IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 30813

SOUTH DAKOTA BOARD OF REGENTS,
as the Governing Board for
DAKOTA STATE UNIVERSITY,

Plaintiff – Appellee,

vs.

MADISON HOUSING AND
REDEVELOPMENT COMMISSION,

Defendant – Appellant.

Appeal from the Third Judicial Circuit,
Lake County, South Dakota.
The Hon. Patrick T. Pardy Judge, presiding

APPELLANT'S BRIEF

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Notice of Appeal filed August 29, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES:

PRELIMINARY STATEMENT

References to Dakota State University, acting as a post-secondary institution governed by the South Dakota Board of Regents, shall be referred to herein as "DSU" or the "university." The Madison Housing and Redevelopment Commission, a political subdivision of the State of South Dakota providing housing and development services to the Madison, South Dakota area, shall be referred to herein as "MHRC."

References to the Settled Record are designated as "SR," and refers to documents contained in the Settled Record of the case, and will reference the page number as prescribed by the Clerk's Certificate filed October 27, 2023. References to the "plaintiff" are used interchangeably with the "Appellee," both of which refer to Dakota State University, and references to the "defendant" are used interchangeably with the "Appellant," both of which refer to Madison Housing and Redevelopment Commission.

JURISDICTIONAL STATEMENT

The defendant has the right to request review the trial court's judgment and order pursuant to SDCL 15-26A-3 and SDCL 15-26A-6.

LEGAL ISSUES

I. Whether the trial court erred in granting any or all of the Appellee's motion for summary judgment relief, either because the court incorrectly applied the law of contracts and single writings, or because the court should have denied the motion to take further evidence on the issues presented?

The most relevant cases related to this issue are as follows:

a. Lillibridge v. Meade Sch. Dist. #46-1, 2008 SD 17, 12, 746 N.W.2d 428, 432

b. Jermar Properties, LLC v. Lamar Advert. Co., 2015 SD 26, 864 N.W.2d 1

c. Edgar v. Mills, 2017 SD 7, 892 N.W.2d 223

The most relevant statutory provisions related to this issue is the following:

a. SDCL 53-8-7

II. Whether the trial court erred in refusing to grant any or all of the Appellant's motion for summary judgment?

The most relevant cases related to this issue are as follows:

a. Tri-City Assocs., L.P. v. Belmont, Inc., 2014 SD 23, 845 N.W.2d 911

b. Kramer v. William F. Murphy Self-Declaration of Tr., 2012 S.D. 45, 816 N.W.2d 813

c. Jermar Properties, LLC v. Lamar Advert. Co., 2015 S.D. 26, 864 N.W.2d 1

III. Whether, if granting summary judgment as ordered in favor the Appellee was appropriate, the trial court erred in refusing to adopt the plain language of the parties' writing concerning the appropriate calculation of an imputed "reserve account"?

The most relevant cases related to this issue are as follows:

a. Northland Capital Fin. Servs., LLC v. Robinson, 2022 S.D. 32, 976 N.W.2d 252

b. Edgar v. Mill, 2017 S.D. 7, 892 N.W.2d 223

STATEMENT OF THE CASE AND FACTS CASE HISTORY

This is an action regarding multiple leases which contained an option to purchase the same real estate in favor of the Appellee and contained in only the initial lease other

relevant terms concerning the Appellant keeping certain monies in reserve to be credited back towards the purchase price. Additionally, there contained language concerning a certain mortgage or mortgages which created the basis for calculation of the purchase price between the parties. All activities and instruments were executed and concerned parties in the city of Madison, Lake County, South Dakota. Action was first commenced by admission of service of a summons and complaint by the plaintiff on April 29, 2022, in the Third Judicial Circuit, Hon. Patrick T. Pardy, Judge, presiding.

The court issued partial summary judgment, upon cross motions for summary judgment, granting a number of the Plaintiff's claims and denying the Defendant's claim on November 21, 2023.

A court trial was held on June 28, 2024, where the Court returned a Judgment and Order in favor of the Plaintiff's remaining claims, granting a judgment against the Defendant in the amount of $23,310.79, and ordering title to the real property be delivered to the Plaintiff. Said Judgment and Order was entered on July 23, 2024. Defendant appeals from the Judgment and Order by service and filing a notice of appeal on August 29, 2024.

STATEMENT OF FACTS

This dispute arises from various contracts, fashioned as leases, which contain certain provisions for the Tenant (Appellant) to purchase the leased property, under certain terms and conditions. The Appellee, Dakota State University, acting as a post-secondary institution governed by the South Dakota Board of Regents, and the Appellant, the Madison Housing and Redevelopment Commission, a political subdivision of the

State of South Dakota providing housing and development services to the Madison, South Dakota area, entered into an agreement on October 30, 2000 for MHRC to lease to DSU two 8 unit apartment buildings in the City of Madison, SD. SR at 679. Subsequent leases were executed after the expiration of the first lease document, which contained materially different language, and omitted certain material language and provisions to the first document entered into pertaining to these two parties' relationship. These leases pertain to the calculation of DSU's option to purchase the property at a later date of DSU's choosing, and what credit would be given to DSU, and what monies would be required to be held in a "reserve" account by MHRC, and later credited towards DSU's purchase of the property outright.

The original lease (SR679-SR683) (hereinafter referred to as "original lease" or "2000 lease") called for DSU to pay as rent for the property $103,680 annually, paid monthly commencing August 1, 2001. The original lease contains recitals the rent is premised upon construction costs of $1,272,000.00 incurred by MHRC and an initial financing rate of 6.25%. Id. Further, the lease provided that if lower costs or financing rates permitted a lower annual payment by MHRC, the difference between $103,680 and the lower payment would be deposited in a "reserve account" which would be returned to DSU if they did not renew the lease or given as credit to DSU should they exercise an option to purchase later contained in the original lease. Id. The lease further provided that if DSU exercised a right of renewal under another section of the lease, which called for a renewal for a "like term" and that the rental rate would be adjusted to reflect MHRC's "actual costs associated with its ownership and administration of the facility."

The original lease contains the relevant provision regarding DSU's option to buy as follows: "[DSU] shall have the option to purchase the leased premises at any time after the initial term of this lease for an amount equal to the then existing mortgage principal and interest balance, upon reasonable notice to the owner." Id. The original lease contains no restriction on MHRC re-financing its mortgage balance, nor any mention of what should happen should MHRC re-finance the property, and change it's initial obligation that the lease contemplates. Id.

DSU took possession of the property pursuant to this lease without incident in August of 2001, and according to both parties, paid rent as proscribed on time and without incident. SR 532, SR 37, SR 53. The rent was kept the same as calculated in the original lease at $ 103,680. SR 786-879. Further, MHRC did not deposit monies that were called for to be deposited into any "reserve account." Id.

In July of 2011, the parties entered into another agreement titled "Housing Lease," (hereinafter referred to as "2011 lease") pertaining to the same subject property, which was to come into effect August 1, 2011 for a term of three years to July 31, 2014. SR 684-689. The 2011 lease provided for the same rental payment, but contained different terms shifting obligations for maintenance upon the property and also contained different renewal language from the original lease, calling for automatic renewal of the lease for successive two-year terms. Id. The lease also contained substantially the same language concerning an option in favor of DSU to purchase the lease premises "at any time for an amount equal to the then existing mortgage principal and interest balance," but contained no provision concerning any restriction on re-financing, nor reference to which mortgage the term refers to. Id. Notably, the lease contains no term, nor mention

of re-integrating any prior terms of the original (2000) lease, and does not contain any provision regarding the duty of MHRC to keep and hold a "reserve account." Id. Neither party disputes that DSU paid the called for rent on time and met its obligations thereto. SR. 786-879.

In July of 2014, the parties entered into another lease agreement, to be effective August 1, 2014 to July 31, 2016 (hereinafter referred to as the "2014 lease"). SR 690-695. Notably, this lease kept the rental amount fixed at $103,680 annually paid by DSU, and kept materially similar terms as the 2011 lease including the option to purchase as outlined previously, and also omits any mention of which mortgage balance said option was referenced to, and omitted any mention of any duty of MHRC to keep and hold a "reserve account." Id. Neither party disputes that DSU paid the called for rent on time and met its obligations thereto. SR. 786-879.

In May of 2017, the parties entered into another lease agreement, effective from August 1, 2017 until July 31, 2020 (hereinafter referred to as the "2017 lease"). SR 696-701. Notably, this lease is the next writing between these parties, indicating that during the term of August 1, 2016, until May of 2017, there was no writing concerning the parties ongoing relationship. Id. The 2017 lease contained similar provisions on duties of the parties to each other, including the option to purchase on similar terms, and an absence of any mention of a reserve clause, but notably, did increase the yearly annual payments of rent from $103,680 annually to $135,000 in year one, $146,000 in year two, and $152,000 in year 3. Id. By all accounts, DSU paid these amounts proscribed on time and without incident. SR 786-879.

That on or about April 6, 2020, DSU gave MHRC notice expressing its desire to go forward with the purchase of the property pursuant to its option contained in the various leases. SR 452.

The parties were unable to agree as to the final purchase price under the terms of the various leases, and as such, entered into an addendum in September of 2020 continuing the lease relationship, acknowledging that the parties were continuing to negotiate the purchase price. SR 702-703. That addendum acknowledged in recitals that the parties "entered into a Lease that was changed a number of times." Id. The addendum called for DSU to pay $14,384.34 monthly to continue to lease the premises, and followed the terms of the 2017 lease as to other matters. Id. A second addendum to the lease was entered into in January of 2021 and effective until May 7, 2021, continuing the terms of the first addendum from September of 2020. SR704-705. The parties do not dispute that DSU paid the amounts proscribed during the pendency of the September 2020 and January 2021 addendums. SR 786-879.

After May of 2021, DSU continued to pay $14,384.34 monthly, and continued to keep possession of the property, absent any writing or agreement of the parties. SR 786-879. Ultimately, MHRC issued a Notice to Quit upon DSU on March 25, 2022, allowing DSU until May 31,2022 to quit and remove from said property and deliver possession to MHRC. SR 442-451. DSU initiated a lawsuit to seek to enforce its option to purchase, including all terms contained in the 2000 lease agreement on April 29, 2022. SR. 1-37. MHRC answered and denied the allegations that it was bound to keep any reserve account, and alleging that it was improper to fix the purchase price amount to the 2000 mortgage documents, but instead to follow the plain language of the option that said

purchase price should be the "then existing mortgage principal and interest balance." SR 38-55.

Depositions of the then sitting board members of MHRC were taken on August 25, 2022. SR 56-62. Those board members (Tim Walburg, Tom Bernard, Scott Johnson and Marie Lohsandt) testified as to their current knowledge of the arrangement with DSU. Largely, the board members testified to the fact that the 2000 lease had been negotiated and entered into prior to their involvement with MHRC, and acknowledged that they were not aware of any reserve account being kept by MHRC during their tenure as board members. SR 102-420.

A deposition of a now-sitting Circuit Judge Chris Giles (hereinafter "Giles"), a former member of the board of directors of MHRC, was taken on April 14, 2023. SR 74. In his deposition, Judge Giles testified that he also had not been present when the 2000 lease was negotiated, but had been involved in negotiation as a board member during later leases, in particular, to his recollection the 2014 and/or 2017 leases. SR 532-626. He also offered his recollection that MHRC had treated the negotiations as negotiating new leases and agreements, and not agreements serving as continuations of the 2000 lease. Id. Giles testified to many facets of the agreement, but stated that it was his understanding that DSU's option, as he understood it, was to allow for DSU to buy the subject property "at whatever debt or obligation was outstanding" to MHRC when DSU exercised their option. Id.

After depositions were completed, both parties moved for summary judgment regarding, amongst other things, whether the various lease agreements were part of one continuous transaction, or if the various leases should be read as independent agreements.

SR 102-420 and SR 421-423. After submission of statements of undisputed material facts, briefs, and affidavits in support of each parties' respective opinion, a hearing was held on November 7, 2023. SR 511. The trial court entered a memorandum decision on November 8, 2023, finding that the multiple lease agreements should be read as one continuous document, that MHRC had the duty to keep a reserve account, that the failure to keep a reserve account constituted a breach of the implied duty of good faith and fair dealing, and that the phrase "then existing mortgage principal and interest balance" refers to the initial mortgage that MHRC took out on the property and not the refinanced mortgage. Other requests for relief by the Plaintiff (DSU), and all requests for relief by the Defendant (MHRC), were denied. SR 522-523.

MHRC asked for an intermediate appeal on the issue of whether summary judgment should have been granted by the trial court, which was denied. SR 644.

A court trial was conducted on the outstanding issues of fact, under the rules and parameters of the trial court's summary judgment decision on June 28, 2024. SR 660. At that trial, DSU put on testimony of its calculation of the buyout agreement, using the original financing obligations, amortized out to the date of trial, and using the money actually paid by DSU to MHRC over the lifetime of the lease arrangements. SR 706-711. This calculation included a calculation of the credit owed back to DSU based upon the actual money paid by DSU less the imputed costs of financing (again imputed to the original financing documents). Id. MHRC at trial urged the trial court to use the exact language from the 2000 lease agreement when determining the value of the credit for the "reserve account," instead of the actual rental rate or monies actually paid by DSU to calculate the reserve account credit. SR 735-785. The trial court adopted DSU's

calculations for the value of the reserve account, which credited DSU for the increased amount of rent paid over the original lease amounts called for by the 2000 lease which explicated how the parties would calculate the reserve account amounts. SR 880-881.

After trial, a Judgment and Order was entered in favor of DSU. SR 880-881. Each party filed proposed findings of fact and conclusions of law. DSU's were accepted and MHRC's were denied by the trial court. SR 882-888 and SR 891-894.

MHRC filed a notice of appeal on August 29, 2024. SR 906-935.

STANDARD OF REVIEW

1. The Supreme Court must review a trial court's decision whether to grant summary judgment *de novo*. Barr v. Cole, 998 N.W.2d 343. Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admission on file, together with affidavits show that there is no genuine issue to as to any material fact and that the moving party is entitled to a judgment as a matter of law. Tammen v. Tronvold, 2021 SD 56, 965 N.W.2d 161 (quoting SDCL 15-6-56(c)). "The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party . . . . if there exists any basis which supports the ruling of the trial court, affirmance of a summary judgment is proper." Id. Further, "entry of summary judgment is mandated against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." State v. BP plc, 2020 SD 47, 948 N.W.2d 45.

2. Regarding findings of fact of the trial court, the appellate court reviews those findings under the "clearly erroneous" standard of review. Conti v. Conti, 2021 SD

62, 967 N.W.2d 10. The Supreme Court may only overturn the trial court's findings of fact on appeal when a complete review of the evidence leaves the appellate court with a definite and firm conviction that a mistake has been made. Id. (quoting Schieffer v. Schieffer, 2013 SD 11, 826 N.W.2d 627 (internal citations omitted)).

ARGUMENT

1. Did the trial court err in granting summary judgment in favor of the Appellee, in particular finding that the various lease agreements constituted one writing of a single, continuous transaction?

Appellant contends that the court erred in granting summary judgment in favor of DSU regarding the motion for summary judgment brought by DSU. The trial court made a fundamental decision that flows through the remainder of the trial court's decision, namely that the various lease agreements should be construed as a single continuous document. SR 512. MHRC contends that the court rendered this decision in error, and if that error is overturned, the remainder issues found in favor of DSU must be erroneous, as they rest on that fundamental issue.

a. Whether the various lease agreements should be read as a single, continuous transaction, or as separately bargained for, independent agreements.

The trial court relied upon the assertion that the court must apply the rule of construction of contracts in the instant dispute, and as such must ascertain and give effect to the mutual intention of the parties. SR 516 (quoting Talley v. Talley, 566 N.W.2d 846, 1997 SD 88 (internal citations omitted). However, when "the meaning of contractual language is plain and unambiguous, construction is not necessary." Ziegler Furniture & Funeral Home, Inc. V. Cicmanec, 2006 SD 6, 14, 709 N.W.2d 350, at 356. Construction is only necessary or appropriate when the contract is ambiguous. Id. When the language

of the contract is unambiguous, it is the court's duty to declare and enforce the contract as written. Lillibridge v. Meade Sch. Dist. #46-1, 2008 SD 17, 746 N.W.2d 428, 432. This stands for the proposition that in this case, the trial court applying construction to even consider that the various contracts must be read together was inappropriate. In reviewing each contract, each is unambiguous as to what is being contracted for, the parties involved, the term that each lease agreement calls for, and that DSU had an option to purchase property of MHRC. Because no ambiguity exists, there should be no consideration of older, expired leases by the trial court.

However, if the court did correctly determine some ambiguity in the agreements at issue, it is an error to determine that all of the various agreements can and should be read together as memorializing a single transaction. The court in its analysis, notes that the leases from 2001 to 2017 do not reference each other. SR 517. The trial court relies upon a 2020 Addendum to the leases which reference the 2000 and 2017 lease, but fails to mention that the text of that 2020 Addendum specifically states "The parties acknowledge that they are in the process of negotiating a settlement, and any statements made, whether set forth in this document or otherwise shall not be used against the party making said statement in the event that the parties are not able to successfully negotiate a conclusion to this matter." SR702, see SR 517. The parties themselves agreed that any said references would not be applied against any party, and thus agreed that such analysis of internal references should not be used against either party.

The only other arguable internal reference the agreements have in common is the option to purchase granted to DSU. However, these terms are mere recitations that DSU would have an option to purchase subject property, but contain absolutely no references

to other leases, mortgages or mortgage amounts, amortization agreements or the like. SR 679-705.

The trial court relies largely on Kramer v. William F. Murphy Self-Declaration of Tr., and Baker v. Wilburn, in its analysis of whether the contracts should be read together as a single contract. Kramer v. William F. Murphy Self-Declaration of Tr., 2012 SD 45, 816 N.W.2d 813., Baker v. Wilburn, 456 N.W.2d 306. Baker is cited as standing for the proposition that when internal references in several writing are made, and connects the documents, that the writings will memorialize a single transaction as long as they involve the same subject matter. Baker v. Wilburn, 456 N.W.2d 306. In this case, there is no internal reference in any of the various agreements to each other, and the 2020 lease acknowledges the dispute amongst the parties about this issue while specifically agreeing that neither party shall have negative inferences made against them while they were attempting to resolve their dispute. As such, no such internal references can be found or should be considered.

MHRC acknowledges that the parties to the various leases are the same, and that generally, a lease interest granted to DSU for compensation were involved in the agreements. However, it is critical that despite the language of the 2000 lease allowing for renewal for a "like term" the parties went forward and change materially the agreement by modifying the grant of the lease term from ten (10) years to only three (3) years. Other material terms changed as well, such as the excising of the term regarding the keeping and holding of the "reserve clause," which former MHRC board member Giles testified in multiple places at his deposition that he believed was purposeful, and not a mere omission. SR 532-627. Thus, MHRC argues that it is not in question as to

whether consideration for the agreements changed between at least the 2001 to 2011 lease. Other courts have recognized that when consideration for a lease in changed in later agreements, that the initial lease and later agreements should not be considered "one contract." Pitchblack Oil, LLC v. Hess Bakken Invs. II, LLC, 949 F.3d 424, 431 (8th Cir. 2020) (applying North Dakota Law); Lillibridge v. Mesa Petroleum Co., 907 F.2d 1030, 1036 (10th Cir. 1990); Sunac Petroleum Corp. v. Parkes, 416 S.W.2d 798, 802 (Tex. 1967); see also Sawyer v. Guthrie, 215 F. Supp. 2d 1254, 1265 n.5 (D. Wyo. 2002) (stating that lease was not a renewal but instead a new, separate lease because, among other things, the duration of the lease changed and the consideration changed). Additionally, between the 2000 and 2011 lease, other items and terms changed, such as MHRC's right to terminate the lease being defined (and silent on that issue in the 2000 lease), as well as the term of renewal called for being modified from ten years to three years. The court found that the 2011 and later leases are renewals or extensions of the 2000 lease. Other courts have noted when considering renewals that a renewal or extension does not occur when the later in time contract has different terms. Williams Petroleum Co. v. Midland Cooperatives, Inc, 679 F.2d 815, 819 (10th Cir. 1982). Thus, the later agreement is a separate contract and should render the prior contract or contracts retired.

Additionally, there exists in this relationship between the parties a gap in time where no lease agreement was in place, which stands against the proposition that this was a continuous transaction. In particular, the 2014 lease between the parties noted that it was an agreement for two (2) years, terminating in July of 2016. SR 679-705. The next writing between the parties is not until May of 2017 to begin a lease agreement on

August 1, 2017. Id. While neither party disputes that DSU continued to lease the described property at issue, DSU has contented that the various leases read together, constitute a single, continuous transaction (emphasis added). The fact that this gap exists, and then notably, the consideration changed substantially (rent was increased approximately 30% to roughly 50% over the amount proscribed by the 2014 lease), further memorialized that the 2017 lease was not a mere continuation of the prior lease or leases. MHRC contends that this gap and replacement of an apparently implied agreement from August 1, 2016 (the day after the 2014 lease expired) until May of 2017, stands for the proposition that at this juncture, there was not a mere renewal as called for by the 2014 lease or a continuance of the prior agreement, but a novation replacing the prior agreement or agreements. Notably, this period where no writing occurs cannot be a mere renewal, as it does not extend for an additional like term of the 2014 lease, but merely nine (9) months, approximately. MHRC contends that under the doctrine of novation, not only did the 2011 lease replace the 2000 lease, but the 2017 lease replaced any prior implied lease under the 2014 lease. See SDCL 20-7-6; Jermar Properties, LLC v. Lamar Advert. Co., 2015 SD 26, 864 N.W.2d 1.

For the above reasons, summary judgment was not ripe or proper as to the findings of the court in favor of DSU. There existed material undisputed facts that called into question the intentions of the parties as whether they intended to be bound by prior terms, or whether the contracts were intended to be a continuation of the same transaction. There existed in the record prior transcripts before the trial court evidencing that not only did the current board members dispute that the contracts were intended to be read together, but the recollections of a prior board member whom was a trained and bar-

admitted lawyer in South Dakota that for MHRC's part, they intentionally created new agreements with definitive terms and omissions as separately bargained for lease contracts. SR 56-62; SR 532-626. Because that factual dispute exists (regarding whether the parties had separately negotiated or intended these contracts to be separate (or not)), the court should have received them in the light most favorable to MHRC, meaning that the parties intended to separately bargain for and negotiate these contract (or at least that there existed some dispute on that issue) and denied the summary judgment motion brought by DSU.

b. Whether the reserve account should no longer be enforceable against the purchase price, or imputed against Appellant.

The trial court also found that the issue regarding the requirement of MHRC to keep a "reserve account" in favor of DSU, resting its decision on the fact that it had determined already that the leases represent a single continuing transaction. MHRC contends that this is not a single transaction (as argued above), but that even if the various leases do memorialize a single transaction, it is not appropriate to continue to hold MHRC to that term, when it does not appear in later agreements between the parties. Under South Dakota law, the court must enforce the agreement of the parties as drafted. Edgar v. Mills, 2017 SD 7, 892 N.W.2d 223. (Contracting parties are held to the terms of their agreement, and disputes cannot be resolved by adding words the parties left out." (internal quotation omitted)). In this case, the court improperly added "words the parties left out" by reading into later leases a continuing calculation and obligation of MRHC to keep and ultimately credit towards DSU's option the "reserve account." Judge Chris Giles testified in his deposition that it was his recollection that it was purposeful that the language concerning the reserve account was omitted from the later agreements on

various occasions. SR 532-626. Thus, even if the various leases are evidence of a continuing transaction between the parties, the omission of the reserve account language cannot be implied, as the parties had shifted other terms and conditions of their agreement through the various leases (terms of the leases, payment for rent, shifting of maintenance costs and responsibilities, etc.), and agreed to be bound by those changes. South Dakota law stands for the proposition that a contract in writing may be modified without new consideration only by a new writing or executed oral agreement. See SDCL 53-8-7. If the 2011 or 2017 leases were mere continuations of a prior written agreement, they must be amendments to the same, and the new amendments make no mention of any duty or right of either party to the reserve account referenced by the 2000 lease. Thus, it must be an error for the trial court to hold that MHRC is and was continuously responsible to hold a reserve account after the expiration of the 2000 lease, and for DSU to receive credit for any amounts from said reserve account after the expiration of the 2000 lease.

The court in resolving this issue should have given greater weight to the undisputed testimony that the parties' intent in entering into these various agreements was a live controversy, and in resolving the same in the light most favorable to MHRC, that summary judgment in favor of DSU was improper.

c. Whether Appellant's failure to keep a reserve account is a breach of contract, and a breach of an implied duty of good faith and fair dealing.

MHRC contends that should the questions of whether the lease agreements are construed as a continuous transaction, and whether there existed a duty to keep and hold a reserve account past the expiration of the 2000 lease are resolved in their favor, there

cannot be any provable breach. It is axiomatic that if the 2000 lease terms are not applicable as to the parties because a different agreement replaced the relevant terms, that MHRC cannot be in breach of contract by not maintaining a reserve account where the lease relationship creates no continuing duty for them to do so. The trial court resolved this in error in favor DSU by extension of its erroneous decision regarding the nature of the various agreements discussed above.

This issue, for the reasons stated above, is and was not ripe for summary judgment in favor of DSU, given the factual determinations that should have been made as to the intent of the parties and the nature of their agreement(s).

d. Whether the term "then existing mortgage principal and interest balance" refers to the initial mortgage incurred by Appellant or to the actual existing mortgage principal and interest balance realized by Appellant at the time of the option.

The court determined that it would be an absurd result if the phrase of the option which states that DSU would have the option to purchase the property at the "then existing mortgage principal and interest balance" meant that DSU might have to pay for any balance which might be refinanced by MHRC against the property and held by a subsequent mortgage. SR 512-521. The court noted that question of ambiguity presented a question of law for the court. Vander Heide v. Boke Ranch, Inc., 2007 SD 69, 736 N.W.2d 824, 832. The court also notes that when the words are clear and explicit, and leads to no absurd consequences, the search for the parties' common intent is at an end. Nelson v. Schellpfeffer, 2003 SD 7, 656 N.W.2d 740, 743. The court further cites that the court is constrained from interpreting a contract literally if doing so would produce an absurd result. Id.; SR 512-521.

The above analysis is premised upon a number of assumptions of the court that are in error. First, that there is any ambiguity in the term of "then existing mortgage principal and interest balance." The phrase quite literally means the amount of principal and interest remaining at the time DSU exercises, or would exercise, its option to purchase the subject property. There contains no restriction in any of the agreements forbidding MHRC from re-financing the property to pay for costs and maintenance upon the real property. SR 679-705. MHRC avers that if each lease was independently bargained for and a separate agreement, DSU had no less than three opportunities to make clear its intention of tying the option to the original financing upon the subject property. Even if the documents are the record of a single continuing transaction, no further definition of the term exists. If the parties intended to prevent MHRC from incurring additional debt, they would have done and said so in their agreements. Under South Dakota law, however, the court enforces the agreement of the parties as drafted. Edgar v. Mills, 2017 SD 7, 892 N.W.2d 223, 231. ("Contracting parties are held to the terms of their agreement, and disputes cannot be resolved by adding words the parties left out." (internal quotation omitted)).

The trial court's decision on this issue is further evidence that summary judgment on this issue is not appropriate in favor of DSU, as the question of intention of the parties is and was a ripe question. Judge Chris Giles testified that it was always his understanding that throughout the relationship, that MHRC was not to lose money on the project, and that DSU's option, and the language describing it, was particularly chosen to reflect that whatever the debt was at any time against the property ought to be the purchase price, to protect MHRC from loss. SR 532-626. This at the very least creates a

question which, if resolved in favor of MHRC, favors the matter being settled after an offer of evidence as to the parties' intent.

2. Did the trial court err in refusing to grant any or all of the Appellant's Motion for Summary Judgment?

In the interest of brevity, the Appellant will refer the appellate court to argument and citations to law above with respect to the issues of construing the various lease agreements as a single continuous transaction, the duty to keep a reserve account, and the determination of the meaning of the term "then existing mortgage principal and balance" wherever possible or applicable, but offer argument in support of alleged error of the trial court in failing to grant Appellant's motion.

a. That the court should have granted summary judgment in favor of Appellant regarding the purchase amount equal to the "then existing mortgage principal and interest balance."

Regarding MHRC's request for relief, the trial court erred by not adopting the relief to determine that the option is pegged to the amount of outstanding mortgage balance at the time DSU exercises its option. As laid out *supra*, the term appears in all of the lease agreements, and is not ambiguous. Under the plain language of the agreement, the term refers to the balance owed on any mortgage on the subject property at the time DSU exercises its option to purchase. The term "then" is a temporal modifier confirming that the mortgage balance at the time of the exercise of the option will change. The parties certainly anticipated that the balance would decrease as payments are made, but other language in the agreements confirms that the parties anticipated that the mortgage balance may increase as MHRC had to incur additional debt, and offered that the rental rate to be adjusted accordingly. SR 679 (the 2011, 2014 and 2017 leases contain such language). Because this language is not ambiguous, and the facts available to the court at

the time indicated that prior MHRC board members anticipated that the mortgage would change with DSU being responsible for the balance, summary judgment was appropriate to grant in favor of MHRC.

b. That the trial court should have granted summary judgment in favor of the Appellant regarding the various leases are not a single writing or transaction.

When interpreting a contract, the court "must give effect to the intention of the contracting parties." Ziegler Furniture & Funeral Home, Inc. v. Cicmanec, 2006 SD 6, ¶ 16, 709 N.W.2d 350, 355. According to the South Dakota Supreme Court, "[t]o determine intent, we look 'to the language that the parties used in the contract[.]'" Tri-City Assocs., L.P. v. Belmont, Inc., 2014 SD 23, ¶ 11, 845 N.W.2d 911, 915 (quoting Poeppel v. Lester, 2013 SD 17, ¶ 16, 827 N.W.2d 580, 584 (second alternation in original)). "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.'" Gloe v. Union Ins. Co., 2005 SD 30, ¶ 29, 694 N.W.2d 252, 260.

"'When the meaning of contractual language is plain and unambiguous, construction is not necessary.'" Ziegler Furniture & Funeral Home, Inc., at ¶ 14, 709 N.W.2d at 354 (quoting Pesicka v. Pesicka, 2000 SD 137, ¶ 6, 618 N.W.2d 725, 726). Instead, construction is only appropriate if the contract is ambiguous. Id. When unambiguous, the court's duty is to declare and enforce the contract as written. Lillibridge v. Meade Sch. Dist. #46-1, 2008 SD 17, ¶ 12, 746 N.W.2d 428, 432 ("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" (internal quotation omitted)).

In this matter, the plain language of the 2000 lease states that DSU had the right to renew the ten year lease in 2011 for a "like term." See SR 679. In 2011, rather than renewing for a like term, the parties entered into an wholly new lease agreement with a materially shorter term, and which materially changed the parties' duties and responsibilities under the agreement. The 2011 lease is more properly understood as a separate, independent lease. In Kramer v. William F. Murphy Self-Declaration of Trust, the court stated: "[w]hen two or more instruments are executed *at the same time* by the same parties, for the same purpose and as part of the same transaction, the court must consider and construe the instruments as *one contract.*" Kramer, at ¶ 13 (quoting Baker v. Wilburn, 456 N.W.2d 304 (SD 1990), at 304) (first emphasis added and second in original). In that case, the documents not only were executed at the same time, but execution of the various documents was dependent upon the execution of another document and the contracts were attached to each other and sequentially labeled. Id. at 13. Here, the 2000 and 2011 leases were executed 10 years apart, and were different transactions. Similarly, the 2014 and 2017 leases were executed three years apart after a period of an apparently imputed contract where no writing expressly controlled the parties' agreement.

Lastly, the consideration changed by and between these parties multiple times over the various agreements as well. Other courts have recognized that when consideration for the lease is changed in later agreements, then the initial lease and later agreements should not be considered "one contract." Pitchblack Oil, LLC v. Hess Bakken Invs. II, LLC, 949 F.3d 424, 431 (8th Cir. 2020) (applying North Dakota law); Lillibridge v. Mesa Petroleum Co., 907 F.2d 1031, 1036 (10th Cir. 1990); Sunac

Petroleum Corp. v. Parkes, 416 S.W.2d 798, 802 (Tex. 1967); see also Sawyer v. Guthrie, 215 F. Supp. 2d 1254, 1264 n.5 (D. Wyo. 2002) (stating that lease was not a renewal but instead a new, separate lease because, among other things, the duration of the lease changed and the consideration changed). The term of years changed from a ten year leasehold to three years in 2011, and to only two years memorialized by the 2014 lease. The amount of rent called for changed from the 2014 to the 2017 lease by a significant margin, with no recitation or reference to prior writings or agreements. Additionally, between the 2000 lease and the 2011 lease, the parties shifted responsibility for various maintenance and costs. All of these changes support a material change of the bargained for exchange.

The trial court erred in denying MHRC's request for summary judgment, because all of the undisputed facts show that each of these leases were independently entered into, for materially different consideration, despite the object of the lease and the parties remaining the same. That fact is supported by the deposition testimony of Chris Giles at various points SR 532-627. Viewing all of the evidence available to the court in the light most favorable to DSU, the court still should have determined these various lease agreements to be separately bargained for agreements, and not allow prior terms from expired leases to survive to the time of litigation.

c. That the trial court should have granted summary judgment declaring that the Appellant was not required to keep or credit the "reserve account."

MHRC avers that the court erred in relying upon the teserve account provision in the 2000 Lease. The 2000 lease expired upon its terms after 10 years. The 2011 lease replaced the existing 2000 lease. Thus, under the legal doctrine of novation, the 2011

lease substituted and replaced the 2011 lease. *See* SDCL 20-7-5; Jermar Properties, LLC v. Lamar Advert. Co., 2015 SD 26, ¶¶ 6-11, 864 N.W.2d 1, 2–4.

Further, even assuming that the 2011 lease was not a novation extinguishing the 2000 lease, then the question becomes about what impact does the 2011 lease have on the reserve account in the 2000 lease. Judge Chris Giles testified that MHRC intentionally removed the requirement to maintain a reserve account from the 2011 lease. SR 532-705. As a later agreement, even if construed as "one transaction," the 2011 lease modifies or amends the earlier 2000 lease. *See* SDCL 53-8-7 ("A contract in writing may be altered by a contract in writing without a new consideration or by an executed oral agreement, and not otherwise"). This amendment removed the reserve account from the 2011 lease, the 2014 lease, and the 2017 lease.

The trial court found there is an implied reserve account clause in the 2011 lease, the 2014 lease, and the 2017 lease by virtue of the leases memorializing a single, continuous transaction. SR 512. Under South Dakota law, however, the court enforces the agreement of the parties as drafted. Edgar v. Mills, 2017 SD 7, ¶ 28, 892 N.W.2d 223, 231. ("Contracting parties are held to the terms of their agreement, and disputes cannot be resolved by adding words the parties left out" (internal quotation omitted)).

DSU's claim that the "reserve account," as referenced in the 2000 lease, must be applied to any exercising of DSU's option to purchase the property fails because the term does not meet the statute of frauds. As is well settled, the statute of frauds requires the contract for the sale of land must not only be in writing and signed by the party who is charged, but the writing must contain all the material terms and conditions of the agreement between the parties. Amdahl v. Lowe, 471 N.W.2d 770 (SD 1991). Although

DSU did have a writing in its most recent lease of 2017 ensuring their right of an option to purchase the property at what are now disputed terms, there exists absolutely no mention of MHRC being beholden to keep or apply a "reserve account" after the expiration of the 2000 lease in 2011. Because the later leases, and most crucially, the 2017 lease, do not contain said provision, that certain provision concerning the "reserve account" balance means that even if a reserve account had been kept, it is not required to be applied toward the present purchase of the MHRC's property pursuant to DSU's option to purchase said property.

Because the new lease agreements are not mere continuations of the prior lease or leases, the failure of any writing after 2011 binding MHRC to keep a reserve account should have freed MHRC from said duty, and as such, the imputed amounts for the reserve account cannot and should not be applicable to DSU's option to purchase. There existed sufficient uncontroverted evidence in the record at the time the trial court rendered its opinion to permit the trial court to grant summary judgment in favor of MHRC on this issue, whether because the writings are not representations of a single continuous transaction, or under the doctrine of novation.

d. The trial court should have granted summary judgment in favor of Appellant declaring that the 2020 or 2021 lease addendum could not be considered as evidence for or against either party.

The trial court erred in not granting summary judgment in favor of MHRC regarding its claim that the 2022 lease addendum should not be considered as evidence for or against either party. The 2020 lease addendum (and the later February 2021 lease addendum) executed between the parties after some dispute had arisen regarding the value of DSU's option to purchase, stands for the proposition that the parties expressly

agreed that "any statements made, whether set forth in this document or otherwise, shall not be used against the party making said statement in the event that the parties are not able to successfully negotiate a conclusion to this matter." SR 702-705. This clear and unambiguous statement makes plain the parties intended the document to memorialize their intent to continue the relationship while settlement talks were ongoing, and did not intend the document to be used as evidence in any later litigation.

The court should have granted summary judgment in favor of MHRC on this issue. Instead the court referenced the 2020 lease addendum as the sole document which contained internal reference to prior leases. SR 516. This was impermissible by contract and agreement of the parties and in error by the trial court.

3. Did the trial court err in failing to adopt the clear and unambiguous term for calculation of the value of the Appellee's option at trial, and fail to correctly consider the Appellant's argument for calculation of said option?

The trial court took the remaining matters left after its summary judgment decision at a court trial held on June 28. At issue was the value of DSU's option to purchase, and the value of the reserve account credited to DSU. See SR735-785. In particular, the trial court refused to adopt MHRC's position that the language in the 2000 lease which identifies how to calculate the reserve credit, despite there being no ambiguity in that clause or phrase. The phrase, which only appears in the 2000 lease, and does not appear in later leases, states:

> "The annual rental amount is premised upon construction costs not in excess of One Million Two Hundred Seventy-Two Thousand Dollars ($1,272,000) to be financed at an interest rate of 6.25%. In the event that lower construction rates costs or lower interest rates would permit a lower annual payment, the difference between One Hundred Three Thousand Six Hundred Eighty Dollars ($103,680) and the lower payment will be deposited in a reserve account."

SR. 679. The trial court relied upon the premise in calculating the reserve account credit that the phrase did not mean what it says, but apparently substituted the term of "between One Hundred Three Thousand Six Hundred Eighty Dollars ($103,680)" for the actual money paid by DSU to lease the premises (such term being more appropriately termed "rental rate" or "lease amount").

The court found that it was not a modification or rescission of the lease to substitute the precise term for calculating the reserve credit, because the various lease agreements were all one continuous transaction, and therefore, when the lease amounts increased in 2017, all that DSU was doing by paying more for rent was accelerating the building up of the reserve account or credit. See SR 786-879 and SR 882-888. The finding of the court in this lone variable swings the value of the buyout approximately $280,000 dollars. See SR 734 ("Scenario 1" v. "Scenario 4").

MHRC avers that the language in the 2000 lease is a clear manifestation that the appropriate calculation of any reserve account must start with the balance of $103,680 less MHRC's service on the 2000 amortized debt and other costs as agreed. See SR 679. The South Dakota Supreme court has noted that:

> "The primary goal of contract interpretation is to determine and enforce the intent of the parties." Travertine Corp. v. Lexington-Silverwood, 683 N.W.2d 267, 271 (Minn. 2004). "Where there is a written instrument, the intent of the parties is determined from the plain language of the instrument itself." Id. Moreover, a court must give effect to the language of an unambiguous contract. Halla Nursery, Inc. v. City of Chanhassen, 781 N.W.2d 880, 884 (Minn. 2010). A contract is unambiguous if "it has only one reasonable interpretation." *Id.* "[W]hen a contractual provision is clear and unambiguous, courts should not rewrite, modify, or limit its effect by a strained construction." Travertine Corp., 683 N.W.2d at 271.

Northland Capital Fin. Servs., LLC v. Robinson, 2022 SD 32, 976 N.W.2d 252.

In the instant case, the plain language of the clause itself uses a fixed, unambiguous dollar amount ($103,680) as the starting point for calculating the reserve account balance or credit. The language itself only has one reasonable interpretation, that the calculation begins not with an implied term of "rental rate" or "lease amount," but the fixed dollar amount. Thus, it was clearly in error for the trial court to adopt the scenario laid out by DSU's Exhibit 4, Scenario 1 (SR 735), which started the calculation of the reserve account credit with the amount of the agreed upon rental rate, as opposed to a fixed $103,680. The parties (and namely, DSU) had multiple opportunities to clarify or make certain regarding the calculation of the reserve account in 2011, 2014, and 2017, and failed to do so or omitted the same. MHRC avers that the trial court made a clearly impermissible choice in determining as it did, or at the very least, modified or rescinded a contract term by choosing that path to calculate the reserve account credit.

A trial court should not rewrite the parties' contract or add to its language, which is precisely what the trial court did with respect to this term. See Edgar v. Mill, 2017 SD 7, 892 N.W.2d 223. "Contracting parties are held to the terms of their agreement and disputes cannot be resolved by adding words the parties left out." Id. (quoting Gettysburg School Dist. 53-1 v. Larson, 2001 SD 91, 631 NW.2d 196, 200-201). In this case, the court added the term "rental rate" or "lease amount" to the clause that defines the reserve account calculation, but substituting the same for the actual term in the contract ($103,680). This was clearly in error.

Additionally at trial, MHRC urged the court to follow the actual financing obligations incurred by MHRC when calculating the reserve account, which the court refused to do. The trial court rested its decision on the notion that the summary judgment

Order resolved this issue regarding appropriate financing instrument which should be used for determining the option price, and by extension, the reserve account calculation. See SR 522-523. MHRC argues that this finding was in error with respect to calculating the value of the reserve account. The reserve account clause does not fix or determine to which mortgage principal and interest balance is referred to for terms after renewal of the 2000 lease, but merely references the "then existing mortgage balance and principal." SR 679. As discussed above, the term contemplates that the mortgage balance would fluctuate over time, going down as the mortgage is paid, but does not forbid MHRC from refinancing. MHRC did refinance, in 2017 and 2022. See SR 735 ("Scenario 5" and "Scenario 6"). As such, the clear and unambiguous language of the reserve account clause stands for the proposition that on this issue, the trial court erred by not using or applying in its calculation the actual financing burden that MHRC realized in 2017 and 2022 when determining the value of the reserve account credit (represented by Scenarios 5 and 6). SR 735.

CONCLUSION

For the reasons Stated above, it is urged that the trial court be reversed on its decision to grant partial summary judgment in favor of DSU, that the trial court be found to have committed error in refusing to grant partial summary judgment in favor of MHRC, and that the trial court be found to have committed error in its calculation at trial of the value of the reserve account, and consequently the value of DSU's option to purchase.

Dated this 6th day of December, 2024.

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Office Word Times New Roman font 12, and contains 8,429 words, excluding the table of contents, table of cases, preliminary statement, jurisdictional statement, statement of legal issues and certificate of counsel. I have relied on the word and character count of the word-processing program to prepare the certificate.

Dated this 6th day of December, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of December, 2024, a true and correct copy of the Brief of Appellant was served upon the following through Odyssey File and Serve:

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APPENDIX

TABLE OF CONTENTS

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RE: *South Dakota Board of Regents v. Madison Housing and Redevelopment Commission;* 39CIV22-35 Plaintiff's Motion for Partial Summary Judgment and Defendant's Motion for Partial Summary Judgment.

The South Dakota Board of Regents, as the Governing Board for Dakota State University (hereinafter "Plaintiff") filed a complaint on April 29, 2022, alleging breach of contract against the Madison Housing and Redevelopment Commission (hereinafter "Defendant"). Plaintiff submitted a Motion for Partial Summary Judgment. Defendant also submitted a Motion for Partial Summary Judgment. A hearing on the motions was held on November 7, 2023. Having considered the parties' argument, briefs, and other documentary evidence, the Court issues the following Memorandum Opinion.

STATEMENT OF FACTS

The Plaintiff is a board that was created to govern Dakota State University, a state-operated and publicly funded post-secondary institution situated in Madison, South Dakota. The Defendant is a Commission created by the City of Madison and does business in Madison, South Dakota. The Plaintiff and Defendant agreed that Defendant would construct two 8-plex units, with the intent to use the property as student housing, and Plaintiff would lease the property from Defendant. This Plaintiff has continuously leased the property for approximately twenty-three (23) years.

The initial written lease agreement was executed between the parties on October 30, 2000. The parties agreed on a term of ten years to begin on August 1, 2001, for the annual rental price of $103,680.00. The lease also included an option to purchase the property "at any time after the initial term of this lease for an amount equal to the then existing mortgage principal and interest balance, upon reasonable notice to [Defendant]." After the term of ten years was complete, the parties went on to execute a renewal on August 1, 2011; August 1, 2014; and August 1, 2017. The 2011 and 2014 lease renewals were for a term of three years each at an annual price of $103,680.00. The 2017 lease renewal was for a term of three years at a total price of $433,000.00. All three lease renewals had an option to purchase.

The initial lease included a provision for a "reserve fund" which was to be funded by any amounts paid by Plaintiff to Defendant in excess of the amounts necessary to service the original Note and Mortgage. Said fund was to be used for maintenance and repair of the property and if the Plaintiff decided to exercise its option, any remaining amount would be credited to Plaintiff. There is dispute whether the reserve fund provision was included in the lease renewal agreements. The reserve fund no longer exists.

On April 6, 2020, Plaintiff gave Defendant notice expressing its desire to exercise the option to purchase, and requested that Defendant provide Plaintiff with the required pay-off amount of the "then existing mortgage principal and interest balance." There was a disagreement regarding what the "then existing mortgage" consisted of, so the parties negotiated two lease extensions that extended the lease from Sept 2020 to May 2021. Since the lease expiration of May 2021, Plaintiff has continuously leased the property informally and an agreement has not been reached. As a result, Plaintiff instituted these proceedings against Defendants.

STANDARD OF REVIEW

SDCL § 15-6-56(c) states that summary judgment shall be granted when the moving party proves that "no genuine issue as to any material fact [exists] and that the moving party is entitled to judgment as a matter of law." *See also Anderson v. Production Credit Ass'n*, 482 N.W.2d 642, 644 (S.D. 1992). Summary judgment is authorized where "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[.]" *Krier v. Dell Rapids Twp.*, 2006 S.D. 10, ¶ 12, 709 N.W.2d 841, 844-45 (2006) (citing SDCL § 15-6-56(c)). "All reasonable inferences derived from the facts are viewed in the light most favorable to the nonmoving party." *Id.* (citing *Northstream Invs., Inc. v. 1804 Country Store Co.*, 2005 S.D. 61, ¶ 11), 697 N.W.2d 762, 765. In order to defeat summary judgment, the nonmoving party may not rest on mere allegations or his pleadings, but rather must set forth, by affidavit or other evidence, specific facts showing the existence of genuine issues of material fact for trial. *Plato v. State Bank of Alcester*, 555 N.W.2d 365, 366 (S.D. 1996). While questions of fact are generally reserved for a jury and preclude the granting of summary judgment, "a court may determine a question of fact by summary judgment if it appears to involve no genuine issues of material fact and the claim

fails as a matter of law." *Daktronics, Inc. v. McAfee*, 1999 S.D. 113, ¶ 16, 599 N.W.2d 358, 362. "Where . . . no genuine issue of fact exists [summary judgment] is looked upon with favor[.]" *Wilson v. Great N. Ry. Co.*, 157 N.W.2d 19, 21 (S.D. 1968).

1. **Whether the multiple lease agreements shall be construed as one continuous document.**

APPLICABLE LAW

"The primary rule in the construction of contracts is that the court must, if possible, ascertain and give effect to the mutual intention of the parties." *Talley v. Talley*, 566 N.W.2d 846, 1997 SD 88. (citing *Huffman v. Shevlin*, 76 S.D. 84, 89, 72 N.W.2d 852, 855 (1955)). "Writings connected by internal references to each other and involving the same subject matter constitute a single contract for the entire transaction." *Id.* (citing *Baker v. Wilburn*, 456 N.W.2d at 306 (S.D. 1990)). Several instruments which have been executed at different times and which pertain to the same transaction are to be read together, even if they do not expressly refer to one another. *St.Paul Fire & Marine Ins. Co. v. Tennefas Const. Co.*, 396F.2d 623 (8th Cir. 1968).

In *Baker*, the South Dakota Supreme Court recognized that all writings that are executed together as part of a single transaction are to be interpreted together. *Kramer v. William F. Murphy Self-Declaration of Tr.*, 2012 SD 53, ¶ 13, 816 N.W.2d 813, 816. "In determining whether separate documents are to be viewed as one contract, it is not critical whether the documents were executed at exactly the same time or whether the parties to each agreement were identical." *Id.* at ¶ 14. (citing *Baker*, 456 N.W.2d at 306 (S.D. 1990)). "Where several writings are connected by internal references to each other, even if they were executed on different dates and were not among all of the same parties, they will constitute a single contract as long as they involve the same subject matter and prove to be parts of an entire transaction." *Id.*

South Dakota courts consider numerous factors in determining whether multiple contracts must be interpreted together, including: (1) whether one contract referenced the other, (2) whether one contract was hinged on the execution of another contract, (3) whether the contracts are executed on the same day, and (4) whether the contracts involve the same subject matter and parties. *Kramer*, 2012 SD 53, ¶ 14, 816 N.W.2d 813, 816. *See Baker*, 456 N.W.2d at 306.

ANALYSIS

The Plaintiff argues that the multiple leases that were executed between the parties should be read together as one continuous transaction because: (1) all leases contain the same subject matter, (2) identical language regarding the option to purchase, and (3) the changes in terms were merely modifications rather than material changes. Plaintiff also asserts that the lack of a merger or integration clause in any of the leases shows that the parties did not intend for the lease agreements to be standalone instruments for standalone transactions.

Defendant argues that material terms, such as the length of the contract, consideration, and the parties' duties/responsibilities, in the renewal leases were changed, which supports a finding that the contracts were all separately bargained-for contracts. The South Dakota Supreme Court has ruled that when multiple documents exist involving a single transaction, they should be construed as one contract. Defendant asserts that this rule only applies to contracts that are a part of the same transaction or were executed at the same time. However, the Supreme Court has struck down that assertion in *Kramer* and *Baker* by ruling that it is not critical that agreements are executed at the exact same time, with the exact same terms.

The "Addendum to Lease" that was executed in September of 2020 internally references both the original 2000 lease and the most recent lease in 2017 in paragraph 2. While the 2000 lease does not directly reference any of the subsequent leases directly, it does state that Plaintiff

has the "right of renewal," indicating the parties' intent to continue this relationship. As the Supreme Court has stated, an important factor in determining whether agreements should be read together is whether the subject matter is the same. Here, the subject matter of the 2000 lease and the 2017 lease are the two 8-plex housing units, which have remained the same throughout all leases and addendums, as have the parties.

This Court finds that the multiple agreements between the parties should be construed together as a single, continuous transaction. Therefore, the Plaintiff's motion for partial summary judgment on its issue "1" is GRANTED and the Defendant's motion for partial summary judgment on its issue "2" is DENIED.

2. **Whether the express term in the original lease that requires Defendant to maintain a "reserve account" is in effect in the subsequent lease renewals.**

APPLICABLE LAW

"Contracting parties are held to the terms of their agreement, and disputes cannot be resolved by adding words the parties left out." *Edgar v. Mills*, 2017 SD 7, ¶ 28, 892 N.W.2d 223, 231. "If the parties' intent is clearly manifested by the language of the contract, it is the court's duty to enforce it." *Atmosphere Hospitality Management, LLC v. Shiba Investments, Inc.*, 158 F. Supp. 3d 837, 862 (D.S.D. 2016). The Restatement (Second) of Contracts states that the "[m]emorandum sufficient to satisfy the writing requirement of the statute of frauds may consist of several writings if one of the writings is signed and the writing indicates a continuing transaction." Restatement (Second) of Contracts § 132 (Am. Law Inst. 1981).

ANALYSIS

Defendant argues that the reserve account term expired when the 2000 lease expired after the 10-year term ended. The Court has determined that the various agreements between the

parties should be construed as one transaction. Therefore, the question comes down to whether the express term in the 2000 lease is an implied term in the subsequent lease renewals.

Since the agreements are to be read as one continuous contract, it is not necessary that each of the renewals include the reserve account term. The South Dakota Supreme Court has held that when the parties' intent is clearly manifested by the contractual language, it is the court's duty to enforce it. The parties here clearly intended to create a reserve account that was to be credited to the Plaintiff upon exercising its option to purchase. The Plaintiff gave effect to this term by paying the Defendant monthly installments that were to be deposited into the reserve account. The mere absence of this term in the lease renewals is not sufficient to indicate that the parties intended to remove the reserve account term from the subsequent leases.

The Defendant argues that the reserve account provision does not satisfy the requirements of the statute of frauds because the lease renewal agreements make no mention of the Defendant being required to keep or apply the reserve account after the 2000 lease term ended. However, as stated in the Restatement (Second) of Contracts, the writing requirement of the statute of frauds may consist of several writings if one of the writings is signed and the writing indicates a continuing transaction. Here, the Court has found that the several writings indicate a continuing transaction, and all writings were signed by both parties. Therefore, the statute of frauds is satisfied.

The Court finds that the reserve account term that was executed in the 2000 lease is still in effect, as all agreements are construed as one transaction. Plaintiff's motion for partial summary judgment on its issue "2" is GRANTED. Defendant's motion for partial summary judgment on its issue "3" is DENIED.

3. **Whether Defendant's failure to maintain the reserve account constitutes a breach of Defendant's implied duty of good faith and fair dealing.**

APPLICABLE LAW

The elements for breach of contract are: 1) an enforceable promise; 2) a breach of the promise; and 3) resulting damages. *Weitzel v. Sioux Valley Heart Partners*, 2006 S.D. 45, ¶ 31, 714 N.W.2d at 894 (internal citations omitted). "Whether a contract has been breached is a pure question of fact for the trier of fact to resolve." *Id.* The Supreme Court of South Dakota provided that "[e]very contract contains an implied covenant of good faith and fair dealing which prohibits either contracting party from preventing or injuring the other party's right to receive the agreed benefits of the contract." *Farm Credit Services of America v. Dougan*, 2005 SD 94, ¶ 8, 704 N.W.2d 24.

ANALYSIS

The Plaintiff contends that Defendant's failure to maintain the reserve account and refusal to account for any monies currently remaining in the reserve account constitutes a breach of Defendant's implied duty of good faith and fair dealing. Neither party disputes the existence of the reserve account and the Defendant's obligation under the 2000 lease to maintain the reserve account. The Defendant argues that when the 10-year term in the 2000 lease concluded, the reserve account term disappeared, and the Defendant was no longer responsible for the maintenance of such an account. As this Court has previously stated, the agreements are one continuous transaction, therefore the reserve account term is still in effect and the Defendant's responsibility to maintain that account remains in effect. There is no dispute as to the fact that Defendant has not performed this obligation.

While questions of fact are generally reserved for the jury and preclude summary judgment, the undisputed evidence leaves no genuine issues of material fact to be considered, and thus, partial summary judgment in favor of Plaintiff's issue "3" is GRANTED.

4. **Whether the phrase, "then existing mortgage principal and interest balance" refers to the initial mortgage that Defendant took out on the property or the refinanced mortgage.**

APPLICABLE LAW

"If the parties' intent is clearly manifested by the language of the contract, it is the court's duty to enforce it." *Atmosphere Hospitality Management, LLC v. Shiba Investments, Inc.*, 158 F. Supp. 3d 837, 862 (D.S.D. 2016) (citing *Pesicka v. Pesicka*, 618 N.W.2d 725, 727 (S.D. 2000). "The language of the contract is given its plain and ordinary meaning unless the language is ambiguous." *Id.* (citing *Am. State Bank v. Adkins*, 458 N.W.2d 807, 809) (internal quotations omitted). "Contract language is ambiguous if a genuine uncertainty exists as to which of two or more meanings is correct." *Id.* "Whether a contract is ambiguous presents a question of law for the court." *Vander Heide v. Boke Ranch, Inc.*, 2007 SD 69, ¶ 17, 736 N.W.2d 824, 832.

"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 v. Schellpfeffer*, 2003 S.D. 7, ¶ 8, 656 N.W.2d 740, 743. "[T]his Court is constrained from interpreting a contract literally if doing so would produce an absurd result." *Id.* at ¶ 12.

ANALYSIS

The Court finds that this provision is not ambiguous, and therefore, extrinsic evidence is not admissible to determine the parties' intent.

Plaintiff argues that the "then existing mortgage" refers to the mortgage that was taken out at the onset of the construction, not the refinanced amount as the Defendant argues. The Defendant's interpretation would lead to an absurd result in that the Plaintiff would be required

to pay the entire balance of the refinanced mortgage, which includes the debt of multiple properties owned by Defendant rather than just the two 8-plex units that were contracted for. This interpretation of the contract is not reasonable. Requiring Plaintiff to pay a mortgage that collateralizes more than the disputed property is not what the parties bargained for.

The language in question is not ambiguous and therefore the plain and ordinary meaning should be given to the contract. The "then existing mortgage" term refers to the mortgage financing amount contemplated in the original lease. Plaintiff's motion for partial summary judgment on its issue "4" is GRANTED and on its issue "5" is DENIED. Defendant's motion for partial summary judgment on its issue "1" in its brief is DENIED.

CONCLUSION

Based upon the foregoing analysis: Plaintiff's issues "1," "2," and "4" are GRANTED. Plaintiff's issue "5" and Defendant's issues "1," "2," and "3" are DENIED.

Hon. Patrick T. Pardy
Circuit Court Judge
Third Judicial Circuit

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF LAKE	)	THIRD JUDICIAL CIRCUIT
		39CIV22-000035
SOUTH DAKOTA BOARD OF REGENTS, as the Governing Board for DAKOTA STATE UNIVERSITY,	) :) :)	
Plaintiff,	:)	
VS.	:)	ORDER FOR SUMMARY JUDGMENT
MADISON HOUSING AND REDEVELOPMENT COMMISSION,	:) :)	
Defendant.	:	

The Plaintiff, SOUTH DAKOTA BOARD OF REGENTS, as the Governing Board for DAKOTA STATE UNIVERSITY, having moved for Partial Summary Judgment on the Complaint of the Plaintiff against the Defendant, MADISON HOUSING AND REDEVELOPMENT COMMISSION and the Defendant, MADISON HOUSING AND REDEVELOPMENT COMMISSION having moved for Partial Summary Judgment on the Complaint of the Defendant against the Plaintiff; and the Court having held a hearing on the Motions on Tuesday, the 7th day of November, 2023, at 1:00 o'clock PM, R. L. ERICSSON, counsel for the Plaintiff, SOUTH DAKOTA BOARD OF REGENTS, as the Governing Board for DAKOTA STATE UNIVERSITY, having appeared and argued the Motion for the Plaintiff, and JACOB DAWSON and WILSON KLEIBACKER, as counsel for the Defendant, MADISON HOUSING AND REDEVELOPMENT COMMISSION, having appeared and argued the Motion for the Defendant, and the Court having considered the arguments of counsel and having considered all filings of the parties, including Briefs, Affidavits, and exhibits, and no other parties having resisted the Motions;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Motion of the Plaintiff, SOUTH DAKOTA BOARD OF REGENTS, as the Governing Board for DAKOTA STATE UNIVERSITY, for Partial Summary Judgment be, and the same is as to the following issues:

(1) That the multiple lease agreements shall be construed as one continuous document **GRANTED**;
(2) That the express term in the original lease that requires Defendant to maintain

a "Reserve Account" is in effect in the subsequent lease renewals **GRANTED**;

(3) That Defendant's failure to maintain the Reserve Account constitutes a breach of the Defendant's implied duty of good faith and fair dealing **GRANTED**;

(4) That the phrase "then existing mortgage principal and interest balance" refers to the initial mortgage that Defendant took out on the property and not the refinanced mortgage **GRANTED**;

(5) Further, that Plaintiff's Request for Partial Summary Judgment on the issue that extrinsic and parole evidence is admissible to explain the meeting; that both parties attached to the term "for an amount equal to the then existing mortgage principal and interest" **DENIED**;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendant's Motion for Partial Summary Judgment is on the following issues:

(1) That the plain meaning of the Option to Purchase language as contained in the leases by and between these parties from 2000 to 2017 mean that the Plaintiff has the Option to Purchase the Defendant's property at the actual amount owed by the Defendant on its mortgage, interest and principal, at the time the Option is exercised **DENIED**;

(2) That the Plaintiff's assertions that the four different leases entered in question are not a single party writing and merely a continuation of one another, but independently bargained for, contracted and negotiated agreements that should be treated as such **DENIED**;

(3) That if Defendant had a prior obligation to keep a "Reserve Account", that such Reserve Account should no longer be applied to any purchase or the exercise of Plaintiff's Option to Purchase **DENIED**;

IT IS THEREFORE determined that the issues addressed in this Judgment on the Complaint of the Plaintiff and that of the Defendant are hereby deemed **RESOLVED** and **ADJUDICATED** accordingly.

11/20/2023 10:45:07 AM

BY THE COURT:

Circuit Court Judge
Third Judicial Circuit

Attest:
Klosterman, Linda
Clerk/Deputy

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF LAKE	)	THIRD JUDICIAL CIRCUIT
SOUTH DAKOTA BOARD OF REGENTS, as the Governing Board for DAKOTA STATE UNIVERSITY,	)	39CIV. 22-000035
Plaintiff,	)	
vs.	)	FINDINGS OF FACT AND CONCLUSIONS OF LAW
MADISON HOUSING AND REDEVELOPMENT COMMISSION,	)	
Defendant.	)	

The above entitled matter coming on for hearing on Friday, the 28th day of June, 2024, at 9:00 o'clock AM in the courtroom of the Lake Co. Courthouse, Madison, Lake Co., SD, the Hon. Patrick T. Pardy, presiding, and the Plaintiffs, SOUTH DAKOTA BOARD OF REGENT, as the Governing Board for DAKOTA STATE UNIVERSITY, appearing in person, and represented by R. L. Ericsson and John M. Nelson, their attorneys, and the Defendant, MADISON HOUSING AND REDEVELOPMENT COMMISSION, appearing personally and represented by Jacob Dawson and Wilson M. Kleibacker, their attorneys, and the Court having previously considered and ruled on the parties' cross motions for Summary Judgment and Judgment and Order being entered on the 21st day of November, 2023, and the Court having heard the evidence and argument of counsel and being fully advised in the premises, hereby makes and files the following:

FINDINGS OF FACT

-1-

The Board of Regents was created to implement the requirements of Section 3, Article XIV of the South Dakota Constitution that publicly funded post-secondary institutions be governed by a board of regents. SDCL 13-49-1. Constituted as a corporation or body corporate, the Board of Regents enjoys the "power to sue and be sued, to hold, lease and manage, for the purposes for which they were established, any property belonging to the educational institutions under its control, collectively or severally, of which it shall in any manner become possessed." SDCL 13-49-11. Dakota State University is a state-operated post-secondary institution situated in Madison, Lake County, South Dakota, and operates under the authority and direction of the South Dakota Board of Regents pursuant to SDCL 13-49;

-2-

The Defendant, the Madison Housing and Redevelopment Commission is a Commission created by Resolution having been adopted on or about the 21st day of February, 1968, by the City of Madison, a political subdivision of the State of South Dakota, doing business in Madison, Lake County, SD;

-3-

That the Plaintiff during the late 1990's experienced a significant growth in student enrollment, increasing the demand for student housing to be offered by the Plaintiff;

-4-

That based upon the Plaintiff's need for additional student housing, the Plaintiff and Defendant, through negotiations, agreed that upon Defendant's construction of two (2) 8-plex units, the Plaintiff would enter into a 10-year lease with Defendant; that under the initial Lease Agreement, the annual rental amount of $103,680.00 was premised on initial construction costs not in excess of One Million Two Hundred Seventy Two Thousand and no/100 ($1,272,000.00) Dollars, financed at a 6.25% interest rate; that in the event of lower construction costs or lower interest rates, the difference in payment would be applied to the foregoing "Reserve Account";

-5-

That since the construction of the two (2) 8-plex units, the Defendant has been leasing to Plaintiff, for approximately twenty-four (24) years continuously the following described real property:

> Two certain 8-plex housing units, adjacent sidewalk, and parking areas, situated on Lots One (1) and Two (2) of the Plat of MHRC First Addition to the City of Madison, Lake County, South Dakota;

-6-

That on or about the 30th day of October, 2000, by a written Lease Agreement, the Defendant, the Madison Housing and Redevelopment Commission, leased to the Plaintiff, Dakota State University, the above named and described property for a term of ten (10) years starting August 1, 2001 for $103,680 annually, paid in equal installments on the first of the month; that in addition to other provisions of the Agreement, Paragraph 16 of the Agreement provides that "Tenant shall have the option to purchase leased premises at any time after the initial term of this lease for an amount equal to the then existing mortgage principal and interest balance, upon reasonable notice to owner";

-7-

That on or about the 1st day of August, 2011, by a written Lease Agreement, the Defendant, the Madison Housing and Redevelopment Commission, leased to the Plaintiff, Dakota State University, the above named and described property for a term of three (3) years

for $103,680 annually, paid in equal installments on the first of the month; that in addition to other provisions of the Agreement, Paragraph 10(b) of the Agreement provides that "Tenant shall have the option to purchase the leased premises at any time for an amount equal to the then existing mortgage principal and interest balance, upon reasonable notice to owner";

-8-

That on or about the 1st day of August, 2014, by a written Lease Agreement, the Defendant, the Madison Housing and Redevelopment Commission, leased to the Plaintiff, Dakota State University, the above named and described property for a term of three (3) years for $103,680 annually, paid in equal installments on the first of the month; that in addition to other provisions of the Agreement, Paragraph 10(b) of the Agreement provides that "Tenant shall have the option to purchase the leased premises at any time for an amount equal to the then existing mortgage principal and interest balance, upon reasonable notice to owner";

-9-

That on or about the 1st day of August, 2017, by a written Lease Agreement which remains in effect until July 31, 2020, the Defendant, the Madison Housing and Redevelopment Commission, leased to the Plaintiff, Dakota State University, the above named and described property for a term of three (3) years for a total of $433,000 with the first annual payment being $135,000 ($11,250 monthly), the second annual payment being $146,000 ($12,166.67 monthly), and the third annual payment being $152,000 ($12,666.67 monthly); that in addition to other provisions of the Agreement, Paragraph 10(b) the Agreement provides that "Tenant shall have the option to purchase the leased premises at any time for an amount equal to the then existing mortgage principal and interest balance, upon reasonable notice to owner";

-10-

That the above property has, for the past twenty-four (24) years, been relied upon and has become an integral part of the Plaintiff's student housing;

-11-

That pursuant to the initial Lease and all subsequent Leases, the Plaintiff was required to pay, in addition to the rental payments stated, any payments in lieu of real estate taxes and additionally, the Plaintiff was required to reimburse the Defendant the "equivalent amount of the premium for building insurance against fire and extended coverage"; Plaintiff has performed under all Leases the provisions requiring it to pay payments in lieu of taxes and reimbursement of insurance premiums to Owner; Plaintiff further has made all Lease payments under and is not in any way in arrears or delinquent in any of its obligations;

-12-

That under the initial Lease, any amounts paid by Plaintiff to Defendant in excess of the amounts necessary to service the original Note and Mortgage which financed the construction of the leased premises was to be placed in a "Reserve Account"; that such reserve account was to

be used for maintenance and repair on the leased premises, with the specific provision that should the Plaintiff purchase the leased premises, pursuant to its option, any amounts remaining in the "Reserve Account" were to be paid or credited to the Plaintiff;

-13-

By Defendant's own admission, it never created or maintained the "Reserve Account";

-14-

That to the best estimate of the Plaintiff, as of December 31st, 2023, the current "existing mortgage and principle and interest" balance is zero ($0.00) Dollars; the Plaintiff, after computing contemplated interest adjustments on the loan over various lease periods and after applying the computed balance of the Reserve Account, (less credits to the Defendant) having overpaid by $23,310.79;

-15-

That well in advance of the expiration of the Lease dated August 1st, 2017, the Plaintiff gave Defendant reasonable notice by sending a letter to Scott Johnson, the Chairperson of the Madison Housing and Redevelopment Commission, on or about April 6th, 2020, expressing Plaintiff's desire to proceed with the purchase of the property pursuant to the terms of the lease and requested Defendant provide Plaintiff with the required pay-off amount of the "then existing mortgage principle and interest balance";

-16-

That upon Defendant's initial receipt of Plaintiff's request to proceed with its option to buy, Defendant indicated that it did not wish to sell the property to Plaintiff and did not provide any figure for a pay-off based upon the initial financing of the project;

-17-

That subsequent to the giving of notice by the Plaintiff to the Defendant in exercise of its option rights, consistent with the provisions of all of the above stated leases, the Defendant refused to accept the amount which Plaintiff's tender to purchase the leased property, Plaintiff having calculated such pay-off based upon its best estimate of the remaining mortgage principle and interest balance; taking into account the interest adjustments contemplated by the leases and also taking a credit for the "Reserve Account" less documented legitimate expenses paid by the Defendant on the leased property;

-18-

That pending a resolution of the issue, the parties negotiated a Lease extension; such Lease extension executed on or about September 15th, 2020, and expiring December 31st, 2020;

-19-

That Plaintiff performed all of its obligations under the September 15th, 2020, lease

making all Lease payments and paying all payments in lieu of taxes and insurance premiums and other provisions, including but not limited to, repairs on the premises;

-20-

The Plaintiff and Defendant having failed to reach an agreement at the end of the September 15th, 2020, Lease, the parties then negotiated and executed an Extension of Lease being dated the 29th day of January, 2021; that such Extension provided for the Lease to run until the 7th day of May, 2021; that Plaintiff performed all its obligations, including but not limited to, the payment of all rents, payments for payment in lieu of taxes, payment of all insurance premiums to Defendant and other obligations;

-21--

That the parties have been without a written Lease since the 8th day of May, 2021; however, the Plaintiff has continued to make all payments as it has in the past for rents, payment in lieu of taxes, reimbursement of insurance premiums and repairs or other obligations as specified in the Lease to the present date;

-22-

That on the 25th day of March, 2022, the Defendant served upon Plaintiff via its attorney, R. L. Ericsson, a Notice to Quit, such Notice to Quit gave Plaintiff until May 31st, 2022, "to quit and remove from said property , and deliver up possession thereof to the undersigned owner of said property;"

-23-

Defendant has agreed that Plaintiff has the right under all Leases to buy the subject property, but the parties could not agree on the dollar amount for the buy-out;

-24-

That the Plaintiff and Defendant stipulated, pursuant to the various methodologies, all amounts shown in the scenarios are correct;

-25-

That commencing with the January 2024 monthly payment, Plaintiff has, based upon a Motion and Order, paid the monthly rental payments into the Lake County Clerk of Courts office for the reason Plaintiff believed that it had, prior to the January 2024 payment, paid sufficient funds in to cover any obligation it had on the "buy-out" of the property; that as of the making of these Findings and Conclusions, the total held by the Lake County Clerk of Courts is $100,690.38.

Based upon the following Findings of Fact, the Court does hereby make the following

Conclusions of Law:

CONCLUSIONS OF LAW

-1-

The Court has both personal and subject matter jurisdiction of the issues and parties before it;

-2-

That the controversy between Dakota State University and the Madison Housing and Redevelopment Commission is ripe, justiciable, and between adversely interested parties;

-3-

That this Court has the power to declare rights, status and other legal relations in the form of a declaration, pursuant to Chapter 21-24;

-4-

The multiple agreements between the parties should be construed together as a single, continuous transaction;

-5-

The Reserve Account term that was executed in the 2000 lease is still in effect as all agreements are construed as one transaction;

-6-

The Defendant has breached its contractual duty with the Plaintiff by failing to maintain a Reserve Account;

-7-

Defendant's failure to maintain the Reserve Account constitutes a breach of Defendant's implied duty of good faith and fair dealing;

-8-

The phrase "then existing mortgage principle and interest balance" refers to the initial mortgage on the property;

-9-

The phrase "then existing mortgage principle and interest balance" is not ambiguous and therefore extrinsic evidence is not admissible to determine the parties' intent;

-10-

The Plaintiff is entitled to the exercise of its option to purchase the property from the Defendant described as:

> Two certain 8-plex housing units, adjacent sidewalk, and parking areas; situated on Lots One (1) and Two (2) of the Plat of MHRC First Addition to the City of Madison, Lake County, SD;

and to receive a Warranty Deed free and clear of all encumbrances except easements of record and/or reservations in the patent;

-11-

Scenario 1 as shown on Plaintiff's Exhibit "4" is the correct calculation contemplated in the Leases for the buy-out amount;

-12-

The Plaintiff be refunded the amount of Twenty Three Thousand Three Hundred Ten and 79/100 ($23,310.79) Dollars as an overpayment toward the buy-out;

-13-

That the funds deposited by the Plaintiff as rent, pursuant to Motion and Order, with the Lake County Clerk of Courts office in the amount of $100,690.38 should be released by the Clerk to the Plaintiff;

-14-

To the extent that any Findings of Fact are more properly designated as Conclusions of Law, the same are hereby incorporated by this reference as if set forth in full.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:
7/26/2024 4:16:34 PM

Attest:
Klosterman, Linda
Clerk/Deputy

Circuit Judge

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF LAKE	)	THIRD JUDICIAL CIRCUIT
		39CIV22-000035
SOUTH DAKOTA BOARD OF REGENTS, as the Governing Board for DAKOTA STATE UNIVERSITY,	) :) :)	
Plaintiff,	:)	JUDGMENT AND ORDER
VS.	:)	
MADISON HOUSING AND REDEVELOPMENT COMMISSION,	:) :)	
Defendant,	:	

The Plaintiff, SOUTH DAKOTA BOARD OF REGENTS, as the Governing Board for DAKOTA STATE UNIVERSITY, having filed a Complaint in the above mentioned matter on the 19th day of April, 2022, and the Defendant, MADISON HOUSING AND REDEVELOPMENT COMMISSION having filed an Answer and Counterclaim in the above referenced matter on the 31st day of May, 2022, and Plaintiff having filed a Reply to Defendant's Counterclaim on the 16th day of June, 2022; both the Plaintiff and Defendant having moved for Partial Summary Judgment, such motions having been heard on the 7th day of November, 2023, and an Order regarding the Summary Judgment Motions having been entered on the 21st day of November, 2023; and the Court having held a Court Trial on all remaining issues on Friday, the 28th day of June, 2024, at 9:00 o'clock AM, R. L. ERICSSON and JOHN M. NELSON, counsel for the Plaintiff, SOUTH DAKOTA BOARD OF REGENTS, as the Governing Board for DAKOTA STATE UNIVERSITY, having appeared and argued for the Plaintiff, and JACOB DAWSON and WILSON KLEIBACKER, as counsel for the Defendant, MADISON HOUSING AND REDEVELOPMENT COMMISSION, having appeared and argued for the Defendant, and the Court having considered the arguments of counsel and having considered the evidence received, records, and testimony, argument, and all filings of the parties, including Briefs, Affidavits, and exhibits;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff, SOUTH DAKOTA BOARD OF REGENTS, as the Governing Board for DAKOTA STATE UNIVERSITY, be allowed to exercise their option to purchase; AND

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that, the

parties having stipulated to four (4) scenarios to be considered by the Court to determine which is the correct scenario to establish the "option buy-out price", the Court finds that:

Scenario One found in Plaintiff's Exhibit Four is the correct calculation to determine the buyout amount, which based on the evidence introduced at trial, such Scenario One, Plaintiff is owed $23,310.79 from Defendant as a refund from the reserve account;

Plaintiff is therefore granted a Money Judgment against the Defendant in the amount of TWENTY THREE THOUSAND THREE HUNDRED TEN AND 79/100 ($23,310.79) DOLLARS;

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that Defendant shall provide marketable title to the contested property, legally described as

> Two certain 8-plex units, adjacent sidewalk, and parking area, situated on Lots One (1) and Two (2) of the Plat of MHRC First Addition to the City of Madison, Lake County, South Dakota;

The particular area to be transferred is as shown in Defendant's Exhibit Four, with the understanding that such property will need to be platted and the parties should be responsible for the platting and all relevant closing costs, including but not limited to, transfer fee, title insurance, platting and surveying and closing fee as they are normally and customarily paid by Buyer and Seller; and such title shall be delivered within one hundred twenty (120) days of the entry of this JUDGMENT and ORDER; AND

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff shall have the sole right and responsibility to manage, maintain, insure the property, and Plaintiff shall have the use and benefit of the property after the entry of this Judgment and notice of the same being served upon the Defendant;

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that the funds paid in to the Lake County Clerk of Courts in the amount of $100,690.38 be, and the same are to be released forthwith to the Plaintiff;

IT IS THEREFORE determined that the issues addressed in this Judgment and Order on the Complaint of the Plaintiff and Counterclaim of the Defendant are hereby deemed fully **RESOLVED** and **ADJUDICATED** and accordingly, no remaining issues are outstanding.

7/26/2024 4:16:58 PM

7/22/2024 5:33:54 PM

BY THE COURT:

Attest:
Klosterman, Linda
Clerk/Deputy

Circuit Court Judge
Third Judicial Circuit

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF LAKE	)	THIRD JUDICIAL CIRCUIT
		39CIV22-000035
SOUTH DAKOTA BOARD OF REGENTS, as the Governing Board for DAKOTA STATE UNIVERSITY,	) :) :)	
Plaintiff,	:)	NOTICE OF ENTRY OF JUDGMENT AND ORDER
VS.	:)	
MADISON HOUSING AND REDEVELOPMENT COMMISSION,	:) :)	
Defendant,	:	

NOTICE IS HEREBY GIVEN that on 22nd day of July, 2024, the Honorable Patrick T. Pardy, Judge of the Third Judicial Circuit, signed a Judgment and Order, which Judgment and Order was re-signed by the Court on July 26th, 2024, which Judgment, as well as Findings of Fact and Conclusions of Law, were entered and filed on July 26th, 2024. Attached hereto and served herewith are certified copies of the Findings of Fact and Conclusions of Law, as well as the Judgment and Order.

Dated this 31st day of July, 2024.

NELSON & ERICSSON LAW OFFICE, PROF LLC

By _____

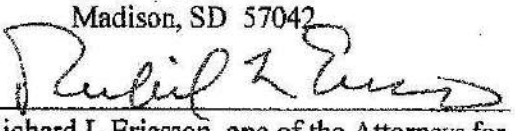
R. L. Ericsson
100 N. Egan Ave., PO Box 406
Madison, SD 57042
Telephone No. (605) 256-4597
rleric@ericssonlaw.com
Attorney for SD Board of Regents,
As the Governing Board for
DAKOTA STATE UNIVERSITY

CERTIFICATE OF SERVICE

This will Certify that on the 31st day of July, 2024, a true and correct copy of the **Notice of Entry of Judgment and Order, together with a certified copy of the signed Findings of Fact and Conclusions of Law, and Judgment and Order,** were hand delivered to the Defendants, attorneys at their street address below:

Jacob Dawson
Lammers, Kleibacker, Dawson & Miller
108 N. Egan Ave.
Madison, SD 57042

Wilson Kleibacker
Lammers, Kleibacker, Dawson & Miller
108 N. Egan Ave.
Madison, SD 57042



Richard L. Ericsson, one of the Attorneys for SD Board of Regents, as the Governing Board for Dakota State University

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:	
COUNTY OF LAKE	)	THIRD JUDICIAL CIRCUIT
	:	
SOUTH DAKOTA BOARD OF REGENTS, as the Governing Board for DAKOTA STATE UNIVERSITY,	)	39CIV. 22-000035
Plaintiff,	)	
vs.	)	FINDINGS OF FACT AND CONCLUSIONS OF LAW
MADISON HOUSING AND REDEVELOPMENT COMMISSION,	)	
Defendant.	)	

The above entitled matter coming on for hearing on Friday, the 28th day of June, 2024, at 9:00 o'clock AM in the courtroom of the Lake Co. Courthouse, Madison, Lake Co., SD, the Hon. Patrick T. Pardy, presiding, and the Plaintiffs, SOUTH DAKOTA BOARD OF REGENT, as the Governing Board for DAKOTA STATE UNIVERSITY, appearing in person, and represented by R. L. Ericsson and John M. Nelson, their attorneys, and the Defendant, MADISON HOUSING AND REDEVELOPMENT COMMISSION, appearing personally and represented by Jacob Dawson and Wilson M. Kleibacker, their attorneys, and the Court having previously considered and ruled on the parties' cross motions for Summary Judgment and Judgment and Order being entered on the 21st day of November, 2023, and the Court having heard the evidence and argument of counsel and being fully advised in the premises, hereby makes and files the following:

FINDINGS OF FACT

-1-

The Board of Regents was created to implement the requirements of Section 3, Article XIV of the South Dakota Constitution that publicly funded post-secondary institutions be governed by a board of regents. SDCL 13-49-1. Constituted as a corporation or body corporate, the Board of Regents enjoys the "power to sue and be sued, to hold, lease and manage, for the purposes for which they were established, any property belonging to the educational institutions under its control, collectively or severally, of which it shall in any manner become possessed." SDCL 13-49-11. Dakota State University is a state-operated post-secondary institution situated in Madison, Lake County, South Dakota, and operates under the authority and direction of the South Dakota Board of Regents pursuant to SDCL 13-49;

-2-

The Defendant, the Madison Housing and Redevelopment Commission is a Commission created by Resolution having been adopted on or about the 21st day of February, 1968, by the City of Madison, a political subdivision of the State of South Dakota, doing business in Madison, Lake County, SD;

-3-

That the Plaintiff during the late 1990's experienced a significant growth in student enrollment, increasing the demand for student housing to be offered by the Plaintiff;

-4-

That based upon the Plaintiff's need for additional student housing, the Plaintiff and Defendant, through negotiations, agreed that upon Defendant's construction of two (2) 8-plex units, the Plaintiff would enter into a 10-year lease with Defendant; that under the initial Lease Agreement, the annual rental amount of $103,680.00 was premised on initial construction costs not in excess of One Million Two Hundred Seventy Two Thousand and no/100 ($1,272,000.00) Dollars, financed at a 6.25% interest rate; that in the event of lower construction costs or lower interest rates, the difference in payment would be applied to the foregoing "Reserve Account";

-5-

That since the construction of the two (2) 8-plex units, the Defendant has been leasing to Plaintiff, for approximately twenty-four (24) years continuously the following described real property:

> Two certain 8-plex housing units, adjacent sidewalk, and parking areas, situated on Lots One (1) and Two (2) of the Plat of MHRC First Addition to the City of Madison, Lake County, South Dakota;

-6-

That on or about the 30th day of October, 2000, by a written Lease Agreement, the Defendant, the Madison Housing and Redevelopment Commission, leased to the Plaintiff, Dakota State University, the above named and described property for a term of ten (10) years starting August 1, 2001 for $103,680 annually, paid in equal installments on the first of the month; that in addition to other provisions of the Agreement, Paragraph 16 of the Agreement provides that "Tenant shall have the option to purchase leased premises at any time after the initial term of this lease for an amount equal to the then existing mortgage principal and interest balance, upon reasonable notice to owner";

-7-

That on or about the 1st day of August, 2011, by a written Lease Agreement, the Defendant, the Madison Housing and Redevelopment Commission, leased to the Plaintiff, Dakota State University, the above named and described property for a term of three (3) years

for $103,680 annually, paid in equal installments on the first of the month; that in addition to other provisions of the Agreement, Paragraph 10(b) of the Agreement provides that "Tenant shall have the option to purchase the leased premises at any time for an amount equal to the then existing mortgage principal and interest balance, upon reasonable notice to owner";

-8-

That on or about the 1st day of August, 2014, by a written Lease Agreement, the Defendant, the Madison Housing and Redevelopment Commission, leased to the Plaintiff, Dakota State University, the above named and described property for a term of three (3) years for $103,680 annually, paid in equal installments on the first of the month; that in addition to other provisions of the Agreement, Paragraph 10(b) of the Agreement provides that "Tenant shall have the option to purchase the leased premises at any time for an amount equal to the then existing mortgage principal and interest balance, upon reasonable notice to owner";

-9-

That on or about the 1st day of August, 2017, by a written Lease Agreement which remains in effect until July 31, 2020, the Defendant, the Madison Housing and Redevelopment Commission, leased to the Plaintiff, Dakota State University, the above named and described property for a term of three (3) years for a total of $433,000 with the first annual payment being $135,000 ($11,250 monthly), the second annual payment being $146,000 ($12,166.67 monthly), and the third annual payment being $152,000 ($12,666.67 monthly); that in addition to other provisions of the Agreement, Paragraph 10(b) the Agreement provides that "Tenant shall have the option to purchase the leased premises at any time for an amount equal to the then existing mortgage principal and interest balance, upon reasonable notice to owner";

-10-

That the above property has, for the past twenty-four (24) years, been relied upon and has become an integral part of the Plaintiff's student housing;

-11-

That pursuant to the initial Lease and all subsequent Leases, the Plaintiff was required to pay, in addition to the rental payments stated, any payments in lieu of real estate taxes and additionally, the Plaintiff was required to reimburse the Defendant the "equivalent amount of the premium for building insurance against fire and extended coverage"; Plaintiff has performed under all Leases the provisions requiring it to pay payments in lieu of taxes and reimbursement of insurance premiums to Owner; Plaintiff further has made all Lease payments under and is not in any way in arrears or delinquent in any of its obligations;

-12-

That under the initial Lease, any amounts paid by Plaintiff to Defendant in excess of the amounts necessary to service the original Note and Mortgage which financed the construction of the leased premises was to be placed in a "Reserve Account"; that such reserve account was to

be used for maintenance and repair on the leased premises, with the specific provision that should the Plaintiff purchase the leased premises, pursuant to its option, any amounts remaining in the "Reserve Account" were to be paid or credited to the Plaintiff;

-13-

By Defendant's own admission, it never created or maintained the "Reserve Account";

-14-

That to the best estimate of the Plaintiff, as of December 31st, 2023, the current "existing mortgage and principle and interest" balance is zero ($0.00) Dollars; the Plaintiff, after computing contemplated interest adjustments on the loan over various lease periods and after applying the computed balance of the Reserve Account, (less credits to the Defendant) having overpaid by $23,310.79;

-15-

That well in advance of the expiration of the Lease dated August 1st, 2017, the Plaintiff gave Defendant reasonable notice by sending a letter to Scott Johnson, the Chairperson of the Madison Housing and Redevelopment Commission, on or about April 6th, 2020, expressing Plaintiff's desire to proceed with the purchase of the property pursuant to the terms of the lease and requested Defendant provide Plaintiff with the required pay-off amount of the "then existing mortgage principle and interest balance";

-16-

That upon Defendant's initial receipt of Plaintiff's request to proceed with its option to buy, Defendant indicated that it did not wish to sell the property to Plaintiff and did not provide any figure for a pay-off based upon the initial financing of the project;

-17-

That subsequent to the giving of notice by the Plaintiff to the Defendant in exercise of its option rights, consistent with the provisions of all of the above stated leases, the Defendant refused to accept the amount which Plaintiff's tender to purchase the leased property, Plaintiff having calculated such pay-off based upon its best estimate of the remaining mortgage principle and interest balance; taking into account the interest adjustments contemplated by the leases and also taking a credit for the "Reserve Account" less documented legitimate expenses paid by the Defendant on the leased property;

-18-

That pending a resolution of the issue, the parties negotiated a Lease extension; such Lease extension executed on or about September 15th, 2020, and expiring December 31st, 2020;

-19-

That Plaintiff performed all of its obligations under the September 15th, 2020, lease

Conclusions of Law:

CONCLUSIONS OF LAW

-1-

The Court has both personal and subject matter jurisdiction of the issues and parties before it;

-2-

That the controversy between Dakota State University and the Madison Housing and Redevelopment Commission is ripe, justiciable, and between adversely interested parties;

-3-

That this Court has the power to declare rights, status and other legal relations in the form of a declaration, pursuant to Chapter 21-24;

-4-

The multiple agreements between the parties should be construed together as a single, continuous transaction;

-5-

The Reserve Account term that was executed in the 2000 lease is still in effect as all agreements are construed as one transaction;

-6-

The Defendant has breached its contractual duty with the Plaintiff by failing to maintain a Reserve Account;

-7-

Defendant's failure to maintain the Reserve Account constitutes a breach of Defendant's implied duty of good faith and fair dealing;

-8-

The phrase "then existing mortgage principle and interest balance" refers to the initial mortgage on the property;

-9-

The phrase "then existing mortgage principle and interest balance" is not ambiguous and therefore extrinsic evidence is not admissible to determine the parties' intent;

-10-

The Plaintiff is entitled to the exercise of its option to purchase the property from the Defendant described as:

> Two certain 8-plex housing units, adjacent sidewalk, and parking areas, situated on Lots One (1) and Two (2) of the Plat of MHRC First Addition to the City of Madison, Lake County, SD;

and to receive a Warranty Deed free and clear of all encumbrances except easements of record and/or reservations in the patent;

-11-

Scenario 1 as shown on Plaintiff's Exhibit "4" is the correct calculation contemplated in the Leases for the buy-out amount;

-12-

The Plaintiff be refunded the amount of Twenty Three Thousand Three Hundred Ten and 79/100 ($23,310.79) Dollars as an overpayment toward the buy-out;

-13-

That the funds deposited by the Plaintiff as rent, pursuant to Motion and Order, with the Lake County Clerk of Courts office in the amount of $100,690.38 should be released by the Clerk to the Plaintiff;

-14-

To the extent that any Findings of Fact are more properly designated as Conclusions of Law, the same are hereby incorporated by this reference as if set forth in full.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:
1/26/2024 4:16:34 PM

Attest:
Klosterman, Linda
Clerk/Deputy

Circuit Judge

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF LAKE	)	THIRD JUDICIAL CIRCUIT
		39CIV22-000035
SOUTH DAKOTA BOARD OF REGENTS, as the Governing Board for DAKOTA STATE UNIVERSITY,	) :	
Plaintiff,	) :	
VS.	) :	JUDGMENT AND ORDER
MADISON HOUSING AND REDEVELOPMENT COMMISSION,	) :	
Defendant,	) :	

The Plaintiff, SOUTH DAKOTA BOARD OF REGENTS, as the Governing Board for DAKOTA STATE UNIVERSITY, having filed a Complaint in the above mentioned matter on the 19th day of April, 2022, and the Defendant, MADISON HOUSING AND REDEVELOPMENT COMMISSION having filed an Answer and Counterclaim in the above referenced matter on the 31st day of May, 2022, and Plaintiff having filed a Reply to Defendant's Counterclaim on the 16th day of June, 2022; both the Plaintiff and Defendant having moved for Partial Summary Judgment, such motions having been heard on the 7th day of November, 2023, and an Order regarding the Summary Judgment Motions having been entered on the 21st day of November, 2023; and the Court having held a Court Trial on all remaining issues on Friday, the 28th day of June, 2024, at 9:00 o'clock AM, R. L. ERICSSON and JOHN M. NELSON, counsel for the Plaintiff, SOUTH DAKOTA BOARD OF REGENTS, as the Governing Board for DAKOTA STATE UNIVERSITY, having appeared and argued for the Plaintiff, and JACOB DAWSON and WILSON KLEIBACKER, as counsel for the Defendant, MADISON HOUSING AND REDEVELOPMENT COMMISSION, having appeared and argued for the Defendant, and the Court having considered the arguments of counsel and having considered the evidence received, records, and testimony, argument, and all filings of the parties, including Briefs, Affidavits, and exhibits;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff, SOUTH DAKOTA BOARD OF REGENTS, as the Governing Board for DAKOTA STATE UNIVERSITY, be allowed to exercise their option to purchase; AND

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that, the

parties having stipulated to four (4) scenarios to be considered by the Court to determine which is the correct scenario to establish the "option buy-out price", the Court finds that:

Scenario One found in Plaintiff's Exhibit Four is the correct calculation to determine the buyout amount, which based on the evidence introduced at trial, such Scenario One, Plaintiff is owed $23,310.79 from Defendant as a refund from the reserve account;

Plaintiff is therefore granted a Money Judgment against the Defendant in the amount of TWENTY THREE THOUSAND THREE HUNDRED TEN AND 79/100 ($23,310.79) DOLLARS;

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that Defendant shall provide marketable title to the contested property, legally described as

> Two certain 8-plex units, adjacent sidewalk, and parking area, situated on Lots One (1) and Two (2) of the Plat of MHRC First Addition to the City of Madison, Lake County, South Dakota;

The particular area to be transferred is as shown in Defendant's Exhibit Four, with the understanding that such property will need to be platted and the parties should be responsible for the platting and all relevant closing costs, including but not limited to, transfer fee, title insurance, platting and surveying and closing fee as they are normally and customarily paid by Buyer and Seller; and such title shall be delivered within one hundred twenty (120) days of the entry of this JUDGMENT and ORDER; AND

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff shall have the sole right and responsibility to manage, maintain, insure the property, and Plaintiff shall have the use and benefit of the property after the entry of this Judgment and notice of the same being served upon the Defendant;

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that the funds paid in to the Lake County Clerk of Courts in the amount of $100,690.38 be, and the same are to be released forthwith to the Plaintiff;

IT IS THEREFORE determined that the issues addressed in this Judgment and Order on the Complaint of the Plaintiff and Counterclaim of the Defendant are hereby deemed fully **RESOLVED** and **ADJUDICATED** and accordingly, no remaining issues are outstanding.

7/26/2024 4:16:58 PM

7/22/2024 5:33:54 PM

BY THE COURT:

Circuit Court Judge
Third Judicial Circuit

STATE OF SOUTH DAKOTA
Third Judicial Circuit Court
I hereby certify that the foregoing instrument is a true and correct copy of the original as the same appears on file in my office on this date:
Attest: Klosterman, Linda Clerk/Deputy

JUL 31 2024

Linda J. Klosterman
Lake County Clerk of Courts

By: _____

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. **30813**

SOUTH DAKOTA BOARD OF REGENTS,
As the Governing Board for
DAKOTA STATE UNIVERSITY,

Plaintiff – Appellee,

Vs.

MADISON HOUSING AND
REDEVELOPMENT COMMISSION

Defendant – Appellant.

Appeal from the Third Judicial Circuit,
Lake County, South Dakota.
The Hon. Patrick T. Pardy, Judge, presiding

APPELLEE'S BRIEF

ATTORNEYS FOR APPELLEE:

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PO Box 406
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ATTORNEYS FOR APPELLANT:

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Notice of Appeal filed August 29, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

TREATISES:

PRELIMINARY STATEMENT

References to Dakota State University, acting as a post-secondary institution governed by the South Dakota Board of Regents, shall be referred to herein as "DSU." The Madison Housing and Redevelopment Commission, a political subdivision of the State of South Dakota providing housing and development services to the City of Madison, South Dakota, shall be referred to herein as "MHRC."

References to the Settled Record are designated as "SR," and refers to document contained in the Settled Record of the case, and will reference the page numbers as prescribed by the Clerk's Certificate filed October 27, 2023. References to the "plaintiff" are used interchangeably with the "Appellee," both of which refer to Dakota State University, and references to the "defendant" are used interchangeably with the "Appellant," both of which refer to the Madison Housing and Redevelopment Commission.

JURISDICTIONAL STATEMENT

The plaintiff concurs that MHRC has the right to request review of the trial court's judgment and order pursuant to SDCL 15-26A-3 and SDCL 15-26A-6.

LEGAL ISSUES

I. **Whether the trial court erred in granting any or all of the Appellee's motion for summary judgment relief, either because the court incorrectly applied the law of contracts and single writings, or because the court should have denied the motion to take further evidence on the issues presented?**

The most relevant cases related to this issue are as follows:

a. *Kramer v. William F. Murphy Self-Declaration of Tr.*, 2012 S.D. 53, 816 N.W.2d 813.

b. *Baker v. Wilburn*, 456 N.W.2d 304 (S.D. 1990).

c. *St. Paul Fire & Marine Ins. Co. v. Tennefas Const. Co.*, 396 F.2d 623 (8th Cir. 1968).

The most relevant statutory provisions related to this issue are the following:

a. SDCL 53-8-7

II. Whether the trial court erred in refusing to grant any or all of the MHRC's motion for summary judgment?

The most relevant cases related to this issue are as follows:

a. *Atmosphere Hospitality Management, LLC v. Shiba Investments, Inc.*, 158 F. Supp. 3d 837 (D.S.D. 2016).

b. *Nelson v. Schellpfeffer*, 2003 S.D. 7, 656 N.W.2d 740.

c. *Edgar v. Mills*, 2017 S.D. 7, 892 N.W.2d 223.

III. Whether, if granting summary judgment as ordered in favor of the Appellee was appropriate, the trial court erred in refusing to adopt the plain language of the parties' writing concerning the appropriate calculation of an imputed "reserve account"?

The most relevant cases related to this issue are as follows:

a. *Nelson v. Schellpfeffer*, 2003 S.D. 7, 656 N.W.2d 740.

STATEMENT OF THE CASE

DSU brought action in Circuit Court, Third Judicial Circuit, before the Honorable Patrick T. Pardy to compel MHRC to perform under DSU's option to purchase certain real estate DSU had been renting under a series of leases, such grant of option to purchase being a provision of each of the leases.

DSU contends all leases constitute one continuing transaction.

DSU requested the court to determine the appropriate "buy-out" figure of the property based on the proposition MHRC had a continuing obligation to deposit, keep and maintain a "reserve account" of monies, being the difference between the amount necessary for the servicing of MHRC's initial debt against the subject property and the amount of the rent paid by DSU during the full term of the several leases.

DSU and MHRC made separate and cross motions for Summary Judgment, both supported by Affidavits, Answers to Interrogatories and Depositions taken in discovery, DSU's motion dated the 6th day of June 2023, and MHRC's motion dated the 1st day of September 2023.

On the 8th day of November 2023, the court issued its written opinion granting Summary Judgment in favor of DSU on DSU's Motion for Summary Judgment on five of the six claims of DSU and denied Summary Judgment on one of DSU's claims and further denied Summary Judgment on all claims made by MHRC. An Order for Summary Judgment pursuant to its November 8th, 2023, decision was entered on the 20th day of November 2023, and served on MHRC on the 22nd day of November 2023.

DSU, believing it had paid enough together with its perceived calculation of the "reserve account", to cover the "buy-out" of the property, moved the court on the 8th day of December, 2023, to allow DSU to make its monthly rental payments, commencing with the January 2024 payment, into court in the custody of the Lake County Clerk of Courts. The court, on the 20th day of December 2023, entered its order allowing DSU rent payments, commencing with the January 2024 payment, to be paid into the Lake County Clerk of Courts until a court trial determining the appropriate "buy-out" amount was held.

Following a court trial held on the 28th day of June, 2024, on the remaining issue of the "buy-out" amount, the trial court found in favor of DSU and a Judgment and Order was entered against MHRC in the amount of $23,310.79 and further ordering good title as to the subject real estate be delivered from MHRC to DSU, Findings of Fact and Conclusions of Law and such Judgment and Order being entered July 26th, 2024, with Notice of Entry of the same being served on MHRC on the 31st day of July, 2024.

Subsequent to the court's decision of July 26th, 2024, DSU moved to have the monies held by the Lake County Clerk of Courts released to DSU and the court ordered the release of the funds on the 26th day of July 2024.

MHRC appealed from the Judgment and Order by service and filing Notice of Appeal on August 29th, 2024.

STATEMENT OF THE FACTS

Due to increasing enrollment and demand for student housing, DSU approached MHRC to be the facilitator for the purpose of obtaining financing to build two 8-plex apartment units in Madison, SD. SR 162-168. The agreement was conditioned on DSU agreeing to rent the two 8-plex units for a term of 10 years with the option to renew. *Id.* The agreement was designed to be a "pass through" arrangement with MHRC acting as the conduit to secure and service financing. SR 168, SR 377. Under the terms of the agreement, which was memorialized in the initial lease dated the 30th day of October, 2000, (hereinafter 2000 Lease) DSU would pay, commencing August 1st, 2001, not only the rental payments at least in an amount equal to MHRC loan payments but would also pay all amounts for insurance and taxes or payments in lieu of taxes during the full term of the lease or extensions thereof. SR 679. The lease also called for the conditional

establishment of a "reserve account". *Id.* It also generally provided, among other things, as to the obligations of DSU and MHRC as to the maintenance of the property. SR 680. Under the lease, DSU had an absolute option to purchase the leased premises. SR 681.

The lease provided for the construction of the 8-plexes at a cost not to exceed $1,272,000.00. SR 679. The initial financing rate was 6.25%, with an initial annual rental payment of $103,680.00. SR 679. The lease further provided that:

> in the event that lower construction costs or lower interest rates would permit a lower annual payment, the difference between the $103,680.00 and the lower payment will be deposited in a reserve account. Monies in the reserve account will be dispersed to tenant (a) if it elects not to renew this lease as provided in paragraph 2, or (b) if it elects to exercise its option to purchase the leased premises as permitted in paragraph 16.

Id. The original lease further provided for the right of DSU to renew the lease and also that the rental rate could be adjusted to reflect MHRC's actual costs associated with the ownership and administration of the facility. SR 679-680. The record reflects that the project was not undertaken as a "money maker" for MHRC but consistent with the stated mission of MHRC, was again a "pass through" arrangement for MHRC to neither make money nor lose money SR 168, SR 377, SR 422.

As stated, the 2000 lease contained a provision granting DSU an option to buy the property. The lease stated, "tenant shall have the option to purchase the leased premises at any time after the initial term of this lease for an amount equal to the then existing mortgage principal and interest balance, upon reasonable notice to the owner". SR 681. There is no dispute that DSU made all lease payments in full and timely. MHRC could not confirm if a "reserve account" was ever created, but it is without dispute that if in fact it was created, it was never fully funded and that no separate reserve account existed at the time of either the hearing on the Motion for Summary Judgment or at the time of the

Court Trial. SR 333-335, SR 406. The 2000 lease contained no integration clause. SR 679-683.

On August 1st, 2011, DSU and MHRC entered a lease agreement entitled "Housing Lease" (hereafter "2011 lease"). SR 684-689. The best evidence indicates that the 2011 lease was drafted and proffered by MHRC to DSU. SR 409-410. The 2011 lease contains virtually the same provisions of the 2000 lease with the exception that the lease was for a term of three years, and it made no reference to the obligation of MHRC to maintain a reserve account as provided in the 2000 lease. The testimony of Chris Giles indicated that this provision was intentionally omitted by MHRC from the 2011 lease. SR 377-379. Mr. Giles acknowledged that MHRC had not met its required obligation to either establish and/or maintain a reserve account as mandated by the 2000 lease. *Id.* DSU did not agree to the extinguishing of the obligation of MHRC to maintain the "reserve account" (SR 196-197), and the 2011 lease contained no provision or language that the reserve account obligation was to be extinguished. SR 684-689. An addendum to this lease clarified the obligations of maintenance between the respective parties. SR 689, SR 420. The other terms, including the rent amount which remained exactly the same are virtually, if not identical, to the provisions contained in the initial 2000 lease. All lease payments were timely made and in the prescribed amount. No integration clause was included in the 2011 lease. SR 684-689.

On August 1st, 2014, DSU and MHRC entered into a lease entitled "Housing Lease" for a term of two years from August 1st, 2014, to July 31st, 2016 (hereinafter "2014 lease"). SR 690-695. Again, this lease is virtually identical to the prior leases with the rental amount remaining exactly the same and again containing an option permitting

DSU to purchase the leased premises and to renew the lease. All payments under this lease were fully and timely made. This lease contained no integration clause *Id.*

On June 27th, 2016, the parties entered into a lease entitled "Housing Lease". Although the lease stated the term of two years, it went on to state the lease was from August 1st, 2016, to July 31st, 2017. The lease was for the same rental amount and contained the same provisions as the 2011 and 2014 leases and the lease did not contain an integration clause. DSU states this lease is not a part of the settled record at the time of filing.

Notwithstanding the fact that the June 27th, 2016, lease is not a part of the settled record at the time of filing of this brief, it is a fact that DSU and MHRC continued their lease agreement on the same terms and conditions as the 2000 lease, the 2011 lease and the 2014 lease. Accordingly, the court should decide what weight, if any, should be given to the June 27th, 2016, lease. All rents during the period of time from August 1st, 2016, to July 31st, 2017, were fully and timely paid.

DSU and MHRC signed a lease dated May 30th, 2017; such lease term commencing August 1st, 2017, again entitled "Housing Lease", (hereinafter "2017 lease") stating for a "term of two years" but thereafter stating "from August 1st, 2017, to July 31st, 2020". SR 696-701. Pursuant to paragraph 6 of the 2000 lease, MHRC requested a rent increase, this increase due to permanent improvements on the leased premises. SR 860-861 The rental was increased to $135,000.00 in year 1, $146,000.00 in year 2, and $156,000.00 in year 3 (SR 696), this increase in rent being the first increase in rent since the initial October 30th, 2000, lease. The lease again contained virtually the identical provisions and language, again granting DSU the option to purchase the leased premises.

SR 696-701. All rents due under this lease were fully and timely paid. No integration clause was included in this lease. *Id.*

On or about April 6th, 2020, prior to the expiration of the 2017 lease, DSU gave written notice to MHRC of its intention to exercise its option to purchase the two 8-plex units.

The parties were unable to agree on the appropriate "buy out" number and accordingly continued the leasing with an addendum dated in September 2020. SR 702-703. The addendum continued the lease on the same terms as the 2017 lease. The September 2020 lease contained a "recital" wherein the parties acknowledged and recognized the 2000 lease. SR 702. A second addendum was entered into in January 2021 with an end date of May 7, 2021, again continuing on the same terms as the 2017 lease and the September 2020 addendum. SR 704-705. All rents under both addendums were timely and fully paid. Neither addendum contained an integration clause. SR 702-705.

Upon the expiration of the January 2021 addendum, DSU continued possession and renting under the same terms as the 2017 lease, the September 2020 and January 2021 addendums. DSU and MHRC agree all rents were fully and timely paid.

Throughout the time from the notice given by DSU to MHRC for the exercise of its option to purchase, MHRC and DSU continued to try and resolve the issue of the appropriate buy-out calculation. DSU became aware, through a review of the financial statements of MHRC obtained from the Department of Legislative Audit, that MHRC had refinanced the original funding bonds several times and had obtained a more favorable interest rate than the original 6.25%. SR 712-733, SR 797.

As has been stated, DSU made every rent payment in full under the aforementioned leases with every rent payment, starting from the onset of the 2000 lease, exceeding the amount MHRC needed to cover the principal and interest of each loan, including all refinancings. This is shown on the trial exhibit DSU prepared by and testified to by Stacy Krusemark. SR 735-785. The calculation, which was adopted by the trial court, showed in detail the payments, principal and interest and the "difference" between the rent and what was needed to service the loan throughout the entirety of this continuing transaction, the difference being what MHRC had a mandatory obligation to deposit, keep and maintain in a "reserve account". SR 736-741.

Further and importantly, the exhibit showed a credit or "adjustment" in the amount of $177,114.24 (SR 801-802) to the final buy-out calculation, giving MHRC credit for all documented expenses they incurred during the full term of the several leases, thus insuring MHRC did not lose any money or suffer any financial detriment whatsoever. SR 735-785.

The matter was complicated as MHRC, unbeknownst to DSU, had, in doing the refinancing of the two 8-plex units, together with other MHRC properties, included them or "bundled them" as collateral in the refinanced loan. SR 343.

In March of 2022, MHRC served DSU with a Notice to Quit, giving DSU until May 31st, 2022, to remove itself from the two 8-plex units.

DSU commenced suit to enforce its option to purchase and demanded upon a determination of the appropriate "buy-out" amount and payment by DSU of said appropriate "buy-out" amount MHRC deliver to DSU clear title to the two 8-plex units free of all encumbrances whatsoever.

STANDARD OF REVIEW

1. "[This Court] review[s] a court's decision to grant a motion for summary judgment de novo." *Barr v. Cole*, 2023 S.D. 60 ¶18, 998 N.W.2d 343 (quoting *Zhi Gang Zhang v. Rasmus*, 2019 S.D. 46 ¶ 25, 932 N.W.2d at 161). Summary Judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue to as to any material fact and that the moving party is entitled to a judgment as a matter of law". *Tammen v. Tronvold*, 2021 S.D. 56, ¶ 17, 965 N.W.2d 161,168 (quoting SDCL 15-6-56 (c)). "The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party . . . . if there exists any basis which supports the ruling of the trial court, affirmance of a summary judgment is proper." *Id.* Further, "[e]ntry of summary judgment is mandated against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *State v. BP plc*, 2020 S.D. 47, ¶ 23, 948 N.W.2d 45,53 (quoting *Nationwide Mut. Ins. Co. v. Barton Solvents Inc.*, 2014 S.D. 70, ¶ 10, 855 N.W.2d 145, 149 (citations omitted)).

2. The appellate court reviews findings of fact of the trial court under the "clearly erroneous" standard of review. *Conti v. Conti*, 2021 S.D. 62, 967 N.W.2d 10. The Supreme Court may only overturn the trial court's findings of fact on appeal when a complete review of the evidence leaves the appellate court with a definite and firm conviction that a mistake has been made. *Id.* (quoting *Schieffer v. Schieffer*, 2013 S.D. 11, 826 N.W.2d 627 (internal citations omitted)).

It is here noted that the DSU concurs with the MHRC's standard of review.

ARGUMENT

DSU relies upon citations and arguments found in its previous briefs (SR 102-120, SR 650-651) and the trial court's memorandum decision (SR 512-521), in response to MHRC's legal issues, however, DSU will also highlight evidence found in the settled record to rebut MHRC's contentions regarding the ruling of the trial court at the summary judgment level and the court trial level.

1. Did the trial court err in granting summary judgment in favor of the Appellee, in particular finding that the various lease agreements constituted one writing of a single, continuous transaction?

DSU contends that the trial court did not err in granting summary judgment in favor of DSU. As MHRC stated in its brief to this Court, the issue of whether these lease agreements constitute a single, continuous transaction is fundamental in this litigation, and it is assuredly the correct analysis of the law and facts. To argue or decide otherwise would be to allow MHRC to receive a windfall from DSU's consistent, on-time overpayments, overpayments which should have been deposited in the reserve account for DSU's benefit, and for DSU to pay the "then existing mortgage principal and interest balance" purported by MHRC, freeing MHRC of all their debt, including debt not associated with the disputed property.

a. Whether the various lease agreements should be read as a single, continuous transaction, or as separately bargained for, independent agreements.

The trial court did not err in granting summary judgment in favor of DSU ruling that the original lease instrument and the lease renewal instruments should be construed as memorializing a single, ongoing transaction.

The trial court relied upon *Talley v. Talley*, 1997 S.D. 88, 566 N.W.2d 846; *Baker v. Wilburn*, 456 N.W.2d 304 (S.D. 1990); *St. Paul Fire & Marine Ins. Co. v. Tennefas Const. Co.*, 396 F.2d 623 (8th Cir. 1968); and *Kramer v. William F. Murphy Self-Declaration of Tr.*, 2012 S.D. 53, 816 N.W.2d 813, in making its decision. DSU agrees with the Court's analysis and citations of such case law.

The MHRC argues that the lease documents do not have any internal references to one another. However, the 2000 lease agreement states that "[DSU] may renew this lease…", an obvious contemplation of a continuing transaction between the parties. SR 679. Additionally, the 2011 lease allowed for an automatic renewal (SR 684), but the 2014 lease (SR 690) and 2017 lease (SR 696) refer to DSU's right to renew found in the 2000 lease, but do not have a specific right to renew themselves. The 2000 lease also states that "[DSU] shall have the option to purchase the lease premises at any time after the *initial* term of this lease …" (emphasis added), which shows that the original drafters anticipated that there would be a continued transaction between the parties that would necessitate additional documents, but would be part of the same transaction. SR 681. However, *St. Paul Fire & Marine Ins. Co. v. Tennefas Const. Co.*, 396 F.2d 623 (8th Cir. 1968) and *Ponderosa-Nevada Inc. v. Venners*, 90 S.D. 579, 243 N.W.2d 801, stand for the proposition that "although the original lease instrument and the instruments renewing that lease were necessarily executed at different times, several instruments which have been executed by the same parties at different times and which pertain to the same transaction will be read together, even if they do not expressly refer to each other."

MHRC also argues that the 2020 lease addendum contains "statements" that, according to the addendum "shall not be used against the party making said statement."

SR 702. However, the internal references that DSU wishes to show the Court are not "statements." Rather, the internal reference found in the 2020 addendum are recitals in anticipation of a contract, a recitation of fact that both parties accept as true prior to entering into the contract. Recitals and statements made during negotiations are different as recitals are agreed to by and between the parties, and statements made during negotiations are necessarily made by one party or the other, hence, it would make sense why the parties would agree that "statements" could not be used against either party.

MHRC, on page 14 of its brief, relies on *Pitchblack Oil,LLC v. Hess Bakken Invs. II, LLC*, 949 F.3d 424, 431 (8th Cir. 2020) (applying North Dakota Law); *Lillibridge v. Mesa Petroleum Co.*, 907 F.2d 1030, 1036 (10th Cir. 1990); *Sunac Petroleum Corp. v. Parkes*, 416 S.W2d 798, 802 (Tex. 1967); see also *Sawyer v. Guthrie*, 215 F. Supp. 2d 1254, 1265 n.5 (D. Wyo. 2002) to make the argument that other courts have decided changing consideration in later agreements should then not be considered one contract. However, MHRC relies upon these cases that are not applicable or mandatory authority for this Court. MHRC would rather have this Court use rulings from other jurisdictions because if the Court were to agree with MHRC in this matter, it would be upsetting settled South Dakota case law.

Additionally, the lack of a merger or integration clause in any of the contracts shows that the parties, either through lack of drafting precision or intent, did not intend for the lease agreements to be standalone instruments for standalone transactions. SR 113. Rather, that each lease was a continuation of the original lease, and all material terms were proliferated to each and every instrument unless otherwise specifically precluded with intent by both parties.

b. Whether the reserve account should no longer be enforceable against the purchase price, or imputed against MHRC.

The trial court relied upon *Edgar v. Mills*, 2017 S.D. 7, 892 N.W.2d 223; *Atmosphere Hospitality Management, LLC v. Shiba Investments, Inc.*, 158 F. Supp. 3d 837 (D.S.D. 2016); and the Restatement of (Second) of Contracts § 132 (Am. Law Inst. 1981) in its decision. DSU agrees with the Court's analysis and citations of such case law.

The express term in the original lease agreement imposing a conditional duty upon MHRC to disburse monies in a "reserve account" to DSU "if [DSU] elects to exercise its option to purchase the leased premises" is also an implied term of all the subsequent lease renewal agreements between the parties. SR 679.

The reserve account's funding and maintenance is denied by the MHRC. Regardless of whether the MHRC funded and maintained the reserve account, the MHRC was under contractual obligation to do so and to disgorge said funds when DSU exercised its option to purchase *after* the original ten (10) year lease was renewed. DSU then could only receive the reserve accounts fund during one of the renewal leases terms, and not during the initial ten (10) year term which suggests that the original drafters contemplated further instruments to extend the lease term until such time that DSU exercised it purchase option.

The MHRC argues that, using the deposition of Chris Giles, the MHRC intended to remove the continuing obligation to keep and fund the reserve account. The best evidence suggests that the 2011 lease was prepared by MHRC. SR 409-410. Therefore, it would be no surprise that MHRC would want to omit the language mandating the maintenance of the reserve clause given MHRC's failure to do so from the onset of the 2000 lease.

Stacy Krusemark, the VP of Business and Administrative Services for DSU, testified and provided a sworn affidavit that DSU did not intend for the reserve account clause to be removed from the leases. SR 158-159. As evidence of Mr. Krusemark's assertion, DSU continued to overpay the amount of rent owed each month, expecting that those monies would be deposited into the reserve account. Had DSU known their monies were being misappropriated by MHRC, they would have quit overpaying. However, DSU believed that the overpayments were going toward the reserve account and would be applied once DSU exercised its option to purchase. Regardless of the enforceability of the reserve account clause, MHRC is in receipt of $689,234.10 (SR 735-785), by Mr. Krusemark's calculation, of overpaid funds from DSU, and to allow MHRC to keep that money absent a credit to the buyout or a refund is an absurd consequence that certainly was not bargained for or intended by DSU.

c. Whether MHRC's failure to keep a reserve account is a breach of contract, and a breach of an implied duty of good faith and fair dealing.

The trial court relied upon *Weitzel v. Sioux Valley Heart Partners*, 2006 S.D. 45, 714 N.W.2d 884; and *Farm Credit Services of America v. Dougan*, 2005 S.D. 94, 704 N.W.2d 24 in its decision. DSU agrees with the Court's analysis and citations of such case law. The *Dougan* case also provides insight into how breach of the implied duty of good faith and fair dealing can be recognized, providing that "'Good faith' is a compact reference to an implied undertaking not to take opportunistic advantage in a way that could not have been contemplated at the time of drafting, and which therefore was not resolved explicitly by the parties." *Dougan* at ¶ 10 (internal citations omitted).

The MHRC argues that this issue was not ripe for summary judgment due to the underlying facts being disputed. However, the undisputed facts presented to the trial court for summary judgment hold a basis for the trial court's ruling on summary judgment. Additionally, MHRC did not raise the ripeness argument in its brief to the trial court when motioning for summary judgment. SR 424-441.

Assuming the express term in the original lease agreement imposed a conditional duty upon MHRC to disburse monies in a "reserve account" to DSU "if [DSU] elects to exercise its option to purchase the leased premises" is also an implied term of all the subsequent lease renewal agreements between the parties, MHRC's failure and refusal to account for any monies currently remaining in that account constitute a breach of MHRC's implied duty of good faith and fair dealing.

Through depositions of Board members who held their position between 2010 and present, there is lack of institutional memory regarding what became of the reserve account. The continued obligation of the MHRC to maintain the reserve account survives. However, the MHRC is unable to produce any documentation that shows the amount that should have been maintained or what occurred to the monies that should have been deposited into such an account. DSU, at the time of the initial lease agreement and every lease agreement going forward, had been paying more money than was required to service the loan with the assumption that the extra money was being placed into the reserve account. If DSU was aware that their extra money was not going into the reserve account, such extra money would not have been paid. Additionally, the MHRC never asked DSU why payments in excess of the loan payments were being made.

It is of paramount importance that the trial court found MHRC to have breached its duty of good faith and fair dealing. It is an unimpeachable finding given the many admissions of the MHRC Board Members of its failure to even establish, maintain, and fund the "reserve account," which the 2000 lease mandated; and thereafter compounded its breach by trying to unilaterally eliminate the explicit mention of the "reserve account" so as to try and both cover up and extinguish their unfulfilled obligation.

d. Whether the term "then existing mortgage principal and interest balance" refers to the initial mortgage incurred by MHRC or to the actual existing principal and interest balance realized by MHRC at the time of the option.

The trial court relies upon *Atmosphere Hospitality Management, LLC v. Shiba Investments, Inc.*, 158 F. Supp. 3d 837 (D.S.D. 2016); *Vander Heide v. Boke Ranch, Inc.*, 2007 S.D. 69, 736 N.W.2d 824; and *Nelson v. Schellpfeffer*, 2003 S.D. 7, 656 N.W.2d 740. DSU agrees with the Court's analysis and citations of such case law.

Assuming all of the lease and renewal instruments are to be treated as memorializing a single, ongoing transaction between the parties, it is reasonable to conclude that the identical terms in those documents granting Plaintiff an option to purchase the leased premises "for an amount equal to the then existing mortgage principal and interest balance" clearly refer to the mortgage financing the parties contemplated MHRC would first secure during the ten-year term of the original lease rather than to any re-mortgaging or refinancing which MHRC might unilaterally secure during the term of the original lease or any renewals of that lease. There had been no language added or removed from the lease agreements which contemplated a remortgaging of the property or allowed for the MHRC to remortgage the property without Plaintiff's knowledge or consent.

As a matter of law, all of the circumstances surrounding the execution of the original lease and the renewals of that lease support a judicial finding that the term in all those instruments prescribing the price DSU would have to pay in order to exercise its reserved option to purchase the leased premises—"an amount equal to the then existing mortgage principal and interest balance"—must in all reason be construed as referring to the principal that would have been remaining on the threshold mortgage amount contemplated by the parties under paragraph 3 of the original lease. SR 679. Therefore, DSU does not believe the trial court erred in its decision regarding the term the "then existing mortgage principal and interest balance."

2. Did the Trial Court err in refusing to grant any or all of the MHRC's Motion for Summary Judgment?

The trial court did not err in refusing to grant any or all of the MHRC's Motion for Summary Judgment. The trial court made the correct determination on MHRC's Motion for Summary Judgment when examining the undisputed facts and the South Dakota and 8th Circuit case law presented by DSU and by the trial court. Additionally, the cross-Summary Judgment motions and the subsequent decision were mutually exclusive, if the trial court decided in favor of DSU, it is necessary for the MHRC to be ruled against. However, DSU will provide evidence to rebut MHRC's arguments for these legal issues.

a. That the court should have granted summary judgment in favor of MHRC regarding the purchase amount equal to the "then existing mortgage principal and interest balance."

In the interest of judicial economy, I would refer the Court to argument made in DSU's brief under issue 1(d) as the trial court's decision was mutually exclusive to rule in favor of DSU. While it is conceded that MHRC could incur additional debt as large

improvements were made to the disputed property, the rental rate could and should have been adjusted to reflect the increase in the actual amount of debt used to make such improvements. Such a rental adjustment was done in 2017, however, unbeknownst to DSU, MHRC refinanced the property, together with other of MHRC's properties, included them or "bundled them" as collateral in the refinanced loan. SR 343.

The lease agreements do not allow MHRC to make improvements and refinance the disputed property in excess of the improvements amount. To suggest otherwise would allow for MHRC to exponentially increase the mortgage under the guise of making improvements and expect DSU to pay the balance for which DSU did not receive benefit commiserate with the mortgage amount, an absurd result.

b. **That the trial court should have granted summary judgment in favor of the MHRC regarding the various leases are not a single writing or transaction.**

In the interest of judicial economy, I would refer the Court to argument made in DSU's brief under issue 1(a) as the trial court's decision was mutually exclusive to rule in favor of DSU. However, DSU would direct the Court's attention to the fact that, indeed, there was a lease agreement entered into on the 27th day of June 2016 which leased the property from August 1, 2016, to July 31, 2017. Such lease is not included in the settled record, but is attached as an appendix to DSU's brief. Even if the Court does not analyze the document itself, it and/or the undisputed facts presented go to show that there was not a gap in lease documentation.

c. **That the trial court should have granted summary judgment declaring that the MHRC was not required to keep or credit the "reserve account."**

In the interest of judicial economy, I would refer the Court to argument made in DSU's brief under issues 1(b) and (c) as the trial court's decision was mutually exclusive to rule in favor of DSU. Additionally, DSU contends that the lease agreements in the immediate action were not and cannot be construed as a novation under SDCL 20-7-5 or *Jermar Properties, LLC v. Lamar Advert. Co.*, 2015 S.D. 26, ¶ 6-11, 864 N.W.2d 1, 2-4 (citing *Ducheneaux v. Miller*, 488 N.W.2d 902, 911 (S.D. 1992)). The Court in *Jermar* enumerated elements of novation that must be met, specifically "'... (1) a previous valid obligation, (2) agreement of all parties to the substitution under a new contract based on sufficient consideration, (3) extinguishment of the old contract, and (4) the validity of the new contract.'" *Id.*

In the instant case, DSU concedes that there was a previous valid obligation under the 2000 lease agreement, but DSU disagrees that there was an agreement of all parties to the substitution under a new contract based on sufficient consideration. As shown in Stacy Krusemark's testimony and affidavit, DSU did not intend to create a new relationship or substitute the relationship, but rather modify the existing relationship and clarify responsibilities. Additionally, DSU contends that there was not an extinguishment of the old contract as the subject matter of the leases remained the same and the reserve account clause lives on throughout the documents. DSU would also contend that there was not a "new contract" for the purposes of the novation elements as the later leases were mere modifications of the original lease agreement as evidenced by the start dates of the leases, wherein when a new lease term was set to end, another lease would start simultaneously.

MHRC contends that if their argument that the leases are not one continuous agreement, then MHRC should be "freed" from the duty to keep a reserve account, and such amounts should not be applicable to DSU's option to purchase. However, the 2000 lease says, explicitly in paragraph 3, that:

> [m]onies in the reserve account will be disbursed to [DSU] (a) if it elects not to renew this lease as provided in paragraph 2, or (b) if it elects to exercise its option to purchase the leased premises as permitted in paragraph 16. Monies in the reserve account will be retained by [MHRC] if Tenant exercises *its* right to terminate this lease under paragraph 20.

SR 679. Even if MHRC's argument is correct under the Court's analysis, MHRC would still not be entitled to the monies that should have been in the reserve account as DSU has never exercised its right to terminate under the 2000 lease, or any other lease in the transaction.

d. The trial court should have granted summary judgement in favor of MHRC declaring that the 2020 or 2021 lease addendum could not be considered as evidence for or against either party.

In the interest of judicial economy, DSU would refer the Court to argument made in DSU's brief under issues 1(a) as the trial court's decision was mutually exclusive to rule in favor of DSU.

3. Did the trial court err in failing to adopt the clear and unambiguous term for calculation of the value of the Appellee's option at trial, and fail to correct consider the MHRC's argument for calculation of said option?

DSU does not dispute that the language in the 2000 lease lays out the formula for the purchase price of the property. However, MHRC fails to acknowledge the interest rate changes that occurred throughout the life of the transaction and MHRC's financing, as shown in Scenarios 1-6 as introduced at trial. SR 735-785. Scenario 1, which was

adopted by the trial court, accurately depicts actual payments made by DSU, estimated loan payments made by MHRC, and the difference between the two to show how much and what rate the reserve account should have been funded. SR 736-741. This scenario also uses only the original financing for the project to estimate the loan payments made by MHRC and not the exponentially increased mortgage obtained by MHRC in 2017, which collateralized additional property. DSU believes that the calculation in Scenario 1 which shows the estimated original loan balance of $488,809.07 minus the estimated reserve account of $689,234.10 plus the actual improvements proven and stipulated to by both parties of $177,114.24 for a total amount owed to MHRC of a negative balance of $23,310.79. SR 736. The result of MHRC's argument to the contrary is that MHRC keeps the additional monies that were overpaid by DSU over approximately 23+ years and the MHRC's entire debt obligation, which collateralizes not just the disputed property, but additional property owned by the MHRC, is paid for by DSU. Such a result is not equitable to the parties as MHRC has reaped the ill-gotten benefit of DSU's trust over the entire course of their relationship.

CONCLUSION

For the reasons state above, DSU would urge this Court affirm the trial court's decision to grant partial summary judgment in favor of DSU, affirm the trial court's decision to deny partial summary judgment in favor of the MHRC, and affirm the trial court's ruling of the correct calculation of DSU's option to purchase the disputed property as the agreed upon and undisputed Standards of Review cannot support a ruling in favor of Appellant.

Dated this 28th day of February 2025.

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Office Word, Times New Roman font size 12, and contains 6,171 words, excluding the table of contents, table of cases, preliminary statement, jurisdictional statement, statement of legal issues, and certificate of counsel. I have relied on the work and character count of the word-processing program to prepare the certificate.

Dated this 28th day of February 2025.

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of February 2025, a true and correct copy of the Brief of Appellee was served upon the following through Odyssey File and Serve:

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 30813

SOUTH DAKOTA BOARD OF REGENTS,
as the Governing Board for
DAKOTA STATE UNIVERSITY,

Plaintiff – Appellee,

vs.

MADISON HOUSING AND
REDEVELOPMENT COMMISSION,

Defendant – Appellant.

Appeal from the Third Judicial Circuit,
Lake County, South Dakota.
The Hon. Patrick T. Pardy Judge, presiding

APPELLANT'S REPLY BRIEF

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Notice of Appeal filed August 29, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

PRELIMINARY STATEMENT

References to Dakota State University, acting as a post-secondary institution governed by the South Dakota Board of Regents, shall be referred to herein as "DSU" or the "university." The Madison Housing and Redevelopment Commission, a political subdivision of the State of South Dakota providing housing and development services to the Madison, South Dakota area, shall be referred to herein as "MHRC."

References to the Settled Record are designated as "SR," and refers to documents contained in the Settled Record of the case, and will reference the page number as prescribed by the Clerk's Certificate filed October 27, 2023. References to the "plaintiff" are used interchangeably with the "Appellee," both of which refer to Dakota State University, and references to the "defendant" are used interchangeably with the "Appellant," both of which refer to Madison Housing and Redevelopment Commission.

REPLY TO APPELLEE'S STATEMENT OF FACTS

MHRC will limit it's reply to DSU's Statement of Facts wherever necessary to provide context or clarification of the assertions below.

Regarding page 6 of the Appellee's brief, when discussing the omission of the reserve account from the 2011 lease, the Appellee notes that that "DSU did not agree to the extinguishing of the obligation of MHRC to maintain the 'reserve account' (SR 196-197), and the 2011 lease contained no provision or language that the reserve account obligation was to be extinguished." Appellee's brief, page 6. MHRC would only clarify that that particular statement, while factually correct, implies that as a consequence of and after DSU made an affirmative objection to the omission of the reserve account, that there was consequently no mention of extinguishing the reserve account in the 2011

lease. MHRC contends that the record is bare as to whether DSU knew at all or raised any objection to the omission of the reserve account clause whatsoever. Not, as the statement implies, that the omission of the reserve account was a conscious drafting decision of either party accepting its continuance.

MHRC objects to the paragraphs beginning: "On June 27th, 2016, the parties entered..." and ending with "... All rents during the period of time from August 1st, 2016, to July 31st, 2017, were fully and timely paid," being considered by the appellate court. Appellee's Brief, page 7. DSU in including this in its statement of facts references a document which is not a part of the settled record of the trial court. MHRC has replied and objected to DSU's motion to include the document as part of the settled record for the appellate court to consider.

STANDARD OF REVIEW

MHRC notes that both parties have agreed to the appropriate standards of review for this court to consider.

ARGUMENT

In this reply brief, Appellee will limit its response to only those arguments not previously presented in its initial brief to the court wherever possible, and attempt to direct the reply to the issue directly responded to, whenever possible.

1. **Did the trial court err in granting summary judgment in favor of the Appellee, in particular finding that the various lease agreements constituted one writing of a single, continuous transaction?**

a. **Whether the various lease agreements should be read as a single, continuous transaction, or as separately bargained for, independent agreements.**

Here, DSU contends that the trial court was right in granting summary judgment, in part, because "to argue or decide otherwise would be to allow MHRC to receive a windfall from DSU's consistent, on-time overpayments, overpayments which should have been deposited in the reserve account for DSU's benefit, and for DSU to pay the "then existing mortgage principal and interest balance" purported by MHRC, freeing MHRC of all their debt, including debt not associated with the disputed property." Appellee's brief, page 11. This statement is only true if the trial court and appellate court are convinced of every element of DSU's claim, in particular, the intent of the initial building contract, and the implied duty for MHRC to "never make a profit." That is absent from the record due to the lack of testimony of the intent of the parties on the initial lease, and all subsequent lease agreements. It would not be a windfall, for example, for DSU to continue to have the benefit of additional housing for its students at all times during this relationship, and the ongoing right to purchase the property at whatever mortgage and interest balance existed when they might exercise an option to purchase absent this assertion of DSU that at all times the 2000 lease provisions are effective. To say it another way, to accept MHRC's position at trial would still confer the benefit of the option to purchase additional housing from MHRC at precisely what was owed against it at any time, while also securing housing in the form of a written lease. As Mr. Giles testified at deposition, MHRC's understanding was that DSU could purchase the property at whatever time, for the debt owed, to protect MHRC from losing money on the relationship. SR 532-626.

Appellee here highlights that it was improper, when considering whether any of the documents had internal references to each other, for the trial court to consider the 2020 addendum's reference to the initial lease and subsequent leases. The parties

explicitly stated in that document, paragraph (2), the following: "the parties acknowledge that they are in the process of negotiating a settlement, and any statements made, whether set forth in this document or otherwise, shall not be used against the party making said statement in the event that the parties are not able to successfully negotiate a conclusion to this matter." SR 702. DSU contends that because recognition of the 2000 lease is contained in that 2020 addendum as a "recital," it is not a "statement," and dismisses the plain intention of the parties to not allow the contents of the document to be wielded as a sword against either party, while citing no caselaw to support its claim. The plain language of that document clearly manifests that they were extending their lease while attempting to resolve their issues, and had resolved to not give either side ammunition to volley against or for either party. It was improper to consider by the trial court as an internal reference to support its ultimate conclusions that all of the writings were thusly internally referential, and is in fact the only reference any of the writings have to each other.

MHRC also further highlights that the Appellee's and court's reliance on certain South Dakota caselaw is misplaced. In particular, in Talley v. Talley, the Supreme Court ruled that four contracts, all for different purposes (a "tool" contract, an "equipment lease," a "real estate lease," and an agreement for wintering calves), executed *at the same time* were part of a single transaction and writing (emphasis added). Talley v. Talley, 1997 SD 88, 566 N.W.2d. In Baker v. Wilburn, the trial court also relied on the same logic, however in Baker, the contracts in question to be read together were also executed very closely together in time, if not the same date. Baker v. Wilburn, 456 N.W.2d 304 (S.D. 1990). Another case relied upon from 1968 concerned work obligations, indemnity

for the same, contracts concerning the same road construction project and a performance bond, all executed between May and August of 1955, concerning three or more parties. St. Paul Fire & Marine Ins. Co. v. Tennefas Const. Co., 396 F.2d 623 (8th Cir. 1968). The last case relied upon by the trial court was Kramer v. William F. Murphy Self-Declaration of Tr., 2012 S.D. 53, 816 N.W.2d 813, which again concerned multiple agreements concerning terms of three documents executed on the *same day* (a "balloon note," a "loan agreement," and a "promissory note.") (emphasis added). This is highlighted for the purpose to note to the court that MHRC does acknowledge that in certain cases, it is logical and lawful for multiple contracts to be read together. In the above cases, it is common that for example, an acquisition of a business may necessarily implicate several other factors which must be contracted for to complete the transaction. In addition, MHRC acknowledges that in certain circumstances, it is not necessary for the agreements at issue to be executed at the same time. See St. Paul Fire & Marine Ins. Co. v. Tennefas Const. Co., 396 F.2d 623 (8th Circuit 1968). However, the reason that DSU cannot produce a more on-point example of caselaw, where multiple lease agreements executed over twenty-plus years obligate parties to the terms of the original lease, is because the facts in this case take that legal principle well past the extreme and to the untenable. No case cited has such a lengthy period of time between various agreements, because, MHRC presumes, no court has accepted that the same can be held to be a single transaction, particularly when either party had the opportunity to separately contract for specifically their aims no less than four times (over 18 years (the 2011, 2014,2016 and 2017 writings)) before litigation commenced. This interpretation is not, cannot and should not be the law of this case.

In this case, MHRC urges that the various leases executed after the termination of the 2000 lease cannot be a single writing, and must be either a 1) novation, indicating a new agreement entirely or a 2) a renewal, re-creating a legal relationship or the replacement of an old contract with a new contract, as opposed to the mere extension of a previous relationship or contract. See Jermar Props., LLC v. Lamar Adver. Co., 2015 SD 26, 864 N.W.2d 1. As in Jermar, the new agreements cannot be "extensions" of the prior contract, because the new leases did not continue the same contract for a specified period. Id. Similar to Jermar, what the parties actually did at the termination of the first agreement is illuminative; the parties had previously contracted for renewal or extension for a "like term" (10 years), but the very fact that a new lease with different terms was executed shows that a substitution ending the old lease was evidenced, and intended. Id. Because of the above and prior argument, summary judgment in favor of DSU on this issue was improper, and in error.

b. Whether the reserve account should no longer be enforceable against the purchase price, or imputed against MHRC.

Appellant only notes here that, should the appellate court resolve in favor of MHRC that the various lease agreements are not a single continuous transaction, that this issue becomes arguably, moot, as subsequent lease agreements did not contain a duty of MHRC to maintain a reserve account whatsoever. For further argument, MHRC directs the court to its initial brief on this issue.

c. Whether MHRC's failure to keep a reserve account is a breach of contract, and a breach of an implied duty of good faith and fair dealing.

Appellant defers to its initial brief regarding this issue.

d. Whether the term "then existing mortgage principal and interest balance" refers to the initial mortgage incurred

by MHRC or to the actual existing principal and interest balance realized by MHRC at the time of the option.

Appellant writes further on this issue only to point out that even if the agreements constitute a single continuous agreement, that it is not axiomatic that to take MHRC's interpretation of this clause as enforceable leads to an absurd result. As deposition testimony from Mr. Giles pointed out, MHRC's aim and intent in the project was that DSU would have the option to purchase the property in an amount equal to the amount of debt left on the property, protecting MHRC from losing money for basically facilitating housing acquisition for DSU. SR. 532-626. Giles' deposition could not be more unequivocal on that understanding. It only makes sense that MHRC might have to borrow money to maintain certain portions of the property, which, it in fact did and had to do.

On the issue of whether paying the outstanding mortgage is an absurd result, MHRC again, tried to impress upon the trial court, and now this court, that it is not their position that DSU would have or should have been obligated to pay for mortgage amounts attributable to other properties (which are adjacent to the subject property), but only that DSU should have to pay for the mortgage balance attributable to the subject property *alone, by itself.* MHRC feels the trial court misunderstood this position in finding that paying for a mortgage on property not subject to the lease agreement would be absurd. Indeed, MHRC agrees that would potentially be an absurd obligation, but it is not the position that MHRC took at the trial level, nor the position it argues is appropriate upon review. MHRC believes that DSU should be obligated to pay the amount of the actual existing mortgage and principal balance *attributable to the subject property itself* at the time of its exercising of its option to purchase.

For further argument, MHRC directs the court to its initial brief on this issue.

2. Did the trial court err in refusing to grant any or all of MHRC's motion for summary judgment?

MHRC contends here that there existed sufficient evidence of undisputed material facts on the record to grant its request for summary judgment in determining the meaning and effect of the various agreements between the parties. MHRC only supplements its prior argument on this issue to point out that the hypothetical strawman of MHRC being "allow[ed] to exponentially increase the mortgage under the guise of making improvements and expect DSU to pay the balance for which DSU did not receive benefit commiserate [sic] with the mortgage amount" being an absurd result, did not occur whatsoever. Appellee's brief, page. 19. MHRC did refinance, and the evidence laid out to the trial court prior to summary judgment and at the evidentiary trial supports that the increased mortgage amount went directly to maintenance of the roof of the premises, as well as other major repairs. SR 786-880. MHRC having to refinance a multi-family housing property such as the subject property to pay for repairs is logically commonly done in the course of such operation, and further, the various lease agreements contained no restriction on such reasonable, foreseeable possibilities. See SR 679-711.

a. That the court should have granted summary judgment in favor MHRC regarding the purchase amount equal to the "then existing mortgage principal and interest balance."

In the interest of judicial economy, Appellant defers to its initial brief and argument supra, regarding this issue.

b. That the trial court should have granted summary judgment in favor of MHRC regarding the various leases not being a single writing or transaction.

MHRC only notes here that in response to Appellee's assertion that the June 2016 lease (which has not and was not entered into the trial record) evidencing there was not a

gap in lease documentation, that even if the court considers said 2016 lease, the lease in and of itself presents further evidence that there is now at least four (4) critical points in this relationship where the material terms changed, most obviously in the terms of the length of their written obligations to each other. The parties contemplated in 2000 a ten-year relationship with a chance for a renewal for a like term. The parties contemplated three-year relationships, in 2011 and 2014, a one-year relationship in 2016, and again a three-year relationship in 2017. These changing terms only further evidence that the consideration changed in this relationship repeatedly, which MHRC contends support a finding of separately bargained for agreements.

c. That the trial court should have granted summary judgment declaring that MHRC was not required to keep or credit the "reserve account."

MHRC only writes further her to supplement its prior argument that even if the new documents are not a novation repeated, that the court could have and should have found that the material changes constituted new and superseding lease agreements modifying the parties duties to each other.

MHRC also further writes to suggest that if the former obligations under prior agreements were not extinguished or retired under later executed agreements, the failure of the 2011, 2014, (disputed; not in settled record) 2016 and 2017 leases to contain any further duty regarding the reserve account should relieve MHRC of the duty to keep and hold a reserve during those time periods. Thus, under that circumstance, it could be arguably true (although MHRC does not adopt this position) that MHRC might be obligated to keep and later pay monies deposited from 2000-2011, and relieved of the duty thereafter. In this instance, it might have been appropriate for the court to order a

calculation of the credit accrued from 2000-2011, credit DSU for that amount, and withhold or discontinue the obligation thereafter.

d. The trial court should have granted judgment in favor MHRC declaring that the 2020 or 2021 lease addendums could not be considered as evidence for against either party.

In the interest of judicial economy, Appellant defers to its initial brief and argument supra, regarding this issue.

3. Did the trial court err in failing to adopt the clear and unambiguous term for calculation of the value of DSU's option at trial, and fail to correctly consider MRHC's argument for calculation of said option?

MHRC writes to respond to Appellee's brief to point out that MHRC did not "fail to acknowledge the interest rate changes that occurred throughout the life of the transaction and MHRC's financing..." See Appellee's brief, page 21. To the contrary, MHRC acknowledges that even if the court were to accept as true all of the actual and imputed financing rates evidenced by DSU exhibit number four (4) at trial (SR 735-786), it does not change the analysis regarding the calculation of amounts deposited into the reserve account after the 2017 lease increased the lease amounts. If the court did not err in finding that MHRC had a continuing duty to keep a reserve account, MHRC contends that the trial court still erred by substituting terms into the relevant 2000 lease term laying out the formula for the reserve account.

Appellee's brief is largely silent on the major issue implied by this argument, namely, that the only time the parties ever agreed and memorialized their calculation of the reserve account balance (in 2000), they used a fix amount of $103,680 less service on the debt of the property to determine what credit ought to be applied against the option buyout calculation. MHRC contends that DSU is silent on this issue largely because there

existed no legal reason for the court to *sua sponte* substitute what it must have deemed an implied term, say, "lease payments" or "rent paid," instead of the fixed dollar amount proscribed by the only writing on the subject. In fact, the trial court, when questioned on whether the court was finding a modification or reformation of the contract with respect to the term of calculating the reserve amount credit, the court noted, "I'm ruling, [the various lease agreements] are continuous – what is the actual term I used in the summary judgment – a single, continuous transaction." SR 824. The trial court couched this logic in the proposition that the 2000 lease contained language that the "initial rental rate" was to be calculated based upon the actual costs associated at the time of the project, and that any adjustment thereafter must reflect those changing costs. However, MHRC avers this is clear error, and a modification or rescission of a crucial material term where no evidence existed that the parties agreed that the rental rate had increased for any other reason than they requested it, and DSU paid it, beginning in 2017.

Lastly, MHRC disagrees with characterization by DSU in its brief that to order as MHRC has urged in this instance would result in an unequitable or "ill-gotten" benefit to MHRC. Even if this appellate court affirms on all other grounds except this particular one, DSU will still enjoy the option to purchase the subject property at a significantly reduced amount less what the plain language of the only writing on the subject calls for with regard to calculation of the buyout option. Neither party contends that DSU did not have adequate time to carefully or precisely draft any of the subsequent agreements, or in particular the 2017 agreement where they were put on notice their obligation for annual rent would increase significantly. In fact, MHRC avers that DSU was silent on all matters concerning the buyout or reserve account at the time of the 2017 lease execution, when it

would have been most prudent to clarify what effect the changing rates would have on DSU's proposition of the buyout figure.

CONCLUSION

For the reasons stated above, and in the Appellant's initial brief on the relevant issues, MHRC urges the appellate court to find in its favor regarding the appropriateness of the trial court's grant in favor of DSU's motion for partial summary judgment, MHRC's motion for partial summary judgment, and finally, if the trial court did not err on the motions for cross-summary judgment, that the court erred in its calculation of the buyout figure after evidentiary trial on the issue.

Dated this 20th day of February, 2025.

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Office Word Times New Roman font 12, and contains 3,081 words, excluding the table of contents, table of cases, preliminary statement, jurisdictional statement, statement of legal issues and certificate of counsel. I have relied on the word and character count of the word-processing program to prepare the certificate.

Dated this 20th day of February, 2025.

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of February, 2025, a true and correct copy of the Reply Brief of Appellant was served upon the following through Odyssey File and Serve:

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