IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 30254

UHRE REALTY CORPORATION and UHRE PROPERTY MANAGEMENT CORPORATION

Plaintiffs and Appellants,

v.

BENJAMIN TRONNES and LESLIE TRONNES

Defendants and Appellees,

Appeal from the Circuit Court, Seventh Circuit
Pennington County, South Dakota

The Honorable Joshua K. Hendrickson
Circuit Judge

APPELLANTS' BRIEF

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Notice of Appeal filed February 9, 2023

Filed: 6/13/2023 3:32 PM CST Supreme Court, State of South Dakota #30254

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PRELIMINARY STATEMENT

Appellant Uhre Realty Corporation will be referred to as "URC." Appellant Uhre Property Management Corporation will be referred to as "UPM." Appellants will be collectively referred to as the "Uhre Entities" or "Appellants." Appellee Benjamin Tronnes will be referred to as "Benjamin." Appellee Leslie Tronnes will be referred to as "Leslie." Appellees will collectively be referred to as the "Tronneses" or "Appellees." Non-party David Pifke will be referred to as "Pifke." Pennington Title Company will be referred to as "Pennington Title."

References to the settled record will be designated as "SR." References to the transcript for trial will be designated as "TT." References to the transcript for the motions hearing on Appellees' motion for summary judgment will be designated as "MT." References to trial exhibits will be designated as "Tr. Ex." References to Appellants' appendix will be designated as "Uhre App."

JURISDICTIONAL STATEMENT

Appellants appeal from (1) the Judgment dated January 6, 2023, which incorporates the Findings of Fact and Conclusions of Law dated December 8, 2022, and entered, filed, and recorded on January 6, 2023, and noticed on January 10, 2023, and (2) the interim Order Granting in Part and Denying in Part Defendants Benjamin and Leslie Tronnes' Motion for Summary Judgment dated April 12, 2022, entered, filed and recorded on April 13, 2022, and noticed on April 21, 2022. The Notice of Appeal was filed February 9, 2023.

STATEMENT OF LEGAL ISSUES

I. The Circuit Court Erred When It Denied URC's Claims for Breach of the Listing Agreement and Declaratory Judgment.

The circuit court erred when it entered findings of fact that were clearly erroneous in denying URC's claims for breach of the listing agreement and an accompanying claim for declaratory judgment. The circuit court also erred when it entered mistaken conclusions of law on those same issues.

- *Garrett v. BankWest, Inc.*, 459 N.W.2d 833, 841 (S.D. 1990)
- *Mehlberg v. Redlin*, 96 N.W.2d 399 (S.D. 1959)

II. The Circuit Court Erred When It Granted the Tronneses Motion for Summary Judgment on UPM's Claim for Breach of the Management Agreement.

The circuit court improperly weighed and resolved genuine issues of material fact regarding the Tronneses motion for summary judgment on UPM's claim for breach of the management agreement.

- *Garrett v. BankWest, Inc.*, 459 N.W.2d, 833, 841 (S.D. 1990)
- *Upell v. Dewey Cnty. Comm'n*, 2016 S.D. 42, 880 N.W.2d 69

III. The Circuit Court Erred When It Awarded the Tronneses Attorneys' Fees Under the Listing Agreement.

The circuit court erred when it interpreted the Listing Agreement in contravention of the plain language contained therein and awarded the Tronneses attorneys' fees.

- *Lillibridge v. Meade School Dist. #£46-1*, 2008 S.D. 17, 746 N.W.2d 428
- *Stern Oil Co., Inc. v. Brown*, 2018 S.D. 15, 908 N.W.2d 144

INTRODUCTION

This case relates to the sale of a residential home. The Tronneses hired UPM to manage and lease the property and hired URC to list the residential home for sale and lease. The listing agreement between URC and the Tronneses contained a termination date and a 180-day tail period. URC procured David Pifke as a tenant for the home and UPM then signed him to an 18-month lease. During the term of the lease, the Tronneses secretly discussed selling the home with Pifke and then on the 181th day after the tail period began, the Tronneses agreed to sell the home to Pifke and refused to pay URC a commission and refused to pay UPM any of the amounts owing on the remainder of the 18-month lease.

URC and UPM brought claims against the Tronneses for breach of a listing agreement and breach of a management agreement. The Tronneses brought a claim against URC and UPM for tortious interference with the closing scheduled at Pennington Title.

On April 12, 2022, the circuit court granted the Tronneses' motion for summary judgment on UPM's claim for breach of contract. On October 11, 2022, the parties appeared at a one-day court trial with three witnesses appearing in the following order: Joshua Uhre, David Pifke, and Benjamin Tronnes. Both parties made oral motions for directed verdict that were denied. After the trial, the Court solicited proposed findings of fact and conclusions law from the parties as well as written objections thereto[1]. The

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[1] Appellants and Appellees served proposed Findings of Fact and Conclusions of Law on November 11, 2022. Appellants did not file their proposed Findings of Fact and Conclusions of Law. However, Appellants' Findings of Fact and Conclusions of Law can be reviewed in full within Defendants' Objections to Plaintiffs' Proposed Findings of Fact and Conclusions of Law, as they are set out therein. Uhre App. 0083. Appellants are happy to supplement the record if necessary.

circuit court entered findings of fact and conclusions of law and denied all claims between the parties, concluding that the Tronneses did not breach the listing agreement and the Uhre Entities did not tortiously interfere with Pennington Title.

STATEMENT OF THE FACTS

The full factual background is set forth in detail in Appellants' proposed findings of fact. ¶¶ 1-157. Joshua Uhre ("Uhre") is the owner and President of two South Dakota corporations engaged in business in the realty industry: Plaintiffs Uhre Realty Corporation ("URC") and Uhre Property Management Corporation ("UPM"). TT 6:25-7:4; 21:18-22. Sometime in 2014, the Tronneses were referred to Uhre by attorney Jeff Hurd for the purpose of assisting them with finding a residential home in Rapid City, South Dakota. TT 10:24-11:7. Uhre assisted the Tronneses with purchasing residential real property located at 1319 12th Street, Rapid City, South Dakota (the "Property").[2] TT 11:16-20.

Years later around mid-2019, the Tronneses reached out to Uhre and asked him to assist with leasing and/or selling the Property because they were moving to Colorado for an employment opportunity. TT 17:4-18:21. URC and UPM began doing business again with the Tronneses primarily for the management, leasing, and listing of their residential real property located at 1319 12th Street, Rapid City, SD 57701 (the "Property"). TT 16:17-17:10. In 2019, URC entered into an Exclusive Listing Agreement with the Tronneses in 2019 for the sale or leasing of the Property, and UPM entered into an

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[2] Uhre testified that the process in closing on the purchase of the Property was difficult because of the sellers at the time. Uhre testified that he took a pay cut on his commission in order to facilitate the transaction for the Tronneses. TT 12:12-14:20. Uhre testified that his relationship with the Tronneses was "excellent" at the time. TT 14:18-20.

Agreement to Manage and Lease Real Estate in the event of any leasing of the Property. The Tronneses were "highly motivated" to sell the Property, but were interested in leasing the Property in the event the Property was not selling. TT 27:22-28:10.

The Management Agreement

On August 16, 2019, the Tronneses executed an Agreement to Manage and Lease Real Estate ("Management Agreement") with UPM for the Property. Uhre App. 00012; TT 21:18-22:6.[3] The Management Agreement commenced on August 16, 2019, and the initial term expired on September 1, 2020, and automatically renewed for "annual periods unless terminated by either party giving 30-days' written notice to the other party in advance of such termination date." *Id.* Under the Management Agreement, UPM was "employ[ed] exclusively to rent, lease, operate and manage the Property." *Id.* The Management Agreement compensated UPM at 10% of the gross monthly rent plus tax upon the "consummation" of negotiations for a lease agreement. *Id.* Such compensation was "due and payable on demand" and could be deducted by UPM from gross receipts. *Id.*[4]

The Listing Agreement

On April 29, 2020, the Tronneses executed an Exclusive Listing and Agency Agreement ("Listing Agreement") with URC.[5] Uhre App. 00002. Uhre specifically

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[3] URC and the Tronneses also executed an Exclusive Listing and Agency Agreement with a start date of September 10, 2019. Tr. Ex. 53; TT 16:17-22.

[4] Uhre secured tenants for a year from 2019 to 2020. Tr. Ex. 54. This lease is not at issue in the lawsuit.

[5] This was the second consecutive Exclusive Listing and Agency Agreement. It was identical to the first one executed in 2019. Tr. Ex. 53; TT 22:7-28:4. The first is not addressed in the factual background because it is not at issue.

signed on behalf of URC. *Id.* The Listing Agreement designated URC as the exclusive listing agent for the sale of the Property, and had an effective start date of May 1, 2020, and an expiration date of October 31, 2020, with a 180-day tail period until April 29, 2021. *Id.* at 1. The Listing agreement provided that if the Property were sold, including "any exchange, trade, lease or option to purchase to which the [the Tronneses] consent[ed]", URC was entitled to 5% of the total selling price plus all applicable sales tax (its "professional fee"). *Id.* at 2. More specifically, URC was entitled to its professional fee if a purchaser was *procured* by URC, a cooperating broker, the Tronneses, or any other person for a price $475,900.00 or at any price the Tronneses accepted, or if the Property was "exchanged or optioned" during the term of the Listing Agreement and the option was later exercised. *Id.* Further, the Listing Agreement incorporated a standard "tail period" that entitled URC to its professional fee "if within 180 days after the expiration of [the Listing Agreement], the [P]roperty was sold to any person to whom the [P]roperty was shown[.]" *Id.* Accordingly, the last day of the tail period according to the agreement was April 29, 2021. *Id.*

The Lease

On or around July of 2020, David Pifke ("Pifke")[6] expressed interest in the Property through the real estate marketing website Trulia and submitted an application. TT 34: 18-25; 102:22-103:10; 104:21-15:3. The Trulia listing did not indicate that the Property was available for leasing. TT 35:1-3. Initially, Pifke's girlfriend, Alethea, reached out to Uhre in June 2020. TT 33:1-4. Uhre testified that he discussed the topic

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[6] Pifke was dismissed as a party-defendant from this lawsuit on April 12, 2022. SR 689 (Order Granting Defendant Pifke's Motion for Summary Judgment, filed April 12, 2022).

of purchasing the Property during the showing with Pifke. TT 34:15-17; 105:4-12. Uhre testified that Pifke was a good candidate to purchase because of his income and credit stated on the application. TT 33:23-34:5. Pifke testified that he liked the Property, was interested in living in Rapid City, but wanted to test a South Dakota winter before committing. TT 104:12-105:12.

On August 1, 2020, Uhre forwarded a copy of a draft lease agreement to Pifke for his review. Tr. Ex. 5; TT 35:14-36:12. Uhre explained to Pifke that the Tronneses "probably wouldn't list it again until June 1" and that "if you like the house while living in Rapid City, we can alway[s] work a deal at any time." Tr. Ex. 4. Pifke asked Uhre if the Tronneses would be willing to agree to neither listing nor show the Property during an 18-month lease term because he was interested in purchasing the Property. Tr. Ex. 4 at p.2. Uhre e-mailed the Tronneses that same day and asked, "[l]et me know your thoughts on the 18 month option." *Id.* The Tronnes Defendant agreed to "keep the [P]roperty off market for 18 months" for an additional $2,100.00 in rent a year. Tr. Ex. 8. Pifke responded, "[t]hat's agreeable to us. Appreciate you working with us on it!" Tr. Ex. 9.

On August 3, 2020, Pifke entered into a Residential Real Estate Lease for the Property with UPM (the "Lease") for a monthly rent of $2,725.00 and an 18-month term from October 1, 2020, through April 1, 2022. Uhre App. 00014. Pursuant to negotiations, the Lease included the following provision: "SALE OF PROPERTY. Owner agrees to hold property off market until February 1, 2022 or 60 days of the termination of lease and not take showings." *Id.* at 00020. The Lease did not permit Pifke or the Tronneses to terminate the Lease prior to the initial 18-month term. *Id.* Instead, Pifke was allowed to terminate "the lease with a minimum of 60 calendar days

written notice after the initial term" or by mutual termination with "Lessor"—UPM. *Id.* Additionally, "[i]n the event of early termination, [Pifke] is required to pay $2,725.00, or the remaining balance of the lease agreement, whichever is more, as an early termination fee." *Id.* at 2. The Lease was signed by Pifke, the Tronneses, and Uhre. *Id.* Uhre signed on behalf of both UPM and URC per the typewritten signature block labeling him as the "Owner/Broker" for "Uhre Realty & Property Management." *Id.* Pifke began residing at the Property Lease on October 1, 2020. *Id.* at 00014.

The Purchase

Uhre, on behalf of UPM and URC, remained involved in management of the Property and efforts to sell the Property to Pifke. Pifke testified that once he started living at the Property, he felt "pressure" to purchase the Property. TT 115:1-12. On November 6, 2020, Leslie sent Uhre a text message that stated: "So second week in December you'll get them to sign contract for deed or buy the house?!?" Tr. Ex. 59. On November 22, 2020, Benjamin sent Uhre a text message that stated: "Did you have the chance to discuss a possible purchase?" *Id.*

On December 4, 2020, Uhre e-mailed Benjamin explaining he would reach out Pifke to "see what his thoughts are on purchasing." Tr. Ex. 20. That same month, Pifke told Uhre he was interested in purchasing, but would not do so until sometime in 2021. Tr. Ex. 24. Pifke testified that because he had a lease for 18 months, "there wasn't a whole lot of urgency on my part." TT 127:6-11.

In January of 2021, Tronnes, without providing any advance notice to Plaintiffs or Pifke, showed up at the Property, which surprised Pifke. TT 117 12-25. Pifke testified that Benjamin told them they were interested in selling the Property and would like to sell it to him. TT 118:7-18; Tr. Ex. 23. Tronnes e-mailed Pifke, on January 23, 2021, and

stated in part: "[a]s we discussed, we'd love it if you bought our home from us. We plan on listing the house again this spring for $499,000. If we can do this without a realtor, we could sell to you for $475,000." Tr. Ex. 23. Four days later, Uhre e-mailed Pifke and asked if he had "made a decision on purchasing?" Tr. Ex. 24. Pifke responded on the same day and said his earlier position remained unchanged. *Id.* Pifke testified that nothing changed after the meeting with the Tronnes and that he considered it more of the same conversation that had been occurring since he moved into the Property. TT 122:25-123:10.

Receiving no response to his first e-mail, Tronnes again e-mailed Pifke on February 3, 2021, and stated, in part: "I don't mean to put a lot of pressure on you, but just getting this back to the top of the inbox. We'd love to get something put together to get a deal done. Let us know what you are thinking." Tr. Ex. 26. Pifke responded the next day writing that he needed "to free up some cash for a down payment before an offer is realistic. As we discussed, the soonest I can do this will be later this year. I know y'all are anxious to sell, so I'll keep you updated." *Id.* One month later on March 4, 2021, Tronnes responded to this e-mail in part stating:

> Leslie and I have discussed this . . . . Our intent is to sell the house to you, but as noted, . . . it would really help us if we can get this one off the books . . . . Our offer continues to stand – we would sell to you for $475,000 up to May 1. We then plan to list it for $499,000 at that time

Id. Pifke responded the next day stating, "I will do whatever I can to find financing sooner, but your May 1st deadline seems at odds" with the Lease's Sale of Property provision and that, "I would not have moved but for the above agreement, which I thought was negotiated in good faith." Tr. Ex. 27. Responding the same day, Tronnes wrote: "[y]ou are right. My apologies. We will discuss that with [Uhre]." *Id.* Tronnes,

however, did not discuss the issue with Uhre. Pifke testified that this made him "worried" and "a little angry" because it "sounded like they were intending to breach the lease." TT:128:16-20.

Pifke testified that he felt like he was working against a May 1 deadline or else the Tronneses would breach the lease. TT 130:23-131:17. On April 30, 2021, the day immediately after 180-day tail period expired according to the Listing Agreement, Pifke replied directly to Tronnes' very first e-mail on January 24, 2021, and wrote, "I'm pleased to be able to present the attached offer, to purchase the house from you for $500,000." Tr. Ex. 29. On May 3, 2021, Pifke and Tronnes agreed to a Counteroffer with minimal changes to the initial offer, the same purchase price of $500,000, and to terminate the Lease upon closing. Tr. Ex. 31. The Purchase Agreement was dated April 30, 2021. *Id.*

Pifke testified that once the Property was under contract, "[i]t felt like a relief." TT 135:2-8.

Appellants were not included, in any capacity, on any of the foregoing communications nor were they apprised of the same at any point during. Appellants first became aware of the agreement on May 4, 2021, when Tronnes sent Uhre an e-mail stating: "I just wanted to let you know that we've entered into a private sales agreement with our tenants and plan to close on June 1. We will be terminating the property management agreement at that time. We really appreciate all the help with this property over the years." Tr. Ex. 60.

The Closing

On May 20, 2021, Uhre e-mailed a representative of Pennington Title Company ("Pennington"), the title company helping close Pifke's purchase, and wrote in part, "I

believe I am entitled to my professional fee of 5% of the purchase price plus tax as the procuring cause." Tr. Ex. 34. Uhre also provided relevant excerpts from the Management Agreement, the Listing Agreement, and the Lease. *Id.* The ALTA Settlement Statement from Pennington identified a 5.00% commission in the amount of $25,000.00, a 6.50% sales tax on commission and a transaction fee of $200.00 all due to URC. Tr. Ex. 49. Thereafter, URC demanded the Tronneses pay their professional fee under the Listing Agreement.

ARGUMENT

This is an appeal of an order granting a motion for summary judgment. Summary judgment is only proper when 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 judgment as a matter of law. SDCL § 15-6-56(c). Summary judgment is an extreme remedy, which is not intended as a substitute for trial. *Discover Bank v. Stanley*, 2008 S.D. 111, ¶ 19, 757 N.W.2d 756, 761. In adjudicating a motion for summary judgment, the circuit court must consider the evidence in the light most favorable to the non-movants and all reasonable inferences drawn from the facts must be made in non-movants' favor. *Richards v. Lenz*, 539 N.W.2d 80, 83 (S.D. 1995).

I. The Circuit Court Erred When It Denied URC's Claims for Breach of the Listing Agreement and Declaratory Judgment.

URC is entitled to a commission under the Listing Agreement for any one of three reasons: (1) Pifke was "procured" as a purchaser during the term of the Listing Agreement, (2) Pifke exercised an "option" to purchase, or (3) the Tronneses breached the covenant of good faith and fair dealing. The circuit court erred when it adopted in

full the Tronneses proposed findings of fact and conclusions of law finding otherwise. The circuit court adopted all proposed findings of fact, and adopted all proposed conclusions of law except for the section regarding the Tronnes' claim for tortious interference. The circuit court's findings of fact regarding procuring cause are clearly erroneous and the conclusions are incorrect as a matter of law.

URC's claims for breach of the listing agreement and declaratory judgment that URC is entitled to a commission involve the exact same facts and law and, therefore, will be addressed together in this section. Findings of fact are reviewed under the clearly erroneous standard. *Mettler v. Williamson*, 424 N.W.2d 670, 671 (S.D. 1988). Conclusions of law reviewed de novo and are clearly reviewable. *Permann v. S.D. Dep't of Labor, Unemployment Ins. Div.*, 411 N.W.2d 113, 116-17 (S.D. 1987).

A. Pifke was "Procured" as a Purchaser During the Term of the Listing Agreement.

First, Pifke was "procured" as a purchaser during the term of the Listing Agreement. The circuit court generically concluded that no purchaser was procured during the term of the Listing Agreement and, therefore, no commission was owed thereunder. Uhre App. 00037 at COL ¶¶ 21-22. However, the circuit court did not include any analysis for the definition of "procure" nor any reasons for why Pifke was not "procured" during the term of the Listing Agreement.

URC proposed to the circuit court comprehensive law, analysis, and conclusions for how and why Pifke was procured during the term of the Listing Agreement, all of which were rejected by the circuit court. *See* Uhre App. 00105-0011 (COL at ¶¶ 2-26). Because the circuit court's analysis is so lacking in analysis regarding perhaps the most central issue at trial regarding "procurement," it is admittedly difficult to understand what the circuit

court's reasoning was for determining that Pifke was not procured during the term of the Listing Agreement. *See Repp. v. Van Someren*, 2015 S.D. 53, ¶ 10, 866 N.W.2d 122, 126 ("Findings must be entered with sufficient specificity to permit meaningful review.") ("We cannot meaningfully review the trial court's decision without the trial court's reasons for ruling the way it did."). URC's proposed conclusions regarding procurement should have been adopted by the circuit court.

"An action for breach of contract requires proof of an enforceable promise, its breach, and damages." *McKie v. Huntley*, 2000 S.D. 160, ¶ 17, 620 N.W.2d 599, 603. "A breach of contract claim is allowed even though the conduct failed to violate any of the express terms of the contract agreed to by the parties." *Garrett v. BankWest, Inc.*, 459 N.W.2d 833, 841 (S.D. 1990) (citation omitted).

The first element of the breach of contract claim was satisfied when the Tronneses made an enforceable promise to pay a commission to URC if a "purchaser" was "procured" for the Property "by [URC], by any other cooperating broker, by the Seller, or by any other person during the term of [the Listing Agreement] . . . ." Uhre App. 00003. URC[7] was the "procuring cause" of originating Pifke as a purchaser of Property. The term of the Listing Agreement was May 1, 2020, with an expiration on October 31, 2020, with a 180-tail period to April 29, 2020. Importantly, however, the circuit court was incorrect in its interpretation of the Listing Agreement when it concluded that "URC would be entitled compensation if, during the term of the Listing Agreement, a purchaser was procured for the Property *and an offer was accepted by the Seller*." Uhre App. 00026-27, 00037 (FOF at ¶ 22; COL ¶ 21)

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[7] To the extent UPM or Uhre, individually, were the procuring causes during the term of the Listing Agreement, it would make no difference. The Listing Agreement simply requires that a purchaser be procured by anyone during the term of the Listing Agreement. Uhre App. 00003.

(emphasis in original). The Listing Agreement includes no such language requiring acceptance of an offer. Instead, the relevant language is as follows:

> If a purchaser is procured for the property by the Broker, by any other cooperating broker, by the Seller, or by any other person at the price and upon the terms stated above, or at any other price or upon any other terms accepted by the Seller during the term of this Agreement[.]

Uhre App. 00003. This provision simply requires that "a purchaser is procured for the property" upon the terms of the Listing Agreement "during the term of this Agreement." *Id.* There is no language in the provision requiring that an *offer* be made during the term. "Procuring" a purchaser is different than receiving and accepting an offer.

"In order to ascertain the terms and conditions of a contract, [the Court] must examine the contract as a whole and give words their plain and ordinary meaning." *Coffey v. Coffey*, 2016 S.D. 96, ¶ 8, 888 N.W.2d 805, 808-09 (quoting *Gloe v. Union Ins. Co.*, 2005 S.D. 30, ¶ 29, 694 N.W.2d 252, 260) (internal quotation marks omitted). The Court does not "interpret language in a manner that renders a portion of the contract meaningless." *Id.* (quoting *Tri-City Assocs., L.P. v. Belmont, Inc.*, 2014 S.D. 23, ¶ 11, 845 N.W.2d 911, 915). "Instead, [the Court] interpret[s] the contract to give a reasonable and effective meaning to all its terms." *Id.* (quoting *Tri-City Assocs., L.P.*, 2014 S.D. 23, ¶ 11, 845 N.W.2d at 915) (internal quotation marks omitted).

It is appropriate to rely upon dictionary definitions when a term is not defined in a contract. *See, e.g., Ass Kickin Ranch, LLC v. North Star Mut. Ins. Co.*, 2012 S.D. 73, ¶ 12, 822 N.W.2d 724, 727-28 (relying upon Merriam-Webster's online dictionary); *Matter of Certification of Question of Law from United States District Court, District of South Dakota, Central Division*, 2021 S.D. 35, ¶ 18, 960 N.W.2d 829, 835-36 (relying upon Black's Law Dictionary, among other dictionaries); *Coffey*, 2016 S.D. 96, ¶ 13 n.1, 888

N.W.2d at 810 n.1 (relying upon The American Heritage College Dictionary).

The term "procure" is not defined in the Listing Agreement.[8] The Black's Law Dictionary defines "Procure" as: "1. to obtain (something), esp. by special effort or means; 2. To achieve or bring about (a result)." Similarly, Merriam-Webster's online dictionary defines "Procure" as: "to bring about or achieve (something) by care and effort."

"Procuring cause," as it relates to brokers, is defined in 12 C.J.S. Brokers § 258 as follows:

> As used in that branch of the law relating to brokers' commissions, the terms "procuring cause," "efficient cause," and "proximate cause" have substantially, if not quite, the same meaning and are often used interchangeably. A broker is the procuring cause of a sale when the broker originates or causes a series of events which, without a break in their continuity, result in the accomplishment of the prime object of the employment, which is, usually, to procure a purchaser ready, willing, and able to buy on the owner's terms. A broker is the procuring cause of a sale when the broker originates or causes a series of events which, without a break in their continuity, result in the accomplishment of the prime object of the employment, which is, usually, to procure a purchaser ready, willing, and able to buy on the owner's terms. Pursuant to a brokerage agreement or an implied brokerage agreement, a broker must with diligence and fidelity provide substantial services to the principal/vendor or purchaser which services become a substantial causal predicate to a consummated sale for the broker to be entitled to a commission. Thus it has been said that "procurement," within the meaning of the rule requiring a broker to procure a purchaser ready, willing, and able to buy from the seller, is defined as the broker's efforts which are the efficient cause, but not necessarily the sole cause, of a series of unbroken, continuous events, which culminate in the accomplishment of the objective of his employment.
>
> In order to be regarded as a procuring cause of a sale, a broker must show that he called a potential purchaser's attention to the property and that it was through the broker's continuous efforts in negotiations that the sale was consummated, without a substantial break in the negotiations. An alternative statement provides that a broker is the effective agent, or the

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[8] The circuit court concluded the Listing Agreement was unambiguous and all parties agreed. Thus, there is no need to construe the Listing Agreement against any one party. With that said, URC does contest the finding of fact, if necessary, finding that "URC was the drafter of the Listing Agreement." Uhre App. 00026 (FOF ¶ 20). Like the Management Agreement, the Listing Agreement was a form document provided by the Black Hills Association of Realtors. TT 19:19-20:6. This was unrebutted by the Tronneses. In fact, the Listing Agreement states at the very top: "Black Hills Association of Realtors®". Uhre App. 00002.

> procuring cause, when the broker is the first broker to interest the prospective purchaser in the property, when the broker causes such purchaser to inspect or view the property, and when the broker conducts negotiations concerning a sale thereof with the prospective purchaser. Another statement provides that a broker is the procuring cause of a sale and entitled to the commission if his intervention is a foundation upon which negotiations are begun. However, a broker may earn a commission when he is the effective cause of a sale which the broker is authorized to sell and it is not necessary that the broker participate in the final negotiations leading to the sale. Under this standard, a broker "procures" a buyer within the meaning of a listing agreement if the broker informs the customer of the property under the agreement and leads the customer to the seller.

Id. (footnotes omitted).

This Court has defined "procuring cause" as: "one originating a series of events which, without break in their continuity, result in the accomplishment of the prime object of the broker's employment." *Mehlberg v. Redlin*, 96 N.W.2d 399, 401 (S.D. 1959) (explaining, "[i]n the absence of a special contract, to earn a commission a broker must be the 'procuring cause' of a sale consummated by his principal."). Further, "[a]n agent is an 'effective cause,' . . . when his efforts have been sufficiently important in achieving a result for the accomplishment of which the principal has promised to pay him, so that it is just that the principal should pay the promised compensation to him.'" *Id.* (quoting Restatement of Agency 2d, § 448, Comment a).

In *Mehlberg v. Redlin*, the South Dakota Supreme Court recognized that a broker was a procuring cause when his "preliminary activity" of undertaking the "effort and expense of establishing a market place to which . . . . purchasers of real property would be induced to resort" put the seller and purchaser in the office. *Id.* The Court explained that "the direct contribution made by [the broker] the consummation of the sale . . . was to lodge in the mind [of the purchaser], who made inquiry for rental property for immediate occupancy, that [the broker] has [the seller's] newly constructed cottage for sale." *Id.*

Here are the relevant, uncontested facts in the record. Josh Uhre, who the circuit court did not find lacked any credibility, testified he listed the Property for sale and that Pifke discovered it through an online advertisement on Trulia. TT 34:18-25; 102:22-103:10; 104:21-15:3. Uhre personally responded to the inquiry from Pifke, arranged for a showing, and then personally showed the Property to Pifke. TT 34:15-17; 105:4-12. At the showing, Uhre told Pifke the intent was to sell the Property. TT 34:15-17. Pifke negotiated an 18-month lease that precluded the Tronneses from selling the Property during the lease term. Tr. Exs. 3-15. Pifke, who the circuit court specifically found was credible, testified that he had expressed a possibility of purchasing the property prior to leasing the Property. TT 95:24-96:10; *see also* TT 105:4-12. On August 1, 2021, Pifke sent an e-mail to Uhre stating, in part:

> "Perhaps with an 18-month term instead, so that it would coincide with the Spring, in the event we don't move forward as the purchaser."

Tr. Ex. 4 (emphasis added). Pifke testified about this e-mail at trial and agreed that he was "expressing the possibility of becoming a purchaser." TT 95:24-96:10; *see also* TT 105:4-12. Uhre e-mailed Pifke and let him know he had the option to purchase the Property at any time. Tr. Ex. 6. Pifke signed the 18-month lease. Uhre App. 00014. After that time, Uhre continuously inquired with Pifke about purchasing the Property. Tr. Ex. 20.

As such, the circuit court's findings of fact downplaying his interest in the purchase of the Property by stating that Pifke was "specifically looking for a rental home" and he "did not intend to purchase the Property" are clearly erroneous in light of the credible testimony from Pifke, which was corroborated by Uhre, that Pifke was looking for a home to rent in the interim and, potentially, eventually purchase. Uhre App. At 00027 (FOF ¶¶ 28, 30). As explained above, Pifke acknowledged, *in writing*, his contemplation of purchasing the

Property as early as August 1, 2021, prior to when the lease was even executed.

Pifke testified that as soon as he started living at the Property after he moved in on October 1, 2020, he felt "pressure" to purchase the Property. TT 115:1-12. Indeed, Uhre continued to communicate with Pifke about purchasing the Property. Tr. Ex. 20, 24. During this time, the Tronneses continued to ask Uhre, even after October 31, 2020, to try and effectuate a sale of the Property. Tr. Ex. 59. Pifke testified that the Tronneses did not add anything new in their conversations with him that was not already expressed since day 1 by Uhre. TT 122:25-123:10.

These efforts to advertise the Property to Pifke, meet with him, place him in the Property, restrict the listing of the Property, and then continue to discuss purchasing the Property—all occurring prior to the end of the term of the Listing Agreement on October 31, 2020—set up the dominoes that would ultimately lead to Pifke purchasing the Property. That was the conclusion that was discussed at all times between Uhre and the Tronneses. Uhre testified that Pifke was a good candidate to purchase, and the Tronneses continued to communicate to Uhre to keep trying to sell the Property to him.

In the end, Pifke purchased the Property, which was always the plan for Uhre and the Tronneses, and was always a possibility for Pifke. Uhre brought about this specific result due to his special efforts. Black Law Dictionary (defining "Procure"); Merriam Webster, https://www.merriam-webster.com/dictionary/procure (2023); 12 C.J.S. Brokers § 258 (defining "procuring cause"); *Mehlberg*, 96 N.W.2d at 301 (discussing "procuring cause" as it relates to brokers). Even if the "final negotiations" occurred between Pifke and the Tronneses, it does alter the fact that Pifke was "procured" prior to October 31, 2020. 12 C.J.S. Brokers § 258 (explain that "a broker may earn a commission when he is the effective cause of a sale which the broker is authorized to sell and it is not necessary that

the broker participate in the final negotiations leading to the sale" and that "under this standard, a broker "procures" a buyer within the meaning of a listing agreement if the broker informs the customer of the property under the agreement and leads the customer to the seller").

It was error of the circuit court to reject the findings of fact and conclusions of law regarding the efforts to procure Pifke prior to October 31, 2020, it was error to reject the law regarding the analysis for defining "procuring cause," and it was error to issue clearly erroneous findings of fact downplaying Pifke's interest and intentions in potentially purchasing the Property. The Tronneses owe URC a commission under the terms of the Listing Agreement because Pifke was procured as a purchaser by the result of the special care and effort of URC or someone else during the term of the Listing Agreement.[9]

B. Pifke Exercised an Option to Purchase the Property.

Second, the Tronneses also made an enforceable promise under the Listing Agreement to pay a commission to URC if the Property was "exchanged or optioned during the term of [the Listing Agreement] and said option is exercised[.]"

The circuit court concluded that the "Lease was not an option contract" and "[t]herefore, the Property was not optioned within the terms of the Listing Agreement." Uhre App. 00038 at (COL ¶¶ 29-32). However, this conclusion of law is an error because URC has not taken the position that the Lease, itself, contained an option to purchase or that the Lease was an "option contract." To that end, the conclusion of the circuit court was

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[9] In essence, the circuit court's conclusion was that had Pifke offered to purchase on April 29, 2021, a commission would have been owed, and if Pifke offered to purchase on April 30, 2021, no commission was owed despite the same efforts to procure Pifke as a purchaser. It defies logic and the plain language of the Listing Agreement.

flawed in its analysis. Instead, the analysis should have been whether URC and Pifke entered into a separate option contract, which they did. They entered into a separate option contract in writing, which was acknowledged and ratified by the Tronneses.

"An option to purchase real property may be defined as a contract by which an owner of real property agrees with another person that the latter shall have the privilege of buying the property at a specified price within a specified time, or within a reasonable time." *Laska v. Barr*, 2016 S.D. 13, ¶ 6, 876 N.W.2d 50, 53 (quoting *Ziegler Furniture & Funeral Home, Inc. v. Cicmanec*, 2006 S.D. 6, ¶ 14, 709 N.W.2d 350, 354). "Such an agreement 'imposes no obligation to purchase upon the person to whom it is given.'" *Ziegler*, 2006 S.D. 6, ¶ 17, 709 N.W.2d at 355 (quoting *Kuhfield v. Kuhfeld*, 292 N.W.2d 312, 314 (S.D. 1980)). "The option is exercised when the optionee accepts the irrevocable offer, and an enforceable contract of sale is created." *Advanced Recycling Systems, LLC v. Southeast Properties, Ltd. P'ship*, 2010 S.D. 70, ¶ 12, 787 N.W.2d 778, 783.

The subject matter of the Lease was Pifke's terms and obligations for renting the Property. The separate written option contract exchanged via e-mails involved Pifke's separate rights in purchasing the Property. On August 1, 2020, Uhre e-mailed to Pifke and stated as follows:

> Hi. I spoke to the owners and to keep the property off market for 18 months is $2,700/th including the pet fee. It's a matter of $2,100 extra a year and would give you peace of mind & enjoyment of the property for the full term. And also to mention, that you could purchase the home at any time if you desired too which would likely be a lesser payment. What do you think?

Tr. Ex. 9 (emphasis added). Pifke responded to the e-mail: "That's agreeable to us. Appreciate you working with us on it!" *Id.* Uhre e-mailed the Tronneses and stated, "Just had to ask." Leslie responded, "Nice!" Tr. Ex. 53.

Based on the e-mails, the following is true. First, the Tronneses and URC were

prohibited from selling the Property during the term of the Lease. Second, Pifke had the exclusive option to purchase the home at any time during the Lease. Third, Pifke paid the Tronneses an increased monthly rent price in exchange and in consideration for prohibiting the Tronneses from listing the Property for sale during the term of the Lease. Fourth, Pifke had the option to purchase the Property for list price that was advertised on Trulia: $475,900.00. Uhre App. 00003. Benjamin testified that he never rescinded that same option being on the table up until Pifke made his counteroffer. TT 170:2017122. Benjamin conceded at trial he would have accepted an offer of $475,000.00 had that been the offer Pifke made. *Id.* Ultimately, Pifke exercised his option. However, Pifke testified he increased his offer to $500,000.00 in order to ensure he received the Property out of fear the Tronneses would breach the Lease Agreement. TT 132:20-133:2; *see also* TT 110:3-10; 128:16-20; 131:18-132:7.

Under the Listing Agreement, the Property was "optioned during the term" of the Listing Agreement and "said option [was] exercised." Uhre App. 00003. There is no requirement that the option be exercised *during* the term of the Listing Agreement. Instead, it must be optioned during the term and commission is owed if the option is ever exercised. As such, the Tronneses owe a commission under the Listing Agreement and it was error for the circuit court to conclude otherwise.

C. The Tronneses Breached the Covenant of Good Faith and Fair Dealing.

Third, the Listing Agreement and the parties thereto are subject to the implied covenant of good faith and fair dealing. A party may be liable for breaching the implied covenant of good faith and fair dealing. *Zochert v. Protective Life Insurance Co.*, 2018 S.D. 84, ¶ 22, 921 N.W.2d 479, 486 (explaining that the implied covenant prohibits parties "from preventing or injuring the other party's right to receive the agreed benefits of the contract.").

"A breach of contract claim is allowed even though the conduct failed to violate any of the express terms of the contract agreed to by the parties." *Garrett v. BankWest, Inc.*, 459 N.W.2d 833, 841 (S.D. 1990) (citation omitted). "[T]his implied covenant allows an aggrieved party to sue for breach of contract when the other contracting party, by his lack of good faith, limited or completely prevented the aggrieved party from receiving the expected benefits of the bargain." *Garrett*, 459 N.W.2d at 841.[10]

SDCL § 57A–1–201(19) defines "good faith" as "honesty in fact in the conduct or transaction concerned," but the meaning "'varies with the context' of the contract." *Id.* (quoting *Farm Credit Servs., Farm Credit Servs. of Am. v. Dougan*, 2005 S.D. 94, ¶ 8, 704 N.W.2d 24, 28). "Lack of good faith may be evidenced by various conduct, such as 'evasion of the spirit of the deal; abuse of power to determine compliance; and, interference with or failure to cooperate in the other party's performance.'" *Id.* (quoting *Garrett*, 459 N.W.2d at 841). The Tronneses lack of good faith completely prevented URC from receiving the benefit of the bargain that it receive a commission for the special effort it provided in procuring a purchaser for the Property.

The circuit court erred when it concluded (at COL ¶¶ 45, 49) that there was "[n]o evidence presented to support the claim that the Tronneses lacked good faith in their interactions with URC or UPM[.]" Uhre App. 00041 (COL ¶¶ 45, 49) (emphasis added). The Tronneses' lack of good faith was evidenced at trial by their attempt to fail to cooperate with URC and evade the spirit of the deal by (1) continuing to consistently and repeatedly request the assistance of Uhre's time and efforts after the stated expiration date of the

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[10] A party does not need to prove bad faith, but rather an absence of good faith. *See, e.g., Miller v. Am. Pride Seafoods, LLC*, 2019 WL 2092188, at *2 (Mass. Ct. App. 2019) ("The plaintiff must prove the lack of good faith, not necessarily the existence of bad faith.").

Listing Agreement on October 31, 2020, in order to facilitate the sale of the Property to Pifke and without the intention to compensate URC for those special efforts to facilitate a sale of the Property, (2) by threatening Pifke through e-mail correspondence and stopping by the Property unannounced to breach the Lease with Pifke, which Pifke testified he believed Tronnes intended to breach the Lease and that is why he expedited a purchase offer by April 30, 2020, (3) by failing to advise Uhre of any of these communications with Pifke while simultaneously failing to advise URC that they no longer wanted URC to communicate with Pifke about purchasing the Property, and (4) by expressly advising Pifke that they would speak with Uhre about the Lease and the purchase of the Property, and then failing to discuss with Uhre or inform Pifke that they did not discuss with Uhre.

The Tronneses should not be allowed to reap the rewards from URC's special efforts in originating a purchaser for the Property and consistent efforts in facilitating a purchase of the Property, and then attempt to evade the obligation to pay a commission to Uhre for those special efforts while simultaneously attempting to gain a windfall of compensation by inducing Pifke to offer $25,000.00 above the list price because of a threatened breach of the Lease while not paying any commission on the increased purchase amount.

The Tronneses breached the implied covenant of good faith and fair dealing and are, therefore, estopped from claiming that URC is not entitled to a commission and related fees under the Listing Agreement. *See, e.g., Miller v. Am. Pride Seafoods, LLC*, 2019 WL 2092188 (Mass. App. Ct. 2019) (upholding a jury verdict that the defendant breached the implied covenant of good faith and fair dealing contained in a listing agreement for property and was liable to the broker for the commission even though transaction was completed after the term and tail period); *Partner Canada Biomedical International, Inc. v. Amgen, Inc.*, 2018 WL 3462516 (S.D.N.Y. 2018) (rejecting defendant's argument and allowing a

claim for tortious interference by broker even though transaction was completed after term and tail period).

The Tronneses' breach of the Listing Agreement damaged URC in an amount of $30,116.56, which includes the escrowed sum of $26,399.00 ($24,600.00 + $1,599.00 + $200.00), plus interest calculated at a rate of 10.00% from the date of closing on June 15, 2021. *See* SDCL § 21-1-13.1; SDCL § 54-3-16.

II. The Circuit Court Erred When it Granted Summary Judgment In Favor of the Tronneses on UPM Claim for Breach of Contract.

The circuit court erred when it granted summary judgment in favor of the Tronneses on UPM's claim for breach of the Management Agreement. *See* Uhre App. 00012 (Management Agreement). The standard of review for a circuit court's granting of a motion for summary judgment as a matter of law is reviewed de novo. *Upell v. Dewey Cnty. Comm'n*, 2016 S.D. 42, ¶ 6, 880 N.W.2d 69, 71.

The motion was fully briefed with a brief, response brief, and reply brief. UPM filed an affidavit of counsel opposing the motion on February 28, 2022, with attached exhibits, including deposition transcripts and documentation.

The circuit court offered no findings or conclusions during its oral ruling regarding the reason it granted the Tronneses' motion for summary judgment. Instead, the circuit court simply stated that there were no genuine issues of material fact and that summary judgment was proper. The court's entire ruling on said motion was as follows:

> As far as the claim on the property management agreement, again, I find there's no dispute of material fact. I do believe summary judgment to be proper for Mr. - - Defendants Tronneses on that count for the property management agreement.

Uhre App. 00048 (MT 33:15-20).

There were numerous genuine issues of material fact that should have precluded

granting summary judgment in favor of the Tronneses. First, the Tronneses' failure to compensate UPM for the remaining period of the lease constitutes an actionable breach of contract. The Management Agreement provides if "negotiations were initiated" and "consummated, [the Tronneses], shall compensate [UPM] in accordance with the rates hereinafter set forth." SR 431 (Management Agreement). Further, "such compensation is ***due and payable on demand***"—such compensation being 10% of the gross monthly rent. *Id.* (emphasis added). Thus, the Management Agreement dictates UPM was entitled to compensation upon the consummation of a lease, and when Pifke executed the Lease, UPM was entitled to 10% of monthly rent—$2,725.00—for 18-months. SR 446 (Lease). Importantly, this amount is "due" upon UPM's demand for the same. Even assuming *arguendo* the Management Agreement was terminated, its express terms provide that termination "*shall not affect* the right of [UPM] to receive leasing commissions or fees which have accrued[.]." SR 431. "Accrued" is not defined, but as discussed above, UPM's right to compensation is triggered by the consummation of a lease which is due upon demand. *See id.* Arguably, UPM accrued the full amount when Pifke signed the Lease. Thus, a genuine issue of material fact exists as to whether compensation was accrued and for how much.

Second, a genuine issue of material fact exists as to when the Management Agreement terminates. The Management Agreement provides that it expired on September 1, 2020, but that it is "automatically renewable . . . for annual periods unless terminated by either party giving 30-days' written notice to the other party in advance of such termination date." *Id.* While the Tronneses contended in their summary judgment brief that the Agreement expired 30-days after the e-mail on May 4, 2021, the Agreement's terms conversely represent annually renewing, one-year terms. This result

requires that notice to terminate must be given at least 30-days before September 1st, and that such termination only occurs on September 1st.[11]

Finally, the Tronneses failed to discharge their duty of good faith and fair dealing. Importantly, "this implied covenant allows an aggrieved party to sue for breach of contract when the other contracting party, by his lack of good faith, limited or completely prevented the aggrieved party from receiving the expected benefits of the bargain." *Garrett*, 459 N.W.2d at 841. When Pifke consummated the Lease, UPM expected to receive 10% of the monthly rent rate for 18-months. The Tronneses were well aware of that expectation as a party thereto. Even so, the Tronneses covertly discussed terminating the Lease with Pifke, and never discussed the issue with UPM, despite Benjamin's express statement that he would. SR 477 (Tronnes E-mail to Pifke dated March 4, 2021). Instead, the Tronneses agreed to sell the Property and terminate the Lease *before* informing Uhre in a two-sentence e-mail six months after originally contacting Pifke. SR 500 (Tronnes E-mail to Uhre dated May 4, 2021), *cf.* Ex. A (Management Agreement at 2 ("Owner agrees to make available to Broker all data, records and documents pertaining to the property")). Such actions were dishonest, certainly evaded the "spirit of the deal," and deprived UPM from receiving the expected benefits of the bargain.

In conclusion, there were multiple genuine issues of material fact precluding summary judgment and UPM should have been permitted to prosecute its claim at trial. As such, UPM requests that this Court reverse and remand UPM's claim for breach of the management agreement.

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[11] This fact further complicates and disputes the Tronneses' allegation that UPM's compensation during the month of June was improper. *See* SR 431 (providing that compensation may be paid by Broker deducting it from gross receipts).

III. The Circuit Court Erred When it Awarded Attorneys' Fees to the Tronneses Under the Listing Agreement.

The circuit court erred in concluding the Tronneses are entitled to attorneys' fees as a matter of law under the Listing Agreement.[12] This Court reviews "conclusions of law de novo." *Berggren v. Schonebaum*, 2017 S.D. 89, ¶ 10, 905 N.W. 2d 563, 566 (citing *Tri-City Assocs.*, 2014 S.D. 23, ¶ 19, 845 N.W.2d at 916). The circuit court wrongfully adopted the Tronneses proposed conclusion of law in full in writing "that the Tronneses are entitled to their attorneys' fees in this matter *as they are the prevailing party* under the Listing Agreement." Uhre App. 00045 (COL ¶ 73) (emphasis added). The Listing Agreement does not provide attorneys' fees for *prevailing parties*, so the circuit court's reasoning is flawed. As a matter of law, the Tronneses did not satisfy the conditions for an award of attorneys' fees under the Listing Agreement.

The circuit court correctly recognized that South Dakota follows the American Rule with respect to the recovery of attorneys' fees, which requires each party to bear its own attorney fees *unless* there "is an agreement for attorney fees between the parties or where 'an award of attorney's fees is authorized by statute.'" *Id.* at COL ¶ 71; *see, e.g., Goin v. Houdashelt*, 2020 S.D. 32, ¶ 21, 945 N.W.2d 349, 355 ("[u]nder our 'American Rule' for attorney fees, each party must bear its own attorney fees absent an agreement for attorney fees between the parties or where 'an award of attorney fees is authorized by statute'");

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[12] From the outset, it should be noted that a specific amount of attorneys' fees was not awarded and that the circuit court only went as far as concluding as a matter of law that Respondents were entitled to such fees. A ruling on the amount and reasonableness of attorneys' fees was held in abeyance pending this Court's decision. Accordingly, this Court is reviewing the circuit court's conclusion of law and not the actual award of attorneys' fees, which requires a different analysis.

Rupert v. City of Rapid City, 2013 S.D. 13, ¶ 32, 827 N.W.2d 55, 67)); *Stern Oil Co., Inc. v. Brown*, 2018 S.D. 15, ¶ 44, 908 N.W.2d 144, 157 (quoting *Arrowhead Ridge I, LLC. v. Cold Stone Creamery, Inc.*, 2011 S.D. 38, ¶ 25, 800 N.W.2d 730, 737) ("an award of attorneys' fees is allowed when authorized by the parties' agreement or by statute."); *Jacobson v. Gulbransen*, 2001 S.D. 33, ¶ 31, 623 N.W.2d 84, 91 ("[a]n award of attorney's fees is not the norm"). "The party requesting an award of attorneys' fees has the burden to show its basis by a preponderance of the evidence." *Id.*

Here, the final sentence of Section 7 of the Listing Agreement provided a narrow set of circumstances in which an award of attorneys' fees was authorized under of the Listing Agreement: "The Broker and Seller, as parties to this agreement, agree that a party *in breach* of any of the covenants, promises or obligations arising under this contract shall be liable and responsible for attorney's fees and costs that may result from *enforcement thereof* as against the party *in breach*." Uhre App. 00003 (emphasis added).

The circuit court's conclusion of law awarding attorneys' fees to the Tronneses as the "prevailing party" conflicts with the plain language of the Listing Agreement. "When determining the meaning of a contract, 'effect will be given to the plain meaning of its words." *Lillibridge v. Meade School Dist. # 46-1*, 2008 S.D. 17, ¶ 12, 746 N.W.2d 428, 432 (quoting *In re Dissolution of Midnight Star,* 2006 S.D. 98, ¶ 12, 724 N.W.2d 334, 337) (additional citation omitted). The Court must "give effect to the language of the entire contract and particular words and phrases are not interpreted in isolation." *Id.* (citation omitted). In that way, the Court looks "to the language that the parties used in the contract to determine their intention." *Id.* (quoting *Pauley v. Simonson,* 2006 S.D. 73, ¶ 8, 720 N.W.2d 665, 667-68). "If the parties' intention is made clear by the language of the contract 'it is the duty of this Court to declare and enforce

it.'" *Id. (Pauley,* 2006 S.D. 73, ¶ 8, 720 N.W.2d at 667-68). Here, the Listing Agreement specifically and narrowly permits an award of attorneys' fees only after a breach of its terms and, further, only to the party seeking to enforce the breach of the Listing Agreement against the breaching party. In that way, there would need to have been a (1) breach of the Listing Agreement by URC, and (2) enforcement of the breach by the Tronneses against URC as the breaching party.

The circuit court's conclusion of law stating Appellees are entitled to attorneys' fees as a prevailing party is incongruous with the plain language of the Listing Agreement because it simply *does not* provide attorneys' fees to a prevailing party. Importantly, this Court has specifically held that "[u]nlike statutory costs and disbursements to a prevailing party, the terms of the contract control the consideration of attorney's fees and costs provided for agreement between the parties." *Stern Oil Co.*, 2018 S.D. 15, ¶ 51, 908 N.W.2d at 159 (citing *DocMagic, Inc. v. Mortg. P'ship of Am., L.L.C.*, 729 F.3d 808, 812 (8th Cir. 2013)). Attorneys' fees are recoverable only "if the parties' contract so provides." *See, e.g., Id.* at ¶ 44; *see also Jacobson v. Leisinger*, 2008 S.D. 19, ¶ 15, 746 N.W.2d 739, 743 (stating, "[a]ttorney fees are not generally recoverable in actions sounding in tort"). The Listing Agreement does not include any common "prevailing party" language, which this Court defines as "the party in whose favor the decision or verdict is or should be rendered and judgment entered." *Stern Oil Co.*, 2018 S.D. 15, ¶ 47, 908 N.W.2d at 158 (quoting *Hewitt v. Felderman*, 2013 S.D. 103, ¶ 28, 841 N.W.2d 258, 266). To be sure, and in fact, the term "prevailing party" is not even written in the Listing Agreement. Instead, its terms plainly state that only a party *in breach* of those terms is liable for attorneys' fees. However, Appellees never even *alleged* that Appellants committed a breach of the Listing Agreement and even though the circuit court never made such a conclusion, Appellants are now being

held liable for attorneys' fees. Since the circuit court did not find *either* party to be in breach of the Listing Agreement, the circuit could not have, as a matter of law, concluded the Tronneses were entitled to attorneys' fees under the Listing Agreement.

The terms of the Listing Agreement are plain and unambiguous and the Tronneses are precluded from claiming otherwise. Appellants and Appellees both claimed at trial and in their post-trial submissions that the Listing Agreement was unambiguous. The circuit court *adopted* Appellees' proposed conclusion of law that the Listing Agreement was unambiguous and concluded that the Listing Agreement is not ambiguous. Uhre App. 00036 (COL ¶ 17). The Tronneses also brought no claims seeking to invalidate or construe the attorneys' fee language. In that way, this Court must simply interpret the attorneys' fee language as written.

Appellants respectfully request that this Court reverse and amend the circuit court's conclusion of law regarding Appellees' entitlement to attorneys' fees.

CONCLUSION

First, the circuit court erred when it concluded that the Tronneses did not breach the Listing Agreement. Second, the circuit court improperly granted summary judgment in favor of the Tronneses on UPM's claim for breach of the Management Agreement. Third, the circuit court erred in granting attorneys' fees to the Tronneses under the Listing Agreement. Consequently, URC respectfully requests that this Court reverse trial court ruling on the Listing Agreement claims for breach of contract, declaratory judgment, and the award of attorneys' fees to the Tronneses, and instead award URC its attorneys' fees or, alternative, remand for further findings and conclusions consistent with this Court's opinion. In addition, UPM respectfully asks this Court to reverse and remand its claim for breach of the management agreement against the Tronneses.

Dated this 13th day of June, 2023.

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REQUEST FOR ORAL ARGUMENT

Appellants respectfully request oral argument before the Court.

/s/ Jonathan A. Heber
Jonathan A. Heber

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellants' Brief does not exceed the word limit set forth in SDCL § 15-26A-66, said Brief containing 9,450 words, exclusive of the table of contents, table of cases, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel.

/s/ Jonathan A. Heber
Jonathan A. Heber

CERTIFICATE OF SERVICE

I, Jonathan A. Heber, do hereby certify that on this 13th day of June, 2023, I have electronically filed the foregoing with the Supreme Court using the Odyssey File & Serve system which will send notification of such filing to the following:

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 30254

UHRE REALTY CORPORATION and UHRE PROPERTY MANAGEMENT CORPORATION

Plaintiffs and Appellants,

v.

BENJAMIN TRONNES and LESLIE TRONNES

Defendants and Appellees,

Appeal from the Circuit Court, Seventh Circuit
Pennington County, South Dakota

The Honorable Joshua K. Hendrickson
Circuit Judge

APPENDIX

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Notice of Appeal filed February 9, 2023

INDEX TO APPELLANTS' APPENDIX

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When all agents of this firm represent only you:

☒ **Single Agency** is when a firm and all of its agents represent **only** you and advocate for **only** your interests during a transaction. If at any time during the transaction any agent of the same firm represents both you and the other party, limited agency applies.

When only individually named agent(s) of this firm represents you:

☐ **Appointed Agency** is when a responsible broker names a specific agent(s) of the firm to represent **only** you and advocate for **only** your interests during a transaction. Agents within the firm who have not been specifically appointed do not represent you and cannot advocate for your interests. If at any time during the transaction the responsible broker or a non-appointed agent within the firm represents the other party, limited agency applies to the responsible broker. If at any time during the transaction your appointed agent(s) represents both you and the other party, limited agency applies.

When all agents of this firm represents both purchasers and owners:

☒ **Limited Agency** is when a firm represents both sides to a transaction and no agent within the firm solely represents you or solely advocates for your interests. Limited agency **may only occur** with prior written permission from both sides to a transaction. Within limited agency, the limited agent is required to represent the interests of you and the other party equally, and the agent cannot disclose your confidential information to the other party unless legally required to by law.

When a broker does not represent either party to a contract:

☐ **Transaction Brokerage** is when a broker or agent assists one or more parties with a real estate transaction without being an agent or advocate for the interests of any party to the transaction.

Acknowledgment: I have been provided a copy of this disclosure indicating the brokerage and agency relationships offered by this firm. If this is a residential transaction, I also acknowledge the agent has given me a copy of the Consumer Real Estate Information Guide in booklet/printed format, or, if not provided, I authorize the agent to provide the guide electronically, as an attachment or link, to access the electronic version of the guide, at ***ben.tronnes@usahockey.org & ltronnes@gmail.com*** (e-mail).

Signature(s) DocuSigned by: Benjamin Tronnes April 29, 2020 | 7:20 AM MDT 214F0F6B0F4F43F... DocuSigned by: Leslie Tronnes April 29, 2020 | 7:47 PM CDT AAF80BAAA562471... Date

When you choose not to have an agency relationship with a firm:

I acknowledge the firm/agent named above does not represent me as a client. If I am a customer to a real estate transaction I understand the firm/agent may be acting as an agent for the other party of the transaction.

Signature(s) _____ Date _____

Pennington County, SD
FILED
IN CIRCUIT COURT
OCT 21 2022
Ranae Truman, Clerk of Courts
By _____ Deputy

Serial# 062996-100158-8120028
Prepared by Josh Uhre | Uhre Realty | joshuhre@gmail.com |

EXHIBIT
Z
tabbies
UHRE APP 0001

REALTOR®

EXCLUSIVE LISTING AND AGENCY AGREEMENT
BLACK HILLS ASSOCIATION OF REALTORS®

EQUAL HOUSING OPPORTUNITY

Client: *Benjamin and Leslie Tronnes*

Responsible Broker and Brokerage Firm: *Uhre Realty Corporation*
(hereinafter referred to as *Broker*)

Start Date: *May 1, 2020* **Expiration Date:** *October 31, 2020* at midnight. If Client enters into a purchase agreement during the term of this agreement, the termination of this agreement shall be the date of closing under said purchase agreement, or if the transaction does not close, the date which the parties agree to discontinue negotiating. This agreement can be terminated with mutual written consent of the parties.

1. **Creation of Agency.** The Broker, as agent for the Client, negotiates and advocates on behalf of the Client, performs the terms of any written agreement made with the Client, and promotes the interest of the Client with the utmost good faith, loyalty, and fidelity. The Client should carefully read all documents to assure that they adequately express Client's understanding of the transaction and protection of your own interests. The Client represents no other Broker has been employed as an exclusive agent for real estate defined in Section 2 and agrees to protect, defend, indemnify and hold Broker harmless from the claims, liability, and expenses, including reasonable attorney's fees, arising by reason of the claim of any other broker in compensation as the result of a transaction that is within the scope of this agreement. Not all agency options may be offered by broker.

   A. **Single Agency:** When a firm and all of its agents represent **only** you and advocate for **only** your interests during a transaction.

   The Client further authorizes:

   B. **Appointed Agency:** The broker appoints *N/A* as your agent, to represent **only** you and advocate for **only** your interests. Upon signing this agreement, agents within the firm who have not been specifically named do not represent you and cannot advocate for your interests. Confidential information can only be shared with the responsible broker *N/A* and the designated broker *N/A*, unless you provide written permission. The responsible broker may appoint other affiliated licensees to be your agent during the term of this agreement should the appointed agent not be able to fulfill the terms of this agreement or by written agreement between you and the responsible broker. An appointment of another or additional affiliated licensee does not relieve the first appointed agent of any duties owed to you.

   Limited agency rules apply to the responsible broker when a purchaser client of this firm inquires about your property under contract for sale/lease with this firm. The responsible broker can legally be the limited agent of both parties of a transaction with your knowledge and written consent of you and the other party.

   Your appointed agent(s) can legally be a limited agent for an in-company transaction with your knowledge and written consent of you and the other party.

   (If this broker/firm does not offer appointed agency representation initial N/A below)

   C. **Limited Agency:** All licensees of the brokerage firm owe you the duties as described in single agency until a purchaser client of this firm inquires about your property under contract for sale/lease with this firm. At this time a limited agency relationship exists, however, limited agency **may only occur** with prior written permission of the parties of the potential in-company transaction. In a limited agency relationship the broker, directly or through one or more agent, may not be able to continue to provide services previously provided to you, such as:
   - No longer providing advice or advocating for your interests, or the purchaser's interests, to the detriment of either party.

   Unless you give written consent, a limited agent cannot:
   - Disclose personal confidences of one party or the other party, unless required by law
   - Disclose a buyer is willing to pay more, or a seller is willing to accept less, than the asking price or lease rate offered for the property;
   - Disclose the motivating factors for any client, buying, selling, or leasing the property;
   - Disclose a client will agree to financing terms other than those offered.

The client acknowledges and consents as *initialed*:

I agree to appointed agency and the appointed agent(s) named in 1B: *Yes* ____ \ ____ *No* ____ \ ____ *N/A* BT \ LT

I agree to limited agency representation, as described in 1C: *Yes* BT \ LT *No* ____ \ ____ *N/A* ____ \ ____

THIS IS A LEGAL AND BINDING CONTRACT, IF NOT FULLY UNDERSTOOD, SEEK LEGAL ADVICE

☒ RE Residential ☐ LD Land ☐ MF Multi-Family ☐ CI Commercial ☐ BI Business/Industry

2. **LEGAL DESCRIPTION.** The undersigned Seller warrants that he/she is the owner of record of the property or has the written authority to execute this Agreement on behalf of the owner of record and hereby grants the undersigned Broker, for the above term, the exclusive irrevocable right and privilege to sell the following property legally described as:
Legal description for home/lot:
1. Tax Id 20901: BOULEVARD ADD; BLOCK 42; LOT 7-8 & N10' OF LOT 9 (Acres 0.180)
2. Tax Id 20902: BOULEVARD ADD; BLOCK 42; S15' OF LOT 9 & ALL OF LOT 10 (Acres 0.150)
3. Tax Id 24522: HUNTS; BLOCK 42; LOT 11 & VAC ST JAMES ST (80X130) ADJ TO SAID LOT (Acres 0.360)
County: ***Pennington***, State ***South Dakota***
Also known as: ***1319 12th Street, Rapid City, SD 57701***

3. **TERMS:** For the sum of $ ***475,900.00***, on the following terms: ***Cash, New Loan***;
or, with Seller's consent, for any sum or on other terms which price includes all encumbrances, taxes, assessments and discount points charged at time of closing by mortgagee, as agreed upon by Buyer and Seller.

4. **MULTIPLE OFFERS:** Seller acknowledges when in a multiple offer situation, all responses are directed by the Seller and at their discretion.

5. **PERSONAL PROPERTY:** The following personal property shall be conveyed by Seller to Buyer, free of liens and without warranty of condition, by bill of sale at closing and in accordance with its terms:

6. **DEFINITION:** The term "sale" shall be deemed to include any exchange, trade, lease or option to purchase to which the Seller consents. In the event of a sale, the Broker is permitted to represent and receive compensation from both parties.

7. **PROFESSIONAL FEE:**
Total fee for services provided to be ***5***% or $ _____ of the total selling price plus all applicable sales tax.
1. ***2.5***% or $ _____ to Listing Agent of total sale price plus applicable sales tax
2. ***2.5***% or $ _____ to cooperating Buyers Agent of total sale price plus applicable sales tax

A. Transaction fee of $ ***200.00*** plus applicable sales tax.

If a purchaser is procured for the property by the Broker, by any other cooperating broker, by the Seller, or by any other person at the price and upon the terms stated above, or at any other price or upon any other terms accepted by the Seller during the term of this Agreement or if exchanged or optioned during the term of this contract and said option is exercised, or if within ***180*** days after the expiration of this agreement, the property is sold to any person to whom the property was shown the Seller agrees to pay compensation as stated above. Seller further agrees that Broker or Broker's authorized representative may act as escrow agent for all money, transaction papers, and documents associated with this transaction. If this property is listed with another licensed real estate broker after expiration of this listing, this contract shall be null and void in its entirety. In the event that an option is accepted by the Seller, all money received for said option shall be divided ***100%*** to the Seller and ***0%*** to the Broker with the Broker not to receive more than the above agreed upon professional fee. The Broker and Seller, as parties to this agreement, agree that a party in breach of any of the covenants, promises or obligations arising under this contract shall be liable and responsible for attorney's fees and costs that may result from enforcement thereof as against the party in breach.

8. **EARNEST MONEY:** All earnest money deposits shall be held by the Listing Company or Escrow Closing Agent until the sale is closed. If earnest money deposited by the Buyer is forfeited, the earnest money, less expenses, shall be divided ***50***% to Seller and ***50***% to Listing Office. However, in no case may the Listing Office's share exceed the compensation stated herein. Seller understands that per SDCL 36-21A-81, both Buyer and Seller must agree in writing to release of earnest money.

9. **PROCEEDS DISBURSEMENT:** It is agreed that the Listing Office and/or Closing Agent shall hold the balance of the sales price for account of Seller until all expenses incurred on the Seller's behalf, relating to the sale of this property, have been paid.

Seller(s) DS BT DS LT (Initials) and Listing Office Broker/Agent _____ (Initials) have read this page

10. **TRANSFER OF TITLE:** Seller represents the title of the property to be good and merchantable and hereby warrants that all known encumbrances, liens or clouds on title are disclosed. In the event of a sale, exchange or trade, Seller, at their expense, will convey to the Buyer good and merchantable title to said property by Warranty Deed or such other conveyance instrument, sufficient to convey good and merchantable title, properly signed and with the necessary State Transfer Fee for recording paid by Seller. Further, Seller, at their expense, shall promptly furnish to the Buyer an Owner's Policy of Title Insurance in the amount of the purchase price.

11. **NON-DISCRIMINATION:** This property is offered for sale regardless of race, religion, creed, color, sex, handicap, familial status, ancestry, national origin, or any other protected class under law.

12. **MULTIPLE LISTING SERVICE:** Any listing taken on a contract to be filed with the multiple listing service is subject to the rules and regulations of the service upon signature of the seller(s).

13. **SELLER AUTHORIZES BROKER, BY INITIALS IN THE APPROPRIATE SPACE TO:**

1. BT LT List and market the herein property with the local MULTIPLE LISTING SERVICE (MLS).

☒ Place a FOR SALE sign on the property.

☐ Place a LOCKBOX on the property.

☒ Cooperate with other Brokers, including Brokers representing a buyer, and Seller further agrees Broker may compensate selling Brokers.

☒ Advertise or market the property.

OR

2. _____ Withhold the herein property from the local MULTIPLE LISTING SERVICE (MLS). Seller understands property shall not be marketed to the public. Public marketing includes, but is not limited to, flyers displayed in windows, yard signs, digital marketing on public facing websites, brokerage website displays, digital communications marketing (email blasts), multi-brokerage listing sharing networks, and applications available to the general public.

14. **SELLER'S PROPERTY DISCLOSURE STATEMENT:**

A. Seller hereby agrees to indemnify and hold Broker and Brokers agent harmless from any claim(s) arising out of misrepresented or incomplete disclosure statements made by Seller. Seller agrees to fill out a Seller's Property Disclosure Statement, if applicable, and have it available for inspection on the premises. By state law (SDCL 43-4-38) this disclosure must be shared with other Brokers and potential Buyers before a Purchase Agreement is written.

☐ The parties acknowledge that no disclosure statement is required by reason of the following: _____

_____

B. The following disclosure is provided to help sellers and buyers with respect to home surveillance devices. The property (check one) ☐ has ☐ does not have a video or audio surveillance device/system. The device/system (check one) ☐ does ☐ does not capture audio.

15. **LEAD PAINT DISCLOSURE:** Seller shall complete and submit a lead-based paint disclosure if property is residential and built prior to 1978 as required by federal regulation.

Seller(s) BT LT and Listing Office Broker/Agent _____ have read this page
(Initials) (Initials)

16. **AGENCY DISCLOSURE:** The seller acknowledges that they have received a copy of an Agency Relationship Disclosure.

17. **AGENT OBLIGATIONS:** Regardless of representation, the broker shall: Disclose all known material facts about the property which could affect the Client's use or enjoyment of the property, disclose information which could have a material impact on either party's ability to fulfill their obligations under the purchase/lease agreement, respond honestly and accurately to questions concerning the property, and deal honestly and fairly with all parties.

18. **TAX CONSEQUENCES:** The Seller acknowledges that there may be tax consequences arising out of the sale of this property and that they are advised to seek competent tax advice.

19. **OTHER:**

The undersigned hereby agree to the above terms and acknowledge receipt of a copy of this agreement.

Dated this _____

Benjamin Tronnes	X DocuSigned by: Benjamin Tronnes
Seller's Name - Printed or Typed	Seller's Signature
Leslie Tronnes	X DocuSigned by: Leslie Tronnes
Seller's Name - Printed or Typed	Seller's Signature
Uhre Realty Corporation	DocuSigned by:
Listing Company	Designated Broker's Signature
Josh Uhre	DocuSigned by:
Listing Agent	Listing Agent's Signature

DISCLOSURE OF INFORMATION AND ACKNOWLEDGMENT
LEAD-BASED PAINT AND/OR LEAD-BASED PAINT HAZARDS

Address: *1319 12th Street, Rapid City, SD 57701*

Lead Warning Statement

Every purchaser of any interest in residential real property on which a residential dwelling was built prior to 1978 is notified that such property may present exposure to lead from lead-based paint that may place young children at risk of developing lead poisoning. Lead poisoning in young children may produce permanent neurological damage, including learning disabilities, reduced intelligence quotient, behavioral problems, and impaired memory. Lead poisoning also poses a particular risk to pregnant women. The seller of any interest in residential real property is required to provide the buyer with any information on lead-based paint hazards from risk assessments or inspections in the seller's possession and notify the buyer of any known lead-based paint hazards. A risk assessment or inspection for possible lead-based paint hazards is recommended prior to purchase.

Seller's Disclosure (initial)

BT LT (a) Presence of lead-based paint and/or lead-based paint hazards (check one below):

☐ Known lead-based paint and/or lead-based paint hazards are present in the housing (explain):

_____

_____

☒ Seller has no knowledge of lead-based paint and/or lead-based paint hazards in the housing.

BT LT (b) Records and Reports available to the seller (check one below):

☐ Seller has provided the purchaser with all available records and reports pertaining to lead-based paint and/or lead-based hazards in the housing (list documents below):

_____

_____

☒ Seller has no reports or records pertaining to lead-based paint and/or lead-based paint hazards in the housing.

Agents Acknowledgment (initial)

JL (c) Agent has informed the seller of the seller's obligations under 42 U.S.C. 4852 d and is aware of his/her responsibility to ensure compliance.

Purchaser's Acknowledgement (initial)

_____ (d) Purchaser has received copies of all information listed above.

_____ (e) Purchaser has received the pamphlet *Protect Your Family From Lead in Your Home.*

_____ (f) Purchaser has (check one below):

☐ Received a 10-day opportunity (or mutually agreed upon period) to conduct a risk assessment or inspection of the presence of lead-based paint or lead-based paint hazards; or

☐ Waived the opportunity to conduct a risk assessment or inspection for the presence of lead-based paint and/or lead-based paint hazards.

Certification of Accuracy

The following parties have reviewed the information above and certify, to the best of their knowledge, that the information they have provided is true and accurate.

Docusigned by:
Benjamin Trownes — April 29, 2020 | 7:20 AM MDT
Seller — Date

Purchaser — Date

Docusigned by:
Leslie Trownes — April 29, 2020 | 7:47 PM CDT
Seller — Date

Purchaser — Date

Docusigned by:
[signature] — April 28, 2020 | 7:00 PM MDT
Listing Agent — Date

Selling Agent — Date

DocuSign SECURED

Certificate Of Completion

Envelope Id: 4944B776C1AD4469A465C6B26F26CBA5 Status: Completed

Subject: Please DocuSign: Exclusive Listing Agreement.pdf, Lead Based Paint.pdf, Relationship Disclosure.pdf

Source Envelope:

Document Pages: 6 Signatures: 9 Envelope Originator:
Certificate Pages: 5 Initials: 15 Josh Uhre
AutoNav: Enabled PO Box 1577
EnvelopeId Stamping: Enabled Rapid City, SD 57709
Time Zone: (UTC-07:00) Mountain Time (US & Canada) joshuhre@gmail.com
IP Address: 209.159.219.98

Record Tracking

Status: Original Holder: Josh Uhre Location: DocuSign
28-Apr-20 | 18:44 joshuhre@gmail.com

Signer Events	Signature	Timestamp
Benjamin Tronnes ben.tronnes@usahockey.org Security Level: Email, Account Authentication (None)	DocuSigned by: Benjamin Tronnes 214F0F6B0F4F43F...	Sent: 28-Apr-20 | 18:53 Viewed: 29-Apr-20 | 07:18 Signed: 29-Apr-20 | 07:20
	Signature Adoption: Pre-selected Style Using IP Address: 67.172.154.228	
Electronic Record and Signature Disclosure: Accepted: 29-Apr-20 | 07:18 ID: b3dd3806-40ce-430f-a627-6c58477e4a73		
Josh Uhre joshuhre@gmail.com Owner/Broker Uhre Realty & Property Management Security Level: Email, Account Authentication (None)	DocuSigned by: 41558AE542FA44F...	Sent: 28-Apr-20 | 18:53 Viewed: 28-Apr-20 | 18:59 Signed: 28-Apr-20 | 19:00
	Signature Adoption: Uploaded Signature Image Using IP Address: 209.159.219.98	
Electronic Record and Signature Disclosure: Not Offered via DocuSign		
Leslie Tronnes ltronnes@gmail.com Security Level: Email, Account Authentication (None)	DocuSigned by: Leslie Tronnes AAF606AAA562471...	Sent: 28-Apr-20 | 18:53 Viewed: 29-Apr-20 | 15:32 Signed: 29-Apr-20 | 18:47
	Signature Adoption: Pre-selected Style Using IP Address: 174.245.197.238 Signed using mobile	
Electronic Record and Signature Disclosure: Accepted: 16-Aug-19 | 20:11 ID: 16489ff3-d7c4-450e-944c-dd8be220e07b		

In Person Signer Events	Signature	Timestamp
Editor Delivery Events	**Status**	**Timestamp**
Agent Delivery Events	**Status**	**Timestamp**
Intermediary Delivery Events	**Status**	**Timestamp**
Certified Delivery Events	**Status**	**Timestamp**

Carbon Copy Events	Status	Timestamp
Witness Events	**Signature**	**Timestamp**
Notary Events	**Signature**	**Timestamp**

Envelope Summary Events	Status	Timestamps
Envelope Sent	Hashed/Encrypted	28-Apr-20 | 18:53
Certified Delivered	Security Checked	29-Apr-20 | 15:32
Signing Complete	Security Checked	29-Apr-20 | 18:47
Completed	Security Checked	29-Apr-20 | 18:47

Payment Events	Status	Timestamps

Electronic Record and Signature Disclosure

ELECTRONIC RECORD AND SIGNATURE DISCLOSURE

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Getting paper copies

At any time, you may request from us a paper copy of any record provided or made available electronically to you by us. You will have the ability to download and print documents we send to you through the DocuSign system during and immediately after signing session and, if you elect to create a DocuSign signer account, you may access them for a limited period of time (usually 30 days) after such documents are first sent to you. After such time, if you wish for us to send you paper copies of any such documents from our office to you, you will be charged a $0.00 per-page fee. You may request delivery of such paper copies from us by following the procedure described below.

Withdrawing your consent

If you decide to receive notices and disclosures from us electronically, you may at any time change your mind and tell us that thereafter you want to receive required notices and disclosures only in paper format. How you must inform us of your decision to receive future notices and disclosure in paper format and withdraw your consent to receive notices and disclosures electronically is described below.

Consequences of changing your mind

If you elect to receive required notices and disclosures only in paper format, it will slow the speed at which we can complete certain steps in transactions with you and delivering services to you because we will need first to send the required notices or disclosures to you in paper format, and then wait until we receive back from you your acknowledgment of your receipt of such paper notices or disclosures. To indicate to us that you are changing your mind, you must withdraw your consent using the DocuSign 'Withdraw Consent' form on the signing page of a DocuSign envelope instead of signing it. This will indicate to us that you have withdrawn your consent to receive required notices and disclosures electronically from us and you will no longer be able to use the DocuSign system to receive required notices and consents electronically from us or to sign electronically documents from us.

All notices and disclosures will be sent to you electronically

Unless you tell us otherwise in accordance with the procedures described herein, we will provide electronically to you through the DocuSign system all required notices, disclosures, authorizations, acknowledgements, and other documents that are required to be provided or made available to you during the course of our relationship with you. To reduce the chance of you inadvertently not receiving any notice or disclosure, we prefer to provide all of the required notices and disclosures to you by the same method and to the same address that you have given us. Thus, you can receive all the disclosures and notices electronically or in paper format through the paper mail delivery system. If you do not agree with this process, please let us know as described below. Please also see the paragraph immediately above that describes the consequences of your electing not to receive delivery of the notices and disclosures

electronically from us.

How to contact DocuSign Ink:

You may contact us to let us know of your changes as to how we may contact you electronically, to request paper copies of certain information from us, and to withdraw your prior consent to receive notices and disclosures electronically as follows:

To contact us by email send messages to: joshuhre@gmail.com

To advise DocuSign Ink of your new e-mail address

To let us know of a change in your e-mail address where we should send notices and disclosures electronically to you, you must send an email message to us at joshuhre@gmail.com and in the body of such request you must state: your previous e-mail address, your new e-mail address. We do not require any other information from you to change your email address..

In addition, you must notify DocuSign, Inc. to arrange for your new email address to be reflected in your DocuSign account by following the process for changing e-mail in the DocuSign system.

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To request delivery from us of paper copies of the notices and disclosures previously provided by us to you electronically, you must send us an e-mail to joshuhre@gmail.com and in the body of such request you must state your e-mail address, full name, US Postal address, and telephone number. We will bill you for any fees at that time, if any.

To withdraw your consent with DocuSign Ink

To inform us that you no longer want to receive future notices and disclosures in electronic format you may:

i. decline to sign a document from within your DocuSign session, and on the subsequent page, select the check-box indicating you wish to withdraw your consent, or you may;

ii. send us an e-mail to joshuhre@gmail.com and in the body of such request you must state your e-mail, full name, US Postal Address, and telephone number. We do not need any other information from you to withdraw consent.. The consequences of your withdrawing consent for online documents will be that transactions may take a longer time to process..

Required hardware and software

Operating Systems:	Windows® 2000, Windows® XP, Windows Vista®; Mac OS® X
Browsers:	Final release versions of Internet Explorer® 6.0 or above (Windows only); Mozilla Firefox 2.0 or above (Windows and Mac); Safari™ 3.0 or above (Mac only)
PDF Reader:	Acrobat® or similar software may be required to view and print PDF files
Screen Resolution:	800 x 600 minimum
Enabled Security Settings:	Allow per session cookies

** These minimum requirements are subject to change. If these requirements change, you will be asked to re-accept the disclosure. Pre-release (e.g. beta) versions of operating systems and browsers are not supported.

Acknowledging your access and consent to receive materials electronically

To confirm to us that you can access this information electronically, which will be similar to other electronic notices and disclosures that we will provide to you, please verify that you were able to read this electronic disclosure and that you also were able to print on paper or electronically save this page for your future reference and access or that you were able to e-mail this disclosure and consent to an address where you will be able to print on paper or save it for your future reference and access. Further, if you consent to receiving notices and disclosures exclusively in electronic format on the terms and conditions described above, please let us know by clicking the 'I agree' button below.
By checking the 'I agree' box, I confirm that:

- I can access and read this Electronic CONSENT TO ELECTRONIC RECEIPT OF ELECTRONIC RECORD AND SIGNATURE DISCLOSURES document; and

- I can print on paper the disclosure or save or send the disclosure to a place where I can print it, for future reference and access; and

- Until or unless I notify DocuSign Ink as described above, I consent to receive from exclusively through electronic means all notices, disclosures, authorizations, acknowledgements, and other documents that are required to be provided or made available to me by DocuSign Ink during the course of my relationship with you.

AGREEMENT TO MANAGE AND LEASE REAL ESTATE

(This is a legally binding contract. If you do not understand it, seek legal advice.)

This agreement to manage and lease real estate is made and entered into as of this _____ day of August 16, 2019 | 1:36 PM MDT by and between Benjamin & Leslie Tronnes hereinafter called the Owner and Uhre Property Management, Josh Uhre hereinafter called the Broker.

Whereas, Owner is the owner of the property known as 1319 12th Street located at 1319 12th Street, Rapid City, SD 57701 and legally described as
BOULEVARD ADD; BLOCK 42; LOT 7-8 & N10' OF LOT 9
BOULEVARD ADD; BLOCK 42; S15' OF LOT 9 & ALL OF LOT 10
HUNTS; BLOCK 42; LOT 11 & VAC ST JAMES ST (80X130) ADJ TO SAID LOT

Owner hereby employs Broker exclusively to rent, lease, operate and manage said property subject to the terms and conditions of this agreement.

In consideration of the management and leasing functions to be performed by Broker under this agreement, Owner agrees to pay Broker a fee or fees for services rendered at the rates hereinafter set forth. Owner recognizes Broker as agent in any negotiations relative to said property or any part thereof, which may have been initiated during the term hereof, and if consummated, shall compensate Broker in accordance with the rates hereinafter set forth. Such compensation is due and payable on demand and may be deducted by Broker from gross receipts.

Management: 10% of the Gross Monthly Rent (plus sales tax)
Leasing: _____ (plus sales tax)

The term of this agreement shall commence on the _____ day of August 16, 2019 | 1:36 PM MDT and expire on the 1 day of September, 2020. This agreement is automatically renewable, upon expiration, for annual periods unless terminated by either party giving 30-days' written notice to the other party in advance of such termination date. However, the termination of this agreement shall not affect the right of Broker to receive leasing commissions or fees which have accrued on the date specified in such notice and have not been paid.

As agent for Owner, Broker owes Owner the duties of loyalty, obedience, disclosure, confidentiality, reasonable care and diligence, and full accounting. Broker must disclose all known material facts about the property which could affect a tenant's use or enjoyment of the property, disclose information which could have a material impact on either party's ability to fulfill their obligations under the lease agreement, respond honestly and accurately to questions concerning said property, and deal honestly and fairly with all parties.

The duties and responsibilities of Broker in connection with the management of said property are as follows:

1. Broker shall take all reasonable steps to collect and enforce the collection of all rentals and other charges due Owner from tenants of said property in accordance with the terms of their tenancies.

2. From gross revenues collected from said property, Broker is hereby authorized to accrue and make disbursements from Owner's funds for contractual mortgage payments, property and employee taxes, salaries and any other compensation due and payable to the employees of Owner, special assessments, premiums for hazard and liability insurance and any other insurance required, and sums otherwise due and payable by Owner as operating expenses which are incurred pursuant to the terms of this agreement including management and other fees as provided herein.

3. Broker shall deposit gross revenues collected into a special trust account in a bank whose deposits are insured by the Federal Deposit Insurance Corporation. Broker shall have authority to endorse checks payable to Owner, deposit funds of Owner into said trust account, and to draw on such account any payment to be made by Broker to discharge any of the liabilities or obligations incurred by Broker pursuant to this agreement.

4. Broker shall arrange all repairs, replacements and decorating necessary to maintain said property it its present condition and for the operating efficiency of said property. The expense of any one item of maintenance shall not exceed the sum of $ 200.00 unless authorized by Owner or unless Broker determines it to be an emergency. Owner approval is not required in the event of an emergency where immediate repairs are required to preserve the property, continue essential services to the property, avoid danger to life or property, or to comply with federal, state or local law.

5. Broker shall have the authority to negotiate, prepare and execute all leases and to cancel and modify existing leases as agent for Owner.

6. Broker shall advertise the availability for rent of the property or any part thereof and to display "For Rent" or "For Lease" signs thereon; to show property to prospective tenants; to execute leases, renewals or cancellations of leases relating to said property; to terminate tenancies and to sign and serve for Owner such notices as Broker deems appropriate; to institute legal actions in the name of Owner; to evict tenants and recover possession of said premises; to recover rents and other sums due, and to settle, compromise and release such actions.

7. Broker shall have authority to hire, supervise and terminate on behalf of Owner all independent contractors and property employees, if any, reasonably required in the operation of said property. All such property employees are employees of Owner.

8. Broker shall maintain accurate records of all moneys received and disbursed in connection with its management of said property, and such records shall be open for inspection by Owner at all reasonable times. Broker shall provide monthly financial statements to Owner.

Owner agrees to maintain a minimum balance of $ 200.00 in Broker's trust account and in the event the amount falls below such minimum balance, Owner hereby agrees to pay such excess promptly upon the request of Broker.

Owner agrees to make available to Broker all data, records and documents pertaining to the property which Broker may require to properly exercise Broker's duties hereunder.

Owner shall complete and submit a lead-based paint disclosure if property is residential and built prior to 1978 as required by federal regulation.

Owner authorizes Broker to:

a. cooperate with brokers who represent tenants and
b. compensate cooperating brokers from Broker's fees
c. compensate Broker's agent

Owner agrees to hold Broker harmless from all damage suits in connection with the management of said property and from liability from injury suffered by any employee or other person whomsoever and to carry, at Owner's expense, adequate public liability insurance and to name Broker as co-insured. Broker also shall not be liable for any error of judgement oR for any mistake of fact or law, or for anything which Broker may do or refrain from doing hereunder, except in cases of willful misconduct or gross negligence. If suit is brought to collect Broker's compensation or if Broker successfully defends any action brought against Broker by Owner, relating to said property, or Broker's management thereof, Owner agrees to pay all costs incurred by Broker in connection with such action, including reasonable attorney fees.

This agreement may be later amended or modified at any time by a written mutual agreement signed by Owner and Broker.

Broker will not discriminate based on race, color, creed, religion, sex, national origin, age, handicap or familial status and will comply with all federal, state and local fair housing and civil rights laws and with all equal opportunity requirements.

Broker accepts this exclusive employment and agrees to use due diligence in the exercise of the duties, authority and powers conferred upon Broker under the terms hereof.

Receipt of a copy of the contract by the owner has been acknowledged.

DocuSigned by:
Benjamin Trownes — August 16, 2019 | 1:36 PM MDT
214F0F6B0F4F43F... Owner Date

DocuSigned by:
Kristi Trownes — August 16, 2019 | 9:14 PM
AAF80BAAA662471... Owner Date

Social Security Number or Tax Identification Number

Social Security Number or Tax Identification Number

2925 Underwood Pt. #4
Address

605-999-7127
Phone Number

Colorado Springs, CO 80920
City/State/Zipcode

DocuSigned by:
[signature] — August 16, 2019 | 8:18 PM MDT
4155BAE542FA44F... Broker By Agent

RESIDENTIAL REAL ESTATE LEASE

DS DWP (Lessee Initial) I acknowledge the firm/agent named below does not represent me as a client. If I am a customer to a real estate transaction I understand the firm/agent may be acting as an agent for the other party of the transaction.

THIS LEASE AGREEMENT (hereinafter referred to as the "Agreement") is made and entered into this day of August 3, 2020 | 3:22 PM PDT, by and between **Uhre Property Management** (hereinafter referred to as "Lessor") and David Pifke, _____(hereinafter referred to as "Lessee"). No other tenants are allowed without the written consent of the Lessor, or the execution of a new lease/rental agreement.

WITNESSETH:

WHEREAS, Lessor is the landlord of certain real property being, lying and situated in Pennington County, South Dakota such real property having a street address of **1319 12th St, Rapid City, SD 57701**

The property is described as follows: 4 Bed, 2.5 Bath, 2 Car Garage, **1319 12th St, Rapid City, SD 57701** located at
BOULEVARD ADD; BLOCK 42; LOT 7-8 & N10' OF LOT 9
BOULEVARD ADD; BLOCK 42; S15' OF LOT 9 & ALL OF LOT 10
HUNTS; BLOCK 42; LOT 11 & VAC ST JAMES ST (80X130) ADJ TO SAID LOT
See the attached GIS Map for reference of property boundary line (hereinafter referred to as "Premises").

WHEREAS, Lessor is desirous of leasing the Premises to Lessee upon the terms and conditions as contained herein; and

NOW, THEREFORE, the covenants and obligations contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto hereby agree as follows:

TERM. The lease term begins on **_10/01/2020_**, (hereinafter referred to as "Commencement Date") and shall terminate at 12 o'clock midnight on **_4/01/2022_**. Lessee shall vacate the premises upon termination of the Agreement, unless (i) Lessor and Lessee have extended this agreement or signed a new agreement; (ii) Lessor accepts rent from Lessee (other than past due rent), in which case a month-to-month tenancy shall be created which either party may terminate by a Sixty (60) day written notice. In the event a month-to-month tenancy results, rent shall be at a rate agreed to by Lessor and Lessee, or as allowed by law; all other terms and conditions of this Agreement shall remain in full force and effect.

RENT. Rent shall mean all monetary obligations owed from Lessee to Lessor under the terms of this Agreement, except for security deposit, if any.

(1) **Amount.** The total rent for the term hereof is the sum of **$2,725.00 ($2,700 + $25/pet fee) per month** for the term of the Agreement.

(2) **Due Date.** Rent is payable on the First day of each month of the term and can be late 3 days after aforementioned date. The first month's installment is to be paid upon the due execution of this Agreement.

EXHIBIT
tabbies
3

(3) **Commencement Date.** Rent for the period beginning on the Commencement Date is due no later than seven (7) days prior to the commencement date. All other payments are to be paid as set forth in the Rent Section, paragraphs (1) and (2) above.

(4) **Early Termination.** In the event of early termination, Lessee is required to pay **$2,725.00**, or the remaining balance of the lease agreement, whichever is more, as an early termination fee.

(5) **Payment Information.** All such payments shall be made to Lessor at Lessor's address listed here: **PO Box 1577, Rapid City, South Dakota 57709** or any other location subsequently specified by Lessor in writing to Lessee, on or before the due date and without demand. If any payment is returned for non-sufficient funds, stop payment, or account closure by Lessee's bank, the Lessor may charge appropriate fees, as detailed in the Late Charge Section below.

SECURITY DEPOSIT. Upon the execution of this Agreement, Lessee shall deposit with Lessor the sum of **$2,950.00 ($2,700 + $250/pet deposit),** receipt of which is hereby acknowledged by Lessor, as security for any damage caused to the Premises during the term hereof. Such deposit shall be returned to Lessee, without interest, unless municipal code otherwise requires, and less any set off for cleaning or damages to the Premises upon the termination of this Agreement.

The Security Damage Deposit may not be used to pay rent or other charges while the Lessee occupies the Premise. No refund of the Security Damage Deposit will be made until Lessee has vacated, and the Premise has been inspected by the Lessor. The return of a security damage deposit shall occur within 30 days after Lessee moves out.

DAMAGE TO PREMISES. If, by no fault of Lessee, Premises are totally or partially damaged or destroyed by fire, earthquake, flood, storm, accident, civil commotion, or other unavoidable cause so as to render the Premises totally or partially uninhabitable, either Lessor or Lessee may terminate this Agreement by giving the other written notice. Rent shall be prorated on the date the premises became totally or partially uninhabitable. The prorated amount shall be the current monthly Rent prorated on a thirty (30) day period. If the Agreement is not terminated, Lessor shall promptly repair the damage, and Rent shall be reduced based on the extent to which the damage interferes with Lessee's reasonable use of the Premises. If damage occurs as a result of an act of Lessee or Lessee's guests, only Lessor shall have the right of termination, and no reduction in Rent shall be made.

INSURANCE: Lessee's or guests' personal property and vehicles are not insured by Lessor against loss or damage due to fire, theft, vandalism, rain, water, criminal or negligent acts of others, or any other cause. Lessee shall carry Lessee's own insurance (Renter's Insurance) to protect Lessee from any such loss or damage. Lessee shall comply with any requirement imposed on Lessee by Lessor's insurer to avoid: (i) an increase in Lessor's insurance premium (or Lessee shall pay for the increase in premium); or (ii) loss of insurance. **Lessees shall provide proof of insurance within five (5) days prior to the commencement of the agreement.**

The property owner is responsible for paying and maintaining the following HOA dues, property taxes and insurances:

LATE CHARGE. Lessee acknowledges that late payment of Rent may cause Lessor to incur costs and expenses, the exact amount of which is extremely difficult and impractical to determine. These costs may include but are not limited to: processing, enforcement, accounting expenses and late charges imposed on the Lessor. Partial payments are not accepted. In the event that any payment required to be paid by Lessee hereunder is not made within 3 days, Lessee shall pay to Lessor, in addition to such payment or other charges due hereunder, a "late fee" in the amount of **$30.00 per day**. Late fees are deemed additional Rent.

- If a Tenant defaults in making a payment or breaks any provisions of this agreement, the Landlord may obtain the services of any attorney with respect to the defaults involved, Tenant agrees to pay to the

Landlord any costs or fees involved, including reasonable attorney's fees, Collection Agency Commissions (up to 40% of final invoice.)

- If my account is assigned to a collection agency. I understand that I am responsible for all attorney fees, court costs, delinquency fees, that may be incurred during the collection of my debt. I understand that the delinquency fee will be equal to **(40%)** of the principal amount owed.

RETURNED CHECKS. Lessee acknowledges that the issuance of a returned check may cause Lessor to incur additional costs and expenses, the exact amount of which is extremely difficult and impractical to determine. If any payment is returned by the financial institution, for any reason, Lessor may require all future payments to be made in cash or by certified check. In addition, Lessee shall pay a **$150.00** returned check fee. All fees, late fees, and service charges incurred by the Lessee as well as any expenses including reasonable attorney's fees incurred by Lessor in instituting and prosecuting any actions by reason of any default of Lessee hereunder shall be deemed to be additional rent and shall be due from Lessee to Lessor immediately following the incurring of the respective expenses, the nonpayment of which shall be a breach of this agreement for nonpayment of rent.

USE OF PREMISES. The Premises shall be used and occupied by Lessee and Lessee's immediate family, consisting of up to 2 people, exclusively, and no part of the Premises shall be used at any time during the term of this Agreement by Lessee for the purpose of carrying on any business, profession, or trade of any kind, or for any purpose other than as a private dwelling. Lessee shall not allow any other person, other than Lessee's immediate family or transient relatives and friends who are guests of Lessee, to use or occupy the Premises without first obtaining Lessor's written consent to such use. Lessee shall comply with any and all laws, ordinances, rules and orders of any and all governmental or quasi-governmental authorities affecting the cleanliness, use, occupancy and preservation of the Premises.

HOUSEHOLD MEMBERS AND GUESTS. Any additions to the household members named on the lease, including live-in aides and foster children, but excluding natural births, require the advance written approval of the Lessor. Such approval will be granted only if the new family members pass the Lessor's screening criteria and a unit of the appropriate size is available. Permission to add live-in aides and foster children shall not be unreasonably refused. Lessee agrees not to have the same overnight guest that has not passed the Lessor's screening criteria for more than 10 consecutive nights, and no more than a total of 20 nights per year.

CONDITION OF PREMISES. Lessee stipulates, represents and warrants that Lessee has examined the Premises, and that they are at the time of this Lease in good order, repair, and in a safe, clean and leasable condition. Lessee has examined and determined that all appliances and fixtures, if any, including smoke detector(s), are clean and in operable condition, within one month of move-in.

KEYS; LOCKS. The Lessee shall be issued _2_ keys to the property by the Lessor at the signing of this Agreement. In the event the Lessee loses the keys that were issued at the signing of this agreement and the Lessee requests more keys from the Lessor, the Lessee will be required to pay in advance **$40.00** per key requested.

(1)**Lock Out.** There will be a **$50.00** charge for the second and each subsequent time Lessor is called to let any of the Lessees into the Premises, whatever the reason. The charge to unlock your door is **$85.00** After Hours.

(2)**Re-Keys Existing Locks.** In the event Lessee re-keys existing locks or opening devices, Lessee shall immediately deliver copies of all keys to Lessor. Lessee will be required to pay **$260.00 for a Re-Keying Fee.** Lessee may not remove locks, even if installed by Lessee.

ASSIGNMENT AND SUB-LETTING. Lessee shall not assign this Agreement, or sub-let or grant any license to use the Premises or any part thereof without the prior written consent of Lessor. Unless such consent is obtained, any assignment, transfer or subletting of Premises or this Agreement or tenancy by voluntary act of Lessee,

operation of law or otherwise, shall, at the option of Lessor, terminate this Agreement. Any proposed assignee, transferee or sub-lessee shall submit to Lessor an application and credit information for Lessor's approval and, if approved, sign a separate written agreement with Lessor and Lessee. Lessor's consent one such assignment, sub-letting or license shall not be construed as consent to any subsequent assignment, transfer or sublease and does not release Lessee or Lessee's obligations under this Agreement. An assignment, sub-letting or license without the prior written consent of Lessor or an assignment or sub-letting by operation of law shall be absolutely null and void and shall, at Lessor's option, terminate this Agreement.

ALTERATIONS AND IMPROVEMENTS. Lessee shall make no alterations to the buildings or improvements on the Premises or construct any building or make any other improvements on the Premises without the prior written consent of Lessor. Any and all alterations, changes, and/or improvements built, constructed or placed on the Premises by Lessee shall, unless otherwise provided by written agreement between Lessor and Lessee, be and become the property of Lessor and remain on the Premises at the expiration or earlier termination of this Agreement. Lessor may charge Lessee for restoration of the Premises to the condition it was in prior to any alterations/improvements. Lessee shall not make any repairs, alternations, or improvements in or about the Premises including: painting, wallpapering, adding or changing locks, installing antenna or satellite dish(es), placing signs, displays or exhibits, or using screws, fastening devices, large nails or adhesive materials. Lessor shall not be responsible for costs of alternations or repairs made by Lessee. Lessee shall not deduct from Rent the costs of any repairs, alternations or improvements and any deduction made by Lessee shall be considered unpaid Rent.

NON-DELIVERY OF POSSESSION. Lessee is not in possession of the Premises. In the event Lessor cannot deliver possession of the Premises to Lessee upon the Commencement Date, such Date shall be extended to the date on which possession is made available to Lessee. If non-delivery of possession is through no fault of Lessor or its agents, then Lessor or its agents shall have no liability, but the rental herein provided shall abate until possession is given. Lessor or its agents shall have thirty (30) days in which to give possession, and if possession is tendered within such time, Lessee agrees to accept the demised Premises and pay the rental herein provided from that date. In the event possession cannot be delivered within such time, through no fault of Lessor or its agents, then Lessee may terminate this Agreement by giving written notice to Lessor, and Lessee shall be refunded all Rent and security deposit paid. Possession is deemed terminated when Lessee has returned all keys to the Premises to Lessor.

HAZARDOUS MATERIALS. Lessee shall not keep on the Premises any item of a dangerous, flammable or explosive character that might unreasonably increase the danger of fire or explosion on the Premises or that might be considered hazardous or extra hazardous by any responsible insurance company.

LEAD-BASED PAINT DISCLOSURE. This property was built before 1978. Housing built before 1978 may contain lead-based paint. Lead paint, paint chips and dust can cause health hazards if not managed properly. Lead exposure is especially harmful to young children and pregnant women. Before renting pre-1978 housing, Lessors must disclose the presence of lead-based paint hazards in the dwelling. Renters must also receive a federally-approved pamphlet on lead poisoning prevention.
Lessor has no knowledge regarding the presence of lead-based paint on the Premises.

UTILITIES. Lessee shall be responsible for arranging and paying for all utility services required on the Premises.

STORAGE. Storage is permitted as follows: Lessee shall store only personal property Lessee owns, and shall not store property claimed by another or in which another has any right, title or interest. Lessee shall not store any improperly packaged food or perishable goods, flammable materials, explosives, hazardous waste or other inherently dangerous material, or illegal substances.

VEHICLES/PARKING. Parking is permitted as follows: Parking is to be used only for properly licensed and operable motor vehicle. NO trailers, boats, campers, recreational vehicles, busses, trucks or unregistered vehicles

are to be brought on the premises. NO parking or driving on the property lawn or neighbor's lawns or driveway is permitted. Any cars found parked on the lawn will be towed at Lessee's expense. Parking space is to be kept clean and cars must be parked in an orderly fashion. Mechanical work or storage of inoperable vehicles in not permitted in garage or parking space or elsewhere on the Premises. The Lessor, at the Lessees expense, may remove disabled vehicles and unregistered vehicles at any time. NO vehicle maintenance may be performed on the property (i.e. oil changes, brake changes, etc.). Town parking restrictions must be followed.

NEIGHBORHOOD CONDITIONS. Lessee is advised to satisfy Lessee's self as to neighborhood or area conditions, including: schools, proximity and adequacy of law enforcement, crime statistics, proximity of registered felons or offenders, fire protection, other governmental services, availability, adequacy and cost of any speed-wired, wireless internet connections or other telecommunications or other technology services and installations, proximity to commercial, industrial or agricultural activities, existing and proposed transportation, construction and development that may affect noise, view, or traffic, airport noise, noise or odor from any source, wild and domestic animals, other nuisances, hazards, or circumstances, cemeteries, facilities and condition of common areas, conditions and influences of significance to certain cultures and/or religions, and personal needs, requirements and preferences of Lessee.

MAINTENANCE AND REPAIR; RULES. Lessee will, at its sole expense, keep, maintain and safeguard the Premises and appurtenances in good and sanitary condition and repair during the term of this Agreement and any renewal thereof. Without limiting the generality of the foregoing, Lessee shall:

(a) Not obstruct the driveways, sidewalks, courts, entry ways, stairs and/or halls, which shall be used for the purposes of ingress and egress only;

(b) Keep all windows, glass, window coverings, doors, locks and hardware in good, clean order and repair;

(c) Not obstruct or cover the windows or doors;

(d) Not leave windows or doors in an open position during any inclement weather;

(e) Not hang any laundry, clothing, sheets, etc. from any window, rail, porch or balcony nor air or dry any of same within any yard area or space;

(f) Not cause or permit any locks or hooks to be placed upon any door or window without the prior written consent of Lessor;

(g) Keep all air conditioning filters clean and free from dirt; Expected replacement is every 6 months (June & November)

(h) Keep all lavatories, sinks, toilets, and all other water and plumbing apparatus in good order and repair and shall use same only for the purposes for which they were constructed. Lessee shall not allow any sweepings, rubbish, sand, rags, ashes or other substances to be thrown or deposited therein. Any damage to any such apparatus and the cost of clearing stopped plumbing resulting from misuse shall be borne by Lessee;

(i) And Lessee's family and guests shall at all times maintain order in the Premises and at all places on the Premises, and shall not make or permit any loud or improper noises, or otherwise disturb other residents;

(j) Keep all radios, television sets, stereos, phonographs, etc., turned down to a level of sound that does not annoy or interfere with other residents;

(k) Deposit all trash, garbage, rubbish or refuse in the locations provided therefor and shall not allow any trash, garbage, rubbish or refuse to be deposited or permitted to stand on the exterior of any building or within the common elements;

(l) Abide by and be bound by any and all rules and regulations affecting the Premises or the common area appurtenant thereto which may be adopted or promulgated by the Condominium or Homeowners' Association having control over them.

(m) Properly use, operate and safeguard landscaping and winterizing irrigation (lawn sprinkler) system by October 1st of each year if equipped, and appliance, and all mechanical, electrical, gas and plumbing fixtures, and keep them and the Premises clean, sanitary and well ventilated. See the attached GIS map for Premise

(n) Be responsible for checking and maintaining all smoke detectors.

(o) Be responsible for mowing weekly and edging lawns, watering, weeding, pruning, raking, and fertilizing. **If grass gets longer than 6" we will have the lawn cut at the tenant's expense. Cost is $130.**

Lessee shall immediately notify Lessor, in writing, of any problem, malfunction or damage. Lessee shall be charged for all repairs or replacements caused by Lessee, pets, guests or licensees of Lessee, excluding ordinary wear and tear. Lessee shall be charged for all damage to Premises as a result of failure to report a problem in a timely manner. Lessee shall be charged for repair of drain blockages or stoppages, unless caused by defective plumbing parts or tree roots invading sewer lines.

Lessee agrees to comply with all Lessor's rules and regulations that are at any time posted on the Premises or delivered to Lessee. Lessee shall not, and shall ensure that guests and licensees of Lessee shall not, disturb, annoy, endanger or interfere with neighbors, or use the Premises for any unlawful purposes, including, but not limited to, using, manufacturing, selling, storing or transporting illegal drugs or other contraband, or violate any law or ordinance, or commit a waste or nuisance on or about the Premises.

TEMPORARY RELOCATION. Subject to local law, Lessee agrees, upon demand of Lessor, to temporarily vacate Premises for a reasonable period, to allow for fumigation (or other methods) to control wood destroying pests or organisms, or other repairs to Premises. Lessee agrees to comply with all instructions and requirements necessary to prepare Premises to accommodate pest control, fumigation or other work, including bagging or storage of food and medicine, and removal of perishables and valuables.

INSPECTION OF PREMISES. Lessor and Lessor's agents shall have the right at all reasonable times during the term of this Agreement and any renewal thereof to enter the Premises for the purpose of inspecting the Premises and all buildings and improvements thereon. And for the purposes of making any necessary or agreed repairs, decorations, additions or alterations as may be deemed appropriate by Lessor for the preservation of the Premises or the building. Lessor and its agents shall further have the right to exhibit the Premises and to display the usual "for sale", "for rent" or "vacancy" signs on the Premises at any time before the expiration of this Lease. The right of entry shall likewise exist for the purpose of removing placards, signs, fixtures, alterations or additions, but do not conform to this Agreement or to any restrictions, rules or regulations affecting the Premises.

(1) **Notice.** Lessor and Lessee agree that 24-hour written notice shall be reasonable and sufficient notice to conduct an inspection of the Premises, unless the Lessee waives the right to such notice. Notice may be given orally to show the Premises to actual or prospective purchasers or renters provided Lessee has been notified in writing. No notice is required: (i) to enter in case of an emergency; (ii) if the Lessee is present and consents at the time of entry; or (iii) if the Lessee has abandoned or surrendered the Premises. No written notice

is required if Lessor and Lessee orally agree to an entry for agreed services or repairs if the date and time of entry are within one week of the oral agreement.

SIGNS. Lessee authorizes Lessor to place FOR SALE and FOR RENT signs on the Premises within 60 days of termination of lease.

SALE OF PROPERTY. Owner agrees to hold property off market until February 1, 2022 or 60 days of the termination of lease and not take showings.

SUBORDINATION OF LEASE. This Agreement and Lessee's interest hereunder are and shall be subordinate, junior and inferior to any and all mortgages, liens or encumbrances now or hereafter placed on the Premises by Lessor, all advances made under any such mortgages, liens or encumbrances (including, but not limited to, future advances), the interest payable on such mortgages, liens or encumbrances and any and all renewals, extensions or modifications of such mortgages, liens or encumbrances.

LESSEE'S HOLD OVER. If Lessee remains in possession of the Premises with the consent of Lessor after the natural expiration of this Agreement, a new tenancy from month-to-month shall be created between Lessor and Lessee which shall be subject to all of the terms and conditions hereof except that rent shall then be due and owing at **$3,105.00 per month** and except that such tenancy shall be terminable upon sixty (60) days written notice served by either party.

EARLY TERMINATION OF LEASE.

The lease terminates early if:

(1) During the initial term of the lease or any extension thereof, the Lessor may terminate the tenancy on the following grounds:

(a) Serious or repeated violations of the terms and conditions of the lease;

(b) Violation of Federal, State, or local law that imposes obligations on the Lessee in connection with the occupancy or use of the contract unit and the premises;

(c) Criminal activity (as provided in Criminal Activity Section described below);

(d) Non-payment of rent or repeated failure to pay rent in a timely manner;

(e) Any misrepresentation or false statement of information on Lessee's application regardless of whether intentional or negligent;

(f) Interfering with the management of the property;

(g) Causing an undue financial burden on the property; or

(h) Other good cause (as provided in Other Good Cause for Terminating Tenancy Section as described below).

(2) The Lessee terminates the lease with a minimum of 60 calendar days written notice after the initial term; or

(3) The Lessor and the Lessee mutually agree to terminate the lease, and subject to any agreed upon terms of a subsequent "Release Agreement".

In addition to any obligations established by Rent Section (4) as described above, in the event of termination by Lessee prior to completion of the original term of this Agreement, Lessee shall also be responsible for lost Rent, rental commissions, advertising expenses, cleaning and painting costs necessary to ready Premises for re-rental.

CRIMINAL ACTIVITY. Any of the following types of criminal activity by the Lessee, any member of the household, a guest or another person under the Lessee's control shall be cause for termination of tenancy.

(1) Any activity including criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises by other residents (including conduct/actions against the Lessor and/or property management staff and/or any agents of Lessor);

(2) Any activity including criminal activity that threatens the health, safety or right to peaceful enjoyment of their residences by persons residing in the immediate vicinity of the premises;

(3) Any violent criminal activity on or off the premises;

(4) Any drug-related criminal activity on or off the premises;

(5) Any other activity which impairs the physical or social environment of the premises;

(6) Illegal use or possession of a controlled substance;

(7) Abuse of alcohol that threatens the health, safety or right to peaceful enjoyment of the premises by other residents;

(8) Interference with management of property.

(9) Criminal activity directly relating to domestic violence, dating violence, sexual assault or stalking engaged in by a member of a Lessee's household or any guest or other person under the Lessee's control shall not be cause for eviction for the Lessee or immediate family member of the Lessee's household who is a victim of domestic violence, dating violence, sexual assault or stalking and as a result Lessee victim could not control or prevent the criminal activity. This exception for victims of domestic violence does not apply to the eviction of a family member who is the perpetrator of the domestic violence or if there is an actual or imminent threat to other residents, the larger community, Lessor/Lessor's agents or persons providing service to the property if the Lessee is not evicted.

The Lessor may terminate the tenancy for criminal activity in accordance with this section if the Lessor determines that the household member/guest has committed the criminal activity, regardless of whether the household member/guest has been arrested or convicted for such activity. In addition, the Lessor may terminate the tenancy if any member of the household is:

(1) Fleeing to avoid prosecution, or custody or confinement after conviction, for a crime, or attempt to commit a crime, that is a felony under the laws of the place from which the individual flees; or

(2) Violating a condition of probation or parole under Federal or State law.

OTHER GOOD CAUSE FOR TERMINATION OF TENANCY. During the first year of the initial lease term or anytime during the tenancy, other good cause for termination of tenancy must be something the family did or failed to do. Other good cause includes, but is not limited to:

(1) Disturbance of neighbors;

(2) Destruction of property;

(3) Failure to maintain utilities or wasting utilities provided by the Lessor;

(4) Allowing persons not named on the lease to reside in the unit without Lessor's prior written consent;

(5) Living or housekeeping habits that cause damage or present safety concerns to the Lessee, other residents or to the unit or premises or that may otherwise result in minimum housing violations; or

(6) An incident or incidents of actual or threatened domestic violence, dating violence, sexual assault or stalking will not be construed as serious or repeated violations of the lease by the victim or threatened victim of that violence and will not be good cause for terminating a lease held by the victim of such violence.

EVICTION BY COURT ACTION. The Lessor may only evict the Lessee from the contract unit by instituting a court action.

LESSOR TERMINATION NOTICE. The Lessor must give the Lessee a notice that specifies the grounds for termination of tenancy. The notice of grounds must be given at or before commencement of the eviction action. The notice of grounds may be included in, or may be combined with, any Lessor eviction notice to the Lessee. Lessor eviction notice means a notice to vacate, or a complaint used under State or local law to commence an eviction action.

LESSEE'S OBLIGATIONS UPON VACATING PREMISES. Upon the termination of the Agreement, Lessee shall surrender the Premises in as good a state and condition as they were at the commencement of this Agreement, reasonable use and wear and tear thereof and damages by the elements accepted. Lessee is responsible completing the Tenant Move-Out Cleaning Checklist upon move-out. The minimum Cleaning Fee for the checklist is **$1,250.00.**

(1) Upon the termination of the Agreement, Lessee shall: (i) give Lessor all copies of all keys or opening devices to Premises, including any common areas; (ii) vacate and surrender the Premises to Lessor, empty of all persons; (iii) vacate any/all parking and/or storage space; (iv) clean and deliver Premises as specified in Lessee's Obligations Upon Vacating Premises Section (see Move-Out Checklist) (2) below, to Lessor in the same condition as referenced in Maintenance and Repair; Rules Section above; (v) remove all debris; (vi) give written notice to Lessor of Lessee's forwarding address.

(2) Right to Pre-Move-Out Inspection and Repairs as follows: (i) After giving or receiving notice of termination of a tenancy, or before the end of a lease, Lessee has the right to request an inspection on Premises take place prior to termination of the lease or rental. If Lessee requests such an inspection, Lessee shall be given an opportunity to remedy identified deficiencies prior to termination, consistent with the terms of this Agreement. (ii) Any repairs or alternations made to the premises as a result of this inspection (collectively "Repairs") shall be made at Lessee's expense. Repairs may be performed by Lessee or through others, who have adequate insurance and licenses and are approved by Lessee. The work shall comply with applicable law, including governmental permit inspection and approval requirements. Repairs shall be performed in a good, skillful manner with materials of quality and appearance comparable to existing materials. It is understood that exact restoration of appearance or cosmetic items following all repairs may not be possible. (iii) Lessee shall: (a) obtain receipts for Repairs performed by others; (b) prepare a written statement indicating the Repairs performed by Lessee and the date of such Repairs; and (c) provide copies of receipts and statements to Lessor prior to termination.

PET(S). Pets are not allowed at the Premises without the express written consent of Lessor. Lessee shall be entitled to keep no more than **1 Dog (approximately 60lbs or less) at a cost of $25/pet/month with a $250.00 deposit**. However, at such time as Lessee shall actually keep any such animal on the Premises. No animal that is undomesticated or that is considered illegal according to federal, state or local law will be tolerated at the

Premises. **Lessee will be responsible for any possible damage caused by an authorized or unauthorized pet, including but not limited to: damage to house (and yard) caused by urination/defecation, pests brought into the property on or by the animal, damage to the house, yard or third parties caused by actions of the pet (scratching, clawing, biting, etc.), or any claims brought by a third party due to the animal. Tenant(s) are responsible for any local code violations.**

QUIET ENJOYMENT. Lessee, upon payment of all of the sums referred to herein as being payable by Lessee and Lessee's performance of all Lessee's agreements contained herein and Lessee's observance of all rules and regulations, shall and may peacefully and quietly have, hold and enjoy said Premises for the term hereof.

INDEMNIFICATION. Lessor shall not be liable for any damage or injury of or to the Lessee, Lessee's family, guests, invitees, agents or employees or to any person entering the Premises or the building of which the Premises are a part or to goods or equipment, or in the structure or equipment of the structure of which the Premises are a part, and Lessee hereby agrees to indemnify, defend and hold Lessor harmless from any and all claims or assertions of every kind and nature.

DEFAULT. If Lessee fails to comply with any of the material provisions of this Agreement, other than the covenant to pay rent, or of any present rules and regulations or any that may be hereafter prescribed by Lessor, or materially fails to comply with any duties imposed on Lessee by statute, within seven (7) days after delivery of written notice by Lessor specifying the non-compliance and indicating the intention of Lessor to terminate the Lease by reason thereof, Lessor may terminate this Agreement.

(1) **Acceleration.** If Lessee fails to pay rent when due and the default continues for seven (7) days thereafter, Lessor may, at Lessor's option, declare the entire balance of rent payable hereunder to be immediately due and payable and may exercise any and all rights and remedies available to Lessor at law or in equity or may immediately terminate this Agreement.

JOINT AND INDIVIDUAL OBLIGATIONS. If there is more than one Lessee, each one shall be individually and completely responsible for the performance of all obligations of Lessee under this Agreement, jointly with every other Lessee, and individually, whether or not in possession.

ABANDONMENT. If at any time during the term of this Agreement Lessee abandons the Premises or any part thereof, Lessor may, at Lessor's option, obtain possession of the Premises in the manner provided by law, and without becoming liable to Lessee for damages or for any payment of any kind whatsoever. Lessor may, at Lessor's discretion, as agent for Lessee, relet the Premises, or any part thereof, for the whole or any part thereof, for the whole or any part of the then unexpired term, and may receive and collect all rent payable by virtue of such reletting, and, at Lessor's option, hold Lessee liable for any difference between the rent that would have been payable under this Agreement during the balance of the unexpired term, if this Agreement had continued in force, and the net rent for such period realized by Lessor by means of such reletting. If Lessor's right of reentry is exercised following abandonment of the Premises by Lessee, then Lessor shall consider any personal property belonging to Lessee and left on the Premises to also have been abandoned, in which case Lessor may dispose of all such personal property in any manner Lessor shall deem proper and Lessor is hereby relieved of all liability for doing so.

ATTORNEYS' FEES. Should it become necessary for Lessor to employ an attorney to enforce any of the conditions or covenants hereof, including the collection of rentals or gaining possession of the Premises, Lessee agrees to pay all expenses so incurred, including a reasonable attorneys' fee.

WAIVER. The waiver of any breach shall not be construed as a continuing waiver of the same or any subsequent breach.

NOTICE. Notices may be served at the following addresses, or at any other location subsequently designated:

STATE OF SOUTH DAKOTA) SS. COUNTY OF PENNINGTON	)	IN CIRCUIT COURT SEVENTH JUDICIAL CIRCUIT
UHRE REALTY CORPORATION; AND UHRE PROPERTY MANAGEMENT CORPORATION, Plaintiffs, vs. BENJAMIN TRONNES and LESLIE TRONNES, Defendants.	)	51CIV21-000821 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This matter came before the Court for trial on October 11, 2022. Plaintiffs appeared via their manager, Josh Uhre and were represented by counsel, Jonathan Heber and Abigale Farley of Cutler Law Firm, LLP. Defendants, appeared personally and were represented by counsel, Katelyn A. Cook and Keely Kleven of Gunderson, Palmer, Nelson and Ashmore, LLP. The Court having heard and considered the evidence presented at the trial and being fully advised in the premises, the Court does hereby make and enter the following:

FINDINGS OF FACT

1. Any Finding of Fact which is more appropriately a Conclusion of Law should be treated in its appropriate fashion as such throughout.
2. The issues before the Court include both Plaintiffs' and Defendants' request for declaratory judgment as to whether the Tronneses breached the terms of the Listing Agreement; Plaintiff Uhre Realty Corporation (hereinafter "URC") related claim for breach of contract related to the Listing Agreement; URC's claim that the Tronneses breached the implied covenant of good faith and fair dealing; and the Tronneses'

counterclaim against both URC and Plaintiff Uhre Property Management (hereinafter "UPM") for tortious interference with business relations.

3. This Court has previously granted partial summary judgment in the Tronnes' favor on UPM's breach of contract claim for the alleged breach of the Agreement to Manage and Lease Real Estate.
4. URC and UPM had voluntarily dismissed their claim for Civil Conspiracy against the Tronneses.
5. URC is a South Dakota corporation organized and existing under the laws of the State of South Dakota with a principal place of business is located within Pennington County, South Dakota.
6. Josh Uhre is the President of URC.
7. UPM is a South Dakota corporation organized and existing under the laws of the State of South Dakota with a principal place of business is located within Pennington County, South Dakota.
8. Josh Uhre is the President of UPM.
9. URC and UPM are two separate and distinct legal entities.
10. There is no fictional name registration or D/B/A for "Uhre Realty and Property Management."
11. Defendants Ben and Leslie Tronnes are residents of Colorado Springs, Colorado.
12. The property at issue in this case is a residential property formerly owned by the Tronneses, located at 1319 12th St. Rapid City, SD 57701 (hereinafter the "Property").
13. In 2019 the Tronneses decided to relocate to Colorado due to various job opportunities.

14. Because of this, they entered into a first "Exclusive Listing and Agency Agreement" with URC effective September 10, 2019, expiring April 10, 2020, with the intent to sell the Property.

15. When the Property had not yet sold, the Tronneses then entered into an "Agreement to Manage and Lease Real Estate" (hereinafter the "Property Management Agreement") with UPM on August 16, 2019, for purposes of managing the Property, which included securing tenants and collecting rent payments. (Tr. Ex. 1).

16. UPM was the drafter of this Property Management Agreement.

17. UPM was hired by the Tronneses "exclusively" to "rent, lease, operate and manage [the Property]" subject to the terms and conditions of the Property Management Agreement. *Id.*

18. In exchange for the services set forth in the Property Management Agreement, the Tronneses agreed to compensate UPM 10% of the gross monthly rent collected by UPM during the term of the Property Management Agreement.

19. On April 29, 2020, the Tronneses subsequently entered into the operative "Exclusive Listing and Agency Agreement" (hereinafter the "Listing Agreement") with URC effective May 1, 2020 and terminating on October 31, 2020. (Tr. Ex. 2).

20. URC was the drafter of this Listing Agreement.

21. Per the Listing Agreement, URC had the "exclusive irrevocable right and privilege to *sell* [the Property]." *Id.* (Emphasis added).

22. Per the Listing Agreement, URC would be entitled to receive a commission in one of three ways. First, URC would be entitled to compensation if, *during the term of the Listing Agreement*, (1) a purchaser was procured for the Property, or (2) if the Property

was exchanged or optioned and said option was eventually exercised. *Id.* at ¶ 7 A. (Emphasis added)

23. Third, if no purchase, exchange, or option occurred during the term of the Listing Agreement, then URC's only means of obtaining a commission was if the property was "*sold* to any person to whom the property was shown" *within 180 days after the expiration of the Listing Agreement*. *Id.* (Emphasis added).
24. The Listing Agreement expired on October 31, 2020. *Id.* at preamble.
25. The 180-day tail period set forth in the Listing Agreement expired on April 29, 2021.
26. In the meantime, in the summer of 2020, David Pifke and his partner, Althea Nelson were living in Las Vegas, NV and were looking to relocate to South Dakota due to COVID-related closures.
27. To this end, Althea contacted UPM to inquire about leasing the Property.
28. At the time David and Althea reached out to UPM regarding a lease, David was not in a financial position to be able to qualify for financing to purchase a property. Because of this, they were specifically looking for a rental home.
29. David and Althea also were looking for a lease because they were unsure whether they would want to remain in South Dakota permanently as they had not lived through a winter in Rapid City.
30. At the time David and Althea moved to Rapid City, they did not intend to purchase the Property.
31. UPM initially sent a draft lease with a one-year term beginning October 1, 2020 and ending October 1, 2021.

32. On August 1, 2020, having reviewed a draft lease sent by UPM, David raised concerns to UPM about the one-year term of the lease and inquired as to whether, if the Property was sold during the terms of the lease, he and Althea would have to relocate. (Tr. Ex. 5).

33. UPM replied, indicating that the Tronneses would likely opt to relist the Property on June 1, 2021. (Tr. Ex. 4).

34. With this information, David inquired whether the Tronneses would be willing to agree to not list the Property until the end of the lease term and whether the Tronneses would be agreeable to an eighteen-month lease term. *Id.*

35. David and Althea did not want to have to make the Property available for showings because they valued their privacy and doing so would be difficult to coordinate as David worked from home. They also did not want to have to move again in less than a year should the Property be sold. *Id.*

36. The Tronneses agreed to keep the Property off the market for eighteen months. (Tr. Ex. 8).

37. David signed a "Residential Real Estate Lease" with the Tronneses and UPM (hereinafter the "Lease") on August 3, 2020. (Tr. Ex. 3).

38. The term of the Lease was from October 1, 2020, to April 1, 2022. *Id.*

39. The Lease contained the following provision: "Owner agrees to hold property off market until February 1, 2022, or 60 days of the termination of lease and not take showings." *Id.* at "Sale of Property."

40. David and Althea moved into the property in October of 2020.

41. While Uhre had periodically inquired whether David would be interested in eventually purchasing the property, even through December of 2020, David maintained that he and Althea were unsure of whether they intended to stay and had not "looked much into [purchasing the Property]". (Tr. Ex. 22).
42. Uhre inquired again in January of 2021, but that inquiry was not at the behest of the Tronneses and was unknown to the Tronneses at the time.
43. David was of the understanding that because the Lease was with UPM, his interactions with Uhre were done on behalf of UPM.
44. In the meantime, the Tronneses were renting a property in Colorado Springs with their three children.
45. That property became available for the Tronneses to purchase in January of 2021 (hereinafter the "Colorado home").
46. Because the Tronneses had yet to sell the Property in Rapid City, they negotiated an extended closing date on the Colorado home to June 1, 2021.
47. Their goal in doing so was to sell the Property in advance of the June 1, 2021, closing date to allow them to obtain more favorable financing for the Colorado home.
48. While David had never expressed any interest in purchasing the Property, the Tronneses decided to stop by the Property when they were back in South Dakota in January of 2021 to try to facilitate a sale.
49. At this time, the Tronneses discussed the possibility of David purchasing the Property.
50. As of the time of this meeting, the Listing Agreement had expired.

51. On January 23, Ben sent a follow up email to David stating that they would sell the Property for $499,000 with a realtor or $475,000 without a realtor and putting him in touch with Blue Ribbon Mortgage to try to encourage him to seek financing. (Tr. Ex. 23).

52. Because the Tronneses were still focused on selling the Property in advance of their June 1, 2021, closing on the Colorado home, Ben again reached out to Pifke on February 4, 2021, asking whether David would be able and interested to purchase the Property. (Tr. Ex. 26).

53. David reiterated that he still "would need to free up some more cash for a down payment before an offer [would be] realistic," and that "I know y'all are anxious to sell, so I'll keep you updated." (Tr. Ex. 26).

54. On March 4, 2021, Ben reached out via email to David to let him know that they would plan to list the Property on May 1, 2021, as a final effort to try to get the Property sold prior to the June 1, 2021, closing date on the Colorado home. (Tr. Ex. 26).

55. He reiterated that he would sell the Property to David for $475,000 up until that point, at which point they would list the Property for $499,000. (Tr. Ex. 26).

56. In response, David pointed out the fact that the lease prohibited the Property from being sold until February 1, 2022, and that in his opinion, listing it earlier would be a breach of the Lease. (Tr. Ex. 27).

57. Ben acknowledged this in a responsive email that same day. Once David pointed out the fact that listing the Property would be a breach of the Lease, Ben no longer planned to list the Property on May 1, 2021.

58. This was the last communication between Ben and David until David eventually made an offer to purchase the Property.

59. This is consistent with testimony from both David and Ben, as well as the cell phone records which did not indicate any calls between the parties. (Tr. Ex. 63).

60. David indicated that after receiving this email from Ben, he spoke with his sister who is an attorney who told him that while an early list date would likely breach the Lease, his recourse would be limited.

61. He also believed that Ben was planning to list the Property on May 1, 2021, because roofers came to the Property in early spring to fix preexisting hail damage on the roof.

62. Thus, all of this led David to make an offer on the Property for $500,000 on April 30, 2021.

63. David made the offer for $500,000 because he did not want to risk getting into a "bidding war" with other people if the Property was going to be listed on May 1, 2021, and he believed that $499,000 would be the list price. (Tr. Ex. 29).

64. Prior to the instant litigation, David had never seen the Listing Agreement and did not even know what a "tail period" was.

65. Thus, David had no knowledge that a tail period existed, much less that the tail period expired on April 29, 2021.

66. He was able to finally make the offer because he was able to free up additional cash by selling his NFL Las Vegas Raiders season tickets to his father and ultimately qualify for financing.

67. Ben was surprised to receive the offer from David as they had not communicated since March of 2021.

68. Like David, Ben had no intent to circumvent URC's receipt of a commission on the Property and instead testified that he had not even thought about the tail period during that time as he was fully focused on attempting to sell the Property in advance of the June 1, 2021, closing date on the Colorado home.

69. The Tronneses sent a counteroffer to David on May 3, 2021, which David signed and accepted that same day. (Tr. Exs. 30-31).

70. At this time, it was still the Tronneses' goal to close on the Property by June 1, 2021, in order to effectuate their closing on the Colorado home.

71. The parties agreed to use Pennington Title Company to effectuate the closing on the Property.

72. On May 20, 2021, Josh Uhre, purportedly on behalf of both UPM and URC, emailed Greg Wick at Pennington Title Company stating that he had "an active exclusive listing agreement" on the Property and that he was entitled to his professional fee of 5%. (Tr. Ex. 34).

73. However, contrary to Uhre's assertion, URC did not have an active Listing Agreement at that time as it had expired on October 31, 2020; likewise, the tail period had expired April 29, 2021.

74. As a result of this email, Pennington Title Company made the decision to hold the disputed commission funds in escrow.

75. If Ben wanted to try to close on the Property with Pennington Title Company on time, he could either agree to escrow the funds or agree to indemnify Pennington Title Company for any claims URC or UPM may make.

76. Because Ben did not want to accept any additional legal liability and because he wanted to close on the Property on time with Pennington Title Company, he had no choice but to acquiesce to Pennington Title Company's decision to escrow the funds.

77. Had Uhre not reached out to Pennington Title Company, the funds would not have been put into escrow.

78. Those funds have yet to be released.

79. Because those funds were put into escrow and were not available, Ben had to allocate money that he had pulled from his retirement account to help facilitate the closing on the Colorado home.

80. To date, the Tronneses have incurred $46 biweekly in finance charges associated with having to utilize these funds.

81. As of the date of trial, 69 weeks had passed since the June 15, 2021, closing date; thus, 34.5 biweekly payments had occurred.

82. Thus, 34.5 biweekly payments times the $46 in finance charges results in $1,587.00 in payments incurred by the Tronneses.

83. Ultimately, because David had various issues with appraisals and his financing, the closing on the Property was delayed and the sale of the Property was not finalized until June 15, 2021, which resulted in the Tronneses having to purchase a different home in Colorado.

84. The Property eventually sold for $492,000, with commissions withheld in the amount of $24,600, sales tax in the amount of $1,599.00, and fees in the amount of $200.00, for a total of $26,399.00.

CONCLUSIONS OF LAW

1. Any Conclusion of Law set forth herein which is more appropriately a Finding of Fact should be treated in its appropriate fashion as such throughout.
2. The Findings of Fact set forth above are incorporated herein by this reference as if set forth in their entirety.
3. This Court has jurisdiction over the parties and subject matter of this case.
4. Courts in South Dakota have the power to "declare rights, status, and other legal relations whether or not further relief is or could be claimed." *See* SDCL § 21-24-1.
5. A request for declaratory relief may be allowed even when another adequate remedy exists. *Agar S.D. v. McGee*, 527 N.W.2d 282, 286–87 (S.D. 1995); SDCL § 15-6-57.
6. Furthermore, SDCL § 21-24-3 provides that "any person interested under a . . . written contract . . . whose rights, status, or other legal relations are affected by a . . . contract . . . may have determined any question of construction or validity arising under the . . . contract . . . and obtain a declaration of rights, status, or other legal relations thereunder."
7. "A contract may be construed either before or after there has been a breach thereof." SDCL § 21-24-4.
8. Finally, SDCL § 21-24-6 grants broad powers to the court to grant declaratory relief "in any proceeding where declaratory relief is sought, [and] in which a judgment or decree will terminate the controversy or remove an uncertainty."
9. Thus, this Court has the power to construe the terms of the Listing Agreement to determine whether the Tronneses breached the contract.

10. As set forth in the Property Management Agreement, UPM was an agent of the Tronneses with the "exclusive [right] to rent, lease, operate and manage" the Property. (Tr. Ex. 1).

11. URC was likewise an agent of the Tronneses and was given the "exclusive irrevocable right and privilege to sell" the Property during the term of the Listing Agreement. (Tr. Ex. 2).

BREACH OF CONTRACT AND DECLARATORY JUDGMENT

12. A breach of contract results if there is "(1) an enforceable promise; (2) a breach of the promise; and, (3) resulting damages." *Bowes Construction, Inc. v. South Dakota Department of Transportation*, 793 N.W.2d 36, 43 (S.D. 2010) (citing *Guthmiller v. Deloitte & Touche, L.L.P.*, 699 N.W.2d 493, 498 (S.D. 2005)).

13. "When interpreting a contract, the Court should look "to the language that the parties used in the contract to determine their intention." *Lillibridge v. Meade Sch. Dist. #£46-1*, 746 N.W.2d 428, 432 (S.D. 2008) (quoting *Pauley v. Simonson*, 720 N.W.2d 665, 667–68 (S.D. 2006)). "Contract interpretation is a question of law." *Nelson v. Schellpfeffer*, 656 N.W.2d 740, 743 (S.D. 2003).

14. In interpreting a contract:

> The goal of contract interpretation is to see to it that the mutual intent of the parties is carried into effect. The contract is to be read as a whole, making every effort to give effect to all provisions. When the words of a contract are clear and explicit and lead to no absurd consequences, the search for the parties' common intent is at an end.

Nelson, 656 N.W.2d at 743 (quotations and citations omitted); *McKie Ford Lincoln, Inc. v. Hanna*, 907 N.W.2d 795, 798 (S.D. 2018) (contract interpreted according to its terms).

15. When a contract is clear, extrinsic evidence will not be considered because "the intent of the parties can be derived from within the four corners of the contract." *Vander Heide v. Boke Ranch, Inc.*, 736 N.W.2d 824, 835–36 (S.D. 2007) (citations omitted); *In re J.D.M.C.*, 739 N.W.2d 796, 806 (S.D. 2007) (Extrinsic evidence cannot be considered unless the contract is deemed uncertain or ambiguous).

16. Here, the Listing Agreement provides:

> If a purchaser is procured for the property by the Broker, by any other cooperating broker, by the Seller, or by any other person at the price and upon the terms stated above, or at any other price or upon any other terms accepted by the Seller during the term of this Agreement or if exchanged or optioned during the term of this contract and said option is exercised, or if within 180 days after the expiration of this agreement, the property is sold to any person to whom the property was shown the Seller agrees to pay compensation as stated above … The Broker and Seller, as parties to this agreement, agree that a party in breach of any of the covenants, promises or obligations arising under this contract shall be liable and responsible for attorney's fees and costs that may result from enforcement thereof as against the party in breach. *Id.*

17. The Listing Agreement is not ambiguous and therefore, no extrinsic evidence may be introduced or utilized to attempt to vary the terms of the Listing Agreement.

18. In reviewing this provision, it discusses actions taken during two pertinent timeframes which may give rise to a commission being owed to URC—during the term of the Listing Agreement and during the 180-day tail period.

Actions During the Term of the Listing Agreement

19. The term of the Listing Agreement expired October 31, 2020.

20. During the term of the Listing Agreement, URC would only be entitled to a commission if one of three things occurred:

Purchase

21. First, URC would be entitled to compensation if, during the term of the Listing Agreement, a purchaser was procured for the Property *and an offer was accepted by the Seller*. *Id.* At ¶ 7 A (emphasis added).

22. Here, a purchaser was not procured and there was never an offer accepted by the Tronneses during the term of the Listing Agreement.

Exchange

23. Second, URC would be entitled to receive a commission if, during the term of the Listing Agreement, the Property was exchanged. *Id.* at ¶ 7 A.

24. Title to the Property was never exchanged during the term of the Listing Agreement.

Option

25. Third, URC would be entitled to a commission if the Property was optioned during the term of the Listing Agreement and said option was exercised. *Id.* at ¶ 7 A.

26. An option contract is "a contract by which an owner of real property agrees with another person that the latter shall have the privilege of buying the property at a specified price

within a specified time, or within a reasonable time in the future, and which imposes no obligation to purchase upon the person to whom it is given." *Kuhfeld v. Kuhfeld*, 292 N.W.2d 312, 314 (S.D. 1980); *In the Matter of the Dennis Snaza family Trust*, 909 N.W.2d 719, 721 (S.D. 2018).

27. An option contract "is exercised when the optionee accepts the irrevocable offer, and an enforceable contract of sale is created." *Advanced Recycling Systems, LLC v. Southeast Properties Ltd. Partnership*, 787 N.W.2d 778, 783 (S.D. 2010).

28. The Lease Agreement provides: "Owner agrees to hold property off market until February 1, 2022 or 60 days of the termination of lease and not take showings." (Tr. Ex. 3 at "Sale of Property").

29. Nowhere in the plain language of the Lease does it state that David had any privilege to purchase the property for a specified price or within a specified time.

30. Because the language of the Lease is unambiguous, no extrinsic evidence may vary the terms of the Lease.

31. The Lease was not an option contract as defined above. Therefore, the Property was not optioned within the term of the Listing Agreement.

32. Therefore, no actions occurred during the term of the Listing Agreement that would give rise to URC being owed a commission.

Actions During the 180-day Tail Period

33. Alternatively, if no purchase, exchange, or option occurred during the term of the Listing Agreement (as discussed *supra*), URC's only means of obtaining a commission was if the

property was "sold to any person to whom the property was shown" within 180 days after the expiration of the Listing Agreement. *Id.*

34. Here, the Listing Agreement defines "sale" as "any exchange, trade, lease or option to purchase to which the Seller consents." (Tr. Ex. 2).

35. The property was not sold during the 180-day period after the expiration of the Listing Agreement, which expired on April 29, 2021.

36. Instead, the Property was sold on June 15, 2021, over a month and a half after the close of the tail-period.

37. Therefore, because no purchaser was procured for the Property during the term of the Listing Agreement, and the Property was not exchanged or optioned during the term of the Listing Agreement, and because no sale occurred during the 180-day tail period, the Tronneses did not breach the terms of the Listing Agreement by failing to pay the commission allegedly owed to URC.

38. As such, this Court declares, pursuant to SDCL § 21-24 *et. seq.*, that no commission is owed to URC or UPM under the terms of the Listing Agreement.

IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

39. "[E]very contract contains an implied covenant of good faith and fair dealing [that] prohibits either contracting party from preventing or injuring the other party's right to receive the agreed benefits of the contract.'" *Nygaard v. Sioux Valley Hosps. & Health Sys.*, 2007 S.D. 34, ¶¶ 20-22, 731 N.W.2d 184, 193–94 (quoting *Farm Credit Servs. of Am. v. Dougan*, 2005 SD 94, 704 N.W.2d 24, ¶ 8 (internal citations omitted)).

40. This duty of good faith permits an aggrieved party to bring a breach of contract action when the other party:

> [B]y [its] lack of good faith, limited or completely prevented the aggrieved party from receiving the expected benefits of the bargain. A breach of contract claim is allowed even though the conduct failed to violate any of the express terms of the contract agreed to by the parties.

Id. (quoting *Garrett v. BankWest, Inc.*, 459 N.W.2d 833, 841 (S.D.1990)).

41. The meaning of the covenant "varies with the context of the contract." *Id.* Ultimately, the duty "emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." *Id.* (quoting Restatement (Second) of Contracts § 205, cmt a (1981)).

42. However, the "duty of good faith and fair dealing 'is not a limitless duty or obligation.'" *Id.* "The implied obligation 'must arise from the language used or it must be indispensable to effectuate the intention of the parties.'" *Id.* (internal citations omitted).

43. The South Dakota Supreme Court has also recognized a limitation when the language of a contract addresses the issue, stating "The covenant of good faith does not create an amorphous companion contract with latent provisions to stand at odds with or in modification of the express language of the parties' agreement. It is not a repository of limitless duties and obligations." *Id.* (quoting *Farm Credit Services*, 2005 SD 94 at ¶ 9, 704 N.W.2d at 28 (citations omitted)).

44. Therefore, "[i]f the express language of a contract addresses an issue, then there is no need to construe intent or supply implied terms" under the implied covenant. *Id.* at ¶ 10 (citations omitted).

45. No evidence was presented to support the claim that the Tronneses lacked good faith in their interactions with URC or UPM, and no evidence supports that they attempted to push the sale of the Property outside the 180-day tail period.

46. To the contrary, the evidence presented supports the testimony that the Tronneses were attempting to sell the Property as quickly as possible.

47. The Court finds Ben Tronnes' testimony was credible.

48. The Court also finds David Pifke's testimony was credible.

49. Therefore, the Tronneses did not breach the implied covenant of good faith and fair dealing.

TORTIOUS INTERFERENCE WITH BUSINESS RELATIONS

50. The South Dakota Supreme Court has described the tort of intentional interference as follows: In general, the tort of intentional interference with contractual relations serves as a remedy for contracting parties against interference from outside intermeddlers. To prevail on a claim of tortious interference, "there must be a 'triangle'-a plaintiff, an identifiable third party who wished to deal with the plaintiff, and the defendant who interfered with' the contractual relations." *Gruhlke v. Sioux Empire Federal Credit Union, Inc.*, 2008 S.D. 89, ¶ 7, 756 N.W.2d 399, 404 (quoting *Landstrom v. Shaver*, 1997 S.D. 25 ¶ 75, 561 N.W.2d 1, 16).

51. The elements of the cause of action are:

    1. the existence of a valid business relationship or expectancy;
    2. knowledge by the interferer of the relationship or expectancy;
    3. an intentional and unjustified act of interference on the part of the interferer;
    4. proof that the interference caused the harm sustained; and

5. damage to the party whose relationship or expectancy was disrupted.

Nelson v. WEB Water Dev. Ass'n, 507 N.W.2d 691 (S.D. 1993) (quoting *Tibke v. McDougall*, 479 N.W.2d 898, 908 (S.D. 1992)); *see also Lien v. Northwestern Engineering Co.*, 39 N.W.2d 483, 485 (S.D. 1949) (holding that "the interference must have been intentional and without reasonable justification or excuse.").

52. A cause of action for intentional or tortious interference with a contractual relationship represents "the recognition that valid business relationships and expectancies are entitled to protection from unjustified interference." *Hayes v. Northern Hills General Hosp.*, 590 N.W.2d 243, 248 (quoting *Landstrom v. Shaver*, 1997 S.D. 25, ¶ 81, 561 N.W.2d 1, 18).

53. "The tort also protects a party's interest in stable economic relationships." *Hayes*, 590 N.W.2d at 248 (citing *Maltz v. Union Carbide Chemicals & Plastics Co., Inc.*, 992 F. Supp. 286, 312 (S.D.N.Y. 1998)).

54. "One is liable for commission of this tort who interferes with business relations of another, both existing and prospective, by inducing a third person not to enter into or continue a business relation with another or by preventing a third person from continuing a business relation with another." *Hayes*, 1999 S.D. 28, ¶ 22, 590 N.W.2d at 248 (emphasis added) (quoting *Northern Plumbing & Heating, Inc., v. Henderson Bros., Inc.*, 268 N.W.2d 296, 299 (1978)); *see also, e.g., Setliff v. Akins*, 2000 S.D. 124, ¶ 36, 616 N.W.2d 878, 889; *St Onge Livestock Co., Ltd. v. Curtis*, 2002 S.D. 102, ¶ 22, 650 N.W.2d 537, 543; Gruhlke, 2008 S.D. 89, ¶ 12 n.4, 756 N.W.2d at 406 n.4.

55. The full text of Restatement (Second) of Torts § 766, Intentional Interference with Performance of Contract by Third Person, provides: "One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and

a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting ot the other from the failure of the third person to perform the contract."

56. In the event URC was owed a commission in connection with the sale of the Property from the Tronnes Defendants to Pifke, Pennington was the particular title company entity that would have issued payment of the funds to URC.

57. Uhre testified at trial, and the Tronnes Defendants did not offer evidence to dispute, that it was normal and usual to communicate directly with title companies, including about payment of commissions.

58. Benjamin Tronnes testified at trial that it is standard practice to place disputed commissions in escrow pending resolution of the dispute.

59. Benjamin Tronnes testified that Pennington was retained to close on the sale of the Property.

60. Benjamin Tronnes admitted at trial that the Tronnes Defendants closed on the sale of the Property with Pennington and Pifke.

61. Benjamin Tronnes admitted that he has not been prevented from doing business with Pennington Title by either URC or UPM. *See Hayes*, 1999 S.D. 28, ¶ 22, 590 N.W.2d at 248; Restatement (Second) of Torts § 766

62. The Tronnes Defendants did not satisfy their burden and present sufficient evidence at trial that URC or UPM intentionally or unjustifiably interfered with any business relationship between the Tronnes Defendants and Pennington.

63. Thus, the third element for a claim of tortious interference is not satisfied.

64. In addition, the Tronnes Defendants did not satisfy their burden and present sufficient evidence that the e-mail from Uhre to Pennington caused the alleged harm.

65. Thus, the fourth element for a claim of tortious interference is not satisfied.

66. Finally, Tronnes Defendants failed to satisfy their burden and present sufficient evidence of damages at trial.

67. In particular, the Tronnes Defendants failed to present credible evidence at trial of damages related to a loan that was taken out prior to Pifke making an offer on April 30, 2021. The Tronnes Defendants did not offer any documentation related to the draw from the retirement account, verification of the interest payments, or offer competent evidence that the draw from the retirement account could not be repaid earlier.

68. In addition, Benjamin Tronnes admitted at trial that he would have accepted an offer of $475,000.00 from Pifke, which was $25,000.00 less than the offer of $500,000.00. This fact calls into question the veracity of any claim that the escrowing of $26,399.00 caused damage to the Tronnes Defendants.

69. Thus, the fifth element for a claim of tortious interference is not satisfied.

70. The Tronnes Defendants' claims of tortious interference with a business expectancy is dismissed

ATTORNEYS' FEES

71. South Dakota follows the American rule with regard to the recovery of attorneys' fees, which provides:

> [e]ach party bears the party's own attorney fees. However, attorney fees are allowed when there is a contractual agreement that the prevailing party is entitled to attorney fees or there is statutory authority authorizing an award of attorney fees.

Credit Collection Servs., Inc. v. Pesicka, 2006 S.D. 81, ¶ 6, 721 N.W.2d 474, 476–77 (citing *Crisman v. Determan Chiropractic, Inc.*, 2004 SD 103, ¶ 26, 687 N.W.2d 507, 513) (citations omitted)(emphasis added).

71 Therefore, even if there is no statute authorizing attorneys' fees, they are recoverable if the parties' contract so provides. *Id.*

72 Here, the Listing Agreement provides: "The Broker and Seller, as parties to this agreement, agree that a party in breach of any of the covenants or obligations arising under this contract shall be liable and responsible for attorneys' fees and costs that may result from enforcement thereof as against the party in breach." (Tr. Ex. 2 at ¶ 7(A)).

73 Therefore, the Court concludes that the Tronneses are entitled to their attorneys' fees in this matter as they are the prevailing party under the Listing Agreement. Said attorneys' fees shall be determined by affidavit and separate Motion to the Court to be filed in this case.

LET JUDGMENT ENTER ACCORDINGLY.

Dated this 8 day of December, 2022

BY THE COURT:

Honorable Joshua K. Hendrickson

ATTEST:

Clerk of Courts

By: Deputy

(SEAL)

Pennington County, SD
FILED
IN CIRCUIT COURT
Nunc Pro Tunc 12/9/22
DEC 12 2022
Ranae Truman, Clerk of Courts
By Deputy

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
) SS.
COUNTY OF PENNINGTON) SEVENTH JUDICIAL CIRCUIT

FILE NO. CIV21-821

UHRE REALTY CORPORATION; and UHRE PROPERTY MANAGEMENT CORPORATION,

Plaintiffs,

vs.

BENJAMIN TRONNES and LESLIE TRONNES,

Defendants.

MOTIONS HEARING

BEFORE: THE HONORABLE JOSHUA K. HENDRICKSON
Circuit Court Judge
Pennington County Courthouse
Rapid City, South Dakota
April 11, 2022

APPEARANCES:

PLAINTIFFS UHRE: MR. JONATHAN A. HEBER
Attorney at Law
Minnehaha County
Sioux Falls, South Dakota

DEFENDANTS TRONNES: MS. KATELYN A. COOK
Attorney at Law
Pennington County
Rapid City, South Dakota

DEFENDANT PIFKE: MS. KASSIE SHIFFERMILLER
Attorney at Law
Pennington County
Rapid City, South Dakota

inapplicable here as the expressed contract provisions completely dispose of the issues set forth in plaintiffs' complaint.

Thank you, Judge.

THE COURT: Thank you.

All right. Having reviewed the file in its entirety, hearing arguments of the parties in regards to the summary judgment motions, I'll go ahead and rule on those at this time.

First, looking at Defendant Pifke's motion for summary judgment, I'm in agreement with defense, Mr. Pifke, on that. I don't think there's a -- the standard of summary judgment is in light most favorable to the nonmoving party if there's any -- as long as there's no disputed material facts summary judgement --

THE COURT REPORTER: I'm sorry, Your Honor, I'm having a hard time hearing you.

THE COURT: I'm sorry. I'm trying to put my thoughts together coherently for you and it's not working real well.

I don't see any disputed material facts in regards to the Pifke motion for summary judgment. I do agree with the arguments of the defense of the agency and that it was -- the lease was terminated

upon the purchase of the home, and, therefore, I'll grant summary judgment in regard to Counts 3 and 4 for Mr. Pifke.

On the summary judgment for the Defendant Tronnes the argument is a little different here, and obviously there's a listing agreement. That's where in this case I do view that on the claim of the good faith and fair dealing there's genuine issue of material fact based upon the arguments presented by the plaintiff in that regard. I do believe there's a question of fact of whether that listing agreement was breached. In that regard, I'll deny the motion for summary judgment in regard to the claim on the listing agreement.

As far as the claim on the property management agreement, again, I find there's no dispute of material fact. I do believe summary judgment to be proper for Mr. -- Defendants Tronneses on that count for the property management agreement.

As far as the summary judgment request on the counterclaim, I don't believe that that -- well, the argument put forth by plaintiffs in that one is compelling to the Court. I'm denying that claim on that summary judgment motion, on that

STATE OF SOUTH DAKOTA) SS. COUNTY OF PENNINGTON	)	IN CIRCUIT COURT SEVENTH JUDICIAL CIRCUIT
UHRE REALTY CORPORATION; AND UHRE PROPERTY MANAGEMENT CORPORATION, Plaintiffs, vs. BENJAMIN TRONNES and LESLIE TRONNES, Defendants.	)	51CIV21-000821 **PLAINTIFFS' OBJECTIONS TO DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Uhre Realty Corporation and Uhre Property Management Corporation ("Plaintiffs" or "Uhre Entities"), by and through their counsel of record, submit the following Objection to Defendants' Findings of Fact and Conclusions of Law. The Uhre Entities incorporate herein their own prior proposed Findings of Fact and Conclusions of Law dated November 11, 2022.

FINDINGS OF FACT

1. Any Finding of Fact which is more appropriately a Conclusion of Law should be treated in its appropriate fashion as such throughout.

No objection.

2. The issues before the Court include both Plaintiffs' and Defendants' request for declaratory judgment as to whether the Tronneses breached the terms of the Listing Agreement; Plaintiff Uhre Realty Corporation (hereinafter "URC") related claim for breach of contract related to the Listing Agreement; URC's claim that the Tronneses breached the implied covenant of good faith and fair dealing; and the Tronneses' counterclaim against both URC and Plaintiff Uhre Property Management (hereinafter "UPM") for tortious interference with business relations.

No objection.

3. This Court has previously granted partial summary judgment in the Tronnes' favor on UPM's breach of contract claim for the alleged breach of the Agreement to Manage and Lease Real Estate.

No objection.

4. URC and UPM had voluntarily dismissed their claim for Civil Conspiracy against the Tronneses.

No objection.

5. URC is a South Dakota corporation organized and existing under the laws of the State of South Dakota with a principal place of business is located within Pennington County, South Dakota.

No objection.

6. Josh Uhre is the President of URC.

No objection.

7. UPM is a South Dakota corporation organized and existing under the laws of the State of South Dakota with a principal place of business is located within Pennington County, South Dakota.

No objection.

8. Josh Uhre is the President of UPM.

No objection.

9. URC and UPM are two separate and distinct legal entities.

No objection.

10. There is no fictional name registration or D/B/A for "Uhre Realty and Property Management."

No objection.

11. Defendants Ben and Leslie Tronnes are residents of Colorado Springs, Colorado.

No objection.

12. The property at issue in this case is a residential property formerly owned by the Tronneses, located at 1319 12th St. Rapid City, SD 57701 (hereinafter the "Property").

No objection.

13. In 2019 the Tronneses decided to relocate to Colorado due to various job opportunities.

No objection.

14. Because of this, they entered into a first "Exclusive Listing and Agency Agreement" with URC effective September 10, 2019, expiring April 10, 2020, with the intent to sell the Property.

No objection.

15. When the Property had not yet sold, the Tronneses then entered into an "Agreement to Manage and Lease Real Estate" (hereinafter the "Property Management Agreement") with UPM on August 16, 2019, for purposes of managing the Property, which included securing tenants and collecting rent payments. (Tr. Ex. 1).

OBJECTION:

1. **The Agreement to Manage and Lease Real Estate predated the first "Exclusive Listing and Agency Agreement"; however, the two agreements were entered into contemporaneously, and for the primary purpose of selling the Property.**

16. UPM was the drafter of this Property Management Agreement.

OBJECTION:

1. **Uhre testified that he obtained a copy of the Property Management Agreement from the Black Hills Association of REALTORS.**

17. UPM was hired by the Tronneses "exclusively" to "rent, lease, operate and manage [the Property]" subject to the terms and conditions of the Property Management Agreement. *Id.*

OBJECTION:

1. **URC objects to the extent this language is cited for the purpose of suggesting that URC cannot procure or discuss a prospective lease, which is untrue. UPM is the company who ultimately enters into the lease, which is precisely what happened in this matter, but the management agreement does not preclude another company from procuring or discussing the same prior to execution of the lease.**
2. **Indeed, the Listing Agreement, which was entered into after the Management Agreement, specifically contemplates a lease and discusses throughout the Listing Agreement about procuring a lease and, in fact, advises that a lease of the Property constitutes a "sale" of the Property: "The term 'sale' shall be deemed to**

include any exchange, trade, lease or option to purchase to which the Seller consents." (Emphasis added.)

18. In exchange for the services set forth in the Property Management Agreement, the Tronneses agreed to compensate UPM 10% of the gross monthly rent collected by UPM during the term of the Property Management Agreement.

No objection.

19. On April 29, 2020, the Tronneses subsequently entered into the operative "Exclusive Listing and Agency Agreement" (hereinafter the "Listing Agreement") with URC effective May 1, 2020 and terminating on October 31, 2020. (Tr. Ex. 2).

OBJECTION:

1. **No objection as to the plain language contained in the Listing Agreement. However, URC notes that it has a claim, in part, to extend the term and the 180-day tail period based on the conduct of the Tronnes Defendants via waiver/estoppel/breach of implied covenant of good faith and fair dealing.**

20. URC was the drafter of this Listing Agreement.

OBJECTION:

1. **Uhre testified that he obtained a copy of the Listing Agreement from the Black Hills Association of REALTORS.**

21. Per the Listing Agreement, URC had the "exclusive irrevocable right and privilege to *sell* [the Property]." *Id.* (Emphasis added).

No objection.

22. Per the Listing Agreement, URC would be entitled to receive a commission in one of three ways. First, URC would be entitled to compensation if, *during the term of the Listing Agreement*, (1) a purchaser was procured for the Property, or (2) if the Property was exchanged or optioned and said option was eventually exercised. *Id.* at ¶ 7 A. (Emphasis added).

OBJECTION:

1. **This is untrue and a misstatement of the Listing Agreement.**
2. **While the Listing Agreement does discuss actions taken during the term and the 180-day tail period, it *also* considers actions that occur after both of those periods. For example, the Listing Agreement merely requires that a purchaser be "procured" during the term of the Agreement; yet, it makes no distinction on when a purchase agreement be entered into, which could occur after the term and the 180-day tail period. Likewise, as for options, the Listing Agreement requires that the Property be "optioned during the term of this contract," but does not**

provide a timeframe on when that option is exercised, which could occur after the expiration of the contract and the 180-day tail period.

3. **Further, this provision does not include the term "offer" or acceptance of said offer anywhere in the provision. It merely requires that a purchaser be *procured* during the term of the Agreement upon the terms stated in the Agreement. If the Agreement wanted to require an "offer" or, for example, a signed purchase agreement, it could have said that, but it did not.**

23. Third, if no purchase, exchange, or option occurred during the term of the Listing Agreement, then URC's only means of obtaining a commission was if the property was "*sold* to any person to whom the property was shown" *within 180 days after the expiration of the Listing Agreement. Id.* (Emphasis added).

OBJECTION:

1. **See Response to No. 22. In addition to other reasons claimed by URC, including being the procuring cause, URC has also claimed that the term and 180-day tail period are extended due to the conduct of the Tronnes Defendants via waiver/estoppel/breach of implied covenant of good faith and fair dealing.**

24. The Listing Agreement expired on October 31, 2020. *Id.* at preamble.

OBJECTION:

1. **No objection as to the plain language contained in the Listing Agreement. However, URC has a claim, in part, to extend the term and the 180-day tail period based on the conduct of the Tronnes Defendants via waiver/estoppel/breach of implied covenant of good faith and fair dealing.**

25. The 180-day tail period set forth in the Listing Agreement expired on April 29, 2021.

OBJECTION:

1. **No objection as to the plain language contained in the Listing Agreement. However, URC has a claim, in part, to extend the term and the 180-day tail period based on the conduct of the Tronnes Defendants.**

26. In the meantime, in the summer of 2020, David Pifke and his partner, Althea Nelson were living in Las Vegas, NV and were looking to relocate to South Dakota due to COVID-related closures.

No objection.

27. To this end, Althea contacted UPM to inquire about leasing the Property.

OBJECTION:

1. **There is no evidence in the record that *Alethea* contacted *UPM*. Instead, Uhre testified that URC (not UPM) advertised the Property for sale and for lease, as permitted in the Listing Agreement, on various online websites, such as Zillow**

and Trulia. Uhre testified that Pifke reached out to URC through Trulia about the Property. The Trulia listing seen by Pifke included the listing price of $475,900. Through that process of reaching out to URC, Pifke was referred to UPM.

28. At the time David and Althea reached out to UPM regarding a lease, David was not in a financial position to be able to qualify for financing to purchase a property. Because of this, they were specifically looking for a rental home.

OBJECTION:

1. **See Response to No. 27.**
2. **Pifke testified that he had conversations about purchasing the home prior to and after entering into the lease. He testified that he was interested in purchasing the house; *however*, he felt that he was not in a rush due to the 18-month lease, and he wanted to get his finances more "liquid" and experience at least one winter in South Dakota.**
3. **To suggest that Pifke was not interested or considering purchasing the Property belies the testimony in the record. For example, on August 1, 2020, at 5:25 PM, Pifke wrote an e-mail to Uhre stating, in part: ("Perhaps with an 18 month term instead, so that it would coincide with the spring, *in the event we don't move forward as the purchaser.*"). (Emphasis added.)**
4. **Thereafter, Pifke negotiated a provision in the lease preventing the Tronnes Defendants from selling the Property during the term.**

29. David and Althea also were looking for a lease because they were unsure whether they would want to remain in South Dakota permanently as they had not lived through a winter in Rapid City.

OBJECTION:

1. **Pifke testified that he had conversations about purchasing the home prior to and after entering into the lease. He testified that he was interested in purchasing the house; *however*, he felt that he was not in a rush due to the 18-month lease, and he wanted to get his finances more "liquid" and experience at least one winter in South Dakota.**
2. **To suggest that Pifke was not interested or considering purchasing the Property belies the testimony in the record. For example, on August 1, 2020, at 5:25 PM, Pifke wrote an e-mail to Uhre stating, in part: ("Perhaps with an 18 month term instead, so that it would coincide with the spring, *in the event we don't move forward as the purchaser.*"). (Emphasis added.)**
3. **Thereafter, Pifke negotiated a provision in the lease preventing the Tronnes Defendants from selling the Property during the term.**

30. At the time David and Althea moved to Rapid City, they did not intend to purchase the Property.

OBJECTION:

1. **Pifke testified that he had conversations about purchasing the home prior to and after entering into the lease. He testified that he was interested in purchasing the house; *however*, he felt that he was not in a rush due to the 18-month lease, and he wanted to get his finances more "liquid" and experience at least one winter in South Dakota.**
2. **To suggest that Pifke was not interested or considering purchasing the Property belies the testimony in the record. For example, on August 1, 2020, at 5:25 PM, Pifke wrote an e-mail to Uhre stating, in part: ("Perhaps with an 18 month term instead, so that it would coincide with the spring, *in the event we don't move forward as the purchaser.*"). (Emphasis added.)**
3. **Thereafter, Pifke negotiated a provision in the lease preventing the Tronnes Defendants from selling the Property during the term.**

31. UPM initially sent a draft lease with a one-year term beginning October 1, 2020 and ending October 1, 2021.

OBJECTION:

1. **For clarity, Josh Uhre, on behalf of UPM, sent a draft lease to Pifke.**

32. On August 1, 2020, having reviewed a draft lease sent by UPM, David raised concerns to UPM about the one-year term of the lease and inquired as to whether, if the Property was sold during the terms of the lease, he and Althea would have to relocate. (Tr. Ex. 5).

No objection.

33. UPM replied, indicating that the Tronneses would likely opt to relist the Property on June 1, 2021. (Tr. Ex. 4).

OBJECTION:

1. **Josh Uhre was communicating to Pifke on behalf of both UPM and URC as the discussions involved both a lease and a purchase of the property, as well as the impact of the lease on the sale of the property.**
2. **In the referenced e-mail to Pifke, "Their plan is to pull the property off the market until next year once it is rented. Depending on how things are with Covid and the market, *we* probably wouldn't list it against until June 1. Obviously, if you like the house while living in Rapid City, we can always work a deal at any time." (Emphasis added.)**

34. With this information, David inquired whether the Tronneses would be willing to agree to not list the Property until the end of the lease term and whether the Tronneses would be agreeable to an eighteen-month lease term. *Id.*

OBJECTION:

1. **Tr. Ex. 4 speaks for itself.**

2. **For clarity, Pifke wrote in the e-mail to Uhre stating, in part: ("Perhaps with an 18 month term instead, so that it would coincide with the spring, *in the event we don't move forward as the purchaser.*"). (Emphasis added.)**

35. David and Althea did not want to have to make the Property available for showings because they valued their privacy and doing so would be difficult to coordinate as David worked from home. They also did not want to have to move again in less than a year should the Property be sold. *Id.*

OBJECTION:

1. **Tr. Ex. 4 speaks for itself.**
2. **Pifke was also considering purchasing the Property at this time as well. Indeed, Pifke wrote in the e-mail to Uhre stating, in part: ("Perhaps with an 18 month term instead, so that it would coincide with the spring, *in the event we don't move forward as the purchaser.*"). (Emphasis added.)**

36. The Tronneses agreed to keep the Property off the market for eighteen months. (Tr. Ex. 8).

No objection.

37. David signed a "Residential Real Estate Lease" with the Tronneses and UPM (hereinafter the "Lease") on August 3, 2020. (Tr. Ex. 3).

OBJECTION:

1. **Josh Uhre signed on behalf of Uhre Realty as well (see Page 15).**

38. The term of the Lease was from October 1, 2020, to April 1, 2022. *Id.*

No objection.

39. The Lease contained the following provision: "Owner agrees to hold property off market until February 1, 2022, or 60 days of the termination of lease and not take showings." *Id.* at "Sale of Property."

No objection.

40. David and Althea moved into the property in October of 2020.

No objection.

41. While Uhre had periodically inquired whether David would be interested in eventually purchasing the property, even through December of 2020, David maintained that he and Althea were unsure of whether they intended to stay and had not "looked much into [purchasing the Property]". (Tr. Ex. 22).

OBJECTION:

1. **This not only misstates the record, but it is intentionally paraphrased in a way to make it untrue. The e-mail from Pifke states: "We're happy here and I think we want to stay, but I haven't looked much into it."**

42. Uhre inquired again in January of 2021, but that inquiry was not at the behest of the Tronneses and was unknown to the Tronneses at the time.

OBJECTION:

1. **This is untrue.**
2. **First, there is no evidence in the record that the Tronnes Defendant did not know about the communication in January of 2021.**
3. **Second, the Tronnes Defendants were aware that Uhre was still having discussions with Pifke in and after January 2021, including conversations about fixing the Property in March of 2021. In fact, Tronnes testified that he had continued to request that Uhre reach out to Pifke about purchasing the Property, even after the written expiration in the Listing Agreement but prior to the end of the 180-day tail period, and had never advised him to stop.**
4. **Third, at minimum, URC had an implied agency or agency by estoppel because the Tronnes Defendants engaged in acts—repeated communications regarding selling the property and requests to continue to effectuate the sale after October 31, 2020—wherein URC reasonably believed that it was still the Tronnes Defendants' agent and, therefore, the Tronnes Defendants are estopped from denying the existence of the agency.**

43. David was of the understanding that because the Lease was with UPM, his interactions with Uhre were done on behalf of UPM.

OBJECTION:

1. **Misstatement of testimony. Pifke did not testify that he believed all his interactions were with UPM. He further testified that he was aware of URC.**

44. In the meantime, the Tronneses were renting a property in Colorado Springs with their three children.

OBJECTION:

1. **The Uhre Entities object insofar as the Tronnes Defendants did not meet their burden in proving the effect, if any, the closing on the property in Rapid City had on closing on the property in Colorado Springs. The Tronnes Defendants did not produce any documentation, e-mails, appraisals, purchase agreements, anything regarding the alleged transactions in Colorado Springs despite the existence of that information if those transactions did happen as described. Furthermore, the Tronnes Defendants objected to producing any information regarding the transactions in Colorado Springs and described those transactions as "irrelevant" to this lawsuit.**

45. That property became available for the Tronneses to purchase in January of 2021 (hereinafter the "Colorado home").

OBJECTION:

1. **The Uhre Entities object insofar as the Tronnes Defendants did not meet their burden in proving the effect, if any, the closing on the property in Rapid City had on closing on the property in Colorado Springs. The Tronnes Defendants did not produce any documentation, e-mails, appraisals, purchase agreements, anything regarding the alleged transactions in Colorado Springs despite the existence of that information if those transactions did happen as described. Furthermore, the Tronnes Defendants objected to producing any information regarding the transactions in Colorado Springs and described those transactions as "irrelevant" to this lawsuit.**

46. Because the Tronneses had yet to sell the Property in Rapid City, they negotiated an extended closing date on the Colorado home to June 1, 2021.

OBJECTION:

1. **The Uhre Entities object insofar as the Tronnes Defendants did not meet their burden in proving the effect, if any, the closing on the property in Rapid City had on closing on the property in Colorado Springs. The Tronnes Defendants did not produce any documentation, e-mails, appraisals, purchase agreements, anything regarding the alleged transactions in Colorado Springs despite the existence of that information if those transactions did happen as described. Furthermore, the Tronnes Defendants objected to producing any information regarding the transactions in Colorado Springs and described those transactions as "irrelevant" to this lawsuit.**

47. Their goal in doing so was to sell the Property in advance of the June 1, 2021, closing date to allow them to obtain more favorable financing for the Colorado home.

OBJECTION:

1. **The Uhre Entities object insofar as the Tronnes Defendants did not meet their burden in proving the effect, if any, the closing on the property in Rapid City had on closing on the property in Colorado Springs. The Tronnes Defendants did not produce any documentation, e-mails, appraisals, purchase agreements, anything regarding the alleged transactions in Colorado Springs despite the existence of that information if those transactions did happen as described. Furthermore, the Tronnes Defendants objected to producing any information regarding the transactions in Colorado Springs and described those transactions as "irrelevant" to this lawsuit.**

48. While David had never expressed any interest in purchasing the Property, the Tronneses decided to stop by the Property when they were back in South Dakota in January of 2021 to try to facilitate a sale.

OBJECTION:

1. **This is untrue as to the statement: "While David had never expressed any interest in purchasing the Property . . ."**
2. **First, Uhre testified that he and Pifke discussed purchasing the Property at the initial showing in July 2020.**
3. **Second, Pifke testified that he was interested in purchasing the Property from the beginning, but that he needed to get his financing in place, he needed to witness one South Dakota winter, and that ultimately he was not in a rush because he had a lease for 18 months and a provision precluding the Tronnes Defendants from listing the property.**
4. **Second, on August 1, 2020, Pifke stated in an e-mail regarding requesting an 18-month extension: "(Perhaps with an 18 month term instead, so that it would coincide with the spring, in the event we don't move forward as the purchaser.)"**
5. **Third, in an e-mail to Pifke on August 1, 2020, Uhre states: "And also to mention, that you could purchase the home at any time if you desired too which would likely be a lesser payment. What do you think?" Pifke replied: "That's agreeable to us. Appreciate you working with us on it!"**
6. **Fourth, on December 7, 2020, Pifke e-mailed Uhre and stated: "We're happy here and I think we want to stay, but I haven't looked much into it."**
7. **Fourth, Pifke testified that the meeting in January was annoying to him because it was merely a continuation of the same discussions that were being had.**

49. At this time, the Tronneses discussed the possibility of David purchasing the Property.

No objection.

50. As of the time of this meeting, the Listing Agreement had expired.

OBJECTION:

1. **The Listing Agreement includes an expiration date of October 31, 2020. However, URC has made a claim in this lawsuit that the term of the Listing Agreement and/or the 180-day tail period were extended, waived, and/or Tronnes Defendants estopped due to their conduct in this lawsuit; *see* Uhre Entities proposed Findings of Fact and Conclusions of Law dated November 11, 2022.**

51. On January 23, Ben sent a follow up email to David stating that they would sell the Property for $499,000 with a realtor or $475,000 without a realtor and putting him in touch with Blue Ribbon Mortgage to try to encourage him to seek financing. (Tr. Ex. 23).

OBJECTION:

1. **This statement is partially untrue. No dispute as to the e-mail. However, Benjamin Tronnes did not put him in touch with Blue Ribbon Mortgage to have him seek financing, but rather to provide a contact who, as he explains in the e-mail dated March 4, 2021, "may be able to find a way to keep your down payment reasonable." At trial, Benjamin Tronnes testified that she works magic and has a way of making deals work.**

52. Because the Tronneses were still focused on selling the Property in advance of their June 1, 2021, closing on the Colorado home, Ben again reached out to Pifke on February 4, 2021, asking whether David would be able and interested to purchase the Property. (Tr. Ex. 26).

OBJECTION:

1. **The Uhre Entities do not dispute that Benjamin Tronnes e-mailed again on February 4, 2021, and the e-mail speaks for itself.**

The Uhre Entities object insofar as the Tronnes Defendants did not meet their burden in proving the effect, if any, the closing on the property in Rapid City had on closing on the property in Colorado Springs. The Tronnes Defendants did not produce any documentation, e-mails, appraisals, purchase agreements, anything regarding the alleged transactions in Colorado Springs despite the existence of that information if those transactions did happen as described. Furthermore, the Tronnes Defendants objected to producing any information regarding the transactions in Colorado Springs and described those transactions as "irrelevant" to this lawsuit.

53. David reiterated that he still "would need to free up some more cash for a down payment before an offer [would be] realistic," and that "I know y'all are anxious to sell, so I'll keep you updated." (Tr. Ex. 26).

OBJECTION:

1. **The full e-mail states: "I've done some looking into financing, which has validated my earlier thinking that I need to free up some more cash for a down payment before an offer is realistic. As we discussed, the soonest I can do this will be later this year. I know y'all are anxious to sell, so I'll keep you updated."**

54. On March 4, 2021, Ben reached out via email to David to let him know that they would plan to list the Property on May 1, 2021, as a final effort to try to get the Property sold prior to the June 1, 2021, closing date on the Colorado home. (Tr. Ex. 26).

OBJECTION:

1. **The Uhre Entities do not dispute that Benjamin Tronnes e-mailed again on March 4, 2021; however, the evidence in the record does not support the statement that this was "<u>a final effort</u> to try to get the Property sold prior to the June 1, 2021, closing date on the Colorado home." (Emphasis added.)**

55. He reiterated that he would sell the Property to David for $475,000 up until that point, at which point they would list the Property for $499,000. (Tr. Ex. 26).

No objection.

56. In response, David pointed out the fact that the lease prohibited the Property from being sold until February 1, 2022, and that in his opinion, listing it earlier would be a breach of the Lease. (Tr. Ex. 27).

No objection.

57. Ben acknowledged this in a responsive email that same day. Once David pointed out the fact that listing the Property would be a breach of the Lease, Ben no longer planned to list the Property on May 1, 2021.

OBJECTION:

1. **This statement lacks complete context. Benjamin Tronnes admitted that Pifke was correct, *but* he did not confirm to Pifke that he would not list the property. In fact, he stated in the e-mail: "We will discuss that with Josh." Benjamin Tronnes testified that he did not, in fact, discuss that with Uhre, which therefore was a misrepresentation to Pifke.**
2. **Further, Benjamin Tronnes did not follow up with Pifke to advise him that he did not, in fact, discuss with Uhre, nor did he follow up to confirm that any point that he would not list the property in May of 2021.**

58. This was the last communication between Ben and David until David eventually made an offer to purchase the Property.

OBJECTION:

3. **No objection that the record does not evidence further communications. However, it is nearly impossible to discern whether the Tronnes Defendants and Pifke could have communicated in numerous different ways that were ultimately not discoverable in this lawsuit.**

59. This is consistent with testimony from both David and Ben, as well as the cell phone records which did not indicate any calls between the parties. (Tr. Ex. 63).

OBJECTION:

1. **See Response to No. 58 above.**

60. David indicated that after receiving this email from Ben, he spoke with his sister who is an attorney who told him that while an early list date would likely breach the Lease, his recourse would be limited.

OBJECTION:

1. **This statement lacks complete context. No objection that Pifke believed the Tronnes Defendants intended to breach the lease and also sought the advice of legal counsel on the same. In addition, Pifke also testified that he immediately attempted to reach out for information on financing too because, as he had testified earlier, he did not feel rushed to make an offer because he believed he had 18 months to do so.**

2. **Furthermore, Pifke testified that ultimately he was concerned about his options for recourse because he believed that, regardless of his options, he would not be able to keep the Property if the Tronnes Defendants breached and sold to someone else, and that keeping the property was his primary concern.**

61. He also believed that Ben was planning to list the Property on May 1, 2021, because roofers came to the Property in early spring to fix preexisting hail damage on the roof.

OBJECTION:

1. **This statement lacks complete context. Benjamin Tronnes failed to follow up with Pifke at any time to advise and assure Pifke that he was not going to breach the lease agreement and list the property. In fact, Benjamin Tronnes advised Pifke that he would discuss the matter with Uhre, thereby leaving the matter open, and then never (1) contacted Uhre, like he said he would, nor (2) followed up with Pifke regarding the result of that prospective conversation.**

62. Thus, all of this led David to make an offer on the Property for $500,000 on April 30, 2021.

OBJECTION:

1. ***See* Uhre Entities Findings of Facts and Conclusions of Law relating to "procuring cause" during the term of the Listing Agreement.**

63. David made the offer for $500,000 because he did not want to risk getting into a "bidding war" with other people if the Property was going to be listed on May 1, 2021, and he believed that $499,000 would be the list price. (Tr. Ex. 29).

OBJECTION:

1. **This statement lacks complete context. Pifke also testified that he made the offer because he feared the Tronnes Defendants were going to breach the Lease and that, ultimately, he would not have recourse to keep the Property.**

64. Prior to the instant litigation, David had never seen the Listing Agreement and did not even know what a "tail period" was.

OBJECTION:

1. **To clarify, Pifke testified that he had never seen the Listing Agreement and did not know what a tail period was.**

65. Thus, David had no knowledge that a tail period existed, much less that the tail period expired on April 29, 2021.

OBJECTION:

1. **The Uhre Entities object to clarify that Pifke testified that he had no such knowledge. The record, however, indicates that Pifke made an offer on April 30,**

2021, the day after the tail period was stated to terminate in the Listing Agreement.

66. He was able to finally make the offer because he was able to free up additional cash by selling his NFL Las Vegas Raiders season tickets to his father and ultimately qualify for financing.

OBJECTION:

1. **This statement lacks complete context. Pifke testified that he feared the Tronnes Defendants were going to breach the lease agreement so he expedited his attempt to obtain financing and, in so doing, he sold his NFL tickets to his father, which assisted with liquidating his assets and making the down payment.**

67. Ben was surprised to receive the offer from David as they had not communicated since March of 2021.

OBJECTION:

1. **Benjamin Tronnes testified that he was surprised. Whether he was, in fact, surprised is disputed. Benjamin Tronnes testified that the offer of $475,000.00 to Pifke, who was a current a tenant at the property, was held open until May 1, 2021, and an offer by Pifke was made within that timeframe. Furthermore, Uhre testified that at all times everyone considered Pifke a strong candidate to purchase and that, in essence, it was a matter of when, not if, he purchased the property. Thus, it is questionable whether Benjamin Tronnes was actually surprised.**
2. **Furthermore, Pifke had specifically advised Tronnes before then via e-mail that "the soonest I can do this will be later this year. I know y'all are anxious to sell, so I'll keep you updated." Thus, Benjamin Tronnes had been advised that Pifke was continuing to keep a tab on purchasing the property.**

68. Like David, Ben had no intent to circumvent URC's receipt of a commission on the Property and instead testified that he had not even thought about the tail period during that time as he was fully focused on attempting to sell the Property in advance of the June 1, 2021, closing date on the Colorado home.

OBJECTION:

1. **Disputed. The Tronnes Defendants showed up unannounced to where Pifke was living in the Property, and without any notice at any time to Uhre, attempted to pressure Pifke to purchase the property and also advised him that their listing agreement was inactive. The Tronnes Defendants *then* threatened to breach the lease agreement and list the property earlier if Pifke did not capitulate and purchase the property. The testimony at trial suggests that Benjamin Tronnes did, in fact, attempt to circumvent URC's receipt of the commission and, to this day still, continues to attempt to circumvent URC's receipt of the commission.**

69. The Tronneses sent a counteroffer to David on May 3, 2021, which David signed and accepted that same day. (Tr. Exs. 30-31).

No objection.

70. At this time, it was still the Tronneses' goal to close on the Property by June 1, 2021, in order to effectuate their closing on the Colorado home.

OBJECTION:

1. **The Uhre Entities object insofar as the Tronnes Defendants did not meet their burden in proving the effect, if any, the closing on the property in Rapid City had on closing on the property in Colorado Springs. The Tronnes Defendants did not produce any documentation, e-mails, appraisals, purchase agreements, anything regarding the alleged transactions in Colorado Springs despite the existence of that information if those transactions did happen as described. Furthermore, the Tronnes Defendants objected to producing any information regarding the transactions in Colorado Springs and described those transactions as "irrelevant" to this lawsuit.**

71. The parties agreed to use Pennington Title Company to effectuate the closing on the Property.

No objection.

72. On May 20, 2021, Josh Uhre, purportedly on behalf of both UPM and URC, emailed Greg Wick at Pennington Title Company stating that he had "an active exclusive listing agreement" on the Property and that he was entitled to his professional fee of 5%. (Tr. Ex. 34).

OBJECTION:

1. ***See* Uhre Entities Findings of Fact and Conclusions of Law regarding the claim for tortious interference.**
2. **This statement is untrue and is misleading. Uhre testified that "active" meant his entitlement to a commission. The e-mail to Greg Wick, which is the only e-mail that is claimed to be the interference, *attached* the entire Listing Agreement, Lease Agreement, and Management Agreement for Pennington Title's review. Furthermore, in the body of the e-mail to Greg Wick, Uhre also quoted the part of the Listing Agreement that indicated that the identified expiration date was October 31, 2020, which contradicts the Tronnes Defendants' claim that Uhre made a misrepresentation to Greg Wick.**
3. **In addition, Uhre qualified his email with: "I <u>believe</u> I am entitled to my professional fee of 5% of the purchase price plus tax as the procuring cause." (Emphasis added.)**
4. **In addition, URC has made a claim that the term and 180-day tail period of the Listing Agreement was extended by the conduct of the Tronnes Defendants.**

73. However, contrary to Uhre's assertion, URC did not have an active Listing Agreement at that time as it had expired on October 31, 2020; likewise, the tail period had expired April 29, 2021.

OBJECTION:

1. ***See* Uhre Entities Findings of Fact and Conclusions of Law regarding the claim for tortious interference.**
2. **Further, this statement is untrue and is misleading. Uhre testified that "active" meant his entitlement to a commission. The e-mail to Greg Wick, which is the only e-mail that is claimed to be the interference, *attached* the entire Listing Agreement, Lease Agreement, and Management Agreement for Pennington Title's review. Furthermore, in the body of the e-mail to Greg Wick, Uhre also quoted the part of the Listing Agreement that indicated that the identified expiration date was October 31, 2020, which contradicts the Tronnes Defendants' claim that Uhre made a misrepresentation to Greg Wick.**
3. **In addition, URC has made a claim that the term and 180-day tail period of the Listing Agreement was extended by the conduct of the Tronnes Defendants.**

74. As a result of this email, Pennington Title Company made the decision to hold the disputed commission funds in escrow.

OBJECTION:

1. **Speculation and not supported by the weight of the evidence in the record. The Tronnes Defendants did not call any witnesses from Pennington Title or introduce any testimony from any representatives of Pennington Title as to the reason for placing the funds into escrow. As Benjamin Tronnes testified, it is common practice for a title company to put "disputed" funds into escrow and, therefore, it is probable that the mere dispute of the funds is the reason the funds were placed into escrow. Furthermore, the e-mails in the record demonstrate that the Tronnes Defendants *requested* that the funds not be released to URC and *agreed* to placing the funds in escrow pending the dispute.**

75. If Ben wanted to try to close on the Property with Pennington Title Company on time, he could either agree to escrow the funds or agree to indemnify Pennington Title Company for any claims URC or UPM may make.

OBJECTION:

1. **Speculation and misstatement of evidence. The Tronnes Defendants did not call any witnesses from Pennington Title or introduce any testimony from any representatives of Pennington Title as to the reason for placing the funds into escrow. As Benjamin Tronnes testified, it is common practice for a title company to put "disputed" funds into escrow and, therefore, it is probable that the mere dispute of the funds is the reason the funds were placed into escrow. Furthermore, the e-mails in the record demonstrate that the Tronnes Defendants *requested* that the funds not be released to URC and *agreed* to placing the funds in escrow pending the dispute.**

76. Because Ben did not want to accept any additional legal liability and because he wanted to close on the Property on time with Pennington Title Company, he had no choice but to acquiesce to Pennington Title Company's decision to escrow the funds.

OBJECTION:

1. **Speculation and misstatement of evidence. The Tronnes Defendants did not call any witnesses from Pennington Title or introduce any testimony from any representatives of Pennington Title as to the reason for placing the funds into escrow. As Benjamin Tronnes testified, it is common practice for a title company to put "disputed" funds into escrow and, therefore, it is probable that the mere dispute of the funds is the reason the funds were placed into escrow. Furthermore, the e-mails in the record demonstrate that the Tronnes Defendants *requested* that the funds not be released to URC and *agreed* to placing the funds in escrow pending the dispute.**
2. **Furthermore, Benjamin Tronnes admits that he could have agreed to an indemnification agreement to release the funds and, in fact, his counsel indicated in an e-mail to Pennington Title that she and the Tronnes Defendants were going to work out an indemnification agreement after the closing of the property, but then they never further explored that with Pennington Title.**

77. Had Uhre not reached out to Pennington Title Company, the funds would not have been put into escrow.

OBJECTION:

1. **Speculation and not supported by the weight of the evidence in the record. The Tronnes Defendants did not call any witnesses from Pennington Title or introduce any testimony from any representatives of Pennington Title as to the reason for placing the funds into escrow. As Benjamin Tronnes testified, it is common practice for a title company to put "disputed" funds into escrow and, therefore, it is probable that the mere dispute of the funds is the reason the funds were placed into escrow. Furthermore, the e-mails in the record demonstrate that the Tronnes Defendants *requested* that the funds not be released to URC and *agreed* to placing the funds in escrow pending the dispute.**

78. Those funds have yet to be released.

No objection.

79. Because those funds were put into escrow and were not available, Ben had to allocate money that he had pulled from his retirement account to help facilitate the closing on the Colorado home.

OBJECTION:

1. **This is untrue. Benjamin Tronnes testified that he withdrew funds on April 29, 2021, which was the *day before* Pifke e-mailed Benjamin Tronnes an offer to purchase the property.**
2. **Furthermore, the Tronnes Defendants have not met their evidentiary burden. The Tronnes Defendants offered *no* documentation whatsoever at trial confirming the amount or the frequency of payments or, even, to whom the payments were being made.**

80. To date, the Tronneses have incurred $46 biweekly in finance charges associated with having to utilize these funds.

OBJECTION:

3. **The Tronnes Defendants have not met their evidentiary burden. The Tronnes Defendants offered *no* documentation whatsoever at trial confirming the amount or the frequency of payments or, even, to whom the payments were being made.**

81. As of the date of trial, 69 weeks had passed since the June 15, 2021, closing date; thus, 34.5 biweekly payments had occurred.

OBJECTION:

1. **The Tronnes Defendants have not met their evidentiary burden. The Tronnes Defendants offered *no* documentation whatsoever at trial confirming the amount or the frequency of payments or, even, to whom the payments were being made.**

82. Thus, 34.5 biweekly payments times the $46 in finance charges results in $1,587.00 in payments incurred by the Tronneses.

OBJECTION:

1. **The Tronnes Defendants have not met their evidentiary burden. The Tronnes Defendants offered *no* documentation whatsoever at trial confirming the amount or the frequency of payments or, even, to whom the payments were being made.**

83. Ultimately, because David had various issues with appraisals and his financing, the closing on the Property was delayed and the sale of the Property was not finalized until June 15, 2021, which resulted in the Tronneses having to purchase a different home in Colorado.

OBJECTION:

2. **No objection insofar as the cause of the delay was Pifke.**
3. **However, the Uhre Entities object insofar as the Tronnes Defendants did not meet their burden in proving the effect, if any, the closing on the property in Rapid City had on closing on the property in Colorado Springs. The Tronnes Defendants did not produce any documentation, e-mails, appraisals, purchase agreements, anything regarding the alleged transactions in Colorado Springs despite the existence of that information if those transactions did happen as described. Furthermore, the Tronnes Defendants objected to producing any information**

regarding the transactions in Colorado Springs and described those transactions as "irrelevant" to this lawsuit.

84. The Property eventually sold for $492,000, with commissions withheld in the amount of $24,600, sales tax in the amount of $1,599.00, and fees in the amount of $200.00, for a total of $26,399.00.

No objection.

CONCLUSIONS OF LAW

1. Any Conclusion of Law set forth herein which is more appropriately a Finding of Fact should be treated in its appropriate fashion as such throughout.

No objection.

2. The Findings of Fact set forth above are incorporated herein by this reference as if set forth in their entirety.

No objection.

3. This Court has jurisdiction over the parties and subject matter of this case.

No objection.

4. Courts in South Dakota have the power to "declare rights, status, and other legal relations whether or not further relief is or could be claimed." *See* SDCL § 21-24-1.

No objection.

5. A request for declaratory relief may be allowed even when another adequate remedy exists. *Agar S.D. v. McGee*, 527 N.W.2d 282, 286–87 (S.D. 1995); SDCL § 15-6-57.

No objection.

6. Furthermore, SDCL § 21-24-3 provides that "any person interested under a . . . written contract . . . whose rights, status, or other legal relations are affected by a . . . contract . . . may have determined any question of construction or validity arising under the . . . contract . . . and obtain a declaration of rights, status, or other legal relations thereunder."

No objection.

7. "A contract may be construed either before or after there has been a breach thereof." SDCL § 21-24-4.

No objection.

8. Finally, SDCL § 21-24-6 grants broad powers to the court to grant declaratory relief "in any proceeding where declaratory relief is sought, [and] in which a judgment or decree will terminate the controversy or remove an uncertainty."

No objection.

9. Thus, this Court has the power to construe the terms of the Listing Agreement to determine whether the Tronneses breached the contract.

No objection.

10. As set forth in the Property Management Agreement, UPM was an agent of the Tronneses with the "exclusive [right] to rent, lease, operate and manage" the Property. (Tr. Ex. 1).

No objection.

11. URC was likewise an agent of the Tronneses and was given the "exclusive irrevocable right and privilege to sell" the Property during the term of the Listing Agreement. (Tr. Ex. 2).

No objection.

BREACH OF CONTRACT AND DECLARATORY JUDGMENT

12. A breach of contract results if there is "(1) an enforceable promise; (2) a breach of the promise; and, (3) resulting damages." *Bowes Construction, Inc. v. South Dakota Department of Transportation*, 793 N.W.2d 36, 43 (S.D. 2010) (citing *Guthmiller v. Deloitte & Touche, L.L.P.*, 699 N.W.2d 493, 498 (S.D. 2005)).

No objection.

13. "When interpreting a contract, the Court should look "to the language that the parties used in the contract to determine their intention." *Lillibridge v. Meade Sch. Dist. #£46-1*, 746 N.W.2d 428, 432 (S.D. 2008) (quoting *Pauley v. Simonson*, 720 N.W.2d 665, 667–68 (S.D. 2006)). "Contract interpretation is a question of law." *Nelson v. Schellpfeffer*, 656 N.W.2d 740, 743 (S.D. 2003).

No objection.

14. In interpreting a contract:

> The goal of contract interpretation is to see to it that the mutual intent of the parties is carried into effect. The contract is to be read as a whole, making every effort to give effect to all provisions. When the words of a contract are clear and explicit and lead to no absurd consequences, the search for the parties' common intent is at an end.

Nelson, 656 N.W.2d at 743 (quotations and citations omitted); *McKie Ford Lincoln, Inc. v. Hanna*, 907 N.W.2d 795, 798 (S.D. 2018) (contract interpreted according to its terms).

No objection.

15. When a contract is clear, extrinsic evidence will not be considered because "the intent of the parties can be derived from within the four corners of the contract." *Vander Heide v. Boke Ranch, Inc.*, 736 N.W.2d 824, 835–36 (S.D. 2007) (citations omitted); *In re J.D.M.C.*, 739 N.W.2d 796, 806 (S.D. 2007) (Extrinsic evidence cannot be considered unless the contract is deemed uncertain or ambiguous).

No objection.

16. Here, the Listing Agreement provides:

> If a purchaser is procured for the property by the Broker, by any other cooperating broker, by the Seller, or by any other person at the price and upon the terms stated above, or at any other price or upon any other terms accepted by the Seller during the term of this Agreement or if exchanged or optioned during the term of this contract and said option is exercised, or if within 180 days after the expiration of this agreement, the property is sold to any person to whom the property was shown the Seller agrees to pay compensation as stated above … The Broker and Seller, as parties to this agreement, agree that a party in breach of any of the covenants, promises or obligations arising under this contract shall be liable and responsible for attorney's fees and costs that may result from enforcement thereof as against the party in breach.

Id.

No objection.

17. The Listing Agreement is not ambiguous and therefore, no extrinsic evidence may be introduced or utilized to attempt to vary the terms of the Listing Agreement.

OBJECTION:

1. **For clarity, the Uhre Entities agree that no extrinsic evidence may be introduced or utilized to attempt to vary the *intent* of the unambiguous terms of the Listing Agreement.**

18. In reviewing this provision, it discusses actions taken during two pertinent timeframes which may give rise to a commission being owed to URC—during the term of the Listing Agreement and during the 180-day tail period.

OBJECTION:

2. **While the Listing Agreement does discuss actions taken during the term and the 180-day tail period, it *also* considers actions that occur after both of those periods. For example, the Listing Agreement merely requires that a purchaser be "procured" during the term of the Agreement; yet, it makes no distinction on when a purchase agreement be entered into, which could occur after the term and the 180-day tail period. Likewise, as for options, the Listing Agreement requires that the Property be "optioned during the term of this contract," but does not provide a timeframe on when that option is exercised, which could occur after the expiration of the contract and the 180-day tail period.**

Actions During the Term of the Listing Agreement

19. The term of the Listing Agreement expired October 31, 2020.

OBJECTION:

1. **The Uhre Entities do not dispute that the Listing Agreement states that the expiration date is October 31, 2020.**
2. **However, the Uhre Entities assert that due to the contact of the Tronnes Defendants in requesting additional assistance after the date of October 31, 2020, URC claims that the Tronnes Defendants waived that provision or are otherwise estopped from relying upon the termination date, and ultimately disputes that the Listing Agreement expired on October 31, 2020.**

20. During the term of the Listing Agreement, URC would only be entitled to a commission if one of three things occurred:

OBJECTION:

1. **Incomplete Finding of Fact. See Responses to Nos. 21-25.**

Purchase

21. First, URC would be entitled to compensation if, during the term of the Listing Agreement, a purchaser was procured for the Property *and an offer was accepted by the Seller*. *Id.* At ¶ 7 A (emphasis added).

OBJECTION:

1. **This is untrue. This provision does not include the term "offer" or acceptance of said offer anywhere in the provision. It merely requires that a purchaser be *procured* during the term of the Agreement upon the terms stated in the Agreement. If the Agreement wanted to require an "offer" or, for example, a signed purchase agreement, it could have said that, but it did not.**

22. Here, a purchaser was not procured and there was never an offer accepted by the Tronneses during the term of the Listing Agreement.[1]

OBJECTION:

1. **This is untrue. URC, or someone else, procured Pifke as a purchaser during the term of the Listing Agreement. *See* Uhre Entities Findings of Fact and Conclusions of Law dated October 11, 2022, which are incorporated herein.**
2. **Further, this provision does not include the term "offer" or acceptance of said offer anywhere in the provision. It merely requires that a purchaser be *procured* during the term of the Agreement upon the terms stated in the Agreement. If the Agreement wanted to require an "offer" or, for example, a signed purchase agreement, it could have said that, but it did not.**

Exchange

23. Second, URC would be entitled to receive a commission if, during the term of the Listing Agreement, the Property was exchanged. *Id.* at ¶ 7 A.

No objection.

24. Title to the Property was never exchanged during the term of the Listing Agreement.

OBJECTION:

1. **For clarity, the Listing Agreement contains a provision indicating the expiration is October 31, 2020. Due to the contact of the Tronnes Defendants in requesting additional assistance after the date of October 31, 2020, URC claims that the Tronnes Defendants waived that provision or are otherwise estopped from relying upon the termination date, and ultimately disputes that the Listing Agreement expired on October 31, 2020.**

Option

25. Third, URC would be entitled to a commission if the Property was optioned during the term of the Listing Agreement and said option was exercised. *Id.* at ¶ 7 A.

OBJECTION:

[1] At best, UPM (not URC) procured a *tenant* during the term of the Listing Agreement. Thus, while the Tronneses do not believe that UPM or URC is entitled to any fee whatsoever, should the Court disagree, the Tronneses alternatively propose a finding that URC at most would be entitled to 5% of the *lease* value as a professional fee.

1. **This is untrue. The Listing Agreement requires that the Property be "optioned during the term of this contract," but does not provide a timeframe on when that option is exercised, which could occur after the expiration of the contract and the 180-day tail period.**

26. An option contract is "a contract by which an owner of real property agrees with another person that the latter shall have the privilege of buying the property at a specified price within a specified time, or within a reasonable time in the future, and which imposes no obligation to purchase upon the person to whom it is given." *Kuhfeld v. Kuhfeld*, 292 N.W.2d 312, 314 (S.D. 1980); *In the Matter of the Dennis Snaza family Trust*, 909 N.W.2d 719, 721 (S.D. 2018).

No objection.

27. An option contract "is exercised when the optionee accepts the irrevocable offer, and an enforceable contract of sale is created." *Advanced Recycling Systems, LLC v. Southeast Properties Ltd. Partnership*, 787 N.W.2d 778, 783 (S.D. 2010).

No objection.

28. The Lease Agreement provides: "Owner agrees to hold property off market until February 1, 2022 or 60 days of the termination of lease and not take showings." (Tr. Ex. 3 at "Sale of Property").

No objection.

29. Nowhere in the plain language of the Lease does it state that David had any privilege to purchase the property for a specified price or within a specified time.

No objection.

30. Because the language of the Lease is unambiguous, no extrinsic evidence may vary the terms of the Lease.

No objection.

31. The Lease was not an option contract as defined above. Therefore, the Property was not optioned within the term of the Listing Agreement.

OBJECTION:

1. ***See* Uhre Entities' proposed Findings of Fact and Conclusions of law regarding the option contract.**
2. **Furthermore, URC does not claim that the Lease, by itself, was an option contract. Rather, *URC*, on behalf of and with the consent of the Tronnes Defendants, gave Pifke the exclusive right to purchase the property at his election within the agreed-upon period of his Lease in exchange for holding the property off the market. The**

option to purchase the Property was a separate and distinct option to purchase between URC and Pifke. This option is *corroborated* by the fact that the Lease precluded the Tronnes Defendants, and thereby URC, from listing the Property during the term of the Lease. Uhre testified that the purchase amount never changed from the list price that Pifke viewed (i.e., $475,900.00), and that all parties understood that Pifke could exercise that option to purchase at any time during his Lease. To that end, Pifke testified that he was not in a rush to purchase the Property or sort out his finances because he had the Property secured for 18 months. Further, Benjamin Tronnes even testified that he also reiterated the offer in 2021 and never rescinded it and would have accepted it had Pifke made that offer rather than the increased offer of $500,000.00.

3. **In an e-mail to Pifke on August 1, 2020, Uhre states: "And also to mention, that you could purchase the home at any time if you desired too which would likely be a lesser payment. What do you think?" Pifke replied: "That's agreeable to us. Appreciate you working with us on it!"**

32. Therefore, no actions occurred during the term of the Listing Agreement that would give rise to URC being owed a commission.

OBJECTION:

1. **See Responses to Nos. 12-32. Further, see also Uhre Entities proposed Findings of Fact and Conclusion of Law dated November 11, 2022.**

Actions During the 180-day Tail Period

33. Alternatively, if no purchase, exchange, or option occurred during the term of the Listing Agreement (as discussed *supra*), URC's only means of obtaining a commission was if the property was "sold to any person to whom the property was shown" within 180 days after the expiration of the Listing Agreement. *Id.*

OBJECTION:

1. **This is untrue, in part. There are at least three ways in which a commission may be owed after the expiration of the 180 days.**
    a. **First, a purchaser is procured during the term and the property is sold after the expiration of the 180 days.**
    b. **Second, the property is optioned during the term and the option is exercised after the expiration of the 180 days.**
    c. **Third, and as stated by the Tronnes Defendants, the property is sold to a person to whom the property was shown.**
3. **Separately, URC also claims that the expiration date/tail period may be extended based on the conduct of the Tronnes Defendants. *See* Uhre Entities proposed Findings of Fact and Conclusions of Law dated November 11, 2022.**

34. Here, the Listing Agreement defines "sale" as "any exchange, trade, lease or option to purchase to which the Seller consents." (Tr. Ex. 2).

No objection.

35. The property was not sold during the 180-day period after the expiration of the Listing Agreement, which expired on April 29, 2021.

OBJECTION:

1. **URC does not dispute that the sale of the Property closed on June 15, 2021.**
2. **However, URC also claims that the expiration date/tail period may be extended based on the conduct of the Tronnes Defendants. *See* Uhre Entities proposed Findings of Fact and Conclusions of Law dated November 11, 2022.**

36. Instead, the Property was sold on June 15, 2021, over a month and a half after the close of the tail-period.

OBJECTION:

1. **URC does not dispute that the sale of the Property closed on June 15, 2021.**
2. **However, URC also claims that the expiration date/tail period may be extended based on the conduct of the Tronnes Defendants. *See* Uhre Entities proposed Findings of Fact and Conclusions of Law dated November 11, 2022.**

37. Therefore, because no purchaser was procured for the Property during the term of the Listing Agreement, and the Property was not exchanged or optioned during the term of the Listing Agreement, and because no sale occurred during the 180-day tail period, the Tronneses did not breach the terms of the Listing Agreement by failing to pay the commission allegedly owed to URC.

OBJECTION:

1. **That is untrue. URC is owed a commission because either (1) it, or someone else, procured Pifke as a purchaser, (2) Pifke exercised his option to purchase, (3) the Tronnes Defendants breached the implied covenant of good faith and fair dealing, or (4) the term or the tail period is extended due to the conduct of the Tronnes Defendants. *See* Responses to Nos. 12-36; *see also* Uhre Entities proposed Findings of Fact and Conclusions of Law.**

38. As such, this Court declares, pursuant to SDCL § 21-24 *et. seq.*, that no commission is owed to URC or UPM under the terms of the Listing Agreement.

OBJECTION:

1. **URC refers the Court to its proposed Findings of Fact and Conclusions of Law dated November 11, 2022, in support of its claim that a commission is owed.**

IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

39. "[E]very contract contains an implied covenant of good faith and fair dealing [that] prohibits either contracting party from preventing or injuring the other party's right to receive the agreed benefits of the contract.'" *Nygaard v. Sioux Valley Hosps. & Health*

Sys., 2007 S.D. 34, ¶¶ 20-22, 731 N.W.2d 184, 193–94 (quoting *Farm Credit Servs. of Am. v. Dougan*, 2005 SD 94, 704 N.W.2d 24, ¶ 8 (internal citations omitted)).

No objection.

40. This duty of good faith permits an aggrieved party to bring a breach of contract action when the other party:

> [B]y [its] lack of good faith, limited or completely prevented the aggrieved party from receiving the expected benefits of the bargain. A breach of contract claim is allowed even though the conduct failed to violate any of the express terms of the contract agreed to by the parties.

Id. (quoting *Garrett v. BankWest, Inc.*, 459 N.W.2d 833, 841 (S.D.1990)).

No objection.

41. The meaning of the covenant "varies with the context of the contract." *Id.* Ultimately, the duty "emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." *Id.* (quoting Restatement (Second) of Contracts § 205, cmt a (1981)).

No objection.

42. However, the "duty of good faith and fair dealing 'is not a limitless duty or obligation.'" *Id.* "The implied obligation 'must arise from the language used or it must be indispensable to effectuate the intention of the parties.'" *Id.* (internal citations omitted).

No objection.

43. The South Dakota Supreme Court has also recognized a limitation when the language of a contract addresses the issue, stating "The covenant of good faith does not create an amorphous companion contract with latent provisions to stand at odds with or in modification of the express language of the parties' agreement. It is not a repository of limitless duties and obligations." *Id.* (quoting *Farm Credit Services*, 2005 SD 94 at ¶ 9, 704 N.W.2d at 28 (citations omitted)).

No objection.

44. Therefore, "[i]f the express language of a contract addresses an issue, then there is no need to construe intent or supply implied terms" under the implied covenant. *Id.* at ¶ 10 (citations omitted).

No objection.

45. No evidence was presented to support the claim that the Tronneses lacked good faith in their interactions with URC or UPM, and no evidence supports that they attempted to push the sale of the Property outside the 180-day tail period.

OBJECTION:

1. **That is untrue. *See* Uhre Entities proposed Findings of Fact and Conclusions of Law dated November 11, 2022, relating to the Tronnes Defendants' absence of good faith.**
2. **Further, the evidence in the record indicates the Tronnes Defendants' lack of good faith is evidence by their attempt to fail to cooperate with URC and evade the spirit of the deal by (1) continuing to consistently and repeatedly request the assistance of Uhre's time and efforts after the stated expiration date of the Listing Agreement on October 31, 2020, in order to facilitate the sale of the Property to Pifke and without the intention to compensate URC for those special efforts to facilitate a sale of the Property, (2) by threatening Pifke through e-mail correspondence and stopping by the Property unannounced to breach the Lease with Pifke, which Pifke testified he believed Tronnes intended to breach the Lease and that is why he expedited a purchase offer by April 30, 2020, (3) by failing to advise Uhre of any of these communications with Pifke while simultaneously failing to advise URC that they no longer wanted URC to communicate with Pifke about purchasing the Property, and (4) by expressly advising Pifke that they would speak with Uhre about the Lease and the purchase of the Property, and then failing to discuss with Uhre or inform Pifke that they did not discuss with Uhre.**

46. To the contrary, the evidence presented supports the testimony that the Tronneses were attempting to sell the Property as quickly as possible.

OBJECTION:

1. **This statement lacks context. The Tronnes Defendants did not advise Uhre about their efforts to discuss directly with Pifke, they did not advise about any developments in purchasing property in Colorado Springs, and meanwhile they continued to request that Uhre assist in selling the property. Ultimately, the predominant issue is whether the Tronnesses were intending to compensate URC for the commission under the Listing Agreement.**

47. The Court finds Ben Tronnes' testimony was credible.

OBJECTION:

1. **While the Court need not determine that Benjamin Tronnes lacked credibility to find in favor of URC and UPM, this Court may determine that Benjamin Tronnes lacked credibility when it considers, for example, his intent in not paying the commission to URC, his testimony regarding continuing communications with Uhre about selling the Property after October 31, 2020, and his testimony regarding his alleged damages.**

48. The Court also finds David Pifke's testimony was credible.

No objection.

49. Therefore, the Tronneses did not breach the implied covenant of good faith and fair dealing.

OBJECTION:

1. **That is untrue. See Responses to Nos. 39-48; *see also* Uhre Entities proposed Findings of Fact and Conclusions of Law.**

TORTIOUS INTERFERENCE WITH BUSINESS RELATIONS

50. Tortious interference with a business relationship requires: "(1) the existence of a valid business relationship or expectancy; (2) knowledge by the interferer of the relationship or expectancy; (3) an intentional and unjustified act of interference on the part of the interferer; (4) proof that the interference caused the harm sustained; and (5) damage to the party whose relationship or expectancy was disrupted." *Tibke v. McDougall,* 479 N.W.2d 898, 908 (S.D. 1992).

No objection.

51. For tortious interference with a business relationship, three parties must be involved: a plaintiff, an identifiable third party who wished to deal in contract or business with the plaintiff, and the defendant who interfered with the plaintiff and the third party. *Landstrom v. Shaver*, 561 N.W.2d 1, 16 (S.D. 1997); *Tibke*, 479 N.W.2d at 908–09.

No objection.

52. The action does not need to induce a breach of contract. More broadly stated, a plaintiff needs "to show that [his] relationship with an identifiable third party was affected by [the defendant's] actions." *See Janvrin v. Cont'l Res., Inc.*, 2016 WL 3566213, at *5 (D.S.D. June 27, 2016) (emphasis added) (citing *Table Steaks v. First Premier Bank, N.A.*, 650 N.W.2d 829, 835 (S.D. 2002) (emphasis added)).

No objection.

53. Here, the Tronneses had a valid business relationship with Pennington Title Company.

OBJECTION

1. **This statement is incomplete and/or lacks context. The Tronnes Defendants had a relationship with Pennington Title Company to *close* on the transaction. Benjamin Tronnes testified and agreed that was why they hired them. As explained below, Pennington Title Company ultimately closed on the transaction.**
2. **In fact, the Tronnes Defendants' agree that this was the purpose of retaining Pennington Title insofar as their proposed Finding of Fact No. 70, above, states: "The parties agreed to use Pennington Title Company to effectuate the closing on the Property."**

54. Uhre, on behalf on UPM and URC, was aware of this relationship.

OBJECTION

1. **Uhre testified that initially he was unaware of what closing company had been retained and was calling to find out. He testified that he was then advised on the phone by personnel at Pennington Title Company to send an e-mail, which he then did to explain the basis for why he believed URC was entitled to a commission.**

55. Uhre's email to Greg Wick of Pennington Title Company wherein he represented that he had an "active" listing agreement was an intentional and unjustified act.

OBJECTION:

1. ***See* Uhre Entities Findings of Fact and Conclusions of Law regarding the claim for tortious interference.**
2. **Further, this statement is untrue and is misleading. Uhre testified that "active" meant his entitlement to a commission. The e-mail to Greg Wick, which is the only e-mail that is claimed to be the interference, *attached* the entire Listing Agreement, Lease Agreement, and Management Agreement for Pennington Title's review. Furthermore, in the body of the e-mail to Greg Wick, Uhre also quoted the part of the Listing Agreement that indicated that the identified expiration date was October 31, 2020, which contradicts the Tronnes Defendants' claim that Uhre made a misrepresentation to Greg Wick.**
3. **In addition, URC has made a claim that the term and 180-day tail period of the Listing Agreement was extended by the conduct of the Tronnes Defendants.**

56. But for Uhre's email to Pennington Title Company, the disputed commission would not have been withheld and subsequently put into escrow.

OBJECTION:

1. **Speculation and not supported by the weight of the evidence in the record. The Tronnes Defendants did not call any witnesses from Pennington Title or introduce any testimony from any representatives of Pennington Title as to the reason for placing the funds into escrow. As Benjamin Tronnes testified, it is common practice for a title company to put "disputed" funds into escrow and, therefore, it is probable that the mere dispute of the funds is the reason the funds were placed into escrow. Furthermore, the e-mails in the record demonstrate that the Tronnes Defendants *requested* that the funds not be released to URC and *agreed* to placing the funds in escrow pending the dispute.**

57. The Tronneses were damaged because they still cannot use the funds.

OBJECTION:

1. **The Tronnes Defendants have not met their burden of proof of establishing damages. The Tronnes Defendants did not introduce any actual evidence that they have been damaged by the escrowing of the funds.**

58. Furthermore, because they had to utilize money that they had withdrawn from Ben's retirement account to close on the Colorado home and have not been able to pay that back, they have had to pay biweekly finance charges on that money.

OBJECTION:

1. **First, this is untrue. Benjamin Tronnes testified that he withdrew funds from his retirement account on April 29, 2021, the day *before* Pifke e-mailed an offer to Benjamin Tronnes.**
2. **Furthermore, the Tronnes Defendants have failed to meet their evidentiary burden of proving their alleged damages. They did not introduce any of the alleged retirement account documentation, any documentation evidencing the finance charges, and any documentation evidencing their alleged inability to pay the charges. Moreover, and perhaps most critically, Benjamin Tronnes testified that they would have accepted $475,000.00 rather than $500,000.00, which contradicts their argument that escrowing approximately the difference between those amounts (i.e., approximately $25,000.00) somehow caused them damage.**

59. As of the date of trial, they had made 34.5 bi-weekly payments in charges in the amount of $46.

OBJECTION:

4. **The Tronnes Defendants have not met their evidentiary burden. The Tronnes Defendants offered *no* documentation whatsoever at trial confirming the amount or the frequency of payments or, even, to whom the payments were being made.**

60. Therefore, the Court finds Uhre, on behalf of URC and UPM, tortiously interfered with the Tronneses' business relationship with Pennington Title Company, and as such, the Tronneses are entitled to $1,587.00 in damages, plus prejudgment interest in the statutory amount.

OBJECTION:

1. ***See* Uhre Entities proposed Findings of Fact and Conclusions of Law dated November 11, 2022, regarding claim for tortious interference.**
2. ***See also* Responses to Nos. 50-60.**

ATTORNEYS' FEES

61. South Dakota follows the American rule with regard to the recovery of attorneys' fees, which provides:

> [e]ach party bears the party's own attorney fees. However, attorney fees are allowed when there is a contractual agreement that the prevailing party is entitled to attorney fees or there is statutory authority authorizing an award of attorney fees.

Credit Collection Servs., Inc. v. Pesicka, 2006 S.D. 81, ¶ 6, 721 N.W.2d 474, 476–77 (citing *Crisman v. Determan Chiropractic, Inc.*, 2004 SD 103, ¶ 26, 687 N.W.2d 507, 513) (citations omitted)(emphasis added).

No objection.

62. Therefore, even if there is no statute authorizing attorneys' fees, they are recoverable if the parties' contract so provides. *Id.*

No objection.

63. Here, the Listing Agreement provides: "The Broker and Seller, as parties to this agreement, agree that a party in breach of any of the covenants or obligations arising under this contract shall be liable and responsible for attorneys' fees and costs that may result from enforcement thereof as against the party in breach." (Tr. Ex. 2 at ¶ 7(A)).

No objection.

64. Therefore, the Court concludes that the Tronneses are entitled to their attorneys' fees in this matter as they are the prevailing party under the Listing Agreement. Said attorneys' fees shall be determined by affidavit and separate Motion to the Court to be filed in this case.

OBJECTION:

1. **The Listing Agreement <u>does not</u> include "prevailing party" language wherein whomever prevails is awarded their attorneys' fees. Instead, it states that "a party in breach" of the Listing Agreement "shall be liable" from "enforcement thereof." It does not contemplate awarding attorneys' fees against a party not in breach and, further, it does not contemplate an award to simply the prevailing party. The Tronnes Defendants have alleged no claims in this lawsuit that URC breached the Listing Agreement. Further, as the Tronnnes Defendants admit, the Listing Agreement is clear and unambiguous.**

Dated this 21st day of November, 2022.

CUTLER LAW FIRM, LLP

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CERTIFICATE OF SERVICE

I, Jonathan A. Heber, do hereby certify that on this 21st day of November, 2022, I have electronically filed the foregoing with the Clerk of Court using the Odyssey File & Serve system which will send notification of such filing to the following:

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/s/ Jonathan A. Heber
One of the Attorneys for Uhre Realty Corporation
and Uhre Property Management Corporation

STATE OF SOUTH DAKOTA) SS. COUNTY OF PENNINGTON	)	IN CIRCUIT COURT SEVENTH JUDICIAL CIRCUIT
UHRE REALTY CORPORATION; AND UHRE PROPERTY MANAGEMENT CORPORATION, Plaintiffs, vs. BENJAMIN TRONNES and LESLIE TRONNES, Defendants.	)	51CIV21-000821 **DEFENDANTS' OBJECTIONS TO PLAINTIFFS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Defendants Benjamin Tronnes and Leslie Tronnes, ("Defendants") by and through Katelyn A. Cook of Gunderson, Palmer, Nelson & Ashmore, LLP, their attorneys, and pursuant to SDCL § 15-6-52(a), respectfully submit their Objections to Plaintiffs' Proposed Findings of Fact and Conclusions of Law. Defendants also incorporate by this reference, all arguments and objections previously made relevant to the issues presently before this Court.

Furthermore, Defendants generally object to Plaintiffs' Proposed Findings of Fact and Conclusions of Law to the extent they are inconsistent Defendants' Proposed Findings of Fact and Conclusions of Law, and any amendments thereto, as well as inconsistent with the record. Defendants believe the case law cited in their proposed document is an accurate representation of the case law relevant to the matter. Defendants further object to any factual findings beyond those cited in their own Proposed Findings as they are irrelevant to the matter at hand. Defendants' specific objections are noted in bold typeface below.

FINDINGS OF FACT

1. At all times relevant hereto, Josh Uhre ("Uhre") is the owner and operator of two corporations engaged in the realty industry in Rapid City, South Dakota: Uhre Realty Corporation ("URC") and Uhre Property Management Corporation ("UPM") (together, the "Uhre Entities").

Objection. URC engages in the realty industry but testimony provided at trial supports that UPM is simply a property management company and does not actually sell properties.

2. At all times relevant hereto, Benjamin and Leslie Tronnes (collectively, the "Tronnes Defendants") were the owners of residential real property located at 1219 12th Street, Rapid City, SD 57701 (the "Property").

3. In or around mid-2019, URC and UPM began doing business with Benjamin and Tronnes Defendants primarily for the management, leasing, and listing of the Property.

4. On July 15, 2021, Plaintiffs commenced this action by filing a Summons and Complaint.

5. On October 4, 2022, the Uhre Entities and the Tronnes Defendants submitted pre-trial statements to the Court.

6. On October 11, 2022, the Court held a one-day court trial to determine whether the Tronnes Defendants were liable for breach of a listing agreement, and whether URC and/or UPM were liable for tortious interference with a business expectancy with Pennington Title Company. Plaintiffs and Tronnes Defendants also both moved for declaratory judgment regarding entitlement to the escrow funds held by Pennington.

7. At the court trial on October 11, 2022, Josh Uhre testified on behalf of URC and UPM, Benjamin Tronnes testified on behalf of the Tronnes Defendants, and David Pifke testified pursuant to a trial subpoena.

TRONNES DEFENDANTS' PURCHASE OF PROPERTY

8. Sometime in 2014, the Tronnes Defendants were referred to Uhre by attorney Jeff Hurd of Bangs McCullen Law Firm, for the purpose of assisting them with finding a residential home in Rapid City, South Dakota.

9. Benjamin Tronnes was hired as an associate attorney by Bangs McCullen Law Firm in Rapid City.

10. Uhre met personally with the Tronnes Defendants to discuss what kind of residential home they were interested in purchasing in Rapid City.

11. At this time, Uhre was working as a real estate agent for VIP Properties, LLC.

12. Uhre found and passed along to the Tronnes Defendants a listing for the Property and attending a showing of the Property with them.

13. After the showing, the Tronnes Defendants were interested in purchasing the Property as their home and made an offer.

14. Uhre testified that the sellers of the Property, at the time, were particularly challenging to negotiate a purchase of the Property.

15. Uhre recalled dedicating significant time over weekdays, evenings, and weekends to facilitate a purchase of the Property for the Tronnes Defendants.

16. To get the deal done for the Tronnes Defendants, Uhre agreed, as a courtesy, to reduce his purchase commission, and thereby his revenue, to appease the sellers with a more favorable margin on the sale of the Property.

17. By the end of the purchase transaction, Uhre testified that he felt he had an excellent relationship with the Tronnes Defendants and could communicate with them any time, usually by phone, e-mail, and group text messages.

18. After the purchase of the Property, Uhre continued to see the Tronnes Defendants from time to time as their children played soccer together.

FORMATION OF UHRE REALTY CORPORATION

19. In 2015, Uhre formed URC and UPM.

20. URC is a full-service real estate business that is engaged in assisting with the sale, purchase, and leasing of residential homes in the greater Rapid City area.

21. UPM is primarily engaged with the management of residential property.

22. Among the services provided by URC, it assists clients with the sale, purchase, and/or leasing of residential homes, including, but not limited to, meeting with clients to discuss their needs and interests, providing price opinions, marketing the residential property, taking photographs of the residential property, staging and attending open houses, communicating with other real estate agents, negotiating offers and sale/purchase transactions, and attending the closings at title companies.

23. URC is a commission-based business wherein revenue is derived from sales and/or purchases of real property, which is the standard for businesses engaged in the real estate industry.

24. As part of the business, URC incurs out-of-pocket costs from efforts to assist clients with the purchase, sale, or leasing of residential property prior to any receipt of a commission, including, but not limited to, fuel costs for driving to and from showings, costs of hiring photographers for the property, Multiple Listing Service ("MLS") dues, costs of advertisements, costs for purchasing signage, and the printing of materials in connection with open houses.

25. In addition, Uhre dedicates his own time, on behalf of URC, toward facilitating purchases, sales, or leasing of residential property, including, but not limited to, attending open

houses on the weekends and usually on Sunday afternoons, communicating with clients at all hours about new leads, and preparing and responding to offers at all hours.

AGREEMENT TO MANAGE AND LEASE REAL ESTATE

26. Sometime in 2019, about five years after assisting the Tronnes Defendants with their purchase of the Property, the Tronnes Defendants reached out to Uhre to request assistance with selling the Property.

27. The Tronnes Defendants were interested in selling the Property because Benjamin Tronnes had accepted an offer to serve as in-house counsel for USA Hockey in Colorado Springs, Colorado.

28. While the Tronnes Defendants were principally focused on selling the Property, the Tronnes Defendants expressed an interest to Uhre in leasing the Property to tenants as a way of generating income from the Property while still attempting to sell the Property.

29. On August 16, 2019, the Tronnes Defendants executed an Agreement to Manage and Lease Real Estate ("Management Agreement") with UPM for the management of the Property.

30. The Management Agreement commenced on August 16, 2019, with an initial term expiring on September 1, 2020, and an automatic renewal for "annual periods unless terminated by either party giving 30-days' written notice to the other party in advance of such termination date."

31. Under the Management Agreement, UPM was "employ[ed] exclusively to rent, lease, operate and manage the Property."

32. The Management Agreement compensated UPM at 10% of the gross monthly rent plus tax upon the "consummation" of negotiations for a lease agreement.

33. Such compensation was "due and payable on demand" and could be deducted by UPM from gross receipts.

FIRST EXCLUSIVE LISTING AND AGENCY AGREEMENT

34. On September 9, 2019, the Tronnes Defendants also executed an Exclusive Listing and Agency Agreement ("Initial Listing Agreement") with URC.

35. The Initial Listing Agreement is a form document provided to URC by the Black Hills Association of REALTORS®.

36. The Tronnes Defendants had no suggested changes, revisions, or additions to the terms and conditions in the Initial Listing Agreement, other than recommendations on how to fill in the blanks.

37. The Tronnes Defendants decided on a list price of $475,900.00 for the Property and, at all relevant times in this lawsuit, that list price never deviated from that amount.

38. Uhre signed the Listing Agreement on behalf of URC.

39. The Listing Agreement designated URC as the exclusive listing agent for the sale of the Property, and had an effective start date of May 1, 2020, and an expiration date of October 31, 2020, with a 180-day tail period until April 29, 2021.

40. The Listing agreement provided that if the Property were sold, including "any exchange, trade, lease or option to purchase to which the [the Tronnes Defendants] consent[ed]", URC was entitled to 5% of the total selling price plus all applicable sales tax (its "professional fee") (Emphasis added.).

Objection. This finding is inaccurate in that it is not an accurate summary of the actual language set forth in the Listing Agreement and to that extent, Defendants would argue that their proposed findings are accurate and should be adopted by this Court.

41. URC was entitled to its professional fee if a purchaser was "procure[d]" by URC, a cooperating broker, the Tronnes Defendants, or any other person for a price of at least $475,900.00 or at any price the Tronnes Defendants accepted, or if the Property was "exchanged or optioned"

during the term of the Listing Agreement and the option was later exercised at any point in time thereafter.

Objection. This finding is inaccurate in that it is not an accurate summary of the actual language set forth in the Listing Agreement and to that extent, Defendants would argue that their proposed findings are accurate and should be adopted by this Court.

42. The Listing Agreement also incorporated a standard "tail period" that entitled URC to its professional fee "if within 180 days after the expiration of [the Listing Agreement], the [P]roperty was sold to any person to whom the [P]roperty was shown[.]"

43. URC listed the Property for sale at $475,900.00 and for rent through various online resources like Zillow and Trulia.

44. Uhre, on behalf of URC, received and responded to all inquiries concerning the Property.

Objection. This evidence is not supported by the record as Mr. Pifke testified that his interactions regarding the lease of the Property were with UPM as they never had any agreements nor dealing with URC.

45. Uhre, on behalf of URC, would show the Property in the ordinary course of business to prospective buyers and/or tenants.

46. Uhre personally attended every scheduled open house for the Property, which typically happened between 11:00 AM and 2:00 PM on Sundays.

47. Uhre received offers to purchase the Property and communicated them with the Tronnes Defendants.

THE CHAVEZ LEASE

48. On September 30, 2019, UPM entered into a one-year Residential Real Estate Lease with Michael and Natasha Chavez for their lease of the Property (the "Chavez Lease").

49. The Tronnes Defendants encouraged Uhre to attempt to sell the Property to Chavez.

50. The Chavezes expressed an initial interest to Uhre in potentially purchasing the Property; however, the Chavezes ultimately did not purchase the Property.

51. During the term of the Chaves Lease, UPM was permitted to place "For Sale" signs on the Property and list the Property for sale.

52. URC continued to list and attempt to sell the Property during the term of the Chavez Lease.

53. Uhre testified that all communications with the Chavezes during the lease were done through him and that the Tronnes Defendants had no communications with the Chavezes.

54. The Chavezes completed their one-year lease term and moved out at the expiration of the Chavez Lease.

SECOND EXCLUSIVE LISTING AND AGENCY AGREEMENT

55. On April 29, 2020, the Tronnes Defendants executed a second Exclusive Listing and Agency Agreement ("Listing Agreement") with URC, which was virtually identical to the Initial Listing Agreement.

56. Likewise, the Listing Agreement is a form document provided to URC by the Black Hills Association of REALTORS®.

Objection. This proposed finding is incomplete as it fails to mention that URC was the entity that proposed using this Listing Agreement.

57. The Tronnes Defendants again had no suggested changes, revisions, or additions to the Initial Listing Agreement, other than recommendations on how to fill in the blanks.

58. The list price remained at $475,900.00.

59. Uhre signed the Listing Agreement on behalf of URC.

60. The Listing Agreement designated URC as the exclusive listing agent for the sale of the Property, and had an effective start date of May 1, 2020, and an expiration date of October 31, 2020, with a 180-day tail period until April 29, 2021.

61. The Listing agreement provided that if the Property were sold, including "any exchange, trade, lease or option to purchase to which the [the Tronnes Defendants] consent[ed]", URC was entitled to 5% of the total selling price plus all applicable sales tax (its "professional fee") (emphasis added).

Objection. This finding is inaccurate in that it is not an accurate summary of the actual language set forth in the Listing Agreement and to that extent, Defendants would argue that their proposed findings are accurate and should be adopted by this Court.

62. URC was entitled to its professional fee if a purchaser was procured by URC, a cooperating broker, the Tronnes Defendants, or any other person for a price $475,900.00 or at any price the Tronnes Defendants accepted, or if the Property was "exchanged or optioned" during the term of the Listing Agreement and the option was later exercised.

Objection. This finding is inaccurate in that it is not an accurate summary of the actual language set forth in the Listing Agreement and to that extent, Defendants would argue that their proposed findings are accurate and should be adopted by this Court.

63. The Listing Agreement also incorporated a standard "tail period" that entitled URC to its professional fee "if within 180 days after the expiration of [the Listing Agreement], the [P]roperty was sold to any person to whom the [P]roperty was shown[.]"

64. URC continued to list the Property was listed for sale and for rent through various online resources like Zillow and Trulia.

65. URC continued to receive and respond to all inquiries concerning the Property.

66. Uhre continued to show the Property to prospective buyers and/or tenants.

67. Uhre continued to personally attend every scheduled open house for the Property.

THE PIFKE LEASE

68. In or around July of 2020, David Pifke ("Pifke"), who at the time lived in Las Vegas, Nevada, expressed interest to URC, through the website Trulia, in leasing the Property.

Objection. This is inconsistent with testimony from Pifke at trial which indicated that all of his interactions were with UPM as that was the entity in charge of leasing the Property and that they were never initially looking to purchase the Property.

69. While visiting Rapid City on or about July 21, 2020, Uhre personally walked through and showed Pifke the Property.

70. Pifke expressed that he liked the Property and submitted an application to Uhre to lease it just after the showing.

71. Pifke was aware that Uhre had listed the Property for sale.

72. Pifke testified that he had conversations with Uhre at the outset about purchasing the Property.

Objection. This is inconsistent with testimony from Pifke at trial which indicated that they were never initially looking to purchase the Property because they were unsure whether they would remain in Rapid City after living through a winter and because he did not have the financial wherewithal to purchase the Property.

73. Uhre testified that Pifke was considered a good candidate to purchase the Property because he had sufficient income and credit.

74. Pifke considered purchasing the Property in the future as a possibility, but he wanted to make sure that he liked living in Rapid City before making an offer to purchase the Property.

Objection. This is inconsistent with testimony from Pifke at trial which indicated that they were never initially looking to purchase the Property because they were unsure whether they would remain in Rapid City after living through a winter and because he did not have the financial wherewithal to purchase the Property.

75. Pifke testified that he also wanted to make it through at least one winter season in South Dakota before making an offer to purchase the Property.

Objection. This is inconsistent with testimony from Pifke at trial which indicated that they were never initially looking to purchase the Property because they were unsure whether they would remain in Rapid City after living through a winter and because he did not have the financial wherewithal to purchase the Property.

76. Uhre testified that he discussed with the Tronnes Defendants about Pifke as a positive prospect and candidate to purchase the Property.

77. After receiving a proposed lease, on August 1, 2020, Pifke e-mailed Uhre with questions about the terms in pertinent part:

> Regarding "sale of property":
> 1. It is not clear from this paragraph what happens to the remaining term of the lease if the property is sold before October 1, 2021. Would the buyer (as lessor's successor-in-interest) be obligated to let us stay until the end of the lease (or buy us out), or is the intent this clause to permit early termination with 30 days notice? Do the owners intend to leave the house listed for sale while we are leasing it?

78. Uhre responded, "It would be a minimum of 30 day notice . . . . Their plan is to pull the [P]roperty off the market until next year once it is rented . . . . We probably wouldn't listed it again until June 1. Obviously, if you like the house while living in Rapid City, we can always[s] work a deal at any time."

79. In response, Pifke wrote to Uhre asking "what it would take for the owners to commit to not listing or showing the property until the end of the lease term? (Perhaps with an 18 month term instead, so that it would coincide with the spring, in the event we don't move forward as the purchaser.)."

80. Upon this request, Uhre e-mailed the Tronnes Defendants and asked, "[l]et me know your thoughts on the 18 month option."

81. Later that evening, Uhre e-mailed Pifke that they would "keep the [P]roperty off market for 18 months" for an extra $2,100 a year. "And also to mention, that you could purchase

the home at any time if you desired too which would likely be a lesser payment. What do you think?"

82. Pifke responded, "[t]hat's agreeable to us. Appreciate you working with us on it!"

83. Uhre forwarded Pifke's response to the Tronnes Defendants and wrote, "Just had to ask."

84. Leslie Tronnes responded to Uhre and wrote, "Nice!"

85. On August 3, 2020, Pifke entered into a Residential Real Estate Lease for the Property (the "Lease") with UPM for the monthly rent of $2,725.00 and an 18-month term from October 1, 2020, through April 1, 2022.

86. The Lease included the following provision: "SALE OF PROPERTY. Owner agrees to hold property off market until February 1, 2022 or 60 days of the termination of lease and not take showings."

87. The Lease did not permit Pifke or the Tronnes Defendants to terminate the Lease prior the initial 18-month term.

Objection. This is unsupported by the record and clearly contrary to the terms of the Lease which does in fact have specific provisions as to "early termination." *See* Ex. 3, pg. 7.

88. Pifke was allowed to terminate "the lease with a minimum of 60 calendar days written notice after the initial term" or by mutual termination with "Lessor"—UPM.

Objection. This statement contradicts the proposed finding set forth in paragraph 87, and Defendants reiterate their objection to paragraph 87.

89. The Lease was signed by Pifke, the Tronnes Defendants, and Uhre.

Objection. This is inconsistent with the evidence provided at trial. Uhre acknowledged that there is no entity called "Uhre Realty and Property Management" nor is there a fictional name filing for any such entity. Furthermore, this is inconsistent with the plain language of the Lease which specifically states "Agreed: Lessor: Uhre Property Management." *See* Ex. 3 pg. 13. The electronic receipt referenced by Plaintiffs is not a part of the Lease.

90. Uhre signed on behalf of both UPM and URC as noted by the typewritten signature block which labels him as the "Owner/Broker" for "Uhre Realty & Property Management."

Objection. This is inconsistent with the evidence provided at trial. Uhre acknowledged that there is no entity called "Uhre Realty and Property Management" nor is there a fictional name filing for any such entity. Furthermore, this is inconsistent with the plain language of the Lease which specifically states "Agreed: Lessor: Uhre Property Management." ***See*** **Ex. 3 pg. 13. The electronic receipt referenced by Plaintiffs is not a part of the Lease.**

91. Pifke began residing at the Property as contemplated by the Lease on October 1, 2020.

92. Thereafter, Uhre, on behalf of UPM and URC, remained involved in the management of the Property and efforts to sell the Property to Pifke.

Objection. This is inconsistent with testimony from Pifke at trial which indicated that all of his interactions were with UPM as that was the entity in charge of leasing the Property and that they were never initially looking to purchase the Property.

THE PURCHASE

93. Pifke advised Uhre that he was interested in purchasing but would not be able to do so until sometime in 2021.

Objection. This is inconsistent with testimony from Pifke at trial which indicated that they were never initially looking to purchase the Property because they were unsure whether they would remain in Rapid City after living through a winter and because he did not have the financial wherewithal to purchase the Property.

94. Uhre testified that while Pifke was a good candidate to purchase the Property, the timing was not right for purchase in August 2020.

95. Pifke testified that he did not feel a lot of urgency to make an offer to purchase the Property because his lease was for a term of 18 months.

Objection. This is inconsistent with testimony from Pifke at trial which indicated that they were never initially looking to purchase the Property because they were unsure whether they would remain in Rapid City after living through a winter and because he did not have the financial wherewithal to purchase the Property.

96. In September, 2020, prior to when Pifke was scheduled to move in to the Property, URC received a purchase offer for the Property from individuals other than Pifke in the amount of $425,000.00, and discussed the same with the Tronnes Defendants via text messages.

97. Ultimately, the Tronnes Defendants rejected the offer because it was too low and coming in $50,000.00 under asking price.

98. Uhre sent text messages to the Tronnes Defendants on October 1, 2022, and wrote, "I just checked in the [sic] tenants. They seemed pretty excited about living here. And she said she loves the house…"

99. Leslie responded to the text message from Uhre and wrote, "Well that's good! Can you tell them we have an offer on the table! Haha[.]"

100. Uhre responded to Leslie Tronnes after a few more text message exchanges, and wrote: "Lol!! I told them to get settled in and I'll have them over for a barbecue."

101. Benjamin Tronnes wrote a text message on that same day, which said: "They'll love it even more when they get their first utility bill. Sell before it snows though! Lol!"

102. Leslie Tronnes responded across two separate text messages: "That is probably the bigger selling point. More space better price."

103. On November 6, 2020, Leslie Tronnes wrote Uhre via text messages: "So second week in December you'll get them to sign contract for deed or buy the house?!?" Lol, but seriously!"

104. Uhre responded to the Tronnes Defendants that same day on November 6, 2020: "I'll definitely ask. I think his parents are coming out for Thanksgiving so, might be good timing. Our neighbor to the south of me is putting her house on the market this weekend. Assuming its

going to be in the in the [sic] $800's so, if it sells quick that will be 2 comps that will drive prices up in the Blvd area."

105. On November 22, 2020, Benjamin Tronnes wrote to Uhre via text message: "Did you have the chance to discuss a possible purchase?"

106. On December 4, 2020, Benjamin Tronnes wrote to Uhre via text message: "Hey Josh, just following up on this one. Also – can you email me at my USA Hockey email the fully executed lease agreement? I can't seem to find my copy. Thanks!"

107. Uhre e-mailed a copy of the Lease Agreement to Benjamin Tronnes.

108. On December 4, 2020, Uhre e-mailed Pifke and stated, in part: "Have you given it any thought of purchasing the property?"

109. The Tronnes Defendants were becoming more eager to sell the Property after putting a house under contract in Colorado.

110. On January 11, 2021, Leslie Tronnes wrote in a text message to Uhre: "Do you have the contact info for our current tenants? Email and/or phone number…ty."

111. Uhre did not respond to the text message or otherwise provide the information to the Tronnes Defendants.

112. On January 20, 2021, the Tronnes Defendants arrived at the Property and met Pifke and his significant other.

113. Pifke testified that he was not expecting the Tronnes Defendants.

114. This was the first time Pifke met or communicated directly with the Tronnes Defendants.

115. At the meeting on January 20, 2021, the Tronnes Defendants and Pifke discussed Pifke purchasing the Property.

116. Pifke asked about Uhre's involvement in the sale and the Tronnes Defendants advised him they had no agreement with Uhre.

117. Pifke testified that it was odd hearing from the Tronnes Defendants directly because it was exactly the same conversation Pifke had already had with Uhre.

118. Pifke assumed that meeting with the Tronnes Defendants directly and using Uhre separately was two separate angles of discussions and was simply another sales tactic by the Tronnes Defendants to sell the Property to him.

119. Pifke told the Tronnes Defendants he was interested in purchasing, but he needed to figure out financing.

120. On January 23, 2021, Tronnes e-mailed Pifke, and stated in part: "[a]s we discussed, we'd love it if you bought our home from us. We plan on listing the house again this spring for $499,000. If we can do this without a realtor, we could sell to you for $475,000."

121. Pifke did not respond to this e-mail.

122. The Tronnes Defendants did not identify who they were going to list the Property with on May 1, 2021, and otherwise never advised Uhre that they intended to list the Property with anyone else or advised him to cease any efforts in selling the Property to Pifke.

Objection. This finding is inconsistent with evidence provided at trial. Ben Tronnes testified that they did not believe that they had an active Listing Agreement with Uhre and therefore did not think they needed to advise him not to sell the Property. Furthermore, Ben Tronnes testified that certain of Uhre's contacts regarding the sale of the home, such as the December 4, 2020 contact were not prompted by nor authorized by the Tronneses.

123. Benjamin Tronnes testified that he did not express any concerns with Uhre about his efforts to sell the Property.

Objection. This finding is inconsistent with evidence provided at trial. Ben Tronnes testified that they did not believe that they had an active Listing Agreement with Uhre and therefore did not think they needed to advise him not to sell the Property. Furthermore, Ben Tronnes

testified that certain of Uhre's contacts regarding the sale of the home, such as the December 4, 2020 contact were not prompted by nor authorized by the Tronneses.

124. Four days later, Uhre e-mailed Pifke and asked if he had "made a decision on purchasing?"

125. Pifke responded to Uhre on the same day and said his position remained unchanged.

126. Tronnes sent another e-mail to Pifke on February 3, 2021, and stated, in part: "I don't mean to put a lot of pressure on you, but just getting this back to the top of the inbox. We'd love to get something put together to get a deal done. Let us known what you are thinking."

127. Pifke responded the next day writing that he needed "to free up some cash for a down payment before an offer is realistic. As we discussed, the soonest I can do this will be later this year. I know y'all are anxious to sell, so I'll keep you updated."

128. One month later on March 4, 2021, Tronnes responded to this e-mail in part stating: "Leslie and I have discussed this . . . . Our intent is to sell the house to you, but as noted, . . . it would really help us if we can get this one off the books . . . . Our offer continues to stand – we would sell to you for $475,000 up to May 1. We then plan to list it for $499,000 at that time."

129. Pifke responded the next day stating, "I will do whatever I can to find financing sooner, but your May 1st deadline seems at odds" with the Lease's Sale of Property provision and that, "Alethea & I would not have moved but for the above agreement, which I thought was negotiated in good faith."

130. Responding the same day, Tronnes wrote: "[y]ou are right. My apologies. We will discuss that with [Uhre]."

131. Tronnes did not discuss or attempt to discuss the issue with Uhre.

132. Pifke was concerned that the Tronnes Defendants would breach the Lease anyways, so he promptly consulted with a lawyer about what his options were and what recourse he would have if the Tronnes Defendants breached the lease and sold the Property.

133. Pifke believed he did not have any reasonable recourse to ensure he purchased the Property if the Tronnes Defendants breached the Lease and sold the Property to someone else.

134. Pifke wanted to ensure that he was the one who purchased the Property.

135. Pifke conferred with a friend, who was a loan officer from California, and discussed his options to purchase the Property sooner, and she confirmed that he needed to free up some cash to make a down payment.

136. During this time, Uhre was communicating with the Tronnes Defendant about replacing the roof on the Property.

137. Uhre was also coordinating the roof replacement with Pifke.

138. The roof replacement made Pifke more concerned that the Tronnes Defendants were going to breach the Lease and list the Property on May 1, 2021.

139. Pifke testified that submitting an offer by May 1, 2021, seemed to be the path of least resistance and so he decided to submit an application for financing in that timeframe to avoid the Tronnes Defendants breaching the Lease.

140. Benjamin Tronnes testified that on April 29, 2021, which was the day before he received an offer from Pifke, he took out a loan for $29,519.00.

141. Benjamin Tronnes testified that he had not revoked the offer to sell the Property to Pifke for $475,000 and that he would have accepted that offer had he received it from Pifke.

142. After being approved for financing, on April 30, 2021, Pifke replied directly to Tronnes' very first e-mail on January 24, 2021, and wrote, "I'm pleased to be able to present the attached offer, to purchase the house from you for $500,000."

143. Pifke testified that he offered $25,000 more than the $475,000 offer on the table in order to avoid a bidding war with other potential purchasers in the event the Tronnes Defendants breached the Lease.

144. Benjamin Tronnes testified that at the end of the day, it does not concern him that Pifke offered $25,000 more than the amount that was on the table for $475,000.

145. On May 3, 2021, Pifke and Tronnes agreed to a Counteroffer with minimal changes to the initial offer, the same purchase price of $500,000, and to terminate the Lease upon closing.

146. The Purchase Agreement was dated April 30, 2021.

Objection. While the Purchase Agreement was initially dated April 30, 2021, this was not the final version of the same as the parties continued negotiating as set forth in the final Counteroffer.

147. Uhre testified he had no knowledge that the communications between Tronnes and Pifke starting around January 2021 had been occurring.

148. Uhre first became aware of Pifke's purchase on May 4, 2021, when Tronnes sent Uhre an e-mail only stating: "I just wanted to let you know that we've entered into a private sales agreement with our tenants and plan to close on June 1. We will be terminating the property management agreement at that time. We really appreciate all the help with this property over the years."

149. Uhre testified that he communicated with Benjamin Tronnes about receiving a commission and that Benjamin Tronnes advised him that no commission was owed.

150. Uhre testified that he was surprised by this response and that he believed he was entitled to a commission under the Listing Agreement because he felt he was the procuring cause of Pifke's purchase.

151. Uhre testified that he believed he was the procuring cause of the purchase because he found Pifke, showed him the Property, communicated with him about purchasing the Property, secured him as a tenant for the Property, and secured him as a purchaser.

Objection. Uhre is an agent of either UPM or URC and has no individual legal right or ability to undertake any of these actions. Furthermore, to the extent the Property was shown to Pifke, it was simply for purposes of leasing the Property as Pifke testified he had no interest in purchasing the Property at that time.

152. Uhre also testified that Pifke always had the option to purchase the Property for the list price, and Tronnes admitted at trial that he would have sold the Property to Pifke had he offered the list price.

153. Uhre testified that he reached out to First American Title to determine whether closing was scheduled for the Property and was advised no. Uhre then reached out to Pennington Title and was told by Vicki that a closing was scheduled for the Property.

154. Uhre testified that in his line of business, he has conversations with title companies all the time and that it is not unusual to communicate directly with the title company, especially when it relates to receipt of commissions.

155. On May 20, 2021, Uhre e-mailed Greg Wick, who is a representative of Pennington Title Company ("Pennington"), which was the title company helping close Pifke's purchase, and wrote in part, "I believe I am entitled to my professional fee of 5% of the purchase price plus tax as the procuring cause."

156. Uhre quoted excerpts from the Management Agreement, the Listing Agreement, and the Lease in the body of the e-mail and attached all three of the original agreements in their entirety.

157. Uhre testified that he believed he had an active Listing Agreement as to the commission he was owed.

Objection. This is inconsistent with the actual language of Uhre's email to Pennington Title Company wherein he specifically misrepresented that he had an *active* listing agreement, stating, "I'm reaching out to you because I have an active exclusive listing agreement, management agreement, and lease agreement with them." *See* Tr. Ex. 34.

158. Uhre never spoke to Pennington about the Property again after his May 20 e-mail, he did not attend closing, and he did not request that Pennington would hold the commission in escrow.

159. Benjamin Tronnes exchanged many e-mails with Pennington Title about closing and the disputed commission, and also retained legal counsel to asset with closing on the Property.

160. Benjamin Tronnes testified that he instructed Pennington not to release the disputed commission to Uhre.

161. On May 25, 2021, Greg Wick e-mailed Benjamin Tronnes, and wrote in part: "Attached is our sample escrow agreement which we can complete to escrow the disputed amounts if you are unsuccessful in resolving this issue prior to closing."

162. On June 9, 2021, at 12:00 PM, Benjamin Tronnes e-mailed Jennifer Rude at Pennington, and wrote: "Josh Uhre is not our agent for purposes of this transaction. I understand that he is listed in the Sellers Statement but that issue is disputed. I would appreciate it if Penn Title did not communicate with Josh regarding this sale. If he needs to be contacted, please let us know ahead of time and we can communicate directly with him."

163. On June 9, 2021, at 12:07 PM, Benjamin Tronnes e-mailed Jennifer Rude at Pennington, and wrote in part: "To be clear – it has already been agreed upon by us and Penn Title that the disputed commission will be held in escrow and that there will be no funds issued to Uhre Realty absent an agreement between us and Uhre Realty or a court order. If Josh shows up at Penn Title tomorrow for some reason, he is, again, not our agent for purposes of this transaction and I

would expect Penn Title to let us know if he communicates with anyone there. I believe our attorney Katie Cook (copied) will be discussing an indemnity agreement with Greg at some point in the near future which may allow for a release of the disputed commission to us."

164. On June 14, 2021, at 10:46 AM, Benjamin Tronnes e-mailed Jennifer Rude, and wrote in part: "As noted, the commission is disputed and should not be distributed unless to us via an indemnity agreement that our attorney is working on. It should not be distributed to Uhre."

165. On June 14, 2021, at 3:54 PM, Greg Wick e-mailed Jennifer Rude and copied Benjamin Tronnes, and wrote in part: "Mr. Tronnes attorney Katelyn Cook at GPNA suggested revised language to the draft letter of indemnification I forwarded her on Thursday. I will forward my email string with Ms. Cook so we all stay in the loop. I indicated that we were willing to substitute a proof of funds letter or irrevocable letter of credit from Mr. Tronnes so as to not be required to escrow funds, nor delay closing tomorrow."

166. On June 14, 2021, at 4:06 PM, Katelyn Cook e-mailed Greg Wick and stated in part: "I just talked to Ben on the phone. At this point, since we're so close to closing, let's just proceed and just put the commission funds into escrow. Then, we can work with getting everything you need post-closing to get the funds released at that time. That way we don't have to try to scramble last minute and we can make sure that we get everything closed tomorrow without any further complication."

167. On June 14, 2021, at 4:17 PM, Greg Wick e-mailed the Tronnes Defendants' counsel of record, Katelyn Cook, and stated in part: "We'll go ahead with the commission holdback and close pursuant to your and Ben's instructions."

168. On June 15, 2021, Benjamin Tronnes e-mailed Katie Mittelstedter at Pennington, and wrote in part: "I just signed, but wanted to make sure that we had the continuing caveat that the commission would be held in escrow and not distributed."

169. The ALTA Settlement Statement from Pennington identified a 5.00% commission in the amount of $24,600.00, a 6.50% sales tax on commission in the amount of $1,599.00, and a transaction fee of $200 all due to URC, for a total of $26,399.00.

Objection. This statement in incomplete as it omits testimony from Ben Tronnes stating that Defendants specifically objected to the money being withheld in escrow but were told that it was the only way Pennington Title would effectuate the closing on the Property.

170. On June 15, 2021, the Tronnes Defendants closed on the sale of the Property to Pifke at Pennington for a purchase price of $492,000.00.

171. Pennington continues to escrow the total amount of $26,399.00.

From the foregoing findings of fact, the Court now makes the following:

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the subject matter and parties of this lawsuit.

BREACH OF CONTRACT

2. "An action for breach of contract requires proof of an enforceable promise, its breach, and damages." *McKie v. Huntley*, 2000 S.D. 160, ¶ 17, 620 N.W.2d 599, 603.

3. First, Uhre was the "procuring cause" of originating Pifke as a purchaser of Property.

4. The Tronnes Defendants made an enforceable promise under the Listing Agreement to pay a commission to URC if a "purchaser" was "procure[d]" for the Property "by [URC], by any other cooperating broker, by the Seller, or by any other person during the term of [the Listing Agreement] . . . ."

Objection. This proposed conclusion of law omits the entirety of the provision and is therefore inaccurate, as the plain language of the provision which goes on further to state that the terms must be "accepted by the Seller during the term of this [Listing] Agreement." *See* Tr. Ex. 2, pg. 2.

5. This particular provision in the Listing Agreement requires that a purchaser be "procured" by anyone during the term of the Listing Agreement. Under this provision, it does not require than a purchase agreement be executed during the term.

Objection. This is contrary to the plain language of the provision which goes on further to state that the terms must be "accepted by the Seller during the term of this [Listing] Agreement." *See* Tr. Ex. 2, pg. 2.

6. The term of the Listing Agreement was May 1, 2020, with an expiration on October 31, 2020, with a 180-tail period to April 29, 2020.

7. "In order to ascertain the terms and conditions of a contract, [the Court] must examine the contract as a whole and give words their plain and ordinary meaning." *Coffey v. Coffey*, 2016 S.D. 96, ¶ 8, 888 N.W.2d 805, 808-09 (quoting *Gloe v. Union Ins. Co.*, 2005 S.D. 30, ¶ 29, 694 N.W.2d 252, 260) (internal quotation marks omitted). The Court does not "interpret language in a manner that renders a portion of the contract meaningless." *Id.* (quoting *Tri-City Assocs., L.P. v. Belmont, Inc.*, 2014 S.D. 23, ¶ 11, 845 N.W.2d 911, 915). "Instead, [the Court] interpret[s] the contract to give a reasonable and effective meaning to all its terms." *Id.* (quoting *Tri-City Assocs., L.P.*, 2014 S.D. 23, ¶ 11, 845 N.W.2d at 915) (internal quotation marks omitted).

8. It is appropriate to rely upon dictionary definitions when a term is not defined in a contract. *See, e.g., Ass Kickin Ranch, LLC v. North Star Mut. Ins. Co.*, 2012 S.D. 73, ¶ 12, 822 N.W.2d 724, 727-28 (relying upon Merriam-Webster's online dictionary); *Matter of Certification of Question of Law from United States District Court, District of South Dakota, Central Division*, 2021 S.D. 35, ¶ 18, 960 N.W.2d 835-36 (relying upon Black's Law Dictionary, among other

dictionaries); *Coffey*, 2016 S.D. 96, ¶ 13 n.1, 888 N.W.2d at 810 n.1 (relying upon The American Heritage College Dictionary).

9. The term "procure" is not defined in the Listing Agreement.

10. The Black's Law Dictionary defines "Procure" as: "1. to obtain (something), esp. by special effort or means; 2. To achieve or bring about (a result)."

11. Similarly, Merriam-Webster's online dictionary defines "Procure" as: "to bring about or achieve (something) by care and effort."

12. "Procuring cause," as it relates to brokers, is defined in 12 C.J.S. Brokers § 258 as follows:

> As used in that branch of the law relating to brokers' commissions, the terms "procuring cause," "efficient cause," and "proximate cause" have substantially, if not quite, the same meaning and are often used interchangeably. A broker is the procuring cause of a sale when the broker originates or causes a series of events which, without a break in their continuity, result in the accomplishment of the prime object of the employment, which is, usually, to procure a purchaser ready, willing, and able to buy on the owner's terms. A broker is the procuring cause of a sale when the broker originates or causes a series of events which, without a break in their continuity, result in the accomplishment of the prime object of the employment, which is, usually, to procure a purchaser ready, willing, and able to buy on the owner's terms. Pursuant to a brokerage agreement or an implied brokerage agreement, a broker must with diligence and fidelity provide substantial services to the principal/vendor or purchaser which services become a substantial causal predicate to a consummated sale for the broker to be entitled to a commission. Thus it has been said that "procurement," within the meaning of the rule requiring a broker to procure a purchaser ready, willing, and able to buy from the seller, is defined as the broker's efforts which are the efficient cause, but not necessarily the sole cause, of a series of unbroken, continuous events, which culminate in the accomplishment of the objective of his employment.
>
> In order to be regarded as a procuring cause of a sale, a broker must show that he called a potential purchaser's attention to the property and that it was through the broker's continuous efforts in negotiations that the sale was consummated, without a substantial break in the negotiations. An alternative statement provides that a broker is the effective agent, or the procuring cause, when the broker is the first broker to interest the prospective purchaser in the property, when the broker causes such purchaser to inspect or view the property, and when the broker conducts negotiations concerning a sale thereof with the

> prospective purchaser. Another statement provides that a broker is the procuring cause of a sale and entitled to the commission if his intervention is a foundation upon which negotiations are begun. However, a broker may earn a commission when he is the effective cause of a sale which the broker is authorized to sell and it is not necessary that the broker participate in the final negotiations leading to the sale. Under this standard, a broker "procures" a buyer within the meaning of a listing agreement if the broker informs the customer of the property under the agreement and leads the customer to the seller.

Id. (footnotes omitted).

13. The South Dakota Supreme Court defined "procuring cause" as: "one originating a series of events which, without break in their continuity, result in the accomplishment of the prime object of the broker's employment." *Mehlberg v. Redlin*, 96 N.W.2d 399, 401 (S.D. 1959) (explaining, "[i]n the absence of a special contract, to earn a commission a broker must be the 'procuring cause' of a sale consummated by his principal."). Further, "[a]n agent is an 'effective cause,' . . . when his efforts have been sufficiently important in achieving a result for the accomplishment of which the principal has promised to pay him, so that it is just that the principal should pay the promised compensation to him.'" *Id.* (quoting Restatement of Agency 2d, § 448, Comment a).

Objection. The *Mehlberg* case is inapplicable as the language of the contract in that case is completely different from the language in the Listing Agreement at issue here. Because the language of the Listing Agreement is unambiguous, this Court must construe it "according to its plain and ordinary meaning and a court cannot make a forced construction or a new contract for the parties." *Matter of Certification of Question of L. From United States Dist. Ct. , Dist. of S. Dakota, Cent. Div.*, 2021 S.D. 35, 960 N.W.2d 829. Furthermore, this Court "need only look to the language that the parties used in the contract to determine their intention." *Ziegler Furniture & Funeral Home, Inc. v. Cicmanec*, 2006 S.D. 6, ¶ 16, 709 N.W.2d 350, 355 (internal quotations omitted). " 'If that intention is clearly manifested by the language of the [agreement], it is the duty of this [C]ourt to declare and enforce it.' " *Id.* (quoting *In re Estate of Stevenson*, 2000 SD 24, ¶ 14, 605 N.W.2d 818, 821 (citing *Rowett v. McFarland*, 394 N.W.2d 298, 301 (S.D.1986) (citation omitted)). Furthermore, this Court cannot consider extrinsic evidence "because the intent of the parties can be derived from within the four corners of the contract." *Kernelburner, L.L.C. v. MitchHart Mfg., Inc.*, 2009 S.D. 33, ¶ 7, 765 N.W.2d 740, 742 (internal quotations omitted).

14. In *Mehlberg v. Redlin*, the South Dakota Supreme Court recognized that a broker was a procuring cause when his "preliminary activity" of undertaking the "effort and expense of establishing a market place to which . . . . purchasers of real property would be induced to resort" put the seller and purchaser in the office. *Id.* The Court explained that "the direct contribution made by [the broker] the consummation of the sale . . . was to lodge in the mind [of the purchaser], who made inquiry for rental property for immediate occupancy, that [the broker] has [the seller's] newly constructed cottage for sale." *Id.*

Defendants reiterate the objection from Paragraph 13.

15. The Appellate Court of Illinois decision *Lyons v. Shane*, 479 N.E.2d 456 (Ill. 1985) is also instructive for its legal principals. In *Lyons*, the circuit court had a bench trial to consider whether the defendants were liable to the plaintiff for a commission on the sale of their property that occurred after the termination of the listing agreement. *Id.* at 456. While the underlying facts in *Lyons* are not identical to the instant case, and it is not cited for that reason, the legal principals remain instructive. The *Lyons* court observed that "[g]enerally, the policy of the law is to protect a broker who has been employed and authorized to act and who, in good faith, has so acted." *Id.*at 823. The court recognized that while the sale occurred after the termination of the listing agreement, "the plaintiff exerted his efforts before the listing agreement expired" and thus it did not matter that there was no seller-broker relationship when the sale was made. *Id.* at 844-45. The court recognized that "[a] broker may be considered the procuring cause if he brings together the parties who ultimately consummate the transaction or is instrumental in the consummation." *Id.* at 822-23. As in this case, the court found that "Maley's inability to secure reasonable financing delayed the final sale." *Id.* at 824. The court decided that "the defenda't's conduct in continuing

negotiations with the prospective lessee procured by the plaintiff, even though the broker's contract had expired, amounted to a waiver of the time limit fixed in that contract." *Id.* at 824-25.

Defendants reiterate the objection from Paragraph 13.

16. Prior to October 31, 2020, Pifke discovered the Property through an online advertisement created and paid for by URC.

Objection. This fact is unsupported by the record. Mr. Pifke specifically testified that he did not have anything to do with locating the property—instead, it was his partner, Ms. Nelson, that did. Ms. Nelson did not testify as to what she found or how she found it, and as such, this finding assumes facts not in the record.

17. Prior to October 31, 2020, Pifke inquired with Uhre about leasing the Property.

Objection. This is inconsistent with testimony from Pifke at trial which indicated that all of his interactions were with UPM as that was the entity in charge of leasing the Property and that they were never initially looking to purchase the Property. Uhre as an individual does not have any legal right or ability to sell or lease the Property.

18. Prior to October 31, 2020, Uhre showed Pifke the Property and explained that the overarching intent was to sell the Property.

19. Prior to October 31, 2020, Pifke was interested in purchasing the Property after being able to spend time in Rapid City.

Objection. This is inconsistent with testimony from Pifke at trial which indicated that they were never initially looking to purchase the Property because they were unsure whether they would remain in Rapid City after living through a winter and because he did not have the financial wherewithal to purchase the Property. This is further shown by Pifke's response to Uhre's December 7, 2020 email, where when he asks Pifke whether he has given any thought to purchasing the Property, Pifke states, "We're happy here and I think we want to stay, but I haven't looked much into it."

20. Prior to October 31, 2020, Pifke testified that he would not have leased the Property unless the Property was taken off the market during the 18-month term of his Lease.

21. Prior to October 31, 2020, Pifke entered into the Lease wherein the Property could not be listed as a result of Uhre's efforts and expenditures in marketing the Property for sale and for lease.

Objection. This finding is vague and ambiguous as it is unclear as to what is meant.

22. Prior to October 31, 2020, Uhre and Pifke discussed the subject of Pifke purchasing the Property during the initial showing, during the negotiations of the Lease, and after the Lease was executed.

Objection. This is inconsistent with testimony from Pifke at trial which indicated that they were never initially looking to purchase the Property because they were unsure whether they would remain in Rapid City after living through a winter and because he did not have the financial wherewithal to purchase the Property.

23. Uhre was the sole individual communicating and negotiating with Pifke. Pifke never met nor spoke to the Tronnes Defendants until on or about January 20, 2021.

24. Benjamin Tronnes acknowledged during his testimony that he frequently communicated with Uhre about Pifke purchasing the Property because Uhre was his connection to Pifke.

25. Pifke purchased the Property.

26. The Tronnes Defendants owe URC a commission under the terms of the Listing Agreement because Pifke was procured as a purchaser by the result of the special care and effort of URC or someone else during the term of the Listing Agreement.

Objection. This interpretation is contrary to the plain language of the Listing Agreement because the Tronneses never accepted an offer on any terms during the term of the Listing Agreement as required by the plain language of the Listing Agreement. Defendants reiterate their objection set forth in response to Paragraph 13 as well as their own Proposed Findings and Conclusions.

27. Second, the Tronnes Defendants also made an enforceable promise under the Listing Agreement to pay a commission to URC if the Property was "exchanged or optioned during the term of [the Listing Agreement] and said option is exercised[.]"

Objection. This proposed conclusion of law omits the entirety of the provision and is therefore inaccurate, as the plain language of the provision which goes on further to state that the terms must be "accepted by the Seller during the term of this [Listing] Agreement." *See* Tr. Ex. 2, pg. 2.

28. An option to purchase is "a contract by which an owner of real property agrees with another person that the latter shall have the privilege of buying the property at a specified price within a specified time[.]" *Laska v. Barr*, 2016 S.D. 13, ¶ 6, 876 N.W.2d 50, 53 (citation omitted).

29. Pifke had the option to purchase the Property during the term of the Lease for the price set forth in the Listing Agreement.

Objection. This is inconsistent with the plain language of the Lease Agreement which simply states "Owner agrees to hold property off market until February 1, 2022 or 60 days of the termination of the lease and not take showings." Tr. Ex. 3, pg. 7. This is also inconsistent with the testimony of both Pifke and Tronnes which indicated that the purpose of this provision was simply to give Pifke peace of mind so he and his partner did not have to deal with showings while they lived at the Property and to ensure that the Property would not be sold and they would not have to move less than a year after moving to Rapid City. *See* Tr. Ex. 8.

30. Pifke paid an increased monthly rent price in exchange and in consideration for prohibiting the Tronnes Defendants from listing the Property for sale during the term of the Lease.

31. Uhre testified that the option price never changed during the term of the Listing Agreement and that it was always on the table for Pifke.

32. Pifke exercised such option by purchasing the Property.

Objection. This is inconsistent with the plain language of the Lease Agreement which simply states "Owner agrees to hold property off market until February 1, 2022 or 60 days of the termination of the lease and not take showings." Tr. Ex. 3, pg. 7.

33. Benjamin Tronnes admitted at trial that he would have accepted an offer from Pifke to purchase at the price set forth in the Listing Agreement.

34. The Tronnes Defendant breached the Listing Agreement by failing to pay URC 5% of the purchase price plus all applicable sales tax upon Pifke's purchase of the Property.

Objection. As set forth fully in Defendants' Proposed Findings of Fact and Conclusions of Law, URC is not entitled to a commission based on the plain language of the Listing Agreement.

35. Third, the Listing Agreement and the parties thereto are subject to the implied covenant of good faith and fair dealing.

36. A party may liable for breaching the implied covenant of good faith and fair dealing. *Zochert v. Protective Life Insurance Co.*, 2018 S.D. 84, ¶ 22, 921 N.W.2d 479, 486 (explaining that the implied covenant prohibits parties "from preventing or injuring the other party's right to receive the agreed benefits of the contract.").

37. "A breach of contract claim is allowed even though the conduct failed to violate any of the express terms of the contract agreed to by the parties." *Garrett v. BankWest, Inc.*, 459 N.W.2d 833, 841 (S.D. 1990) (citation omitted).

38. "[T]his implied covenant allows an aggrieved party to sue for breach of contract when the other contracting party, by his lack of good faith, limited or completely prevented the aggrieved party from receiving the expected benefits of the bargain." *Garrett*, 459 N.W.2d at 841.[1]

39. SDCL § 57A–1–201(19) defines "good faith" as "honesty in fact in the conduct or transaction concerned," but the meaning "'varies with the context' of the contract." *Id.* (quoting *Farm Credit Servs., Farm Credit Servs. of Am. v. Dougan*, 2005 S.D. 94, ¶ 8, 704 N.W.2d 24, 28).

[1] A party does not need to prove bad faith, but rather an absence of good faith. *See, e.g., Miller v. Am. Pride Seafoods, LLC*, 2019 WL 2092188, at *2 (Mass. Ct. App. 2019) ("The plaintiff must prove the lack of good faith, not necessarily the existence of bad faith.").

40. "Lack of good faith may be evidenced by various conduct, such as 'evasion of the spirit of the deal; abuse of power to determine compliance; and, interference with or failure to cooperate in the other party's performance.'" *Id.* (quoting *Garrett*, 459 N.W.2d at 841).

41. The Tronnes Defendants lack of good faith completely prevented URC from receiving the benefit of the bargain that it receive a commission for the special effort it provided in procuring a purchaser for the Property.

Objection. The proposed conclusion of law is inconsistent with the record. There is no evidence of bad faith. To the contrary, the Tronneses' primary motivation to try to sell the Property to Pifke was based on their desire to effectuate the purchase of a home in Colorado as soon as possible, and not to attempt to push the sale or closing out of the tail period or to otherwise swindle URC out of a commission.

42. The Tronnes Defendants' lack of good faith is evidence by their attempt to fail to cooperate with URC and evade the spirit of the deal by (1) continuing to consistently and repeatedly request the assistance of Uhre's time and efforts after the stated expiration date of the Listing Agreement on October 31, 2020, in order to facilitate the sale of the Property to Pifke and without the intention to compensate URC for those special efforts to facilitate a sale of the Property, (2) by threatening Pifke through e-mail correspondence and stopping by the Property unannounced to breach the Lease with Pifke, which Pifke testified he believed Tronnes intended to breach the Lease and that is why he expedited a purchase offer by April 30, 2020, (3) by failing to advise Uhre of any of these communications with Pifke while simultaneously failing to advise URC that they no longer wanted URC to communicate with Pifke about purchasing the Property, and (4) by expressly advising Pifke that they would speak with Uhre about the Lease and the purchase of the Property, and then failing to discuss with Uhre or inform Pifke that they did not discuss with Uhre.

Objection. The proposed conclusion of law is inconsistent with the record. Pifke testified that he did not feel threatened. Ben Tronnes testified that he felt there was no need to continue to talk to URC about the Property because the Listing Agreement terminated on October 31,

2020. He furthermore testified URC reached out an inquired without being asked by the Tronneses to do so. To the contrary, the Tronneses' primary motivation to try to sell the Property to Pifke was based on their desire to effectuate the purchase of a home in Colorado as soon as possible, and not to attempt to push the sale or closing out of the tail period or to otherwise swindle URC out of a commission.

43. The Tronnes Defendants should not be allowed to reap the rewards from URC's special efforts in originating a purchaser for the Property and consistent efforts in facilitating a purchase of the Property, and then attempt to evade the obligation to pay a commission to Uhre for those special efforts while simultaneously attempting to gain a windfall of compensation by inducing Pifke to offer $25,000.00 above the list price because of a threatened breach of the Lease while not paying any commission on the increased purchase amount.

Defendants reiterate the objection raised in paragraphs 41 and 42.

44. The Tronnes Defendants breached the implied covenant of good faith and fair dealing and are, therefore, estopped from claiming that URC is not entitled to a commission and related fees under the Listing Agreement. *See, e.g., Miller v. Am. Pride Seafoods, LLC*, 2019 WL 2092188 (Mass. App. Ct. 2019) (upholding a jury verdict that the defendant breached the implied covenant of good faith and fair dealing contained in a listing agreement for property and was liable to the broker for the commission even though transaction was completed after the term and tail period); *Partner Canada Biomedical International, Inc. v. Amgen, Inc.*, 2018 WL 3462516 (S.D.N.Y. 2018) (rejecting defendant's argument and allowing a claim for tortious interference by broker even though transaction was completed after term and tail period).

Defendants reiterate the objection raised in paragraphs 41 and 42.

45. The Tronnes Defendants' breach of the Listing Agreement damaged URC in an amount of $30,116.56, which includes the escrowed sum of $26,399.00 ($24,600.00 + $1,599.00 + $200.00), plus interest of $3,717.56 calculated at a rate of 10.00% from the date of closing on June

15, 2021, through November 11, 2022. See SDCL § 21-1-13.1 ("Prejudgment interest on damages arising from a contract shall be at the contract rate, if so provided in the contract; otherwise, if prejudgment interest is awarded, it shall be at the Category B rate of interest specified in §54-3-16"); see also SDCL § 54-3-16 (stating that the Category B rate of interest is 10.00%).

Defendants reiterate the objection raised in paragraphs 41 and 42.

46. URC is declared to be entitled to the commission, tax, and fees held in escrow by Pennington.

Defendants reiterate the objection raised in paragraphs 41 and 42.

TORTIOUS INTERFERENCE WITH A BUSINESS EXPECTANCY

47. The South Dakota Supreme Court has described the tort of intentional interference as follows:

> In general, the tort of intentional interference with contractual relations serves as a remedy for contracting parties against interference from outside intermeddlers. To prevail on a claim of tortious interference, "there must be a 'triangle'-a plaintiff, an identifiable third party who wished to deal with the plaintiff, and the defendant who interfered with' the contractual relations."

Gruhlke v. Sioux Empire Federal Credit Union, Inc., 2008 S.D. 89, ¶ 7, 756 N.W.2d 399, 404 (quoting *Landstrom v. Shaver*, 1997 S.D. 25 ¶ 75, 561 N.W.2d 1, 16).

48. The elements of the cause of action are:

1. the existence of a valid business relationship or expectancy;
2. knowledge by the interferer of the relationship or expectancy;
3. an intentional and unjustified act of interference on the part of the interferer;
4. proof that the interference caused the harm sustained; and
5. damage to the party whose relationship or expectancy was disrupted.

Nelson v. WEB Water Dev. Ass'n, 507 N.W.2d 691 (S.D. 1993) (quoting *Tibke v. McDougall*, 479 N.W.2d 898, 908 (S.D. 1992)); *see also Lien v. Northwestern Engineering Co.*, 39 N.W.2d 483, 485

(S.D. 1949) (holding that "the interference must have been intentional and without reasonable justification or excuse.").

49. A cause of action for intentional or tortious interference with a contractual relationship represents "the recognition that valid business relationships and expectancies are entitled to protection from unjustified interference." *Hayes v. Northern Hills General Hosp.*, 590 N.W.2d 243, 248 (quoting *Landstrom v. Shaver*, 1997 S.D. 25, ¶ 81, 561 N.W.2d 1, 18).

50. "The tort also protects a party's interest in stable economic relationships." *Hayes*, 590 N.W.2d at 248 (citing *Maltz v. Union Carbide Chemicals & Plastics Co., Inc.*, 992 F. Supp. 286, 312 (S.D.N.Y. 1998)).

51. "One is liable for commission of this tort who interferes with business relations of another, both existing and prospective, by inducing a third person not to enter into or continue a business relation with another or by preventing a third person from continuing a business relation with another." *Hayes*, 1999 S.D. 28, ¶ 22, 590 N.W.2d at 248 (emphasis added) (quoting *Northern Plumbing & Heating, Inc., v. Henderson Bros., Inc.*, 268 N.W.2d 296, 299 (1978)); *see also, e.g., Setliff v. Akins*, 2000 S.D. 124, ¶ 36, 616 N.W.2d 878, 889; *St Onge Livestock Co., Ltd. v. Curtis*, 2002 S.D. 102, ¶ 22, 650 N.W.2d 537, 543; Gruhlke, 2008 S.D. 89, ¶ 12 n.4, 756 N.W.2d at 406 n.4.

52. The full text of Restatement (Second) of Torts § 766, Intentional Interference with Performance of Contract by Third Person, provides: "One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting ot the other from the failure of the third person to perform the contract."

53. In the event URC was owed a commission in connection with the sale of the Property from the Tronnes Defendants to Pifke, Pennington was the particular title company entity that would have issued payment of the funds to URC.

54. Uhre testified at trial, and the Tronnes Defendants did not offer evidence to dispute, that it was normal and usual to communicate directly with title companies, including about payment of commissions.

55. Benjamin Tronnes testified at trial that it is standard practice to place disputed commissions in escrow pending resolution of the dispute.

Objection. This conclusion misstates the testimony presented at trial. Mr. Tronneses testified that this was represented to him by Pennington Title Company, not that he had a personal opinion or experience as to the "standard practice."

56. Benjamin Tronnes testified that Pennington was retained to close on the sale of the Property.

57. Benjamin Tronnes admitted at trial that the Tronnes Defendants closed on the sale of the Property with Pennington and Pifke.

58. Benjamin Tronnes admitted that he has not been prevented from doing business with Pennington Title by either URC or UPM. *See Hayes*, 1999 S.D. 28, ¶ 22, 590 N.W.2d at 248; Restatement (Second) of Torts § 766.

Objection. The cited authority is narrower than the actual law is set forth in Defendants' Proposed Findings and Conclusions. Defendants' object to this law being incorporated.

59. The Tronnes Defendants did not satisfy their burden and present sufficient evidence at trial that URC or UPM intentionally or unjustifiably interfered with any business relationship between the Tronnes Defendants and Pennington.

Objection. This finding is inconsistent with the record. Testimony at trial indicated that Uhre intentionally emailed Pennington Title Company and misrepresented that he had an "active" listing agreement, as is set forth in the plain language of the email in question. Tr. Ex. 34.

60. Thus, the third element for a claim of tortious interference is not satisfied.

61. In addition, the Tronnes Defendants did not satisfy their burden and present sufficient evidence that the e-mail from Uhre to Pennington caused the alleged harm.

Objection. Ben Tronnes testified that had Uhre not sent the email in question, Pennington Title Company would not have placed the funds in escrow.

62. Thus, the fourth element for a claim of tortious interference is not satisfied.

63. Finally, Tronnes Defendants failed to satisfy their burden and present sufficient evidence of damages at trial.

64. In particular, the Tronnes Defendants failed to present credible evidence at trial of damages related to a loan that was taken out prior to Pifke making an offer on April 30, 2021. The Tronnes Defendants did not offer any documentation related to the draw from the retirement account, verification of the interest payments, or offer competent evidence that the draw from the retirement account could not be repaid earlier.

Objection. This finding is inconsistent with the record. Ben Tronnes' testimony under oath is evidence. Mr. Tronnes testified as to the biweekly finance charges and also provided testimony under oath that they would not be able to pay the loan back in full. Absent a finding from this Court that Mr. Tronnes' testimony was not credible, such testimony constitutes evidence to support this element of the tortious interference claim.

65. In addition, Benjamin Tronnes admitted at trial that he would have accepted an offer of $475,000.00 from Pifke, which was $25,000.00 less than the offer of $500,000.00. This fact calls into question the veracity of any claim that the escrowing of $26,399.00 caused damage to the Tronnes Defendants.

Objection. This finding is inconsistent with the record. Ben Tronnes' testimony under oath is evidence. Absent a finding from this Court that Mr. Tronnes' testimony was not credible, such testimony constitutes evidence to support this element of the tortious interference claim.

66. Thus, the fifth element for a claim of tortious interference is not satisfied.

67. The Tronnes Defendants' claims of tortious interference with a business expectancy is dismissed.

ATTORNEYS' FEES

68. At the close of the court trial, the Court advised the parties to provide any applicable theories for recovery of attorneys' fees.

69. "An award of attorney's fees is not the norm. The party requesting . . . fees has the burden to show, by a preponderance of the evidence, the basis for such an award." *Jacobson v. Gulbransen*, 2001 S.D. 33, ¶ 31, 623 N.W.2d 84, 91.

70. "Under our 'American Rule' for attorney fees, each party must bear its own attorney fees absent an agreement for attorney fees between the parties or where 'an award of attorney's fees is authorized by statute.'" *Goin v. Houdashelt*, 2020 S.D. 32, ¶ 21, 945 N.W.2d 349, 355 (quoting *Rupert v. City of Rapid City*, 2013 S.D. 13, ¶ 32, 827 N.W.2d 55, 67).

71. The Listing Agreement states: "The Broker and Seller, as parties to this agreement, agree that a party in breach of any of the covenants, promises or obligations arising under this contract shall be liable and responsible for attorney's fees and costs that may result from enforcement thereof as against the party in breach."

72. URC has asserted a claim against the Tronnes Defendants for breach of the covenants, promises, and obligations arising under the Listing Agreement.

73. The Tronnes Defendants have not asserted a claim against URC for breach of any covenants, promises, or obligations arising under the Listing Agreement.

Objection. This finding misconstrues the plain language of the Listing Agreement. Defendants have brought claims for damages resulting from the Listing Agreement.

74. The Court determines that URC is entitled to its reasonable attorneys' fees relating to its enforcement of the Listing Agreement against the Tronnes Defendants as the breaching parties.

75. If any Findings of Fact are improperly designated as such, they are hereby incorporated by reference in the Conclusions of Law. If any Conclusions of Law are improperly designated as such, they are hereby incorporated by reference in the Findings of Fact.

Dated this 21st day of November, 2022.

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

By: /s/ *Katelyn A. Cook*
Katelyn A. Cook
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CERTIFICATE OF SERVICE

I hereby certify on November 21, 2022, I served a true and correct copy of **DEFENDANTS' OBJECTIONS TO PLAINTIFFS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW** through South Dakota's Odyssey File and Serve Portal upon the following individuals:

Jonathan A. Heber
Tanner J. Fitz
Abigale Farley
Cutler Law Firm, LLP
P.O. Box 1400
Sioux Falls, SD 57101-1400
Attorneys for Plaintiffs

By: /s/ *Katelyn A. Cook*
Katelyn A. Cook

STATE OF SOUTH DAKOTA) SS. COUNTY OF PENNINGTON	)	IN CIRCUIT COURT SEVENTH JUDICIAL CIRCUIT
UHRE REALTY CORPORATION and UHRE PROPERTY MANAGEMENT CORPORATION, Plaintiffs, vs. BENJAMIN TRONNES and LESLIE TRONNES, Defendants.	)	51CIV21-000821 **NOTICE OF ENTRY OF JUDGMENT**

YOU ARE HEREBY NOTIFIED AND INFORMED that a Judgment in the above-entitled action was entered by the Honorable Joshua Hendrickson, Circuit Court Judge, on January 6, 2023, and filed with the Pennington County Clerk of Court on January 6, 2023. A copy of the Judgment is attached hereto and served upon you.

Dated this 10th day of January, 2023.

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

By: /s/ *Katelyn A. Cook*
Katelyn A. Cook
Attorneys for Defendants
PO Box 8045
Rapid City, SD 57709
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CERTIFICATE OF SERVICE

I hereby certify on January 10, 2023, I served a true and correct copy of **NOTICE OF ENTRY OF JUDGMENT** through South Dakota's Odyssey File and Serve Portal upon the following individuals:

Jonathan A. Heber
Tanner J. Fitz
Abigale M. Farley
Cutler Law Firm, LLP
P.O. Box 1400
Sioux Falls, SD 57101-1400
Attorneys for Plaintiffs

By: */s/ Katelyn A. Cook*
Katelyn A. Cook

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS.	
COUNTY OF PENNINGTON	)	SEVENTH JUDICIAL CIRCUIT

UHRE REALTY CORPORATION; AND UHRE PROPERTY MANAGEMENT CORPORATION,	)	51CIV21-000821
Plaintiffs,	)	**JUDGMENT**
vs.	)	
BENJAMIN TRONNES and LESLIE TRONNES,	)	
Defendants.	)	

This matter came on for trial before the Court on October 11, 2022, the Honorable Joshua Hendrickson, Circuit Judge, presiding. Uhre Realty Corporation and Uhre Property Management Corporation appeared personally through their manager, Josh Uhre, and were represented by their counsel, Jonathan Heber and Abigale Farley of Cutler Law Firm, LLP. Benjamin Tronnes and Leslie Tronnes appeared personally and were represented by their counsel, Katelyn A. Cook and Keely Kleven of Gunderson, Palmer, Nelson and Ashmore, LLP. The issues having been duly tried and a decision having been duly rendered it is hereby;

ORDERED, ADJUDGED AND DECREED as follows:

1. That the Court's Findings of Fact and Conclusions of Law dated December 8, 2022, are incorporated herein by this reference;
2. That Uhre Realty Corporation's claims against Defendants Benjamin and Leslie Tronnes are hereby dismissed with prejudice;

3. That Defendants Benjamin and Leslie Tronnes' claim for tortious interference against Uhre Realty Corporation and Uhre Property Management Corporation is hereby dismissed with prejudice; and
4. Pennington Title Company may release the escrowed funds to Benjamin and Leslie Tronnes upon the signing of this Order;
5. The Court will consider any timely-filed applications for costs and attorneys' fees following this Judgment.

1/6/2023 9:16:02 AM

BY THE COURT:

Honorable Joshua Hendrickson
Circuit Court Judge

Attest:
LeBon, Linda
Clerk/Deputy

STATE OF SOUTH DAKOTA) SS. COUNTY OF PENNINGTON	)	IN CIRCUIT COURT SEVENTH JUDICIAL CIRCUIT
UHRE REALTY CORPORATION; AND UHRE PROPERTY MANAGEMENT CORPORATION, Plaintiffs, vs. BENJAMIN TRONNES and LESLIE TRONNES, Defendants.	)	51CIV21-000821 **NOTICE OF ENTRY OF ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS BENJAMIN AND LESLIE TRONNES' MOTION FOR SUMMARY JUDGMENT**

PLEASE TAKE NOTICE that the attached Order Granting in Part and Denying in Part Defendants Benjamin and Leslie Tronnes' Motion for Summary Judgment was signed by the Honorable Joshua K. Hendrickson, Circuit Court Judge, Seventh Judicial Circuit on April 12, 2022, and was entered and filed with the Pennington County Clerk on April 13, 2022. A true and correct copy of the Order is attached hereto.

Dated this 21st day of April, 2022.

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

By: /s/ *Katelyn A. Cook*

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CERTIFICATE OF SERVICE

I hereby certify on April 21, 2022, I served a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS BENJAMIN AND LESLIE TRONNES' MOTION FOR SUMMARY JUDGMENT** through South Dakota's Odyssey File and Serve Portal upon the following individuals:

Jonathan A. Heber
Tanner J. Fitz
Cutler Law Firm, LLP
P.O. Box 1400
Sioux Falls, SD 57101-1400
Attorneys for Plaintiffs

By: */s/ Katelyn A. Cook*
Katelyn A. Cook

STATE OF SOUTH DAKOTA | IN CIRCUIT COURT

COUNTY OF PENNINGTON | SEVENTH JUDICIAL CIRCUIT

UHRE REALTY CORPORATION; AND UHRE PROPERTY MANAGEMENT CORPORATION, Plaintiffs, vs. BENJAMIN TRONNES; LESLIE TRONNES Defendants.	51CIV21-000821 **ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS BENJAMIN AND LESLIE TRONNES' MOTION FOR SUMMARY JUDGMENT**

Benjamin and Leslie Tronnes filed a Motion for Summary Judgment on December 16, 2021. The Motion was brought on for a hearing before the Honorable Joshua K. Hendrickson on **April 11, 2022, at 8:30 a.m.**, at the Pennington County Courthouse in Rapid City, South Dakota. Plaintiffs Uhre Realty Corporation and Uhre Property Management Corporation were not present and were represented by Jonathan A. Heber, of Cutler Law Firm, LLP, of Sioux Falls, South Dakota. Defendants Benjamin and Leslie Tronnes were not present and were represented by Katelyn A. Cook of Gunderson, Palmer, Nelson & Ashmore, LLP, of Rapid City, South Dakota. David Pifke appeared and was represented by Kassie McKie Shiffermiller of Lynn, Jackson, Shultz & Lebrun, P.C., of Rapid City, South Dakota.

Based upon the arguments of counsel, and the pleadings, affidavits, memorandums, and briefs filed with regard to the motion,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that

1. Defendants Benjamin and Leslie Tronnes' Motion for Summary Judgment is hereby **GRANTED** as to Count II of the Complaint for Breach of Agreement to Manage and Lease

Real Estate, and as to Count V of the Complaint for Declaratory Relief relating only to the Agreement to Manage and Lease Real Estate in Paragraph 58;

2. Defendants Benjamin and Leslie Tronnes' Motion for Summary Judgment is hereby **DENIED** as to Count I for Breach of Exclusive Listing and Agency Agreement, and as to Count V relating only to the Exclusive Listing and Agency Agreement in Paragraph 57;

3. Defendants Benjamin and Leslie Tronnes' Motion for Summary Judgment is hereby **DENIED** at this time as to their Counterclaim for Tortious Interference with a Business Expectancy;

4. Plaintiffs Uhre Realty Corporation and Uhre Property Management Corporation voluntarily dismissed Count IV for Civil Conspiracy to Breach Agreements;

5. Defendant Benjamin and Leslie Tronnes' request for consideration of attorneys' fees is **DENIED** at this time; and

6. The caption in this lawsuit shall be updated consistent with the rulings in this Order and the separate Order Granting Defendant David Pifke's Motion for Summary Judgment.

Dated this 12 day of April, 2022.

BY THE COURT:

Honorable Joshua K. Hendrickson
Circuit Court Judge

ATTEST:

Clerk of Courts
By: _____
Deputy

SEAL

Pennington County, SD
FILED
IN CIRCUIT COURT
APR 13 2022
Ranee Trumm, Clerk of Courts
By _____ Deputy

STATE OF SOUTH DAKOTA | IN CIRCUIT COURT

COUNTY OF PENNINGTON | SEVENTH JUDICIAL CIRCUIT

UHRE REALTY CORPORATION; AND UHRE PROPERTY MANAGEMENT CORPORATION, Plaintiffs, vs. BENJAMIN TRONNES; LESLIE TRONNES; AND DAVID PIFKE, Defendants.	51CIV21-000821 **PLAINTIFFS' OBJECTIONS AND RESPONSES TO BENJAMIN AND LESLIE TRONNES' STATEMENT OF UNDISPUTED MATERIAL FACTS AND STATEMENT OF ADDITIONAL MATERIAL FACTS**

COMES NOW the Plaintiffs, Uhre Realty Corporation and Uhre Property Management Corporation, by and through their undersigned counsel of record, and hereby submit their Objections and Responses to Defendants Benjamin Tronnes and Leslie Tronnes' ("Defendants") Statement of Undisputed Material Facts and Statement of Additional Material Facts.

1. Benjamin and Leslie Tronnes entered into a Property Management Agreement with Uhre Property Management and Josh Uhre on August 16, 2019 to oversee their home in Rapid City at 1319 12th St. Rapid City, SD 57701.

RESPONSE: Undisputed. However, the Property Management Agreement speaks for itself.

2. Uhre Property Management and Josh Uhre were agents of principals Benjamin and Leslie Tronnes for purposes of "negotiate[ing], prepar[ing] and execut[ing] all leases and to cancel and modify existing leases."

RESPONSE: Undisputed that the language cited and modified derives from the Property Management Agreement. However, the Property Management Agreement speaks for itself.

3. In the Property Management Agreements, Defendants granted UPM the "exclusive[right] to rent, lease, operate and manage" the property."

RESPONSE: Disputed. The Property Management Agreement states: "Owner hereby employs Broker exclusively to rent, lease, operate and manage said property subject to the terms and conditions of this agreement." The plain language indicates that Uhre Property Management was employed *only* for those functions, rather than that *only* Uhre Property Management could perform them. Furthermore, the Property Management Agreement speaks for itself.

4. During the term of the Property Management Agreement, the Defendants also entered into an "Exclusive Listing and Agency Agreement" (hereinafter the "Listing Agreement") with URC beginning May 1, 2020 and running through October 31, 2020 under which URC had the exclusive right to list the Property for sale.

RESPONSE: Disputed. The Property Management Agreement had an expiration date of October 31, 2020, and a tail period of 180 days. Otherwise, the Property Management Agreement and Exclusive Listing and Agency Agreement speak for themselves.

5. Under the terms of the Listing Agreement, URC was only entitled to compensation if a purchaser was procured for the Property or if the Property was exchanged or optioned during the term of the contract and said option was exercised, or if within 180 days after the expiration of the agreement, the property was sold to any person to whom the property was shown.

RESPONSE: Disputed insofar as the Listing Agreement speaks for itself. The above statement is a paraphrased version of the Listing Agreement. Furthermore, Defendants have a duty of good faith and fair dealing from preventing or injuring the other party's right to receive the agreed benefits of the contract. *See Zochert v. Protective Life Insurance Co.*, 2018 S.D. 84, ¶ 22, 921 N.W.2d 479, 486 (explaining that the implied covenant prohibits parties "from preventing or injuring the other party's right to receive the agreed benefits of the contract."). SDCL § 57A–1–201(19) defines "good faith" as "honesty in fact in the conduct or transaction concerned," but the meaning "'varies with the context' of the contract." *Id.* (quoting *Farm Credit Servs., Farm Credit Servs. of Am. v. Dougan*, 2005 S.D. 94, ¶ 8, 704 N.W.2d 24, 28).

6. The 180-day tail period expired on April 29, 2021.

RESPONSE: Undisputed. However, the Listing Agreement speaks for itself.

7. As part of the Listing Agreement, Uhre Realty Corporation and Josh Uhre were agents of principles Benjamin and Leslie Tronnes.

RESPONSE: Disputed, in part, for clarity. Uhre Realty Corporation was the listing company and Josh Uhre was the listing agent. The Listing Agreement speaks for itself.

8. The Listing Agreement, signed by Defendants on May 1, 2020 with URC, gave URC the "exclusive irrevocable right and privilege to sell" the Property during the terms of that agreement.

RESPONSE: Disputed, in part, for clarity. Defendants signed on April 29, 2020. The Listing Agreement speaks for itself.

9. On August 3, 2020, the Defendants and Uhre, representing UPM as an agent for the Defendants, entered into an 18-month Lease Agreement with Pifke under which Pifke leased the Property from the Defendants.

RESPONSE: Disputed, in part, on the basis that the Residential Lease Agreement is between David Pifke and Uhre Property Management. However, Plaintiffs acknowledge that Defendants signed the Lease Agreement, as did Josh Uhre on behalf of both URC and UPM. The Lease Agreement speaks for itself.

10. The term of the Lease was to run from October 1, 2020 to April 1, 2022.

RESPONSE: Undisputed. The Lease Agreement speaks for itself.

11. In early 2021, Defendants attempted to sell the Property to Pifke, but Pifke could not obtain financing to purchase the property.

RESPONSE: Disputed, in part. Plaintiffs do not dispute that Plaintiffs offered the Property for sale to Pifke in "early 2021"; however, it is disputed the reason that Pifke made an offer on April 30, 2021, the day after the expiration of the tail period. Plaintiffs have attempted to schedule the depositions of Defendants and Pifke in other to investigate the facts in this case, and all

Defendants have refused to consent to their depositions. *See* Plaintiffs' Motion for Order Setting Remote Depositions; *see also* Rule 56(f) Affidavit.

12. No offer was ever made by Dave Pifke to Defendants prior to April 29, 2021.

RESPONSE: Disputed., in part. Plaintiffs have attempted to schedule the depositions of Defendants and Pifke in order to investigate the facts in this case, and all Defendants have refused to consent to their depositions. *See* Plaintiffs' Motion for Order Setting Remote Depositions; *see also* Rule 56(f) Affidavit. It is undisputed that David Pifke made at least one offer on April 30, 2021.

13. Defendants desired to sell their house as quickly as possible, stating in an email to Dave Pfike [sic] "I don't mean to put a lot of pressure on you, but just getting this back to the top of the inbox. We'd love to get something put together to get a deal done."

RESPONSE: Disputed, in part. Undisputed that Defendants sent an e-mail to David Pifke, which e-mail speaks for itself, but disputed as to Defendants desires. Plaintiffs have attempted to schedule the depositions of Defendants and Pifke in order to investigate the facts in this case, and all Defendants have refused to consent to their depositions. *See* Plaintiffs' Motion for Order Setting Remote Depositions; *see also* Rule 56(f) Affidavit. It is undisputed that David Pifke made at least one offer on April 30, 2021.

14. On March 4, 2021, Defendants emailed Dave Pfike [sic] and stated, "Our intent is to sell the house to you, but as noted, we are financing another house and it would really help us if we can get this one off the books before we close on our current place."

RESPONSE: Undisputed that Defendants sent an e-mail to David Pifke, which e-mail speaks for itself.

15. Dave Pfike [sic] sent Defendants an offer for $500,000 on April 30, 2021.

RESPONSE: Undisputed that David Pifke e-mailed a purchase offer on April 30, 2021. Plaintiffs have attempted to schedule the depositions of Defendants and Pifke in order to

investigate the facts in this case, and all Defendants have refused to consent to their depositions. *See* Plaintiffs' Motion for Order Setting Remote Depositions; *see also* Rule 56(f) Affidavit. It is undisputed that David Pifke made at least one offer on April 30, 2021.

16. Defendants signed the counter offer on May 3, 2021.

RESPONSE: Undisputed that Defendants signed a document entitled "Counteroffer" bearing a date of May 3, 2021. Plaintiffs have attempted to schedule the depositions of Defendants and Pifke in order to investigate the facts in this case, and all Defendants have refused to consent to their depositions. *See* Plaintiffs' Motion for Order Setting Remote Depositions; *see also* Rule 56(f) Affidavit. It is undisputed that David Pifke made at least one offer on April 30, 2021.

17. On May 4, 2021, Defendants informed Josh Uhre that they were terminating the Management Agreement as of June 4, 2021.

RESPONSE: Undisputed that Defendants sent an e-mail to Josh Uhre on May 4, 2021, which speaks for itself.

18. Defendants worked with Pennington Title Company to sell their house.

RESPONSE: Undisputed that Pennington Title Company was retained by Defendants and Pifke for closing on the sale of the Property. The Tronnes' and Pifke, however, did not immediately or promptly notify Plaintiffs of the sale of the Property. The full scope of information possessed by Pennington Title Company is unknown at this time. Plaintiffs have sent a Subpoena Duces Tecum for service upon Pennington Title Company. *See* Subpoena. Furthermore, Plaintiffs have attempted to schedule the depositions of Defendants and Pifke in order to investigate the facts in this case, and all Defendants have refused to consent to their depositions. *See* Plaintiffs' Motion for Order Setting Remote Depositions; *see also* Rule 56(f) Affidavit. It is undisputed that David Pifke made at least one offer on April 30, 2021.

19. Even though the tail period under the Listing Agreement had clearly expired on April 29, 2021, Josh Uhre, on behalf of URC, emailed Pennington Title Company on May 20, 2021

RESPONSE: Disputed insofar as the e-mail speaks for itself and the statement is a paraphrased version thereof. Undisputed, however, that Josh Uhre e-mailed Greg Wick on behalf of Pennington Title Company on May 20, 2021, at 10:25 AM. The e-mail provided, in further part, the language in the agreements for Pennington Title Company's review, and stated: "I don't know what the sale price is since they negotiated a contract directly with the renter. I believe I am entitled to my professional fee of 5% of the purchase price plus tax as the procuring cause. Here it he language in the agreements."

20. The sale of the house was finalized on June 15, 2021.

RESPONSE: Disputed insofar as the term "finalized" is ambiguous. It is Plaintiffs' understanding, however, that the closing on the Property was held on June 15, 2021.

21. The July 8, 2021 invoice sent by UPM to Defendants showed that for the month of June, UPM took the entire 10% commission (and fees) on the June rent, despite the fact that the agreement ended as of June 4th and UPM would no longer be providing any services for the month of June.

RESPONSE: The invoice speaks for itself. Disputed that the agreement ended on June 4, 2021, insofar as the Tronnes' improperly attempted to terminate the agreement in contravention of the terms thereof.

22. Pennington Title has retained the [sic]

RESPONSE: This statement appears to be incomplete and, therefore, Plaintiffs cannot respond to it. Out of an abundance of caution, Plaintiffs dispute the statement.

23. Defendants sustained further harm because that money is still in escrow with Pennington Title Company and Pennington Title Company refuses to release those funds.

RESPONSE: Disputed that Defendants have been harmed and further disputed that Plaintiffs are responsible for Pennington Title Company's decision, which appears to have been consented to by the Tronnes' in certain e-mails, that Pennington Title Company hold the commission in escrow until the dispute is resolved. Furthermore, URC is entitled to the commission held in escrow. Plaintiffs have sent a Subpoena Duces Tecum for service upon Pennington Title Company. *See* Subpoena. Furthermore, Plaintiffs have attempted to schedule the depositions of Defendants and Pifke in order to investigate the facts in this case, and all Defendants have refused to consent to their depositions. *See* Plaintiffs' Motion for Order Setting Remote Depositions; *see also* Rule 56(f) Affidavit. It is undisputed that David Pifke made at least one offer on April 30, 2021.

STATEMENT OF ADDITIONAL MATERIAL FACTS

1. On August 1, 2020, David Pifke sent an e-mail to Josh Uhre that stated, in part, "What would it take for the owners to commit to not listing or showing the property until the end of the lease term? (Perhaps with an 18 month term instead, so that it would coincide with the spring, in the event we don't move forward as the purchaser."). *See* Affidavit of Jonathan A. Heber ("Aff. of Counsel"), Ex. D.

2. On August 1, 2020, Josh Uhre sent a responsive e-mail to David Pifke that stated: "Hi. I spoke to the owners and to keep the property off market for 18 months is $2,700/mth including the pet fee. It's a matter of $2,100 extra a year and would give you peace of mind & enjoyment of the property for the full term. And also to mention, that you could purchase the home at any time if you desired too which would likely be a lesser payment. What do you think?" *Id.*

3. On August 1, 2020, David Pifke sent a responsive e-mail that stated: "That's agreeable to us. Appreciate you working with us on it!" *Id.*

4. On December 4, 2020, Josh Uhre sent an e-mail to David Pifke and asked, in part: "Have you given it any thought of purchasing the property?"). *Id.*, Ex. E.

5. On January 2, 2021, Benjamin Tronnes sent an e-mail to David Pifke that stated: "It was great meeting you this week. Sorry for just popping in on you. Just wanted to get you my contact info. As we discussed, we'd love it if you bought our home from us. We plan on listing the house again this spring for $499,000. If we can do this without a realtor, we could sell to you for $475,000. I will also follow-up on this email with another that connects you and Christina at Blue Ribbon Mortgage. She is amazing and can help get you closed." *Id.*, Ex. F.

6. On January 27, 2021, David Pifke responded to an e-mail from Josh Uhre and stated: "Nothing's changed since we spoke about this a little over month ago: we're interested, but not going to be in a position to do so until later this year." *Id.*, Ex. G.

7. On March 4, 2021, Benjamin Tronnes sent an e-mail to David Pifke that stated: "We wanted to let you know that we will be listing the property again around May 1. Our intent is to sell the house to you, but as noted, we are financing another house and it would really help us if we can get this one off the books before we close on our current place. Our offer continues to stand – we would sell to you for $475,000 up to May 1. We then plan to list it for $499,000 at that time. This obviously doesn't preclude you from making an offer after May 1, we just need to open it up eventually to try and expedite a sale." *Id.*, Ex. H.

8. On March 4, 2021, David Pifke responded and stated: "I will do whatever I can to find financing sooner, but your May 1st deadline seems at odds with the lease, which states: 'SALE OF PROPERTY. Owner agrees to hold property off market until February 1, 2022 or 60 days of

the termination of lease and not take showings.' Alethea & I would not have moved but for the above agreement, which I thought was negotiated in good faith." *Id.*

9. There is a gap in communications between March 4, 2021, and April 30, 2021, which the latter is the date on which David Pifke provided Benjamin and Leslie Tronnes with a written purchase offer on April 30, 2021, without copying Josh Uhre. *Id.*, Ex. I.

10. On May 4, 2021, Benjamin Tronnes sends an e-mail to Josh Uhre that states: "I just wanted to let you know that we've entered into a private sales agreement with our tenants andplan to close on June 1. We will be terminating the property management agreements at that time. We really apprciate all the help with this property over the years." *Id.*, Ex. K.

11. On May 20, 2021, Josh Uhre provided Pennington Title with copies of the Listing Agreement, Management Agreement, and Lease for Pennington Title's review. *Id.*, Ex. L & N.

12. On June 10, 2021, Pennington Title Company provided a Settlement Statement that contemplated a 5.00% commission, sales tax, and transaction fee for Uhre Realty Corporation in the amount of $26,825.00. *Id.*, Ex. M.

13. On May 25, 2021, Greg Wick on behalf of Pennington Title Company sent an e-mail to Benjamin Tronnes that summarizing a phone conversation from earlier, which attached a sample escrow agreement to be completed "to escrow the disputed amounts if you are unsuccessful in resolving this issue prior to closing." *Id.*, Ex. N.

14. On June 9, 2021, Benjamin Tronnes sent an e-mail to Jennifer Rude at Pennington Title, which copied his legal counsel, that stated in part: "To be clear – it has already been agreed upon by us and Penn Title that the disputed commission will be held in escrow and that there will be no funds issued to Uhre Realty absent an agreement between us and Uhre Realty or a court order." *Id.*

15. On June 14, 2021, Greg Wick on behalf of Pennington Title Company sent an e-mail to Katelyn Cook, who is legal counsel for Defendants Benjamin Tronnes and Leslie Tronnes, that stated in part: "We'll go ahead with the commission holdback and close pursuant to your and Ben's instructions." *Id.*

Dated this 28th day of February, 2022.

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CERTIFICATE OF SERVICE

I, Jonathan A. Heber, do hereby certify that on this 28th day of February, 2022, I have electronically filed the foregoing with the Clerk of Court using the Odyssey File & Serve system which will send notification of such filing to the following:

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Appeal No. 30254

In the

Supreme Court of the State of South Dakota

UHRE REALTY CORPORATION and UHRE PROPERTY MANAGEMENT CORPORATION

Plaintiffs and Appellants

v.

BENJAMIN TRONNES AND LESLIE TRONNES

Defendants and Appellees

Appeal from the Circuit Court
Seventh Judicial Circuit
Pennington County, South Dakota

The Honorable Joshua Hendrickson

BRIEF OF APPELLEES BENJAMIN AND LESLIE TRONNES

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Filed: 8/11/2023 11:50 AM CST Supreme Court, State of South Dakota #30254

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PRELIMINARY STATEMENT

Citations to the record will appear as "(CR ___)" with the page number from the Clerk's Appeal Index. Citations to Appellants' appendix will be designated as "(APP___)" followed by the appropriate page number. Citations to the October 11, 2022, trial transcript will be designated as "(TT___)". Citations to the December 8, 2022, Findings of Fact and Conclusions of Law will be designated as "FOF" and "COL" respectively, along with the appropriate paragraph number.

Appellant Uhre Realty Corporation will be referred to as "URC," Appellant Uhre Property Management Corporation will be referred to as "UPM," Appellee Benjamin Tronnes shall be referred to as "Benjamin", and Appellee Leslie Tronnes shall be referred to as "Leslie," with both being collectively referred to as the "Tronneses."

JURISDICTIONAL STATEMENT

URC and UPM appeal from the circuit court's Judgment dated January 2, 2023. (APP 00124-125). This Judgment incorporated the circuit court's Findings of Fact and Conclusions of Law dated December 8, 2022. (APP 00024-00045). Notice of Entry of this Judgment was filed on January 10, 2023. (APP 00122). Appellants filed their notice of appeal on February 9, 2023. (CR 1249).

The Order is one that may be appealed pursuant to SDCL § 15-26A-3. Notice of Appeal was filed within the time limits of SDCL § 15-26A-6. Therefore, this Court has jurisdiction to consider the issues raised on appeal.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I. Did the circuit court err in finding Benjamin and Leslie did not breach the Listing Agreement?

Following a court trial, the circuit court found that Benjamin and Leslie did not breach the terms of the Listing Agreement and likewise did not breach the implied covenant of good faith and fair dealing.

- *McKie Ford Lincoln, Inc. v. Hanna*, 2018 S.D. 14, ¶ 9, 907 N.W.2d 795, 798
- *Nygaard v. Sioux Valley Hosps. & Health Sys.*, 2007 S.D. 34, ¶ 13, 731 N.W.2d 184, 191

II. Did the circuit court err in granting the Tronneses' Motion for Partial Summary Judgment finding they did not breach the Property Management Agreement?

The Tronneses moved for partial summary judgment on Appellants' claim that the Tronneses breached the Property Management Agreement. The circuit court granted the motion finding there was no dispute of material fact and the Tronneses were entitled to judgment as a matter of law.

- *McKie Ford Lincoln, Inc. v. Hanna*, 2018 S.D. 14, ¶ 9, 907 N.W.2d 795, 798
- *Nygaard v. Sioux Valley Hosps. & Health Sys.*, 2007 S.D. 34, ¶ 13, 731 N.W.2d 184, 191

III. Did the circuit court err in finding the Tronneses are entitled to their attorneys' fees under the Listing Agreement?

The circuit court found that per the terms of the Listing Agreement, the Tronneses were entitled to their attorneys' fees as they successfully defended against every claim by Appellants.

- *Credit Collection Servs., Inc. v. Pesicka*, 2006 S.D. 81, ¶ 6, 721 N.W.2d 474, 476–77

- *Nelson v. Schellpfeffer*, 656 N.W.2d 740, 743 (S.D. 2003)

STATEMENT OF THE CASE

This is an appeal from the Honorable Joshua Hendrickson, Seventh Circuit, Pennington County, South Dakota. This case arises out of a dispute relating to two separate contractual agreements, the "Agreement to Manage and Lease Real Estate" (hereinafter the "Property Management Agreement") and the "Exclusive Listing and Agency Agreement" (hereinafter the "Listing Agreement"). (APP 000012; APP 00001).

The parties tried the case to the circuit court on October 11, 2022. The issues before the circuit court at the time of trial included: (1) the parties' competing declaratory judgment claims as to whether the Tronneses breached the terms of the Listing Agreement; (2) URC's claim that the Tronneses breached the implied covenant of good faith and fair dealing; (3) whether the Tronneses were entitled to their attorneys' fees under the Listing Agreement; and (4) the Tronneses' counterclaim against both URC and UPM for tortious interference with business relations. (APP 00024, FOF ¶ 2). Prior to the October 2022 court trial on these issues, the circuit court granted the Tronneses' Motion for Partial Summary Judgment on UPM's claim that the Tronneses breached the Property Management Agreement. (CR 691).

Following the court trial, the circuit court entered a Judgment in the Tronneses' favor finding that the Tronneses did not breach the Listing Agreement, did not breach the implied covenant of good faith and fair dealing, and that the Tronneses were entitled to their attorneys' fees per the terms of the Listing Agreement. (APP 00124-125). The

circuit court found in favor of UPM and URC as to the Tronneses' tortious interference claim. UPM and URC now appeal from this Judgment. *Id.*

STATEMENT OF FACTS

This lawsuit stems from the lease and subsequent sale of Benjamin and Leslie's property at 1319 12th St. Rapid City, South Dakota 57701 ("the Property") to David Pifke ("Pifke").[1] In 2019, the Tronneses decided to relocate from Rapid City to Colorado due to various job opportunities. (APP 00024, FOF ¶ 13). As a result, they entered into a first "Exclusive Listing and Agency Agreement" with URC effective September 10, 2019, expiring April 10, 2020, with the intent to sell the Property. (APP 00025, FOF ¶ 14). When the Property had still not sold but the Tronneses were ready to relocate to Colorado, the Tronneses decided to enter into the Property Management Agreement with UPM on August 16, 2019, for purposes of managing the Property, which included securing tenants and collecting rent payments. *Id.* at FOF ¶ 15.

On April 29, 2020, the Tronneses subsequently entered into the Listing Agreement at issue with URC effective May 1, 2020, and terminating on October 31, 2020. *Id.* at FOF ¶ 19. Per the Listing Agreement, URC had the "exclusive irrevocable right and privilege to *sell* [the Property]." *Id.* (Emphasis added). The Listing Agreement also contained a 180-day tail period which expired on April 29, 2021. (APP 00027, FOF ¶ 25).

In the meantime, in the summer of 2020, Pifke and his partner, Althea Nelson were living in Las Vegas, NV and were looking to relocate to South Dakota due to COVID-related closures. *Id.* at FOF ¶ 26. To this end, Althea contacted UPM to

[1] Pifke was dismissed as a defendant in the lawsuit following his successful Motion for Summary Judgment.

specifically inquire about leasing the Property. *Id.* at FOF ¶ 27. At the time Pifke and Althea reached out to UPM regarding a lease, Pifke was not in a financial position to be able to qualify for financing to purchase a property. *Id.* at FOF ¶ 28. Because of this, and because they were unsure whether they would want to reside in Rapid City permanently, they were specifically looking for a rental home. *Id.* at FOF ¶¶ 28-29. When Pifke and Althea eventually moved into the Property, they did not intend to purchase the home. *Id.* at FOF ¶ 30.

UPM initially sent a draft lease with a one-year term beginning October 1, 2020, and ending October 1, 2021. *Id.* at FOF ¶ 31. Upon receipt of this lease, Pifke raised concerns to UPM about the one-year term of the lease and inquired as to whether, if the Property was sold during the terms of the lease, he and Althea would have to relocate. (APP 00028, FOF ¶ 32). UPM replied, indicating that the Tronneses would likely opt to relist the Property on June 1, 2021. *Id.* at FOF ¶ 33. With this information, Pifke inquired whether the Tronneses would be willing to agree to not list the Property until the end of the lease term and whether the Tronneses would be agreeable to an eighteen-month lease term. *Id.* at FOF ¶ 34. This was because Pifke did not want to have to make the Property available for showings because he and Althea valued their privacy and doing so would be difficult to coordinate as Pifke worked from home. *Id.* at FOF ¶ 35. They also did not want to have to move again in less than a year should the Property be sold. *Id.* As a result, via the Lease, the Tronneses agreed to keep the Property off the market for eighteen months. *Id.* at FOF ¶ 36; APP 00020.

Following this exchange, Pifke signed a "Residential Real Estate Lease" with the Tronneses and UPM (hereinafter the "Lease") on August 3, 2020. (APP 00014-23). The

Lease began on October 1, 2020, and ended April 1, 2022. *Id.* Pifke moved into the Property after the October 1, 2020, start date of the lease. The Listing Agreement expired later that same month on October 31, 2020. (APP 00002). While Uhre had periodically inquired whether Pifke would be interested in eventually purchasing the property, even through December of 2020, Pifke maintained they were unsure of whether they intended to stay and had not "looked much into [purchasing the Property]". (APP 00029, FOF ¶ 41). Uhre inquired again in January of 2021, but that inquiry was not at the behest of the Tronneses and was unknown to the Tronneses at the time.[2] *Id.* at FOF ¶ 42.

In the meantime, the Tronneses were renting a property in Colorado Springs with their three children. That property became available for the Tronneses to purchase in January of 2021 (hereinafter the "Colorado home"). *Id.* at FOF ¶¶ 44-45. Because the Tronneses had yet to sell the Property in Rapid City, they negotiated an extended closing date on the Colorado home to June 1, 2021. *Id.* at FOF ¶ 46. Their goal in doing so was to sell the Property in advance of the June 1, 2021, closing date to allow them to obtain more favorable financing for the Colorado home. *Id.* at FOF ¶ 47. While Pifke had never expressed any interest in purchasing the Property, the Tronneses decided to stop by the Property when they were back in South Dakota in January of 2021 to attempt to facilitate a sale. *Id.* at FOF ¶ 48. At this time, the Tronneses discussed the possibility of Pifke purchasing the Property.[3] *Id.* at FOF ¶ 49.

On January 23, Benjamin sent a follow up email to Pifke stating that they would sell the Property for $499,000 with a realtor or $475,000 without a realtor and putting

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[2] Pifke testified that he was of the understanding that because the Lease was with UPM, his interactions with Uhre were done on behalf of UPM. (APP 00029, FOF ¶ 43).
[3] As of the time of this meeting, the Listing Agreement had expired.

him in touch with Blue Ribbon Mortgage to try to encourage him to seek financing. (APP 00030, FOF ¶ 51; CR 895). Because the Tronneses were still focused on selling the Property in advance of the June 1, 2021, closing on the Colorado home, Benjamin again reached out to Pifke on February 4, 2021, asking whether Pifke would be able and interested to purchase the Property. *Id.* at FOF ¶ 52; CR 895. Pifke reiterated that he still "would need to free up some more cash for a down payment before an offer [would be] realistic," and that "I know y'all are anxious to sell, so I'll keep you updated." *Id.* at FOF ¶ 53; CR 895.

On March 4, 2021, Benjamin reached out via email to Pifke to let him know that they would plan to list the Property on May 1, 2021, as a final effort to try to get the Property sold prior to the June 1, 2021, closing date on the Colorado home. (APP 00030, FOF ¶ 54; CR 895). He reiterated that he would sell the Property to Pifke for $475,000 up until that point, at which point they would list the Property for $499,000. *Id.* at FOF ¶ 55; CR 895. In response, Pifke pointed out the fact that the lease prohibited the Property from being sold until February 1, 2022, and that in his opinion, listing it earlier would be a breach of the Lease. *Id.* at FOF ¶ 56; CR 896. Benjamin acknowledged this in a responsive email that same day. Once Pifke pointed out the fact that listing the Property would be a breach of the Lease, Benjamin no longer planned to list the Property on May 1, 2021. *Id.* at FOF ¶ 57. This was the last communication between Benjamin and Pifke before Pifke eventually made an offer to purchase the Property.[4] (APP 00031, FOF ¶ 58).

[4] This is consistent with testimony from both Pifke and Benjamin, as well as the cell phone records which did not indicate any calls between the parties. (CR 1019).

Pifke indicated that after receiving this email from Benjamin, he spoke with his sister who is an attorney who told him that while an early list date would likely breach the Lease, his recourse would be limited. *Id.* at FOF ¶ 60. He also believed that Benjamin was still planning to list the Property on May 1, 2021, because roofers came to the Property in early spring to fix preexisting hail damage on the roof. *Id.* at FOF ¶ 61. Thus, all of this led Pifke to make an offer on the Property for $500,000 on April 30, 2021. *Id.* at FOF ¶ 62.

Pifke made the offer for $500,000 because he did not want to risk getting into a "bidding war" with other people if the Property was going to be listed on May 1, 2021, and he believed that $499,000 would be the list price. (APP 00031, FOF ¶ 63). Prior to the instant litigation, Pifke had never seen the Listing Agreement and did not even know what a "tail period" was. *Id.* at FOF ¶ 64. Thus, Pifke had no knowledge that a tail period existed, much less that the tail period expired on April 29, 2021. *Id.* at FOF ¶ 65. He was able to finally make the offer because he was able to free up additional cash by selling his NFL Las Vegas Raiders season tickets to his father and ultimately qualify for financing. *Id.* at FOF ¶ 66.

Benjamin was surprised to receive the offer from Pifke as they had not communicated since March of 2021. (APP 00031, FOF ¶ 67). Like Pifke, Benjamin had no intent to circumvent URC's receipt of a commission on the Property and instead testified that he had not even thought about the tail period during that time as he was fully focused on attempting to sell the Property in advance of the June 1, 2021, closing date on the Colorado home. *Id.* at FOF ¶ 68. The Tronneses sent a counteroffer to Pifke on May 3, 2021, which Pifke signed and accepted that same day. *Id.* at FOF ¶ 69. The next day,

on May 4, 2021, Benjamin sent an email to UPM indicating the Tronneses were terminating the Property Management Agreement. (CR 238; CR 373 at ¶ 17). The closing and eventual sale of the home took place on June 15, 2021. (APP 00033, FOF ¶ 83).

STANDARD OF REVIEW

There are three issues before this Court on this appeal: (1) whether the circuit court erred when it denied URC's claims for breach of the Listing Agreement and declaratory judgment; (2) whether the circuit court erred in granting summary judgment on UPM's claim for breach of the Property Management Agreement; and (3) whether the circuit court erred in determining the Tronneses are entitled to their attorneys' fees under the Listing Agreement.

The interpretation of the Listing Agreement and Property Management Agreement "is a question of law reviewed de novo." *McKie Ford Lincoln, Inc. v. Hanna*, 2018 S.D. 14, ¶ 9, 907 N.W.2d 795, 798 (citing *Detmers v. Costner*, 2012 S.D. 35, ¶ 20, 814 N.W.2d 146, 151). The same standard of review applies to declaratory judgments: "This Court reviews declaratory judgments as we do any other order, judgment, or decree" giving no deference to a circuit court's conclusions of law under the de novo standard of review." *In re Pooled Advoc. Tr.*, 2012 S.D. 24, ¶ 20, 813 N.W.2d 130, 138 (citing *Fraternal Order of Eagles No. 2421 of Vermillion v. Hasse*, 2000 S.D. 139, ¶ 8, 618 N.W.2d 735, 737 (citing SDCL § 21–24–13)).

As to the determination of whether the circuit court erred in determining the Tronneses did not breach the implied covenant of good faith and fair dealing, this Court has held it will uphold the trial court "unless its findings of fact are 'clearly erroneous.'"

Mettler v. Williamson, 424 N.W.2d 670, 671 (S.D. 1988). "A finding is 'clearly erroneous' when after reviewing all of the evidence we are left with a definite and firm conviction that a mistake was made." *Id.* (citing *United States v. United States Gypsum Co.*, 333 U.S. 364, 68 S.Ct. 525, 92 L.Ed. 746 (1948); *Vaughn v. Eggleston*, 334 N.W.2d 870 (S.D.1983); *In re Estate of Hobelsberger*, 85 S.D. 282, 181 N.W.2d 455 (1970)). "The standard of review for findings of fact is clearly erroneous as opposed to mistake of law." *Id.* Importantly, "Findings of fact, whether based on oral or documentary evidence, may not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." *See* SDCL § 15-6-52(a).

ARGUMENT AND AUTHORITIES

I. THE CIRCUIT COURT CORRECTLY DETERMINED THAT BENJAMIN AND LESLIE DID NOT BREACH THE LISTING AGREEMENT

URC made two claims at trial against the Tronneses, namely, that the Tronneses breached the Listing Agreement by not paying URC a commission from the sale of the Property and that the Tronneses breached the implied covenant of good faith and fair dealing. As detailed below, the circuit court correctly found in favor of the Tronneses on both of these claims.

A. The circuit court correctly interpretated the plain language of the Listing Agreement.

A breach of contract results if there is "(1) an enforceable promise; (2) a breach of the promise; and, (3) resulting damages." *Bowes Construction, Inc. v. South Dakota Department of Transportation*, 793 N.W.2d 36, 43 (S.D. 2010) (citing *Guthmiller v. Deloitte & Touche, L.L.P.*, 699 N.W.2d 493, 498 (S.D. 2005)).

The interpretation of a contract is a question of law for the court. *McKie Ford Lincoln*, 2018 S.D. 14, ¶ 9, (citing *Detmers*, 2012 S.D. 35, ¶ 20). When interpreting a contract, the court "looks to the language that the parties used in the contract to determine their intention." *Id.* "In order to ascertain the terms and conditions of a contract, [the court] examine[s] the contract as a whole and give[s] words their plain and ordinary meaning." *Id.* (quoting *Nygaard v. Sioux Valley Hosps. & Health Sys.*, 2007 S.D. 34, ¶ 13, 731 N.W.2d 184, 191. When a contract is clear, extrinsic evidence will not be considered because "the intent of the parties can be derived from within the four corners of the contract." *Vander Heide v. Boke Ranch, Inc.*, 736 N.W.2d 824, 835–36 (S.D. 2007) (citations omitted); *In re J.D.M.C.*, 739 N.W.2d 796, 806 (S.D. 2007) (Extrinsic evidence cannot be considered unless the contract is deemed uncertain or ambiguous). Here, neither party argued that the Listing Agreement was ambiguous, and in fact, the circuit court specifically found the Listing Agreement was **not** ambiguous, thus barring the introduction of extrinsic evidence to attempt to vary the terms of the Listing Agreement. (APP 00036, COL ¶ 17).

The pertinent language of the Listing Agreement provides:

> If a purchaser is procured for the property by the Broker, by any other cooperating broker, by the Seller, or by any other person at the price and upon the terms stated above, or at any other price or upon any other terms accepted by the Seller during the term of this Agreement or if exchanged or optioned during the term of this contract and said option is exercised, or if within 180 days after the expiration of this agreement, the property is sold to any person to whom the property was shown the Seller agrees to pay compensation as stated above … The Broker and Seller, as parties to this agreement, agree that a party in breach of any of the covenants, promises or obligations arising under this contract shall be liable and responsible for attorney's fees and costs that may result from enforcement thereof as against the party in breach.

(APP 0003 at ¶ 7A). Because the Listing Agreement is unambiguous, in reviewing the circuit court's decision, this Court must simply look to the plain language of the agreement.

Throughout URC and UPM's brief, they consistently insert punctuation into this provision which is not actually present, attempting to change the reading of the contract. *See i.e.,* App. Br. at 12 (adding a period in brackets after the quotation from the Listing Agreement to try to change the qualifying language that follows.) However, the plain language clearly delineates two pertinent timeframes which may give rise to a commission being owed: (1) during the term of the Listing Agreement; and (2) during the term of 180-day tail period.

The Listing Agreement expired on October 31, 2020, the same month that Pifke's Lease began. (APP 0002). The tail period expired April 29, 2021. A breakdown of the plain language of the Listing Agreement emphasizes why the circuit court was correct in its holdings.

Actions During the Term of the Listing Agreement

During the term of the Listing Agreement, URC would only be entitled to a commission if one of three things occurred: (1) purchase; (2) exchange; or (3) option.

Purchase

As to the first potential means of receiving a commission—purchase—the pertinent language of the Listing Agreement provides that the Tronnes would be obligated to pay a commission to URC, "If a purchaser is procured for the property . . . at the price and upon the terms stated above, or at any other price or upon any other terms *accepted by the Seller during the term of this Agreement* . . ." Thus, URC would only be

entitled to compensation if a purchaser was procured for the Property ***and*** an offer was accepted by the Seller *during the term of the Listing Agreement.* (APP 0003 at ¶ 7 A) (emphasis added). There was no offer accepted by the Tronneses during the term of the Listing Agreement, so URC cannot claim a commission under this portion of the Listing Agreement.

Exchange

As to the second means of receiving a commission—exchange—the pertinent language of the Listing Agreement provides that the Tronnes would be obligated to pay a commission to URC if the property was, "exchanged. . . during the term of this contract." *Id.* at ¶ 7 A. The term of the Listing Agreement expired on October 31, 2020, and the home did not sell until June 15, 2021. (*Id.* at ¶ 7 A). As such, there was no title exchanged until seven months after the expiration of the Listing Agreement. Thus, URC cannot claim a commission under this provision of the Listing Agreement.

Option

Finally, as to the third means of receiving a commission during the term of the Listing Agreement, the Tronneses would be obligated to pay a commission to URC if the property was "optioned during the term of this contract and said option is exercised." *Id.* at ¶ 7A. An option contract is "a contract by which an owner of real property agrees with another person that the latter shall have the privilege of buying the property at a specified price within a specified time, or within a reasonable time in the future, and which imposes no obligation to purchase upon the person to whom it is given." *Kuhfeld v. Kuhfeld*, 292 N.W.2d 312, 314 (S.D. 1980); *In the Matter of the Dennis Snaza Family Trust*, 909 N.W.2d 719, 721 (S.D. 2018). An option contract "is exercised when the

optionee accepts the irrevocable offer, and an enforceable contract of sale is created." *Advanced Recycling Systems, LLC v. Southeast Properties Ltd. Partnership*, 787 N.W.2d 778, 783 (S.D. 2010).

At no point did UPM or URC argue that the Lease was ambiguous. Because the language of the Lease is unambiguous, no extrinsic evidence may vary the terms of the Lease. Here, the Lease Agreement provides: "Owner agrees to hold property off market until February 1, 2022, or 60 days of the termination of lease and not take showings." (APP 00020 at "Sale of Property"). Nowhere in this language does it state that Pifke had any privilege to purchase the property for a specified price or within a specified time—it simply prevented the property from being shown while Pifke resided there.

The email chain cited in Appellants' brief constitutes extrinsic evidence that cannot be used to vary the unambiguous terms of the Lease. However, even if this court were to construe this email chain as its own separate "option" contract as Appellants now apparently suggest, the record demonstrates this language was added simply because Pifke wanted a longer lease period to ensure that the Property would not be listed, and they would not have to move again within a year of moving to Rapid City. (APP 00028 at ¶¶ 33-35). It had nothing to do with his desire to have an option to purchase the property within eighteen months or some desire for exclusivity, nor did Pifke believe that was the case. (TT 111:7-11).[5] This is especially true given the repeated statements from Pifke in his deposition, at trial, and in various emails, that they were not in the market to

[5] Q (attorney Heber): So in terms of trade-off you thought that -- correct me if I am wrong, but you thought you're agreeing for a longer term and increased rent in order to keep the property off the listing.

A (Pifke): Correct, yeah.

purchase a home when they first moved to Rapid City (contrary to Appellants' representations in their brief). Furthermore, Benjamin testified that they did not have any discussions regarding any exclusivity with Pifke. (TT 144: 10-16). It is elementary that all contracts require mutual assent to be valid. *See Liebig v. Kirchoff*, 2014 S.D. 53, ¶ 37, 851 N.W.2d 743, 752. By arguing that this extrinsic email chain constitutes an option, Appellants are now trying to hold Pifke and the Tronneses to the terms of some contract which neither was aware they were entering.

Finally, no option was "exercised" during the term of the Listing Agreement as the sale did not occur until seven months after the expiration of the Listing Agreement. Importantly, an option contract "which is intended by its parties to run for an unlimited time is void." *Kuhfeld v. Kuhfeld*, 292 N.W.2d 312, 314 (S.D. 1980). To the extent this Court would construe the extrinsic email chain to constitute an option contract, said option would be void as it was for an "unlimited time." (Appellants' Brief, pg. 18 (stating that Pifke could purchase the property "at any time")). Ultimately, there was no "option" involved in this case. Because the Property was not sold, exchanged, or optioned, no actions occurred during the term of the Listing Agreement that would give rise to URC being owed a commission.

Actions During the 180-day Tail Period

Alternatively, if no purchase, exchange, or option occurred during the term of the Listing Agreement (as discussed *supra*), URC's only means of obtaining a commission was if the property was "sold to any person to whom the property was shown" within 180 days after the expiration of the Listing Agreement. (APP 00003 at ¶ 7A). The Listing Agreement defines "sale" as "any exchange, trade, lease or option to purchase to which

the Seller consents." (*Id.* at ¶ 6). The property was not sold during the 180-day period after the expiration of the Listing Agreement, which expired on April 29, 2021. Instead, the Property was sold on June 15, 2021, over a month and a half after the close of the tail-period. Thus, no "sale" occurred during the 180-day tail period, and as such, URC is not entitled to a commission.

Appellants spend a large portion of their brief arguing that Uhre was the "procuring cause," thus entitling URC to a commission for the listing. However, in order to accept this argument, this Court would have to ignore the language of the Listing Agreement. As outlined above, when looking to the plain language of the Listing Agreement, it is clear that the definition of "procurement" is irrelevant here, which explains why the circuit court chose to disregard UPM and URC's proposed findings on that issue. Procurement of a buyer is only one portion of what has to occur in order to entitle URC to a commission; there are further conditions (i.e. sale, exchange, or option within the term of the Listing Agreement or sale during the tail period) that must also occur within certain, clearly defined timeframes. Even if this Court determines that URC did procure a buyer, it still does not change the fact that the additional requirements set forth in the Listing Agreement were not satisfied.

In support of their arguments regarding procurement, Appellants cite one South Dakota case—*Mehlberg v. Redlin* 77 S.D. 586, 589, 96 N.W.2d 399, 401 (1959). However, this case does not even involve a written listing agreement; instead it appears to deal with a verbal agreement between a seller and a realtor, leaving this Court with no choice but to rely upon the Restatement to determine what was meant between the parties as to "procurement." Here, there is no need to resort to an analysis of the definition of

"procure" when there is a clear and unambiguous contract dictating how and when URC would be entitled to a commission.

In reviewing contracts such as the Listing Agreement at issue, this Court looks to the language that the parties used in the contract to determine their intention. The plain language of the Listing Agreement provides that a commission can be earned by URC if there is an offer accepted for the Property, if the Property was exchanged, or if the Property was optioned during the term of the Listing Agreement. Alternatively, URC could have earned a commission if the Property was sold within 180 days after the expiration of the Listing Agreement. None of these criteria were met here. Because of this, the circuit court correctly determined that the Tronneses did not breach the terms of the Listing Agreement and that URC is not entitled to a commission from the sale of the Property.

B. The circuit court correctly determined the Tronneses did not breach the implied covenant of good faith and fair dealing.

Appellants also appeal the circuit court's determination that the Tronneses did not breach the implied covenant of good faith and fair dealing. "[E]very contract contains an implied covenant of good faith and fair dealing [that] prohibits either contracting party from preventing or injuring the other party's right to receive the agreed benefits of the contract.'" *Nygaard*, 2007 S.D. 34, ¶¶ 20-22 (quoting *Farm Credit Servs. of Am. v. Dougan*, 2005 SD 94, 704 N.W.2d 24, ¶ 8 (internal citations omitted)). This duty of good faith permits an aggrieved party to bring a breach of contract action when the other party:

> [B]y [its] lack of good faith, limited or completely prevented the aggrieved party from receiving the expected benefits of the bargain. A breach of contract claim is allowed even though the

> conduct failed to violate any of the express terms of the contract agreed to by the parties.

Id. (quoting *Garrett v. BankWest, Inc.*, 459 N.W.2d 833, 841 (S.D.1990)). The meaning of the covenant "varies with the context of the contract." *Id.* Ultimately, the duty "emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." *Id.* (quoting Restatement (Second) of Contracts § 205, cmt a (1981)).

However, the "duty of good faith and fair dealing 'is not a limitless duty or obligation.'" *Id.* "The implied obligation 'must arise from the language used or it must be indispensable to effectuate the intention of the parties.'" *Id.* (internal citations omitted). This Court has also recognized a limitation when the language of a contract addresses the issue, stating, "The covenant of good faith does not create an amorphous companion contract with latent provisions to stand at odds with or in modification of the express language of the parties' agreement. It is not a repository of limitless duties and obligations." *Id.* (quoting *Farm Credit Services*, 2005 SD 94 at ¶ 9, 704 N.W.2d at 28 (citations omitted)). Therefore, "[i]f the express language of a contract addresses an issue, then there is no need to construe intent or supply implied terms" under the implied covenant. *Id.* at ¶ 10 (citations omitted).

This determination should not be overturned by this Court absent a "definite and firm conviction that a mistake was made." *Mettler,* 424 N.W.2d at 671. The circuit court is "the exclusive judge of the credibility of the witnesses and the weight to be given their testimony." *Century 21 Associated Realty v. Hoffman*, 503 N.W.2d 861, 864 (S.D. 1993) (citing *Wolff v. Royal Ins. Co. of America*, 472 N.W.2d 233 (S.D.1991); *In Interest of A.D.*, 416 N.W.2d 264 (S.D.1987)). Furthermore, "all conflicts in the evidence must be

resolved in favor of the trial court's findings." *Id.* (citing *Matter of Estate Gibbs*, 490 N.W.2d 504 (S.D.1992)). This is even true if the record reflects that certain testimony conflicts on various issues. *Id.*

Appellants argue the circuit court erred in determining the Tronneses did not breach the implied covenant of good faith and fair dealing. In doing so, Appellants cherry pick favorable portions of the record while ignoring clear evidence to the contrary which shows the Tronneses wanted to sell the home as quickly as possible. *See, e.g.*, CR 895 (email regarding needing to try to expedite a sale); TT 150:5-10. Appellants argue the Tronneses continued to request URC's assistance after the Listing Agreement expired in October of 2020. (Appellants' Br. pg. 21). However, some of these contacts that occurred after the expiration of the Listing Agreement were not at the bequest of the Tronneses and were unbeknownst to them. (APP 00029, FOF ¶ 42). Appellants also overlook that once the Listing Agreement expired, Pifke testified that he understood these contacts with Uhre were on behalf of UPM to manage the Property, not in any attempt to secure a sale. *Id.* at ¶ 43.

Appellants argue that Benjamin "threatened" Pifke into purchasing the Property, despite the fact there was no contact between them after March of 2021 and that Pifke testified that he made the offer without any further prompting from or any further indication that the home was actually going to be listed May 1, 2021. (APP 00031, FOF ¶ 58-62). The circuit court had the opportunity to hear Pifke and Benjamin testify, found them both to be credible, and had the opportunity to judge firsthand whether Pifke felt "threatened." (APP 00041, COL ¶¶ 47-48).

Appellants overlook that Pifke was completely unaware that there was a "tail period" and refuse to give any weight to Benjamin's testimony that he had no intent to circumvent a commission to URC and that he had not even thought about the tail period once the Listing Agreement had expired. (APP 00032, FOF ¶ 68). Benjamin testified his only goal was to sell the Property in Rapid City as soon as possible so as to allow the Tronneses to obtain more favorable financing on the purchase of their new home in Colorado—not to try to delay the sale to push it outside of the 180-day tail period. (TT 150:5-17).

There is no evidence to support Appellants' manifesto that the Tronneses and Pifke somehow conspired to push the sale of this Property outside of the tail-period. Both testified that they were either unaware of or not thinking of the tail period and that the Tronneses wanted to sell the home as quickly as possible. This Court cannot and should not overturn the circuit court's findings simply because Appellants do not agree with them. Appellants have not met their burden.

II. THE CIRCUIT COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF THE TRONNESES ON UPM'S BREACH OF THE PROPERTY MANAGEMENT AGREEMENT CLAIM

Prior to the court trial, the circuit court granted the Tronneses' Motion for Partial Summary Judgment on UPM's breach of contract claim with regard to the Property Management Agreement. Appellants argue the circuit court erred in doing so because the circuit court "offered no findings or conclusions during its oral ruling." (Appellants' Br. pg. 22). They also argue there were "numerous" genuine issues of material fact which should have precluded summary judgment. Both arguments wholly lack merit.

First, a trial court is under no obligation to enter findings and conclusions on a motion for summary judgment. "[F]indings of fact and conclusions of law are unnecessary in a summary judgment action." *Piner v. Jensen*, 519 N.W.2d 337, 339 (S.D. 1994) (citing SDCL § 15–6–52(a); *Wilson v. Great N. Ry. Co.*, 83 S.D. 207, 211, 157 N.W.2d 19, 21 (1968)). "Since summary judgment presupposes there is no genuine issue of fact, findings of fact and conclusions of law are unnecessary." *Id.* (quoting *Wilson*, 83 S.D. at 211, 157 N.W.2d at 21). Thus, the circuit court's failure to provide these findings in and of itself does not constitute error.

Second, with regard to Appellants' claim that there were "numerous" issues of fact, Appellants actually mistake issues of law for issues of fact. The alleged "error" Appellants point to is not a question of fact—it is instead their disagreement with the way the circuit court interpreted the Property Management Agreement, which is an issue of law. *See McKie Ford Lincoln*, 2018 S.D. 14, ¶ 9 (citing *Detmers*, 2012 S.D. 35, ¶ 20). Appellants do not dispute that Benjamin sent an email on May 4, 2021, to UPM indicating the Tronneses were terminating the Property Management Agreement. (CR 238; CR 373 at ¶ 17). Instead, the first issue of "fact" alleged by Appellants to preclude summary judgment is Appellants' argument that UPM was entitled to compensation for managing the Property even though the Property Management Agreement was terminated in writing by Benjamin. The pertinent language of the Property Management Agreement provides:

> This agreement is automatically renewable, upon expiration, for annual periods **unless** terminated by either party giving 30-days' written notice to the other party in advance of such termination date. However, the termination of this agreement shall not affect the right of the Broker to receive leasing commissions or fees **which have accrued on the date specified in such notice** and have not been paid.

(APP 00012) (emphasis added).

In order for this Court to accept Appellants' position that UPM was entitled to commission for the entire 18-month Lease, it would have to totally ignore the actual language of the provision set forth *supra*. The provision clearly contemplates that the Property Management Agreement would automatically renew "**unless** terminated by either party giving 30-days' notice to the other party in advance of such termination date." *Id.* (Emphasis added). Furthermore, the provision goes on to state that the Broker is only entitled to those fees which have accrued "on the date specified in such notice." *Id.* If the broker were entitled to all fees for the entirety of the 18-month Lease regardless of the circumstances, there would be absolutely no reason to have included this provision. Simply put, this is a question of law, and not a question of fact. Because the plain language of the Property Management Agreement defeats Appellants' argument, the circuit court properly granted summary judgment in the Tronneses' favor.

Appellants then argue there is a "material issue of fact as to when the Property Management Agreement terminates." Again, this is not an issue of fact—it is a question of the interpretation of the agreement, and as such, a question of law. The language of the Property Management Agreement is clear and unambiguous. Benjamin emailed on May 4, 2023, and provided 30 days' notice that he, as principal, was terminating the agreement. They paid the fees that had accrued as of the June 4, 2021, termination date. There is no factual dispute at issue here.

Finally, as to Appellants' argument that the Tronneses breached the implied covenant of good faith and fair dealing with regard to the Property Management Agreement, as set forth *supra*, "[i]f the express language of a contract addresses an issue,

then there is no need to construe intent or supply implied terms" under the implied covenant. *Nygaard*, 2007 S.D. 34 at ¶ 10 (citations omitted). The implied covenant does not create a separate contract that "stands at odds with or in modification of the express language of the parties' agreement." *Id.* Here, the language explicitly gives either party the right to terminate the Property Management Agreement with 30-days' notice. The Tronneses cannot be found to have breached the implied covenant simply because they exercised their termination right under the Property Management Agreement.

Appellants have failed to point to any genuine dispute of material fact that would have precluded the circuit court from granting the Tronneses' Motion for Partial Summary Judgment. Therefore, this Court should affirm the ruling of the circuit court in dismissing UPM's claim for breach of the Property Management Agreement.

III. THE CIRCUIT COURT CORRECTLY DETERMINED THE TRONNESES ARE ENTITLED TO ATTORNEYS' FEES UNDER THE LISTING AGREEMENT

Appellants allege the Tronneses should not be allowed to recover their legal fees incurred defending against their unsuccessful claims under the Listing Agreement. South Dakota follows the American rule with regard to the recovery of attorneys' fees, which provides:

> [e]ach party bears the party's own attorney fees. However, attorney fees are allowed when there is a contractual agreement that the prevailing party is entitled to attorney fees or there is statutory authority authorizing an award of attorney fees.

Credit Collection Servs., Inc. v. Pesicka, 2006 S.D. 81, ¶ 6, 721 N.W.2d 474, 476–77 (citing *Crisman v. Determan Chiropractic, Inc.*, 2004 SD 103, ¶ 26, 687 N.W.2d 507, 513) (citations omitted) (emphasis added). Therefore, even if there is no statute authorizing attorneys' fees, they are recoverable if the parties' contract so provides. *Id.*

Here, the Listing Agreement provides for an award of attorneys' fees to the Tronneses, stating: "The Broker and Seller, as parties to this agreement, agree that a party in breach of any of the covenants or obligations arising under this contract shall be liable and responsible for attorneys' fees and costs that may result from enforcement thereof as against the party in breach." (APP 00003 at ¶ 7A). Throughout this litigation, the Tronneses were successful in defeating every single one of Appellants' claims against them.

However, Appellants contend the Tronneses are not entitled to their fees because Appellants did not "breach" the Listing Agreement. Thus, they argue they should not be held responsible for filing a wholly unsuccessful lawsuit, forcing the Tronneses to incur thousands of dollars in attorneys' fees to defend against it. Such an argument is contrary to both the language and intent of the agreement and would lead to an absurd result—that only Appellants had the potential to recover fees in this instance, despite failing in their claims against the Tronneses. *See Nelson v. Schellpfeffer*, 656 N.W.2d 740, 743 (S.D. 2003) (contract interpretation should not lead to an absurd result). When considering the entirety of the contract and the intent behind the same, the circuit court's construction and decision to award the Tronneses their attorneys' fees should be affirmed.

CONCLUSION

The circuit court's holdings should all be affirmed by this Court. First, the plain language of the Listing Agreement is clear. Certain conditions had to be met within certain timeframes in order to entitle URC to a commission, and simply put, URC did not meet those conditions. Second, Appellants have not met their burden to show the circuit court's findings with regard to the implied covenant of good faith and fair dealing were

clearly erroneous. Third, the circuit court did not err in granting partial summary judgment to the Tronneses on Appellants' claim for breach of the Property Management Agreement. Finally, the circuit court was correct in awarding the Tronneses their attorneys' fees for prevailing against Appellants' claims. For these reasons, the Tronneses respectfully request this Court affirm the circuit court in full.

REQUEST FOR ORAL ARGUMENT

Appellees respectfully requests oral argument in this case.

Dated: August 11, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I certify this Appellees' Brief complies with the type volume limitation provided for in South Dakota Codified Laws. This Brief for Appellees, excluding the table of contents, table of cases, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates contains 7,340 words. I have relied upon the word count of our word processing system as used to prepare this Brief for Appellees. The original Brief for Appellees and all copies are in compliance with this rule.

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CERTIFICATE OF SERVICE

I hereby certify on August 11, 2023, the **BRIEF OF APPELLEES BENJAMIN TRONNES AND LESLIE TRONNES** was filed through South Dakota Odyssey File and Serve which will send notification to:

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 30254

UHRE REALTY CORPORATION and UHRE PROPERTY MANAGEMENT CORPORATION

Plaintiffs and Appellants,

v.

BENJAMIN TRONNES and LESLIE TRONNES

Defendants and Appellees,

Appeal from the Circuit Court, Seventh Circuit
Pennington County, South Dakota

The Honorable Joshua K. Hendrickson
Circuit Judge

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Notice of Appeal filed February 9, 2023

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I. The Circuit Court Erred When It Denied URC's Claims for Breach of the Listing Agreement and Declaratory Judgment.

A. Pifke was "Procured" as a Purchaser During the Term of the Listing Agreement.

The Listing Agreement must be interpreted according to the words it actually uses. This Court recognizes that"[w]hen determining the meaning of a contract, 'effect will be given to the plain meaning of its words.'" *Lillibridge v. Meade School Dist. #46-1*, 2008 S.D. 17, ¶ 12, 746 N.W.2d 428, 432 (quoting *In re Dissolution of Midnight Star*, 2006 S.D. 98, ¶ 12, 724 N.W.2d 334, 337) (citation omitted). The Tronneses erroneously assert "URC would only be entitled to compensation if a purchaser was procured for the Property ***and*** an offer was accepted by the Seller *during the term of the Listing Agreement*," i.e., an "offer" must be made and accepted during the Listing Agreement. (Emphasis added). Critically, the Listing Agreement specifically used the term "procured," not "offer":

> If a purchaser is procured for the property by the Broker, by any other cooperating broker, by the Seller, or by any other person at the price and upon the terms stated above, or at any other price or upon any other terms accepted by the Seller during the term of this Agreement[.]

Uhre App. 0001. If the provision intended that both offer and acceptance must occur for a commission to be owed, it would have provided as much. Use of the term "procured," which has a much broader and different meaning than the traditional offer and acceptance, would have been unnecessary. This is especially true in real estate transactions, where the term "procured" has specific import. *See, e.g.*, 12 C.J.S. Brokers § The Tronnes' interpretation essentially deletes a term and inserts another, which interpretation was erroneously adopted by the circuit court. *See* Appellees' Brief at p.16 ("[I]t is clear that the

definition of 'procurement' is irrelevant here, which explains why the circuit court chose to disregard UPM and URC's proposed findings on the issue."). This outright dismissal of the term "procured" by the Tronneses—and the circuit court—was error.

When the actual words in the Listing Agreement are interpreted, they center around the term "procured." The Tronneses seemingly believe an "offer" is required because of the following phrase: "accepted by the Seller during the term of this Agreement." However, using ordinary grammatical construction, the language "accepted by the Seller" relates to the immediately preceding language: "or at any other price or upon any other terms." The Listing Agreement states the Broker may sell the Property for the list price ($475,900.00) and, due to the Seller signing the Listing Agreement, they consented to that sale price. If the terms of the sale vary from the Listing Agreement, then the provision acknowledges that Seller must accept those terms. This is consistent with Section 3 of the Listing Agreement where it states the terms of the sale are for the sum of $475,900.00 "or, *with Seller's consent*, for any sum or on other terms which price includes . . . ." (Emphasis added).

Here, Pifke was "procured" as a purchaser for the Property during the term of the Listing Agreement and upon terms set forth therein. The Tronneses proclaim this Court cannot consider extrinsic evidence of the meaning of "procured," but it is well within this Court's province to interpret words according to their ordinary meaning. The word "procured" is not defined in the Listing Agreement and, therefore, it must be interpreted according to its ordinary meaning. *Jackson v. Canyon Place Homeowner's Ass'n, Inc.*, 2007 S.D. 37, ¶ 11, 731 N.W.2d 210 ("[w]e may use statutes and dictionary definitions to determine the plain and ordinary meaning of undefined words"). Notably, the Tronneses have *never* offered an interpretation of this term at any point in this litigation.

Nevertheless, "procure" has been interpreted numerous times by various

jurisdictions, secondary authorities and, on at least one occasion, this Court. *See, e.g.*, *Mehlberg v. Redlin*, 96 N.W.2d 399, 401 (S.D. 1959) (interpreting the meaning of "procuring cause" relative to brokers).[1] Consistent therewith, Uhre brought about the specific result of purchasing the property due to his special efforts. Black's Law Dictionary (defining "Procure"); Merriam Webster, https://www.merriam-webster.com/dictionary/procure (2023); 12 C.J.S. Brokers § 258 (defining "procuring cause"); *Mehlberg*, 96 N.W.2d at 401. Even if the "final negotiations" occurred between Pifke and the Tronneses, it does not alter the fact Pifke was "procured" prior to October 31, 2020. 12 C.J.S. Brokers § 258 ("a broker may earn a commission when he is the effective cause of a sale which the broker is authorized to sell and it is not necessary that the broker participate in the final negotiations leading to the sale," and "under this standard, a broker 'procures' a buyer within the meaning of a listing agreement if the broker informs the customer of the property under the agreement and leads the customer to the seller"). Pifke was procured consistent within and upon the Listing Agreement's specific terms of purchase, which he was aware of from the online listing, and his offer was $25,000.00 more because he believed the Tronneses were going to breach the Lease.[2]

The circuit court erred in its interpretation of the Listing Agreement when it did not consider whether URC was the procuring cause for Pifke. Therefore, this Court should reverse the determination that a commission is not owed. At minimum, this Court should reverse and remand to enter findings of fact and conclusions of law consistent with the correct law for defining and determining "procuring cause."

---

[1] The Tronneses claim this case is irrelevant. However, this case is directly on point as it addresses the ordinary meaning of "procuring cause" as it relates to brokers.

[2] Benjamin Tronnes testified they would have accepted $475,000.00. TT 170:20-171:22.

B. Pifke Exercised an Option to Purchase the Property.

The Tronneses made an enforceable promise under the Listing Agreement to pay a commission to URC if the Property was "exchanged or optioned during the term of [the Listing Agreement] and said option is exercised[.]" URC and the Tronneses agreed to hold the Property off the market for the entire 18-month duration of the Lease, including the entirety of the favorable subsequent Spring and Summer listing season, and simultaneously granted Pifke the exclusive right to purchase within that same timeframe.

First, while the Tronneses claim that "[b]ecause the language of the Lease is unambiguous, no extrinsic evidence may vary the terms of the Lease," they never objected at trial to the introduction of any such evidence under the parole evidence rule. Regardless, the argument is irrelevant because URC does not argue, and did not argue in its Appellant Brief, that the Lease contained an option to purchase. That separate option to purchase was made between URC and Pifke, with the written consent of the Tronneses, prior to and independent of the Lease.

Second, the Tronneses falsely claim the longer lease period had nothing to do with a desire to have an option to purchase. On August 1, 2020, prior to the execution of the Lease, Uhre e-mailed to Pifke and stated as follows:

> Hi. I spoke to the owners and to keep the property off market for 18 months is $2,700/th including the pet fee. It's a matter of $2,100 extra a year and would give you peace of mind & enjoyment of the property for the full term. <u>And also to mention, that you could purchase the home at any time if you desired too which would likely be a lesser payment</u>. What do you think?

Tr. Ex. 9 (emphasis added). Pifke responded to the e-mail: "That's agreeable to us. Appreciate you working with us on it!" *Id.* Uhre e-mailed the Tronneses and stated, "Just had to ask." Leslie responded, "Nice!" Tr. Ex. 53. The Tronneses *selectively* cite (at p.14 n.5) to the transcript to support their position the Lease was not connected to the option to

purchase, but conveniently fail to include the testimony addressing the option that was given in the *same* answer, shown in bold below:

> Q (attorney Farley): So in terms of trade-off you thought that -- correct me if I am wrong, but you thought you're agreeing for a longer term and increased rent in order to keep the property off the listing.
>
> A (Pifke): Correct, yeah. **You know, at that point we had the other places we had looked at we didn't like as much, and so I think I was amenable to getting deal done even if there were terms a little less favorable than the initially quoted rent.**
>
> **Q (attorney Farley): And Josh mentions in the e-mail, again, that you could purchase the home at any time if you decided that's what you wanted to do?**
>
> **A (Pifke): Yeah.**

TT: 111:7-20. Further, Uhre also testified: "[Pifke] had expressed interest in buying the home too while he was in it. So that was an option for him to buy as well. While he was in the house he had an option to buy." TT: 41:11-14. Additionally, Uhre testified:

> Well, from the beginning with Pifke and the conversation and the Tronneses, he always had an option to buy, and throughout the - - prior to signing the lease, to executing to the lease, as well as into the lease agreement, there was constant request to try to procure Pifke into accepting an offer, and what's why I felt that I was owed my commission.

TT: 76:13-20. Finally, when the Tronneses threatened to list the Property on May 1, 2021, Pifke e-mailed Benjamin Tronnes and referenced the no-sale provision by stating: "Alethea & I would not have moved but for the above agreement, which I thought was negotiated in good faith."

Third, the Tronneses claim (at p. 15) "Benjamin testified that they did not have any discussions regarding any exclusivity with Pifke." This testimony, elicited during direct by his counsel, is nonsensical and contradicted by the record because the Lease expressly prohibited selling the Property during the term: "Owner agrees to hold property off market until February 1, 2022 or 60 days of the termination of lease and not take showings." That

provision of the Lease was entitled, "Sale of Property," confirming that it concerned selling the Property, not just marketing it.

Fourth, the Tronneses once again improperly interpret the Listing Agreement when they claim (at p. 15) the option had to be exercised "during the term of the Listing Agreement." Instead, the Listing Agreement states, "or optioned during the term of this contract and said option is exercised." The phrase "during the term of this contract" *only* modified the term "optioned." Thus, the Property must be optioned during the term of the Listing Agreement. However, the option can be exercised after the term of the Listing Agreement and a commission is still owed. For these reasons, the circuit court's analysis based on this interpretation was flawed as a matter of law.

Fifth, the Tronneses incorrectly argue the option contract was void because it was for an unlimited time. The option agreement was for the 18-month term of the Lease. This was acknowledged by the Lease's prohibition in selling or showing the Property. The option to purchase was limited to the duration of the Lease, either 18-months or 60 days from the termination of the same. In sum, URC asks that this Court reverse as to the issue of an option agreement.

C. The Tronneses Breached the Covenant of Good Faith and Fair Dealing in the Listing Agreement.

The circuit court erred when it concluded (at COL ¶¶ 45, 49) there was "[n]o evidence presented to support the claim that the Tronneses lacked good faith in their interactions with URC or UPM[.]" Uhre App. 00041 (emphasis added). The record was replete with evidence indicating the Tronneses not only breached the covenant of good faith and fair dealing, but that they never even intended to fulfill the terms of the Listing Agreement.

In January of 2021, the Tronneses, without providing any advance notice to Uhre or Pifke, showed up at the Property, during the tail period of the Listing Agreement. TT 117:12-25. Pifke testified that Benjamin told him, during that surprise and undisclosed visit, they were interested in selling the Property to him. TT 118:7-18; Tr. Ex. 23. The Tronneses never disclosed this meeting to Uhre. Instead, Benjamin Tronnes, a licensed attorney, e-mailed Pifke on January 23, 2021, and stated, in part: "[a]s we discussed, we'd love it if you bought our home from us. We plan on listing the house again this spring for $499,000. If we can do this without a realtor, we could sell to you for $475,000." Tr. Ex. 23.

Importantly, the Listing Agreement states a commission is owed during the tail period for any sale to a person who was shown the Property, like Pifke was as he was shown the Property prior to leasing and was living there. Yet, in the e-mail following the secret visit, the Tronneses state they could sell the property to him "without a realtor," which was not only untrue because URC was unequivocally owed a commission if the sale occurred at this time and during the tail period, but it also evidences a secret and deceitful intention to avoid communicating with Uhre.

Ultimately, Pifke happened to make an offer one day after the tail period and the Tronneses did not pay the commission to URC. In fact, Pifke testified he made an offer $25,000 above the list price because he believed the Tronneses intended to breach the Lease Agreement and he would not have the resources to challenge it. In the end, the Tronneses pocketed the additional $25,000.00 and the commission owed to URC for a windfall of approximately $50,000.00.

II. The Circuit Court Erred When Granting the Tronnes' Motion for Summary Judgment on UPM's Claim for Breach of the Management Agreement.

When a trial court "merely stat[es] there were no genuine issues of material fact, [this Court] [is] left to ascertain if any such facts exist when viewed in a light most favorably to [] the nonmoving party."[3] *Paint Brush Corp., Parts Brush Div. v. Neu*, 1999 S.D. 120, ¶ 37, 599 N.W.2d 384, 393. Questions concerning the interpretation of the Management Agreement naturally must be resolved before questions of fact are, but both questions are still subject to review. While "[c]ontract interpretation is a question of law reviewed de novo," whether an individual's conduct constitutes a breach of contract is a question of fact. *Poeppel v. Lester*, 2013 S.D. 17, ¶ 16, 827 N.W.2d 580, 584; *Moe v. John Deere, Co.*, 516 N.W.2d 332, 335 (S.D. 1994) (citations omitted). "When reviewing a grant of summary judgment, [the Court is] not bound by the trial court's factual findings, but rather must undertake an independent review of the record." *Toben v. Jeske*, 2006 S.D. 57, ¶ 11, 718 N.W.2d 32, 35 (citation omitted).

The Management Agreement's provision concerning the right to payment of accrued compensation regardless of termination is consistent with the Management Agreement's language as a whole. *Poeppel*, 2013 S.D. 17, ¶ 16, 827 N.W.2d at 584 ("In order to ascertain the terms and conditions of a contract, we examine the contract as a whole and give words their plain and ordinary meaning."). The Management Agreement does not say compensation is accrued upon the receipt of a monthly rent check. Rather, it expressly ties compensation to the "consummation" of lease negotiations: Owner recognizes Broker as agent in any negotiations relative to said property or any part

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[3] UPM does not claim the "circuit court erred" by not offering "findings or conclusions during its oral ruling." *See* Tronnes Brief at 20.

thereof, which may have been initiated during the term hereof, ***and if consummated, shall compensate Broker*** in accordance with the rates hereinafter set forth." Uhre App. 00012 (emphasis added). In the same manner that the accrual of a claim is tied to one event, so is compensation under the Management Agreement. *See Huron Center, Inc. v. Henry Carlson Co.*, 2002 S.D. 103, ¶ 11, 650 N.W.2d 544, 548 ("While the questions of what constitutes accrual is one of law, the question of when accrual occurred is one of fact generally reserved for trial.").

The Tronnes' assertion to the contrary incorrectly presupposes the property is *always* leased. Appellees' Brief at p.22. The Management Agreement was active even when the Property was not leased and even then, UPM was required to secure a tenant and lease. Uhre App. 00013 ("the broker shall advertise the availability for rent of the property or any part thereof and to display 'For Rent' or 'For Lease' signs thereon; to show property to prospective tenants."). However, if no lease was consummated, no compensation accrued. *Id.* at p.12. The Tronnes' interpretation is inconsistent with the Management Agreement's purpose because it would allow termination of the same immediately following what could be expansive "leasing" efforts by UPM to deprive them of any compensation for doing so. *Id.* ("In consideration of the management and leasing functions to be performed by Broker under this agreement, Owner agrees to pay Broker a fee or fees for services rendered").

UPM maintains that under the terms of the Management Agreement its termination could only occur on September 1, 2021, and that they would be entitled to all "accrued" compensation, regardless of termination. The same being because the Management Agreement was set in one-year increments with automatic annual renewal. *Id.* Automatic renewal would continue to occur each September, importantly, "***unless***

terminated by either party giving 30-days' written notice to the other party in advance of such termination date." *Id.* (emphasis added). Thus, the notice terminates automatic renewal, not the Management Agreement in and of itself. This is consistent with the fact that most often, leases are for one-year periods. In fact, the Lease was originally 12 months, prior to Uhre's efforts to secure higher rent and a longer term in exchange for not listing the Property during the Lease, giving Pifke the option of purchasing. Tr. Exs. 4, 8.

Furthermore, the underlying rationale for the Tronnes' surreptitious and dishonest conduct in bringing about and causing the termination of the Lease and the Management Agreement is a discernible goal to prevent UPM from collecting that agreed to. Indeed, "[g]ood faith is derived from the transaction and conduct of the parties. The meaning of good faith "varies with the context and emphasizes faithfulness to an agreed common purpose and consistent with the justified expectations of the other party." *Garrett v. BankWest, Inc.*, 459 N.W.2d 833, 841 (S.D. 1990). Whether the Tronnes' conduct in bringing about and causing the termination of the Lease and the Management Agreement is a breach of the covenant of good faith and fair dealing is a question for the finder of fact, not summary judgment. *See Moe*, 516 N.W.2d at 335 (citations omitted).

Importantly, "[l]ack of good faith may be evidenced by ***various conduct***, such as 'evasion of the spirit of the deal; abuse of power to determine compliance; and, interference with or failure to cooperate in the other party's performance.'" *Zochert v. Protective Life Ins. Co.*, 2018 S.D. 84, ¶ 22, 921 N.W.2d 479, 486 (citations omitted) (emphasis added). In January of 2021, the Tronneses asked Uhre for a copy of the Lease, but conveniently omitted they were reviewing the same in anticipation of a surprise visit and offer to Pifke for purchase of the Property "without a realtor," that could be acted upon up until the end of April, the same time the Listing Agreement's tail period expired.

Uhre App. 00001; Tr. Exs. 23, 26. As the property manager, UPM was responsible for communicating with Pifke and Uhre had always been the sole individual to do so. *See, e.g.*, Tr. Exs. 4, 9, 24. Considering a tenant's rights to the quiet enjoyment of the home they rent, the Tronneses failing to contact UPM about whether they could or should visit the Property unannounced further discounts their credibility. *See* SDCL § 43-32-6; Uhre App. 00012 (requiring UPM to "disclose all known material facts about the property which could affect a tenant's use or enjoyment of the property"). After the Tronnes' visit, they still did not disclose any information about the same to UPM. Instead, they continued in their efforts to try and sell the Property "without a realtor" to Pifke. Tr. Ex. 26. When Pifke again rejected the offer and reminded Ben Tronnes of the Lease's terms, Ben Tronnes said he would talk to Uhre, but again, did not do so. Tr. Ex. 27. Then, when the Tronnes' aggressive tactics prevailed in producing an offer from Pifke, they waited until the purchase agreement was fully executed before sending an unspecific e-mail to Uhre about the transaction. Tr. Ex. 60.

Although the circuit court's ruling was not elaborative, it can be surmised that disputes concerning the intent and reasoning for the Tronnes' conduct was resolved in their favor. However, the record does not support Ben Tronnes' claim he was simply unaware of his legal obligations. "A person's declared intentions may be discounted when they conflict with the facts." *State ex rel. Jealous of Him v. Mills*, 2001 S.D. 65, ¶ 10, 627 N.W.2d 790, 793) (citations omitted). Not only was Ben Tronnes an experienced attorney, the Tronneses were contemplating the nature of their legal obligations because they sought a copy of the Lease, but still inexplicably forgot about obligations thereunder until Pifke, a layperson, reminded them. Tr. Ex. 27. Moreover, the Tronnes' admission that money was *the* motivating factor for communicating with

Pifke supports their intent to deprive UPM and URC of contractual benefits. Tronnes Brief at 19 ("the Tronneses wanted to sell the home as quickly as possible"); TT 145:17-23 (I don't believe we were quite getting our mortgage payments back on rent, and so we were bleeding a little bit there").

Even assuming, *arguendo*, the Tronneses forgot about three separate contracts, "ignorance of the contents of a written contract is not a ground for relief from liability." *In re Est. of Smid*, 2008 S.D. 82, ¶ 38, 756 N.W.2d 1, 14 (citation omitted). It is well-settled that "[o]ne who accepts a contract is conclusively presumed to know its contents and to assent to them, in the absence of fraud, misrepresentation or other wrongful act by another contracting party." *Id.* (citation omitted). "[P]ermit[ting] a party, when sued on a written contract, . . . to admit that he signed it but did not read it or know its stipulations would absolutely destroy the value of all contracts." *Id.* (citation omitted).

The Tronnes knew the Property was subject to an 18-month Lease that prevented selling the Property. This is the same Lease that entitled UPM to compensation upon "its consummation." Despite this, in furtherance of the goal to interfere with UPM contractual rights, the Tronneses surreptitiously and dishonestly elicited an offer for the Property with the expressly stated purpose of doing so without Uhre's knowledge of involvement. At minimum, there is genuine disputed of material fact as to *why* the Tronneses kept Uhre in the dark for several months. Indeed, this Court has stated that intent "[o]bviously . . . "presents a question of fact. This is elementary!" *Setliff v. Akins*, 2000 S.D. 124, ¶ 30, 616 N.W.2d 878, 888 (reversing summary judgment). The meaning of good faith "varies with the context" and context is certainly important considering the Lease's fixed-term that prevented a sale and the Listing Agreement. Therefore, this Court should reverse and remand for a trial on UPM's breach of contract claim.

III. The Circuit Court Erred When it Awarded Attorneys' Fees to the Tronneses Under the Listing Agreement.

"The party requesting an award of attorneys' fees has the burden to show its basis by a preponderance of the evidence." *Endres v. Endres*, 2022 S.D. 80, ¶ 36, 984 N.W.2d 139, 150 (quoting *Stern Oil Co., Inc. v. Brown*, 2018 S.D. 15, ¶ 44, 908 N.W.2d 144, 157). Likewise, failing to cite to authority supporting an argument in a brief to this Court is considered a waiver of that argument. *See Hart v. Miller*, 2000 S.D. 53, ¶ 42, 609 N.W.2d 138, 148 (citing SDCL § 15-26A-60(6)). In contravention of these two principles, Appellees' opposition on the issue regarding the circuit court's award of attorneys' fees rests entirely upon conclusory assertions with no analysis or application to fact or law.

First, the Tronneses assert that denying them attorneys' fees is contrary to the language of the Listing Agreement, but do not explain why, let alone cite to any authority in support of the proposition. Appellees' Brief at p.24. Their failure to cite authority in support of the position constitutes a waiver of the argument and the Court need not evaluate the issue further. Even so, the insinuation URC has contrivedly inserted the term "breach" is contradicted by the provision's plain language, which twice clarifies the requirement of breach. *Id.* ("Appellants contend the Tronneses are not entitled to their fees because Appellants did not 'breach' the Listing Agreement."); Uhre App. 00003 There is no other conclusion to be reached from this language other than that "party in breach" is the party that "shall be liable and responsible for attorneys' fees and costs." Uhre App. 00003.

Second, the singular legal authority the Tronneses purport to rely on is a contract interpretation principle, related to their assertion their responsibility for attorneys' fees is

"contrary" to the "intent of the agreement." Appellees' Brief at 24 (citing *Nelson v. Schellpfeffer*, 2003 S.D. 7, ¶ 8, 656 N.W.2d 740, 743). However, the Tronneses never asserted the attorneys' fees provision was ambiguous at trial; rather, they proposed the accepted conclusion of law that the Listing Agreement was unambiguous. *See id.* at 11 ("neither party argued that the Listing Agreement was ambiguous and in fact, the circuit court specifically found the Listing Agreement was **not** ambiguous" (emphasis in original)); *see also, e.g., Liebig v. Kirchoff,* 2014 S.D. 53, ¶ 35, 851 N.W.2d 743, 752 ("We have consistently held that this Court may not review theories argued for the first time on appeal.") (citation omitted). Once more, the Tronneses fail to explain why construction supports their position, including what "intent" they refer to. The argument should be disregarded for its lack of support in the law and in the record.

Even assuming, *arguendo*, the circuit court did and could construe the attorneys' fees provision,[4] *and* this Court overlooks Appellees' multiple failures to cite authority and rationalize their arguments, the conclusion is the same. This Court recognizes that intent is determined by "the language that the parties used in the contract." *See, e.g., Tri-City Associates, L.P. v. Belmont, Inc.*, 2014 S.D. 23, ¶ 11, 845 N.W.2d 911, 915 (citation omitted). Here, the Court does not need to look beyond the language that twice identifies a party in breach as the one liable for attorneys' fees. To that end, responsibility for one's attorneys' fees, regardless of success, is not an "absurd result." In fact, this is the *default* rule unless a contract or statute provides otherwise, neither of which is the case here. *Endres*, 2022 S.D. 80, ¶ 36, 984 N.W.2d at 150. URC's position is wholly

[4] The same would be error given the Conclusion of Law that the Listing Agreement is unambiguous and Appellees' failure to make such an argument prior to appeal.

consistent with the Listing Agreement and South Dakota's long-standing commitment to the American Rule.

The Listing Agreement unequivocally authorizes an award of attorneys' fees against a party in breach and at no other time. The Tronnes' deferral to an emotional plea about why they should not bear responsibility for their attorneys' fees, rather than black letter law and the language of the contract, is representative of the total lack of justification for their award of attorneys' fees. Appellees' Brief at p.24 ("forcing the Tronneses to incur thousands of dollars in attorneys' fees to defend a "wholly unsuccessful lawsuit"). This Court should reverse the circuit court's ruling.

CONCLUSION

For the foregoing reasons, Appellants ask that this Court reverse and remand to the circuit court.

Dated this 11th day of September, 2023.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellants' Reply Brief does not exceed the word limit set forth in SDCL § 15-26A-66, said Reply Brief containing 4,717 words, exclusive of the table of contents, table of authorities, and any certificates of counsel.

/s/ Jonathan A. Heber
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