IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

---

**APPEAL NO. 29433**

---

PESKA PROPERTIES, INC., a South Dakota Corporation,

Plaintiff/Appellant,

v.

NORTHERN RENTAL CORP, a South Dakota Corporation, and
STEVE WILLIS.

Defendants/Appellees.

---

Appeal from the Second Judicial Circuit
Minnehaha County, South Dakota
The Honorable Douglas E. Hoffman, Circuit Court Judge

---

# APPELLANT'S BRIEF

---


OLIVIER MILES HOLTZ, LLP
Kasey L. Olivier
6210 S. Lyncrest Ave.
Sioux Falls, SD 57108

NICHOLSON LAW OFFICE
Thomas J. Nicholson
4201 S. Minnesota Ave.
Sioux Falls, SD 57105

*Attorneys for the Appellant*

CUTLER LAW FIRM, LLP
Kent R. Cutler
Kimberly Wassink
140 N. Phillips Ave.
Sioux Falls, SD 57101

*Attorneys for the Appellees*


---


Notice of Appeal filed: September 30, 2020

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**



**Statutes**

## PRELIMINARY STATEMENT

References to the Clerk's Index are cited as (C.R.) with the applicable page number. In addition to the page number on which they appear in the record, trial exhibits will be cited as (Ex.) with the exhibit number. References to the court trial transcript will be referred to as (TT) with the applicable page number. References to Peska Properties, Inc.'s Appendix will be referred to as (App.) with the applicable page number.

## STATEMENT OF JURISDICTION

Peska Properties, Inc. appeals from the Judgment filed and served on September 11, 2020. Notice of Entry of Judgment was filed and served on September 16, 2020. Peska Properties, Inc. timely filed their Notice of Appeal on September 30, 2020. This Court has jurisdiction pursuant to SDCL § 15-24A-3(1).

## REQUEST FOR ORAL ARGUMENT

Peska Properties, Inc. respectfully requests oral argument on each of the issues before this Honorable Court.

## STATEMENT OF THE ISSUES

**I. The trial court erred when it determined that contract damages must be commercially reasonable rather than putting the injured party in the same position as if there had been no breach.**

Relevant Statutes and Cases:

SDCL § 21-2-1

SDCL § 21-2-2

SDCL § 57A-9-109

SDCL § 57A-9-627

*Arrowhead Ridge I, LLC v. Cold Stone Creamery, Inc*., 2011 S.D. 38, 800 N.W.2d

*Stern Oil Company, Inc. v. Brown,* 2018 S.D. 15, 908 N.W.2d 14

*Tri-State Refining and Inv. Co., Inc. v. Apoloosa Co.,* 431 N.W.2d 311 (S.D. 1988)

**II. Peska Properties did not receive a "Windfall" to offset the detriment of damages.**

Relevant Cases:

*McKie v. Huntley,* 2000 S.D. 160, 620 N.W.2d 599

*Stern Oil Company, Inc. v. Brown,* 2018 S.D. 15, 908 N.W.2d 14

SDCL § 21-2-1

## STATEMENT OF THE CASE

On or about October 4, 2019, Peska Properties, Inc. commenced an action in Minnehaha County, Second Judicial Circuit, South Dakota, for damages stemming from the breach of a commercial lease agreement. (C.R. 1). The Honorable Douglas E. Hoffman was assigned to the matter.

A one-day court trial was held on July 29, 2020. The trial court entered its judgment on September 11, 2020. (C.R. 689, App. 0004-6). Notice of Entry of Judgement was filed and served on September 16, 2020. (C.R. 689, App. 0002-0003). Peska Properties, Inc. timely appealed the court's judgment decision on September 30, 2020. (C.R. 694).

## STATEMENT OF FACTS

Steve Willis (hereinafter "Willis") is a well-educated, savvy business owner in Sioux Falls, South Dakota. (TT144-145). Willis obtained dual bachelor's degrees in economics and English, a law degree, a master's degree in business administration, became a licensed CPA, and is now the C.E.O. and Vice President of Northern Rental (hereinafter "Northern"), which owns and operates franchise leasing companies called Aaron's Rental. (TT145). Over time, Willis and Northern have opened five separate Aaron's Rental franchise locations, specializing in lease agreements. (TT145).

On December 23, 2011, Willis, individually, and as Vice President of Northern, negotiated and entered into a Lease Agreement (hereinafter "Lease Agreement") with Peska Properties, Inc. (hereinafter "Peska Properties"). (TT8, C.R. 176, Ex. 2). Willis and Northern intended to use the 7,150 square foot space as an Aaron's Rental franchise for the purpose of leasing and selling common household goods. (TT145, C.R. 176, Ex. 2, App. 0062-0091). The Lease Agreement spanned ten years, commencing on June 1, 2012,

with three, five-year renewal options for a total of fifteen years. (TT18, C.R. 176, Ex. 2, App. 0062-0091). The rental rate was $5,958.33 monthly for the first year of the ten-year term and incrementally increased each subsequent year. (C.R. 176, Ex. 2, App. 0062-0091). In addition to rent, Peska Properties also extended Willis and Northern a $50,0000 loan for construction improvements to the rental space. (C.R. 176, Ex. 2, App. 0062-0091). Willis and Northern used the loan proceeds to renovate the leased space to meet the specific franchise requirements for their Aaron's Rental franchise. (TT147).

In March of 2017, Willis and Northern closed the Aaron's Rental franchise store, letting it sit empty for nearly a year. (TT147). In May 2018, Willis and Northern hired Jay Zea with RE/MAX Professionals, Inc. to sublet the property. (TT147). Zea then placed a for-rent sign on the property, listed the property on the MLS database for real estate brokers, and prepared marketing materials. (TT19, C.R. 270-77, Ex. 5: 6-12). Peska Properties first became aware Willis and Northern were seeking to sublet the premises once the for-rent signage was placed on the property, prompting Peska Properties C.E.O. Gene Peska (hereinafter "Peska") to contact Willis to discuss the sublease. (TT19-20).

After six months passed without any potential tenants making an offer on the property, Peska approached Willis about hiring a different real estate agent. (TT20-21). Peska recommended Bill Connelly with NAI, a real estate agent that had been successful in leasing properties for Peska in the past. (TT20). Following Peska's recommendation, Willis and Northern hired Connelly on October 8, 2018, and listed the property for $11.20 per square foot. (C.R. 322, Ex. 6:45 App. 0093-95).

Eight more months passed with no offers being made on the property. (TT21). On June 1, 2019, the Willis and Northern Lease Agreement entered its eighth lease year with

rent at $6,643.54 a month or $11.15 per square foot. (TT21, C.R. 176, Ex. 2, App. 0064). In year nine, rent would increase to $6,709.08 per month, or $11.26 per square foot, and in year ten rent would increase to $6,780.58 per month, or $11.38 per square foot. (C.R. 176, Ex. 2, App. 0064).

**Radco**

On June 6, 2019, Mills After Market Accessories, Inc., also known as Radco (hereinafter "Radco") made an initial offer to lease the premises. (TT21, C.R. 358, Ex. 6: 81). Radco's offer was for a direct, seven-year lease with Peska rather than a subtenancy with Willis and Northern. (*Id.*). Radco's offer was as follows:

A. For the remaining period the Aaron's lease approximately 29 months – Tenant (Radco) to receive free rent for the first five months as described in Paragraph 9 above and then pay a monthly rental of $3,500.00 for the remaining 24 months.
B. Aaron's shall pay $72,624.00 plus $32,635.00 for a total of $105,259.00 to Landlord to be released from the current lease.
C. The $32,635.00 shall be the payment for the base rent Aug. 1, 2019 to Dec. 31, 2019.
D. The $72,624.00 when divided by 24 months equates to $3,027.00/month. When added to the $3,500 base rent paid by Radco $6,527.00/month to the Landlord.
E. Tenant shall pay a base rental rate of $11.00/sq. ft. for the remainder of the initial five-year term after the expiration of the current Aaron's lease period.
F. Base rent shall escalate three (3) percent at the beginning of each of the two five-year lease option period if exercised.

(C.R. 360, Ex. 6:83).

After receiving Radco's offer, Connelly met with both Peska and Willis to recommend they counter with a better offer. (TT117). Willis and Northern then notified Peska that they no longer wanted to do a sublease with to Radco. (TT167). As a result, paired with Radco's request to enter into a direct lease agreement rather than a subtenancy, Peska Properties entered into a separate listing agreement with Connelly.

(TT118). On June 19, 2019, Willis, Northern, and Peska jointly made the following counteroffer to Radco:

1. Tenant shall have occupancy on or before July 15, 2019;
2. Current time remaining on the sublease is 32 months;
3. Tenant shall be given **3 months** free rent;
4. Remaining 29 months at a rate of $9.50 psf ($5,636.70) month for the first 29 months plus NNN and utilities;
5. Landlord will sign a new 7 year lease (84 months) @ $9.50 for the first 29 months and remaining 55 months at $11.00 psf. NNN plus utilities;
6. Landlord to pay $25,000 toward buildout allowance.

(C.R. 355, Ex. 6:78, App. 0105). On June 19, 2019, Brockhouse, on behalf of Willis, Northern and Peska, communicated to Radco that Willis and Peska wanted $9.50 per square foot during the remainder of the subtenancy, rather than the $5.89 per square foot proposed by Radco. (C.R. 354, Ex. 6:77, App. 0104).

On June 22, 2019, Radco responded with the following counter offer:

1. Fine on occupancy date;
2. Fine on sub lease of 32 months;
3. Fine on 3 month free rent;
4. Remaining 29 month at $8.43 psf. ($5,000) month for the first 29 months plus NNN and utilities;
5. Tenant will sign a new 7 year lease (84 months) @8.43 per month for the first 29 months and the remaining 55 months at $10.50 psf. NNN plus utilities;
6. Landlord to pay $25,000 toward buildout allowance.

(C.R. 353, Ex. 6:76, App. 0103). Radco submitted a Letter of Intent to Willis and Peska Properties on July 9, 2019. (C.R. 569, Ex. 12). Radco's renovations to the leased space totaled $105,500.00. (TT29). The construction was completed by Peska Construction, Inc., a separate entity from Peska Properties. (TT7). Peska Properties paid the $25,000.00 for the Radco buildout via check directly to Radco. (C.R. 550, Ex. 9).

**Breach**

On July 12, 2019, Connelly provided Radco's Letter of Intent to both Willis and Peska via email. (C.R. 367, Ex. 6:90, App. 0111). Willis responded on July 15, 2019, stating that he had not signed anything releasing his lease. (*Id.*). On July 16, 2019, Willis wrote to Peska stating that the property was listed, that Peska should talk to his attorney about his duty to mitigate damages, and that they would not pay what was due under their Lease Agreement under any set of circumstances. (TT122, C.R. 369, Ex. 6:92, App. 0112). He further stated, "I might consider walking away for nothing otherwise we could do [t]he lease with Radco ourselves." (*Id.*). On July 18, 2019, Willis again wrote to Peska stating that because Peska Properties had "received a favorable lease proposal from Radco on the space referred to above we are notifying you that we consider that all of our payment obligations and involvement under the lease agreement on this property will end as of July 31, 2019." (C.R. 255, Ex. 3, App. 0114). Willis then instructed Peska Properties to enter into the Radco lease as "there is no question that this is the most reasonable approach." (*Id.*).

On July 19, 2019, and in response to Willis's letter, Peska Properties provided Willis and Northern with written notice that they were in breach of their Lease Agreement. (C.R. 226, Ex. 4). Willis and Northern then stopped all payments under their Lease Agreement and stopped participating in the finalization with the Radco lease agreement, which Peska Properties finalized on August 20, 2019. (TT158, C.R. 553 Ex. 11).

**Damages**

Paragraph 28 of the Lease Agreement specifies the landlord's remedies following the tenant's default. Paragraph 8(b) states as follows:

> b. Upon Default by Tenant, Landlord may pursue any one or more of the following remedies, separately or in any combination: (i) Landlord may terminate this Lease by giving written notice to tenant, in which event Tenant will vacate the Premises within thirty (30) days of receipt of Landlord's notice, and this Lease will terminate at midnight on the day Tenant so vacates; (ii) with or without terminating this Lease, Landlord may enter and take possession of the Premises and remove Tenant and any other person who may be occupying the Premises; **(iii) Landlord may re-let the Premises, or any part thereof on such reasonably terms and conditions as Landlord may deem satisfactory, and receive the rent for any such re-letting;** (iv) Landlord may do whatever Tenant is obligated to do under the terms of this Lease; or (v) any other remedy which Landlord may have at law or in equity; provided that no such remedy will have the effect of (1) accelerating the due date on which Tenant otherwise would be obligated to make any payment of rent or Other Charges or **(2) requiring Tenant to pay for any improvements or modifications that Landlord may make to the Premises in order to accommodate a replacement for Tenant with a non-retail use.** Landlord agrees to use commercially reasonable efforts to mitigate its damages and the resulting liability of tenant.

(C.R. 196, Ex. 2:17 (emphasis added), App. 0069). At the time of the July breach, there was $228,311.00 in rent due for the remainder of the Willis and Northern lease term. (C.R. 551, Ex. 10). Radco agreed to pay rent in the amount of $155,709.16 for the remainder of the Willis and Northern lease term, leaving $72,601.84 in rent due under the Lease Agreement. (C.R. 551, Ex. 10).

Willis and Northern also owed $10,792.30 on the $50,000 buildout loan extended by Peska Properties. (C.R. 551, Ex. 10). Interest per the Lease Agreement on this loan was 8%. (C.R. 225, Ex. 2:49, App. 0091). In addition to the $25,000 Peska Properties contributed to the buildout of the Radco lease space, Peska Properties has an ongoing

loan payment in the form of mortgage for that rental space in the amount of $6,800 per month. (TT32, 40-41).

**Trial**

At trial, Willis requested the trial court use a pro-rated, "blended-rate" calculation, rather than lost rental profits to measure damages, as he believed this was the fairest approach for himself. (TT177, 179). Willis did admit, however, that Peska "did everything he could to mitigate damages for Peska Construction, Inc., and Peska Properties, but I don't think he has to date done what he could to mitigate damages for Northern Rental." (TT162). When asked what more Peska could have done, Willis focused solely on the calculation of damages, testifying that Peska should have "averaged the rent $10 over the remainder of the or over the seven-year term and give Northern Rental the benefit of that." (TT163). Other than reducing the amount of damages owed, Willis did not testify that there were additional actions Peska could have taken to lessen the overall damages. (TT163). Neither Willis nor Northern offered any evidence or testimony that Radco was able or willing to pay more rent for the remainder of Willis and Northern's lease term, or that Peska intentionally sought a lower initial rental rate.

Willis also took affirmative steps to secure the Radco lease. Willis testified that his July 19, 2019, letter instructing Peska to enter into the lease with Radco, and stopping all rent payments, including past-due utilities and loan payments, was intentionally designed to force Peska to enter into the Radco lease. (TT180).

Connelly testified that he and Peska did everything they could to negotiate the best lease on the property, that he witnessed Peska working hard to help Willis, and Peska worked hard to mitigate the damages Willis and Northern would owe under the Lease

Agreement. (TT110-111, 113-114, 123, 129). However, because Willis and Northern were vacating with only 32 months left on a space tailor-made to their franchise, the space itself was very difficult to lease. (TT129). He further testified that the fair market value of the location in 2019 was somewhere between "$9.00 and $10.50 at best". (TT129). While Connelly testified when questioned by opposing counsel, that when averaged over seven years of the lease, Radco's payments were $10.11 per square foot, this was not the amount they agreed to pay during the initial term of the lease. (TT113-114, 123, 139-130).

**Trial Court's Decision**

At the close of evidence, the trial court entered initial oral findings of fact and conclusions of law. (TT200-217). In finding that Radco should have paid more during the remainder of Willis and Northern's term, the court stated "Well, I mean, I guess we didn't plug any videos in to evidence, but I hear their commercials on TV and the radio all the time. . . And every pickup truck I see in Sioux Falls has got a Radco sticker on their, um, what do you a call that they put on the bed of their truck. Their topper." (TT191). The court then stated, "I mean when you lose your business and you pay rent on something for two years plus with the doors closed you're obviously hemorrhaging." (TT199, App. 0043). "I mean Mr. Peska is a smart business man, and it appears, I mean we don't have his financial balance sheets, and income statements, and stuff, but everything I am hearing it sounds like he's very competent and been very successful, but I'm just going to cut to the chase on this, you guys, and we'll see what's left over here, but I, I'm accepting the blended rent argument." (TT199-200; App. 0043-44).

The court found that Peska was not reasonable in his efforts to mitigate damages because Peska would not compromise what he was owed for the remainder of the Willis and Northern Lease Agreement. (TT200; App. 0044). The Court stated:

> I just don't think it's commercially reasonable under the circumstances to break it up the way that it was, and I don't think Peska was reasonable in his efforts to mitigate damages. I mean to me Willis' argument, I would look at it this way, and I'm not sure if he articulated it this way, but this is what I heard him trying to say on the witness stand, that that is, yeah, the agreement that was presented to me for approval was lowball rent for my months, and then premium rent for Peska's new months, but if you averaged it all together it was a decent deal, and we weren't going to get a better deal, so let's take it, and then me and Peska will, you know, work the rest of it out later, that's why he kept trying to say, you know, we wanted to go to mediation.

(TT200; App. 0044). The trial court found that proration of the contract damages was the proper calculation method, because "it is the most fair and commercially reasonable way to do that. And so I think that probably would have been recommended by a mediator if this had gone to mediation." (TT201; App. 0045).

On September 10, 2020, the trial court signed written findings of fact and conclusions of law solidifying its oral findings, and ordered damages for past due rent and interest, the buildout loan and interest, commission, and prior overpayment for a total due as of July 29, 2020, of $36,923.50. (C.R. 641-56; App.0007-0023). The court's blended-rate calculation found that the average compromised rental rate for Radco was $9.70 per square foot rather than the actual rent of $8.43. (C.R. 653; App. 0012). The trial court also found that there were thirty-four months remaining under Willis and Northern's Lease Agreement, with a total of $228,312.32 of remaining rental payments. (C.R. 65; App. 0014). It did not require Willis and Northern to pay any damages for the first three months of the Radco lease, during which time Radco did not pay rent.

(C.R.655; App. 0022). The trial court held that Willis and Northern owed $935.48 per month from August 2020 through and including May 2022, for a total lease term amount owed of $31,806.60, a loss of $40,796.56 to Peska Properties; that Willis and Northern only owed $10,747.00 for the Radco buildout, a loss of $14,253.00 to Peska Properties; and that Northern and Willis owed Peska Properties $2,606.88 for a blended-rate realtor commission. (*Id*.) The trial court denied Peska Properties attorney's fees because it was "a split decision. So, I'm saying nobody won and nobody lost. It's a draw, So, no attorney's fees. Each side's responsible for their own attorney's fees." (TT204-205; App. 0048).

## STANDARD OF REVIEW

A trial court's calculation of damages for breach of contract raises a question of law. *See Lamar Advertising of South Dakota, Inc. v. Heavy Constructors, Inc.* 2008 S.D. 10, ¶ 13, 745 N.W.2d 374. "Conclusions of law are reviewed under a de novo standard of review and no deference is given to the trial court's conclusions of law." *Id.*

A trial court's findings of fact are reviewed by this Court under the clearly erroneous standard. *Arnold Murray Constr., LLC v. Hicks*, 2001 SD 7, ¶ 6, 621 N.W.2d 171, 174. "A trial court's determination as to the prevailing party and the award of costs and disbursements under an abuse of discretion standard." *Stern Oil Company, Inc. v. Brown,* 2018 S.D. 15, ¶ 44, 908 N.W.2d 144, 157.

## ARGUMENT

### I. The trial court erred when it determined that contract damages must be commercially reasonable rather than putting the injured party in the same position as if there had been no breach.

Under South Dakota law, damages from the breach of a lease agreement are to be treated like any other contract. *See Arrowhead Ridge I, LLC v. Cold Stone Creamery, Inc*., 2011 S.D. 38, ¶¶ 16-22, 800 N.W.2d 730, 735-37. Pursuant to SDCL § 21–2–1, damages for breach of contract consist of the amount that will compensate the aggrieved party for all of the detriment caused by, and that are the likely result of, the breach. The statute provides:

> For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom. No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and their origin.

SDCL § 21–2–1. Contract damages must "be a direct consequence of the breach of contract and reasonably within the contemplation of the parties at the time of making the contract." *Stern Oil Company, Inc. v. Brown*, 2018 S.D. 15, ¶17, 908 N.W.2d 144, 150. "Any doubt persisting on the certainty of damages should be resolved against the contract breaker." *AFSCME-Local 1025 Sioux Falls School Dist.,* 2000 S.D. 20, ¶14, 605 N.W.2d 811*,* 815. The purpose of contract damages is to put the injured party in the same position it would have been had there been no breach. *Lamar Advertising of South Dakota, Inc. v. Heavy Constructors, Inc.* 2008 S.D. 10, ¶ 14, 745 N.W.2d 377, 376; *Bad Wound v. Lakota Comty. Homes, Inc.*, 1999 SD 165, ¶ 9, 603 N.W.2d 723, 725. "A landlord is treated as any other aggrieved party to a contract." *Arrowhead Ridge I, LLC v. Cold Stone Creamery, Inc.*, 2011 S.D. 38, ¶18, 800 N.W.2d 730, 736 (quoting *Schneiker v. Fordon*, 732 P.2d 603, 607-09 (Colo.1987).

Had Willis and Northern upheld the terms of the contract, and had there been no breach, Peska Properties would have received $228,311.00 in rental payments for the remaining lease term, $12,155.74 for the remaining buildout loan with interest, and would not have had to pay $25,000.00 in buildout costs or $22,218.59 in realtor fees. Peska Properties requested a straight calculation based upon the lost rent of $72,601.84, the remaining loan and interest in the amount of $12,155.74, and the $25,000.00 it incurred in buildout costs for Radco. Peska Properties acknowledges that rent cannot be accelerated under the Lease Agreement, and that at the time of trial past damages for lost rent were $34,650.64 plus interest, with future rent damages of $36,951.20.

### A. The trial court erred in finding that Peska Properties did not exercise reasonable diligence to mitigate damages.

A landlord must exercise reasonable diligence to mitigate damages, however, this duty does not require the landlord to sacrifice any substantial right of his own or exalt the interests of the tenant above his own. *Arrowhead Ridge I, LLC v. Cold Stone Creamery, Inc*., 2011 S.D. 38, ¶¶ 20, 22, 800 N.W.2d at 736. The breaching party bears the burden of proving that damages would have been lessened by the exercise of reasonable diligence. *Id.* at ¶ 20.

Mitigation in this case involved hiring two real estate agents, preparation and distribution of marketing materials, a listing on the MLS database for real estate brokers, and for-rent signs being placed on the premises. Radco was the first, and only, prospective tenant after the property sat vacant for a year. Peska Properties engaged in numerous offers and counters that increased Radco's initial offer of $5.89 per square foot to $8.43 per square foot for the Willis and Northern term. (C.R. 354, Ex. 6:77). Connelly

testified that he was not aware of anything else that Peska could have done to negotiate a higher lease amount. (*See* TT122-23).

In *Arrowhead Ridge I, LLC v. Cold Stone Creamery, Inc*., this Court examined the mitigation efforts required of a landlord. 2011 S.D. 38, 800 N.W.2d 730. At trial Arrowhead presented undisputed evidence of its efforts to lease to the premises to another tenant following a breach of the lease agreement by the current tenant Cold Stone Creamery. *Id.* at ¶ 20. It posted signs indicating the space was available, circulated a data sheet to commercial real estate brokers in Sioux Falls, and made calls to advise that the premises were available. *Id.* at ¶ 6. Cold Stone Creamery failed to present evidence on the issue of mitigation at trial. *Id.* at 20. Despite Arrowhead's efforts, it was unable to lease the premises due to an exclusivity provision in another tenant's lease agreement, which was the sole basis supporting the trial court's conclusion that Arrowhead failed to mitigate its damages. *Id.* at ¶ 22. This Court held that the actions taken by Arrowhead "were substantial efforts to lease the premises to another tenant." *Id.* As a result, this Court found that the trial court had abused its discretion in finding that Arrowhead had failed to mitigate its damages. *Id.*

The mitigation efforts in this case were identical if not more substantial than those taken in *Arrowhead I*. In fact, Willis himself admitted that Peska Properties mitigated the damages, but in reality, he was just unhappy with the amount that was stilled owed. At trial Willis testified as follows:

Q: In this case, you've alleged that Gene has somehow failed to mitigate his damages?
A: No, I think he mitigated his damages, or he's trying to. I'm worried about our damages.
Q: Okay. So, you think, but in damages in general, do you think that Gene did everything he could to mitigate damages?

A: I think Gene did everything he could to mitigate damages for Peska Construction, Inc. and Peska Properties, but I don't think he has to date done what he could to mitigate damages for Northern Rental.

(TT162). When asked what more Peska could have done, Willis testified that Peska should have considered the entire lease agreement, that they had been a good tenant in the past, they had paid their rent up until they breached, that the rent Radco was paying increased rent after the Willis and Northern lease term, and that Peska Properties should have averaged the total damages thereby giving the benefit to Willis and Northern. (TT163). Willis's position, on behalf of himself and Northern, is not that there were additional steps Peska Properties could have taken to mitigate damages, but that Willis and Northern's rights should supersede those of Peska Properties, giving a benefit to the contract breaker. As a result, the trial court's finding that Peska Properties failed to mitigate damages is clearly erroneous and should be reversed.

**B. The trial court failed to place the injured party in the same position had there been no breach.**

While damages cannot be unconscionable, grossly oppressive or contrary to substantial justice, the purpose of contract damages "is to put the injured party in the same position it would have been had there been no breach." *See Lamar Advertising of South Dakota, Inc. v. Heavy Constructors, Inc.* 375; 2008 S.D. 10, ¶ 14, 745 N.W.2d 374, 376. "The calculation of damages under [a] lease is analogous to the calculation of damages generally." *Burch v. Bricher*, 2006. S.D. 101, ¶ 10, 724 N.W.2d 604, 607. "The detriment caused by the breach of an obligation to pay money only is deemed to be the amount due by the terms of the obligation with interest thereon." SDCL § 21-2-2. "Proof of damages requires a reasonable relationship between the method used to calculate damages and the amount claimed." *Id.* (quoting: *Bunkers v. Jacobson*, 2002 SD 135, ¶ 40,

653 N.W.2d 732, 743 (citation omitted)). "In applying this rule, a reasonable certainty test is employed. Reasonable certainty requires proof of a rational basis for measuring loss, without allowing any room for speculation." *Id*. (citations omitted).

At trial, the amount due under the Lease Agreement, as well as the amount actually paid by Radco was undisputed. Peska Properties' straight calculation of the rent due after mitigation is the most reasonably certain method to calculate contract damages. As there was no evidence at trial that Radco was willing, or able, to pay more in rent during the remainder of the Willis and Northern lease term, the trial court engaged in speculation when it held, "If Radco was willing to pay the fair market lease value of the property during the remaining years of Northern's lease – which they are willing to do after Northern's lease period ends – there would be no detriment." (C.R. 650).

In trying to find a compromise, based upon what "would have been recommended by a mediator"[1], the trial court deviated from well-established law, requiring that the calculation be commercially reasonable. South Dakota law imposes commercial reasonability on creditors in secured transactions for the collection, enforcement, disposition, or acceptance of amounts owed. SDCL § 57A-9-627. However, South Dakota law specifically states that this does not apply "to the creation or transfer of an interest in or lien on real property, including a lease or rents thereunder[.]" SDCL § 57A-9-109. Instead, South Dakota contract law mandates that after a breach of contract the injured

---

[1] The trial court stated, "it is the most fair and commercially reasonable way to do that. And so I think that probably would have been recommended by a mediator if this had gone to mediation." (TT201).

party must be made whole, and any doubt should be construed against the contract breaker.

The trial court improperly relied upon *Tri-State Refining and Inv. Co., Inc. v. Apoloosa Co.,* 431 N.W.2d 311 (S.D. 1988), for the proposition that "the monthly lease payment amount may not be the proper measure of damages under SDCL § 21-2-1." (C.R. 649-50). Unlike the case presently before this Court, *Tri-State* involved a tenant suing a landlord for breach of a farm lease agreement based upon the landlord's termination of the lease. *Id.* at 315. The *Tri-State* trial court awarded damages from the landlord to the tenant for the monthly rent amount. *Id.* This Court found that there was no evidence that the tenant suffered $200.00 per month in damages as a result of the landlord breaching the lease. *Id.* Thus, it held that the, "[m]onthly rental payments are not the proper measure of damages to the **lessee** under SDCL 21-2-1." *Id.* (emphasis added).

As opposed to *Tri-State,* here the landlord is seeking damages for breach of contract by the tenant for the loss of rent owed, which was specifically contemplated at the time the parties entered the contract and was the actual damage suffered by the landlord. The holding in *Tri-State* was specific to the tenant because the tenant did not suffer a monetary loss of the rental amount, and therefore monthly rent was not the proper method of damages. *Tri-State,* 431 N.W.2d at 315. Here, the trial court's expansion of the *Tri-State* holding to all lease agreements contradicts the language of SDCL § 21-1-2 and case law stating that a landlord is treated as any other aggrieved party to a contract, and the purpose of contract damages is to put the injured party in the same position it would have been had there been no breach. *See Arrowhead Ridge I, LLC v. Cold Stone Creamery, Inc.*, 2011 S.D. 38, ¶18, 800 N.W.2d 730, 736; *Lamar Advertising*

*of South Dakota, Inc. v. Heavy Constructors, Inc.* 2008 S.D. 10, ¶ 14, 745 N.W.2d 377, 376; *Bad Wound v. Lakota Comty. Homes, Inc.*, 1999 SD 165, ¶ 9, 603 N.W.2d 723, 725. If a lease agreement is to be treated like any other contract, the actual monetary loss cannot be disregarded as the proper measure of damages, especially to give a benefit to the contract breaker. Under the trial court's holding, Willis and Northern are given a benefit for breaching the contract, with Peska Properties shouldering the loss of $55,049.56. This result does not place Peska Properties in the same position had their been no breach, and does not make Peska Properties whole.

**C. The trial court erroneously calculated damages for the Radco buildout.**

The Radco buildout was $105,500. As part of its final offer, Radco required Peska Properties to reimburse it for $25,000 of this cost. The trial court held that Willis and Northern should only be held responsible for $10,747 of the buildout, because "Radco continues to use many of the floor coverings, counters, and warehouse shelving which were installed by Construction for Northern and paid for by Northern." FOF 27.

While the trial court is correct that Radco reused and modified the warehouse shelves, sales counters and some flooring, the construction plans show that more than half of the Radco space was substantially renovated for retail use, including demolition, carpentry, finishes, plumbing, construction to walls and flooring, installation of lighting, ceilings, electrical, HVAC, and construction of a pergola. TT32-33; Ex. 15. These changes were above and beyond what Radco could repurpose from anything left behind

by Willis and Northern[2]. Any benefit of reusing materials was conferred upon Radco, not Peska Properties, which paid $25,000 toward the renovation. Additionally, if Peska Properties had not agreed to pay $25,000 toward renovations, Radco could have walked away from the agreement. Therefore, the property left behind by Willis and Northern also conferred a benefit upon themselves as it may have helped secure a tenant to mitigate their damages.

**D. The trial court erred in finding Peska Properties was not the prevailing party.**

"In South Dakota, the party in 'whose favor the decision or verdict is or should be rendered and judgment entered" is the primary consideration in determining the prevailing party.'" *Stern Oil Company, Inc. v. Brown,* 2018 S.D. 15, ¶ 49, 908 N.W.2d 144, 158 (quoting *Geraets v. Halter*, 1999 S.D. 11, ¶ 20, 588 N.W.2d 231, 235). The trial awarded Peska Properties $36,962.50 for past damages and $935.48 per month from August 2020 through May 2022 in future damages. Per the Lease Agreement, the parties also agreed that the prevailing party would be entitled to attorney's fees, costs and expenses as the result of any dispute to enforce the terms of the contract. Paragraph 30 of the lease agreement states:

> In any action, suit or proceeding to enforce, defend or interpret the rights of either Landlord or Tenant under the terms of this Lease or to collect any amounts due, Landlord or Tenant hereunder, the prevailing party, pursuant to a final order of a court having jurisdiction over said matter as to which applicable periods within which to appeal have elapsed, shall be entitled to recover all reasonable costs and expenses incurred by said prevailing party in enforcing, defending or interpreting its rights hereunder, including, without limitation, all collector and court costs, and reasonable attorney's

[2] Under paragraph 25 of the Lease Agreement, Willis and Northern surrendered title and ownership to all of the alterations made to the property when they terminated their lease agreement and abandoned the premises on July 18, 2019. Ex. 2.

> fees, whether incurred out of court, at trial, on appeal, or in any bankruptcy proceeding.

(C.R. 194, Ex. 2:18).

This Court addressed a similar situation in *Stern Oil Company, Inc. v. Brown,* 2018 S.D. 15, 908 N.W.2d 144. In *Stern Oil*, the plaintiff was awarded $900,000 in the first trial, and $260,464 in the second trial. The trial court denied attorney's fees finding that the plaintiff lost on two significant issues at trial, which included a discount the plaintiff received for damages on diesel fuel sales. *Id.* at ¶ 48. The trial court found that there was no prevailing party because "both parties gained victories and suffered losses." *Id.* In finding that the trial court abused its discretion, this Court stated, "we are hard pressed to find cases where we have affirmed a trial court's decision that determined a party receiving a monetary judgment was not the prevailing party." *Id.* This Court held that because the jury found the defendant breached the contract, the plaintiff was owed damages, and the contract between the parties awarded the prevailing party in litigation attorney's fees, the trial court abused its discretion.

This case is materially similar to the factual underpinnings in *Stern Oil*. Here, the trial court stated "It's a split decision. So, I'm saying that nobody won and nobody lost. It's a draw. So, no attorney's fees. Each side's responsible for their own attorney's fees. How about that." (TT205). However, the trial court awarded judgment in favor of Peska Properties stating, "Northern and Willis, joint and severally, owe Properties the following amount as of the date of trial. . . TOTAL AMOUNT CURRENTLY DUE AS DATE OF TRIAL: $36,923.50." (C.R. 653). Therefore, under well-settled South Dakota law, Peska Properties was the prevailing party, and by the terms of the contract is entitled to its attorney's fees and costs.

**II. Peska Properties did not receive a "Windfall" to offset the detriment of damages.**

To recover damages for breach of contract, the loss must be clearly ascertainable in both its nature and origin. SDCL § 21–2–1. "Essential to proving contract damages is evidence that damages were in fact caused by the breach." *McKie v. Huntley,* 2000 S.D. 160, ¶ 18, 620 N.W.2d 599, 605 (citing *Bad Wound v. Lakota Community Homes, Inc*., 1999 SD 165, ¶ 9, 603 N.W.2d 723, 725). "The ultimate purpose behind allowance of damages for breach of contract is to place the injured party in the position he or she would have occupied if the contract had been performed, or to make the injured party whole." *Stern Oil Company, Inc. v. Brown,* 2018 S.D. 15, ¶ 16, 908 N.W.2d 144, 151.

Peska Properties sustained $109,757.58 in damages as a result of Willis and Northern's breach. (C.R. 551, Ex. 10). Peska Properties also incurred $22,218.59 in realtor fees, resulting in a total detriment of $131,976.17, not including the costs of litigation. (C.R. 548, Ex. 7). This amount was a substantial loss for Peska Properties and not a "windfall" as found by the trial court when it stated:

> In the case at bar, there is a genuine question as to whether the method used to calculate the loss has a rational basis. Claiming the full damages would force the **jury** to speculate as to the detriment actually realized by Peska. As previously stated, Peska is receiving a substantial windfall because the true detriment is not the extent of damages claimed.

R. 651 (emphasis added)[3]. While the court did not specifically define the "windfall" it was referring to, in paragraph 22 of its findings of fact the trial court made the following findings:

a) Radco appears to be a financially strong tenant;
b) The new 7- year lease increases the value of Properties' mall;

---

[3] This matter was held as a court trial, and there was no jury to speculate regarding the detriment realized by Peska.

c) The additional 55- month term is valuable to Properties in the form of base, rent, triple net charges, and common area maintenance charges;
d) $15.00 tenant leasehold allowance is a fairly low buildout allowance;
e) $3.50 psf tenant leasehold allowance is a very low buildout allowance;
f) The fair market rental on the Leased Premises was between $9.00 psf to $10.50 psf;
g) $8.43 psf is below fair market rental for the Leased Premises and $11.00 psf is above fair market rental for the Leased Premises;
h) The blended rate of the rent payable during the entire 87-month term of the Radco lease falls within the fair market rental rate for the Leased Premises; and
i) There is no guarantee Properties would be able to re-let the Leased Premises at the termination of Northern's Lease term. In other words, without the Radco 55-month extension Properties may have been left with a vacant space in its mall at the expiration of Northern's Lease term.

(C.R. 646, App. 0012). These findings disregard Willis and Northern's wrongful conduct and contribution toward the losses sustained.

Willis and Northern chose to close the Aaron's business located on the property in 2017. They then remained in possession of the premises, leaving it sit empty for nearly a year before seeking to sublet or notifying Peska Properties that they no longer wanted to lease the premises. As the building itself had been substantially modified by Willis and Northern to fit the specifications of their Aaron's franchise, it required substantial modifications to accommodate a different tenant. Finding a tenant that was willing to invest the amount of money needed for renovations took the parties almost a year. Further, Connelly testified that finding a tenant willing to invest such substantial funds would require a longer lease term than the 34 months remaining under the Willis and Northern Lease Agreement. If Willis and Northern had taken steps to relet the premises in 2017, they may have found another tenant willing to pay more than Radco, as it would have given more time under the remaining lease term. However, due to the constraints

created by Willis and Northern, significant time passed, making the property less valuable to prospective tenants.

The trial court found that Peska Properties benefited financially as a result of Peska Construction, Inc. completing the renovations for Radco, simply because Gene Peska was C.E.O. of both corporations[4]. It was undisputed at trial that Peska Properties, is a separate corporate entity from Peska Construction, Inc. It was also undisputed that Peska Properties paid the $25,000 directly to Radco via check for the cost of the renovations, a loss sustained by Peska Properties regardless of which construction company completed renovations. At trial, Gene Peska was the corporate representative for Peska Properties, Inc., not a direct party to the contract, which was between Peska Properties, Willis and Northern. The trial court's assumption, without evidence, that Gene Peska benefitted personally[5], does not cure the damages suffered by Peska Properties. The trial court's finding ignores the language of the Lease Agreement, corporate structure of both entities and assumed facts that were not in evidence.

Further, there is no evidence that Radco was willing to pay more during the initial term of the lease. Connelly testified that at the time the property was listed in 2019, the fair market rental value was $9.50 to $10.50, at best, not that $8.43 was below a fair rent

---

[4] The trial court stated, "And when you, um, yeah, you pay for buildout, but then you get to do the buildout. You're obviously getting a rebate on that, and that's smart business." (TT199).

[5] The trial court stated, "I mean Mr. Peska is a smart business man, and it appears, I mean we don't have his financial balance sheets, and income statements, and stuff, but everything I am hearing it sounds like he's very competent and been very successful, but I'm just going to cut to the chase on this, you guys, and we'll see what's left over here, but I, I'm accepting the blended rent argument." (TT199-200).

rate. (TT129). He also testified that the space presented a challenge to rent as it was an Aaron's franchise tailored space. (*Id.*). Radco needed to spend $105,500 upfront to modify the space before it could operate. The most Radco offered to pay during the remaining time under Willis and Northern's lease term was $8.43 per square foot, due to the short time remaining under the lease term and the substantial funding to renovate the retail space.

By compromising the damages owed, the trial court rewarded Northern and Willis for breaching their contractual agreement by requiring Peska Properties to shoulder the remaining loss. Not only does it disregard established law, but it also sets a negative precedent for future tenants to breach lease agreements and walk away with a benefit when the landlord secures a new tenant, regardless of the losses sustained by the landlord and the actions taken to mitigate damages. This inequality places the interests of tenants above those of landlords and degrades the mutual promises made in contractual agreements.

## CONCLUSION

Steve Willis is a highly educated business owner. Through Northern Rental, Inc. he owns and operates franchise leasing companies. Not only was he very knowledgeable of the consequences of breaching a lease agreement, he and Northern took affirmative steps that not only devalued the premises for prospective tenancy, but also forced Peska Properties into the lease with Radco. There is no dispute that Willis and Northern breached their lease agreement. Peska Properties took every reasonable step to find, and secure a new tenant, to mitigate the loss sustained. This is all the law requires. The trial court erred in finding that Peska Properties did not suffer a detriment and improperly

denied Peska Properties all of the damages caused by Willis and Northern's breach. Further, after finding that Peska Properties was owed damages as a result of Willis and Northern's breach, the trial court wrongly concluded that Peska Properties was not the prevailing party.

Finally, if this Court finds that the trial court improperly compromised damages for the lost rent and Radco's buildout costs, then it should also reverse the trial court's ruling on the commission adjustment, a benefit conferred to Peska Properties.

Dated this 8th day of March, 2021.

*/s/ Kasey L. Olivier*

OLIVIER MILES HOLTZ, LLP
Kasey L. Olivier (kasey@omhlawfirm.com)
Ashley Miles Holtz (ashley@omhlawfirm.com)
4201 S. Minnesota Ave, Ste 113
Sioux Falls, SD 57105
(605) 331-0609

-and-

Thomas J. Nicholson
NICHOLSON LAW OFFICE
4201 S. Minnesota Ave, Ste 113
Sioux Falls, SD 57105
(605) 335-7100

*Attorneys for the Appellant*

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Appellant's Brief and all appendices were e-mailed and mailed by first class mail, postage prepaid to:

CUTLER LAW FIRM, LLP
Kent R. Cutler
Kimberly Wassink
140 N. Phillips Ave.
Sioux Falls, SD 57101
(605) 335-4951

*Attorneys for the Appellee*

Dated this 8th day of March, 2021.

*/s/ Kasey L. Olivier*
Kasey L. Olivier

## CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This Brief was prepared using Microsoft Word and contains 7,508 words from the Statement of the Case through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

Dated this 8th day of March, 2021.

*/s/ Kasey L. Olivier*

OLIVIER MILES HOLTZ, LLP
Kasey L. Olivier (kasey@omhlawfirm.com)
Ashley Miles Holtz (ashley@omhlawfirm.com)
4201 S. Minnesota Ave, Ste 113
Sioux Falls, SD 57105
(605) 331-0609

**APPENDIX**
**TABLE OF CONTENTS**

**APPENDIX**
**TABLE OF CONTENTS**

# TAB 1

| | | |
|---|---|---|
| STATE OF SOUTH DAKOTA | ) | IN CIRCUIT COURT |
| | ) SS | |
| COUNTY OF MINNEHAHA | ) | SECOND JUDICIAL CIRCUIT |

| | |
|---|---|
| PESKA PROPERTIES, INC.,<br><br>Plaintiff,<br><br>v.<br><br>NORTHERN RENTAL CORP., a South Dakota corporation, and STEVE WILLIS, Individually,<br><br>Defendants. | 49CIV19-002729<br><br>**NOTICE OF ENTRY OF JUDGMENT** |

TO: PLAINTIFF PESKA PROPERTIES, INC., AND TO KASEY L. OLIVIER, ASHLEY MILES HOLTZ, AND THOMAS J. NICHOLSON, ITS COUNSEL OF RECORD:

PLEASE TAKE NOTICE that the Judgment, a true and correct copy of which is attached hereto and by this reference made a part hereof as if fully set forth at length and in detail herein, has been entered, filed and recorded in the above-entitled action in the office of the above entitled Court on the 11th day of September, 2020.

Dated this 16th day of September, 2020.

CUTLER LAW FIRM, LLP
Attorneys at Law

*/s/ Kent R. Cutler*
Kent R. Cutler
140 N. Phillips Ave., 4th Floor
P.O. Box 1400
Sioux Falls, South Dakota 57101-1400
Telephone (605) 335-4950
kentc@cutlerlawfirm.com
*Attorneys for Defendants*

## CERTIFICATE OF SERVICE

I, Kent R. Cutler, one of the attorneys for Defendants, do hereby certify that on this 16th day of September, 2020, I have electronically filed the foregoing through Odyssey File & Serve which will send notification of such filing to the following:

Kasey L. Olivier
Ashley Miles Holtz
OLIVIER MILES HOLTZ, LLP
4201 S. Minnesota Ave, Ste 113
Sioux Falls, SD 57105
(605) 331-0609
kasey@omhlawfirm.com
ashley@omhlawfirm.com

and

Thomas J. Nicolson
NICHOLSON LAW OFFICE
4201 S. Minnesota Ave, Ste 113
Sioux Falls, SD 57105
(605) 335-7100
tom@nicholsonandnicholson.com

*Attorneys for the Plaintiff*

Dated this 16th day of September, 2020.

*/s/ Kent R. Cutler*
Kent R. Cutler

| | | |
|---|---|---|
| STATE OF SOUTH DAKOTA<br>) SS<br>COUNTY OF MINNEHAHA | ) | IN CIRCUIT COURT<br>SECOND JUDICIAL CIRCUIT |

| | |
|---|---|
| PESKA PROPERTIES, INC.,<br><br>Plaintiff,<br><br>v.<br><br>NORTHERN RENTAL CORP., a South Dakota corporation, and STEVE WILLIS, Individually,<br><br>Defendants. | 49CIV19-002729<br><br>**JUDGMENT** |

This matter having come on for trial on the 29th day of July, 2020, before the Honorable Douglas E. Hoffman, Circuit Court Judge, at the Minnehaha County Courthouse in the City of Sioux Falls, South Dakota; the Plaintiff having appeared through its sole shareholder and company representative, Gene Peksa, and its attorney, Kasey L. Olivier, Olivier Miles Holtz, LLP, Sioux Falls, South Dakota; the Defendants having appeared through shareholder, company representative, and individual defendant, Steve Willis, along with their attorney, Kent R. Cutler, Cutler Law Firm, LLP, Sioux Falls, South Dakota; the parties having presented witness testimony and offered exhibits which were received into evidence during trial; the Court having considered the evidence presented and the pleadings on file herein; and having entered Findings of Fact and Conclusions of Law consistent therewith;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Plaintiff shall have and recover from Defendants, jointly and severally, the following amounts as calculated on the Court's Damage Calculation attached as Exhibit 1 to the Findings of Fact and Conclusions of Law as follows:

a. Past due rent from August 2019 through July 2020 in the amount of $11,225.76 together with prejudgment interest of $607.62 for a total of $11,883.38;

b. Balance on Defendants' buildout of $10,792.30 together with prejudgment interest of $1,363.44 for a total of $12,155.74;

c. Defendants' pro-rata share of Mills Aftermarket Accessories, Inc. d/b/a Radco's buildout in the amount of $9,770.00 together with prejudgment interest of $977.00 for a total of $10,747.00;

d. Adjustment of NAI's commission payment between Plaintiff and Defendants based on the Court's decision in the amount of $2,606.88 without prejudgment interest; and

e. Defendants' shall receive a $419.50 credit against the amounts due as a result of their overpayment of Plaintiff's July 17, 2019 invoice/statement.

2. Defendants' shall pay Plaintiff a rent deficiency payment in the amount of $935.48 per month on or before the first day of the each month from August, 2020 through May, 2022.

3. The Court's Findings of Fact and Conclusions of Law in this matter which were entered on September 11, 2020 and filed on September 11, 2020 are incorporated in this Judgment as if fully set forth herein;

4. Neither the Plaintiff nor the Defendants' are considered prevailing parties in this

matter and as such neither shall recover attorneys' fees from the other.

Dated this 11 day of September, 2020.

BY THE COURT:

HON. DOUGLAS E. HOFFMAN
Circuit Court Judge

ATTEST: Angelia M. Gries
Clerk

By: Russell, Deputy

FILED
SEP 11 2020
Minnehaha County, S.D.
Clerk Circuit Court

# TAB 2

| | | |
|---|---|---|
| STATE OF SOUTH DAKOTA | ) | IN CIRCUIT COURT |
| | : ss | |
| COUNTY OF MINNEHAHA | ) | SECOND JUDICIAL CIRCUIT |

| | |
|---|---|
| PESKA PROPERTIES, INC.,<br><br>Plaintiff,<br><br>vs.<br><br>NORTHERN RENTAL CORP., a South Dakota Corporation, and STEVE WILLIS, Individually,<br><br>Defendants. | 49CIV19-002729<br><br>**FINDINGS OF FACT AND CONCLUSIONS OF LAW** |

The above-entitled action having come before the Honorable Douglas E. Hoffman, Circuit Court Judge, and a trial having been held on Wednesday, July 29, 2020, at the Minnehaha County Courthouse, Sioux Falls, South Dakota; the Plaintiff having appeared through member and company representative, Gene Peska, along with its attorney, Kasey L. Olivier, Olivier Miles Holtz, LLP, Sioux Falls, South Dakota; the Defendants having appeared through shareholder, company representative, and individual defendant, Steve Willis, along with their attorney, Kent R. Cutler, Cutler Law Firm, LLP, Sioux Falls, South Dakota; the Court having considered the Court's pleadings on file, the parties' pre-trial briefing, and the exhibits received and witness testimony presented during trial; and the Court finding that good cause exists;

NOW, WHEREFORE, the Court enters the following Findings of Fact and Conclusions of Law:

## FINDINGS OF FACTS

1. Gene Peska ("Peska") is a South Dakota resident and the sole shareholder of Peska Properties, Inc. ("Properties") and Peska Construction, Inc. ("Construction").

2. Steve Willis ("Willis") is a South Dakota resident and a shareholder in Northern Rental Corp. ("Northern"), which owns and operates Aaron's in Sioux Falls.

3. Properties, Northern, and Willis entered into a Lease dated December 23, 2011 ("Lease"). Exhibit 2. The Lease was for 7,150 sq.ft. of retail space at 2409 East 10th Street, Sioux Falls, South Dakota ("Leased Premises") and was for an initial term of 10-years. Peska and Willis agree the Lease's 10-year term began June 1, 2012, after Construction delivered occupancy, and runs through May, 2022. Pursuant to Section 4.g. of the Lease, Properties performed an additional $50,000.00 of buildout in the Leased Premises at Northern's request, which Northern was paying as additional rent, together with 8% interest, amortized monthly over the initial 10-year term. Section 28 of the Lease outlining Properties' rights and remedies in the event of a Tenant default, restricts any such right or remedy from having "the effect of (1) accelerating the due date on which Tenant otherwise would be obligated to make any payment of Rent or Other Charges or (2) requiring Tenant to pay for any improvements or modifications that Landlord may make to the Premises in order to accommodate a replacement for Tenant with a non-retail use."

4. Northern opened and operated an Aaron's store in the Leased Premises.

5. In early 2017, Northern and Willis made the business decision to close the Aaron's located in the Leased Premises.

6. In May, 2018, Northern and Willis listed the Leased Premises for sub-lease with

realtor Jay Zea.

7. After several months without much interest in the Leased Premises, Peska suggested to Willis that he contact commercial realtor Bill Connelly ("Connelly") with NAI Sioux Falls to see if Connelly could be of assistance subleasing the Leased Premises.

8. Peska had a lengthy relationship and significant experience with Connelly, who had worked on at least one deal per year for Peska for the better part of 10 years.

9. On October 8, 2018, Willis listed the Leased Premises for sub-lease with Connelly.

10. In late April or early May 2019, Mills Aftermarket Accessories, Inc. d/b/a Radco ("Radco") began expressing interest in the Leased Premises.

11. Northern and Willis remained current on their Lease obligations to Properties from early 2017 to June 2019 even though it had closed its Aaron's store and the Leased Premises was sitting vacant.

12. On or about June 6, 2019, Radco submitted a Letter of Intent on the Leased Premises. Exhibit 6, pp. 81 through 83. The requested lease term in Radco's Letter of Intent exceeded Northern's remaining term on the Leased Premises, which required Peska to be involved in the negotiations with Radco.

13. On or about June 19, 2019, Properties responded to Radco's Letter of Intent. Properties offered to accept $9.50 psf for the remainder of Northern's 32-month lease term, increasing by 30% to $11.00 psf on the first month of the extended 55-month term with Properties. Exhibit 6, p. 78.

14. On or about June 22, 2019, Radco responded by offering to pay $8.43 psf on

Northern's remaining lease term and $10.50 psf during Properties' 55-month extended term. Exhibit 6, p. 76.

15. Between June 22, 2019 and June 28, 2019, additional negotiations lead Radco to offer $11.00 psf during Properties' 55-month extended term while staying put on $8.43 psf during Northern's remaining lease term.

16. Around this same time, Willis and Peska attempted to negotiate a resolution of Northern's remaining Lease obligations to Properties to no avail. Willis suggested Peska should get Properties' deal done with Radco following which Willis hoped he and Peska could reach an agreement on a resolution of Northern's remaining lease obligations.

17. Properties entered into a listing agreement for the Leased Premises with Connelly on July 1, 2019. Exhibit 6, p. 65-68.

18. Willis confirmed his suggestion that Peska should enter into a lease with Radco in writing on July 18, 2019. Exhibit 6, p. 94.

19. On July 19, 2019, Properties provided Willis a default notice along with a July 17, 2019 statement in the amount of $15,484.50 for the balance due under the Lease through July 2019. Exhibit 4, pp. 1 – 39.

20. Properties entered into a Letter of Intent with Radco on July 23, 2019. Exhibit 6, pp. 241-244.

21. Properties entered into a new 7-year (3 months free of rent and 84 months of rent) lease with Radco on August 1, 2019. The Radco lease provided for three months of free rent, 31 months of rent at $8.43 psf, and 53 months of rent at $11.00 psf. The Radco lease required

Properties to contribute $25,000 in leasehold improvements, which equates to $3.50 psf of the 7,150 sq. ft. Leased Premises. Exhibit 11.

22. Regarding the Radco lease, Connelly testified as follows:

a) Radco appears to be a financially strong tenant;

b) The new 7-year lease increases the value of Properties' mall;

c) The additional 55-month term is valuable to Properties in the form of base rent, triple net charges, and common area maintenance charges;

d) $15.00 tenant leasehold allowance is a fairly low buildout allowance;

e) $3.50 psf tenant leasehold allowance is a very low buildout allowance;

f) The fair market rental on the Leased Premises was between $9.00 psf to $10.50 psf;

g) $8.43 psf is below fair market rental for the Leased Premises and $11.00 psf is above fair market rental for the Leased Premises;

h) The blended rate of the rent payable during the entire 87-month term of the Radco lease falls within the fair market rental rate for the Leased Premises; and

i) There is no guarantee Properties would be able to re-let the Leased Premises at the termination of Northern's Lease term. In other words, without the Radco 55-month extension Properties may have been left with a vacant space in its mall at the expiration of Northern's Lease term.

23. Construction is the preferred contractor on Properties' buildouts. Construction did

both Northern's and Radco's buildout. Construction earns profit and overhead on its construction projects.

24. Construction did over $100,000 of buildout for Radco for which it would have earned overhead and profit.

25. Properties contributed $25,000 towards Radco's buildout. Exhibits 9 and 11.

26. The $25,000 Properties contributed towards Radco's buildout equates to $3.50 psf which is a low buildout contribution in consideration of the extended 55-month term.

27. Radco continues to use many of the floor coverings, counters, and warehouse shelving which were installed by Construction for Northern and paid for by Northern. Exhibits A-D. Northern and Willis admit they owe Properties the balance of $10,792.30 for Northern's original buildout plus interest of $1,363.44 as of August 1, 2020.

28. By letter dated September 6, 2019, Northern Rental sent Properties a check in the amount of $15,904.00 to satisfy Properties' July 17, 2019 statement. Northern's check actually over paid the amount due Properties by $419.50. Exhibit H and 14.

29. Neither Northern nor Willis have made any payments to Properties since September 6, 2019.

30. Northern and Willis have paid in full Connelly's/NAI's invoice for re-letting the Leased Premises during the remainder of Northern's term in the amount of $9,949.83. Exhibit 8. The amount due NAI from Northern and Willis was based on $8.43 psf rent during Northern's remaining term.

31. Properties has paid in full Connelly's/NAI's invoice for leasing the Leased Premises

for the additional 55-month term in the amount of $22,218.59. Exhibit 7. The amount due NAI from Properties was based on $11.00 psf rent during Radco's extended term.

32. Any Finding of Fact which is more properly designated as a Conclusion of Law shall be deemed to be a Conclusion of Law.

From the foregoing Findings of Fact the Court now makes the following:

**CONCLUSIONS OF LAW**

1. All Findings of Fact and Conclusions of Law stated on the record are incorporated herein by this reference.

2. This Court has personal jurisdiction of the parties and the subject matter of these proceedings.

3. Properties as the Plaintiff bears the burden of proving its claims by the greater convincing force of the evidence.

4. Properties, Northern, and Willis entered into an enforceable Lease and are liable to each other for the performance of the same.

5. Northern breached the Lease in July 2019.

6. At the time of Northern's breach of the Lease, the Lease had 34 months remaining on its term.

7. Radco's lease has a total term of 87 months (3 months free of rent plus 84 months of rent).

8. An action for a breach of contract is governed by SDCL § 21 chapters 1 and 2. These chapters lay out the basis for any claim of damages resulting from a breach of contract. In

addition to these statutes, the Supreme Court of South Dakota has developed a fairly robust jurisprudence concerning contract breaches. According to these cases, the fundamental rationale of a damage claim for a breach of contract is to put the injured party in the same position they would have been had no breach occurred. *Bad Wound v. Lakota Community Homes Inc*, 1999 S.D. 165, ¶ 9, 603 N.W.2d 723, 725 (citing *Ducheneaux v. Miller*, 488 N.W.2d 902, 915 (S.D. 1992)). However, to recover any damages the loss must "be clearly ascertainable in both its nature and origin." *McKie v. Huntley*, 2000 S.D. 160, ¶ 18, 620 N.W.2d 599, 603 (citing SDCL 21-2-1). Furthermore, the party claiming damages must show a "reasonable relationship" between the method used to calculate damages and the amount claimed. *FB & I Bldg. Prod. Inc. v. Superior Truss and Components, A Div. of Banks Lumber, Inc.*, 2007 S.D. 13, ¶ 20, 727 N.W.2d 474, 480 (citing *McKie*, 2000 S.D. 160, ¶ 18, 620 N.W.2d at 603). This amount claimed must also be reasonably certain and should not be speculative. *Olson v. Aldren*, 170 N.W.2d 891, 895 (S.D. 1969). Finally, the injured party cannot recover more in the claim then they would have realized with full performance of the contract, and the damages must be reasonable and not contrary to substantial justice. SDCL §21-1-5; SDCL §21-1-3.

9. In *Tri-State Refining and Inv Co, Inc. v. Apaloosa Co*, the Supreme Court of South Dakota held that the monthly lease payment amount may not be the proper measure of damages under SDCL § 21-2-1. *Tri-State*, 431 N.W.2d at 315. Rather, the Court stated that the trial court must examine the record to determine if the leasee suffered any harm proximately resulting from the breach of the lease. *Id.* This amount of detriment is the true measure of damages. *Id.* Even though *Tri-State* is based on a leasee being the injured party, it is still true that

the monthly rent payment value is not automatically the proper amount of damages to claim.

10. To recover damages, the loss must "be clearly ascertainable in both its nature and origin." *McKie*, 2000 S.D. 160, ¶ 18, 620 N.W.2d at 603 (citing SDCL § 21-2-1). There is a genuine question of fact as to the origin of the loss felt by Peska. In a normal lease breach case, undoubtedly the origin is the breaching party. Here, however, Northern continued to make periodic payments even when they were no longer using the property. It was only after the second lease was created with Radco that Northern completely ceased the lease payments. If Radco was willing to pay the fair market lease value of the property during the remaining years of Northern's lease—which they are willing to do after Northern's lease period ends—there would be no detriment.

11. In proving damages, "the party must also establish a 'reasonable relationship between the method used to calculate damages and the amount claimed." *FB & I Bldg. Prod. Inc.*, 2007 S.D. 13, ¶ 20, 727 N.W.2d at 480 (citing *McKie*, 2000 S.D. 160, ¶ 18, 620 N.W.2d at 603). The Supreme Court of South Dakota has stated that there is not an exact formula for calculating damages, rather the Court applies a reasonable certainty test for the proof required to establish a right to recover the claimed amount. *McKie*, 2000 S.D. 160, ¶ 18, 620 N.W.2d at 603. "Reasonable certainty requires proof of a rational basis for measuring loss, without allowing a jury to speculate." *Id.* In the case at bar, there is a genuine question as to whether the method used to calculate the loss has a rational basis. Claiming the full damages would force the jury to speculate as to the detriment actually realized by Peska. As previously stated, Peska is receiving a substantial windfall because the true detriment is not to the extent of damages

claimed.

12. "Damages must in all cases be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered." SDCL § 21-1-3. This fundamental principle controls all damages claims, regardless of the type of injury, the form of calculation, or amount of damages claimed. When the damages sought by the injured party are unconscionable or unreasonable on their face, they cannot be recovered. *Id.*

13. The Court finds as a matter of law that the most commercially reasonable manner to calculate the balance due under Northern's Lease is to use a blended rent rate during the entire 7-year term of Radco's lease with Properties. The blended rent rate during the entire 7-year term of the Radco lease is $9.70 psf. Using the blended rate, Northern and Willis are responsible for a deficiency in rent of $935.48 per month beginning in August 2019.

14. The blended rent rate is the most commercially reasonable manner to calculate the amounts due under Northern's Lease as the blended rent rate over the entire term of the 7-year Radco lease is $9.70 psf which falls within the range of fair market rent as testified to by Connelly.

15. To allow Properties to mitigate its damages during Northern's remaining term at $8.43 psf, with a 30% increase in rent to $11.00 psf the first month of the new 55-month extended term, is not commercially reasonable.

16. It's further not commercially reasonable for Properties to receive above fair market rent during the 55-month extended term and Northern and Willis to receive below fair market rent credit during the remaining 34 months on their Lease.

17. Properties, Construction, and Peska all benefited in many ways from the Radco lease as testified by Connelly.

18. Properties could not have entered into the Radco lease and secured the new 55-month extended term, had Northern not cooperated by consenting to and allowing Properties to enter into the 7-year Radco lease.

19. Northern and Willis admit they owe Properties the balance of $10,792.30 for Northern's original buildout plus interest of $1,363.44 as of August 1, 2020.

20. Section 28 b. (2) of the Lease provides Properties can pursue its legal rights and remedies in the event of Northern's default, but restricts any remedy from having the effect of "(2) requiring Tenant to pay for any improvements or modifications that Landlord may make to the Premises to accommodate a replacement Tenant with a non-retail use."

21. It is not commercially reasonable to require Northern and Willis to pay the entire $25,000 contribution to Radco's buildout as Radco is currently using floor coverings, counters, and warehouse shelving paid for by Northern, and Peska, Properties, and Construction all benefited for the reasons outlined by Connelly, particularly when Radco received an extended 55-month term.

22. The commercially reasonable manner for Northern and Properties to share the $25,000 contribution to Radco's buildout is in proportion to the remaining term on Northern's Lease compared to the total 87-month term of the Radco lease.

23. Northern and Willis shall be responsible for their proportionate share of the $25,000.00 Radco buildout (34 months/87 months equals 39.08%) which equates to $9,770.00.

33. The commission payable to NAI/Connelly should be adjusted between Properties

and Northern based on the blended rent rate of $9.70 psf, which requires Northern and Willis to reimburse Properties for $2,606.88 of the commission Properties paid to Connelly/NAI. There shall not be pre-judgment interest on the commission adjustment as the commission adjustment was unknown to Northern and Willis until after the trial in this matter.

24. The Court's calculation of the damages is attached as Exhibit 1 and incorporated herein by reference.

25. Northern and Willis, jointly and severally, owe Properties the following amounts as of the date of trial:

a. Past Due Rent Claim: $935.48 per month from August 2019 through July 2020 totaling $11,225.76, together with pre-judgment interest in the amount of $607.62, for the total of $11,833.38;

b. Northern Buildout Claim: $10,792.30, together with pre-judgment interest of $1,363.44, for a total of $12,155.74;

c. Radco Buildout Claim: $9,770.00, together with pre-judgment interest in the amount of $977.00, for a total of $10,747.00;

d. Commission Adjustment: $2,606.88, without prejudgment interest; and

e. Northern Credit for Overpayment on July 17, 2019 Invoice: ($419.50)

TOTAL AMOUNT CURRENTLY DUE AS DATE OF TRIAL: $36,923.50

26. Because payments are not allowed to be accelerated under Section 28.b.(1) of the Lease, Northern and Willis shall pay Properties the amount of $935.48 per month beginning in August 2020 through and including May, 2022.

Any Conclusion of Law which is more properly designated as a Finding of Fact shall be deemed to be a Finding of Fact.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 10 day of Sept, 2020.

BY THE COURT:

HON. DOUGLAS E. HOFFMAN
Circuit Court Judge

Angelia M. Gries

ATTEST:

By: _____
Clerk

FILED
SEP 11 2020
Minnehaha County, S.D.
Clerk Circuit Court

Exhibit 1

## JUDGE HOFFMAN'S DAMAGE CALCULATION

**RENT CLAIM**

**Northern Rentals Total Remaining Lease Payments**

Year 8: 10 months x $6,643.64 = $66,436.40
Year 9: 12 months x $6,709.08 = 80,508.96
Year 10: 12 months x $6,780.58 = $81,366.96
**Northern Rentals Remaining Rent Due $228,312.32**

**Calculation of Blended Rate**

$0.00 psf x 3 months = $0.00
$8.43 psf x 31 mos = $261.33 psf
$11.00 x 53 mos = $583.00 psf
**$844.33 psf / 87 mos = $9.70 psf blended rate**

**Blended Rate Calculation During Remaining Northern Rentals Term**

Annual Rent $9.70 x 7,150 = $69,355.00
Monthly Rent $69,355.00 / 12 = $5,779.58
**Mitigation Amount $5,779.58 x 34 months = $196,505.72**

**Total Lease Term Balance Due**

**$228,312.32 - $196,505.72 = $31,806.60**

**Monthly Balance Due**

**$31,806.60 / 34 months = $935.48 per month**

**Total Currently Due Plus 10% Prejudgment Interest (August 2019 through July 2020)**

**12 months (Aug 2019 through July 2020) x $935.48 = $11,225.76**
**10% Prejudgment Interest ($7.79 per month x 78 months) = $607.62**

**TOTAL RENT AND INTEREST DUE THROUGH JULY 2020**

**$11,225.76 + $607.62 = $11,833.38**

**FUTURE RENT CLAIM**

**$935.48 each month August 2020 through May 2022**

**BALANCE AND INTEREST ON BUILD-OUT—Exhibit 2, Page 49 Amortization Schedule**

**$10,792.30 balance plus $1,363.44 interest = $12,155.74**

**PRO-RATA SHARE OF $25,000 RADCO BUILDOUT**

**$9,770.00**

**10% Prejudgment Interest (12 months) = $977.00**

**Total $10,747.00**

**COMMISSION ADJUSTMENT BASED ON BLENDED RATE**

Mitigation Amount $196,505.72 x 6% = $11,790.34

6.5% Sales Tax on $11,790.34 = $766.37

Total Due from Northern Rentals $12,556.71

Total Previously Paid by Northern Rentals = $9,949.83

**Balance Due by Northern Rentals = $2,606.88**

**TOTAL AMOUNT DUE FROM NORTHERN RENTALS TO PESKA PROPERTIES**

| | |
|---|---|
| **Rent and Interest through July 2020** | **$11,833.38** |
| **Buildout Balance and Interest** | **$12,155.74** |
| **Pro-Rate Share of Radco Buildout** | **$10,747.00** |
| **Commission Adjustment** | **$2,606.88** |
| **Credit for overpayment on outstanding invoice** | **($419.50)** |
| **TOTAL CURRENTLY DUE** | **$36,923.50** |

**Plus $935.48 per month from August 2020 through May 2022**

# TAB 3

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:SS
COUNTY OF MINNEHAHA ) SECOND JUDICIAL CIRCUIT

**********

PESKA PROPERTIES, INC.,

Plaintiff,

-vs-

NORTHERN RENTAL CORP., a SOUTH DAKOTA CORPORATION; AND STEVE WILLIS, Individually.

Defendant.

**COURT TRIAL**

49 CIV 19-2729

**********

BEFORE: The Honorable **Douglas Hoffman**
Circuit Court Judge in and for the
Second Judicial Circuit, State of South
Dakota, Sioux Falls, South Dakota.

APPEARANCES: Ms. Kasey L. Olivier
Attorney at Law
6210 South Lyncrest Avenue
Sioux Falls, South Dakota

For the Plaintiff;

Mr. Kent R. Cutler
Attorney at Law
413 North Dakota Avenue
Sioux Falls, South Dakota

For the Defendant.

PROCEEDINGS: The above-entitled proceedings commenced at 9:00 a.m. on the 29th day of July, 2020, Courtroom 5A at the Minnehaha County Courthouse, Sioux Falls, South Dakota.

Roxane R. Osborn
605-782-3032
Sioux Falls, South Dakota

A Yes.
Q So, your letter would have been six days after Radco signed the LOI for the space; is that right?
A Yes.
Q And the benefit to Gene Peska, in your mind, is that he got 55 additional months of a lease as a result of entering in to this with Radco?
A He got a lease worth $451,000.
Q Additional money?
A Additional money.

MR. CUTLER: That's all I have, Your Honor.

THE COURT: Ms. Olivier.

THE COURT: Ms. Olivier.

MS. OLIVIA: Nothing.

THE COURT: All right. Thank you. You may retake your seat, sir.

(The witness was excused.)

THE COURT: Okay. Well, so, um, let's see, Ms. Olivier, do you have any other witnesses today?

MS. OLIVIA: No, Your Honor. We rest.

THE COURT: Okay. And, Mr. Cutler, have you covered all the testimony you wanted to present?

MR. CUTLER: I have, Your Honor.

THE COURT: So, we've got all the testimony in. Mr. Cutler, did you get all your exhibits offered that you

intended to? I don't think --

MR. CUTLER: I did. I think there are a couple that I didn't offer, Your Honor, but, ah, oh, I, I should offer Exhibit I, which is, I'm sorry, I had Mr. Willis testify about his damage calculation. I failed to offer that one. Thank you for reminding me.

THE COURT: Which is demonstrative. Any objection to Exhibit I?

MS. OLIVIA: Your Honor, we would object that Exhibit I does contain (inaudible) evidence, and it's evidence that's outside the lease agreement for the parties, used to alter the terms of the agreement. We did brief this in our pretrial brief, and we would stand on that objection, that they did not plead reformation of this contract in any of the pleadings, and they are trying to use the Radco lease to alter the terms of the agreement.

THE COURT: Yeah, I just think it's a chalkboard of what they think the correct result should be in the case, so I'm going to receive it on that basis. And we'll get in to the nuts and bolts of how we should interpret all of this, and what's material or not here in your closing arguments. So, okay. We've got, so that's received. So, we've got A through D received. E and F were not offered. G is received. H was not offered. And I and J are received.

MR. CUTLER: I believe I did offer H, Your Honor, and,

I apologize, I would offer that, we did talk about that.

MS. OLIVIA: And we stipulated to foundation of H.

THE COURT: Okay.

MR. CUTLER: I believe the only two I didn't offer, E and F, Your Honor.

THE COURT: All right. So, without objection then H is also received.

MR. CUTLER: Thank you.

THE COURT: And, Ms. Olivier, I've got all your exhibits. We received those right off the bat.

MS. OLIVIA: Yes, Your Honor.

THE COURT: Okay. So, we've got that all set. Okay. Well, so, who wants to go first?

MS. OLIVIA: I'm happy to go first, unless, Mr. Cutler, you want to. I can go first.

THE COURT: Okay. Let's get some closing arguments and let's get this thing decided, and we'll go home and call it a day.

MS. OLIVIA: Sounds good. Thank you, Your Honor.

As the court has heard, the parties don't dispute that there was a lease that was signed on December 23rd, 2011. Mr. Willis said that his rental term started on August 1st, 2012, which means that with the two months of free rent, the rent would have commenced or the lease term, rental term for ten years would have started in June of 2012.

This wasn't an agreement that was forced upon Steve Willis or Northern Rental. This was a property that in 2011 they sought out. They borrowed money from Gene Peska to buildout to be their franchise agreement, to look like an Aaron's Rental, to have, as Mr. Connelly testified, very distinct specific look to it. And that would need a, would need a substantial amount of changes done to it when they breached their lease.

The parties don't dispute that there was a breach in this case. The main issue is what are the damages. Well, under South Dakota law, give me a second here, under South Dakota law, damages must be reasonably certain and not speculative.

In this case, our damage calculation that is Exhibit 10, follows the lease agreement to a T. It provides the amount that was left due and remaining under the Willis Northern lease. Gene followed and did everything reasonable to mitigate those damages, and there was an amount during that term that was used to mitigate those damages.

The court --

THE COURT: How come the rent went up from $8.43 to $11 right at the time that Willis is off the hook?

MS. OLIVIA: You'll see, Your Honor, that Steve Willis was actually a part of those negotiations.

THE COURT: So, you think Steve said I should bend

over and take it in the shorts?

MS. OLIVIA: I don't think so. I think those are the terms that Radco came forward with for the terms of the sublease. Their first offer was a lower amount for the sublease that came on June 6th, and then it increased after that incrementally. They also saw that when we went back and -- or when Steve Willis and Bill Connelly made their counteroffer in June before Gene had formally hired Bill, that that was actually the counteroffer that Steve Willis agreed to.

THE COURT: Well, he wanted your client to get a lease, right, because --

MS. OLIVIA: It's true.

THE COURT: -- if Radco walked away, then he was really screwed?

MS. OLIVIA: That's very true.

THE COURT: Okay.

MS. OLIVIA: So, he wanted to mitigate his damages, but he agreed to that. This was no surprise to him.

THE COURT: But Bill Connelly testified on the witness stand today that the fair market value of the leasehold was between $9 and 10.50, and so when he was asked, well, then how did Gene get 11 bucks for it, he said, well, because it was a blended rate. That's what your witness said on the witness stand.

MS. OLIVIA: He didn't say it. They were talking about what the blended rate would have been over the course of the lease in the increments going up.

THE COURT: Right.

MS. OLIVIA: Because over the course of the Radco lease, they incrementally went up as well.

THE COURT: Okay. But Radco was okay paying 11 bucks for a property that wasn't worth that much if they only had to pay $8.43 for the first 29 months. I mean that seemed to be clearly what Mr. Connelly's testimony was.

MS. OLIVIA: And those were negotiations that Steve Willis was part of.

THE COURT: Yeah, but I mean was that fair on your client's part to say, look, we'll really lowball the rent, so I can recoup more damages at the trial in front of Judge Hoffman in July of 2020?

MS. OLIVIA: The law doesn't favor and give a benefit to somebody that's breaking a contract. In fact, the South Dakota Supreme Court has said, any doubt on the certainty of damages should be resolved against the contract breaker. So, giving a benefit like this where you say you get a credit for a tenant that comes subsequent if you breach your lease, encourages people to say, hey, if I can break my lease, but I don't want to pay that rental amount, and I breached my lease. And even if I find somebody that will pay less during

my period, but maybe there's somebody else paying more, I can blend that and get a better deal.

THE COURT: Well, but I mean Willis wasn't in bad faith here. He didn't move his business somewhere else. He closed the doors, and then didn't he pay rent for like 27 months afterwards for an empty space that the lights were off?

MS. OLIVIA: I agree. And I agree that he did that, but he still had a duty under his contract and under the terms of negotiations he negotiated in 2011.

THE COURT: What if, what if, ah, Mr. Peska would've done a deal with Radco said that the rent for the first 29 months what we're calling the sublease, but wasn't really a sublease, right. It was a new lease. So, we're fictionally calling it a sublease, but what if he would have said, well, let's do 6 bucks a square foot for the first 29 months, and let's do 15 bucks a square foot after that, and then I can nail Willis for quite a few more thousands of dollars when I sue him and go in front of Hoffman.

MS. OLIVIA: Sure, but nobody has testified in this case that Gene never tried to do that. They've always testified Gene was doing his hardest to mitigate the damages in this case.

THE COURT: But, but if he would have done $6 and $15 or 843 and 11, or had done just 11 or $10.11, he gets the same amount of money. So, he could have really screwed Willis, or

he could have -- or he could have said, well, let's, I mean you see what I'm saying?

MS. OLIVIA: I understand where you're going, but.

THE COURT: Connelly was his guy. He referred Willis to his guy. So, Connelly's like here, well, I mean Willis was my client until Gene got involved and then I had two clients.

MS. OLIVIA: True, but nobody benefits. Nobody benefits by having a lower lease on this profit -- on this property. Gene doesn't benefit even by the $11. He still owes money to the bank on his mortgage.

THE COURT: Sure. But he's making money off of this deal because he's getting equity. He's building up equity, but I mean that's a side issue, but here's where the rubber meets the road. So, answer this question for me, and then you're in really good shape. What is the commercial justification for having the rent at 843 for the first 29 months, and at 11 bucks starting on month thirty?

MS. OLIVIA: I think, Your Honor, the answer to that is that is the offer that Radco was willing to pay. There is the lease that they said, we'll pay 843 for these months, and then will pay 11. And that's what they were willing to pay.

THE COURT: So, what was the big difference between month 29 and month 30 that justified a thirty percent bounce?

MS. OLIVIA: Because it's allowing -- the amounts that were negotiated were negotiated between what Radco

was willing to pay and the most that they could get them to pay.

THE COURT: Why would Radco say we'll pay you 843 for 29 months, and then we'll pay you $11 starting on month thirty for another, you know, four years?

MS. OLIVIA: I'm not sure. Those are the offers that they came in with. Those are the final numbers they came. Nobody benefits. Gene doesn't benefit by being here today. If he could have negotiated for the full amount of Steve Willis' lease, we wouldn't be here.

THE COURT: True. So, Gene would have said, let's do $10.11, but, you know, even for the entire seven-year term, why would it make any difference to Radco? It's -- they end up with the same amount of money. It's just then Willis' breach is less, and your client will have exercised his duty to mitigate to the fullest extent. So, I mean that's the argument here, is that Gene didn't fully mitigate his damages, and he structured this to increase his damages. And you're saying that doesn't matter because Willis sent an email saying do the deal.

MS. OLIVIA: No, the Radco sent an email saying this was the amount they were willing to pay, but I think you have to under -- like another issue would be when a new business comes in they may not be able to pay as much on rent on the front end. They need to build up a customer base. They

need to build up time to be there. They have startup costs. They have new expenses. They may not be able to pay.

THE COURT: But that's not true of Radco. I mean Radco is a well-established business. Aren't they? I mean that's --

MS. OLIVIA: In this case, I don't think that we know. This is a new location for them.

THE COURT: Well, I mean, I guess we didn't plug any videos in to evidence, but I hear their commercials on TV and the radio all the time.

MS. OLIVIA: But this was -

THE COURT: And every pickup truck I see in Sioux Falls has got a Radco sticker on their, um, what do you call a shell that they put on the bed of their truck. Their topper.

MS. OLIVIA: Topper. And, and you're, you're right. The issue is this was Mills Aftermarket Lease Accessories. So, this was a company that was also a franchisee. So, this was a newer company coming in, and starting, and needing to build up their -- they did a $100,000 buildout on this space. They had a lot of startup costs, and that may be why they structured their offer the way that they did.

THE COURT: It sounds like maybe Willis paid too much in his initial lease because Connelly came in here and said it's worth 959 to 1050 now, and he signed up to pay more than

that. I guess although it went up over the term of the lease, but I mean we can't undo the deal that he made, but, all right. Well, so you, obviously, disagree with Cutler on the issue of -- on the blended rate issue?

MS. OLIVIA: Yes, Your Honor.

THE COURT: Okay. So, I mean cause they're conceding some of the points. It's not like he's coming in here and saying we don't owe anything.

MS. OLIVIA: True.

THE COURT: So, I think, what about the acceleration clause that --

MS. OLIVIA: We're not asking that these necessarily be paid in a lump sum. We understand that they may need to be paid when due, however, Steve Willis when he terminated the contract in July of 2019, just stopped making rent payments, and that's the amount that's due under the lease. If there are payments to be made when due, that is just fine.

THE COURT: Okay. So, what about the buildout for Radco? Should that be prorated since it was done to effectuate a seven-year lease, and Willis was only on the hook for two and a half?

MS. OLIVIA: Under the terms of the contract, it says that for retail -- if there is a breach of contract the tenant is responsible for a buildout that is for retail use.

MR. CUTLER: That's not what the contract says.

THE COURT: Well, I --

MR. CUTLER: It's Section 28 under B, Your Honor, and what it does say is that there's no obligation of the tenant to pay for a buildout for a nonretail use. It never says in the lease anywhere that he is responsible for paying for any buildout.

THE COURT: Oh, dear.

MR. CUTLER: You could say it's implied, but there's nothing in the lease that says that. The other part of it is, you know, Bill Connelly, I asked him, that was $3.50 a foot for buildouts, Your Honor. And I asked Bill Connelly if you had a client who was going to get a four-and-a-half-year lease and the tenant asked for 350 a foot and buildout, would you suggest to him that they do it as long as the rental rate was reasonable. And he said absolutely, well, I don't know if he said absolutely, but he said, yes.

THE COURT: So, um, I guess that's the reason why I asked who wanted to go first because, obviously, normally the plaintiff goes first, and the plaintiff has the burden of proof, but in this case the defendant is conceding a number of points, and is kind of, you know, challenging certain points, and that's, I guess, one of the points that the defendant is challenging.

MR. CUTLER: Yeah.

THE COURT: So, maybe we'll shift gears and so, Mr.

Cutler, what are you trying to tell me here on this interpretation. I'm going to read it out loud for everybody, including the record here just so that we can put our language parsing caps and sharpen our pencils here.

So, starting out with B, it says that on depond (sp) default by the tenant, the landlord may pursue any one or more of the following remedies separately or in combination, and then it has one, two, three, four, and then turning to five it says, any other remedy which landlord may have at law or an equity, provided that, provided that no such remedy will have the effect of 1) accelerating, blah, blah, blah, which we talked about.

Or 2) requiring tenant to pay for any improvements or modifications that the landlord may make to the premises in order to accommodate a replacement for tenant with a nonretail use. So, what you're saying, Mr. Cutler, is that that doesn't ipso facto mean that any improvements made to facilitate a res -- a retail tenant are automatically included as damages. Rather the plaintiff would have to prove that that was part of his damages, or his cover, or should be subtracted from the cover rent that he's receiving under the replacement lease.

MR. CUTLER: Yeah. And, and, ah, so my position on that is this, Your Honor. I'll try to see if I can make this clear. If Radco had simply done an overlay of Northern

Rentals term and did not have an additional four and a half years. So, if they were only going to take it up till Northern Rentals term, I think that Peska Properties would have a pretty good argument that probably that should be Northern Rentals cause he didn't receive anything over and beyond the term that they were going to be there, and here he is not having to spend extra money to do a buildout.

THE COURT: Well, and further just to touch on the other issue, um, Radco probably wouldn't have wanted to pay more than $8.43 if they were going to move in for 29 months, and then they had to leave. So, I mean you could say, you can say that the rent for the 21st, 29 months is worth less than the rent for the other four and a half years because of that, but it's kind of disingenuous to say that, I think, is your argument that I'm hearing. When there weren't two leases --

MR. CUTLER: Right.

THE COURT: -- that you know had to be pursued separately. It was all coalesced in to a single lease for the seven years, and so Willis is saying, you should -- you're not treating me, you're not treating me fairly, IE, you're not exercising commercially reasonable efforts to mitigate your damages against me by characterizing the first 29 months as a fire sale lease, and the subsequent four and a half years as a fair market value lease plus premium.

MR. CUTLER: That's exactly the point. And the

thirty percent increase, I've always said that it, you don't see leases with thirty percent increases. That was not the way that this should have been structured first of all. Second of all, I would suggest to the court and everybody in this room, and I guess people can disagree if they want, but Radco originally asked for a five-year lease and Peska went back and said I want a seven-year lease, and Peska got his additional two years.

Radco would have never taken that place unless they had assurances that they had it for longer than the Northern Rentals term. If they simply had to do a sublease with Northern Rentals, it probably never would have happened. And that's why we think the blended rate is the appropriate way. I had written down exactly what you said, Bill Connelly, when I asked him the question was $11 the fair market rental, he said 900 to 1050.

The blended rate is right in the middle of that fair market rental according to him. All we're asking is that we do a fair calculation not necessarily based one hundred percent on the structure of the Radco lease, but that the court look at the Radco lease, look at the benefits to Peska that he got a very strong client. By the way, you look up Radco on the Internet, their Dun and Bradstreet is up there. He got a stronger tenant. He has an operating business in the mall, which Bill Connelly, and I think Gene Peska both

admitted increased the value of his property and also helps with the remaining space in the mall. He's got an additional four-and-a-half-year term. which at the end of Northern Rentals lease he could have sat there with it empty for four and a half years. I know that.

THE COURT: Well, let me reign you in here, and let's just zero back in on the, um --

MR. CUTLER: The buildout?

THE COURT: Yeah. The 25,000.

MR. CUTLER: I'm sorry.

THE COURT: It was 25,000, right?

MR. CUTLER: Yeah.

THE COURT: In buildout. What do you want to do with that?

MR. CUTLER: $3.50 a square foot that is towards Bill. If you divide it by the 7150 feet, it's $3.50. Bill Connelly testified that $15 a square foot TI allowances on the low end, and he sees them up to $40 a foot, and I asked him this specific question, Your Honor, I said, Mr. Connelly, if you had a tenant who had somebody that was willing to sign a four and a half year lease with you at a good, reasonable rental rate, and the potential tenant was asking for a buildout of $3.50, what would you tell your client. He said, I'd tell him to pay the $3.50. The point is this, that is a very small amount for Gene Peska, Peska Properties to have to eat

to get that additional four and a half years. Why should Northern Rentals after they, after now we, we know that Radco's using their counters. We know they're using their, their warehouse racks. We know a lot of those leaseholders -- why should my client have to pay any part of $25,000, which is only three and a half dollars a square foot additional TI allowance when that's a reasonable sum for a four-and-a-half-year lease, which he's got at the end of the term.

THE COURT: So, is that your bottom line, or is your bottom line it should be prorated?

MR. CUTLER: No, I don't think, I think it should be zero. I think, that's what I think.

THE COURT: Okay. Well, Ms. Olivier, what do you think on the prorate. I, I'm sorry, on the build, the new buildout for Radco. The 25 grand. Here you're, I think, you know, obviously, your position is coming in you should pay that Willis should pay the whole thing. Willis is saying, I shouldn't pay anything. I'm saying, well, maybe it should be prorated, but I want to give you the last word here on that one.

MS. OLIVIA: Can I have one minute?

THE COURT: Sure.

MS. OLIVIA: I think the buildout was integral to Radco even coming in and taking this space. Bill Connelly said that the Aaron's space needed a lot of work, and I don't, I

mean the question would be would Radco have even done this lease if Gene hadn't paid them the 25,000. Originally, they wanted 30. They negotiated it down to 25. If he hadn't done the $25,000 buildout this lease wouldn't have gotten done and it would have continued to sit empty.

THE COURT: Okay.

MR. CUTLER: The, the other thing I'd say to that, Your Honor, is that Mr. Peska wouldn't have gotten that work contract that he got and that he made profit and overhead on either.

THE COURT: Well, I mean, he, obviously, benefited in a lot of different ways, and if we were sitting in a court of equity I could probably accept some of Willis' other arguments, but it's a court of law, and it's a written contract. So, I don't think I can go there. So, I mean, yeah, I mean when you lose your business and you pay rent on something for two years plus with the doors closed you're obviously hemorrhaging. And when you, um, yeah, you pay for buildout, but then you get to do the buildout. You make the profit on the buildout. You're obviously getting a rebate on that, and that's smart business. I mean Mr. Peska is a smart businessman, and it appears, I mean we don't have his financial balance sheets, and income statements, and stuff, but everything I'm hearing it sounds like he's very competent and been very successful, but I'm just going to cut to the

chase on this, you guys, and we'll see what's left over here, but I, I'm accepting the blended rent argument. I just don't think it's commercially reasonable under the circumstances to break it up the way that it was, and I don't think that Peska was reasonable in his efforts to mitigate damages. I mean to me Willis' argument, I would look at it this way, and I'm not sure if he articulated it this way, but this is what I heard him trying to say on the witness stand, and that is, yeah, the agreement that was presented to me for approval was lowball rent for my months, and then premium rent for Peska's new months, but if you averaged it all together it was a decent deal, and we weren't going to get a better deal, so let's take it, and then me and Peska will, you know, work the rest of it out later. That's why he kept trying to say, you know, we wanted to go to mediation. That's not introducing settlement negotiations where you come in to court and say, well, Judge, we tried, they offered to settle the case for X, and now they're asking for three times X, that's inadmissible, but it's not inadmissible for somebody to say, well, yeah, I agreed to this deal, but I figured, you know, we were working together cooperatively, and we were presenting a united front to the adverse party, and then we were going to work this out together to have reasonable mitigation be the end result.

So, I think that's a fair interpretation. And I

think that can withstand the scrutiny of the five pooh-bahs in Pierre. If they take another look at it, and with regard to the, the buildout for the new tenant, yeah, that was a super low buildout, and I think it benefited Peska significantly because he got a long-term deal with a great client, and, ah, and so I don't -- the lease doesn't say that Willis has to pay the new buildout for any new tenant to step in and take over any part of his lease. I mean you could argue that to say that to save one month's rent he has to pay the buildout for the new, you know, fifty-year lease. So, we have to look at what the actual purposes and benefits were that resulted from that buildout. And so I think prorating it is the most fair and commercially reasonable way to do that. And so I think that probably would have been recommended by a mediator if this had gone to mediation.

I don't think it was unreasonable for Willis to think that they would be able to work something like that out, and I don't think it's unreasonable to interpret the contract this way. I mean you could argue and Mr. Cutler has argued that the entire buildout should be attributed to the part of the lease that accrued after the Aaron's lease was completed, but I don't think that's really fair either. I think prorating is really the only reasonable way to do that. So, we'll do the, we'll let you guys do the math. And then with regard to the rent payments that aren't due yet because

the end of Willis' lease is August 1 of 2022, right?

MR. CUTLER: I think the way that Mr. Peska's calculated it, it shows that it is May of 2022, Your Honor.

THE COURT: Okay. So, I think, Ms. Olivier, maybe that's what you said, too?

MS. OLIVIA: Yes, Your Honor.

THE COURT: Yeah. So, I think those payments aren't due yet, so I can't give you a judgment for those payments.

MS. OLIVIA: Can we request that they be declared due in the future though? I don't want to get in to a situation where those payments aren't made, and we're right back in front of you.

THE COURT: Yeah, right. He owes the money, but he's not in breach until the payments are overdue. So, I mean you could come back and get a supplemental judgment for them periodically if they fall, if he falls behind. Now, if he just wants to go ahead and you know cut a check for all of that, I think you guys would just have to come to an agreement on what a reasonable discount rate is, which is really hard to figure out now. I mean we used to talk about look at the 30 year old, 30 year T bill rate, and things like that, and it would be like four percent, but now you get, you know like a fraction of a percent on a T bill, and you can put your money in the stock market and dependent, depending upon how you time it, you could make twenty percent, but, on

the other hand, you might lose twenty percent. So, you know, I mean what's a reasonable discount rate. Some economist would have to tell us about that I guess, maybe Mr. Willis is an economist, if I listened to his testimony about all of his degrees.

But, you know, I mean some figure that's probably more than one percent and less than ten percent is a reasonable discount rate, ah, but I don't think you had -- so, but I mean that would be if you guys agree on it, otherwise, I think you just have to do the pay as you go thing.

And then what other issues are there in the case? I think that's it, isn't it?

MS. OLIVIA: There would be the amount due for the buildout loan, so that would be the.

THE COURT: Oh, from -- that he owes on the old buildout loan.

MS. OLIVIA: Yeah.

THE COURT: Well, you guys pretty much agree. Aren't you just within a few dollars on that?

MS. OLIVIA: I think we're right on on that, aren't we?

MR. CUTLER: Yeah. Steve testified that he needs to pay that.

THE COURT: Yeah.

MR. CUTLER: So, we admitted it.

THE COURT: So, I mean I think, I think there was

some correspondence going back and forth that confused the issue, and, you know, I don't know if, Mr. Cutler, you were playing that out there just to try to muddy the water up a little bit and make it look like, you know, things were too confusing, but I'm assuming that the accurate balance can be determined, and if you guys can't agree on it just send me an email and tell me why you think it's one or the other. And I mean if you guys if you're within $1000 on it, you should probably split the difference rather than spend the attorney's fees to get an adjudication.

MR. CUTLER: I think just for the record, there's an amortization schedule somewhere that was put together, and the balance due would be the, would show the August 1 payment of 2019, that would be on the am schedule. Don't you have an amortization schedule somewhere?

MS. OLIVIA: Yeah.

MR. CUTLER: We should be able to figure that out., Your Honor.

THE COURT: Okay. Yeah. So, and then, let's see, is there like prejudgment interest or anything that has to be calculated?

MS. OLIVIA: We'd have to do prejudgment interest, and then there is an attorney's fee provision on paragraph 30 that says in any action, suit or proceeding to enforce, defend, or interpret the rights of either landlord or tenant

under the terms of this lease, the prevailing party is awarded attorney's fees.

THE COURT: It's a split decision. So, I'm saying that nobody won and nobody lost. It's a draw. So, no attorney's fees. Each side's responsible for their own attorney's fees. How about that.

MR. CUTLER: So, Your Honor, can I just go through some numbers here off of our sheet and also what I just did on the pro rata on the thing to see if we can all kind of say we're on the same page, so we know.

THE COURT: We can give it a whirl.

MR. CUTLER: Okay. So, I'm looking at Exhibit I, the second page.

THE COURT: Okay. That's your proposed calculations?

MR. CUTLER: Yeah. So, the rent claimed from August 19 to October 19, Radco got three free months, but do we use the blended rate for that term in there, too, Your Honor? Does Northern Rentals have to take a complete hit on the three months that were free?

MS. OLIVIER: I think they've previously testified they should pay that amount.

THE COURT: I think that's all part and parcel of the deal. So, ah, so, yeah. So, Radco got three free months, and then started paying $8.43 for the fourth month?

MR. CUTLER: Yeah, on November of '19 I think is

when they first paid rent, but that's, I guess that's a question I have here, too, if we're using the blended rate and should.

THE COURT: I think the way here's the way I'm interpreting it is, that you take all the rent that was paid for the entire Radco lease, and you or to be paid, I guess, and then divide it by the length of the lease, which includes the three free months. I mean nothing's really free. You don't get a free --

MR. CUTLER: Right.

THE COURT: It's, instead of being the blended rate instead of it being like $10.11, it's going to be more like probably $10.02, or $9.98, after you factor in those three free months.

MR. CUTLER: Okay.

THE COURT: If you're picking up what I'm laying down.

MR. CUTLER: I am, I am.

THE COURT: Yeah.

MR. CUTLER: So, rather than, rather than figuring the rent on 84 months, which is seven years, we should have three more months on it to get it to 87 months, and then figure out what the blended rate is on that and use that for calculating the damages.

THE COURT: Okay. So, is that what they paid for 84 months and they got three months free?

MR. CUTLER: Yes. Yes.

THE COURT: Yeah. So, you got 87 months, and then just add all the rent in and divide it by the 87 months.

MR. CUTLER: And use the blended rate, whatever it comes to, based off the 87.

THE COURT: So, we got three months where rent was zero, 29 months where rent was $8.43, and however many more months where rent was $11, or whatever it is.

MR. CUTLER: Okay.

THE COURT: And then mush it altogether.

MR. CUTLER: Okay. We'll try to figure that out. Then I did just -- I then divided 29 months by 84 months. This is on the proration of the $25,000. So, there is 29 months left on the Northern Rentals by 84 months. There was 55 additional months.

THE COURT: Is 84 include the three free months?

MR. CUTLER: No. The three, the three free months aren't included in there, but we all agreed Peska got 55 and, and maybe actually maybe it should be 30, 32 months divided by 84. So, like, so I just want to make sure I get this right so we have it right. So, if we do 32 divided by 84, that's thirty-eight percent, Your Honor.

THE COURT: Shouldn't it be 29 divided by 87? I mean I'm not sure. I'm --

MR. CUTLER: For 29 by 87, is, ah, 29 by 87 is

thirty-three percent. It's, it's pretty close. So, if we take either 38 or 33, or we do it in the middle, and do thirty-five percent time $25,000 dollars, that comes to $8750 would be the proration.

THE COURT: So, when, let me just think this through. So, when they did the new deal how many more months was Willis on the hook for?

MS. OLIVIER: 34.

THE COURT: 32.

MR. CUTLER: 32.

MS. OLIVIER: 34.

MR. CUTLER: 32.

THE COURT: Depending upon where you start counting from.

MS. OLIVIER: From August to May is ten months, and then there was two more years, which would be 12, 12, 34.

MR. CUTLER: So, that includes the three free months then cause Peska got an additional 55 months. So, it's actually 87 probably should be the denominator on that, if 34 is the numerator, I guess.

THE COURT: Let's do 34 over 87. So, what does that come to?

MR. CUTLER: 34 divided by 87. 34 divided by 87, Your Honor.

THE COURT: I got 39.

MR. CUTLER: Is 39 percent.

MS. OLIVIER: 39.

MR. CUTLER: 34 divided by 87, 39 percent.

THE COURT: Okay. So, that means your guy has to pay thirty-nine percent of 25 grand.

MR. CUTLER: Okay. Times --

THE COURT: Right.

MR. CUTLER: Yeah, let me get there. 39, 39 percent times 25,000.

MS. OLIVIER: $9770.

MR. CUTLER: What did you come up with?

MS. OLIVIER: 9770.

THE COURT: That sounds good to me.

MR. CUTLER: I come up with 85, let me. 39 percent, right, times 25,000. 9750.

THE COURT: 9770. Right.

MS. OLIVIER: Yeah, that's what I came up with.

THE COURT: That's what I got.

MS. OLIVIER: And that's what Gene got.

THE COURT: The official golden Midas touch UJS calculator got 970.

MR. CUTLER: Mine comes up with 9750, but maybe my Apple phone isn't working. 25,000 times 39 percent.

THE COURT: The majority vote says it's 9770.

MR. CUTLER: 9770?

THE COURT: Yes.

MR. CUTLER: Okay. And then we'll have to do some math, Your Honor, if we can't figure out the math with a blended rate, should we just send you an email and...

THE COURT: Just like a child support calculation, send me your calculations and I'll either -- I'll pick the one that looks right to me.

MR. CUTLER: Very good.

THE COURT: So, I wasn't very good at math. Okay. Did that cover everything?

MR. CUTLER: Yeah. So, we got the rent. We got to figure out, we admitted the balance and the buildout, whatever that shows in the am schedule, and then 9770 for the $25,000 buildout is Northern Rentals' responsibility.

THE COURT: And then --

MS. OLIVIER: And the interest on the rent or the Willis buildout as well.

MR. CUTLER: Interest on the buildout, all right. And then, the, and then Northern Rentals would have to pay, well, we're July 29th, but we can put the August 2020 payment in there. Then after that so that would be a lump sum, Your Honor, through August of 2020. Then after that whatever the monthly rate difference is than Northern Rentals will have to pay that each and every month.

THE COURT: Yeah, are we're going to have trouble

calculating that out?

MR. CUTLER: I can figure it out.

THE COURT: We got to do our blended rate and all that stuff, but…

MS. OLIVIER: Take a look at it, we'd also ask for interest on back due rent.

THE COURT: Well, yeah, I think we agreed that needs to be in there.

MR. WILLIS: What rate?

MS. OLIVIER: The statute sets it at ten percent.

THE COURT: Yeah, it's ten percent by statute. I know it's high, but the legislature hasn't altered it to become more reasonable.

MR. CUTLER: All right. I'm, I'm going to be in the office tomorrow, but I have something I have to do, and then I'm going to be out through next week. I don't know if I'll be able to, I'll maybe try to scribble this out tonight cause I don't want to delay things. So, we can get them, Kasey can prepare a judgment for the court to review, and hopefully we come together. I don't think we'll have a hard time getting our figures together. And if we do, we'll communicate with you, Judge, and you can make, and I think I understand exactly what you're saying here.

THE COURT: Yeah, yeah. I'm going to be on vacation, but I'll have my iPad and everything with me. And so I'd

like to check my emails at least every night. So, and then I can sign a, an order or judgment on my iPad and email it back to the clerks, and to you guys, and we'll get it filed as soon as it's ready to go.

MR. CUTLER: Sounds good. Thank you, Your Honor.

THE COURT: Okay. So, now, I guess the other thing we have to touch base on is if somebody's thinking they got screwed here and they want to appeal, then we have to probably have the, have each side prepare, I mean if we get an appeal, we're probably going to get a cross appeal. So, we'd have to have each side prepare proposed findings of fact and conclusions of law that they think I should have entered, and objections to the findings that I did enter, and all of that to perfect an appeal.

So, you don't have to decide that now, but just talk to your lawyer about what your options are, and what the cost of all of that would be, and you know the risk benefit analysis, and then you can make a judgment on that, but if we just have to iron out any wrinkles in getting a document that says what my ruling is, that's not going to take very long, and you know cost, probably a few hundred bucks for it.

MS. OLIVIER: Can I just circle back just so that we're on the same page, as I think Gene has a few questions. So, there is the buildout that is owed by Willis and Northern for their buildout still owed with interest.

THE COURT: They got to pay that.

MS. OLIVIER: Okay. And then the --

MR. CUTLER: Now, wait a second. That Mr. Peska was demanding 25,000 on that.

MS. OLIVIER: No.

THE COURT: He's talking about the old, she's talking about the old buildout.

MR. CUTLER: Oh, right, right, sorry, sorry.

THE COURT: Yep.

MS. OLIVIER: And then it's the 9770 for the new buildout?

THE COURT: Yes.

MS. OLIVIER: Okay. And then there's the blended rate for the rent that is due, correct?

THE COURT: Yes.

MS. OLIVIER: Okay. And interest on back due rent?

THE COURT: Yes. Future payments due as they come due.

MS. OLIVIER: One other issue. Mr. Peska would like to address is, Gene, the realtors commission was actually a blended rate of the nine and the 22 for the full thing now. Steve paid for the months that were his portion. Gene paid the substantial portion of the 22, should that also be taken to a blended rate to afford them an equal portion of coming to that agreement.

THE COURT: All right. So, I was wondering if

somebody was going to raise that issue. I'm not sure exactly how the, um, how that was figured. I know we have an exhibit on it or some documents that refer to it.

MR. CUTLER: So, Connelly billed Northern Rentals 843 and the remaining term and billed Peska at the $11 for his term.

THE COURT: Okay.

MS. OLIVIER: So, it should be at the blended rate.

THE COURT: So, if we go back and do a blended rate, then you would, you'd be prorating that according to, I guess the number of months rather than the amount that the, the number of months rather than the rate would be the driving factor and how it's to be prorated since we would do a blended rate for the entire lease that would be equidistant, which would probably result in a small offset against Willis' ledger over in to Peska's ledger, probably going to be a swing of about maybe 1000 bucks or something like that.

MR. CUTLER: And that since there was no commission, Your Honor, just to, since there is no commission on the three free months the denominator on doing the commission calculation would be 34 months for Steve and 84 months total. Does makes sense?

THE COURT: Well, I understand what you're saying, but I think if we follow our blended rate theory through, we've got to think about that a little bit more.

MR. CUTLER: So, Steve's prorate would be 34 months.

MS. OLIVIER: Right, but if we're going to take a blended rate for all of the rent because that is what is fair, and it was looked over what the average should be across the lease, then they should equally, they both signed contracts with Bill Connelly, they should equally bear those costs, just like their equally bearing the rent.

THE COURT: I agree with what Kasey just said. Yeah, you're going to have to take the hit on that part.

MR. CUTLER: Why, why, we use, so you're saying we paid, we, we should combine the two commissions and then divide them 50/50?

THE COURT: No, divide them by the number of months that Willis was still on the hook for the lease versus the new months under the Radco lease. So, it's still going to be like one- third, two-thirds.

MR. CUTLER: Actually, 29. Yeah.

THE COURT: It's just that because his pro rata share was figured at a lesser rate, and now it's going to be an equal rate, that'll shift a few bucks over from Gene's share of the commission over to Steve's share, but it's not going to be a big deal you know.

MS. OLIVIER: Is it possible to calculate that now while we're all here so we're not in, I think there might be some confusion. I, I'm confused, I guess I'm just confused.

MR. CUTLER: Why don't I do this. I will this evening, I'm a pretty good numbers person. I'll put an email together, and I can include the court on it, and I can include Kasey on it. You can both review it, and then if you have any complaints you can let the judge know, and the judge can rule rather than trying to. I'm trying to figure it out. I think I know how we have to do it. That's just a suggestion.

THE COURT: No, I agree with that. I'm writing notes down, too, so it's on my punch list. but I'm afraid that's going to be a little more calculation than we want to sit here and try to beat our brains with right now.

MS. OLIVIER: That's fine.

THE COURT: So, not that I'm lazy, but it's 3:30, which means it's break time for us government employees, and we need to go lean on our shovels for a while by the water cooler, but we'll get it worked out. All right.

MR. CUTLER: All right. Thank you, Your Honor.

MS. OLIVIER: Thank you, Your Honor.

THE COURT: Yeah, thank you. It was a pleasure to participate in your process here today and I know it's, you know everybody thinks they should win and get everything that they wanted, and you know so the best I can with what we've got. I think that's the correct result, and we'll see what the Supremes think if somebody's mad enough to take it

up there.

MR. CUTLER: Sounds good, Judge.

MS. OLIVIER: Thank you, Your Honor.

(No further proceedings were had.)

# TAB 4

# LEASE

This Lease is entered into this 23rd day of Dec., 2011, by Peska Properties, Inc. a S D corporation ("**Landlord**"), and Northern Rental Corporation, a SD corporation, and Steve Willis, individually, (collectively "**Tenant**"), as follows:

1. **Demise.** Landlord leases to Tenant that certain 7,150 square foot space in the to-be-built building shown on **Exhibit "B"** attached hereto which space, with landlord's approval, will be built pursuant to the final store plan yet to be made by Aarons designers, and made a part hereof ("**Building**"), and the land described on **Exhibit "A"** attached hereto and made a part hereof, and all other improvements thereon ("**Land**"), located at 2401 E. 10th Street, Sioux Falls, SD, together with all rights, privileges, easements and appurtenances benefiting the foregoing (collectively, "**Premises**").

2. **Initial Term.** Subject to the terms and provisions of Paragraph 6 below, the initial term of this Lease will be ten (10) years ("**Initial Term**"), commencing the date on which Tenant opens for business ("**Commencement Date**", but not later than 60 days after **"Possession Date"** defined in paragraph 6 below), and ending at midnight on the tenth (10th) annual anniversary of the Commencement Date, or in the event that the Commencement Date is not the first day of the month, the Initial Term shall continue in full force and effect for a period of ten (10) years from the first day of the calendar month next succeeding the Commencement Date ("**Expiration Date**"). All references in this Lease to "**Term**" will include the Initial Term.

3. **Extended Terms.**

a. Tenant, by giving notice to Landlord no later than one-hundred-eighty (180) days prior to the Expiration Date, will have the option to extend the Initial Term ("**First Option**") for an additional five (5) years ("**First Extended Term**"), commencing the day immediately following the Expiration Date and terminating at midnight on the day on which the fifth (5th) annual anniversary of the Expiration Date occurs. If Tenant exercises the First Option, during the First Extended Term, all other terms and conditions of this Lease will remain in effect, except that Rent will be adjusted as provided in Paragraph 4 (c) below. In the event Tenant exercises the First Option, all references in this Lease to "**Term**" will include the Initial Term and the First Extended Term.

b. Tenant, by giving notice to Landlord no later than one-hundred-eighty (180) days prior to the expiration of the First Extended Term, will have the option to extend the Term ("**Second Option**") for an additional five (5) years ("**Second Extended Term**"), commencing the day immediately following the last day of the First Extended Term and terminating on the day on which the tenth (10th) annual anniversary of the Expiration Date occurs. If Tenant exercises the Second Option, during the Second Extended Term, all other terms and conditions of this Lease will remain in effect, except that Rent will be adjusted as provided in Paragraph 4 (d) below, and the provisions of this Paragraph 3 will not operate to grant Tenant any further options to extend. In the event Tenant exercises the Second Option, all references in this Lease to "**Term**" will include the Initial Term, the First Extended Term and the Second Extended Term.

c Tenant, by giving notice to Landlord no later than one-hundred-eighty (180) days prior to the expiration of the Second Extended Term, will have the option to extend the Term ("**Third Option**") for an additional five (5) years ("**Third Extended Term**"), commencing the day immediately following the last day of the Second Extended Term and terminating on the day on which the fifteenth ($15^{th}$) annual anniversary of the Expiration Date occurs. If Tenant exercises the Third Option, during the Third Extended Term, all other terms and conditions of this Lease will remain in effect, except that Rent will be adjusted as provided in Paragraph 4 (d) below, and the provisions of this Paragraph 3 will not operate to grant Tenant any further options to extend. In the event Tenant exercises the Third Option, all references in this Lease to "**Term**" will include the Initial Term, the First Extended Term, the Second Extended Term, and the Third Extended Term.

. d. In order to prevent the inadvertent failure of Tenant to exercise any of the aforesaid options within the time specified above, it is agreed that Landlord may not terminate this Lease until and unless Landlord notifies Tenant in writing and points out that the option to extend or to further extend, as the case may be, has not been exercised. Tenant's option to extend, in each instance, shall continue for a period of ten (10) days after receipt of such notice from Landlord; but if Tenant does not send written notice of the exercise of such option to Landlord within said ten (10) day period, Tenant's option to extend shall thereafter terminate.

4. Rent.

a. Subject to the provisions of Paragraph 4 (b) below, during the Initial Term, rent ("**Rent**") will be as follows:

Initial Estimate -

| YEARS | PER YEAR | PER MONTH | PER SQ. FT. PER YR. |
|---|---|---|---|
| 1 | $ 71,500.00 | $ 5,958.33 | $ 10.00 |
| 2 | $ 72,930.00 | $ 6,077.50 | $ 10.20 |
| 3 | $ 74,360.00 | $ 6,196.66 | $ 10.40 |
| 4 | $ 75,861.50 | $ 6,321.79 | $ 10.61 |
| 5 | $ 77,363.00 | $ 6,446.92 | $ 10.82 |
| 6 | $ 78,149.50 | $ 6,512.46 | $ 10.93 |
| 7 | $ 78,936.00 | $ 6,578.00 | $ 11.04 |
| 8 | $ 79,722.50 | $ 6,643.54 | $ 11.15 |
| 9 | $ 80,509.00 | $ 6,709.08 | $ 11.26 |
| 10 | $ 81,367.00 | $ 6,780.58 | $ 11.38 |

b. beginning on the first day of the month after the start of business, but no later than 60 days after landlord has turned over the premises to Tenant, ("**Possession Date**", hereinafter defined), ("**Rent Start Date**"), Tenant will pay Rent monthly, in advance, on the first day of each month during the Initial Term.

c. If Tenant exercises the First Option, during the First Extended Term, Rent will be as follows:

| YEARS | PER YEAR | PER MONTH | PER SQ. FT. PER YR. |
|---|---|---|---|
| 11-15 | $ 87,015.50 | $ 7,251.29 | $ 12.17 |

Tenant will pay Rent monthly, in advance, on the first day of each month during the First Extended Term.

d. If Tenant exercises the Second Option, during the Second Extended Term, Rent will be as follows:

| YEARS | PER YEAR | PER MONTH | PER SQ. FT. PER YR. |
|---|---|---|---|
| 16-20 | $ 92,950.00 | $ 7,745.83 | $ 13.00 |

Tenant will pay Rent monthly, in advance, on the first day of each month during the Third Extended Term.

e. Until changed by notice from Landlord, which notice shall be effective not less than five (5) business days after Tenant's receipt thereof, all payments of Rent will be made by Tenant to Landlord at the address specified in Paragraph 32 below.

f. Tenant must receive from Landlord a completed and signed W-9 for tax reporting purposes.

g. Prior to the Tenant starting its operation, Tenant may choose additional buildout and in such case, Tenant will pay additional rent for any buildout up to $50,000.00 performed or paid for by Landlord that is in addition to the items included on Exhibit E. Said additional rent shall be calculated by amortizing the total cost of the buildout over the first 10 year term of the Lease at the rate of 8% interest and may be pre-paid by Tenant. Any amount in excess of $50,000.00 shall be mutually agreed upon by the parties. **See Exhibit J** for the amortization for a buildout of $50,000.00.

5. **Payments of Taxes, Insurance, Parking Lot and Grounds Maintenance.**

a. The payments of Taxes (hereinafter defined) and Insurance (hereinafter defined), Snow Removal, Parking Lot Maintenance, Landscaping and Grounds Maintenance (collectively maintenance) which Tenant is required to make under the provisions of this Lease are sometimes collectively referred to herein as "**Other Charges.**"

b. Beginning on the Rent Start Date and continuing on the first day of each subsequent month during the lease, Tenant will pay to Landlord, in the amount of $1050.00 per month as Other Charges, Taxes (hereinafter defined) and Insurance (hereinafter defined); which amounts will be the Tenant's estimated proportionate share of these expenses. The monthly estimate will change each year based upon the average of the actual monthly amounts of the immedtiate prior year for Other Charges and will take into consideration anticipated increases or decreases in insurance premiums and taxes. That proportionate share is estimated to be thirty percent (30%) of the overall taxes and fifty-one percent (51%) of the overall insurance which the

tear, damage or destruction by casualty, condemnation and the act(s) or omission(s) of Landlord, its employees, agents, contractors, invitees and guests excepted. In addition, Tenant shall pay for the first One Thousand and No/100 Dollars ($1,000.00) per year of any expenses to repair or replace the HVAC system(s) serving the Premises. Tenant is responsible for managing all calls/contacts and to make all calls/contacts relating to the fire alarm and security maintenance system for its own premises and shall shield Landlord from being responsible for or receiving those calls or contacts.

**15. Alterations by Tenant.**

a. Tenant shall have the right to make such improvements, additions and changes to the Premises as Tenant shall desire ("**Alterations**"); provided, that (i) Alterations made by Tenant in excess of Seventy-five Thousand and No/100 Dollars ($75,000.00) during any Calendar Year, except those initial Alterations made by Tenant before opening for business ("**Initial Alterations**"), will not be made without the prior written consent of Landlord, which said consent will not be unreasonably withheld or delayed, (ii) Tenant will cause all Alterations to be completed in a workmanlike manner and in compliance with all applicable codes, ordinances and laws, and (iii) Tenant will not make any Alterations which would have an adverse impact on the structure of the Premises or the systems contained within the Premises. Tenant promptly will pay the cost of all Alterations. Title to all Alterations will remain in Tenant, notwithstanding how they may be installed in, or affixed to, the Premises, subject to the provisions contained in Paragraph 25 below. In no event shall Tenant be allowed to remove fixtures or alterations that would damage the premises beyond reasonable repairs.

b. Tenant shall obtain Landlord's consent to the plans for the Initial Alterations prior to commencement of construction. Landlord's consent to any Initial Alterations which are nonstructural in nature and are made solely to the interior of the Premises shall not be unreasonably withheld, conditioned or delayed. Landlord may withhold its consent in its sole discretion with regard to any Initial Alterations which are either structural in nature or are made to the exterior of the Premises.

**16. Estoppel Certificate.** Landlord and Tenant, upon request by the other, will execute and deliver to the other an estoppel certificate setting forth the status of the payment of Rent and Other Charges under this Lease, whether or not the executing party knows of any Default (hereinafter defined) by the requesting party, and such other matters as are reasonably acceptable to the executing party. Tenant must have at least twenty (20) days from its receipt of said estoppel certificate and/or other related documentation to complete and deliver an executed document(s) to Landlord.

**17. Assignment and Subletting.** Except upon written consent of Landlord, which said consent will not be unreasonably withheld or delayed, Tenant cannot assign this Lease or sublet all or any part of the Premises. Any such assignment or sublease to which Landlord consents will be subject to all of the terms and conditions of this Lease and shall not release Tenant from liability for the performance of Tenant's obligations hereunder. However, Landlord's consent will not be required with respect to such an assignment or sublease to (i) a parent or wholly-owned subsidiary of Tenant or to any entity with which or into which Tenant may consolidate or

merge or to any entity to which Tenant may sell all or substantially all of its assets and that assumes the performance of Tenant's obligations under this Lease; provided, that the assignee, sublessee or purchaser will use the Premises only for the purposes stated in Paragraph 10 above, and Tenant will not be released from Tenant's obligations hereunder, (ii) an individual(s) or entity that has a net worth at least equal to the net worth of Tenant as of the Commencement Date; provided, that the assignee or sublessee will use the Premises only for the purposes stated in Paragraph 10 above, in which event Tenant will not be released and discharged from liability for the performance of Tenant's obligations hereunder, or (iii) a bona fide franchisee of Tenant, provided, that such franchisee will use the Premises only for the purposes stated in Paragraph 10 above, and Tenant will not be released from Tenant's obligations hereunder. Notwithstanding the foregoing, in the event of an assignment or sublease, as provided for above, Tenant will provide notice thereof to Landlord within thirty (30) days of the effective date of any such assignment or sublease.

18. **Legal Requirements.** Tenant promptly will comply with all legal requirements affecting the Premises, compliance with which is necessary by reason of the nature of Tenant's use. Tenant, at Tenant's expense and on behalf of itself and Landlord, may contest any such legal requirement. In such event, Tenant may permit the contested legal requirement to remain unsatisfied during the period of such contest and any appeal therefrom; provided, that during said period Tenant will procure a bond or take such other action as reasonably may be necessary to protect the interest of Landlord. However, Landlord and not Tenant will be required to pay the cost of any modifications or alterations to the Premises in order to comply with any such legal requirement, unless the need for compliance results from a change in the nature of the use to which Tenant puts the Premises, and/or alterations made by Tenant in which event Tenant will pay the entire cost associated with such compliance when due.

19. **No Liens.** Landlord will not be liable for any labor or services provided, or materials supplied, to the Premises at the instance of Tenant, and no mechanics or materialmens liens will attach to the estate or interest of Landlord in the Premises on account of the foregoing. If any such lien is filed, Tenant, within thirty (30) days after receipt of notice thereof, will secure a release of said lien or contest the same, in which event Tenant will post a bond adequate to protect the interest of Landlord during the pendency of such proceedings.

20. **Damage or Destruction.**

a. If the Premises are completely destroyed by fire or other casualty or damaged so substantially that the remainder of the Premises are unsuitable for the continued feasible use by Tenant for the operation of its business, Tenant will have the right, at Tenant's option, to terminate this Lease by giving notice to Landlord within thirty (30) days after the date on which such damage or destruction occurred (the date on which the fire or other casualty occurs is herein referred to as the "**Date**"). If Tenant gives such notice, this Lease will terminate as if the Date were the Expiration Date, and Rent and all Other Charges will be apportioned and paid to, but excluding, the Date.

b. If Tenant does not elect to terminate this Lease under the provisions of Paragraph 20 (a) above, or if the Premises are partially damaged or destroyed, but remain suitable for the

Dollars ($2,000,000) for injury to or death of persons or damage to property as a result of the negligence of Tenant, its employees, agents, invitees and guests. Said liability coverage shall increase to Two Million Five Hundred Thousand Dollars ($2,500,000.00) subsequent to the 1st five (5) years of the initial terms and shall increase by Two Hundred and Fifty Thousand Dollars ($250,000.00) each five (5) year period thereafter, including renewal terms. Landlord is to be listed as an additional insured for replacement cost of the premises Tenant is leasing.

d. Each insurance policy required by this Lease: (i) will be issued by an insurer authorized under the laws of the State or Commonwealth in which the Premises are located to issue the coverage provided by the policy, (ii) will be issued by an insurer reasonably satisfactory to Landlord and Tenant, (iii) will not be cancelable without a minimum of thirty (30) days prior written notice to Landlord and Tenant, and (iv) will contain a provision whereby the insurer permits Landlord and Tenant to waive all rights of recovery against the other, and whereby the insurer itself waives any claims by way of subrogation against Landlord or Tenant, their respective employees, agents, invitees and guests. Notwithstanding any other provision of this Lease to the contrary, Landlord and Tenant hereby waive any and all rights of recovery, claims, actions or causes of action against each other, their respective directors, employees, agents, invitees and guests, for any loss or damage that may occur to the Premises and to all property, whether real, personal or mixed, located therein or thereabout by reason of fire, the elements, or any other casualty, regardless of cause or origin, including negligence of the parties hereto, their respective directors, employees, agents, invitees and guests.

e. On or before the Possession Date, Landlord and Tenant will deliver to the other a certificate with respect to the insurance coverage(s) that each of them is to maintain under this Lease. Promptly upon the replacement or renewal of each such coverage, Landlord and Tenant will deliver to the other a certificate evidencing such replacement or renewal.

25. **Surrender; Removal of Tenant's Property.** Upon the expiration or the earlier termination of this Lease, Tenant will surrender the Premises to Landlord in substantially the same condition that they were in on the Commencement Date, normal wear and tear, depreciation and obsolescence, Alterations, damage by fire or other casualty, condemnation and damage resulting from the acts or omissions of Landlord, its employees, agents, contractors, invitees and guests excepted. Tenant will leave the Alterations, and title to the same then will pass to Landlord. However, Tenant will have the option to remove all equipment, signs, back-lit canopies, trade fixtures and personal property installed in or placed on or about the Premises by Tenant, in which event Tenant will repair any resulting damage to the Premises.

b. Landlord hereby waives any statutory or common law lien or other similar lien pertaining to Tenant's personal property, and all personal property in or on the Premises, including, but not limited to, Tenant's moveable trade fixtures, furniture and equipment, whether owned by Tenant or any other person, shall be and remain the personal property of Tenant, exempt from the claims of Landlord or any Mortgagee or lienholder of Landlord without regard to the means by which the same are installed or attached. Tenant may, at any time during the continuance of its tenancy under this Lease, remove all such property that Tenant owns or may have installed or placed at its own expense on the Premises or that it furnished and Landlord installed, in which event Tenant will repair any resulting damage to the Premises.

26. **Holding Over.** If Tenant remains in possession of the Premises after the Expiration Date or the earlier termination of this Lease, Tenant will become a tenant from month-to-month at one hundred twenty-five percent (125%) of the Rent payable as of the Expiration Date or earlier termination of this Lease, but otherwise subject to all the terms and provisions of this Lease, but there will be no extension of this Lease by operation of law. Notwithstanding the foregoing, there shall be no increase in the Rent for sixty (60) days following the Expiration Date if the parties are negotiating in good faith for a renewal, so long as that renewal is retroactive such that the renewal term will commence the day following the Expiration Date.

27. **Right of Entry.** Tenant will permit Landlord and Landlord's representatives to enter the Premises during Tenant's normal business hours for the purposes of inspecting, repairing and showing the Premises to prospective purchasers, tenants and mortgagees; provided, however, that all of the foregoing will be done in a manner so as not to interfere with Tenant's business operations, only upon prior written request to Tenant and accompanied by a representative of Tenant, except when Landlord must enter to make emergency repairs to the Premises.

28. **Tenant's Default and Landlord's Remedies.**

a. The following events will constitute a default by Tenant hereunder: (i) if Tenant fails to pay when due any Rent or Other Charges and does not cure such failure within seven (7) calendar days after Tenant's receipt of written notice of such failure from Landlord; or (ii) if Tenant breaches any warranty given to Landlord in this Lease; or (iii) if Tenant files, or has filed against it, any petition for relief under applicable bankruptcy laws; or (iv) if Tenant fails to fully perform any of its other obligations under this Lease and does not cure such failure within thirty (30) days after Tenant's receipt of written notice from Landlord, which said notice will specify the nature of the failure, or, if such failure cannot reasonably be cured within thirty (30) days, if Tenant does not promptly commence to cure the same within said thirty (30) day period and pursue completion of said cure with due diligence ("**Default**").

b. Upon Default by Tenant, Landlord may pursue any one or more of the following remedies, separately or in any combination: (i) Landlord may terminate this Lease by giving written notice to Tenant, in which event Tenant will vacate the Premises within thirty (30) days of receipt of Landlord's notice, and this Lease will terminate at midnight on the day Tenant so vacates; (ii) with or without terminating this Lease, Landlord may enter and take possession of the Premises and remove Tenant and any other person who may be occupying the Premises; (iii) Landlord may re-let the Premises, or any part thereof, on such reasonable terms and conditions as Landlord may deem satisfactory, and receive the rent for any such re-letting; (iv) Landlord may do whatever Tenant is obligated to do under the terms of this Lease; or (v) any other remedy which Landlord may have at law or in equity; provided, that no such remedy will have the effect of (1) accelerating the due date on which Tenant otherwise would be obligated to make any payment of Rent or Other Charges or (2) requiring Tenant to pay for any improvements or modifications that Landlord may make to the Premises in order to accommodate a replacement for Tenant with a non-retail use. Landlord agrees to use commercially reasonable efforts to mitigate its damages and the resulting liability of Tenant.

c. The failure of Landlord to strictly enforce the performance of any of Tenant's obligations under this Lease will not be deemed a waiver of any rights or remedies that Landlord may have to strictly enforce such subsequent performance by Tenant and will not be deemed a waiver of any subsequent Default by Tenant in the performance of such obligations.

29. **Landlord's Default and Tenant's Remedies.**

a. The following events will constitute a default by Landlord: (i) if Landlord fails to pay any sum of money to be paid by Landlord hereunder and does not cure such failure within thirty (30) calendar days after Landlord's receipt of written notice from Tenant; or (ii) if Landlord fails fully to perform any of its other obligations under this Lease and does not cure such failure within thirty (30) days after Landlord's receipt of written notice from Tenant, which said notice will specify the nature of the failure, or, if such failure cannot reasonably be cured within thirty (30) days, if Landlord does not promptly commence to cure the same within such thirty (30) day period and pursue completion of said cure with due diligence ("**Default**").

b. Upon Default by Landlord, Tenant may pursue any one or more of the following remedies, separately or in any combination: Tenant may do whatever Landlord is obligated to do under the terms of this Lease, at Tenant's option, in which event Tenant may send a billing statement to Landlord for payment of the reasonable cost of performing such obligations. Upon the occurrence of a Landlord Default, Tenant may pursue any one or more of the following remedies, separately or in any combination: (i) Tenant may bring an action against Landlord to recover all damages incurred or sustained by Tenant as a result of such Landlord Default; (ii) Tenant may do whatever Landlord is obligated to do under the terms of this Lease, at Tenant's option, invoice Landlord for the reasonable and average cost of performing such obligations, and if Landlord has not reimbursed Tenant within thirty (30) days of receipt of such invoice, Tenant will begin to deduct the cost thereof from the installments of Rent and Other Charges next due under this Lease until Tenant is fully reimbursed; or (iii) any other remedy that Tenant may have at law or in equity.

c. The failure of Tenant to strictly enforce the performance of Landlord's obligations under this Lease will not be deemed a waiver of any rights or remedies that Tenant may have to strictly enforce such subsequent performance by Landlord and will not be deemed a waiver of any subsequent Default by Landlord in the performance of such obligations.

30. **Attorney's Fees.** In any action, suit or proceeding to enforce, defend or interpret the rights of either Landlord or Tenant under the terms of this Lease or to collect any amounts due Landlord or Tenant hereunder, the prevailing party, pursuant to a final order of a court having jurisdiction over said matter as to which applicable periods within which to appeal have elapsed, shall be entitled to recover all reasonable costs and expenses incurred by said prevailing party in enforcing, defending or interpreting its rights hereunder, including, without limitation, all collector and court costs, and reasonable attorney's fees, whether incurred out of court, at trial, on appeal, or in any bankruptcy proceeding.

31. **Time of Essence.** Time is of the essence of this Lease.

32. **Notices.** Each notice provided for under this Lease must comply with the requirements of this Paragraph 32. Each notice shall be in writing and sent by nationally recognized overnight courier, or by depositing it with the United States Postal Service, certified mail, return receipt requested, postage prepaid, addressed to the appropriate party as hereinafter provided. Each notice shall be effective upon being so deposited, but the time period in which a response to any notice must be given or any action taken with respect thereto shall commence to run from the date of receipt of the notice by the addressee thereof, as evidenced by actual receipt, if by overnight delivery, the return receipt, if by certified mail. Rejection or other refusal by the addressee to accept or the inability of the United States Postal Service to deliver because of a changed address of which no notice was given shall be deemed to be the receipt of the notice sent. Any party shall have the right from time to time to change the address or individual's attention to which notices to it shall be sent (provided not changed to a post office box) by giving to the other parties at least ten (10) days prior notice thereof. The addresses of the parties shall be those set forth below:

LANDLORD:
Peska Properties, Inc
2700 N. Fourth Avenue
Sioux Falls, SD 57104

TENANT:
Northern Rental Corporation
3538 S Western Ave
Sioux Falls, SD 57105

With a copy to:
Aaron's, Inc.
309 E. Paces Ferry Road, N.E.
Atlanta, Georgia 30305-2377
Attn: Vice President, Franchise

And
Steve Willis
3538 S. Western Avenue
Sioux Falls, SD 57105

33. **Entire Agreement.** This Lease contains the entire agreement of Landlord and Tenant, and no other matters or agreements between the parties, either oral or written, will be of any effect.

34. **Quiet Enjoyment.** Landlord warrants that it will have good and indefeasible fee simple title to the Premises, and has the lawful authority to enter into this Lease. Landlord further warrants that Tenant, subject to the terms and conditions of this Lease, will peaceably and quietly hold and enjoy the Premises during the Term without hindrance or interruption, so long as no Default by Tenant shall occur.

35. **Construction of Improvements.**

a. Landlord agrees to construct the Premises and then make certain improvements to the Premises, at Landlord's sole expense ("**Finish Improvements**"), in accordance with all applicable municipal, state and federal statutes, codes and regulations, including, without

46. **Counterparts.** This Lease may be executed in counterparts, each of which shall constitute an original and all of which when taken together shall constitute one and the same instrument.

47. **Continuous Operations.** Notwithstanding anything to the contrary contained herein, Tenant shall not be obligated to continuously operate its business in the Premises during the Term of the Lease; Tenant will however during any period of failure to operate its business be obligated to all of the terms of this Lease and further provided, however, in the event Tenant fails to continuously operate its business in the Premises in excess of thirty (30) days, excluding temporary closures related to casualty, condemnation, remodeling of the Premises or the performance of inventory within the Premises, Landlord shall have the right, but not the obligation, without declaring a Default hereunder, to terminate this Lease upon written notice to Tenant, and in which case Tenant shall immediately surrender possession of the Premises to Landlord.

48. **Schedule of Exhibits.**

**Exhibit "A"**: Legal Description of Land/Building
**Exhibit "B"**: Site Plan of Premises
**Exhibit "C"**: Tenant's Standard Signage Package
**Exhibit "D"**: Tenant's Panel Position on the Pylon Sign
**Exhibit "E"**: Landlord's Finish Improvements
**Exhibit "F"**: Floor Plan of Completed Premises
**Exhibit "G"**: Franchise Acknowledgement
**Exhibit "H"**: Landlord's Lien Waiver
**Exhibit "I"**: Landlord's W-9
**Exhibit "J"**: Build-out Amortization

SIGNATURES ON NEXT PAGE

**LANDLORD:**

Peska Properties, Inc.,
a South Dakota Corporation

By: _____

Its: Pres.

Date: 12/23/11

**TENANT:**

Northern Rental Corporation,
a South Dakota Corporation

By: _____

Its: V.P.

Date: 12/23/11

By: _____
Steve Willis, Individually

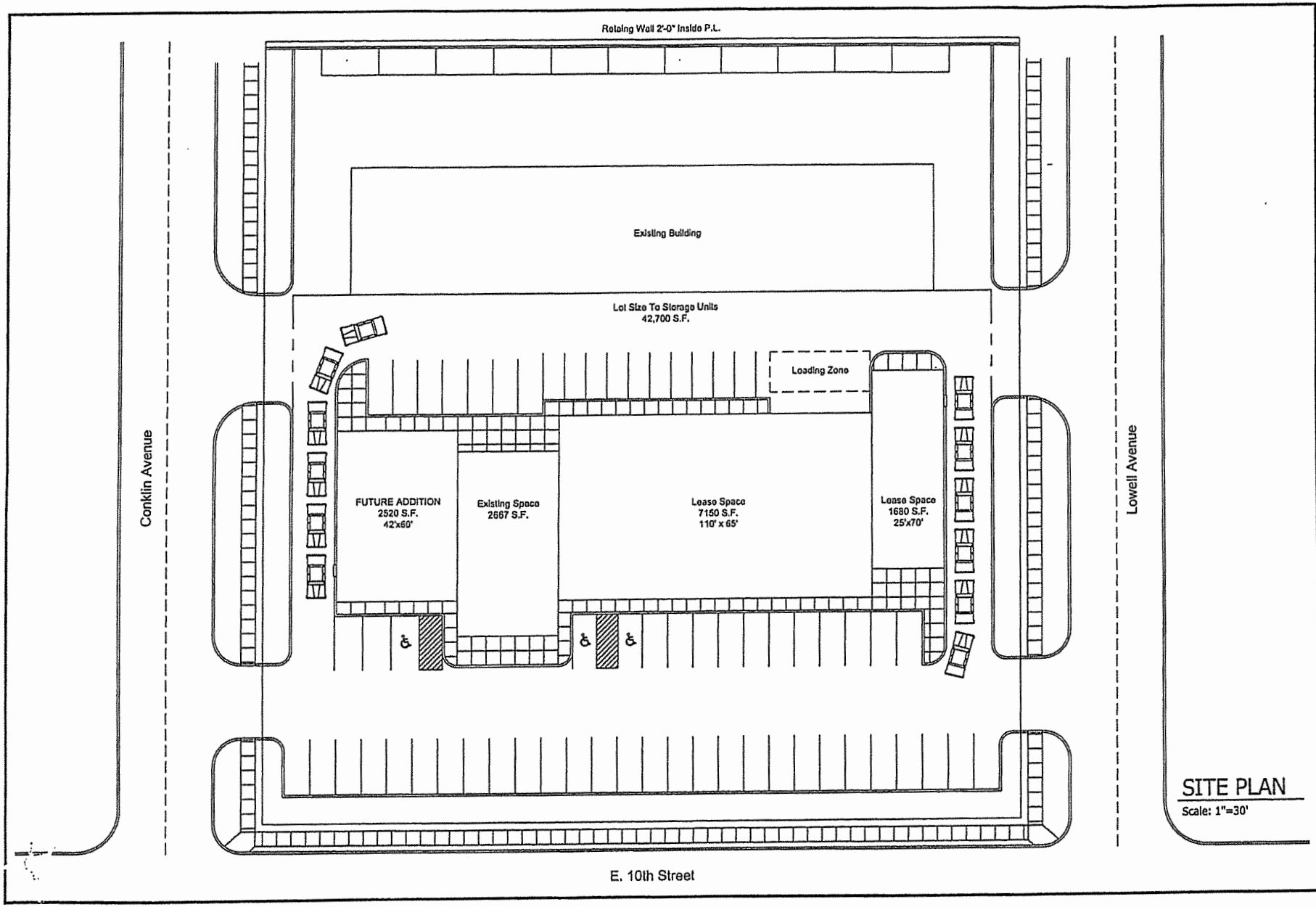
Date: 12/23/11



Plaintiff's Exhibit 2 000023

Exhibit "B"

Site Plan of Premises
(Landlord)




SITE PLAN

Scale: 1"=30'

EXHIBIT B 26

Plaintiff's Exhibit 2 Tabbies

PESKA CONSTRUCTION, INC.

SITE PLAN

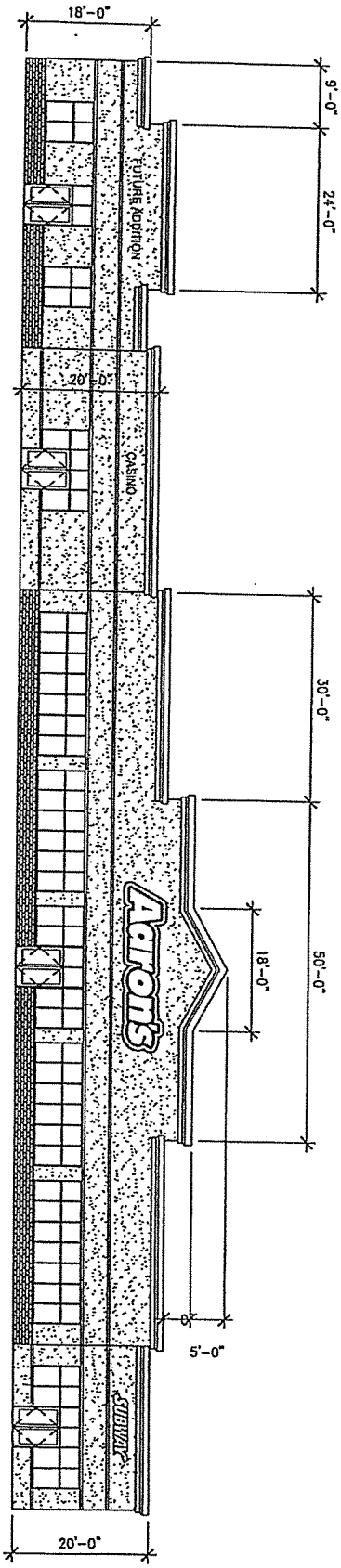
CONE'S CORNER
SIOUX FALLS, SD



12/22/11

XXXXX

C1.1




| | | | |
|---|---|---|---|
| A2. | FRONT ELEVATION | Plaintiff's Exhibit 2 | 000027 |
| 12/22 | CONE'S CORNER | | Deska CONSTRUCTION, INC. |

Exhibit C

# Aaron's, Inc. Standard Signage Package

As a multinational retailer with over 1800 stores across the United States and Canada it is imperative that we are able to display our standard, trademarked, internationally recognizable signage at all of our locations.

This exhibit details our standard sign package. We reserve the right to amend our standard sign package at any time to conform to new corporate guidelines. Changes to the package may include, but are not limited to, color, size, shape, construction, wording, or layout. Notwithstanding anything to the contrary, Landlord acknowledges and agrees that all signage installed by Aaron's, Inc. shall, at all times, remain the sole and exclusive property of Aaron's, Inc., and that Aaron's, Inc. shall at all times be entitled to remove its' signage without being deemed to be in violation of its lease. Landlord also acknowledges and agrees that under no circumstance shall Landlord be deemed to have any ownership rights in any signage installed by Aaron's, Inc. nor shall any signage installed by Aaron's, Inc. be deemed to constitute a permanent fixture or improvement.

The primary Aaron's, Inc. building sign is blue, white and gold (fig. 1). It consists of a double embossed plastic face with second surface graphics covering an internally illuminated metal back and sides (fig. 2), commonly referred to as a "Cloud" type sign. Aaron's, Inc. does not use "Channel Letter" type signs. Sizes and internal details are subject to change based on local codes and ordinances. We reserve the right to install the largest signage allowed by law.

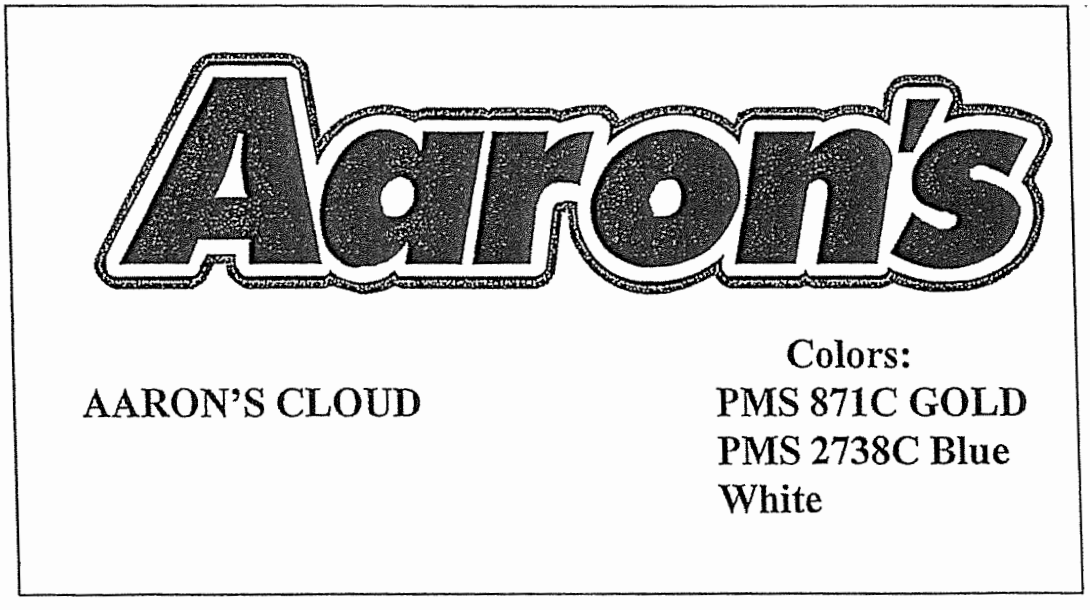



Fig. 1

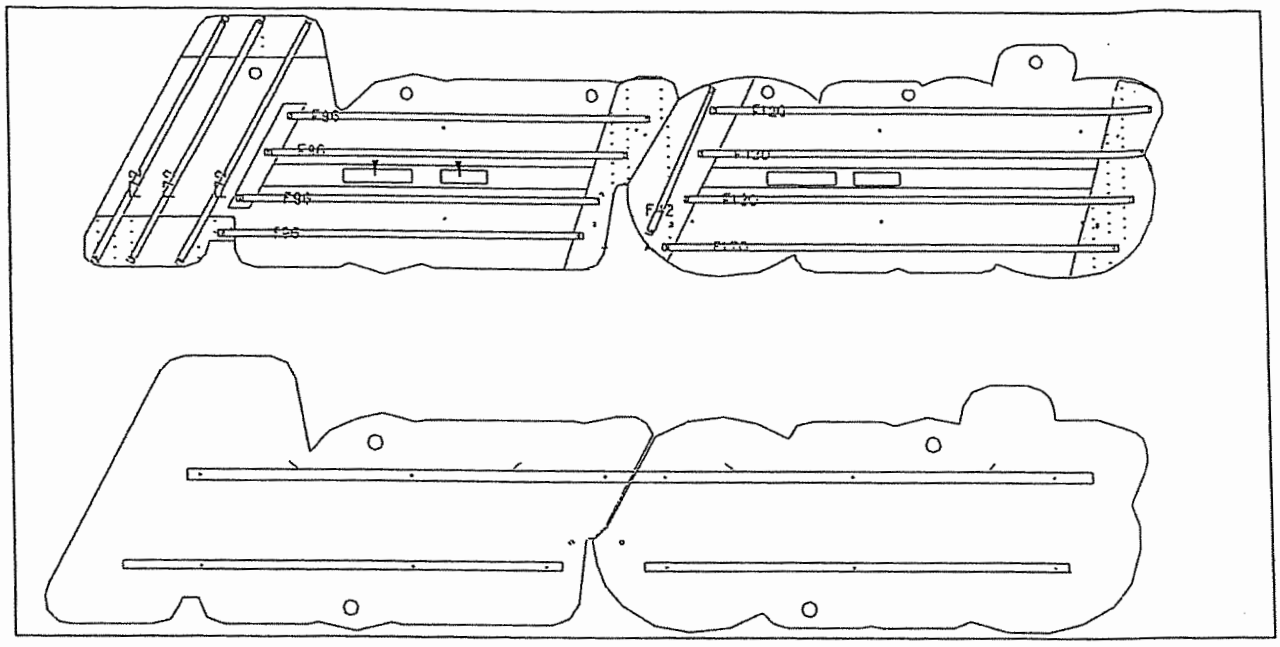


Fig.2

Field personnel will determine the signage installation method. Our standard signage installation profile (Fig. 3) or slight variations will be used whenever possible. Aaron's, Inc. signage is designed to be fastened directly to a building or other suitable structure. It cannot be mounted on a raceway.

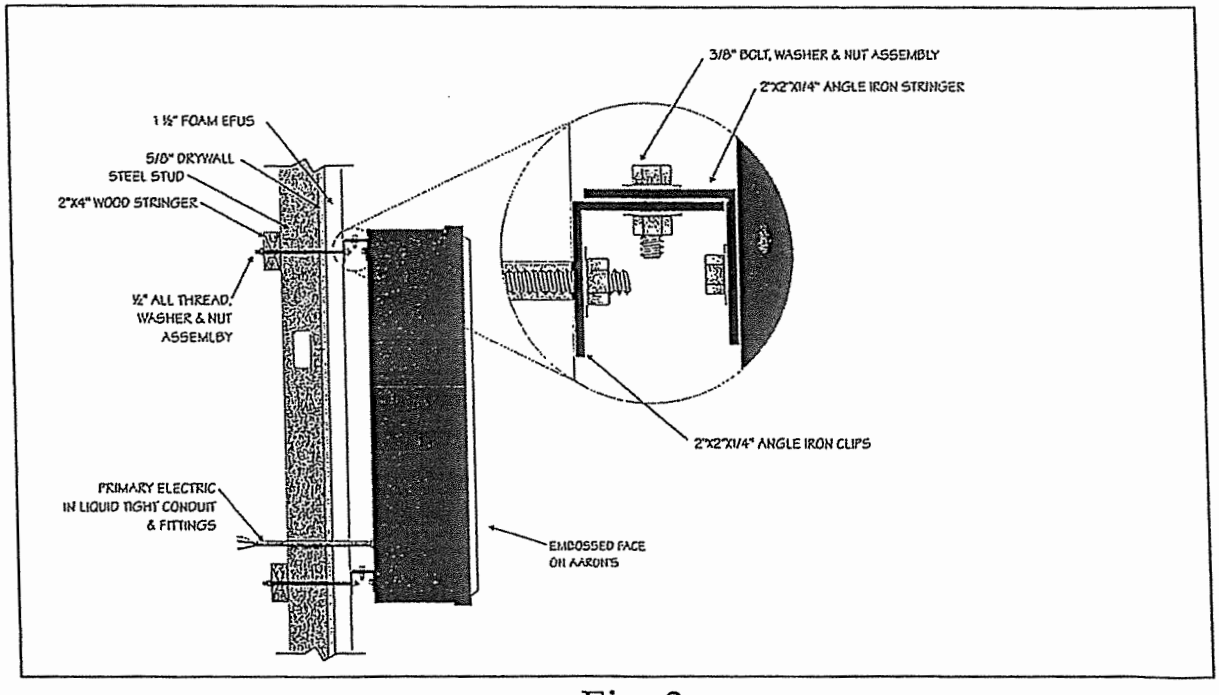



Fig. 3



Plaintiff's Exhibit 2 000029

The standard Aaron's, Inc. signage also consists of non-illuminated plastic letters that spell out the words "Furniture", "Electronics", "Computers" and "Appliances" (Fig. 4) installed on the face of the building.

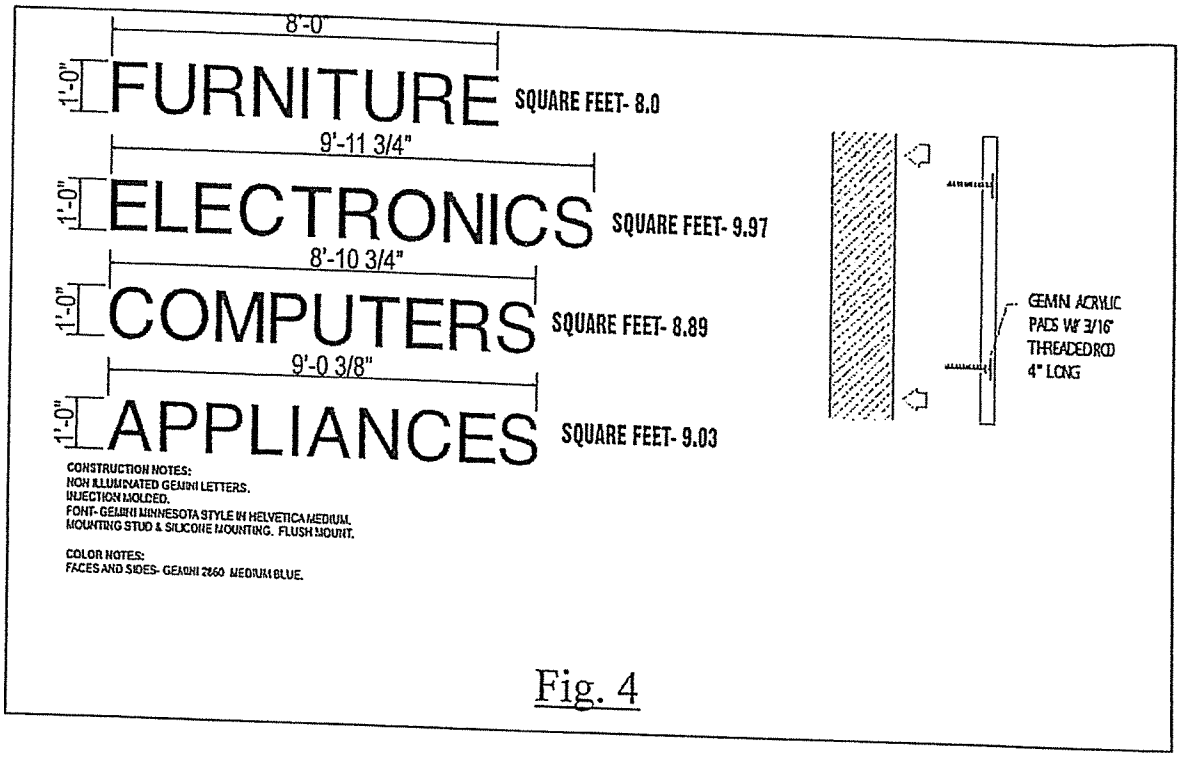



Fig. 4

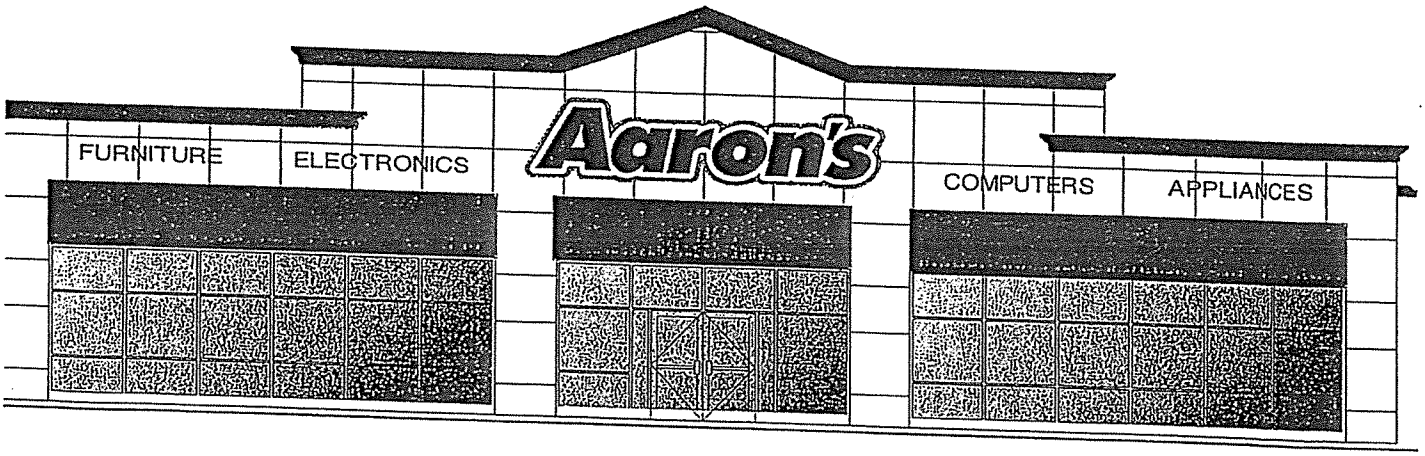
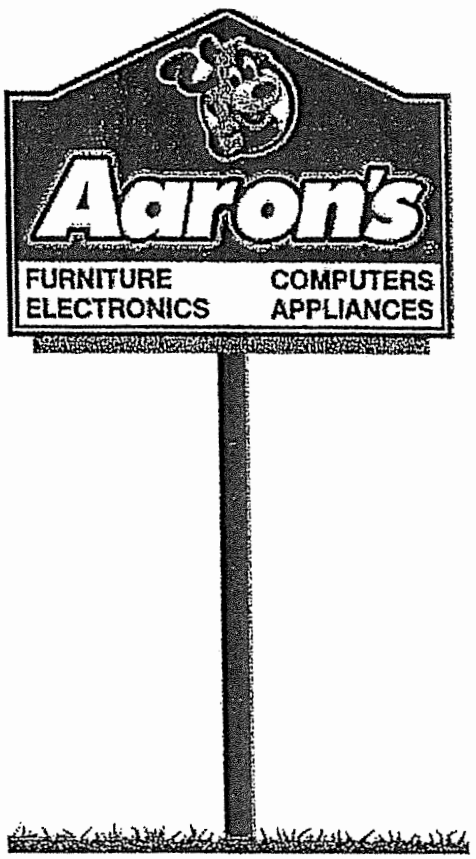



Fig. 5

# TYPICAL AARON'S STOREFRONT SIGNAGE




NOTES:
DP. FABRICATED CABINET W/ 2" .050 ALUM. RETAINERS
.050 ALUM. FILLER/BOTTOM SKIRT TO BE .090 ALUM
FRAMED W/ TS 2" X 2" X 16GA BOTTOM SKIRT FRAMED W/ TS 1 1/4"X 1 1/4"X 16GA
DOUBLE FACED CABINET W/ .150 CLEAR LEXAN FACES
UPPER PORTION OF FACE - PAINTED AND EMBOSSED WITH 2ND SURFACE GRAPHICS
LOWER PORTION OF FACE - FLAT W/ 2ND SURFACE GRAPHICS
FACE TO BE SEPARATED W/ 2 1/4"H-BAR
INTERN. ILLUM. W/ 6500 SYLVANIA T8 LAMPS
COLORS:
CABINET & H-BAR PMS 2738C BLUE
BOTTOM SKIRT - PMS 871C GOLD
UPPER PORTION OF FACE
BACKGROUND - DRACAL 8500 542 CARIBIC BLUE
AARON'S LUCKY DOG LOGO - DIGITAL PRINT
AARON'S COPY - SEE DETAIL
FACE TO BE BACK SPAYED WHITE
BOTTOM PORTION OF FACE
COPY & BORDER STRIPE - DRACAL 542 CARIBIC BLUE
BACKGROUND TO BE SPRAYED WHITE
ALL GRAPHICS TO BE 2ND SURFACE

Fig. 6

Whenever possible Aaron's, Inc. will install our custom pylon sign (Fig. 6). We reserve the right to install the sign at the maximum height and size allowed by law.

In the event that we are unable to install our own pylon cabinet, but are able to utilize space on an existing single or multi tenant sign, we will install faces with our standard logo (Fig. 7) enlarged to fill the available area. We reserve the right to use different logos or layouts on the pylon signs based on the size and shape of the available area.


Fig. 7



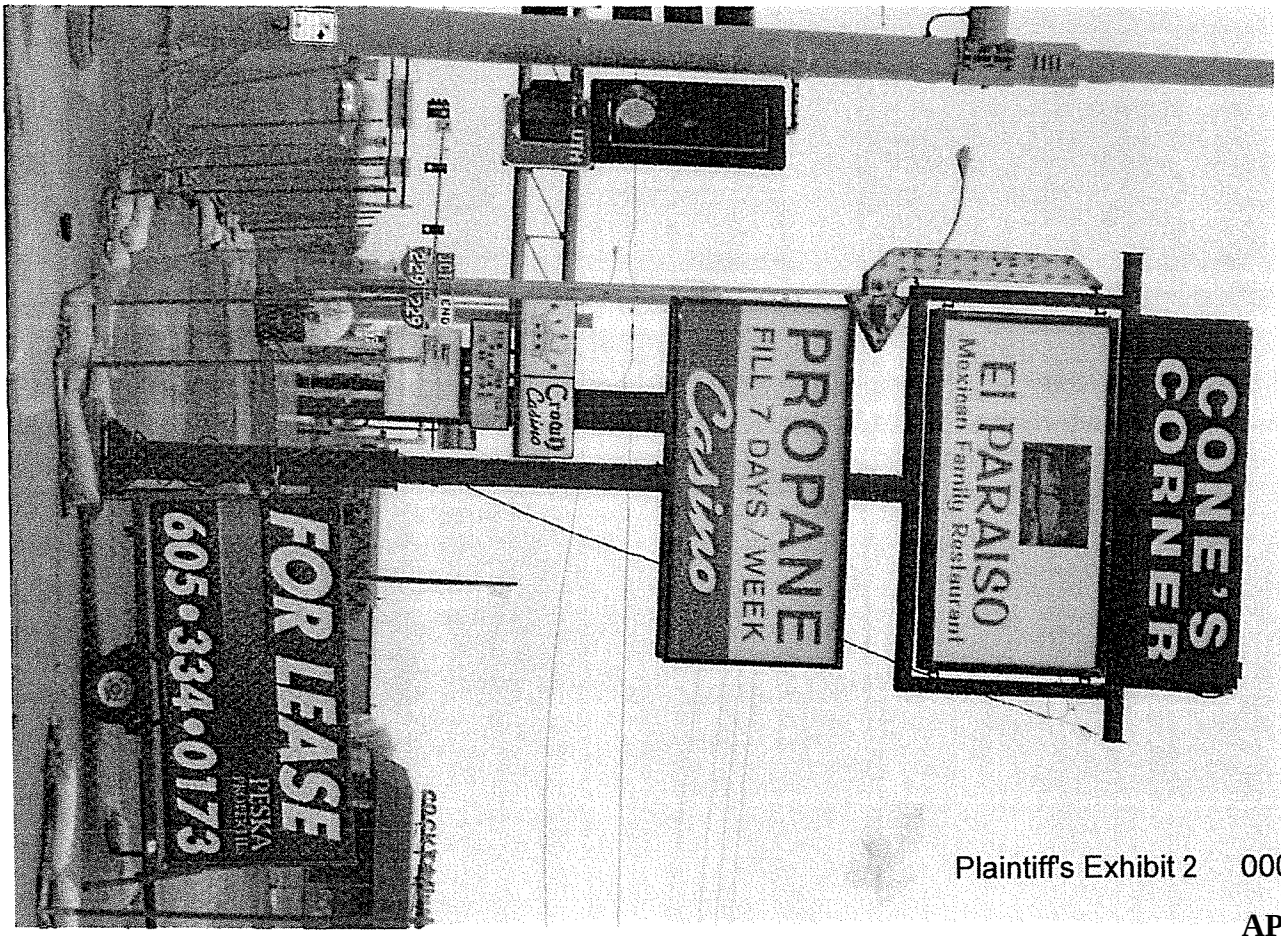
Plaintiff's Exhibit 2 000031

Exhibit "D"

Tenant's Panel Position on exsiting Pylon Sign
(Landlord)


EXHIBIT
D

Plaintiffs Exhibit 2 000033


Plaintiff's Exhibit 2 000034

Exhibit "E"

Landlord's Finish Improvements

**General Notes and Requirements:**

1. Space to be constructed and then demised into showroom and returns (warehouse) area at approximately 75% / 25% ratio, respectively; and office areas, restrooms, and wingwalls as per agreed plans.

2. Landlord is responsible to certify that the premises are safe from all hazardous materials. If hazardous materials are found during the lease, it will be Landlord's responsibility to remove.

3. Space must meet all current applicable code requirements inclusive of type, i.e. ADA, local, state, federal, fire, and handicapped codes.

4. Provide Certificate of Occupancy for space as agreed without any additional work needed by Tenant. All additional work by Tenant will be permitted and paid for by Tenant.

**Roof and Building:**

1. Warrant that the roof is waterproof.

2. Warrant that the builing and the demised premises are waterproof.

3. All roof and wall penetrations to be sealed and finished to match building exterior.

4. Provide demised premises in broom-clean condition; remove and dispose of all trash

5. Provide exterior finish and façade design completed as per agreed plans

**Parking:**

1. Provide adequate parking spaces as per agreed plans to be properly striped with handicap spaces provided, marked and signed per code requirements.

2. Provide adequate pole and/ or wall lighting for night vision around entryway, parking and receiving and dumpster areas – minimum of two foot candles with a timer and/ or photocell.

3. Parking area must be completed new 4" minimum asphalt parking lot, well drained and in good condition. Landscaping to meet applicable code requirements including plantings as agreed per the plans.

4. Provide and install dumpster enclosure or screening fence in rear of demised premises as agreed per the plans.

**Delivery Doors and All Other Building Exits:**

1. All exterior doors will be new, water tight with sweeps and seals.

2. All exterior doors (other than storefront entry doors) will be metal commercial grade, and will have alarmed hardware – if the door(s) are used as emergency exits(s), hardware must be equipped with panic mechanism(s) in compliance with applicable code as per plans.

3. Provide and install double-door panic hardware mechanism(s) or single-door panic hardware mechanism(s) with padlocked barrel bolts on the opposite door, complete with audible alarm and emergency release.

4. Provide ADA and fire code compliant building access per state and local codes.

**Exterior Walls:**

1. All walls, including Aaron's façade, to be completed as agreed per the plans.

2. Finished to match plans.

3. All penetrations to be sealed and finished to match building exterior.

**Water and Gas Service:**

1. One metered service dedicated to the demised premises only.

2. Services must be in compliance with applicable codes.

3. Services must be in good working order for the term of this lease.

**Restrooms and Plumbing:**

1. Plumbing service dedicated to the demised premises only. Install in warehouse area per agreed plans floor drain, mop sink, two restrooms, with fixtures, entrance doors and frames, that are handicap accessible and in compliance with ADA standards and all applicable codes.

2. Complete and in good working order for possession of premises by Lessee.

3. Provide and install exhaust fans/vents in restrooms per applicable codes.

**Showroom:**

1. Provide office walls as per plans to celing height with door and window cutouts and uncapped 6' to 8' wing walls laid out as per agreed plans and clean the space with walls ready to receive paint.

2. Ceiling height 11'-0" – 11'-9" clear height; and soffit, if required by the plans.

3. 2'x4' new white and/or black acoustical tile in with R-19 insulation.

4. 2'x4' 18 cell, new parabolic lay in fixtures (approximately every 100 sq. ft). in the showroom area, and 8' lighting fixtures in warehouse area as per agreed plans.

5. Clean and level concrete flooring ready to receive floor finishes.

6. 9' split one inch windows installed as per agreed plans, along the entire width of street frontage and 50' along the west side of showroom(or as otherwise agreed) with a pair of 3' x 7' storefront doors, with the following hardware: push pull, door closures, mail slot installed no lower than 5' a.f.f., threshold, thumb turn lock, and flush bolts. Storefront façade structure to be sufficient to support Lessee's sign. All such windows to be new one-inch clear double pane, clear inboard, "PPG solar ban 60 low E", energy efficient commercial retail grade glass, free of cracks, bronze (or colored, blue or red) metal frames, watertight and wind-tight. Sidewalk to be completed as agreed per the plans with ADA-compliant handicap ramp if required and access as per code.

7. Provide single duplex outlets every 12' lineal feet of demised space. Max – 6 outlets per circuit; plus outlets in the office area every 4 feet, and 6 floor outlets.

8 Pair of 3' x 8' solid core hung and operational doors to be located in warehouse demising wall or alternate location per Lessee instructions. Stain grade birch veneer with metal knock down frames (paint grade). Slab doors – not drilled for latch hardware, friction hold open feature required. Four hollow core window insert wood doors, for offices as per plans.

**Returns/Warehouse Area:**

1. 8' – strip lights at bar joist.

2. Provide minimum 12'x14' overhead door and loading dock at the rear of the building and emergency exit metal door and frame as per agreed plans.

3. Provide three (3) 6" x 48" pipe bollards equally spaced 5 feet apart and 12" from the building at the exterior overhead door.

4. Provide 400-watt halogen wall pack fixture with motion sensor at all exterior service doors. Metal halide with photo cell.

5. Two (2) handicapped accessible restrooms must meet all applicable code requirements. F.R.P required on all walls, security room with metal door, and office space with door cutout as per agreed plans.

6. Provide mop sink and water cooler per codes and washer /dryer water hookups with floor drain per as agreed plans. ADA accessible if required by code, at the restrooms. F.R.P. on walls behind mop sink. and fountain area.

7. Provide clean sealed concrete floor in warehouse.

8. Supply and install unit water heater to meet minimum code requirements.

**HVAC System:**

1. Dedicated to premises only and in compliance with all applicable codes

2. Landlord shall provide a minimum of 1 ton per 350 square feet of floor space in the showroom. Unit heater to minimum code must be supplied and installed in warehouse area.

3. HVAC system(s) to include standard grade new units, operational at possession, including but not limited to; duct work, diffusers, wiring, etc.

**Electrical Service and Wiring:**

1. Minimum 400 amp service (larger if required by code) Min. 40 breakers @ 120v.

2. Service and wiring to be incompliance with all applicable codes.

3. One-metered service complete to demised premises and operational.

4. Electrical panel(s) to be located in the warehouse area and labeled correctly and in legible print.

5. Provide conduit from panel to center of sign canopy or j-box to be centered on building storefront, conduit is to be 1" and have one set of 10/2 wire with ground and a 20 amp breaker at panel for storefront. Final connection to be completed by Aaron's sign installer. Timer to be installed for building sign and pylon sign if applicable.

6. Provide and install single duplex outlets every 12' of demised space. Max – 6 outlets per circuit; plus one outlet for every 6' of office areas, four center showroom in-floor or column outlets, security camera outlets and 220 outlet in the washer/dryer certification area in the warehouse area.

**Emergency Lighting:**

1. Provide and install emergency lighting as required by all applicable codes.

2. Provide and install L.E.D. exit lighting as required by all applicable codes.

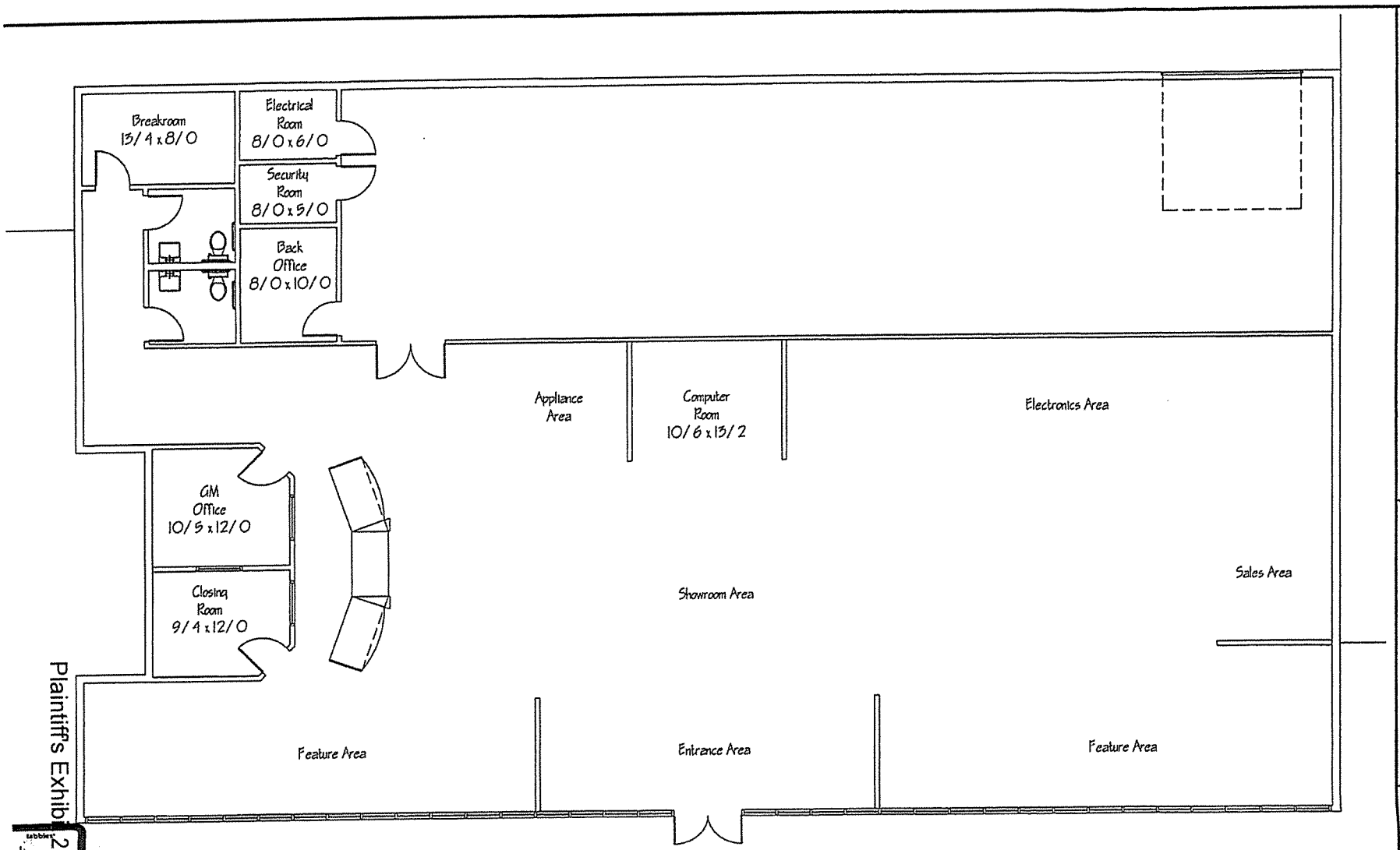
**Phone Wiring:** Provide and install conduit through exterior wall and 4X4 telephone board to be located near the electrical panel.

**Sprinkler System:**

If required by applicable codes, provide and install a sprinkler system to be in compliance with all said codes.

Exhibit "F"

Floor Plan of Completed Premises
(Tenant)




AARON'S FLOORPLAN

Scale: 1/8" = 1'-0"

PESKA CONSTRUCTION, INC.

FLOORPLAN

CONE'S CORNER
SIOUX FALLS, SD



12/23/11

XXXXX

A1.2

Plaintiff's Exhibit 2 EXHIBIT 00041

APP. 0090

| Fixed Rate Loan | |
|---|---|
| Number of Payments : | 120 |
| Number of Years: | 10 |
| Loan Amount : | 50,000.00 |
| Interest Rate : | 8.000% |
| Date of 1st Payment : | March1 2011 |
| Yearly Payment | 7,279.66 |
| Monthly Payment | 606.64 |
| Ballon Year | 4 |
| Ballon Amount | #NAME? |

| Pmt Date | Pmt Nbr | Required Payment | Pmt Breakdown | | Ending Balance | Paid Equity |
|---|---|---|---|---|---|---|
| | | | Interest | Principal | | |
| #VALUE! | 70 | 606.64 | 174.36 | 432.27 | 25,722.27 | 24,277.73 |
| #VALUE! | 71 | 606.64 | 171.48 | 435.16 | 25,287.11 | 24,712.89 |
| #VALUE! | 72 | 606.64 | 168.58 | 438.06 | 24,849.05 | 25,150.95 |
| #VALUE! | 73 | 606.64 | 165.66 | 440.98 | 24,408.07 | 25,591.93 |
| #VALUE! | 74 | 606.64 | 162.72 | 443.92 | 23,964.16 | 26,035.84 |
| #VALUE! | 75 | 606.64 | 159.76 | 446.88 | 23,517.28 | 26,482.72 |
| #VALUE! | 76 | 606.64 | 156.78 | 449.86 | 23,067.42 | 26,932.58 |
| #VALUE! | 77 | 606.64 | 153.78 | 452.86 | 22,614.57 | 27,385.43 |
| #VALUE! | 78 | 606.64 | 150.76 | 455.87 | 22,158.69 | 27,841.31 |
| #VALUE! | 79 | 606.64 | 147.72 | 458.91 | 21,699.78 | 28,300.22 |
| #VALUE! | 80 | 606.64 | 144.67 | 461.97 | 21,237.81 | 28,762.19 |
| #VALUE! | 81 | 606.64 | 141.59 | 465.05 | 20,772.76 | 29,227.24 |
| #VALUE! | 82 | 606.64 | 138.49 | 468.15 | 20,304.60 | 29,695.40 |
| #VALUE! | 83 | 606.64 | 135.36 | 471.27 | 19,833.33 | 30,166.67 |
| #VALUE! | 84 | 606.64 | 132.22 | 474.42 | 19,358.91 | 30,641.09 |
| #VALUE! | 85 | 606.64 | 129.06 | 477.58 | 18,881.33 | 31,118.67 |
| #VALUE! | 86 | 606.64 | 125.88 | 480.76 | 18,400.57 | 31,599.43 |
| #VALUE! | 87 | 606.64 | 122.67 | 483.97 | 17,916.60 | 32,083.40 |
| #VALUE! | 88 | 606.64 | 119.44 | 487.19 | 17,429.41 | 32,570.59 |
| #VALUE! | 89 | 606.64 | 116.20 | 490.44 | 16,938.97 | 33,061.03 |
| #VALUE! | 90 | 606.64 | 112.93 | 493.71 | 16,445.26 | 33,554.74 |
| #VALUE! | 91 | 606.64 | 109.64 | 497.00 | 15,948.25 | 34,051.75 |
| #VALUE! | 92 | 606.64 | 106.32 | 500.32 | 15,447.94 | 34,552.06 |
| #VALUE! | 93 | 606.64 | 102.99 | 503.65 | 14,944.29 | 35,055.71 |
| #VALUE! | 94 | 606.64 | 99.63 | 507.01 | 14,437.28 | 35,562.72 |
| #VALUE! | 95 | 606.64 | 96.25 | 510.39 | 13,926.89 | 36,073.11 |
| #VALUE! | 96 | 606.64 | 92.85 | 513.79 | 13,413.10 | 36,586.90 |
| #VALUE! | 97 | 606.64 | 89.42 | 517.22 | 12,895.88 | 37,104.12 |
| #VALUE! | 98 | 606.64 | 85.97 | 520.67 | 12,375.21 | 37,624.79 |
| #VALUE! | 99 | 606.64 | 82.50 | 524.14 | 11,851.08 | 38,148.92 |
| #VALUE! | 100 | 606.64 | 79.01 | 527.63 | 11,323.45 | 38,676.55 |
| #VALUE! | 101 | 606.64 | 75.49 | 531.15 | 10,792.30 | 39,207.70 |
| #VALUE! | 102 | 606.64 | 71.95 | 534.69 | 10,257.61 | 39,742.39 |
| #VALUE! | 103 | 606.64 | 68.38 | 538.25 | 9,719.35 | 40,280.65 |
| #VALUE! | 104 | 606.64 | 64.80 | 541.84 | 9,177.51 | 40,822.49 |
| #VALUE! | 105 | 606.64 | 61.18 | 545.45 | 8,632.06 | 41,367.94 |
| #VALUE! | 106 | 606.64 | 57.55 | 549.09 | 8,082.97 | 41,917.03 |
| #VALUE! | 107 | 606.64 | 53.89 | 552.75 | 7,530.21 | 42,469.79 |
| #VALUE! | 108 | 606.64 | 50.20 | 556.44 | 6,973.78 | 43,026.22 |
| #VALUE! | 109 | 606.64 | 46.49 | 560.15 | 6,413.63 | 43,586.37 |
| #VALUE! | 110 | 606.64 | 42.76 | 563.88 | 5,849.75 | 44,150.25 |
| #VALUE! | 111 | 606.64 | 39.00 | 567.64 | 5,282.11 | 44,717.89 |
| #VALUE! | 112 | 606.64 | 35.21 | 571.42 | 4,710.69 | 45,289.31 |
| #VALUE! | 113 | 606.64 | 31.40 | 575.23 | 4,135.45 | 45,864.55 |
| #VALUE! | 114 | 606.64 | 27.57 | 579.07 | 3,556.39 | 46,443.61 |
| #VALUE! | 115 | 606.64 | 23.71 | 582.93 | 2,973.46 | 47,026.54 |
| #VALUE! | 116 | 606.64 | 19.82 | 586.81 | 2,386.64 | 47,613.36 |
| #VALUE! | 117 | 606.64 | 15.91 | 590.73 | 1,795.92 | 48,204.08 |
| #VALUE! | 118 | 606.64 | 11.97 | 594.67 | 1,201.25 | 48,798.75 |
| #VALUE! | 119 | 606.64 | 8.01 | 598.63 | 602.62 | 49,397.38 |
| #VALUE! | 120 | 606.64 | 4.02 | 602.62 | 0.00 | 50,000.00 |

# TAB 5

# Agency Agreement – Owner/Lessor - South Dakota (Listing Agreement)

**Client:** Steve Willis d/b/a Northern Rental Corporation

**Responsible Broker and Brokerage Firm:** Troy Fawcett, Sioux Falls Commercial, Inc., d/b/a NAI Sioux Falls
(hereinafter referred to as Broker)

**Start Date:** 10/8/2018 **Expiration Date:** 10/9/2019 at midnight. If Client enters into a purchase agreement during the term of this agreement, the termination of this agreement shall be the date of closing under said purchase agreement, or if the transaction does not close, the date which the parties agree to discontinue negotiating. This agreement can be terminated with mutual written consent of the parties.

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

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

*The Client further authorizes:*

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

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

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

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

C. **Limited Agency**: All licensees of the brokerage firm owe you the duties as described in single agency until a purchaser client of this firm inquires about your property under contract for sale with this firm. At this time a limited agency relationship exists, however, limited agency **may only occur** with prior written permission of the parties of the potential in-company transaction. In a limited agency relationship the broker, directly or through one or more agent, may not be able to continue to provide services previously provided to you, such as:

- No longer providing advice or advocating for your interests, or the purchaser's interests, to the detriment of either party.

Unless you give written consent, a limited agent cannot:

- Disclose personal confidences of one party or the other party, unless required by law
- Disclose a buyer is willing to pay more, or a seller is willing to accept less, than the asking price offered for the property;
- Disclose the motivating factors for any client, buying, selling, or leasing the property;
- Disclose a client will agree to financing terms other than those offered.

The client acknowledges and consents as *initialed*:

| | | | |
|---|---|---|---|
| I agree to appointed agency and the appointed agent(s) named in 1B: | *Yes* ___ | *No* ___ | *N/A* ___ |
| I agree to limited agency representation, as described in 1C, of: | | | |
| 1. My appointed agent(s) named in 1B. | *Yes* ___ | *No* ___ | *N/A* ___ |
| 2. The responsible broker/firm. | *Yes* ___ | *No* ___ | *N/A* ___ |

2) **Description of Property**. The Client warrants that Client is the owner of record of the property; or Client's representative has the written authority, attached, to execute this agreement on behalf of the owner of record and hereby grants the undersigned Broker, for the term of this agreement, the right to sell the property legally described as:

7,150 sq. ft. of Lot 51 except Lot H1 contained therein, Lot 52, Lot 53 except Lot H1containted therein, Lot 54 except Lot h-1 contained therein of County Auditor's Subdivision of the Southeast Quarter (SE1/4) of Section 15, Township 101 North, Range 49 West, Minnehaha County, South Dakota, according to the recorded plat thereof.

And

Lot 55 and Lot 66, except the South 40 Feet thereof, Count Auditor's Subdivision of the Southeast Quarter (SE1/4) of Section 15, Township 101 North, Range 49 West, Minnehaha County, South Dakota, according to the recorded plat thereof.

Also known as:2401 E 10th Street City: Sioux Falls Sate: SD Zip: 57103

**Property listed is For Lease**

A. **Lease Price: For the sum of $11.20 NNN**

$ Click or tap here to enter text.

Client represents the property to be good and leasable condition. In the event of an undisclosed property defect that results in cancellation of a lease by Lessee, Client shall be liable to Broker for fee outlined in Section 3 as though the lease was not canceled.

3) **Broker Services and Compensation**

A. The fee for services provided by broker will be 6 % of the total lease value, or one and one-fourth (1 ¼) month's rent, whichever is greater, plus applicable sales tax.

B. Client authorizes broker as *initialed*:

1. Cooperate with brokers who represent buyers — Yes ____ No ____
2. Compensate cooperating brokers 50% of 6% or $Click or tap here to enter text. — Yes ____ No ____

C. If Broker is an exclusive agent, and during the period of this agreement the property is leased by Client, Broker, a cooperating broker, or anyone else; or if Broker is a non-exclusive agent and the property is leased to a Lessee identified by Broker and submitted to Client in writing; or should any of the aforementioned produce a Lessee ready, willing, and able to lease the property; Client agrees to pay compensation as stated above.

D. If within 180 days after the expiration or mutual written termination of this contract a lease is made to any person to whom the property has been shown during the listing period, Client agrees to pay the Broker as stated above. If this property is listed with another real estate licensee after expiration or mutual termination, this contract shall be null and void in its entirety.

E. The term "lease" shall be deemed to include any exchange or trade to which Client consents. In the event of an exchange or trade, Broker is permitted to represent and receive compensation from both parties. No compensation is owed if Client is in an exclusive agreement with another Broker.

F. Broker may act as escrow agent for all money, papers, and documents associated with this transaction.

4) **Authorizations.** Seller authorizes Broker as initialed:

| | | |
|---|---|---|
| A. Advertise by computerized or other media. | Yes ____ | No ____ |
| B. Place a firm marketing sign on property. | Yes ____ | No ____ |
| C. Install a lockbox on the property. | Yes ____ | No ____ |
| D. Request mortgagee to release information to Broker. | Yes ____ | No ____ |
| E. Request utility companies to release information to Broker. | Yes ____ | No ____ |
| F. Disclose to buyers or buyers' agents that Seller has received other offers. | Yes ____ | No ____ |

5) **Personal Property.** The following personal property is included in the stated price and shall be conveyed by Client to Lessee, free of liens and without warranty of condition, by a bill of sale at lease execution and in accordance with its terms:

Click or tap here to enter text.

6) **Disclosures.** Seller(s) shall complete and submit a property condition disclosure statement as required by SDCL 43-4-38, unless exempt pursuant to SDCL 43-4-43, with this listing agreement. Seller(s) shall complete and submit a lead-based paint disclosure if property is residential and was built prior to 1978 as required by federal regulation. [N/A-Non-Residential Property]

7) **Nondiscrimination**. Client and Broker will not participate in any act that unlawfully discriminates on the basis of race, color, creed, religion, sex, disability, familial status, country of national origin or any other category protected under federal, state or local law.

8) **Modification.** No modification of any of the terms of this agreement shall be valid or binding upon the parties, unless such modifications have first been reduced to writing and signed by both parties.

9) **Other Instructions.**

Click or tap here to enter text.

***THIS IS A LEGALLY BINDING CONTRACT. If you have questions regarding the duties and responsibilities of the broker, you should resolve those questions before proceeding further or SEEK LEGAL ADVICE.***

Client: _____ Date: 10/8/18 Phone: 351-6911

Client: _____ Date: _____ Phone: _____

Address: _____

City: _____ State: _____ Zip: _____

E-mail address: _____

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

Broker/Firm: _____
NAI SIOUX FALLS

By Agent: _____ Date: 10-8-18


2700 N 4th Ave Sioux Falls, SD 57104

# COMMERCIAL LEASE
## PESKA PROPERTIES

THIS LEASE is made effective August 1, 2019 between Peska Properties, Inc. of Sioux Falls, South Dakota herein called the Lessor and Mills Aftermarket Accessories, Inc., a Minnesota Corporation, of 14858 Dellwood Drive, Baxter, MN 56425 hereby called the Lessee.

Lessee hereby leases from Lessor and Lessor leases to the Lessee, the premises situated in the City of Sioux Falls, South Dakota, described as follows:

2409 E 10th St., Sioux Falls, SD

**BUILDING DESCRIPTION**

The premises consist of 7,150 square feet of building space containing a combination of Retail and Warehouse space; depicted on Exhibit A attached hereto, in that certain 14,087 square foot building upon the following terms and conditions:

1. **Term and Rent.** The Lease shall have an initial term of 7 years commencing on November 1, 2019 and terminating on October 31, 2026.

TERM

| | | | |
|---|---|---|---|
| 11/1/2019 thru 10/31/2020 | $60,274.50 | $5,022.88 | Monthly |
| 11/1/2020 thru 10/31/2021 | $60,274.50 | $5,022.88 | Monthly |
| 11/1/2021 thru 5/31/2022 | $35,160.16 | $5,022.88 | Monthly |
| 6/1/2022 thru 5/31/2023 | $78,650.00 | $6,554.17 | Monthly |
| 6/1/2023 thru 5/31/2024 | $78,650.00 | $6,554.17 | Monthly |
| 6/1/2024 thru 5/31/2025 | $78,650.00 | $6,554.17 | Monthly |
| 6/1/2025 thru 5/31/2026 | $78,650.00 | $6,554.17 | Monthly |

Initial: _____ Date: 8/20/19 Initial: RAD Date: 8/19/2019

6/1/2026 thru 10/31/2026 $32,770.85 $6,554.17 Monthly

All rentals payments are payable in advance on the first day of each month's rental, during the term of this lease. All rental payments shall be made to the Lessor, at the address specified below, unless changed and the Lessee is notified in writing at least 30 days prior to the changing of the address:

Payment address: 2700 North 4th Avenue
Sioux Falls, SD 57104

If payment has not been received within (3) three days past due date, there will be a late fee penalty of $50 per day, not to exceed $200 in the aggregate, however if the late payment is not made within thirty (30) days of its due date, the late fee of $50 per day shall thereafter run continuously until full payment of all late payments and fees are received.

2. **Lease Term:** 7 Years commencing on November 1, 2019.

3. **Possession:** August 1, 2019, is the possession date, however, possession is for the purpose of allowing the Lessee to perform certain buildout improvements and the commencement of rent shall be November 1, 2019 with the condition that the insurance requirements of Section 14 herein commence on August 1, 2019.

4. **Use.** Lessee shall use and occupy the Premises for retail sales and auto accessories installation to vehicles, and uses ancillary and related thereto. The Premises shall be used for no other purpose without the prior written consent of Lessor, which consent shall not be unreasonably withheld, conditioned or delayed. In connection with Lessee's business, Lessee may bring upon, keep, and use in and about the Premises ordinary amounts of Hazardous Materials (defined in Section 23). Lessee shall not manufacture, sell, or store any other Hazardous Materials on the Premises. It shall be Lessee's obligation for the cost and clean up of any Hazardous Materials discharged onto the Premises by Lessee in violation of applicable Environmental Laws after the Commencement Date, which obligation for clean up shall be timely and run perpetually. Lessee shall indemnify, defend and hold harmless the Lessor for any reason or issue that is related to Lessee's use of Hazardous Materials.

5. **Quiet Enjoyment.** Lessor covenants and agrees with Lessee that as long the rents are paid when due according to the terms and conditions of this lease, the Lessee's possession of the above described premises will not be disturbed by anyone claiming by, through, or under the Lessor.

6. **Care and Maintenance of Premises.** Lessor will deliver the Premises and Building, including, but not limited to, all electrical, mechanical, HVAC, plumbing, lighting, sprinkler, dock

Initial: _____ Date: 8/20/19 Initial: PDO Date: 8/19/2019

Dated: 8/20/19

By: 8/20/19
Peska Properties, Inc. (Lessor)
Gene Peska, President

Dated: _____

By: 8/19/2019
Mills Aftermarket Accessories, Inc. (Lessee)

Its: CFO

Initial: _____ Date: 8/20/19

Initial: RAD Date: 8/19/2019

# REAL ESTATE RELATIONSHIPS DISCLOSURE

*(This document is NOT a contract between you and this firm. This document is being provided to you as a consumer as you have not indicated to this agent you are a client with a written contract to another real estate firm).*

As required by South Dakota Law, each firm has a responsible broker who must provide a written disclosure of the specific agency/brokerage relationships their firm may establish **PRIOR** to their agent discussing your confidential buying, selling, or leasing objectives of real estate or business opportunity. The following agency relationships are permissible under South Dakota law.

The office policy of NAI SIOUX FALLS (firm) is to provide the relationships marked. This disclosure was provided by Bill Connelly (agent) on behalf of TROY FAWCETT (responsible broker).

*When all agents of this firm represent only you:*

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

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

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

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

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

---

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

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

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

Signature(s) X _____ 10/8/18 _____ Date _____

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

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

Signature(s)_____ Date_____

SDREC.REALESTATERELATIONSHIPSDISCLOSURE.2014

# Agency Agreement – Owner/Lessor - South Dakota (Listing Agreement)

Client: Peska Properties

**Responsible Broker and Brokerage Firm:** Troy Fawcett, Sioux Falls Commercial, Inc. dba NAI Sioux Falls
(hereinafter referred to as Broker)

**Start Date:** 7-1-2019 **Expiration Date:** September 1, 2019 at midnight. If Client enters into a lease agreement during the term of this agreement, the termination of this agreement shall be the date of full execution of said lease agreement, or if the lease is not fully executed, the date which the parties agree to discontinue negotiating. This agreement can be terminated with mutual written consent of the parties.

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

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

*The Client further authorizes:*

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

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

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

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

C. **Limited Agency:** All licensees of the brokerage firm owe you the duties as described in single agency until a purchaser client of this firm inquires about your property under contract for sale/lease with this firm. At this time a limited agency relationship exists, however, limited agency may only occur with prior written permission of the parties of the potential in-company transaction. In a limited agency relationship the broker, directly or through one or more agent, may not be able to continue to provide services previously provided to you, such as:

- no longer providing advice or advocating for your interests, or the lessee's interests, to the detriment of either party.

Unless you give written consent, a limited agent cannot:

- Disclose personal confidences of one party or the other party, unless required by law
- Disclose a buyer or lessee is willing to pay more, or a seller or landlord is willing to accept less, than the asking price or lease rate offered for the property;
- Disclose the motivating factors for any client, buying, selling, or leasing the property;
- Disclose a client will agree to financing terms other than those offered.

| The client acknowledges and consents as *initialed*: | | | |
|---|---|---|---|
| I agree to appointed agency and the appointed agent(s) named in 1B: | *Yes* ✓ | *No* | *N/A* |
| I agree to limited agency representation, as described in 1C, of: | | | |
| 1. My appointed agent(s) named in 1B. | *Yes* ✓ | *No* | *N/A* |
| 2. The responsible broker/firm. | *Yes* ✓ | *No* | *N/A* |

2) **Description of Property**. The Client warrants that Client is the owner of record of the property; or Client's representative has the written authority, attached, to execute this agreement on behalf of the owner of record and hereby grants the undersigned Broker, for the term of this agreement, the right to lease the property legally described as:

Former Aarons Furniture Space approximately 7120 square feet

Also known as: 2401 East 10th street City: Sioux Falls Zip: 57103

Property listed is for Lease

A. Lease Price: For the sum of Eleven Dollars per square foot

$ 11.00, on the following terms: cash

or other terms, by written acceptance, to Client.

Client represents the property to be good and leasable condition. In the event of an undisclosed property defect that results in cancellation of a lease by Lessee, Client shall be liable to Broker for fee outlined in Section 3 as though the lease was not canceled.

3) **Broker Services and Compensation**

A. The fee for services provided by broker will be 6 % of the total lease value, or one and one-fourth (1 ¼) month's rent, whichever is greater, plus applicable sales tax.

B. Client authorizes broker as *initialed*:

1. Cooperate with brokers who represent buyers — Yes ✓ No \
2. Compensate cooperating brokers 3 % or $ _____ — Yes ✓ No \

C. If Broker is an exclusive agent, and during the period of this agreement the property is leased by Client, Broker, a cooperating broker, or anyone else; or if Broker is a non-exclusive agent and the property is leased to a Lessee identified by Broker and submitted to Client in writing; or should any of the aforementioned produce a Lessee ready, willing, and able to lease the property; Client agrees to pay compensation as stated above.

D. If within 90 days after the expiration or mutual written termination of this contract a lease is made to any person to whom the property has been shown during the listing period, Client agrees to pay the Broker as stated above. If this property is listed with another real estate licensee after expiration or mutual termination, this contract shall be null and void in its entirety.

E. The term "lease" shall be deemed to include any exchange or trade to which Client consents. In the event of an exchange or trade, Broker is permitted to represent and receive compensation from both parties. No compensation is owed if Client is in an exclusive agreement with another Broker.

F. Broker may act as escrow agent for all money, papers, and documents associated with this transaction.

4) **Authorizations.** Client authorizes Broker as initialed:

| | | |
|---|---|---|
| A. Advertise by computerized or other media. | Yes ✓ | No / |
| B. Place a firm marketing sign on property. | Yes ✓ | No / |
| C. Install a lockbox on the property. | Yes ✓ | No / |
| D. Request utility companies to release information to Broker. | Yes ✓ | No / |
| E. Disclose to lessee or their agent that Client has received other offers. | Yes ✓ | No / |

5) **Personal Property.** The following personal property is included in the stated price and shall be conveyed by Client to Lessee, free of liens and without warranty of condition, by a bill of sale at lease execution and in accordance with its terms: _____

NONE

6) **Disclosures.** Seller(s) shall complete and submit a property condition disclosure statement as required by SDCL 43-4-38, unless exempt pursuant to SDCL 43-4-43, with this listing agreement. Seller(s) shall complete and submit a lead-based paint disclosure if property is residential and was built prior to 1978 as required by federal regulation. [N/A-Non-Residential Property]

7) **Nondiscrimination**. Client and Broker will not participate in any act that unlawfully discriminates on the basis of race, color, creed, religion, sex, disability, familial status, country of national origin or any other category protected under federal, state or local law.

8) **Modification.** No modification of any of the terms of this agreement shall be valid or binding upon the parties, unless such modifications have first been reduced to writing and signed by both parties.

9) **Other Instructions.** _____

*THIS IS A LEGALLY BINDING CONTRACT. If you have questions regarding the duties and responsibilities of the broker, you should resolve those questions before proceeding further or SEEK LEGAL ADVICE.*

Client: Posta Properties Date: 7/1/19 Phone: 605-201-7379

Client: _____ Date: _____ Phone: _____

Address: 2700 W 4th Ave

City: Sioux Falls State: S.D Zip: 57104

E-mail address: gene@postaconstruction.com

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

Broker/Firm: NAI SIOUX FALLS

By Agent: _____ Date: 7-1-19

## Bill Connelly

**From:** Bradyn Neises <bradyn@benderco.com>
**Sent:** Monday, June 24, 2019 9:21 AM
**To:** Bill Connelly
**Cc:** Doug Brockhouse
**Subject:** Counter from Radco

Bill,

Please see below counter from Radco. Give Doug or me a call if you have any questions.

Thank you,

*Bradyn Neises*
*Commercial Sales & Leasing*
***Bender Commercial Real Estate Services***
*122 S Phillips Ave. Suite 350 Sioux Falls, SD 57104*
*Cell: (605) 579-0189*
*Direct: (605) 782-1682*
*Fax: (605) 332-1100*
*Email: bradyn@benderco.com*

Bender COMMERCIAL 22 YEARS

---

**From:** Bart Harmer
**Sent:** Saturday, June 22, 2019 11:10 AM
**To:** Doug Brockhouse <dbrock@benderco.com>; Bradyn Neises <bradyn@benderco.com>
**Subject:** RE: Response From Sublandlord/Property Owner

Please confirm the NNN expense covers taxes, insurance, and CAM.

Below is what we feel comfortable with on the proposed 7 year term from Gene.

1. Fine on occupancy date
2. Fine on sub lease of 32 months
3. Fine on 3 month free rent
4. Remaining 29 month at $8.43 psf. ($5,000) month for the first 29 months plus NNN and utilities.
5. Tenant will sign a new 7 year lease (84 months) @ $8.43 per month for the first 29 months and the remaining 55 months at $10.50 psf. NNN plus utilities.
6. Landlord to pay $25,000 toward buildout allowance.

Thank you,

Bart

**From:** Doug Brockhouse [mailto:dbrock@benderco.com]
**Sent:** Wednesday, June 19, 2019 1:52 PM
**To:** Bart Harmer ; Bradyn Neises <bradyn@benderco.com>
**Subject:** Response From Sublandlord/Property Owner

Bart: Please find attached six bullet points that the Sublandlord (Steve Willis) and the Property Owner (Gene Peska) came up with responding to the Offer that we made last week or the Aarron's sublease space on east 10th St. A quick comparison: You offered $5.89/sq. ft. for the months that you would be paying "subtenant" rent. They countered at $9.50/sq. ft. There still seems to be some confusion about the exact number of months remaining on the lease. After the sublease term expires they did agree to the lease amount that you offered.

We had asked for a total of lease length of 60 months they countered at 84 months.

The did respond with $25K in improvement dollars.

Take a look through it and let me know what you think.

Thanks

**Douglas Brockhouse, SIOR**

SIOR

Bender Commercial Real Estate Services
122 South Phillips Avenue
Suite 350
Sioux Falls, SD 57104

605-782-1664 (d)
605-728-5800 (c)

Licensed in: SD MN IA

dbrock@benderco.com

View my profile: www.linkedin.com/pub/doug-brockhouse/6/992/1b3

06/19/2019

Radco/ Peska Properties counter offer.

1. Tenant shall have occupancy on or before July 15th 2019
2. Current time remaining on Sub lease is 32 months.
3. Tenant shall be given **3 months** free rent
4. Remaining 29 months at a rate of $9.50 psf. ($5636.70) month for the first 29 months plus NNN and utilities.
5. Landlord will sign a new 7 year lease (84 months) @ $9.50 for the first 29 months and remaining 55 months at $11.00 psf. NNN plus utilities.
6. Landlord to pay $25,000 toward build out allowance.

## Bill Connelly

**From:** Doug Brockhouse <dbrock@benderco.com>
**Sent:** Monday, June 17, 2019 7:23 AM
**To:** Bill Connelly; Bradyn Neises
**Subject:** Requested TI Items For Aarons

Bill: I can't tell if I sent this to you from my phone last week. This is the list of improvements that they want to do to the Aarons space.

Thanks

**Douglas Brockhouse, SIOR**

SIOR

Bender Commercial Real Estate Services
122 South Phillips Avenue
Suite 350
Sioux Falls, SD 57104

605-782-1664 (d)
605-728-5800 (c)

Licensed in: SD MN IA

dbrock@benderco.com

View my profile: www.linkedin.com/pub/doug-brockhouse/6/992/1b3



---

**From:** Bart Harmer [mailto:bharmer@radco.com]
**Sent:** Wednesday, June 12, 2019 5:24 PM
**To:** Doug Brockhouse <dbrock@benderco.com>
**Subject:** RE: Sioux Falls

I apologize. I have been traveling and forgot.

Below is a very rough draft and list of what we tentatively must do. There will likely be many things added and possibly something deleted. If your require more exact information let me know and I can try and bring our construction manager down. He is in the middle of another project right now so he has only briefly advised me on this.

Remove carpet and finish the concrete with some coating or paint.

Remove the breakroom in the warehouse area.

Install some sort of floor drain in the warehouse area.

Remove drop ceiling and paint ceilings.

Add a wall to complete a storage area in the rear, and on the show floor opposite the sales counter.

Add another overhead door to the rear of the building on the opposite side of the existing overhead door.

Re paint all interior walls.

---

**From:** Doug Brockhouse [mailto:dbrock@benderco.com]
**Sent:** Wednesday, June 12, 2019 5:02 PM
**To:** Bart Harmer <bharmer@radco.com>; Bradyn Neises <bradyn@benderco.com>
**Subject:** Sioux Falls

Bart: Just checked in with Bill & Gene. They are hoping to have us a response by Friday. Bill did ask if I received a list of what improvements are to be done.

Thanks

**Douglas Brockhouse, SIOR**

SIOR

Bender Commercial Real Estate Services
122 South Phillips Avenue
Suite 350
Sioux Falls, SD 57104

605-782-1664 (d)
605-728-5800 (c)

Licensed in: SD MN IA

dbrock@benderco.com

View my profile: www.linkedin.com/pub/doug-brockhouse/6/992/1b3

Real Estate Services
Bender
COMMERCIAL
We open doors.

# OFFER TO LEASE

June 6, 2019

The undersigned party offers to lease a portion of the premises situated in the City of Sioux Falls, County of Minnehaha, South Dakota described as follows:

CO AUD SUB SE1/4 (EX LOTS H-1 LOTS 51, 53 & 54) N20 LOTS 55 & 66 & ALL LOTS 51 TO LOT 54 15-101-49 SIOUX FALLS CITY UNPLATTED CITY OF SIOUX FALLS, MINNEHAHA COUNTY, SOUTH DAKOTA;
PARCEL ID #53794 ("Property")

Also known as: 2409 E 10th Street ("Leased Premises")

The lease agreement to be executed shall contain, among others, the following terms and conditions:

1. LANDLORD: Peska Properties Inc.
   2700 North 4th Avenue
   Sioux Falls, SD 57104
2. Tenant: Radco
   _____
   _____
3. USE OF PREMISES: Retail Sales and Auto Accessories Installation
4. SIZE OF SPACE: 7,120 square feet +/-
5. LEASE TYPE: NNN + Utilities
6. LEASE TERM: Five (5) years, with two (2) five (5) year options to renew.
7. LEASE POSSESSION August 1, 2019
8. LEASE COMMENCEMENT: Upon Full Execution of a Lease Agreement.
9. RENT COMMENCEMENT: January 1, 2020 ~~or upon commencement of business whichever occurs first~~.

10. BASE RENT: A. For the remaining period of the Aaron's lease approximately 29 months – Tenant (Radco) to receive free rent for the first five months as described in Paragrah 9 above and then pay a monthly rental of $3,500.00 for the remaining 24 months.

B. Aaron's shall pay $72,624.00 plus $32,635.00 for a total of $105,259.00 to Landlord to be released from the current lease.

C. The $32,635.00 shall be the payment for the base rent Aug. 1, 2019 to Dec. 31, 2019.

D. The $72,624.00 when divided by 24 months equates to $3,027.00/month. When added to the $3,500.00 base rent paid by Radco $6,527.00/month to the Landlord.

E. Tenant shall pay a base rental rate of $11.00/sq. ft. for the remainder of the initial five year term after the expiration of the current Aaron's lease period.

F. Base rent shall escalate three (3) percent at the beinning of each of the two five year lease option periods if exercised.

11. TAXES, INSURANCE AND MAINTENANCE: <u>Commencing on Lease Possession of Aug. 1, 2019 and thereafter:</u>

Tenant shall pay for its pro rata share of all real estate taxes, casualty insurance and common area maintenance ("CAM").

Tenant shall procure and maintain general liability insurance with Landlord being named as an "additional insured" on Tenant's policy.

Tenant, at its sole cost and expense, shall be responsible to keep and maintain the following items in good condition and repair, excluding replacements, reasonable wear and tear: (i) all heating, air conditioning, ventilating and electrical facilities and equipment located within or attached to the Leased Premises; (ii) all lighting facilities located within or attached to the Leased Premises; (iii) all interior walls, ceilings, floors, windows, doors located within or forming a part of the Leased Premises.

12. UTILITIES: Tenant shall be responsible for it's own gas, electric, garbage, water, phone and internet service.

13. SUBLEASE: Tenant shall be allowed to sublease any or all of the Leased Premises upon Landlord's written approval. Such approval shall not be unreasonably withheld.

14. ASSIGNMENTS: Provided Landlord's/Tenant's interests are not adversely affected, Tenant may assign this lease to any person or entity controlling, controlled by, or under common control of the Tenant upon written notice to the Landlord/Tenant, subject to Landlord approval. RDO

**15. PARKING:** Tenant shall be allowed to use common area parking.

**16. SIGNAGE:** Tenant shall be allowed, at its sole cost and expense, to install building or door signage per City code. Landlord to approve signage prior to installation.

**17. SPACE FINISH:** Tenant shall provide to the Landlord Tenant Improvement/Space Finish required by the Tenant. Landlord shall bid the cost of improvements/space finish and provide Tenant those bids. Landlord/Aarons shall provide Tenant $30,000 in allowance for improvements/finish. Landlord/Aarons shall negotiate payment of the allowance to be paid..

**18. OTHER TERMS:** Subject to lease agreement being accepted by Tenant and Landlord.

A. Tenant obtaining all required licensing and approvals necessary from city/county/state.
B. Contractor Bid

It is understood that leasing agents are acting as agents only in bringing Landlord and Tenant together. Parties acknowledge that the leasing agents are compensated by the Landlord in this transaction; however, the agents are bound to honest and ethical conduct to all parties.

All other terms and conditions are to be worked out between both parties prior to leasing. This offer is contingent upon execution of a definitive lease agreement for the above described space within ten (10) business days of the date of acceptance. Both parties agree to proceed in good faith to consummate this transaction.

| | |
|---|---|
| LANDLORD: **Peska Properties Inc.** | TENANT: Radco _____ |
| BY:_____ | BY: Ronald D O'Leary |
| ITS:_____ | ITS: CFO |
| DATE:_____ | DATE: 6/6/2019 |

**THIS IS A LEGALLY BINDING CONTRACT – IF YOU DO NOT UNDERSTAND IT, SEEK COMPETENT ADVICE**

## Bill Connelly

**From:** Steve Willis <steve.bronco@midconetwork.com>
**Sent:** Monday, July 15, 2019 6:36 AM
**To:** Bill Connelly
**Subject:** RE: Signed LOI - Radco

Thanks, As of today I have not signed anything releasing the lease.

---

**From:** Bill Connelly [mailto:bconnelly@naisiouxfalls.com]
**Sent:** Friday, July 12, 2019 11:48 AM
**To:** Gene Peska
**Cc:** steve.willis@aaronrents.com
**Subject:** FW: Signed LOI - Radco

Gene see signed LOI and info for preparing the lease. Let me know if you have any questions. Thank you

Bill A. Connelly
Vice President
bconnelly@naisiouxfalls.com

NAI Sioux Falls

2500 West 49th Street, Suite #100
Sioux Falls, South Dakota 57105

Direct +1 605 444 7130
Mobile +1 605 254 2360
Fax +1 605 357 7102



---

**From:** Bradyn Neises <bradyn@benderco.com>
**Sent:** Friday, July 12, 2019 11:25 AM
**To:** Bill Connelly <bconnelly@naisiouxfalls.com>
**Cc:** Gene (Gene@peskaconstruction.com) <Gene@peskaconstruction.com>; Doug Brockhouse <dbrock@benderco.com>
**Subject:** Signed LOI - Radco

Bill,

See attached LOI signed by Radco. One note, when you prepare the Lease please change "After Market" in the Tenant name to "Aftermarket". If you have any questions feel free to give me a call.

Thank you!

***Bradyn Neises***
*Commercial Sales & Leasing*
***Bender Commercial Real Estate Services***
*122 S Phillips Ave. Suite 350 Sioux Falls, SD 57104*
*Cell: (605) 579-0189*
*Direct: (605) 782-1682*
*Fax: (605) 332-1100*

## Bill Connelly

**From:** Steve Willis <steve.bronco@midconetwork.com>
**Sent:** Tuesday, July 16, 2019 6:50 AM
**To:** Bill Connelly
**Subject:** FW: Scans From Copier

Bill, fyi. sw

-----Original Message-----
From: Steve Willis [mailto:steve.bronco@midconetwork.com]
Sent: Tuesday, July 16, 2019 6:49 AM
To: 'Gene Peska'
Subject: RE: Scans From Copier

Gene: As far as I know we have the property listed.
Also you should talk to Tom about your duty to Mitigate damages.

In any case we will not pay what you have requested as it is not Due under any set of circumstances.

I might consider walking away for nothing otherwise we could do The lease with Radco ourselves.

sw
-----Original Message-----
From: Gene Peska [mailto:gene@peskaconstruction.com]
Sent: Monday, July 15, 2019 3:24 PM
To: Steve Willis
Subject: Fwd: Scans From Copier

here you go

-------- Forwarded Message --------
Subject: Scans From Copier
Date: Mon, 15 Jul 2019 15:16:28 -0500
From: copier@peskaconstruction.com
To: gene@peskaconstruction.com

See Attached File
---
TASKalfa 3051ci
[00:17:c8:25:4d:c4]
---

## Bill Connelly

**From:** Steve Willis <steve.bronco@midconetwork.com>
**Sent:** Monday, July 22, 2019 6:16 AM
**To:** Bill Connelly
**Subject:** FW:
**Attachments:** Peska Lease End.cutler.docx

I also sent this via US mail. sw

---

**From:** steve.bronco@midconetwork.com [mailto:steve.bronco@midconetwork.com]
**Sent:** Saturday, July 20, 2019 10:20 AM
**To:** steve.bronco@midconetwork.com
**Subject:**

fmi

July 18, 2019

Northern Rental Corporation
3538 S Western Ave
Sioux Falls, SD 57105

Peska Properties (via Certified Mail-RRR - SW 7.18.19)
2700 N 4th Ave
Sioux Falls, SD 57104

Re: **2409 E 10th Street - NRC Lease Status**

Dear Gene:

This letter is in reference to the offer you have received to rent the above-referenced space. Because you have received a favorable lease proposal from Radco on the space referred to above we are notifying you that we consider that all of our payment obligations and involvement under the lease on this property will end as of July 31, 2019. You should, therefore, enter into the Radco lease. Given the position of the parties there is no question that this is the most reasonable approach.

We do owe you for various expenses under the lease. Those include:

1. July 2019 Rent
2. Unpaid Triple Net Expenses
3. Unpaid Buildout Costs

While we may still disagree on the exact amounts due, we can work toward figuring out and coming to an agreement on these amounts and they should not prevent you from proceeding with the lease to Radco in order to mitigate damage in the future as required under Paragraph 28(b) of our lease.

You should provide us with a formal demand for the amounts you believe are due under the lease through July 31, 2019.

Thanks.

Steve Willis VP
"steve.bronco@midconetwork.com"
Phone# 605-351-6911

cc: Kent Cutler, Esq.
Bill Connelly

## Bill Connelly

**From:** Steve Willis <steve.bronco@midconetwork.com>
**Sent:** Monday, July 15, 2019 6:15 AM
**To:** Bill Connelly
**Subject:** RE: Radco Update

I will talk to him.

---

**From:** Bill Connelly [mailto:bconnelly@naisiouxfalls.com]
**Sent:** Thursday, July 11, 2019 10:41 AM
**To:** steve.willis@aaronrents.com; Gene Peska
**Subject:** FW: Radco Update

Please review the attached new LOI for the former Aarons space. Steve you will need to confirm the finale buy out with Gene. If this meets your approval we can go to a lease as they would like occupancy 8-1-2019


Bill A. Connelly
Vice President
bconnelly@naisiouxfalls.com

NAI Sioux Falls

2500 West 49th Street, Suite #100
Sioux Falls, South Dakota 57105

Direct +1 605 444 7130
Mobile +1 605 254 2360
Fax +1 605 357 7102




---

**From:** Bradyn Neises <bradyn@benderco.com>
**Sent:** Thursday, July 11, 2019 10:03 AM
**To:** Bill Connelly <bconnelly@naisiouxfalls.com>
**Cc:** Doug Brockhouse <dbrock@benderco.com>
**Subject:** Radco Update

Bill,

Attached is the updated LOI that we sent to Radco and they are good with these terms. They are working on catching the right guy for signature. We were told that we could get it tomorrow.

Be in touch soon!


*Bradyn Neises*
*Commercial Sales & Leasing*
***Bender Commercial Real Estate Services***
*122 S Phillips Ave. Suite 350 Sioux Falls, SD 57104*
*Cell: (605) 579-0189*
*Direct: (605) 782-1682*
*Fax: (605) 332-1100*

## Bill Connelly

**From:** Steve Willis <steve.bronco@midconetwork.com>
**Sent:** Friday, June 07, 2019 7:13 AM
**To:** Bill Connelly
**Subject:** RE: LOI for Aarons sublease

Talk to you Monday.

---

**From:** Bill Connelly [mailto:bconnelly@naisiouxfalls.com]
**Sent:** Thursday, June 06, 2019 3:33 PM
**To:** steve.willis@aaronrents.com
**Subject:** LOI for Aarons sublease

Hello Steve please call me to discuss as soon as you can, Thank you

**Bill A. Connelly**
Vice President
bconnelly@naisiouxfalls.com

NAI Sioux Falls

2500 West 49th Street, Suite #100
Sioux Falls, South Dakota 57105

Direct +1 605 444 7130
Mobile +1 605 254 2360
Fax +1 605 357 7102



**From:** NAI SIOUX FALLS <copier.nai@midconetwork.com>
**Sent:** Thursday, June 06, 2019 3:22 PM
**To:** Bill Connelly <bconnelly@naisiouxfalls.com>
**Subject:** Attached Image

## Bill Connelly

**From:** Bill Connelly
**Sent:** Thursday, July 11, 2019 10:41 AM
**To:** steve.willis@aaronrents.com; Gene Peska
**Subject:** FW: Radco Update
**Attachments:** LOI - Radco (7.9.2019).pdf

Please review the attached new LOI for the former Aarons space. Steve you will need to confirm the finale buy out with Gene. If this meets your approval we can go to a lease as they would like occupancy 8-1-2019


Bill A. Connelly
Vice President
bconnelly@naisiouxfalls.com

NAI Sioux Falls

2500 West 49th Street, Suite #100
Sioux Falls, South Dakota 57105

Direct +1 605 444 7130
Mobile +1 605 254 2360
Fax +1 605 357 7102




---

**From:** Bradyn Neises <bradyn@benderco.com>
**Sent:** Thursday, July 11, 2019 10:03 AM
**To:** Bill Connelly <bconnelly@naisiouxfalls.com>
**Cc:** Doug Brockhouse <dbrock@benderco.com>
**Subject:** Radco Update

Bill,

Attached is the updated LOI that we sent to Radco and they are good with these terms. They are working on catching the right guy for signature. We were told that we could get it tomorrow.

Be in touch soon!


***Bradyn Neises***
*Commercial Sales & Leasing*
***Bender Commercial Real Estate Services***
*122 S Phillips Ave. Suite 350 Sioux Falls, SD 57104*
*Cell: (605) 579-0189*
*Direct: (605) 782-1682*
*Fax: (605) 332-1100*
*Email: bradyn@benderco.com*

Bender COMMERCIAL 22 YEARS

Real Estate Services
Bender
COMMERCIAL
We open doors.

# Letter of Intent

July 9, 2019

The undersigned party offers to lease a portion of the premises situated in the City of Sioux Falls, County of Minnehaha, South Dakota described as follows:

**CO AUD SUB SE1/4 (EX LOTS H-1 LOTS 51, 53 & 54) N20 LOTS 55 & 66 & ALL LOTS 51 TO LOT 54 15-101-49 SIOUX FALLS CITY UNPLATTED CITY OF SIOUX FALLS, MINNEHAHA COUNTY, SOUTH DAKOTA; PARCEL ID #53794 ("Property")**

Also known as: **2409 E 10th Street ("Leased Premises")**

The lease agreement to be executed shall contain, among others, the following terms and conditions:

| | | |
|---|---|---|
| 1. | **LANDLORD:** | Peska Properties Inc.<br>2700 North 4th Avenue<br>Sioux Falls, SD 57104 |
| 2. | **TENANT:** | Mills After Market Accessories Inc.<br>1485 Dellwood Drive<br>Baxter, MN 56425 |
| 3. | **USE OF PREMISES:** | Retail Sales and Auto Accessories Installation |
| 4. | **SIZE OF SPACE:** | 7,120 square feet +/- |
| 5. | **LEASE TYPE:** | NNN + Utilities |
| 6. | **LEASE TERM:** | Seven (7) years, with two (2) five (5) year options to renew. |
| 7. | **LEASE POSSESSION** | August 1st, 2019 |
| 8. | **LEASE COMMENCEMENT:** | Upon Full Execution of a Lease Agreement. |
| 9. | **RENT COMMENCEMENT:** | August 1st, 2019 |

**10. BASE RENT:**

| Term Month | Base Rent/Sq. Ft. |
|---|---|
| 0-3 | $0.00 |
| 4-29 | $8.43 |
| 30-84 | $11.00 |

**11. TAXES, INSURANCE AND MAINTENANCE:**

<u>Commencing on Lease Possession of Aug. 1, 2019 and thereafter:</u>

Tenant shall pay for its pro rata share of all real estate taxes, casualty insurance and common area maintenance ("CAM").

Tenant shall procure and maintain general liability insurance with Landlord being named as an "additional insured" on Tenant's policy.

Tenant, at its sole cost and expense, shall be responsible to keep and maintain the following items in good condition and repair, excluding replacements, reasonable wear and tear: (i) all heating, air conditioning, ventilating and electrical facilities and equipment located within or attached to the Leased Premises; (ii) all lighting facilities located within or attached to the Leased Premises; (iii) all interior walls, ceilings, floors, windows, doors located within or forming a part of the Leased Premises.

**12. UTILITIES:** Tenant shall be responsible for it's own gas, electric, garbage, water, phone and internet service.

**13. SUBLEASE:** Tenant shall be allowed to sublease any or all of the Leased Premises upon Landlord's written approval. Such approval shall not be unreasonably withheld.

**14. ASSIGNMENTS:** Provided Landlord's interests are not adversely affected, Tenant may assign this lease to any person or entity controlling, controlled by, or under common control of the Tenant upon written notice to the Landlord, subject to Landlord approval.

**15. PARKING:** Tenant shall be allowed to use common area parking.

**16. SIGNAGE:** Tenant shall be allowed, at its sole cost and expense, to install building or door signage per City code. Landlord to approve signage prior to installation.

**17. SPACE FINISH:** Tenant shall provide to the Landlord Tenant Improvement/Space Finish required by the Tenant. Landlord shall bid the cost of improvements/space finish and provide Tenant those bids. Landlord shall provide Tenant $25,000 in allowance for improvements/finish.

**18. OTHER TERMS:** Subject to lease agreement being accepted by Tenant and Landlord.

A. Tenant obtaining all required licensing and approvals necessary from city/county/state.
B. Contractor Bid

It is understood that leasing agents are acting as agents only in bringing Landlord and Tenant together. Parties acknowledge that the leasing agents are compensated by the Landlord in this transaction; however, the agents are bound to honest and ethical conduct to all parties.

All other terms and conditions are to be worked out between both parties prior to leasing. This offer is contingent upon execution of a definitive lease agreement for the above described space within ten (10) business days of the date of acceptance. Both parties agree to proceed in good faith to consummate this transaction.

LANDLORD: **Peska Properties Inc.**

BY:_____

ITS:_____

DATE:_____

TENANT: **Mills After Market Accessories Inc.**

BY:_____

ITS:_____

DATE:_____

## Bill Connelly

**From:** Bill Connelly
**Sent:** Monday, July 01, 2019 12:32 PM
**To:** steve.willis@aaronrents.com
**Subject:** Aarons lease offer

Steve, please call me to discuss the last offer from Radco. Thanks

Bill A. Connelly
Vice President
bconnelly@naisiouxfalls.com

NAI Sioux Falls

2500 West 49th Street, Suite #100
Sioux Falls, South Dakota 57105

Direct +1 605 444 7130
Mobile +1 605 254 2360
Fax +1 605 357 7102

**Bill Connelly**

---

**From:** Bill Connelly
**Sent:** Thursday, June 06, 2019 4:31 PM
**To:** steve.willis@aaronrents.com
**Subject:** LOI for Aarons sublease

Steve this just came in today please call me to discuss.

Bill A. Connelly
Vice President
bconnelly@naisiouxfalls.com

NAI Sioux Falls

2500 West 49th Street, Suite #100
Sioux Falls, South Dakota 57105

Direct +1 605 444 7130
Mobile +1 605 254 2360
Fax +1 605 357 7102

## Bill Connelly

**From:** Bill Connelly
**Sent:** Thursday, June 06, 2019 3:33 PM
**To:** steve.willis@aaronrents.com
**Subject:** LOI for Aarons sublease
**Attachments:** 1744_001.pdf

Hello Steve please call me to discuss as soon as you can, Thank you

Bill A. Connelly
Vice President
bconnelly@naisiouxfalls.com

NAI Sioux Falls

2500 West 49th Street, Suite #100
Sioux Falls, South Dakota 57105

Direct +1 605 444 7130
Mobile +1 605 254 2360
Fax +1 605 357 7102



**From:** NAI SIOUX FALLS <copier.nai@midconetwork.com>
**Sent:** Thursday, June 06, 2019 3:22 PM
**To:** Bill Connelly <bconnelly@naisiouxfalls.com>
**Subject:** Attached Image

## Bill Connelly

**From:** Bradyn Neises <bradyn@benderco.com>
**Sent:** Wednesday, May 22, 2019 8:44 AM
**To:** Doug Brockhouse; Bill Connelly
**Subject:** RE: Aaron's Lease Info

Bill,

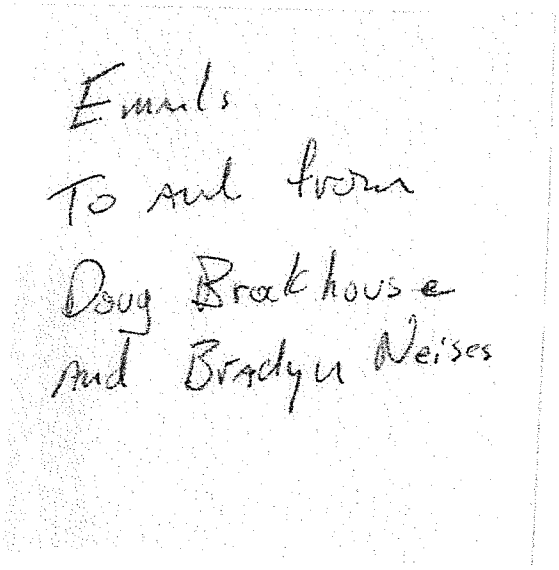
Doug and I toured the Aaron's space with our client again yesterday. I think they have a growing interest in the space. Can you provide details for the original lease.

Name of Tenant:
Address of Tenant:
Length of the Lease:
Options to renew:
TI Allowance:

Appreciate your help!

***Bradyn Neises***
*Commercial Sales & Leasing*
***Bender Commercial Real Estate Services***
*122 S Phillips Ave. Suite 350 Sioux Falls, SD 57104*
*Cell: (605) 579-0189*
*Direct: (605) 782-1682*
*Fax: (605) 332-1100*
*Email: bradyn@benderco.com*

Bender COMMERCIAL 22 YEARS of Opening Doors




---

**From:** Doug Brockhouse <dbrock@benderco.com>
**Sent:** Wednesday, May 15, 2019 1:45 PM
**To:** Bill Connelly (bconnelly@naisiouxfalls.com) <bconnelly@naisiouxfalls.com>; Bradyn Neises <bradyn@benderco.com>
**Subject:** Aaron's Lease Info

Bill: Our guy is coming back to town this coming Tuesday along with several other people from his company to take another look at the Aaron's lease space. In preparation for that meeting can you give us some info on the lease details:
Length of time remaining
Options to renew
Is the Landlord anticipating giving any TI allowance

Anything along those lines would be helpful.

Thanks

## Bill Connelly

**From:** Bradyn Neises <bradyn@benderco.com>
**Sent:** Monday, June 24, 2019 9:21 AM
**To:** Bill Connelly
**Cc:** Doug Brockhouse
**Subject:** Counter from Radco

Bill,

Please see below counter from Radco. Give Doug or me a call if you have any questions.

Thank you,

*Bradyn Neises*
*Commercial Sales & Leasing*
***Bender Commercial Real Estate Services***
*122 S Phillips Ave. Suite 350 Sioux Falls, SD 57104*
*Cell: (605) 579-0189*
*Direct: (605) 782-1682*
*Fax: (605) 332-1100*
*Email: bradyn@benderco.com*

Bender COMMERCIAL 22 YEARS

---

**From:** Bart Harmer
**Sent:** Saturday, June 22, 2019 11:10 AM
**To:** Doug Brockhouse <dbrock@benderco.com>; Bradyn Neises <bradyn@benderco.com>
**Subject:** RE: Response From Sublandlord/Property Owner

Please confirm the NNN expense covers taxes, insurance, and CAM.

Below is what we feel comfortable with on the proposed 7 year term from Gene.

1. Fine on occupancy date
2. Fine on sub lease of 32 months
3. Fine on 3 month free rent
4. Remaining 29 month at $8.43 psf. ($5,000) month for the first 29 months plus NNN and utilities.
5. Tenant will sign a new 7 year lease (84 months) @ $8.43 per month for the first 29 months and the remaining 55 months at $10.50 psf. NNN plus utilities.
6. Landlord to pay $25,000 toward buildout allowance.

Thank you,

Bart

**From:** Doug Brockhouse [mailto:dbrock@benderco.com]
**Sent:** Wednesday, June 19, 2019 1:52 PM
**To:** Bart Harmer ; Bradyn Neises <bradyn@benderco.com>
**Subject:** Response From Sublandlord/Property Owner

Bart: Please find attached six bullet points that the Sublandlord (Steve Willis) and the Property Owner (Gene Peska) came up with responding to the Offer that we made last week or the Aarron's sublease space on east 10th St. A quick comparison: You offered $5.89/sq. ft. for the months that you would be paying "subtenant" rent. They countered at $9.50/sq. ft. There still seems to be some confusion about the exact number of months remaining on the lease. After the sublease term expires they did agree to the lease amount that you offered.

We had asked for a total of lease length of 60 months they countered at 84 months.

The did respond with $25K in improvement dollars.

Take a look through it and let me know what you think.

Thanks

**Douglas Brockhouse, SIOR**

SIOR

Bender Commercial Real Estate Services
122 South Phillips Avenue
Suite 350
Sioux Falls, SD 57104

605-782-1664 (d)
605-728-5800 (c)

Licensed in: SD MN IA

dbrock@benderco.com

View my profile: www.linkedin.com/pub/doug-brockhouse/6/992/1b3

## Bill Connelly

**From:** Bradyn Neises <bradyn@benderco.com>
**Sent:** Monday, June 24, 2019 4:33 PM
**To:** Bill Connelly
**Cc:** Doug Brockhouse
**Subject:** Radco Counter

Bill,

Doug and I spoke with Bart with Radco. He said that there is more than himself that has to approve the terms of the lease. He requested that we get a written counter, so that they can discuss and review.

Thank you,

***Bradyn Neises***
*Commercial Sales & Leasing*
***Bender Commercial Real Estate Services***
*122 S Phillips Ave. Suite 350 Sioux Falls, SD 57104*
*Cell: (605) 579-0189*
*Direct: (605) 782-1682*
*Fax: (605) 332-1100*
*Email: bradyn@benderco.com*

Bender COMMERCIAL 22 YEARS of Opening Doors

## Bill Connelly

**From:** Bill Connelly
**Sent:** Wednesday, May 15, 2019 2:27 PM
**To:** Doug Brockhouse
**Subject:** RE: Aaron's Lease Info

Ok Doug, The lease began on December 23rd 2011 and was a 10 year lease for the initial term. So that said there is a little less than 3years on the lease. I have spoken to Gene Peska and I know he wants to work with the current tenant in as much as will make sense. Potentially even doing a direct lease depending on the terms.
As far as TI allowance there is nothing planned for however as you know everything is negotiable!
I hope this is helpful, Let me know if there is anything else you need.

Thanks,

**Bill A. Connelly**
Vice President
bconnelly@naisiouxfalls.com

NAI Sioux Falls

2500 West 49th Street, Suite #100
Sioux Falls, South Dakota 57105

Direct +1 605 444 7130
Mobile +1 605 254 2360
Fax +1 605 357 7102



---

**From:** Doug Brockhouse <dbrock@benderco.com>
**Sent:** Wednesday, May 15, 2019 1:45 PM
**To:** Bill Connelly <bconnelly@naisiouxfalls.com>; Bradyn Neises <bradyn@benderco.com>
**Subject:** Aaron's Lease Info

Bill: Our guy is coming back to town this coming Tuesday along with several other people from his company to take another look at the Aaron's lease space. In preparation for that meeting can you give us some info on the lease details:
Length of time remaining
Options to renew
Is the Landlord anticipating giving any TI allowance

Anything along those lines would be helpful.

Thanks

**Douglas Brockhouse, SIOR**

## Bill Connelly

**From:** Bill Connelly
**Sent:** Monday, July 01, 2019 10:27 AM
**To:** Doug Brockhouse
**Subject:** RE: Radco

Doug, I did receiver your counter offer. I have not been able to reach Steve yet to discuss. Thank you

Bill A. Connelly
Vice President
bconnelly@naisiouxfalls.com

NAI Sioux Falls

2500 West 49th Street, Suite #100
Sioux Falls, South Dakota 57105

Direct +1 605 444 7130
Mobile +1 605 254 2360
Fax +1 605 357 7102



---

**From:** Doug Brockhouse <dbrock@benderco.com>
**Sent:** Monday, July 01, 2019 10:10 AM
**To:** Bill Connelly <bconnelly@naisiouxfalls.com>; gene@peskaconstruction.com; Bradyn Neises <bradyn@benderco.com>
**Subject:** Radco

Bill: Just wanted to confirm that you received the offer/counter that I sent over the weekend.

Please let us know.

Thanks

**Douglas Brockhouse, SIOR**

SIOR

Bender Commercial Real Estate Services
122 South Phillips Avenue
Suite 350
Sioux Falls, SD 57104

605-782-1664 (d)
605-728-5800 (c)

Licensed in: SD MN IA

## Bill Connelly

**From:** Bill Connelly
**Sent:** Tuesday, July 23, 2019 10:21 AM
**To:** Doug Brockhouse
**Subject:** FW: LOI
**Attachments:** doc05334520190723101144.pdf

Here is the LOI, but obviously the lease terms prevail.

Bill A. Connelly
Vice President
bconnelly@naisiouxfalls.com

2500 West 49th Street, Suite #100
Sioux Falls, South Dakota 57105

Direct +1 605 444 7130
Mobile +1 605 254 2360
Fax +1 605 357 7102



-----Original Message-----
From: Gene Peska <gene@peskaconstruction.com>
Sent: Tuesday, July 23, 2019 10:14 AM
To: Bill Connelly <bconnelly@naisiouxfalls.com>
Subject: LOI

Here is the Letter of intent but the Lease Terms Prevail

## Bill Connelly

**From:** Doug Brockhouse <dbrock@benderco.com>
**Sent:** Monday, June 17, 2019 7:23 AM
**To:** Bill Connelly; Bradyn Neises
**Subject:** Requested TI Items For Aarons

Bill: I can't tell if I sent this to you from my phone last week. This is the list of improvements that they want to do to the Aarons space.

Thanks

**Douglas Brockhouse, SIOR**

SIOR

Bender Commercial Real Estate Services
122 South Phillips Avenue
Suite 350
Sioux Falls, SD 57104

605-782-1664 (d)
605-728-5800 (c)

Licensed in: SD MN IA

dbrock@benderco.com

View my profile: www.linkedin.com/pub/doug-brockhouse/6/992/1b3



---

**From:** Bart Harmer [mailto:bharmer@radco.com]
**Sent:** Wednesday, June 12, 2019 5:24 PM
**To:** Doug Brockhouse <dbrock@benderco.com>
**Subject:** RE: Sioux Falls

I apologize. I have been traveling and forgot.

Below is a very rough draft and list of what we tentatively must do. There will likely be many things added and possibly something deleted. If your require more exact information let me know and I can try and bring our construction manager down. He is in the middle of another project right now so he has only briefly advised me on this.

Remove carpet and finish the concrete with some coating or paint.

Remove the breakroom in the warehouse area.

Install some sort of floor drain in the warehouse area.

Remove drop ceiling and paint ceilings.

Add a wall to complete a storage area in the rear, and on the show floor opposite the sales counter.

Add another overhead door to the rear of the building on the opposite side of the existing overhead door.

Re paint all interior walls.

---

**From:** Doug Brockhouse [mailto:dbrock@benderco.com]
**Sent:** Wednesday, June 12, 2019 5:02 PM
**To:** Bart Harmer <bharmer@radco.com>; Bradyn Neises <bradyn@benderco.com>
**Subject:** Sioux Falls

Bart: Just checked in with Bill & Gene. They are hoping to have us a response by Friday. Bill did ask if I received a list of what improvements are to be done.

Thanks

**Douglas Brockhouse, SIOR**

SIOR

Bender Commercial Real Estate Services
122 South Phillips Avenue
Suite 350
Sioux Falls, SD 57104

605-782-1664 (d)
605-728-5800 (c)

Licensed in: SD MN IA

dbrock@benderco.com

View my profile: www.linkedin.com/pub/doug-brockhouse/6/992/1b3

## Bill Connelly

**From:** Doug Brockhouse <dbrock@benderco.com>
**Sent:** Friday, June 28, 2019 7:44 PM
**To:** Bill Connelly; gene@peskaconstruction.com; Bradyn Neises
**Subject:** FW: Radco Counter

Bill: See Bart's message below. Hopefully, this gets it done.

Please let us know.

Thanks

**Douglas Brockhouse, SIOR**

SIOR

Bender Commercial Real Estate Services
122 South Phillips Avenue
Suite 350
Sioux Falls, SD 57104

605-782-1664 (d)
605-728-5800 (c)

Licensed in: SD MN IA

dbrock@benderco.com

View my profile: www.linkedin.com/pub/doug-brockhouse/6/992/1b3



---

**From:** Bart Harmer [mailto:bharmer@radco.com]
**Sent:** Friday, June 28, 2019 4:23 PM
**To:** Doug Brockhouse <dbrock@benderco.com>
**Cc:** Bradyn Neises <bradyn@benderco.com>
**Subject:** RE: Radco Counter

Doug, I was able to communicate with the owner. We will do the $11.00 psf for the 55 months but we are sticking at the $8.43 for 29 months.

Bart

**From:** Doug Brockhouse [mailto:dbrock@benderco.com]
**Sent:** Tuesday, June 25, 2019 1:13 PM
**To:** Bart Harmer <bharmer@radco.com>; Bradyn Neises <bradyn@benderco.com>
**Subject:** FW: Radco Counter

Bart: Below in red is what they came back with. It looks like we are $0.50/sq. ft. across the entire length of a 7 year lease. Actually, $0.57 for the first 29 months.

Your thoughts?

**Douglas Brockhouse, SIOR**

SIOR

Bender Commercial Real Estate Services
122 South Phillips Avenue
Suite 350
Sioux Falls, SD 57104

605-782-1664 (d)
605-728-5800 (c)

Licensed in: SD MN IA

dbrock@benderco.com

View my profile: www.linkedin.com/pub/doug-brockhouse/6/992/1b3



---

**From:** Bill Connelly [mailto:bconnelly@naisiouxfalls.com]
**Sent:** Tuesday, June 25, 2019 9:59 AM
**To:** Bradyn Neises <bradyn@benderco.com>
**Cc:** Doug Brockhouse <dbrock@benderco.com>; Gene Peska <gene@peskaconstruction.com>
**Subject:** RE: Radco Counter

1. Fine on occupancy date
2. Fine on sub lease of 32 months
3. Fine on 3 month free rent
4. Remaining 29 month at $8.43 psf. ($5,000) month for the first 29 months plus NNN and utilities.
5. Tenant will sign a new 7 year lease (84 months) @ $8.43 per month for the first 29 months and the remaining 55 months at $10.50 psf. NNN plus utilities.
6. Landlord to pay $25,000 toward buildout allowance.

Bradyn and Doug, Our counter to your last offer is as we stated. We are in agreement to all the terms from your clients last offer with the following exceptions.

Item #4. Remaining 29 months a $9.00 psf. ($5,340) for the first 29 months plus NNN and utilities.
Item #5 The remaining 55 months. At $11.00 psf. NNN plus utilities.
All other items on your offer are agreed to.

Thank you, we look forward to your response and hope to have this counter offer agreed to prior to the end of this week.

**Bill A. Connelly**
Vice President
bconnelly@naisiouxfalls.com

NAI Sioux Falls

2500 West 49th Street, Suite #100
Sioux Falls, South Dakota 57105

Direct +1 605 444 7130
Mobile +1 605 254 2360
Fax +1 605 357 7102



---

**From:** Bradyn Neises <bradyn@benderco.com>
**Sent:** Monday, June 24, 2019 4:33 PM
**To:** Bill Connelly <bconnelly@naisiouxfalls.com>
**Cc:** Doug Brockhouse <dbrock@benderco.com>
**Subject:** Radco Counter

Bill,

Doug and I spoke with Bart with Radco. He said that there is more than himself that has to approve the terms of the lease. He requested that we get a written counter, so that they can discuss and review.

Thank you,

***Bradyn Neises***
*Commercial Sales & Leasing*
***Bender Commercial Real Estate Services***
*122 S Phillips Ave. Suite 350 Sioux Falls, SD 57104*
*Cell: (605) 579-0189*
*Direct: (605) 782-1682*
*Fax: (605) 332-1100*
*Email: bradyn@benderco.com*

Bender COMMERCIAL 22 YEARS

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

---

**APPEAL NO. 29433**

---

PESKA PROPERTIES, INC., a South Dakota Corporation,

Plaintiff/Appellant,

v.

NORTHERN RENTAL CORP, a South Dakota Corporation, and
STEVE WILLIS.

Defendants/Appellees.

---

Appeal from the Second Judicial Circuit
Minnehaha County, South Dakota
The Honorable Douglas E. Hoffman, Circuit Court Judge

---

# APPELLEES' BRIEF

---


CUTLER LAW FIRM, LLP
Kent R. Cutler
Kimberly Wassink
140 N. Phillips Ave.
Sioux Falls, SD 57101

*Attorneys for the Appellees*

OLIVIER MILES HOLTZ, LLP
Kasey L. Olivier
6210 S. Lyncrest Ave.
Sioux Falls, SD 57108

NICHOLSON LAW OFFICE
Thomas J. Nicholson
4201 S. Minnesota Ave.
Sioux Falls, SD 57105

*Attorneys for the Appellant*


---


Notice of Appeal filed: September 30, 2020


---

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Other Cases**



**Statutes**

## PRELIMINARY STATEMENT

Appellant Peska Properties, Inc. will be referenced as "Peska Properties." Appellee Northern Rental Corp. will be referred to as "Northern Rental," and Appellee Steve Willis will be referenced as "Willis."

References to the clerk's record will be designated as "CR." References to the transcript for the court trial will be designated as "TT." The trial court's findings of fact will be indicated by "FF" followed by the appropriate number, and the trial court's conclusions of law will be referred to as "CL" with the appropriate number. References to exhibits introduced at trial will be referred to as "Ex." References to Appellees' appendix will be designated as "App."

## JURISDICTIONAL STATEMENT

Appellant appeals from the circuit court's decision at a bench trial which occurred on July 29, 2020, resulting in a Judgment filed and served on September 11, 2020 and Notice of Entry filed and served on September 16, 2020. Appellant filed its Notice of Appeal on September 30, 2020. This Court has jurisdiction pursuant to SDCL § 15-24A-3(1).

## REQUEST FOR ORAL ARGUMENT

Appellees Northern Rental Corp. and Steve Willis respectfully request oral argument on all issues.

## STATEMENT OF LEGAL ISSUES

**I. The Trial Court Correctly Applied South Dakota Law and Calculated Reasonable Damages to Compensate Appellant for Breach of a Commercial Lease.**

South Dakota law requires damages to be reasonable and clearly ascertainable in both their nature and their origin. It also prohibits a person from recovering a greater amount in damages for the breach of an obligation than he could have gained by full performance. The burden of proof is on the party seeking damages. The nonbreaching party has a duty to mitigate damages. If by his negligence or willfulness he allows the damages to be unnecessarily enhanced, the increased loss falls upon him.

Appellant failed to show the trial court's findings of fact on reasonable damages and on Appellant's failure to reasonably mitigate its damages are clearly erroneous. The trial court awarded damages for breach of a commercial lease using a blended rate of rent to take into account the fact that Appellants agreed to free rent and below fair market value rent from replacement tenant during the approximately 2.5 years remaining on Appellees' lease and thereafter received a thirty-percent increase in rent, to a rate above fair market value, as soon as replacement tenant's new lease term of approximately 5.5 years began.

- SDCL § 21-1-3
- SDCL § 21-1-5
- SDCL § 21-2-1
- *Arrowhead Ridge I, LLC v. Cold Stone Creamery, Inc.*, 2011 S.D. 38, 800 N.W.2d 730

**II. The Trial Court Did Not Abuse Its Discretion in Finding Neither Appellant Nor Appellees Were the Prevailing Party, Where the Only Contested Issue Was Damages and the Trial Court Adopted Nearly All of Appellees' Damage Calculation and Rejected the Calculation Proposed by Appellant on the Primary Element of Damages, Lost Rent.**

The law in South Dakota requires that a trial court consider the issues in controversy and the overall result in determining whether one party is the "prevailing party." Appellant did not meet its burden to show the trial court abused its discretion in finding neither party prevailed. The trial court adopted Appellees' calculation of damages for lost rent, the primary element of damages at issue, and rejected Appellant's calculation for lost rent. The trial court

followed the law, and its decision is justified by sound reasoning and substantial evidence.

- *Stern Oil Co., Inc. v. Brown*, 2018 S.D. 15, 908 N.W.2d 144
- *Geraets v. Halter*, 1999 S.D. 11, ¶ 21, 588 N.W.2d 231, 235

## INTRODUCTION

This case presents one primary issue: the amount of damages due Appellant/Landlord from Appellees/Tenants following Appellant/Landlord's re-leasing of the Appellees/Tenants' former location. Appellant/Landlord claims the trial court committed clear error by awarding it inadequate damages. However, the parties cooperated so that Appellant/Landlord secured a desirable placement tenant with whom it executed a lucrative lease for the months remaining on Appellees/Tenants' lease and for an additional four-and-one-half years beyond that term. For the new lease period, Appellant/Landlord charged its replacement tenant rent at a rate significantly above fair rental value, while giving it free rent and below fair market value rent during the months remaining on Appellees/Tenants' lease. The Appellant/Landlord benefitted in numerous other ways as a result of the replacement lease. The trial court followed the law in taking the replacement lease into account in calculating the damages due Appellant/Landlord.

The trial court heard and weighed all of the evidence and correctly applied South Dakota law to determine the proper amount of damages to compensate Appellant/Landlord, taking into account all the facts and circumstances. The trial court's decision was reasonable and supported by abundant evidence, and it did not commit clear error in determining Appellant/Landlord leveraged its position and failed to reasonably mitigate its damages.

Appellant/Landlord's position ignores the mandates of South Dakota law, which require damages to be reasonable, clearly ascertainable in nature and origin, and to put the nonbreaching party in a position as good as *but not better than* full performance. The

trial court, sitting as fact finder, calculated damages according to those mandates, and its decision should be affirmed.

Appellant/Landlord further claims the trial court abused its discretion in determining Appellant/Landlord was not the "prevailing party" for purposes of an attorney's fees-prevailing party provision in the lease. This action was determined in a one-day court trial at which the sole issue was the amount of damages. The trial court adopted Appellees/Tenants' damage calculation for rent, the bulk of damage claim, and rejected Appellant/Landlord's damage calculation. Appellant/Landlord misinterprets and misapplies the case law upon which it relies, and there is no merit to this claim. While the trial court determined that neither party prevailed over the other in this case, if there was a prevailing party it was Appellees/Tenants, not Appellant/Landlord. There is no error by the trial court.

## STATEMENT OF THE FACTS

On or about December 23, 2011, Appellant Peska Properties, Inc. ("Peska Properties") and Appellees Steve Willis ("Willis") and Northern Rental Corp. ("Northern Rental") entered into a lease for 7,150 square feet of rental space located at 2409 E. 10th Street in Sioux Falls, South Dakota ("Leased Premises"). CR 624; App. 2 (FF 3). The lease was for an initial 10-year term. It began on June 1, 2012 and was to run through May, 2022. Northern Rental's rent for the first year was $10.00 per square foot, equaling $5,958.33 per month. CR 177; Ex. 2. Rent increased incrementally each year for the 10-year term. *Id*.

Also, as part of the agreement, Peska Properties performed $50,000 of buildout at Northern Rental's request. Northern Rental paid this as additional rent, at a rate of 8%

interest, amortized monthly over the initial 10-year term. CR178; Ex. 2. Northern Rental owned and operated an Aaron's store, a rent-to-own business, in the Leased Premises. CR 642; App. 2 (FF 4).

Unfortunately, in early 2017, Northern Rental made the very difficult business decision to close Aaron's. CR 642; App. 2 (FF 5). Northern Rental continued to pay Peska Properties the rent when it was due. Northern Rental closed its doors in March, 2017, and continued to pay rent through July, 2019. TT 169.

In May, 2018, rent was paid to date but the property was still vacant. Northern Rental engaged Sioux Falls realtor Jay Zea to list the premises for sub-lease. CR 642; App. 2 (FF 6). After several months without finding a sub-tenant, Gene Peska ("Peska"), the sole owner of Peska Properties suggested that Willis contact his realtor, Bill Connelly ("Connelly"), for assistance in filling the space. CR 643; App. 3 (FF 7). On October 8, 2018, Northern Rental listed the space for sub-lease with Connelly. CR 643; App. 3 (FF 9). Northern Rental continued to pay the rent as it came due. TT 169.

A year went by until, in late April or early May of 2019, Mills Aftermarket Accessories, Inc., d/b/a Radco ("Radco"), a regional auto parts vendor, became interested in the space. CR 643; App. 3 (FF 10). Soon after, on or about June 6, 2019, Radco submitted a Letter of Intent on the Leased Premises. CR 643; App. 3 (FF 12).

Radco required a much longer-term lease than Northern Rental's remaining months. This required Peska to be involved in the Radco negotiations. *Id*. Accordingly, Peska and Radco commenced a brief period of negotiating terms. The trial court made the following Findings of Fact specific to the negotiations and Peska Properties' new lease with Radco:

1. On or about June 19, 2019, Landlord responded to Radco's Letter of Intent by offering to accept $9.50 per square foot for the remainder of Tenants' 32-month lease term, increasing by 30% to $11.00 per square foot on the first month of the extended 55-month term with Landlord. CR 643; App. 3 (FF 13) and Ex. 6, p. 78.

2. On or about June 22, 2019, Radco responded by offering to pay $8.43 psf on Northern's remaining lease term and $10.50 psf during Properties' 55-month extended term. CR 643; App. 3-4 (FF 14).

3. Between June 22 to June 28, 2019, additional negotiations lead Radco to offer $11.00 psf during Properties' 55-month extended term while staying put on $8.43 psf during Northern's remaining lease term. CR 644; App. 4 (FF 15).

4. Around the same timeframe, Willis and Peska [Properties] attempted to negotiate a resolution of Northern's remaining Lease obligation to Properties to no avail. Willis suggested Peska should get Properties' deal done with Radco following which Willis hoped he and Peska could reach an agreement on a resolution of Northern's remaining lease obligations. CR 644; App. 4 (FF 16).

5. Properties entered into a listing agreement for the Leased Premises with Connelly on July 1, 2019. CR 644; App. 4 (FF 17).

6. Willis confirmed his suggestion that Peska should enter into a lease with Radco in writing on July 18, 2019. CR 644; App.4 (FF 18).

7. Properties entered into a Letter of Intent with Radco on July 23, 2019. CR 644; App. 4 (FF 20).

On August 1, 2019, Peska Properties and Radco executed a new lease for 87 months. CR 553; Ex. 11. The lease gave Radco possession on August 1, the same day the lease was signed. *Id.* During the 34 months of Northern Rental's remaining term, Radco received three months of free rent and 31 months of rent set at $8.43 per square foot. *Id*. The months immediately after the expiration of Northern Rental's lease term, Radco's rent increased to $11.00 per square foot, a 30 percent increase month after month. *Id*.

The Radco lease required Properties to contribute $25,000 in leasehold improvements, which equates to $3.50 per square foot of the 7,150 square foot Leased Premises. *Id*. *See also* CR 644; App. 4 (FF 20, 21); Ex. 11. At trial, Connelly, Peska Properties' primary witness, testified that a Tenants Improvement ("TI") allowance of $3.50 per square foot is "extremely" low. TT 138:21. Peska Construction, Inc. did over $100,000 of buildout for Radco. *See* CR 646; App. 6 (FF 24). Connelly also testified that in his opinion, fair market rental on the Leased Premises was between $9.00 per square foot to $10.50. TT 129.

**The Parties' Positions on Damages**

Northern Rental and Peska Properties did not come to terms on a buyout of the months remaining on their lease. The parties subsequently tried the issue of the amount of damages to the trial court on July 29, 2020, before the Honorable Douglas Hoffman.

Peska Properties and Northern Rental both presented a damage calculation to the Court. With respect to damages for rent, Peska Properties proposed a straight calculation of the remaining 34 months of Northern Rental's term multiplied by the amount of rent set out in the lease, less the amount paid by Radco during Northern Rental's remaining term. CR 551; TT 185; Ex. 10; App.19-20. Peska Properties calculates the rent remaining as $228,311.00, reduced by $155,709.16, the amount of rent Radco paid during the remainder of Northern Rental's lease, claiming a balance of $72,601.84 remaining on Northern Rental's term. *Id*. To that, Peska Properties added $10,792.30 as the balance due on Northern Rental's original buildout for the space as of July 31, 2019, as well as interest of $1,363.44 on that balance. Northern Rental did not dispute it owed that amount. TT 175, 203. Finally, Peska Properties asked that the Court order Northern

Rental to pay $25,000, the amount Peska Properties agreed to pay on Radco's $100,000 buildout. In total, Peska Properties sought damages of $109,757.58. CR 551; TT 185; Ex. 10; App.19-20.

Northern Rental asked the trial court to take all of the circumstances into account in calculating damages, including Peska Properties' extended-term lease with Radco. To do so, Northern Rental proposed a "blended rate" of rent averaging the free rent (3 months) and lower than fair market value rent Radco paid during the remaining months of Northern Rental's lease (31 months) with the rental rate during the new portion of the Radco lease (53 months). CR 655; App. 15. The blended rate is summarized as follows:

**Calculation of Blended Rate**
$0.00 psf x 3 mos = $0.00
$8.43 psf x 31 mos = $261.33 psf
$11.00 x 53 mos = $583.00 psf
**$844.33 psf / 87 mos = $9.70 psf blended rate**

*Id*. Northern Rental did not dispute payment of the balance due on its buildout. It did contest damages based on the $25,000 Peska Properties paid on Radco's buildout.

**Trial Testimony of Peska Properties' Witness Bill Connelly**

At trial, one of Peska Properties' primary witnesses was Bill Connelly, long-time friend and real estate agent for Peska and Peska Properties. Connelly testified that he and Peska regularly do "substantial deals" together, yearly. Connelly is also the realtor Peska suggested Willis retain in seeking a replacement tenant. With respect to the Radco lease, Connelly testified as follows:

a) Radco appears to be a financially strong tenant;

b) The new 7-year lease increases the value of Properties' mall;

c) The additional 55-month term is valuable to Properties in the form of base rent, triple net charges, and common area maintenance charges;

d) $15.00 tenant leasehold allowance is a fairly low buildout allowance;

e) $3.50 psf tenant leasehold allowance is a very low buildout allowance;

f) The fair market rental on the Leased Premises was between $9.00 psf to $10.50 psf;

g) $8.43 psf is below fair market rental for the Leased Premises and $11.00 psf is above fair market rental for the Leased Premises;

h) The blended rate of the rent payable during the entire 87-month term of the Radco lease falls within the fair market rental rate for the Leased Premises; and

i) There is no guarantee Properties would be able to re-let the Leased Premises at the termination of Northern's Lease term. In other words, without the Radco 55-month extension, Properties may have been left with a vacant space in its mall at the expiration of Northern's Lease term.

CR 645; App. 5 (FF 22). The trial court adopted Connelly's testimony in its findings of fact.

**The Legal Standards the Trial Court Applied**

To its findings of fact, the trial court applied South Dakota law regarding damages. Specifically, the trial court considered the applicable portions of SDCL § 21 chapters 1 and 2, which lay out the basis for any claim of damages in general and those resulting from a breach of contract. CR 647; App. 7 (CL 8). SDCL § 21-1-3 provides as follows:

> Damages must in all cases be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered.

In addition, SDCL § 21-1-5 prohibits damages for breach from exceeding the gain of full performance, providing as follows:

> Notwithstanding the provisions of these statutes, no person can recover a greater amount in damages for the breach of an obligation than he could have gained by the full performance thereof on both sides, except in the cases specified in statutes providing exemplary damages or penal damages and in statutes relating to damages for breach of promise to marry, for seduction, or wrongful injuries to animals.

Finally, SDCL § 21-2-1 requires the party claiming damages to prove them with certainty and prohibits recovery for damages that are uncertain:

> For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom. No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and their origin.

The trial court also reviewed what it described as a "fairly robust jurisprudence concerning contract breaches," setting forth the following as guidance for its decision:

> According to these cases, the fundamental rationale of a damage claim for a breach of contract is to put the injured party in the same position they would have been had no breach occurred. *Bad Wound v. Lakota Community Homes Inc*, 1999 S.D. 165, ¶ 9, 603 N.W.2d 723, 725 (citing *Ducheneaux v. Miller*, 488 N.W.2d 902, 915 (S.D. 1992)). However, to recover any damages the loss must "be clearly ascertainable in both its nature and origin." *McKie v. Huntley*, 2000 S.D. 160, ¶ 18, 620 N.W.2d 599, 603 (citing SDCL 21-2-1). Furthermore, the party claiming damages must show a "reasonable relationship" between the method used to calculate damages and the amount claimed. *FB & I Bldg. Prod. Inc. v. Superior Truss and Components, A Div. of Banks Lumber, Inc.*, 2007 S.D. 13, ¶ 20, 727 N.W.2d 474, 480 (citing *McKie*, 2000 S.D. 160, ¶ 18, 620 N.W.2d at 603). This amount claimed must also be reasonably certain and

> should not be speculative. *Olson v. Aldren*, 170 N.W.2d 891, 895 (S.D. 1969). **Finally, the injured party cannot recover more in the claim then they would have realized with full performance of the contract, and the damages must be reasonable and not contrary to substantial justice. SDCL §21-1-5; SDCL §21-1-3.**

CR 648; App. 7-8 (CL 8) (emphasis added).

The trial court further referenced *Tri-State Refining and Inv Co, Inc. v. Apaloosa Co*, 431 N.W.2d 311 (S.D. 1988), in which the Supreme Court of South Dakota held that the monthly lease payment amount may not be the proper measure of damages under SDCL § 21-2-1. *Tri-State*, 431 N.W.2d at 315. Rather, the Court stated that the trial court must examine the record to determine if the lessee suffered any harm proximately resulting from the breach of the lease. *Id.* This amount of detriment is the true measure of damages. *Id.* Even though *Tri-State* is based on a lessee being the injured party, it is still true that the monthly rent payment value is not automatically the proper amount of damages to claim. CR 648; App. 8 (CL 9). Most critically, the law directs the court as finder of fact to examine and consider all the circumstances when determining a reasonable amount of damages to award.

The trial court found as follows:

> To recover damages, the loss must "be clearly ascertainable in both its nature and origin." *McKie*, 2000 S.D. 160, ¶ 18, 620 N.W.2d at 603 (citing SDCL § 21-2-1). There is a genuine question of fact as to the origin of the loss felt by Peska. In a normal lease breach case, undoubtedly the origin is the breaching party. Here, however, Northern continued to make periodic payments even when they were no longer using the property. It was only after the second lease was created with Radco that Northern completely ceased the lease payments. If Radco was willing to pay the fair market lease value of the property during the remaining years of Northern's lease—which they are willing to do after Northern's lease period ends—there would be no detriment.

> In proving damages, "the party must also establish a 'reasonable relationship between the method used to calculate damages and the amount claimed." *FB & I Bldg. Prod. Inc.*, 2007 S.D. 13, ¶ 20, 727 N.W.2d at 480 (citing *McKie*, 2000 S.D. 160, ¶ 18, 620 N.W.2d at 603). The Supreme Court of South Dakota has stated that there is not an exact formula for calculating damages, rather the Court applies a reasonable certainty test for the proof required to establish a right to recover the claimed amount. *McKie*, 2000 S.D. 160, ¶ 18, 620 N.W.2d at 603. "Reasonable certainty requires proof of a rational basis for measuring loss, without allowing a jury to speculate." *Id.* In the case at bar, there is a genuine question as to whether the method used to calculate the loss has a rational basis. Claiming the full damages would force the jury to speculate as to the detriment actually realized by Peska. As previously stated, Peska is receiving a substantial windfall because the true detriment is not to the extent of damages claimed.
>
> Damages must in all cases be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered." SDCL § 21-1-3. This fundamental principle controls all damages claims, regardless of the type of injury, the form of calculation, or amount of damages claimed. When the damages sought by the injured party are unconscionable or unreasonable on their face, they cannot be recovered. *Id*.

CR 649-650; App. 9-10 (CL 10, 11, 12).

**The Trial Court's Damages Calculation**

Based on the foregoing legal standards and its findings of fact, the trial court used the "blended rate" of rent to take into account all the relevant factors, including the Radco lease. The trial court calculated the damages due Properties as follows:

> 1. The Court finds as a matter of law that the most commercially reasonable manner to calculate the balance due under Northern's Lease is to use a blended rent rate during the entire 7-year term of Radco's lease with Properties. The blended rent rate during the entire 7-year term of the Radco lease is $9.70 psf. Using the blended rate, Northern and Willis are responsible for a deficiency in rent of $935.48 per month beginning in August 2019. CR 650; App. 10 (CL 13).
>
> 2. The blended rent rate is the most commercially reasonable manner to calculate the amounts due under Northern's Lease as the blended rent rate over the entire term of the 7-year Radco lease is $9.70 psf which falls within the range of fair market rent as testified to by Connelly. CR 650; App. 10 (CL 14).

3. To allow Properties to mitigate its damages during Northern's remaining term at $8.43 psf, with a 30% increase in rent to $11.00 psf the first month of the new 55-month extended term, is not commercially reasonable. CR 650; App. 10 (CL 15).

4. It's further not commercially reasonable for Properties to receive above fair market rent during the 55-month extended term and Northern and Willis to receive below fair market rent credit during the remaining 34 months on their Lease. CR 650; App. 10 (CL 16).

5. Properties, Construction, and Peska all benefited in many ways from the Radco lease as testified by Connelly. CR 651; App. 11 (CL 17).

6. Properties could not have entered into the Radco lease and secured the new 55-month extended term, had Northern not cooperated by consenting to and allowing Properties to enter into the 7-year Radco lease. CR 651; App. 11 (CL 18).

7. Northern and Willis admit they owe Properties the balance of $10,792.30 for Northern's original buildout plus interest of $1,363.44 as of August 1, 2020. CR 651; App. 11 (CL 19).

8. Section 28 b. (2) of the Lease provides Properties can pursue its legal rights and remedies in the event of Northern's default, but restricts any remedy from having the effect of "(2) requiring Tenant to pay for any improvements or modifications that Landlord may make to the Premises to accommodate a replacement Tenant with a non-retail use." CR 651; App. 11 (CL 20).

9. It is not commercially reasonable to require Northern and Willis to pay the entire $25,000 contribution to Radco's buildout as Radco is currently using floor coverings, counters, and warehouse shelving paid for by Northern, and Peska, Properties, and Construction all benefited for the reasons outlined by Connelly, particularly when Radco received an extended 55-month term. CR 651; App. 11 (CL 21).

10. The commercially reasonable manner for Northern and Properties to share the $25,000 contribution to Radco's buildout is in proportion to the remaining term on Northern's Lease compared to the total 87-month term of the Radco lease. CR 651; App. 11 (CL 22).

11. Northern and Willis shall be responsible for their proportionate share of the $25,000 Radco buildout (34 months/87 months equals 39.08%) which equates to $9,770.00. CR 651; App. 11 (CL 23).

12. The commission payable to NAI/Connelly should be adjusted between Properties and Northern based on the blended rent rate of $9.70 psf, which requires Northern and Willis to reimburse Properties for $2,606.88 of the commission Properties paid to Connelly/NAI. There shall not be pre-judgment interest on the commission adjustment as the commission adjustment was unknown to Northern and Willis until after the trial in this matter. CR 651-652; App. 11-12 (CL 33-misnumbered).

13. The Court's calculation of the damages is attached as Exhibit 1 and incorporated herein by reference. CR 652; App. 12 (CL 24).

14. Northern and Willis, jointly and severally, owe Properties the following amounts as of the date of trial:

a. Past Due Rent Claim: $935.48 per month from August 2019 through July 2020 totaling $11,225.76, together with pre-judgment interest in the amount of $607.62, for the total of $11,833.38;
b. Northern Buildout Claim: $10,792.30, together with pre-judgment interest of $1,363.44, for a total of $12,155.74;
c. Radco Buildout Claim: $9,770.00, together with pre-judgment interest in the amount of $977.00, for a total of $10,747.00;
d. Commission Adjustment: $2,606.88, without prejudgment interest; and
e. Northern Credit for Overpayment on July 17, 2019 Invoice: ($419.50)

TOTAL AMOUNT CURRENTLY DUE AS DATE OF TRIAL: $36,923.50

CR 652; App. 12 (CL 25).

15. Because payments are not allowed to be accelerated under Section 28.b.(1) of the Lease, Northern and Willis shall pay Properties the amount of $935.48 per month beginning in August 2020 through and including May, 2022. CR 652; App. 12 (CL 26).

The trial court's Exhibit 1 lays out the calculation in detail and breaks down the calculation of the blended rate. The trial court adopted Northern Rental's calculation of damages for rent, the primary element of damages.

## Peska Properties' Claims of Error

Peska Properties disagrees with the way the trial court calculated damages and claims the calculation is clearly erroneous. It claims the trial court should have considered nothing but Northern Rental's remaining lease term in determining damages. In its view, the trial court should have, as a matter of law, multiplied the number of months remaining on Northern Rental's term by the monthly rental amount, less payment due from Radco, and awarded that amount. Peska Properties' argument implies this method is mandatory, whether or not the resulting damages are reasonable and even if it puts Peska Properties in a position better than full performance. Similarly, Peska Properties claims the trial court's findings that implicate Peska Properties' failure to mitigate its damages are also clearly erroneous.

Peska Properties further contends the trial court abused its discretion by not finding it to be the prevailing party. The trial court concluded that in light of the entirety of the case, the limited issue in controversy and the result, no party prevailed, and all parties should pay their own fees and costs. Peska Properties appeals the trial court's decisions to this Court.

## STANDARD OF REVIEW

Peska Properties has a high burden to prevail on appeal. A trial court's findings on damages and as to the sufficiency of mitigation are subject to the clearly erroneous standard. *Ducheneaux v. Miller*, 488 N.W.2d 902, 915 (S.D. 1992). In *Mash v. Cutler*, 488 N.W.2d 642, 645-46 (S.D. 1992), this Court set forth the standard of review where, as here, the trial court acted as finder of fact in a court trial as to the award of contract damages, which is as follows:

> A trial court's findings of fact are presumed correct unless they are shown to be clearly erroneous. This court may not substitute its judgment of factual questions for that of the trial court unless the findings of fact are clearly erroneous. In applying the "clearly erroneous" standard, we do not ask whether we would have made the same findings as did the trial court. Rather, the test is whether, after reviewing all the evidence, we are left with a definite and firm conviction that a mistake has been made.
>
> The findings of fact made by the trial court are presumptively correct. The burden to show error is on the appellant. Further, "[t]his court is not free to disturb the lower court's findings unless it is satisfied that they are contrary to a clear preponderance of the evidence." The credibility of witnesses, the weight to be accorded their testimony, and the weight of the evidence must be determined by the trial court and we accord the trial court some deference based on its observations of the witnesses and the evidence.
>
> Furthermore, in a court trial, "[u]pon review, the evidence and inferences therefrom must be viewed in a light most favorable to uphold the verdict [judgment] and, if there is competent and substantial evidence to support the verdict [judgment], it must be upheld."

*Id*. (internal citations omitted).

In this case, Peska Properties had the burden of proving damages at trial. It also has the burden of showing the trial court was clearly erroneous here. *Id*. (internal citations omitted).

Peska Properties has a similarly-high burden with respect to the trial court's prevailing party decision, reviewed under an abuse of discretion standard. *Stern Oil Co., Inc. v. Brown*, 2018 S.D. 15, ¶ 46, 908 N.W.2d 144, 157. "An abuse of discretion 'is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary and unreasonable.'" *Erickson v. Earley*, 2016 S.D. 37, ¶ 8, 878 N.W.2d 631, 634 (quoting *Blair-Arch v. Arch*, 2014 S.D. 94, ¶ 10, 857 N.W.2d 874, 877).

As set forth below, the trial court's decisions are based on abundant evidence and the correct application of long-held fundamentals of South Dakota law. There is no clear error, and the trial court should be affirmed in all respects.

## ARGUMENT

### I. In Calculating Damages, the Trial Court Correctly Applied South Dakota Law, and its Findings of Fact are not Clearly Erroneous.

#### A. The Trial Court Did Not Err in Finding it Reasonable to Use a Blended Rate of Rent to Account for Peska Properties' Accepting Lower than Fair Market Rent During Northern Rental's Remaining Term While Charging Above Fair Market Rent When Radco's New Lease Term Began.

To reiterate the legal standards guiding the trial court, "[i]n an action for breach of contract, the plaintiff is entitled to recover all his detriment proximately caused by the breach, not exceeding the amount he would have gained by full performance." *Mash v. Cutler*, 488 N.W.2d 642, 646 (S.D. 1992). SDCL § 21-1-3 provides that "[d]amages must in all cases be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered." While contract damages aim to place the non-breaching party in as good a position as performance would have done, SDCL § 21-1-5 mandates against placing a party in a *better* position than full performance, providing in pertinent part that "no person can recover a greater amount in damages for the breach of an obligation than he could have gained by the full performance thereof on both sides...." The significance of these points cannot be overstated.

While Peska Properties claims the trial court "used the wrong standard in determining contract damages must be commercially reasonable rather than putting the injured party in the same position as if there had been no breach," that is simply a wrong declaration of South Dakota law and a wrong summation of what the trial court did. As set out above, and cited repeatedly by the trial court, damages must be reasonable. SDCL § 21-1-3. The inquiry is fact-intensive, not formulaic. Contract damages must aim to put a party in a position as good as, but not better than, full performance. The concept of reasonable damages and expectation damages are not in conflict and are not mutually exclusive. The trial court followed these mandates and based its calculation of damages on substantial evidence, the bulk of which came from the testimony of Peska Properties' primary witness, Bill Connelly. In fact, Connelly testified that the blended rate, taking into account both the remainder period of Northern Rental's lease and the new period of Radco's lease, was the accurate way to quantify what Radco paid:

> Q. [By Attorney Cutler]: What did you think the fair market value of [the Leased Premises] was when you listed it for Northern Rental?
> A. [By Bill Connelly]: Probably somewhere between $9.00 to $10.50 at best.
> Q. Okay. Well, then why, why would Radco have agreed to pay Gene Peska $11 a square foot for the extended term?
> A. Well, they didn't. I mean if you take the combined over seven years they didn't.
> Q. Right. I've done that calculation, the blended rate, I believe, over the entire terms, about ten dollars and eleven cents a square foot or something like that.[1] Does that sound right to you?
> A. Sounds about right.

---

[1] At the time of trial, there was uncertainty as to the exact number of months remaining on the Northern Rental lease term, which accounts for discussion of $10.11 per square foot as the blended rate. That issue was later clarified, and the correct blended rate was established as $9.70. CR 655; App. 15.

TT 129:19-130:5.

The trial court found Connelly's testimony compelling:

> Q. [By the Court to Peska Properties' counsel]: But Bill Connelly testified on the witness stand today that the fair market value of the leasehold was between $9 and $10.50, and so when he was asked, well, then how did Gene get 11 bucks for it, he said, well, because it was a blended rate. That's what your witness said on the witness stand.

TT 186:20-25. See also TT 189 (Court: "Connelly was [Peska's] guy. He referred Willis to his guy. So Connelly's like, here, well, I mean Willis was my client until Gene got involved and then I had two clients.").

Connelly also testified concerning the many ways the lucrative Radco lease benefitted Peska Properties:

> Q. [By Attorney Cutler]: Would you agree with me at the time that you visited that site, Northern Rental was not open for business, true?
> A. [By Connelly]: That's correct.
> Q. [Cutler]: And that's the primary tenant in that mall, it was anyhow, the largest space in that mall?
> A. I believe so, yes.
> Q. A mall like that..it's important to have the large tenant spaced filled, is it not?
> A. Oh sure.
> Q. It increases the value of the mall to the owner?
> A. Correct.
> Q. And it would also increase the value of the mall to the other tenants as well, would it not?
> A. Possibly, just from the traffic count, I suppose.
> Q. Sure. In any event, you'd agree with me that having that large space, which was a majority of that mall occupied was beneficial to Peska Properties, the owner of the property?
> A. Certainly, yes.

TT 130:6- 131:6.

Connelly provided the only evidence on the fair rental value of the Leased Premises. Connelly was Peska Properties' witness. The trial court found this to be the most reasonable way to quantify damages. Peska Properties wants to substitute its calculation for the court's. That is impermissible.

If Northern Rental had been able to perform, Peska Properties would not have realized the many benefits of the Radco lease. The trial court looked at the whole picture, the entirety of the circumstances. That is what an inquiry on reasonableness requires. Moreover, Peska Properties' damage calculation would put it in a far better position than full performance, and the trial court followed the law by rejecting it.

### B. The Trial Court Did Not Err in Finding Peska Properties' Structuring of Rental Rates Was Contrary to Its Duty to Mitigate Its Damages.

Peska Properties claims the trial court's decisions regarding mitigation of damages are clearly erroneous as well. A trial court's decision as to whether a party has reasonably mitigated its damages is a question of fact subject to the clearly erroneous standard of review. *Ducheneaux v. Miller*, 488 N.W.2d 902, 918 (S.D. 1992). *Summit Petroleum Corp. of Indiana v. Ingersoll-Rand Fin. Corp.*, 909 F.2d 862, 868 (6th Cir. 1990) ("[T]he adequacy of mitigation is a question of fact."); *State Office Systems, Inc. v. Olivetti Corp. of America*, 762 F.2d 843, 847 (10th Cir.1985); *Ford v. Nicks*, 866 F.2d 865, 873 (6th Cir.1989) ("The district court's finding on the issue of mitigation of damages [in a Title VII case] is a factual finding reviewable only under the 'clearly erroneous' standard."); *Payne v. Sec. Sav. & Loan Ass'n, F.A.*, 924 F.2d 109, 111 (7th Cir. 1991) ("Because the question of mitigation is a factual one, we will not overturn the district court's finding unless it was clearly erroneous."). Again, Peska Properties'

burden on appeal is one of the highest in law, as the trial court's findings are presumed correct and shall not be overturned unless the reviewing court is firmly certain a mistake has been made.

For well over a century and to date, this Court has described the duty to mitigate damages as follows:

> The law imposes upon a party injured from another's breach of contract or tort the active duty of making reasonable exertion to render the injury as light as possible. If, by his negligence or willfulness, he allows the damages to be unnecessarily enhanced, the increased loss, that which was avoidable by the performance of his duty, falls upon him. This is a practical duty under a great variety of circumstances, and, as the damages which are suffered by a failure to perform it are not recoverable, it is a duty of great importance. *Ducheneaux v. Miller*, 488 N.W.2d 902, 917 (S.D.1992) (quoting *Gardner v. Welch*, 21 S.D. 151, 110 N.W. 110, 112–13 (1906)).

*Arrowhead Ridge I, LLC v. Cold Stone Creamery, Inc.*, 2011 S.D. 38, ¶ 16, 800 N.W.2d 730, 735.

Reasonable mitigation is part and parcel of the consideration of reasonable damages. With respect to mitigation, the trial court was again compelled by the discrepancy between the rental rate Radco paid Peska Properties during the remainder of Northern Rental's term as compared to the rent Radco paid during its new, extended lease.

> Q. [By the Court]: How come the rent went up from $8.43 to $11 right at the time that Willis is off the hook? 185:21
> A. [By Attorney Olivier]: You'll see, Your Honor, that Steve Willis was actually a part of those negotiations.
> Q. [By the Court]: So, you think Steve said I should…take it in the shorts?
> …
> He wanted your client to get a lease, right, because if Radco walked away, then he was really screwed?
> A. [By Ms. Olivier]: That's very true…So he wanted to mitigate his damages, but he agreed to that. This was no surprise to him.

Q. [By the Court]: But Bill Connelly testified on the witness stand today that the fair market value of the leasehold was between $9 and $10.50, and so when he was asked, well, then how did Gene get 11 bucks for it, he said, well, because it was a blended rate. That's what your witness said on the witness stand.
Q. [By the Court]: But Radco was okay paying 11 bucks for a property that wasn't worth that much if they only had to pay $8.43 for the first 29 months. I mean that seemed to be clearly what Mr. Connelly's testimony was.
A. [By Ms. Olivia]: And those were negotiations that Steve Willis was part of.
Q. [By the Court]:Yeah, but I mean was that fair on your client's part to say, look, we'll really lowball the rent, so I can recoup more damages at the trial in front of Judge Hoffman in July of 2020? TT 187:16.

Peska Properties did not answer the court's repeated question of what justified having the rent at $8.43 for Northern Rental's part of the lease and jumping to a 30 percent increase as soon as Radco's new lease commenced. TT 189. The court questioned why Radco would desire or insist on such terms, because the amount of Radco's rent obligation would be the same, concluding that Peska Properties structured the terms to its financial advantage. TT 190. The court found it unreasonable:

Q. [By the Court]: [T]here weren't two leases that you know had to be pursued separately. It was all coalesced in to a single lease for the seven years, and so Willis is saying, you should—you're not treating me…fairly, i.e., you're not exercising commercially reasonable efforts to mitigate your damages against me by characterizing the first 29 months as a fire sale lease, and the subsequent four and half years as a fair market value lease plus premium.

A. [By Attorney Cutler]: That's exactly my point. And the thirty percent increase, I've always said that it, you don't see leases with thirty percent increases. That was not the way that this should have been structured first of all. Second of all, I would suggest to the court and everybody in this room, and I guess people can disagree if they want, but Radco originally asked for a five-year lease and Peska went back and said I want a seven-year lease, and Peska got his additional two years. Radco would have never taken that place unless they had assurances that they had it for longer than the Northern Rental term. If they simply had to do a sublease with Northern Rental, it probably

> never would have happened. And that's why we think the blended rate is the appropriate way. I had written down exactly what you said, Bill Connelly, when I asked him the question was $11 the fair market rental, he said 9.00 to 10.50. The blended rate is right in the middle of that fair market rental according to him.

TT 195:15-24.

South Dakota law is clear: Peska Properties breaches its duty to mitigate if it allows, willfully or by negligence, Northern Rental's damages to be "unnecessarily enhanced." This, again, is a fact-specific inquiry. While a landlord's actions in one case might be deemed reasonable under the circumstances, a finding that mitigation efforts were sufficient under one set of facts does not create a template. The context of another case might require the landlord to do more or act differently.

Here, there was abundant, competent evidence upon which the trial court based its decision to apply a blended rate rather than Peska Properties' bright-line calculation which ignored many of the significant benefits of the Radco lease. Had the trial court calculated damages in the manner Peska Properties advocates, the result would have been unreasonable. Free rent is not mitigation. Peska Properties' allowance to the subtenant of free rent and rent below fair market value during the remaining term of Northern Rental's lease, while benefitting from the buildout and charging what its realtor testified was in excess of fair market value during the new, extended period of the lease, is wholly at odds with South Dakota law. The result would be unreasonable, substantially unjust, and would allow Peska Properties to recover more than would result by full performance, in contravention of SDCL § 21-1-5.

Moreover, Peska Properties focuses only on the process and the fact that a replacement tenant was secured. However, Peska Properties could have acted reasonably

to lessen the damages. While a landlord need not subrogate its rights to a tenant in its mitigation efforts, the trial court was correct in determining it also is not allowed to take advantage of its tenant's plight to its own financial benefit. Radco had no motive or incentive to structure the lease with a 30 percent increase for the majority of its overall term. The higher amount Radco was willing to pay later in the lease demonstrates its deep desire to occupy the premises at that time. If Northern Rental had performed, the location would not have been available to Radco, and there is no evidence that Peska Properties could have filled the space with such a lucrative tenant in a long-term lease after Northern Rental's lease term came to an end. The evidence supports the inference that the structure of Radco's lease enhanced Northern Rental's damages. Based on these circumstances, there is no clear error and the trial court should be affirmed.

### C. Peska Properties' Claims of Error Lack Merit and Should Be Rejected.

Peska Properties argues the trial court failed to place the injured party in the same position had there been no breach and that the court "deviated from well established law, requiring that the calculation be commercially reasonable" which it claims is only required for creditors in secured transactions and other limited circumstances. There is no merit to these claims. The trial court articulated and applied the law. Peska Properties never challenged the body of law applicable to the case at the trial court level, and its attempt to do so now is therefore waived. Peska Properties' attempt to assign error based on the court's use of the term "commercially reasonable" is a red herring. This is a commercial case and a commercial lease. The trial court's use of the term "commercially reasonable" is not incorrect. There was substantial evidence to support the findings, the

trial court correctly applied all the proper standards in determining damages, and Peska Properties' arguments should be rejected.

Similarly, Peska Properties' claim that the trial court improperly relied upon *Tri State Refining, Tri-State Refining and Inv Co, Inc. v. Apaloosa Co*, 431 N.W.2d 311 (S.D. 1988), because the facts are not identical to those present here, has no merit. The trial court did not rely on a singular case. The trial court utilized a body of law, all of which was correctly applicable to its determination of damages. This, again, is nothing more than Peska Properties attempting to persuade this Court to replace the trial court's decisions with its own. Its calculation and rationale advance a stringent, bright-line rule considering only the remaining term and the amount of rent. It ignores all other circumstances. There was no improper reliance, the correct legal standards were followed, and Peska Properties' claims to the contrary should be rejected.

Peska Properties takes issue with the trial court's use of the term "windfall" in the context of the benefits it received from the Radco lease. SDCL § 21-1-5 prohibits damages for breach from being in excess of full performance. That is another way of saying damages should not result in a windfall. That is why the trial court calculated damages using the blended rate. As shown throughout, the trial court correctly applied the law to facts that were largely undisputed. The trial court's findings on damages carry great weight, as does the amount it concludes is reasonable. Peska Properties disagrees with the trial court's decision.

In addition, Peska Properties argues the trial court erroneously calculated damages for the Radco buildout, to which Peska Properties contributed $25,000 of the $100,000. The court prorated damages for the Radco buildout and required Northern

Rental to pay $9,770.00 of Peska Properties' $25,000.00 portion. TT 209. This decision was not clearly erroneous. Arguably, it was more than Northern Rental should have been required to pay. Radco utilized the space for approximately 7.5 years while Northern Rental's remaining term was approximately 2.5 years. It is undisputed that Radco utilized much of the infrastructure as it was, leaving interior elements such as the bathroom and ceiling unchanged. Radco also utilized Northern Rental's existing fixtures and shelving. Connelly testified Peska Properties' contribution to the buildout was "extremely" low. Considering the whole picture, the trial court's damage award was more than reasonable. Accordingly, Peska Properties was likely awarded too much on this element but clearly not too little in damages. Again, there is no error.

Finally, Peska Properties claims the trial court erred in considering any benefit to Peska Construction. While it would not have been erroneous, improper or reversible error for the trial court to do so, the court expressly stated in its bench ruling that it was not taking Peska Construction's involvement into account. TT 199.

## II. The Trial Court Did Not Abuse Its Discretion in Determining Neither Peska Properties Nor Northern Rental Was the Prevailing Party.

The Northern Rental-Peska Properties lease provides for attorney's fees to the "prevailing party" but does not define that term. Lease ¶ 30. The trial court ruled that neither party prevailed over the other. Peska Properties claims the trial court abused its discretion in denying it prevailing party status. Abuse of discretion "is discretion not justified by, and clearly against, reason and evidence." *Nelson v. Nelson Cattle Co.,* 513 N.W.2d 900, 906 (S.D.1994) (citing *Dacy v. Gors,* 471 N.W.2d 576, 580 (S.D.1991)). "The test is whether a judicial mind, in view of the law and circumstances, could

reasonably have reached the [same] conclusion." *Michlitsch v. Meyer*, 1999 S.D. 69, ¶ 10, 594 N.W.2d 731, 733.

This court has defined a "prevailing party" under SDCL § 15-17-37 to mean "the party in whose favor the decision or verdict is or should be rendered and judgment entered." *Hewitt v. Felderman*, 2013 S.D. 91, ¶ 28, 841 N.W.2d at 266 (quoting *Picardi v. Zimmiond*, 2005 S.D. 24, ¶ 16, 693 N.W.2d 656, 661). In *Crisman v. Determan Chiropractic, Inc.*, 2004 S.D. 103, ¶ 23, 687 N.W.2d at 513, this Court applied the same definition to an employment agreement providing for attorney's fees to the "prevailing party" that did not otherwise define that term. Since the lease between Northern Rental and Peska Properties does not define the term "prevailing party," this definition applies here as well. *Stern Oil Co., Inc. v. Brown*, 2018 S.D. 15, ¶ 47, 908 N.W.2d 144, 158.

Northern Rental continued to pay rent for years after it vacated and only disputed future rent at trial. The amount of damages was the only issue at trial. The trial court accepted Northern Rental's damage calculation. If anyone prevailed, it was Northern Rental. *Compare* App. 15-16 (Trial Court's Damage Calculation), App. 17-18 (Northern Rental's Proposed Damage Calculation), and App. 19-20 (Peska Properties' Proposed Damage Calculation).

Peska Properties relies upon *Stern Oil Co., Inc. v. Brown*, 2018 S.D. 15, 908 N.W.2d 144, to support its argument. However, this case is in no way like the *Stern Oil* case. *Stern Oil* was a second trial, this time to a jury, of a myriad of claims, including the breach of fuel supply contracts and damages. Unlike here, the defendant Brown denied it breached the contract. He also asserted a claim of fraud and numerous affirmative

defenses. Liability for damages was squarely at issue and before the jury, as was whether damages should be awarded and, if so, in what amount. In *Stern Oil*, the trial court based its rationale almost exclusively on the fact that in the second trial, the jury awarded damages in a lesser amount than the trial court had awarded in the first trial, a bench trial. This Court took issue with that logic, holding as follows:

> In making its prevailing party determination, the circuit court focused primarily on the difference in the damages awarded to Stern Oil in the first and second trials without addressing why the significant damage award did not meet the definition of prevailing party. Further, the court did not adequately consider a number of significant facts. First, the jury found in favor of Stern Oil on its sole claim: breach of contract. The jury also rejected all of Brown's contract formation defenses and fraud claims. On damages, the jury appears to have awarded substantially all the future damages that Stern Oil sought for the markup on gasoline and transportation of the gasoline over the remaining 8.5 years of the MFSAs by entering a verdict in excess of $240,000. The damages awarded for breach of contract were significant and were in no sense nominal. After the jury returned its verdict, the circuit court entered a judgment in favor of Stern Oil on the verdict. The award by the jury undoubtedly meets this Court's definition of a prevailing party as "the party in whose favor the decision or verdict is or should be rendered and judgment entered."

*Id*.

In the second trial in *Stern Oil*, the jury considered whether the contract was breached, whether any of the numerous contract formation defenses Brown asserted were applicable or proven, whether Brown met his burden on the fraud claim he asserted, and whether Stern Oil was damaged and, if so, in what amount. The jury returned a verdict for more than $240,000 in Stern Oil's favor. Stern Oil won on every issue. The jury awarded nearly one-quarter of a million dollars. Even so, the trial court held Stern Oil was not the prevailing party. The trial court

was reversed for a clear abuse of discretion under these unusual circumstances. The case currently before the court is almost nothing like *Stern Oil*.

*Stern Oil* is instructive in that it directs the court to consider the issues of the case and the result, as a whole, when determining whether a specific party is the prevailing one. In *Stern Oil*, this Court reversed because the trial court made "a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary and unreasonable," thereby abusing its discretion.

In the case currently before the Court, the trial court followed the law and, consistent with *Stern Oil* and many other cases, considered all facts, the scope of the issues before the court, and "the party in whose favor" decisions were made. Having just presided over the case, the trial court was in the best position to determine which party prevailed. *Crisman v. Determan Chiropractic, Inc.*, 2004 S.D. 103, ¶ 23, 687 N.W.2d 507, 513. In fact, if either party was designated as "prevailing," it should have been Northern Rental, as the trial court adopted, nearly in its entirety, its calculation on damages, the only contested issue before the court.

Another case which demonstrates that the contested issues and the result as a whole should be considered in determining "prevailing party" status is *Geraets v. Halter*, 1999 S.D. 11, ¶ 21, 588 N.W.2d 231, 235. In that case, this Court affirmed a prevailing party designation to a party that paid money damages to the other party, which had sued for specific performance.

The court reasoned as follows:

> The Geraets' original complaint sought the remedy of specific performance to enforce a purchase agreement. Only at the conclusion of trial did the Geraets make a motion for compensatory damages for costs

> incurred. Halters never objected to the payment of those costs, in fact, they offered to reimburse Geraets prior to this lawsuit. The payment of Geraets' costs was not a contested issue. Therefore, Halters were properly held to be the prevailing parties.

*Id*.

In the case before the court, Northern Rental did not contest liability. The only issue was the reasonable amount of damages to compensate Peska Properties. Northern Rental and Peska Properties both presented their calculations. The trial court rejected Peska Properties' method for lost rent and calculation and adopted Northern Rental's instead. In fact, it was Northern Rental that prevailed on the most important substantive issue in the case, not Peska Properties. Accordingly, the trial court had discretion to decide neither party prevailed over the other and to order both to pay their own costs and fees. There was no abuse of discretion, and Peska Properties' claim of error is without merit.

As a final consideration, if Peska Properties' argument as to who is a prevailing party is taken to its logical end, in any case where the sole issue is the amount of damages, the party seeking damages will always be the prevailing party if it recovers damages in any amount. Such a rule would be unjust and contrary to the spirit and letter of the law. A reasonable analysis, and a fair and just result, require the Court to consider all the issues and the result within the context of the particular case. That is what the trial court did, and its decision should be affirmed.

Dated this 7th day of May, 2021.

CUTLER LAW FIRM, LLP
Attorneys at Law

/s/ Kimberly R. Wassink

Kent R. Cutler
Kimberly R. Wassink
140 N. Phillips Ave., 4th Floor
Sioux Falls, SD 57104
(605) 335-4950
kentc@cutlerlawfirm.com
kimw@cutlerlawfirm.com
*Attorneys for Appellees*

## CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellees' Brief does not exceed the word limit set forth in SDCL § 15-26A-66, said Brief containing 8,919 words, exclusive of the table of contents, table of cases, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel.

/s/ Kimberly R. Wassink
Kimberly R. Wassink

## CERTIFICATE OF SERVICE

I, Kimberly R. Wassink, one of the attorneys for Appellees, do hereby certify that on this 7th day of May, 2021, I have electronically filed with the Clerk of the South Dakota Supreme Court the foregoing Appellees' Brief with notification of filing via email and U.S. mail, served upon the following:

Kasey L. Olivier
Ashley Miles Holtz
OLIVIER MILES HOLTZ, LLP
6210 S. Lyncrest Ave.
Sioux Falls, SD 57108
(605) 331-0609
kasey@omhlawfirm.com
ashley@omhlawfirm.com

and

Thomas J. Nicolson
NICHOLSON LAW OFFICE
4201 S. Minnesota Ave, Ste 113
Sioux Falls, SD 57105
(605) 335-7100
tom@nicholsonandnicholson.com

*Attorneys for the Appellant*

Dated this 7th day of May, 2021.

/s/ Kimberly R. Wassink
Kimberly R. Wassink

# APPENDIX
# TABLE OF CONTENTS

# APPENDIX TAB 1

| | |
|---|---|
| STATE OF SOUTH DAKOTA )<br>: ss<br>COUNTY OF MINNEHAHA ) | IN CIRCUIT COURT<br><br>SECOND JUDICIAL CIRCUIT |
| PESKA PROPERTIES, INC.,<br><br>Plaintiff,<br><br>vs.<br><br>NORTHERN RENTAL CORP., a South Dakota Corporation, and STEVE WILLIS, Individually,<br><br>Defendants. | 49CIV19-002729<br><br>**FINDINGS OF FACT AND CONCLUSIONS OF LAW** |

The above-entitled action having come before the Honorable Douglas E. Hoffman, Circuit Court Judge, and a trial having been held on Wednesday, July 29, 2020, at the Minnehaha County Courthouse, Sioux Falls, South Dakota; the Plaintiff having appeared through member and company representative, Gene Peska, along with its attorney, Kasey L. Olivier, Olivier Miles Holtz, LLP, Sioux Falls, South Dakota; the Defendants having appeared through shareholder, company representative, and individual defendant, Steve Willis, along with their attorney, Kent R. Cutler, Cutler Law Firm, LLP, Sioux Falls, South Dakota; the Court having considered the Court's pleadings on file, the parties' pre-trial briefing, and the exhibits received and witness testimony presented during trial; and the Court finding that good cause exists;

NOW, WHEREFORE, the Court enters the following Findings of Fact and Conclusions of Law:

## FINDINGS OF FACTS

1. Gene Peska ("Peska") is a South Dakota resident and the sole shareholder of Peska Properties, Inc. ("Properties") and Peska Construction, Inc. ("Construction").

2. Steve Willis ("Willis") is a South Dakota resident and a shareholder in Northern Rental Corp. ("Northern"), which owns and operates Aaron's in Sioux Falls.

3. Properties, Northern, and Willis entered into a Lease dated December 23, 2011 ("Lease"). Exhibit 2. The Lease was for 7,150 sq.ft. of retail space at 2409 East 10th Street, Sioux Falls, South Dakota ("Leased Premises") and was for an initial term of 10-years. Peska and Willis agree the Lease's 10-year term began June 1, 2012, after Construction delivered occupancy, and runs through May, 2022. Pursuant to Section 4.g. of the Lease, Properties performed an additional $50,000.00 of buildout in the Leased Premises at Northern's request, which Northern was paying as additional rent, together with 8% interest, amortized monthly over the initial 10-year term. Section 28 of the Lease outlining Properties' rights and remedies in the event of a Tenant default, restricts any such right or remedy from having "the effect of (1) accelerating the due date on which Tenant otherwise would be obligated to make any payment of Rent or Other Charges or (2) requiring Tenant to pay for any improvements or modifications that Landlord may make to the Premises in order to accommodate a replacement for Tenant with a non-retail use."

4. Northern opened and operated an Aaron's store in the Leased Premises.

5. In early 2017, Northern and Willis made the business decision to close the Aaron's located in the Leased Premises.

6. In May, 2018, Northern and Willis listed the Leased Premises for sub-lease with

realtor Jay Zea.

7. After several months without much interest in the Leased Premises, Peska suggested to Willis that he contact commercial realtor Bill Connelly ("Connelly") with NAI Sioux Falls to see if Connelly could be of assistance subleasing the Leased Premises.

8. Peska had a lengthy relationship and significant experience with Connelly, who had worked on at least one deal per year for Peska for the better part of 10 years.

9. On October 8, 2018, Willis listed the Leased Premises for sub-lease with Connelly.

10. In late April or early May 2019, Mills Aftermarket Accessories, Inc. d/b/a Radco ("Radco") began expressing interest in the Leased Premises.

11. Northern and Willis remained current on their Lease obligations to Properties from early 2017 to June 2019 even though it had closed its Aaron's store and the Leased Premises was sitting vacant.

12. On or about June 6, 2019, Radco submitted a Letter of Intent on the Leased Premises. Exhibit 6, pp. 81 through 83. The requested lease term in Radco's Letter of Intent exceeded Northern's remaining term on the Leased Premises, which required Peska to be involved in the negotiations with Radco.

13. On or about June 19, 2019, Properties responded to Radco's Letter of Intent. Properties offered to accept $9.50 psf for the remainder of Northern's 32-month lease term, increasing by 30% to $11.00 psf on the first month of the extended 55-month term with Properties. Exhibit 6, p. 78.

14. On or about June 22, 2019, Radco responded by offering to pay $8.43 psf on

Northern's remaining lease term and $10.50 psf during Properties' 55-month extended term. Exhibit 6, p. 76.

15. Between June 22, 2019 and June 28, 2019, additional negotiations lead Radco to offer $11.00 psf during Properties' 55-month extended term while staying put on $8.43 psf during Northern's remaining lease term.

16. Around this same time, Willis and Peska attempted to negotiate a resolution of Northern's remaining Lease obligations to Properties to no avail. Willis suggested Peska should get Properties' deal done with Radco following which Willis hoped he and Peska could reach an agreement on a resolution of Northern's remaining lease obligations.

17. Properties entered into a listing agreement for the Leased Premises with Connelly on July 1, 2019. Exhibit 6, p. 65-68.

18. Willis confirmed his suggestion that Peska should enter into a lease with Radco in writing on July 18, 2019. Exhibit 6, p. 94.

19. On July 19, 2019, Properties provided Willis a default notice along with a July 17, 2019 statement in the amount of $15,484.50 for the balance due under the Lease through July 2019. Exhibit 4, pp. 1 – 39.

20. Properties entered into a Letter of Intent with Radco on July 23, 2019. Exhibit 6, pp. 241-244.

21. Properties entered into a new 7-year (3 months free of rent and 84 months of rent) lease with Radco on August 1, 2019. The Radco lease provided for three months of free rent, 31 months of rent at $8.43 psf, and 53 months of rent at $11.00 psf. The Radco lease required

Properties to contribute $25,000 in leasehold improvements, which equates to $3.50 psf of the 7,150 sq. ft. Leased Premises. Exhibit 11.

22. Regarding the Radco lease, Connelly testified as follows:

a) Radco appears to be a financially strong tenant;

b) The new 7-year lease increases the value of Properties' mall;

c) The additional 55-month term is valuable to Properties in the form of base rent, triple net charges, and common area maintenance charges;

d) $15.00 tenant leasehold allowance is a fairly low buildout allowance;

e) $3.50 psf tenant leasehold allowance is a very low buildout allowance;

f) The fair market rental on the Leased Premises was between $9.00 psf to $10.50 psf;

g) $8.43 psf is below fair market rental for the Leased Premises and $11.00 psf is above fair market rental for the Leased Premises;

h) The blended rate of the rent payable during the entire 87-month term of the Radco lease falls within the fair market rental rate for the Leased Premises; and

i) There is no guarantee Properties would be able to re-let the Leased Premises at the termination of Northern's Lease term. In other words, without the Radco 55-month extension Properties may have been left with a vacant space in its mall at the expiration of Northern's Lease term.

23. Construction is the preferred contractor on Properties' buildouts. Construction did

both Northern's and Radco's buildout. Construction earns profit and overhead on its construction projects.

24. Construction did over $100,000 of buildout for Radco for which it would have earned overhead and profit.

25. Properties contributed $25,000 towards Radco's buildout. Exhibits 9 and 11.

26. The $25,000 Properties contributed towards Radco's buildout equates to $3.50 psf which is a low buildout contribution in consideration of the extended 55-month term.

27. Radco continues to use many of the floor coverings, counters, and warehouse shelving which were installed by Construction for Northern and paid for by Northern. Exhibits A-D. Northern and Willis admit they owe Properties the balance of $10,792.30 for Northern's original buildout plus interest of $1,363.44 as of August 1, 2020.

28. By letter dated September 6, 2019, Northern Rental sent Properties a check in the amount of $15,904.00 to satisfy Properties' July 17, 2019 statement. Northern's check actually over paid the amount due Properties by $419.50. Exhibit H and 14.

29. Neither Northern nor Willis have made any payments to Properties since September 6, 2019.

30. Northern and Willis have paid in full Connelly's/NAI's invoice for re-letting the Leased Premises during the remainder of Northern's term in the amount of $9,949.83. Exhibit 8. The amount due NAI from Northern and Willis was based on $8.43 psf rent during Northern's remaining term.

31. Properties has paid in full Connelly's/NAI's invoice for leasing the Leased Premises

for the additional 55-month term in the amount of $22,218.59. Exhibit 7. The amount due NAI from Properties was based on $11.00 psf rent during Radco's extended term.

32. Any Finding of Fact which is more properly designated as a Conclusion of Law shall be deemed to be a Conclusion of Law.

From the foregoing Findings of Fact the Court now makes the following:

**CONCLUSIONS OF LAW**

1. All Findings of Fact and Conclusions of Law stated on the record are incorporated herein by this reference.

2. This Court has personal jurisdiction of the parties and the subject matter of these proceedings.

3. Properties as the Plaintiff bears the burden of proving its claims by the greater convincing force of the evidence.

4. Properties, Northern, and Willis entered into an enforceable Lease and are liable to each other for the performance of the same.

5. Northern breached the Lease in July 2019.

6. At the time of Northern's breach of the Lease, the Lease had 34 months remaining on its term.

7. Radco's lease has a total term of 87 months (3 months free of rent plus 84 months of rent).

8. An action for a breach of contract is governed by SDCL § 21 chapters 1 and 2. These chapters lay out the basis for any claim of damages resulting from a breach of contract. In

addition to these statutes, the Supreme Court of South Dakota has developed a fairly robust jurisprudence concerning contract breaches. According to these cases, the fundamental rationale of a damage claim for a breach of contract is to put the injured party in the same position they would have been had no breach occurred. *Bad Wound v. Lakota Community Homes Inc*, 1999 S.D. 165, ¶ 9, 603 N.W.2d 723, 725 (citing *Ducheneaux v. Miller*, 488 N.W.2d 902, 915 (S.D. 1992)). However, to recover any damages the loss must "be clearly ascertainable in both its nature and origin." *McKie v. Huntley*, 2000 S.D. 160, ¶ 18, 620 N.W.2d 599, 603 (citing SDCL 21-2-1). Furthermore, the party claiming damages must show a "reasonable relationship" between the method used to calculate damages and the amount claimed. *FB & I Bldg. Prod. Inc. v. Superior Truss and Components, A Div. of Banks Lumber, Inc.*, 2007 S.D. 13, ¶ 20, 727 N.W.2d 474, 480 (citing *McKie*, 2000 S.D. 160, ¶ 18, 620 N.W.2d at 603). This amount claimed must also be reasonably certain and should not be speculative. *Olson v. Aldren*, 170 N.W.2d 891, 895 (S.D. 1969). Finally, the injured party cannot recover more in the claim then they would have realized with full performance of the contract, and the damages must be reasonable and not contrary to substantial justice. SDCL §21-1-5; SDCL §21-1-3.

9. In *Tri-State Refining and Inv Co, Inc. v. Apaloosa Co*, the Supreme Court of South Dakota held that the monthly lease payment amount may not be the proper measure of damages under SDCL § 21-2-1. *Tri-State*, 431 N.W.2d at 315. Rather, the Court stated that the trial court must examine the record to determine if the leasee suffered any harm proximately resulting from the breach of the lease. *Id.* This amount of detriment is the true measure of damages. *Id.* Even though *Tri-State* is based on a leasee being the injured party, it is still true that

the monthly rent payment value is not automatically the proper amount of damages to claim.

10. To recover damages, the loss must "be clearly ascertainable in both its nature and origin." *McKie*, 2000 S.D. 160, ¶ 18, 620 N.W.2d at 603 (citing SDCL § 21-2-1). There is a genuine question of fact as to the origin of the loss felt by Peska. In a normal lease breach case, undoubtedly the origin is the breaching party. Here, however, Northern continued to make periodic payments even when they were no longer using the property. It was only after the second lease was created with Radco that Northern completely ceased the lease payments. If Radco was willing to pay the fair market lease value of the property during the remaining years of Northern's lease—which they are willing to do after Northern's lease period ends—there would be no detriment.

11. In proving damages, "the party must also establish a 'reasonable relationship between the method used to calculate damages and the amount claimed." *FB & I Bldg. Prod. Inc.*, 2007 S.D. 13, ¶ 20, 727 N.W.2d at 480 (citing *McKie*, 2000 S.D. 160, ¶ 18, 620 N.W.2d at 603). The Supreme Court of South Dakota has stated that there is not an exact formula for calculating damages, rather the Court applies a reasonable certainty test for the proof required to establish a right to recover the claimed amount. *McKie*, 2000 S.D. 160, ¶ 18, 620 N.W.2d at 603. "Reasonable certainty requires proof of a rational basis for measuring loss, without allowing a jury to speculate." *Id.* In the case at bar, there is a genuine question as to whether the method used to calculate the loss has a rational basis. Claiming the full damages would force the jury to speculate as to the detriment actually realized by Peska. As previously stated, Peska is receiving a substantial windfall because the true detriment is not to the extent of damages

claimed.

12. "Damages must in all cases be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered." SDCL § 21-1-3. This fundamental principle controls all damages claims, regardless of the type of injury, the form of calculation, or amount of damages claimed. When the damages sought by the injured party are unconscionable or unreasonable on their face, they cannot be recovered. *Id.*

13. The Court finds as a matter of law that the most commercially reasonable manner to calculate the balance due under Northern's Lease is to use a blended rent rate during the entire 7-year term of Radco's lease with Properties. The blended rent rate during the entire 7-year term of the Radco lease is $9.70 psf. Using the blended rate, Northern and Willis are responsible for a deficiency in rent of $935.48 per month beginning in August 2019.

14. The blended rent rate is the most commercially reasonable manner to calculate the amounts due under Northern's Lease as the blended rent rate over the entire term of the 7-year Radco lease is $9.70 psf which falls within the range of fair market rent as testified to by Connelly.

15. To allow Properties to mitigate its damages during Northern's remaining term at $8.43 psf, with a 30% increase in rent to $11.00 psf the first month of the new 55-month extended term, is not commercially reasonable.

16. It's further not commercially reasonable for Properties to receive above fair market rent during the 55-month extended term and Northern and Willis to receive below fair market rent credit during the remaining 34 months on their Lease.

17. Properties, Construction, and Peska all benefited in many ways from the Radco lease as testified by Connelly.

18. Properties could not have entered into the Radco lease and secured the new 55-month extended term, had Northern not cooperated by consenting to and allowing Properties to enter into the 7-year Radco lease.

19. Northern and Willis admit they owe Properties the balance of $10,792.30 for Northern's original buildout plus interest of $1,363.44 as of August 1, 2020.

20. Section 28 b. (2) of the Lease provides Properties can pursue its legal rights and remedies in the event of Northern's default, but restricts any remedy from having the effect of "(2) requiring Tenant to pay for any improvements or modifications that Landlord may make to the Premises to accommodate a replacement Tenant with a non-retail use."

21. It is not commercially reasonable to require Northern and Willis to pay the entire $25,000 contribution to Radco's buildout as Radco is currently using floor coverings, counters, and warehouse shelving paid for by Northern, and Peska, Properties, and Construction all benefited for the reasons outlined by Connelly, particularly when Radco received an extended 55-month term.

22. The commercially reasonable manner for Northern and Properties to share the $25,000 contribution to Radco's buildout is in proportion to the remaining term on Northern's Lease compared to the total 87-month term of the Radco lease.

23. Northern and Willis shall be responsible for their proportionate share of the $25,000.00 Radco buildout (34 months/87 months equals 39.08%) which equates to $9,770.00.

33. The commission payable to NAI/Connelly should be adjusted between Properties

and Northern based on the blended rent rate of $9.70 psf, which requires Northern and Willis to reimburse Properties for $2,606.88 of the commission Properties paid to Connelly/NAI. There shall not be pre-judgment interest on the commission adjustment as the commission adjustment was unknown to Northern and Willis until after the trial in this matter.

24. The Court's calculation of the damages is attached as Exhibit 1 and incorporated herein by reference.

25. Northern and Willis, jointly and severally, owe Properties the following amounts as of the date of trial:

a. Past Due Rent Claim: $935.48 per month from August 2019 through July 2020 totaling $11,225.76, together with pre-judgment interest in the amount of $607.62, for the total of $11,833.38;

b. Northern Buildout Claim: $10,792.30, together with pre-judgment interest of $1,363.44, for a total of $12,155.74;

c. Radco Buildout Claim: $9,770.00, together with pre-judgment interest in the amount of $977.00, for a total of $10,747.00;

d. Commission Adjustment: $2,606.88, without prejudgment interest; and

e. Northern Credit for Overpayment on July 17, 2019 Invoice: ($419.50)

TOTAL AMOUNT CURRENTLY DUE AS DATE OF TRIAL: $36,923.50

26. Because payments are not allowed to be accelerated under Section 28.b.(1) of the Lease, Northern and Willis shall pay Properties the amount of $935.48 per month beginning in August 2020 through and including May, 2022.

Any Conclusion of Law which is more properly designated as a Finding of Fact shall be deemed to be a Finding of Fact.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 10 day of Sept, 2020.

BY THE COURT:

HON. DOUGLAS E. HOFFMAN
Circuit Court Judge

Angelia M. Gries

ATTEST:

By: _____
Clerk

UNIFIED JUDICIAL SYSTEM
STATE OF SOUTH DAKOTA

FILED
SEP 11 2020
Minnehaha County, S.D.
Clerk Circuit Court

Exhibit 1

## JUDGE HOFFMAN'S DAMAGE CALCULATION

### RENT CLAIM

**Northern Rentals Total Remaining Lease Payments**

Year 8: 10 months x $6,643.64 = $66,436.40
Year 9: 12 months x $6,709.08 = 80,508.96
Year 10: 12 months x $6,780.58 = $81,366.96
**Northern Rentals Remaining Rent Due $228,312.32**

**Calculation of Blended Rate**

$0.00 psf x 3 months = $0.00
$8.43 psf x 31 mos = $261.33 psf
$11.00 x 53 mos = $583.00 psf
**$844.33 psf / 87 mos = $9.70 psf blended rate**

**Blended Rate Calculation During Remaining Northern Rentals Term**

Annual Rent $9.70 x 7,150 = $69,355.00
Monthly Rent $69,355.00 / 12 = $5,779.58
**Mitigation Amount $5,779.58 x 34 months = $196,505.72**

**Total Lease Term Balance Due**

**$228,312.32 - $196,505.72 = $31,806.60**

**Monthly Balance Due**

**$31,806.60 / 34 months = $935.48 per month**

**Total Currently Due Plus 10% Prejudgment Interest (August 2019 through July 2020)**

**12 months (Aug 2019 through July 2020) x $935.48 = $11,225.76**
**10% Prejudgment Interest ($7.79 per month x 78 months) = $607.62**

**TOTAL RENT AND INTEREST DUE THROUGH JULY 2020**

**$11,225.76 + $607.62 = $11,833.38**

### FUTURE RENT CLAIM

**$935.48 each month August 2020 through May 2022**

BALANCE AND INTEREST ON BUILD-OUT—Exhibit 2, Page 49 Amortization Schedule

**$10,792.30 balance plus $1,363.44 interest = $12,155.74**

PRO-RATA SHARE OF $25,000 RADCO BUILDOUT

**$9,770.00**

**10% Prejudgment Interest (12 months) = $977.00**

**Total $10,747.00**

COMMISSION ADJUSTMENT BASED ON BLENDED RATE

Mitigation Amount $196,505.72 x 6% = $11,790.34

6.5% Sales Tax on $11,790.34 = $766.37

Total Due from Northern Rentals $12,556.71

Total Previously Paid by Northern Rentals = $9,949.83

**Balance Due by Northern Rentals = $2,606.88**

TOTAL AMOUNT DUE FROM NORTHERN RENTALS TO PESKA PROPERTIES

| | |
|---|---|
| **Rent and Interest through July 2020** | **$11,833.38** |
| **Buildout Balance and Interest** | **$12,155.74** |
| **Pro-Rate Share of Radco Buildout** | **$10,747.00** |
| **Commission Adjustment** | **$2,606.88** |
| **Credit for overpayment on outstanding invoice** | **($419.50)** |
| TOTAL CURRENTLY DUE | $36,923.50 |

**Plus $935.48 per month from August 2020 through May 2022**

# APPENDIX TAB 2

## NORTHERN RENTAL'S LEASE DAMAGE CALCULATION

**RADCO LEASE**

Remaining Northern Rentals Lease Term (Aug 2019 through March 2022)

3 free months of rent

$8.43 psf for remainding 29 months of Northern Rental's term

$11.00 psf for additional 55 month term after Northern Rental's term

$11.00 psf - $8.43 psf = $2.57 psf increase

$2.57 psf /$8.43 psf = **30.5% rent increase month** after Northern Rental's term expires

**BLENDED RATE**

$8.43 psf x 29 mos = $244.47 psf

$11.00 x 55 mos = $605.00 psf

$849.47 psf / 84 mos = **$10.11 psf blended rate**

**RENT CLAIM**

Northern Rental at $11.15 psf in year 8, $11.26 in year 9, and $11.38 in year 10 of Lease

Aug '19 through Oct '19 (full base rent of $6,643.54) = **$19,930.62**

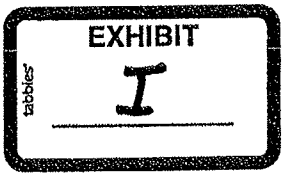
$1.10 psf rent average per year difference x 29 mos (2.4 years) x 7,150 sf = **$18,876.00**

**BALANCE ON BUILD-OUT**

**$10,792.30**—Being used by Radco

**OUTSTANDING INVOICE**

**$15,484.50**—Tendered $15,904.00 payment on September '19 (overpayment of $419.50)



**TOTAL DUE WITHOUT CONSIDERATION OF BENEFITS TO PESKA**

| | |
|---|---|
| Rent Claim | |
| Aug '19 – Oct '19 ($6,643.54 per month) | $19,930.62 |
| Nov '19 – Dec '21 (26 months) | $18,876.00 |
| Balance on Build-Out | $10,792.30—Being used by Radco |
| RE Commission (6%) | $8,346.29—Paid |
| Outstanding Invoice | $15,484.50—Tendered $15,904.00 |
| Credit for overpayment on outstanding invoice | ($419.50) |

**CURRENT TOTAL CLAIM (accelerated with Buildout Balance)** **$49,179.42**

**CURRENT TOTAL CLAIM (accelerated without Buildout Balance)** **$38,387.12**

**CURRENT TOTAL AMOUNT DUE (no acceleration)**

| | |
|---|---|
| Rent Claim (August '19 – Oct '19) | $19,930.62 |
| Rent Claim (Nov '19 – July '20)($650.90 per month) | $5,858.10 |
| Balance on Buildout | $10,792.30 |
| Credit for overpayment on outstanding invoice | ($419.50) |
| **TOTAL INCLUDING BUILDOUT BALANCE** | **$36,161.52** |
| **TOTAL EXCLUDING BUILDOUT BALANCE** | **$25,369.22** |
| **16 ADDITIONAL MONTHLY PAYMENTS** | **$650.90 per month** |

# APPENDIX TAB 3

# PLAINITFF'S DAMAGES

## RENT REMAINING ON WILLIS LEASE

8/1/2019-5/31/2022 (34 months remaining on lease)

| Lease Year | Calendar Year | Amt. Due Per Year | Amt. Due Per Month | Amount Due Per Sq. Ft. | Months Remaining under Lease | Amount Due Under Lease |
|---|---|---|---|---|---|---|
| 8 | 2019-2020 | $79,722.50 | $6,643.54 | $11.15 | 10 | $66,435.00 |
| 9 | 2020-2021 | $80,509.00 | $6,709.08 | $11.26 | 12 | $80,509.00 |
| 10 | 2021-2022 | $81,367.00 | $6,780.58 | $11.38 | 12 | $81,367.00 |

**Total Rent Remaining Under Willis, Northern, Peska Lease: $228,311.00**

## RADCO SUBLEASE RENT FOR REMAINING WILLIS/NORTHERN LEASE TERM

11/1/2019-5/31/2022 (31 months paying under Northern/Willis Lease)

| Lease Year | Calendar Year | Amt. Due Per Year | Amt. Due Per Month | Amount Due Per Sq. Ft. | Months Remaining under Lease | Amount Due Under Lease |
|---|---|---|---|---|---|---|
| 8 | 11/1/2020-10/31/2020 | $60,274.50 | $5,022.88 | $8.43 | 12 | $60,274.50 |
| 9 | 11/1/2020-11/1/2021 | $60,274.50 | $5,022.88 | $8.43 | 12 | $60,274.50 |
| 10 | 11/1/2021-5/31/2022 | $35,160.16 | $5,022.88 | $8.43 | 7 | $35,160.16 |

**Total Radco Sublease for Willis, Northern, Peska Lease Term: $155,709.16**

## BUILDOUT COSTS

Balance due for original buildout for Northern and Willis as of July 31, 2019: $10,792.30

Interest per Lease paragraph 4g for Northern/Willis Buildout at 8%: $1,363.44

Balance paid for Radco retail use buildout: $25,000.00

## DAMAGE CALCULATION

| | |
|---|---|
| Total Rent Remaining Under Willis, Northern, Peska Lease: | $228,311.00 |
| Balance due for original buildout for Northern and Willis as of July 31, 2019: | $10,792.30 |
| Interest per Lease paragraph 4g for Northern/Willis Buildout at 8%: | $1,363.44 |
| Balance paid for Radco retail use buildout: | $25,000.00 |
| **Total** | **$265,466.74** |
| Offset for Mitigation of Sublease Payments: | $155,709.16 |

# Total Damages: $109,757.58

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

---

**APPEAL NO. 29433**

---

PESKA PROPERTIES, INC., a South Dakota Corporation,

Plaintiff/Appellant,

v.

NORTHERN RENTAL CORP, a South Dakota Corporation, and
STEVE WILLIS.

Defendants/Appellees.

---

Appeal from the Second Judicial Circuit
Minnehaha County, South Dakota
The Honorable Douglas E. Hoffman, Circuit Court Judge

---

# APPELLANT'S REPLY BRIEF

---


OLIVIER MILES HOLTZ, LLP
Kasey L. Olivier
6210 S. Lyncrest Ave.
Sioux Falls, SD 57108

NICHOLSON LAW OFFICE
Thomas J. Nicholson
4201 S. Minnesota Ave.
Sioux Falls, SD 57105

*Attorneys for the Appellant*

CUTLER LAW FIRM, LLP
Kent R. Cutler
Kimberly Wassink
140 N. Phillips Ave.
Sioux Falls, SD 57101

*Attorneys for the Appellees*


---


Notice of Appeal filed: September 30, 2020

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**



**Statutes**

## REPLY ARGUMENT

### I. WILLIS AND NORTHERN RENTAL ARE UNABLE TO DEMONSTRATE THAT PESKA PROPERTIES FAILED TO MITIGATE DAMAGES.

#### A. Willis and Northern Rental are Unable to Articulate What Additional Reasonable Steps Peska Properties Should Have Taken and as a Result Have Failed to Meet Their Burden of Proof.

Willis and Northern Rental fail to articulate what further reasonable steps Peska Properties could have taken to lessen damages. Rather, they make the same flawed argument as the trial court: that Peska Properties should have unilaterally dictated that Radco pay the same amount for the entire seven-year lease term. This argument dismisses the elements of negotiation and meeting of the minds required to form a valid contract. It also creates an unobtainable standard, far exceeding the reasonable steps requirement for mitigation under South Dakota law. *See Arrowhead Ridge I, LLC v. Cold Stone Creamery, Inc.,* 2011 S.D. 38, ¶ 20, 800 N.W.2d 730, 736; *Mash v. Cutler,* 488 N.W.2d 642, 648 (S.D. 1992) (quoting *Renner Elevator Co. v. Schuer,* 367 N.W.2d 204, 207 (S.D. 1978); *Knowing v. Williams,* 75 S.D. 454, 67 N.W.2d 780, 783 (S.D. 1954).

Willis and Northern Rental's broad statements brush over the burden they thrust onto Peska Properties as a result of their breach. At the time Radco made its initial offer on the premises, Peska Properties was faced with a commercial space retrofitted to the Aaron's franchise, which had already sat vacant on the market for a year. During negotiations, while Peska Properties was working hard to increase Radco's initial offer from $5.89 to $8.43 per square foot, Willis and Northern Rental abruptly terminated their lease agreement. They then stopped making payments under their lease and construction loan forcing Peska Properties to accept the Radco lease agreement at $8.43 per square foot. With no other potential tenants and time of the essence, Willis and Northern

Rental's actions had the intended effect of limiting Peska Properties negotiating power with Radco. Had Peska approached Radco with a take it or leave it at $10 per square foot for the entire lease, it would have risked Radco walking away, thereby forfeiting all mitigation efforts.

Now, after strategically forcing Peska Properties into the lease at $8.43 per square foot, Willis and Northern Rental are arguing that Peska Properties did not properly mitigate damages. As failure to mitigate damages is an affirmative defense, the burden shifted to Willis and Northern Rental to prove what additional reasonable steps Peska Properties should have taken. *See Mash v. Cutler,* 488 N.W.2d 642, 648 (S.D. 1992) (quoting *Renner Elevator Co. v. Schuer,* 367 N.W.2d 204, 207 (S.D. 1978); *Knowing v. Williams,* 75 S.D. 454, 67 N.W.2d 780, 783 (S.D. 1954).

Willis and Northern Rental fail to identify any evidence of additional steps Peska Properties could have taken. Rather, they admit that their argument is based upon "the inference that the structure of Radco's lease enhanced Northern Rental's damages." (Appellee Brief at 25). Meaning they have no actual evidence to support this claim and meet their burden of proof.

Willis and Northern Rental also fail to address the trial judge's improper supplementation of its personal observations of bumper stickers and commercials to reach the conclusion that Radco would have paid additional rent and therefore Peska Properties failed to mitigate damages. Even if these observations were proper for the trial court to consider, they do not provide any evidence that Radco was actually able or willing to pay more for the remainder of the Willis and Northern Rental lease term. The

actual evidence at trial was that $8.43 was the most Radco was willing to pay and that the parties negotiated the best lease possible.

Importantly, Willis and Northern Rental fail to address the trial court's statements that it ultimately reached its conclusion based upon what "would have been recommended by a mediator if this had gone to mediation." A trial judge is not a mediator. By acting as a mediator, the trial court disregarded the very foundation of our judiciary: that the role of the "judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law." SDCL 16-2 (App. A). This is central to the American concept of justice and the rule of law. By placing itself in the capacity of a mediator, the trial court deprived the parties of having their dispute determined by South Dakota law, thereby undermining the public trust and confidence in our legal system.

**B. Bill Connelly did not Testify that the Radco Lease was Below Fair Market Value During the Willis and Northern Lease Term.**

When asked about the fair market value for the listed space, Connelly testified that the fair market value when it was listed was "probably, somewhere between 9.00 to 10.50 *at best."* (TT 129) (emphasis added). This does not mean that $8.43 was below fair market value, as he further testified that $8.43 for the remainder of the lease term was the best agreement they could reach with Radco. (TT 123). Additionally, Radco needed to pay $100,000 in construction costs to refit the premises to meet their business. This is a substantial cost to bear upfront, likely lessening their ability to pay additional rent during the initial years of the lease.

Importantly, neither the trial court, nor Willis and Northern Rental, could specifically articulate what additional step Peska Properties should have taken to increase

the rent amount. The trial court simply stated that Radco should have paid more during the initial term of the lease agreement and did not think the lease agreement was properly structured. However, there was no evidence to support the findings that Radco would have or could have agreed to any other terms. Therefore, renting the property to Radco for $8.43 per square foot was necessary to reduce the overall amount of damages.

**C. Free Rent was Only Extended to Radco During Construction When the Property was Under Construction.**

Radco was not allocated free rent during a usable time period on the property. Despite the possession date of the premises being noted as August 1, 2019, under the Radco lease, the actual agreement was not finalized until August 20, 2019, meaning that the first month of noted "free rent" had already passed before the actual agreement was signed. (C.R. 553-558). Further, the property needed more than $100,000 in construction alterations that were commenced and conducted during September and October 2019. During this time, Radco was unable to use the property other than for the purpose of construction. (C.R. 553-558).

Initial free rent during construction is common in commercial leases, and the same benefit was extended to Willis and Northern Rental at the outset of their lease term. (C.R. 181). While Willis and Northern Rental claim free rent is not mitigation, they failed to produce any evidence that Radco would have moved forward with the lease without the initial months of construction free, or that another tenant was willing to rent the space during this time. Therefore, granting these free months of rent was necessary to reduce the overall amount of damages Willis and Northern would owe.

## II. THE TRIAL COURT FAILED TO PROPERLY CALCULATE DAMAGES UNDER SOUTH DAKOTA LAW

### A. The Trial Court Improperly Relied Upon *Tri-State Refining* to Reject Calculating Damages Based Upon Lost Rent in Conclusion of Law No. 9

Willis and Northern Rental ignore Conclusion of Law No. 9, which they drafted, in claiming that in determining the proper method to calculate damages, the trial court did not solely rely upon *Tri-State Refining and Inv. Co., Inc. v. Appaloosa Co*, 431 N.W.2d 311 (S.D. 1998). Important to the trial court's calculation of damages was its rejection of the loss of full rent in favor of a compromised blended rate, which it set forth in Conclusion of Law No. 9 based upon its interpretation of *Tri-State Refining.* While the trial court acknowledged that the *Tri-State* holding was based upon a breach by the landlord, it ignored the reasoning the *Tri-State* Court gave for not awarding rent as a measure of damages, which was that the tenant did sustain a monetary loss of rent because of the landlord's breach. This is materially distinguishable from the present case where Peska Properties did lose rent payments as a result of Willis and Northern Rental's breach.

Despite Willis and Northern Rental's broad claim that this factual distinction "has no merit", it is extremely important. By denying Peska Properties the full measure of its damages, the trial court disregarded SDCL 21-2-1, which mandates that the measure of damages is "the amount which will compensate the party aggrieved for all of the detriment proximately cause thereby, or which, in the ordinary course of things, would be likely to result therefrom." The lost rental payments after the Radco lease are the detriment directly caused by Willis and Northern Rental's breach of contract. By denying these damages, the trial court failed to make the injured party whole, thereby committing

reversible error. *See Stern Oil Company, Inc. v. Brown,* 2018 S.D. 15, ¶ 16, 908 N.W.2d 144, 151.

**B. Willis and Northern Rental's Breach Caused Substantial Harm and Did Not Place Peska Properties in a Better Position Following the Breach.**

By breaching their lease agreement, Willis and Northern Rental caused $131,976.17 in damages, $74,319.73 of which was not awarded to Peska Properties under the trial court's decision. Despite these damages, Willis and Northern Rental boldly argue that they placed Peska Properties in a better position than before their breach because Radco is a longer-term tenant. This argument is misleading. Not only did Willis and Northern Rental devalue the property by allowing it to sit empty for a year prior to hiring a real estate agent to find a subtenant, Peska Properties was forced to step in when they were unable to obtain a single offer on the premises. Peska recommended Bill Connelly, a proven real estate agent, who was able to secure an offer from Radco. Willis and Northern Rental then decided they no longer wanted to sublease or participate in negotiations, forcing Peska Properties to hire Bill Connelly separately to negotiate a longer lease with Radco. Then, in the midst of negotiations with Radco, Willis and Northern Rental terminated their lease agreement, took an oppositional stance against Peska Properties, and stopped making lease and rental payments.

Even considering Willis and Northern Rental's wrongful conduct, Peska Properties worked diligently to secure the best least possible for the remainder of their lease term. This conferred the benefit upon Willis and Northern Rental rather than Peska Properties.

**C. Peska Properties properly objected to Willis and Northern Rental's Proposed Findings of Fact and Conclusions of Law.**

Willis and Northern Rental baselessly argue that Peska Properties did not object to the trial court's Findings of Fact and Conclusions of Law. Peska Properties filed objections to the Findings of Fact and Conclusions of Law submitted by Willis and Northern Rental in accordance with the schedule set forth by the trial court. (C.R. 627) Following this submission, the trial court signed Willis and Northern Rental's Findings of Fact and Conclusions of Law verbatim. In its objections, Peska Properties specifically objected to Findings of Fact Nos 1, 3, 7, 8, 11, 12, 13, 14, 15, 16, 18, 19, 21, 22, 23, 24, 26, 27, 28 and Conclusions of Law Nos 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, 23, 33, 24, 25, 26. Further, Peska Properties specifically objected to Willis and Northern Rental's proposed damage calculation labeled as "Judge Hoffman's Damage Calculation". Peska then also provided its own findings of fact and conclusions of law. The trial court then signed the Findings of Fact and Conclusions of Law submitted by Willis and Northern Rental verbatim. Peska Properties met its burden to object to the Proposed Findings of Fact and Conclusions of law.

Under South Dakota law, "[i]f a party does not present proposed findings of fact, or by some other motion, objection, or exception indicate his disagreement with the trial court's findings, the sufficiency of the evidence to support the findings may not be questioned on appeal." *See Mash v. Cutler,* 488 N.W.2d 642, 648-49 (S.D. 1992). As Peska Properties filed objections to the Findings of Fact and Conclusions of Law signed by the trial court, as well as proposed its own Findings of Fact and Conclusions of Law, it met its burden to preserve this issue for appeal.

## III. ACCORDING TO LONG-STANDING SOUTH DAKOTA LAW, PESKA PROPERTIES WAS THE PREVAILING PARTY AND SHOULD BE AWARDED ATTORNEY'S FEES

Willis and Northern Rental's argument against attorney's fees fails for three reasons. First, they misrepresent the damage calculation they presented at trial as compared to the judgment actually entered by the court. *See* Appellee brief at 35 (stating "the trial court adopted, nearly in its entirety, its calculation on damages, the only contested issue before the court.") At trial, Willis and Northern Rental submitted a damage calculation totaling $46,575.92 as follows:

| | |
|---|---|
| Rent Claim (August '19-October '19) | $19,930.62 |
| Rent Claim (Nov '19 – July '20) ($650.90 per month) | $5,858.10 |
| Balance on buildout | $10,792.30 |
| Credit for overpayment on outstanding invoice | (419.50) |
| **TOTAL INCLUDING BUILDOUT BALANCE** | **$36,161.52** |
| **TOTAL EXCLUDING BUILDOUT BALANCE** | **$25,369.22** |
| **16 ADDITIONAL MONTHLY PAYMENTS** | **$650.90** |

(C.R. 609) The trial court however, awarded $57,554.06, which included a higher monthly rental payment for August 2020 through May 2022, part of Radco's buildout costs and partial realtor fees. The trial court awarded $10,978.14 more than the amount presented by Willis and Northern Rental. (C.R. 686) Therefore, the trial court did not adopt "nearly in its entirety" Willis and Northern Rental's calculation on damages.

Second, Willis and Northern Rental's own actions following the breach, and prior to trial, undermine their argument against attorney's fees. At the time of the breach, Willis and Northern Rental had an outstanding balance of $15,484.50 for unpaid utilities. Knowing this amount was due, they paid this to Peska Properties prior to trial. However,

they also knew that they owed a balance on their own buildout loan in the amount of $10,792.30, which they did not pay. TT 162. As a result, Peska Properties was forced to bring suit to recover the amount due for Willis and Northern Rental's buildout loan under the lease agreement, which provides:

> In any action, suit or proceeding to enforce, defend or interpret the rights of either Landlord or Tenant under the terms of this Lease or to collect any amounts due Landlord or Tenant hereunder, the prevailing party, pursuant to a final order of a court having jurisdiction over said matter as to which applicable periods within which to appeal have elapsed, shall be entitled to recover all reasonable costs and expenses incurred by said prevailing party in enforcing, defending or interpreting its rights hereunder, including without limitation all collector and court costs, and reasonable attorney's fees, whether incurred our of court, at trial, on appeal, or in any bankruptcy proceeding.

(C.R. 193) Not only did Peska Properties have to initiate litigation and proceed to trial to collect past due rent, future due rent, new build out costs and realtor fees, but it also had to litigate the buildout loan.

Finally, Willis and Northern Rental misconstrue the standard for determining the prevailing party, which they base upon whose method of calculation was accepted by the trial court. While the trial court compromised damages using a blended rate, it still entered an award of $57,554.06 in Peska Properties favor, which was $10,978.14 more than submitted by Willis and Northern Rental. Under South Dakota law, this makes Peska Properties the prevailing party. *See Stern Oil, Inc. v. Brown,* 2018 S.D. 15, ¶49, 908 N.W.2d 144, 158 (holding that "the party in whose favor the decision or is or should be rendered and judgment entered is the primary consideration in determining the prevailing party.").

Further, Willis and Northern Rental argue they did not contest liability, which is not entirely accurate. (Appellee brief at 36) While Willis and Northern Rental admitted they breached the lease agreement, they contested being liable for the cost of Radco's buildout. (C.R. 609) As the trial court found that they were partially liable for these damages, Peska Properties also prevailed on this issue.

As the prevailing party at trial and having collected amounts due under the language of the lease agreement, the trial court wrongfully denied Peska Properties its attorney's fees and costs.

## CONCLUSION

Peska Properties proved that it took every reasonable step to mitigate damages. Inferences and assumptions based upon the structure of the lease agreement do not overcome the undisputed evidence that the parties negotiated the best lease possible.

The trial court committed clear error in deviating from South Dakota law on the proper method of calculating damages. Not even Willis and Northern Rental could provide justification for the trial court's position that it was sitting as a mediator rather than as arbiter of the facts and law. Such compromise fails to properly apply South Dakota law, is clearly erroneous and should be reversed.

Dated this 28th day of May, 2021.

*/s/ Kasey L. Olivier*

OLIVIER MILES HOLTZ, LLP
Kasey L. Olivier (kasey@omhlawfirm.com)
Ashley Miles Holtz (ashley@omhlawfirm.com)
6210 S. Lyncrest Ave.
Sioux Falls, SD 57108
(605) 331-0609

-and-

Thomas J. Nicholson
NICHOLSON LAW OFFICE
4201 S. Minnesota Ave, Ste 113
Sioux Falls, SD 57105
(605) 335-7100

*Attorneys for the Appellant*

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Appellant's Reply Brief was e-mailed and mailed by first class mail, postage prepaid to:

CUTLER LAW FIRM, LLP
Kent R. Cutler
Kimberly Wassink
140 N. Phillips Ave.
Sioux Falls, SD 57101
(605) 335-4951

*Attorneys for the Appellee*

Dated this 28th day of May, 2021.

*/s/ Kasey L. Olivier*
Kasey L. Olivier

## CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), I hereby certify that this Reply Brief complies with the requirements set forth in the South Dakota Codified Laws. This Reply Brief was prepared using Microsoft Word and contains 2,829 words, or ten pages, from the Reply Argument through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

Dated this 28th day of May, 2021.

*/s/ Kasey L. Olivier*

OLIVIER MILES HOLTZ, LLP
Kasey L. Olivier (kasey@omhlawfirm.com)
Ashley Miles Holtz (ashley@omhlawfirm.com)
6210 S. Lyncrest Ave.
Sioux Falls, SD 57108
(605) 331-0609