to control the endeavors of the other where it states the following:

Independent Contractor Relationship. Notwithstanding anything to the contrary, neither AMT nor B&G will have any authority to bind the other in any respect and AMT and

B&G will each remain an independent contractor responsible for its own actions.

(CP 74)

The Agreement also contains a choice of law provision that states it shall be governed by and construed in accordance with the internal laws of the state of Michigan without regard to conflicts of law principles. (CP 74)

The Browns had no other lender to cover their portion of the mint production costs. (CP 143, ll. 15-17) A.M. Todd provided them financing and in exchange received a Security Interest and Mortgage to certain of the Browns' personal and real property. (CP 64, ll. 6-9; CP 72) B & G Farms, Inc., Michael B. Brown and Margie Brown executed a mortgage and assignment of rents on certain real property located in Grant County, Washington. (CP 13, ¶ 15) B & G Farms, Inc., as an entity, does not own farm ground. (CP 46, ll. 14-15)

The Browns accumulated debt under the Agreement in all but crop year 2002. (CP 64, ll. 10-12) In the end, the Browns owed a substantial debt to A.M. Todd. (CP 64, l. 15) According to Mr. Brown, after 1999 the mint market flat lined in part due to competition from mint oil producers in China and India. (CP 39, l. 23 to CP 40, l. 23) (*See also*, CP

200, l. 25 to CP 201, l. 5) He attributes his failure to make money under the Agreement to these market forces. (CP 40, ll. 2-5)

Throughout the duration of the Agreement, A.M. Todd provided and reviewed in person accounting statements for all crop years. (CP 64, ll. 16-17; CP 78-91) These detailed accountings provided, among other financial information, the price or estimated price per pound that was realized for the mint oil. (CP 78-91)

The Browns, through Mr. Brown, confirmed in writing the specific amount of debt they accumulated as of February 14, 2003, and again as of January 25, 2005. (CP 64, ll. 16-23; CP 92-93)

The Agreement called for A.M. Todd to deliver to the Browns a report issued by Ernst & Young (or other accounting firm) verifying the annual "AMT participation amount." (CP 70-71) The Agreement defines the "AMT participation amount" as follows:

The excess, if any, of the aggregate revenues generated by AMT from the sale of such oil using the base sale price at which AMT markets and sells such oil, which base sale price excludes any overhead or pass-through charges of AMT, over the price paid by AMT to B&G to purchase such oil.

(CP 69-70) The report was to be based upon procedures mutually acceptable to the parties and each party was to pay one-half of the fees and expenses for the report. (CP 71) However, because the Agreement was

not profitable, the parties agreed not to employ the services of a third party accounting firm given the cost entailed. (CP 201, lls. 16-19)

Mr. Brown never contemplated terminating the Agreement. (CP 39, ll. 11-14) In fact, the parties continued to voluntarily contract with each other for several years and in 2005, for example, they entered into another mint grower agreement. (CP 165-170) Addendum A to that Agreement addresses the Browns' accumulated debt where it specifically states:

This addendum addresses the issue of B&G, Farms Inc. and Michael Brown's ledger balance to A.M. Todd Company for past years production shortfalls of mint oil. This agreement explains and illustrates how the debt will be repaid to A.M. Todd Company by B&G Farms, Inc. from the overage production of peppermint and spearmint oil from acreage under contract to A.M. Todd Company.

(CP 168)

In the big picture, the debt owed to A.M. Todd was small compared to the roughly \$15,000,000.00 the Browns owed to Cenex for the rest of its vast farming operations. (CP 46, ll. 23-25)

In 2007, the Browns obtained an offer for financing of their farming operation, which they perceived as having favorable terms due to the low interest rate. (CP 13, ll. 18-19) The offer was from Rabo Bank and the financing was necessary because the Browns' prior lender, Cenex,

was no longer willing to continue their operating loan. (CP 47, l. 10 to CP 48, l. 5)

The Browns wanted the refinance to be completed by the fall of 2007. (CP 13, ll. 18-19) To enable their refinancing, the Browns required A.M. Todd to withdraw its mortgage securing the Browns' payment under the mint contract. (CP 179, ll. 16-17; CP 65, ll. 2-5) A.M. Todd was not offered a junior lien position. (CP 46, ll. 20-22) A.M. Todd was willing to release its mortgage in exchange for a partial payment of the debt in the amount of \$500,000.00 and in exchange for a Promissory Note in the face amount of \$2,348,125 (the "Note"). (CP 65, 4-9; CP 94-97)

The Browns signed the Note at their farm after they returned from their accountant's office where the Rabo refinancing documents, including A.M. Todd's mortgage release, were finalized. (CP 201, l. 26 to CP 202, l. 7)

Interest was to accrue on the principal amount of the Note at the rate of 7.25 percent per annum from November 9, 2007. (CP 65, ll. 9-11; CP 94) The Note called for annual payments of \$600,000.00, plus decreasing payments of interest on December 1 of each year from 2008 to 2011. (CP 65, ll. 11-13; CP 94-97) If any of the annual payments were not paid, the Note provides that A.M. Todd is entitled to accelerate the entire outstanding balance of principal and interest, and the Note also

provides for a default rate of interest of 12 percent. (CP 65, ll. 14-17; CP 94-97)

The Browns relied heavily on their accountants in negotiating the terms of the Note. (CP 45, ll. 9-14) Mr. Brown did not play a significant role in negotiating the Note with A.M. Todd. (CP 48, l. 18 to CP 49, l. 7) Most of that business was conducted by the Browns' office manager, attorney and accountants. (CP 48, l. 18 to CP 49, l. 7) The Browns relied on the judgment of those individuals. (CP 49, ll. 1-2)

Mr. Brown states the duress alluded to in the Browns' Answer to A.M. Todd's Complaint (CP 14, ll. 2-4) was that absent the Rabo refinancing, the Browns would have been "liquidated." (CP 41, ll. 19-24)

According to Farrah Wardenaar, the Browns' office manager, the urgency was created by Cenex revoking their operating line, making the Rabo refinance necessary for their continued farming. (CP 47, l. 19 to CP 48, l. 5) The other source of financial pressure the Browns felt at that time resulted from shortfalls between their row crop contract prices and the ultimate market price for crops such as wheat and corn. (CP 54, l. 20 to CP 55, l. 3)

When it came to signing the Note, Mr. Brown was happy and upbeat because he saw the Rabo refinancing and the Note as an end to his debt problems. (CP 202, lls. 8-9)

The Browns are in default under the terms of the Note for failing to make any of the scheduled installment payments. (CP 65, ll. 17-19) The Browns attribute their failure to make the payments simply due to a shortfall in cash. (CP 56, ll. 1-4) After their default, the Browns asked if the Note could be rewritten to allow them more time to make payments, but at the same time did not argue about the debt they owed. (CP 202, lls. 10-12) (*See also*, CP 56-57)

A.M. Todd accelerated the entire balance of principal and interest. (CP 65, ll. 19-21) There is currently due and payable on the Note the principal sum of \$2,337,421.00 plus default interest at the rate of 12 percent per annum from December 1, 2008. (CP 65, ll. 20-24)

The Note allows A.M. Todd to recover attorney's fees and costs incurred to enforce it:

The undersigned agree to pay the Holder hereof any and all costs and expenses, including reasonable attorney's fees, accounting fees and expert witness fees incurred by the Holder hereof in protecting or enforcing their rights under the terms of this Note whether or not a lawsuit is commenced. Attorney's fees and such costs and expenses shall include services and such costs and expenses rendered at both the trial and appellate levels, as well as services and such costs and expenses rendered subsequent to judgment in obtaining execution thereon. The award of such fees, costs, and expenses shall bear interest at the default rate provided herein.

(CP 95)

B. Counterstatement of Procedure

On March 29, 2010, A.M. Todd filed its Complaint on Promissory Note in the Benton County Superior Court, alleging that after repeated demand, the Browns had failed and refused to pay the amounts owing under the Note. (CP 1-10)

On June 4, 2010, the Browns filed their Answer and Affirmative Defenses to Complaint on Promissory Note, which raised no counterclaims and alleged that the Note was void by virtue of duress at the time it was signed. (CP 11-14)

Following disclosures of witnesses and discovery, A.M. Todd noted this matter for summary judgment (CP 22) which was argued in open court on June 24, 2011, before Judge Vic L. Vanderschoor (RP 1-13). Judge Vanderschoor awarded A.M. Todd summary judgment, concluding “[g]iven the evidence before the Court I think it’s appropriate to grant summary judgment.” (RP 11, ll. 20-21)

The Browns filed their Notice of Appeal on July 21, 2011. (CP 216)

III. RESPONSE ARGUMENT

A. Standard of Review

It was proper for Judge Vandeschoor to award summary judgment in order to avoid a needless trial in this case. “CR 56(c) directs a court to

grant summary judgment to a moving party ‘if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.’” *Tran v. State Farm Fire & Cas. Co.*, 136 Wn.2d 214, 223, 961 P.2d 358 (1998). The appellate court reviews summary judgment decisions *de novo*, engaging in the same inquiry as the trial court. *Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 77 (1985). The appellate court examines the pleadings, affidavits, and depositions before the trial court and takes the position of the trial court. *Owen v. Burlington N. & Santa Fe R.R. Co.*, 153 Wn.2d 780, 787, 108 P.3d 1220 (2005). Summary judgment is appropriate “if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c).

“A material fact is one that affects the outcome of the litigation.” *Owen*, 153 Wn.2d at 789. While generally a question of fact is left to the jury, when reasonable minds could reach only one conclusion, questions of fact can be determined as a matter of law. *Id.* Further, a party may not rely on speculation or having its own affidavits accepted at face value. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1

(1986). Instead, it must put forth evidence showing the existence of a triable issue. *Id.* Ultimately, the “purpose of summary judgment is to avoid a useless trial.” *Christiano v. Spokane County Health Dist.*, 93 Wn. App. 90, 93, 969 P.2d 1078 (Div. III, 1998). Here the trial court appropriately considered the pleading, affidavits and depositions and concluded that summary judgment was appropriate given the evidence before it. The purpose of summary judgment, to avoid a needless, and costly trial, was realized.

B. A.M. Todd is entitled to judgment on the Note because it was prepared in response to the Browns’ demand that A.M. Todd release its mortgage, and because the Browns repeatedly acknowledged they owed the debt but nonetheless failed to pay any of the installment payments called for by the Note.

A.M. Todd is entitled to judgment on the Note because the Note was properly executed and the Browns defaulted on their obligations. There is no dispute the Browns signed the Note and thereafter failed to make the scheduled installment payments. A.M. Todd’s calculation of the Note balance with interest to the date of judgment, is uncontested. Given this simple factual scenario A.M. Todd is entitled to the judgment it was awarded by Judge Vanderschoor.

1. The facts do not support a defense of duress through business compulsion where A.M. Todd applied no pressure on the Browns, but instead facilitated the Browns’ refinancing arraignment with its new

lender through the negotiations that gave rise to the Note and Mortgage release.

The Browns are not entitled to relief from the Note under a theory of duress. At its heart, this lawsuit presented a simple claim: the Browns executed the Note in exchange for an installment payment schedule and release of collateral and, thereafter, they have failed to make the Note's annual installment payments. In response to this case, the Browns, for the first time, have concocted a claim that the Note was signed under duress which should release them from any responsibility for the substantial debt they have repeatedly admitted they owe. It should not be forgotten that it was at the Browns' request A.M. Todd provided a payoff amount so an agreement could be reached resulting in A.M. Todd releasing its collateral to make way for the Browns' new lender. The financial pressure the Browns felt at that time was imposed by (1) Cenex revoking the Browns' operating loan; (2) economic trouble resulting from shortfalls in revenue from their row crops such as wheat and corn (not mint); as well as, (3) the requirements of clear title to collateral demanded by their new lender, Rabo. These factors were outside A.M. Todd's control.

Far from a situation that could have amounted to duress for the Browns, the arm's length negotiations with A.M. Todd regarding the Note and Mortgage Release were conducted by the Browns' accountants and

representatives and the Note itself was voluntarily signed by the Browns at their farm *after* the Rabo refinancing paperwork was executed and after A.M. Todd provided the mortgage release. Had the Browns actually felt duress at the time the Note was presented to them, they could have rejected it. There was ample time for them at that point to pursue any legal claims for the accounting they now claim is necessary. They did not do so and have simply concocted non-existent defenses in this case to delay the inevitable.

Washington's version of the Uniform Commercial Code states the right to enforce obligations under the terms of a negotiable instrument is subject to certain defenses, including duress, "which, under other law, nullifies the obligation of the obligor." RCW 62A.3-305(a)(1)(ii). Under Washington contract law, "A party to a contract which he has voluntarily signed cannot, in the absence of fraud, deceit, or coercion be heard to repudiate his own signature." *Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket, Inc.*, 96 Wn 2d 939, 944, 640 P.2d 1051 (1982) (despite the defendants notation on the contract and belief of a possible failure of good faith bargaining, the court refused his attempt to repudiate his voluntary signature). "Generally, circumstances must demonstrate a person was deprived of his free will at the time he entered into the challenged agreement in order to sustain a claim of duress." *Retail Clerks,*

96 Wn.2d at 944-45. The Browns can point to no facts in support of an argument they were deprived of their free will when the Note was signed.

As a species of duress, the defense of business compulsion, as alleged in this case, involves involuntary action where one is compelled to act in a manner that either he suffers a serious business loss or he is compelled to make a monetary payment to his detriment. *Barker v. Walter Hogan Enters., Inc.*, 23 Wn. App. 450, 452, 596 P.2d 1359 (1979). However, a business obligation is not voidable simply because it was incurred under stress. *Nord v. Eastside Ass'n Ltd.*, 34 Wn. App. 796, 798, 664 P.2d 4 (1983) (holding that even though the defendant was facing financial stress, the defense of business compulsion was not available to it in an action to enforce a promissory note where the note resulted from intensive negotiations through the parties' legal representatives). Rather "it has been said wisely that contracts made under stress are a daily occurrence, and if such urgency is to affect their validity, no one could safely negotiate with a party who finds himself in difficulty by virtue of financial adversities." *Barker*, 23 Wn. App. at 452-453. Therefore, the necessary elements of a defense of business compulsion are that the allegedly offending party applied the immediate pressure and also caused or contributed to the underlying circumstances which led to the victim's vulnerability. *Barker*, 23 Wn. App. 453. Here, any financial strain or

pressure the Browns felt at the time they entered into the Rabo refinancing package resulted from factors such as failings in wheat and corn crops, and Cenex's revocation of operating financing, which were beyond A.M. Todd's control. In that sense, this case is similar to *Barker* where the court found the underlying vulnerability of the plaintiff was caused by a normal and expected termination of a 10-year lease term along with pressures imposed by a third party buyer, not the defendant. *Id*

The Browns claim they signed the Note without feeling satisfied with A.M. Todd's accounting. This does not state a defense.

In order to substantiate the allegation of economic duress or business compulsion, the plaintiff must go beyond the mere showing of a reluctance to accept and of financial embarrassment. There must be a showing of acts on the part of the defendant which produced these two factors. The assertion of duress must be proven by evidence that the duress resulted from defendant's wrongful and oppressive conduct and not by plaintiff's necessities. The mere fact that a contract is entered into under stress of pecuniary necessity does not constitute business compulsion.

Puget Sound Power & Light Co. v. Shulman, 84 Wn.2d 433, 443, 526 P.2d 1210 (1974) (rejecting a claim of business compulsion despite the debtors' desperate financial position). Here A.M. Todd was a mere witness to the larger financial negotiations undertaken between the Browns' representatives and Rabo in response to Cenex's decision to revoke operating financing.

In reality, when it came time for the Browns to refinance their vast farming operation, they were not particularly concerned about the face amount of the Note, nor were they willing to offer A.M. Todd additional collateral or more than a fractional payment on the amount owed. The obligation they owed A.M. Todd was minor compared to the \$15,000,000.00 they owed Cenex. A.M. Todd merely financed the Browns' mint farming under the 1999 Agreement and until this lawsuit was filed, A.M. Todd had not sought enforcement of the Browns' obligation to pay the debt. Meanwhile, over the years the Browns acknowledged the debt and the parties worked in various ways to facilitate the Browns' payment of it; the 2005 growing contract (CP 165-170) constituted one such example. Otherwise, for all intents and purposes, this account remained idle and hardly could have contributed to the financial pressure the Browns claim at the time the Note was executed. A.M. Todd played a tertiary role at best during the refinancing negotiations, and simply lacked the bargaining power to impose the undue pressure the Browns now attribute to it.

In the end, it was the Browns who applied pressure on A.M. Todd for it to release its Mortgage. Not surprisingly, A.M. Todd was not willing to become an unsecured creditor, unless the Browns executed the Note with a payment schedule to provide some assurance of repayment.

This arraignment allowed the Browns to farm another day and to date escape any further payment owed to A.M. Todd. This was a good deal all around for the Browns and not one that arose from duress or business compulsion.

2. The Agreement did not create a joint venture because the parties expressly stated their intentions to carry out their separate obligations as independent contractors.

The Agreement specifically stated the parties had no authority to bind one another and were to remain independent contractors responsible for their own actions. The Browns devote significant attention in their appellate brief to arguing the Agreement, despite unambiguous and express language to the contrary, constituted a joint venture. By definition, parties who intend to act independently of one another do not intend to act jointly; bound at the hip as agents with liability for the other's actions, as would be the case in a joint venture rather than the independent contractual relationship the parties created.

Joint venture members are vicariously liable for each other's acts. *Adams v. Johnston*, 71 Wn. App. 599, 610, 860 P.2d 423 (Div. III, 1993) *amended on denial of reconsideration*, 869 P.2d 416 (1994).

Joint ventures are not created by operation of law. They arise by express or implied contract. In addition, a joint venture does not arise unless there is (a) a common purpose and intention to act as joint venturers; (b) a community of

interest, and (c) an equal right to a voice accompanied by an equal right of control. Other indicia of a joint venture include the right to share in profits, a duty to share in losses, and a joint proprietary interest in the subject matter.

(internal citations omitted) *Adams*, 71 Wash. App. at 611. “Joint adventurers, being governed by the law of partnerships, are each the agent, and by the same token, the principal of the others. Each, therefore, having the right of control over the others, *as a matter of law*, imputed negligence may be invoked against joint venturers.” *Poutre v. Saunders*, 19 Wn.2d 561, 566, 143 P.2d 554 (1943). Furthermore, a joint venture agreement “presupposes that each of the parties has an equal right to a voice in the manner of its performance, and an equal right of control over the agencies used in its performance.” *Moen v. Zurich Gen. Acc. & Liab. Ins. Co.*, 3 Wn. 2d 347, 351, 101 P.2d 323 (1940). Here the Agreement gave rise to a contractual relationship under which the Browns grew mint and processed it into oil, which was then supplied to A.M. Todd for sale. A.M. Todd had no right of control over the farming operation and the Browns had no right to control the marketing of the oil. Further, the Agreement gave rise to a debtor-creditor relationship under which the Browns were financed in their mint farming operation by A.M. Todd, which in turn was granted a security interest and mortgage in collateral owned by the Browns. A

debtor-creditor relationship is an arm's length business relationship, not an agency relationship giving rise to fiduciary duties.

The mere fact that the Agreement called for sharing proceeds and splitting costs cannot override their stated intention to not operate jointly, but rather as independent contractors.

An independent contractor, on the other hand, may be generally defined as one who contractually undertakes to perform services for another, but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in performing the services.

Hollingbery v. Dunn, 68 Wn. 2d 75, 79-80, 411 P.2d 431 (1966).

Relationships such as that between employers and employees or with independent contractors are therefore "not compatible with the equal sharing required between joint venturers." *Adams*, 71 Wash. App. at 612. As stated above, the parties' *intent* to act as joint venturers is critical for establishing such a relationship. Their stated intent was to remain independent from one another, which relationship is not compatible with the concept of a joint venture.

Such is the legal analysis under Washington law, but the Agreement also states it is governed by Michigan law. Under Michigan law the results would be the same because, as in Washington, the intention of the parties is critical.

Whether the parties to a particular contract have thereby created, as between themselves, the relation of joint adventurers or some other relation, depends upon their actual intention, and such relationship arises only when they intend to associate themselves as such. This intention is to be determined in accordance with the ordinary rules governing the interpretation and construction of contracts.

(internal citations omitted) *Goodwin v. S.A. Healy Co.*, 383 Mich. 300, 309, 174 N.W.2d 755 (1970). Here, rather than creating a joint venture, the parties expressed their intention to be independent contractors. The definition of an independent contractor under Michigan law is recognizable to a Washington practitioner.

An independent contractor is one who, carrying on an independent business, contracts to do a piece of work according to his own methods, and without being subject to control of his employer as to the means by which the result is to be accomplished, but only as to the result of the work. Generally the circumstances which go to show one to be an independent contractor, while separately they may not be conclusive, are the independent nature of his business, the existence of a contract for the performance of a specified piece of work, the agreement to pay a fixed price for the work, the employment of assistants by the employee who are under his control, the furnishing by him of the necessary materials, and his right to control the work while it is in progress except as to results.

Hyslop v. Klein, 85 Mich. App. 149, 155-56, 270 N.W.2d 540 (1978).

Again, the creation of such an independent contractor relationship, with the inherent right of exclusive control over the work performed, is by nature the antithesis of a joint venture. *See, Denny v. Garavaglia*, 333

Mich. 317, 52 N.W.2d 521 (1952) (Where two contractors were associated under contract with the state highway department to construct a road, and payment was to be made to them jointly but neither contractor had control over work done by the other, the parties did not intend to create a joint venture). Again the Agreement was one under which A.M. Todd provided financing for the Browns' mint farming, and the Browns sold mint oil to A.M. Todd. Neither controlled the others work and nothing more should be made of this relationship than an arm's length business endeavor.

3. The parties operated independently under the Agreement and therefore did not owe fiduciary duties to one another

Under a typical contractual relationship, the parties owe each other the obligation to operate at arm's length, not with the fiduciary obligations suggested by the Browns. The parties stated intention to be independent in their respective contractual obligations does not create the fiduciary relationship the Browns ascribe to the Agreement.

“The general rule that parties to a business transaction deal at arm's length and do not enter into a fiduciary relationship.” *Annechino v. Worthy*, 162 Wash. App. 138, 145, 252 P.3d 415 (2011). The Browns' contention that A.M. Todd owed a fiduciary duty of loyalty has no merit. Further, the breaches of loyalty they allege have no basis in fact.

A.M. Todd *provided* annual accounting statements, which contained the price per pound of the oil sold. The Browns' contentions to the contrary are false. The parties agreed nothing more was required when early on they determined that retaining Ernst & Young would be too costly. This arrangement was consistent with the Agreement because it specifically stated the manner of accounting would be conducted in a way agreed upon by the parties. During the many years of continued contractual relations between them, the Browns never contemplated legal action to enforce any provision of the contract, or contest the accounting they now allege was insufficient.

The Browns also allege a breach of the fiduciary duty of loyalty where Mr. and Mrs. Brown were requested to individually sign the Note. The Note was a product of negotiation. It was signed after A.M. Todd had already released the mortgage and assignment of rents executed by B&G Farms, Inc., Michael Brown and Margie Brown. It is, therefore, logical that A.M. Todd would also request that Mr. and Mrs. Brown personally sign the Note, since B&G Farms, Inc., itself does not own farm ground and, thus, it presumably had little value. Negotiating the Note under these terms was the kind of logical arm's length business arraignment that would be expected of a creditor under the circumstances.

4. Cenex, not A.M. Todd, created the financial pressure that necessitated release of A.M. Todd's mortgage and the Browns signatures on the installment Note.

The financial pressure, if any, facing the Browns at the time of the Rabo negotiation was caused by shortfalls in their row crops such as wheat and corn, as well as, Cenex's decision to revoke operating financing. It was not caused by A.M. Todd, which to that point had for years attempted to work with the Browns to devise a manner in which the substantial debt the Browns owed to A.M. Todd could be paid. Nonetheless, late in their brief, the Browns return to their duress argument by citing *Inter-Tel, Inc. v. Bank of America*, 985 P.2d 596 (Az. App. 1999) and *Litten v. Jonathan Logan, Inc.*, 220 Pa.Super. 274, 286 A.2d 913 (1971) arguing A.M. Todd caused their economic vulnerability. Both of these cases are easily distinguishable, however.

In *Inter-Tel*, summary judgment was reversed because triable issues of material fact existed whether a release was executed under duress. The plaintiff in *Inter-Tel* claimed the defendant created its severe financial hardship by wrongfully placing its account into its Special Assets Department, knowing that such action would preclude plaintiff from finding another lender. *Inter-Tel*, 195 Ariz. at 117. The court observed that duress can arise when the allegedly wrongful act of a party is the very

thing that created the other party's financial difficulty. *Id.* In vacating the lower court's order of summary judgment, the appellate court found as follows:

There is enough evidence of an improper motive to preclude summary judgment. Inter-Tel was not having difficulty paying its debts, and there is evidence that the bank thought Inter-Tel's account was in satisfactory condition . . . If the bank placed Inter-Tel's account in the Special Assets Department for purposes unrelated to Inter-Tel's ability to pay the debt, and if the bank knew that placing the account in the Special Assets Department would be harmful to Inter-Tel, such conduct could be found wrongful by a reasonable fact finder.

Inter-Tel, 195 Ariz. at 118. Aside from the obvious fact that, as an Arizona case, *Inter-Tel* is not controlling here, the Browns provide no factual basis to contend A.M. Todd took any wrongful action, like the bank's unwarranted action in placing *Inter-Tel* into its special assets division. The Browns can make no causal link between their erroneous allegation that A.M. Todd failed to provide accounting under the 1999 Agreement and the financial pressure imposed by Cenex and Rabo in 2007. In order for there to be duress, there has to be an improper threat. 25 Wash. Prac., *Contract Law And Practice* § 9:16. The Browns can point to no such threats here. As previously stated, to overcome summary judgment a party cannot rely on speculation, but rather must put forth

evidence of a triable issue. The Browns, in attempting to draw an analogy to *Inter-Tel*, are asking this Court to rely on mere speculation.

Litten is also distinguishable. There, the Pennsylvania court found the plaintiffs would have done fine financially had it not been for the fact the “defendant had put them into an inexorable financial crisis that” compelled them to sign the subject agreement. *Litten*, 220 Pa.Super. at 281. Here by sharp contrast, A.M. Todd, as a creditor, was owed a mere fraction of the Browns’ total debt load. AM. Todd was at the time merely a spectator. As the Browns state, the financial pressure they may have felt was brought about by Cenex’s refusal to continue operation lending. When given the opportunity to explain the duress he alleges, Mr. Brown and his office manager, Mrs. Wardenaar, point to these and other market forces, but not to A.M. Todd. The disconnect between the financial pressures they felt and A.M. Todd’s involvement in negotiating the Note, makes the *Litten* case inapplicable.

Unlike *Inter-Tel* and *Litten*, the Washington case of *Nord* is factually analogous to this one. There, the defendants appealed a judgment against them for the balance they owed on a promissory note. The plaintiff was the defendant’s manager and a shareholder. *Nord*, 34 Wash. App. at 797. The other shareholders became dissatisfied with his management and demanded he step down. *Id.* The plaintiff threatened

litigation and the prospect of corporate bankruptcy unless he made a satisfactory sale of his stock. *Id.* Negotiations resulted in a note that became the subject matter of the lawsuit. *Id.* As in this case, the defendants requested relief from their financial obligation by arguing business compulsion. As here, the court in *Nord* observed that there was “evidence in the record tending to prove that factors other than plaintiff’s activities cause the vulnerability of [the defendant]” *Nord*, 34 Wash. App. at 799. Rejecting the defendant’s argument that the plaintiff breached fiduciary duties owed as a director and majority shareholder, the court observed that both the plaintiff and the defendant were represented by counsel and negotiated before reaching an agreement. *Id.* This case is no different. The record shows Mr. Brown left the negotiations of the note to his manager and accountants. The note was negotiated and signed after A.M. Todd had released its mortgage. With *Nord* as guidance, such a scenario does not give rise to business compulsion.

At the time the Rabo refinancing negotiations took place, A.M. Todd could have demanded payment in full for release of its mortgage. It did not. Instead, it was only through A.M. Todd and the Browns’ accountants restructuring the debt under the terms of the Note that the Browns were able to continue farming. The defense has taken A.M. Todd’s facilitation of the Browns’ very financial survival and contorted it

into an argument of overreaching. There were not threats and the Browns are presumed to have the requisite firmness to have negotiated an arm's length agreement with A.M. Todd.

C. The Browns' request for an accounting does not state a defense to the Note because they have long since waived a claim for accounting and their signature on the Note constitutes an account stated.

A request for an accounting is not a defense to the Browns' liability on the Note. First, as has been repeatedly pointed out, annual accounting statements were provided. Further, the Browns have had years to pursue a claim for accounting, if they were so inclined. They also had an opportunity to file a counterclaim in this lawsuit for an accounting. They did not. Instead, for years the Browns have repeatedly acknowledged the debt they owe A.M. Todd. They did so in February 14, 2003, and again in January 25, 2005. (CP 64, ll. 16-23; CP 92-93) In 2005, they also entered into a new mint contract which specified the parties' intent to facilitate the Browns' payment of the substantial debt they had accumulated. (CP 168) Finally, they voluntarily signed the Note in 2007. Their actions created an account stated from which they cannot now escape responsibility.

The Browns argue entitlement to an accounting as a recoupment against AM Todd's claim on the Note. RCW 62A.3-305(a)(3).

“Recoupment is the setting up of a demand arising from the *same transaction* as the plaintiff’s claim or cause of action, strictly for the purpose of abatement or reduction of such claim.” *In re Madigan*, 270 B.R. 749, 754 (B.A.P. 9th Cir. 2001). In modern practice, the term “recoupment” is defined as taking the form of a compulsory counterclaim. BLACK’S LAW DICTIONARY 1302 (8th ed. 2004). Court Rule 13 states the following rule with regard to compulsory counterclaims:

A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

CR 13(a). While the Browns’ Answer asserts their dissatisfaction with A.M. Todd’s accounting practices (CP 13), they raised no such counterclaim for accounting or recoupment. The right to a setoff, in the form of recoupment or otherwise, must be plead. RCW 4.32.150. The Browns did not do so and should be precluded from raising the issue on appeal.

The Browns rely on *Sauget v. Johnston*, 315 F.2d 816, 818 (9th Cir. 1963) and *Gleason v. Metro. Mortgage Co.*, 15 Wash. App. 481, 551 P.2d 147 (1976), to support their demand for an accounting. However, both of those cases involved dissolution litigation where a party specifically sued

for an accounting. *Sauget* involved a suit following a dispute among joint venturers where the plaintiff sued for dissolution and an accounting. *Sauget*, 315 F.2d at 817. Similarly, *Gleason* involved litigation brought to establish a joint venture or partnership and for an accounting of the profits derived from the operation and sale of an apartment complex. *Gleason*, 15 Wash. App. at 482. The Browns here argue the parties were joint venturers governed by the same rules applicable to partnerships. If that were the case, the Browns all along could have maintained a legal action for the purpose of asserting a breach of the partnership agreement and for an accounting, had they chosen to do so. RCW 25.05.170.

Defense argues it preserved the claim for accounting in their answer, citing CR 54(c) and *Kelley v. Powell*, 55 Wash. App. 143, 147-48, 776 P.2d 996 (1989). However, at issue in *Kelley* was the plaintiff's entitlement to damages beyond those specifically plead for in its otherwise properly plead cause of action for unlawful detainer. *Kelley*, 55 Wash. App. at 145. Citing CR 54(c) the court held "relief in *litigated cases* may exceed the amount requested in the complaint, so long as the plaintiff complies with all applicable provisions of the unlawful detainer statute." *Kelley*, 55 Wash. App. at 149. The rule and cited cases are inapplicable here because the Browns never commenced an action for recoupment or

accounting. The flexible rules regarding relief afforded by CR 54(c) have no bearing on the outcome of this case.

The Browns had the opportunity to seek any manner of relief, either through a contract action, declaratory judgment action, or presumably an accounting lawsuit, but they chose not to do so. Instead, the Browns repeatedly acknowledged the debt before eventually signing the Note for a sum certain. Their repeated acknowledgment of the debt creates an account stated:

The Restatement (Second) of Contracts § 282(1) (1981) defines an account stated as “a manifestation of assent by debtor and creditor to a stated sum as an accurate computation of an amount due the creditor.” The Restatement explains further that “[a] party's retention without objection for an unreasonably long time of a statement of account rendered by the other party is a manifestation of assent.” An account stated does not of itself operate to discharge any duty. Rather, it is an admission by each party of the facts asserted and a promise by the debtor to pay the sum indicated. Restatement (Second) of Contracts § 282(2) (1981).

Sunnyside Valley Irr. Dist. v. Roza Irr. Dist., 124 Wn.2d 312, 315, 877 P.2d 1283 (1994). The Browns voluntarily executed the Note and their history of acknowledging the debt cements an obligation for which they have no defense.

D. A.M. Todd was entitled to a judgment for its attorney’s fees and costs because the Note provides for such a recovery in any action undertaken to collect the amount owed.

The American Rule, applicable in this state, dictates that attorney fees are recoverable by the prevailing party as costs of litigation if the recovery of such fees is permitted by contract, statute, or some recognized ground in equity. *City of Sequim v. Malkasian*, 157 Wn.2d 251, 284, 138 P.3d 943 (2006). Further, a provision in a contract that allows attorney's fees in an action to collect payment due under the contract includes fees for the trial court action as well as fees incurred on appeal. *Granite Equipment Leasing Corp. v. Hutton*, 84 Wn.2d 320, 327, 525 P.2d 223 (1974). Here, the Note allows A.M. Todd to recover fees and costs incurred in enforcing its terms, including those fees and costs incurred by plaintiff for this appeal. Therefore, the trial court was correct to award a judgment for fees and costs.

E. Request for Attorney's Fees on Appeal

RAPs 7.2(d) and 18.1 provide for attorney's fees on appeal if permitted by applicable law. As stated above, applicable law allows A.M. Todd to recover attorney's fees and costs in its efforts to enforce the Note. It, therefore, requests that this Court require the Browns to pay all costs of A.M. Todd's defense of this appeal, including its attorney's fees.

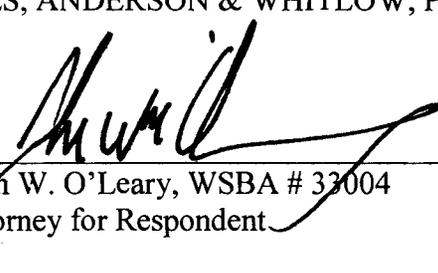
III. CONCLUSION

Respondent, A.M. Todd Company, Inc., respectfully requests the Court affirm the trial court judgment and also award it reasonable attorney's fees for defense of this appeal for the reasons given above.

DATED this 12th day of January, 2012.

HAMES, ANDERSON & WHITLOW, P.S.

By: _____


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