IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

APPEAL NO. 29561

JEROME POWERS,

Appellant,

vs.

DENNIS POWERS,

Appellee,

-and-

PREVAILING WIND PARK, LLC,

Appellee.

APPEAL FROM THE CIRCUIT COURT

FIRST JUDICIAL CIRCUIT

CHARLES MIX COUNTY, SOUTH DAKOTA

HON. DAVID KNOFF

Circuit Court Judge

APPELLANT'S BRIEF

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PRELIMINARY STATEMENT

For ease of reference, Appellant, Jerome Powers, will be referred to as either "Appellant", or "Appellant Jerome" or "Powers-Senior." Appellees in this matter, will be referred to as either "Appellee PWP" or "PWP", while Appellee Dennis Powers will be referred to as either "Appellee Dennis" or "Powers-Junior". References to the settled record, that being the register of actions, if any, will be made by the letters "SR" followed by the applicable page number(s), when and where able to so identify within the underlying record herein. References to the Transcript of Appellant Powers-Senior

and/or Appellee Powers-Junior will be made by the name of the Deponent (Jerome-Depo or Dennis-Depo) as well as by the letters "TR" followed by the name of the applicable page number(s); while references to the trial court's hearing on appeal transcript from October 26, 2020, will be referenced, if and or when perhaps necessary, by and through references herein to "Hrg-TR" followed by the applicable page number(s), where necessary.

JURISDICTIONAL STATEMENT and STATEMENT OF THE CASE

The appeal herein is taken pursuant to Appellant's statutory right to appeal pursuant to SDCL 15-26A-3. Appellant, Jerome Powers, began this action in Charles Mix County on June 29, 2019. SR 2-32. As set forth within his Complaint, Powers-Senior brought the action – as both a declaratory judgment action (Count 1) as to both Appellees and as a breach of contract action as to Powers-Junior (Count 2) and also as an action seeking to void Appellees lease(s) and easement agreement(s) related to the subject property parcels (Count 3) – all as referenced and outlined as to the subject property parcels set forth within the Complaint. SR 2-10; *see also,* Appendix A and B. As part of Appellant's Complaint, Powers-Senior sought the circuit court's review of the terms, conditions and requirements of he and Powers-Junior's 2005 "First Right of Refusal" Agreement (for ease of reference, hereinafter referred to as a "ROFR" or "ROFRs" meaning, "Right of First Refusal", as drafted by Bruce Anderson[1], and as agreed to by father-son as granted to Appellant Jerome by Appellee Dennis) as related to

[1] That is, current First Circuit Court Judge Bruce V. Anderson, who was initially assigned to hear and preside over this case – until he voluntarily recused himself from considering the matter. SR 34.

some ten (10) parcels of real property constituting approximately 630-plus acres of Powers' property in both Charles Mix County and also Bon Homme County. SR 11-32.

Following Appellees making and filing each of their respective Answers, depositions were noticed and taken of Powers-Senior and Powers-Junior on August 21, 2019. Appellant Jerome at SR 472-646; Appellee Dennis at SR 647-741. Thereafter, on October 9, 2020, Appellee PWP made its motion for summary judgment, including filing its motion, its required statement of undisputed material facts and memorandum in support thereof to the lower court. *See*, SR 146-205. Also on October 9, 2020, Appellee Dennis made and filed his motion to (only) join Appellee PWP's motion for summary judgment and its memorandum in support of the motion for summary judgment. SR 96-98. That is, Powers-Junior failed to file or join ***any*** statutorily required statement of undisputed material facts – especially as (should have been) related to the otherwise unaddressed by motion Count 2 (Breach of Contract) of Appellant Jerome's Complaint against Powers-Junior. *See,* Argument - Summary Judgment Legal Standard(s) section, *infra*.

Following submission of fact-based affidavits, briefing and argument(s) that took place prior to and on October 26, 2020, the circuit court subsequently, on January 15, 2021, entered its Memorandum Decision and, ultimately, its January 25, 2021, Order on Prevailing Wind Park, LLC's Motion for Summary Judgment and thereby granting summary judgment and ordering that "Plaintiff's [Jerome Powers] Complaint [wa]s dismissed, on its merits, and with prejudice, [and] … further Ordered … that this dismissal pertains to all of Plaintiff's claims in the Complaint against all Defendants

[Appellees]." *See*, Appendix C, with Notice of Entry being completed and filed on January 27, 2021. SR 764.

Following entry of the circuit court's Order and Appellee PWP's subsequent Notice of Entry, on February 25, 2021, Appellant thereafter timely filed his Notice of Appeal and Docketing Statement herein. SR 774-791.

STATEMENT OF LEGAL ISSUES

ISSUE 1

THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT WHEN IT IMPROPERLY CONSIDERED PAROL EVIDENCE TO DETERMINE APPELLANT JEROME POWERS AND APPELLEE DENNIS POWERS INTENT OF THE ROFRS AT ISSUE IN THIS ACTION.

> Despite the clear precedent of this Court, the Circuit Court – while finding the ROFR Agreement(s) unambiguous so as to be read within the four corners of such Agreement(s) – improperly considered and weighed the parties' thoughts, opinions and apparent intentions of the ROFR agreements. Appendix C, C-7; Appendix F, F-2 through F-5.

Laska v. Barr, 2016 S.D. 13, 876 NW2d 50 [*Laska I*];
Edgar v. Mills, 2017 S.D. 7, 892 NW2d 223;
Williams v. Williams, 347 NW2d 893 (S.D. 1984);
SDCL 15-6-56(c).

ISSUE 2

THE CIRCUIT COURT COMMITTTED REVERSIBLE ERROR BY: A.) ALTERNATIVELY FINDING THAT, IN LIGHT OF THE PRESUMED INTENTION OF POWERS-JUNIOR AND POWERS-SENIOR, THAT THE ROFR AGREEMENTS WERE PERHAPS VOID AS A RESTRAINT AGAINST ALIENATION; AND B.) IN FAILING TO FIND GENUINE ISSUES OF MATERIAL FACTS INCLUDING, IN PART, AS TO APPELLEE DENNIS POWERS AS A RESULT OF HIS FAILURE TO FILE OR JOIN ANY STATEMENT OF UNDISPUTED MATERIAL FACTS.

> Appellant respectively asserts that the Circuit Court below committed reversible error in its Memorandum Decision and Order since summary judgment was not warranted insofar as the Court alternatively opined that the ROFR agreements could be deemed "as a restraint against alienation" and also in failing to find that there were genuine issues of material facts insofar as the binding nature of the ROFR agreements as well as Appellee Dennis' breach thereof. *See*, Appendix A-B-C & Appendix D & Appendix E-1 - E-4; Dennis-Depo TR pgs. 9-10, 12, 42, 72.

Laska v. Barr, 2018 S.D. 6, 907 NW2d 47, 54 [*Laska II*];
Discover Bank v. Stanley, 2008 S.D. 111, 757 NW2d 756;
SDCL 15-6-56(c)(1).

STATEMENT OF THE FACTS

Appellant, Jerome Powers, is a 58-year-old[2] resident of Charles Mix County (Wagner, South Dakota) and owns and operates a long-established and successful guided hunting business in both Charles Mix County and Bon Homme County known by the hunting public as Dakota Plains Hunting. Appellee (and Defendant below), Dennis Powers, is Appellant's son and Appellee Dennis lives with his wife in Avon, South Dakota.

As has been noted, Powers-Senior sought the circuit court's review of the unambiguous terms, conditions and requirements of he and Powers-Junior's 2005 ROFR Agreement as agreed to by father-son and as granted to Appellant Jerome by Appellee Dennis as related to approximately 630-plus acres of Powers' (family) property that was being exchanged between the two men in both Charles Mix County and also Bon Homme County. SR 11-32. Given Appellant Jerome's operation - and continuing (albeit, now wind farm/turbine-diminished) operation - of Dakota Plains Hunting it was agreed prior to and after the ROFR agreements (i.e., from 2005 to at least 2016) that Powers-Senior would continue to maintain hunting rights on Powers-Junior's property parcels. Dennis-Depo TR p. 11.

Following the Powers father-son agreement to the 2005 ROFRs, at some point in the latter part of 2018, Appellant Jerome orally learned[3] that in 2016 Appellee Dennis

[2] Note: With Appellant Jerome's age being relatively important under the facts of the case at bar in light of the average male expectancy in the USA being approximately 78.5 years of age and the corresponding general "time limitation" that's necessarily provided thereby.

[3] That is, Appellant Jerome was never provided the required written notice - as specifically agreed and required by/under Section Two of the ROFRs [*infra.*] - that over two (2) years earlier he [Appellee Dennis] had agreed to and signed-off on Appellee PWP's wind farm lease/easement agreements as related to the subject properties. Appendix E (Affidavit by Powers-Senior), pg. 2, ¶¶4-5.

had either sold, transferred or conveyed an interest or interests in the subject property – without providing notice to him (Appellant Jerome) and as was directly contrary to the agreed-upon terms, conditions and requirements of the ROFRs. Appendix D-3 - D-7; Appendix E.

After late 2018, in June 2019, Appellant Jerome Powers, brought in good faith the underlying declaratory judgment action in Charles Mix County as related to Appellee, Dennis Powers, previously agreeing to and signing, as the designated "Grantor", as related to their still-in-effect binding contractual agreement(s) as entered into back on March 31, 2005, with his father, Appellant Jerome, as the designated "Grantee", that was entitled "First Right of Refusal" ("ROFR") and which document was filed/recorded with the Charles Mix County Register of Deeds Office on April 4, 2005, and thereafter with Bon Homme County on April 6, 2005. *See*, Appendix A and B.

As part of the ROFRs in question, Appellee Dennis, as Grantor, specifically "warrant[ed]" to his father, Appellant Jerome Powers, "that he [was and] is the owner, or is otherwise acquiring pursuant to a Contract for Deed, approx. ten (10) parcels of Charles Mix and Bon Homme County real property which was/is the subject of the ROFR(s) in question. All of such parcels that could and would otherwise be used by Appellant Jerome - and not denied to him and his fee-paying customers - as part of his Dakota Plains Hunting business endeavors.

To be clear, back in 2005, as part of the ROFR agreements applicable to all parcels of the Charles Mix and Bon Homme County real property, Appellee Dennis, with the advice and assistance of attorney Bruce Anderson, voluntarily agreed and specifically contracted with his father, Appellant Jerome, as follows:

> "In the event that GRANTOR [Son, Dennis Powers] offers the above-described property, *or any interest therein, for* sale, *transfer or conveyance*, GRANTOR ***shall not*** sell, ***transfer or convey*** the above-described property, ***nor any interest therein***, ***unless and until he shall have first offered to sell such property or any interest therein to GRANTEE***. If GRANTOR intends to make a bona fide sale of the above-described property, *or any interest therein, he shall give to GRANTEE written notice of such intention*, which notice shall contain the basic terms and conditions demanded by GRANTOR for the sale of such property.
>
> Within thirty (30) days of receipt of such notice and information, GRANTEE [Dad, Jerome Powers] shall either exercise his First Right of Refusal by providing written notice of his acceptance to GRANTOR, or waive his First Right of Refusal by failing to provide GRANTOR with written notification of his acceptance or rejection of the First Right of Refusal within such time." [Emphasis added.]

Notwithstanding the clear and unambiguous contractual language in the ROFR agreements, Appellee Dennis failed to abide by the First Right of Refusal Agreement terms by impermissibly and inexcusably failing to provide to Appellant written notice of his intentions or actions to either sell, transfer or convey any interest(s) in the ROFR property parcels in either or both Charles Mix County and/or Bon Homme County(s). *See,* Appendix E; Dennis-Depo TR pgs. 9-10, 12, 42, 72.

In late 2018-2019, however, Appellant Jerome Powers, otherwise learned that his son, Appellee Dennis, had absent required written notice - prior to 2019 - wrongfully sold, transferred or conveyed interests in the ROFR parcels of real property in either or both Charles Mix County and/or Bon Homme County by and through "Wind Energy Lease and Wind Easement Agreement(s)" which were sought to be granted by Appellee Dennis Powers (and his wife) as "Lessor(s)" to Defendant Prevailing Winds, LLC, as "Lessee" as agreed and to be effective as of September 1, 2016. Appendix E. After that point in time, in approximately 2017, such Wind Energy Lease and Wind Easement

Agreements were then assigned to and assumed (going forward) by (Defendant and) Appellee Prevailing Wind Park, LLC.[4]

However, in Section Four of the applicable ROFR's in this case, Appellee Dennis had agreed and very specifically contracted with his father, Appellant Jerome, as follows:

> "*Any sale of the above-described property or any interest therein, without notice to GRANTEE* (Jerome Powers) *as required by this Agreement shall be void*." [Emphasis added.]

In addition, in Section Five of the applicable ROFR's, the parties agreed that the terms of their ROFR Agreement(s) could be enforced by specific performance. As such, Appellant Jerome Powers, as Grantee, sought to have their Agreement(s) reviewed both under his declaratory judgment as well as a breach of contract claims below and to have such be determined to be enforceable by specific performance by and through his (Jerome's) right to purchase the described/subject property upon the unambiguous and agreed terms of the ROFR's in question or, alternatively, to void Appellees wind lease(s) and related wind easement agreements. SR 2-10; 11-32.

Ultimately, (only) Defendant/Appellee, Prevailing Wind Park, LLC, moved for and filed all statutorily required filing(s) and memorandum/briefing(s) in support of Summary Judgment and Appellant opposed the same. SR 206; Appendix D. The circuit court heard oral argument on October 26, 2020, and it later issued its memorandum decision on January 15th, wherein it found (that is, as Appellant submits and will argue herein - erroneously found) that, "[t[he Agreement executed between Jerome and Dennis

[4] Without knowing the precise status of the conveyed lease(s) on the subject property(s), Appellant Jerome initially brought Counts 1 and/or 3 of his action against both Prevailing Winds, LLC *and* Appellee PWP, LLC. However, after filing his action and once Prevailing Winds' counsel communicated and demonstrated that Appellee PWP was the (most recent) transferred/responsible leasing entity, Appellant Jerome agreed in 2019 to dismiss/not further pursue Prevailing Winds, LLC as the matter moved forward. *See generally*, SR 2-10, ¶23.

Powers does not cover easements and leases related to wind tower projects. The terms of the document intend to apply to fee interest transfer transfers of the property." *See*, Appendix C, C-9.

Prior to its decision, the circuit court held a hearing attended by all parties/counsel by and through oral argument on October 26, 2020, and, following such hearing/argument, the Circuit Court below entered its Memorandum Decision on January 15, 2021, and, thereafter, filed its corresponding Order on January 25, 2021. *See*, Appendix C. Appellee PWP then prepared and served its Notice of Entry herein on Appellant on January 27, 2021. Appendix C. As noted, Appellant's present appeal was thereafter properly and timely filed herein as a matter of right on February 25, 2021. SR 774-775.

ARGUMENT:

SUMMARY JUDGMENT LEGAL STANDARD(S)

Plaintiff trusts that this Court is especially well-versed in the long-established factual/legal hurdle(s) facing parties who advance motions for summary judgment. In fact, our summary judgment standard has long-been articulated and explained in our courts as outlined under SDCL § 15-6-56(c). That is, summary judgment can be 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 as to any material fact and that the moving party is entitled to a judgment as a matter of law." However, it has also long been held in South Dakota that summary judgment is 'an extreme remedy, [and] is not intended as a substitute for a trial.' In addition, '[s]ummary judgment is not the proper method to dispose of factual questions.' *Stern Oil Co., Inc. v. Brown*, 2012 S.D. 56, ¶9, 817 NW2d 395, 399, citing, *Bozied v. City of Brookings*, 2001 S.D. 150, ¶8, 638 NW2d 264, 268. All

reasonable inferences drawn from the facts must be viewed in favor of the non-moving party. *See, Hart v. Miller*, 2000 S.D. 53, ¶ 10, 609 NW2d 138, 142. It is also well-settled that the moving party(s) bear the burden, "*to clearly show the absence of any genuine issue of material fact[s] and an entitlement to judgment as a matter of law*." [Emphasis added.]; *Hart* at ¶ 10, 609 NW2d at 142.

In that regard, and as more directly related to Appellee Dennis Powers, Appellant Jerome Powers points out in his appeal that - while overlooked by the circuit court below - Appellee Dennis faces a long-standing precedential legal obstacle to any entitlement to summary judgment herein insofar as Powers-Junior failed to file or even join the required statement of undisputed material facts, as required by SDCL § 15-6-56(c)(1)("A party [like Appellee Dennis] moving for summary judgment *shall attach to [his] motion* a separate, short and concise statement of the material facts as to which the moving party contends there is no issue to be tried."), and as such, his proposed motion joinder is - as our Supreme Court has routinely held - incomplete and must therefore be denied by this Court. *Discover Bank v. Stanley*, 2008 S.D. 111, ¶ 19, 24-26, 757 NW2d 756, 762-764 ("The plain meaning of SDCL § 15-6-56(c) leaves no doubt that *the moving party must file a statement of undisputed material facts with [his] motion for summary judgment… The circuit court erred when it did not require [the moving party] to submit [his] statement of undisputed material facts as required by SDCL § 15-6-56(c)*.").

In the instant case, on October 9, 2020, Appellee Dennis Powers proceeded to file his "motion joinder"; however, he specifically only indicated to the lower court in such filing that he was "join[ing] [PWP's] Motion for Summary Judgment and [only] join[ed] in Prevailing Wind Park, LLC's Memorandum in Support…" *See*, Appendix D-1.

Consequently, not only did Appellee Dennis fail to file his statement of undisputed material facts; but he also failed to timely file with the circuit court his affidavit by way of any such timely support of the motion (that is, Dennis Powers Affidavit was not timely filed below since it was not filed with his proposed motion joinder and, instead, was only filed - and appropriately objected to - approximately 4-days prior to hearing after Appellant filed his response and had therein objected to the lack of filing of Appellee Dennis Powers affidavit.). *See*, SR 226; *cf.*, SR 217; Appendix D-1. Appellant therefore submits that there can be no doubt that, as clearly noted in this Court's precedential holding in *Stanley*, the circuit court's Order below for summary judgment to/for Appellee Dennis Powers cannot stand as a result of his failure to comply in any respect with the mandatory requirements of SDCL § 15-6-56(c)(1). *See also*, analogous standard of review as outlined within *Williams v. Williams*, 347 NW2d 893, 895 (S.D. 1984) ("The sole question on this appeal is whether … there is a genuine issue of material fact that must be resolved in order to determine the enforceability of an oral extension of the right of first refusal…"); *cf.*, FN No. 7, *infra*.

ISSUE(S) REGARDING ERRONEOUS SUMMARY JUDGMENT DECISION:

1.) *The ROFR agreements in this case are unambiguous and, as such, parol evidence as sought to be interjected by Appellee Prevailing Wind Park, LLC, who was not a party to the parties' 2005 agreements, was incompetent, inadmissible and should not have been considered as basis for the Circuit Court's summary judgment decision in this case.*

As the Court is aware, "[c]ontract interpretation is a question of law reviewable de novo. When the meaning of contract language is plain and unambiguous, construction is not necessary. If a contract is found to be ambiguous the rules of construction apply." *Laska v. Barr*, 2016 S.D. 13, ¶ 5, 876 NW2d 50, 52 [*Laska I*], citing, *Ziegler Furniture &*

Funeral Home v. Cicmanec, 2006 S.D. 6, ¶14, 709 NW2d 350, 354, as quoting *Pesicka v. Pesicka*, 2000 S.D. 137, ¶6, 618 NW2d 725, 726. Additionally, it has long been held that, '[a] contract is ambiguous ***only*** ***when*** it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement.' [Emphasis added.] *Laska I*, 2016 S.D. 13, ¶5, 876 NW2d at 52, quoting *Pesicka*, 2000 S.D. 137, ¶10, 618 NW2d at 727.

Appellant respectfully submits that, in contrast to the uncertainty and/or ambiguities that this Court found in the different agreement terms reviewed as a part of *Laska I*, the ROFR agreement terms in the case at bar were not and are not ambiguous. *See*, Appendix Exhibits A and B, filed with Plaintiff's Complaint [SR 2-10], incl. ¶9 of said Complaint. In fact, the circuit court indicated in its Memorandum Decision that it too was finding that the ROFR agreements were not ambiguous. Appendix C. Inapposite to that key finding, however, the circuit court below went on to try to support his legal conclusion(s) about (what was and should have been determined to be such unambiguous) ROFR terms when the court determined that it was able to reach this decision because, in part, it found that:

> "Jerome testified inconsistently at his deposition stating he did not have the right to purchase the property if it was leased to a third-party (SUMF 34, as submitted only by Appellee PWP with its motion for summary judgment) and then stating he does not have the right to purchase the property if any [non-fee] interest is transferred (SUMF 44, as submitted only by Appellee PWP with its motion for summary judgment). … The Agreement does not contemplate offering a non-fee interest in the property under the same terms as would be offered to a third-party.[5] The Agreement clearly

[5] See, the circuit court's footnote No. 3, as used to support the lower court's legal analysis of the ROFR agreements – outside the four-corners of such ROFR agreements: "In Jerome's deposition he was [also] asked if a lease was offered to a third-party, Dennis would first have to offer him the opportunity to lease the property, to which he replied 'Yes'. Jerome

> contemplates only a fee simple sale of the real estate or a portion (in fee) of the real estate. This is consistent with the inaction of Jerome when he had knowledge of the property being leased in the past (which he now claims is a violation of the Agreement[s])."

Appellant respectfully submits here that it is precisely this kind of improper and erroneous interjection of and/or positive or negative reliance on such parol evidence that this Court fairly recently straightforwardly found to be reversible error in a fairly analogous ROFR-focused case of *Edgar v. Mills*, 2017 S.D. 7, ¶¶ 28-29, 892 NW2d 223, 231 ("Because the 'Right of First Refusal' provision is unambiguous, the circuit court erred when it considered parol evidence to determine the parties' intent. … The court also erred when it used parol evidence to convert the lease agreement into a purchase contract … we will *not* rewrite the parties' contract or add to its language. … '*Contracting parties are held to the terms of their agreement, and disputes cannot be resolved by adding words the parties left out*.' [citing] *Gettysburg School Dist. 53-1 v. Larson*, 2001 S.D. 91, ¶ 11, 631 NW2d 196, 200-201.") [Emphasis added.].

Appellant, in pointing out the related lessons learned in *Edgar*, respectfully submits that it was therefore improper and reversible error for the circuit court to use and rely on non-legally grounded statements or assumptions or claimed intentions of a party to form the basis for the Court's legal interpretation of an unambiguous ROFR. In this case, again like in *Edgar*, Appellant submits that it was/is particularly erroneous for the court to cite to and/or rely on such parol evidence in order to justify its "adding words the parties

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Deposition page 173, lines 15-19. The Court can find nothing in the [ROFR] that provides this." *See*, Appendix C-7, with improper reference and reliance on Appellee PWP's STUMFs [Appendix E, as opposed by Appellant, in part, through Appendix D-3-D-7, Appellant's Opposition to Appellee PWP's STUMF] which even more explicitly - and improperly - interjected parol evidence into the circuit court's decision-making equation.

left out." That is to say, neither Appellee Dennis (as Grantor) nor Appellant Jerome (as Grantee) nor (now Judge) Bruce Anderson (as legal counsel and ROFR-scrivener) incorporated "additional wording" in such ROFR agreements setting forth that such were only "triggered" when or if, as the circuit court ultimately opined that the ROFR only applies: "when the property (or a portion of the property) is to be sold in fee simple to a third party." Appendix C-7. Instead, as this Court can easily ascertain specifically from the ROFR agreement terms (Appendix A and Appendix B) the plain, consistent, clear and unambiguous contractually binding language was agreed to, in writing, and memorialized as spelled-out below.

That is, back in 2005, in Section Two of the parties' ROFR agreements (*see*, Appendix A and Appendix B), Appellee Dennis clearly and unambiguously agreed and very specifically contracted with Appellant Jerome as follows:

> "In the event that GRANTOR (Dennis Powers) offers the above-described property, *or any interest therein, for* sale, *transfer or conveyance*, GRANTOR *shall not sell, transfer or convey* the above-described property, *nor any interest therein, unless and until he shall have first offered to sell such property or any interest therein to GRANTEE*. If GRANTOR intends to make a bona fide sale of the above-described property, *or any interest therein, he shall give to GRANTEE written notice of such intention*, which notice shall contain the basic terms and conditions demanded by GRANTOR for the sale of such property.
>
> Within thirty (30) days of receipt of such notice and information, GRANTEE (Jerome Powers) shall either exercise his First Right of Refusal by providing written notice of his acceptance to GRANTOR, or waive his First Right of Refusal by failing to provide GRANTOR with written notification of his acceptance or rejection of the First Right of Refusal within such time." [Emphasis added.]; **see also*, Section Four language of the ROFR agreements pertaining to "Unauthorized Transactions" being voided for failure to comply.

Clearly, nowhere in the ROFR language above does it say: Grantor's offer of the above-described property, *or* any interest therein, for sale, transfer or conveyance means "if/when sold in fee simple to a third party." Instead, of course, the above-referenced plain language was and, essentially, is compounded in effect on insofar as Grantor is instructed that he (Appellee Dennis) "*shall not sell, transfer or convey* [such property] *nor any interest therein, unless and until he shall have first offered to sell such property* or any interest therein, to Grantee (Appellant Jerome)." Like in *Edgar*, the circuit court's erroneous addition of words "to be sold in fee simple" for the benefit of Appellee Dennis Powers and/or Appellee PWP's wishes and/or after-the-fact desires or recently-claimed intentions[6], constituted reversible error.

Moreover, Appellant further notes and similarly submits herein that the remaining ROFR agreement terms are incapable of more than one meaning when objectively viewed by reasonably intelligent person(s) who would/should fully and appropriately examine the context of the Agreement. As such, Appellant Powers and his son's set of agreement terms herein were and are fully integrated to the extent that Appellees strained and improper attempts to interject its interpretation(s) of intent of the actual parties to such agreement were, in fact, inadmissible for consideration by the circuit court below. *See generally*, *Pankratz v. Hoff*, 2011 S.D. 69, ¶ 14, 806 NW2d 231, 236 (Parol evidence is inadmissible to determine an unambiguous contract/real estate agreement(s) – even where there is more than one agreement to consider):

[6] *See*, Appellant's Complaint (SR 2-10), with Complaint Exhibits (SR 11-32), including Complaint Exhibit E, Appellee PWP's 2019 attempted - but failed - "Consent to Wind Energy Lease and Wind Easement Agreement that Appellant, Jerome Powers, denied insofar as his action to decline to give up his ongoing rights under the applicable ROFR agreements

> "A document is fully integrated when the parties intend it to be a complete and final expression of their agreement, and not fully integrated when the parties might naturally make additional terms or agreements as a separate agreement. *See Berg v. Hudesman,*115 Wash.2d 657, 801 P.2d 222, 230 (1990); *see also Neal v. Marrone,* 239 N.C. 73, 79 S.E.2d 239, 242 (1953); *Renner Plumbing, Heating and Air Conditioning, Inc. v. Renner,* 225 Va. 508, 303 S.E.2d 894, 898 (1983); 11 Richard A. Lord, Williston on Contracts § 33:14 (4th Ed.1999). 'However, where the parties have deliberately put their engagements in writing in such terms as import a legal obligation free of uncertainty, it is presumed the writing was intended by the parties to represent all their engagements as to the elements dealt with in the writing. Accordingly, all prior and contemporaneous negotiations in respect to those elements are deemed merged in the written agreement. *And the rule is that*, in the absence of fraud or mistake or allegation thereof, *parol testimony of prior or contemporaneous negotiations or conversations inconsistent with the writing, or which tend to substitute a new and different contract from the one evidenced by the writing, is incompetent*.' *Neal,* 79 S.E.2d at 242; *see also Renner,* 303 S.E.2d at 898; *Berg,* 801 P.2d at 230; *Williston on Contracts* § 33:20."

See also, Kernelburner, LLC v. MitchHart Mfg., Inc., 2009 S.D. 33, ¶¶ 7, 10, 765 NW2d 740, 742-743 ("*It is not necessary to go beyond the four corners of the document to determine the parties' intent*." … "Consequently, the trial court erroneously considered parol evidence."). *See/cf.*, FN. 7-8, *infra*, as related to the clear ROFR terms herein.

Appellant submits that foregoing result occurred, in part, because Appellee PWP wrongly sought to urge the court below that the clear agreement terms of the ROFRs were "arguably ambiguous as to whether they could be triggered by Dennis' granting of a lease or easement" to and for the intrusive wind farm interests. Appellant notes, however, that while Appellee PWP attempted to essentially misdirect the Circuit Court about what it claimed was ambiguous or open to interpretation as far as what in fact was intended or meant by the clear ROFR agreement terminology of "any interest therein, for sale transfer or conveyance" – the lower court, just like this Honorable Court, needed only to go to *Laska I,* 2016 S.D. 13,

at ¶ 5, 876 NW2d at 53.[7] *See/cf. also*, *First Federal Sav. & Loan Ass'n of Rapid City v. Wick*, 322 NW2d 860, 862 (S.D. 1982) (Due-on-sale clause provides for accelerated payment 'if all or any part of the property or any interest therein is sold or transferred by Mortgagor without Mortgagee's prior written consent.'). Appellee PWP, however, as part of its motion for summary judgment, went even further in actually requesting the court to "*assume* the ROFR's are *arguably ambiguous*." As noted below and re-argued here, however, Appellant is aware of no controlling South Dakota legal authority wherein it was or is *ever* appropriate for a court to *assume* that mutually agreed to and binding real-estate related agreements are *arguably ambiguous. See/cf.*, *Pankratz*, 2011 S.D. 69, ¶ 14, 806 NW2d at 236; *Kernelburner*, 2009 S.D. 33, ¶ 10, 765 NW2d at 742-743; *Laska I*, 2016 S.D. 13, ¶ 5, 876 NW2d 50 at 52.[8]

Even in light of the foregoing legal principles, Appellee PWP still sought to have the circuit court below make an unwise and erroneous proverbial leap in logic insofar as to what it claimed were the "arguably ambiguous" provisions within the Powers' ROFR agreements to the extent that sections (i.e., Sections 2-3-4) should therefore be "assumed" to mean that "whatever portion of or interest in the [subject property] that Dennis intends to sell [or transfer or convey, per the Agreement terms] would have the first right to purchase the same." Of course, that is not what the Agreement actually says nor even assumedly says.

---

[7] "In contrast to an option, a 'right of first refusal [ROFR] is a conditional right that ripens into an enforceable option contract when the owner [i.e., Appellee/Grantor Dennis] receives a third-party offer to purchase <u>*or lease*</u> the [ROFR] property … <u>*and*</u> <u>*manifests an intention to sell or lease*</u> on those terms.'" [citing] *Dowling Family P'ship*, 2015 S.D. 50, ¶ 16, 865 NW2d at 861 (quoting *Advanced Recycling Sys., LLC v. Se. Props. Ltd. P'ship*, 2010 S.D. 70, ¶ 15, 787 NW2d 778, 784); *See also*, Appendix D-4 - D-7 (Appellant's Opposition to Appellee PWP's STUMF).

[8] "When the meaning of contractual language is plain and unambiguous, construction is not necessary." [citing] *Ziegler Furniture & Funeral Home*, 2006 S.D. 6, ¶ 14, 709 NW2d at 354; *see also, Edgar v. Mills*, 2017 S.D. 7, ¶ 28, 892 NW2d 223, 231 ("*The language of the right of first refusal is unambiguous in what right it creates.*); *Cf.*, Appendix A and B.

Instead, Section Two of the parties' Agreement, as referenced *supra*, objectively and reasonably provides that if Appellee Dennis intends to sell, transfer or convey "any interest therein" (as to the subject properties) that he's simply required to - *shall* - give written notice of his intention(s) to Plaintiff Jerome "which shall contain the basic terms and conditions demanded by Defendant Dennis" for the potential sale of the property – back to Plaintiff Jerome. That is, the ROFR agreements through Sections 2-3-4 do not say – nor assume to say – that a potential sale back to Appellant Jerome, if elected, would, in any way, be the same as the proposed sale, transfer or conveyance of any interest in such properties. Rather, any such (proposed) sale, *transfer or conveyance of any interest* in said properties simply served as (what should have been) the initial triggering event for the ROFR properties – after which the onus was clearly and squarely on Appellee Dennis to *follow the terms of the ROFR agreements and to then notify, in writing, Appellant Jerome of his intention to either sell, transfer or convey any interest in the ROFR property parcel(s).* *Cf.*, *Wick*, 322 NW2d at 862. Appellee Dennis, however, failed in this regard and thereby should have been deemed to have breached the terms and conditions of the unambiguous ROFR agreements. *See*, Appendix E-1 - E-4; Dennis-Depo TR pgs. 9-10, 12, 42, 72.

2.) Appellant Jerome Powers and Appellee Dennis Powers ROFR agreements, in this case and under the disputed facts herein, were not void as unenforceable restraints on alienation and, if to consider, genuine issues of material facts exist so as to deny summary judgment herein.

In looking at this prospective issue, Appellant of course is aware that SDCL § 43-3-5 provides that "[c]onditions restraining alienation, when repugnant to the interest created, are void." *Laska v. Barr*, 2018 S.D. 6, ¶ 24, 907 NW2d 47, 54 [*Laska II*]. In addition, it is agreed for purposes of this issue that the Court can look to *Laska II*, 2018 S.D. 6, ¶ 24, 907 NW2d 47,

54 ("A right of first refusal is a preemptive right restraining alienation." … "It 'is a valuable prerogative, limiting the owner's right to freely dispose of his property by compelling him to offer it first to the party who has the first right to buy'" … "To be valid, the restraint must be reasonable and for a legitimate purpose."), and to include its citations to, *infra.*, *Laska I,* 2016 S.D. 13, ¶ 11, 876 NW2d 50, 55.

In 2018, *Laska II* outlined that "[o]ther courts examining language similar to our statute have considered a number of factors, including: the purpose, whether the price is fixed, the parties intent, and the duration of the restraint." *Laska II,* 2018 S.D. 6, ¶ 25, 907 NW2d at 54, *citing*, *Urquhart v. Teller*, 288 Mont. 497, 958 P2d 714, 718 (1998). In *Laska II*, this Court, of course, went on to weigh, balance the above-referenced various factors from the evidence put on at trial (i.e., <u>*not*</u> at the summary judgment stage) - with a fairly significant amount of the Court's concern being directed toward and focused on the "duration of restraint" factor. Pointing to *Kuhfeld v. Kuhfeld,* 292 NW2d 312, 314 (S.D. 1980), the Court referenced in *Laska II* that, "[a]n option [contract, as referenced in *Laska I*] which is intended by its parties to run for an unlimited time is void; however, an option which is to remain open for [only] a limited time … is valid." *See/cf.*, FN No. 2, *supra*.

With the foregoing in mind, Appellant notes that, as referenced both as part of his Complaint and in the parties' depositions, the duration of the restraint herein was, in fact, reasonable and limited to [only] the life of Plaintiff Powers. Appendix A and B, Section Six ("…this Agreement <u>*shall expire*</u> upon his [Grantee/Appellant Jerome's] death."). Otherwise, Appellant submits that Appellees have not – absent the asserted genuine issues of material facts – identified, as a matter of law, that the overall restraint on alienation, when fully and fairly considering all pertinent factors of the (close family) nature, (clearly identified) extent and (limited) duration of the ROFR terms herein was neither unreasonable nor repugnant.

As such, Appellant respectfully submits that it is critically important for this Court to keep in mind, as further pointed out in *Laska II*, that, '[u]nless the purpose for which the servitude [of the ROFR] is created violates public policy, *and* unless contrary to the intent of the parties, a servitude should be interpreted to avoid violating public policy." *Laska II,* 2018 S.D. 6, ¶ 29, 907 NW2d at 55, *citing*, Restatement (Third) of Prop.: Servitudes § 4.1(2). At the early summary judgment stage of litigation, based on the genuine issues of material facts existing herein as specifically noted by Appellant[9] (*see/cf.*, Appendix D-3 - D-7), and given the unique close family-initiated servitude outlined within and as a part of the agreed upon ROFRs in the case at bar should have similarly been interpreted so as to avoid being found as somehow violating public policy. Appellant therefore submits that the Circuit Court below was legally in error insofar as proposing to alternatively find that the ROFR agreements - as voluntarily agreed to by Powers-Junior and Powers-Senior - were arguably (as alternatively noted by the lower court) void as a restraint against alienation. *See*, Appendix C-8 - C-9; *cf.*, *Laska II,* 2018 S.D. 6, ¶ 29, 907 NW2d at 55 (Instead, "…unless contrary to the intent of the parties, a servitude *should be interpreted to avoid violating public policy*." Emphasis added).

~ ***CONCLUSION*** ~

Appellant respectfully submits that, by and through his factual recitation as well as his arguments and authorities submitted herein, he has established that there were, in fact, reversible errors, including errors of law, committed below which support for this Court that reversal and remand to circuit court is necessary. As a result, Appellant

[9] And, once again, as Appellee Dennis Powers failed below to either propose, join or to oppose Appellant's Objections to Appellee PWP's STUMF. *See*, SDCL § 15-6-56(c)(1); *Discover Bank v. Stanley*, 2008 S.D. at ¶ 19, 24-26, 757 NW2d at 756, 762-764. As to Appellee PWP, Appellant has - within the record in this file - outlined, proposed and filed Appellant's Affidavit submitting his opposition countering statements of undisputed material facts and he continues to offer and rely on the same. *See*, Appendix D and E. In addition, the fact that there may reasonably be different triggers and/or meanings to or for the ROFR agreements in this case arguably, in and of itself, amounts to a genuine issue of material fact that should have precluded summary judgment.

respectfully requests that this Court accordingly reverse and remand this matter to circuit court. In light of the well accepted standards that have long been in effect in order to – where appropriate – serve to discourage and/or dissuade lower courts from improperly deciding factual issues at the summary judgment stage, Appellant urges the Honorable Court herein to reverse and remand this matter for the circuit court's proper consideration of [only] the four-corners of the family-based and family-focused ROFR agreements herein and, ultimately, for the circuit court to properly and fully consider and to allow Appellant to further pursue his requested relief as outlined in his Complaint. SR 2-10.

CERTIFICATE OF COMPLIANCE:

Pursuant to SDCL 15-25A-66, R. Shawn Tornow, Appellant's attorney herein, submits the following:

The foregoing brief, not including the signature section herein, is 24 pages in length. It was typed in proportionally spaced twelve (12) point Times New Roman print style. The left-hand margin is 1.5 inches, the right-hand margin is 1.0 inches. Said brief has been reviewed and referenced as containing 6,682 words and 35,730 characters.

All as respectfully submitted this 18th day of May, 2021, at Sioux Falls, S.D.

/s/ R. Shawn Tornow

R. Shawn Tornow
Tornow Law Office, P.C.
PO Box 90748
Sioux Falls, SD 57109-0748
Telephone: (605) 271-9006
E-mail: rst.tlo@midconetwork.com
Attorney for Appellant, Jerome Powers

CERTIFICATE OF SERVICE:

This is to certify that on this 18th day of May, 2021, your undersigned's office timely e-mailed a copy of Appellant's Brief and Appendix as well as mailing an original and two (2) copies to and for the Court and, if requested and if necessary, is prepared to mail by first-class United States mail, true and correct copy(s) of Appellant's Brief to John Blackburn, attorney of record for Appellee Dennis Powers, at jblaw@iw.net; and Patrick Mahlberg, one of the attorneys for Appellee PWP, LLC, at pmahlberg@fredlaw.com.

/s/ R. Shawn Tornow
R. Shawn Tornow

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PREPARED BY:
Anderson Law Office, P.C.
P.O. Box 425
Wagner, SD 57380
(605) 384-5970

STATE OF SOUTH DAKOTA
COUNTY OF Charles Mix

Filed for record this 4th day of April, 2005 at 10:30 o'clock A m, and recorded in Book 49 of Deeds, Page 116.

REGISTER OF DEEDS SEAL CHARLES MIX COUNTY

By Julie Thiel
Deputy #200504040

Monica Wilson
Register of Deeds

FIRST RIGHT OF REFUSAL

Dennis Powers, of 30747 403rd Avenue, Dante, South Dakota 57329, GRANTOR, for good and valuable consideration, receipt of which is hereby acknowledged, GRANTS and CONVEYS unto Jerome Powers, of 40427 294th Street, Wagner, South Dakota 57380, GRANTEE, a First Right of Refusal for the property and upon the conditions described below:

SECTION ONE
DESCRIPTION OF PROPERTY

GRANTOR warrants that he is the owner, or is otherwise acquiring pursuant to a Contract for Deed, the following described real estate in Charles Mix County, South Dakota, which is the subject of this First Right of Refusal:

The North Half of the Northeast Quarter (N½NE¼), and Southeast Quarter of the Northeast Quarter (SE¼NE¼) of Section Twenty-four (24), Township Ninety-six (96) North, Range Sixty-two (62) West of the 5th P.M. in Charles Mix County

The Southwest Quarter of the Southwest Quarter (SW¼SW¼) of Section Eighteen (18), Township Ninety-six (96) North, Range Sixty-one (61) West of the 5th P.M., in Charles Mix County, South Dakota;

The Northwest Quarter of the Northwest Quarter (NW¼NW¼) of Section Nineteen (19), Township Ninety-six (96) North, Range Sixty-one (61) West of the 5th P.M., in Charles Mix County, South Dakota;

The Southwest Quarter of the Northwest Quarter (SW¼NW¼) of Section Nineteen (19), Township Ninety-six (96) North, Range Sixty-one (61) West of the 5th P.M., in Charles Mix County, South Dakota;

App. EXHIBIT A-1

The Southeast Quarter of the Northwest Quarter (SE¼NW¼) of Section Nineteen (19), Township Ninety-six (96) North, Range Sixty-one (61) West of the 5th P.M., in Charles Mix County, South Dakota; and

The West Half of the Southwest Quarter (W½SW¼) of Section Nineteen (19), Township Ninety-six (96) North, Range Sixty-one (61) West of the 5th P.M., in Charles Mix County, South Dakota; and

Lot Seven (7), otherwise described as Southwest Quarter of the Northeast Quarter (SW ¼ NE ¼) of Section Nineteen (19), Township Ninety-six (96) North, Range Sixty-one (61) West of the 5th P.M., in Charles Mix County, South Dakota.

SECTION TWO
FIRST RIGHT OF REFUSAL

In the event GRANTOR offers the above-described property, or any interest therein, for sale, transfer or conveyance, GRANTOR shall not sell, transfer, or convey the above-described property, nor any interest therein, unless and until he shall have first offered to sell such property or any interest therein, to GRANTEE. If GRANTOR intends to make a bona fide sale of the above-described property, or any interest therein, he shall give to GRANTEE written notice of such intention, which notice shall contain the basic terms and conditions demanded by GRANTOR for the sale of such property.

Within thirty (30) days of receipt of such notice and information, GRANTEE shall either exercise his First Right of Refusal by providing written notice of his acceptance to GRANTOR, or waive his First Right of Refusal by failing to provide GRANTOR with written notification of his acceptance or rejection of the First Right of Refusal within such time.

SECTION THREE
TERMS

Should GRANTOR accept the offer of GRANTEE to purchase the property, it shall be on the following terms:

1. GRANTEE shall pay GRANTOR the sum of $420.00 per acre, which shall be paid in cash or cash equivalent at closing.

2. GRANTOR shall convey fee title, which title shall be merchantable, as shown by abstract or title insurance.

3. Closing shall take place within thirty (30) days of GRANTOR delivering title insurance or abstracts to the property.

4. GRANTEE shall have possession of the property at closing.

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If GRANTEE fails to exercise his First Right of Refusal, GRANTOR may proceed to sell, transfer and convey the property to any other person or entity free from any restrictions of this Agreement.

SECTION FOUR
UNAUTHORIZED TRANSACTIONS

Any sale of the above-described property or any interest therein, without notice to GRANTEE as required by this Agreement shall be void.

SECTION FIVE
SPECIFIC PERFORMANCE

Both parties agree that this Agreement may be enforced by specific performance under the laws of the State of South Dakota.

SECTION SIX
ENTIRE AGREEMENT

This is the entire agreement between the parties and will be binding upon the parties, their heirs, executors, estates, personal representatives, agents and assigns, however, as to GRANTEE, this Agreement shall expire upon his death.

IN WITNESS WHEREOF, the parties have executed this agreement on the 31 day of March, 2005.

Dennis Powers ~ GRANTOR

Jerome Powers ~ GRANTEE

State of South Dakota)
) ss.
County of Charles Mix)

On this the 31 day of March, 2005, before me, the undersigned officer, personally appeared Jerome Powers, known to me or satisfactorily proven to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same for the purposes therein contained.

In witness whereof I hereunto set my hand and official seal.

My Commission Expires:
(SEAL) 4-28-05

Notary Public

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State of South Dakota)
) ss.
County of Charles Mix)

On this the 21 day of March, 2005, before me, the undersigned officer, personally appeared Dennis Powers, known to me or satisfactorily proven to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same for the purposes therein contained.

In witness whereof I hereunto set my hand and official seal.

My Commission Expires:
(SEAL) 6-22-05

Notary Public

App. A-4

PREPARED BY:
Anderson Law Office, P.C.
P.O. Box 425
Wagner, SD 57380
(605) 384-5970

STATE OF SOUTH DAKOTA

COUNTY OF Bon Homme

Filed for record this 6 th day of April, 2005 at 8:35 o'clock A.m., and recorded in Book Mis 30 of Deeds, Page 0056.

By Ruth Tolsma
Deputy

Ellen Rakness
Register of Deeds

FIRST RIGHT OF REFUSAL

Dennis Powers, of 30747 403rd Avenue, Dante, South Dakota 57329, GRANTOR, for good and valuable consideration, receipt of which is hereby acknowledged, GRANTS and CONVEYS unto Jerome Powers, of 40427 294th Street, Wagner, South Dakota 57380, GRANTEE, a First Right of Refusal for the property and upon the conditions described below:

SECTION ONE
DESCRIPTION OF PROPERTY

GRANTOR warrants that he is the owner, or is otherwise acquiring pursuant to a Contract for Deed, the following described real estate in Bon Homme County, South Dakota, which is the subject of this First Right of Refusal:

Lots One (1) and Two (2) and the Northeast Quarter (NE¼) of Section Nineteen (19), Township Ninety-six (96) North, Range Sixty-one (61) West of the 5th P.M. in Bon Homme County, South Dakota;

The Southeast Quarter of the Northwest Quarter (SE¼NW¼) of Section Seventeen (17), Township Ninety-six (96) North, Range Sixty-one (61) West of the 5th P.M. in Bon Homme County, South Dakota;

The West Half (W½) and the Northeast Quarter of the Southwest Quarter (NE¼SW¼) of Section Seventeen (17), Township Ninety-six (96) North, Range Sixty-one (61) West of the 5th P.M. in Bon Homme County, South Dakota;

SECTION TWO
FIRST RIGHT OF REFUSAL

In the event GRANTOR offers the above-described property, or any interest therein,

App. EXHIBIT 13-1

for sale, transfer or conveyance, GRANTOR shall not sell, transfer, or convey the above-described property, nor any interest therein, unless and until he shall have first offered to sell such property or any interest therein, to GRANTEE. If GRANTOR intends to make a bona fide sale of the above-described property, or any interest therein, he shall give to GRANTEE written notice of such intention, which notice shall contain the basic terms and conditions demanded by GRANTOR for the sale of such property.

Within thirty (30) days of receipt of such notice and information, GRANTEE shall either exercise his First Right of Refusal by providing written notice of his acceptance to GRANTOR, or waive his First Right of Refusal by failing to provide GRANTOR with written notification of his acceptance or rejection of the First Right of Refusal within such time.

SECTION THREE
TERMS

Should GRANTOR accept the offer of GRANTEE to purchase the property, it shall be on the following terms:

1. GRANTEE shall pay GRANTOR the sum of $420.00 per acre, which shall be paid in cash or cash equivalent at closing.

2. GRANTOR shall convey fee title, which title shall be merchantable, as shown by abstract or title insurance.

3. Closing shall take place within thirty (30) days of GRANTOR delivering title insurance or abstracts to the property.

4. GRANTEE shall have possession of the property at closing.

If GRANTEE fails to exercise his First Right of Refusal, GRANTOR may proceed to sell, transfer and convey the property to any other person or entity free from any restrictions of this Agreement.

SECTION FOUR
UNAUTHORIZED TRANSACTIONS

Any sale of the above-described property or any interest therein, without notice to GRANTEE as required by this Agreement shall be void.

SECTION FIVE
SPECIFIC PERFORMANCE

Both parties agree that this Agreement may be enforced by specific performance

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under the laws of the State of South Dakota.

SECTION SIX
ENTIRE AGREEMENT

This is the entire agreement between the parties and will be binding upon the parties, their heirs, executors, estates, personal representatives, agents and assigns, however, as to GRANTEE, this Agreement shall expire upon his death.

IN WITNESS WHEREOF, the parties have executed this agreement on the 31 day of March, 2005.

Dennis Powers ~ GRANTOR

Jerome Powers ~ GRANTEE

State of South Dakota)
) ss.
County of Charles Mix)

On this the 31 day of March, 2005, before me, the undersigned officer, personally appeared Jerome Powers, known to me or satisfactorily proven to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same for the purposes therein contained.

In witness whereof I hereunto set my hand and official seal.

My Commission Expires:
(SEAL) 6-27-05

Notary Public

State of South Dakota)
) ss.
County of Charles Mix)

On this the 31 day of March, 2005, before me, the undersigned officer, personally appeared Dennis Powers, known to me or satisfactorily proven to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same for the purposes therein contained.

In witness whereof I hereunto set my hand and official seal.

My Commission Expires:
(SEAL) 6-27-05

Notary Public

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STATE OF SOUTH DAKOTA

COUNTY OF CHARLES MIX

IN CIRCUIT COURT

FIRST JUDICIAL CIRCUIT

Jerome Powers, Plaintiff, vs. Dennis Powers, Defendant, -and- Prevailing Winds, LLC, and Prevailing Wind Park, LLC, Defendants.	11CIV19-000029 **NOTICE OF ENTRY OF ORDER ON PREVAILING WIND PARK, LLC'S MOTION FOR SUMMARY JUDGMENT**

TO: PLAINTIFF JEROME POWERS, AND HIS ATTORNEY OF RECORD, R. SHAWN TORNOW, TORNOW LAW OFFICE, P.C., P.O. BOX 90748, SIOUX FALLS, SOUTH DAKOTA 57109-0748

NOTICE IS HEREBY GIVEN that attached hereto is a copy of the *Order on Prevailing Wind Park, LLC's Motion for Summary Judgment* in the above-entitled action, the original of which was filed in the office of the Clerk of the Circuit Court of Charles Mix County, at Lake Andes, South Dakota, on the 25th day of January, 2021.

Dated this 27th day of January, 2021.

/s/ Lisa M. Agrimonti

Lisa M. Agrimonti (SBSD #3964)
Patrick D.J. Mahlberg
FREDRIKSON & BYRON, P.A.
200 South Sixth Street, Suite 4000
Minneapolis, MN 55402-1425
Telephone: 612-492-7000
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lagrimonti@fredlaw.com
pmahlberg@fredlaw.com

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STATE OF SOUTH DAKOTA :ss COUNTY OF CHARLES MIX	)	IN CIRCUIT COURT FIRST JUDICIAL CIRCUIT
JEROME POWERS, Plaintiff, v. DENNIS POWERS, Defendant, and PREVAILING WINDS, LLC and PREVAILING WIND PARK, LLC, Defendants.	)	11CIV. 19-29 ORDER ON PREVAILING WIND PARK, LLC'S MOTION FOR SUMMARY JUDGMENT

Defendant Prevailing Wind Park, LLC's Motion for Summary Judgment came on for hearing before the Court on October 26, 2020, at the Yankton County Courthouse in Yankton, South Dakota. This motion was joined by Defendant Dennis Powers. Plaintiff Jerome Powers appeared through counsel, R. Shawn Tornow; Defendant Dennis Powers appeared through counsel, John P. Blackburn; Defendant Prevailing Wind Park, LLC, appeared through counsel Lisa Agrimonti, Patrick Mahlberg, and Joe Erickson.

The Court, having reviewed the parties' submissions and listened to the argument of counsel, and the Court having issued its Memorandum Decision dated January 15, 2021, which is attached as Exhibit A and incorporated herein by reference, now, therefore, it is hereby

ORDERED, ADJUDGED and DECREED that Defendant Prevailing Wind Park, LLC's motion for summary judgment is GRANTED; it is further

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ORDERED, ADJUDGED and DECREED that Plaintiff's Complaint is dismissed, on its merits, and with prejudice; it is further

ORDERED, ADJUDGED and DECREED that this dismissal pertains to all of Plaintiff's claims in the Complaint against all Defendants.

Signed: 1/25/2021 10:10:27 AM

BY THE COURT:

Judge David Knoff
First Judicial Circuit

Attest:
Robertson, Jennifer
Clerk/Deputy

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STATE OF SOUTH DAKOTA | CIRCUIT COURT

COUNTY OF CHARLES MIX | FIRST JUDICIAL CIRCUIT

JEROME POWERS, | 11CIV19-29

PLAINTIFF,

vs.

DENNIS POWERS,

DEFENDANT | MEMORANDUM DECISION ON MOTION FOR SUMMARY JUDGMENT

and

PREVAILING WINDS, LLC AND
PREVIALING WIND PARK, LLC,

DEFENDANT

This matter comes before the Court on Defendant Prevailing Wind Park, LLC's Motion for Summary Judgment. The Motion was joined by Defendant Dennis Powers (Dennis). The Court has reviewed the briefs and submissions of the parties including affidavits and the Statements of Uncontested Material Facts as well as any objections to those statements. The Court also received the entire deposition transcripts of Dennis Powers and Jerome Powers (Jerome).

FACTS

Jerome Powers is the father to Dennis Powers. They were in a farming operation together and were jointly purchasing 633 acres of real property from Jerome's parents under a contract for deed in both Charles Mix and Bon Homme counties. Under the terms of the contract, they were paying less than fair market value.[1] In late 2004, Jerome was caught up in illegal drug activity[2] so he transfered his interest in the property to Dennis' name alone in a sale for less than fair market value.

[1] The property was purchased from Clifford and Carol Powers for approximately $314 per acre, which was around half of fair market value. There was also a purchase of some personal property.

[2] Although both parties addressed the illegal drug use in 2004, the Court understands this was the impetus for the transfer of the property, and is not otherwise relevant to the Court's ruling on the motion for summary judgment.

EXHIBIT

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To facilitate the transfer, Jerome quitclaimed his interest in the property to Dennis. He also assigned his interest in the contract for deed with his parents to Dennis. For Dennis's part, he paid Jerome the amount that Jerome had paid his parents under the contract and then became responsible for the entire contract. The proceeds paid to Jerome were obtained through financing with a bank. At this same time the parties entered into a First Right of Refusal Agreement (the Agreement). This Agreement is the basis of the motion for summary judgment. At the time the property was transferred, Dennis was only 22 years old, and it is undisputed that Jerome wanted to protect the property.

The relevant language in Section Two of the Agreement sets out:

> In the event Grantor offers the above-described property, or any interest therein, for sale, transfer or conveyance, Grantor shall not sell, transfer, or convey the above-described property, nor any interest therein, unless and until he shall have first offered to sell such property or any interest therein, to Grantee. If Grantor intends to make a bona fide sale of the above-described property, or any interest therein, he shall give to grantee written notice of such intention, which notice shall contain the basic terms and conditions demanded by Grantor for the sale of such property.

There is additional relevant language in the first right of refusal under "Section Three, Terms":

> Should Grantor accept the offer of Grantee to purchase the property, it shall be on the following terms:
>
> 1. Grantee shall pay Grantor the sum of $420.00 per acre, which shall be paid in cash or cash equivalent at closing.
> 2. Grantor shall convey fee title, which title shall be merchantable, as shown by abstract or title insurance.
> 3. Closing shall take place within thirty (30) days of Grantor delivering title insurance or abstract to the property.
> 4. Grantee shall have possession of the property at closing.

After the sale, Dennis took control of the property. From the time the property was transferred until the time of the suit, Dennis has either leased the property to third parties or Jerome, the property has been mortgaged, the property was retitled into joint tenancy, and easements have been placed against the property. There is a question of fact to the extent Jerome knew of some of these events.

In 2016 there was an attempt by Prevailing Winds, LLC to permit a wind farm with the South Dakota Public Utilities Commission. This application was withdrawn, however in October 2017, under new ownership (Prevailing Wind Park, LLC) a new application was submitted for a wind farm. Both Dennis and Jerome had an interest in the wind farm however their opinion of the wind farm differed greatly. Dennis was interested in participating in the project. He and his wife obtained information

about the project and ultimately received a draft wind energy lease and easement agreement. There is a disagreement whether Dennis and his father discussed the terms and conditions of the Agreement prior to signing. Ultimately Dennis and his wife entered into the lease and wind easement agreement with Prevailing Wind Park LLC for both Bon Homme and Charles Mix counties. At this same time Jerome was actively involved in the public meetings lobbying against the wind farm project. He testified against the wind farm claiming it causes adverse health effects and were bad for business. He claims at this time he learned that Dennis's property was signed up for the project. This caused a breakdown in the father-son relationship.

In early 2019, Prevailing Wind Park, LLC sought consent from Jerome to the wind energy lease and wind easement agreements, due to the language of the Agreement. Jerome did not sign the consent and is asserting his rights under the Agreement.

The crux of the Defendants arguments in the Motion for Summary Judgment is the Agreement only applies to the sale of the fee interest in the property to a third-party, or alternatively, the Agreement is void as a restraint on alienation of property. They are also claiming laches, statute of limitations and waiver.

DECISION

Summary judgment is authorized under SDCL § 15-6-56(c), "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law." It also provides that all reasonable inferences drawn from the facts must be viewed in favor of the non-moving party. Furthermore, unsupported conclusions and speculative statements do not raise a genuine issue of fact." *Dakota Industries, Inc. v. Cabelas.com*, 2009 SD 39, ¶ 20, 766 N.W.2d 510, 516. "Summary judgment is not a substitute for a court trial or for trial by jury where any genuine issue of material fact exists." *Ahl v. Arnio*, 388 N.W.2d 532, 533 (S.D. 1986). Cases involving the interpretation of written documents are particularly appropriate for disposition by summary judgment, such interpretation being a legal issue rather than a factual one. *Estate of Lien v. Pete Lien & Sons*, Inc., 2007 S.D. 100 ¶10.

This dispute hinges on the phrase "or any interest therein" in the Agreement. If "any interest" includes more than an interest in fee title, summary judgment may be inappropriate because an easement

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or lease is an interest in property. The Court would then analyze the other claims in the Defendants' Motion. On the other hand, if "any interest therein" means a fee simple interest in a portion of the land, summary judgment would be appropriate. There is no dispute fee ownership has not been transferred.

The Court reviews the language of the first right of refusal to resolve this question. "[T]o find the intentions of the parties, we rely on the contract language they actually used." *Quinn v. Farmers Ins. Exchange* 2014 S. D. 14 ¶16. (Citations omitted). "A contract is ambiguous when application of rules of interpretation leave a genuine uncertainty as to which two or more meanings is correct." *Ziegler Furniture and Funeral Home, Inc. v. Cicmanec*, 2006 S.D. 6, ¶16. (Citations omitted). In determining the question of ambiguity, a contract is not rendered ambiguous simply because the parties do not agree on its proper construction or their intent upon executing the contract. Rather a contract is ambiguous only when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the *entire integrated agreement*. Id. (Citation omitted, emphasis added) the court looks at the language of the parties used in the contract to determine their intention and if that intention is clearly manifested by the language of the agreement is the duty of the court to declare and enforce it. Id. (Citations omitted).

Jerome testified inconsistently at his deposition stating he did not have the right to purchase the property if it was leased to a third-party (SUMF 34) and then stating he does have the right to purchase the property if any [non-fee] interest is transferred (SUMF 44). The language regarding "or any interest therein" is read in concert with the entire Agreement. *Section Three* of the agreement is helpful in analyzing the intent of the Agreement. The Court notes Section Three only contemplates transferring fee interest from Dennis to Jerome. The agreement does not contemplate offering a non-fee interest in the property under the same terms as would be offered to a third-party.[3] The Agreement clearly contemplates only a fee simple sale of the real estate or a portion (in fee) of the real estate. This is consistent with the inaction of Jerome when he had knowledge of the property being leased in the past (which he now claims is a violation of the Agreement). Reading the document as a whole, it is intended the right to purchase is triggered when the property (or a portion of the property) is to be sold in fee simple to a third party.

[3] In Jerome's deposition he was asked if a lease was offered to a third-party, Dennis would first have to offer him the opportunity to lease the property, to which he replied "Yes". Jerome Deposition page 173, lines 15-19. The Court can find nothing in the First Right of Refusal that provides this.

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Even if the Court were to determine the Agreement is ambiguous or applies to transfers of less than a fee interest, this would, as a matter of law, render the agreement void as a restraint against alienation.

Under SDCL 43-3-5, "[c]onditions restraining alienation, when repugnant to the interest created, are void." A right of first refusal is a preemptive right restraining alienation. *Laska v. Barr*, 2018 S.D. 6, ¶24. To be valid, the restraint must be reasonable and for a legitimate purpose. Id. "The standard against which the impact of a restraint is to be measured is that of the property owner free to transfer property as his or her convenience at a price determined by the market." Id. at ¶25, citing *Restatement (Third) of Prop.: Servitudes* § 3.4 cmt. c. Comment c. to the Restatement is helpful in analyzing this case. It states in part:

> The harmful effects that may flow from restraints on alienation include impediments to the operation of a free market in land, limiting the prospects for improvement, development, and redevelopment of land, and limiting the mobility of landowners and would-be purchasers. Other harmful consequences include the demoralization costs associated with subordinating the desires of current landowners to the desires of past owners, and frustrating the expectations that normally flow from land ownership. Harmful consequences also may flow from enforcement of restraints on alienation that place one person in a position to take unfair advantage of another's need or desire to transfer property.
>
> In determining the injurious consequences likely to flow from enforcement of a restraint on alienation, the nature, extent, and duration of the restraint are important considerations. The standard against which the impact of a restraint is to be measured is that of the property owner free to transfer property at his or her convenience at a price determined by the market. Common types of restraints include prohibitions on transfers without consent of another, rights of first refusal, requirements that transfers be made only to persons meeting certain eligibility requirements, and options that require transfer to a particular person at a time selected by that person. The restraint may extend to all types of transfers, or only to certain types, like leases and subleases. It may require transfer at a fixed price, a price determined by a formula, by an appraisal, or by an offer received from a third party. The duration may be a fixed period, long or short, it may be limited by the occurrence of some event, or it may be unlimited. The greater the practical interference with the owner's ability to transfer, the stronger the purpose that is required to justify a direct restraint on alienation.

In the instant case, for the life of Jerome, Dennis is severely restricted in how he operates his land. For any action other than farming the ground himself, he required to either get permission from Jerome, or risk having to sell the land for far less than fair market value. He would not even be able to make improvements to the property if they entail easements or lending or any other encumbrance on the

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land—no matter how small. Jerome acknowledges he can limit Dennis' ability to mortgage property during Jerome's life. See Jerome's deposition, page 109. This impedes the operation of a free market in the land. It strictly limits improvement and development of the land. It frustrates expectations that normally flow from land ownership. It places Dennis in a position to be taken unfair advantage of in his simple use of the property. As a matter of law, this agreement is repugnant to ownership of the property and is void.[4]

CONCLUSION

The Agreement executed between Dennis and Jerome Powers does not cover easements and leases related to wind tower projects. The terms of the document intend to apply to fee interest transfers of the property. As such, summary judgment for the benefit of all of the Defendants is appropriate. If the Agreement did contemplate easements and leases as the Plaintiff argues, the terms of the Agreement are repugnant to ownership and would be a restraint on alienation, thus the Plaintiff is not able to prevail under either scenario.

Counsel for Prevailing Wind Park, LLC shall prepare an Order.

Dated

January 15, 2021

David Knoff
Circuit Court Judge

ATTEST: Jenny R. Roberts
Clerk

[4] The Court does not address whether the price in the agreement, which the parties acknowledge is less than fair market value, is on its own a restraint against alienation since the Court finds the far greater restrictions argued by Plaintiff clearly alienate the ownership rights of the property. The Court is also not addressing the additional arguments of Defendants.

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STATE OF SOUTH DAKOTA)		IN CIRCUIT COURT
: SS		
COUNTY OF CHARLES MIX)		FIRST JUDICIAL CIRCUIT

* *

JEROME POWERS, Plaintiff,	*	11CIV19-000029
vs.	*	*PLAINTIFF'S OPPOSITION TO DEFENDANT PREVAILING WIND PARK'S MOTION FOR SUMMARY JUDGMENT*
DENNIS POWERS, Defendant,	*	
-and-	*	
PREVAILING WIND PARK, LLC, Defendant.	*	

* *

COMES NOW Plaintiff herein, by & through his attorney of record, R. Shawn Tornow for Tornow Law Office, P.C., and hereby offers and submits Plaintiff's Opposition to Defendant Prevailing Wind Park, LLC's Motion for Summary Judgment, incl. to any extent necessary that such was or is incomplete absent unfiled affidavits of Dennis Powers and/or of Patrick Mahlberg; and, to any additional extent necessary, Plaintiff's Opposition to Defendant Dennis Powers' Motion Joinder as related hereto insofar as such Motion Joinder is, in fact, incomplete and would be untimely for any hearing before this Court on October 26, 2020, insofar as such Motion Joinder fails to be accompanied by Defendant Dennis Powers' separately stated statement of undisputed material facts as required by SDCL §15-6-56(c)(1), as referenced herein. Plaintiff's opposition herein being otherwise grounded in the overarching fact, as argued herein, that there remain genuine issues of material facts to be determined by and through specific fact-finding in this matter. Plaintiff Powers' opposition herein is, in part, supported by the factual issues outlined within the Affidavit of Jerome Powers in opposition to the pending motion(s) for summary judgment, including accompanying pleadings, file exhibits and Brief, as also filed herewith, as well as by and through argument at hearing.

WHEREFORE, Plaintiff prays that Defendant(s) pending motion(s) for summary judgment be hereinafter denied by this Court since such relief or result is not warranted under the facts and law related to this matter insofar as genuine issues of material fact remain to be fairly determined in this matter.

Dated this 22nd day of October, 2020.

/s/ R. Shawn Tornow
R. Shawn Tornow, for
Tornow Law Office, P.C.
PO Box 90748
Sioux Falls, SD 57109-0748
Telephone: 605-271-9006
E-mail: rst.tlo@midconetwork.com
Attorney for Plaintiff, Jerome Powers

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CERTIFICATE OF SERVICE:

I, R. Shawn Tornow, an attorney for Plaintiff herein, does hereby certify that on the 22nd day of October, 2020, a true and correct copy of *Plaintiff's Opposition to Defendant's Motion for Summary Judgment* and accompanying *Affidavit in Opposition* as well as *Plaintiff's Opposition to Defendant's Statement of Undisputed Material Facts* and his corresponding *Brief in Opposition* herein were timely served, by agreement, by uploading the same through Odyssey's File and Serve program or, if requested, by regular e-mail by and through submitting scanned copies of the above-referenced documents to the attention of the following named person(s) at the e-address(es) so indicated:

Lisa Agrimonti, and
Patrick Mahlberg
Fredrikson & Byron, P.A.
200 South Sixth Street, Suite 4000
Minneapolis, MN 55402-1425
E-mail: Lisa Agrimonti @ lagrimonti@fredlaw.com; for Defendant, Prevailing Wind Park, LLC
E-mail: Patrick Mahlberg @ pmahlberg@fredlaw.com; for Defendant, Prevailing Wind Park, LLC
E-mail: Joseph Erickson @ joe@schoenbecklaw.com; also for Defendant, Prevailing Wind Park, LLC
E-mail: John Blackburn @ jblaw@iw.net; for Defendant, Dennis Powers

/s/ R. Shawn Tornow

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STATE OF SOUTH DAKOTA)	: SS	IN CIRCUIT COURT
COUNTY OF CHARLES MIX)		FIRST JUDICIAL CIRCUIT

* *

JEROME POWERS, Plaintiff,	*	11CIV19-000029
vs.	*	*PLAINTIFF'S OPPOSITION TO DEFENDANT PREVAILING WIND PARK'S STATEMENT OF UNDISPUTED MATERIAL FACTS*
DENNIS POWERS, Defendant, -and- PREVAILING WIND PARK, LLC, Defendant.	*	

* *

Pursuant to SDCL §15-6-56(c), Plaintiff hereby submits his opposition to Defendant's statement of undisputed material facts as well as his responsive statements of material facts setting forth, in part, the genuine issues that must hereafter be tried in this matter as provided below and as cited to the record herein.

1.) Defendant's Statement of Undisputed Material Facts No. 5: Contrary to the statement proposed by Defendant Prevailing Wind Park, LLC, the First Right of Refusal Agreement(s) in this case which are, in fact, the crux of the dispute herein were entered into and filed in late March-April 2005, and references to state charges against Plaintiff for ingesting methamphetamine are a more than subtle and obvious effort by Defendant(s) to unnecessarily distort and skew the court's view of Plaintiff in and as a part of the independent-standing and unambiguous contractual agreement matter herein;

2.) Defendant's Statement of Undisputed Material Facts No. 20: Contrary to the statement proposed by Defendant Prevailing Wind Park, LLC, the proposed "fact" is of course not in any way a "material fact" in and for this litigation, especially in light of the specific evidentiary limitations provided under SDCL § 19-19-609(b); rather, Defendant's unnecessary and irrelevant reference(s) to state charges against and/or a conviction of Plaintiff for ingesting a controlled substance are a more than subtle and obvious effort by Defendant(s) to unnecessarily distort and skew the court's view of Plaintiff in and as a part of the independent-standing unambiguous contractual agreement matter herein;

3.) Defendant's Statement of Undisputed Material Facts No. 21: Contrary to the statement proposed by Defendant Prevailing Wind Park, LLC, the proposed fact is of course not in any way a "material fact" in and for this litigation, especially in light of the specific evidentiary limitations provided under SDCL § 19-19-609(b); rather, Defendant's unnecessary and irrelevant reference(s) to state charges against and/or a conviction of Plaintiff for ingesting a controlled substance are a more than subtle and obvious effort by Defendant(s) to unnecessarily distort and skew the court's view of Plaintiff in and as a part of the independent-standing unambiguous contractual agreement matter herein;

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4.) Defendant's Statement of Undisputed Material Facts No. 22: Contrary to the statement proposed by Defendant Prevailing Wind Park, LLC, the proposed fact is of course not in any way a "material fact" in and for this litigation, especially in light of the specific evidentiary limitations provided under SDCL § 19-19-609(b); rather, Defendant's unnecessary and irrelevant reference(s) to state charges against and/or a conviction of Plaintiff for ingesting a controlled substance are a more than subtle and obvious effort by Defendant(s) to unnecessarily distort and skew the court's view of Plaintiff in and as a part of the independent-standing unambiguous contractual agreement matter herein;

5.) Defendant's Statement of Undisputed Material Facts No. 23: Contrary to the statement proposed by Defendant Prevailing Wind Park, LLC, the proposed fact is of course not in any way a "material fact" in and for this litigation, especially in light of the specific evidentiary limitations provided under SDCL § 19-19-609(b); rather, Defendant's unnecessary and irrelevant reference(s) to state charges against and/or a conviction of Plaintiff for ingesting a controlled substance are a more than subtle and obvious effort by Defendant(s) to unnecessarily distort and skew the court's view of Plaintiff in and as a part of the independent-standing unambiguous contractual agreement matter herein;

6.) Defendant's Statement of Undisputed Material Facts No. 30: By way of contrast and opposition to the statement proposed by Defendant Prevailing Wind Park, LLC, the "concept" for the First Right of Refusal Agreement(s) in this case was actually initially thought of by Plaintiff, Jerome Powers, as he testified at his deposition on August 21, 2019, when he indicated that, "*I actually raised the – started the conversation of that [i.e., First Right of Refusal Agreement]. I wanted a safety net put in place so that anything that could – bad could [not] happen to the property...*" Jerome Powers depo. transcript at pg. 101:16-19;

7.) Defendant's Statement of Undisputed Material Facts No. 31: By way of contrast and opposition to the statement proposed by Defendant Prevailing Wind Park, LLC, the idea for the First Right of Refusal Agreement(s) in this case was initially contemplated by Plaintiff, Jerome Powers, as he testified at his deposition on August 21, 2019, when he was first asked:

Q: *When you entered into the agreements in Mr. Anderson's office back in 2005, was it your intent then to limit [Dennis] Powers' ability to convey an easement in the property?*

Jerome Powers answered, "*Yes.*" Jerome Powers depo. transcript at pgs. 157:22-25, and 158:1-5, and additionally,

Q: *You [only] intended at that time to Dennis' ability to outright sell the property, correct?*

Jerome Powers answered, "*No. I just wanted first right of refusal.*" Jerome Powers depo. transcript at pgs. 158:22-24;

8.) Defendant's Statement of Undisputed Material Facts No. 32: By way of contrast and opposition to the statement proposed by Defendant Prevailing Wind Park, LLC, Plaintiff submits that Defendant Dennis Powers speculative opinion of his father's, Jerome Power's, intent if a contractually unambiguous agreement is not a proper nor relevant statement of an undisputed material fact in this case;

9.) Defendant's Statement of Undisputed Material Facts No. 33: By way of contrast and opposition to the statement proposed by Defendant Prevailing Wind Park, LLC, Plaintiff submits that

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Plaintiff's response(s), following his counsel's objection(s), as related to the legal status of his alleged "intent" as he prepared to enter into the contractually unambiguous First Right of Refusal Agreement(s) is not a proper nor relevant statement of an undisputed material fact in this case;

10.) Defendant's Statement of Undisputed Material Facts No. 34: By way of contrast and opposition to the statement proposed by Defendant Prevailing Wind Park, LLC, Plaintiff submits that Plaintiff's response(s), following his counsel's repeated objection(s), as related to the legal status of his alleged and speculative "intent" as he prepared to enter into the contractually unambiguous First Right of Refusal Agreement(s) is not a proper nor relevant statement of an undisputed material fact in this case;

11.) Defendant's Statement of Undisputed Material Facts No. 36: By way of contrast and opposition to the statement proposed by Defendant Prevailing Wind Park, LLC, Plaintiff submits that Plaintiff's response(s), following his counsel's repeated objection(s), as related to the legal status of his alleged and speculative "intent" as he prepared to enter into the contractually unambiguous First Right of Refusal Agreement(s) is not a proper nor relevant statement of an undisputed material fact in this case;

12.) Defendant's Statement of Undisputed Material Facts No. 45: By way of contrast and opposition to the statement proposed by Defendant Prevailing Wind Park, LLC, Dennis Powers would have to first discuss/provide formal notice of the granting of such a [wind farm use] easement with Plaintiff Powers pursuant to the First Right of Refusal Agreement(s) in order, "*To see what effects [sic] it may or may not have on the property in the future. I'm trying to protect the property, thus the reason for the easement – or the First Right of Refusal [Agreement]. ... I want it also to protect my interests as far as my business. I live there permanently. This property surrounds me. And I want to know what's going on around me and to see what effects it's going to have on me.*" Jerome Powers depo. transcript at pg. 191:8-18;

13.) Defendant's Statement of Undisputed Material Facts No. 46: Is opposed by Plaintiff insofar as being unnecessarily duplicative of Defendant's Statement No. 18 and, as such, is not and cannot properly be considered an additional statement of an undisputed material fact herein;

14.) Defendant's Statement of Undisputed Material Facts No. 47: By way of opposition to the statement(s) proposed by Defendant Prevailing Wind Park, LLC within its list of events that he was claimed to be "aware of" or, perhaps, "told about", Plaintiff Powers asserts that, under the contractually unambiguous First Right of Refusal Agreement terms, Plaintiff, as the lawful Grantee by and within such Agreement(s), was not provided the clearly required notice, including by *written notice* from Defendant Powers, as Grantor, of his transfer or conveyance intentions of "any interest(s)" in the subject property(s) so as to contractually trigger and thereby commence the mutually agreed upon terms/conditions/requirements of the contractually unambiguous First Right of Refusal Agreement(s) in this case. *See*, Jerome Powers depo. transcript at pgs. 234:11-25-235:1-3; *See*, Affidavit of Plaintiff, Jerome Powers at ¶¶ 4-5, 7-8;

15.) Defendant's Statement of Undisputed Material Facts No. 48: By way of contrast and opposition to the (intentionally incomplete) statement proposed by Defendant Prevailing Wind Park, LLC, Plaintiff Powers went on to (fully) testify about the unambiguous First Right of Refusal

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Agreement(s) to the extent that, "*...[It's] one thing, as far as the farming part. Long term easement, that's a whole different breed of cat. That's what I wanted this First Right of Refusal for, so that if this took place, I can protect my interest. Absentee owners –*" Jerome Powers depo. transcript at pg. 192:5-10;

16.) Defendant's Statement of Undisputed Material Facts No. 61: Contrary to the statement proposed by Defendant Prevailing Wind Park, LLC, and in direct opposition thereto, Plaintiff Powers refutes that Defendant Powers went "out to the farm ... at [my] house" and that in late August or early September 2018[1] he (Dennis) "went with copies of the proposed [PWP] leases" to discuss with me at my house such proposed easement leases as a part of or related to the unambiguous First Right of Refusal Agreement(s) that was still in effect. *See*, Affidavit of Plaintiff, Jerome Powers at ¶¶ 3-4;

17.) Defendant's Statement of Undisputed Material Facts No. 62: Contrary to the statement proposed by Defendant Prevailing Wind Park, LLC, and in direct opposition thereto, Plaintiff Powers refutes that Defendant Powers went "out to the farm ... at his house" and that "...[B]ack at that time [Jerome] wasn't against wind energy" and/or that they "[T]alked about the lighting systems..." in relationship with, or as a part of or related to the unambiguous First Right of Refusal Agreement(s). *See*, Affidavit of Plaintiff, Jerome Powers at ¶¶ 3-4;

18.) Defendant's Statement of Undisputed Material Facts No. 63: Contrary to the statement proposed by Defendant Prevailing Wind Park, LLC, and in direct opposition thereto, Plaintiff Powers refutes that Defendant Powers was "out to the farm ... at his house" and that they "...[D]iscuss[ed]... the terms and conditions of those proposed [wind easement] leases" in any respect, including as a part of or related to the unambiguous First Right of Refusal Agreement(s). *See*, Affidavit of Plaintiff, Jerome Powers at ¶¶ 3-5;

19.) Defendant's Statement of Undisputed Material Facts No. 64: Contrary to the statement proposed by Defendant Prevailing Wind Park, LLC, and in direct opposition thereto, Plaintiff Powers refutes that Defendant Powers was "out to the farm ... at his house" and that as a part of the claimed and alleged, as disputed, discussion about "...terms and conditions of those proposed [wind easement] leases", nor was there any required *written notice* by Defendant Powers, as Grantor, of his potential or pending transfer or conveyance intentions of "any interest(s)" in the subject property(s) so as to trigger the unambiguous First Right of Refusal Agreement(s). *See*, Jerome Powers depo. transcript at pgs. 234:11-25-235:1-3; *See*, Affidavit of Plaintiff, Jerome Powers at ¶¶ 2-8;

20.) Defendant's Statement of Undisputed Material Facts No. 72: By way of contrast and opposition to the statement proposed by Defendant Prevailing Wind Park, LLC, Plaintiff submits that Defendant's self-serving claim as to what the SDPUC supposedly "rejected" as related to Plaintiff's hunting operations/business is not a proper nor relevant statement of an undisputed material fact in this case;

---

[1] Presumably, Defendant PWP's Statement of Undisputed Material Facts, No. 61, erroneously indicated "September 2018" – when, instead, the timeframe referenced by Plaintiff's counsel at Dennis Powers' August 2019 deposition was actually August-September 2016 – that is, at or just prior to Dennis (and, unbeknownst, to Plaintiff Jerome) and April Powers signing PWP's lease/easement agreement(s) in September of 2016. *See*, Affidavit of Plaintiff, Jerome Powers at ¶ 7.

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21.) Defendant's Statement of Undisputed Material Facts No. 83: By way of contrast and opposition to the statement proposed by Defendant Prevailing Wind Park, LLC, Plaintiff submits that Defendant's reference to Plaintiff's other litigation, with Defendant Prevailing Wind Park, LLC, neither being named and not being a party thereto, is both unnecessary as well as being an irrelevant statement of an undisputed material fact in the instant case.

Dated this 22nd day of October, 2020.

/s/ R. Shawn Tornow

R. Shawn Tornow, for
Tornow Law Office, P.C.
PO Box 90748
Sioux Falls, SD 57109-0748
Telephone: 605-271-9006
E-mail: rst.tlo@midconetwork.com
Attorney for Plaintiff, Jerome Powers

CERTIFICATE OF SERVICE:

I, R. Shawn Tornow, an attorney for Plaintiff herein, does hereby certify that on the 22nd day of October, 2020, a true and correct copy of *Plaintiff's Opposition to Defendant's Motion for Summary Judgment* and accompanying *Affidavit* as well as *Plaintiff's Opposition to Defendant's Statement of Undisputed Material Facts* and corresponding *Brief in Opposition* herein were timely served, by agreement, by uploading the same through Odyssey's File and Serve program or, if requested, by regular e-mail by and through submitting scanned copies of the above-referenced documents to the attention of the following named person(s) at the e-address(es) so indicated:

Lisa Agrimonti, and
Patrick Mahlberg
Fredrikson & Byron, P.A.
200 South Sixth Street, Suite 4000
Minneapolis, MN 55402-1425
E-mail: Lisa Agrimonti @ lagrimonti@fredlaw.com; for Defendant, Prevailing Wind Park, LLC
E-mail: Patrick Mahlberg @ pmahlberg@fredlaw.com; for Defendant, Prevailing Wind Park, LLC
E-mail: Joseph Erickson @ joe@schoenbecklaw.com; also for Defendant, Prevailing Wind Park, LLC
E-mail: John Blackburn @ jblaw@iw.net; for Defendant, Dennis Powers

/s/ R. Shawn Tornow

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STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:SS
COUNTY OF CHARLES MIX) FIRST JUDICIAL CIRCUIT

* *

JEROME POWERS, Plaintiff, vs. DENNIS POWERS, Defendant, -and- PREVAILING WIND PARK, LLC, Defendant.	11CIV19-000029 *PLAINTIFF'S AFFIDAVIT IN OPPOSITION TO DEFENDANT PREVAILING WIND PARK'S MOTION FOR SUMMARY JUDGMENT*

* *

STATE OF SOUTH DAKOTA)
:SS
COUNTY OF CHARLES MIX)

Jerome Powers, Affiant, on behalf of himself being first duly sworn upon his oath, deposes and states as follows:

1. Your Affiant submits that he is over the age of eighteen and is informed and competent to testify to the matters as are set forth herein;

2. Your Affiant, as the Plaintiff herein, submits that prior to 2019, to the best of my recollection and as fully consistent with my prior deposition testimony on August 21, 2019, I had not been provided written notice by my son, Dennis Powers, as required under Section Two of the First Right of Refusal Agreements related to the subject properties (for convenience, hereinafter referenced as the "ROFR properties"), of his intention to either sell, transfer or convey any interest or interests in the ROFR properties in either or both Charles Mix County or Bon Homme County;

3. Your Affiant further submits that, directly contrary to Defendant Prevailing Wind Park, LLC's (hereinafter referred to as "PWP") Statement of Undisputed Material Facts Nos. 61-62-63-64, upon my information and belief and as I re-checked my independent recollection with my wife's (Heidi's) recollection, at no time in September 2016, or prior thereto, did Dennis come "out to the farm" or to my house or at/in any other location where he brought the proposed PWP lease/easement

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agreements with him or him (Dennis) "setting them on [my] table" as part of or in any way related to our discussion of wind energy on or around the subject properties.

4. Your Affiant further submits that, contrary to general assertions or fact-related implications by PWP, at no time from the date of or near the date of September 1, 2016 [PWP's effective date of its wind easement agreement(s) with Defendant Dennis Powers] through 2017 and through most of 2018, did my son, Dennis, orally or in writing provide me with the required notice of his intention to sell, transfer or convey any interest or interests in the ROFR parcels of real property in this matter. That is to say, for over two (2) years, I had no knowledge of my son, Dennis, breaching our ROFR agreement as related to PWP's wind easement agreement(s) with Defendant Dennis Powers and, as I (also) later came to find out, with April Powers;

5. Your Affiant further submits that, it wasn't until approx. the latter months of 2018 where Defendant Dennis Powers first *orally* indicated to me – never indicating in writing (as my son, Dennis, also testified at his August 21, 2019, deposition at pg. 42:10-16) – that over two (2) years earlier he had agreed/signed-off on PWP's intrusive wind farm lease/easement agreements as related to the subject properties and, as a result of him (Dennis) wrongfully selling such an easement interest to PWP, that's what led to a falling out of our father/son/family relationship. As such, only a matter of a few months later did I seek out legal counsel and, ultimately, in June of 2019, in good faith, I authorized the filing of the present declaratory judgment/breach of contract action;

6. Your Affiant also submits that, in approximately early 2019, PWP tellingly, and in contrast to their subsequent positions in this matter, sought a "Consent to Wind Energy Lease and Wind Easement Agreement" from me, pursuant to and based upon, the still intact ROFR related to the subject properties and as directly related to this legal action. As PWP has acknowledged, in 2019 and through to today, I have declined to sign away my ROFR rights. *See*, Exhibit E, as filed with my Complaint on June 29, 2019;

7. Your Affiant additionally submits that, in this circuit court file, I have not been provided with a filed copy of a (proposed) Affidavit of Dennis Powers nor with a filed copy of what appear to

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be exhibits as referenced therein. That is, I was *not* at all informed in 2012 through, at least, the time up to my son's deposition in August 2019 that he had (previously) deeded one-half interest in the subject property to his wife, April Powers, via warranty deed. Moreover, I was *not* at all informed in 2013 through, at least, at some point in 2017 that he had otherwise sought out a mortgage or mortgages as related to the subject property(s);

8. Your Affiant finally submits that, to my knowledge, understanding and belief – as confirmed to me by and through Exhibit E of my Complaint herein – I did not know, and, as such, could not knowingly or intentionally waive my legal rights under the unambiguous contractual terms within our mutually agreed ROFR Agreement as to the wind easement/lease entered into by my son, Dennis, in September 2016, after which I was only provided with an oral indication of the sale and conveyance of such burdensome easement(s) on the property(s) until over 2-years later, in late 2018.

Dated this 22nd day of October, 2020.

_____
Jerome Powers, Affiant

Subscribed and sworn to before me
this 22nd day of October, 2020.

_____
Notary Public—South Dakota
My Commission Expires: _____.

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be exhibits as referenced herein. That is, I was not at all informed in 2017 through, at least, the time up to my son's deposition in August 2018 that he had previously deeded one-half interest in the subject property to his wife, April Powers, via warranty deed. However, I was not at all informed in 2033 through, at least, at some point in 2017 that he had otherwise sought out a mortgage or mortgages related to the subject property(s).

8. Your Affiant finally submits that, to my knowledge, understanding and belief – as confirmed to me by and through Exhibit F of my Complaint herein – I did not know, and, as such, could not knowingly or intentionally waive my legal rights under the unambiguous contractual terms within our mutually agreed ROFR Agreement as to the wind easements/leases entered into by my son, Dennis, in September 2016, after which I was only provided with an oral indication of the sale and conveyance of such burdensome easement(s) on the property(s) until over 2-years later, in late 2018.

Dated this 22nd day of October, 2020.

Joanne Powers, Affiant

Subscribed and sworn to before me
this 22nd day of October, 2020.

Notary Public – South Dakota
My Commission Expires: 2-11-2022

App. E-4

STATE OF SOUTH DAKOTA	IN CIRCUIT COURT
COUNTY OF CHARLES MIX	FIRST JUDICIAL CIRCUIT

Jerome Powers, Plaintiff, vs. Dennis Powers, Defendant, -and- Prevailing Winds, LLC, and Prevailing Wind Park, LLC, Defendants.	Case No. 11CIV19-000029 **DEFENDANT PREVAILING WIND PARK, LLC'S STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

Defendant, Prevailing Wind Park, LLC ("PWP"), respectfully submits this statement of undisputed material facts in support of PWP's Motion for Summary Judgment. The Affidavits and Exhibits thereto referenced herein are attached to the Affidavit of Dennis Powers, the Affidavit of Meghan Semiao, or the Affidavit of Patrick Mahlberg filed herewith.

THE PARTIES

Jerome Powers

1. Jerome lives in Wagner, right next to the "Property" described below. (J. Powers Dep. Tr. 5:6-7 (Mahlberg Aff. Ex. 1).)[1]

2. Jerome is in his mid-to-late fifties. (J. Powers Dep. Tr. 222:4-5 (Mahlberg Aff. Ex. 1).)

[1] The cited portions of the transcripts of the respective depositions of Jerome Powers and Dennis Powers are attached as Exhibits 1 and 2 to the Affidavit of Patrick D.J. Mahlberg ("Mahlberg Aff.") filed herewith.

A. Correct. . . .

(J. Powers Dep. Tr. 158:25-159:3 (Mahlberg Aff. Ex. 1).)

32. Dennis confirmed that the intent was to prevent Dennis from an outright sale of the Property: "So my understanding of the first -- the right of first refusal was so that I could not go and sell off this property for a huge profit, because it was sold to us rather cheap." (Dennis Depo. Tr. 74:21-75:6 (Mahlberg Aff. Ex. 2).)

33. Jerome did not intend that the first right of refusal agreements could be triggered by Dennis conveying any interest in the Property, no matter how small, at the time the agreements were executed:

> Q: Did you intend at the time you entered into this Right of First Refusal Agreement with Dennis Powers that Dennis Powers could not convey any interest in any part of the property, no matter how small, a part of the property, without giving you the option to purchase of the entirety of the property at $420 per acre? Yes or no.
>
> [Mr. Tornow: Objection to the form of the question insofar as it calls for a legal conclusion.]
>
> A: No.

(J. Powers Dep. Tr. 169:19-170:3 (Mahlberg Aff. Ex. 1).)

34. Jerome also did not intend for the leasing of the Property by Dennis to trigger the agreements:

> Q: . . . So did you intend at the time that you entered into the First Right of Refusal agreement that if Dennis told you he was going to lease the property to a third party, that you would have the ability to respond by saying, "I'm exercising my rights to purchase all of your property for $420 per acre"?
>
> A: No.

(J. Powers Dep. Tr. 160:3-9 (Mahlberg Ex. 1).)

35. At the time the agreements were executed, Jerome also did not have in mind any intent with regard to a distinction between agricultural and non-agricultural uses of the Property, or any intent about a wind farm. (J. Powers Dep. Tr. 170:8-13 (Mahlberg Ex. 1).)

36. Jerome testified that he does not know what he intended with respect to easements. (Jerome Depo. Tr. 157:22-158:15 (Mahlberg Ex. 1).)

The Terms of the Agreement

37. Mr. Anderson drafted a "First Right of Refusal Agreement" for each part of the Property—one for Charles Mix County and one for Bon Homme County. (J. Powers Dep. Tr. 104:20-105:3, Ex. 10 (Charles Mix County), and Ex. 11 (Bon Homme County).)

38. The agreements are identical other than the legal descriptions. (*Compare* J. Powers Dep. Tr. Ex. 10 *with* Ex. 11 (Mahlberg Aff. Ex. 1); *id.* at 74:18-75:3.)

39. The first right of refusal language in each agreement is as follows:

SECTION TWO
FIRST RIGHT OF REFUSAL

In the event GRANTOR offers the above-described property, or any interest therein, for sale, transfer or conveyance, GRANTOR shall not sell, transfer, or convey the above-described property, nor any interest therein, unless and until he shall have first offered to sell such property or any interest therein, to GRANTEE. If GRANTOR intends to make a bona fide sale of the above-described property, or any interest therein, he shall give to GRANTEE written notice of such intention, which notice shall contain the basic terms and conditions demanded by GRANTOR for the sale of such property.

Within thirty (30) days of receipt of such notice and information, GRANTEE shall either exercise his First Right of Refusal by providing written notice of his acceptance to GRANTOR, or waive his First Right of Refusal by failing to provide GRANTOR with written notification of his acceptance or rejection of the First Right of Refusal within such time.

(J. Powers Dep. Tr. Ex. 10, p. 2; *id.* at Ex. 11, p. 2 (Mahlberg Aff. Ex. 1).)

40. The agreements do not define what "any interest therein" means—whether it be a partial interest (e.g., an easement or a leasehold interest) or a fee interest in all or a part of the

Property. (*See* J. Powers Dep. Tr. Exs. 10 and 11 (Mahlberg Aff. Ex. 1).) But, this portion of each agreement requires Dennis to give Jerome notice and an opportunity to purchase the same property or interest therein—"such property or any interest therein"—that Dennis is offering to someone else. (*Id.*)

41. The agreement's next section, titled "Terms," contemplates a transaction from Dennis to Jerome only "should [Dennis] accept the offer by [Jerome] to purchase the [P]roperty." (*See* J. Powers Dep. Tr. Exs. 10 and 11 (Mahlberg Aff. Ex. 1).)

42. Then, each agreement contemplates a sale at the fixed price of $420 per acre:

SECTION THREE
TERMS

Should GRANTOR accept the offer of GRANTEE to purchase the property, it shall be on the following terms:

1. **GRANTEE shall pay GRANTOR the sum of $420.00 per acre, which shall be paid in cash or cash equivalent at closing.**
2. **GRANTOR shall convey fee title, which title shall be merchantable, as shown by abstract or title insurance.**
3. **Closing shall take place within thirty (30) days of GRANTOR delivering title insurance or abstracts to the property.**
4. **GRANTEE shall have possession of the property at closing.**

If GRANTEE fails to exercise his First Right of Refusal, GRANTOR may proceed to sell, transfer and convey the property to any other person or entity free from any restrictions of this Agreement.

(J. Powers Dep. Tr. Exs. 10 and 11, pp. 2-3 (Mahlberg Aff. Ex. 1.) This section of the agreement does not contain the "any interest therein" language found in the first right of refusal language; rather, it only provides terms of a sale of the "fee title" of the property. (*Id.*)

43. The remainder of the agreements describe unauthorized transactions, allow for specific performance, and provide that the agreements are "binding upon the parties, their heirs, executors, estates, personal representatives, agents and assigns, however, as to [Jerome], this

Agreement shall expire on his death." (*See* J. Powers Dep. Tr. Exs. 10 and 11 (Mahlberg Aff. Ex. 1).)

Jerome's Current Contentions That Dennis Could Not Convey A Lease Or Easement Interest Without Triggering Dennis's Rights Under the Agreements

44. Jerome's position is that the ROFRs give Jerome the ability to control whether Dennis may grant *any* interest in the Property to any third party, regardless of the scope of that interest, based upon whether Jerome likes the use or not:

> Q: And so your position is that you have the ability to dictate what Dennis does on that property if it involves granting an interest to a third party, correct?
>
> A: Correct.
>
> Q: And in response, if Dennis intends to grant an interest to a third party, the nature of which you disagree with, you can respond by forcing a sale of the entirety of the property to you at $420 per acre; is that right?
>
> A: Correct.

(J. Powers Dep. Tr. 168:19-169:3 (Mahlberg Aff. Ex. 1); *see id.* at 181:19-24 (""Q. Mr. Powers, is it your position that the First Right of Refusal gives you the right to force Dennis to sell to you all 633 acres at a price of $420 if he intends to grant any easement or any lease or any other interest in the property to a third party?" A. Yes."), 189:12-190:12.)

45. According to Jerome, Dennis's choice is either farm the Property himself, or let it go fallow—any attempt to put any part of the property to any other productive use through a third party gives Jerome "control" and the right to buy all of the Property for $420 per acre at his whim:

> Q: Right. You want the ability to control that 633 acres, correct?
>
> A: Correct.

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA
APPEAL NO. 29561

JEROME POWERS,

Appellant,

v.

DENNIS POWERS,

Appellee,

-and-

PREVAILING WIND PARK, LLC,

Appellee.

APPEAL FROM THE CIRCUIT COURT
FIRST JUDICIAL CIRCUIT
CHARLES MIX COUNTY, SOUTH DAKOTA

HON. DAVID KNOFF
Circuit Court Judge

BRIEF OF APPELLEE DENNIS POWERS

Dennis Powers Also Joins Brief of Co-Appellee

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NOTICE OF APPEAL FILED FEBRUARY 25, 2021

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IN THE SUPREME COURT
OF THE
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-and-

PREVAILING WIND PARK, LLC,

Appellee.

APPEAL FROM THE CIRCUIT COURT
FIRST JUDICIAL CIRCUIT
CHARLES MIX COUNTY, SOUTH DAKOTA

HON. DAVID KNOFF
Circuit Court Judge

BRIEF OF APPELLEE DENNIS POWERS

Dennis Powers Also Joins Brief of Co-Appellee

PRELIMINARY STATEMENT:

For the purpose of this document, Appellee Dennis Powers shall be referred to as "Dennis Powers," Appellee Prevailing Wind Park, LLC shall be referred to as "Prevailing Wind," and Appellant Jerome Powers shall be referred to as "Jerome Powers" for the purpose of clarity in this Appellee Brief.

JURISDICTIONAL STATEMENT:

Jerome Powers appeals the Order entered by the Hon. David Knoff on January 25, 2021. This appeal comes after the Circuit Court's Memorandum Decision and Order entered on January 15, 2021. SR-742, SR-756; *see* also, Appendix A & B. Dennis Powers recognizes this Court has jurisdiction to review the Circuit Court Order pursuant to S.D. Codified Laws § 15-26A-3. Jerome Powers filed his Notice of Appeal on February 25, 2021. SR-774.

ADOPT/JOIN APPELLEE PREVAILING WIND PARK LLC'S BRIEF:

Pursuant to S.D. Codified Laws § 15-26A-67:

> In cases involving more than one appellant or appellee, including cases consolidated for purposes of appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs. *See,* Appendix I-1.

Appellee Dennis Powers hereby adopts and joins in Appellee Prevailing Wind's Appellee Brief and its subservient documents. This statutory adoption is in addition to Appellee Dennis Powers' limited issue Appellee Brief.

STATEMENT OF LEGAL ISSUE:

THE CIRCUIT COURT'S DECISION TO UPHOLD DENNIS POWERS' MOTION JOINDER AND GRANT SUMMARY JUDGMENT FOR APPELLEES WAS PROPER. SINCE DENNIS POWERS WAS THE JOINING PARTY IN THE SUMMARY JUDGMENT MOTION, HE DID NOT BEAR THE BURDEN OF SATISFYING THE STATUTORY SUBSERVIENT REQUIREMENTS FOR A SUMMARY JUDGMENT MOTION. DENNIS POWERS CO-APPELLEE COMPLIED WITH ALL STATUTORY REQUISITES IN WHICH HE JOINED. PREVAILING WIND, AS THE MOVING

PARTY, SATISFIED THE STATUTORY REQUIREMENTS FOR THE SUMMARY JUDGMENT MOTION AND THIS APPEAL.

> Dennis Powers respectfully asserts that the Circuit Court entered an appropriate decision in its Memorandum Decision and Order when it granted Prevailing Wind's summary judgment motion and upheld Dennis Powers motion joinder. The Circuit Court granted Summary Judgment to both Dennis Powers and Prevailing Wind – to both Defendants. Jerome Powers failed to submit a timely objection to Dennis Powers' Motion joinder. Jerome Powers contends Dennis Powers Motion joinder is statutorily defective and should have been denied by the Circuit Court. The Circuit Court however, in its Memorandum Decision, accepted Dennis Powers' Motion joinder. *See,* Appendix A, B, C, D & E.

Discover Bank v. Stanley, 2008 S.D. 111, 757 N.W.2d 756.
Murray v. Mansheim, 2010 S.D. 18, 779 N.W.2d 379.
Nelson v. Schellpfeffer, 2003 S.D. 7, 656 N.W.2d 740.
Table Steaks v. First Premier Bank, N.A., 2002 S.D. 105, 650 N.W.2d 829. SR-97.
SDCL § 15-6-56(c)(1).
SDCL § 15-6-61.
SDCL § 15-26A-67.

STATEMENT OF THE CASE AND FACTS:

The Trial Court is the Circuit Court of the First Judicial Circuit. The Circuit Court Judge was/is Hon. David Knoff.

The nature of the case is a dispute involving an alleged Right of First Refusal regarding a lease Jerome Powers contends triggered his right to buy several hundred acres for four-hundred twenty dollars ($420) per acre. The disposition by the Circuit Court decided adversely to Jerome Powers' contention ruling favorably to his son Dennis Powers and Prevailing Wind the alleged right of first refusal did not invoke "trigger" Jerome Powers' right to buy the several hundred acres for four-hundred twenty dollars ($420) per acre. Dennis Powers may keep his land ownership. The Circuit Court granted Summary Judgment to Defendants, now Appellees.

For the purpose of brevity, Dennis Powers adopts and incorporates the statement of the case and statement of undisputed material facts as set forth in Prevailing Wind's October 9, 2020, Statement of Undisputed Material Facts in Support of Motion for Summary Judgment. SR-148; *see* also, Appendix D.

ARGUMENT:

MOTION'S LEGAL STANDARDS

This Court previously held: "[t]he plain meaning of SDCL § 15-6-56(c)[(1)] leaves no doubt that the *moving party* must file a statement of undisputed material facts with a motion for summary judgment…" [Emphasis added.]; *Discover Bank v. Stanley*, 2008 S.D. 111, ¶ 25, 757 N.W.2d 756, 764. South Dakota's motion for summary judgment statute provides:

> A party moving for summary judgment shall attach to the motion a separate, short, and concise statement of the material facts as to which the *moving party* contends there is no genuine issue to be tried. ****

[Emphasis added.]; S.D. Codified Laws § 15-6-56(c)(1). *See,* Appendix G-1. The requirements of the statute are all separate documents; yet SDCL § 15-6-56(c)(1) implies the documents are recognized by the courts as a *unit*. Prevailing Wind here was the Movant. It satisfied the statutory requirements when it filed its motion for summary judgment and all other subservient documents, as a *unit*. Dennis Powers joined/adopted the Motion of Prevailing Wind. *See*, Appendix E. Dennis Powers joined the Movant's filings.

Dennis Powers respectfully argues that when a party joins in a *moving party's* motion for summary judgment, that party is joining *all parts* of the *moving party's* motion for summary judgment; unless expressly stated otherwise. Dennis Powers, began

his Motion Joinder and Memorandum in Support of Motion for Summary Judgment by stating:

> Defendant Dennis Powers has and does join in the Motion for Summary Judgment and joins in Prevailing Wind Park, LLC's Memorandum in Support of our Motion for Summary Judgment and incorporates herein the case law and authority for our legal assertions. SR-96; *see* also, Appendix E-1.

Prevailing Wind, in its motion for summary judgment expressly stated its motion was supported by the accompanying statement of undisputed material facts. SR-146; *see* also, Appendix C-1. Dennis Powers by implication joined *all parts* of Prevailing Wind's Motion, which includes all subservient documents required when the *moving party* files its motion for summary judgment. *See,* Appendix D. In this case, the subservient documents included Prevailing Wind's statement of undisputed material facts as well as any and all other documents accompanying its motion. Dennis Powers hopes it is understood that if he did not want to join in Prevailing Wind's statement of undisputed material facts, he would have either expressly stated such intent or he would have filed his own motion for summary judgment and avoided joining Prevailing Wind.

This Appellate Court Provides for adoption of or "join in" briefs of other parties. *See,* SDCL § 15-26A-67; Appendix I-1. This is what Appellee Dennis Powers did in the Circuit Court. The Circuit Court granted summary judgment to both Appellees. The Motions of both Appellees are attached and shown in the Appendix. *See,* Appendix C & E. Prevailing Wind's Circuit Court Motion contained the following language:

> This Motion is supported by the accompanying Statement of Undisputed Material Facts, Memorandum, Affidavit of Dennis Powers **** and all files and proceedings herein. SR-146; *see* also, Appendix C-1.

This is the Motion Dennis Powers joined. It included by direct reference a Statement of Undisputed Material Facts! Dennis Powers joined this Motion in its entirety. Therefore, Dennis Powers respectfully suggests he joined in the Primary Movant's Motion which included the statutorily required Statement of Undisputed Material Facts.

Jerome Powers cites this Court's interpretation of SDCL § 15-6-56(c)(1) in *Discover Bank v. Stanley*, 2008 S.D. 111, 757 N.W.2d 756 as purported authority for his appellate position claiming Dennis Powers joinder is statutorily defective. However, Jerome Powers fails to point out appellant Discover Bank was the *moving party* making their original appeal. In *Discover Bank*, it was the *moving party* who failed to comply with the statutory requirement of filing the statutory statement of undisputed material facts. The distinction here: Dennis Powers is *joining* in a properly filed motion and statement of undisputed material facts.

Both Appellees have sought the same relief; joined in the same authorities; received the same Circuit Court ruling; and now both Appellees are endeavoring to sustain the Circuit Court's favorable judgment. Dennis Powers hopes it is understood that when he submitted his motion joinder (*see,* Appendix E), on October 9, 2020, to join Prevailing Wind's motion for summary judgment, he intended to join in the Motion and the other required, but subservient, documents accompanying Prevailing Wind's Motion. SR-96; *see* also, Appendix C & D. The *moving party*, Prevailing Wind, did comply with the statutory requirements. By joining, the Motion which included the Statement of Undisputed Material Facts, Dennis Powers intended his joinder to include not only Prevailing Wind's Motion, but also the other subservient documents. This Appellate Court encourages joinder. *See* SDCL § 15-26A-67; Appendix I-1. Dennis Powers is again

taking advantage of joinder. He is adopting Prevailing Wind's Brief as his own and filing this short Appellee's brief of his own to address the position raised by Jerome Powers regarding Dennis Powers Circuit Court joinder.

ROFR IS UNCONSCIONABLE

Jerome Powers would be greatly, unjustly enriched by inflation and soaring property values. SR-96; *see* also, Appendix E-1. The four-hundred twenty dollar ($420) per acre Jerome Powers is to pay pales by comparison to current land values of several thousand per acre. SR-96; *see* also, Appendix E-1. Most rights of first refusal give opportunity to meet or exceed an arm's length offer to purchase. SR-97; *see* also, Appendix E-2. Not here: Jerome Powers is trying to force transfer of this land for an antiquated, low land price with no consideration for improvements and inflation SR-97; *see* also, Appendix E-2. Such assertions are unconscionable and would be an immense unjust enrichment to Jerome Powers who has ignored exercising such alleged rights until he sees opportunity to immensely gain monetarily. SR-97; *see* also, Appendix E-2. This Court in *Table Steaks v. First Premier Bank, N.A.*, 2002 S.D. 105, 650 N.W.2d 829 previously held: "[e]very contract contains an implied covenant of good faith and fair dealing. This implied obligation must arise from either the language used in the contract…or must be indispensable to effectuate the intention of the parties" - - but not in our case! *Table Steaks*, 2002 S.D. 105, ¶ 16, 650 N.W.2d at 834–35. SR-97; *see* also, Appendix E-2.

ABSURD RESULT

Dennis Powers by analogy compares *Nelson v. Schellpfeffer*, 2003 S.D. 7, 656 N.W.2d 740, which discusses an *absurd result*. This Court, previously held: "[a]n absurd

result is one that is 'ridiculously incongruous or unreasonable,' ****" *Nelson v. Schellpfeffer*, 2003 S.D. 7, ¶ 12, 656 N.W.2d 740, 743. Dennis Powers urges this court to refuse Jerome Powers' assertion of failure to "join all." If this Court were to accept Jerome Powers' argument, doing so would be inconsistent with this Court's precedent and would effectively cause an absurd result. As this Court previously stated: "we have an obligation to interpret law in a manner avoiding "absurd results," *Murray v. Mansheim*, 2010 S.D. 18, ¶ 7, 779 N.W.2d 379, 382.

If Dennis Powers favorable Circuit Court ruling is not sustained and Prevailing Wind's favorable ruling is sustained, Dennis Powers then goes back to the Circuit Court; goes through the almost identical procedures as have already been done in the present case record; hopefully obtains the same Circuit Court ruling granting summary judgment, then Jerome Powers again appeals and he and Dennis Powers come back to this Appellate Court on the almost identical case record. Dennis Powers respectfully argues such syllogism would be a waste of judicial effort and contrary to the interests of judicial economy.

HARMLESS ERROR

Dennis Powers respectfully suggests any error in his Circuit Court Motion Joinder, if any, should be viewed as a harmless error because, as the *joining party*, Dennis Powers did not bear the burden of satisfying the statutory requirements of SDCL § 15-6-56(c)(1). South Dakota's Harmless Error statute, S.D. Codified Laws § 15-6-61, provides:

> The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." *See*, Appendix H-1.

Dennis Powers respectfully suggests his error, if any, did not affect the substantial rights of the parties. When determining whether or not the error affected the substantial rights of the parties, Dennis Powers urges this Court to consider the minuteness of the purported error in the context of this entire case. Dennis Powers harmless error was not a determinative factor in the Circuit Court's decision and other evidence proves both Appellee's intent to join together in this Motion for Summary Judgment.

Prevailing Wind, throughout its statement of undisputed material facts, makes reference to the same facts Dennis Powers puts forth in his Affidavit. SR-226; *see* also, Appendix D & F. These references are evidence of both Appellee's cooperation in establishing the substance of their statement of undisputed material facts. Dennis Powers respectfully asks this Court to consider the intent of the parties based on the actions they have taken together thus far. Sufficient evidence exits Dennis Powers intended to join in *all parts* of Prevailing Wind's Motion for Summary Judgment and the claims of both Appellee's rest upon parallel facts. To deny Dennis Powers' motion joinder and send him back to the Circuit Court seeking the same result in effect now solely based on what Dennis Powers hopes is, if any, a harmless error. It would be inconsistent with this Court's encouragement of joinder (*see*, SDCL § 15-26A-67; *see* also, Appendix I-1) and considerations of judicial economy.

CONCLUSION:

Dennis Powers respectfully submits: The burden of satisfying the statutory requirements of SDCL § 15-6-56(c)(1) was met by Prevailing Wind's Motion which Dennis Powers joined. Prevailing Wind did satisfy the statutory requirements of SDCL §

15-6-56(c)(1). Dennis Powers joined Prevailing Wind's Motion which included all statutorily required documents.

Dennis Powers respectfully requests this Court sustain the Circuit Court Order granting summary judgment favorable to both Appellees.

CERTIFICATE OF COMPLIANCE:

Pursuant to S.D. Codified Laws § 15-26A-66, John P. Blackburn, Appellee Dennis Powers attorney herein, submits the following:

The foregoing brief, not including the signature section here and the Appendix below, is twelve (12) pages in length. It was typed in proportionally spaced twelve (12) point Times New Roman font. The left-hand margin is 1.5 inches. The top, bottom, and right-hand margins are all 1.0 inches. This brief has been reviewed and referenced as containing 2162 words and 13,989 characters (with spaces).

Respectfully submitted this 28 day of June, 2021.

JOHN P. BLACKBURN
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Attorney for Appellee, Dennis Powers

CERTIFICATE OF SERVICE:

This is to certify that on this 28 day of June, 2021, my staff and I timely e-mailed a copy of Appellee Dennis Powers' Brief and Appendix to SCClerkBriefs@ujs.sate.sd.us. My staff and I also mailed, by first-class United States mail, an original and two (2) copies to the Supreme Court Clerk's office at 500 East Capitol Ave., Pierre, South Dakota 57501. My Staff and I also mailed, by first-class United States mail, two true and correct hard

copies of Appellee Dennis Powers' Brief and Appendix to R. Shawn Tornow, attorney of record for Appellant Jerome Powers, at Tornow Law Office, PO Box 90748, Sioux Falls, South Dakota 57109-0748 and to Patrick Mahlberg at Frederickson & Byron, P.A., 200 South Sixth Street, Suite 4000, Minneapolis, Minnesota 55402-1425. An email containing Appellee Dennis Powers' Brief and Appendix has also been sent to each of their email addresses: rst.tlo@midconetwork.com and pmahlberg@fredlaw.com.

_____

JOHN P. BLACKBURN

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STATE OF SOUTH DAKOTA :ss COUNTY OF CHARLES MIX	)	IN CIRCUIT COURT FIRST JUDICIAL CIRCUIT
JEROME POWERS, Plaintiff, v. DENNIS POWERS, Defendant, and PREVAILING WINDS, LLC and PREVAILING WIND PARK, LLC, Defendants.	)	11CIV. 19-29 ORDER ON PREVAILING WIND PARK, LLC'S MOTION FOR SUMMARY JUDGMENT

Defendant Prevailing Wind Park, LLC's Motion for Summary Judgment came on for hearing before the Court on October 26, 2020, at the Yankton County Courthouse in Yankton, South Dakota. This motion was joined by Defendant Dennis Powers. Plaintiff Jerome Powers appeared through counsel, R. Shawn Tornow; Defendant Dennis Powers appeared through counsel, John P. Blackburn; Defendant Prevailing Wind Park, LLC, appeared through counsel Lisa Agrimonti, Patrick Mahlberg, and Joe Erickson.

The Court, having reviewed the parties' submissions and listened to the argument of counsel, and the Court having issued its Memorandum Decision dated January 15, 2021, which is attached as Exhibit A and incorporated herein by reference, now, therefore, it is hereby

ORDERED, ADJUDGED and DECREED that Defendant Prevailing Wind Park, LLC's motion for summary judgment is GRANTED; it is further

ORDERED, ADJUDGED and DECREED that Plaintiff's Complaint is dismissed, on its merits, and with prejudice; it is further

ORDERED, ADJUDGED and DECREED that this dismissal pertains to all of Plaintiff's claims in the Complaint against all Defendants.

Signed: 1/25/2021 10:10:27 AM

BY THE COURT:

Judge David Knoff
First Judicial Circuit

Attest:
Robertson, Jennifer
Clerk/Deputy

STATE OF SOUTH DAKOTA
COUNTY OF CHARLES MIX

CIRCUIT COURT
FIRST JUDICIAL CIRCUIT

JEROME POWERS,

PLAINTIFF,

vs.

DENNIS POWERS,

DEFENDANT

and

PREVAILING WINDS, LLC AND
PREVIALING WIND PARK, LLC,

DEFENDANT

11CIV19-29

MEMORANDUM DECISION ON
MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on Defendant Prevailing Wind Park, LLC's Motion for Summary Judgment. The Motion was joined by Defendant Dennis Powers (Dennis). The Court has reviewed the briefs and submissions of the parties including affidavits and the Statements of Uncontested Material Facts as well as any objections to those statements. The Court also received the entire deposition transcripts of Dennis Powers and Jerome Powers (Jerome).

FACTS

Jerome Powers is the father to Dennis Powers. They were in a farming operation together and were jointly purchasing 633 acres of real property from Jerome's parents under a contract for deed in both Charles Mix and Bon Homme counties. Under the terms of the contract, they were paying less than fair market value.[1] In late 2004, Jerome was caught up in illegal drug activity[2] so he transfered his interest in the property to Dennis' name alone in a sale for less than fair market value.

[1] The property was purchased from Clifford and Carol Powers for approximately $314 per acre, which was around half of fair market value. There was also a purchase of some personal property.

[2] Although both parties addressed the illegal drug use in 2004, the Court understands this was the impetus for the transfer of the property, and is not otherwise relevant to the Court's ruling on the motion for summary judgment.

EXHIBIT
A

To facilitate the transfer, Jerome quitclaimed his interest in the property to Dennis. He also assigned his interest in the contract for deed with his parents to Dennis. For Dennis's part, he paid Jerome the amount that Jerome had paid his parents under the contract and then became responsible for the entire contract. The proceeds paid to Jerome were obtained through financing with a bank. At this same time the parties entered into a First Right of Refusal Agreement (the Agreement). This Agreement is the basis of the motion for summary judgment. At the time the property was transferred, Dennis was only 22 years old, and it is undisputed that Jerome wanted to protect the property.

The relevant language in Section Two of the Agreement sets out:

> In the event Grantor offers the above-described property, or any interest therein, for sale, transfer or conveyance, Grantor shall not sell, transfer, or convey the above-described property, nor any interest therein, unless and until he shall have first offered to sell such property or any interest therein, to Grantee. If Grantor intends to make a bona fide sale of the above-described property, or any interest therein, he shall give to grantee written notice of such intention, which notice shall contain the basic terms and conditions demanded by Grantor for the sale of such property.

There is additional relevant language in the first right of refusal under "Section Three, Terms":

> Should Grantor accept the offer of Grantee to purchase the property, it shall be on the following terms:
>
> 1. Grantee shall pay Grantor the sum of $420.00 per acre, which shall be paid in cash or cash equivalent at closing.
> 2. Grantor shall convey fee title, which title shall be merchantable, as shown by abstract or title insurance.
> 3. Closing shall take place within thirty (30) days of Grantor delivering title insurance or abstract to the property.
> 4. Grantee shall have possession of the property at closing.

After the sale, Dennis took control of the property. From the time the property was transferred until the time of the suit, Dennis has either leased the property to third parties or Jerome, the property has been mortgaged, the property was retitled into joint tenancy, and easements have been placed against the property. There is a question of fact to the extent Jerome knew of some of these events.

In 2016 there was an attempt by Prevailing Winds, LLC to permit a wind farm with the South Dakota Public Utilities Commission. This application was withdrawn, however in October 2017, under new ownership (Prevailing Wind Park, LLC) a new application was submitted for a wind farm. Both Dennis and Jerome had an interest in the wind farm however their opinion of the wind farm differed greatly. Dennis was interested in participating in the project. He and his wife obtained information

about the project and ultimately received a draft wind energy lease and easement agreement. There is a disagreement whether Dennis and his father discussed the terms and conditions of the Agreement prior to signing. Ultimately Dennis and his wife entered into the lease and wind easement agreement with Prevailing Wind Park LLC for both Bon Homme and Charles Mix counties. At this same time Jerome was actively involved in the public meetings lobbying against the wind farm project. He testified against the wind farm claiming it causes adverse health effects and were bad for business. He claims at this time he learned that Dennis's property was signed up for the project. This caused a breakdown in the father-son relationship.

In early 2019, Prevailing Wind Park, LLC sought consent from Jerome to the wind energy lease and wind easement agreements, due to the language of the Agreement. Jerome did not sign the consent and is asserting his rights under the Agreement.

The crux of the Defendants arguments in the Motion for Summary Judgment is the Agreement only applies to the sale of the fee interest in the property to a third-party, or alternatively, the Agreement is void as a restraint on alienation of property. They are also claiming laches, statute of limitations and waiver.

DECISION

Summary judgment is authorized under SDCL § 15-6-56(c), "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law." It also provides that all reasonable inferences drawn from the facts must be viewed in favor of the non-moving party. Furthermore, unsupported conclusions and speculative statements do not raise a genuine issue of fact." *Dakota Industries, Inc. v. Cabelas.com*, 2009 SD 39, ¶ 20, 766 N.W.2d 510, 516. "Summary judgment is not a substitute for a court trial or for trial by jury where any genuine issue of material fact exists." *Ahl v. Arnio*, 388 N.W.2d 532, 533 (S.D. 1986). Cases involving the interpretation of written documents are particularly appropriate for disposition by summary judgment, such interpretation being a legal issue rather than a factual one. *Estate of Lien v. Pete Lien & Sons*, Inc., 2007 S.D. 100 ¶10.

This dispute hinges on the phrase "or any interest therein" in the Agreement. If "any interest" includes more than an interest in fee title, summary judgment may be inappropriate because an easement

or lease is an interest in property. The Court would then analyze the other claims in the Defendants' Motion. On the other hand, if "any interest therein" means a fee simple interest in a portion of the land, summary judgment would be appropriate. There is no dispute fee ownership has not been transferred.

The Court reviews the language of the first right of refusal to resolve this question. "[T]o find the intentions of the parties, we rely on the contract language they actually used." *Quinn v. Farmers Ins. Exchange* 2014 S. D. 14 ¶16. (Citations omitted). "A contract is ambiguous when application of rules of interpretation leave a genuine uncertainty as to which two or more meanings is correct." *Ziegler Furniture and Funeral Home, Inc. v. Cicmanec*, 2006 S.D. 6, ¶16. (Citations omitted). In determining the question of ambiguity, a contract is not rendered ambiguous simply because the parties do not agree on its proper construction or their intent upon executing the contract. Rather a contract is ambiguous only when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the *entire integrated agreement*. Id. (Citation omitted, emphasis added) the court looks at the language of the parties used in the contract to determine their intention and if that intention is clearly manifested by the language of the agreement is the duty of the court to declare and enforce it. Id. (Citations omitted).

Jerome testified inconsistently at his deposition stating he did not have the right to purchase the property if it was leased to a third-party (SUMF 34) and then stating he does have the right to purchase the property if any [non-fee] interest is transferred (SUMF 44). The language regarding "or any interest therein" is read in concert with the entire Agreement. *Section Three* of the agreement is helpful in analyzing the intent of the Agreement. The Court notes Section Three only contemplates transferring fee interest from Dennis to Jerome. The agreement does not contemplate offering a non-fee interest in the property under the same terms as would be offered to a third-party.[3] The Agreement clearly contemplates only a fee simple sale of the real estate or a portion (in fee) of the real estate. This is consistent with the inaction of Jerome when he had knowledge of the property being leased in the past (which he now claims is a violation of the Agreement). Reading the document as a whole, it is intended the right to purchase is triggered when the property (or a portion of the property) is to be sold in fee simple to a third party.

[3] In Jerome's deposition he was asked if a lease was offered to a third-party, Dennis would first have to offer him the opportunity to lease the property, to which he replied "Yes". Jerome Deposition page 173, lines 15-19. The Court can find nothing in the First Right of Refusal that provides this.

Even if the Court were to determine the Agreement is ambiguous or applies to transfers of less than a fee interest, this would, as a matter of law, render the agreement void as a restraint against alienation.

Under SDCL 43-3-5, "[c]onditions restraining alienation, when repugnant to the interest created, are void." A right of first refusal is a preemptive right restraining alienation. *Laska v. Barr*, 2018 S.D. 6, ¶24. To be valid, the restraint must be reasonable and for a legitimate purpose. Id. "The standard against which the impact of a restraint is to be measured is that of the property owner free to transfer property as his or her convenience at a price determined by the market." Id. at ¶25, citing *Restatement (Third) of Prop.: Servitudes* § 3.4 cmt. c. Comment c. to the Restatement is helpful in analyzing this case. It states in part:

> The harmful effects that may flow from restraints on alienation include impediments to the operation of a free market in land, limiting the prospects for improvement, development, and redevelopment of land, and limiting the mobility of landowners and would-be purchasers. Other harmful consequences include the demoralization costs associated with subordinating the desires of current landowners to the desires of past owners, and frustrating the expectations that normally flow from land ownership. Harmful consequences also may flow from enforcement of restraints on alienation that place one person in a position to take unfair advantage of another's need or desire to transfer property.
>
> In determining the injurious consequences likely to flow from enforcement of a restraint on alienation, the nature, extent, and duration of the restraint are important considerations. The standard against which the impact of a restraint is to be measured is that of the property owner free to transfer property at his or her convenience at a price determined by the market. Common types of restraints include prohibitions on transfers without consent of another, rights of first refusal, requirements that transfers be made only to persons meeting certain eligibility requirements, and options that require transfer to a particular person at a time selected by that person. The restraint may extend to all types of transfers, or only to certain types, like leases and subleases. It may require transfer at a fixed price, a price determined by a formula, by an appraisal, or by an offer received from a third party. The duration may be a fixed period, long or short, it may be limited by the occurrence of some event, or it may be unlimited. The greater the practical interference with the owner's ability to transfer, the stronger the purpose that is required to justify a direct restraint on alienation.

In the instant case, for the life of Jerome, Dennis is severely restricted in how he operates his land. For any action other than farming the ground himself, he required to either get permission from Jerome, or risk having to sell the land for far less than fair market value. He would not even be able to make improvements to the property if they entail easements or lending or any other encumbrance on the

land—no matter how small. Jerome acknowledges he can limit Dennis' ability to mortgage property during Jerome's life. See Jerome's deposition, page 109. This impedes the operation of a free market in the land. It strictly limits improvement and development of the land. It frustrates expectations that normally flow from land ownership. It places Dennis in a position to be taken unfair advantage of in his simple use of the property. As a matter of law, this agreement is repugnant to ownership of the property and is void.[4]

CONCLUSION

The Agreement executed between Dennis and Jerome Powers does not cover easements and leases related to wind tower projects. The terms of the document intend to apply to fee interest transfers of the property. As such, summary judgment for the benefit of all of the Defendants is appropriate. If the Agreement did contemplate easements and leases as the Plaintiff argues, the terms of the Agreement are repugnant to ownership and would be a restraint on alienation, thus the Plaintiff is not able to prevail under either scenario.

Counsel for Prevailing Wind Park, LLC shall prepare an Order.

Dated

January 15, 2021

David Knoff
Circuit Court Judge

ATTEST: Jennifer Roberts
Clerk

[4] The Court does not address whether the price in the agreement, which the parties acknowledge is less than fair market value, is on its own a restraint against alienation since the Court finds the far greater restrictions argued by Plaintiff clearly alienate the ownership rights of the property. The Court is also not addressing the additional arguments of Defendants.

STATE OF SOUTH DAKOTA	IN CIRCUIT COURT
COUNTY OF CHARLES MIX	FIRST JUDICIAL CIRCUIT

Jerome Powers, Plaintiff, vs. Dennis Powers, Defendant, -and- Prevailing Winds, LLC, and Prevailing Wind Park, LLC, Defendants.	Case No. 11CIV19-000029 **DEFENDANT PREVAILING WIND PARK, LLC'S MOTION FOR SUMMARY JUDGMENT**

Defendant Prevailing Wind Park, LLC, by and through its undersigned attorneys, respectfully moves the Court for summary judgment dismissing Plaintiff's Complaint in its entirety.

This motion is supported by the accompanying Statement of Undisputed Material Facts, Memorandum, Affidavit of Dennis Powers, Affidavit of Meghan Semiao, and Affidavit of Patrick Mahlberg, and all of the files and proceedings herein.

Dated: October 9, 2020

/s/ Lisa M. Agrimonti

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STATE OF SOUTH DAKOTA	IN CIRCUIT COURT
COUNTY OF CHARLES MIX	FIRST JUDICIAL CIRCUIT

Jerome Powers, Plaintiff, vs. Dennis Powers, Defendant, -and- Prevailing Winds, LLC, and Prevailing Wind Park, LLC, Defendants.	Case No. 11CIV19-000029 **DEFENDANT PREVAILING WIND PARK, LLC'S STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

Defendant, Prevailing Wind Park, LLC ("PWP"), respectfully submits this statement of undisputed material facts in support of PWP's Motion for Summary Judgment. The Affidavits and Exhibits thereto referenced herein are attached to the Affidavit of Dennis Powers, the Affidavit of Meghan Semiao, or the Affidavit of Patrick Mahlberg filed herewith.

THE PARTIES

Jerome Powers

1. Jerome lives in Wagner, right next to the "Property" described below. (J. Powers Dep. Tr. 5:6-7 (Mahlberg Aff. Ex. 1).)[1]

2. Jerome is in his mid-to-late fifties. (J. Powers Dep. Tr. 222:4-5 (Mahlberg Aff. Ex. 1).)

[1] The cited portions of the transcripts of the respective depositions of Jerome Powers and Dennis Powers are attached as Exhibits 1 and 2 to the Affidavit of Patrick D.J. Mahlberg ("Mahlberg Aff.") filed herewith.

3. He was a farmer until about 2005. (J. Powers Dep. Tr. 7:5-14 (Mahlberg Aff. Ex. 1).)

4. For about the last ten years, Jerome has been self-employed running a guided hunting business. (J. Powers Dep. Tr. 10:11-16 (Mahlberg Aff. Ex. 1).)

5. As set out below, the events giving rise to this dispute began in late 2004, when Jerome was indicted on felony drug charges in connection with his possession and use of crystal meth. (J. Powers Dep. Tr. 58:3-64:23 (Mahlberg Aff. Ex. 1).) Jerome pled guilty to a Class 4 felony on December 22, 2004. (*Id.* at 65:18-66:15.) In 2005, Jerome was sentenced to serve ten years in prison. (*Id.* at 224:9-18.) He served a total of six months of that sentence. (*Id.*)

Dennis Powers

6. Dennis is Jerome's son, and married to April Powers. (Verified Cplt. ¶ 2.)

7. Dennis and April live in Avon with their three children. (D. Powers Dep. Tr. 6:11-24 (Mahlberg Aff. Ex. 2).) Dennis is in his mid-to-late thirties. (*Id.* at 6:4-6.)

8. Dennis is a farmer; he and his wife also run a sanitation business and a portable toilet rental business. (D. Powers Dep. Tr. 18:9-21:6 (Mahlberg Aff. Ex. 2).)

Prevailing Wind Park, LLC

9. PWP is a South Dakota limited liability company. (Affidavit of Meghan Semiao ("Semiao Aff.") filed herewith, ¶ 2.) PWP is a wholly-owned subsidiary of sPower, a renewable energy company. (*Id.*)

THE PROJECT

10. PWP developed and permitted through the South Dakota Public Utilities Commission ("SDPUC"), and certain local government units, a wind project known as

Prevailing Wind Park (the "Project") in Bon Homme, Charles Mix, and Hutchinson Counties. (Semiao Aff., ¶ 3.)

THE PROPERTY AT ISSUE

11. The property at issue in this litigation (the "Property") consists of a total of approximately 630 acres of land in Bon Homme County and in Charles Mix County, South Dakota. (J. Powers Dep. Tr. 39:24-40:2 (Mahlberg Aff. Ex. 1).)

HISTORY OF OWNERSHIP OF THE PROPERTY

Jerome and Dennis Purchased the Property From Clifford and Carol Powers

12. Clifford and Carol Powers ("Clifford" and "Carol"), now deceased, were Jerome's parents and Dennis's grandparents, respectively. They owned the Property until the early 2000s. (J. Powers Dep. Tr. 44:23-45:4 (Mahlberg Aff. Ex. 1).)

13. In April 2003, Clifford and Carol sold the Property (and their cattle and farm equipment) on a Contract for Deed to Dennis and Jerome. (J. Powers Dep. Tr. Ex. 3 (Contract for Deed) and Ex. 4 (Amended Contract for Deed) (correcting legal descriptions) (Mahlberg Aff. Ex. 1)); Affidavit of Dennis Powers ("D. Powers Aff.") filed herewith, ¶ 2.)

14. The Property consists of properties in separate counties. As a result, there are separate real estate documents for the property in each county; however, they are identical other than the legal descriptions. (*See* J. Powers Dep. Tr. 74:18-75:3 (Mahlberg Aff. Ex. 1).)

15. At that time, about 300 acres of the Property were pasturelands, about 300 acres were tillable cropland, and the remaining approximately 30 acres was comprised of the homestead, creeks, and otherwise non-farmable land. (J. Powers Depo. Tr. at 39:24-42:11 (Mahlberg Aff. Ex. 1).)

16. Dennis and Jerome agreed to pay $199,000 for the Property. (J. Powers Depo. Tr. at Ex. 3, p. 2; *id.* at 50:14-51:1 (Mahlberg Aff. Ex. 1).)

17. The purchase price worked out to about $314 per acre, which was less than half of the fair market value of the Property. (J. Powers Depo. Tr. 53:19-22, 55:1-3 (Mahlberg Aff. Ex. 1).)

18. After Dennis purchased the Property, he converted 230 acres into more valuable cropland, with no help from Jerome. (J. Powers Dep. Tr. 77:11-78:14 (Mahlberg Aff. Ex. 1.)

19. The value of the Property has foreseeably increased from the time ownership was consolidated in Dennis. J. Powers Dep. Tr. 109:2-4 (Mahlberg Aff. Ex. 1); D. Powers Aff. ¶ 9.)

Jerome Ran Into Legal Trouble, Leading Him to Sell His Interest in the Property to Dennis

20. In December 2004, Jerome went to a party, smoked meth, and was arrested. (J. Powers Dep. Tr. 58:21-61:13 (Mahlberg Aff. Ex. 1).)

21. He was charged with two felonies and a misdemeanor. (J. Powers Dep. Tr. 64:1-23 and Ex. 5 (criminal case file information) (Mahlberg Aff. Ex. 1).)

22. On December 22, 2004, Jerome pled guilty to the charge of possession of a controlled substance, a class 4 felony; in exchange, the other felony charge and the misdemeanor charges were dismissed. (J. Powers Dep. Tr. 64:24-65:21 (Mahlberg Aff. Ex. 1).)

23. Jerome knew he may be going to prison for a number of years. (J. Powers Dep. Tr. 68:25-69:3 (Mahlberg Aff. Ex. 1).)

THE TRANSACTION BETWEEN JEROME AND DENNIS

24. With his future uncertain, Jerome did not want to saddle his wife with debt while he was gone and decided to try to sell his ownership interest in the land to someone in the family. (J. Powers Dep. Tr. 71:16-20; 98:21-25 (Mahlberg Aff. Ex. 1).)

25. Jerome's siblings turned down the opportunity. (J. Powers Dep. Tr. 99:1-7 (Mahlberg Aff. Ex. 1).)

26. Jerome approached Dennis with the opportunity, Dennis was interested, and Jerome ultimately decided to sell his interest in the Property to Dennis. (J. Powers Dep. Tr. 70:6-9, 71:4-20 (Mahlberg Aff. Ex. 1); D. Powers Aff. ¶¶ 3-6.)

27. Jerome and Dennis went to then-lawyer, now-Judge Bruce Anderson's office to have the deal drawn up in the spring of 2005. (J. Powers Dep. Tr. 75:4-8 (Mahlberg Aff. Ex. 1).)

28. Dennis obtained a loan from a local bank to finance the purchase. (D. Powers Aff. ¶ 6.)

29. To complete the deal, Jerome gave Dennis a Quit Claim Deed for his interest in the Property, assigned Dennis his interest in the Contract for Deed, and Dennis paid Jerome an amount equal to the payments Jerome had made toward the Contract for Deed and the personal property. (J. Powers Dep. Tr. 73:2-21, Ex. 6 (Assignment of Contract for Deed), and Ex. 7 (Quit Claim Deed) (Mahlberg Aff. Ex. 1); *see* D. Powers Aff. ¶ 6.)

The First Right of Refusal Agreements

Jerome's Intent at the Time of the Transaction

30. Jerome had the idea of imposing a first right of refusal agreement on the Property in order to (a) protect Dennis, who was only 22 at the time, from somehow losing the Property and (b) keep ownership in the family if Dennis later decided to outright sell the Property. (J. Powers Dep. Tr. 100:5-11, 101:14-103:22, 107:7-108:22 (Mahlberg Aff. Ex. 1).)

31. For example, Jerome testified as follows:

> Q. You intended to limit Dennis's ability to outright sell the property to a third party before you had the opportunity to buy it back at $420 per acre, correct?

A. Correct. . . .

(J. Powers Dep. Tr. 158:25-159:3 (Mahlberg Aff. Ex. 1).)

32. Dennis confirmed that the intent was to prevent Dennis from an outright sale of the Property: "So my understanding of the first -- the right of first refusal was so that I could not go and sell off this property for a huge profit, because it was sold to us rather cheap." (Dennis Depo. Tr. 74:21-75:6 (Mahlberg Aff. Ex. 2).)

33. Jerome did not intend that the first right of refusal agreements could be triggered by Dennis conveying any interest in the Property, no matter how small, at the time the agreements were executed:

> Q: Did you intend at the time you entered into this Right of First Refusal Agreement with Dennis Powers that Dennis Powers could not convey any interest in any part of the property, no matter how small, a part of the property, without giving you the option to purchase of the entirety of the property at $420 per acre? Yes or no.
>
> [Mr. Tornow: Objection to the form of the question insofar as it calls for a legal conclusion.]
>
> A: No.

(J. Powers Dep. Tr. 169:19-170:3 (Mahlberg Aff. Ex. 1).)

34. Jerome also did not intend for the leasing of the Property by Dennis to trigger the agreements:

> Q: . . . So did you intend at the time that you entered into the First Right of Refusal agreement that if Dennis told you he was going to lease the property to a third party, that you would have the ability to respond by saying, "I'm exercising my rights to purchase all of your property for $420 per acre"?
>
> A: No.

(J. Powers Dep. Tr. 160:3-9 (Mahlberg Ex. 1).)

35. At the time the agreements were executed, Jerome also did not have in mind any intent with regard to a distinction between agricultural and non-agricultural uses of the Property, or any intent about a wind farm. (J. Powers Dep. Tr. 170:8-13 (Mahlberg Ex. 1).)

36. Jerome testified that he does not know what he intended with respect to easements. (Jerome Depo. Tr. 157:22-158:15 (Mahlberg Ex. 1).)

The Terms of the Agreement

37. Mr. Anderson drafted a "First Right of Refusal Agreement" for each part of the Property—one for Charles Mix County and one for Bon Homme County. (J. Powers Dep. Tr. 104:20-105:3, Ex. 10 (Charles Mix County), and Ex. 11 (Bon Homme County).)

38. The agreements are identical other than the legal descriptions. (*Compare* J. Powers Dep. Tr. Ex. 10 *with* Ex. 11 (Mahlberg Aff. Ex. 1); *id.* at 74:18-75:3.)

39. The first right of refusal language in each agreement is as follows:

SECTION TWO
FIRST RIGHT OF REFUSAL

In the event GRANTOR offers the above-described property, or any interest therein, for sale, transfer or conveyance, GRANTOR shall not sell, transfer, or convey the above-described property, nor any interest therein, unless and until he shall have first offered to sell such property or any interest therein, to GRANTEE. If GRANTOR intends to make a bona fide sale of the above-described property, or any interest therein, he shall give to GRANTEE written notice of such intention, which notice shall contain the basic terms and conditions demanded by GRANTOR for the sale of such property.

Within thirty (30) days of receipt of such notice and information, GRANTEE shall either exercise his First Right of Refusal by providing written notice of his acceptance to GRANTOR, or waive his First Right of Refusal by failing to provide GRANTOR with written notification of his acceptance or rejection of the First Right of Refusal within such time.

(J. Powers Dep. Tr. Ex. 10, p. 2; *id.* at Ex. 11, p. 2 (Mahlberg Aff. Ex. 1).)

40. The agreements do not define what "any interest therein" means—whether it be a partial interest (e.g., an easement or a leasehold interest) or a fee interest in all or a part of the

Property. (*See* J. Powers Dep. Tr. Exs. 10 and 11 (Mahlberg Aff. Ex. 1).) But, this portion of each agreement requires Dennis to give Jerome notice and an opportunity to purchase the same property or interest therein—"such property or any interest therein"—that Dennis is offering to someone else. (*Id.*)

41. The agreement's next section, titled "Terms," contemplates a transaction from Dennis to Jerome only "should [Dennis] accept the offer by [Jerome] to purchase the [P]roperty." (*See* J. Powers Dep. Tr. Exs. 10 and 11 (Mahlberg Aff. Ex. 1).)

42. Then, each agreement contemplates a sale at the fixed price of $420 per acre:

> **SECTION THREE**
> **TERMS**
>
> **Should GRANTOR accept the offer of GRANTEE to purchase the property, it shall be on the following terms:**
>
> 1. **GRANTEE shall pay GRANTOR the sum of $420.00 per acre, which shall be paid in cash or cash equivalent at closing.**
> 2. **GRANTOR shall convey fee title, which title shall be merchantable, as shown by abstract or title insurance.**
> 3. **Closing shall take place within thirty (30) days of GRANTOR delivering title insurance or abstracts to the property.**
> 4. **GRANTEE shall have possession of the property at closing.**
>
> **If GRANTEE fails to exercise his First Right of Refusal, GRANTOR may proceed to sell, transfer and convey the property to any other person or entity free from any restrictions of this Agreement.**

(J. Powers Dep. Tr. Exs. 10 and 11, pp. 2-3 (Mahlberg Aff. Ex. 1.) This section of the agreement does not contain the "any interest therein" language found in the first right of refusal language; rather, it only provides terms of a sale of the "fee title" of the property. (*Id.*)

43. The remainder of the agreements describe unauthorized transactions, allow for specific performance, and provide that the agreements are "binding upon the parties, their heirs, executors, estates, personal representatives, agents and assigns, however, as to [Jerome], this

Agreement shall expire on his death." (*See* J. Powers Dep. Tr. Exs. 10 and 11 (Mahlberg Aff. Ex. 1).)

Jerome's Current Contentions That Dennis Could Not Convey A Lease Or Easement Interest Without Triggering Dennis's Rights Under the Agreements

44. Jerome's position is that the ROFRs give Jerome the ability to control whether Dennis may grant *any* interest in the Property to any third party, regardless of the scope of that interest, based upon whether Jerome likes the use or not:

> Q: And so your position is that you have the ability to dictate what Dennis does on that property if it involves granting an interest to a third party, correct?
>
> A: Correct.
>
> Q: And in response, if Dennis intends to grant an interest to a third party, the nature of which you disagree with, you can respond by forcing a sale of the entirety of the property to you at $420 per acre; is that right?
>
> A: Correct.

(J. Powers Dep. Tr. 168:19-169:3 (Mahlberg Aff. Ex. 1); *see id.* at 181:19-24 (""Q. Mr. Powers, is it your position that the First Right of Refusal gives you the right to force Dennis to sell to you all 633 acres at a price of $420 if he intends to grant any easement or any lease or any other interest in the property to a third party?" A. Yes."), 189:12-190:12.)

45. According to Jerome, Dennis's choice is either farm the Property himself, or let it go fallow—any attempt to put any part of the property to any other productive use through a third party gives Jerome "control" and the right to buy all of the Property for $420 per acre at his whim:

> Q: Right. You want the ability to control that 633 acres, correct?
>
> A: Correct.

Q: And all that Dennis Powers can do is farm the property himself or, I suppose, let it be fallow, right?

A: Right.

(J. Powers Dep. Tr. 191:19-192:4 (Mahlberg Aff. Ex. 1).)

Dennis's Use of the Property Since 2005

46. Between 2005 and today, Dennis (with no help from Jerome) converted about 230 acres of the Property from pastureland into more valuable tillable cropland. (J. Powers Dep. Tr. 77:11-78:14 (Mahlberg Aff. Ex. 1); D. Powers Aff. ¶ 9.)

47. After Dennis bought out Jerome's interest, and after the ROFRs were put in place, the Property has been subject to several transactions between Dennis and third parties (as well as Jerome) involving a variety of interests in the property—easements, leases, and fee ownership. Those transactions—all of which Jerome had actual and/or constructive knowledge of, but did nothing about—are listed below along with the evidence of Jerome's knowledge:

	Transaction by Dennis	Year	Citation to Jerome's Knowledge of Transaction
A.	Verbal Right to Hunt to Jerome	2005	J. Powers Depo. Tr. 17:10-18 (Mahlberg Aff. Ex. 1)
B.	Easement to B-Y Water District - Bon Homme County property	2006	D. Powers Aff. ¶¶ 7-8, Ex. 1; J. Powers Depo. Tr. 117:10-19, 120:9-25 (Jerome was aware of the pipe being put in at the time, though not specifically aware of an easement grant) (Mahlberg Aff. Ex. 1)
C.	Easement to B-Y Water District - Charles Mix County property	2006	D. Powers Aff. ¶ 7-8, Ex. 2; J. Powers Depo. Tr. 117:10-19, 120:9-25 (Jerome was aware of the pipe being put in at the time, though not specifically aware of an

	Transaction by Dennis	Year	Citation to Jerome's Knowledge of Transaction
			easement grant) (Mahlberg Aff. Ex. 1)
D.	Verbal Right to Hunt to Jerome	2006	J. Powers Depo. Tr. 17:10-18 (Mahlberg Aff. Ex. 1)
E.	Verbal Right to Hunt to Jerome	2007	J. Powers Depo. Tr. 17:10-18 (Mahlberg Aff. Ex. 1)
F.	Verbal Right to Hunt to Jerome	2008	J. Powers Depo. Tr. 17:10-18 (Mahlberg Aff. Ex. 1)
G.	Verbal Right to Hunt to Jerome	2009	J. Powers Depo. Tr. 17:10-18 (Mahlberg Aff. Ex. 1)
H.	Verbal farming lease of all of Property to Jim and Marlene Wittmeier	2010	D. Powers Aff. ¶¶ 9-10 (Mahlberg Aff. Ex. 1)
I.	Verbal Right to Hunt to Jerome	2010	J. Powers Depo. Tr. 17:10-18 (Mahlberg Aff. Ex. 1)
J.	Verbal farming lease of all of Property to Wittmeiers	2011	D. Powers Aff. ¶ 11; J. Powers Depo. Tr. 182:12-14 (Mahlberg Aff. Ex. 1)
K.	Verbal Right to Hunt to Jerome	2011	J. Powers Depo. Tr. 17:10-18 (Mahlberg Aff. Ex. 1)
L.	Written farming lease of all of Property to Wittmeiers	2012	D. Powers Aff. ¶ 12, Ex. 8; J. Powers Depo. Tr. 182:21-183:3 (Mahlberg Aff. Ex. 1)
M.	Verbal Right to Hunt to Jerome	2012	J. Powers Depo. Tr. 17:10-18 (Mahlberg Aff. Ex. 1)
N.	Dennis deeded April a joint tenancy with right of survivorship interest in the Property by Warranty Deed	2012	D. Powers Aff. ¶ 19, Ex. 6; J. Powers Depo. Tr. 119:9-24 (Jerome stating that he does not recall discussing April's interest in the property with Dennis, but that he would have no basis to disagree if Dennis said that they had discussed it) (Mahlberg Aff. Ex. 1)

	Transaction by Dennis	Year	Citation to Jerome's Knowledge of Transaction
O.	Written farming lease of all of Property to Wittmeiers	2013	D. Powers Aff. ¶¶ 12-13, Ex. 3; J. Powers Depo. Tr. 152:7-10, 183:4-7 (Mahlberg Aff. Ex. 1)
P.	Mortgaged Property in favor of Commercial State Bank	2013	D. Powers Aff. ¶ 20; J. Powers Depo. Tr. 116:1-8 (Dennis told Jerome he put mortgages on the property sometime in 2017 or prior) (Mahlberg Aff. Ex. 1)
Q.	Mortgaged Property again in favor of Commercial State Bank	2013	D. Powers Aff. ¶ 20; J. Powers Depo. Tr. 116:1-8 (Dennis told Jerome he put mortgages on the property sometime in 2017 or prior) (Mahlberg Aff. Ex. 1)
R.	Verbal Right to Hunt to Jerome	2013	J. Powers Depo. Tr. 17:10-18 (Mahlberg Aff. Ex. 1)
S.	Mortgaged Property again in favor of Commercial State Bank	2013	D. Powers Aff. ¶ 20
T.	Written farming lease of all of Property to Wittmeiers	2014	D. Powers Aff. ¶¶ 12-13, Ex. 3; J. Powers Depo. Tr. 152:7-10, 183:4-7 (Mahlberg Aff. Ex. 1)
U.	Mortgaged Property again in favor of Commercial State Bank	2014	D. Powers Aff. ¶ 20; J. Powers Depo. Tr. 116:1-8 (Dennis told Jerome he put mortgages on the property sometime in 2017 or prior) (Mahlberg Aff. Ex. 1)
V.	Verbal Right to Hunt to Jerome	2014	J. Powers Depo. Tr. 17:10-18 (Mahlberg Aff. Ex. 1)
W.	Written farming lease of all of Property to Wittmeiers	2015	D. Powers Aff. ¶¶ 12-13, Ex. 3; J. Powers Depo. Tr.

	Transaction by Dennis	Year	Citation to Jerome's Knowledge of Transaction
			115:14-25 (Mahlberg Aff. Ex. 1)
X.	Verbal Right to Hunt to Jerome	2015	J. Powers Depo. Tr. 17:10-18 (Mahlberg Aff. Ex. 1)
Y.	Written farming lease of all of Property to Wittmeiers	2016	D. Powers Aff. ¶¶ 12-13, Ex. 3; J. Powers Depo. Tr. 115:14-25 (Mahlberg Aff. Ex. 1)
Z.	Lease of trailer house on Property to Jerome	2016	J. Powers Depo. Tr. 135:22-136:12 (Mahlberg Aff. Ex. 1)
AA.	Mortgaged Property again in favor of Commercial State Bank	2016	D. Powers Aff. ¶ 20; J. Powers Depo. Tr. 116:1-8 (Dennis told Jerome he put mortgages on the property sometime in 2017 or prior) (Mahlberg Aff. Ex. 1)
BB.	Verbal Right to Hunt to Jerome	2016	J. Powers Depo. Tr. 17:10-18 (Mahlberg Aff. Ex. 1)
CC.	Written farming lease of tillable land to Clearfield Colony	2017	D. Powers Aff. ¶¶ 14-15, Ex. 4; J. Powers Depo. Tr. 183:8-15 (Mahlberg Aff. Ex. 1)
DD.	Written lease of pastureland to Nathan Mathis	2017	D. Powers Aff. ¶ 16, Ex. 5; J. Powers Depo. Tr. 115:8-13 (Mahlberg Aff. Ex. 1)
EE.	Lease of trailer house on Property to Jerome	2017	J. Powers Depo. Tr. 135:22-136:12 (Mahlberg Aff. Ex. 1)
FF.	Mortgaged Property again in favor of Commercial State Bank	2017	D. Powers Aff. ¶ 20; J. Powers Depo. Tr. 116:1-8 (Dennis told Jerome he put mortgages on the property sometime in 2017 or prior) (Mahlberg Aff. Ex. 1)

	Transaction by Dennis	Year	Citation to Jerome's Knowledge of Transaction
GG.	Verbal Right to Hunt to Jerome	2017	J. Powers Depo. Tr. 17:10-18 (Mahlberg Aff. Ex. 1)
HH.	Written farming lease of tillable land to Clearfield Colony	2018	D. Powers Aff. ¶ 15, Ex. 4; J. Powers Depo. Tr. 183:8-15 (Mahlberg Aff. Ex. 1)
II.	Written lease of pastureland to Nathan Mathis	2018	D. Powers Aff. ¶ 16, Ex. 5; J. Powers Depo. Tr. 115:8-13 (Mahlberg Aff. Ex. 1)
JJ.	Verbal Right to Hunt to Jerome	2018	J. Powers Depo. Tr. 17:10-18 (Mahlberg Aff. Ex. 1)
KK.	Written farming lease of tillable land to Clearfield Colony	2019	D. Powers Aff. ¶ 15, Ex. 4; J. Powers Depo. Tr. 114:10-21 (Mahlberg Aff. Ex. 1)
LL.	Written lease of pastureland to Nathan Mathis	2019	D. Powers Aff. ¶ 16, Ex. 5; J. Powers Depo. Tr. 115:8-13 (Mahlberg Aff. Ex. 1)

48. As Jerome puts it, "I've let him [Dennis] do whatever he wanted to do out there, knowing it could be a violation. . . ." (J. Powers Dep. Tr. 192:3-4 (Mahlberg Aff. Ex. 1).)

49. Rather than assert his rights at any time over the nearly 15-year period from 2005 until 2019, Jerome sat on his rights (or at least what he now claims have been his rights all along). (Jerome Depo. Tr. 182:12-184:21 (Jerome explaining that each lease triggered his rights of first refusal, but that Jerome "merely did not exercise his rights") (Mahlberg Aff. Ex. 1)); *id.* at 184:11-21 (leases were a violation under Jerome's interpretation, but Jerome did nothing) (Mahlberg Aff. Ex. 1); *id.* at 185:2-186:15 (mortgages were a violation under Jerome's interpretation, but Jerome did nothing); *id.* at 192:23-193:2:

> Q: So, as I understand it, then, you viewed these other things as acceptable enough to you even though you could have exercised your First Right of Refusal, you didn't, right?

A: Correct.

(*Id.* at 236:13-237:13.)

THE WIND FARM

50. What ultimately became the Project was initially proposed by an entity called Prevailing Winds, LLC. (Semiao Aff. ¶ 4.)

51. Prevailing Winds, LLC was formed in 2014 by a group of investors who developed a nearby wind project known as the Beethoven Wind Project. (Semiao Aff. ¶ 4.)

52. In June 2016, Prevailing Winds, LLC filed an application for a 200-MW wind farm with the SDPUC. (Semiao Aff. ¶ 5.)

53. The SDPUC commenced the permitting process, which included, among other things, a public input hearing held on August 24, 2016. (Semiao Aff. ¶ 5.)

54. Jerome attended the public input hearing to learn more about the project and how it could affect Jerome and the community. (J. Powers Dep. Tr. 33:16-34:24, Ex. 2; *id.* at 35:13-36:2 (Mahlberg Aff. Ex. 1).)

55. Prevailing Winds, LLC withdrew its application from SDPUC consideration in August 2016. (Semiao Aff. ¶ 5.)

56. In October 2017, sPower purchased the Prevailing Winds, LLC Project-related assets. (Semiao Aff. ¶ 6.)

57. On May 30, 2018, PWP filed an application for a wind energy facility permit with the SDPUC. (Semiao Aff. ¶ 7.)

JEROME'S KNOWLEDGE OF DENNIS'S INTENT TO PARTICIPATE IN THE WIND PROJECT

58. Dennis was aware of the Prevailing Winds, LLC project and attended the public input hearing meeting in June 2016—the same one that Jerome went to. (D. Powers Dep. Tr. 8:7-24 (Mahlberg Aff. Ex. 2).)

59. Dennis and his wife were interested in having the Property be part of Prevailing Winds, LLC's wind project (and what ultimately became the Project), having missed out on a nearby project previously. (D. Powers Dep. Tr. 27:12-28:17 (Mahlberg Aff. Ex. 2).)

60. Dennis and April received a draft of the Wind Energy Lease and Wind Easement Agreements that would be used if they agreed to participate in the project. (D. Powers Dep. Tr. 38:6-22 (Mahlberg Aff. Ex. 2).)

61. Dennis and Jerome were on good terms at the time and, in late August or early September 2018, Dennis went with copies of the proposed leases to Jerome's house. (D. Powers Depo. Tr. 39:16-40:12 (Mahlberg Aff. Ex. 2).)

62. They discussed wind energy and specifically the potential for blinking lights as part of the Project's turbine lighting systems. (D. Powers Depo. Tr. 40:13-42:5 (Mahlberg Aff. Ex. 2).)

63. Dennis does not recall whether his father looked at the leases (D. Powers Depo. Tr. 78:24-79:10 (Mahlberg Aff. Ex. 2)), but Dennis and his father did generally discuss the agreement's terms and conditions. (*Id.* at 81:18-82:15.)

64. Jerome did not raise the ROFRs during that conversation. (D. Powers Depo. Tr. 82:16-19 (Mahlberg Aff. Ex. 2).)

65. On September 15, 2016, Dennis and April signed Wind Energy Lease and Wind Easement Agreements with Prevailing Winds, LLC—one for the Bon Homme County property

and one for the Charles Mix County property. (D. Powers Depo. Tr., Exs. 14A and 15A (Mahlberg Aff. Ex. 2).)

JEROME'S PARTICIPATION IN THE WIND PROJECT PERMITTING PROCESS

66. Jerome participated in the permitting proceedings for what became the Prevailing Wind Park from when the very first public input meeting was held in June 2016 for the Project's predecessor. (J. Powers Dep. Tr. 33:16-34:24, Ex. 2 (Mahlberg Aff. Ex. 1); *id.* at 35:13-36:2; *see also* (sworn) Proof of Mailing by Jennifer Bell, p. 7 of spreadsheet (showing mailing went to Jerome Powers) (Mahlberg Aff. Ex. 4).)

67. Jerome provided testimony against the Project at a SDPUC Public Input Hearing on July 12, 2018. (SDPUC July 12, 2018 Public Input Hrg. Tr. pp. 44:8-46:17 (Mahlberg Aff. Ex. 5).)

68. In October 2018, Jerome served as a lay witness for opponents of the Project, and he gave live testimony to the SDPUC suggesting that wind farms cause adverse health effects and are bad for business. (SDPUC Oct. 12, 2018 Hrg. Tr. 1008:17-1020:25 (Mahlberg Aff., Ex. 3).) Jerome testified that he had learned the Property had been signed up for the Project, that he had expressed his displeasure about that with Dennis, and that they had had a breakdown in their relationship. (*Id.* at 1014:8-1015:9.)

69. Jerome did not mention the ROFRs at any point in the SDPUC proceeding. (SDPUC Oct. 12, 2018 Hrg. Tr. 1008:17-1031:21 (Mahlberg Aff. Ex. 3); *see* J. Powers Dep. Tr. 193:24-197:19 (Mahlberg Aff. Ex. 1).)

70. Jerome "knew" he had rights under the ROFRs at that time, but "kept it quiet." (J. Powers Dep. Tr. 197:5-19) (Mahlberg Aff. Ex. 1).)

THE SDPUC PERMITTED THE PROJECT AND THE PROJECT WAS BUILT

71. On November 28, 2018, the SDPUC issued its Final Decision and Order granting PWP an energy facility permit for the Project. (Semiao Aff. ¶ 7, Ex. 1 (SDPUC Order).)

72. In its Order, the SDPUC rejected Jerome's claims that the Project would adversely affect Jerome's hunting operations, concluding instead that the fact that Jerome owns 12.8 acres is what limits his hunting business, not the Project. (Semiao Aff. ¶ 7, Ex. 1, at p. 17, ¶ 54.)

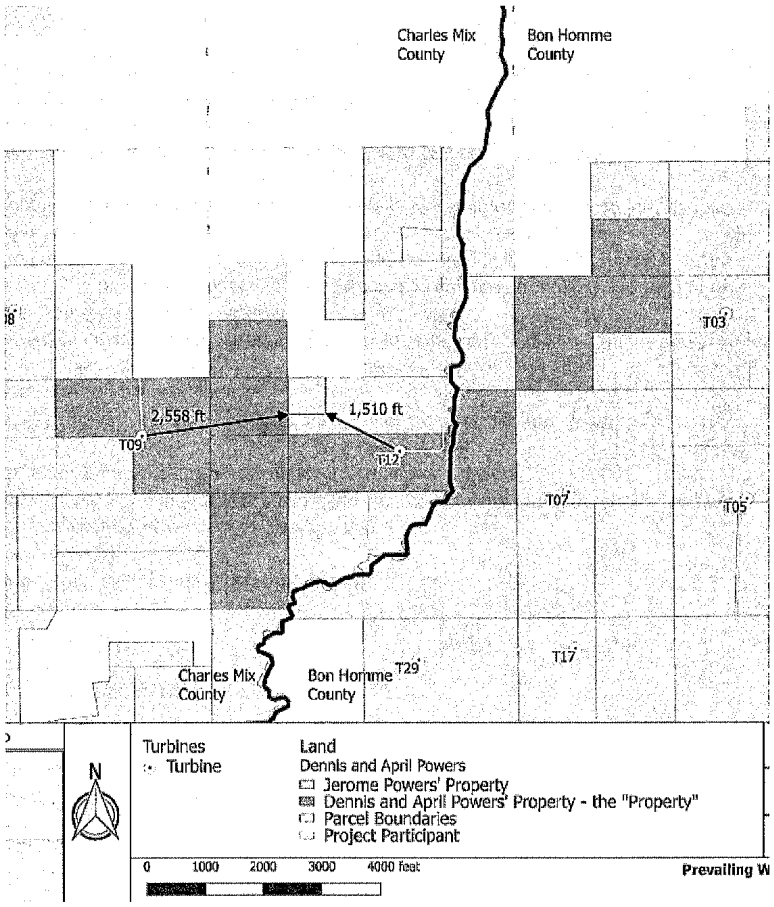
73. After obtaining the energy facility permit, PWP set about to execute and construct the Project. (Semiao Aff. ¶ 8.)

74. As part of those efforts, PWP approached Jerome to obtain documents evidencing Jerome's consent to the Wind Energy Lease and Wind Easement Agreements. (Semiao Aff. ¶ 8.) This clean-up title work is a standard operating procedure in project financing and project execution efforts. (*Id.*) Jerome did not sign the consents. (*Id.*)

75. PWP began construction of the Project on the Charles Mix County and Bon Homme County portions of the Property on or around July 2019. (Semiao Aff. ¶ 9.)

76. PWP completed the Project and began operations in April 2020. (Semiao Aff. ¶ 9.)

77. As it relates to the Property, the Project includes a collector line and turbines as shown on the map excerpt below:



(Semiao Aff. ¶ 9, Ex. 2 (full map).)

THIS LAWSUIT

78. Jerome commenced the captioned action in June 2019. (*See generally* Verified Cplt.)

79. The Verified Complaint asserts the following claims: (1) Declaratory Judgment; (2) Breach of Contract; and (3) Voiding of Defendants [*sic*] Lease(s) & Easement Agreement(s). (*See generally* Verified Cplt.) Jerome seeks declaratory relief. (*Id.*)

80. The Verified Complaint asserts that Dennis has repeatedly breached the ROFRs from 2005 forward:

> 10.
>
> Between March 31, 2005, and today's date, Defendant Dennis Powers has failed to abide by the First Right of Refusal Agreement(s) terms by failing to ever provide to Plaintiff written notice of his intention to either sell, transfer or convey any interest or interests in the ROFR parcels of the described/subject real property in either or both Charles Mix County and/or Bon Homme County.

(Verified Cplt. ¶ 10.)

81. Jerome's position is that Dennis's conduct with respect to the Wind Energy Lease and Wind Easement Agreements give Jerome the rights under the ROFRs to force Dennis (and April) to sell the Property to Jerome for $420 per acre. (J. Powers Dep. Tr. 181:19-24 ("Q. Mr. Powers, is it your position that the First Right of Refusal gives you the right to force Dennis to sell to you all 633 acres at a price of $420 if he intends to grant any easement or any lease or any other interest in the property to a third party?" A. Yes.") (Mahlberg Aff. Ex. 1).)

82. Jerome and Dennis were each deposed on August 21, 2019. (Mahlberg Aff. Exs. 1 and 2.) Since then, Dennis was allowed to amend his Answer, but no other actions have been taken in this case. (*See generally* Docket.)

83. Jerome has also started litigation against the Charles Mix County Commission, *see Jerome Powers and Darrell Petrik v. Charles Mix Cty. Comm'n*, 11 CIV20-000018. (*See generally* Docket.) In that case, the Charles Mix County Commission has moved for dismissal. (Mahlberg Aff. ¶ 7.)

84. Additionally, PWP has moved to intervene in the case and for dismissal. (Mahlberg Aff. ¶ 7.) The pending motions in that action will be heard the same day as PWP's summary judgment motion in this case. (*Id.*)

Dated: October 9, 2020

/s/ Lisa M. Agrimonti

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STATE OF SOUTH DAKOTA		IN CIRCUIT COURT
COUNTY OF CHARLES MIX		FIRST JUDICIAL CIRCUIT
Jerome Powers, Plaintiff, Vs. Dennis Powers, Defendant -and- Prevailing Wind Park, LLC Defendant.	)	Case No. 11CIV19-000029 DEFENDANT DENNIS POWERS' MOTION JOINDER AND MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Defendant Dennis Powers has and does join in the Motion for Summary Judgment and joins in Prevailing Wind Park, LLC's Memorandum in Support of our Motion for Summary Judgment and incorporates herein the case law and authority for our legal assertions.

1. The Plaintiff's Complaint assertions regarding alleged Right of First Refusal and triggering of the Right of First Refusal are unconscionable. The Right of First Refusal itself is unconscionable because of Dennis Powers' then of young age; lack of business experience and the Right of First Refusal being brought about/created by Dennis Powers' Father, Jerome Powers, the Plaintiff herein. The Right of First Refusal was born of Plaintiff Jerome Powers' idea and would benefit only him under his understanding, interpretation of it.

2. Regarding the Right of First Refusal, Defendant Dennis Powers asserts there never was a meeting of the minds; there was/is a lack of mutual assents regarding the alleged meaning arising from the Right of First Refusal.

3. There was no consideration to Defendant Dennis Powers for entering into the Right of First Refusal. Dennis Powers received no consideration for entering into the Right of First Refusal documents.

4. The asserted Right of First Refusal contains no termination date.

5. Plaintiff Jerome Powers would be greatly, unjustly enriched by inflation and soaring property values. The $420 per acre Jerome Powers is to pay pales by comparison to current land values of several thousand dollars per acre.

Most rights of first refusal give opportunity to meet or exceed an arm's length offer to purchase. Not here: Plaintiff is trying to force transfer of this land for an antiquated, low land price with no consideration for improvements and inflation.

Such rights are unconscionable and would be a huge unjust enrichment to Plaintiff – a Plaintiff who has ignored exercising such alleged rights until he sees opportunity to hugely gain monetarily.

Conclusion

Every contract contains an implied covenant of good faith and fair dealing - - but not in this case! See *Table Steaks vs. First Premiere Bank*, 2002 SD 105 at paragraph 16

Dated this the 9th day of October, 2020.

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CERTIFICATE OF SERVICE

I, John P. Blackburn, hereby certify that on this 9th day of October, a true and correct copy of this Defendant Dennis Powers' Motion Joinder and Memorandum In Support of Motion for Summary Judgment, is filed by Odyssey and sent by e-mail to the following:

Hon. David Knoff at: david.knoff@ujs.state.sd.us
R. Shawn Tornow, Esq. at: rst.tlo@midconetwork.com
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John P. Blackburn

STATE OF SOUTH DAKOTA COUNTY OF CHARLES MIX	IN CIRCUIT COURT FIRST JUDICIAL CIRCUIT
Jerome Powers, Plaintiff, vs. Dennis Powers, Defendant, -and- Prevailing Winds, LLC, and Prevailing Wind Park, LLC, Defendants.	Case No. 11CIV19-000029 **AFFIDAVIT OF DENNIS POWERS**

STATE OF SOUTH DAKOTA)
)ss
COUNTY OF _____)

Dennis Powers, being first duly sworn on oath, states as follows:

1. My name is Dennis Powers. I am 38 years old. I married my wife, April, on August 9, 2003. I make this affidavit based on my personal knowledge.

2. The property I own in Charles Mix County and Bon Homme County, which is at issue in this litigation ("Property"), was owned by my grandparents, Clifford and Carol Powers. In 2003, my grandparents sold the properties to my Dad, Jerome Powers, and me on a contract for deed. Because of an error in a legal description, an Amended Contract for Deed was executed and recorded.

3. In late 2004, my Dad smoked crystal meth, was arrested, and charged with drug-related offenses. He pleaded guilty to at least one of the charges.

4. Once it became clear that he was going to jail for his drug-related criminal issues, and potentially for an extended term, my Dad said that his future was so uncertain that he wanted to get the Property out of his name entirely. That way, he said, his wife could not be saddled with the debt payments on the Property.

5. Jerome also said that he wanted to keep the ownership of the Property in the family. He talked with all of his siblings, giving them the opportunity to buy Jerome's interest. None of his siblings took Jerome up on that opportunity.

6. I was interested in the Property, so I decided that I wanted to buy it.. At that time, I did not have the resources necessary to complete the transaction, which required me to pay off Jerome's one-half interest in the contract for deed, without borrowing money. I took out a loan through the Community Bank of Avon to finance the transaction. My grandparents and their children, including Jerome Powers, were all aware of the transactions that were taking place. We executed agreements necessary to effectuate the transaction, including a Quit Claim Deed from my father to me. At that time, we also entered into a First Right of Refusal Agreement ("ROFR") with respect to the Property – one ROFR for the part of the Property in Bon Homme County and a second, identical ROFR for the part of the Property in Charles Mix County.

7. Historically, both the Property and my Dad's residence (immediately adjacent to the Property) were not serviced by rural water. At my property, we used a 600-foot well for water, but it could not keep up with farming practices, *e.g.* spraying, large herds of cattle. At my Dad's residence, water had to be hauled in. This is a task that involves filling a large tank (e.g., 1,100 gallons) and driving that tank to my Dad's residence, then unloading the water into the cisterns on site. On many occasions, I did the hauling and unloading work myself.

8. My grandparents, my Dad, and I were interested in having rural water brought to the properties and arranged with B-Y Water District to do just that. The pipeline that was installed on the subject property is the same pipeline that provides service to my Dad's residence. My Dad and I discussed that project before, during, and/or after it was done. A true and correct copy the easement executed to B-Y Water District in order to facilitate installation of the Bon Homme County portion of the subject property is attached hereto as **Exhibit 1**. I also granted an easement on the Charles Mix County portion of the Property to B-Y Water District, a true and correct copy of which is attached hereto as **Exhibit 2**. This, too, was part of the same project and my dad and I discussed this pipeline project on several occasions around the time that the easement to B-Y Water District was granted.

9. I farmed the Property myself until 2010. Between the time that I bought the Property and when I stopped farming, I (without any help from Jerome) converted about 230 acres of the Property from pastureland into more valuable, tillable croplands. In 2009, I was considering getting out of farming the Property. I discussed this with Jerome Powers and with my Grandpa. I discussed with them my thoughts about getting out of farming to focus on other endeavors, and then renting the land out to third parties. After those discussions, I decided to stop farming myself. I held a "farm sale" to sell off most of my farming equipment and talked with potential lessees. I talked about this with my Dad and Grandpa at the time too.

10. I leased the Property to Jim Wittmeier pursuant to an oral agreement with Mr. Wittmeier and his mother, Marlene Wittmeier, in March 2010 for the 2010 crop season. I discussed the fact that I was going to lease to the Wittmeiers with my father, including specific terms of the agreement. My Dad raised certain issues with respect to the lease arrangement. One of those issues was how much I would be paid under the lease compared to what I had paid for the

Property. The implication of this conversation was that I would be making a good sum of money relative to that purchase price. Another one of the issues was my Dad's concern about his ability to hunt the Property; specifically, he said he was concerned that the Wittmeiers' cattle on the Property would trample grounds that he wanted to use for pheasant hunting. Regardless of what my Dad's concerns were, he did not assert that the lease violated or triggered any of his rights under ROFRs.

11. I leased the Property to James and Marlene Wittmeier in 2011, again pursuant to a verbal agreement. I discussed with my Dad the fact that I was again going to lease the Property to the Wittmeiers for the 2011 season. My Dad did not assert that the 2011 lease arrangement violated or triggered any of his rights under the ROFRs.

12. In 2011, I determined that the lease agreements with the Wittmeiers should be in writing. We engaged in negotiations, which resulted in us signing the "Wittmeier – Powers Lease Agreement" (the "Wittmeier Lease Agreement"), a true and correct copy of which is attached hereto as **Exhibit 3**. As set forth in the Wittmeier Lease Agreement, the term of the lease was the five-year period from March 1, 2012, through February 28, 2017. (*See* Wittmeier Lease Agreement, p. 1, ¶ 2.) This written lease included a premium clause, pursuant to which the Wittmeiers would pay me a certain percentage of revenues if certain benchmark revenues were achieved in connection with their farming pursuant to the Wittmeier Lease Agreement. (*Id.* at ¶ 3.) I specifically discussed the Wittmeier Lease Agreement and its terms with my father, including the five-year term and the premium clause. My Dad did not assert that the Wittmeier Lease Agreement violated or triggered any of his rights under the ROFRs.

13. The Wittmeiers did, in fact, lease the Property pursuant to the Wittmeier Lease Agreement during the 2012, 2013, 2014, 2015, and 2016 seasons. My Dad and I discussed the

Wittmeiers' use of the Property on many occasions throughout that period. Throughout the term of the Wittmeier Lease Agreement, my Dad complained about the Wittmeiers' cattle interfering with his efforts to freely hunt the Property. At one point, I offered to sell my uncle Jim Powers and my Dad part of the land, but they did not pursue that offer. My Dad never asserted that the Wittmeier Lease violated or triggered any of his rights under the ROFRs.

14. Toward the end of the Wittmeier Lease Agreement term, in part because of my Dad's continued complaints relative to hunting, I decided that I would rent the Property out to someone else. I had several conversations with my Dad about potential lessees. One of those potential lessees was Clearfield Colony. When I decided that I would, in fact, lease a significant portion of the Property to Clearfield Colony, my Dad and I talked about the price per acre I would receive as rent, as well as a request that my Dad made to me to seek obtain hunting rights on the rest of Clearfield Colony's properties for my Dad as consideration for Clearfield Colony's lease of the Property. I did not obtain those rights from Clearfield Colony for my Dad.

15. In March 2016, I entered into a five-year lease agreement with Clearfield Colony. A true and correct copy of that lease agreement – the "Clearfield Powers Lease Agreement Farm Ground" (the "Clearfield Colony Lease Agreement") is attached hereto as **Exhibit 4**. The Clearfield Colony Lease Agreement covered about 520 acres, which was all of the Property except for 100 acres +/- of the Bon Homme County portion of the Property, which I leased separately (see below), and a 13-acre portion of the Property that consisted of a home site and a "salvage yard" or "junk yard." The Clearfield Colony Lease Agreement terms ran from March 1, 2017, through February 28, 2022. My Dad did not assert that entering into the Clearfield Colony Lease Agreement violated or triggered any of his rights under the ROFRs.

16. I entered into a lease agreement of approximately 100 acres +/- of the Bon Homme County portion of the Property with Nathan Mathis for pasturing purposes in early 2016, covering the five-year period after the Wittmeier Lease would expire – from March 1, 2017, through February 28, 2022. A true and correct copy of my agreement with Mr. Mathis – the "Mathis – Powers Lease Agreement Bon Homme Co. Pasture" (the "Mathis Lease Agreement") is attached hereto as **Exhibit 5**. My Dad did not tell me that entering into the Mathis Lease Agreement violated or triggered any of his rights under the ROFRs.

17. I paid off the remaining balance on the contract for deed in 2012. This was done, in part, because my grandfather, Clifford Powers, wanted the land paid off before he passed away so that there would not be any issues with the Property, or my financial obligations relating to it via the contract for deed, being in the estate. I talked about this payoff of the contract for deed with my Dad and at least his sister, Jackie (who was to handle the estate after my grandfather passed).

18. My grandfather died on August 14, 2012. About once a year after that, and before my father I had a falling out in our relationship in 2018, my Dad asked me to sell him an approximately 10-acre portion of the Property that we call the "home place." My Dad never asserted that he had a right under the ROFRs to force the sale of the "home place" or any other portion of the Property as a consequence of my leasing all of the Property.

19. On August 20, 2012, in connection with my immediate family's estate planning purposes, I deeded a one-half interest in the Property to my wife, April, via a Warranty Deed. A true and correct copy of each Warranty Deed (one for that part of the Property in Bon Homme County and one for that part of the Property in Charles Mix County) is attached hereto as **Exhibit 6** and **Exhibit 7**. At that time, I told my Dad about this conveyance and that I was putting April

into ownership of the Property with me in case something happened to me. My Dad did not tell me that conveying a one-half interest in the Property to April violated or triggered any of his rights under the ROFRs.

20. My wife and I have entered into many financing agreements that involved mortgaging the Property. Those agreements—and the related mortgages—include the following:

- March 7, 2013 – mortgage in favor of Commercial State Bank;
- March 14, 2013 – another mortgage in favor of Commercial State Bank;
- December 4, 2013 – a third mortgage in favor of Commercial State Bank;
- September 12, 2014 – mortgage in favor of Commercial State Bank;
- May 27, 2016 – mortgage in favor of Commercial State Bank; and
- May 19, 2017 – mortgage in favor of Commercial State Bank.

Pursuant to those agreements, April and I "grant[ed], bargain[ed], convey[ed], mortgage[d] and [sold] to [Commercial State Bank], with power of sale, the [Property]." I discussed each of these mortgages with Jerome Powers before I entered into them. At one point, my Dad told me that he thought I was starting to "bite off a lot there"—meaning that we had a lot of payments to be making. Never did my Dad assert that our mortgaging of the Property violated or triggered any of his rights under the ROFRs.

FURTHER YOUR AFFIANT SAYETH NOT.

_____
Dennis Powers

Subscribed and sworn to before me
this _____ day of _____, 2020.

_____
Notary Public

15-6-56(c). Motion for summary judgment and proceedings thereon.

The motion and supporting brief, statement of undisputed material facts, and any affidavits, and any response or reply thereto shall be served within the dates set forth in § 15-6-6(d).

(1) A party moving for summary judgment shall attach to the motion a separate, short, and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried. Each material fact in this required statement must be presented in a separate numbered statement and with appropriate citation to the record in the case.

(2) A party opposing a motion for summary judgment shall include a separate, short, and concise statement of the material facts as to which the opposing party contends a genuine issue exists to be tried. The opposing party must respond to each numbered paragraph in the moving party's statement with a separately numbered response and appropriate citations to the record.

(3) All material facts set forth in the statement that the moving party is required to serve shall be admitted unless controverted by the statement required to be served by the opposing party.

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Source: SD RCP, Rule 56 (c), as adopted by Sup. Ct. Order March 29, 1966, effective July 1, 1966; SL 2006, ch 329 (Supreme Court Rule 06-55), eff. July 1, 2006; SL 2007, ch 302 (Supreme Court Rule 06-70), eff. Jan. 1, 2007; SL 2008, ch 281 (Supreme Court Rule 07-02), eff. Jan. 1, 2008.

15-6-61. Harmless Error.

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties. Source: SD RCP, Rule 61, as adopted by Sup. Ct. Order March 29, 1966, effective July 1, 1966.

15-26A-67. Briefs of multiple appellants or appellees.

In cases involving more than one appellant or appellee, including cases consolidated for purposes of appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs. Source: Supreme Court Rule 79-1, Rule 12 (8); SDCL Supp, § 15-26A-49

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 29561

JEROME POWERS, Appellant, vs. DENNIS POWERS, Appellee, and PREVAILING WIND PARK, LLC, Appellee.	**BRIEF OF APPELLEE PREVAILING WIND PARK, LLC**

APPEAL FROM CIRCUIT COURT
FIRST JUDICIAL CIRCUIT
CHARLES MIX COUNTY, SOUTH DAKOTA

HONORABLE DAVID KNOFF

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PRELIMINARY STATEMENT

For clarity, Appellant Jerome Powers, and Appellee Dennis Powers, shall be individually referred to herein by their respective first names, "Jerome" and "Dennis." Appellee Prevailing Wind Park, LLC shall be referred to herein as "PWP," and its Appendix filed herewith shall be cited as "PWP App." Citations to the Appendix of the Brief of Appellant shall be by "Jerome's App." PWP adopts the convention, "SR," used by Jerome for other citations to the record.

JURISDICTIONAL STATEMENT

This appeal was taken from the Order by the Honorable David Knoff, Circuit Court Judge, First Judicial Circuit, State of South Dakota, dated and filed January 25, 2021, which was based on the circuit court's related Memorandum Decision, dated January 15, 2021, on PWP's Motion for Summary Judgment, which Defendant Dennis Powers joined. PWP served and filed Notice of Entry of Circuit Court's Summary Judgment Order on January 27, 2021. Jerome filed and served his Notice of Appeal on February 25, 2021. This Court has jurisdiction according to SDCL § 15-26A-3.

REQUEST FOR ORAL ARGUMENT

PWP respectfully requests the privilege of appearing before this Court for oral argument.

STATEMENT OF THE LEGAL ISSUES

Issue One:

> Jerome and Dennis Powers, father and son, entered into two first right of refusal agreements ("ROFRs") covering properties in Bon Homme and Charles Mix Counties (the "Property") in 2005. The ROFRs gave Jerome certain rights in the event that Dennis intended to sell the Property. In 2016, Dennis and his wife entered into two 2016 Wind Energy Lease and Wind Easement Agreements (the "Wind Easements") for the Property with PWP's predecessor-in-interest. Were

Jerome's rights under the ROFRs triggered by Dennis's intent and subsequent entry into the Wind Easements?

The circuit court determined that the ROFRs contemplated only fee simple sales of the real estate or a portion thereof. Hence, PWP's offer to obtain a partial interest in the properties for the Wind Easements did not trigger the ROFRs.

Most relevant cases:

1. *Laska v. Barr*, 2016 S.D. 13, 876 N.W.2d 50 (*Laska I*);

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

Most relevant statutory provisions:

1. SDCL § 53-8-5.

Issue Two:

Alternatively, if the ROFRs are to be interpreted as Jerome contends—triggered if Dennis intends to grant any interest (no matter how limited) in any portion of the property at issue (no matter how small) for the duration of Jerome's lifetime, and, regardless of the terms offered, providing Jerome the right to obtain the fee simple interest in the entirety of the Property at a fixed, below market, price—are the ROFRs void as unreasonable restraints on alienation under SDCL § 43-3-5 and *Laska v. Barr*, 2018 S.D. 6, 907 N.W.2d 47 (*Laska II*)?

The circuit court held that, under Jerome's proffered interpretation of the ROFRs, they were void as unreasonable restraints on alienation under SDCL § 43-3-5.

Most relevant cases:

1. *Laska v. Barr*, 2018 S.D. 6, 907 N.W.2d 47 (*Laska II*);

2. *Urquhart v. Teller*, 1998 MT 119, 288 Mont. 497, 958 P.2d 714.

Most relevant statutory provisions:

1. SDCL § 43-3-5.

Issue Three:

Are there other bases to uphold the circuit court's decision dismissing Jerome's claims?

The circuit court granted summary judgment dismissing Jerome's claims based on the two alternative bases noted above. Affirmance on either ground is appropriate. In addition, this Court should affirm the circuit court's decision on summary judgment on

other grounds briefed before the circuit court, but not relied upon in its decision; namely, because Jerome's claims are barred by the statute of limitations.

Most relevant cases:

1. *Strassburg v. Citizens State Bank*, 1998 S.D. 72, 581 N.W.2d 510;
2. *Healy v. Osborne*, 2019 S.D. 56, 934 N.W.2d 557.

Most relevant statutory provisions:

1. SDCL § 15-2-13(1).

STATEMENT OF THE CASE

This case centers on two agreements—the ROFRs—between Jerome and Dennis Powers, father and son. The ROFRs relate to two properties, which together comprise roughly 630 acres of land in Bon Homme and Charles Mix Counties (together, the "Property"). In 2003, Jerome and Dennis, together, purchased the Property from Jerome's parents/Dennis's grandparents. In late 2004, Jerome engaged in illegal drug activity and got caught. In 2005, in anticipation of going to prison, Jerome sold his interest in the Property to Dennis. As part of that transaction, the parties entered into the ROFRs. Dennis has owned the Property since then; his wife came into title in 2012.

Dennis has made productive use of the Property. In addition to farming the Property himself and converting more than 200 acres of it into more valuable cropland, Dennis has also made numerous grants or transfers of a variety of interests in the Property—easements, leases, hunting rights, a partial fee interest to his wife, and several mortgages. Jerome did not assert that any of those transfers triggered the ROFRs when they were made, but now contends that the Wind Easements triggered those rights.

In June 2019, Jerome commenced a lawsuit in Charles Mix County Circuit Court alleging that Dennis and his wife April's entry into Wind Easements (one on each of the

properties) with PWP's predecessor-in-interest triggered Dennis's obligations (and Jerome's corresponding rights) under the ROFRs. Jerome asserted claims for declaratory judgment, breach of contract, and voiding of the Wind Easements. The thrust of Jerome's complaint is that before Dennis granted *any* interest in the Property, Dennis was obligated to grant Jerome the right to purchase the Property for $420 per acre pursuant to the ROFRs.

PWP moved for Summary Judgment dismissing Jerome's claims on October 9, 2020. (SR 146-147.) Dennis joined in PWP's motion. The Circuit Court, Honorable David Knoff, held a hearing (SR 801-885), and then filed its Memorandum Decision on PWP's Motion for Summary Judgment on January 15, 2021 (SR 742-747), and corresponding Order on PWP's Motion for Summary Judgment, on January 25, 2021 (SR 756-763), granting PWP's Motion and ordering the dismissal of Jerome's claims, from which Jerome took this appeal.

STATEMENT OF THE FACTS

THE PARTIES

Jerome lives in Wagner, next to the Property. (PWP's Statement of Undisputed Material Facts in Supp. of Mot. for Summ. J. ("PWP's SUMF") ¶ 1 (PWP App. 1).) Jerome is in his mid-to-late fifties. (*Id.* at ¶ 2.)

Dennis is married to April Powers. (*Id.* at ¶ 6 (PWP App. 2).) Dennis, April, and their three children live in Avon. (*Id.* at ¶ 7.) Dennis is in his mid-to-late thirties. (*Id.*)

PWP—a South Dakota limited liability company—is a wholly-owned subsidiary of sPower, a renewable energy company. (*Id.* at ¶ 9.)

THE PROJECT AND PROPERTY AT ISSUE

PWP developed and permitted through the South Dakota Public Utilities Commission ("SDPUC"), and certain local government units, a wind project known as Prevailing Wind Park (the "Project") in Bon Homme, Charles Mix, and Hutchinson Counties. (PWP's SUMF ¶ 10 (PWP App. 2-3).)

The Property consists of a total of approximately 630 acres of land in Bon Homme County and in Charles Mix County, South Dakota. (*Id.* at ¶ 11 (PWP App. 3).)

Clifford and Carol Powers, now deceased, were Jerome's parents and Dennis's grandparents. In April 2003, they sold the Property (and their cattle and equipment) on a Contract for Deed to Dennis and Jerome for $199,000. (*Id.* at ¶¶ 12, 16 (PWP App. 3-4).) At that time, the Property was comprised of about 300 acres of tillable cropland, 300 acres of pasture land, and 30 acres for a homestead, creeks, and otherwise non-farmable land. (*Id.* at ¶ 15 (PWP App. 3).) The price worked out to about $314 per acre—less than half of the Property's fair market value at the time. (*Id.* at ¶ 17 (PWP App. 4).)

THE TRANSACTION BETWEEN JEROME AND DENNIS

In December 2004, Jerome went to a party, smoked meth, and was arrested. (PWP's SUMF, ¶ 20 (PWP App. 4).) Jerome pled guilty to the charge of possession of a controlled substance, a class 4 felony; in exchange, other charges were dismissed. (*Id.* at ¶ 22.) Jerome knew he may be going to prison for a number of years. (*Id.* at ¶ 23.)

Jerome did not want to saddle his wife with debt while he was incarcerated and decided to try to sell his ownership interest in the land to someone in the family. (*Id*. at ¶ 24.) Jerome's siblings declined. (*Id.* at ¶ 25 (PWP App. 5).) Jerome approached Dennis, who was interested. (*Id.* at ¶ 26.)

Jerome and Dennis went to then-lawyer, now-Judge Bruce Anderson to have the deal drawn up in the spring of 2005. (*Id.* at ¶ 27.) Jerome sold his interest in the Property to Dennis and assigned Dennis his interest in the Contract for Deed; in exchange, Dennis paid Jerome an amount equal to the payments Jerome had made toward the Contract for Deed and the personal property. (*Id.* at ¶ 29.)

Jerome had the idea to impose a right of first refusal on the Property to (a) protect Dennis, who was only 22 at the time, from somehow losing the Property and (b) keep ownership in the family if Dennis later decided to outright sell the Property. *(Id*. at ¶¶ 30-31 (PWP App. 5-6); *cf.* Jerome's Opp'n to PWP's SUMF ¶ 6[1] (Jerome's App. D-4).)

Mr. Anderson drafted a "First Right of Refusal Agreement"—each, a "ROFR"—applicable to each county's portion of the Property. *(Id*. at ¶ 37 (PWP App. 7).) They are identical other than the legal descriptions. (*Id.* at ¶ 38.)

The right of first refusal language in each agreement is as follows:

> **SECTION TWO**
> **FIRST RIGHT OF REFUSAL**
>
> In the event GRANTOR offers the above-described property, or any interest, for sale, transfer or conveyance, GRANTOR shall not sell, transfer, or convey the above-described property, nor any interest therein, unless and until he shall have first offered to sell such property or any interest therein, to GRANTEE. If GRANTOR intends to make a bona fide sale of the above-described property, or any interest therein, he shall give to GRANTEE written notice of such intention, which notice shall contain the basic terms and conditions demanded by GRANTOR for the sale of such property.

[1] Jerome responded to PWP's SUMF ¶ 30 asserting that Jerome had the idea of putting the ROFRs in place because he "wanted a safety net put in place so that anything that could – bad could [not] happen to the property." (*See* Jerome's Opp'n to PWP's SUMF ¶ 6 (App. D-4).) Jerome omitted, however, the remainder of his answer, which was that he wanted "a safety net to save it via it being getting overextended at the bank or having anybody come in to try and, well, beat him out of it, per se." (*See* Jerome Dep. Tr. 101:14-22 (SR 498).) Thus, the fact was not genuinely disputed.

> Within thirty (30) days of receipt of such notice and information, GRANTEE shall either exercise his First Right of Refusal by providing written notice of his acceptance to GRANTOR, or waive his First Right of Refusal by failing to provide GRANTOR with written notification of his acceptance or rejection of the First Right of Refusal within such time.

(*Id.* at ¶ 39 (PWP App. 7).)

The ROFRs do not define what "any interest therein" means—whether it be a partial interest (e.g., an easement or a leasehold interest) or a fee interest in all or a part of the Property. (*See id.* at ¶ 40 (PWP App. 7-8).) But, this portion of each ROFR requires Dennis to give Jerome notice and an opportunity to purchase the same property or interest therein—"such property or any interest therein"—that Dennis is offering to someone else. (*Id.*)

The next section—"Terms"—contemplates a potential transaction under the ROFRs from Dennis to Jerome only "should [Dennis] accept the offer by [Jerome] to purchase the [P]roperty." (*See id.* at ¶¶ 41-42 (PWP App. 8).) Then, each ROFR contemplates a sale of "fee title" at the fixed price of $420 per acre, and other terms:

> **SECTION THREE**
> **TERMS**
>
> Should GRANTOR accept the offer of GRANTEE to purchase the property, it shall be on the following terms:
>
> 1. GRANTEE shall pay GRANTOR the sum of $420.00 per acre, which shall be paid in cash or cash equivalent at closing.
>
> 2. GRANTOR shall convey fee title, which title shall be merchantable, as shown by abstract or title insurance.
>
> 3. Closing shall take place within thirty (30) days of GRANTOR delivering title insurance or abstracts to the property.
>
> 4. GRANTEE shall have possession of the property at closing.

> If GRANTEE fails to exercise his First Right of Refusal, GRANTOR may proceed to sell transfer and convey the property to any other person or entity free from any restrictions of this Agreement.

(*Id*. at ¶ 42.) These sections of the ROFRs do not contain the "any interest therein" language found in Section Two. (*Id.*)

The ROFRs are "binding upon the [Jerome and Dennis], their heirs, executors, estates, personal representatives, agents and assigns, however, as to [Jerome], this Agreement shall expire on his death." (*See id*. at ¶ 43 (PWP App. 8-9).)

Jerome asserts the ROFRs gave him the ability to control whether Dennis may grant *any* interest in the Property to any third party, regardless of the scope of that interest, based upon whether Jerome likes the use or not:

> Q: And so your position is that you have the ability to dictate what Dennis does on that property if it involves granting an interest to a third party, correct?
>
> A: Correct.
>
> Q: And in response, if Dennis intends to grant an interest to a third party, the nature of which you disagree with, you can respond by forcing a sale of the entirety of the property to you at $420 per acre; is that right?
>
> A: Correct.

(PWP's SUMF ¶ 44 (PWP App. 9).) Put differently, Dennis can either farm the Property himself or let it go fallow, but any attempt to put any part of the Property to productive use through a third party gives Jerome "control" and the right to buy all of the Property for $420 per acre at his whim. (*Id.* at ¶ 45 (PWP App. 9-10).)

Jerome's contentions are not supported by his testimony about the purpose of the ROFRs. As Jerome testified, he did not intend that the ROFRs could be triggered by

Dennis conveying any interest in the Property, no matter how limited, at the time the agreements were executed (*id.* at ¶ 33 (PWP App. 6)) or that Dennis's leasing of the Property would trigger the agreements. (*Id.* at ¶ 34.)[2] In addition, Jerome neither made a distinction between agricultural and non-agricultural uses of the Property nor had any intent about a wind farm. (*Id.* at ¶ 35 (PWP App. 7).)

DENNIS'S USE OF THE PROPERTY SINCE 2005

Between 2005 and today, Dennis (with no help from Jerome) converted about 230 acres of the Property from pastureland into more valuable tillable cropland. (PWP's SUMF ¶ 18 (PWP App. 4).) Because of that, and market forces, the Property's value has increased significantly since ownership was consolidated in Dennis. (*Id.*)

Dennis has also entered into several transactions between Dennis and third parties (as well as Jerome) involving a variety of interests in the Property—hunting rights, easements, leases, and fee ownership. (*Id.* at ¶ 47 (PWP App. 10-14).) Those transactions included the following:

- Verbal rights to hunt to Jerome in 2005 through 2018;
- Easements to B-Y Water District in 2006;
- Leases to third parties (various lessees) for farming in 2010 through 2019;
- Transfer of joint tenancy interest with right of survivorship to his wife, April, in 2012;

[2] Jerome asserted in his Opposition to PWP's SUMF ¶¶ 33 and 34 (Jerome's App. D-4-5) that Jerome's intent was irrelevant but did not dispute the facts.

- Mortgage interests to a bank in 2013 (three times), 2014, and 2016; and
- Lease of a trailer home to Jerome in 2016 and 2017.

(*Id.*)

Jerome had actual and/or constructive knowledge of many of these transactions,[3] but rather than assert his rights at any time from 2005 until 2019, Jerome sat on his rights (or at least what he now claims have been his rights all along). (*Id.* at ¶¶ 48-49 (PWP App. 14-15).) Jerome's explanation was that those transactions were acceptable to him, despite the fact that they allegedly violated his rights under the ROFRs:

> Q: So, as I understand it, then, you viewed these other things as acceptable enough to you even though you could have exercised your First Right of Refusal, you didn't, right?
>
> A: Correct.

(*Id.* at ¶ 49.)[4]

THE WIND FARM

What ultimately became the Project was initially proposed by an entity called Prevailing Winds, LLC. (PWP's SUMF ¶ 50 (PWP App. 15).) In June 2016, Prevailing

[3] In his opposition to PWP's SUMF ¶ 47, Jerome asserted there were issues of fact as to his knowledge of some of the transactions, and that he was entitled to receive written notice of the same. (Jerome's Opp'n to PWP's SUMF ¶ 14 (Jerome's App. D-5).). Jerome's undisputed knowledge of transactions that occurred more than six years before he commenced this action is discussed in Section IV, below.

[4] Jerome contends that farming-related easements are a "whole different breed of cat" from long-term easements, and that he wanted the ROFRs in place for those long-term easements. (*See* Jerome's Opp'n to PWP's SUMF ¶ 15 (Jerome's App. D-6-7).) The ROFRs do not align with Jerome's contention.

Winds, LLC filed an application for a 200-MW wind farm with the SDPUC. *(Id*. at ¶ 52.) Prevailing Winds, LLC subsequently withdrew its application. (*Id.* at ¶ 55.)

In October 2017, sPower purchased the Prevailing Winds, LLC Project-related assets. (*Id*. at ¶ 56.) On May 30, 2018, PWP filed an application for a wind energy facility permit with the SDPUC. (*Id.* at ¶ 57.)

DENNIS AND APRIL SIGN THE WIND EASEMENTS

Dennis and April were interested in having the Property be part of the Project. (PWP's SUMF ¶ 59 (PWP App. 16).) On September 15, 2016, Dennis and April signed the Wind Easements with Prevailing Winds, LLC—one for the Bon Homme County property and one for the Charles Mix County property. (*Id.* at ¶ 65 (PWP App. 16-17).)

JEROME'S PARTICIPATION IN THE PROJECT PERMITTING PROCESS

Jerome participated in the permitting proceedings for what became PWP's Project from the outset. (PWP's SUMF ¶ 66 (PWP App. 17).) Jerome provided testimony against the Project at a SDPUC hearing on July 12, 2018. (*Id.* at ¶ 67.)

In October 2018, Jerome served as a lay witness for Project opponents and testified to the SDPUC suggesting that wind farms cause adverse health effects and are bad for his hunting business. *(Id*. at ¶ 68.) Jerome testified that he had learned the Property had been signed up for the Project, that he had expressed his displeasure about that with Dennis, and that they had had a breakdown in their relationship. (*Id.*) Jerome did not mention the ROFRs. (*Id.* at ¶ 69.) Jerome "knew" he had rights under the ROFRs at that time, but "kept it quiet." (*Id.* at ¶ 70.)

THE SDPUC PERMITTED THE PROJECT AND THE PROJECT WAS BUILT

On November 28, 2018, the SDPUC granted PWP an energy facility permit for the Project. (PWP's SUMF ¶ 71 (PWP App. 18).) In its Order, the SDPUC rejected

Jerome's claims that the Project would adversely affect Jerome's hunting operations. *(Id.* at ¶ 72.)

PWP then set about to execute and construct the Project. (*Id.* at ¶ 73.) As part of those efforts, PWP approached Jerome to obtain documents evidencing Jerome's consent to the Wind Easements to clean up the title work. (*Id.* at ¶ 74.) This clean-up title work is a standard operating procedure in project financing and execution. (*Id.*) Jerome did not sign the consents. (*Id.*)

PWP began construction of the Project on the Property on or around July 2019 (*id.* at ¶ 75), and began Project operations in April 2020. (*Id.* at ¶ 76.) There are turbines and a collector line on the Property. (*Id.* at ¶ 77.)

THIS LITIGATION

Jerome commenced this action in June 2019. (PWP's SUMF ¶ 78 (PWP App. 19).) Jerome asserts that Dennis has breached the ROFRs from 2005 forward (*id.* at ¶ 80 (PWP App. 20)) and asserts claims for declaratory judgment, breach of contract, and voiding of the Wind Easements. (*Id.* at ¶ 79.)

Following discovery, PWP moved for summary judgment dismissing Jerome's Complaint in its entirety. (SR 146.) Dennis joined in the motion. (*See* SR 96-97.) The circuit court held oral argument (SR 801-855), then granted summary judgment and entered its order dismissing Jerome's Complaint in its entirety. (*See* SR 756-763.) Jerome appealed on February 25, 2021. (*See* SR 774-775.)

ARGUMENT

I. STANDARD OF REVIEW OF SUMMARY JUDGMENT.

A circuit court's entry of summary judgment is reviewed de novo. *Patterson v. Plowboy, LLC*, 2021 S.D. 25, ¶ 11, 959 N.W.2d 55, 58 (quotation and citation omitted).

Summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." SDCL § 15-6-56(c).

The legal principles guiding the Court's review of summary judgment are well settled:

> [The Court] must determine whether the moving party demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law. The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party. The nonmoving party, however, must present specific facts showing that a genuine, material issue for trial exists. [The Court's] task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied. If there exists any basis which supports the ruling of the trial court, affirmance of a summary judgment is proper.

Patterson, 2021 S.D. 25, ¶ 11, 959 N.W.2d at 58-59 (quotation omitted).

II. REASONABLY CONSTRUED, THE WIND EASEMENTS DID NOT TRIGGER JEROME'S RIGHTS UNDER THE ROFRS.

A. Applicable Law.

The Court's standard of review for interpretation of a contract is also well settled:

> Contract interpretation is a question of law reviewed de novo. When interpreting a contract, this Court looks to the language that the parties used in the contract to determine their intention. In order to ascertain the terms and conditions of a contract, we examine the contract as a whole and give words their plain and ordinary meaning.

McKie Ford Lincoln, Inc. v. Hanna, 2018 S.D. 14, ¶ 9, 907 N.W.2d 795, 798 (quotations and citations omitted). "Contracts are considered as a whole and all of the provisions, including those granting an option, are examined to determine the meaning of any part."

Comm. Trust and Sav. Bank v. Christensen, 535 N.W.2d 853, 857 (S.D. 1995) (quotations omitted).

When a contract is unambiguous, construction is not necessary. *Laska v. Barr (Laska I)*, 2016 S.D. 13, ¶ 5, 876 N.W.2d 50, 52. "[A] contract is ambiguous only when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined *the context of the entire integrated agreement*." *Id.* ¶ 5, 876 N.W.2d at 52-53 (emphasis added).

B. The Circuit Court Properly Found that the ROFRs Contemplate Fee Simple Sales.

Jerome contends that the ROFRs contemplate that the granting of any lease or easement, or even a mortgage, on any part of the Property, triggers Dennis's obligations to give Jerome notice and the opportunity to purchase the Property in fee simple for a fraction of its market value. Reading the ROFRs as a whole, the circuit court properly found that Jerome's contention fails.

As before the circuit court, Jerome cites to only select terms of the ROFRs in support of his proposed interpretation—particularly, focusing on one section of the ROFRs (Section Two), which uses the undefined phrase, "any interest therein." (*See* Jerome's Br. 17-18; Jerome's App. A-2, B-2.) However, the law does not permit that contracts be interpreted or dictated by cherry-picked terms. As before the circuit court, Jerome ignores entirely the remainder of the ROFRs that militate against his argument. The circuit court did not ignore these terms, but rather, reviewed the ROFRs in their entirety, and construed them reasonably in light thereof. As the circuit court noted, the "or any interest therein" language upon which Jerome (exclusively) relies "is read in

concert with the entire Agreement." (Memo. Decision on Mot. for Summ. J. ("Circuit Court Memo.") (Jerome's App. C-7).) As the circuit court continued:

> *Section Three* of the Agreement is helpful in analyzing the intent of the Agreement. The Court notes Section Three only contemplates transferring fee interest from Dennis to Jerome. The agreement does not contemplate offering a non-fee interest in the property under the same terms as would be offered to a third-party. The Agreement clearly contemplates only a fee simple sale of the real estate or a portion (in fee) of the real estate. . . . Reading the document as a whole, it is intended the right to purchase is triggered when the property (or a portion of the property) is to be sold in fee simple to a third party.

(*Id*. (italics in original).) Notably, Jerome does not address this fundamental interpretation in his Brief, does not address Section Three—the "Terms" of the ROFRs—at all, and does not explain how its terms are compatible with his proffered interpretation of the ROFRs.

The circuit court properly construed the ROFRs in a manner consistent with their terms within the context of the entire agreements.[5] There was no sale of a fee simple interest in the Property. Therefore, under a plain (and fair) reading of the ROFRs as a whole, the ROFRs were not triggered, and the circuit court properly dismissed Jerome's claims on that basis.

C. The Circuit Court Noting that Testimony Was *Consistent with* the Proper Interpretation of the Unambiguous Terms of the ROFRs as a Whole, Is Not Error, Much Less Reversible Error.

[5] This is also consistent with how valid ROFRs typically work (there being some relationship between what is offered and the terms on which the ROFR-holder may exercise its rights). *See Advanced Recycling Sys., LLC v. Se. Props. Ltd. P'ship*, 2010 S.D. 70, ¶ 17, 787 N.W.2d 778, 784-85; *Edgar v. Mills*, 2017 S.D. 7, ¶ 27, 892 N.W.2d 223, 231.

Jerome improperly devotes much of his argument about the ROFRs' meaning to the parol evidence rule. That rule provides: "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument." SDCL § 53-8-5; *see also Poeppel v. Lester*, 2013 S.D. 17, ¶ 19, 827 N.W.2d 580, 584. It is accordingly true that a court generally may not rely upon parol evidence in order to determine in the first instance whether an agreement is ambiguous, if the language of the agreement itself is unambiguous. *See, e.g.*, *Edgar*, 2017 S.D. 7, ¶ 28, 892 N.W.2d at 231. It is also true that a court may not use parol evidence to rewrite or add to the unambiguous terms of a contract. *See id.* ¶ 29.

Jerome's reliance on the parol evidence rule here is misplaced. As noted above, the circuit court found that *the terms of the ROFRs themselves* are unambiguous when read in context as a whole, and foreclosed Jerome's proffered interpretation. Despite acknowledging that the circuit court found the agreements to be unambiguous, Jerome contends that the circuit court's discussion of the parties' intent was an "improper and erroneous interjection of and/or positive or negative reliance on [] parol evidence" warranting reversal. (Jerome's Br. p. 16 (citing *Edgar*, 2017 S.D. 7, 892 N.W.2d 223).)

In stark contrast to *Edgar*, the circuit court did *not* review extrinsic evidence to find that the ROFRs were ambiguous, and did *not* otherwise use extrinsic evidence to rewrite or add to the ROFRs' unambiguous terms. Rather, the circuit court here simply noted (quite accurately) that testimony was *consistent with* the reasonable interpretation of the unambiguous terms of the contract as a whole. (Circuit Court Memo. (Jerome's App. C-7).)

Jerome's parol evidence argument misunderstands both the nature of the circuit court's decision and this Court's review. At worst, the circuit court noting testimony that was consistent with the unambiguous terms of the ROFRs was dicta as to this part of its decision (but relevant to its alternative holding), which does not warrant reversal. Moreover, "[c]ontract interpretation is a question of law reviewable de novo." *See, e.g.*, *Laska II*, 2018 S.D. 6, ¶ 16; 907 N.W.2d at 52. If this Court interprets the language of ROFRs as the circuit court did—that reasonably as a whole, the terms of the ROFRs contemplate fee simple sales of all or some portion of the Property as triggering events, then the circuit court's decision stands. As set forth above, it can and should.

III. THE CIRCUIT COURT PROPERLY HELD THAT, IF THE ROFRS ARE INTERPRETED AS JEROME CONTENDS, THEY ARE VOID BECAUSE THEY ARE UNREASONABLE RESTRAINTS ON ALIENATION UNDER SDCL § 43-3-5 AND *LASKA II*.

A. A Right of First Refusal Is Valid Only if It Is Reasonable and for a Legitimate Purpose.

Restraints on the alienation of property are harmful and, like other jurisdictions across the country, South Dakota has codified the general rule against them. *See* SDCL § 43-3-5 ("Conditions restraining alienation, when repugnant to the interest created, are void.").[6] As the Court has recognized, "[a] right of first refusal is a preemptive right restraining alienation." *Laska II*, 2018 S.D. 6, ¶ 24, 907 N.W.2d at 54 (citing *Laska I*, 2016 S.D. 13, ¶ 11, 876 N.W.2d at 55). "To be valid, the restraint *must be reasonable* and for a legitimate purpose." *Laska II*, 2018 S.D. 6, ¶ 24, 907 N.W.2d at 54 (emphasis added); *see* Restatement (Third) of Property: Servitudes § 3.4 ("A servitude that imposes

[6] The Restatement (Third) of Property: Servitudes, quoted in the circuit court's decision, outlines several harmful effects of such restraints. (See Circuit Court Memo. (Jerome's App. C-8) (quoting Restatement, § 3.4 cmt. c).)

a direct restraint on alienation of the burdened estate is invalid if the restraint is unreasonable.").

In determining whether a restraint is unreasonable, the circuit court here, just as this Court did in *Laska II*, looked to and applied the principles of the Restatement (Third) of Property: Servitudes. As the Court stated in *Laska II*, "[t]he standard against which the impact of a restraint is to be measured is that of the property owner free to transfer property at his or her convenience at a price to be determined by the market." 2018 S.D. 6, ¶ 25, 907 N.W.2d at 54 (quoting Restatement (Third) of Property: Servitudes § 3.4 cmt. c.). When evaluating the reasonableness of a right of first refusal's restraint against alienation, courts consider a number of factors, including: the restraint's purpose; the nature, extent, and duration of the restraint; the nature of the property interest and type of land involved; whether the price is fixed; and the parties' intent. *Laska II*, 2018 S.D. 6, ¶ 25, 907 N.W.2d at 54 (citations omitted). "The greater the practical interference with the owner's ability to transfer, the stronger the purpose that is required to justify a direct restraint on alienation." *Id.* ¶ 27, 907 N.W.2d at 55. If a right of first refusal is unreasonable, it is void. *Id.* ¶ 32, 907 N.W.2d at 56.

B. The ROFRs Are Unreasonable Restraints on Alienation.

The circuit court's analysis of the ROFRs under *Laska II* was correct. If Jerome's interpretation of the ROFRs prevails, then, for so long as Jerome is alive, the ROFRs prohibit Dennis from conveying, leasing, granting, giving, or otherwise parting with any interest in any portion of the Property to anyone, even on a temporary basis, without first giving Jerome written notice and the option to purchase the entirety of the Property for a fraction of its market value. In other words, Jerome's argument is that the ROFRs give him the right to determine, based on his own personal preferences (or based on nothing at

all), what happens on Dennis's (and April's) property for Jerome's lifetime. Effectively, Jerome's interpretation amounts to a total prohibition on alienation of the Property, and a significant impediment to its productive use, for Jerome's life. If Jerome's interpretation prevails, then the ROFRs must be declared void under SDCL § 43-3-5 and *Laska II* because they impose unreasonable restraints on the alienation of the Property.

An examination of the relevant factors and the undisputed evidence that was before the circuit court demonstrates that the ROFRs, when measured against the standard "of the property owner free to transfer property at his or her convenience at a price to be determined by the market," are unreasonable restraints on alienation and therefore void.

First, the ROFRs serve no legally valid purpose. On their face, the ROFRs do not indicate any purpose. Dennis and Jerome entered into the ROFRs at a time when Jerome was going to prison on drug charges, and he conveyed his interest in the Property to Dennis to divest himself of the Property and keep the fee ownership of the Property in the Powers' family. (PWP's SUMF ¶¶ 24, 26, 30-36 (PWP App. 4-7).)[7] According to

[7] "The nonmoving party . . . must present specific facts showing that a genuine, material issue for trial exists." *Weiss v. Van Norman*, 1997 S.D. 40, ¶ 9, 562 N.W.2d 113, 115. Jerome did not oppose PWP's SUMF ¶¶ 24, 26, or 35 at all. (*See* Jerome's Opp'n to PWP's SUMF (Jerome's App. D-1-7).) He opposed ¶¶ 32-34 and 36 on the grounds that they were not relevant but did not dispute the facts themselves. (*Id.* at ¶¶ 8-11 (Jerome's App. D.-5-6).) As to PWP's SUMF ¶ 30, Jerome put in an opposition, but that opposition neither actually disputes PWP's SUMF ¶ 30 nor does it accurately reflect Jerome's testimony, which stated that Jerome wanted a "safety net" so that Dennis could not lose the Property to a third party—that is what PWP's SUMF ¶ 30 says too. (*Id.* at ¶ 6 (Jerome's App. D-4).) While Jerome also put in a response to PWP's SUMF ¶ 31 attempting to muddy the picture (*id.* at ¶ 7 (Jerome's App. D-4)), Jerome's testimony was clear. For example, immediately after Jerome testified that he intended the ROFRs to limit Dennis's ability to convey an easement to a third party, he then testified unequivocally that he does not know what he intended as to easements relative to the

Jerome, the purpose of the ROFRs was to ensure that Dennis did not convey the ownership of the Property to a third party. (*Id*. at ¶ 30 (PWP App. 5).)[8] Put differently, the ROFRs were intended to prevent the sale of the Property, which is a direct affront to the rule against restraints on the alienation of property. Preventing the sale of property is not a valid purpose, and has been consistently and summarily rejected by courts that have found ROFRs to be unreasonable restraints on alienation. *See, e.g.*, *Kershner v. Hurlburt*, 277 S.W.2d 619, 626 (Mo. 1955) ("It does not appear that there was any relation between the restraint imposed and the accomplishment of any purpose other than the prevention of a sale."); *Urquhart v. Teller*, 1998 MT 119, ¶ 18, 288 Mont. 497, 504, 958 P.2d 714, 718 ("If, from the circumstances, it appears that the particular restraint, or the price set thereby, is primarily for the purpose of restraining the alienability of the property, it will weigh heavily against the validity of the restraint.") (cited by *Laska II*, 2018 S.D. 6, ¶¶ 24-25, 907 N.W.2d at 54); *Tombari v. Blankenship-Dixon Co.*, 574 P.2d 401, 404 (Wash. Ct. App. 1978) ("The only apparent purpose of the preemptive right is to restrain alienation.").

Second, the nature, extent, and duration of the restraint—providing Jerome the lifetime right to take the entire Property in fee simple if Dennis wishes to convey any

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ROFRs. (J. Powers Depo. Tr. 157:22-158:15 (SR 512).) A party resisting summary judgment "cannot claim the benefit of a version of the facts more favorable to his contentions that he himself has given in his own sworn deposition testimony." *Waddell v. Dewey Cty. Bank*, 471 N.W.2d 591, 595 n.3 (S.D. 1991).

[8] Jerome also alluded to a purported purpose of "protecting" Dennis from being taken advantage of and losing the property. (*See* Jerome's Opp'n to PWP's SUMF ¶ 6 (Jerome's App. D-4).) Ironically, Jerome is now attempting to use the ROFRs not to "protect" Dennis, but to harm Dennis by attempting to undo the granting of a partial interest that Dennis and April desired to make, and take the Property away from them at a fraction of the Property's fair market value.

interest in any portion of the Property to any third party—is frankly absurd. If the ROFRs apply in this manner, then Dennis could not even have brought his own wife into title without risking the loss of the Property. Further, Dennis (and April) would be prohibited from making productive use of the land in myriad ways. For example, they would be prohibited from leasing any part of the land out for farming purpose or hunting (or any other purposes), obtaining financing, or building a home, barn, or other improvement that would require granting any rights to a third party necessary to make the property functional, such as an easement to the electric utility, rural water system, or the telecommunications company.

Although Dennis and April would *not* be divesting themselves of the Property and instead would be making productive use of it, they would nevertheless risk losing the entirety of their Property to Jerome. As Jerome explained at his deposition, in his view, the use and conveyance of any interest in the Property is subject to his complete, subjective control. (PWP's SUMF ¶ 45 (PWP App. 9-10).) Again, under the terms of the ROFRs, this control extends for the duration of Jerome's lifetime, which means that the Property would be effectively handcuffed to Jerome's whims (and past, present, and apparently likely future animus toward Dennis) for decades.

Third, the option price set by the ROFRs for Jerome's purchase of the Property is fixed at $420 per acre. That price was well below the market value of the Property even when the ROFRs were executed and pales in comparison to the Property's fair market value today. (PWP's SUMF ¶¶ 17, 19 (PWP App. 4).) Jerome further acknowledged that property values foreseeably increased from the time that the Property was purchased. (*Id.* at ¶¶ 18-19; *see also* J. Powers Dep. Tr. pp. 88:13-18 and 88:24-98:7 (noting (in

2019) that land adjacent to the Property sold for $2,300 per acre of crop land and pastureland sold for $1,500 per acre) (SR 494-95).) Thus, under Jerome's view of the ROFRs, he would be able to purchase the Property at less than 20% of its market value, at a loss of value to Dennis (and April) of more than $1,100,000.[9]

Several courts have explained how fixed-priced ROFRs impose a serious restraint on alienation. *See, e.g.*, *Trecker v. Langel*, 298 N.W.2d 289, 292 (Iowa 1980) ("If the pre-emptive right requires that the property be offered at much less than its value at the time of proposed sale, there is an obvious check upon alienation, since the owner will retain the property rather than sell it at a great sacrifice.") (cited generally by *Laska II*); *see also Low v. Spellman*, 629 A.2d 57, 59 (Me. 1993) (same) (citing *American Law of Property* § 26.66, at 508); *Iglehart v. Phillips*, 383 So.2d 610, 615 (Fla. 1980) ("An option for a fixed price clearly discourages any improvements of the land by the existing property owner because he could never recover the value of the improvements should the optionee exercise the option."). While this Court has noted that the fixed-price nature of a right of first refusal does not invalidate it *per se*, *see Laska II*, 2018 S.D. 6, ¶ 26, 907 N.W.2d at 55, as the circuit court noted, the below-market fixed price of the ROFRs merely piles on to other more egregious aspects. (*See, e.g.*, Circuit Court Memo. n.4 (SR 773).)

Ultimately, the basic standard against which the reasonableness of a restraint is to be measured is the property owner's freedom to transfer property at his or her

[9] ROFRs' formula: $420 per acre times 630 acres = $264,600. Market formula (based on Jerome's testimony): ($2,300 per acre times 530 acres (cropland)) + ($1,500 per acre times 100 acres (non-cropland)) = $1,369,000. ROFRs' value as % of market value = $264,600/$1,369,000 = 19.33%. Net loss to Dennis and April: $264,600 (ROFR price) - $1,369,000 (market value) = ($1,104,400).

convenience at a price determined by the market. *Laska II*, 2018 S.D. 6, ¶ 24, 907 N.W.2d at 54. Against that measure, Dennis (and April) have no freedom to convey *any interest* in the Property, because if they try to do so, they are subject to Jerome's ROFR rights, exercisable upon Jerome's caprice. The practical restraint on alienation of the Property—and in this particular case, even the improvement or granting of partial interests to make productive use of the Property—is essentially absolute. Either Dennis lets Jerome control the use of the Property or Dennis (and April) risk a forced sale to Jerome in which Dennis (and April) lose, and Jerome gains, more than $1,000,000 in value. No reasonable actor would convey property under these circumstances and, consequently, the ROFRs are void from inception. *See Laska II*.[10]

C. The Circuit Court Properly Granted Summary Judgment Invalidating the ROFRs; There Are No Genuine Disputes of Material Facts; the ROFRs Are Manifestly Unreasonable by Their Basic Nature.

When it is clear that a right of first refusal imposes an unreasonable restraint on the alienation of property, the right of first refusal may be appropriately voided through a motion for summary judgment as a matter of law. *See, e.g, Urquhart*, 1998 MT 119, at ¶¶ 17, 25 ("The District Court . . . granted summary judgment to vendor as to the right of first refusal. . . . We determine that the right of first refusal is an unreasonable restraint on alienation. The District Court correctly concluded that, under [the Montana statute

[10] Under similar circumstances, courts have consistently voided fixed-price ROFRs as unreasonable. *See, e.g.*, *Tombari*, 574 P.2d at 404 ("In the present case, the market value of the land has increased from $1,000 per acre, the fixed price, to $3,000 per acre. . . ."); *Gray v. Vandver*, 623 S.W.2d 172, 174 (Tex. App. 1981) ("So, it is entirely possible, even likely, that when this grantee, his heirs, executors and administrators should decide to sell this property, $175 would be of such inadequate value as to completely (foreclose) alienation."); *Urquhart*, 1998 MT 119, at ¶ 21 ("Enforcing the right of first refusal at this point would simply restrain [the owner] from transferring the property or give the [ROFR holder] the bargain purchase of the century.").

identical to SDCL § 43-3-5], the right is repugnant to [vendor's] interest and therefore void.") (cited by *Laska II*, and Jerome's Brief); *Trecker*, 298 N.W.2d at 293 (upholding summary judgment) (cited by *Laska II*).

Based on the manifestly unreasonable facts of the ROFRs summarized above, the circuit court found that, if the ROFRs operated as Jerome contended to support his claims, they were void as a matter of law. Under SDCL § 43-3-5 and *Laska II*, that conclusion is unremarkable, well-supported, and unavoidable.

Jerome's tepid argument is telling. He largely fails to engage with the required analysis and does not attempt to address or refute any of the grossly unreasonable aspects of the ROFRs noted by the circuit court in its decision. (*See* Jerome's Br. 22-23.) Jerome also cannot generally explain to this Court how the ROFRs are reasonable if they operate as he contends, so he does not even really try. (*Id*.) Instead, Jerome summarily notes that the ROFRs "only" last for Jerome's entire lifetime, were imposed in a familial relationship, and have a "clearly identified" extent. (*Id.* at 22.)

Jerome's brief discussion of *Laska II* is misleading. *Laska II* did not in any way hold that a ROFR is reasonable if it has a limited duration, much less an indefinite and speculative limitation that could extend a half century or more into the future. *Laska II* also did not hold that the particular ROFR in that case would have been reasonable if it had a limit on duration. Rather, the Court noted in *Laska II* that, *even if* the ROFR at issue was re-written to impose a limit on duration (as requested by the ROFR holder based on the lifetimes of individuals involved), it remained "repugnant to the interest created," and was still properly voided by the circuit court. 2018 S.D. 6, ¶ 32, 907 N.W.2d at 56.

Laska II provides an example of a circuit court properly voiding an unreasonable ROFR. The ROFRs here are no more valid. The fact that the circuit court decision in *Laska II* did not come to the Court in the procedural posture of summary judgment, does not in any way indicate that a ROFR cannot properly be invalidated by summary judgment as a matter of law under SDCL § 43-3-5 in the appropriate case, and there is no more appropriate case than here.

Rather than attempting to explain how the ROFRs are reasonable, Jerome runs to the "genuine dispute of material fact" standard to attempt to undo summary judgment. But while Jerome blankly states that there are "genuine issues of material facts" that purportedly render the circuit court's decision erroneous, Jerome does not, in any meaningful way, actually dispute any of the facts recited above or referenced by the circuit court in its decision, much less demonstrate a genuine issue of any material fact that would foreclose summary judgment. That approach was not enough to survive summary judgment below nor should it be enough here. *See also U.S. Bank Nat'l Ass'n v. Scott*, 2003 SD 149, ¶ 24, 673 N.W.2d 646, 653 (conclusory allegations and denials that do not set forth specific facts do not prevent issuance of a judgment). In fact, Jerome does not cite one purported "fact" from the record in this Section of his Brief. (*See* Jerome's Br. 22-23.)[11]

[11] This section of Jerome's Brief does contain a general citation to Jerome's Opposition to PWP's Statement of Undisputed Material Facts before the circuit court. (*See* Jerome's Br. 23.) However, Jerome does not cite to any one of these purported scattered facts (or the actual portion of the record in which it is contained) as supporting his argument or go further to explain how they purportedly create a factual dispute that rises to the level that would prevent summary judgment. *See* SDCL § 15-26A-64; *Harms v. Northland Ford Dealers*, 1999 S.D. 143, ¶ 27, 602 N.W.2d 58, 64.

While no material facts are disputed, whether the ROFRs at issue are unreasonable restraints on alienation does not depend on resolution or determination of discrete facts. Rather, the legal conclusion that the ROFRs are void as unreasonable restraints on alienation stems directly as a matter of law from the terms of the ROFRs and the fundamental manner in which Jerome claims they operate, both in his testimony (PWP's SUMF ¶ 81 (PWP App. 20)), and now in his argument on appeal. (Jerome's Br. p. 21 ("[A]ny such (proposed by Dennis to third party) sale, *transfer or conveyance of <u>any</u> interest* in said properties" triggers the ROFRs).)

The only facts necessary to evaluate the ROFRs are basic and undisputed. A trial of factual issues is not necessary, warranted, or prudent, as it cannot alter the unavoidable legal conclusion that these ROFRs are unreasonable restraints on alienation that are void under SDCL § 43-3-5 and *Laska II*.

D. Jerome's Final Argument Reinforces the Circuit Court's Alternative Decision.

Jerome's final argument is that the ROFRs should be interpreted to "avoid violating public policy," and relying on this Court's discussion in *Laska II* about whether to narrow the scope of the restraints in order to make them acceptable, contends that the "ROFRs in the case at bar should have similarly been interpreted so as to avoid being found as somehow violating public policy." (Jerome's Br. 23.) However, that is perfectly consistent with the circuit court's determination that the ROFRs, when read as a whole, contemplated only fee simple sales. *Jerome* is the party advocating for an interpretation of the ROFRs that gives them an effect that is repugnant to public policy. Convincing a court to accept and enforce that interpretation is the only way that Jerome can prevail in his opposition to the Project and his son's decision to participate in it, take

the entirety of his son and daughter-in-law's 633 acres for a fraction of their market value, and come into tremendous windfall himself. South Dakota law does not suffer that outcome; SDCL § 43-3-5 exists, and the circuit court properly applied it.

IV. THIS COURT COULD AFFIRM THE DECISION UNDER THE STATUTE OF LIMITATIONS.

A. Legal Standard.

"If there exists any basis which supports the ruling of the trial court, affirmance of a summary judgment is proper." *Patterson*, 2021 S.D. 25, ¶ 11, 959 N.W.2d at 59. "It is a well entrenched rule of this Court that, where a judgment is correct, it will not be reversed even though it is based on erroneous conclusions or wrong reasons." *Wolff v. Sec'y of S. Dakota Game, Fish & Parks Dep't*, 1996 S.D. 23, ¶ 32, 544 N.W.2d 531, 537.

At the circuit court, the parties fully briefed and argued the statute of limitations, but the circuit court did not reach that defense in its decision. On appeal, PWP asserts that this Court, if it determines that the ROFRs apply and are not void as a matter of law, should nevertheless affirm because the statute of limitations bars Jerome's claims.[12]

[12] PWP reserves the right to pursue its affirmative defenses of waiver and laches, as well as others, in the event the case is remanded to the circuit court, though it need and should not be.

B. The Statute of Limitations Bars Jerome's Claims.

1. The Statute of Limitations for a Breach of the ROFRs Is Six Years.

The statute of limitations for a breach of contract claim is six years. SDCL § 15-2-13(1). "Deciding what constitutes accrual of a cause of action . . . entailing statutory construction, presents an issue of law." *Strassburg v. Citizens State Bank*, 1998 S.D. 72, ¶ 10, 581 N.W.2d 510, 513. A cause of action accrues when a party has actual notice of the cause of action or is charged with notice. *Id.*; SDCL § 17-1-1 ("Notice is either actual or constructive."). "Actual notice consists in express information of a fact." SDCL § 17-1-2. "Constructive notice is notice imputed by the law to a person not having actual notice," SDCL § 17-1-3, and "[e]very person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and who omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself." SDCL § 17-1-4.

> In response to a summary judgment motion where the defendant asserts the statute of limitations as a bar to the action and presumptively establishes the defense by showing the case was brought beyond the statutory period, the burden then shifts to the plaintiff to establish the existence of material facts in avoidance of the statute of limitations. . . .

Healy v. Osborne, 2019 S.D. 56, ¶ 19, 934 N.W.2d 557, 562-63 (quoting *Strassburg*, 1998 S.D. 72, ¶ 13, 581 N.W.2d at 513).

The statute of limitations begins to run on a breach of a ROFR claim when a ROFR holder has actual or constructive knowledge of a breach, such as the failure to give required notice of a contemplated transaction. *See Hempel v. Creek House Trust*, 743 N.W.2d 305, 310 (Minn. Ct. App. 2007) ("A right of first refusal is breached when the

required notice is not given because that is when appellants' claim would survive a motion to dismiss.").

2. The Statute of Limitations Expired Before Jerome Commenced this Action.

From the outset of this case, Jerome has asserted that Dennis has breached the ROFRs repeatedly from March 31, 2005, forward, by failing to provide Jerome with written notice of Dennis's intent to transfer any interests in the Property. (PWP's SUMF ¶ 80 (PWP App. 20).) Jerome's position is self-defeating, because if he is right, then the statute of limitations is an insurmountable bar. The undisputed material facts demonstrated that Dennis did, in fact, enter into many transactions without giving Jerome the notice Jerome claims he was entitled to receive. There is also no dispute that Jerome had actual and/or constructive knowledge of several of those transactions that took place more than six years before Jerome commenced this action. As a result, the statute of limitations would, if this Court reaches the issue, bar Jerome's claims.

a) Dennis Entered into Transactions with Third Parties Without Giving Jerome Notice Under the ROFRs.

Dennis entered into a substantial number of transactions from March 31, 2005, through Jerome's commencement of this action in June 2019. Many of Dennis's grants/conveyances/sales of "any interest" in the Property happened more than six years before Jerome started this action, including: hunting rights to Jerome starting in 2005 forward;[13] easement rights for water service in 2006;[14] agricultural leases from 2010

[13] (PWP's SUMF ¶¶ 47.A., 47.D.-G., 47.I., 47.K., 47.M., 47.R., 47.V., 47.X., 47.BB., 47.GG., 47.JJ (PWP App. 10-14).)

[14] (*Id.* at ¶ 47.B (PWP App. 10).)

through 2013;[15] joint tenancy with right of survivorship to April in 2012;[16] and mortgages to a bank in 2013.[17] It is undisputed that Dennis did not give Jerome written notice of his intent to enter into any of these transactions.

b) Jerome Knew About the Transactions and Dennis's Failure to Give Written Notice Under the ROFRs.

Jerome's Verified Complaint asserted that Dennis has, since March 31, 2005, breached the ROFRs by failing to "ever provide [Jerome] written notice of his intention to either sell, transfer or convey any interest or interests in the [Property]. . . ." (PWP's SUMF ¶ 80 (PWP App. 20).) Jerome is correct inasmuch as Dennis entered into numerous transactions without giving Jerome written notice of those transactions. Many of those transactions took place more than six years before Jerome brought this action. (*See id.* at ¶¶ 47.A-.R (PWP App. 10-12).) Of those transactions, there is no dispute that Jerome had actual knowledge of transactions to himself (PWP's SUMF ¶¶ 47.A, .D, .E, .F, .G, .I, .K, .M, and .R (PWP App. 10-12)) and agricultural leases to others in 2010, 2011, 2012, and 2013. (*Id.* at ¶¶ 47.H, .J, .L, and .O (PWP App. 11-12).)[18] As a result, if the ROFRs are interpreted as Jerome argues they should be, then Jerome's claims are still

[15] (*Id.* at ¶¶ 47.H, 47.J, 47.L, 47.O (PWP App. 11-12).)

[16] (*Id.* at ¶ 47.N (PWP App. 11).)

[17] (*Id.* at ¶¶ 47.P, 47.Q (PWP App. 12).)

[18] Jerome did dispute his actual or constructive knowledge as to some other transfers relevant to the statute of limitations defense. Specifically, Jerome asserted in an affidavit that he was unaware of certain specific transfers, despite his own sworn deposition testimony to the contrary. Setting aside the fact that Jerome's testimony controls, *Waddell*, 471 N.W.2d at 595 n.3, his assertions relate to only a few of the transfers. (*Compare* PWP's SUMF ¶ 47 (PWP App. 10-12) *with* Jerome's Opp'n to PWP's SUMF ¶ 6 (Jerome's App. D-4).) Therefore, there is no genuine issue of material fact that precludes summary judgment because Jerome had knowledge of at least one of the alleged breaches more than six years before commencing this action.

barred because he knew that Dennis had breached the ROFRs more than six years before Jerome commenced the action.

V. JEROME'S SCATTERED PROCEDURAL ARGUMENT IS A NON-STARTER.

Jerome scatters a relatively undeveloped procedural argument in the legal standard section, as well as a footnote in his Brief. (*See* Jerome's Br. 13-14; *id.* at 23, n. 9.) Jerome seems to imply that the circuit court somehow could not grant summary judgment dismissing his breach of contract claim, because Dennis Powers did not submit a separate statement of facts. The Court should not address this argument, because it is not properly presented and developed. *See* SDCL §§ 15-26A-60(4), (6) (requiring express designation and argument regarding legal issues on appeal). Regardless, this argument is a non-starter.

Any party can move for summary judgment on another party's claims, and a court can grant that party's motion if properly supported.[19] *See* SDCL § 15-6-56(c). The Court granted *PWP's Motion*, in which Dennis joined. Jerome had a full opportunity to respond (and, in fact, did so), and he does not (and cannot) contend otherwise.[20]

Jerome's sole reliance on *Discover Bank v. Stanley*, 2008 S.D. 111, 757 N.W.2d 756, for his argument is misplaced. In *Discover*, the moving party (the only party adverse to the non-moving party), failed entirely to submit the undisputed statement of

[19] Jerome specifically sought relief against PWP in connection with the breach of contract claim. (Verified Cplt. ¶ 18 (SR 7) (seeking to have the property transferred by specific performance "unencumbered by" the Wind Easements).)

[20] Two affidavits with exhibits—of Dennis Powers and of Patrick D.J. Mahlberg—were served upon Jerome's counsel on October 9, 2019, but were not successfully uploaded into the Odyssey system until later. (SR 468.) At the close of oral argument, the parties declined the circuit court's invitation to submit post-hearing briefing. (SR 871.)

facts required by SDCL § 15-6-56(c). This failure "prevented [the non-moving] party from knowing exactly what facts [the moving party] planned on using to support its motion until the day of the hearing." 2008 S.D. 111, ¶ 25, 757 N.W.2d at 764.

By stark contrast here, PWP was the moving party and submitted its Statement of Undisputed Material Facts with its motion in accordance with SDCL § 15-6-56(c). Jerome had ample notice of the precise and detailed facts on which PWP based its motion and was able to file a detailed responsive affidavit as well as an opposition to PWP's Statement of Undisputed Material Facts. Moreover, Dennis's joinder (or not) in PWP's Motion was, as a practical matter, largely immaterial—whether Dennis joined or not, the circuit court determined that the ROFRs are either not a basis for a valid claim or, alternatively, are invalid themselves. None of Jerome's claims survive that determination. Put differently, all of Jerome's claims—no matter how they are cast or who they are against—fall with the ROFRs. Jerome's attempts to manufacture some technicality that would warrant reversal of summary judgment because Dennis did not file a separate statement of facts in connection with PWP's motion is both baseless and pointless.

CONCLUSION

Either the ROFRs at issue are interpreted as a whole to operate reasonably, in which case they were not triggered, or the ROFRs operate as Jerome contends for the purposes of this litigation, and they are void as unreasonable restraints on alienation in violation of SDCL § 43-3-5 consistent with *Laska II*. Either way, South Dakota law firmly forecloses the relief that Jerome seeks. The circuit court's decision on summary judgment dismissing Jerome's claims on alternative bases is well-founded, and should be

upheld. PWP also respectfully submits that the Court can and should uphold the circuit court's decision because Jerome's claims are barred by the statute of limitations as well.

Dated: July 2, 2021

By: */s/* Patrick D.J. Mahlberg

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-25A-66, the undersigned, one of the attorneys for the Appellee Prevailing Wind Park, LLC, hereby certifies that this Brief, not including the Table of Contents, Table of Cases, Jurisdictional Statement, Statement of Legal Issues, the Appendix, the Certificates, and the signature blocks is 33 pages in length. It was typed in proportionally spaced twelve (12) point Times New Roman print style. The left-hand margin is 1.5 inches, the right-hand margin is 1.0 inches. Relying upon the word count of the word-processing system used to prepare this brief, there are 9,339 words (including footnotes) in the brief.

Dated: July 2, 2021

By: /s/ Patrick D.J. Mahlberg

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for the Appellee Prevailing Wind Park, LLC, hereby certifies that on the 2nd day of July, 2021, a true and correct copy of the Brief and Appendix of Appellee Prevailing Wind Park, LLC was timely e-mailed to: the South Dakota Supreme Court at: SCClerkBriefs@ujs.state.sd.us; Appellant Jerome Powers at: rst.tlo@midconetwork.com; and Appellee Dennis Powers at: jblaw@iw.net. In addition, one original and two (2) copies were sent by U.S. Mail to the South Dakota Supreme Court, 500 East Capitol Ave., Pierre, South Dakota, 57501. Two copies were also sent by U.S. Mail to counsel for Appellant Jerome Powers and Appellee Dennis Powers, respectively, as follows:

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APPENDIX

APPENDIX

STATE OF SOUTH DAKOTA	IN CIRCUIT COURT
COUNTY OF CHARLES MIX	FIRST JUDICIAL CIRCUIT

Jerome Powers, Plaintiff, vs. Dennis Powers, Defendant, -and- Prevailing Winds, LLC, and Prevailing Wind Park, LLC, Defendants.	Case No. 11CIV19-000029 **DEFENDANT PREVAILING WIND PARK, LLC'S STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

Defendant, Prevailing Wind Park, LLC ("PWP"), respectfully submits this statement of undisputed material facts in support of PWP's Motion for Summary Judgment. The Affidavits and Exhibits thereto referenced herein are attached to the Affidavit of Dennis Powers, the Affidavit of Meghan Semiao, or the Affidavit of Patrick Mahlberg filed herewith.

THE PARTIES

Jerome Powers

1. Jerome lives in Wagner, right next to the "Property" described below. (J. Powers Dep. Tr. 5:6-7 (Mahlberg Aff. Ex. 1).)[1]

2. Jerome is in his mid-to-late fifties. (J. Powers Dep. Tr. 222:4-5 (Mahlberg Aff. Ex. 1).)

[1] The cited portions of the transcripts of the respective depositions of Jerome Powers and Dennis Powers are attached as Exhibits 1 and 2 to the Affidavit of Patrick D.J. Mahlberg ("Mahlberg Aff.") filed herewith.

3. He was a farmer until about 2005. (J. Powers Dep. Tr. 7:5-14 (Mahlberg Aff. Ex. 1).)

4. For about the last ten years, Jerome has been self-employed running a guided hunting business. (J. Powers Dep. Tr. 10:11-16 (Mahlberg Aff. Ex. 1).)

5. As set out below, the events giving rise to this dispute began in late 2004, when Jerome was indicted on felony drug charges in connection with his possession and use of crystal meth. (J. Powers Dep. Tr. 58:3-64:23 (Mahlberg Aff. Ex. 1).) Jerome pled guilty to a Class 4 felony on December 22, 2004. (*Id.* at 65:18-66:15.) In 2005, Jerome was sentenced to serve ten years in prison. (*Id.* at 224:9-18.) He served a total of six months of that sentence. (*Id.*)

Dennis Powers

6. Dennis is Jerome's son, and married to April Powers. (Verified Cplt. ¶ 2.)

7. Dennis and April live in Avon with their three children. (D. Powers Dep. Tr. 6:11-24 (Mahlberg Aff. Ex. 2).) Dennis is in his mid-to-late thirties. (*Id.* at 6:4-6.)

8. Dennis is a farmer; he and his wife also run a sanitation business and a portable toilet rental business. (D. Powers Dep. Tr. 18:9-21:6 (Mahlberg Aff. Ex. 2).)

Prevailing Wind Park, LLC

9. PWP is a South Dakota limited liability company. (Affidavit of Meghan Semiao ("Semiao Aff.") filed herewith, ¶ 2.) PWP is a wholly-owned subsidiary of sPower, a renewable energy company. (*Id.*)

THE PROJECT

10. PWP developed and permitted through the South Dakota Public Utilities Commission ("SDPUC"), and certain local government units, a wind project known as

Prevailing Wind Park (the "Project") in Bon Homme, Charles Mix, and Hutchinson Counties. (Semiao Aff., ¶ 3.)

THE PROPERTY AT ISSUE

11. The property at issue in this litigation (the "Property") consists of a total of approximately 630 acres of land in Bon Homme County and in Charles Mix County, South Dakota. (J. Powers Dep. Tr. 39:24-40:2 (Mahlberg Aff. Ex. 1).)

HISTORY OF OWNERSHIP OF THE PROPERTY

Jerome and Dennis Purchased the Property From Clifford and Carol Powers

12. Clifford and Carol Powers ("Clifford" and "Carol"), now deceased, were Jerome's parents and Dennis's grandparents, respectively. They owned the Property until the early 2000s. (J. Powers Dep. Tr. 44:23-45:4 (Mahlberg Aff. Ex. 1).)

13. In April 2003, Clifford and Carol sold the Property (and their cattle and farm equipment) on a Contract for Deed to Dennis and Jerome. (J. Powers Dep. Tr. Ex. 3 (Contract for Deed) and Ex. 4 (Amended Contract for Deed) (correcting legal descriptions) (Mahlberg Aff. Ex. 1)); Affidavit of Dennis Powers ("D. Powers Aff.") filed herewith, ¶ 2.)

14. The Property consists of properties in separate counties. As a result, there are separate real estate documents for the property in each county; however, they are identical other than the legal descriptions. (*See* J. Powers Dep. Tr. 74:18-75:3 (Mahlberg Aff. Ex. 1).)

15. At that time, about 300 acres of the Property were pasturelands, about 300 acres were tillable cropland, and the remaining approximately 30 acres was comprised of the homestead, creeks, and otherwise non-farmable land. (J. Powers Depo. Tr. at 39:24-42:11 (Mahlberg Aff. Ex. 1).)

16. Dennis and Jerome agreed to pay $199,000 for the Property. (J. Powers Depo. Tr. at Ex. 3, p. 2; *id.* at 50:14-51:1 (Mahlberg Aff. Ex. 1).)

17. The purchase price worked out to about $314 per acre, which was less than half of the fair market value of the Property. (J. Powers Depo. Tr. 53:19-22, 55:1-3 (Mahlberg Aff. Ex. 1).)

18. After Dennis purchased the Property, he converted 230 acres into more valuable cropland, with no help from Jerome. (J. Powers Dep. Tr. 77:11-78:14 (Mahlberg Aff. Ex. 1.)

19. The value of the Property has foreseeably increased from the time ownership was consolidated in Dennis. J. Powers Dep. Tr. 109:2-4 (Mahlberg Aff. Ex. 1); D. Powers Aff. ¶ 9.)

Jerome Ran Into Legal Trouble, Leading Him to Sell His Interest in the Property to Dennis

20. In December 2004, Jerome went to a party, smoked meth, and was arrested. (J. Powers Dep. Tr. 58:21-61:13 (Mahlberg Aff. Ex. 1).)

21. He was charged with two felonies and a misdemeanor. (J. Powers Dep. Tr. 64:1-23 and Ex. 5 (criminal case file information) (Mahlberg Aff. Ex. 1).)

22. On December 22, 2004, Jerome pled guilty to the charge of possession of a controlled substance, a class 4 felony; in exchange, the other felony charge and the misdemeanor charges were dismissed. (J. Powers Dep. Tr. 64:24-65:21 (Mahlberg Aff. Ex. 1).)

23. Jerome knew he may be going to prison for a number of years. (J. Powers Dep. Tr. 68:25-69:3 (Mahlberg Aff. Ex. 1).)

THE TRANSACTION BETWEEN JEROME AND DENNIS

24. With his future uncertain, Jerome did not want to saddle his wife with debt while he was gone and decided to try to sell his ownership interest in the land to someone in the family. (J. Powers Dep. Tr. 71:16-20; 98:21-25 (Mahlberg Aff. Ex. 1).)

25. Jerome's siblings turned down the opportunity. (J. Powers Dep. Tr. 99:1-7 (Mahlberg Aff. Ex. 1).)

26. Jerome approached Dennis with the opportunity, Dennis was interested, and Jerome ultimately decided to sell his interest in the Property to Dennis. (J. Powers Dep. Tr. 70:6-9, 71:4-20 (Mahlberg Aff. Ex. 1); D. Powers Aff. ¶¶ 3-6.)

27. Jerome and Dennis went to then-lawyer, now-Judge Bruce Anderson's office to have the deal drawn up in the spring of 2005. (J. Powers Dep. Tr. 75:4-8 (Mahlberg Aff. Ex. 1).)

28. Dennis obtained a loan from a local bank to finance the purchase. (D. Powers Aff. ¶ 6.)

29. To complete the deal, Jerome gave Dennis a Quit Claim Deed for his interest in the Property, assigned Dennis his interest in the Contract for Deed, and Dennis paid Jerome an amount equal to the payments Jerome had made toward the Contract for Deed and the personal property. (J. Powers Dep. Tr. 73:2-21, Ex. 6 (Assignment of Contract for Deed), and Ex. 7 (Quit Claim Deed) (Mahlberg Aff. Ex. 1); *see* D. Powers Aff. ¶ 6.)

The First Right of Refusal Agreements

Jerome's Intent at the Time of the Transaction

30. Jerome had the idea of imposing a first right of refusal agreement on the Property in order to (a) protect Dennis, who was only 22 at the time, from somehow losing the Property and (b) keep ownership in the family if Dennis later decided to outright sell the Property. (J. Powers Dep. Tr. 100:5-11, 101:14-103:22, 107:7-108:22 (Mahlberg Aff. Ex. 1).)

31. For example, Jerome testified as follows:

> Q. You intended to limit Dennis's ability to outright sell the property to a third party before you had the opportunity to buy it back at $420 per acre, correct?

A. Correct. . . .

(J. Powers Dep. Tr. 158:25-159:3 (Mahlberg Aff. Ex. 1).)

32. Dennis confirmed that the intent was to prevent Dennis from an outright sale of the Property: "So my understanding of the first -- the right of first refusal was so that I could not go and sell off this property for a huge profit, because it was sold to us rather cheap." (Dennis Depo. Tr. 74:21-75:6 (Mahlberg Aff. Ex. 2).)

33. Jerome did not intend that the first right of refusal agreements could be triggered by Dennis conveying any interest in the Property, no matter how small, at the time the agreements were executed:

> Q: Did you intend at the time you entered into this Right of First Refusal Agreement with Dennis Powers that Dennis Powers could not convey any interest in any part of the property, no matter how small, a part of the property, without giving you the option to purchase of the entirety of the property at $420 per acre? Yes or no.
>
> [Mr. Tornow: Objection to the form of the question insofar as it calls for a legal conclusion.]
>
> A: No.

(J. Powers Dep. Tr. 169:19-170:3 (Mahlberg Aff. Ex. 1).)

34. Jerome also did not intend for the leasing of the Property by Dennis to trigger the agreements:

> Q: . . . So did you intend at the time that you entered into the First Right of Refusal agreement that if Dennis told you he was going to lease the property to a third party, that you would have the ability to respond by saying, "I'm exercising my rights to purchase all of your property for $420 per acre"?
>
> A: No.

(J. Powers Dep. Tr. 160:3-9 (Mahlberg Ex. 1).)

35. At the time the agreements were executed, Jerome also did not have in mind any intent with regard to a distinction between agricultural and non-agricultural uses of the Property, or any intent about a wind farm. (J. Powers Dep. Tr. 170:8-13 (Mahlberg Ex. 1).)

36. Jerome testified that he does not know what he intended with respect to easements. (Jerome Depo. Tr. 157:22-158:15 (Mahlberg Ex. 1).)

The Terms of the Agreement

37. Mr. Anderson drafted a "First Right of Refusal Agreement" for each part of the Property—one for Charles Mix County and one for Bon Homme County. (J. Powers Dep. Tr. 104:20-105:3, Ex. 10 (Charles Mix County), and Ex. 11 (Bon Homme County).)

38. The agreements are identical other than the legal descriptions. (*Compare* J. Powers Dep. Tr. Ex. 10 *with* Ex. 11 (Mahlberg Aff. Ex. 1); *id.* at 74:18-75:3.)

39. The first right of refusal language in each agreement is as follows:

SECTION TWO
FIRST RIGHT OF REFUSAL

In the event GRANTOR offers the above-described property, or any interest therein, for sale, transfer or conveyance, GRANTOR shall not sell, transfer, or convey the above-described property, nor any interest therein, unless and until he shall have first offered to sell such property or any interest therein, to GRANTEE. If GRANTOR intends to make a bona fide sale of the above-described property, or any interest therein, he shall give to GRANTEE written notice of such intention, which notice shall contain the basic terms and conditions demanded by GRANTOR for the sale of such property.

Within thirty (30) days of receipt of such notice and information, GRANTEE shall either exercise his First Right of Refusal by providing written notice of his acceptance to GRANTOR, or waive his First Right of Refusal by failing to provide GRANTOR with written notification of his acceptance or rejection of the First Right of Refusal within such time.

(J. Powers Dep. Tr. Ex. 10, p. 2; *id.* at Ex. 11, p. 2 (Mahlberg Aff. Ex. 1).)

40. The agreements do not define what "any interest therein" means—whether it be a partial interest (e.g., an easement or a leasehold interest) or a fee interest in all or a part of the

Property. (*See* J. Powers Dep. Tr. Exs. 10 and 11 (Mahlberg Aff. Ex. 1).) But, this portion of each agreement requires Dennis to give Jerome notice and an opportunity to purchase the same property or interest therein—"such property or any interest therein"—that Dennis is offering to someone else. (*Id.*)

41. The agreement's next section, titled "Terms," contemplates a transaction from Dennis to Jerome only "should [Dennis] accept the offer by [Jerome] to purchase the [P]roperty." (*See* J. Powers Dep. Tr. Exs. 10 and 11 (Mahlberg Aff. Ex. 1).)

42. Then, each agreement contemplates a sale at the fixed price of $420 per acre:

SECTION THREE
TERMS

Should GRANTOR accept the offer of GRANTEE to purchase the property, it shall be on the following terms:

1. GRANTEE shall pay GRANTOR the sum of $420.00 per acre, which shall be paid in cash or cash equivalent at closing.
2. GRANTOR shall convey fee title, which title shall be merchantable, as shown by abstract or title insurance.
3. Closing shall take place within thirty (30) days of GRANTOR delivering title insurance or abstracts to the property.
4. GRANTEE shall have possession of the property at closing.

If GRANTEE fails to exercise his First Right of Refusal, GRANTOR may proceed to sell, transfer and convey the property to any other person or entity free from any restrictions of this Agreement.

(J. Powers Dep. Tr. Exs. 10 and 11, pp. 2-3 (Mahlberg Aff. Ex. 1.) This section of the agreement does not contain the "any interest therein" language found in the first right of refusal language; rather, it only provides terms of a sale of the "fee title" of the property. (*Id.*)

43. The remainder of the agreements describe unauthorized transactions, allow for specific performance, and provide that the agreements are "binding upon the parties, their heirs, executors, estates, personal representatives, agents and assigns, however, as to [Jerome], this

Agreement shall expire on his death." (*See* J. Powers Dep. Tr. Exs. 10 and 11 (Mahlberg Aff. Ex. 1).)

Jerome's Current Contentions That Dennis Could Not Convey A Lease Or Easement Interest Without Triggering Dennis's Rights Under the Agreements

44. Jerome's position is that the ROFRs give Jerome the ability to control whether Dennis may grant *any* interest in the Property to any third party, regardless of the scope of that interest, based upon whether Jerome likes the use or not:

> Q: And so your position is that you have the ability to dictate what Dennis does on that property if it involves granting an interest to a third party, correct?
>
> A: Correct.
>
> Q: And in response, if Dennis intends to grant an interest to a third party, the nature of which you disagree with, you can respond by forcing a sale of the entirety of the property to you at $420 per acre; is that right?
>
> A: Correct.

(J. Powers Dep. Tr. 168:19-169:3 (Mahlberg Aff. Ex. 1); *see id.* at 181:19-24 (""Q. Mr. Powers, is it your position that the First Right of Refusal gives you the right to force Dennis to sell to you all 633 acres at a price of $420 if he intends to grant any easement or any lease or any other interest in the property to a third party?" A. Yes."), 189:12-190:12.)

45. According to Jerome, Dennis's choice is either farm the Property himself, or let it go fallow—any attempt to put any part of the property to any other productive use through a third party gives Jerome "control" and the right to buy all of the Property for $420 per acre at his whim:

> Q: Right. You want the ability to control that 633 acres, correct?
>
> A: Correct.

Q: And all that Dennis Powers can do is farm the property himself or, I suppose, let it be fallow, right?

A: Right.

(J. Powers Dep. Tr. 191:19-192:4 (Mahlberg Aff. Ex. 1).)

Dennis's Use of the Property Since 2005

46. Between 2005 and today, Dennis (with no help from Jerome) converted about 230 acres of the Property from pastureland into more valuable tillable cropland. (J. Powers Dep. Tr. 77:11-78:14 (Mahlberg Aff. Ex. 1); D. Powers Aff. ¶ 9.)

47. After Dennis bought out Jerome's interest, and after the ROFRs were put in place, the Property has been subject to several transactions between Dennis and third parties (as well as Jerome) involving a variety of interests in the property—easements, leases, and fee ownership. Those transactions—all of which Jerome had actual and/or constructive knowledge of, but did nothing about—are listed below along with the evidence of Jerome's knowledge:

	Transaction by Dennis	Year	Citation to Jerome's Knowledge of Transaction
A.	Verbal Right to Hunt to Jerome	2005	J. Powers Depo. Tr. 17:10-18 (Mahlberg Aff. Ex. 1)
B.	Easement to B-Y Water District - Bon Homme County property	2006	D. Powers Aff. ¶¶ 7-8, Ex. 1; J. Powers Depo. Tr. 117:10-19, 120:9-25 (Jerome was aware of the pipe being put in at the time, though not specifically aware of an easement grant) (Mahlberg Aff. Ex. 1)
C.	Easement to B-Y Water District - Charles Mix County property	2006	D. Powers Aff. ¶ 7-8, Ex. 2; J. Powers Depo. Tr. 117:10-19, 120:9-25 (Jerome was aware of the pipe being put in at the time, though not specifically aware of an

	Transaction by Dennis	Year	Citation to Jerome's Knowledge of Transaction
			easement grant) (Mahlberg Aff. Ex. 1)
D.	Verbal Right to Hunt to Jerome	2006	J. Powers Depo. Tr. 17:10-18 (Mahlberg Aff. Ex. 1)
E.	Verbal Right to Hunt to Jerome	2007	J. Powers Depo. Tr. 17:10-18 (Mahlberg Aff. Ex. 1)
F.	Verbal Right to Hunt to Jerome	2008	J. Powers Depo. Tr. 17:10-18 (Mahlberg Aff. Ex. 1)
G.	Verbal Right to Hunt to Jerome	2009	J. Powers Depo. Tr. 17:10-18 (Mahlberg Aff. Ex. 1)
H.	Verbal farming lease of all of Property to Jim and Marlene Wittmeier	2010	D. Powers Aff. ¶¶ 9-10 (Mahlberg Aff. Ex. 1)
I.	Verbal Right to Hunt to Jerome	2010	J. Powers Depo. Tr. 17:10-18 (Mahlberg Aff. Ex. 1)
J.	Verbal farming lease of all of Property to Wittmeiers	2011	D. Powers Aff. ¶ 11; J. Powers Depo. Tr. 182:12-14 (Mahlberg Aff. Ex. 1)
K.	Verbal Right to Hunt to Jerome	2011	J. Powers Depo. Tr. 17:10-18 (Mahlberg Aff. Ex. 1)
L.	Written farming lease of all of Property to Wittmeiers	2012	D. Powers Aff. ¶ 12, Ex. 8; J. Powers Depo. Tr. 182:21-183:3 (Mahlberg Aff. Ex. 1)
M.	Verbal Right to Hunt to Jerome	2012	J. Powers Depo. Tr. 17:10-18 (Mahlberg Aff. Ex. 1)
N.	Dennis deeded April a joint tenancy with right of survivorship interest in the Property by Warranty Deed	2012	D. Powers Aff. ¶ 19, Ex. 6; J. Powers Depo. Tr. 119:9-24 (Jerome stating that he does not recall discussing April's interest in the property with Dennis, but that he would have no basis to disagree if Dennis said that they had discussed it) (Mahlberg Aff. Ex. 1)

	Transaction by Dennis	Year	Citation to Jerome's Knowledge of Transaction
O.	Written farming lease of all of Property to Wittmeiers	2013	D. Powers Aff. ¶¶ 12-13, Ex. 3; J. Powers Depo. Tr. 152:7-10, 183:4-7 (Mahlberg Aff. Ex. 1)
P.	Mortgaged Property in favor of Commercial State Bank	2013	D. Powers Aff. ¶ 20; J. Powers Depo. Tr. 116:1-8 (Dennis told Jerome he put mortgages on the property sometime in 2017 or prior) (Mahlberg Aff. Ex. 1)
Q.	Mortgaged Property again in favor of Commercial State Bank	2013	D. Powers Aff. ¶ 20; J. Powers Depo. Tr. 116:1-8 (Dennis told Jerome he put mortgages on the property sometime in 2017 or prior) (Mahlberg Aff. Ex. 1)
R.	Verbal Right to Hunt to Jerome	2013	J. Powers Depo. Tr. 17:10-18 (Mahlberg Aff. Ex. 1)
S.	Mortgaged Property again in favor of Commercial State Bank	2013	D. Powers Aff. ¶ 20
T.	Written farming lease of all of Property to Wittmeiers	2014	D. Powers Aff. ¶¶ 12-13, Ex. 3; J. Powers Depo. Tr. 152:7-10, 183:4-7 (Mahlberg Aff. Ex. 1)
U.	Mortgaged Property again in favor of Commercial State Bank	2014	D. Powers Aff. ¶ 20; J. Powers Depo. Tr. 116:1-8 (Dennis told Jerome he put mortgages on the property sometime in 2017 or prior) (Mahlberg Aff. Ex. 1)
V.	Verbal Right to Hunt to Jerome	2014	J. Powers Depo. Tr. 17:10-18 (Mahlberg Aff. Ex. 1)
W.	Written farming lease of all of Property to Wittmeiers	2015	D. Powers Aff. ¶¶ 12-13, Ex. 3; J. Powers Depo. Tr.

	Transaction by Dennis	Year	Citation to Jerome's Knowledge of Transaction
			115:14-25 (Mahlberg Aff. Ex. 1)
X.	Verbal Right to Hunt to Jerome	2015	J. Powers Depo. Tr. 17:10-18 (Mahlberg Aff. Ex. 1)
Y.	Written farming lease of all of Property to Wittmeiers	2016	D. Powers Aff. ¶¶ 12-13, Ex. 3; J. Powers Depo. Tr. 115:14-25 (Mahlberg Aff. Ex. 1)
Z.	Lease of trailer house on Property to Jerome	2016	J. Powers Depo. Tr. 135:22-136:12 (Mahlberg Aff. Ex. 1)
AA.	Mortgaged Property again in favor of Commercial State Bank	2016	D. Powers Aff. ¶ 20; J. Powers Depo. Tr. 116:1-8 (Dennis told Jerome he put mortgages on the property sometime in 2017 or prior) (Mahlberg Aff. Ex. 1)
BB.	Verbal Right to Hunt to Jerome	2016	J. Powers Depo. Tr. 17:10-18 (Mahlberg Aff. Ex. 1)
CC.	Written farming lease of tillable land to Clearfield Colony	2017	D. Powers Aff. ¶¶ 14-15, Ex. 4; J. Powers Depo. Tr. 183:8-15 (Mahlberg Aff. Ex. 1)
DD.	Written lease of pastureland to Nathan Mathis	2017	D. Powers Aff. ¶ 16, Ex. 5; J. Powers Depo. Tr. 115:8-13 (Mahlberg Aff. Ex. 1)
EE.	Lease of trailer house on Property to Jerome	2017	J. Powers Depo. Tr. 135:22-136:12 (Mahlberg Aff. Ex. 1)
FF.	Mortgaged Property again in favor of Commercial State Bank	2017	D. Powers Aff. ¶ 20; J. Powers Depo. Tr. 116:1-8 (Dennis told Jerome he put mortgages on the property sometime in 2017 or prior) (Mahlberg Aff. Ex. 1)

	Transaction by Dennis	Year	Citation to Jerome's Knowledge of Transaction
GG.	Verbal Right to Hunt to Jerome	2017	J. Powers Depo. Tr. 17:10-18 (Mahlberg Aff. Ex. 1)
HH.	Written farming lease of tillable land to Clearfield Colony	2018	D. Powers Aff. ¶ 15, Ex. 4; J. Powers Depo. Tr. 183:8-15 (Mahlberg Aff. Ex. 1)
II.	Written lease of pastureland to Nathan Mathis	2018	D. Powers Aff. ¶ 16, Ex. 5; J. Powers Depo. Tr. 115:8-13 (Mahlberg Aff. Ex. 1)
JJ.	Verbal Right to Hunt to Jerome	2018	J. Powers Depo. Tr. 17:10-18 (Mahlberg Aff. Ex. 1)
KK.	Written farming lease of tillable land to Clearfield Colony	2019	D. Powers Aff. ¶ 15, Ex. 4; J. Powers Depo. Tr. 114:10-21 (Mahlberg Aff. Ex. 1)
LL.	Written lease of pastureland to Nathan Mathis	2019	D. Powers Aff. ¶ 16, Ex. 5; J. Powers Depo. Tr. 115:8-13 (Mahlberg Aff. Ex. 1)

48. As Jerome puts it, "I've let him [Dennis] do whatever he wanted to do out there, knowing it could be a violation. . . ." (J. Powers Dep. Tr. 192:3-4 (Mahlberg Aff. Ex. 1).)

49. Rather than assert his rights at any time over the nearly 15-year period from 2005 until 2019, Jerome sat on his rights (or at least what he now claims have been his rights all along). (Jerome Depo. Tr. 182:12-184:21 (Jerome explaining that each lease triggered his rights of first refusal, but that Jerome "merely did not exercise his rights") (Mahlberg Aff. Ex. 1)); *id.* at 184:11-21 (leases were a violation under Jerome's interpretation, but Jerome did nothing) (Mahlberg Aff. Ex. 1); *id.* at 185:2-186:15 (mortgages were a violation under Jerome's interpretation, but Jerome did nothing); *id.* at 192:23-193:2:

> Q: So, as I understand it, then, you viewed these other things as acceptable enough to you even though you could have exercised your First Right of Refusal, you didn't, right?

A: Correct.

(*Id.* at 236:13-237:13.)

THE WIND FARM

50. What ultimately became the Project was initially proposed by an entity called Prevailing Winds, LLC. (Semiao Aff. ¶ 4.)

51. Prevailing Winds, LLC was formed in 2014 by a group of investors who developed a nearby wind project known as the Beethoven Wind Project. (Semiao Aff. ¶ 4.)

52. In June 2016, Prevailing Winds, LLC filed an application for a 200-MW wind farm with the SDPUC. (Semiao Aff. ¶ 5.)

53. The SDPUC commenced the permitting process, which included, among other things, a public input hearing held on August 24, 2016. (Semiao Aff. ¶ 5.)

54. Jerome attended the public input hearing to learn more about the project and how it could affect Jerome and the community. (J. Powers Dep. Tr. 33:16-34:24, Ex. 2; *id.* at 35:13-36:2 (Mahlberg Aff. Ex. 1).)

55. Prevailing Winds, LLC withdrew its application from SDPUC consideration in August 2016. (Semiao Aff. ¶ 5.)

56. In October 2017, sPower purchased the Prevailing Winds, LLC Project-related assets. (Semiao Aff. ¶ 6.)

57. On May 30, 2018, PWP filed an application for a wind energy facility permit with the SDPUC. (Semiao Aff. ¶ 7.)

JEROME'S KNOWLEDGE OF DENNIS'S INTENT TO PARTICIPATE IN THE WIND PROJECT

58. Dennis was aware of the Prevailing Winds, LLC project and attended the public input hearing meeting in June 2016—the same one that Jerome went to. (D. Powers Dep. Tr. 8:7-24 (Mahlberg Aff. Ex. 2).)

59. Dennis and his wife were interested in having the Property be part of Prevailing Winds, LLC's wind project (and what ultimately became the Project), having missed out on a nearby project previously. (D. Powers Dep. Tr. 27:12-28:17 (Mahlberg Aff. Ex. 2).)

60. Dennis and April received a draft of the Wind Energy Lease and Wind Easement Agreements that would be used if they agreed to participate in the project. (D. Powers Dep. Tr. 38:6-22 (Mahlberg Aff. Ex. 2).)

61. Dennis and Jerome were on good terms at the time and, in late August or early September 2018, Dennis went with copies of the proposed leases to Jerome's house. (D. Powers Depo. Tr. 39:16-40:12 (Mahlberg Aff. Ex. 2).)

62. They discussed wind energy and specifically the potential for blinking lights as part of the Project's turbine lighting systems. (D. Powers Depo. Tr. 40:13-42:5 (Mahlberg Aff. Ex. 2).)

63. Dennis does not recall whether his father looked at the leases (D. Powers Depo. Tr. 78:24-79:10 (Mahlberg Aff. Ex. 2)), but Dennis and his father did generally discuss the agreement's terms and conditions. (*Id.* at 81:18-82:15.)

64. Jerome did not raise the ROFRs during that conversation. (D. Powers Depo. Tr. 82:16-19 (Mahlberg Aff. Ex. 2).)

65. On September 15, 2016, Dennis and April signed Wind Energy Lease and Wind Easement Agreements with Prevailing Winds, LLC—one for the Bon Homme County property

and one for the Charles Mix County property. (D. Powers Depo. Tr., Exs. 14A and 15A (Mahlberg Aff. Ex. 2).)

JEROME'S PARTICIPATION IN THE WIND PROJECT PERMITTING PROCESS

66. Jerome participated in the permitting proceedings for what became the Prevailing Wind Park from when the very first public input meeting was held in June 2016 for the Project's predecessor. (J. Powers Dep. Tr. 33:16-34:24, Ex. 2 (Mahlberg Aff. Ex. 1); *id.* at 35:13-36:2; *see also* (sworn) Proof of Mailing by Jennifer Bell, p. 7 of spreadsheet (showing mailing went to Jerome Powers) (Mahlberg Aff. Ex. 4).)

67. Jerome provided testimony against the Project at a SDPUC Public Input Hearing on July 12, 2018. (SDPUC July 12, 2018 Public Input Hrg. Tr. pp. 44:8-46:17 (Mahlberg Aff. Ex. 5).)

68. In October 2018, Jerome served as a lay witness for opponents of the Project, and he gave live testimony to the SDPUC suggesting that wind farms cause adverse health effects and are bad for business. (SDPUC Oct. 12, 2018 Hrg. Tr. 1008:17-1020:25 (Mahlberg Aff., Ex. 3).) Jerome testified that he had learned the Property had been signed up for the Project, that he had expressed his displeasure about that with Dennis, and that they had had a breakdown in their relationship. (*Id.* at 1014:8-1015:9.)

69. Jerome did not mention the ROFRs at any point in the SDPUC proceeding. (SDPUC Oct. 12, 2018 Hrg. Tr. 1008:17-1031:21 (Mahlberg Aff. Ex. 3); *see* J. Powers Dep. Tr. 193:24-197:19 (Mahlberg Aff. Ex. 1).)

70. Jerome "knew" he had rights under the ROFRs at that time, but "kept it quiet." (J. Powers Dep. Tr. 197:5-19) (Mahlberg Aff. Ex. 1).)

THE SDPUC PERMITTED THE PROJECT AND THE PROJECT WAS BUILT

71. On November 28, 2018, the SDPUC issued its Final Decision and Order granting PWP an energy facility permit for the Project. (Semiao Aff. ¶ 7, Ex. 1 (SDPUC Order).)

72. In its Order, the SDPUC rejected Jerome's claims that the Project would adversely affect Jerome's hunting operations, concluding instead that the fact that Jerome owns 12.8 acres is what limits his hunting business, not the Project. (Semiao Aff. ¶ 7, Ex. 1, at p. 17, ¶ 54.)

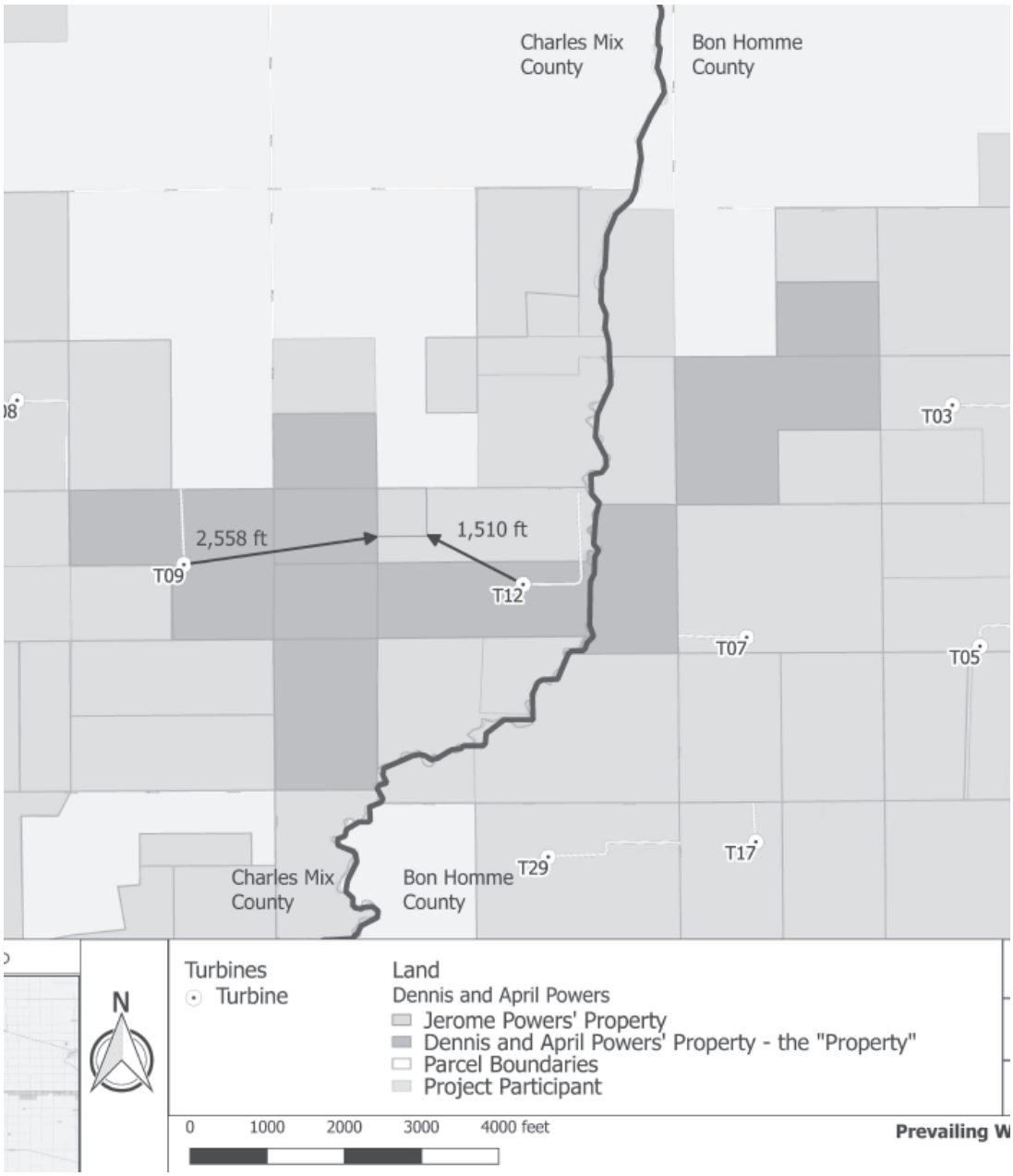
73. After obtaining the energy facility permit, PWP set about to execute and construct the Project. (Semiao Aff. ¶ 8.)

74. As part of those efforts, PWP approached Jerome to obtain documents evidencing Jerome's consent to the Wind Energy Lease and Wind Easement Agreements. (Semiao Aff. ¶ 8.) This clean-up title work is a standard operating procedure in project financing and project execution efforts. (*Id.*) Jerome did not sign the consents. (*Id.*)

75. PWP began construction of the Project on the Charles Mix County and Bon Homme County portions of the Property on or around July 2019. (Semiao Aff. ¶ 9.)

76. PWP completed the Project and began operations in April 2020. (Semiao Aff. ¶ 9.)

77. As it relates to the Property, the Project includes a collector line and turbines as shown on the map excerpt below:



(Semiao Aff. ¶ 9, Ex. 2 (full map).)

THIS LAWSUIT

78. Jerome commenced the captioned action in June 2019. (*See generally* Verified Cplt.)

79. The Verified Complaint asserts the following claims: (1) Declaratory Judgment; (2) Breach of Contract; and (3) Voiding of Defendants [*sic*] Lease(s) & Easement Agreement(s). (*See generally* Verified Cplt.) Jerome seeks declaratory relief. (*Id.*)

80. The Verified Complaint asserts that Dennis has repeatedly breached the ROFRs from 2005 forward:

> 10.
>
> Between March 31, 2005, and today's date, Defendant Dennis Powers has failed to abide by the First Right of Refusal Agreement(s) terms by failing to ever provide to Plaintiff written notice of his intention to either sell, transfer or convey any interest or interests in the ROFR parcels of the described/subject real property in either or both Charles Mix County and/or Bon Homme County.

(Verified Cplt. ¶ 10.)

81. Jerome's position is that Dennis's conduct with respect to the Wind Energy Lease and Wind Easement Agreements give Jerome the rights under the ROFRs to force Dennis (and April) to sell the Property to Jerome for $420 per acre. (J. Powers Dep. Tr. 181:19-24 ("Q. Mr. Powers, is it your position that the First Right of Refusal gives you the right to force Dennis to sell to you all 633 acres at a price of $420 if he intends to grant any easement or any lease or any other interest in the property to a third party?" A. Yes.") (Mahlberg Aff. Ex. 1).)

82. Jerome and Dennis were each deposed on August 21, 2019. (Mahlberg Aff. Exs. 1 and 2.) Since then, Dennis was allowed to amend his Answer, but no other actions have been taken in this case. (*See generally* Docket.)

83. Jerome has also started litigation against the Charles Mix County Commission, *see Jerome Powers and Darrell Petrik v. Charles Mix Cty. Comm'n*, 11 CIV20-000018. (*See generally* Docket.) In that case, the Charles Mix County Commission has moved for dismissal. (Mahlberg Aff. ¶ 7.)

84. Additionally, PWP has moved to intervene in the case and for dismissal. (Mahlberg Aff. ¶ 7.) The pending motions in that action will be heard the same day as PWP's summary judgment motion in this case. (*Id.*)

Dated: October 9, 2020

/s/ Lisa M. Agrimonti

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IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

APPEAL NO. 29561

JEROME POWERS,

Appellant,

vs.

DENNIS POWERS,

Appellee,

-and-

PREVAILING WIND PARK, LLC,

Appellee.

APPEAL FROM THE CIRCUIT COURT

FIRST JUDICIAL CIRCUIT

CHARLES MIX COUNTY, SOUTH DAKOTA

HON. DAVID KNOFF

Circuit Court Judge

APPELLANT'S REPLY BRIEF

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NOTICE OF APPEAL FILED FEBRUARY 25, 2021

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APPELLANT'S REPLY BRIEF

PRELIMINARY STATEMENT

For ease of reference, Appellant, Jerome Powers, will again be referred to as either "Appellant", or "Appellant Jerome" or "Powers-Senior." Appellees in this matter, will be referred to as either "Appellee PWP" or "PWP", while Appellee Dennis Powers will be referred to as either "Appellee Dennis" or "Powers-Junior". References to the settled record, that being the register of actions, if any, will be made by the letters "SR" followed by the applicable page number(s), when and where able to so identify within the underlying record herein. References to the Transcript of Appellant Powers-Senior

and/or Appellee Powers-Junior will be made by the name of the Deponent (Jerome-Depo or Dennis-Depo) as well as by the letters "TR" followed by the name of the applicable page number(s); while references to the trial court's motion hearing transcript from October 26, 2020, will be referenced, if and or when perhaps necessary, by and through references herein to "Hrg-TR" followed by the applicable page number(s), if necessary.

JURISDICTIONAL STATEMENT and STATEMENT OF THE CASE

As previously set forth within Appellant's Initial Appellant's Brief.

STATEMENT OF LEGAL ISSUES

As previously set forth within Appellant's Initial Appellant's Brief.

ARGUMENT:

Appellant continues to rely on its initial Brief and all arguments and authorities relied on therein, including reliance on the long-standing precedent of *Discover Bank v. Stanley*, 2008 S.D. 111, ¶ 19, 757 NW2d 756, 762-764 insofar as the party(s) seeking summary judgment is/are required to file[1] a statement of undisputed material facts in support of their claim(s) – a long-standing mandatory requirement that was, however, overlooked by the lower court as to Appellee Dennis. *See*, Initial Brief at pg. 13, Argument; Appendix D-1.

[1] Appellant, by way of response to both Appellees, also notes that this filing requirement has obviously been held to be more than a technicality and clearly more than harmless error. In addition, it must be kept in mind that Appellee PWP was/is not a party, as set forth within Appellant's Complaint, to Count 2, Breach of Contract (as related to Appellee Dennis' failure to provide written notice) and, as such, Appellee Dennis would need to assert – but cannot assert – undisputed material facts as to his act of providing the required *written notice* of his intentions to Appellant Jerome. However, neither Powers-Junior nor Appellee PWP did (or could) file such a pivotal statement - within such ***required*** statement(s) of undisputed facts. Instead, that key *disputed* material fact was noted and argued below by Appellant and still remains disputed. *See*, Initial Brief Appendix D-1, D-5-D-6; E-1 through E-4, as filed; *cf.*, *Aberle v. City of Aberdeen*, 2006 S.D. 60, ¶17, 718 NW2d 615, 620-621 ("The moving party bears the burden to clearly show the absence of genuine issues of material fact…")

ISSUE(S) REGARDING ERRONEOUS SUMMARY JUDGMENT DECISION:

1.) *The ROFR agreements in this case are unambiguous and, as such, parol evidence as sought to be interjected by Appellee Prevailing Wind Park, LLC, who was not a party to the parties' 2005 agreements, was incompetent, inadmissible and should not have been considered as the basis for the Circuit Court's summary judgment decision in this case.*

Appellees responsive argument is ironic insofar as it claims that Appellant Jerome – in seeking to set aside summary judgment when there are, in fact, remaining genuine issues of material fact – purportedly fails to address the full context of the mutually agreed ROFR terms as prepared by (now) Judge Anderson. Ironically, however, Appellees fail to logically address the full terms of the ROFR's at issue since they fail to adequately legally address the pivotal and key ROFR language as used, understood and relied on throughout Sections 2, 4 and 5, again from 2005, as unambiguously follows (once again, in Section 2):

> "In the event that GRANTOR (Dennis Powers) offers the above-described property, *or any interest therein*, *for* sale, *transfer or conveyance*, GRANTOR *shall not sell*, *transfer or convey* the above-described property, *nor any interest therein*, *unless and until he shall have first offered to sell such property or any interest therein to GRANTEE*. If GRANTOR intends to make a bona fide sale of the above-described property, *or any interest therein*, *he shall give to GRANTEE written notice of such intention*, which notice shall contain the basic terms and conditions demanded by GRANTOR for the sale of such property.
>
> Within thirty (30) days of receipt of such notice and information, GRANTEE (Jerome Powers) shall either exercise his First Right of Refusal by providing written notice of his acceptance to GRANTOR, or waive his First Right of Refusal by failing to provide GRANTOR with written notification of his acceptance or rejection of the First Right of Refusal within such time." [Emphasis added.]; *as previously noted, *see*, Section Four language of the ROFR agreements pertaining to "Unauthorized Transactions" being voided for failure to comply.

To be clear, nowhere in the ROFR language above does it say: Grantor's offer of the above-described property, *or* any interest therein, for sale *or* transfer *or* conveyance means "if/when sold in fee simple to a third party." Instead, of course, the above-referenced plain language was and, essentially, is compounded in effect insofar as Grantor is instructed that he (Appellee Dennis) "*shall not sell, transfer or convey* [such property] *nor any interest therein, unless and until he shall have first offered to sell such property* or any interest therein, to Grantee (Appellant Jerome)."

Appellees attempt to gloss over the fact that the contract language at issue is not only keyed on the very important phrase of "any interest therein." Rather, as previously noted and important to the case herein, Grantor [Dennis Powers] was required not to "*sell, transfer or convey* the above-described property, *nor any interest therein, unless and until he shall have first offered to sell such property or any interest therein to Grantee* [Appellant Jerome]. Moreover, if Dennis intended to make a sale *or* transfer *or* conveyance of such property, *or any interest therein*, he was required to give Appellant Jerome "*written notice of such intention*" and that required "*notice [to] contain the basic terms and conditions demanded by [Dennis Powers] for the sale of such property*." Section Three, as improperly sought to almost be exclusively relied on by Appellees; of course, only becomes applicable "[s]hould Grantor [Appellee Dennis] accept the offer of Grantee [Appellant Jerome] to purchase the property…" after the required notice in writing was to be provided by Appellee Dennis – which, once again, such key triggering event never - EVER - took place in this case.[2]

[2] Appellant therefore submits that – contrary to Appellees' position and/or the lower court's decision below – since such triggering event *never* was contemplated nor undertaken by Appellee Dennis, that it would be and is improper that the otherwise contingency provision that is outlined within Section Three should not and cannot be relied upon to change to the

As taught early-on from 1st year Property class in law school - in addition to property sales, there are of course, property transactions where property rights – such as easements and/or leases – are either sold, transferred or conveyed over varying timeframes (i.e., as otherwise took place here with the damaging, burdensome and long-term wind farm leases at issue). Nowhere within Appellees arguments nor adequately within the lower court's decision are *all* such options of a sale or transfer or conveyance analyzed, considered or addressed in their full and proper legal context as part of the entire context of the ROFR agreements at issue.

That is, Appellant respectfully submits that both Appellees and the lower court impermissibly sought to impermissibly rewrite the terms of the contract by ignoring – and/or essentially deleting – the requirement that *if Dennis intended to make a sale* ***or*** *transfer* ***or*** *conveyance of such property, or any interest therein,* he was first required to give Appellant Jerome written notice of his intention. As this Court is aware, however, when Appellee Dennis transferred and/or conveyed the easement/lease interests in the subject property herein, he failed to *ever* give Appellant Jerome the required notice in writing. As such, Appellant continues to submit to this Court that any such argument to ignore such key contractual language or for the court below to arguably seek to re-write the contract by/through summary deletion or elimination of all such pivotal governing language was and is reversible error – especially in light of this Court's de novo review of the same language as set forth below.

As has been noted, "[c]ontract interpretation is a question of law reviewable de novo. When the meaning of contract language is plain and unambiguous, construction is not

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contrary the otherwise unambiguous provisions (within Sections Two, Four & Five) of the full extent of the legally binding contractual agreement terms set forth within the ROFR's at issue.

necessary. If a contract is found to be ambiguous the rules of construction apply." *Laska v. Barr*, 2016 S.D. 13, ¶ 5, 876 NW2d 50, 52 [*Laska I*], citing, *Ziegler Furniture & Funeral Home v. Cicmanec*, 2006 S.D. 6, ¶ 14, 709 NW2d 350, 354, as quoting *Pesicka v. Pesicka*, 2000 S.D. 137, ¶ 6, 618 NW2d 725, 726. Additionally, it has long been held that, '[a] contract is ambiguous ***only*** ***when*** it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement.' [Emphasis added.] *Laska I*, 2016 S.D. 13, ¶ 5, 876 NW2d at 52, quoting *Pesicka*, 2000 S.D. 137, ¶ 10, 618 NW2d at 727.

Moreover, Appellant respectfully reiterates that – in addition to Appellant's proper and much more than tepid reliance on the 2017 *Edgar* case insofar as disallowing the erroneous interjection of positive or negative reliance on such parol evidence that the Court straightforwardly found to be reversible error in such similar ROFR-focused case of *Edgar v. Mills*, 2017 S.D. 7, ¶¶ 28-29, 892 NW2d 223, 231 ("Because the 'Right of First Refusal' provision is unambiguous, the circuit court erred when it considered parol evidence to determine the parties' intent. … The court also erred when it used parol evidence to convert the lease agreement into a purchase contract … we will ***not*** rewrite the parties' contract or add to its language. … '*Contracting parties are held to the terms of their agreement, and disputes cannot be resolved by adding words the parties left out*.' [citing] *Gettysburg School Dist. 53-1 v. Larson*, 2001 S.D. 91, ¶ 11, 631 NW2d 196, 200-201.") [Emphasis added.] – the day after Appellant's initial Brief herein, on May 19, 2021, this Court further outlined the impermissibility of use of parol evidence as part of a court's analysis of unambiguous contractual agreements in *Nelson v. Garber*, 2021 S.D. 32, ¶ 19, 960 NW2d 340, 345 ("Only when a [document] is incomplete, ambiguous, or uncertain may

surrounding circumstances and external evidence be considered for the purpose of determining the [parties] real intention[s]…" as outlined in *Selway Homeowners Ass'n v. Cummings*, 2003 S.D. 11, ¶27, 657 NW2d 307, 315, other internal citations omitted.). As Appellant has noted and Appellees tend to agree – in an incorrect and erroneous way of interpretation – the ROFRs at issue are *not* incomplete, *not* ambiguous and *not* uncertain such that use of parol evidence and/or surrounding circumstances and external evidence[3] was therefore entirely improper for consideration below and, as such, amounted to reversible error. *See generally*, Initial Brf., Appendix F; Hrg-TR at pgs. 38-41; 51-53 (As to prohibited consideration of "*surrounding circumstances*" and "*external evidence*":

At the summary judgment motion hearing at pgs. 52-53: "The Court: Then I will also address then the lease to Wittmeier back in 2011 – and I'm looking at page 182 of [Appellant] Jerome Powers' deposition. And it talks about, 'You knew your son was going to lease out the property to Jim Wittmeier in 2011; correct?' And the response was, 'Correct.' And he did not take the position at that time that the Right of First Refusal was triggered. And I guess I'm trying to determine what triggers the Right of First Refusal.") Contrary to the lower court's consideration of any such alleged (by Appellee PWP) surrounding circumstances and/or external (parol) evidence[4], however, within the unambiguous four-corners of the ROFR's, Appellant's Right of

[3] Appellant can, in part, primarily point to Appellee PWP's proposed STUMF No. 47, as timely and properly objected to below [*see*, Appellant's initial Brief/objections via Appendix D-3 thru D-7]; however, as inappropriately referenced and relied on as impermissible "surrounding circumstances" and "external evidence" wrongly submitted to and considered by the lower court as parol evidence to (incorrectly and wrongly) determine the intention of the parties in this case in what was claimed to be unambiguous ROFR contract terms. *See*, *Edgar*, 2017 S.D. 7, ¶¶28-29, 892 NW2d at 231; *Nelson*, 2021 S.D. 32, ¶19, 960 NW2d at 345.

[4] *See*, FN. 2, *supra*; *cf.*, *Edgar*, 2017 S.D. 7, ¶¶28-29, 892 NW2d at 231; *Nelson*, 2021 S.D. 32, ¶19, 960 NW2d at 345.

First Refusal was/is clearly delineated as being "triggered" by and through the required "written notice" being provided by Appellee Dennis to Appellant Jerome. *See,* Appendix A-B, Section Two "First Right of Refusal", initial Appellant's Brief.

Contrary to Appellee PWP's attempt to essentially "cover for"[5] the prejudicial and reversible error argued to have transpired below insofar as its reliance on – and directing the lower court to – such improper parol evidence, Appellant relies on the lessons learned in both *Edgar* and as most recently analyzed in *Nelson* to demonstrate the impropriety of reliance on the parol evidence rule as a rule of substantive law – not to be overlooked by either Appellees or the court below. That is, once again, like in *Edgar*, the circuit court's erroneous addition of words "to be sold in fee simple" for the benefit of Appellee Dennis Powers and/or Appellee PWP's wishes and/or after-the-fact desires or recently-claimed intentions, amounted to reversible error as a part of the court's summary determination. *See also, Kernelburner, LLC v. MitchHart Mfg., Inc.*, 2009 S.D. 33, ¶¶ 7, 10, 765 NW2d 740, 742-743 ("*It is not necessary to go beyond the four corners of the document to determine the parties' intent*." … "Consequently, the trial court erroneously considered parol evidence.").[6]

2.) *Appellant Jerome Powers and Appellee Dennis Powers ROFR agreements, in this case and under the disputed facts herein, were not void as unenforceable restraints on alienation and, if to consider, genuine issues of material facts exist so as to deny summary judgment herein.*

Appellant continues to rely on all of his argument(s) advanced in his Initial Brief, including that the key "intended duration" timeframe was - in direct contrast to *Laska* -

[5] At pgs. 16-17 of Appellee PWP's Brief it misleadingly attempted to couch its argument as "The Circuit Court noting that testimony was *consistent with* the … interpretation of the unambiguous terms of the ROFRs as a whole, is not error…" (Emphasis in original).

[6] *See,* Initial Appellant's Brief at FN. 6-7-8, as related to the clear and still-existing ROFR terms.

clearly delineated and, in fact, reasonably limited to (only) Appellant Jerome's life. And, as such, satisfies that important review prong for the Court.[7] By way of furtherance of his Reply Brief herein, however, Appellant has previously appropriately pointed to this Court's prior review of *Laska v. Barr*, 2016 S.D. 13, 876 NW2d 50 [*Laska I*]; and, *Laska v. Barr*, 2018 S.D. 6, ¶ 24, 907 NW2d 47, 54 [*Laska II*] in conjunction with the provisions of SDCL § 43-3-5 which, again, provides that "[c]onditions restraining alienation, when repugnant to the interest created, are void." *Laska v. Barr*, 2018 S.D. 6, ¶ 24, 907 NW2d 47, 54 [*Laska II*]. … "To be valid, the restraint must be reasonable and for a legitimate purpose."), in accord with other out of state cases in California, Iowa and Washington State, including, *Rubin v. Moys*, 1999 WL 685797, at *7 (Wash. Ct. App. Sept. 2, 1999).

That is, in *Rubin*, as specifically cited with approval by this Court, "…Washington courts [previously] upheld rights of first refusal as reasonable contractual rights, even where they established a fixed price. *See, Thompson v. Thompson*, 1 Wash. App. 196, 460 P2d 679 (1969). In *Thompson*, the court upheld an option granted in a real estate contract that allowed the purchasers to buy additional property for a set price. The court found the option was supported by adequate consideration because it was included in the original contract and it indicated it would impose a reasonable time period on the option. The court found 12 years was not unreasonable. *Thompson*, 1 Wash.App. at 200-201, 460 P2d 679. … Similarly, after [a prior case], a Washington court upheld a preemptive right to purchase property for a fixed price in *Lawson v. Redmoor Corp.*, 37 Wash.App. 351, 679 P2d 972 (1984). In that case, the court found that the preemptive right to purchase property at a fixed price *well below the market rate* <u>*did not as a matter of law so fetter*</u>

[7] *See, Kuhfeld v. Kuhfeld*, 292 NW2d 312, 314 (S.D. 1980); Initial Brief at pg. 22.

alienability that it must be invalidated as an unreasonable restraint. The court also found the clause was valid in part because the parties had a definite purpose in mind and both benefited from the agreement. *Lawson*, 37 Wash.App. at 356, 679 P2d 972. Thus, the fixed price does not render the preemptive right per se unreasonable." [Emphasis added.]

As a result, in response to Appellees argument(s) that the agreed-upon price to/for the ROFR property(s) demonstrates that the agreement(s) herein were – as claimed – an unreasonable restraint on alienation, Appellant submits that such argument and/or the lower court's position is misplaced in the case at bar. Perhaps more importantly, however, Appellant urges that Appellees overall analysis in this regard is improper as a result of being entirely premature at the summary judgment stage of the proceedings in the case at bar. That is, in *Laska I* and/or *Laska II* both the lower court and this Court (following remand and the need for all issues of fact to be further analyzed and reviewed through the consideration of parol evidence, including testimony from trial) made factual findings on the full examination of the record – again, *not* at the preliminary and/or premature summary judgment stage of any such proceedings.

In its brief, Appellee PWP weakly attempts to claim that Appellant has not in the underlying record herein identified genuine issues of material fact "in a meaningful way." Such a disingenuous claim, however, seemingly ignores his responsive pleadings and/or arguments below, including (Initial Brief) Appendix D and E as cited, argued and referenced to the Court. *See*, Hrg-TR at pgs. 47-49; *see also*, Initial Brief pg. 23.

As to Appellee PWP arguments at pgs. 27-31 of its Brief, Appellant simply submits that such flawed and unmeritorious arguments do not merit consideration herein as a result of their failure to file a notice of review. *See, Johnson v. Radle*, 2008 S.D. 23, ¶19, 747

NW2d 644, 652 ("The circuit court did not consider the issue, and defendants cannot assert error on a matter not ruled on by the circuit court. *See, Watertown v. Dakota, Minnesota & Eastern Railroad Co.,* 1996 SD 82, ¶ 26, 551 N.W.2d 571, 577 (citations omitted). 'Further, defendants did not file a notice of review on this issue, and therefore, they have waived it.' *See, Opperman v. Heritage Mut. Ins. Co.,* 1997 SD 85, ¶ 2, n. 1, 566 NW2d 487, 489 n. 1 (citing SDCL 15-26A-22; *Rude Transp. Co. v. S.D. Pub. Utils. Comm'n,* 431 NW2d 160, 162 (S.D. 1988)) (failure to file a notice of review waives the issue).") With neither of Appellees having field the statutorily required Notice of Review, the attempted-to-be-raised arguments/issues at pages 27-31 of Appellee PWP's Brief are not properly before this Court and, as such, do not necessitate a further response since the lower court failed to address any such arguments. *See,* Initial Brief, Appendix C-9.

***CONCLUSION*:**

Appellant respectfully submits that, by and through his factual recitation as well as his arguments and authorities submitted herein, he has established that there were, in fact, reversible errors, including errors of law beyond harmless error(s), committed below which support for this Court that reversal and remand to circuit court is necessary. In light of the well accepted standards that have long been in effect in order to – where appropriate – serve to discourage and/or dissuade lower courts from improperly deciding factual issues at the summary judgment stage such as here, Appellant again urges the Honorable Court herein to reverse and remand the case at bar.

CERTIFICATE OF COMPLIANCE:

Pursuant to SDCL 15-25A-66, R. Shawn Tornow, Appellant's attorney herein, submits the following:

The foregoing brief, not including the signature section herein, is 14 pages in length. It was typed in proportionally spaced twelve (12) point Times New Roman print style. The left-hand margin is 1.5 inches, the right-hand margin is 1.0 inches. Said brief has been reviewed and referenced as containing 3,610 words and 19,744 characters.

All as respectfully submitted this 18th day of August, 2021, at Sioux Falls, S.D.

/s/ R. Shawn Tornow
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CERTIFICATE OF SERVICE:

This is to certify that on this 18th day of August, 2021, your undersigned's office timely e-mailed a copy of Appellant's Reply Brief and Appendix, if any, as well as mailing an original and two (2) copies to and for the Court and, if requested and if necessary, is prepared to mail by first-class United States mail, true and correct copy(s) of Appellant's Reply Brief to John Blackburn, attorney of record for Appellee Dennis Powers, at jblaw@iw.net; and Patrick Mahlberg, one of the attorneys for Appellee PWP, LLC, at pmahlberg@fredlaw.com.

/s/ R. Shawn Tornow