IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

No. 30891

VERVENT, INC.

Defendant/Appellant,

vs.

LJP CONSULTING LLC

Plaintiff/Appellee.

Appeal from the Circuit Court
Second Judicial Circuit
Minnehaha County, South Dakota

The Honorable Douglas P. Barnett, Presiding Judge

PRINCIPAL BRIEF OF APPELLANT VERVENT, INC.

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PRELIMINARY STATEMENT

This case involves a breach of contract dispute arising from a one-page Referral Agreement with no defined term of duration beyond ties to an underlying contract associated with referred business. The Circuit Court nonetheless allowed this simple document to have an unlimited shelf-life through manifest legal errors occurring before, during and after trial. As a result, Plaintiff LJP Consulting LLC ("LJP") was wrongfully allowed to balloon a properly terminated agreement into a $1.2 million judgment. In addition, the Circuit Court, under the guise of injunctive relief, improperly authorized prospective monetary payments that are to continue indefinitely per the judgment. In other words, Defendant Vervent, Inc. (Vervent") which was never a party to the Referral Agreement, received no perceptible benefit from that agreement, and properly terminated the agreement under South Dakota law is now saddled with an obligation that will go on forever. The Circuit Court's decisions must be reversed.

Citations to the settled record of the Clerk's Record Index will be denoted "R-__." Citations to the Motions Hearing Transcript on July 9, 2024 will be denoted "MHT-___." Citations to the Jury Trial Transcript will be denoted "TT1-___," "TT2-___," or "TT3-___." Citations to Exhibits offered and admitted at the trial will be denoted "Ex. ___." The letter associated with the referral services at issue in this case will be referred to as the "Referral Agreement".

JURISDICTIONAL STATEMENT

After a three-day jury trial, the jury returned a verdict in favor of LJP Consulting LLC ("LJP"). The Special Verdict was filed on August 12, 2024. (R-1754). On August 14, 2024, LJP moved for a permanent injunction pursuant to SDCL § 21-8-14(2), (3) and SDCL § 21-9-1, -4, on its request for specific performance and for the entry of final judgment. (R-1773). On August 23, 2024, Vervent filed a Motion for Remittitur. (R-1793). On October 7, 2024, the Circuit Court entered an Order Denying Vervent's Motion for Remittitur and a separate Order Granting LJP's Application for Taxation of Costs, Motion for a Permanent Injunction, and entered Final Judgment. (R-1906, R-1908). Pursuant to SDCL § 15-6-50(b), Vervent filed a Renewed Motion for Judgment as a Matter of Law on October 17, 2024, which was denied by the Circuit Court on November 4, 2024. (R-1927, R-1945). Notice of entry of the Court's Order denying Vervent's Renewed Motion for Judgment as a Matter of Law was served on November 4, 2024, thereby commencing the deadline within which to appeal pursuant to SDCL § 15-26A-6. (R-1947). Vervent timely filed its Notice of Appeal on November 7, 2024. (R-1953).

REQUEST FOR ORAL ARGUMENT

Vervent respectfully requests the privilege of being heard on oral argument on all of the issues raised in this appeal.

STATEMENT OF THE ISSUES

I. Is the Referral Agreement terminable at will by either party with respect to past referrals if the document contains no term of duration or termination provision?

The Circuit Court denied Vervent's motion to dismiss on this question and subsequently granted LJP's second motion for summary judgment in part, holding that the general rule that a contract without a termination provision is terminable at will does not apply to the Referral Agreement and therefore Vervent breached the Referral Agreement in terminating it.

Authority: SDCL § 15-6-12(b)(5)
SDCL § 15-6-56
Martin v. Equitable Life Assurance Soc., 553 F.2d 573 (8th Cir. 1977)
Singpiel v. Morris, 1998 S.D. 86, 582 N.W.2d 715
Warner-Lambert Pharmaceutical Co. v. John J. Reynolds, Inc., 178 F. Supp. 655 (S.D.N.Y. 1959), *aff'd* 280 F.2d 197 (2d Cir. 1960)

II. As a matter of law, can LJP continue to recover damages under the Referral Agreement in the absence of evidence that Vervent renewed a Client contractual relationship with a referred client after March 31, 2022?

The Circuit Court denied Vervent's motion for judgment as a matter law during trial, motion for remittitur, and renewed motion for judgment as a matter of law after trial, holding that LJP presented sufficient evidence that damages after March 31, 2022 were available under the Referral Agreement, even though Vervent acquired the client, First Equity, and the underlying contractual relationship that triggered LJP's right to a referral fee had not been renewed.

Authority: SDCL § 15-6-50
Williams v. Brinkman, 2016 S.D. 50, 883 N.W.2d 74
J. Clancy, Inc. v. Khan Comfort, LLC, 2021 S.D. 9, 955 N.W.2d 382

III. Was a permanent injunction for future monetary damages statutorily authorized as a matter of law or did the Circuit Court abuse its discretion in awarding prospective monetary damages through a post-trial permanent injunction when LJP failed to ask the jury to consider awarding future damages?

After trial, the Circuit Court granted LJP's request for a permanent injunction,

which ordered Vervent to continue paying LJP a referral fee for so long as Vervent is servicing any active account associated with the First Equity name.

Authority: SDCL § 21-8-14
Williams v. Brinkman, 2016 S.D. 50, 883 N.W.2d 74
McDowell v. Sapienza, 906 N.W.2d 399, 407 (S.D. 2018)

STATEMENT OF THE CASE

LJP filed the Complaint on April 28, 2021, and an Amended Complaint on December 6, 2021. The pleadings request a declaratory judgment that LJP is entitled to a continued 3% referral fee under the Referral Agreement that Vervent's predecessor executed with LJP. In addition, LJP requested past damages, and future damages for as long as the referred client account (First Equity) generates revenue for Vervent, conflating a contract with a referred business (which no longer exists) with the associated product. (R-197). Vervent moved to dismiss the Complaint, contending that the Referral Agreement was terminable at will because it contained no definite term. (R-17, R-19). The Circuit Court denied the motion by Letter Decision on December 3, 2021, holding that the Referral Agreement could be terminated as to future referrals, but was not terminable at will as to past referrals. (R-193). LJP filed a Motion for Partial Summary Judgment (Second) on May 3, 2022. (R-255). The Circuit Court issued a Letter Decision on August 24, 2023, concluding that Vervent acquired Total Card's obligations under the Referral Agreement with LJP. (R-1024). The Circuit Court further concluded that Vervent is liable to continue paying LJP the 3% referral fee under the Referral Agreement and its unilateral termination of the Referral Agreement and failure to pay was a breach, but damages were an issue of fact because the Referral Agreement was ambiguous. (*Id.*).

Prior to trial, the Circuit Court granted LJP's second motion in limine, which prohibited Vervent from introducing any evidence or argument to the jury about Vervent's 2022 acquisition of First Equity, the client that LJP had originally referred to Vervent's predecessor. (R-1176). Damages were tried to a Minnehaha County jury in August 2024. At the close of LJP's case-in-chief, the Circuit Court denied Vervent's motion for judgment as a matter of law, but granted Vervent's motion to reconsider its prior ruling on LJP's second motion in limine, which permitted Vervent to introduce evidence of the complicated 2022 acquisition of First Equity and relevant servicing contracts pre- and post-acquisition. (R-1229, R-1232, R-1241, R-1243, TT2-108:1-109:19).

The jury returned a verdict in favor of LJP by special verdict, awarding LJP $1,000,064.75 in damages. (R-1754). Following additional post-trial motions and briefing under Rule 50 and remittitur related to Vervent's 2022 acquisition of First Equity, the Circuit Court entered final judgment consistent with the jury's award, plus costs and pre-judgment interest, as well as a permanent injunction in favor of LJP that ordered Vervent to pay LJP 3% referral fee on all First Equity accounts that Vervent services for as long as Vervent services any active First Equity account. (R-1908). This final ruling on permanent injunctive relief resulted in a final post-trial legal error, thereby completing the trifecta of pretrial, in trial, and post-trial error.

STATEMENT OF FACTS

While the underlying history to this case has a lot of moving parts, the dispute itself involves relatively straightforward business dealings. At heart, LJP entered into a

Referral Agreement whereby LJP referred business to Total Card, Inc ("TCI"). TCI paid LJP a fee for sourcing the referral after it entered into a contract with the referred organization. Vervent later acquired TCI and terminated the Referral Agreement because it lacked a definitive term and the Referral Agreement was not clear as to what business revenue this document covered anyway. Shortly thereafter, Vervent acquired the referred organization, as well. As a result the business that LJP referred in 2012 no longer exists and the requirement under the Referral Agreement of a referred contract likewise cannot be met. In the absence of an underlying contract associated with referred business, the Circuit Court nonetheless (1) granted a partial motion for summary judgment prior to trial, (2) initially precluded Vervent from presenting evidence of the lack of an underlying referral contract during trial, and (3) denied Vervent's request during and after trial to enter judgment as a matter of law due to the lack of an underlying referral contract. As a result, Vervent is left with a judgment that includes monetary injunctive relief with no end date, all from a simple referral agreement with no defined term and in the absence of a contract with the referred business. The facts that take us on this remarkable journey from a simple business referral to a judgment that goes on forever are as follows.

A. Total Card and LJP execute a Referral Agreement

TCI was a local credit card company that provided call center services and support for companies seeking to build and issue credit card programs. (TT1-28:1-6, TT1-137:1-11, TT2-44:4-16). TCI also offered collection services. (TT2-45:21-51:10). LJP, owned by Alonzo Primus, is a scatter-shot business that provides tax advice,

loan product consulting, legal compliance services and business referral services, among other things. (TT1-27:5-21).

In 2011, LJP and TCI explored a business relationship in which LJP would refer call center business to TCI in exchange for a referral fee arising from the contractual review associated with the referred business. (R-1024). Following negotiations, LJP and TCI executed a written Referral Agreement in 2012. (*Id.*, Ex. 9). The Referral Agreement provided that "[f]or each new business opportunity referred to TCI; LJP Consulting LLC will be entitled to a referral fee equal to a percentage of the amount billed to a referral client for call center services provided by TCI." (Ex. 9). The Referral Agreement further provided:

> If TCI wishes to purse [sic] the opportunity and it is not a prospective client that TCI is already engage [sic] with; a broker fee will be established based on the actual revenue for call center support services provided by TCI. The referral fee will be paid for the initial term of the servicing agreement (the rate established will be 3% for each client engagement/referral). If the TCI/Client contractual relationship is renewed, an ongoing referral fee of 3% will continue to be paid to LJP Consulting LLC.

(*Id.*) (emphasis supplied). Notably, call center services are not defined nor is the billing methodology. Nonetheless, an underlying contract with referred business is a necessary pre-condition to LJP receiving a fee.

B. TCI's Contractual Relationship with First Equity

In 2014, LJP referred First Equity Card Corporation, a company that offered subprime consumer credit cards, to TCI. (TT1-52:1-7). TCI entered into a servicing agreement with First Equity on August 26, 2014, that included, among other services, call center support. (TT1-62:14-20, Ex. M-N). The 2014 Servicing Agreement (Ex.

M) was executed by TCI, a special purpose entity created by Total Card, Inc., and Progress One Financial, LLC, a wholly-owned subsidiary of First Equity Card Corporation. (TT2-191:1-24, R-1024).[1]

Pursuant to Section 3.03 of the 2014 Servicing Agreement, Total Card Solutions, LLC and Progress One Financial, LLC also executed a Supplement to Servicing Agreement ("Supplement"). (Ex. N). Progress One Financial, LLC assigned all of its right, title, and interest in the receivables purchased under the 2014 Receivables Agreement to Progress Funding, LLC in the Supplement. (Ex. M at Sec. 9.05, Ex. N). Progress Funding, LLC was a wholly-owned subsidiary of Progress One Financial, LLC. (*See* Ex. DD, R-1344). Thus, Progress Funding, LLC ultimately owned the First Equity accounts receivables. (TT2-209:19-23).

The 2014 Servicing Agreement and Supplement outlined the First Equity credit card program that TCI serviced for First Equity, providing an initial term of five years that then automatically renewed for additional one-year periods. (Ex. M at Sec. 6.01, TT2-193:19-194:8). The initial term ended in August 2019. LJP did not introduce the 2014 Receivables Agreement or Supplement to the jury during its case-

[1] There is no dispute that First Equity Card Corporation executed the servicing agreements with TCI through the wholly-owned subsidiary, Progress One Financial. (*See* R-1025, R-286, TT2-192:3-18). The parties further agree that the 2014 Receivables Agreement (Ex. M) and Supplement (Ex. N) are the underlying service agreement between TCI and First Equity that triggered LJP's 3% referral fee. (*See* R-1025, R-286 ¶¶ 41-57, R-1930). First Equity Card Corporation (the parent) was required to guarantee Progress One's payment and performance to TCI. (R-287).

in-chief at trial, even though payment under the Referral Agreement requires the existence of an underlying contract with the referred entity.

Despite initial protest from ownership as to whether LJP referred First Equity, TCI paid LJP a 3% referral fee, pursuant to the Referral Agreement, from November 2014 until October 2020. (TT1-72:19-75:22, Ex. 34-35). During this period, TCI paid LJP more than $1.2 million in referral fees. (Ex. 35, TT1-92:19-22).

C. Vervent Acquires TCI in 2020

Vervent is a credit and finance company that provides various credit and loan services, programs, and call center support services. (TT2-115:2-119:17). Vervent was interested in the credit card industry, so in November 2020, Vervent acquired TCI. (TT1-78:14-15, TT2-120:20-121:11). To facilitate the acquisition, Vervent created the special purpose entity Phoenix Card Group LLC to be a new funding source to purchase credit card receivables that were managed internally by TCI (not First Equity receivables). (TT2-194:9-24). Phoenix Card Group LLC and Vervent executed a new servicing agreement, dated November 30, 2020, for Vervent to service the credit card receivables purchased and owned by Phoenix Card Group, LLC. (Ex. FF).

D. Vervent Terminates the LJP Referral Agreement

After acquiring TCI, Vervent paid LJP the 3% referral fee on the First Equity accounts for November and December 2020, using the same $5.25 per account calculation that TCI had previously used. (TT1-78:16-19). However, Vervent realized that TCI vastly overpaid LJP based on the full $5.25 servicing bundle that TCI had provided to First Equity, which included both call center support services and

collections. (TT2-123:9-125:7). Thereafter, in consultation with external and internal counsel, Vervent terminated the Referral Agreement in January 2021. (Ex. 37, TT1-80:19-81:4). LJP filed this action on April 28, 2021. (R-2).

E. Vervent Acquires First Equity in 2022

On March 31, 2022, Vervent acquired First Equity Card Corporation, which is the company that LJP originally referred to TCI. (TT2-128:5-19, Ex. EE). Vervent's acquisition formally occurred through its affiliate and special purpose entity, Phoenix Card Group LLC. (TT2-130:2-3, TT2-150:5-14, TT2-194:9-195:6). Vervent's subsidiary, Phoenix Card Group LLC, purchased the First Equity credit card receivables from Progress Funding LLC—the First Equity entity that owned the receivables under the 2014 Servicing Agreement and Supplement. (TT2-194:17-195:6, Ex. M, Ex. N). While Vervent, Inc. and Phoenix Card Group LLC are separate companies, from global enterprise, the entities "all fall[] into the same bucket." (TT2-150:5-8). As Joe Noe, Vervent's President, testified at trial, "Phoenix Card Group acquired the portfolio receivables. Right? That's what Phoenix Card Group acquired. Vervent acquired the company that is First Equity Card Corporation." (TT2-200:11-14).

As of March 31, 2022, First Equity Card Corporation no longer exists as a going concern and certainly not as a referred business with which Vervent conducts business. (TT2-128:20-22). In other words, First Equity is no longer a "client" of Vervent's in a practical sense or in a legal sense according to the terms of the Referral

Agreement. (*Id.*, TT2-198:20-199:8).[2] Indeed, no First Equity assets are serviced by Vervent pursuant to the 2014 Servicing Agreement and Supplement because Vervent's special purpose vehicle (Phoenix Card Group LLC) purchased those assets from Progress Funding LLC. (TT2-195:22-196:6). Instead, as of March 31, 2022, Vervent now services the First Equity card program for Phoenix Card Group LLC through their intracompany servicing agreement, dated November 30, 2020. (*Id.*, Ex. FF, TT2-130:14-132:4).

Put simply, Vervent now services the First Equity card program for itself and no longer receives any perceptible value for a referred business Vervent paid to acquire. (TT2-132:1-4). While Vervent continues to track its "intracompany" servicing of the First Equity program, this is simply to keep track of costs, profits, and revenue associated with the First Equity card for analysis against other enterprise-wide endeavors. (TT2-130:19-23).

F. Pre-Trial Rulings

When LJP filed its Second Motion for Summary Judgment on May 3, 2022, it argued that Vervent's termination of the Referral Agreement in January 2021 was a breach of contract; but expressly limited its request for damages to the time frame of January 2021 through March 2022 when Vervent acquired First Equity. (R-255, R-722). In its August 24, 2023 Letter Decision, the Court concluded that following its acquisition of TCI in 2020, Vervent assumed TCI's rights under the First Equity

[2] For a visual summary of the corporate mergers and acquisitions involving Vervent and TCI in 2020, and Vervent and First Equity in 2022, see Ex. II. (TT2-200:19-202:1).

servicing agreement and the obligations under the LJP Referral Agreement. (R-1029). The Circuit Court also held that Vervent could only terminate the Referral Agreement to subsequent referrals and had to continue paying LJP for the First Equity referral with no analysis as to the status of the referred contract. (*Id.*). The Court, however, concluded that the phrase "call center support services" in the Referral Agreement was ambiguous. (*Id.*). Vervent's 2022 acquisition of First Equity was not before the Court or analyzed in the 2023 Letter Decision, nor did the Circuit Court address a time frame associated with damages, despite LJP limiting its motion to damages arising prior to March 31, 2022.

G. Pre-Trial Motion in Limine

Despite limiting its requested summary judgment relief to March of 2022, LJP filed a pre-trial motion in limine seeking to prohibit Vervent from arguing that it was not liable for damages owed to LJP after Vervent acquired First Equity in March 2022. (R-1060). Vervent responded that, post-acquisition of First Equity, Vervent generates revenue from itself and there is no longer an underlying contract that would entitle LJP to an ongoing referral fee. (R-1065). In addition, Vervent noted that the Circuit Court made no express findings on the availability of damages after Vervent's acquisition of First Equity, leaving it an issue for trial. (MHT-31-32). It bears repeating that LJP itself had limited its request for damages to Judge Sogn at summary judgment to the date that Vervent acquired First Equity, rendering LJP's motion in limine before trial to Judge Barnett all the more disingenuous. The Circuit Court nevertheless granted LJP's second motion in limine. (MHT-38-39, R-1176).

H. Trial and Post-Trial Motions

As a result of the forgoing pre-trial rulings, the Circuit Court instructed the jury that Vervent had breached the Referral Agreement as a matter of law, leaving the issue of damages due from Vervent to LJP as the only issue for the jury to decide. LJP contended that it was entitled to $1,100,458.84 in damages from January 2021 through trial, which LJP calculated based on the way that TCI had historically paid LJP for "call center services." (TT1-93:4-9). Vervent, on the other hand, does not provide call center services in the same way as TCI and therefore calculated damages owed to LJP from January 2021 to the date of trial based on its industry-backed understanding of "call center services,"—a number significantly less than TCI's calculation. (TT2-53:21-54:17, TT2-71:12-72:2, TT2-162:4-163:9, Ex. UU). Under Vervent's calculation, LJP would have been entitled to no more than $130,434.15, without factoring in overpayment. (*Id.*). Paul Simon, Total Card's national sales director who secured the Referral Agreement with LJP in 2012, testified at trial that LJP should have only been paid 3% of $2.25 for the call center support services that TCI provided to First Equity. (TT2-53:21-54:17, TT2-71:12-72:2).

LJP rested its case-in-chief without introducing any evidence of an underlying contract between TCI/Vervent and First Equity, even though elemental to receipt of a referral fee. It did not introduce the 2014 Receivables Agreement (Ex. M) or Supplement (Ex. N) to the jury, even though those were the only underlying contracts that objectively could have triggered an obligation to pay a referral fee to LJP. Vervent moved for judgment as a matter of law under SDCL § 15-6-50(a),

contending that LJP failed to show that it is entitled to damages because LJP failed to present evidence that an underlying contract was renewed, or existed, to trigger a continued referral fee to LJP. (TT2-92, R-1229, R-1232). The Circuit Court denied the motion. (TT2-108).

Vervent alternatively moved the Circuit Court to reconsider its ruling on LJP's motion in limine that precluded evidence of the March 2022 First Equity acquisition. (TT2-86, R-1241, R-1243). This time, the Circuit Court reversed course, ruling that LJP's motion in limine was wrongfully granted, which allowed Vervent to introduce evidence about Vervent's acquisition of First Equity, albeit halfway through trial. (*Id.*).

LJP did not introduce any rebuttal evidence. The jury returned a verdict in favor of LJP by special verdict, awarding LJP $1,000,064.75 in damages. (R-1754). The jury's verdict awarded LJP 3% of $5.25 per active accounts on the Vervent invoices to First Equity from January 2021 through June 2024.

Following trial, LJP filed a motion for a permanent injunction that sought to compel Vervent to pay LJP 3% of $5.25 for each First Equity account that Vervent services, consistent with the jury's verdict, for as long as Vervent services the First Equity accounts. (R-1773, R-1775, R-1879). LJP also filed an Application for Taxation of Costs. (R-1780). Vervent opposed the permanent injunction because it improperly sought future damages, but the Circuit Court granted it. (R-1855, R-1908).

Vervent filed a motion for remittitur on the 2022 acquisition of First Equity issue, which LJP opposed and the Circuit Court denied. (R-1793, R-1796, R-1806, R-

1871, R-1906). Vervent renewed its motion for judgment as a matter of law under SDCL § 15-6-50(b), which was also denied. (R-1927, R-1930, R-1945).

STANDARDS OF REVIEW

The Court reviews a trial court's grant or denial of a motion to dismiss de novo. *Gruhlke v. Sioux Empire Fed. Credit Union, Inc.*, 2008 S.D. 89, ¶ 17, 756 N.W.2d 399, 408. It likewise reviews entry of summary judgment under a de novo standard of review, which will be affirmed when there are no genuine issues of material fact and legal questions have been correctly decided. *Wyman v. Bruckner*, 2018 S.D. 17, ¶ 9, 908 N.W.2d 170, 174.

Whether judgment as a matter of law under SDCL § 15-6-50(a) should be granted is a question of law, reviewed de novo. *Williams v. Brinkman*, 2016 S.D. 50, ¶ 11-13, 883 N.W.2d 74, 79-81. The Court is to determine if "there is any evidence, if believed, sustaining the verdict against the moving party." *Id.* "In reviewing a renewed motion for judgment as a matter of law after the jury verdict, the evidence is reviewed 'in a light most favorable to the verdict or to the nonmoving party.' " *Id.* at ¶ 14, 883 N.W.2d at 81. Without weighing the evidence, the Court must decide if there is evidence that supports the verdict. *Id.*

In reviewing the grant of a permanent injunction under SDCL § 21-8-14, whether a permanent injunction is statutorily authorized is reviewed de novo, and the Court's subsequent decision to grant or deny the injunction is reviewed for an abuse of discretion. *Williams*, 2016 S.D. at ¶ 19, 883 N.W.2d at 83.

ARGUMENT

The jury verdict in this case was predetermined by the Circuit Court's reversible errors related to contract constructions. First, the Court misapplied the law related to contract termination and damages, resulting in the jury being told Vervent was already in the wrong at the outset of trial. Next, the Court read the contract to somehow hold a party responsible for paying "referral fees" to another party for a business it already owns—going so far as initially restricting evidence on this truth based on a legally flawed motion in limine. Finally, it held that referral fees must be paid in perpetuity, by again misreading the contract and ignoring established law.

I. The Referral Agreement contains no definite term and therefore the general rule permitting its termination at will should apply.

The Court's initial ruling on the motion to dismiss and summary judgment rulings, which did not address the March 2022 acquisition of First Equity, served as the first error of law and prejudicial blow to Vervent's defense. The manifest errors in the Circuit Court's pre-trial rulings also established a framework for subsequent prejudicial errors during and after trial that have resulted in a never-ending monetary judgment associated with a nonexistent referred business. This is particular true as Vervent was improperly labeled as a "breaching" defendant from the moment trial began. Instead, the Circuit Court should have determined that a contract without a term extends for a "reasonable" period of time, and allowed the requirement of an underlying contract to be presented to the jury rather than labeling Vervent "in breach".

"The general rule is that contracts having no fixed term are terminable at will by either party." *Martin v. Equitable Life Assurance Soc.*, 553 F.2d 573, 574 (8th Cir. 1977) (citing *Meredith v. John Deere Plow Co.*, 185 F.2d 481, 482 (8th Cir. 1950)). In *Martin*, the Eighth Circuit Court of Appeals, applying South Dakota law, reasoned:

> The contract does not provide for the employment of the agent for any fixed term. There is nothing in XIIA which manifests an intent that the grounds for termination set forth therein constitute the exclusive basis for termination. Article XIIB commences with the clause "unless otherwise terminated." This clearly manifests an intent of the parties to preserve to each the right to terminate at will.

Id. at 574-75. It is well-established across jurisdictions that indefinite or perpetual contracts are disfavored by the courts. *See, e.g.*, *Warner-Lambert Pharmaceutical Co. v. John J. Reynolds, Inc.*, 178 F. Supp. 655, 661 (S.D.N.Y. 1959), *aff'd* 280 F.2d 197 (2d Cir. 1960) ("If the parties intend that the obligation be perpetual, they must expressly say so."); *H & R Block Tax Servs. LLC v. Franklin*, 691 F.3d 941, 944 (8th Cir. 2012) (noting that Missouri courts do not support imposing a contractual obligation in perpetuity but shall permit termination within a reasonable time); *Glacial Plains Coop. v. Chippewa Valley Ethanol Co., LLP*, 912 N.W.2d 233, 237 (Minn. 2018) ("A contract of indefinite duration is terminable at will upon reasonable notice to the other party after a reasonable time has passed."); *Louis DeGidio, Inc. v. Indus. Combustion, LLC*, 66 F.4th 707, 715 (8th Cir. 2023) (same); *Johnson v. Associated Milk Producers, Inc.*, 886 N.W.2d 384, 390 (Iowa 2016) (noting a contract is terminable at will if no durational term is ascertained).

South Dakota law is consistent with the general rule. *See Singpiel v. Morris*, 1998 S.D. 86, ¶ 15, 582 N.W.2d 715, 719 (reviewing plain language of the contract and

concluding that "there is no phrase that explicitly requires mutual agreement in order to terminate the contract."); SD Civil Pattern Jury Instruction § 30-10-90 (noting that a contract with no fixed duration "continues for a time that is reasonable under the circumstances and may be terminated at any time by either party upon reasonable notification to the other party."). In this case, the Referral Agreement's renewal term contains no term and no termination provision. Vervent terminated it after LJP was paid $1.2 million in referral fees over the course of six years, which was reasonable in light of the renewal term's language, circumstances, nature of the referral, and relationship of the parties. Vervent should have been permitted to explain to a jury why its ultimate termination was reasonable and not a breach. Instead, it was unduly forced to start trial with the jury being told that Vervent was already in the wrong—a patently unfair starting position.

In ruling on Vervent's motion to dismiss and LJP's first motion for summary judgment on the termination issue, the Circuit Court summarily concluded that the general rule that a contract without a definite term is terminable at will "is inapplicable under the alleged facts in this case. Instead, I find persuasive the caselaw cited by LJP, including *Warner-Lambert Pharmaceutical Co. v. John J. Reynolds, Inc.*, 178 F. Supp. 655 (S.D.N.Y. 1959), *aff'd* 280 F.2d 197 (2d Cir. 1960)." (R-193). The Circuit Court failed to analyze or explain why the Referral Agreement could not be terminated after a reasonable amount of time. *See Entertainment USA, Inc. v. Moorehead Communs., Inc.*, 93 F. Supp. 3d 915, 930 (D. Ind. 2015) (rejecting *Warner-Lambert*'s application to a referral agreement and holding that Indiana's general rule—that a

contract without a termination date is terminable at will after a reasonable amount of time—controlled and presented a fact issue). The Court's conclusory rejection of Vervent's position paved the way for a plainly erroneous outcome.

A. The Circuit Court erred as a matter of law in adopting LJP's construction of the Referral Agreement's language instead of applying its plain language.

While the Referral Agreement states that the referral fee "will continue to be paid to LJP" if the client contractual relationship is renewed, that clause does not obligate Vervent to pay the referral fee forever. Yet, that is the inexplicable relief that LJP requested and obtained in this case.[3] LJP's requested relief—that it must be paid a 3% referral fee for so long as Vervent services First Equity or the First Equity accounts generate revenue—is found nowhere in the Referral Agreement itself.

A contract must be interpreted as a whole, so that no part is rendered superfluous or meaningless. The plain language of the renewal term – and its distinct differences from the initial term language – shows that the Circuit Court rendered the distinction of the initial term compared to the renewal term meaningless, and thus erred in denying Vervent's motion to dismiss and later granting LJP's second motion for summary judgment. *See Black Hills Excavating Servs. v. Retail Constr. Servs.*, 2016 S.D. 23, ¶ 15, 877 N.W.2d 318, 325 (noting South Dakota's "longstanding rule" that a contract "is to be read as a whole, making every effort to give effect to all

[3] On December 6, 2021, after the Circuit Court denied Vervent's Motion to Dismiss, LJP filed an Amended Complaint. (R-197). LJP added a request for specific performance of the Referral Agreement in the future, specifically an Order for Vervent to pay the 3% referral fee to LJP "for so long as the First Equity account generates revenue." (*Id.*).

provisions"); *Jones v. Siouxland Surgery Ctr. Ltd. P'ship*, 2006 S.D. 97, ¶ 15, 724 N.W.2d 340, 345 (stating that a contract is to be construed and interpreted so that no part of it is superfluous).

The Referral Agreement provides that a 3% "referral fee will be paid for the initial term of the servicing agreement." (Ex. 9). It further provides: "If the TCI/Client contractual relationship is renewed, an ongoing referral fee of 3% will continue to be paid to LJP." (*Id.*). Thus, the Referral Agreement, critically, is separated into an initial term and a renewal term—and the two terms are phrased differently. Unlike the language in the initial term, the renewal term does not create a contractual expectation of referral fees for a definite period of time.

The initial term provision's use of the word "for" – "for the initial term" – suggests that the referral fee was owed to LJP for the duration of the initial term of the servicing agreement with the client that LJP referred to TCI. Here, that initial term with First Equity was five years. (*See* Ex. M). The initial term, therefore, contains a fixed duration, and TCI could not have terminated the Referral Agreement during the initial term of the servicing with the client that LJP referred to Total Card.

In contrast, the renewal term contains no such language as to duration. The renewal term under the auto-renewal provisions of the 2014 Servicing Agreement also expired on August 14, 2020. The Referral Agreement is silent on whether referral payments are due during additional renewals thereafter. Further, the Referral Agreement does not state that the ongoing referral fee will continue to be paid "during the renewal term," "for the renewal term of the servicing agreement," or

something similar that mirrors the initial term provision. LJP has repeatedly and conveniently glossed over this distinction in the contract's plain language and syntax.

In adopting LJP's framework and finding the *Warner-Lambert Pharmaceutical Co. v. John J. Reynolds, Inc.*, 178 F. Supp. 655 (S.D.N.Y. 1959), *aff'd* 280 F.2d 197 (2d Circ. 1960) and the other cases cited by LJP to be controlling, the Circuit Court held that Vervent cannot terminate the Referral Agreement until it either stops servicing the First Equity accounts or the First Equity accounts no longer generate revenue. This rationale, untethered to the plain language of the Referral Agreement itself, is legally erroneous. The contrasting syntax of the two provisions confirms the Referral Agreement was not terminable at will during the initial term, but became an indefinite contract terminable at will after a reasonable amount of time during the renewal term. As breach is normally a factual issue for the jury, Vervent should have been permitted to show the jury why it was reasonable to terminate the Referral Agreement during a subsequent renewal term. Thus, the Circuit Court's unblinking acceptance of LJP's rendering of the Referral Agreement early in this case was not only a legal error, it was also extremely prejudicial to Vervent.

B. *Warner-Lambert* and related authority are inapplicable to the Referral Agreement.

Warner-Lambert Pharmaceutical Co. v. John J. Reynolds, Inc., 178 F. Supp. 655 (S.D.N.Y. 1959), and related authority are inapplicable to the language used in the Referral Agreement. *Warner-Lambert* is considered one of the seminal cases on the exception to the general rule on termination—namely, that a contract is not indefinite when a party's obligation to pay is conditioned on conduct that is within the party's

control. In *Warner-Lambert*, the manufacturer of Listerine was bound by a written contract from the 1880s to pay Listerine's developer and "his heirs executors and assigns" a fee on every Listerine product manufactured or sold. *Warner-Lambert*, 178 F. Supp. 655 at 657. Seventy-five years later, the manufacturer argued that it was no longer obligated to pay the developer's heirs in part because the agreements contained an indefinite term. *Id.* at 660. The Southern District Court for New York disagreed, concluding that the "obligation to pay on each and every gross of Listerine continues as long as this preparation is manufactured or sold by Lambert and his successors." *Id.* If the manufacturer were to cease manufacturing of Listerine, it would no longer owe the royalty payment. *Id.* at 661-62. As a result, the court concluded that the contract did not contain an indefinite term; instead, its payment obligation was conditioned on a continuing event—i.e., manufacturing and sales. *Id.*

Here, the Referral Agreement does not contain language agreeing to bind TCI's successors or assigns like the agreement in *Warner-Lambert* did. More importantly, it does not contain language that clearly ties or conditions Vervent's continued payment to LJP on the continued servicing of the First Equity account. LJP has fashioned that requested relief out of whole cloth in order to apply *Warner-Lambert* and related authority to this case. But this creates the classic square peg in the round hole problem. *Warner-Lambert*'s contract language plainly stated an ongoing promise to pay "for each and every" product sold. The Referral Agreement's renewal term simply states that a referral fee will continue ***if*** the contract is renewed; it does not state that a referral fee will continue ***for so long as*** the contract is renewed. Indeed,

the latter language would create conditional language more analogous to *Warner-Lambert*.

Hypothetically, even if TCI or Vervent would have terminated the underlying First Equity contractual relationship, the plain language of the Referral Agreement does not confirm that the referral fee owed to LJP would have likewise terminated. For example, if the First Equity servicing agreement had been renewed once to trigger the renewal term, but was later terminated, the "ongoing referral fee" arguably would have still continued. There is no language in the renewal term that plainly and unambiguously states LJP's referral fee ends if the "Client contractual relationship" ends, despite LJP's repeated assumption otherwise in this case. This result creates the uncertainty that a referral fee would be due to LJP in perpetuity—a result that the law loathes—and bolsters why the general rule should apply. The Circuit Court therefore erred in relying on *Warner-Lambert* and related case law cited by LJP. (*See* R-193).[4] The Circuit Court should have held that the Referral Agreement is terminable at will.

The Circuit Court's flawed analysis in its December 3, 2021 Letter Decision permeated subsequent rulings in the case. By Letter Decision dated August 24, 2023, the Circuit Court granted LJP's second motion for summary judgment in part, holding that Vervent stepped into the shoes of TCI. (R-1024). The Court, without any further analysis, stated: "[t]he court previously ruled that Vervent cannot unilaterally terminate the referral agreement as it relates to past referrals." (R-1029).

[4] The Circuit Court did not cite any other cases that it found persuasive.

Thus, the Circuit Court continued its legal error in holding that Vervent breached the Referral Agreement in terminating it.

II. As a matter of law, LJP cannot recover damages under the Referral Agreement after Vervent acquired First Equity in March 2022.

Immediately at the start of trial, prospective jurors were advised that Vervent was already in the wrong by breaching the Referral Agreement. Instead, in accordance with the Circuit Court's initial ruling on an important motion in limine, Vervent was forced to start trial without the benefit of being able to explain that the company LJP referred in 2012 no longer exists. The snowball effect from erroneous pretrial rulings and the motion in limine set the stage for the second chapter of reversible error in this matter. As a result, LJP was given a free shot to present damages to the jury without having to address the fact that the company referred in 2012 was no longer in business. Nor did LJP even bother to introduce an underlying contract for "call center services" which is fundamental to payment under the Referral Agreement.

In this vacuum, the parties presented competing evidence as to the methodology to calculate "call center support services." But even after the Circuit Court prematurely determined breach as a matter of law, LJP still had the burden of proving its right to continuing damages through the date of trial. *See Mash v. Cutler*, 488 N.W.2d 642, 651 (S.D. 1992). It plainly failed to meet its burden by the lack of an underlying contract being introduced at trial. As such, the Circuit Court erred in denying Vervent's motion for judgment as a matter of law after LJP rested its case-in-chief, and the Circuit Court's pre-trial ruling on a pivotal motion in limine prejudiced

Vervent both at trial and post-trial, with respect to damages. (*See* R-1229, R-1232, TT2-86:8, TT2-107:25-108:2).

A. The Circuit Court erred in denying Vervent's Rule 50(a) motion.

A motion for judgment as a matter of law is governed by statute, which provides:

> (1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.
> (2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

SDCL § 15-6-50(a).

Whether judgment as a matter of law should be granted is a question of law, reviewed de novo. *See Williams v. Brinkman*, 2016 S.D. 50, ¶ 11-13, 883 N.W.2d 74, 79-81 (adopting de novo standard of review and moving away from abuse of discretion standard). The Court is to determine if "there is any evidence, if believed, sustaining the verdict against the moving party." *Id.* (quoting *Pitt-Hart v. Sanford USD Med. Ctr.*, 2016 S.D. 33, ¶ 7, 878 N.W.2d 406, 409). To recover damages for a breach of contract, the plaintiff has the burden to establish (1) an enforceable promise, (2) a breach of the promise, and (3) resulting damages caused by the breach. *Bowes Constr., Inc. v. S.D. DOT*, 2010 S.D. 99, ¶ 21, 793 N.W.2d 36, 43. "With no proof of causation of damages, [the plaintiff] cannot prevail under any of the theories of recovery it has

presented." *Id.* at ¶ 24, 793 N.W.2d at 44. When considering whether a jury verdict is sustained by the evidence, the Court is:

> not to speculate or query how we would have viewed the evidence and testimony, or what verdict we would have rendered had we been the jury. The real and only question to be solved and answered is, *Is there any legal evidence upon which the verdict can properly be based, and the conclusions embraced in and covered by it be fairly reached?*

Biegler v. American Family Mut. Ins. Co., 2001 S.D. 13, ¶ 32, 621 N.W.2d 592, 602 (internal quotation omitted) (italics in original).

The existence and scope of a contract are matters of law for the Court to determine. *See Weitzel v. Sioux Valley Heart Partners*, 2006 S.D. 45, ¶ 22.. Here, the verdict after March 31, 2022 was not based on proper evidence, and the jury should have never been permitted to consider damages after that date. Even assuming the Circuit Court correctly held that Vervent breached the Referral Agreement by terminating it, LJP was entitled to a referral fee under the Referral Agreement only if a TCI (Vervent)/Client contractual relationship was renewed. (*See* Ex. 9). The "Client" for purposes of this contract provision was First Equity Card Corporation. The only underlying "contractual relationship" that entitled LJP to a referral payment was the 2014 Servicing Agreement and Supplement between TCI and First Equity's subsidiary, Progress One Financial. (*See* Ex. M, Ex. N). In its case-in-chief, LJP failed to introduce any evidence that a "Client contractual relationship" continued after March 31, 2022, and there was no evidence introduced to show that the 2014 Servicing Agreement and Supplement were "renewed" after March 31, 2022. Thus, no evidence supported damages after Vervent acquired First Equity on March 31,

2022. LJP's ability to recover damages should have ended on March 31, 2022 as a matter of law.

1. Invoices alone do not demonstrate a contractual relationship.

LJP contended that sufficient evidence existed to show a renewed "Client contractual relationship" after March 2022 based on Vervent's intracompany invoicing on the First Equity card portfolio for tracking purposes (Ex. 38). (*See* TT1-83:2-18, TT2-97:11-21). But the invoices were insufficient as a matter of law because invoices alone are not a contract, and the evidence did not suggest otherwise. For example, there was no corresponding evidence of payment from First Equity to Vervent on those invoices introduced to the jury, meaning the underlying "contractual relationship" post-March 2022 lacked any form of consideration or mutual assent to create a contract. In the absence of proof of an ongoing, renewed contractual arrangement, there is no basis for LJP's ongoing recovery of damages.

While South Dakota has not directly addressed whether an invoice alone is sufficient to prove the existence of a contract, several other jurisdictions have—all concluding that an invoice is not a contract. *See, e.g.*, *Engineered Floors, LLC v. Lakeshore Equip. Co.*, 2023 U.S. Dist. LEXIS 88259, at *17 (C.D. Cal. May 18, 2023) ("California law dictates that unsigned invoices cannot, on their own, create a contract or add terms to an unwritten contract absent additional evidence showing that the parties intended for the invoices' terms to control."); *Sal's Heating & Cooling v. Harbour View Assocs.*, 226 N.E.3d 410, 414 (Ohio Ct. App. 2023) (concluding that an invoice with a customer acknowledgement signature did not create a binding contract because the

provisions in the invoice were not bargained for and lacked consideration); *Harold & Hilari, Inc. v. AA Auto & Truck Servs.*, 2020 IL App (1st) 190725-U, P21 (Ill. 1st Dist. Ct. App. Mar. 16, 2020) (finding that an invoice for work performed is not a "written contract" because it lacks evidence of mutual assent on the face of the instrument); *Chu v. Schein*, 2014 Tex. App. LEXIS 6546, at *4-5 (Tex. Ct. App. June 17, 2014) (holding that invoices were not evidence of a contract, and appellees failed to bring forth any evidence linking the invoices to an account held by appellant); *Tanenbaum Textile Co. v. Schlanger*, 40 N.E.2d 225, 226 (N.Y. Ct. App. 1942) (stating that an invoice is no contract).

The substantial amount of persuasive authority on this legal principle is consistent with South Dakota law. In *J. Clancy, Inc. v. Khan Comfort, LLC*, 2021 S.D. 9, ¶ 25, 955 N.W.2d 382, 391, this Court confirmed that a party's signature on a document plus his payment constituted acceptance of the terms of the document. The "continuing performance and submission of invoices to Khan Comfort, as required under the September document, and Khan Comfort's payments to J. Clancy evince mutual assent." *Id.*

Where, as here, there is no corresponding payment or evidence of acceptance, there is no contract. The invoices, standing alone, therefore could not have proven the underlying "Client contractual relationship" continued to exist after March 2022, particularly in light of later testimony at trial that such invoices were for informational tracking only. There was no additional evidence introduced at trial that First Equity accepted or paid the invoices, or otherwise assented to the contractual relationship.

2. Continued servicing of the First Equity accounts was insufficient to show a renewed contractual relationship because the First Equity accounts were not serviced under the 2014 Servicing Agreement after March 31, 2022.

LJP also opposed Vervent's Rule 50(a) motion because Vervent continued to service the First Equity accounts after Vervent acquired First Equity. (*See* TT1-83:2-18, TT2-97:11-21). The Circuit Court originally granted LJP's second motion in limine, which prohibited Vervent from discussing Vervent's acquisition of First Equity in March 2022 or subsequent governing contractual documents, during LJP's case-in-chief. Thus, Vervent was not able to discuss the status of the various contracts post 2022-acquisition to even test LJP's continued servicing theory before Vervent was required to make its Rule 50(a) motion.

Nevertheless, the evidence that LJP introduced on Vervent's purported continued servicing of the First Equity accounts after March 2022 was also insufficient to prove the "Client contractual relationship" had been renewed after March 2022. LJP did not introduce any evidence to the jury to show that First Equity remained a client of Vervent's or that the original servicing agreement (Ex. M and Ex. N) was renewed post-acquisition.

In fact, the only evidence that LJP introduced at trial on Vervent's continued servicing to First Equity after March 2022 circled right back to the First Equity invoices (Ex. 38). Alonzo Primus testified:

> Q. Is it your understanding – what is your understanding of if Vervent is still making money for servicing the First Equity accounts, or still billing for servicing the First Equity accounts?

A. Based on the invoices they're providing [Ex.38], they're still making money on First Equity accounts that I referred.

TT1-83:6-11.

LJP then introduced Ex. 39, which was a spreadsheet to calculate the damages that LJP sought based on the Vervent invoices (Ex. 38) to First Equity from January 2021 to the date of trial. (TT1-83:19-89:11). Because invoices alone cannot prove a contract, LJP failed to show "contractual relationship" was renewed. There was no additional evidence introduced by any witness in LJP's case-in-chief that the First Equity contractual relationship had been renewed by Vervent after March 2022. The Circuit Court erred in permitting damages post-March 2022 to be presented to the jury.

B. The Circuit Court's rulings on LJP's second motion in limine had a prejudicial effect on Vervent at trial that contributed to the Circuit Court's legal error at trial and post-trial.

This Court employs a two-step process when reviewing evidentiary rulings. It first must determine whether the trial court abused its discretion in making an evidentiary ruling, and second, whether this error was a prejudicial error that "in all probability affected the jury's conclusion." *Frye-Byington v. Rapid City Med. Ctr., LLP*, 2021 S.D. 3, ¶ 10, 954 N.W.2d 314, 317.

The Circuit Court initially erroneously excluded evidence that Vervent acquired First Equity in March 2022. (MHT-38-39). While the Circuit Court later reversed its ruling after LJP rested its case-in-chief, Vervent was prohibited from discussing critical evidence about Vervent's acquisition of First Equity in voir dire and opening statements, and prohibited from presenting evidence during LJP's case

in chief on that issue. Because of the Circuit Court's initial error at the pre-trial conference, Vervent was also denied the right to cross-examine or impeach LJP's principal, Alonzo Primus, on that issue or the underlying contractual agreements that would have triggered LJP's right to a referral fee during LJP's case-in-chief. It was prevented from showing the jury a true picture of the parties' relationship after March 2022. Furthermore, LJP painted the picture to the jury throughout the first half of trial that the duration of damages to which it was entitled was never in question—only the methodology. This was clearly prejudicial to Vervent.

Indeed, the fact that LJP itself had previously limited its request for damages in its second summary judgment motion to the date that Vervent acquired First Equity, particularly prejudiced Vervent at trial. In its pre-trial second motion in limine to Judge Barnett, LJP misconstrued the scope of Judge Sogn's 2023 Letter Decision, repeatedly emphasizing that Vervent "stepped into the shoes" of Total Card and therefore the sole remaining issue at trial was the damages methodology. LJP's approach implied that Judge Sogn held that Vervent's acquisition of First Equity in 2022 had no bearing on damages that LJP could recover.

In reality, however, the duration of damages or the effect of Vervent's acquisition of First Equity had never been tested or addressed by the Circuit Court because LJP did not seek damages after March 2022 in its summary judgment motion. Judge Sogn never held that Vervent's acquisition of First Equity was irrelevant to damages. Instead, Judge Sogn's holding that Vervent "stepped into the shoes" of Total Card only applied to Vervent's acquisition of TCI in 2020. It did not

foreclose competing evidence or argument on the duration of damages or the effect of the 2022 acquisition.

LJP's subsequent bait-and-switch at trial through its second motion in limine paved the way for LJP to avoid the complicated issue regarding Vervent's acquisition of First Equity in 2022 altogether with the jury. The Circuit Court thus allowed LJP to present a misleading picture of the parties and the underlying contractual relationships through the date of trial in its case-in-chief, permitting LJP to oversimplify the duration of damages to the jury. The Circuit Court's mid-trial reversal then forced Vervent to boil down a complex multi-million-dollar corporate acquisition to the jury, on the fly with no advance notice.

Worse yet, even though Vervent was able to introduce the 2022 acquisition evidence, that timing and posture had the effect of leading the jury to believe that it was *Vervent's* burden to show that an underlying contractual relationship no longer existed post-2022 acquisition. In reality, LJP always had the burden to demonstrate its right to damages—a burden it failed to meet in its case-in-chief.

In South Dakota, the hallmark of trial court error related to motions in limine, is the prejudicial effect. "Error is prejudicial when, in all probability, it produced some effect upon the final result and affected some rights of the party assigning it." *McDowell v. Citibank*, 2007 S.D. 52, ¶ 26, 734 N.W.2d 1, 10. Therefore, the fact that the trial court correctly reversed its earlier ruling is of no moment. The procedural posture on this complex issue that resulted from LJP's disingenuous second motion in limine prejudiced Vervent and affected the jury's decision on damages.

C. The Circuit Court erred in denying Vervent's motion for a remittitur or renewed motion for judgment as a matter of law after trial even though evidence at trial was uncontested that First Equity was no longer a client of Vervent's after March 2022.

After the Circuit Court reversed its ruling on LJP's second motion in limine mid-trial, Vervent introduced the separate 2020 Servicing Agreement (Ex. FF) between Vervent and Phoenix Card Group LLC. (TT2-130:24-133:6). Vervent also introduced a press release announcing the acquisition. (Ex. EE). David Johnson, CEO of Vervent, testified that post-acquisition of First Equity in March 2022, the First Equity accounts were serviced under the completely separate 2020 Servicing Agreement (Ex. FF). (*Id.*). No First Equity accounts continued to be serviced under the 2014 Servicing Agreement (Ex. M) and Supplement (Ex. N) that LJP initially referred to TCI. First Equity is also no longer a "Client" of Vervent's. Vervent "acquired the company that is First Equity Card Corporation." (R-1232, Ex. GG, TT2-200:11-14).

Vervent's testimony on this issue was uncontested by LJP at trial. And while such evidence was introduced after Vervent moved for judgment as a matter of law, Vervent proffered it to the Circuit Court when making its Rule 50(a) motion. (R-1229, 1232, TT2-86:8-109:25).

The special verdict form completed by the jury confirms that the jury improperly awarded damages from March 31, 2022 through June 2024. Following trial, Vervent filed a motion for remittitur and renewed its motion for judgment as a matter of law under Rule 50(b). The Circuit Court erred in denying both motions.

1. Remittitur was appropriate in this case.

Remittitur is similar to a statutory motion for judgment as a matter of law. *See Roth v. Farner-Bocken*, 667 N.W.2d 651, 658-59 (S.D. 2003). "A trial court can deny a motion for new trial on the condition that the prevailing party consent to a reduction in damages. Therefore, the court can provide the recovering party the option of accepting the remittitur or a new trial under SDCL 15-6-59(a)(5)." *Sander v. Geib, Elston, Frost Prof'l Ass'n*, 506 N.W.2d 107, 119 n.10 (S.D. 1993) (internal quotation omitted). If a trial court remits a judgment based on excessive damages, the order is conditioned on the plaintiff's acceptance of the reduced judgment. *Shippen v. Parrott*, 553 N.W.2d 503, 511 (S.D. 1996). The granting of a new trial is reviewed under an abuse of discretion standard. *Ortman v. DeJager*, 2010 S.D. 65, ¶ 5, 787 N.W.2d 299, 301.

Vervent moved the Circuit Court to reduce the judgment by $528,072.47 for damages that the jury awarded to LJP after March 31, 2022. (R-1793, R-1796). Vervent expanded on its argument as to why invoices were insufficient evidence to support the judgment and again demonstrated how LJP failed to present sufficient evidence to support damages after March 31, 2022.[5] The Circuit Court should have remitted the jury verdict because Vervent presented uncontested evidence at trial that the First Equity invoices are used for intracompany tracking only, reflecting a left

[5] At the time that Vervent made its Rule 50(a) motion, its witnesses had not yet provided testimony about the reasons for the continued First Equity invoices and intracompany tracking for different business silos after Vervent acquired First Equity in 2022—nor would they have been permitted to do so until the Circuit Court reversed its ruling on LJP's second motion in limine.

pocket/right pocket exchange of information, and they are no longer delivered to the Pennsylvania address to which they are addressed. The evidence that First Equity is no longer Vervent's client and the First Equity accounts are no longer serviced under the original 2014 Servicing Agreement and Supplement remained uncontested. Because the jury awarded damages to LJP from March 2022 through June 2024, which should not have been included in the judgment, the Circuit Court erred in denying Vervent's motion for remittitur.

2. The Circuit Court erred in denying Vervent's Renewed Motion for Judgment as a Matter of Law.

SDCL § 15-6-50(b) provides:

> If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than ten days after notice of entry of judgment - and may alternatively request a new trial or join a motion for a new trial under § 15-6-59. In ruling on a renewed motion, the court may:
>
> (1) If a verdict was returned:
>
> (A) Allow the judgment to stand;
>
> (B) Order a new trial; or
>
> (C) Direct entry of judgment as a matter of law; or
>
> (2) If no verdict was returned:
>
> (A) Order a new trial; or
>
> (B) Direct entry of judgment as a matter of law.

SDCL § 15-6-50(b).

"In reviewing a renewed motion for judgment as a matter of law after the jury verdict, the evidence is reviewed 'in a light most favorable to the verdict or to the nonmoving party.' " *Williams v. Brinkman*, 2016 S.D. 50, ¶ 14, 883 N.W.2d 74, 81 (quoting *Alvine Family Ltd. P'ship v. Hagemann*, 2010 S.D. 28, ¶ 18, 780 N.W.2d 507,

512). Without weighing the evidence, the Court must decide if there is evidence that supports the verdict. *Id.* "If sufficient evidence exists so that reasonable minds could differ, judgment as a matter of law is not appropriate." *Id.* (internal quotation omitted). "A Rule 50(b) motion . . . is based on and relates back to the prior Rule 50(a) motion made at the close of evidence." *In re Est. of Tank*, 998 N.W.2d 109, 129 (S.D. 2023) (quotation omitted).

No reasonable jury could have concluded that a "Client contractual relationship" was renewed after Vervent acquired First Equity on March 31, 2022. After Vervent was permitted to introduce evidence of its 2022 acquisition of First Equity to the jury, LJP produced no rebuttal evidence that could have supported the jury's verdict on damages from March 31, 2022 through June 2024. The 2014 Servicing Agreement that triggered LJP's referral payment was no longer operative.

Vervent continued to issue First Equity invoices purely for intracompany tracking and accounting reasons. In addition, LJP had already started this lawsuit, so Vervent did not change its accounting invoices mid-lawsuit. LJP elicited no evidence through its cross-examination of Vervent's witnesses to demonstrate that the First Equity invoices after March 2022 were a contract or that Vervent continued to service the First Equity accounts under a "renewed" contractual relationship stemming from LJP's 2014 referral. Consequently, permitting the jury verdict on damages after March 31, 2022 to stand was erroneous because those damages are no longer based on the Referral Agreement's triggering referral payment language. The jury's verdict requires Vervent to pay LJP a referral fee on an intracompany service it

provides to itself. This is a nonsensical result that the Circuit Court should have corrected as a matter of law.

III. The Circuit Court committed legal error and abused its discretion in awarding prospective monetary relief through a post-trial permanent injunction that was not statutorily authorized.

As the final act of reversible error, the Circuit Court entered permanent monetary injunctive relief requiring Vervent to pay a referral fee to LJP with no perceptible end date, despite the lack of an underlying referral. This head-scratching relief is purportedly based on an injunctive remedy that is more appropriate for non-monetary claims.

"It is settled in this state that [an] injunction is not granted as a matter of course." *Foley v. Yankton*, 230 N.W.2d 476, 478 (S.D. 1975). What is more, a mandatory injunction, which compels a party to act rather than compelling a party to not act, "is a most extraordinary form of relief and its grant is not favored by the courts." *Id.* (citing *Viestenz v. Arthur TP.*, 54 N.W.2d 572 (N.D. 1952)); *see also Heckler v. Lopez*, 463 U.S. 1328, 1333 (1983) ("The injunction issued here is in substance, if not in terms, a mandatory one, which like a mandamus, is an extraordinary remedial process which is granted, not as a matter of right but in the exercise of a sound judicial discretion." (internal quotation omitted)).

This Court reviews a Circuit Court's decision "to grant or deny injunctive relief for an abuse of discretion," but it "still review[s] the court's conclusions of law de novo and findings of fact under the clearly erroneous standard." *New Leaf, LLC v. FD Dev. of Black Hawk LLC*, 2010 S.D. 100, ¶ 12, 793 N.W.2d 32, 35. "In this

context, abuse of discretion 'can simply be an error of law or it might denote a discretion exercised to an unjustified purpose, against reason and evidence.' " *Ladson v. BPM Corp.*, 2004 S.D. 74, ¶ 15, 681 N.W.2d 863, 867 (quoting *Hendrickson v. Wagners, Inc.*, 1999 S.D. 74, ¶ 14, 598 N.W.2d 507, 510). A permanent injunction is only authorized under limited circumstances set forth by South Dakota statute:

> Except where otherwise provided by this chapter, a permanent injunction may be granted to prevent the breach of an obligation existing in favor of the applicant:
>
> (1) Where pecuniary compensation would not afford adequate relief;
>
> (2) Where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief;
>
> (3) Where the restraint is necessary to prevent a multiplicity of judicial proceedings; or
>
> (4) Where the obligation arises from a trust.

SDCL § 21-8-14.

"Whether the facts of a particular case meet these statutory prerequisites is a question of law." *Williams*, 2016 S.D. at ¶ 19, 883 N.W.2d at 83. LJP moved for a permanent injunction under SDCL § 21-8-14(2), (3) and SDCL § 21-9-1, -4. The Circuit Court appeared to reject LJP's request under SDCL § 21-8-14(2), but granted the injunction under 21-8-14(3). (R-1908).

At the outset, the Circuit Court should have denied LJP's request based on LJP's utter failure to meet its burden in demonstrating an underlying referred contract, and correspondingly, why it was entitled to such unusual and extraordinary relief as a result. In fact, the South Dakota Supreme Court has cautioned:

> Courts generally do not "compel money payments by injunctive orders except in very special cases. Instead, a judgment is rendered for most ordinary money judgments." Dan B. Dobbs, *Law of Remedies* § 2.6(1), p.

> 103-04 (2d ed. 1993). This general rule is true because "[a]n essential element to equitable relief is the lack of an adequate remedy at law." *Knodel*, 581 N.W.2d at 507. If a plaintiff's grievance can be adequately remedied by receipt of a judge-ordered sum of money, then a jury-awarded sum of money is also likely a sufficient remedy. Consequently, while "[t]he law-equity distinction does not prevent injunctions to require money payments, . . . good sense or caution will often do so." Dobbs, *supra*, § 2.6(1), p. 104.

Williams, 2016 S.D. at ¶ 21, 883 N.W.2d at 84 n.12.

SDCL 21-8-14(3) requires the Circuit Court to find that the "restraint is necessary to prevent a multiplicity of judicial proceedings." In *Williams*, this Court reversed a circuit court's issuance of a permanent injunction under § 21-8-14(3) because "Plaintiffs could have avoided future litigation by seeking compensation for past and future damages in one action." *Id.* at ¶ 22, 883 N.W.2d at 84. "The fact that they chose not to do so does not render an injunction *necessary* to prevent multiple suits." *Id.* Thus, this Court held that a permanent injunction was not statutorily authorized. *Id.*

The same error occurred in this case, as LJP could have sought future damages at trial but chose not do so. LJP's failure to pursue future damages – a common remedy available to litigants at trial – did not trigger a right to a post-trial permanent injunction. In fact, LJP failed to even marshal an argument as to why the injunction was a "necessity" under SDCL 21-8-14(3) and the Circuit Court failed to make any such finding on what the necessity was in this case. (*See* R-1908). *See also Williams*, 2016 S.D. at ¶ 22, 883 N.W.2d at 84 (cautioning that "the question is not whether an injunction *can* prevent multiple judicial proceedings; the question is whether the injunction is *necessary* to do so.").

Even if the Circuit Court correctly concluded that a permanent injunction was statutorily authorized, the Circuit Court abused its discretion in issuing the permanent injunction under the facts of this case. To exercise its discretion, the Court is to consider the following factors:

> (1) Did the party to be enjoined cause the damage? (2) Would irreparable harm result without the injunction because of lack of an adequate and complete remedy at law? (3) Is the party to be enjoined acting in bad faith or is the injury-causing behavior an innocent mistake? (4) In balancing the equities, is the hardship to be suffered by the enjoined party disproportionate to the benefit to be gained by the injured party?

McDowell v. Sapienza, 2018 S.D. 1, ¶ 25, 906 N.W.2d 399, 407 (internal quotation omitted); *Strong v. Atlas Hydraulics, Inc.*, 2014 S.D. 69, ¶ 138, 855 N.W.2d 133, 138.

The Circuit Court abused its discretion in issuing a permanent injunction, holding that each of the four factors weighed in favor of one. (*See* R-1911). The Circuit Court found that an award of future damages would have been difficult for the jury to calculate, meaning irreparable harm would result even though future damages in commercial contract cases are regularly submitted to juries. (*Id.*). Importantly, this Court in *Williams* rejected that exact rationale, reasoning that an injunctive order to pay money "undermines the conclusion that the harm was irreparable." *Williams*, 2016 S.D. at ¶ 21, 883 N.W.2d at 83. No South Dakota authority supports the Circuit Court's rationale on irreparable harm when authorizing a permanent injunction to prevent a multiplicity of judicial proceedings under SDCL § 21-8-14(3), rather than an injunction under § 21-8-14(2).

Simply put, a commercial contract dispute is a poor fit for permanent injunctive relief regarding future damages. Indeed, the vast majority—if not all—of the South Dakota cases that have granted a permanent injunction did so based on an equitable claim or because the harm involved property rights that could not be made whole through monetary relief alone. *See, e.g.*, *McDowell v. Sapienza*, 906 N.W.2d 399, 408 (S.D. 2018) (affirming permanent injunction ordering Sapienzas to tear down and rebuild their house); *Strong v. Atlas Hydraulics, Inc.*, 855 N.W.2d 133, 141 (S.D. 2014) (affirming permanent injunction that compelled Atlas to remedy the issue on its property because, without it, Strong's property would continue to experience water damage); *Raven Indus. v. Lee*, 783 N.W.2d 844, 852 (S.D. 2010) (affirming permanent injunction after former Raven employee unfairly competed with Raven by using alleged confidential information when working for competitor); *Ladson v. BPM Corp.*, 681 N.W.2d 863, 868 (S.D. 2004) (considering four injunction factors and affirming permanent injunction to prevent property owner's livestock from continuing to trespass on neighbor's property); *Hendrickson v. Wagners, Inc.*, 598 N.W.2d 507, 511-12 (S.D. 1999) (finding that circuit court should have granted permanent injunction ordering Wagners to fill in ditches to avoid future damage to Hendrickson's crops because evidence showed all four factors weighed in favor of injunction). In contrast, no South Dakota case has granted a permanent injunction that compels the continued payment of money based on a breach of contract that occurred years ago.

Moreover, there was no evidence presented at trial or finding by the Circuit Court that Vervent acted in bad faith. The Circuit Court held that Vervent's

"behavior" was "an intentional decision." (R-1908). However, an intentional decision does not equal intentional misconduct or bad faith under South Dakota law. *See McDowell*, 2018 S.D. at ¶ 27, 906 N.W.2d at 407-08 (concluding that evidence in the record supported finding that Sapienzas did not make innocent mistakes because they used a construction company unfamiliar with historic district construction standards, they presented inaccurate renderings to the relevant board, and they failed to inform the board about relevant facts); *Strong*, 2014 S.D. at ¶ 18, 855 N.W.2d at 141 (finding evidence in support of bad faith because Atlas lied to its neighbor and the city about the actions that Atlas was taking). In this case, the testimony of David Johnson demonstrated that it consulted with external and internal counsel when analyzing the Referral Agreement and making the decision to terminate. If a breach of contract constituted bad faith, every contract case would result in a corresponding breach of good faith and fair dealing. *See e.g. Fischer Sand & Gravel Co. v. South Dakota Department of Transportation*, 1997 SD 8, ¶ 16 (a party cannot tortiously breach a contract; the cause of action is a breach or a tort, not both). Of course, that does not happen because they are separate claims.

In short, this case involved complicated corporate mergers and acquisitions over time, numerous unrelated contracts, and a legitimate belief that the Referral Agreement was terminable at will because it was silent on its duration. The Circuit Court's own reversal of itself on LJP's second motion in limine with respect to Vervent's acquisition of First Equity in 2022 highlights the complexities of the

transactions, parties, and events that took place in this case. There was no intentional misconduct.

Finally, the injunction in this case requires Vervent to forever pay a referral fee to LJP on an intracompany service that its left hand provides to its right hand. That is an absurd and inequitable result. LJP continues to argue that the referral payments are only due "so long as Vervent is servicing any active First Equity account," and the Circuit Court included that exact language in the permanent injunction. (R-1908). Beyond the fact that such language is completely untethered to the actual language in the Referral Agreement, the injunction's order continues the Referral Agreement in perpetuity on an underlying contractual agreement that no longer exists. LJP is no longer obtaining an earned benefit, rather a windfall. The hardship to Vervent is disproportionate in that Vervent's only exit ramp from the compelled payment is to stop servicing a credit card line it already paid $25 million to purchase. The permanent injunction is deeply inequitable under the facts of this case, and the Circuit Court abused its discretion in ordering it.

CONCLUSION

For the reasons set forth in this Brief, this Court should reverse the Circuit Court's legal conclusions regarding Vervent's ability to terminate the Referral Agreement at will and order a new trial. Alternatively, this Court should reverse the Circuit Court's denial of Vervent's motion for judgment as a matter of law or remittitur, and further reverse the Circuit Court's entry of a permanent injunction in favor of LJP.

Dated this 7th day of May, 2025.

CADWELL SANFORD DEIBERT & GARRY, LLP
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CERTIFICATE OF COMPLIANCE

I hereby certify that Appellant's Principal Brief complies with the Type-Volume requirements of SDCL 15-26A-66 in the following manner: The Brief was prepared using Microsoft Word and uses proportionally spaced font [Garamond] in 13-point type. Based on the word-count feature of the MS Word processing system, the Brief contains 11,085 words.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the foregoing Appellant's Principal Brief, with attached Appendix, was electronically filed and served through eFileSD on counsel shown below.

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The original of the Principal Brief, with attached Appendix, was mailed, by U.S. mail, postage prepaid, to:

Ms. Shirley Jameson-Fergel
Clerk of the Supreme Court
500 East Capitol Avenue
Pierre SD 57501-5070

all on May 7, 2025.

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IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

No. 30891

VERVENT, INC.

Defendant/Appellant,

vs.

LJP CONSULTING LLC

Plaintiff/Appellee.

Appeal from the Circuit Court
Second Judicial Circuit
Minnehaha County, South Dakota

The Honorable Douglas P. Barnett, Presiding Judge

APPENDIX TO PRINCIPAL BRIEF OF APPELLANT VERVENT, INC.

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Notice of Appeal Filed November 7, 2024

APPENDIX INDEX

Page #

STATE OF SOUTH DAKOTA) :SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
LJP CONSULTING LLC, A Delaware Limited Liability Company Plaintiff, v. VERVENT INC., A Delaware Corporation; and TOTAL CARD, INC., Defendants.	49CIV21-001047 **ORDER DENYING DEFENDANTS' MOTION TO DISMISS AND MOTION TO STAY DISCOVERY**

On June 10, 2021, Defendants, Vervent Inc. ("Vervent"), and Total Card, Inc. ("TCI"), filed a Motion to Dismiss. Defendants also filed a Motion to Stay Discovery on July 14, 2021. On September 15, 2021, the Court held a hearing on the Motions. Tim R. Shattuck and Jacquelyn A. Bouwman of Woods, Fuller, Shultz & Smith P.C. appeared on behalf of Plaintiff. Shawn Nichols of Cadwell Sanford Deibert & Garry LLP and Michael Barnhill of Michael Best & Friederich LLP appeared on behalf of Defendants.

The Court has considered the parties' motions, briefs, and related affidavits and filings, and the oral arguments of counsel. On December 3, 2021, the Court issued a Letter Decision, the contents of which are incorporated herein by reference, denying Defendants' Motion to Dismiss and Motion for Stay of Discovery in all respects. Accordingly, it is hereby ORDERED, ADJUDGED, and DECREED that:

1. Defendants' Motion to Dismiss is DENIED; and

2. Defendants' Motion for Stay of Discovery is DENIED.

FILED
DEC 06 2021
Minnehaha County, S.D.
Clerk Circuit Court

Dated this 6 day of December, 2021.

BY THE COURT:

Jon Sogn Circuit Court Judge

ATTEST:
ANGELIA M. GRIES, CLERK OF COURTS
BY: _____, DEPUTY
(SEAL)

STATE OF SOUTH DAKOTA

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STATE OF SOUTH DAKOTA) :SS COUNTY OF MINNEHAHA)		IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
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LJP CONSULTING LLC, A Delaware Limited Liability Company Plaintiff, v. VERVENT INC., A Delaware Corporation; and TOTAL CARD, INC., A South Dakota Corporation Defendants.	:	49CIV21-001047 **ORDER GRANTING IN PART AND DENYING IN PART LJP'S SECOND MOTION FOR SUMMARY JUDGMENT**
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On May 3, 2022, LJP Consulting, LLC ("LJP") filed its Second Motion for Summary Judgment. On June 30, 2022, the Court held a hearing on the Motion. Tim R. Shattuck and Jacquelyn A. Bouwman of Woods, Fuller, Shultz & Smith P.C. appeared on behalf of Plaintiff. Shawn Nichols of Cadwell Sanford Deibert & Garry LLP appeared on behalf of Defendants, Vervent Inc. ("Vervent") and Total Card, Inc. ("TCI").

The Court has considered the parties' motions, briefs, and related affidavits and filings, and the oral arguments of counsel. On August 24, 2023, the Court issued a Letter Decision, the contents of which are incorporated herein and attached hereto as **Exhibit A**, granting in part and denying in part the Motion. Accordingly, consistent with the Court's Letter Decision, it is hereby

ORDERED, ADJUDGED, and DECREED:

1. That Vervent acquired all assets and obligations of TCI relating to the Referral Agreement with LJP and the servicing agreement with First Equity;

2. That Vervent assumed TCI's obligations under the Referral Agreement and is therefore bound by the same terms in the Referral Agreement as was TCI;

3. That Vervent is liable to pay some amount to LJP pursuant the Referral Agreement, which Vervent has failed to pay; and

4. That the Referral Agreement is ambiguous as to what constitutes "call center services," and, consequently, there is an issue of material fact regarding the amount, Vervent owes to LJP under the Referral Agreement.

9/19/2023 10:16:59 AM

BY THE COURT:

Hon. Jon C. Sogn
Circuit Court Judge

Attest:
Russell, Lisa
Clerk/Deputy

{05368108.1}

CIRCUIT COURT OF SOUTH DAKOTA
SECOND JUDICIAL CIRCUIT
Minnehaha County
425 N. Dakota Ave.
Sioux Falls, SD 57104

August 24, 2023

Tim Shattuck (*via email*)
PO Box 5027
Sioux Falls, SD 57117

Shawn Nichols (*via email*)
200 East 10th St. #200
Sioux Falls, SD 57104

Re: LJP Consulting LLC v. Vervent, Inc. and Total Card, Inc.
CIV 21-1047

Dear Mr. Shattuck and Mr. Nichols:

This letter sets forth my decision regarding Plaintiff's Second Motion for Summary Judgment. As explained below, I deny in part and grant in part the motion.

Factual and Procedural Background

The court is not required to make findings of fact when ruling on a motion for summary judgment. I set forth some of the facts, however, to help explain the reasons for my decision.

Plaintiff LJP Consulting (LJP) is a company headed by Alonzo Primus. LJP consults with businesses and financial institutions on financial service matters. At times material hereto, Defendant Total Card, Inc. (Total Card or TCI) provided account servicing for credit card portfolios.

In 2011, LJP and Total Card began discussions about developing a relationship in which LJP would refer business to Total Card that would generate revenue for Total Card.

On December 15, 2012, LJP and Total Card entered into a written referral agreement. The agreement states, "For each new business opportunity referred to TCI; LJP Consulting LLC will be entitled to a referral fee equal to a percentage of the amount billed to a referral client for call center services provided by TCI."

The agreement further states:

> LJP Consulting LLC will contact TCI and brief them on each respective opportunity. If TCI wishes to purse (sic) the opportunity and it is not a prospective client that TCI is already engage (sic) with; a broker fee will be established based on the actual revenue for call center support services provided by TCI. The referral fee will be paid for the initial term of the servicing agreement (the rate established will be 3% for each client engagement/referral). If the TCI/Client contractual relationship is renewed, an ongoing referral fee of 3% will continue to be paid to LJP Consulting LLC.

The agreement does not define "call center services" or "call center support services."

Prior to entering into the agreement, Primus and Paul Simon (Total Card's National Sales Director) traded communications regarding how the 3% referral fee would be calculated. Simon confirmed the referral fee would be "based on all TCI related call center support services," including ancillary services such as ACH and payments. The communication further clarified the referral fee would not be paid on start-up/project fees and "FDR" processing because those were just pass-through costs.

In 2014, LJP referred First Equity Card Corporation to Total Card. After a series of negotiations and proposed agreements, Total Card entered into a servicing agreement with Progress One Financial, LLC, a wholly owned subsidiary of First Equity Holdings Group, Inc. Total Card subsequently began servicing the Progress One/First Equity account.

The parties at times refer to Total Card's client as First Equity, and other times refer to the client as Progress One. For convenience purposes, in this decision the court will refer to First Equity as the client being billed by Total Card for the services rendered under the servicing agreement.

Pursuant to the terms of the alleged referral agreement, Total Card made payments each month to LJP in the amount of 3% of the total revenue generated by the First Equity account (excluding the pass-through costs). This continued for approximately six years. In those six years, the First Equity account generated revenue in excess of $40,000,000, and over that six years Total Card paid LJP more than $1,200,000 in referral fees.

In December 2020, in a series of transfers and mergers (described in more detail below) Defendant Vervent acquired most of the assets and liabilities of Total Card, including the referral agreement with LJP and the servicing agreement with First Equity. Vervent made two payments to LJP for referral fees associated with the First Equity account, with the payments based on 3% of the total servicing revenues. In January 2021, however, Total

Card notified LJP that Total Card was terminating the TCI referral agreement and thereafter stopped paying the 3% referral fees associated with the First Equity account.

In April 2021, LJP commenced this action seeking: (1) a declaratory judgment that the Referral Agreement is a valid and enforceable contract with an ongoing obligation to pay a 3% referral fee for so long as the First Equity account continues to generate revenue; and (2) damages for breach of the Referral Agreement resulting from the failure to pay referral fees owed on the First Equity account.

Vervent filed a Motion to Dismiss the instant action, arguing that it properly terminated the Referral Agreement in January 2021, thereby ceasing the ongoing obligation to pay the 3% referral fees from the First Equity account to LJP. LJP opposed the Motion to Dismiss and filed a Motion for Partial Summary Judgment on four issues:

(1) The Referral Agreement is a valid and enforceable contract.
(2) The obligation to pay the 3% referral fee continues for so long as the First Equity account generates revenue.
(3) Vervent assumed the Referral Agreement with its TCI acquisition and the ongoing obligation to pay the referral fee.
(4) Vervent is liable for breach of the Referral Agreement as a result of not paying LJP the referral fees incurred on revenues generated from the First Equity account since January 2021.

On December 3, 2021, the court issued its letter decision denying Vervent's motion to dismiss. The court found Vervent had the right to terminate the agreement with LJP as it pertains to *prospective* referrals that LJP had not yet made, but Vervent was not permitted to end the agreement with LJP as it pertains to the continuing referral fee on the First Equity account.

The court also denied LJP's motion for summary judgment, finding that there were genuine issues of material fact on several issues, including: (1) to what extent Vervent and/or a subsidiary acquired Total Card and/or a subsidiary, including what assets and obligations were acquired and/or assumed by whom; (2) Vervent's claims that Total Card never entered into an agreement with First Equity but instead involved an affiliate, Total Card Solutions, LLC, and a subsidiary of First Equity called Progress One Financial, LLC; and (3) whether the referral agreement is limited to the provision of call center support services and, if so, whether Vervent provides call center support services to First Equity.

On December 6, 2021, LJP filed an amended complaint alleging the same causes of action as the initial complaint but clarifying that LJP was seeking specific performance of the referral agreement in the future.

The parties conducted additional discovery, after which LJP filed a second motion for summary judgment. As part of Vervent's response, it requested time to conduct additional discovery, which was granted. The parties then submitted additional briefing.

ARGUMENT AND ANALYSIS

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law." SDCL § 15-6-56(c). "[T]he moving party has the burden of clearly demonstrating an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law." *Johnson v. Matthew J. Batchelder Co., Inc.*, 2010 S.D. 23, ¶ 8, 779 N.W.2d 690, 693 (citations omitted). All reasonable inferences drawn from the facts must be viewed in favor of the non-moving party. *Id.* (citations omitted). "Unsupported conclusions and speculative statements do not raise a genuine issue of fact." *Dakota Indus., Inc. v. Cabela's.Com, Inc.*, 2009 S.D. 39, ¶ 20, 766 N.W.2d 510, 516. "[A] disputed fact is not 'material' unless it would affect the outcome of the suit under the governing substantive law in that a 'reasonable jury could return a verdict for the nonmoving party.'" *Gul v. Ctr. For Family Med.*, 2009 S.D. 12, ¶ 8, 762 N.W.2d 629, 633 (quoting *Weitzel v. Sioux Valley Heart Partners*, 2006 S.D. 45, ¶ 17, 714 N.W.2d 884, 891).

The primary issue pending is whether the terms "call center services" or "call center support services" as used in the referral agreement are ambiguous. Before addressing that issue, the court will clarify some of the other issues raised in LJP's motion for summary judgment.

Vervent acquired all assets and obligations of Total Card relating to the referral agreement with LJP and servicing agreement with First Equity.

Vervent initially asserted there was a question of fact regarding whether Vervent and/or a subsidiary acquired Total Card and/or a subsidiary, including what assets and obligations were acquired and/or assumed by whom.

Based on the submissions relating to LJP's second motion for summary judgment, the court finds that Total Card transferred all of its assets and liabilities (except certain retained assets and liabilities) to a wholly owned subsidiary, TCI Dropdown. The referral agreement with LJP and the servicing agreement with First Equity were not part of the retained assets or liabilities, but instead were transferred to TCI Dropdown. Vervent then purchased Total Card's equity interest in TCI Dropdown. TCI Dropdown subsequently merged with and into Vervent.

Material to this case, the bottom line of these transactions is that Vervent acquired all assets and obligations of Total Card relating to the referral agreement with LJP and the servicing agreement with First Equity.

Vervent is bound by the same terms as was Total Card.

Vervent asserts that because the referral agreement was between LJP and Total Card, the terms of the agreement are not binding on Vervent. Vervent, however, agrees (and the court finds) that Vervent assumed the Total Cards' rights under the First Equity servicing agreement and the obligations under the LJP referral agreement. Caselaw is clear that when a successor acquires a contract, it steps into the shoes of its predecessor. *Minder & Jorgenson Land Co. v. Brustuen*, 26 S.D. 38, 127 N.W. 546, 547 (1910); *Groseth Intern., Ind. v. Tenneco, Inc.*, 410 N.W.2d 159, 169 (S.D. 1987).

Vervent is liable to pay LJP pursuant to the referral agreement and its failure to do so is a breach of the referral agreement.

The court previously ruled that Vervent cannot unilaterally terminate the referral agreement as it relates to past referrals. Further, based on the submittals, the court finds that Vervent continues to provide services to First Equity, is liable to pay LJP pursuant to the referral agreement, and has failed to pay LJP the amount due to LJP.

The real question, however, is how much is due to LJP under the referral agreement, which is a genuine issue of material fact.

The referral agreement with LJP is ambiguous.

As stated in *Detmers v. Costner*, 2021 S.D. 40, ¶¶ 21-22:

> "[W]here there is a valid express contract existing between parties in relation to a transaction fully fixing the rights of each, there is no room for an implied promise." *J. Clancy, Inc. v. Khan Comfort, LLC*, 2021 S.D. 9, ¶ 27, 955 N.W.2d 382, 391 (quoting *Koopman v. City of Edgemont by Dribble*, 2020 S.D. 37, ¶ 20, 945 N.W.2d 923, 928). "[A]n express contract precludes the existence of a contract implied by law or a quasi-contract." *Id.* (alteration in original) (quoting *Jurrens v. Lorenz Mfg. Co. of Benson, Minn.*, 1998 S.D. 49, ¶ 6, 578 N.W.2d 151, 153).
>
> " 'Contract interpretation is a question of law' reviewed de novo." *Detmers I*, 2012 S.D. 35, ¶ 20, 814 N.W.2d at 151 (citation omitted). "When interpreting a contract, '[a court] looks to the language that the parties used in the contract to determine their intention.' " *Id.* (citation omitted). "When the words of a contract are clear and explicit and lead to no absurd

> consequences, the search for the parties' common intent is at an end." *Id.* (quoting *Nelson v. Schellpfeffer*, 2003 S.D. 7, ¶ 8, 656 N.W.2d 740, 743). Courts "may neither rewrite the parties' contract nor add to its language[.]" *Id.* ¶ 21, 814 N.W.2d at 151 (quoting *Culhane v. W. Nat'l Mut. Ins. Co.*, 2005 S.D. 97, ¶ 27, 704 N.W.2d 287, 297).

As further stated in *Dowling Family Partnership v. Midland Farms, LLC*, 2015 S.D. 50, ¶ 13, 865 N.W.2nd 854, 860:

> "A contract is ambiguous when application of rules of interpretation leave[s] a genuine uncertainty as to which of two or more meanings is correct." *Ziegler Furniture & Funeral Home, Inc. v. Cicmanec*, 2006 S.D. 6, ¶ 16, 709 N.W.2d 350, 355 (quoting *Alverson v. Nw. Nat'l Cas. Co.*, 1997 S.D. 9, ¶ 8, 559 N.W.2d 234, 235).
>
> > A contract is not rendered ambiguous simply because the parties do not agree on its proper construction or their intent upon executing the contract. Rather, a contract is ambiguous only when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement.
>
> *Pesicka v. Pesicka*, 2000 S.D. 137, ¶ 10, 618 N.W.2d 725, 727 (quoting *Singpiel v. Morris*, 1998 S.D. 86, ¶ 16, 582 N.W.2d 715, 719).

Whether a contract is ambiguous is a question of law. *Roseth v. Roseth*, 2013 S.D. 27, ¶ 13, 829 N.W.2d 136, 142. If a contract is found to be ambiguous, parol evidence is admissible to explain the instrument. *Id.* ¶ 15.

In addition, as held by our Supreme Court in *Laska v. Laska*, 2016 S.D 13, ¶ 9, 876 N.W.2d 50,

> We have previously explained that "when there is an ambiguous contract, evidence must be introduced to determine what the intentions of the parties were and ... such evidence creates a question of fact[.]" *Gail M. Benson Living Tr. v. Physicians Office Bldg., Inc.*, 2011 S.D. 30, ¶ 16, 800 N.W.2d 340, 344 (quoting *Vollmer v. Akerson*, 2004 S.D. 111, ¶ 9, 688 N.W.2d 225, 229). Therefore, we remand to the circuit court to consider extrinsic evidence and determine the parties' intent. *See id.* (finding a contract ambiguous and remanding "to allow the introduction of evidence regarding the intentions of the parties").

In this case, LJP at times asserts the referral agreement is not ambiguous (page 18 of LJP's brief filed May 3, 2022), and at other times asserts the agreement is ambiguous (page 6 of LJP's brief filed November 1, 2022). Vervent asserts the referral agreement is unambiguous but admits the agreement does not define "call center services" or "call center support services."

LJP asserts it is entitled to payments based upon 3% of total revenue generated for services provided by Vervent to First Equity. LJP further asserts that Paul Simon's communications prior to the parties entering into the referral agreement, and Total Card's course of conduct in making payments for six years, support LJP's interpretation.

Vervent asserts "call center support services" is limited to those services in which a customer calls Vervent on the phone for technical or customer support purposes and does not include on-line services, sending written and electronic communications to customers, and use of other technology.

The court concludes that the referral agreement is ambiguous to the extent it does not define "call center services" or "call center support services." Accordingly, as required by *Laska,* evidence must be introduced to determine what the intentions of the parties were, and such evidence creates a question of fact.

Conclusion

As set forth above, the court grants in part and denies in part LJP's second motion for summary judgment. LJP shall prepare a proposed order. Thank you.

Sincerely,

Jon Sogn

Jon Sogn, Circuit Court Judge

FILED
AUG 24 2023
Minnehaha County, S.D.
Clerk Circuit Court

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

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49CIV21-001047

LJP CONSULTING LLC, A Delaware Limited Liability Company,

Plaintiff,

v.

VERVENT, INC., a Delaware Corporation,

Defendant.

ORDER ON PLAINTIFF'S MOTIONS IN LIMINE

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On June 24, 2024, LJP Consulting, LLC ("LJP") filed its Motions in Limine. On July 1, 2024, Vervent, Inc. ("Vervent") and Total Card, Inc. ("TCI") filed a response to the Motions in Limine. On July 3, 2024, LJP filed its reply brief in support of its Motions in Limine.

On July 9, 2024, the Court held a pretrial conference and heard LJP's Motions in Limine. Tim R. Shattuck and Jacquelyn A. Bouwman of Woods, Fuller, Shultz & Smith P.C. appeared on behalf of LJP. Shawn Nichols of Cadwell Sanford Deibert & Garry LLP appeared on behalf of Defendants, Vervent and TCI. [1]

The Court has considered the Motions in Limine, related filings, other documents on file in this matter, including prior rulings of the Court, and the oral arguments of counsel. At the pretrial conference, the Court made oral rulings on the Motions in Limine. The Court

[1] At the pretrial conference, the parties noted that they would be filing a joint stipulation to dismiss TCI as a Defendant.

incorporates those rulings and the rationale stated on the record for those rulings into this Order. Accordingly, consistent with the Court's oral rulings, it is hereby

ORDERED, ADJUDGED, and DECREED:

1. LJP's first Motion in Limine is denied.

2. LJP's second Motion in Limine is granted.

3. LJP's third Motion in Limine is granted.

4. LJP's fourth Motion in Limine is granted.

5. LJP's witness sequestration request is granted by agreement of the parties. All witnesses, with the exception of expert witnesses and one corporate representative for each side, shall be sequestered.

Dated this ___ day of _____, 2024.

7/25/2024 2:32:45 PM

BY THE COURT:

Hon. Douglas P. Barnett
Circuit Court Judge

ATTEST:

Clerk _____

By _____

Attest:
Russell, Lisa
Clerk/Deputy

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

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49CIV21-001047

LJP CONSULTING LLC, A New Jersey Limited Liability Company,

Plaintiff,

v.

VERVENT, INC., A Delaware Corporation,

Defendant.

ORDER GRANTING PLAINTIFF'S APPLICATION FOR TAXATION OF COSTS AND PLAINTIFF'S MOTION FOR THE GRANT OF A PERMANENT INJUNCTION AND THE ENTRY OF A FINAL JUDGMENT

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The Court, the Honorable Douglas P. Barnett, Circuit Court Judge, presiding, held a hearing on Plaintiff, LJP Consulting LLC's, Motion for the Grant of a Permanent Injunction and the Entry of a Final Judgment and Plaintiff's Application for Taxation of Costs on September 9, 2024, at 3:00 p.m., at the Minnehaha County Courthouse in Sioux Falls, South Dakota. Tim R. Shattuck and Jacquelyn A. Bouwman of Woods, Fuller, Shultz & Smith P.C. appeared on behalf of Plaintiff, LJP Consulting LLC ("LJP"). Shawn Nichols of Cadwell Sanford Deibert & Garry LLP appeared on behalf of Defendant, Vervent, Inc. ("Vervent").

LJP's Amended Complaint asserts a claim for past damages resulting from Vervent's breach of the Referral Agreement and a claim for specific performance of the Referral Agreement on a going-forward basis. This Court previously ruled that Vervent acquired the Referral Agreement from Total Card, Inc., is therefore bound by the Referral Agreement, and has breached the Referral Agreement by refusing to pay LJP referral fees owed after January 2021. (Judge Sogn's Second Letter Decision, Aug. 24, 2023.) A jury trial was held August 6 - 8, 2024,

to determine the damages owed to LJP under the Referral Agreement and whether LJP was entitled to damages following the First Equity transaction in March 2022.

The jury returned a verdict in favor of LJP in the amount of $1,000,064.75. (Jury's Special Verdict.) The jury also determined that LJP's damages continued to accrue after March 2022, as evidenced by the jury's itemization of damages for each month from January 2021 through June 2024 (the most recent monthly invoices that Vervent produced in discovery). (*Id.*) Specifically, the jury determined that the referral fees owed to LJP each month should be calculated at 3% of $5.25 for each active First Equity account. (*Id.* at Special Interrogatory No. 2.)

Based on the jury's verdict, LJP is entitled to judgment in the principal amount of $1,000,064.75. Pursuant to SDCL §§ 21-1-13.1 and 54-3-16(2), LJP is also entitled to pre-judgment interest in the amount of $220,512.75 as of September 17, 2024, plus per diem interest of $273.99 after September 17, 2024, until entry of final judgment. The Court further finds that, LJP, as the prevailing party, is entitled to its costs in the amount of $1,985.27 pursuant to SDCL § 15-17-37. At the hearing, Vervent noted that, subject to its Motion for Remittitur, it had no objection to Plaintiff's Application for Taxation of Costs or to LJP's calculation of the amount of pre-judgment interest or the amount of the final judgment.

Furthermore, based upon the jury's finding that LJP is entitled to referral fees after March 2022, the Court finds that LJP is entitled to specific performance via a permanent injunction mandating the payment of future referral fees owed under the Referral Agreement pursuant to SDCL §§ 21-8-14(3), 21-9-1, and 21-9-4. Specific performance of the Referral Agreement is

proper under the facts of this matter and necessary to avoid a multiplicity of judicial proceedings. The Court further finds that through specific performance, the Court "can do more perfect and complete justice" than any available remedy at law. *Nielsen v. Hokenstead*, 81 S.D. 526, 528, 137 N.W.2d 880, 881 (1965) (internal quotation omitted).

In considering a request for a permanent injunction, the Court is required to weigh the following four factors:

> (1) Did the party to be enjoined cause the damage? (2) Would irreparable harm result without the injunction because of lack of an adequate and complete remedy at law? (3) Is the party to be enjoined acting in bad faith or is the injury-causing behavior an innocent mistake? (4) In balancing the equities, is the hardship to be suffered by the enjoined party disproportionate to the benefit to be gained by the injured party?

McDowell v. Sapienza, 2018 S.D. 1, ¶ 25, 906 N.W.2d 399, 407. Each of these factors weigh in favor of entry of a permanent injunction. First, Vervent has caused damage to LJP by refusing to pay the referral fees owed to LJP. Second, irreparable harm would result without the injunction because there is no adequate and complete remedy at law. An award of future damages is not an adequate remedy because it would have been extremely difficult for the jury to calculate the amount of such damages. As a result, LJP would be required to file multiple lawsuits over time to be fully compensated for its future losses. Third, Vervent's behavior was not an innocent mistake, but was an intentional decision to discontinue payments legally owed to LJP under the Referral Agreement. Fourth, any hardship suffered by Vervent by being subject to the permanent injunction is not disproportionate to the benefit to be gained by LJP. The injunction for specific performance simply requires Vervent to fulfill its obligations to LJP under the Referral Agreement.

Therefore, having considered the filings and pleadings in this matter, including the Jury's Special Verdict, as well as the arguments of counsel, and for the reasons stated by the Court in its oral ruling at the hearing, which are incorporated herein by reference, and above in this Order, it is hereby

ORDERED, ADJUDGED, AND DECREED that LJP's Application for Taxation of Costs is granted; it is further

ORDERED, ADJUDGED, AND DECREED that LJP's Motion for the Grant of a Permanent Injunction and the Entry of a Final Judgment is granted; it is further

ORDERED, ADJUDGED, AND DECREED that judgment is entered in favor of LJP and against Vervent consistent with the jury's award of $1,000,064.75 in principal, plus costs in the amount of $1,985.27, and pre-judgment interest in the amount of $220,512.75 as of September 17, 2024, for a final judgment of **$1,222,562.77** as of September 17, 2024, plus per diem pre-judgment interest of $273.99 after September 17, 2024, until entry of this Order, with post-judgment interest accruing on the final judgment amount until the judgment is satisfied in full; it is further

ORDERED, ADJUDGED, AND DECREED that a permanent injunction is entered in favor of LJP and that Vervent shall, by the 15th day of each month provide LJP with a copy of the invoices prepared by Vervent for servicing the First Equity accounts the prior month and Vervent shall pay LJP 3% of $5.25 for each First Equity account serviced the prior month (0.03 x $5.25 x the number of active accounts), which is consistent with the calculation of damages in Special Interrogatory No. 2 of the Jury's Special Verdict; it is further

ORDERED, ADJUDGED, and DECREED, that the permanent injunction is effective as of July 31, 2024, and shall be effective for so long as Vervent is servicing any active First Equity account; it is further

ORDERED, ADJUDGED, and DECREED that the permanent injunction is binding on Vervent, its officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with Vervent pursuant to SDCL § 15-6-65(d); and it is further

ORDERED, ADJUDGED, and DECREED that if either party believes that there has been a change in circumstances affecting the enforcement of the permanent injunction, that party may move the Court to construe, modify, or vacate the injunction.

10/7/2024 4:03:53 PM

BY THE COURT:

Douglas P. Barnett
Circuit Court Judge

Attest:
Patzer, Sarah
Clerk/Deputy

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

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49CIV21-001047

LJP CONSULTING LLC, A New Jersey Limited Liability Company,

Plaintiff,

v.

VERVENT, INC., A Delaware Corporation,

Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR REMITTITUR

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The Court, the Honorable Douglas P. Barnett, Circuit Court Judge, presiding, held a hearing on Defendant's Motion for Remittitur on September 9, 2024, at 3:00 p.m., at the Minnehaha County Courthouse in Sioux Falls, South Dakota. Tim R. Shattuck and Jacquelyn A. Bouwman of Woods, Fuller, Shultz & Smith P.C. appeared on behalf of Plaintiff, LJP Consulting LLC ("LJP"). Shawn Nichols of Cadwell Sanford Deibert & Garry LLP appeared on behalf of Defendant, Vervent, Inc. ("Vervent").

The Court, having considered the filings and pleadings in this matter, including the Jury's Special Verdict, as well as the arguments of counsel, and for the reasons stated by the Court in its oral ruling, which are incorporated herein by reference, it is hereby

ORDERED, ADJUDGED, AND DECREED that Vervent's Motion for Remittitur is denied.

10/7/2024 4:04:08 PM

BY THE COURT:

Douglas P. Barnett
Circuit Court Judge

Attest:
Patzer, Sarah
Clerk/Deputy

STATE OF SOUTH DAKOTA) :SS COUNTY OF MINNEHAHA)		IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
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LJP CONSULTING LLC, A Delaware Limited Liability Company Plaintiff, v. VERVENT INC., A Delaware Corporation Defendant.	:	49CIV21-001047 **ORDER DENYING DEFENDANT'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW**
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On October 17, 2024, Vervent Inc. ("Vervent") timely filed Defendant's Renewed Motion for Judgement as a Matter of Law ("Renewed Motion") pursuant to SDCL § 15-6-50(b). LJP Consulting, LLC filed an opposition to the Renewed Motion on October 22, 2024. Vervent has waived the filing of a reply brief, and the parties have agreed that the Renewed Moton may be decided by the Court based on the written submissions without a hearing.

Having considered the Renewed Motion and the parties' briefs regarding the Renewed Motion, the parties' other submissions and arguments regarding the relief sought by the Renewed Motion, the evidence presented at trial, and the jury's verdict, the Court hereby:

1. Orders, adjudges, and decrees that the Renewed Motion is denied;

2. Orders, adjudges, and decrees that Vervent's third argument that a reasonable jury could not find that the client contractual relationship was renewed after March 31, 2022, was not made in support of Vervent's Motion for Judgment as a Matter of Law filed pursuant to SDCL § 15-6-50(a), and therefore was not properly included in the Renewed Motion; and

3. Orders, adjudges, and decrees that even if the Court considered Vervent's argument that a reasonable jury could not find that the client contractual relationship was renewed after March 31, 2022, the Court would deny the Renewed Motion.

11/4/2024 12:34:01 PM

BY THE COURT:

Douglas P. Barnett
Circuit Court Judge

Attest:
Patzer, Sarah
Clerk/Deputy

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 30891

LJP CONSULTING LLC,

Plaintiff-Appellee,

vs.

VERVENT INC.,

Defendant-Appellant.

Appeal from the Circuit Court
Second Judicial Circuit
Minnehaha County, South Dakota

THE HONORABLE DOUGLAS P. BARNETT, CIRCUIT COURT JUDGE

APPELLEE'S BRIEF

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Attorneys for Defendant-Appellant

Notice of Appeal Filed November 7, 2024

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JURISDICTIONAL STATEMENT

Vervent appeals the circuit court's denial of its Motion to Dismiss and partial granting of LJP's first Motion for Summary Judgment, which were decided on December 3, 2021. (R. 193-96.) Vervent appeals the circuit court's decision to initially grant LJP's Motion in Limine on July 25, 2024, which the circuit court later reversed in favor of Vervent prior to its case in chief. (R. 1176-77; Vol. 2 Tr. 108-09.) Vervent appeals the circuit court's denial of its initial Motion for Judgment as a Matter of Law and its renewed Motion for Judgment as a Matter of Law on August 7, 2024. (R. 1229-1240; Vol. 2 Tr. 108, 218.) Vervent appeals the jury's award of damages for referral fees after March 31, 2022. (Special Verdict (R. 1754-56; App. 7-9).) Vervent appeals the circuit court's denial of its Motion for Remittitur and granting of LJP's Motion for Permanent Injunction on October 7, 2024. (R. 1906-1912.) Finally, Vervent appeals the circuit court's denial of its second renewed Motion for Judgment as a Matter of Law on November 4, 2024. (R. 1945-46.) Vervent filed its Notice of Appeal on November 7, 2024. (R. 1953-55.)

STATEMENT OF THE ISSUES

I. Whether the circuit court properly ruled that a party cannot unilaterally terminate obligations it owes for a completed referral under a referral agreement without an end duration?

The circuit court denied Vervent's Motion to Dismiss and partially granted LJP's first Motion for Summary Judgment, holding that the facts of the present case are distinguishable from the general rule that a contract without a specified duration is unilaterally terminable. Specifically, the circuit court ruled that the Referral Agreement itself could be unilaterally terminated as to prospective referrals, but LJP's right to a referral fee owed for the completed referral of First Equity could not be unilaterally terminated by Vervent.

Authority: *Warner-Lambert Pharmaceutical Co. v. John J. Reynolds, Inc., aff'd*, 280 F.2d 197 (2d Cir. 1960)

Lura v. Multaplex, Inc., 129 Cal. App. 3d 410, 412 (Cal. Ct. App. 1982)
Cambee's Furniture, Inc. v. Doughboy Recreational, Inc., 825 F.2d 167, 172 (8th Cir. 1987)
SDCL § 15-6-12(b)(5)
SDCL § 15-6-56

II. Whether a reasonable jury could have found there was an ongoing "Client contractual relationship," as contemplated by the Referral Agreement between Vervent and Phoenix, as successor-in-interest to First Equity, entitling LJP to continuing referral fees on the First Equity Accounts after March 31, 2022?

The jury awarded LJP damages for each month on the Special Verdict, including those after March 31, 2022, confirming the jury's finding that Vervent's continued servicing of the First Equity Accounts for Phoenix after March 2022 constituted an ongoing "Client contractual relationship" under the Referral Agreement, thereby entitling LJP to continuing referral fees.

Authority: *Osman v. Karlen & Assocs.*, 2008 S.D. 16, ¶ 14, 746 N.W.2d 437, 442
Matter of Est. of Tank, 2023 S.D. 59, ¶ 56, 998 N.W.2d 109, 126
Alvine v. Mercedes-Benz of N. Am., 2001 S.D. 3, ¶ 17, 620 N.W.2d 608, 612
Coffey v. Coffey, 2016 S.D. 96, ¶ 9, 888 N.W.2d 805, 809
SDCL § 15-6-50(a)
SDCL § 15-6-59(a)

III. Whether the circuit court properly entered a permanent injunction ordering Vervent to pay LJP future referral fees, consistent with the jury's calculation of damages, for so long as Vervent is servicing the First Equity Accounts?

The circuit court granted LJP a permanent injunction ordering specific performance of Vervent's continuing obligations owed to LJP under the Referral Agreement. Specifically, the circuit court utilized the jury's calculation of damages and ordered Vervent to pay future referral fees consistent with the jury's verdict as they become due under the Referral Agreement for so long as Vervent is servicing the First Equity Accounts.

Authority: *Nielsen v. Hokenstead*, 81 S.D. 526, 528, 137 N.W.2d 880, 881 (1965)
Smith v. WIPI Grp., USA, Inc., 2023 S.D. 48, ¶ 57, 996 N.W.2d 368, 383
McDowell v. Sapienza, 2018 S.D. 1, ¶ 25, 906 N.W.2d 399, 407

Tamarind Lithography Workshop, Inc. v. Sanders, 193 Cal. Rptr. 409, 410 (Ct. App. 1983)
SDCL § 21-9-1
SDCL § 21-9-4
SDCL § 21-8-14(2)
SDCL § 21-8-14(3)

STATEMENT OF THE CASE

LJP Consulting LLC ("LJP") filed suit in the Second Judicial Circuit, Minnehaha County, against Vervent Inc. ("Vervent") and Total Card, Inc. ("TCI")[1] in April 2021. (R. 2-10.) LJP filed an Amended Complaint in December 2021, seeking damages for breach of contract and specific performance of the referral fees owed under the Referral Agreement (as defined below). (R. 197-205.) Vervent filed a Motion to Dismiss, alleging that it could unilaterally terminate the Referral Agreement because it does not have an end date. (R. 17-26.) LJP countered with its first Motion for Summary Judgment ("First MSJ"), arguing that while the Referral Agreement could be terminated for future referrals, the obligations owed for a completed referral—*i.e.* the First Equity referral—could not be unilaterally terminated. (R. 34-81.) The Honorable Jon C. Sogn ruled in favor of LJP on that issue, finding that the obligations owed under the Referral Agreement for a completed referral could not be unilaterally terminated. (First Letter Decision (R. 193-96).)

Following discovery regarding Vervent's acquisition of TCI, LJP filed its second Motion for Summary Judgment ("Second MSJ"). (R. 255-663.) Judge Sogn granted the Second MSJ in part, ruling that: (1) Vervent had acquired the Referral Agreement and is bound by the same terms as was TCI; and (2) Vervent's failure to pay referral fees is a

[1] TCI was dismissed from this lawsuit after it was confirmed that Vervent had acquired the contracts at issue and was the only proper defendant. (Stip. and Order Dismissing TCI (R. 1125-29).)

breach of the Referral Agreement. (Second Letter Decision (R. 1024-30).) Regarding the amount of the referral fee owed, Judge Sogn ruled that the Referral Agreement is ambiguous because it does not specifically define the services upon which the 3% referral fee is calculated and the amount of damages owed was, therefore, a question of fact for the jury. (*Id.* 7 (R. 1030).) In short, the only issue that remained to be tried to the jury was the calculation of damages under the Referral Agreement.

The Honorable Douglas P. Barnett presided over the jury trial. Vervent moved for judgment as a matter of law after LJP's case in chief ("Initial JMOL") and renewed its motion after its own case ("First Renewed JMOL"). Both motions were denied by Judge Barnett. (R. 1229-40; Vol. 2 Tr. 217-18.) At the conclusion of the 3-day trial, the jury determined the monthly referral fee should be calculated as 3% of $5.25 for each of the active First Equity Accounts serviced during a given month and awarded LJP $1,000,064.75 based on that calculation. (App. 7-9.)

Vervent filed a motion for remittitur and a second renewed motion for judgment as a matter of law ("Second Renewed JMOL"), both of which were denied. (R. 1793-1803, 1927-40.) LJP moved for a permanent injunction ordering payment of future referral fees consistent with the jury's calculation of damages. (R. 1773-79.) Judge Barnett granted the permanent injunction, ordering Vervent to pay LJP 3% of $5.25 for each account serviced during a given month, for so long as Vervent continues to service the First Equity Accounts. (R. 1908-12.) Vervent then appealed. (R.1953-55.)

STATEMENT OF THE FACTS

In December 2012, LJP and TCI executed a contract (the "Referral Agreement") exclusively prepared by TCI. (Vol. 1 Tr. 37-38, 151; Ex. 9[2] (R. 1425-26; App. 1-2).) The Referral Agreement specified that TCI would pay LJP a referral fee of 3% of the revenue generated by providing call center services to a qualified referral. (App. 1-2.) The Referral Agreement further provides that the referral fee will be ongoing if the "Client contractual relationship is renewed." (*Id.*) LJP subsequently referred First Equity Card Corporation ("First Equity") to TCI in 2013. (Vol. 1 Tr. 53.) TCI accepted First Equity as a qualified referral and began servicing the First Equity credit card accounts (collectively, the "First Equity Accounts") in November 2014. (Ex. 35 (R. 1510-88).) Pursuant to the Referral Agreement, each month from November 2014 through October 2020, TCI paid LJP a referral fee equal to 3% of the revenue TCI generated from servicing the First Equity Accounts that month. (Exs. 34-35 (R. 1503-88).)

In November 2020, Vervent acquired substantially all of TCI's assets and liabilities, including the right to service the First Equity Accounts. (Second Letter Decision (R. 1024-30).) Similarly, Vervent acquired the Referral Agreement that was originally between TCI and LJP. (*Id.*) Consistent with TCI's course of conduct, for the first two months after Vervent had acquired TCI, Vervent paid LJP the 3% referral fee on all revenue generated by servicing the First Equity Accounts. (Ex. 36 (R. 1589-90); Vol. 1 Tr. 79-80.) In January 2021, Vervent sent a letter to LJP terminating the Referral Agreement, effective immediately and ceased paying LJP the monthly referral fees. (Ex. 37 (R. 1591); Vol. 1 Tr. 83.)

[2] Citations to exhibits are to the trial exhibits.

LJP commenced this action in April 2021. (Compl.; Affs. of Service (R. 2-14).) In March 2022, during the pendency of this litigation, First Equity was acquired by Phoenix Card Group LLC ("Phoenix")—a cousin entity of Vervent (the "First Equity Acquisition"). (Exs. DD, GG (R. 1343-44, 1368-82).) Vervent has an ongoing agreement with Phoenix to service the First Equity Accounts. (Ex. FF (R. 1347-67).) Each month following the First Equity Acquisition, Vervent has continued to issue an invoice for servicing the accounts and has been paid by Phoenix for its servicing. (Ex. 38 (R. 1592-55; App. 3-6[3]).) Since terminating the referral fee owed to LJP, Vervent has been paid $36,664,959.15 and counting for servicing the First Equity Accounts referred by LJP. (Exs. 38-39 (R. 1592-1656).)

At trial, LJP and Vervent presented competing theories regarding the calculation of the referral fee under the Referral Agreement. Ultimately, the jury arrived its own calculation, determining that the monthly referral fee should be calculated as 3% of a $5.25 flat fee for each of the active First Equity Accounts serviced by Vervent in a given month.[4] (App. 7-9.) Vervent also argued that the jury should not award referral fees for any month following the First Equity Acquisition, asserting that there was no longer an ongoing "Client contractual relationship," as contemplated by the Referral Agreement. LJP argued that the jury should award damages for each month through the date of trial, and that Vervent's invoices and other compelling evidence proved Vervent continued to

[3] The appendix includes a sample of Vervent's invoices, including the final invoice issued before the First Equity Acquisition (March 2022), the first invoice issued after the First Equity Acquisition (April 2022), and the last invoice issued prior to the date of trial (June 2022).

[4] Although the central issue at trial was how to calculate damages under the Referral Agreement, on appeal Vervent does not challenge the jury's method for calculating the referral fee.

be paid for servicing the First Equity Accounts just as it had prior to the First Equity Acquisition. The jury agreed with LJP—awarding damages for each month on the Special Verdict, totaling the $1,100,458.84. (*Id.*)

ARGUMENT

I. The circuit court correctly ruled that Vervent could not unilaterally terminate the obligations it owed under the Referral Agreement with respect to the completed First Equity referral.

A motion to dismiss is "viewed with disfavor and is rarely granted." *Guthmiller v. Deloitte & Touche, LLP*, 2005 S.D. 77, ¶ 4, 699 N.W.2d 493, 496. This Court's "review of a grant or denial of a motion to dismiss is the same as [its] review of a motion for summary judgment—is the pleader entitled to judgment as a matter of law? Thus, all reasonable inferences of fact must be drawn in favor of the non-moving party and [the Court] give[s] no deference to the trial court's conclusions of law." *Id.*

Vervent argues its Motion to Dismiss should have been granted because the Referral Agreement contains no definite term and was, therefore, unilaterally terminable. (Def.'s Br. 16.) While it is true that the general rule permits a contract with no fixed term to be terminated unilaterally, that general rule is inapplicable to a payment obligation owed on a completed referral.

Vervent refuses to recognize that the Referral Agreement is properly viewed as two separate, but related, legal components. The first being the Referral Agreement itself which provides that Vervent would pay a referral fee to LJP for any future referrals that LJP made. The second being the referral fee obligations owed to LJP under the Referral Agreement for the completed referral of First Equity. Because the contract does not contain a specified end date, LJP agrees that Vervent was legally permitted to terminate the Referral Agreement as it pertains to **prospective** referrals that LJP had not yet made.

See Cambee's Furniture, Inc. v. Doughboy Recreational, Inc., 825 F.2d 167, 172 (8th Cir. 1987) ("In general, a contract providing for no fixed term is terminable at will by either party.") (citing *Martin v. Equitable Life Assurance Soc'y of the U.S.*, 553 F.2d 573, 574 (8th Cir.1977)).

Contrary to prospective referrals, it was a breach of the Referral Agreement for Vervent to unilaterally terminate LJP's right to an ongoing referral fee for the **completed** First Equity referral. Although this is an issue of first impression for this Court, the right to ongoing fees for a completed referral under a contract with no end date is grounded in case law from across the nation for over a century. *Compare* Alexander *v. Cap. Paint Co.*, 111 A. 140, 144 (Md. 1920) *with Prism Grp., Inc. v. Slingshot Techs. Corp.*, 104 Mass. App. Ct. 785, 795, 245 N.E.3d 740, 748–49 (2024). Critically, Vervent has failed to cite any contrary authority.

The circuit court correctly relied on this plethora of legal authority in holding that "the general rule that a contract without a definite term is terminable at will by either party is inapplicable under the alleged facts in this case." (First Letter Decision 4 (R. 196).) In disputing the circuit court's ruling, Vervent repeatedly portrays its obligation under the Referral Agreement as an "indefinite or perpetual contract." (Def.'s Br. 17.) Vervent's argument mischaracterizes the circuit court's ruling. The referral fee owed on the First Equity Accounts is **not** an agreement in perpetuity; instead, it is a vested interest arising from a unilateral contract that continues only for so long as Vervent is generating revenue from servicing the First Equity Accounts.

A. The circuit court relied on well-established case law in ruling that referral fees for a completed referral cannot be unilaterally terminated.

The circuit court relied on *Warner-Lambert Pharmaceutical Co. v. John J. Reynolds, Inc.*, one of the seminal cases to consider the principle of ongoing payments arising from "agreements between the parties [that] contemplated periodic payments for the use of a trade secret, to wit, the secret formula for Listerine." 178 F. Supp. 655, 659 (S.D.N.Y. 1959), *aff'd*, 280 F.2d 197 (2d Cir. 1960). Warner, like Vervent, was a successor in interest to the original agreement. Warner argued that the agreement was "indefinite and unclear, at least to the length of time during which they would continue in effect." *Id.* at 660.

The *Warner* court disagreed and distinguished the agreement from a contract in perpetuity, holding "[t]he mere fact that an obligation under a contract may continue for a very long time is no reason in itself for declaring the contract to exist in perpetuity or for giving it a construction which would do violence to the expressed intent of the parties." *Id.* at 661. Instead, the court determined that the obligation of "[the original party] and its successors to pay is conditioned upon the continued manufacture or sale or Listerine." *Id.* at 662.

Warner, like Vervent, was "no innocent lamb wandering in the wilderness of big business ready to be shorn. It carried on a highly successful business on a large scale. It had available the advice of competent counsel." *Id.* at 667. As a successor, Warner, like Vervent, continued to reap the benefits of the agreement, indicating "how valuable the rights under the contract are and how unjust it would be to permit it to have its cake and eat it too." *Warner*, 178 F. Supp. at 667. Accordingly, the *Warner* court held the

agreement required Warner to continue making royalty payments for so long as it continued to manufacture Listerine. *Id.*

In the present case, the circuit court found *Warner* to be persuasive, ruling that referral fees owed under the Referral Agreement for the completed referral of First Equity could not be unilaterally terminated. (First Letter Decision 4 (R. 196).) Vervent attempts to distinguish *Warner* because the underlying contract in *Warner* had a provision that bound successors. (Def.'s Br. 22.) However, the *Warner* court did **not** rely on this successor provision in concluding the plaintiff was entitled to an ongoing commission. Instead, the court determined that the obligation "to pay is conditioned upon the continued manufacture or sale [of] Listerine." *Warner*, 178 F. Supp. at 662. Even so, in its Complaint, LJP pled that Vervent had acquired the Referral Agreement, which the circuit court was required to treat as true for purposes of the Motion to Dismiss.[5] (Compl. ¶ 13 (R. 4).); *Guthmiller*, 2005 S.D. 77, ¶ 4, 699 N.W.2d at 496.

Vervent further attempts to distinguish *Warner* by arguing that the terms of the Referral Agreement provide a referral fee will continue *if* the contract is renewed versus *for so long* as the contract is renewed. (Def.'s Br. 22.) Vervent's argument is a distinction without meaning. In its Complaint, LJP also pled that First Equity was an ongoing client of Vervent. (Compl. ¶ 16 (R. 4).) In other words, LJP pled (and later established at trial) the existence of an ongoing contractual relationship entitling LJP to a continuing referral fee.

In addition to its unsuccessful attempt to distinguish *Warner*, Vervent summarily asserts that the other "related authority are inapplicable to the Referral Agreement."

[5] This fact was later established as undisputed when LJP filed its Second MSJ.

(Def.'s Br. 21.) However, Vervent fails to distinguish the numerous cases from across the country that have consistently applied the principle established in *Warner* to referral agreements.

One of the first cases to do so is *Lura v. Multaplex, Inc.*, which is directly analogous to the present case. 129 Cal. App. 3d 410, 412 (Cal. Ct. App. 1982). In *Lura*, the parties entered into an agreement that provided a commission (referral fee) for referred business accounts. *Id.* The agreement did not specify a duration. *Id.* The referring party solicited the accounts but had no continuing duty to service them. *Id.* For two years, commissions were paid on a referred account until the party holding the account terminated its commission payments, asserting the referring party had received full and reasonable compensation. *Id.* In support of its unilateral termination, the terminating party argued the agreement was an impermissible contract in perpetuity. *Id.* at 413.

The *Lura* court disagreed, holding "the important factor, then, is not whether the contract fails to specify a termination date, but whether there is an ascertainable event which necessarily implies termination." *Id.* at 414-15. The court further noted that "[t]he present agreement, like *Warner*, provides for such an event, i.e., the termination of sales to the specified accounts." *Id.* at 415. In other words, "an agreement providing for the payment of a percentage of all billings on sales is subject to the construction that it is to continue for as long as 'billings' are made." *Id.* at 415. Like in *Lura*, Vervent's argument that it could unilaterally terminate commissions because a "reasonable" amount had been paid is directly contrary to the terms of the Referral Agreement.

Furthermore, the *Lura* court recognized that the "agreement is unilateral; [plaintiff's] only duties were to obtain the accounts, and he had no further duty to service them. Once this performance was executed, the only obligation remaining was that of [defendant] to pay the agreed compensation." *Id.* at 414. The same is true here. Vervent admits that the referral of the First Equity Accounts was "completed years ago" and that "[n]o work continues" on the part of LJP. (Def.'s MTD Br. 5 (R. 23).) Vervent's argument "merely reaffirms that [LJP] fully performed [its] obligations and was entitled to the agreed upon compensation." *Lura*, 129 Cal. App. 3d. at 415.

Lura is just one of many cases to enforce an ongoing referral fee where the referral had been completed. *See Prism Grp., Inc.*, 104 Mass. App. Ct. at 795 (holding continued commissions owed for a completed referral of customers "is neither novel nor troublesome—many royalty agreements operate on such basis."); *Ins. Distribution Consulting, LLC v. Freedom Equity Grp., LLC*, No. 3:20-CV-00096, 2021 WL 5545231, at *5 (S.D. Tex. Nov. 26, 2021) (recognizing courts have long held that rights to vested commissions, such as for securing new business relationships, "will not be affected by termination of the contract"); *High Concept Holdings, Inc. v. CarMedix, Inc.*, 2019 IL App (1st) 18-0075-U, ¶¶ 40-41 (holding referral agreement is "'terminable' in that one party can cut off the contractual relationship going forward—meaning no more 'finding,' no more new clients—but *not* cut off an obligation *already* incurred") (emphasis in original); *McDonald v. Scitec, Inc.*, 2013 ME 59, ¶ 2, 79 A.3d 374, 378-89, *as revised* (June 20, 2013) (ruling either party could terminate the open-ended agreement prospectively but could not "unilaterally end [the plaintiff's] entitlement to commissions based on performance rendered before the agreement was terminated"); *Better Living*

Now, Inc. v. Image Too, Inc., 67 A.D.3d 940, 942, (N.Y. 2009) (holding obligations continued "so long as the plaintiff and the 'Other Party' continue their relationship"); *Jefferson Smurfit Corp. v. Hopkins*, 894 S.W.2d 951, 952 (Ark. Ct. App. 1995) (holding obligation under the agreement was "to continue as long as the [the defendant] continued to make sales"); *American Chocolates Inc. v. Mascot Pecan Co.*, 592 So. 2d 93, 95 (Miss. 1991) (ruling termination of the contract "could not relieve [the defendant] of an obligation it had resulting from a past performance by [the plaintiff]"); *Hoover v. Kleer-Pak of N. Carolina, Inc.*, 236 S.E.2d 386, 389 (N.C. Ct. App. 1977) (ruling commissions owed under referral agreement would be paid for so long as products were sold); *Muller Enterprises, Inc. v. Gerber*, 133 N.W.2d 913, 919 (Neb. 1965) ("Where, as here, the contract has been fully performed on one side, the law will not permit the injustice of the other party retaining the benefit without paying[.]"); *Alexander v. Cap. Paint Co.*, 111 A. 140, 144 (Md. 1920) (recognizing the parties made "the compensation contingent upon success and proportioned to the benefit it might derive from it").

B. The case law cited by Vervent is inapplicable and does not stand for the proposition asserted.

The case law relied on by Vervent is not on point. For example, the *Martin* case only recites the general rule that contracts with ongoing obligations by both sides and no fixed term are unilaterally terminable. *Martin*, 553 F.2d at 573. Contrary to the *Martin* case, Vervent admits LJP fully performed its obligations under the Referral Agreement. (Def.'s MTD Br. 5 (R. 23).) Relatedly, Vervent cites *Singpiel* for the proposition that it could unilaterally terminate the agreement, but *Singspiel* involved a lease with an express term allowing for termination upon thirty days written notice. *Singpiel v. Morris*, 1998 S.D. 86, ¶ 9, 582 N.W.2d 715, 717.

Of the cases cited by Vervent, only one involves a referral agreement, *Ent. USA, Inc. v. Moorehead Commc'ns, Inc.*, 93 F. Supp. 3d 915, 931 (N.D. Ind. 2015). However, *Ent. USA, Inc.* does not stand for the proposition asserted by Vervent; instead, it merely states that because the referral agreement did not have an end date, the agreement itself was unilaterally terminable. *Id.* LJP does not dispute this general rule. The court in that opinion did not address the ongoing obligation for referrals that were made during the period of the referral agreement.[6]

Significantly, in a subsequent opinion in the same case, the court *did* rule on that issue, finding that "[the defendant] and [the plaintiff] intended an agreement that would live on **as long as any referred location was producing activations**." *Ent. USA, Inc. v. Moorehead Commc'ns, Inc.*, No. 1:12-CV-116 RLM, 2017 WL 3432319, at *6 (N.D. Ind. Aug. 9, 2017), *aff'd*, 897 F.3d 786 (7th Cir. 2018) (emphasis added). Such is the case here, where the Referral Agreement clearly contemplates that if the client contractual relationship is renewed, an "ongoing referral fee of 3% will continue to be paid to LJP[.]" (App. 1-2.) In other words, the only case relied on by Vervent with analogous facts directly contradicts its argument and is consistent with the circuit court's ruling that fees owed for a completed referral could not be unilaterally terminated. Vervent's "failure to cite supporting authority is a violation of SDCL 15-26A-60(6) and the issue is thereby deemed waived[,]" requiring affirmance of the circuit court. *State v. Fool Bull*, 2009 S.D. 36, ¶ 46, 766 N.W.2d 159, 169.

[6] Although the court had not yet ruled on that issue, the court did cite an Indiana case that had held a referral agreement was not terminable at the will of either party because it was conditioned upon payment for so long as the company continued to sell products to the referral. *Ent. USA, Inc.*, 93 F. Supp. 3d at 931 (citing *Marksill Specialties, Inc. v. Barger*, 428 N.E.2d 65, 68 (Ind. Ct. App. 1981)).

II. The jury correctly relied on the trial evidence in concluding that LJP is owed referral fees for Vervent's servicing of the First Equity Accounts after March 31, 2022.

Vervent next takes issue with the jury's award of damages for Vervent's failure to pay referral fees after March 31, 2022, the date Phoenix acquired First Equity. In doing so, Vervent concedes that if the circuit court correctly held that Vervent wrongly terminated LJP's right to fees owed for a completed referral, then the jury properly awarded damages for the time period before March 31, 2022, *i.e.* $471,992.28 in principal plus pre-judgment interest of $146,679.14. (*See* Def.'s Br. 26 (arguing only that the evidence was insufficient for the jury to award damages after March 31, 2022); App. 7-9; Ex. A to Mot. for Perm. Inj. (R. 1779).)

On this second issue, Vervent argues that the circuit court committed reversable error by (1) advising the jury that Vervent was in breach of the Referral Agreement; (2) originally granting a motion in limine prohibiting entry of evidence on the First Equity Acquisition; and (3) not overruling the verdict because no reasonable jury could have found damages continued after March 2022.

Each of Vervent's arguments is without merit and arises from Vervent's refusal to accept the jury's verdict. The evidence presented by LJP undisputedly established that Vervent continues to service and be paid for servicing the First Equity Accounts, just as it did prior to March 31, 2022. The jury, therefore, correctly concluded that LJP was entitled to its referral fee after March 2022. Furthermore, the Court is required to view the evidence and all reasonable inferences in a light most favorable to LJP.

A. Vervent consented to the preliminary jury instruction that advised the jury that Vervent was in breach of the Referral Agreement.

Vervent takes issue with prospective jurors being advised at the beginning of voir dire that Vervent had breached the Referral Agreement, and their only job was to determine damages. The preliminary jury instruction that Vervent takes issue with provided a statement of the case and read, in part, as follows:

> The Court has determined that the referral agreement is a valid and enforceable contract; and that Vervent, as Total Card's successor, is bound by the rights and obligations in the referral agreement. The Court has also determined that Vervent breached the referral agreement by terminating the agreement. However, the Court has determined that the referral agreement is ambiguous as to what constitutes call center services and, by extension, what is legally owed under that agreement. The parties dispute the amount owed and that determination is now an issue for you to decide.

(Prelim. Jury Ins. No. 3 (R. 1744).)

Critically, Vervent agreed to this jury instruction—which was proposed by LJP *with joint consent from Vervent.* (Pl.'s Prop. Prelim. Jury. Ins. 1 (R. 1163); Vol. 1 Tr. 5 (providing Vervent's consent to the preliminary instructions).) Not only did Vervent consent to the substance of the jury instruction, Vervent did not object to the jury instruction being read prior to voir dire and again once the jury was seated. (Vol. 1 Tr. 5.) Vervent cannot now challenge a preliminary jury instruction that it consented to before the circuit court. *See State v. Roach*, 2012 S.D. 91, ¶ 27, 825 N.W.2d 258, 266 ("[F]ailure to object at trial constitutes a waiver of that issue on appeal.").

B. Vervent suffered no prejudice when the circuit court reversed its ruling and permitted Vervent to introduce evidence of the First Equity Acquisition.

Prior to trial, LJP made a motion in limine seeking to exclude evidence that Vervent is not liable for referral fees after the First Equity Acquisition because it was undisputed that Vervent continued to service the First Equity Accounts for a third-party

(Phoenix). LJP argued that such evidence would only serve to confuse the jury because Phoenix's ownership of the First Equity Accounts had no legal bearing on the issue of damages owed under the Referral Agreement. LJP also argued that its motion in limine was consistent with the circuit court's ruling on LJP's Second MSJ, which held that Vervent had stepped into the shoes of TCI and was continuing to service the First Equity Accounts.[7] (Second Letter Decision 5 (R. 1028).) The circuit court initially agreed and granted the motion. (Order Granting MIL (R. 1176-77).)

After LJP's case in chief, Vervent made a Motion for Reconsideration. (Mot. for Rec. (R. 1241-47).) The circuit court reversed its ruling on the motion in limine and allowed Vervent to introduce evidence regarding the First Equity Acquisition and to argue to the jury that damages should be cut off after March 2022. (Vol. 2 Tr. 108-09.) Specifically, the circuit court ruled that whether Vervent was continuing to service the First Equity Accounts after the acquisition, and whether LJP was entitled to a corresponding referral fee under the ambiguous terms of the Referral Agreement, were questions of fact for the jury to resolve. (*Id.*)

A circuit court's evidentiary ruling is reviewed de novo under a two-step process. *Weiland v. Bumann*, 2025 S.D. 9, ¶ 58, 18 N.W.3d 148, 161. First, the Court must determine whether the circuit court abused its discretion in making an evidentiary ruling. *Id.* at 162. Second, the Court must determine whether the error was "a prejudicial error

[7] Vervent alleges LJP's motion in limine was "disingenuous" because LJP had limited its request for damages through the date of the First Equity Acquisition as part of its Second MSJ. (Def.'s Br. 12.) LJP limited the damages period in its Second MSJ because it did not yet have discovery on the First Equity Acquisition or Vervent's continued servicing of the First Equity Accounts at the time of the motion *not* because LJP was in any way conceding it was not owed continuing fees after March 2022. (Pl.'s Second MSJ Reply Br. 21-22 (R. 278-79).)

that in all probability affected the jury's conclusion." *Id.* Evidentiary rulings are reversible only when the error is demonstrated *and* shown to be prejudicial. *Id.* As to the first prong, the circuit court did not abuse its discretion in originally granting the motion in limine because the undisputed evidence submitted with the motion established that Phoenix (not Vervent) had acquired the First Equity Accounts, and that Vervent was still servicing the First Equity Accounts now owned by Phoenix. (MIL Rep. Br., Exs. 1-4 (R. 1075-1124; Pretrial Tr. 39.)

However, even *if* it could be said that the circuit court erred in granting the motion in limine, the circuit court remedied any such error when it reversed its ruling prior to Vervent's case in chief. Vervent argues that because the ruling was not reversed until mid-trial, it was prohibited from discussing the First Equity Acquisition in voir dire and opening statements. (Def.'s Br. 30.) However, voir dire and opening statements are not evidence. *See State v. Daniel*, 2000 S.D. 18, ¶ 13, 606 N.W.2d 532, 535 ("[V]oir dire of the jury is not the time for premature presentation of evidence[.]); *State v. Brewer*, 266 N.W.2d 560, 562 (S.D. 1978) ("The opening statement is a statement of what counsel expects the evidence to show, and it is not evidence in and of itself."). Furthermore, Vervent fails to explain how not addressing the First Equity Acquisition in voir dire and opening statements prejudiced it or how it in all probability affected the jury's verdict. *Weiland*, 18 N.W.3d at 162.

Vervent further argues it was prejudiced because it was prohibited from presenting evidence regarding the First Equity Acquisition during LJP's case in chief, such as cross examining LJP's principal, Alonzo Primus, on the issue. LJP called only two witnesses in its case in chief—Alonzo Primus and Paul Simon. (Vol. 1 Tr. 26, 135.) Neither witness

was involved with the First Equity Acquisition, so neither would have had the foundation to speak to the details of the transaction. Significantly, nothing prohibited Vervent from re-calling either Mr. Primus or Mr. Simon during its own case in chief and questioning either witness about the First Equity Acquisition if it believed such testimony was crucial. Mr. Primus was the designated representative for LJP and remained available at counsel table for the entire trial. (Vol. 1 Tr. 10.) And Mr. Simon is the Vice President of Sales at *Vervent* and was certainly within its purview to recall as a witness. (*Id.* 136.)

Vervent also argues that LJP painted the picture to the jury throughout its case in chief that the duration of damages was not in question. (Def.'s Br. 31.) However, even if LJP's motion in limine had not initially been granted, LJP still would have presented the same picture to the jury as that was its theory of the case (a theory that the jury ultimately adopted).

Vervent further alleges the reversal of the motion in limine forced it to "boil down a complex multi-million-dollar corporate acquisition to the jury, on the fly with no advance notice." (Def.'s Br. 32.) This argument, too, is without merit. In fact, Vervent's witness and exhibit list, filed the week before trial, referenced six exhibits related to the First Equity Acquisition that it intended to use for an offer of proof outside the presence of the jury regarding the acquisition, proving that Vervent was prepared to proceed on this issue, if only to preserve its record. (Def.'s Ex. List.) In arguing its Motion for Reconsideration, Vervent stated it was prepared to present testimony from Joseph Noe along with five exhibits (DD, EE, FF, GG, and HH) as an offer of proof on the First Equity Acquisition. (Vol. 2 Tr. 92, 104.) Vervent further represented that it had pre-marked these exhibits two weeks prior to trial because trials "are dynamic environments

where things change" and it was "for sure going to make an offer of proof through testimony and through argument to the [circuit court][.]" (*Id.* 104.) Most damning to Vervent's argument that it was not prepared to present the issue to the jury is Vervent's own statement mid-trial that "[t]his argument certainly hasn't been a secret until today." (*Id.*)

For Vervent to now argue that the circuit court's initial granting of the motion in limine forced it to present its argument "on the fly with no advance notice" is disingenuous, at best. When the circuit court reversed its ruling on the motion in limine, Vervent was fully prepared to proceed and did in fact introduce its exhibits on the First Equity Acquisition along with supporting testimony by David Johnson and Joseph Noe. (Vol. 2 Tr. 112, 178; Exs. DD-GG, II (R. 1343-82, 1739).)

Finally, Vervent briefly argues the timing of the introduction on the First Equity acquisition led the jury to believe it was Vervent's burden to show an underlying contractual relationship no longer exists. (Def.'s Br. 39.) Vervent fails to offer any support for this notion. The final jury instructions instructed the jury that LJP, as the Plaintiff, had the burden of proof. (Jury Ins. 14 (R. 1770).) Moreover, Vervent's counsel reminded the jury of LJP's burden of proof seven times during closing arguments. (Vol. 3 Tr. 50, 54, 57.)

In sum, Vervent has failed to show how it has been prejudiced, let alone that the alleged error "in all probability affected the jury's conclusion." *Weiland*, 18 N.W.3d at 162.

C. Vervent cannot add language to the Referral Agreement.

In its Initial JMOL and Second Renewed JMOL, Vervent argued LJP had failed to introduce evidence that the original 2014 servicing agreement and supplement between

TCI and First Equity (the "Original Servicing Agreement") continued after the First Equity Acquisition. (R. 1236-38, 1935-37.) Although couched as a question of sufficiency of the evidence, Vervent's argument is one of contract interpretation. Critically, Vervent's argument impermissibly seeks to insert language into the Referral Agreement that does not exist. *See Edgar v. Mills*, 2017 S.D. 7, ¶ 29, 892 N.W.2d 223, 231 ("Contracting parties are held to the terms of their agreement, and disputes cannot be resolved by adding words the parties left out.").

The Referral Agreement provides that LJP is entitled to an ongoing referral fee if the "Client contractual relationship" is renewed. (App. 1-2.) **Nowhere** in the Referral Agreement does it require the Original Servicing Agreement between TCI and First Equity to be the contractual relationship in effect. In other words, because the Referral Agreement does not define an ongoing "Client contractual relationship," it was the jury's role to determine whether Vervent's continued servicing of the First Equity Accounts constituted a renewed "Client contractual relationship" and, therefore, whether LJP was entitled to an ongoing 3% referral fee. Because the Referral Agreement is ambiguous, the jury could have determined that the "Client contractual relationship" was renewed by any number of means—including the execution of a new servicing agreement or even an informal servicing contract formed by Vervent's conduct in servicing the First Equity Accounts.

Throughout its opening statement and closing argument, Vervent's counsel repeatedly characterized the Referral Agreement as a "Swiss cheese" document, a reference to the ambiguity of its terms. (Vol. 1 Tr. 19-21, 42.) Vervent's own executives further discussed the vagueness of the Referral Agreement. Vervent's CEO, David

Johnson, testified that "[t]he document is extremely vague." (Vol. 2 Tr. 126.) Similarly, Vervent's Vice President of Sales, Paul Simon, testified the Referral Agreement is "pretty vague." (*Id.* 151.)

The jury was permitted to construe any ambiguity in the Referral Agreement, including the meaning of an ongoing "Client contractual relationship" for purposes of continuing referral fees, in a light most favorable to LJP as the non-drafting party. (Jury Ins. No. 10); *Coffey v. Coffey*, 2016 S.D. 96, ¶ 9, 888 N.W.2d 805, 809 ("[A]mbiguities arising in a contract should be interpreted and construed against the scrivener."). Ultimately, the jury interpreted the Referral Agreement and determined there was an ongoing contractual relationship entitling LJP to continuing referral fees after March 2022.

D. A reasonable jury could, and did, find that damages continued after March 31, 2022.

In addition to misconstruing the Referral Agreement to impose a requirement that the Original Servicing Agreement be renewed, Vervent argued in its Second Renewed JMOL that LJP failed to introduce evidence that *any* "Client contractual relationship" continued after March 31, 2022.[8] (Def.'s Br. 26.) However, Vervent itself *admitted* there was an ongoing contractual relationship for Vervent to service the First Equity Accounts—albeit a different servicing agreement from the Original Servicing Agreement. (*See* Def.'s Initial JMOL (R. 1229); Def.'s Sec. Ren. JMOL (R. 1927) (admitting that

[8] The circuit court found that Vervent waived this argument because it was not raised in its Initial JMOL (as distinguished with the narrower argument Vervent raised regarding no continuation of the Original Servicing Agreement). (*See* Order Denying Sec. Ren. JMOL (R. 1945-46).) Nonetheless, the circuit court correctly ruled the argument fails on the merits. (*Id.*)

after March 2022 Vervent "began servicing that program under an entirely distinct contract from the original underlying contract").)

As noted above, LJP was not required to prove that the Original Servicing Agreement was renewed, only that there was an ongoing client contractual relationship. At the pretrial conference, Vervent argued that it was a "question[] of fact as to whether the [R]eferral [A]greement still applies" after the First Equity Acquisition. (Pretrial Tr. 34.) Vervent acknowledged that the jury "may decide against us, but this is a factual issue and these are things that are presented to the jury and not ruled on as a matter of law at this point in time." (*Id.*) Vervent reiterated to the circuit court at the pretrial conference that it was "not asking the court to rule on [whether there is an underlying contract under which a referral fee can be generated] as a matter of law" and that it was "just simply saying [it] should be able to present evidence on that issue." (*Id.* 38.)

Vervent also repeatedly argued at trial that whether the First Equity Acquisition cut off damages, *i.e.* whether the "Client contractual relationship" continued as contemplated under the Referral Agreement, is an issue of fact for the jury to decide. (*See* Vol. 2 Tr. 88, 95, 102, 107; Def.'s Br. in Supp. of Mot. to Rec. 1-3 (R. 1241-43).) The circuit court ultimately agreed and permitted both sides to present their evidence and argument on this issue to the jury. (Vol. 2 Tr. 108-09.) Specifically, the circuit court referenced the ambiguity in the Referral Agreement and ruled that the jury must "determine whether Vervent continued to provide services under a service contract to which LJP has a continuing referral fee due." (*Id.* 109.)

Vervent, unhappy with the jury's verdict, now asks this Court to remove the decision from the jury's purview and to substitute a contrary ruling, arguing that no

reasonable jury could have found in favor of LJP for continuing damages. (Def.'s Br. 36.) Vervent's request is improper because the evidence at trial fully supported the jury's verdict that referral fees continued to accrue after the First Equity Acquisition, and because all facts and reasonable inferences must be viewed in a light most favorable to LJP.

i. LJP established the right to continuing damages in its case in chief.

Following LJP's case in chief, Vervent moved for its Initial JMOL pursuant to SDCL § 15-6-50(a). Judgment as a matter of law cannot be granted where "sufficient evidence exists so that reasonable minds could differ[.]" *Weiland*, 2025 S.D. 9, ¶ 37, 18 N.W.3d at 158. In considering a motion for judgment as a matter of law, the circuit court is not permitted to weigh the evidence. *Id.* Instead, the evidence must be viewed in a light most favorable to LJP as the non-moving party, and the circuit court "must indulge all legitimate inferences therefrom" in favor of the non-movant. *Osman v. Karlen & Assocs.*, 2008 S.D. 16, ¶ 14, 746 N.W.2d 437, 442.

LJP offered strong and uncontroverted evidence in its case in chief which supported the jury's finding of an ongoing contractual relationship, and, therefore, LJP's entitlement to damages beyond the First Equity Acquisition. Exhibit 38 provided a detailed invoice for each month from January 2021 through June 2024 issued by Vervent for servicing the First Equity Accounts. (Ex. 38 (R. 1592-1655).) All those invoices—both before and after the First Equity Acquisition—are on Vervent's letterhead, list "First Equity" as the "Client," and provide the same address in Ambler, Pennsylvania for First Equity. (Ex. 38 (R. 1592-1655; App. 3-6).) Each invoice also lists the number of First

Equity Accounts serviced by Vervent that month, the rate Vervent charged for each account serviced, and a total amount due to Vervent for servicing. (*Id.*)

The fact that Vervent continued to issue these invoices for servicing the First Equity Accounts each month for over three years, **including each month after the First Equity Acquisition**, is sufficient evidence of an ongoing contractual relationship. *Weiland*, 2025 S.D. 9, ¶ 37, 18 N.W.3d at 158. These invoices must be viewed in a light most favorable to LJP, including all reasonable inferences. *Osman*, 2008 S.D. 16, ¶ 14, 746 N.W.2d at 442. A jury could reasonably infer that Vervent issued these invoices each month pursuant to an ongoing contractual relationship to service the First Equity Accounts, including after March 2022. Reasonable minds could likewise conclude that Vervent was in fact being paid each month for servicing these accounts, consistent with the invoices it issued.

During LJP's case in chief, Mr. Primus also testified that "[b]ased on the invoices they're [Vervent] providing, they're still making money on First Equity Accounts that I referred." (Vol. 1 Tr. 83.) Consistent with his testimony and these invoices, a spreadsheet was also introduced as Exhibit 39 which totaled Vervent's call center services revenue, including revenue received after March 2022. (Ex. 39 (R. 1656).) When explaining Exhibit 39, Mr. Primus testified that Vervent had made $36,664,959.15 on the First Equity Accounts from January 2021 through June 2024. (Vol. 1 Tr. 93.) Similarly, on cross examination, Vervent's counsel questioned Mr. Primus about that number and whether it constituted Vervent's gross revenue from servicing the First Equity Accounts, to which Mr. Primus agreed. (*Id.* 124-25.)

Vervent wrongly argues that the invoices and its continued servicing of the First Equity Accounts are insufficient to demonstrate an ongoing contractual relationship entitling LJP to continuing referral fees under the Referral Agreement. Vervent's argument is directly contrary to this Court's precedent that the evidence and all reasonable inferences must be viewed in a light most favorable to LJP for purposes of judgment as a matter of law.

Vervent incorrectly relies on one South Dakota case, which actually supports *LJP's* position. In *Khan Comfort*, this Court ruled that the evidence supported an express contract because a party's continuing performance and submission of invoices to the other party, coupled with that party's payments evidenced mutual assent to an underlying contract. *J. Clancy, Inc. v. Khan Comfort, LLC*, 2021 S.D. 9, ¶ 25, 955 N.W.2d 382, 391. Even *if* the evidence presented in LJP's case in chief did not establish an express underlying contract for Vervent to continue servicing the First Equity Accounts, LJP's evidence undoubtedly established an implied-in-fact servicing contract which is "gathered by implication or proper deduction from the conduct of the parties, language used, or acts done by them, or other pertinent circumstances attending the transaction." *Id.* at 2021 S.D. 9, ¶ 20, 955 N.W.2d 382, 389. *See also Setliff v. Akins*, 2000 S.D. 124, ¶ 13, 616 N.W.2d 878, 885 (holding that the "pertinent inquiry" as to whether an implied contract exists "is whether the facts and circumstances properly evaluated permit an inference that services were rendered in expectance by one of receiving and the other of making compensation"); *Jurrens v. Lorenz Mfg. Co. of Benson, Minn.*, 1998 S.D. 49, ¶ 9, 578 N.W.2d 151, 154 ("The absence of an express contract does not, however, foreclose

the possibility of a contractual relationship, because the parties may, by their acts and conduct, create an implied contract.").

Certainly, reasonable minds, coupled with all reasonable inferences, could have accepted LJP's position that there was an ongoing client contractual relationship to service the First Equity Accounts after March 2022. *Weiland*, 2025 S.D. 9, ¶ 37, 18 N.W.3d at 158. In fact, the jury *did* agree with LJP—ultimately issuing a verdict for damages each month from January 2021 through June 2024. The circuit court appropriately denied Vervent's Initial JMOL, and this Court, should affirm. Furthermore, in Vervent's case in chief, its own witnesses confirmed the existence of an ongoing express contractual agreement to service the First Equity Accounts, and that Vervent was receiving servicing revenue pursuant to its invoices.

ii. LJP further established the right to continuing damages in Vervent's case in chief.

After Vervent's case in chief, Vervent submitted its First Renewed JMOL. Following the jury's verdict, Vervent then moved for remittitur and its Second Renewed JMOL. The circuit court properly denied each motion. (Vol. 2 Tr. 218; Order Denying Remittitur (R. 1906-07).) A motion for remittitur is viewed under the same high burden as a motion for new trial. SDCL § 15-6-59(a); *Sander v. Geib, Elston, Frost Pro. Ass'n*, 506 N.W.2d 107, 119 n.10 (S.D. 1993) (noting that unconditional remitter is not an available remedy, and a new trial will be granted if the circuit court finds a verdict excessive and the recovering party does not consent to remittitur). This Court has held that "[n]o court may set aside a jury verdict unless it is clearly unreasonable, arbitrary, and unsupported by the evidence." *Matter of Est. of Tank*, 2023 S.D. 59, ¶ 56, 998 N.W.2d 109, 126. The evidence and all inferences must be viewed in a light most

favorable to LJP as the non-moving party. *Id.*; *Lewis v. Sanford Med. Ctr.*, 2013 S.D. 80, ¶ 16, 840 N.W.2d 662, 666.

This Court reviews the circuit court's denial of a motion for remittitur under an abuse of discretion standard. *State v. Timmons*, 2022 S.D. 28, ¶ 19, 974 N.W.2d 881. 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 or unreasonable." *Id.* In other words, an abuse of discretion will be found only if "no judicial mind, in view of the law and circumstances of the particular case could reasonably have reached such a conclusion." *Roth v. Farner-Bocken Co.*, 2003 S.D. 80, ¶ 9, 667 N.W.2d 651, 659. Therefore, the decision will rest within the "sound discretion of the circuit court whose superior knowledge of all the facts and circumstances of the case enables him to know the requirements of justice." *Timmons*, 2022 S.D. 28, ¶ 19, 974 N.W.2d at 888.

On appeal, Vervent argues the circuit court erred in upholding the jury's verdict because the evidence at trial was "uncontested that First Equity was no longer a client of Vervent's after March 2022."[9] (Def.'s Br. 33.) Vervent's argument is misguided. In addition to the invoices introduced in LJP's case in chief, further evidence and testimony was introduced in Vervent's case in chief proving that: (1) Vervent and Phoenix—the successor of First Equity—are separate legal entities; (2) Vervent and Phoenix had a formal servicing agreement to service the First Equity Accounts, *i.e.* an ongoing "Client

[9] Vervent again argues the First Equity Accounts were no longer being serviced under the Original Servicing Agreement between TCI and First Equity. (Def.'s Br. 33.) However, for the reasons discussed above, this is irrelevant as the language in the Referral Agreement merely requires an ongoing "Client contractual relationship" – not an express renewal of the Original Servicing Agreement. (App. 1-2.)

contractual relationship;" and (3) Vervent was continuing to receive revenue from Phoenix for servicing the First Equity Accounts.

Vervent first argues that because "it" acquired First Equity, it should not be liable for subsequent referral fees because Vervent services the First Equity Accounts "for itself." (Def.'s Br. 3, 10-12, 26, 29-31, 34, 36.) Vervent's repeated representation to this Court that Vervent was the entity that acquired First Equity is a blatant misstatement of the record. When discussing the details of the transaction, Vervent itself is forced to concede that the entity that acquired First Equity is Phoenix, a separate legal entity from Vervent. (Def.'s Br. 17; *see also* Vol. 2 Tr. 200 (testimony from Vervent Card's President that "Phoenix Card Group acquired the portfolio receivables"); Ex. GG (R.1368-82) (purchase agreement between Progress Funding and Phoenix for the First Equity Accounts).) Vervent also submitted an exhibit to the jury proving that Vervent and Phoenix are separate cousin entities. (Ex. DD (R. 1343-44).) Vervent's own witnesses confirmed the same under oath. Vervent's CEO, Mr. Johnson, testified as follows:

> Q. And just to be clear. When you say Vervent acquired First Equity, that's a little oversimplification. Phoenix Card Group is a separate company from Vervent; correct?
>
> A. Well, it all falls into the same bucket.
>
> Q. Well, it's Phoenix Card Group, LLC. That's a company; correct?
>
> A. Yeah.
>
> Q. And that company is the one that now owns the First Equity portfolio, these accounts that we just looked at?
>
> A. Yes.
>
> Q. And then there's Vervent Inc. over here which -- that's a separate corporation, obviously; correct?

A. Correct.

Q. And that's the company that's servicing the First Equity Accounts and sending the bills out for the servicing?

A. Yes.

(Vol. 2 Tr. 150.)

On direct examination, the Vervent Card's President, Mr. Noe, testified that Vervent takes advantage of the doctrine of corporate separateness to avoid credit risks:

> Q. So, why would two people that work together want a contract with each other?
>
> A. Well, it's an intercompany agreement[10] [Exhibit FF]. You think of it that way. Right? So again, liked I talked about earlier, we want to keep the service company [Vervent] separate. We don't want the service company to take credit risks, per se. It's a service company, and so you have separate entities [e.g. Phoenix] that are special purpose that actually take the credit card receivables in.
>
> Those entities are making the investment in the economics of the credit card portfolio such that they're taking credit risks. I would say it's common to try to keep those things separated, but because you have the servicing entity providing fully managed card services for the portfolio company, you need to create some kind of agreement between those entities to sort of memorialize it.

(*Id.* 197.)

As discussed in the testimony above, Vervent and Phoenix do have a formal agreement governing Vervent's servicing of the First Equity Accounts (the "New Servicing Agreement"). (Ex. FF (R. 1347-67).) This agreement was introduced into evidence *by Vervent*. Despite Vervent's attempt to characterize the New Servicing

[10] Tellingly, Mr. Noe characterized Exhibit FF as an *intercompany* agreement (two or more related companies) as opposed to an *intracompany* agreement (within the same company).

Agreement as a "left pocket/right pocket exchange of information" or an "intracompany agreement," the jury was unpersuaded. (Def.'s Br. 34-36.)

The terms of the New Servicing Agreement make clear that this is not an informal document for mere record keeping purposes. The New Servicing Agreement is a twenty-page contract with all the formalities expected to govern an agreement between separate companies. (Ex. FF (R. 1347-67).) By example, Section 3.5 of the agreement provides the circumstances whereby Phoenix is permitted to terminate Vervent as servicer. (*Id.*) Section 6.1 requires Vervent to indemnify, defend, and hold harmless Phoenix. (*Id.*) Perhaps most relevant, Section 3.1 provides that Vervent shall be entitled to servicing fees for servicing the accounts. (*Id.*) Consistent with the New Servicing Agreement, Vervent issues a formal invoice each month with an amount due and owing for servicing the First Equity Accounts. (Ex. 38 (R. 1592-55; App. 3-6).)

Each of these detailed contractual provisions beg the question why such formality would be needed—why could Phoenix "terminate" Vervent as servicer—if they are same company or if this is a "left pocket/right pocket exchange of information." (Def.'s Br. 34-35.) The jury likewise saw through this fallacy. Although Phoenix now holds the underlying receivables for the First Equity Accounts, there can be no doubt that the "Client contractual relationship" is on ongoing because Vervent admitted under oath it is still servicing the same exact First Equity Accounts originally referred by LJP.

On cross examination, Mr. Johnson admitted Vervent is continuing to service the First Equity Accounts *after* the First Equity Acquisition:

> Q. And so, Vervent is still sending an invoice directed to client First Equity; correct?
>
> A. Well, they're no longer a client. We just haven't caught up

with it in our accounting.

Q. Well, the client's listed as First Equity?

A. It says that on the invoice, yes.

Q. And these are the same accounts that Total Card serviced on behalf of First Equity, and then Vervent began servicing after the Total Card purchase?

A. Same accounts.

Q. Same program?

A. Same everything.

(Vol. 2 Tr. 148 (emphasis added); *see also id.* 149 (providing further testimony that the invoices are for servicing "the same accounts that Total Card serviced for First Equity").)

Mr. Noe similarly testified that Vervent was still servicing the same First Equity Accounts originally referred by LJP:

Q. Vervent is still the servicer, still billing every month for servicing that same portfolio?

A. Through a different contract [Ex. FF] it bills the portfolio, yes.

(*Id.* 211.) Mr. Noe's testimony also provided the final nail in the coffin when he admitted that not only is Vervent still servicing the First Equity Accounts, it continues to be paid for doing so. (*Id.* 198.)

It certainly cannot be said that the jury's verdict in awarding LJP damages after March 2022, by determining there was an ongoing "Client contractual relationship" between Vervent and Phoenix (as successor to the First Equity Accounts) was unreasonable, arbitrary, or unsupported by the evidence. *Tank*, 2023 S.D. 59, ¶ 56, 998 N.W.2d at 126. Ultimately, Vervent was allowed to present all of its evidence to the jury regarding the First Equity Acquisition and vigorously argued in closing argument that

damages should be cut off after March 2022.[11] (Vol. 3 Tr. 42.) Vervent's counsel concluded its closing argument by noting that the decision was in the jury's hands, and that the jury's role is to decide what is fair and appropriate. (*Id.* 56.)

Despite recognizing that the ultimate decision lays in the jury's hands, Vervent now argues that no reasonable jury could have found there was an ongoing "Client contractual relationship" entitling LJP to damages after March 2022. Likewise, Vervent now argues no judicial mind could have sustained the verdict. In reality, Vervent refuses to accept the jury's duly reached and well-reasoned verdict.

The jury's verdict for damages post March 2022, is supported by an overwhelming amount of evidence, including: Vervent's continued invoices for servicing the First Equity Accounts (Ex. 38 (R. 1592-55; App. 3-6)), the testimony and exhibit proving Vervent and Phoenix are separate legal entities (Ex. DD (R. 1343-44)); the New Servicing Agreement proving that Vervent and Phoenix, as successor of the First Equity Accounts, have an ongoing client contractual relationship (Ex. FF (R. 1347-67)); and Mr. Noe's testimony that Vervent continues to receive revenue for servicing the First Equity Accounts (Vol. 2 Tr. 198). The circuit court properly sustained the jury's verdict, and this Court should affirm.

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[11] The jury instructions similarly instructed the jury that the circuit court's determination of liability should in no way prejudice its decision and that its only job is to determine the amount of damages, **if any**, to be paid to LJP for the breach of the Referral Agreement. (Jury Ins. 7 (R. 1763).) Likewise, Interrogatory No. 3. on the Special Verdict allowed the jury to insert $0.00 for any individual month it did not believe damages were owed. Therefore, the jury could have awarded $0.00 for each month after March 2022 if it had been persuaded by Vervent's argument. (App. 8-9.)

III. The circuit court correctly ruled that LJP is entitled to a permanent injunction for future referral fees for so long as Vervent is servicing the First Equity Accounts.

In the Amended Complaint, LJP sought a declaration that it is entitled to referral fees for so long as the First Equity Accounts continue to generate revenue. (Am. Compl. ¶ 27 (R. 200).) As part of its count for breach of contract, LJP also requested specific performance of the Referral Agreement going forward. (*Id.* ¶ 36 (R. 201).) Following trial, LJP moved for a permanent injunction to enforce its claim for specific performance. (Mot. for Perm. Inj. (R. 1773-79).) In other words, LJP's request for specific performance merely asked the circuit court to hold Vervent to the jury's calculation of the referral fee owed going forward.

Vervent was fully aware that LJP would be asking the circuit court to order specific performance based on the jury's verdict. At the pretrial conference, LJP's counsel noted that the verdict form would need to allow the jury to specify its method for calculating damages so that the circuit court could use the same for LJP's forthcoming motion for specific performance. (Pretrial Tr. 53-54.) Vervent's counsel indicated his agreement with this approach noting it "makes incredible sense" and further stated that both parties "deserve and [are] entitled to know" how the jury calculated the referral fees "so we can calculate future damages[.]" (*Id.* 54-55.) In fact, there would have been no need for Special Interrogatory No. 2. (asking the jury to describe how it calculated damages) if not for LJP's request for ongoing damages. (App. 8.) Vervent raised no objection to the final verdict form. (Vol. 3 Tr. 16.)

The circuit court granted the motion pursuant to SDCL §§ 21-8-14(3), 21-9-1, and 21-9-4, finding specific performance is proper under the facts and necessary to avoid a multiplicity of judicial proceedings. (Order Granting Perm. Inj. 2-3 (R. 1909-10).) The

circuit court likewise considered the permanent injunction factors, finding each weighed in favor of entry of a permanent injunction. (*Id.*) Finally, the circuit court ruled that specific performance "can do more perfect and complete justice" than any available remedy at law. (*Id.* (quoting *Nielsen v. Hokenstead*, 81 S.D. 526, 528, 137 N.W.2d 880, 881 (1965).)

This Court has stated it "will not disturb a ruling on injunctive relief unless we find an abuse of discretion." *Sturzenbecher v. Sioux Cnty. Ranch, LLC*, 2025 S.D. 24, ¶ 17. The circuit court's findings of fact are reviewed under a clearly erroneous standard and its conclusions of law are reviewed de novo. *Id.*

A. The permanent injunction is statutorily authorized.

A permanent injunction may be granted to prevent the breach of an obligation existing in favor of the applicant in the following scenarios:

> (1) Where pecuniary compensation would not afford adequate relief;
> **(2) Where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief;**
> **(3) Where the restraint is necessary to prevent a multiplicity of judicial proceedings; or**
> (4) Where the obligation arises from a trust.

SDCL § 21-8-14 (emphasis added). LJP submitted its request for the permanent injunction pursuant to subsections two and three. The circuit court granted the injunction under subsection three, but not subsection two. Despite declining to invoke subsection two, the circuit court did correctly find "[i]t would be difficult to accurately calculate damages for future breaches as demonstrated by the jury's verdict" because "[t]he amount awarded each month . . . varies greatly," thereby finding the factual predicate necessary for subsection two. (Decision Tr. 5.) This court can affirm the grant of the injunction under either subsection. *See Osman v. Karlen & Assocs.*, 2008 S.D. 16, ¶ 23,

746 N.W.2d 437, 444 (affirming the circuit court if it is correct for any reason in the record).

On appeal, Vervent argues the permanent injunction is improper and that LJP should have sought future damages from the jury at trial. (Def.'s Br. 39.) Contrary to Vervent's argument, any calculation of future damages by the jury would have been based on rank speculation and conjecture—which is prohibited under South Dakota law. *See Smith v. WIPI Grp., USA, Inc.*, 2023 S.D. 48, ¶ 57, 996 N.W.2d 368, 383 ("It is well settled that damages must not be speculative[.]"). LJP fits squarely within the purview of SDCL § 21-8-14(2) because it would be "extremely difficult to ascertain the amount of compensation which would afford adequate relief."

LJP has no way of knowing how many First Equity Accounts will remain active each month and for how long Vervent will continue to service the accounts. For example, the jury awarded $32,442.01 in damages for the month of September 2021 ($5.25 * 205,981 active accounts * 3%), but only awarded $13,950.56 in damages for the month of June 2024 ($5.25 * 88,575 accounts[12] * 3%)—evidencing the vast disparity each month in the number of active accounts. (App. 8-9; Ex. 38 at p. 12, 63-64 (R. 1603, 1654-55).) Therefore, it would be not only "extremely difficult" to calculate a specific dollar amount or a lump sum that would adequately compensate it for future damages—it would be impossible. SDCL § 21-8-14(2).

Despite criticizing LJP for not presenting future damages to the jury, Vervent remains silent on how either party could predict with any accuracy the number of First Equity Accounts that will remain active each month and for how long Vervent will

[12] Total accounts in June 2024 were calculated as follows: 55,832 accounts + 10,599 accounts + 22,144 accounts. (Ex. 38 at 63-64 (R. 1654-55; App. 5-6).)

continue to service those accounts. In fact, when seeking approval to file a supersedeas bond in this matter, Vervent itself admitted that "[t]he exact amount of prospective monthly payments under the Permanent Injunction are *impossible* to calculate, as they will be based on monthly service invoices as they are generated." (Mot. to App. Supersedeas Bond 1 (R. 1985) (emphasis added).)

Neither party has any way of knowing the amount of the referral fee, if any, that will be owed for each month in 2025, 2026, 2027, . . . 2040, and so on. Instead of asking the jury to speculate as to future damages, LJP simply and appropriately asked the circuit court to "do more perfect and complete justice" by requiring Vervent to pay exactly what is owed under the Referral Agreement—no more and no less—each month going forward. *Nielsen*, 137 N.W.2d at 881. Moreover, because Vervent continues to breach the Referral Agreement by refusing to pay the ongoing monthly fees owed to LJP, without a permanent injunction, LJP would be required to sue Vervent repeatedly for future referral fees. Accordingly, the permanent injunction is also necessary to avoid a "multiplicity of judicial proceedings" under SDCL § 21-8-14(3). Both of these scenarios are precisely the situations the South Dakota Legislature contemplated in codifying SDCL § 21-8-14(2), (3) and SDCL §§ 21-9-1, 4.

B. Case law supports the proposition that where damages are too speculative, an injunction is the appropriate remedy.

Vervent's opposition relies heavily on the *Magner v. Brinkman* case for its assertion that a permanent injunction is improper to compel monetary payments.[13] 2016 S.D. 50, 883 N.W.2d 74. However, Vervent's reliance on *Magner* is misplaced. In *Magner*, the lawsuit centered on the drainage of water from defendants' property onto

[13] Vervent refers to this case as the *Williams* case in its brief. Williams was the second plaintiff in the case.

plaintiffs' property due to the construction of a private road. *Id.* Plaintiffs initially sought monetary damages and a permanent injunction requiring defendants to move the road. *Id.* at 78. The monetary damages were tried to the jury. *Id.*

Following trial, plaintiffs abandoned the request for defendants to move their road and instead asked the court to order defendants pay an additional $28,936 for corrective landscaping on plaintiffs' property. *Id.* The circuit court reasoned that the jury's verdict established that defendants had altered their property in some fashion that caused increased drainage. *Id.* Accordingly, the circuit court enjoined defendants from future improvements that would alter plaintiffs' property and ordered the defendants to pay an additional lump sum of $28,936 to plaintiffs. *Id.*

Ultimately, this Court reversed the permanent injunction, holding that the circuit court had abused its discretion. *Id.* at 82. This Court noted that a permanent injunction is appropriate only under limited circumstances, such as those listed in SDCL § 21-8-14. *Id.* This Court further noted that "the very nature of [p]laintiffs' modified request for injunction undermines the conclusion that the harm was irreparable and not easily measured in damages." *Id.* at 83.

The facts of this case are markedly distinguishable from the facts in *Magner*. In *Magner*, the plaintiffs were able to provide evidence as to a *specific dollar amount* that would compensate them for the corrective landscaping. The circuit court, therefore, abused its discretion in awarding a permanent injunction which awarded an additional *lump sum* of monetary damages that could have been, but were not presented to the jury. Here, LJP fits squarely within the purview of SDCL § 21-8-14(2) because it would have been "extremely difficult to ascertain the amount of compensation which would afford

adequate relief." As noted above, LJP has no way of knowing how many First Equity Accounts will remain active each month and for how long Vervent will continue to service the accounts. Therefore, it is impossible for LJP to calculate a specific dollar amount or a lump sum that would adequately compensate it for future damages.

Unlike in *Magner*, the jury here was presented with a special interrogatory and determined that LJP was entitled to a monthly payment equal to "3% of $5.25 per active accounts on the Vervent invoices to First Equity." (App. 8.) Therefore, the circuit court did not usurp the jury's role, but merely applied the jury's calculation of damages in requiring Vervent to pay 3% of $5.25 for each of the active First Equity Accounts it services each month in the future.

Other jurisdictions that have considered similar facts have likewise ruled that a permanent injunction is appropriate to enforce contractual damages that are too speculative to calculate at the time of trial. For example, in *Tamarind Lithography Workshop, Inc. v. Sanders*, a company breached a contract by failing to give the screen credits to the film's screenwriter. 193 Cal. Rptr. 409, 410 (Ct. App. 1983). The jury awarded $25,000 in damages for the company's failure to give the screenwriter credit. The screenwriter then sought an injunction ordering specific performance from the trial court. The California Court of Appeals ruled that specific performance was appropriate for two reasons: "(1) that an accurate assessment of damages would be far too difficult and require much speculation, and (2) that any future exhibitions might be deemed to be a continuous breach of contract and thereby create the danger of an untold number of lawsuits." *Id.* at 412.

Similarly, in *Teague v. Springfield Life Ins. Co., Inc*, the North Carolina Court of

Appeals affirmed a ruling that a disabled plaintiff be compensated $900 per month from 1978-1980 *and* specific performance of the insurance contract, compelling the defendant to pay the plaintiff $900 per month in the future, up to age 65, *as long as his disability continues, and he survives*. 285 S.E.2d 860 (Ct. App. N.C. 1982).

Farnsworth on Contracts also recognizes that specific performance or an injunction are powers vested in the court and "[i]f the breach occurs when the contract still has many years to run, it may not be possible at the time of the trial to forecast loss that will result in the future. In such situations equitable relief has often been granted." E. Allan Farnsworth, *Farnsworth on Contracts*, § 12.06 (Zachary Wolfe ed., 4th ed.) (collecting cases).

In sum, specific performance is appropriate here because the parties have no way of determining how many of the First Equity Accounts will be active each month and for how long Vervent will service the accounts.

C. Each of the factors weigh in favor of granting LJP a permanent injunction.

Because the injunction is clearly authorized by statute (SDCL § 21-8-14(2), (3) and SDCL §§ 21-9-1, 4), the Court then considers the following factors:

> (1) Did the party to be enjoined cause the damage? (2) Would irreparable harm result without the injunction because of lack of an adequate and complete remedy at law? (3) Is the party to be enjoined acting in bad faith or is the injury-causing behavior an innocent mistake? (4) In balancing the equities, is the hardship to be suffered by the enjoined party disproportionate to the benefit to be gained by the injured party?

McDowell v. Sapienza, 2018 S.D. 1, ¶ 25, 906 N.W.2d 399, 407. Here, each of the four factors weighs in favor of LJP's entitlement to a permanent injunction.

As to the first factor, the circuit court correctly ruled that Vervent legally acquired the Referral Agreement and has breached the same by refusing to make the 3% referral

fees owed to LJP. (Second Letter Decision (R. 1024-30).) Vervent, as the successor-in-interest to the Referral Agreement, clearly owes an obligation to LJP for the referral fees.

Second, irreparable harm would result without the injunction because there is a lack of an adequate and complete remedy at law. As discussed above, LJP has no way of calculating with any reasonable certainty the future referral fees that will be owed, so it cannot be adequately compensated without the permanent injunction. Vervent could stop servicing the First Equity Accounts tomorrow or fifteen years from now. Moreover, LJP would be required to file multiple new lawsuits to recover continuing referral fees owed in the future.

Third, Vervent's conduct is closer to bad faith than it is to an "innocent mistake." In support of its assertion that it did not act in bad faith, Vervent alleges it was acting upon legal advice. (Def.'s Br. 42.) Although Mr. Johnson testified he received legal advice regarding the Referral Agreement, there is no evidence in the record as to the content of that advice.[14] Even if, for argument's sake, Vervent's legal counsel incorrectly instructed Vervent to terminate payment of the referral fee, Vervent and its legal counsel's ignorance of the law does not absolve Vervent of its decision to terminate the referral fees. There are at least a dozen cases across the country that explicitly hold that it is improper to terminate referral fees owed on a completed referral. Vervent has failed to cite any cases to the contrary, further underscoring its bad faith. Finally, the circuit court correctly recognized that the jury's verdict entitles LJP to ongoing fees, and that Vervent

[14] In discovery, Vervent asserted that the legal advice given to it is protected by the attorney/client privilege and refused to disclose the communication between Vervent and its counsel regarding termination of the Referral Agreement. (Mot. for Perm. Inj. Reply Br. 12 (R. 1786) (citing Vervent's Privilege Log, Entry 33).)

would be acting in bad faith if it failed to make payments going forward. (Decision Tr. 5.)

Fourth, the hardship suffered by Vervent is not disproportionate to the benefit to be gained by LJP. Vervent not wanting to honor the terms of the Referral Agreement is not sufficient grounds to deny the payments owed to LJP. Every party that is enjoined faces some form of hardship because they are being ordered to do (or refrain) from doing something. The fact that Vervent is unhappy with the terms of the Referral Agreement it acquired (despite having made over *thirty-six million dollars* in servicing revenue from LJP's referral of First Equity) is not a basis to deny the injunction for future referral fees that will be owed. The injunction simply requires Vervent to satisfy its obligations under the Referral Agreement.

D. Although the injunction is permanent, it does not require Vervent to continue to pay referral fees in perpetuity.

Finally, Vervent argues the injunction is improper because it "continues the Referral Agreement in perpetuity" and "requires Vervent to forever pay a referral fee to LJP[.]" (Def.'s Br. 43.) Vervent's argument again mischaracterizes the circuit court's ruling and seeks to re-litigate the issues that were properly decided in denying Vervent's Motion to Dismiss. *See Warner*, 178 F. Supp. at 660-61 ("The mere fact that an obligation under a contract may continue for a very long time is no reason in itself for declaring the contract to exist in perpetuity or for giving it a construction which would do violence to the expressed intent of the parties.").

The circuit court's order granting specific performance expressly states that it "shall be effective *for so long as Vervent is servicing any active First Equity Accounts*." (Order 5 (R. 1912) (emphasis added).) Once Vervent stops servicing the First Equity

Accounts, its obligation under the injunction also ceases. Because the permanent injunction is consistent with the jury's verdict, is statutorily authorized under SDCL §§ 21-8-14(2) and (3), and is supported by the four injunction factors, it is properly affirmed.

CONCLUSION

For the reasons stated above, LJP respectfully requests this Court: (1) affirm the circuit court's ruling that the Referral Agreement could be terminated for prospective referrals, but could not be terminated as to the referral fees owed for the completed referral of the First Equity Accounts; (2) affirm the jury's verdict for referral fees owed after the First Equity Acquisition in March 2022; and (3) affirm the circuit court's permanent injunction ordering specific performance of the Referral Agreement for so long as Vervent is continuing to service the First Equity Accounts.

Dated this 27th day of June, 2025.

WOODS, FULLER, SHULTZ & SMITH P.C.

By /s/ *Tim R. Shattuck*

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Attorneys for Plaintiff-Appellee

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements set forth in SDCL § 15-26A-66(b). This brief was prepared using Microsoft Word, Times New Roman (12 point) and contains 12,171 words, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues, certificates of counsel, and any addendum materials. I have relied on the word count of the word-processing program to prepare this certificate.

Dated this 27th day of June, 2025.

WOODS, FULLER, SHULTZ & SMITH P.C.

By /s/ *Tim R. Shattuck*

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Attorneys for Plaintiff-Appellee

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of June, 2025, a true and correct copy of Appellee's brief was served via Odyssey file and serve upon the following:

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Email: Jacquelyn.Bouwman@woodsfuller.com
Attorneys for Plaintiff-Appellee

APPENDIX

TOTAL CARD, INC.

Date: December 15th, 2012

Client: LJP Consulting LLC
Address: 114 Tammy Lane
City, State, Zip: Mickleton, NJ 08056

RE: Letter of Understanding between Total Card, Inc. and LJP Consulting LLC

This letter is to confirm the terms of a mutually beneficial business relationship between Total Card, Inc. (TCI) and LJP Consulting LLC. For each new business opportunity referred to TCI; LJP Consulting LLC will be entitled to a referral fee equal to a percentage of the amount billed to a referral client for call center services provided by TCI.

With each new company referred, a brief summary will be provided to assist TCI with due diligence and business opportunity analysis. Information on each referral opportunity will include the following:

1. Client company name:
2. Client company address:
3. Client company contact:
4. Client contact e-mail:
5. Client product offering:
6. Servicing Requirements:
7. Approximate start date:
8. Special notes:

A Qualified Referral: LJP Consulting LLC will contact TCI and brief them on each respective opportunity. If TCI wishes to purse the opportunity and it is not a prospective client that TCI is already engage with; a broker fee will be established based on the actual revenue for call center support services provided by TCI. The referral fee will be paid for the initial term of the servicing agreement (the rate established will be 3% for each client engagement/referral). If the TCI/Client contractual relationship is renewed, an ongoing referral fee of 3% will continue to be paid to LJP Consulting LLC. LJP Consulting LLC will schedule and participate in a conference call with the prospective client to introduce TCI. After the conference call is completed, TCI will control the sales process and keep LJP Consulting LLC informed of progress. The referral is considered qualified after the conference call is complete.

Sales Process
TCI will notify LJP Consulting LLC as soon as an agreement is reached with the respective client to provide call center support services. TCI will provide details as to the structure of the agreement and services to be provided. TCI and LJP Consulting LLC agree the initial referral fee of 3% may be reduced if standard TCI pricing is reduced as a requirement to secure the new call center servicing relationship.

Broker Fee Payment Terms

TCI will pay the LJP Consulting LLC within15 working days after receipt of payment from client each month for cash received during the previous month.

TOTAL CARD, INC.	Date	LJP CONSULTING LLC	Date: 12/15/2012
Name and Title PAUL N. SIMON NTL. Sales Director TOTAL CARD, INC.		Alonzo J. Primus, CEO	

VERVENT

2700 S. Lorraine
Sioux Falls, SD 57106
Phone: 605.977.5800
Fax: 605.339.7951

4/9/2022

INVOICE

Client: First Equity
Contact:
Address: 100 Wissahickon Ave
Ambler, PA 19002
E-mail:
Phone:
Fax:

CRN: **F000099**
Invoice #: 0099-0322
Invoice Date: 3/31/2022
Invoice Due Date: 4/10/2022

PERIOD	DESCRIPTION	QUANTITY	RATE	AMOUNT
Mar-2022	Gross Active Account	189,051	$5.30	$ 1,001,970.30
Mar-2022	Application Fee With Credit Bureaus	27,581	$0.50	$ 13,790.50
Mar-2022	Letters/Statements Mailed on Behalf of Client	1,902	$0.66	$ 1,257.22
Mar-2022	TabaPay Fee Invoice			$ 108,264.08
Mar-2022	TabaPay Fee Invoice - App Fee			$ 9,440.63
Mar-2022	Evolve Bank & Trust Invoice			$ 4,792.45
Mar-2022	Evolve Bank & Trust Invoice - App Fee			$ 353.20
Mar-2022	BM-406 Reallocation			$ 19,260.41
Mar-2022	TransUnion invoices			$ 34,678.61
Mar-2022	Experian Invoices			$ 7,558.57
Mar-2022	Direct Marketing Invoices			$ 74,653.82
Mar-2022	Carousel Checks - Check Stock and Deposit Books			$ 120.43
Mar-2022	FDR Fees - Verify Now			$ 11,941.29
Mar-2022	Lexis Nexis Invoices			$ 35.46
			Subtotal	$ 1,288,116.97

Any invoice not paid within thirty (30) days of receipt shall accrue interest at an interest rate of the lower of one and one-half percent per month or the highest rate allowed by law.

VERVENT

2700 S. Lorraine
Sioux Falls, SD 57106
Phone: 605.977.5800
Fax: 605.339.7951

5/12/2022

INVOICE

Client: First Equity
Contact:
Address: 100 Wissahickon Ave
Ambler, PA 19002
E-mail:
Phone:
Fax:

CRN: **F000099**
Invoice #: 0099-0422
Invoice Date: 4/30/2022
Invoice Due Date: 5/10/2022

PERIOD	DESCRIPTION	QUANTITY	RATE	AMOUNT
Apr-2022	Bundled Gross Active	185,167		
	0 - 300,000 Accounts	113,932	$5.93	$ 675,616.76
	300,001+ Active Accounts	71,235	$5.41	$ 385,381.35
	By Deal			
	Servicing Deal 1	181,937		
	Servicing Deal 2	3,230		
	Servicing Deal 3			
	Servicing Deal 4			
Apr-2022	Vervent Digital Marketing Commissions	9	$25.00	$ 225.00
Apr-2022	Application Fee With Credit Bureaus	31,759	$0.50	$ 15,879.50
Apr-2022	Letters/Statements Mailed on Behalf of Client	1,401	$0.66	$ 926.06
Apr-2022	TabaPay Fee Invoice			$ 99,184.81
Apr-2022	TabaPay Fee Invoice - App Fee			$ 10,939.69
Apr-2022	Evolve Bank & Trust Invoice			$ 4,604.30
Apr-2022	Evolve Bank & Trust Invoice - App Fee			$ 419.20
Apr-2022	BM-406 Reallocation			$ 14,737.36
			Subtotal	$ 1,207,914.03
			Tax Rate	
			Sales Tax	$ -
			Other	$ -
			Total Amount Due	$ 1,207,914.03

Any invoice not paid within thirty (30) days of receipt shall accrue interest at an interest rate of the lower of one and one-half percent per month or the highest rate allowed by law.

VERVENT

2700 S. Lorraine
Sioux Falls, SD 57106
Phone: 605.977.5800
Fax: 605.339.7951

7/10/2024

INVOICE

Client: First Equity
Contact:
Address: 100 Wissahickon Ave
Ambler, PA 19002

CRN: **F000099**
Invoice #: 0099-0624
Invoice Date: 6/30/2024
Invoice Due Date: 7/10/2024

PERIOD	DESCRIPTION	QUANTITY	RATE	AMOUNT
Jun-2024	Bundled Gross Active - Phase I	55,832		
	0 - 300,000 Accounts	55,832	$5.930	$ 331,083.76
	300,001+ Active Accounts	-	$5.410	$ -
Jun-2024	Bundled Gross Active - Phase II	10,599		
	0 - 300,000 Accounts	10,599	$5.700	$ 60,414.30
	300,001+ Active Accounts	-	$5.200	$ -
	By Deal			
	Servicing Phase 1	55,832		
	Servicing Phase 2	10,599		
Jun-2024	Letters/Statements Mailed on Behalf of Client	600	$0.66	$ 396.60
Jun-2024	TabaPay Fee Invoice			$25,632.35
Jun-2024	TabaPay Fee Invoice - App Fee			$15.00
Jun-2024	Evolve Bank & Trust Invoice			$1,322.55
Jun-2024	Evolve Bank & Trust Invoice - App Fee			$0.00
Jun-2024	FISERV Verify Now Invoices			425.78
Jun-2024	BM-406 Reallocation			11,479.09
Jun-2024	TBOM ACH Fees			-
Jun-2024	First Premier Lockbox			398.53
Jun-2024	Transunion			$0.00
Jun-2024	Cass Information Systems, Inc.			$166.67
Jun-2024	Reliant Capital Solutions			$427.54
Jun-2024	Carousel Checks			$0.00
Jun-2024	Lexis Nexis			$0.00
Jun-2024	Eide Bailly LLP			$0.00
Jun-2024	USPS PO Box Rental			$0.00
				$ 431,762.17

Subtotal	
Tax Rate	
Sales Tax	$ -
Other	$ -
Total Amount Due	$ 431,762.17

Any invoice not paid within thirty (30) days of receipt shall accrue interest at an interest rate of the lower of one and one-half percent per month or the highest rate allowed by law.

VERVENT

2700 S. Lorraine
Sioux Falls, SD 57106
Phone: 605.977.5800
Fax: 605.339.7951

7/10/2024

INVOICE

Client: First Equity - TCS
Contact:
Address: 100 Wissahickon Ave
Ambler, PA 19002

CRN: **F000513**
Invoice #: 0513-0624
Invoice Date: 6/30/2024
Invoice Due Date: 7/10/2024

PERIOD	DESCRIPTION	QUANTITY	RATE	AMOUNT
Jun-2024	Monthly Servicing Fees - F01	22,144	$5.50	$ 121,792.00
Jun-2024	Vervent Digital Marketing Commissions	-	$25.00	$ -
	By Deal			
	Servicing Deal 6	2,551		
	Servicing Deal 7	5,655		
	Servicing Deal 8	5,087		
	Servicing Deal 9	4,266		
	Servicing Deal 10	4,585		
	Servicing Deal 11	-		
	Servicing Deal 12	-		
Jun-2024	Letters/Statements Mailed on Behalf of Client	200	$0.66	$ 132.20
Jun-2024	TabaPay Fee Invoice			$ -
Jun-2024	TabaPay Fee Invoice - App Fee			$ -
Jun-2024	Evolve Bank & Trust Invoice			$ -
Jun-2024	Evolve Bank & Trust Invoice - App Fee			$ -
Jun-2024	FISERV Verify Now Invoices in Old CRN			$ -
Jun-2024	TBOM ACH Fees in Old CRN			$ -
Jun-2024	First Premier Lockbox in Old CRN			$ -
Jun-2024	TBOM ACH Fees in New CRN			$ -
Jun-2024	Payix			$ -
Jun-2024	Tabapay New CRN			$ 13,677.53
Jun-2024	Tabapay - App Fee - New CRN			$ 2,852.86
Jun-2024	Evolve New CRN			$ 562.15
Jun-2024	Evolve- App Fee - New CRN			$ 122.55
Jun-2024	FISERV Verify Now -New CRN			$ 151.04
Jun-2024	First Premier Lockbox in New CRN			$ 97.45
Jun-2024	Google Services/Facebook Advertising - Marketing			$ -
Jun-2024	Carousel Checks - Deposit Slips Printing Split Evenly			$0.00
Jun-2024	Proxi Indepent Group - Marketing			$0.00
Jun-2024	BM-406 Reallocation			$ 2,565.86
Jun-2024	Bulldog Media Group -Marketing			$26,636.00
Jun-2024	Chatfuel			$0.00
Jun-2024	Lexis Nexis/Trans Union/Experian - Underwriting			$10,446.77
Jun-2024	Experian Right Offer Marketplace			$200,622.00
Jun-2024	BMG Marketing Referral			($5,488.14)
Jun-2024	AON Integramark Affinity Insurance Services, Inc.			$3,143.46
Jun-2024	Panther Premier Print Solution			$9,504.61
			Subtotal	$ 386,818.34
			Tax Rate	
			Sales Tax	$ -
			Other	$ -
			Total Amount Due	$ 386,818.34

Any invoice not paid within thirty (30) days of receipt shall accrue interest at an interest rate of the lower of one and one-half percent per month or the highest rate allowed by law.

STATE OF SOUTH DAKOTA)
:SS
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT

SECOND JUDICIAL CIRCUIT

LJP CONSULTING LLC, a New Jersey Limited Liability Company, Plaintiff, vs. **VERVENT, INC., a Delaware Corporation,** Defendant.	CIV. 21-1047 **SPECIAL VERDICT**

We, the jury, duly impaneled in the above-entitled action and sworn to try the issues therein, find as follows:

INTERROGATORY NO. 1

What amount of damages do you award to LJP Consulting LLC for Vervent, Inc.'s breach of the Referral Agreement? (You may only complete one of the following three options.)

☐ $_____ – Consistent with LJP Consulting LLC's calculation of damages. (If selected, you may skip the remaining questions and sign and return your verdict.)

☐ $_____ – Consistent with Vervent, Inc.'s calculation of damages. (If selected, you may skip the remaining questions and sign and return your verdict.)

☒ $1,000,004.75 – Other (Fill in the blank). (If Other, you must also answer Interrogatories 2 and 3.)

INTERROGATORY NO. 2

If you answered "Other" to Interrogatory No. 1, describe how you calculated the damages provided in response to Interrogatory No. 1.

The damages were calculated based on 3% of $5.25 per active accounts on the Vervent invoices to First Equity dated January 2021 through June 2024.

INTERROGATORY NO. 3

If you answered "Other" to Interrogatory No. 1, please itemize the damages for each month. If you find that no damages are owed in any month(s), please so indicate by placing "$0.00" on the corresponding line. (The total of each of the line items must equal the damages you listed in response to Interrogatory No. 1 and must be consistent with your description of damages in response to Interrogatory No. 2.)

DATE	DOLLAR AMOUNT
January 2021	$ 32,108.27
February 2021	$ 31,795.00
March 2021	$ 31,603.79
April 2021	$ 30,909.85
May 2021	$ 30,740.85
June 2021	$ 30,618.32
July 2021	$ 31,456.53
August 2021	$ 32,251.43
September 2021	$ 32,442.01
October 2021	$ 32,417.17
November 2021	$ 32,284.51
December 2021	$ 31,891.86
January 2022	$ 31,237.92
February 2022	$ 30,459.24
March 2022	$ 29,775.53
April 2022	$ 29,163.80
May 2022	$ 28,792.58
June 2022	$ 28,675.08
July 2022	$ 28,419.14
August 2022	$ 27,711.65
September 2022	$ 26,581.59
October 2022	$ 25,419.08

November 2022	$ 19,834.29
December 2022	$ 18,730.37
January 2023	$ 17,737.34
February 2023	$ 16,904.32
March 2023	$ 16,047.52
April 2023	$ 15,345.54
May 2023	$ 18,854.17
June 2023	$ 14,922.97
July 2023	$ 18,099.90
August 2023	$ 18,068.40
September 2023	$ 17,925.71
October 2023	$ 17,626.61
November 2023	$ 17,168.92
December 2023	$ 16,165.23
January 2024	$ 16,088.63
February 2024	$ 15,545.88
March 2024	$ 14,980.61
April 2024	$ 14,537.72
May 2024	$ 14,274.86
June 2024	$ 13,950.56
[redacted]	

Dated this 8th day of August, 2024.

Rebecca L Munsch

Foreperson

Rebecca L. Munsch

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

No. 30891

VERVENT, INC.

Defendant/Appellant,

vs.

LJP CONSULTING LLC

Plaintiff/Appellee.

Appeal from the Circuit Court
Second Judicial Circuit
Minnehaha County, South Dakota

The Honorable Douglas P. Barnett, Presiding Judge

REPLY BRIEF OF APPELLANT VERVENT, INC.

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Claire E. Wilka
Cadwell Sanford Deibert & Garry LLP
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Attorneys for Plaintiff-Appellee

Notice of Appeal Filed November 7, 2024

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TABLE OF AUTHORITIES

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INTRODUCTION

Appellee's Brief confirms rather than refutes the two primary reasons for reversal of the Circuit court's rulings. The case below presented not one, but three startling and unusual circumstances:

First, the factual circumstance that the defendant had acquired both parties to the underlying referral agreement and so there was nothing left to "refer," much less pay on. Nothing in the Referral Agreement speaks to or contemplates this type of changed circumstances, let alone mandates a never-ending referral fee, the perpetual commission appellee obtained here, which somehow long outlives First Equity, TCI, and those parties' 2014 Servicing Agreement.

Second, closely related, and highly prejudicial, the Circuit Court's initial prohibition of defendant from even raising Vervent's acquisition of TCI to the jury—only to change that ruling later in the case, but only ***after*** voir dire, openings, and the completion of plaintiff's case. Far too little, too late.

Third, in a commercial case about money damages of uncertain future amount, the Court allowed a permanent injunction affecting future monetary relief.

Faced with these three errors, Appellee weakly waves its hands. As to the contract issues, LJP's brief fails to cite any law or facts supporting perpetual commissions after a contract is extinguished, thus confirming there is no justification for upholding the erroneous judgment and rulings against

Vervent in this case. As to the motion in limine about face, LJP argues that this was all about "evidence," not the barring of ***legal claims***, and fails to address the core prejudice issues at hand. And as to the injunction, appellee fails to distinguish this case from the long line of cases in South Dakota and elsewhere that prohibit equitable relief in money damages cases, much less equitable relief in perpetuity.

ARGUMENT

I. Vervent was prejudiced by the Circuit Court's erroneous decision to preclude evidence of the First Equity transaction.

Reversal is warranted—and a new trial should be granted—because the Circuit Court's incorrect evidentiary rulings prevented Vervent from presenting its key defense during three critical phases of trial: voir dire, opening statements, and LJP's case in chief. For a ***majority*** of the proceedings, Vervent was precluded from arguing, mentioning, referring to, or questioning witnesses about the 2022 purchase of First Equity by Vervent's affiliate. By the time the Circuit Court realized the prejudice to Vervent, it was too late. The Circuit Court ultimately allowed Vervent to present the question whether the "[c]lient contractual relationship was renewed"—but only ***after*** LJP had closed its case.

This was not an "evidentiary" ruling. It was a ruling about an entire line of defense. To be sure, evidence was part of this argument just as it is part of any legal argument, but the motion in limine's effect was not to strike some particular document or bit of testimony—it was to foreclose an entire case. Appellee never even addresses much less refutes that fact. On this basis, the prejudice to Vervent was

manifest and undisputed. *See e.g. Kjerstad v. Ravellette Publishing*, 517 N.W.2d 419, 426 (SD 1994) (reversible error related to violation of a motion in limine based on prejudice); *see also* SDCL 19-19-103. Once a trial court makes a definitive ruling on the record regarding a motion in limine, a claim for reversible error is preserved for appeal. *See Liebig v. Kirchoff*, 2014 SD 53 at ¶ 20; *see also* SDCL 15-26A-7.

Instead, LJP attempts to address this error on an evidentiary basis. Even indulging that incorrect test, Vervent still wins. LJP opens by admitting that "evidentiary" rulings are reversible when (1) error is shown, and (2) the error was prejudicial. (Appellee Brief at 25.) Here, the first prong is established by the Circuit Court's recognition of its error and its ultimate reversal. LJP barely puts up a fight on this prong, offering a circular argument about what the evidence supposedly shows, ***not*** what the jury was entitled to hear and decide. *Id.*

As to the second prong, LJP is forced into nonsensical arguments deriding key elements of trial procedure and preparation. First, LJP says that voir dire and opening statements do not count because they are not "evidence." (*Id.* at 18.) But the test is prejudice, not evidence. Every trial lawyer knows that opening statements are critical to a parties' case. Indeed, "[a]t this stage of the trial, the jury is peculiarly alert and impressionable…." *Binegar v. Day*, 80 S.D. 141, 148 (1963); *see also* Harry Kalven, Jr. & Hans Zeisel, *The American Jury*, 23 Am. J. Trial Advoc. 203, 203 (1999) (observing that studies have shown that 80 percent of jurors make up their minds after opening statements); James W. Quinn, *The Mega-Case Marathon*, 26 Litig. 16, 20 (2000) ("Most experts agree that the jurors' first impressions from opening statement can be

powerful influences at the end of the case."). If these stages of trial are not important, why have them at all?

Caselaw, too, proves LJP wrong. *See, e.g.*, *First Premier Bank v. Kolcraft Enters. (In re Boone)*, 2004 SD 92, ¶ 27 (finding reversible error where defendant was allowed to reference a prior settlement agreement during opening statements and awarding plaintiff a new trial). In *First Premier*, the plaintiff filed a motion in limine requesting an order precluding reference to a prior settlement between the parties. The circuit court promised it would rule on the motions in limine but in the meantime inexplicably allowed defendant to reference the settlement agreement during its opening statement. *Id.* ¶ 17. Plaintiff moved for a mistrial after defendant referenced the settlement agreement in its opening statements, but the circuit court denied it, stating, "[w]hat the attorneys say is not evidence." *Id.* ¶ 12. On appeal, this Court declined to find a pertinent distinction between "evidence" and opening statements, holding that the refences to the settlement agreement in opening statements were prejudicial and constituted reversible error. Tellingly, the Court noted the circuit court's erroneous "distinction between disclosure in opening statements and disclosure by formal evidentiary admission." *Id.* ¶ 26. Plaintiff was thus awarded a new trial. The Court is thus not restricted to find prejudice solely when it arises from an error in "evidence."

Prejudice warranting a new trial was found under strikingly similar circumstances in an Illinois case, *Benuska v. Dahl*, 87 Ill. App. 3d 911 (2d Dist. 1980). In *Benuska*, the Circuit Court granted defendant Jones' motion in limine to preclude

evidence that she had been intoxicated at the time of an accident during which the plaintiff, Jones' passenger, was injured. After the plaintiff and one of the defendants had presented their respective cases-in-chief, the court reversed its ruling, concluding that the plaintiff could present evidence of Jones' intoxication to the jury. *Id.* at 912. Jones moved for a mistrial, but the court denied it and allowed the plaintiff to re-open her case to present evidence of Jones' intoxication. *Id.*

On appeal, Jones argued that the mid-trial reversal of the motion in limine ruling deprived her of a fair opportunity to contest the charge of intoxication. *Id.* at 913. After cautioning that "a mistrial should be declared only as the result of some occurrence of such character and magnitude that a party is deprived of its right to a fair trial" and that Jones was required to demonstrate "actual prejudice as a result of the ruling or occurrence," the Illinois appellate court held that Jones did, indeed, suffer actual prejudice for three reasons: ***First***, "Jones did not have the opportunity to question prospective jurors on voir dire" regarding intoxication. *Id.* ***Second***, "Jones was deprived of the opportunity to address the jury on the same question in her opening statement, which was also prejudicial." *Id.* ***Third***, "it was clearly prejudicial for the evidence pertaining to intoxication to be introduced all at once near the end of trial...." *Id.*

As in *Benuska*, here, Vervent was deprived of the opportunity to raise its central defense in voir dire and its opening statement. And, just like in *Benuska*, the prejudice that resulted to Vervent warrants a new trial. LJP's opposition brief never grapples with this unusual, prejudicial and dispositive fact.

Instead, LJP argues that, even if Vervent was prejudiced by the Circuit Court's mid-trial reversal, any prejudice was cured because Vervent could have re-called Mr. Primus as an adverse witness in its case-in-chief. (Appellee Brief at 18-19.) But of course, interjecting a new concept into one's case through the calling of an adverse witness who had already testified presents challenges of its own. The jury might in that circumstance just as readily blame Vervent for wasting time by re-calling a witness who had already testified. The cure of prejudice should not become a game of Russian roulette. The prejudice should not have occurred in the first place.

This leaves LJP with an argument that Vervent was not prejudiced because Vervent was prepared to make an offer of proof on the First Equity transaction. (*Id.* at 19-20.) According to LJP, this means Vervent was "fully prepared" to completely change its trial strategy, evidence, and witness examinations when the Circuit Court changed its mind on the motion in limine. (*Id.* at 20.) But that is adjustment, not concession. That Vervent was nimble in its face of prejudice does not legitimize that prejudice. The point is Vervent ended up trying a completely different case, half way through trial as a result of the Circuit Court's admission of error.

Indeed, Vervent had no opportunity to lay groundwork and develop a running presentation on a complex commercial transaction that even the Circuit Court had trouble following. Instead, it became Vervent's burden to disprove a client relationship under the Referral Agreement. If burdens of proof, voir dire, opening statement and cross examination are essential components of a constitutional right to

trial—which they are—then giving one party an unfair advantage with respect to these important components of trial, must constitute reversable error.

II. The Contract Originally At Issue Ended

A. The Circuit Court erred in granting partial summary judgment before trial finding Vervent in breach of contract and ruling that a payment obligation for referral services can continue indefinitely.

This Court has repeatedly cautioned that contractual language is to be interpreted according to its plain and ordinary meaning and not based on a "forced construction." *Stene v. State Farm Mut. Auto. Ins. Co.*, 1998 S.D. 95, ¶ 14, 583 N.W.2d 399, 402 (quoting *St. Paul Fire & Marine Ins. Co.*, 520 N.W.2d at 887) (internal quotation mark omitted). Yet, in granting summary judgment, the Circuit Court interpreted the Referral Agreement in a manner that defies its own words. While the Referral Agreement does outline a definite initial duration for payment obligations during the course of an underlying referred contract, the certainty ends once the initial term is complete.

LJP fails to distinguish this case from what it acknowledges to be the general rule, highlighted by the Eighth Circuit's decision, applying South Dakota law, that "contracts having no fixed term are terminable at will." *Martin v. Equitable Life Assurance Soc.*, 553 F.2d 573, 574 (8th Cir. 1977). LJP's concedes this rule and so is then forced to argue that it should not apply here because the contract is neither perpetual nor indefinite. This is plainly incorrect. The Referral Agreement expressly provides for a 3% referral fee "for the initial term of the servicing agreement" with the referred client. That part is quantifiable and definite. The trouble arises, however,

in the clause that follows, which provides "If the TCI/Client contractual relationship is renewed, an ongoing referral fee of 3% will continue to be paid to LJP." This distinction between an "initial term" and a "renewal" is critical—and wholly ignored by LJP.

Instead LJP and the Circuit Court rely on a line of out-of-state cases, starting with *Warner-Lambert Pharmaceutical Co. v. John J. Reynolds, Inc.*, 178 F. Supp. 655 (S.D. N.Y. 1959), *aff'd* 280 F.2d 197 (2d Cir. 1960), to argue that Vervent's obligation was not terminable despite the indefinite term. But *Warner-Lambert* and its progeny rest on fundamentally different contract language. Specifically, the *Warner-Lambert* contract provided definitive circumstances under which a royalty payment would end, providing that the payment obligation continues for so long as the obligor and its successors continued manufacturing or selling Listerine. *Id.* at 658. Using the express words of the contract, *Warner-Lambert* examined "whether there is an ascertainable event which necessarily implies termination" in determining whether a termination date was objectively clear.

In this case, LJP and the Circuit Court failed to explain just what ascertainable events identified in the Referral Agreement imply a termination. LJP suggests that the Referral Agreement is separated by past completed referrals and future referrals, and LJP is entitled to a referral fee as long as the First Equity accounts are serviced. But LJP has concocted this concept out of whole cloth, which the Circuit Court erroneously adopted in granting LJP's motion for summary judgment. No language in

the Referral Agreement suggests that termination is tied to completed versus prospective referrals once operating in the "renewal" term.

B. The Circuit Court erred in failing to grant Vervent's multiple motions for judgment as a matter of law.

The Circuit Court's erroneous evidentiary and dispositive motion rulings all trace back to the same fundamental misunderstandings of the Referral Agreement and applicable law. In particular, the Circuit Court ignored the express contractual requirement that a referral fee is only due to the extent the "contractual relationship" giving rise to the fee is "renewed" after its initial term expires. Here, the "contractual relationship" that triggered the referral fee was between First Equity and TCI—separate and unaffiliated business entities with no prior dealings. Assuming, for the sake of argument, that this "contractual relationship" survived Vervent's acquisition of TCI in November 2020, it is inconceivable that this "relationship" remained intact in any legal or practical sense after March 2022, when Vervent's sister company Phoenix purchased and became the owner of First Equity's receivables. From that point forward, Vervent was no longer servicing the receivables because of historic dealings or obligations between First Equity and TCI. Rather, Vervent was servicing assets held by an affiliated company under the same corporate umbrella, pursuant to an overarching corporate business plan to invest in, own, and service the receivables "in-house." This situation goes far beyond anything actually stated or contemplated in the one-page Referral Agreement. By requiring Vervent to pay LJP commissions in perpetuity after March 2022, the Circuit Court invented and applied a contract that simply does not exist, in violation of well-established law.

Tellingly, the final judgment in this case rests on the conflated order that Vervent must pay a referral fee "so long as" it services "First Equity accounts." This misapplication of the contract language exposes the before, during and after trial, errors that currently allow the Referral Agreement to enjoy an infinite shelf-life when it should not. The Circuit Court should have granted Vervent's motion for judgment as a matter of law on this point.

C. LJP is not entitled to damages under the Referral Agreement without proof of a client relationship *or* a renewed contract.

LJP had the burden to prove the right to recover under the Referral Agreement after First Equity ceased to exist as a client. *Bowes Constr., Inc. v. S.D. DOT*, 2010 S.D. 99, ¶ 21, 793 N.W.2d 36, 43. LJP failed to carry this legal burden because it presented ***no evidence*** that the First Equity servicing contract remained in effect or was renewed. Nor did LJP show that Vervent's servicing activities after March 2022 were a renewal of the long-outdated "contractual relationship" between First Equity and TCI, rather than a fundamentally new arrangement dictated by intercompany business considerations as between Vervent and its corporate affiliates, all of which exist under a common ownership structure.

On appeal, LJP suggests that the existence of a different servicing agreement altogether (which was introduced by Vervent) satisfies the "renewal" language in the Referral Agreement. (Appellee Brief at 22-23.) LJP misses the mark, as a "renewal" is a term with a specific definition. *See e.g.*, *BSG, LLC v. Check Velocity, Inc.*, 395 S.W.3d 90, 94-95 (Tenn. 2012) (distinguishing renewals that include extensions of contracts with the same terms for an additional period of time versus renewals that include

entirely new contracts); *Cushman & Wakefiled of Md., Inc. v. DRV Greenteck, LLC*, 2018 WL 3025859 * 15-17 (Md. Ct. App 2018) (broker fee case distinguishing a lease renewal from an assignment). Simply put, a "renewal" does not occur when, as here, one contract between unaffiliated entities dissolves, and a completely separate and distinct arrangement between different affiliated parties is later executed.

The *BSG* case is particularly on point. In *BSG*, there was an obligation on defendant, Check Velocity, to pay a fee to BSG, based on benefits derived from an underlying agreement between Check Velocity and Weight Watchers. *BSG,* 395 S.W.3d at 94. Like this case, under the BSG/Check Velocity agreement, the payment obligation was specifically tied to an agreement or "renewal" of the agreement between Check Velocity and Weight Watchers. *Id.* After a period of time, Check Velocity and Weight Watchers entered into a new agreement, with different terms under which Check Velocity was required to pay fees to BSG. *Id.* at 95. Because the payment obligation was tied to a renewed contract versus a new deal, the Tennessee Supreme Court held that the precondition of a renewal had not been met, and Check Velocity's payment obligation to BSG terminated as a result. *Id.*

The same result fits here as the Referral Agreement requires a renewed contract, not an entirely new and substantively different relationship as is now the case. (*Compare* Exs. M-N (2014 Servicing Agreement between TCI and Progress One Financial) *with* Ex. FF (2020 Servicing Agreement between Vervent and Phoenix Card Group)). The issue of a "renewal" and a "client" relationship is plainly a question of law, despite LJP oddly arguing that this issue of corporate separateness

was somehow a jury issue. *See Weitzel v. Sioux Valley Heart Partners*, 2006 S.D. 45, ¶ 22. Even, though not a jury question, Vervent and Phoenix are plainly under common ownership and control as Vervent's trial exhibits readily show.[1] Vervent's motion under SDCL 15-6-50(a) should have been granted, as LJP failed to introduce any evidence that the "client contractual relationship" had been renewed. To be sure, LJP did not even offer evidence of an exchange of money between parties after March of 2022. Instead, its brief weakly suggests that a jury could reasonably have inferred as much. *See* Appellee Brief at 25. None of LJP's arguments could remotely justify the language in the judgment requiring payment of 3% of $5.25 per First Equity account "for so long as" Vervent services such accounts. That is not at all what the Referral Agreement says. There is no client nor has there been a renewal. Denial of Vervent's multiple motions under this statute was in error. Vervent has preserved its right to appeal this issue under SDCL 15-26A-7, and the Circuit Court should be reversed.

III. The Circuit Court erred in granting indefinite, permanent injunctive relief as a proxy for future lost profits.

In the final act of giving the Referral Agreement undeserving tailwind, the Circuit Court entered a permanent injunction obligating Vervent to pay a fee to LJP essentially in perpetuity. Money injunctions, for future damages, are not merely unusual but unlawful. They stretch far beyond what this Court has previously

[1] As just one example, the Vervent/Phoenix servicing agreement, identifies both parties as having the same address and designates the same person for notice. Attorney Derek Gamble also signed the document on behalf of Phoenix. Gamble was, of course, Vervent's representative at trial, and the author of the letter from Vervent terminating the Referral Agreement (see Ex. 38).

authorized under SDCL 21-8-4. None of LJP's attempts to justify this extreme and unsupported relief pass muster.

A. LJP is not entitled to a permanent injunction under South Dakota law.

LJP provides no South Dakota authority supporting its unusual claim to future monetary damages awarded as injunctive relief. Instead, LJP cites cases from California and North Carolina. (Appellee Br. at 39-40.) It might be appropriate to consider these cases were they merely filling gaps, but they instead stand in direct opposition to established South Dakota law. This Court has cautioned against couching future economic damages as injunctive relief, and LJP fails to explain why it is deserving of novel or unique consideration. *See Magner v. Brinkman,* 2016 SD 50, 883 N.W.2d 74. Likewise, this Court has noted the importance of carefully tailoring the length of the injunction to the relief requested. *See Raven Indus. v. Lee*, 2010 SD 49, ¶ 24, fn7 (noting the plaintiff requested an injunction "indefinite" in duration; the trial court instead tailored relief to two years based on the evidence presented).

The injunction cannot be salvaged by characterizing future damages as too speculative for the jury. The Circuit Court opined that calculating future referral fees would be too difficult, thus implying a legal remedy was inadequate. But *Williams v. Brinkman*, 2016 S.D. 50, 883 N.W.2d 74 expressly "rejected the rationale" that uncertainty of future damages makes an injunction appropriate. Ordering a defendant to pay money over time undermines the conclusion that the harm was irreparable and thus does not justify injunctive relief.

To be sure, this Court's ruling in *Magner* is consistent with the South Dakota statute and the South Dakota Pattern Jury Instruction with respect to future damages. *See* SDCL 21-1-10; SDPJI 50-120-10. As our pattern jury instructions make clear, "all future happenings are somewhat uncertain." SDPJI 50-120-10. As a result, South Dakota juries are advised that "the law does not require certainty as to the amount of such damages." *Id.* While this instruction provides that future damages cannot be based on conjuncture or speculation, the fact that future damages require some reasonable estimation is already baked-into the explanation given to juries. Thus, LJP's argument of uncertainty is at odds with the fact that future damages are, by their nature, uncertain.

B. LJP has failed to satisfy the elements necessary for injunctive relief.

As explained in Vervent's principal brief, the right to injunctive relief is further measured under four common law factors:

1. Whether the enjoining party caused the injury.
2. Whether the injury is irreparable due to a lack of an adequate remedy at law.
3. Whether the enjoined party acted in bad faith.
4. Whether the hardship to the enjoined party is disproportionate to the benefit of the other party.

See e.g., *McDowell v. Sapienza*, 2018 SD 1. Measured against these factors, LJP's case for an injunction quickly crumbles.

Assuming for a moment that Vervent caused the injury by breaching the Referral Agreement (a fact that is hotly disputed), the remaining factors do not favor LJP at all. As explained above, LJP readily had an adequate remedy at law in the form of future damages. The South Dakota Supreme Court's decision in *Williams* is directly

on point. As this Court recognized, LJP could have avoided future litigation "by seeking compensation for past and future damages in one action," and "the fact that they chose not to do so does not render an injunction necessary to prevent multiple suits." *See Williams,* 2016 SD 50 at ¶ 22. By granting an injunction anyway, the Circuit Court bypassed the jury process and awarded LJP a remedy it neither earned nor proved.

Next, LJP contends Vervent acted in bad faith, but there is zero evidence to support such a claim. Instead, it bears repeating, Vervent ceased paying LJP based on a good faith basis related to a debatable contract and on advice of legal counsel. While LJP asserts that Vervent acted in bad faith by not paying fees going forward, this view conflates breaching a contract with acting in bad faith. Vervent had a justified belief that the contract was terminable at will because it is silent on duration. As this Court has noted, if every breach of contract were automatically "bad faith" then "every contract case would result in the corresponding breach of good faith and fair dealing." *See Fischer Sand & Gravel Co. v. SD Dept. of Transp.,* 1997 SD 8, ¶ 16. Furthermore, nothing in the record indicates that the Circuit Court found, or that there were facts justifying a finding of wrongful or inequitable conduct that would weigh in favor of an injunction. At most, the Court found Vervent made a decision based on contract interpretation. This is a far cry from bad faith, or any other type of conduct that could be characterized as poor behavior.

Finally, LJP is not going to suffer irreparable harm, absent injunctive relief, because an adequate remedy at law exists. If Vervent does not pay a referral fee for

any given month, LJP retains a right to bring future claims, just as a landlord might sue a tenant for future unpaid rent, or a royalty owner might sue for unpaid royalties, without needing a perpetual injunction. LJP's assertion that it might have to file multiple lawsuits does not constitute irreparable injury. LJP's injury is purely monetary in nature and entirely redressable by a money judgment.

Finally, the balance of hardships tilts decidedly in Vervent's favor. For LJP, the absence of an injunction means only that it must pursue ordinary legal remedies to collect future fees. By contrast, injunctive relief here compels Vervent to pay LJP indefinitely, no matter if business circumstances change, its business is restructured, it sells its business, or any other imaginable scenario, or risk violating a Court order. Furthermore, the injunction mandates paying a referral fee on self-generated revenue as the mutuality of a client-servicer relationship no longer exists. This leaves Vervent with no perceptible off-ramp here as the Circuit Court's order compels an obligation not found in the contract. In other words, even though Vervent paid handsomely to acquire the First Equity business, LJP somehow gets to continue enjoying a perpetual revenue stream. So, in reality, Vervent's hardship is not simply a desire to avoid obligation, it is now truly a matter of double payment.

Based on the foregoing, none of the equitable factors justify permanent injunction. This case is a run-of-the-mill contract dispute over money and adequate remedies at law exist, making injunction inappropriate.

CONCLUSION

For these reasons, and the reasons set forth in Vervent's Principal Brief, this Court should reverse the Circuit Court's summary judgment rulings and order a new trial. Alternatively, this Court should reverse the Circuit Court's denial of Vervent's motions for judgment as a matter of law or remittitur, and further reverse the Circuit Court's entry of a permanent injunction.

Dated this 28th day of July, 2025.

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CERTIFICATE OF COMPLIANCE

I hereby certify that Appellant's Reply Brief complies with the Type-Volume requirements of SDCL 15-26A-66 in the following manner: The Brief was prepared using Microsoft Word and uses proportionally spaced font [Garamond] in 13-point type. Based on the word-count feature of the MS Word processing system, the Brief contains 4,428 words.

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The undersigned attorney hereby certifies that the foregoing Appellant's Reply Brief was electronically filed and served through eFileSD on counsel shown below.

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