

IN THE
Supreme Court
of the
State of South Dakota

No. 30344

VOR, INC., & GRAND VALLEY
HUTTERIAN BRETHREN, INC.
PLAINTIFFS/APPELLEES

VS.

PAUL O'FARRELL &
SKYLINE CATTLE COMPANY
DEFENDANTS/APPELLANTS

An appeal from the Circuit Court, Third Judicial Circuit
Codington County, South Dakota

The Hon. Robert L. Spears
CIRCUIT COURT JUDGE

APPELLANTS' BRIEF

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Notice of Appeal filed on May 8, 2023

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INTRODUCTION

This is an eviction action. However, the eviction is part of a larger constellation of cases relating to an unusual series of changes to the estate plan of Raymond and Victoria O'Farrell in 2022. Those changes are alleged to be the result of undue influence upon Raymond. The estate plan changes occurred prior to Victoria' death in July 2022, and then led to the precipitous sale of most of the couple's real estate holdings in October 2022.

Raymond's competency, and the validity of the real estate sale and estate plan changes are being challenged in other proceedings. All of those proceedings were already underway prior to this eviction action.

The Appellants in this appeal are Paul O'Farrell (Victoria and Raymond's oldest son) and Skyline Cattle Company (Paul's company which operates the farm ground). They are referred to as "Paul," "Skyline," or "Tenants."

The Appellees include: Victoria and Raymond's landholding entity company, VOR, Inc. ("VOR"); and the Grand Valley Hutterian Brethren, Inc., ("the Colony," "Grand Valley," or "Landlord"). Grand Valley is the putative purchaser of Raymond and Victoria's land. Any reference to Grand

Valley as a “Landlord” is for simplicity, and not intended as an admission by Tenants as to the Colony’s legal status.

The Trial Transcript is referred to by page number as [TT 123]. A post-trial hearing was held on the supersedeas bond, and, pages in that transcript are referred to as [HT 123].

References to the settled record are denoted by [R.123]. This Court previously considered Tenants’ motion related to a supersedeas bond. That motion (dated May 18, 2023) included an appendix of pertinent documents relating to the parallel proceedings. Many of those same parallel pleadings are included in the Appendix here, but they have been reordered and repaginated.

JURISDICTIONAL STATEMENT

Appellants appeal the Circuit Court’s entry of Judgment by the Hon. Robert Spears on May 1, 2023, [R.120]. Notice of entry was given on May 8, 2023. [R.120]. Appellants filed their notice of appeal on May 8, 2023. [R.143]. This Court has jurisdiction, per SDCL § 15-26A-3(1).

LEGAL ISSUES

1.

Did the Circuit Court err by refusing to hold that the eviction claims are compulsory counterclaims to a pre-existing civil action?

Yes, the Circuit Court erred.

- SDCL 15-6-13(a)
- SDCL 21-16-4
- *Heiser v. Rodway*, 247 N.W.2d 65 (S.D. 1976)
- *LPN Trust v. Farrar Outdoor Advert., Inc.*, 1996 S.D. 97
- *City of Aberdeen v. Lutgen*, 273 N.W.2d 183, 185 (S.D. 1979)

2.

Did the Circuit Court err by misapplying procedural statutes in Chapter 21-16, and by ignoring the applicability of the Rules of Civil Procedure to a forcible entry and detainer action?

Yes, the Circuit Court erred.

- SDCL 15-6-81(a)
- SDCL 21-16-8
- SDCL 21-16-7
- SDCL 15-6-12(a) and (b)
- SDCL 15-6-38(b)

3.

Did the Circuit Court err by excluding relevant evidence, admitting problematic evidence, and issuing a judgment beyond the scope of mere possession?

Yes, the Circuit Court erred.

- *Matter of Guardianship of Nelson*, 2017 S.D. 68,
- *Buisker v. Thuringer*, 2002 S.D. 81
- *W. Bldg. Co. v. J.C. Penney Co.*, 245 N.W. 909, 912 (S.D. 1932).
- SDCL 21-16-10

STATEMENT OF THE CASE

In March of 2023 (in a separate proceeding from this case) Paul O'Farrell and Skyline brought suit against the Colony and other parties. The purpose of that suit was to challenge the validity of the Colony's deed, and to seek other relief. [App.9]

The Colony's deed was challenged on the basis of undue influence, corporate capacity, and legal capacity. Paul's lawsuit also challenged the attempted non-renewal of the farmland; it sought tort damages; and it requested a declaration of rights of Paul O'Farrell and VOR, Inc., as ongoing tenants of the VOR, Inc., farmland.

With full knowledge and awareness of that lawsuit, and after the time for answering in that case, VOR and the Colony commenced this present eviction action via service of the Summons on April 17, 2023. The sole remedy sought by the Complaint was to "return possession to the Plaintiffs." [R.5].

Tenants promptly filed a motion to dismiss on April 21, 2023, on the basis that the eviction action was duplicative of the legal and factual issues within Paul's pre-existing lawsuit. *See*, [R.23, ¶ 1; R.27-29] (motion and briefing seeking Rule 13(a) dismissal of compulsory counterclaim).

Prior to the Circuit Court's resolution of the motion to dismiss, Landlord filed a Notice of Trial on April 24, 2023, asserting that a trial would begin on the morning of April 27, 2023, (less than 72 hours later). [R.34]. Tenant filed an Objection to the trial notice, pointing out that "the Plaintiffs are seeking to hold an eviction trial before any of the pending motions to dismiss have been resolved." [R.37-41]. Tenant also pointed out that the Notice was statutorily premature because the Answer had not yet been filed. [R.37-41].

The Circuit Court denied Tenant's compulsory counterclaim motion on April 26, 2023, via an email sent at 11:31 AM. That email ruling also advised counsel that the eviction trial would proceed the following day at 10:00 AM, *i.e.*, in less than 24 hours. [R.83].

The day following denial of their motion to dismiss (which was now on the morning of trial), Defendants filed an Answer and Demand for Jury Trial. [R.86-90].

The court trial proceeding began at 10:00 AM. Tenants noted their demand for a jury trial; they noted the deficiency of notice; and in the alternative, they requested a continuance for five business days under SDCL

21-16-7. [TT 8], or, for a longer continuance by “giving an undertaking” as is permitted by SDCL 21-16-7. [TT 9].

The Circuit Court again denied the Tenant’s motion to dismiss based on the compulsory counterclaim rule; the Circuit Court denied the motions for continuance; and the Circuit Court rejected the demand for a jury trial. [TT 13-15]. The Circuit Court then sequestered witnesses and commenced the court trial. [R.17].

The Circuit Court granted an eviction under SDCL 21-16-10. In its ruling, the Circuit Court held that “much of the testimony and much of the other issues that were...attempted to be brought into this proceeding were completely irrelevant to an eviction proceeding and simply not allowed.” [TT 57-58]. The Circuit Court was responding to Tenants’ argument that the eviction proceeding was intentionally ignoring substantive issues that bear upon title to the real estate at issue. On this point, Tenants had argued that:

...what the Court has heard today is part of the story. In order to hear the entire story and make a decision that affects the property in the correct way, we would need the other proceedings to conclude. We’ve asked the Court to do that. What you’re making a decision on is a partial record that does not incorporate any of the other issues that are central and critical to your decision today.

The case law is clear that when other issues bear upon the ultimate question of possession, the[] ordinarily summary, special, speedy process always gives way to having all of the issues heard all at the same time. And so we ask for a judgment in favor of the defendants, or in the alternative, an order staying these proceedings until the conclusion of the other related matters.

[R.55]. Instead, the Circuit Court conducted the trial with its understanding that “[t]he only thing allowed by statute in an eviction proceeding is the facts and circumstances surrounding the eviction.” [TT 14:12-14].

Following the trial, the Circuit Court entered Findings and Conclusions [R.115] and a “Judgment and Order of Eviction” [R.120]. Notice of Entry was served May 8, 2023, and a notice of appeal was filed the same day. The Tenants appeal from the judgment of eviction and assign several errors of fact, law, and procedure.

STATEMENT OF THE FACTS

The facts of this eviction action relate to other preceding litigation. We begin with an overview of the factual and legal history that led up to the eviction.

Victoria’s undue influence lawsuit: June 2022.

In June 2022, Victoria O’Farrell filed a lawsuit in which she attempted to halt a drastic series of financial decisions purportedly made by her elderly,

vulnerable husband, Raymond O'Farrell. *See*, [App.34 (Complaint, 25CIV22—000038)].¹ Victoria alleged that those actions resulted in illegal changes to the family trust and estate plan, and that these changes occurred while she was temporarily living in a nursing home and recuperating from a surgery. *Id.*

In her Complaint, as well as in an affidavit, Victoria identified her husband Raymond as having an extensive history of alcohol abuse, a limited ability to read and write, and, an inability to explain any of the legal steps he had taken or what the documents intended to accomplish. *Id.* [Appendix 035, 040 (Complaint)]; [App.078, et seq. (Victoria's Affidavit, including ¶¶ 23-24)].

Victoria attributed these maneuvers as part of a scheme orchestrated by her son Kelly O'Farrell and her daughter Rita. [Appendix 045, Complaint, ¶¶ 55-60; and, *see, generally*, Complaint & Affidavit]. Victoria observed that Kelly was upset about the inheritance that his brothers Paul

¹ The Circuit Court took judicial notice of the various, related court files involving the O'Farrell Family. *See*, [TT 12-13]. (taking judicial notice of 25CIV22-38, 25PRO22-11, 25CIV23-15, 25GDN 23-01, "so that the Supreme Court has the ability to review all of those files").

The other files are available in their entirety via eCourts, and, the most pertinent pleadings are included in Appellants' Appendix.

and Lance were going to receive. [Appendix 045, Complaint ¶¶ 57-58].

Victoria alleged that Kelly was “fueled by his resentment” and began isolating and manipulating Raymond. [Appendix 082, Victoria’s Affidavit, ¶ 25]; [Appendix 045, Complaint ¶¶ 58]. And, Victoria forcefully demanded that Kelly would no longer be welcome to live with her and Raymond when she soon returned home, because he was such a problem. *Id.*, ¶ 48.

During this time, various actions were taken by other individuals, purportedly on behalf of Raymond. For example, when Victoria hired an attorney to help fix the situation, Raymond’s attorney immediately attempted to fire that lawyer, apparently relying upon a power of attorney that Raymond held over Victoria. [App.84., ¶ 38].

In addition to filing a Complaint, Victoria attempted to obtain a temporary restraining order. [App.61].

Other than her surgery, Victoria was in good health and was making plans to return home. But she died, unexpectedly, from surgery complications shortly after filing her affidavit and application for a TRO. Her death occurred before she could return home, and, prior to any hearings on her lawsuit.

Victoria's probate file: July 2022.

A probate file was immediately opened for Victoria's estate. *See*, [Appendix 093-095] (Petition, 25PRO22—000011). Victoria died on July 10, 2023, and, her probate was opened on July 8, 2022.

Via an *ex parte* pleading, and without any notice to any family members, Raymond's attorneys petitioned (and succeeded) in making Raymond the "Special Administrator" for his wife's estate, for the express purpose of putting Raymond in control of Victoria's lawsuit against him. The Petition claimed that "an emergency exists" because "the pending litigation requires immediate attention of a Special Administrator...." *Id.*, ¶ 6 [Appendix 094]. This Order now permitted Raymond to exercise control over Victoria's the lawsuit against him. [Appendix 096, Order Appointing Special Administrator].

The Order of Raymond's appointment recites the civil file number of Victoria's lawsuit, but, it omits the caption of the lawsuit. It appears that the proposed Order was drafted so as to help conceal from the Circuit Court that

granting that Order would now make Raymond both Plaintiff and Defendant to the same lawsuit.²

The bulk land sale to the Colony: August and October 2022.

Shortly after Victoria's death, Raymond began executing documents that initiated a sale of most of the family's farmland to the Grand Valley Hutterite Colony. *See, generally*, Eviction Complaint, and Exhibits 3 and 4 [R.3; R.99; R.109]. Notably, the proposed sale to the Hutterite Colony did not sell *all* of the family's land, just the large portion that Paul O'Farrell was slated to inherit. The purported sale documents also attempted to give the Colony the right of first refusal over all of the remaining family land, as well. [R.102, Purchase Agreement, ¶¶ 10.a].

Paul O'Farrell is one of Raymond and Victoria's five children. His pleadings allege that he has worked alongside his parents for several decades on their farm, and at their cattle auction barn. For at least a decade, Paul was

² It is elementary that a party cannot serve on both sides of a lawsuit. *Hampshire v. Powell*, 10 Neb. App. 148, 155, 626 N.W.2d 620, 626 (2001) ("executor is not 'legally competent' to act in that capacity, where his duties would require him to prosecute on behalf of adversary litigants, a suit which he would at the same time defend as an individual.") (citations omitted). *See, also*, S.D.R.Civ.P. 17(a) (real party in interest rule, which requires cognizable parties on both sides of a suit).

designated as the primary recipient of his parents' estate plan. For many years, Paul has lived on his family's trust land. Paul built, paid for, and resided in a house on the trust's land, and also built and paid for a shop in which to operate his business. *See*, Paul's Affidavit, ¶¶ 11-13 [App. 115-120]. For a considerable time, Paul served as a corporate officer and manager of the family's farming entity, until being told he had been removed, as part of Kelly's scheme to manipulate Raymond. *Id.*, ¶ 15.

Paul's attempts to intervene: October 2022.

Following his mother's death, Paul unsuccessfully attempted to intervene in his mother's civil action to carry it forward. *Id.*, ¶ 19. And, Paul unsuccessfully attempted to petition for the removal of Raymond as the representative of Victoria's estate.

Paul's civil lawsuit and guardianship proceeding: March 2023.

After those two attempts were rejected by the Circuit Court, Paul pursued a third legal path, namely a new civil action seeking to rescind the sale, and to unwind the various corporate and trust maneuvers, which he alleges were orchestrated by Kelly O'Farrell. *See*, [Appendix 009-032] (Complaint, 25CIV23—000015).

Paul filed and served his civil action in early March 2023. In addition to seeking a rescission of the sale, and for damages, and for other relief related to the Family Trust, Paul's civil action expressly asked for a declaratory judgment to resolve the dispute about whether Paul and his company Skyline Cattle are rightful occupants of the land putatively sold to the Hutterites.³ The Colony was named as a Defendant in that action.

Paul brought that lawsuit in his own name; and, in his company's name; and, 'for the benefit of' Victoria's Estate and the family trust;⁴ and, for VOR, Inc., on the basis that Paul was the last duly elected President of the corporation.⁵

³ Paragraphs 83 through 87 of Paul's civil lawsuit allege that Skyline Cattle has the ongoing right to continue farming the real estate for the 2023 crop season. Paragraphs 88 and 89 alleges that VOR "failed to issue a legally effective termination notice in 2022," and, accordingly, that the Plaintiffs ask for a declaration as to their legal right "to continue occupying the premises." In other words, both of the Defendants in the newly filed eviction action had already asserted the inverse, identical claims that the Plaintiffs sought to bring in this eviction action.

⁴ See, *Beachy v. Becerra*, 609 N.W.2d 648, 651-51 (Neb. 2000) (citing 31 AmJur2d *Executors and Administrators*, § 1285 (1989)) (interested party to an Estate is permitted to bring or enforce claims for the benefit of the Estate when the Personal Representative has failed to act, or when his interests are antagonistic to the Estate, or are otherwise collusive)

⁵ *Schroder v. Scotten, Dillon Co.*, 299 A.2d 431, 435 (Del. Ch. 1972) (when corporate meetings are not lawfully convened, the previous directors and officers continue to hold office)

In early March 2023, Paul also initiated a conservatorship action to try and protect Raymond from further harm. *See*, [Appendix 103-112.] (Petition, 25PRO23—000001). Paul does not have access to Raymond’s medical records, and, he alleges that Raymond is being isolated, so Paul does not have the ability to obtain the statutory evaluation report. *See*, SDCL 29A-5-306; [Appendix 113]. However, the Circuit Court has refused to allow the Petition to be filed without a report, and refused to order an evaluation. [Appendix 114].

In the wake of those proceedings, this eviction lawsuit emerged.

The eviction lawsuit: April 2023.

In mid-April 2023, which was now several weeks after Paul’s suit was filed and served, Grand Valley and Raymond (purportedly acting through VOR, Inc.) commenced this action for forcible entry and detainer. [*See*, R.19-20] (serving Summons on April 17, 2023).

Paul and Skyline promptly filed motions to dismiss, including a motion asserting that the eviction action was a compulsory counterclaim that needed to be brought within the pre-existing lawsuit. Those motions were denied, as were various other objections about the timing and notice of the proceeding, and, Defendants’ demand for a jury trial .

The Circuit Court convened a court trial on April 27, 2023. It entered findings, conclusions, and a judgment of eviction on May 1, 2023.

In addition to possession, the judgment also purported to create a forfeiture for all of Paul's machinery and equipment which remained on the property on the 10th day after trial.

The Circuit Court's judgment was interpreted by the Landlord as being actionable to acquire possession as of the 10th day after the trial date. However, at no time did the Circuit Court make express findings of "good cause" to shorten the 30-day stay under Rule 62(a).

Tenants filed an application to establish and approve an undertaking, and pointed out that Rule 62(a) afforded an automatic stay of the judgment of possession for 30 days. [R.160]. The Circuit Court rejected the Defendants' proposed undertaking, and, ignored the argument about Rule 62(a). [R.192].

Upon motion to this Court, an undertaking was established. Tenants posted a cash deposit on May 30, 2023, which stayed the operation of the eviction judgment.

Tenants appeal, raising three categories of issues.

SUMMARY OF ARGUMENT

Tenants *first* argue that this eviction action is legally precluded by Paul's prior-filed lawsuit. If this Court agrees with this first argument and dismisses the eviction action, then, the remaining issues need not be reached.

The *second* category of issues relate to the trial procedure, including that: the Circuit Court misconstrued an eviction proceeding statute; it failed to follow any of the timing-and-notice provisions from the Rules of Civil Procedure; and, the Circuit Court denied Tenants of their right to a jury trial.

The *third* category of issues relate to the findings, conclusion, and judgment, including that: the Circuit Court excluded important evidence bearing upon possession; it made factual findings based upon its recollection of witness demeanor from prior proceedings; and it inserted a forfeiture provision unsupported by law or fact. The Circuit Court also eliminated the 30-day automatic stay on judgments without any requisite findings, in violation of SDCL 15-6-62(a). (In addition, if this Court reverses this judgment, then, the award of attorney's fees would be vacated, and

Defendants would be entitled to recover their attorney's fees under via SDCL 21-16-11.)

STANDARD OF REVIEW

Three standards of review apply to the issues in this appeal.

- **De novo review** applies to the construction and application of statutes, *Discover Bank v. Stanley*, 2008 S.D. 111, ¶ 15, as well as to this Court's rules of civil procedure. *Id.* This standard is applied to the issues raised in Sections 1 and 2. In addition, a court's conclusions of law and the form of the judgment are reviewed under a *de novo* standard. *See, Sherburn v. Patterson Farms, Inc.*, 1999 S.D. 414, ¶ 5. This is the standard applicable to Section 3(c).
- **Clearly erroneous review** applies to the Circuit Court's factual findings. This includes the issues raised in Sections 3(a) and 3(b). It is clearly erroneous to make determinations and findings with inadequate evidence, or, when evidence on the record is missing. *Matter of Guardianship of Nelson*, 2017 S.D. 68, ¶ 17, 903 N.W.2d 753, 758.

- The **abuse of discretion** standard is applied to the Circuit Court’s evidentiary rulings, with a two-step inquiry searching for error and prejudice. Error is prejudicial “when in all probability it produced some effect on the final result and affected the rights of the party assigning it.” *Sedlacek v. Prussman Contracting, Inc.*, 2020 S.D. 18, ¶ 16. This applies to evidentiary decisions discussed in Section 3(a) and 3(b).

ARGUMENT

1. **The Circuit Court was required by Rule 13(a) and *LPN Trust v. Farrar Outdoor Advert., Inc.*, 1996 S.D. 97, to dismiss the eviction claim (or, to at least stay the eviction proceedings until the pre-existing litigation concludes).**

This case demonstrates a rare instance where the ordinary, simple, and speedy eviction process offered in Chapter 21-16 must yield to the broader interests of justice and complete judicial review. Here, the right to possession sought in the eviction action was fully embraced by pre-existing litigation, and its resolution requires parties and proceedings beyond the typical, summary process followed in eviction actions.

(a) Rule 13(a) requires all related claims to be decided in a single proceeding.

A party must assert any counterclaim it holds at the time it serves its responsive pleadings, if such a claim is logically connected to the claims asserted in the Complaint. SDCL 15-6-13(a).

Rule 13(a) “was designed to prevent a multiplicity of actions and a duplication of judicial efforts.” *Peterson v. United Accts., Inc.*, 638 F.2d 1134, 1137 (8th Cir. 1981). *See, also, Olawsky v. Clausen*, 87 S.D. 578, 212 N.W.2d 653 (1973); *Annis v. Dewey County Bank*, 335 F.Supp. 133, 138 (D.S.D. 1971). It is Rule 13(a) which allows litigants to achieve resolution of all disputes arising out of common matters, within a single lawsuit. *Id.* “The provision of Rule 13 relating to compulsory counterclaims should be given a broad, realistic interpretation to avoid a multiplicity of suits.” *In re Belcher*, 13 B.R. 421, 423 (Bankr. W.D. Mo. 1981) (citing *Sue & Sam Mfg. Co. v. B-L-S Const. Co.*, 538 F.2d 1048 (4th Cir. 1976)).

The manner in which Rule 13(a) is interpreted in South Dakota was established in *Olawsky*, 212 N.W.2d at 654. This Court held that the proper standard for evaluating a potentially compulsory counterclaim is to ask the question, “Is there any logical relation between the claim and the

counterclaim?” *Id.* “An affirmative answer...would mean that the counterclaim is compulsory.” *Id.*

This Court applies Rule 13(a) in the same manner as the U.S. Supreme Court. *Olansky*, 212 N.W.2d at 655 (citing and quoting *Moore v. New York Cotton Exchange*, 270 U.S. 593 (1929)). The Court searches for a “logical relation” between the claim and counterclaim by looking for “a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship.” *Id.* The Court must ask whether any “essential facts alleged by [plaintiff] enter into and constitute in part the cause of action set forth in the counterclaim. That they are not precisely identical, or that the counterclaim embraces additional allegations does not matter.” *Id.* (quoting *Moore*, 270 U.S. at 593).

There is no question that the Eviction Complaint is directly and logically related to the underlying Complaint in 25CIV23—000015. In this eviction case, the Colony claims it owns the real estate at issue; but this is directly opposite of the claim Paul and Skyline asserted in the underlying lawsuit, *i.e.*, that the title to the land was incorrectly and improperly conveyed. It is self-evident that a party who does not actually and rightfully own land is not permitted to evict tenants from it.

In addition to seeking the rescission, Paragraphs 83 through 87 of the underlying lawsuit allege that Skyline Cattle has the ongoing right to continue farming the real estate for the 2023 crop season, independent of the ownership question. Paragraphs 88 and 89 alleges that VOR “failed to issue a legally effective termination notice in 2022,” and, accordingly, that the Plaintiffs ask for a declaration as to their legal right “to continue occupying the premises.”

Thus, both Paul and Skyline (the Defendants in this Eviction Action) have already asserted the inverse, identical claims that the Landlord seeks to bring in this eviction action. The Compulsory Counterclaim Rule is designed to prevent precisely this type of multiplication and fragmentation of litigation.

The other inquiry required under Rule 13(a) relates to the timing and ripeness of the counterclaim. Here, there is no question as to the pertinent timing. The Plaintiffs’ Eviction Complaint alleges that their cause of action accrued in either August 2022, or, in March 2023. Either of these was *prior* to the time for service of VOR’s and the Colony’s Answers in the existing civil action. Rather than asserting the counterclaim in the existing action, they started new lawsuit. Rule 13(a) forbids this. This eviction claim is compulsory, and cannot be brought here.

Although this Court has outlined the contours of Rule 13(a), there does not appear to be direct South Dakota case law addressing the situation of its application to concurrent, overlapping lawsuits. This Court may wish to look to persuasive authority from two sources in similar contexts: our federal district court (the ‘first-filed rule’), or, the state of Texas (the ‘dominant jurisdiction doctrine’). Either approach yields the same result, namely, that this eviction proceeding should be dismissed and raised as a counterclaim.

When parallel litigation has been initiated in federal court, the “first-filed rule” gives priority to “the party who first established jurisdiction.” *Lewis & Clark Reg'l Water Sys., Inc. v. Carstensen Contracting, Inc.*, 339 F. Supp. 3d 886, 892–93 (D.S.D. 2018) (quoting *Nw. Airlines, Inc. v. Am. Airlines, Inc.*, 989 F.2d 1002, 1006 (8th Cir. 1993)). “The first-filed rule ‘conserve[s] judicial resources and avoid[s] conflicting rulings.” *Id.* It is generally applied to parallel federal cases in competing venues. Although the rule is “not intended to be rigid, mechanical, or inflexible,...[t]he party opposing the first-filed rule has the burden of showing compelling circumstances⁶...supporting its abrogation.” *Id.* (citations omitted).

⁶ “Compelling circumstances” that may justify departing from the first-filed rule can be shown by “two red flags” according to Eighth Circuit precedent. “Even if both red flags are present,

Similar to the first-filed rule, Texas has dealt with the problem of parallel litigation via the “dominant jurisdiction doctrine.” *See, e.g., In re Vinyl Techs., Inc.*, 352 S.W.3d 810, 815 (Tex. App. 2011). When two competing lawsuits are filed in Texas state court, the doctrine of dominant jurisdiction requires *abatement* of the second-filed lawsuit if: (1) the other suit was commenced first; (2) that first suit is still pending; (3) the first suit could be amended to include all of the parties; and (4) the controversies are the same or the first suit could be amended to include all of the claims. *Id.* The doctrine is based on the principles of comity, convenience, and the necessity for an orderly procedure in the trial of contested issues.” *Miles v. Ford Motor Co.*, 914 S.W.2d 135, 138 (Tex. 1995). *See, also, In re Texas Christian Univ.*,

however, [i]n the absence of bad faith, the mere presence of red flags does not necessarily warrant setting aside the first-to-file rule.” *Lewis & Clark Reg'l Water Sys.*, 339 F.Supp.3d at 893 (citations omitted)

One of those red flags is a precipitous race to the courthouse, which is not present here. *See, Prince Mfg. Corp. v. Vactor Mfg., Inc., et. al.*, No. 4:18-CV-04078-KES, 2019 WL 11073225, at *7 (D.S.D. Mar. 27, 2019) (citations omitted) (“A short period of time [such as a few days] between notice of intent to sue and the filing suggests that the first-filer raced to the courthouse to usurp the natural plaintiff's forum choice.”) Paul attempted to intervene in Victoria's lawsuit in October 2022, and, then initiated his new lawsuit in March 2023.

The other red flag is if the first-filed action is solely an action for declaratory judgment, rather than “a suit for damages or equitable relief.” *Nw. Airlines, Inc. v. Am. Airlines, Inc.*, 989 F.2d 1002, 1007 (8th Cir. 1993). Paul's first-filed Complaint seeks all three types of relief: damages, injunctive relief, and declaratory relief.

571 S.W.3d 384, 389 (Tex. App. 2019) (applying compulsory counterclaim rule to dominant jurisdiction analysis). The Circuit Court would lack subject matter jurisdiction over the second-filed action when it is duplicative.

Applying the concepts from either rule requires that this eviction action should be dismissed (or abated). Paul and Skyline's pleadings in the first-filed action were not brought in bad faith, nor did they represent a precipitous rush to the courthouse.

The issue of the deed's validity (and the issue of Raymond's capacity, and, of the *ultra vires* corporate actions) are not new or invented theories. These problems had been brewing since the summer of 2022, when Raymond's own wife was so concerned about Raymond's corporate and trust actions that she started a lawsuit against her husband and son Kelly.

Nor was this a rush-to-file situation. Paul and Skyline waited several months before filing their suit in March 2023. Meanwhile, the Landlord waited even longer, and only proceeded after Paul and Skyline filed suit.

The Colony's purchase agreement with VOR (dated August 12, 2022) included a provision which made the entire agreement "subject to and contingent upon the Seller completing the eviction of the current tenants on the house and building sites by Closing." [R.100; Purchase Agreement, ¶

4.a.).⁷ The parties agreed that the Closing was required to take place “on or before December 31, 2022,” and, that “time is of the essence for each and every provision of this Purchase Agreement.” [R.99, R.106; Purchase Agreement, ¶¶ 1, 21]. In other paragraphs, the Agreement recited that “Seller is in the process of evicting the existing residential tenant” and that “Seller is initiating eviction proceedings on tenants of the house and building sites.” [R.102, R.104; Purchase Agreement, ¶¶ 8.a, 12.b.b.]. Once again, both of these recitations about a residential eviction were *separate* from the plan to terminate/non-renew the crop and pasture leases. *Id.*

In short, the “Seller” repeatedly asserted over the course of several months that it was proceeding with a residential eviction, with the intent to complete the eviction no later than December 31, 2022. But the Seller failed to even start these proceedings until several weeks *after* VOR and the Colony were sued in March 2023.⁸ Whatever rights the Landlord may have had to a speedy eviction trial appear to have been squandered long ago. *See, Clarkson*

⁷ Notably, this provision requiring the completion of “the eviction” prior to closing was separate from the provision regarding “notice of termination and nonrenewal of all oral crop and pasture leases.” [R. 100; Purchase Agreement, ¶ 4.b].

⁸ Subsequent to the purchase agreement, the parties then signed an Indemnification Agreement on October 17, 2022, which *again* recited the idea that an eviction process was already underway: “the undersigned warrant that they have started an eviction process against Paul O’Farrell to remove him...” [R.179, “Agreement for Indemnification”].

& Co. v. Cont'l Res., Inc., 2011 S.D. 72, ¶ 12, 806 N.W.2d 615, 619 (“[I]aches does not depend upon passage of time alone; plaintiff must be chargeable with lack of diligence in failing to proceed more promptly.”).

The Circuit Court’s ruling did not cite any specific authority, holding that: “an eviction action is a specialized proceeding with specific rules and statutes that apply. The statutes and authorities cited by the [Tenants] are inapplicable to such a proceeding.” [R.83].

The Circuit Court erred by overlooking SDCL 15-6-81(a), as well as the line of cases that originated with *Heiser v. Rodway*. Although evictions are specialized proceedings, they are still subject to the Rules of Civil Procedure, and, the scope of such proceedings is not rigidly limited to the question of possession.

(b) Rule 13(a) applies to eviction proceedings; circuit courts must hear all relevant matters to avoid a multiplicity of lawsuits, which means that the ordinarily speedy remedy of eviction must yield when equitable or other collateral issues are integral to the question of possession.

Even though they are “special proceedings,” eviction actions remain subject to the Rules of Civil Procedure. The provisions of Chapter 21-16 are only “excepted from these rules insofar as they are inconsistent or in conflict with the procedure and practice provided by these [R]ules [of Civil

Procedure].” SDCL 15-6-81(a). *See, also*, SDCL 21-16-8 (circuit court must “try the action as in other civil cases”).

This Court has interpreted SDCL 15-6-81(a) to mean that when the statutes pertaining to a “special proceeding” are silent about a particular point of procedure, the Circuit Court is required to follow the Rule of Civil Procedure on that topic. *See, City of Aberdeen*, 273 N.W.2d at 185 (S.D. 1979) (condemnation proceeding statutory scheme “makes no reference to voluntary dismissal, so we turn to SDCL 15-6-41(a)(2)”).

This Court has regularly extended the nuts-and-bolts rules of procedure to special proceedings, including motions to dismiss and motions for summary judgment. *See, Riley v. Young*, 2016 S.D. 39, ¶ 6 (motions to dismiss under Rule 12 are appropriate and applicable to specialized habeas proceedings); *Reutter v. Meierhenry*, 405 N.W.2d 627, 630 (S.D. 1987) (summary judgment is not “inconsistent or in conflict” with rules habeas proceedings). Cases in which Title 15 is held not to apply involve direct and actual conflicts of procedure. *See, Matter of Russell I. Carver Revocable Tr. , U/T/A Dated Oct. 11, 2001, as Amended*, 2020 S.D. 31, ¶ 26 (special proceeding chapter’s procedural rule controls when it “sets forth [a] procedure...which is different from the procedure required...under Title

15”). *See, also, State ex rel. Strickland v. Daniels*, 318 S.E.2d 627, 632 (W.Va. 1984) (absent express language to the contrary in eviction statutes, rules of civil procedure harmonized within the summary eviction process).

There is no principled or logical reason why motions to dismiss should be exempted from application in eviction proceedings. Indeed, the gatekeeping function of such motions is a necessary screening tool. Such motions help the Circuit Court conserve judicial resources and save parties from unnecessary trials.

The same is true for motions to dismiss which employ the compulsory counterclaim rule: Chapter 21-16 does not expressly preclude the applicability of Rule 13(a), and, there may be cases where its application is necessary. Rule 13(a) should be applied to eviction proceedings.

At most, SDCL 21-16-4 directs that an eviction action “cannot be brought in connection with any other except for rents and profits or damages.” But, this Court has rejected attempts to strictly interpret this statute.

On multiple occasions, this Court has recognized the unique, speedy remedy which is ordinarily afforded by Chapter 21-16. *Heiser v. Rodway*, 247 N.W.2d 65, 67 (S.D. 1976) (“Chapter 21-16 is designed as a speedy remedy

to provide possession to the person rightfully entitled to it. It is a summary action intended to prevent protracted litigation because of the introduction of collateral issues not connected with the question of possession.”); *LPN Trust v. Farrar Outdoor Advert., Inc.*, 1996 S.D. 97, at ¶ 10 (forcible entry and detainer is a summary remedy for speedy possession of real estate).

But in each of those instances, this Court has repeatedly rejected the notion that every landlord is entitled to a speedy and simple eviction. *Rindal v. Sohler*, 2003 S.D. 24, ¶ 9, 658 N.W.2d 769, 772 (“courts should also hear other relevant matters to avoid a multiplicity of suits.”); *LPN Trust v. Farrar Outdoor Advert., Inc.*, 1996 SD 97 at ¶ 9 (circuit court in an eviction action maintains jurisdiction over both equitable actions and actions at law, which in some instances will necessarily “interfere with the summary nature of the remedy”). “The right to be heard on relevant matters, as well as the desirable purpose of preventing a multiplicity of suits, is, and must be, superior to the desire to provide a speedy remedy for possession.” *Heiser v. Rodway*, 247 N.W.2d 65, 67 (S.D. 1976).

When it first adopted this interpretation of SDCL 21-16-4, this Court recognized that expanding the scope of eviction proceedings will, in certain cases,

interfere with the summary nature of the remedy. We agree with [the Illinois Supreme Court’s analysis that] that interference is warranted. ‘The fusion of the practice and procedure in suits at law and in equity... is, in our opinion, sufficient to permit necessary equitable relief in these proceedings, rather than to force upon defendants a separate proceeding where the same relief will be forthcoming.’

Heiser v. Rodway, 247 N.W.2d 65, 68 (S.D. 1976) (quoting *Rosewood Corp. v. Fisher*, 263 N.E.2d 833, 838-39 (Ill. 1970). See, also, *State ex rel. Strickland v. Daniels*, 318 S.E.2d 627, 632 (W.Va. 1984) (in case where West Virginia’s 10-day eviction proceeding statute was “at loggerheads” with another rule of procedure, court permitted Tenant’s attempt to have eviction action and other claims to be heard together, even though it would deny Landlord’s right to “speedy recourse through the court system”).

There are not likely to be many instances comparable to the present case (*i.e.*, where the crux of the possession question is inextricably bound up with an equitable challenge to the Landlord’s deed, as well as challenges to the Seller’s corporate authority to terminate the agricultural lease). Even rarer will be the case where such issues were already raised in a pre-existing lawsuit.

But, the principles of *Heiser* are intended for exactly this type of case. In a closely analogous case, these principles were endorsed by this Court in

LPN Trust, which affirmed the Circuit Court’s decision to join an eviction proceeding with a pre-existing equitable action for rescission and reformation. 1996 SD 97, ¶¶ 3, 5. Just like the landlords in *Heiser* and *LPN Trust*, the Colony is not entitled to a “speedy” eviction here because the question of possession is bound up with other, more complicated issues.

Not only is this the result mandated by *Heiser* and *LPN*, it is also the result that the Colony should have foreseen when it signed the purchase agreement in August 2022, and, again when it attempted to close the transaction in October 2022 prior to the commencement of the eviction action. The Colony knew better than to expect a speedy eviction, and its agreements show that it was aware of the possibility.

The Landlord’s new eviction claim meets every definition of a compulsory counterclaim. The only way around this is to ignore the Rules of Civil Procedure, and, to ignore the holdings of *Heiser* and *LPN*. At the time that the Landlord brought this forcible entry and detainer action in April 2023, the Tenants had already initiated a much broader and more complete lawsuit which, among other things, directly addressed the primary issue the Landlord sought to assert in this eviction action.

In sum, the Circuit Court erred by failing to apply Rule 13(a), and by failing to consider the rule of *Heiser* and *LPN*. As a result of those errors, the Circuit Court rammed through an eviction trial that was structured to ignore serious structural and equitable challenges to the Colony's deed and its claims of possession. The Circuit Court chose speed over completeness. The judgment of possession that resulted was both premature and informed by only a fraction of the facts.

This defect alone is sufficient to reverse judgment and enter a dismissal (or, to hold the simple possession proceeding in abeyance until the parallel civil action has concluded).

In the alternative, the Circuit Court's eviction trial was filled with procedural and evidentiary errors that warrant reversal.

2. The Circuit Court erred by conducting the proceedings in a manner contrary to the timing and notice provisions of Chapter 21-16 and various Rules of Civil Procedure, and, in a manner which denied the Tenants their right to a jury trial.

A Circuit Court must follow the Rules of Civil Procedure and the statutory notice procedures for special proceedings. The purpose of notice and timing rules is to afford the parties a meaningful opportunity to attend hearings, marshal evidence, and interpose motions and objections.

Here the Circuit Court rejected any applicability of the Rules of Civil Procedure to eviction proceedings. And, it misapplied the trial notice statute from Chapter 21-16. These procedural decisions were reversible error.

(a) The ‘Notice of Court Trial’ was premature and contrary to the express wording of SDCL 21-16-8.

The notice of trial issued in this case was premature because it relied upon an incomplete reading of SDCL 21-16-8. That statute says that an eviction action can be “brought on for trial upon two days’ notice after issue is joined.” SDCL 21-16-8. The Circuit Court’s reading of that statute focused on the phrase “two days’ notice,” but, ignored the second part of this sentence, which requires that the two-days’ notice can only begin to run “after issue is joined.”

The key phrase “*after issue is joined*” is a term of art in civil procedure. It means ‘after the Answer has been filed.’ *See, Rodee v. Seaman*, 33 S.D. 184, 145 N.W. 441, 442 (1914) (issue is joined by “answer upon the merits”); *Schaetzel v. City of Huron*, 6 S.D. 134, 60 N.W. 741, 742 (1894) (“After issue was joined upon certain paragraphs of the complaint by the answer of the

defendant...”)⁹ In short, an eviction trial can be set upon two days’ notice, but this two-day notice period must wait until *after* the Answer is filed.

Here, an Answer was not yet filed at the time the trial notice was issued because the Tenants had filed motions to dismiss which remained pending until the day before the day noticed for trial.

As a practical matter, motions seeking to dismiss a case would necessarily need to be decided prior to a trial on the merits. In addition, the Tenants’ right to demand a jury trial would be made within the Answer, so, it was premature to set a “court trial’ prior to the Tenants’ Answer and opportunity for a jury demand.

The Circuit Court ruled on the motion to dismiss on April 26, 2023. [R.83, R.86]. The Tenants filed their Answer and Jury Demand the following day, April 27, 2023. Upon the filing of that Answer, “issue was now joined,”

⁹ This is also the same interpretation given to the phrase in numerous other states, including:

- New York. See, *Midland Funding LLC v. Loreto*, 34 Misc. 3d 1232(A), 950 N.Y.S.2d 492 (Civ. Ct. 2012) (“issue is joined in civil court when the answer is filed”).
- Tennessee. See, *New Riviera Arts Theatre v. State ex rel. Davis*, 219 Tenn. 652, 665, 412 S.W.2d 890, 896 (1967) (“The issues were joined when the defendants filed their answer.”)
- Indiana. See, *Bogue v. Murphy*, 25 Ind. App. 102, 57 N.E. 726, 726 (1900) (“issues were joined” when Defendant “filed answer”).

and, SDCL 21-16-8 affords at least two more days' notice prior to the trial. Nonetheless, the Circuit Court proceeded with a court trial on the same day that the Answer was filed. This is error.

The Rules of Civil Procedure inform the sequence of this framework. For example, the Rules require that motions to dismiss be resolved prior to further pleadings and, obviously, before trial. They must be followed in eviction cases.

(b) The Rules require that motions to dismiss “shall” be filed and resolved prior the filing of an Answer.

Although Chapter 21-16 shortens some of the timeline for eviction proceedings, the eviction process is nonetheless subject to the Rules of Civil Procedure. This includes the availability of motions to dismiss. *See, Riley* at ¶ 6 (noting that when “proceedings are civil in nature, the rules of civil procedure apply to the extent they are not inconsistent” and holding “motions to dismiss, therefore, are appropriate to dispose of nonmeritorious [claims]”).

An eviction action is a civil action. And there is nothing in the eviction code that prohibits the use of motions to dismiss. The same analysis from Section 1 applies here, too. Again, this Court has interpreted SDCL 15-6-81(a) to mean that when the statutes pertaining to a “special proceeding” are silent about a particular point of procedure, the Circuit Court is required

to follow the Rule of Civil Procedure on that particular topic. *See, City of Aberdeen*, 273 N.W.2d at 185 (condemnation proceeding statutory scheme “makes no reference to voluntary dismissal, so we turn to SDCL 15-6-41(a)(2)”).

Here, the Tenants filed various motions to dismiss, including motions under Rule 12(b). By operation of that rule, these motions are required to be lodged prior to an Answer. “A motion making any of these defenses [in Rule 12(b)] *shall* be made before pleading if a further pleading is permitted.” SDCL 15-6-12(b).

And, Rule 12(a) explains that an Answer is not required to be filed until after the Court first addresses the motion to dismiss. *See*, SDCL 15-6-12(a) (filing of a motion under Rule 12 alters and postpones the timing for filing an Answer).

The eviction code states that “the time for appearance and pleading shall be four days from the time of service....” SDCL 21-16-7. But the eviction code does not prohibit motions to dismiss, and, in the absence of any other direction, we are required by SDCL 15-6-81(a) to consult the specific rules regarding motions and pleadings.

By operation of Rule 12(b), Tenants filed these motions prior to “pleading.” “A motion making any of these defenses [in Rule 12(b)] *shall* be made before pleading if a further pleading is permitted.” SDCL 15-6-12(b). And by operation for Rule 12(a), Tenants’ Answer was not required to be filed until after the Court first addressed the motion to dismiss. *See*, SDCL 15-6-12(a). At trial, the Landlord mistakenly argued that the Tenants lost their chance to file an Answer because they chose to file a motion to dismiss. The eviction code does not say this, and, SDCL 15-6-81(a) indicates that interpretation is wrong.

In short, the Rules of Civil Procedure required that the Circuit Court first address the pending motions to dismiss prior to the time that Tenants would file an Answer, and prior to setting a trial date.

Instead, the Tenants received notice that their motions to dismiss were denied on April 26th. Their Answer was filed the next day but disregarded. And the notice for trial was not corrected or adjusted. The Circuit Court erred in its interpretation of Chapter 21-16 and the Rules of Procedure.

(c) The Tenants were denied their right to the jury trial demanded in their Answer.

Rule 38(b) permits a litigant to demand a jury trial within an Answer, or, within 10 days thereafter. SDCL 15-6-38(b); S.D Const., Art. VI, Sec. 6.

The eviction statutes also permit a jury trial. SDCL 21-16-8. Notably, that eviction statute does not require that the jury demand be made in the Answer. It simply states, “[i]f a jury trial be demanded...” Based upon the foregoing analysis, SDCL 15-6-81(a) permitted the Tenants to issue a jury demand in their Answer, if the Answer was promptly filed after the denial of the motion to dismiss. The Tenants demanded a jury trial the next day, but were denied a jury trial. A Circuit Court errs when it denies a litigant a jury trial. *Mundhenke v. Holm*, 2010 S.D. 67, ¶ 18. *C.f.*, *State ex rel. Strickland v. Daniels*, 318 S.E.2d 627, 632 (W.Va. 1984) (harmonizing rules for eviction proceedings and Rules of Civil Procedure by shortening dates).

(d) The Circuit Court abused its discretion by refusing a reasonable continuance under SDCL 21-16-7, with or without an undertaking.

The Circuit Court had at least one more chance to rectify these problems by granting a short continuance under SDCL 21-16-7. It refused. The Circuit Court did not consider any of the factors relating to motions for continuance. *Meadowland Apartments v. Schumacher*, 2012 S.D. 30, ¶ 17. The failure to grant the continuance, and, the failure to consider the factors were both an abuse of its discretion in light of all of the other facts and circumstances relating to notice of the trial. If this eviction trial was truly the only forum in which to defend Tenants’ right to possession to a multi-

million dollar farm, Tenants should have been afforded at least a week to prepare.

There were numerous errors of procedure. However, these errors do not need to be corrected if this Court agrees with the analysis in Section 1 and vacates the judgment, dismisses the eviction action, and requires that it be brought as a counterclaim in the existing action.

Finally, we turn to the decisions reached by the Circuit Court and the errors which affected its findings and conclusions.

3. The Circuit Court erred by rejecting key evidence; considering improper evidence; and then prematurely entering a judgment granting relief far beyond the proper scope of law and facts

A Circuit Court has broad discretion regarding the admissibility and weight of evidence in a proceeding. *Kurtz v. Squires*, 2008 S.D. 101, ¶ 3. However, this discretion is not boundless. “[W]hen a [circuit] court misapplies a rule of evidence, as opposed to merely allowing or refusing questionable evidence, it abuses its discretion.” *Id.* Further, neither the Court nor a Jury is permitted to interpose evidence from extrinsic or collateral sources into a trial or deliberations. “[T]he term ‘abuse of discretion’ defies an easy description. It 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.* (citation omitted).

(a) The Circuit Court’s findings and judgment are erroneous because they are based upon inadmissible and impermissible collateral information from a prior proceeding.

During the eviction trial, counsel for the Tenants attempted on several times to explore the details of the undue influence which was believed to be at the root of Raymond’s sudden changes to the O’Farrell estate plan. The Circuit Court excluded any testimony about Kelly O’Farrell (one of the alleged influencers) on the basis that it “doesn’t have anything to do with landlord and tenant.”) [TT 35:8-11]. The Circuit Court excluded testimony about the O’Farrell estate plans. [TT 52:4-9]. The Circuit Court concluded that “[m]uch of the testimony and much of the other issues that were brought into this proceeding or attempted to be brought into this proceeding were completely irrelevant to an eviction proceeding and simply not allowed.” [TT 57:25-58:3].

The Circuit Court continued to exclude such evidence, including a question at page 30 of the transcript, which attempted to explore the timing of the changes to the O’Farrell estate plan. *See*, TT 30 (Q: “Did changes to your parents’ estate plan begin happening after your mother moved into the nursing

home?”). The Landlord objected to this question as being “beyond the scope of an eviction proceeding,” and the Circuit Court sustained the objection. TT 31. This was an abuse of its discretion, because it excluded pertinent information.

In addition, a Circuit Court commits clear error when it makes findings and legal determinations based upon a structurally incomplete record. *Matter of Guardianship of Nelson*, 2017 S.D. 68, ¶ 18 (“absent strong and specific factual findings based on evidence in a fully developed record, the circuit court’s factual findings were clearly erroneous”). “This case therefore boils down to a lack of evidence to make factual determinations required....Evidence on the record is missing, and thus we are left with a definite and firm conviction that a mistake has been committed.” *Matter of Guardianship of Nelson*, 2017 S.D. 68, ¶ 17 (citations omitted). This trial was structurally intended by the Circuit Court to exclude key portions of the story.

The Circuit Court thus erred by excluding pertinent evidence that would have formed the basis to challenge the Colony’s deed, and, thus defeating its claim for possession. Such evidence is permissible in an eviction

proceeding. *See, Heiser v. Rodway*, supra. The judgment should be reversed because it was based upon an incomplete version of the facts.

(b) The Circuit Court erred by injecting extraneous evidence into the eviction trial

Furthermore, not only did the Circuit Court consistently exclude pertinent details about Raymond, Victoria, the Estate plan, and undue influence, but, the Circuit Court also erred by considering extrinsic evidence from *outside* of the eviction trial.

At the same time as it ruled upon an objection as to scope of Paul's testimony, the Circuit Court made the following statement, to which the Tenants further objected:

THE COURT: I will also add that *based on my memory*, late last fall, Mr. O'Farrell senior [*i.e.*, Raymond] testified live in front of me and *it's this Court's opinion* that some of the testimony is now contrary to what this Court observed. The Objection is sustained. Ask your next question.

MR. BRENDTRO: Your honor, I'd move to strike that as evidence in this proceeding.

THE COURT: Move to strike what?

MR. BRENDTRO: Your observations from a prior proceeding.

THE COURT: That is overruled.

MR. BRENDTRO: Thank you.

THE COURT: You take that up on appeal.

[TT 31:3-14].

At the close of the evidence, the Circuit Court made a factual finding on the Record that it found “much of the testimony” of Paul O’Farrell to be “non-credible.” [TT 58:7-8]. This oral finding was then translated into Finding of Fact #22, namely, that “The Court finds the testimony of Paul O’Farrell to be not credible....” [R.118].

There are several errors here. A Circuit Court judge cannot make himself a witness in a case. *W. Bldg. Co. v. J.C. Penney Co.*, 245 N.W. 909, 912 (S.D. 1932). He is “unsworn and not subject to cross-examination.” *Id.* In addition, the factfinder is never permitted to bring extrinsic information from outside of the proceeding—it is elementary that this is not how the factfinding process of trial is supposed to work. *Id.* (finding reversible error when trial judge stated to the record what he has seen and observed outside of the trial proceeding); *Buisker v. Thuringer*, 2002 S.D. 81, ¶ 14 (extrinsic interference with the factfinder warrants reversal when extraneous information introduced from outside of the trial process); SDCL 19-16-1(3) (Rule 801(c)) (“Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”)

The ordinary process for challenging a jury's verdict on the basis of extrinsic interference would be to procure affidavits from jurors. *See e.g., Buisker v. Thuringer*, 2002 S.D. 81, ¶ 15; SDCL 19-4-7. Here, no affidavits are needed because the Circuit Court volunteered both the existence and the effect of the extraneous information. *See id.*, at ¶ 15 (litigant must present “evidence competent to attack the verdict” and establish “the existence of a recognized ground to overturn the jury's verdict.”)

Raymond O'Farrell did not testify at the eviction trial. The Circuit Court's observations and impressions of his statements made at a prior proceeding are wholly inadmissible here.

A party seeking to attack the improper use of extrinsic information must next show prejudice. *Id.*, ¶ 15. The test is whether the extraneous matter had a tendency to influence the factfinder in arriving at its verdict in a manner inconsistent with the evidence and the law. *Id.*

Here, the prejudice is apparent. The primary source of evidence at the eviction trial was from Paul O'Farrell. (Landlord called him as its chief witness, and, Paul provided testimony upon nearly every key point both sides were trying to make.) The Circuit Court's credibility determination was

expressly made based upon the Court's observations from the prior proceeding.

That prior proceeding was not a permissible source of evidence for several reasons. First, what someone said at a prior proceeding is hearsay. Second, the Circuit Court's "observations" of a witness at a prior proceeding are similarly inadmissible. *See, generally*, Chapter 19-19. Third, the Circuit Court's observations were made six months earlier are inherently unreliable when not made contemporaneously with the eviction trial. Fourth, the testimony of Raymond O'Farrell at that proceeding was not even under oath. (For whatever reason, Raymond was never sworn in. *See*, [R.58 "Raymond O'Farrell (not sworn)"]. Fifth, Raymond O'Farrell did not testify at the eviction trial. And sixth, even if all of these shortcomings could be overcome, the prior proceeding was never "joined" with the current eviction action at any time. Other than the fact that the pleadings were judicially noticed, the prior proceeding was not a part of the eviction trial—legally, factually, or procedurally.

The Circuit Court's entire opinion is infected by this impermissible evidence. It was this outside information which tended to influence the

Court in deciding this case in a manner inconsistent with the law and other facts. This, too, merits reversal.

(c) The judgment contains a 10-day personal property forfeiture provision unwarranted by law, fact, or equity.

The Circuit Court signed and entered findings of fact just one day after Plaintiffs' service of their proposed facts, rather than after "the expiration of five days after service of the proposed findings" as required by Rule 52(a). In addition the Circuit Court signed the judgment just one day after Plaintiffs' service of their proposed judgment, rather than "promptly [but] subject to the provisions of SDCL 15-6-54(b)" as required by Rule 58. Tenants filed an Objection to the Findings, Conclusion, and Judgment on May 5, 2023. [R.138].

The judgment was infected by the errors discussed above. But the judgment entered by the Circuit Court also contains a forfeiture provision that is not authorized by any statute within Chapter 21-16, nor any other statute that counsel has been able to identify.

By statute, SDCL 21-16-10 limits the scope of a judgment in an eviction proceeding to *possession*, and, to damages for rent, if requested. ("If the finding of the court or the verdict of the jury be in favor of the plaintiff, the judgment shall be for the delivery of possession to the plaintiff, and for

rents and profits or damages....”). SDCL 15-6-62(a) operates to stay a judgment for 30 days, except for “good cause shown.” No cause was shown, yet, the entire judgment was deemed active on the 10th day after trial, including the forfeiture.

It is erroneous for a Circuit Court to award possession of farm machinery that remains on the property on the tenth day following the trial. This is an inequitable result; it is not supported by any law; and it is a remedy that was never even discussed at trial or in any pleading. The forfeiture was an errant paragraph that did not belong in an eviction judgment, and, the ten-day time period was also error. The form of the Circuit Court’s judgment, and its conclusions of law are reviewed under a *de novo* standard. *See, Sherburn*, 1999 S.D. 414, at ¶ 5. This Circuit Court erred.

CONCLUSION

Judgment of possession was improvidently granted to the Landlord, upon a hasty and incomplete factual record which disregarded the existence of a broader, pre-existing lawsuit directly related to the question of possession. The judgment should be reversed and the case dismissed, or, joined with the pre-existing lawsuit.

The proceedings and trial conducted by the Circuit Court ignored several Rules of Civil Procedure, resulting in a rushed trial that denied meaningful advance notice of the trial, and, which denied Tenants their right to a jury trial. The Circuit Court also made findings of fact based upon six-month old recollection of testimony from a prior proceeding.

The judgment awarded to the Colony went beyond the permissible scope of the proceedings by including an unusual forfeiture provision for hundreds of thousands of dollars of equipment and machinery.

The errors committed by the Circuit Court were numerous and substantial. And, the Circuit Court has made himself a witness. Tenants therefore request that this Court direct the reassignment of the O'Farrell matters to another judge. *Bertelsen v. Allstate Ins. Co.*, 2011 S.D. 13, ¶ 62 (citing *State v. Bult*, 1996 S.D. 20; *Sarver v. Dathe*, 479 N.W.2d 913 (S.D.1992)).

The Tenants ask this Court to reverse and dismiss the judgment of possession, and, to direct an award of their attorney's fees under SDCL 21-15-11.

Dated this 3rd day of July, 2023.

HOVLAND, RASMUS,
BRENDTRO & TRZYNKA, PROF. LLC

/s/ Daniel K. Brendtro
Daniel K. Brendtro
Benjamin M. Hummel
PO Box 2583
Sioux Falls, South Dakota 57101-2583
Attorneys for Appellants/Contestants

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellant's Brief does not exceed the word limit set forth in SDCL § 15-26A-66, said Brief containing 9,994 words, exclusive of the Table of Contents, Table of Authorities, any addendum materials, and any certificates of counsel.

/s/ Daniel K. Brendtro
One of the attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of July, 2023, I electronically filed the foregoing via the Odyssey File and Serve system with the Supreme Court Clerk, which will send notice to Appellee's Counsel.

I also hereby certify that on this 3rd day of July, 2023, I sent a bound copy of the foregoing to the Supreme Court Clerk at the following address:

Shirley Jameson-Fergel
Supreme Court Clerk
500 East Capitol Avenue
Pierre, South Dakota 57501

/s/ Daniel K. Brendtro
One of the attorneys for Appellants

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STATE OF SOUTH DAKOTA)
 :SS
COUNTY OF GRANT)

IN CIRCUIT COURT

THIRD JUDICIAL CIRCUIT

VOR, INC., and GRAND VALLEY HUTTERIAN BRETHREN, INC.)	25CIV.23-18
)	
Plaintiffs,)	
)	
v.)	JUDGMENT AND ORDER OF EVICTION
)	
PAUL O'FARRELL, and SKYLINE CATTLE COMPANY, a South Dakota Corporation,)	
)	
Defendants.)	

A court trial having come on before the Court on April 27, 2023, and the Honorable Robert L. Spears having entered Findings of Fact and Conclusions of Law, it is now hereby,

ORDERED, ADJUDGED, AND DECREED that the Defendants, Paul O'Farrell and Skyline Cattle Company, shall vacate the real property and buildings described below no later than 8:00 a.m. on May 8, 2023; it is further,

ORDERED, ADJUDGED, AND DECREED that the real property and buildings that this eviction judgment applies to are the buildings and real property located at:

The South Half of the Southeast Quarter and the South Half of the Southwest Quarter of Section 22, Township 121, Range 50, West of the 5th P.M.; and the South Half of the Northwest Quarter, the South Half of the Northeast Quarter, the North Half of the Northeast Quarter, the Southeast Quarter, except Lot 1, Hopewell Subdivision of the Southeast Quarter, and the North Half of the Southwest Quarter, of Section 23, Township 121, Range 50, West of the 5th P.M.; and

Lot 2A of Lots 2A and 2B, O'Farrell Subdivision, a RePlat of Lot Two (2) of the Plat of Lots One (1) and Two (2), O'Farrell Subdivision, all located in the South Half of the Southeast Quarter of Section 14, Township 121, Range 50, West of the 5th P.M., all according to plats now on file and of record in the office of the Register of Deeds, Grant County, South Dakota; and

The South Half of the Southwest Quarter of Section 23, Township 121, Township 50, West of the 5th P.M.;

all of the above in Grant County, South Dakota.

It is further,

ORDERED, ADJUDGED, AND DECREED that the Defendants shall have removed by 8:00 a.m. on May 8, 2023, all personal property that they do not intend to abandon, and Grand Valley Hutterian Brethren, Inc. may treat all personal property remaining on the above-described real property and in the buildings located on the real property as of 8:00 a.m. on May 8, 2023, as having been abandoned by the Defendants; it is further,

ORDERED, ADJUDGED, AND DECREED that if the Defendants have not vacated the real property and buildings described above by 8:00 a.m. on May 8, 2023, the Grant County Sheriff is directed to assist the Plaintiffs in physically removing the Defendants from the real property and buildings described above; it is further,

ORDERED, ADJUDGED, AND DECREED that the Court awards the Plaintiffs reasonable attorney's fees, which Affidavits are to be filed and served upon Defendants' counsel, and Defendants shall have fourteen (14) days after receipt of the Affidavits to object and schedule a hearing before the Court on the objection. If no objection is filed within fourteen (14) days, the Clerk of Courts will endorse upon the Judgment the attorney's fees in the amount of \$ _____ to the Plaintiffs; it is further,

ORDERED, ADJUDGED, AND DECREED that costs be taxed against Defendants and in favor of Plaintiffs in the amount of \$ _____, to be hereinafter

inserted by the Clerk of Courts upon filing of Plaintiffs' Application for Taxation of Costs and Affidavit.

BY THE COURT:

5/1/2023 10:36:24 AM

Attest:
Mielitz, Brooke
Clerk/Deputy



Robert L. Spears

Hon. Robert L. Spears
Circuit Court Judge

STATE OF SOUTH DAKOTA)
)
) :ss
)
COUNTY OF GRANT)

IN CIRCUIT COURT

THIRD JUDICIAL CIRCUIT

VOR, INC., and GRAND VALLEY
HUTTERIAN BRETHREN, INC.)
)
)
)

Plaintiffs,)

v.)

PAUL O'FARRELL, and SKYLINE
CATTLE COMPANY, a South Dakota
Corporation,)
)
)
)

Defendants.)

25CIV.23-18

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The court trial in this matter having come on before the Court at 10:00 a.m. on April 27, 2023, in the courtroom of Grant County, Milbank, South Dakota, before the Honorable Robert L. Spears; and the Plaintiffs, VOR, Inc. and Grand Valley Hutterian Brethren, Inc., having been represented in this proceeding by Lee Schoenbeck of Schoenbeck & Erickson, PC and Kiera Leddy of Siegel, Barnett & Schutz, LLP; and the Defendants, Paul O'Farrell and Skyline Cattle Company, having been represented by Daniel Brendtro of Hovland, Rasmus, Brendtro & Trzynka, Prof. LLC; and the Court having reviewed the pleadings and listened to the evidence, does hereby make the following Findings of Fact:

FINDINGS OF FACT

1. This dispute involves the right to possession of ag land and buildings in Grant County, South Dakota.
2. The real property involved in the dispute includes land and buildings located at:

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The South Half of the Southeast Quarter and the South Half of the Southwest Quarter of Section 22, Township 121, Range 50, West of the 5th P.M.; and the South Half of the Northwest Quarter, the South Half of the Northeast Quarter, the North Half of the Northeast Quarter, the Southeast Quarter, except Lot 1, Hopewell Subdivision of the Southeast Quarter, and the North Half of the Southwest Quarter, of Section 23, Township 121, Range 50, West of the 5th P.M.; and

Lot 2A of Lots 2A and 2B, O'Farrell Subdivision, a RePlat of Lot Two (2) of the Plat of Lots One (1) and Two (2), O'Farrell Subdivision, all located in the South Half of the Southeast Quarter of Section 14, Township 121, Range 50, West of the 5th P.M., all according to plats now on file and of record in the office of the Register of Deeds, Grant County, South Dakota; and

The South Half of the Southwest Quarter of Section 23, Township 121, Township 50, West of the 5th P.M.;

all of the above in Grant County, South Dakota.

3. Paul O'Farrell, and the company he owns, Skyline Cattle Company, are in possession of the real property and buildings.

4. Grand Valley Hutterian Brethren, Inc. (hereinafter "Grand Valley") are the owners of the real property and buildings at issue.

5. The real property and buildings at issue were conveyed by VOR, Inc., a South Dakota corporation, to Grand Valley on October 17, 2022.

6. Prior to October 17, 2022, the real property and buildings at issue were owned by VOR, Inc.

7. Paul O'Farrell admitted, both individually and as the representative of Skyline Cattle Company, that he was served by the Grant County Sheriff with both a Notice of Termination of Lease of Residential and Non-Agricultural Land and Buildings

and a Notice of Termination and Non-Renewal of Farm Lease—Agriculture and Grassland on August 20, 2022.

8. Paul O’Farrell admitted that he, individually and as a representative of Skyline Cattle Company, was served with a Notice to Quit by the Grant County Sheriff’s office on March 29, 2023.

9. Paul O’Farrell, individually and as a registered agent of Skyline Cattle Company, was served with the Summons and Complaint in this matter on April 17, 2023.

10. On April 21, 2023, Daniel Brendtro filed a Notice of Appearance on behalf of the Defendants, Paul O’Farrell and Skyline Cattle Company.

11. On April 21, 2023, Defendants filed a document entitled “Defendants 4/21/2023 Motions.”

12. On April 24, 2023, the Plaintiffs’ filed a Notice of Court Trial, the Court having set the court trial to commence at 10:00 a.m. on April 27, 2023.

13. On April 25, 2023, the Defendants filed a document entitled “Defendants’ Objection to ‘Notice of Court Trial’,” but still did not request a jury trial.

14. On April 26, 2023, this Court denied the Objection to the court trial.

15. On April 27, 2023, the morning of trial, Defendants filed an Answer.

16. Paul O’Farrell admitted that he and Skyline Cattle Company had an oral lease with VOR, Inc.

17. Paul O’Farrell admitted that the oral lease could be terminated by VOR, Inc.

18. Paul O’Farrell admitted that he knew VOR, Inc. sold the real property and buildings at issue to Grand Valley.

19. Paul O'Farrell admitted that he was unable to reach an agreement to lease the real property and buildings at issue from Grand Valley.

20. Grand Valley has no lease with Paul O'Farrell or Skyline Cattle Company.

21. Grand Valley wants Paul O'Farrell and Skyline Cattle Company evicted from the real property and buildings at issue.

22. The Court finds the testimony of Paul O'Farrell to not be credible, when it conflicts with the Findings made by the Court.

23. The Court finds that Paul O'Farrell did not have a lease for the real property and buildings at issue.

24. The Court finds that Paul O'Farrell has allowed damage to be done to at least one of the buildings on the real property at issue.

Based upon the above Findings of Fact, the Court makes the following Conclusions of Law:

CONCLUSIONS OF LAW

1. Grand Valley is entitled to an order of eviction pursuant to the forcible entry and detainer statutes, because the Defendants, Paul O'Farrell and Skyline Cattle Company, have held over after the termination of their lease.

2. The Court finds that the oral agricultural lease and the building lease were terminated by VOR, Inc.

3. The Court finds that the Notice to Quit was served upon the Defendants on approximately March 29, 2023.

4. The Court finds that the Summons and Complaint were served upon the Defendants on April 17, 2023.

5. The Court finds that the Defendants made the appearance within the four days required by statute.

6. While the Defendants didn't file an Answer within the four days required by statute, the Court did allow the Defendants to interpose their defenses at the court trial.

7. The Court finds there was not sufficient evidence to support claims of laches, equitable estoppel, or waiver.

8. The Defendants waived their right to assert a jury trial by not filing an Answer requesting one within the four days required by statute.

9. The Defendants committed waste upon at least one building on the real property.

10. The Court will award attorney's fees, pursuant to SDCL 21-16-11.

11. **The Court requires the Defendants to vacate the real property and buildings by 8:00 a.m. on May 8, 2023.**

Any Conclusions of Law deemed to be a Finding of Fact or vice versa shall be appropriately incorporated into the Findings of Fact or Conclusions of Law as the case may be.

Let Judgment be entered accordingly.

BY THE COURT:

5/1/2023 10:37:13 AM

Attest:
Mielitz, Brooke
Clerk/Deputy





Hon. Robert L. Spears
Circuit Court Judge

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STATE OF SOUTH DAKOTA)
 : §§§ :
COUNTY OF GRANT)

IN CIRCUIT COURT

THIRD JUDICIAL CIRCUIT

<p>PAULO O'FARRELL, individually; and, as a beneficiary of the family trust; and, for the benefit of the Estate of Victoria O'Farrell; SKYLINE CATTLE COMPANY, a South Dakota corporation; & VOR, INC., a South Dakota corporation PLAINTIFFS</p> <p style="text-align: center;">v.</p> <p>KELLY O'FARRELL, an individual; GRAND VALLEY HUTTERITE BRETHERN, INC.; a South Dakota corporation; & THE RAYMOND AND VICTORIA O'FARRELL LIVING TRUST, a South Dakota trust, by and through its trustee; and any other necessary parties. DEFENDANTS</p>	<p>25CIV23—_____</p> <p>25CIV23-000015</p> <p>COMPLAINT</p>
--	---

Plaintiffs' Complaint is based upon the following law and facts:

NATURE OF THE ACTION

1. For the past year, Kelly O'Farrell has orchestrated a scheme to interfere with the long-standing trust and estate plans of his parents, (Raymond and Victoria). This resulted in the precipitous and illegal sale of nearly all of the family's farm ground.
2. The nature of this lawsuit is three-fold:
 - *First*, to declare 'void' the improper corporate/trust maneuvers (Count 1, below);
 - *Second*, to rescind and unwind the \$3.2 million real estate transaction (Count 2);
 - And *third*, to recover damages for the injured parties (Count 3).

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INITIAL BACKGROUND

3. **Paul O'Farrell**, a Plaintiff, is the son of Raymond and Victoria O'Farrell. His interest in this lawsuit stems from several interrelated aspects of his family's farming operations and his family's estate plans. Those include the "Family Trust"; the "Trust Corporation"; Victoria's Estate; and Skyline Cattle.
4. **Family Trust.** Paul was the primary beneficiary of his parents' long-standing estate plans, as set forth in the Family Trust, which is called "The Raymond and Victoria O'Farrell Living Trust." It was created on January 14, 2011, and was Restated on March 29, 2017. The primary Family Trust provisions have remained unchanged since 2011. Paul is named as a Successor Co-Trustee under §3.03 of the Family Trust in the event Raymond is "unable" to serve. As an interested person to the Family Trust, Paul brings this suit to restore the property taken from it, and, to effectuate the appointment of Successor Co-Trustees.
5. **Trust Corporation.** Paul is also the most recent individual to be duly-elected as President of the family's Trust Corporation, known as "vOr, Inc." Subsequent attempts in 2022 to remove Paul as its President were invalid, as were various other corporate acts. Thus, Paul also brings this suit on behalf of the Trust Corporation.
6. **Victoria's Estate.** By statute, Paul is an interested party of his mother Victoria's Estate, which is the subject of a 2022 probate proceeding in Grant County.

Victoria's Estate holds various claims and rights, but the Estate has failed to act or

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to pursue them. Paul therefore brings this suit for the benefit of Victoria's Estate, in order to preserve and protect her Estate's rights and interests.

7. **Skyline Cattle.** Paul is the owner of Skyline Cattle Company, through which Paul and his family have conducted farming operations (grain and cattle). Paul has been the sole owner of the company since 2019. Through a related entity he has carried on a trucking business (cattle hauling). For many years, Skyline has rented and farmed the Trust Corporation's land. Skyline brings suit to assert its rights, and, to recover damages.
8. **Kelly O'Farrell.** In 2022, Paul's brother, Kelly O'Farrell manipulated his father Raymond and engaged in other misconduct, in order to set in motion an improper and illegal set of maneuvers, all of which were designed to enrich himself at the expense of his parents and his brother Paul.
9. **Raymond O'Farrell, a person in need of protection.** Raymond has been described by his family as a person in need of protection. His wife Victoria described Raymond's condition in 2022 as having a "history of health problems" and a "history of alcohol abuse." She also noted that "there are often times when he is not fully aware of what is going on, and sometimes acts like the date is 1972, not 2022. Also, my husband was never a strong reader or writer and had a limited education. I do not say that lightly, nor as a criticism of my husband."
10. Among his health issues, Raymond has suffered three strokes, which caused a

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further decline in his limited literacy.

11. Starting in approximately March of 2022, various maneuvers began to be taken, ostensibly in the name of Raymond O'Farrell, the Family Trust, the Trust Corporation, Victoria O'Farrell, and the Estate of Victoria O'Farrell. Kelly was at the center of it all.
12. Kelly O'Farrell's efforts have caused substantial financial harm, and, ultimately culminated in the wrongful sale of \$3.2 million worth of O'Farrell family farmland to the Grand Valley Hutterian Brethren.
13. The victims of Kelly's scheme are several. It caused financial harm to their mother Victoria (and her Estate); to their father Raymond; to the Trust; to their family company (vOr, Inc.); and to Paul, because the intent and effect of the scheme was to orchestrate his disinheritance.
14. The scheme also greatly interfered with Paul's farming operations, business operations, and business relationships.
15. And the improper and unplanned sale of \$3.2 million of Family Trust Land will result in a substantial taxable event, which the Family Trust was designed to avoid.
16. Paul brings this action to do three things: (i) to invalidate the void, *ultra vires*, and illegal maneuvers (including corporate, trust, individual, and probate) which occurred without appropriate notice, consent, or authority, or, as a result of undue influence; (ii) to unwind the \$3.2 million real estate transaction, ostensibly

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undertaken from vOr, Inc., to the Grand Valley Hutterite Brethren; and (iii) to recover damages for the injured parties and entities.

RELATED LITIGATION & VENUE

17. Various O'Farrell family members are residents of Grant County, as are its entities.
18. Victoria O'Farrell (mother), died during the summer of 2022. Her estate is being probated in a separate proceeding in Grant County. *See*, 25PRO22—11. Prior to her death, Victoria started a lawsuit to address some of these same claims. *See*, 25CIV22—38. A copy of her Complaint is attached here, as Exhibit 1, along with a Brief outlining her arguments and claims, which is Exhibit 2.
19. Raymond O'Farrell (father), is a vulnerable person in need of protection. In a separate proceeding, Paul has petitioned for the appointment of a guardian and conservator in Grant County. *See*, 25GDN23— _____. After appointment, his conservator will be an interested party to these proceedings.
20. Because of Raymond's pending conservatorship, and for other reasons, Raymond is "unable" to serve as Trustee of the Family Trust, within the meaning of Section 3.03(a). Paul is named as a Successor Co-Trustee under §3.03 of the Family Trust. Following the appointment of Successor Co-Trustees, it is the intent that the Family Trust would then be realigned as a Plaintiff in this matter.
21. Defendant Grand Valley Hutterian Brethren, Inc., is a South Dakota company with a principal office in Forbes, North Dakota, and, as listed on the Secretary of State's

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website under entity number of NS011229, its registered agent is Jeffrey T. Sveen, 415 S. Main St., 400 Capitol Bldg, Aberdeen, SD 57401-4364.

22. Defendant Kelly O'Farrell lives with Raymond in Grant County, South Dakota.
23. Venue is proper in Grant County pursuant to SDCL 15-5-1, 15-5-8, and 15-5-6.

FACTS

24. In 2011, Raymond and Victoria O'Farrell created a trust, which was the key component of their estate plan.
25. Into this Family Trust, Raymond and Victoria each deposited all (or most) of their assets. This included 100% of their shares of "vOr, Inc.," which is a South Dakota corporation created in 2002 to hold their farm assets, including substantial real estate holdings. In this Complaint, "vOr" is referred to as the Trust Corporation.
26. In total, Raymond and Victoria owned approximately 1,000 acres of farmland near Marvin, South Dakota. They also owned a share of a livestock auction barn in Watertown, South Dakota, along with other various assets.
27. Since 2011, the terms of Raymond and Victoria's Family Trust designated specific land parcels for inheritance by their five children: Paul, Lance, Marcie, Rita, and Kelly.
28. Of their five children, Paul had the most involvement with the family's farm. Paul has served as an officer of the Trust Corporation for numerous years. And, for many years, Paul's mother served as the bookkeeper for Paul's farming and

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trucking operations. Paul also rented and farmed the family's land. And Paul worked at his parents' livestock auction barn.

29. In line with Paul's higher level of contributions and involvement with his parents' farm, Raymond and Victoria's Family Trust designated the majority of their land to be inherited by him. Those were nine contiguous parcels comprising 703.33 acres. The Family Trust owned two other quarters of ground, which are designated to be inherited by Lance, and to Marcie, Kelly, and Rita. However, the Family Trust also granted Paul an option to purchase those two parcels, to allow Paul to keep the farm together.
30. Raymond and Victoria used an estate planning law firm to create their Trust in 2011.
31. Raymond and Victoria returned to that same estate planning law firm to make minor adjustments to it in 2017 and 2021. On both occasions, they affirmed their original intentions.
32. In March of 2022, statutory notice was given to the five O'Farrell children under SDCL 55-4-57, along with a copy of the Trust. In this notice, the beneficiaries were advised that they had "60 days from today to commence a judicial proceeding to contest the validity of our restated trust, [and] if no claim is made within the 60-day period, you will be barred from contesting the trust's validity at our passing."
33. Nobody initiated an action to contest the Trust during that 60-day period.

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34. Instead, Kelly O'Farrell secretly began an orchestrated effort to alienate and isolate Raymond from his family, with the intent of thwarting various features of Raymond and Victoria's Estate plan and disrupting farming operations. This included, for example: "removing" shares of vOr, Inc., from the Trust; "separating" Raymond's and Victoria's assets; interfering in Paul's lending and farming activities; "removing" Paul and Victoria as officers and directors of vOr, Inc.; attempting to fire the attorneys that Victoria hired to stop all of this; and, ultimately, signing a secret agreement to sell nine parcels of family farm ground to the Hutterite Brethren.
35. Some of these actions were accomplished via the misuse of Power of Attorney documents.
36. In addition, Kelly began taking funds from his parents and converted them to his own use.
37. Kelly has isolated Raymond from his family members, and Kelly has given Raymond false information about his family members, in order to alienate Raymond from Paul and other family members, and as part of a plan and scheme to enrich himself and harm his other family members.
38. The problems appear to have started when Kelly moved in with his parents in 2021, where he and his wife lived rent-free.
39. By 2022, Kelly was demanding that his siblings pay him \$1,200 per month to care

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for Raymond and Victoria, and Kelly threatened that he would leave the house and take Raymond if they didn't.

40. Victoria temporarily moved out of the home after she fell and broke her leg in April 2022. This required surgery and recuperation outside of the home, first a hospital and then a nursing home in Garretson, South Dakota.
41. Raymond had long-relied upon his wife Victoria.
42. In the vacuum created by her absence, Victoria realized that Kelly was isolating Raymond. In the summer of 2022, she submitted an affidavit outlining her observations and concerns, which is attached as Exhibit 3.
43. Kelly convinced Raymond to terminate Victoria as his power of attorney and to appoint Kelly in her place.
44. Kelly then took steps to disempower Victoria. He directed his sister Rita to solicit a letter from an Avera physician in June 2022 which purported to advise that their mother Victoria was unable to make financial decisions. The letter was issued, and then Kelly acted upon it. However, less than two weeks later, the same Avera doctor learned that the letter had been procured under false pretenses and disavowed its contents. Instead, the doctor advised that she knew of no issues with Victoria's cognition nor with her ability to make financial decisions. The doctor's affidavit is attached as Exhibit 4.
45. At all times, Victoria was fully capable of making decisions, and, she was keenly

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aware that Kelly had been engaging in a pattern of wrongdoing.

46. Victoria voiced concerns about Kelly, and said in her affidavit that “it became clear that Kelly was trying to influence how Raymond thought about vOr, Inc.’s relationship with Paul and about what the corporation should do in regard to the [Skyline] loans coming due.¹ Since coming to live with us, Kelly seems to have attempted to influence Raymond more and more, and I believe that was part of an effort to undo or disrupt estate planning decisions that my husband and I had already made about what would be done with the family land.”
47. Victoria also reaffirmed the validity of her and Raymond’s estate plans: “Raymond and I put a lot of thought into our estate plan, and the specific distributions that are called for in the Trust Instrument are the result of a lot of reflection and discussion between us about what we believe and how we want our estate distributed.”
48. As of June of 2022, Victoria noted that Raymond had “never expressed to me any inclination to change the estate plan or to make any alteration to the trust. The recent actions that he has taken relating to the Trust and the changes to vOr, Inc.’s directors and officers were not his idea, and I do not believe he even understands

¹ There was a long-standing arrangement by which Skyline’s operating loans were secured by the land owned by the Trust Corporation. This continued for years without incident, and Skyline paid down a sizable portion of the debt in the past few years. As Victoria explained in her affidavit, “there was never any issue with any of our lenders or concerns that assets of vOr, Inc., would be at risk....[N]one of the other loans for which vOr, Inc. assets had been pledged as security were in arrears on any debt service or loan payments.” But, as a result of Kelly’s influence, financial information was not provided to the Bank for the 2022 refinancing process, which led to the declaration of default.

what he purports to have done.” This was based on Victoria’s conversations with Raymond at that time.

49. Victoria hired an attorney to help her, but, the following day, Raymond (via counsel) attempted to “fire” Victoria’s lawyer via Raymond’s power of attorney over her.
50. Victoria remained grateful to Kelly’s wife, Donna, for her help and care, as well as Kelly and Donna’s children. But, Victoria concluded, “based on the series of actions that have been taken, I no longer want Kelly to live in my home. It saddens me to come to that conclusion, but I feel I have no other choice, based on what has gone on in the last month.”
51. Victoria planned to return home after recuperating in the nursing home, and, stated that as part of her return home, “I want the Court to compel [Kelly] to leave.”
52. Victoria died unexpectedly on July 11, 2022, before she could return home.
53. By that time, Victoria had already started a lawsuit to try and unwind these improper actions and to repair the problems with the Family Trust and the Trust Corporation. *See*, 25CIV22-000038 (Grant County, S.D.)
54. However, one week after Victoria’s death, Raymond O’Farrell ostensibly started a probate action for Victoria, in which he filed a Petition seeking to be named as “Special Administrator” of Victoria’s Estate.
55. This Petition claimed that the appointment of a Special Administrator was urgently

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necessary because Victoria was the Plaintiff in a lawsuit (i.e., the one which Victoria had filed to fix the trust and unwind the wrongdoing). The Petition alleged that “[a]n emergency exists requiring appointment without further notice because: The pending litigation requires immediate attention of a Special Administrator to protect the estate of decedent....”

56. In his Petition, Raymond nominated himself to be the Special Administrator, meaning that Raymond would now be acting as both the Plaintiff and the Defendant in the lawsuit which Victoria had commenced to stop Kelly and Raymond from further mischief.
57. The Petition was granted on the same day, without notice to any heirs or interested parties.
58. Despite the lack of notice, Raymond purported to take various legal actions under the Special Administrator status, including maneuvers which apparently resulted in the “sale” to the Hutterite Brethren of \$3.2 million worth of Family Trust land.
59. The land sale contract was purportedly signed between vOr, Inc., and the Hutterite Brethren on August 12, 2022. This contract was kept secret, and, no authority was obtained for it via the probate process. No notice was given until after a closing had purportedly occurred in October 2022.
60. Paul has been living on one of the parcels of Family Trust land for many years. As is typical with farm families, Paul not only lived on the Family Trust land but also

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operated the family farm. Both arrangements were without a written agreement.

61. In reliance upon the ongoing arrangement and family plan, Paul constructed a residence and a shop at his own expense. Both structures are situated on land that is designated for Paul to inherit. Their value greatly exceeds one million dollars.
62. In August 2022, and in conjunction with this attempted land sale, the Trust Corporation attempted to issue notices of “non-renewal” to Paul O’Farrell, his company Skyline Cattle, and other occupants of the family’s trust land.
63. The Trust Corporation’s attempts to “non-renew” Paul and Skyline were contrary to years and years of prior understanding, and they were carried out without proper authority, consent, or understanding.
64. In the months since, Kelly has continued to isolate Raymond and exert influence, which has resulted in other wrongful actions and transactions that are not in Raymond’s or the Family Trust’s best interests.
65. Each of the various actions and transactions was legally ineffective because of a failure of notice, consent, capacity, authority, undue influence, and estoppel.
66. These actions have caused financial harm to multiple parties, including Raymond himself, the Trust, vOr, Inc., Victoria, Victoria’s estate, Paul, and Paul’s company, Skyline Cattle.
67. The first step to fix and repair these problems is to declare the various corporate, trust, and probate maneuvers to be invalid. The second step is to unwind the \$3.2

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million real estate transaction. And the third step is to rectify the harm by an award of damages.

COUNT 1

DECLARATORY JUDGMENT: VOID AND VOIDABLE ACTS

68. These various legal maneuvers were set into motion via a series of actions, made by those purporting to act on behalf of the Trust Corporation; by individuals purporting to act on behalf of the Family Trust; by individuals purporting to act as Victoria O'Farrell's power of attorney; by individuals purporting to act on behalf of Victoria's Estate; and by individuals purporting to act on behalf of Raymond O'Farrell or as his power of attorney.
69. Some of these maneuvers are known to the Plaintiffs; many are still unknown.
70. Plaintiffs seek a declaration that would avoid all of these improper corporate, trust, probate, and individual actions. Such declarations are available via Chapter 21-24.
71. Without limitation, some of the void or voidable actions include the following.
72. **Declaration as to Trust Corporation actions.** Various corporate actions of vOr, Inc., were taken by attempting to "vote" Victoria's stock shares on her behalf. This was done without her knowledge; without proper corporate notice; and, it persisted even after she disavowed such attempts.
73. The election of officers and board members was not carried out in accordance with corporate formalities, rules, or statutes, and, those elections are void, as are the

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actions taken by those officers and directors. This includes, but is not limited to: (i) the” Action by Written Consent of All Directors of vOr, Inc.,” dated June 14, 2022; “Action by Written Consent of All Shareholders of vOr, Inc.,” dated June 14, 2022; “Action by Written Consent of All Shareholders of vOr, Inc.,” dated June 15, 2022; and actions at a purported “Special Meeting of Board of Directors” on June 19, 2022, and June 21, 2022, which attempted, among other things, to remove Paul and Victoria as directors and officers.

74. In addition, various corporate actions were taken in the name of Raymond O’Farrell. These were accomplished without proper corporate notice, without his full knowledge and understanding, and, as a result of undue influence and manipulation.
75. And, various corporate actions were taken in derogation of established agreements, including the Family Trust agreement. Such actions are void, *ultra vires*, or, of a nature that the Corporation or its shareholders would be estopped to undertake them.
76. **Declaration as to Family Trust actions.** Various trust actions were accomplished without proper notice, without consent, without the full knowledge and understanding of the trustees, as a result of undue influence and manipulation, in derogation of established trust agreements.
77. These Family Trust actions are thus void, or, *ultra vires*, or, prohibited by Title 55

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and other trust laws and statutes, or, estopped by the Trust arrangement.

78. Such actions include an attempt to reverse the original Assignment Separate from Certificate dated January 14, 2011, via another such Assignment on June 10, 2022, which attempted to depopulate the Family Trust of land assets.
79. **Declaration as to Successor Trustee.** The trust documents, at Section 3.03(a), provide for the appointment of a successor trustee in the event that Raymond is unable to serve as trustee.
80. Raymond is unable to serve as Trustee.
81. Plaintiffs seek a declaration that Raymond is unable to serve as trustee, and, they will be filing a Petition for Removal within these proceedings.
82. **Declaration as to Victoria's Estate actions.** Various actions by Victoria's Estate were accomplished without proper notice, without valid consent, without the full knowledge and understanding of the fiduciaries, as a result of undue influence and manipulation, in derogation of well-established probate statutes. These actions of Victoria's Estate are thus void, or, *ultra vires*, or, of a nature that the Estate's fiduciaries would be estopped to undertake them.
83. **Declaration of Skyline Cattle's Rental Rights.** Further, Plaintiff Skyline Cattle is entitled to a declaration that it is legally permitted to continue farming the Family Trust Land. During the 2022 crop season, and for many years prior, Paul O'Farrell's company, Skyline Cattle, leased and farmed the Family Trust Land.

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84. In South Dakota, an oral farming lease is deemed to renew automatically for the following crop season unless a written notice for termination is issued prior to September 1st, following the requirements of SDCL 43-32-22.1
85. Because of the failure of its corporate process, vOr, Inc., failed to issue a legally effective termination notice in 2022. Any purported notice was issued by individuals who were not duly elected officers, and, whose actions were *ultra vires*, or, whose actions were a product of undue influence. This includes an attempted termination and non-renewal notice dated August 18, 2022.
86. Skyline Cattle Company seeks an immediate declaration that it is the rightful tenant for the 2023 crop season.
87. Discovery is expected to identify further transactions and actions which would be subject to a declaratory judgment to nullify them. One of those transactions was a \$3.2 million land “sale” of the vast majority of Family Trust land.
88. **Declaration of Paul O’Farrell’s Occupancy Rights.** Further, Plaintiff Paul O’Farrell is entitled to a declaration that he is legally permitted to continue occupying the premises of the Family Trust Land, including residential and non-agricultural land and buildings which are the site of his home and shop.
89. Because of the failure of its corporate process, vOr, Inc., failed to issue a legally effective termination notice in 2022. Any purported notice (including a notice dated August 18, 2022) was issued by individuals who were not duly elected

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officers, and, whose actions were *ultra vires*.

90. **Declaration as to Power of Attorney over Raymond.** A “Durable General Power of Attorney” was signed March 1, 2022, naming Kelly O’Farrell as power of attorney for Raymond O’Farrell. This document was procured without his full knowledge and understanding, and, as a result of undue influence and manipulation, and, without any notice of revocation of his March 29, 2017, power of attorney.
91. **Other Declarations.** Discovery is expected to identify further transactions and actions which would be subject to a declaratory judgment to nullify them, and, those are incorporated herein.

COUNT 2
RESCISSION: \$3.2 MILLION LAND “SALE”

92. Under the terms of the Family Trust, Raymond and Victoria O’Farrell had designated Paul to receive nine, contiguous parcels of farm ground on the edge of Marvin, South Dakota, along Highway 12.
93. Paul’s designated land is legally described as follows:

The South Half of the Southeast Quarter (S ½ SE ¼)² and the South Half of the Southwest Quarter (S ½ SW ¼)³ of Section Twenty-Two (22), Township One Hundred Twenty-One (121), Range Fifty (50) ; and the South Half of the Northwest Quarter (S ½ NW ¼),⁴ the South Half of the Northeast Quarter (S ½ NE ½),⁵ the North Half of the Northeast Quarter (N ½ NE ¼),⁶ the Southeast Quarter (SE ¼),

² Parcel A (these letters correspond to the map of the parcels which follows)

³ Parcel B

⁴ Parcel C

⁵ Parcel D

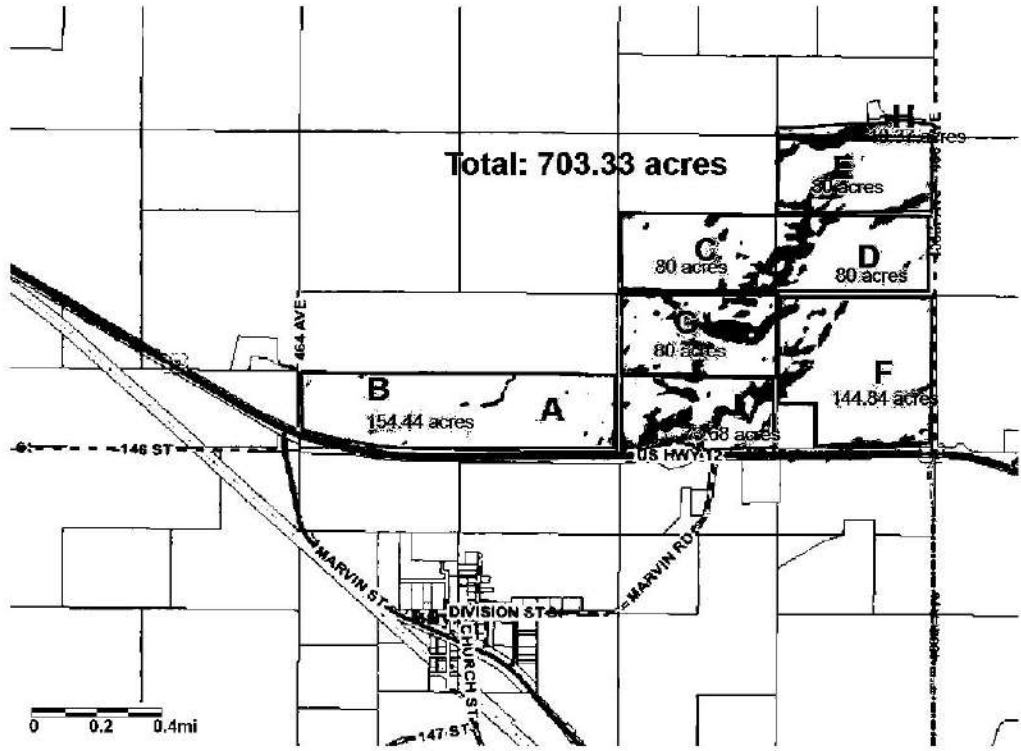
⁶ Parcel E

except Lot One (1) Hopewell Subdivision of the Southeast Quarter (SE ¼),⁷ and the North Half of the Southwest Quarter (N ½ SW ¼),⁸ of Section Twenty-Three (23), Township One Hundred Twenty-one (121), Range Fifty (50), Grant County, South Dakota

Lot 2A of Lots 2A and 2B, O'Farrell Subdivision,⁹ a Replat of Lot Two (2) of the Plat of Lots One (1) and Two (2), O'Farrell Subdivision, all located in the South Half of the Southeast Quarter (S1/2 SE ¼) of Section Fourteen (14) Township One Hundred Twenty-One (121), Range Fifty (50), and all according to plats now on file and of record in the office of the Register of Deeds, Grant County South Dakota

The South Half of the Southwest Quarter (S ½ SW ¼)¹⁰ of Section Twenty-Three (23), Township One Hundred Twenty-One (121), Township Fifty (50), Grant County, South Dakota

94. That land totals approximately 703.33 acres, and is shown here:



⁷ Parcel F
⁸ Parcel G
⁹ Parcel H
¹⁰ Parcel I

95. In October 2022, this land (which Paul was designated to inherit) was “sold” to the Defendant Grand Valley Hutterite Brethren, Inc., for a sale price believed to be \$3.2 million.
96. The “sale” was attempted through the O’Farrell family Trust Company (vOr, Inc.) via a purchase agreement dated August 12, 2022, which lists Raymond as its “President.”
97. The Purchase Agreement also purports to give Grand Valley a “right of first refusal to purchase the other two parcels of land currently owned by Seller.” This, too, violates and thwarts the intention and terms of the Trust Agreement.
98. In addition, the Purchase Agreement purports to lease those other two parcels to the Hutterite Brethren for \$230.00 per acre and \$90.00 per acre for tillable and grassland.
99. Raymond was not duly elected as the President of vOr, Inc., at any time during 2022. Instead, Paul O’Farrell was and remains the duly elected President of vOr, Inc., and any attempted change of officers is a nullity.
100. Victoria’s Estate was legally incapable of carrying out any actions because it failed to follow proper procedures and probate statutes.
101. The Trust Corporation (vOr, Inc.) was legally incapable of carrying out the transaction.
102. Raymond’s consent for the transaction was procured via undue influence, or

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without his full understanding, and without following necessary corporate formalities.

103. The completed transaction was announced to the public for the first time in October 2022.
104. Upon information and belief, some of the funds of the transaction are still being held by the law firm(s) involved.
105. Paul O'Farrell has issued a Notice of Rescission to the Hutterite Brethren, on behalf of vOr, Inc., and has offered to restore to them that which vOr, Inc., has received from them under the contract, upon the condition that they shall do likewise.
106. The land transaction should be rescinded by this Court. This Court should impose a constructive trust on the deeds of the land conveyed, as well as upon any funds flowing from the transaction.
107. If rescission is not available, then, in that case Paul O'Farrell is entitled to an award of damages for unjust enrichment, and, otherwise.
108. Such damages would include a claim for unjust enrichment for the value of the capital improvements Paul has made to the Family Land at his expense, without compensation, including his residence and his shop, which, have an estimated value substantially in excess of one million dollars.
109. The Plaintiffs are also entitled to an accounting of the proceeds of the land sale.

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COUNT 3:
TORT DAMAGES

110. An injured party is permitted a single, complete recovery of damages, even though he or she may plead multiple legal theories of recovery. Here, there are a series of damages to various parties that flow from the acts described above, and, which would fit into several, overlapping legal theories.
111. Discovery will determine the extent and nature of the tort claims. At present, as a result of Kelly O'Farrell's wrongful acts, a recovery of damages appears to be available for Raymond, Victoria, her Estate, the Family Trust, and the Trust Corporation. Such damages would be available as a result of conversion, breach of fiduciary duty, and tortious interference with their expected and established relationships.
112. Damages also appear to be available to Skyline Cattle and Paul O'Farrell as a result of Kelly O'Farrell's tortious interference in their expected and established relationships.
113. Because the extent of the various wrongdoing is not yet known, the Plaintiffs are entitled to an accounting of all funds and property of the Family Trust, the Trust Corporation, and the Estate, in order to ascertain the damages.
114. **No tort damages are sought from the Hutterite Brethren, and Paul sincerely apologizes that they must be made a part of this ordeal.**

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PRAYER FOR RELIEF

The Plaintiffs seek the following relief, and pray for a judgment accordingly:

- A. For a declaratory relief as described above, and as otherwise merited.
- B. For the appointment of a successor trustee for the Family Trust.
- C. For an order enjoining further actions.
- D. For a declaration that Skyline Cattle is lawfully permitted to continue farming the Family Trust land for the 2023 crop year.
- E. For a rescission of the real estate transaction as described above, and, for the award of rescission damages and equalizing payments necessary to restore the parties to their prior positions.
- F. For monetary damages, whether in tort, contract, equity, or otherwise.
- G. For an award of attorney's fees as permitted by statute, including but not limited to Chapter 55-3, or, as permitted as underlying damages.
- H. For equitable relief as appropriate, including (i) a constructive trust; (ii) for unjust enrichment; (iii) accountings; and (iv) any other such relief necessary.

JURY TRIAL

The Plaintiffs request and demand a trial by jury on any and all claims.



Daniel K. Brendtro

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Dated this 2nd day of March, 2023.

HOVLAND, RASMUS,
BRENDTRO, & TRZYNKA, PROF. LLC



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Attorneys for Plaintiffs

EXHIBITS TO COMPLAINT:

- Exhibit 1: "*Complaint*" originally filed in 25CIV22-38
- Exhibit 2: "*Brief*" originally filed in 25CIV22-38
- Exhibit 3: "*Affidavit of Victoria O'Farrell*" originally filed in 25CIV22-38
- Exhibit 4: "*Affidavit of Dr. Elizabeth Vanlith*" originally filed in 25CIV22-38

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Exhibit 1.

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STATE OF SOUTH DAKOTA)
 : SS
COUNTY OF GRANT)

IN CIRCUIT COURT
THIRD JUDICIAL CIRCUIT

VICTORIA O'FARRELL, in her individual)
capacity and as Trustee of the Raymond and)
Victoria O'Farrell Living Trust dated January)
14, 2011, restated March 29, 2017 and)
amended August 26, 2021,)

25CIV22-
25CIV22-000038

Plaintiff,)

COMPLAINT

v.)

RAYMOND O'FARRELL, in his individual)
capacity and as Trustee of the Raymond and)
Victoria O'Farrell Living Trust dated January)
14, 2011, restated March 29, 2017 and)
amended August 26, 2021, and KELLY)
O'FARRELL,)

Defendants.

Victoria O'Farrell, by and through counsel, states and alleges for her Complaint against
Defendants as follows:

NATURE OF THE CASE

1. This is an action seeking to unwind a covert, calculated, and unlawful scheme to
deprive Victoria O'Farrell of her residual ownership interest in and control over 50% of the
shares of vOr, Inc., a family farm corporation organized under the laws of this State. This
scheme was put into motion by virtue of certain actions purportedly taken by her 84-year-old
husband, Raymond, who is the other 50% owner of the corporation and who is a vulnerable
elderly person who appears to have no idea what he was doing, no role in conceiving the scheme,
and no intention to implement its terms.

2. Raymond and Victoria are Trustors and Trustees of the Raymond and Victoria O'Farrell Living Trust dated January 14, 2011, restated March 29, 2017 and amended August 26, 2021 (the "Living Trust"). Raymond and Vicki collectively owned all of the shares of vOr, Inc., and jointly assigned all of those shares in 2011.

3. Earlier this month, on June 10, 2022, Raymond purported to reverse the couple's joint assignment of shares to the Trust as part of their estate plan, thereby imperiling the estate planning objectives which motivated the creation of the Trust in the first place. Vicki had no knowledge or notice this was happening.

4. Raymond, purporting to act in his capacity as Trustee, executed an assignment that would take 50% of vOr Inc., shares out of the Trust and assign them to himself individually. This assignment is unlawful, improper, and ineffective.

5. More troublingly, Raymond then claimed to have authority, as individual shareholder and as Trustee, to sign off on a written instrument that would remove Victoria – his wife of more than 50 years and co-Trustee– as a director of the corporation.

6. A subsequent written instrument purported to modify the Bylaws and appoint new officers – three of Vicki's children and Raymond – who are wrongfully and unlawfully claiming authority to act on behalf of vOR, Inc.

7. Raymond took these actions while Vicki was hospitalized and recovering from multiple surgeries to treat a broken leg, which included a stint in the Intensive Care Unit during which she almost died.

8. Raymond's purported removal of Victoria as director was also accomplished through an improper and unauthorized exercise of his Trustee status and powers pursuant to the Living Trust.

9. Victoria became aware of what Raymond had apparently done while she was recovering in the Garretson nursing home, where she was transferred on or about June 13, 2022.

10. After Victoria found out what was going on, she spoke with Raymond about what he had signed and asked if he knew what he had done.

11. Raymond – who did not go to school past eighth grade and whose limited ability to read and write has been degraded as a result of health problems and an extensive history of alcohol abuse – was unable to explain to his wife what he had done or what the documents were intended to accomplish.

12. Raymond took these inexplicable actions because he is being unduly influenced by their son, Kelly, who resides in the couple's house and who has worked to exert extensive control over Raymond while limiting other family members' access to him.

13. Victoria is also asking that Kelly voluntarily leave their house – an act that she is taking as a last resort because of the escalating aggression that Kelly has demonstrated and a concern that he will continue to isolate Raymond from other family members and use his influence over Raymond and the rights granted him as Raymond's power-of-attorney to engage in self-dealing. In the event that Kelly refuses to do voluntarily, Vicki will seek an Order compelling him to leave.

14. The attempted wrongful takeover of vOr, Inc. comes at a particularly difficult time, as vOr, Inc. is alleged to be in default on loans made by its primary lender, Great Western Bank.

15. vOr, Inc. was current on all of its debt service payments or other obligations, but two promissory notes matured earlier this year.

16. Raymond refused to provide necessary information to the lender to permit vOr, Inc. to refinance, and vOr, Inc. was alleged to have defaulted on the two loans by failing to pay the principal balance and accrued interest.

17. Raymond's refusal to provide this information is another byproduct of Kelly's undue influence on Raymond. It also reflects Kelly's desire to disrupt the estate plan of his mother and father.

18. Now vOr, Inc. faces threat of an imminent foreclosure action that will seek to compel the sale of family farmland: an outcome that Victoria and Raymond have sought to avoid for their entire adult lives.

19. Victoria states claims as follows:

- a. an action for declaratory relief holding that the transfer of shares out of the Trust was ineffective and invalid; that the attempt to remove her as director of vOr, Inc. and duly-appointed officer thereof is ineffective, invalid, and rescinded; and that any further action taken after her removal by Defendants and/or parties claiming to act as directors of vOr, Inc. is ultra vires, ineffective, and invalid;
- b. a claim of conversion against Raymond based on his attempt to assign to himself 12,500 shares in which Victoria had a claim as a tenant in common or alternatively, a claim for declaratory relief stating that Victoria retains her residual ownership of 50% of vOr, Inc. and all the incidents of ownership arising therefrom;
- c. an action to remove Raymond as Trustee based on lack of capacity or, alternatively, because of actions taken in breach of his fiduciary duty and other misconduct taken in and through his status as Trustee of the Living Trust;

- d. a claim of tortious interference against Kelly based on his wrongful and intentional interference with Raymond and Victoria's relationship as shareholders and wrongful and intentional interference with Victoria's rights in and control of vOr, Inc.; and
- e. a claim of civil conspiracy against Kelly and Raymond.

20. More pressingly, Victoria seeks entry of a Temporary Restraining Order against both Raymond and Kelly. The Temporary Restraining Order is necessary and appropriate to restore the Trust and vOr, Inc. to the status quo that existed before Raymond purportedly took the actions that he appears not to understand or intend, which actions appear to be driven by Kelly's influence. Those actions have caused, and will continue to cause, irreparable harm to Victoria individually, to the Trust for which she is Trustor, Trustee, and beneficiary, and to vOr, Inc. for which she is an officer and director.

21. Accordingly, Victoria seeks entry of a TRO awarding relief as follows:

- a. Rescinding any assignment of shares from the Raymond and Victoria O'Farrell Living Trust dated January 14, 2011, to Raymond O'Farrell in his individual capacity, including the "Assignment Separate from Certificate" and ordering that all shares of vOr, Inc. are held in trust in and by the Raymond and Victoria O'Farrell Living Trust and shall remain so until and unless otherwise authorized by the Court;
- b. Rescinding any action purporting to remove the duly-appointed directors and officers of vOr, Inc., who were serving in that capacity as of June 1, 2022;
- c. Enjoining Defendant Raymond O'Farrell from taking any action in his capacity as Trustee that would transfer any shares of vOr, Inc. out of the Trust;
- d. Enjoining Defendant Raymond O'Farrell from taking in any action his capacity as Trustee or in his individual capacity that would change the internal affairs or corporate

governance structure of vOr, Inc., including but not limited to any action that would change or modify the duly-appointed board of directors and officers who were serving in that capacity as of as of June 1, 2022;

- e. Enjoining Defendants Raymond O'Farrell and Kelly O'Farrell from taking further action as purported directors or officers of vOr, Inc.;
- f. Enjoining Defendants Raymond O'Farrell and Kelly O'Farrell, together with any non-party with whom they are acting in concert, from taking any action that would dissipate, impair, or waste the assets of vOr, Inc.;
- g. Enjoining Defendant Kelly O'Farrell from interfering in any way with corporation's internal affairs, management, finances, or operations, whether in his individual capacity or any other capacity; and
- h. Ordering Defendants Raymond O'Farrell and Kelly O'Farrell to prepare and submit an accounting to Plaintiff's counsel within 7 days after entry of the Order, which accounting shall identify the amount and recipient of any distribution or expenditure of funds from vOr, Inc. from June 1, 2022, until the date of the Order

The Temporary Restraining Order – consistent with the express language of 15-6-65(d) – shall be binding upon Raymond and Kelly, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the Order by personal service or otherwise. See Motion for Temporary Restraining Order and Brief in Support of Motion for Temporary Restraining Order, filed separately herewith.

PARTIES, VENUE, AND JURISDICTION

23. Plaintiff Victoria "Vicki" O'Farrell is a resident of Grant County and a citizen of South Dakota.

24. Defendant Raymond O'Farrell is Vicki's husband, a resident of Grant County, and a citizen of South Dakota.

25. Defendant Kelly O'Farrell is Vicki's son, a resident of Grant County, and a citizen of South Dakota.

26. This Court has subject matter jurisdiction over this action and personal jurisdiction over the Defendants, together with the authority to address the internal affairs and governance of vOr, Inc., a South Dakota corporation.

27. This venue is lawful and appropriate as the Defendants reside in Grant County, the actions at issue occurred here, and the corporation has its principal place of business here.

FACTS COMMON TO ALL COUNTS

28. Raymond and Vicki are married and have five adult children: Paul, Kelly, Lance, Marcie, and Rita.

29. Raymond is 84 years old, requires use of a walker, and has suffered at least three strokes.

30. In addition, Raymond has a long history of alcohol abuse and is in poor health.

31. Defendant Kelly O'Farrell, his wife, and their two children currently reside in Raymond and Vicki's household.

32. Vicki is presently residing in the Palisades Nursing Home in Garretson, South Dakota, where she is continuing to recover from multiple surgeries undertaken to repair a broken leg after suffering a fall in April 2022.

33. Vicki has also been undergoing dialysis treatment.

34. Vicki is fully competent, cognizant, and capable of managing her own affairs and has concluded based on her intimate understanding of Raymond's limitations and his own words

that he neither conceived nor actively chose to implement the takeover scheme of the family farm corporation, known as vOr, Inc.

A. Formation of vOr, Inc., a South Dakota Family Farm Corporation

35. In 2002, Raymond and Vicki worked with Watertown attorney Tom Linngren to form vOr, Inc., a South Dakota family farm corporation.

36. The primary asset of the corporation consists of parcels of farm land that were transferred to the corporation from a predecessor entity, O'Farrell Inc., which Raymond had formed and operated with his brothers.

37. Victoria was actively involved in the business of vOr, Inc. and served as bookkeeper for the corporation.

38. The Articles of Incorporation provide that the corporation shall have two (2) directors. Vicki and Raymond were appointed as the initial directors.

39. At all times relevant to this dispute, Vicki and Raymond were directors of vOr, Inc.

B. Creation of the Living Trust in January 2011

40. In 2011, Raymond and Vicki worked with Sioux Falls attorney Evan Anema to form the Raymond and Victoria O'Farrell Living Trust dated January 14, 2011.

41. In funding the Living Trust, Raymond and Vicki executed a document entitled "Assignment Separate from Certificate dated January 14, 2011," which, by its terms, effected an assignment by Raymond and Vicki individually to Raymond and Vicki as Trustees "all right, title, and interest to VOR Inc., a South Dakota corporation, standing in assignor's name on the books of such corporation."

42. At the time of the assignment, Raymond and Vicki each held 12,500 shares of vOr, Inc. that had been issued to each of them individually.

43. By assigning the shares to the Trust, Raymond and Vicki sought to avoid being deemed the record owners of their respective 50% interest at the time of their death, which would necessitate a probate action.

44. Section 1.03 of the Trust Agreement establishing the Living Trust is entitled Transferring Property to the Trust. Subsection 1.03(d), entitled "Separate Property," provides, in pertinent part:

Separate property transferred to the trust will retain its character as separate property if titled in the trust in conjunction with the designation "Separate Property of 'Trustor's Name'". The separate property of either of us, including the property's income and proceeds from the property's sale or exchange, will remain separate property. Each of us has the unrestricted right to remove all or any part of our separate property at any time.

If property titled in the separate name of one of us is transferred to the trust without being titled as separate property the person transferring the property will be considered to have made a gift to the other of one-half of the transferred property's value immediately before transferring it to the trust. Once transferred to the trust, each of us will own one-half of the property as tenants in common, and each half will be treated as separate property of each of us.

45. The 12,500 shares that Vicki and Raymond each held at the time the "Assignment Separate from Certificate" was executed were not titled in the Living Trust with the designation "Separate Property of [Trustor's Name]" and do not qualify as "separate property" that is subject of the "unrestricted right" to removal by the owner of such "separate property."

46. Raymond's 12,500 shares are not his separate property, and Vicki's 12,500 shares are not her separate property. Neither has any right to remove, assign, or transfer any of the shares from the Living Trust.

47. Under the terms of 1.03(d), Vicki was one-half owner as tenant in common of the 12,500 shares that Raymond separately owned and then contributed to the Trust via the “Assignment Separate from Certificate dated January 14, 2011.”

48. Raymond, in turn, was one-half owner as tenant in common of the 12,500 shares that Vicki separately owned and then contributed to the Trust via the “Assignment Separate from Certificate dated January 14, 2011.”

**C. Specific Distributions to O’Farrell Children under the Terms of the Trust
Raymond and Vicki Decided Should Be Made in 2011 and Re-Affirmed in August 2021**

49. The Trust Agreement includes specific provisions under which the land owned by vOr, Inc. would be distributed out to the O’Farrell children.

50. Paul R. O’Farrell – who stayed on the farm and worked with his father in farming – was originally to receive all of the stock in Skyline Cattle Company, a South Dakota corporation in which Raymond and Vicki owned 250 shares each. Vicki and Raymond decided to transfer all of their shares to Paul and did so in 2019.

51. Under the terms of the Trust, Paul is also to receive the following real property currently owned by vOr, Inc.:

The South Half of the Southeast Quarter (S1/2 SE1/4) and the South Half of the Southwest Quarter (S1/2 SW1/4) of Section Twenty-Two (22), Township One Hundred Twenty-One (121), Range Fifty (50); and the South Half of the Northwest Quarter (S1/2 NW1/4), the South Half of the Northeast Quarter (S1/2 NE1/2), the North Half of the Northeast Quarter (N1/2 NE1/4), the Southeast Quarter (SE1/4), except Lot One (1) Hopewell Subdivision of the Southeast Quarter (SE1/4), and the North Half of the Southwest Quarter (N1/2 SW1/4), of Section Twenty-Three (23), Township One Hundred Twenty-One (121), Range Fifty (50), Grant County, South Dakota

Lot 2A of Lots 2A and 2B, O’Farrell Subdivision, a Replat of Lot Two (2) of the Plat of Lots One (1) and Two (2), O’Farrell Subdivision, all located in the South Half of the Southeast Quarter (S1/2 SE1/4) of Section Fourteen (14), Township

One Hundred Twenty-One (121), Range Fifty (50), and all according to plats now on file and of record in the office of the Register of Deeds, Grant County, South Dakota

The South Half of the Southwest Quarter (S1/2 SW1/4) of Section Twenty-Three (23), Township One Hundred Twenty-One (121), Township Fifty (50), Grant County, South Dakota

52. Lance A. O'Farrell is to receive the following parcel of real property:

The Northwest Quarter (NW1/4) of Section Sixteen (16), Township One Hundred Twenty-One (121), Range Fifty (50), Grant County, South Dakota

53. Marcie A. Reyelts, Kelly A. O'Farrell and Rita M. O'Farrell are to each receive a one-third interest in the following parcel of real property:

The Southeast Quarter (SE1/4) of Section One (1), Township One Hundred Twenty-One (121), Range Fifty (50), less Lot One (1), Kane Subdivision, and less the West 100 Feet of the East 133 Feet of the South 100 Feet of the Southeast Quarter (SE1/4), located therein, according to plat now on file and of record in the office of the Register of Deeds, Grant County, South Dakota

54. In 2021, Raymond and Vicki amended Article Nine of the Trust to include the following qualifying statement regarding distributions:

The flush language of Article Nine shall be deleted and the following shall be inserted:

**Article Nine
Specific Distributions upon Death of Survivor**

As soon as practical after the death of the survivor of us, the Trustee shall make the specific distributions identified in this Article from our remaining trust property not distributed under prior Articles of this trust.

Trustor's recognize that the real property distributed below is currently owned by VOR; Inc. However, Trustor's anticipate that the corporation will be dissolved at or prior to the death of the Surviving Trustor with minimal income tax liability. In the event VOR, Inc. is not dissolved prior to the death of the surviving spouse, and our Trustee's determine that VOR, Inc. cannot be dissolved with minimal income tax impact, then the Trustees are instructed to

follow the overall intent of the real property distributions set forth below by distributing shares of VOR, Inc. in proportion to the value of the underlying land, and subject to the purchase option set forth below.

55. Before Vicki was hospitalized, she and Raymond were in complete agreement as to their estate plan and the distributions of their assets.

56. Vicki and Raymond were also in agreement that if one of them was incapacitated, and the other was unable or unwilling to act, then Paul and Lance should jointly serve as successor Trustee, as specially set out in §3.02

57. Kelly has repeatedly expressed frustration and resentment that his brothers Paul and Lance were to receive more from his parents than he would receive. On information and belief, Rita and Marcie were likewise upset about what their parents had decided to do with their assets.

58. Fueled by this resentment, Kelly began to take action to challenge and subvert the settled estate plan of his parents after he and his family moved in to live with his parents in 2021.

59. Among other things, Kelly persuaded Raymond to terminate the agency power granted to Vicki as his power-of-attorney and appointing Kelly as his power-of-attorney in Vicki's place.

60. After Vicki was hospitalized, Kelly took action to further isolate Raymond from her and his brothers and conceived of and implemented the below-described takeover scheme that has attempted to divest Vicki of all right, title, and interest in vOr, Inc. and impair or prevent the administration of the Living Trust on its terms and in accordance with Vicki and Raymond's clearly stated intentions.

D. Vicki Is Injured and Hospitalized, and Raymond (as Influenced and Acting at the Direction of Kelly) Takes Action to Compromise and Interfere with her Interest in and Control over vOr, Inc.

61. In late April 2022, Vicki fell and broke her left tibia and fibula.

62. Vicki underwent surgery at Avera Hospital in Sioux Falls.

63. When Vicki went to a follow up appointment on May 10, Vicki's treating physicians determined that the surgery had failed and that another surgery would be necessary.

64. While Vicki was still recovering from her second surgery, Raymond engaged in a series of transactions intended to dispossess Vicki of interest in vOr, Inc., to deprive of her right to participate in the governance and internal affairs of the corporation, and to permit the removal of Vicki and Paul as the duly-appointed directors of vOR, Inc. and appointment of Raymond and Kelly in their place.

65. Raymond purported to undo the joint assignment of the 25,000 shares into the Living Trust – a key pillar of his and Vicki's estate plan – by signing an "Assignment Separate from Certificate."

66. Acting as Trustee, Raymond purported to assign the shares to himself in his individual capacity. In other words, Raymond acted as both assignor and assignee and undertook

an action that was contrary to the intent of the Living Trust Agreement and the joint assignment of all 25,000 shares he and Vicki had made in January 2011.

67. Neither Raymond nor his attorney provided Vicki with any notice of his intent to undertake this assignment and dramatically change the estate plan that had been formulated in 2011 and re-affirmed as recently as August 21, 2021.

68. In a letter dated June 10, 2022, Raymond's attorney sent Victoria a letter addressed to her at home asking that she, as duly-appointed secretary of vOr, Inc., register 12,500 shares in Raymond's name.

69. Vicki was recovering from her surgery on June 10, 2022, and Raymond and her counsel knew, or should have known, that she would not receive the letter delivered to her at their home and would have no idea that Raymond – her 84-year old husband with limited ability to read and write – was taking action to divest her of all right, title, and interest in vOR, Inc. and authority as to how it would be managed.

70. Then, in the next step of the takeover, Raymond purported to vote all 25,000 shares – 12,500 shares as Trustee of the Living Trust and 12,500 shares in his individual capacity – in a document entitled “Action by Written Consent of All Shareholders.”

71. The “Action by Written Consent of All Shareholders” purports to remove Vicki and Paul as duly-appointed directors and appoint Raymond and Kelly as their replacements.

72. The “Action by Written Consent of All Shareholders” was signed by one shareholder, Raymond, who proceeded to sign wearing two separate hats: as ostensible owner of 12,500 shares via the unlawful assignment to himself, and as Trustee acting on behalf of the Trust, the owner of the other 12,500 shares.

73. By statute, “a director may be removed by the shareholders only at a meeting called for the purpose of removing that director and the meeting notice must state that the purpose, or one of the purposes, of the meeting is removal of the director.” SDCL 47-1A-808. No such notice was provided.

74. Indeed, the same date that Raymond unilaterally sought to remove Vicki and Paul as directors, Raymond and Kelly – each acting as an unlawfully appointed director – sought to create an even more radical change to the internal affairs and governance structure of vOr, Inc.

75. On June 14, 2022, Raymond and Kelly executed the “Action by Written Consent of All Directors,” which, on its face, changed the number of officers from two to four, removed Paul as duly-appointed President and Vicki as duly-appointed Secretary, and installed a new slate of officers: Raymond as President, Marcie (Vicki and Raymond’s daughter) as Vice President, Rita (Vicki and Raymond’s other daughter) as Secretary, and Kelly as Treasurer.

76. The “Action by Written Consent of All Shareholders” and “Action by Written Consent of All Directors” are both dated June 14, 2022, just one day after Vicki had been admitted to Palisades Nursing Home in Garretson, South Dakota.

77. On information and belief, Kelly, not Raymond, had formulated the plan to remove shares from the Trust to be assigned to Raymond individually and to remove his mother from the Board of Directors of vOr, Inc.

78. Based on the sequence of events and the rapidity of the coordinated attack on Vicki’s interest and role in the family farm corporation, Vicki suspects that Kelly was acting with others who would stand to benefit from an action that would disrupt the Living Trust and compromise the estate plan she and Raymond put into place and repeatedly affirmed, which the Trust embodies.

79. When Vicki learned from Paul what happened, she immediately concluded that Raymond was being manipulated to take these actions.

80. Those suspicions were later confirmed on a phone call with Raymond, several days after she had been transferred to Garretson.

81. Vicki directly asked Raymond if he knew what he was signing or understood what he had done, and he said he did not know what he was signing or understand what had been done.

E. Vicki's Access to the Corporate Bank Account and Her Ability to Retain Counsel Comes under Attack.

82. Approximately one week after Raymond took these actions he did not understand and thereby completely overhauled the structure of vOr, Inc. and upended the express estate planning intentions as embodied in the Living Trust, a new line of attack on Vicki's rights and interests as 50% shareholder, director, and officer of vOr, Inc., and as Trustee of the Trust.

83. On or about June 21, 2022, Raymond's counsel contacted Great Western Bank and demanded that Vicki be removed as an authorized user and denied access to the accounts and information relating thereto.

84. Vicki's counsel objected to this attempt to lock her out of the accounts via letter from the undersigned counsel dated June 21, 2022.

85. The following day, Vicki learned that vOr, Inc. checking account had been overdrawn by \$2,800.00.

86. This effort to deny Vicki access to the vOr, Inc. bank accounts appears to have been intended to prevent her from discovering that the account had been overdrawn and that corporate funds have been mismanaged and/or abused.

87. Great Western Bank refused to follow the directive to lock Vicki out of the corporate bank accounts and rejected the demand from Raymond's counsel to terminate Vicki's right as an authorized user and accountholder of vOR, Inc's bank accounts.

88. Undaunted, Raymond's counsel sought further to hamstring Vicki's ability to defend herself against the takeover and divestiture campaign.

89. On June 22, 2022, Raymond's counsel sent a letter to the undersigned counsel, in which Raymond claimed to have the authority, based on a power of attorney naming him as Vicki's agent, to terminate the attorney-client relationship that Vicki had formed with the undersigned counsel.

90. The letter staking out this position, dated June 22, 2022, included the power-of-attorney and a letter dated June 13, 2022, from a physician's assistant employed by Avera Hospital in Milbank, South Dakota.

91. The physician's assistant, Elizabeth Van Lith, had not recently treated Vicki and was not her treating physician on June 13, 2022.

92. The letter from Ms. Van Lith states:

93. Ms. Van Lith has subsequently submitted a sworn affidavit averring that she drafted the letter after being contacted by Rita O'Farrell on June 13, 2022.

94. Rita falsely represented to Ms. Van Lith that she was contacting Ms. Van Lith on Vicki's behalf and that Vicki needed a letter indicating that Vicki could not manage her financial affairs.

95. The letter from Ms. Van Lith was procured based on false pretenses and representations. On information and belief, Rita was acting in concert with or at the direction of

Kelly and Raymond and in furtherance of the conspiracy to divest Vicki of the ability to defend herself against the wrongful takeover and divestiture scheme.

96. It is unclear, at this point, how Raymond's counsel came to possess the letter from Ms. Van Lith.

97. The effort to bully Vicki and interfere with her ability to retain counsel is further evidence of the scorched-earth and cut-throat tactics that have been deployed to dispossess her of the ability to repel the attempted takeover of the family farm corporation and the concerted efforts to take advantage of her injury and hospitalization to upend the O'Farrell's estate plan.

98. Ms. Van Lith has executed a sworn affidavit attesting to the extremely suspicious circumstances that prompted her to draft and execute her June 13, 2022 letter, and has recounted any claim that she has any basis to suggest or conclude that Vicki is not able to make decisions affecting her financial affairs. *See Van Lith Affidavit.*

COUNT ONE: Declaratory and Equitable Relief regarding Internal Affairs and Governance of vOr, Inc. (Raymond O'Farrell and Kelly O'Farrell)

99. Plaintiff incorporates by reference each and every preceding paragraph as if restated in full herein.

100. Under SDCL §21-24-1, this Court has the power to declare rights or duties, and may grant further necessary or proper relief.

101. There exists an actual, justiciable controversy between the parties concerning the ownership of shares in vOr, Inc. and which parties are duly authorized to serve as directors and officers of vOr, Inc.

102. Under the terms of the "Assignment Separate from Certificate," Raymond and Vicki jointly assigned their respective shares in vOr, Inc. to the Trust.

103. Because the shares were not titled as “separate property,” Vicki has rights as a tenant-in-common in the 12,500 shares that had been issued to Raymond and assigned to the Trust under the Assignment Separate from Certificate in July 2011.

104. The “Assignment Separate from Certificate” dated June 10, 2022, was not approved by Vicki in her capacity as Trustee, nor assented to by Vicki as a tenant-in-common with ownership rights in the shares that were purportedly assigned.

105. Under the terms of the Trust, Raymond, acting alone, could not invoke his powers as Trustee to assign to himself 50% of vOr, Inc. shares that had been transferred to the Trust in 2011.

106. Moreover, the purported assignment constitutes a breach of Raymond’s fiduciary duty as Trustee by taking action contrary to the Trust instrument, in excess of the authority granted therein, and to the detriment of Vicki as beneficiary during her life.

107. Accordingly, the “Assignment Separate from Certificate” executed June 10, 2022, and all ancillary acts made to transfer shares out of the Trust and to Raymond in his individual capacity were ineffective and invalid.

108. Because the transfer of shares to Raymond was ineffective, the subsequent actions undertaken by Raymond, purporting to act both as individual shareholder and as Trustee voting the Trust’s shares, were likewise ineffective and invalid.

109. Thus, the entirety of the “Action by Written Consent of All Shareholders” is void and the purported removal of Victoria as a director is ineffective as a matter of law.

110. Any action taken by Raymond and Kelly as directors was unauthorized, illegal, and ineffective, including the “Action by Written Consent of All Directors” dated June 14, 2022,

which purported to amend the Bylaws in order to expand the number of officers from two to four and to name new officers.

111. Vicki is entitled to a declaratory judgment holding that the transfer of shares out of the Trust was ineffective and invalid; that the attempt to remove her as director of vOr, Inc. and duly-appointed officer thereof was ineffective, invalid, and rescinded; that any further action taken after her removal by Defendants and/or parties claiming to act as directors of vOr, Inc. is *ultra vires*, ineffective, and invalid.

COUNT TWO: Conversion (Defendants Raymond O'Farrell and Kelly O'Farrell)

112. Plaintiff incorporates by reference each and every preceding paragraph as if restated in full herein.

113. Raymond's attempted assignment of 50% shares to himself was undertaken in violation of Vicki's right, title, and interest to those shares as a tenant in common.

114. Raymond's action wrongfully exercised control or dominion over the 12,500 shares in a manner that directly repudiated Vicki's right in the shares and that was inconsistent with her rights.

115. On information and belief, Raymond's acts constituting unlawful conversion were done in active concert with and at the behest of Kelly O'Farrell.

116. Kelly O'Farrell has wrongfully exercised control or dominion of vOr, Inc. by purporting to act as director and by otherwise assisting, abetting, or directing Raymond to engage in the above-described wrongful conduct.

117. Vicki has suffered harm as a result of the conversion, including the expense she has incurred and will continue to incur in hiring and paying counsel to challenge the wrongful

conduct and to rescind the subsequent corporate actions that relied on and emerged out of the same wrongful acts of conversion.

118. Vicki is entitled to an award of damages in an amount to be proven at trial.

COUNT THREE: Removal of Raymond as Trustee on Grounds of Incapacity and Affirmative Misconduct.

119. Plaintiff incorporates by reference each and every preceding paragraph as if restated in full herein.

120. Section 3.02(b) of the Trust instrument provides that a Trustee who is a trustor/settlor of the Trust may be removed and states as follows:

If one of us is incapacitated, the non-incapacitated Trustor may remove any Trustee at any time, with or without cause. If a Trustee is removed, resigns, or cannot continue to serve for any reason, the non-incapacitated Trustor may serve as sole Trustee, appoint a Trustee to serve with the non-incapacitated Trustor, or appoint a Successor Trustee.

Id.

121. Alternatively, Vicki seeks Raymond's removal because he has engaged in conduct in violation of his fiduciary duty to the Trust and has taken action, and appears intent on taking additional action, that has dissipated the corpus of the trust, that has been detrimental to the interests of Vicki as beneficiary and that has impaired and interfered with the proper administration of the Trust.

122. Raymond has abused his position as Trustee to wrongfully convert, misappropriate, transfer, and assign to himself, 12,500 shares of vOr, Inc. – roughly one-half of the Trust corpus –without notice to or the consent of Vicki.

123. Raymond has likewise abused his position of Trustee by purporting to vote the remaining 12,500 shares held in Trust in the "Action by Written Consent of Shareholders dated

June 14, 2022,” which sought to remove Vicki – Trustor, co-Trustee, and beneficiary of the Trust – as director, again without providing her with notice or seeking her consent.

124. Raymond has also put assets of the Trust at risk by refusing to provide information to Great Western Bank and by failing to seek refinancing, which caused Great Western Bank to declare the matured loans in default and to expose the corporation to a foreclosure action that risks leading to the irrevocable loss of farm land.

125. Victoria is entitled to an Order stating and declaring that Raymond has been removed as Trustee and for appointment of a successor Trustee who will serve with Vicki and faithfully honor the terms and intent of the Trust Instrument.

COUNT FOUR: Tortious Interference with Business Relationships and Contractual Rights (Kelly O’Farrell)

126. Plaintiff incorporates by reference each and every preceding paragraph as if restated in full herein.

127. Vicki has contractual relationships with vOr, Inc., based on her status as Trustee of the Living Trust and her role as director and officer of the corporation.

128. Kelly O’Farrell has used improper means and acted for the improper purpose of wholly dispossessing, or interfering with, Vicki’s rights to participate in and exercise control over the governance, affairs, and assets of the vOr, Inc.

129. Kelly O’Farrell has participated in, directed, or otherwise unduly influenced the actions of his father to engage in the unlawful assignment of shares from the Living Trust, the unlawful removal of duly-appointed director and officers, and the unlawful attempt to deny Vicki her informational rights in and access to corporate finances.

130. None of Kelly's acts were within the proper scope of his appointment as a director or officer, because he was never lawfully appointed to such a role, and all of Kelly's acts were intentionally geared toward stripping Vicki of her lawful rights *vis-à-vis* vOr, Inc.

131. Kelly's acts that predate the removal of Vicki as director are also improper attempts to interfere with her role in and relationship with vOR, Inc., as an individual and as Trustee of the Raymond and Vicki O'Farrell Living Trust.

132. On information and belief, Kelly has subsequently attempted to use his claimed authority as a director and officer to engage in additional improper acts against Vicki for the improper purpose of depriving her of access to and control over the corporation and impairing her ability to defend herself against the coordinated act.

133. Kelly's wrongful acts have caused, and will continue to cause, Vicki harm, including the expense she has incurred by being forced to hire counsel to uncover, combat, and repel Kelly's misconduct and attempt to seize *de jure* and *de facto* control over vOR, Inc.

134. Kelly's misconduct has also caused Vicki emotional and mental distress, for which she is entitled to recover damages in an amount to be proven at trial.

135. Kelly's acts constitute wanton, willful, and malicious misconduct for which Vicki is entitled to recover punitive damages in an amount to be proven at trial.

136. Plaintiff incorporates by reference each and every preceding paragraph as if restated in full herein.

137. Plaintiff is filing Application for Temporary Restraining Order and supporting materials as of the time this action is being commenced.

138. Together with immediate relief of a temporary restraining order, Plaintiff seeks entry of a preliminary injunction to be in effect for the duration of the case and entry of a

permanent injunction thereafter, seeking relief that is consistent with that sought pursuant to the Application for Temporary Restraining Order.

WHEREFORE, Victoria respectfully requests relief as follows

(a) Entry of a declaratory judgment declaring that

(i) the attempted assignment of 12,500 shares of vOr, Inc. shares from Raymond O'Farrell in his capacity as Trustee to Raymond O'Farrell in his individual capacity is and was unlawful, invalid, and void and therefore rescinded;

(ii) the attempt to remove her as director of vOr, Inc. is and was unlawful, ineffective, and void and therefore rescinded;

(iii) the attempt to remove her as officer and modify the Bylaws to modify the number and identity of officers is and was unlawful, ineffective, and void and therefore rescinded;

(iii) that any further action taken by the reconstituted Board of Directors is *ultra vires* and shall be in all respects invalidated and rescinded;

(b) An Order removing Raymond as Trustee for lack of capacity and for breach of his fiduciary duty and appointing a successor Trustee in accordance with the terms of the Trust Agreement;

(c) An Order and Judgment holding that Raymond and Kelly O'Farrell have committed conversion and are jointly and severally liable for the damages caused thereby;

- (d) an Order and Judgment holding that Kelly O'Farrell has tortiously interfered with Victoria O'Farrell's relationship with, role in, and control of vOR, Inc., and is liable for the compensatory damages and punitive damages caused thereby;
- (e) entry of preliminary and permanent injunctive relief, as necessary; and
- (f) an Order awarding such further equitable relief as is justified by the evidence at trial or otherwise deemed necessary and appropriate by the Court.

Dated: June 27th, 2022

CADWELL SANFORD DEIBERT
& GARRY LLP

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Attorneys for Plaintiff

APP.59

Exhibit 2.

APP.60

STATE OF SOUTH DAKOTA)
 : SS
COUNTY OF GRANT)

IN CIRCUIT COURT

THIRD JUDICIAL CIRCUIT

VICTORIA O'FARRELL, in her individual)
capacity and as Trustee of the Raymond and)
Victoria O'Farrell Living Trust dated January)
14, 2011, restated March 29, 2017 and)
amended August 26, 2021,)

25CIV22-000038

Plaintiff,)

PLAINTIFF'S BRIEF IN
SUPPORT OF MOTION FOR
TEMPORARY RESTRAINING
ORDER UNDER SDCL 15-6-65

v.)

RAYMOND O'FARRELL and KELLY)
O'FARRELL,)

Defendants.)

INTRODUCTION

This is an action that seeks to halt a wrongful scheme to take over a family corporation, in violation of the rights of Victoria O'Farrell, the corporation's 50% owner, director, and officer, and to hold accountable those who were responsible for conceiving and implementing the unlawful scheme to dispossess Victoria and prevent her from defending herself.

Plaintiff Victoria O'Farrell is the matriarch of the O'Farrell family. She also is a Trustee of the Raymond and Victoria O'Farrell Living Trust, along with her husband, Raymond. Shortly after Victoria was hospitalized and underwent two major surgeries, Raymond purported to use his status as Trustee to assign himself 50% of shares of vOr, Inc. (the family farm corporation), without Victoria's knowledge or consent. This assignment was unlawful and invalid on its own terms because Victoria and Raymond had jointly contributed their individual shares of vOr, Inc. to the Living Trust. The Trust Instrument provides that each has the rights of a tenant-in-common in the shares of the other, so that neither could remove or assign shares without the

other's approval and consent. Thus, the attempt for Raymond to use his Trustee role to assign to himself 50% of the shares is wholly ineffective.

But the attempt to transfer shares was just the first step in the scheme. Raymond, acting with or at the behest of his son, Kelly, attempted to remove Victoria as a director and officer of the corporation, deny her access to the corporation's financial records, and even invoke a power-of-attorney executed in 2011 to claim a right to terminate Victoria's relationship with the law firm she hired to protect her. Shortly after these escalating assaults on Vicki's legal rights, she learned that Rita O'Farrell, her daughter, lied to a medical provider in order to obtain a letter from the former provider suggesting that Victoria lacked the ability to handle her own financial affairs. The medical provider had not treated Victoria recently and had no basis to opine about her fitness. The medical provider has since fully recanted the statements in her letter in a sworn affidavit, submitted herewith. *See Affidavit of Elizabeth Van Lith*. Her sworn testimony as to how she was contacted and how she came to believe the letter would be Victoria makes clear that the information Rita provided was provided under false pretenses and with an intent to prevent Victoria from having access to her own financial resources to defend herself.

In short, Victoria has come under coordinated attack at a time when she is very vulnerable. Action has been taken to attempt to dispossess of her rights as Trustee and as former 50% owner of the family farm corporation. The estate plan she put into place with her husband in 2011 and affirmed in 2021 is at risk of being fundamentally altered and thereby cancelled. The threat of irreparable harm she faces is concrete, immediate, and real. She needs, and is entitled to, a Temporary Restraining Order that restores the status quo that existed before Defendants' wrongful acts and that enjoins them from engaging in additional misconduct.

FACTUAL BACKGROUND

The facts relevant to the instant motion are set forth in Plaintiffs' Complaint, the Application for a Temporary Restraining Order ("Application") and in the supporting Affidavits and their attachments, all of which are being filed contemporaneously with this Brief. Victoria O'Farrell ("Vicki") hereby incorporates all facts set forth in the Application, the Affidavits, and the exhibits thereto and provides the following summary:

Vicki and Raymond are married and have five children: their sons Paul, Lance, and Kelly and their daughters, Rita and Marcie. In 2002, they formed a corporation known as vOr, Inc., and each was issued 12,500 shares. In 2011, Vicki and Raymond created the Raymond and Victoria O'Farrell Living Trust dated January 14, 2011, restated March 29, 2017 and amended August 26, 2021 (the "Living Trust"). Hagen Aff., Ex. A.

In creating the Living Trust, Vicki and Raymond also contributed the 12,500 shares each had been issued. They did so pursuant to the "Assignment Separate from Certificate dated January 14, 2011," which, by its terms, effected an assignment by Raymond and Vicki individually to Raymond and Vicki as Trustees "all right, title, and interest to VOR Inc., a South Dakota corporation, standing in assignor's name on the books of such corporation." See Compl., ¶41; Hagen Aff., Ex. B. The plain language of this provision, coupled with the fact that Raymond and Vicki are collectively referred to as "Assignor" in the instrument, demonstrate that the purpose and intent was to make assignment to the Living Trust on a joint, mutually reinforcing basis.

Section 1.03 of the Trust Agreement establishing the Living Trust is entitled Transferring Property to the Trust. Subsection 1.03(d), entitled "Separate Property," provides, in pertinent part:

Separate property transferred to the trust will retain its character as separate property if titled in the trust in conjunction with the designation "Separate Property of 'Trustor's Name'". The separate property of either of us, including the property's income and proceeds from the property's sale or exchange, will remain separate property. Each of us has the unrestricted right to remove all or any part of our separate property at any time.

If property titled in the separate name of one of us is transferred to the trust without being titled as separate property the person transferring the property will be considered to have made a gift to the other of one-half of the transferred property's value immediately before transferring it to the trust. Once transferred to the trust, each of us will own one-half of the property as tenants in common, and each half will be treated as separate property of each of us.

The 12,500 shares that Vicki and Raymond each transferred to the Living Trust pursuant to the "Assignment Separate from Certificate dated January 14, 2011," were not titled in the Living Trust with the designation "Separate Property of [Trustor's Name]." Consequently, the 25,000 shares – which constitute the entire issued stock of vOr, Inc. – do not qualify as "separate property" that is subject of the "unrestricted right" to removal by the owner of such "separate property." Under the terms of ¶ 1.03(d) of the Trust Instrument, Vicki was one-half owner as tenant in common of the 12,500 shares that Raymond separately owned and then contributed to the Trust via the "Assignment Separate from Certificate dated January 14, 2011."

In other words, Raymond's 12,500 shares are not his separate property, and Vicki's 12,500 shares are not her separate property. The Trust held 100% of the shares, and neither Vicki nor Raymond has any right to remove, assign, or transfer any of the shares from the Living Trust. The scheme to dispossess Vicki of her rights as Trustor and Trustee ignores this critical legal concept, and – as will be shown – nearly all of the actions in the attempted corporate takeover are invalid and ineffective as a result.

The actions that need to be unwound were taken without Vicki's knowledge or consent and occurred at a time when she was attempting to recover from a life-threatening medical condition.

Vicki took a bad fall in April 2022 and broke her tibia and fibula. Victoria O'Farrell Aff., at ¶ 26. The initial surgery was unsuccessful in fusing the bones to the steel plate inserted in her leg, and she had a second surgery on or about May 11, 2022. *Id.* Vicki subsequently spent time in the Intensive Care Unit. *Id.* at ¶ 27. She is continuing her recovery at the Palisades Nursing Home in Garretson, South Dakota, to which was admitted on June 13, 2022. *Id.* at ¶ 29. She is continuing to receive dialysis and to attend follow-up appointments to monitor the recovery of her leg. *Id.*

At the time Vicki was admitted to the nursing home in Garretson, her husband Raymond – acting with or at the direction of her son, Kelly – had already attempted to take unilateral action that would strip her of her rights in vOr, Inc. and that was in violation of his fiduciary duties as Trustee. Raymond executed a document entitled “Assignment Separate from Certificate dated June 10, 2022,” by which he sought to use his powers as Trustee to transfer 12,500 shares to himself in his individual capacity. This Assignment assumes that Raymond retained authority to unwind the contribution of the 12,500 shares he had made back in 2011, which is contrary to the Trust Instrument and the purpose and intent of the contribution of shares.

After the purported assignment of shares, Raymond once again abused his power of Trustee in the next step of the corporate takeover and attempt to dispossess Vicki of her legal rights. Raymond purported to vote all 25,000 shares – 12,500 shares as Trustee of the Living Trust and 12,500 shares in his individual capacity – in a document entitled “Action by Written Consent of All Shareholders.”

The “Action by Written Consent of All Shareholders” dated June 14, 2022, purports to remove Vicki and her son Paul as duly-appointed directors and appoint Raymond and Kelly as their replacements. *See* Hagen Affidavit, Ex. E. The “Action by Written Consent of All Shareholders” was signed by one shareholder, Raymond, who proceeded to sign wearing two

separate hats: as ostensible owner of 12,500 shares via the unlawful assignment to himself, and as Trustee acting on behalf of the Trust, the owner of the other 12,500 shares.

By statute, “a director may be removed by the shareholders only at a meeting called for the purpose of removing that director and the meeting notice must state that the purpose, or one of the purposes, of the meeting is removal of the director.” SDCL § 47-1A-808. No such notice was provided.

On June 14, 2022 – the very same day as Vicki was purportedly removed as director and a day after she was admitted to the nursing home in Garretson – Raymond and Kelly sought to further consolidate control over vOr, Inc. by executing the “Action by Written Consent of All Directors.” See Hagen Affidavit, Ex. F. This instrument purportedly changed the number of officers from two to four, removed Paul as duly-appointed President and Vicki as duly-appointed Secretary, and installed a new slate of officers: Raymond as President, Marcie (Vicki and Raymond’s daughter) as Vice President, Rita (Vicki and Raymond’s other daughter) as Secretary, and Kelly as Treasurer. *Id.*

When Vicki discovered what had happened, she tried to speak with her husband, Raymond. In her absence, Kelly had taken steps to isolate Raymond from other family members. Victoria O’Farrell Aff., ¶ 25; Lance O’Farrell Aff., ¶ 8. When she was finally able to speak with Raymond, she asked about the corporate documents he had signed and tried to figure out what he was trying to accomplish. Victoria O’Farrell Aff., ¶ 22. Based on that conversation, she concluded that Raymond – the ostensible author of the scheme – was not able to explain the significance of the documents that bore his name and did not understand what he had done. Victoria O’Farrell Aff., ¶¶ 22 & 33.

Raymond is 84-years old, with a past history of extensive alcohol abuse. Victoria O'Farrell Aff., ¶23. He has suffered three strokes, and even before the strokes, his ability to read and write was very limited. *Id.* Vicki and her son, Lance, do not believe that Raymond formulated the scheme to dispossess Vicki of her rights, nor do they believe that he would have taken any step down this illegal path, but for the undue influence of Kelly. *Id.* at ¶ 22; Lance O'Farrell Aff. ¶¶ 9-13.

Victoria's concern as to her son Kelly's influence on Raymond originated earlier this year. In February 2022, two notes that vOr, Inc., had executed in favor of its lender, Great Western Bank, had come due. *See* Victoria O'Farrell Affidavit, at ¶ 10. The corporation was up to date on all of its payments and was well-positioned to roll over the Notes through refinancing. *Id.* at ¶¶ 10-11. Yet Raymond decided not to provide Great Western Bank with the information it needed in order to obtain new financing. Vicki believed that Raymond would never have made such a rash decision – which put the family farm land at risk – but for Kelly's influence. *Id.* at ¶¶ 10, 12. Great Western Bank has claimed that vOr, Inc. is in default and threatened foreclosure actions.

Kelly has also demanded that his sibling pay his wife, Donna, \$1,200 per month for assistance provided to Raymond and Vicki, in whose home Kelly and his family live rent-free. Lance O'Farrell Aff., ¶16; Victoria O'Farrell Aff., ¶ 14. Kelly threatened that if his demands were not met, he would take Raymond away. Lance O'Farrell Aff., ¶16. Kelly also has access to Raymond's share of the proceeds from a recent sale of a sale barn in which Vicki and Raymond had partial ownership interest. Lance O'Farrell Aff., ¶¶ 6-7.

Kelly has also expressed resentment at the estate planning decisions that Raymond and Vicki made concerning the family farm land owned by vOr, Inc. Victoria O'Farrell Aff., ¶ 18; Lance O'Farrell Aff., ¶¶3-4. The action to assign shares out of the Living Trust and to Raymond

individually and unlawful attempt to appoint new directors and officers appear to be the product of Kelly's control and manipulation over Raymond to alter or disrupt the Estate Plan that Vicki and Raymond put into place more than a decade ago. See *Victoria O'Farrell Aff.*, ¶¶ 20, 25; *Lance O'Farrell Aff.*, ¶¶ 3-5, 14.

Vicki and Raymond re-affirmed the estate plan embodied in the Living Trust as recently as August 2021, and Raymond has never previously expressed to Vicki any desire to change the estate plan or specific distributions it called for. *Victoria O'Farrell Aff.*, at ¶21. Raymond's actions are contrary to specific provisions of the Living Trust and also completely contrary to his and Vicki's long-standing unanimity as to how their joint assets should be distributed on their deaths.

The series of actions taken in June 2022 have put Vicki under an enormous amount of stress, which is exacerbated by the ongoing efforts to block her ability to make her own financial decisions and the attempt to wrongfully interfere with her access to counsel. These actions not only target Vicki's rights and interests, but also attack the Living Trust and the purpose for which it was put into place and imperil the ability of vOr, Inc. to respond to the threat of litigation posed by Great Western Bank.

LEGAL STANDARD

SDCL § 15-6-65(b) permits the issuance of a temporary restraining order where the "specific facts shown by affidavit or by the verified complaint [demonstrate] immediate and irreparable injury, loss or damage will result to the applicant before the adverse party or his attorney can be heard in opposition." SDCL § 15-6-65(b). No other showing is necessary to obtain a temporary restraining order. See *Hoffman v. Bob Law, Inc.*, No. 66CIV11446, 2011 WL

13193410, at *1 (S.D. Cir. July 19, 2011) (granting *ex parte* application for temporary restraining order based solely on showing of threat of irreparable harm).

“The recognized purpose of a temporary restraining order is to suspend proceedings until the court can determine whether an injunction should issue. In the same vein, a temporary restraining order is only an ancillary remedy for the purpose of preserving the status quo or restoring a status wrongfully disturbed pending the final determination of the action.” *Long Prairie Packing Co. v. United Nat. Bank, Sioux Falls*, 338 N.W.2d 838, 840-41 (S.D. 1983).

A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if:

- (1) It clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition;
- and
- (2) The applicant’s attorney certifies to the court in writing the efforts, if any, which have been made to give the notice or the reasons supporting his claim that notice should not be required.

SDCL § 15-6-65(b).

Although notice is not required under these urgent circumstances, this Application is being filed with notice to counsel for Raymond O’Farrell. Plaintiff’s counsel has confirmed that Raymond’s counsel is only representing Raymond, and it is presently unknown whether Defendant Kelly O’Farrell has retained counsel.

ARGUMENT

A. Victoria has no adequate remedy at law and faces irreparable harm without entry of a temporary restraining order.

Victoria has suffered and will continue to suffer irreparable harm, for which there is no adequate remedy at law, if a restraining order is not immediately entered. Harm is irreparable where “it cannot be readily, adequately, and completely compensated with money.” *Strong*, 855 N.W.2d at 140 (citations omitted).

Here, the nature of the harm comes from the coordinated misconduct of Raymond, Kelly, and others who appear to be acting in concert with them. In less than a week, Vicki has found that shares that were dedicated to the Living Trust have been misappropriated by Raymond through the abuse of his Trustee power. Raymond is not and has never been a majority shareholder of vOr, Inc. Despite that, he has attempted to use his status as Trustee to establish complete control over vOr, Inc.

Raymond’s actions were taken without Vicki’s knowledge or consent. By virtue of the joint assignment of shares to the Living Trust in 2011, Vicki has rights of a tenant-in-common in the shares that Raymond has purportedly assigned to himself out of the Living Trust. *See* ¶ 3.01(d) of the Living Trust Instrument. That action violates her rights and gives rise to an action for conversion. *See, e.g., Wood v. Steinau*, 68 N.W. 160 (S.D. 1896) (holding that “a tenant in common may maintain an action against a co-tenant to recover the value of a joint interest in personal property, to the actual possession of which he is entitled, at a time when his rights of ownership and possession are denied and ignored in a manner which deprives him of the possibility of any enjoyment thereof or benefit therefrom”). But, here, the legal remedy afforded by a conversion action is patently inadequate.

The threat of irreparable harm exists because of (1) the ongoing harm caused by the wrongful assignment of shares out of the Living Trust, (2) the exercise of control of vOr, Inc. by individuals who never owned or had an interest in it, and (3) subsequent actions the that the wrongly-appointed directors and officers have taken without notice to Vicki or may take in the future now that she has attempted to protect herself. Add to that the threatened foreclosure and the irrevocable loss of family farm land – an outcome that Raymond and Vicki have always feared and taken steps to assure would never happen.

If the unlawful assignment were allowed to stand, Vicki would effectively be frozen out from the family corporation of which she owned 50% and would be denied any role in the corporation that comprises the primary asset of the Trust that she jointly created. It is hard to conceive of a better example of “irreparable harm.”

The circumstances of the takeover further support a finding of irreparable harm. The June 10 and June 14 corporation actions occurred while Vicki lay in bed in a nursing home more than two hours from her home. Furthermore, by removing Vicki as director and appointing her children as officers – none of whom own shares in vOr, inc., and all of whom have expressed dissatisfaction with the Estate Plan – Vicki could be subject to further dispossession or even retribution by her children.

The new slate of officers – Kelly, Raymond, Rita, and Marcie – have all apparently aligned against Vicki. Indeed, Rita O’Farrell obtained a note from a health provider by making false representations, which note was then used by Raymond’s lawyer to try to terminate an attorney-client relationship Vicki had formed and prevent Vicki from managing her own financial affairs. Elizabeth Van Lith, the Avera physician assistant who drafted the note, has

recanted any claim that Vicki lacks the ability to manage her own financial affairs and explained how she came to write such a letter in the first place. See Van Lith Affidavit.

The evidence of coordinated action against Vicki speaks volumes about the underlying intent of the scheme. Within days after Raymond's illegal assignment of shares, Rita falsely represented that she was acting on Vicki's behalf to induce a medical provider to write a letter suggesting Vicki could not manage her own financial affairs. That letter, in turn, was deployed by Raymond's attorney to support Raymond's wrongful invocation of his power of attorney to prevent Vicki from hiring counsel. These scorched-earth tactics have already been deployed to attack Vicki's rights and interests, and Vicki is justified in believing that more hostility is sure to come, absent entry of a restraining order.

All of this upheaval occurs at a particularly precarious time for vOr, Inc. Its primary lender has declared it in default, not because it is in arrears on any of its debt service payments, but because two loans came due and Raymond acting at Kelly's direction – refused to provide the lender with information necessary to negotiate a new loan or alternative refinancing. Great Western Bank has signaled an intent to initiate foreclosure, a costly procedure that normally can be avoided through negotiation of a workout or forbearance agreement. Presently, vOr Inc is purportedly being run by a new slate of directors and officers who did not build the business or previously have any say in how it is run. Further, soon after they took over, the vOr, Inc. bank account was overdrawn. That is hardly an ideal situation to negotiate a workout with a creditor or seek forbearance on a foreclosure.

The case for returning to the status quo that existed as of June 1, 2022, is even stronger because of compelling evidence that none of these actions reflect the actual wishes of Raymond. Indeed, based on Vicki's conversation with him, he does not understand the gravity of what he

has done. Raymond is 84-years old, in poor health, and has long suffered from alcoholism and the effects of three strokes. His education is limited, as is his ability to read and write. Both Vicki and her son Lance have outlined their concerns that Raymond could not comprehend the nature or significance of his actions and that Kelly, not Raymond, is the impetus behind the unlawful scheme to seize control of vOr, Inc

Vicki is fully cognizant of what is in her own best interests. She is adamantly opposed to having three of her children seize control over an asset they never owned, never contributed to, and never had any say over. She believes they have done this by preying on Raymond's fragility and susceptibility to their undue influence. This is all the more heartbreaking because the scheme to attack Vickie's interest was conceived and implemented behind her back, at a time when she was trying to recover from multiple surgeries. If ever there was a situation where judicial intervention was called for, this is it.

Of course, the harm is not merely personal to Vicki. The scheme not only attempts to deny Vicki legal rights of access and control to which she is entitled as Trustor and Trustee, but it also seeks to upend the long-term estate planning goals that she and Raymond sought to accomplish in creating the Living Trust. Raymond has used his powers as Trustee to take assets out of the Trust and register them in his own name. This action dissipates the corpus of the Trust and, if left intact, could yield catastrophic tax consequences. More pointedly, as recently as August 2021, Raymond and Vicki both re-affirmed the Living Trust and the estate plan it embodies. It was not until Vicki was hospitalized, and Raymond fell under the exclusive influence of Kelly, that these actions to upend the O'Farrells' estate plan and dissipate Living Trust assets began.

As a fiduciary, Vicki is obligated to intervene and attempt to stop conduct that would dissipate the assets of the Trust. The recent report that vOr, Inc. checking account has been overdrawn which came to light the day after Raymond's lawyer tried to remove Vicki's access to the account further demonstrates why a temporary restraining order is warranted and appropriate.

B. Entry of a temporary restraining order will not prejudice Raymond or the Trust and will have no adverse effect on vOr, Inc.

Granting the motion for TRO will not prejudice Raymond or have any adverse effect on vOr, Inc. First, the TRO merely temporarily returns the internal affairs and governance of vOr, Inc. to the status quo that existed before the invalid assignment of shares from the Trust to Raymond that Raymond unilaterally and unlawfully executed. Likewise, the status quo will put the duly-appointed directors and officers back into their rightful positions before the unlawful attempt to kick Vicki out and restructure the corporation's internal affairs.

Furthermore, the requested relief completely aligns with the purpose of a temporary restraining order, i.e., "preserving the status quo or restoring a status wrongfully disturbed pending the final determination of the action." *United Nat. Bank, Sioux Falls*, 338 N.W.2d at 840-41 (S.D. 1983). If the Temporary Restraining Order is entered, Vicki will proceed to develop additional evidence and support to make a showing of entitlement to extend the temporary restraining order beyond the initial period or to obtain preliminary injunctive relief.

Finally, given the nature of the relief requested, the short time during which the relief would be in place, and the underlying purpose to restore vRo, Inc. to its prior status, the Court should enter the relief without requiring posting of an undertaking or bond.

CONCLUSION

A Temporary Restraining Order is an extraordinary remedy that is called for and justified in view of this extraordinary factual situation. The wrongful scheme at the heart of this case involves an invalid attempt to unilaterally dispossess Vicki of her rights as an individual and Trustee of the Living Trust. That invalid attempt includes an assignment of a Trustee to himself that is unauthorized by and contrary to the very Trust Instrument from which any authority as Trustee flows. Compelling evidence also demonstrates that the purported author of these invalid acts was not taking action of his own accord. Vicki has shown that the wrongful scheme to take control of vOr, Inc. has caused, and will continue to cause, harm to her personal rights and interests, to the Living Trust to which she owes fiduciary obligations, and to vOr, Inc. itself. This Court can and should grant the requested relief.

Dated: June 28, 2022

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& GARRY LLP

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true and correct copy of the foregoing was served via Odyssey on those listed below on June 28, 2022:

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Exhibit 3.

APP.77

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF GRANT)

IN CIRCUIT COURT
THIRD JUDICIAL CIRCUIT

VICTORIA O'FARRELL, in her)
individual capacity and as Trustee of the)
Raymond and Victoria O'Farrell Living)
Trust dated January 14, 2011, restated)
March 29, 2017 and amended August 26,)
2021,)

25CIV22- 000038

Plaintiff,)

v.)

RAYMOND O'FARRELL, in his)
individual capacity and as Trustee of the)
Raymond and Victoria O'Farrell Living)
Trust dated January 14, 2011, restated)
March 29, 2017 and amended August 26,)
2021, and KELLY O'FARRELL,)

AFFIDAVIT OF PLAINTIFF
VICTORIA O'FARRELL
OFFERED IN SUPPORT OF
PLAINTIFF'S APPLICATION
FOR TEMPORARY
RESTRAINING ORDER

Defendants.

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF MINNEHAHA)

Victoria O'Farrell, being first duly sworn on oath, deposes and states as follows:

1. The statements contained herein are based on my personal knowledge, unless otherwise qualified.

2. My husband, Raymond O'Farrell, and I have five children—our sons Paul, Lance, and Kelly and our daughters Rita and Marcie.

3. Raymond and I formed a family farming corporation in September 2002 known as vOr, Inc. See attached Exhibit A (Articles of Incorporation).

4. The principal asset of vOr, Inc. consists of 5 parcels of land that were transferred to vOr, Inc. from O'Farrell's, Inc., a predecessor corporation of which Raymond was a shareholder with his brothers. See attached Exhibit B (Quit Claim Deed on January 14, 2003).

5. During this time period, my son Paul continued to farm the land, and I served as bookkeeper for the corporation.

6. In consideration for farming the land, Paul has typically made loan payments on behalf of vOr, Inc., paid taxes, and/or other forms of consideration.

7. Raymond and I were not attempting to maximize the amount of money we might earn from Paul to rent the corporate land, but we also expected and received the type and amount of consideration that we thought to be fair and reasonable.

8. I have reviewed correspondence from Raymond's attorney dated June 22, 2022, in which she suggests that Paul is trying to influence me and that Raymond or I need to be protected from him. This is nonsense, and many of the statements made in the letter about Paul's relationship with vOr, Inc and with Raymond and I, individually, are false.

9. Paul has paid what was expected of him, and until recently, there was never any issue with any of our lenders or any concern that assets of vOr, Inc. would be at risk.

10. Our lender, Great Western Bank, has called loans due and threatened a foreclosure action because Raymond – under the negative influence of my son Kelly – decided he would not provide Great Western Bank with financial information that the bank required in order for vOr, Inc. to be eligible for refinancing and to avoid being declared in default.

11. vOr, Inc. was not in arrears on any of its own debt service or loan payments, and none of the other loans for which vOr, Inc. assets had been pledged as security were in arrears on any debt service or loan payments.

12. Unfortunately, Kelly's influence on my husband has created the problem with Great Western Bank and also has made it necessary for me to file this lawsuit and come to the Court seeking relief.

13. Kelly, his wife Donna, and their two teenage sons moved into our house and provided some assistance to me and to Raymond. I am grateful for that, particularly to Donna for whom I have a great deal of affection.

14. We did not charge Kelly any rent to live at our place, nor would we have thought to do so.

15. But my concerns began when it became clear that Kelly was trying to influence how Raymond thought about vOr, Inc.'s relationship with Paul and about what the corporation should do in regard to the loans coming due. Since coming to live with us, Kelly seems to have attempted to influence Raymond more and more, and I believe that was part of an effort to undo or disrupt estate planning decisions that my husband and I had already made about what would be done with the family land.

16. In January 14, 2011, my husband and I created the Raymond and Victoria O'Farrell Living Trust dated January 14, 2011, which was subsequently restated March 29, 2017 and amended August 26, 2021 (collectively, "the Trust Instrument").

17. Raymond and I put a lot of thought into our estate plan, and the specific distributions that are called for in the Trust Instrument are the result of a lot of reflection and discussion between us about what we believe and how we want our estate to be distributed.

18. After Raymond and I provided notice of the amendment to the Trust in August 2021, it is my understanding that Kelly and Rita were resentful that more assets were to be distributed to Lance and Paul than to the other children.

19. That decision was intentional, not because of any favoritism to any particular child, but because of our views about the family land and our desire that it primarily be distributed to our sons who had remained in the area and assisted us with the farm. More importantly, that decision was ours to make, and not anyone else's.

20. I feel that the actions taken by Raymond's counsel in the last few weeks reflect a desire to change or disrupt our estate plan, and I do not believe that is Raymond's intention. nor do I believe that he is able to do what he claims to have done.

21. Until June 2022, Raymond had never expressed to me any inclination to change the estate plan or to make any alteration to the Trust. The recent actions that he has taken relating to the Trust and the changes to vOr, Inc's directors and officers were not his idea, and I do not believe that he even understands what he purports to have done. I believe this to be the case because I spoke to Raymond about the corporate actions taken on June 10, 2022, and June 14, 2022, after I learned about what had been done.

22. I spoke to Raymond late in the week of June 17, 2022, and, based on that conversation, I do not believe he understands the documents he signed or he knew what he had purportedly done.

23. That does not surprise me, but it is extremely alarming. I am not surprised because Raymond is 84 years old, has had health problems (as have I, of course), and has a history of alcohol abuse. There are often times when he is not fully aware of what is going on, and sometimes he acts as though the date is 1972, not 2022. Also, my husband was never a

strong reader or writer and had a limited education. I do not say that lightly, nor as a criticism of my husband.

24. For these reasons, I believe my husband is very vulnerable to the influence of others, and I am alarmed that he appears not to understand what he was signing. I also believe that none of this would have happened if I had not fallen and broken my leg, requiring multiple surgeries and an extended stay away from home.

25. In my absence, Kelly is keeping Raymond isolated from other family members, and I believe he has manipulated Raymond and induced him to take these steps relating to the Living Trust and the corporation.

26. In late April 2022, I fell and fractured my left tibia and fibula. The first surgery did not fuse the plate inserted into my leg with the bones, and I had a second surgery around May 11, 2022.

27. There were significant complications from the second surgery, and I ended up spending almost a week in the Intensive Care Unit. I feel lucky to have come through, and there is a world of difference between how I felt then and how I feel today.

28. I am still being treated for the second surgery, and I also need to be in a location where I can receive dialysis.

29. On June 13, 2022, I was admitted to the Palisades Nursing Home in Garretson, South Dakota, and I am receiving dialysis and also coming into Sioux Falls for follow up appointments relating to my leg.

30. When I was admitted on June 13, I was not aware that my husband had signed a document claiming to take shares out of Trust and assign them to himself.

31. When we created the Living Trust, I understood that we were jointly assigning the shares to the Trust and they would remain with the Trust unless we jointly decided to revoke the Trust. This is what I understood the purpose and effect of the "Assignment Separate from Certificate" dated January 14, 2011 at the time we both signed that instrument.

32. I have reviewed the "Assignment Separate from Certificate" my husband executed on June 10, 2022. I do not believe that either one of us, acting alone, could transfer shares out of the Trust and back into our own name because the shares, once they were contributed, were not "separate property."

33. More importantly, based on my long relationship with my husband and our conversation, I do not believe he knew what he was doing nor do I believe that he intended to do what he purports to have done.

34. When I became aware that actions were being taken to take the shares out of trust and to remove me as director and officer, I was heartsick. The more I learn about what has happened, the worse I feel about the whole situation.

35. The more I learned, the more I realized that I needed to hire a lawyer. I will address the circumstances surrounding my decision to retain counsel because Raymond's lawyer has attempted to impair my right to hire counsel of my choosing; has falsely suggested that my son Paul retained my lawyer or was involved in the discussions that led to me to make my decision; and has claimed that Raymond, acting under a power-of-attorney in which I appointed him as my agent, can terminate the attorney-client relationship that I formed with my present counsel.

36. On June 20, 2022, I met with my current lawyer at the nursing home in Garretson. After a lengthy meeting where no one else was present, I executed a written retainer agreement.

I made the decision to hire my lawyer to protect myself, and subsequent developments have made it clear why that is necessary.

37. The day after I retained counsel, we learned that Raymond's counsel had contacted Great Western Bank and demanded that I be removed as an authorized user of bank accounts held there by vOr, Inc. Acting on my behalf, my counsel disputed the basis for the attempt and Great Western Bank declined to take any action.

38. The following day, on June 22, 2022, Raymond's counsel wrote a letter to my lawyer claiming to terminate our attorney-client relationship. That is the same letter in which she made false allegations about Paul.

39. No one contacted me to ask me about my decision to hire a lawyer, and the suggestion that I did so because I was being unduly influenced by Paul is absolutely false. I am well aware of what has been going on, and I am also well aware that if I do not have someone to help me, my rights and interest in vOr, Inc., could be changed or worse, and the estate plan that my husband and I have had in place for more than a decade could be disrupted or blocked.

40. Raymond's counsel claimed authority to terminate my attorney-client relationship based on powers I granted to Raymond under a power-of-attorney that I executed back in January 2011, at the same time that we formed the Living Trust.

41. I suspect that Raymond had no idea that this power-of-attorney was being invoked for this purpose. Nonetheless, I have revoked Raymond's authority as attorney-in-fact and nominated by son, Lance, to serve as my attorney-in-fact.

42. I was very angered by this attempted interference, but I was even more distraught to see that Raymond's lawyer included a very short letter from a physician's assistant named Elizabeth Van Lith who claimed to be acting on my behalf and asserted that "due to multiple

medical issues, [I am] unable to handle financial decisions at this time.” This statement is untrue, and Ms. Van Lith had absolutely no basis to say otherwise.

43. I have been treated by Ms. Van Lith on two or three occasions, and the last time was in February of 2022.

44. My counsel contacted in-house counsel at Avera Health Systems, and we learned the whole story, which is set out in the Affidavit of Elizabeth Van Lith. My daughter, Rita, acting without my knowledge or permission, contacted Ms. Van Lith and told her that she (Rita) was acting on my behalf, that I would “need to make financial decisions,” and that having to make financial decisions may negatively impact my health. Ms. Van Lith indicates that she believed this letter would be helpful to me, and I have no reason to doubt that. Of course, as things turned out, the letter was being used in a manner that attempted to prevent me from protecting myself and from having the ability to use my own money to do so.

45. Kelly, Rita, and their sister Marcie apparently have accepted positions as officers of vOr, Inc., based on actions of Raymond and Kelly. Kelly and Rita have both taken actions relating to the corporation, the Trust, and my financial affairs without my notice or approval and that are adverse to me. I am ashamed of what they have done, and they should be ashamed, too. I am also fearful that this is part of a larger plan to gain access to funds that Raymond recently received when a sale barn in which he and I had an ownership interest was sold earlier in 2022.

46. It also appears that my children have come up with a plan to seize control of vOr, Inc. and prevent the estate plan and specific distributions set out in the Trust from being carried through when Raymond and I pass away.

47. Not only did these actions occur without my knowledge, but they occurred while I was separated from Raymond and trying to recover from a major surgery. This saddens and sickens me.

48. For a long time, I was grateful to Kelly's wife, Donna, for her help with medical issues I have faced and for her general help with Raymond and I as we have aged. I also love to see my two grandsons, Kelly and Donna's children. But, based on the series of actions that have been taken, I no longer want Kelly to live in my home. It saddens me to come to that conclusion, but I feel I have no other choice, based on what has gone on in the last month.

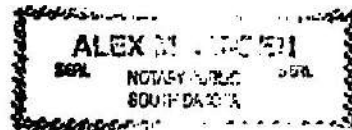
49. I have insurance that provides for at-home care, and I believe that the necessary care that I need as I recover will be provided through that insurance and through other family members. I also believe that my other family members will provide the help and assistance that Raymond needs. For this reason, I want my son Kelly to move out of my home and, if he refuses, I want the Court to compel him to leave.

Date: June 26, 2022.

Victoria O'Farrell
Victoria O'Farrell

Subscribed and sworn to before me
this 26th day of June, 2022.

Alex N. Jensen
Notary Public – South Dakota
My Commission Expires: 10-17-23



CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true and correct copy of the foregoing was served via Odyssey on those listed below on June 28, 2022:

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Exhibit 4.

APP.88

STATE OF SOUTH DAKOTA)
 : SS
COUNTY OF GRANT)

IN CIRCUIT COURT
THIRD JUDICIAL CIRCUIT

VICTORIA O'FARRELL, in her individual)
capacity and as Trustee of the Raymond and)
Victoria O'Farrell Living Trust dated January)
14, 2011, restated March 29, 2017 and)
amended August 26, 2021,)

25CIV22-000038

Plaintiff,)

AFFIDAVIT OF
ELIZABETH VANLITH

v.)

RAYMOND O'FARRELL, in his individual)
capacity and as Trustee of the Raymond and)
Victoria O'Farrell Living Trust dated January)
14, 2011, restated March 29, 2017 and)
amended August 26, 2021, and KELLY)
O'FARRELL,)

Defendants.

APP.89

STATE OF SOUTH DAKOTA)
 :SS
 COUNTY OF GRANT)

IN THE MATTER OF VICTORIA O'FARRELL, DOB 07/10/1943

I, the undersigned Affiant, upon being duly sworn under penalty of perjury, state that:

- 1. My name is Elizabeth VanLith.
 I am a Certified Physicians Assistant, licensed to practice in South Dakota.
 I am employed by Avera McKennan Hospital.
 I work for Avera Medical Group, 301 Flynn Dr., Milbank, SD
- 2. Victoria O'Farrell has been a patient of our clinic for many years.
- 3. On June 13, 2022 at 12:10 pm I received a message from Rita O'Farrell asking me to call her at 509-389-8405. The message was sent via our patient portal system from Patient Victoria O'Farrell's account.
- 4. I called Rita O'Farrell as requested. Rita and I briefly discussed her mothers medical condition. Rita advised that her mother was having mobility issues and continued to be impacted by anesthesia she received associated with a medical procedure. Rita explained that Victoria was going to be required to travel in the near future and would need to make financial decisions. Rita was concerned that such travel and need to make financial decisions may negatively impact Victoria's health. Rita requested that I send to her a "To Whom it May Concern" letter advising that Victoria was unable to make financial decisions at this time.
- 5. While I had not seen Victoria in clinic since 02-25-2022 I authored a letter, consistent with the request, dated 06-13-2022 and sent it to Rita as I believed it would be helpful to Victoria.
- 6. I treated Victoria, three times between 01-07-2022 and 02-25-2022. The treatment was in no way related to her cognition or ability to make financial or decisions of any kind. Prior to nor after authoring the letter of 06-13-2022 have I treated or accessed Victoria related to her cognition or ability to make financial decisions.
- 7. I do not have any knowledge that Victoria is unable to manage her financial affairs.

THE FOREGOING STATEMENTS ARE MADE UNDER PENALTY OF PERJURY.

Dated this 23rd day of June, 2022.

By: 

STATE OF SOUTH DAKOTA

COUNTY OF GRANT

On this 23rd day of June, 2022, before me personally appeared Elizabeth VanLith, known to me or proved to me to be the person whose signature appears herein, and who acknowledged that Affiant executed this Affidavit in my presence for the purposes therein contained.


Notary Public

Printed Name: JoAnn Tillman
Comm expires April 18, 2024

My Commission Expires:

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true and correct copy of the foregoing was served via Odyssey on those listed below on June 28, 2022:

Lee A. Schoenbeck
Schoenbeck Law
1200 Mickelson Dr., #310
Watertown, SD 57201
lee@schoenbecklaw.com

Susan Yexley Jennen
Boos Jennen Law Firm, LLC
113 1st Avenue E
Clark, SD 57225
susan.jennen@boosjennen.com

CADWELL SANFORD DEIBERT
& GARRY LLP

By /s/ Alex M. Hagen _____
Alex M. Hagen
200 E. 10th Street, Suite 200
Sioux Falls, South Dakota 57104
(605) 336-0828
E-mail: *ahagen@cadlaw.com*
Attorneys for Plaintiff

STATE OF SOUTH DAKOTA)
)
COUNTY OF GRANT)

IN CIRCUIT COURT

THIRD JUDICIAL CIRCUIT

25PRO22-000011

ESTATE OF

*

PETITION FOR APPOINTMENT OF
SPECIAL ADMINISTRATOR

VICTORIA O. O'FARRELL,
Deceased.

*

*

*

*

Petitioner Raymond A. O'Farrell states:

1. Petitioner, as the spouse of the decedent, is an interested person as defined by SDCL 29A-1-201(23):

2. Name of decedent: Victoria O. O'Farrell, aka Victoria Olga O'Farrell, Victoria O'Farrell, Vicki O. O'Farrell and Vicki O'Farrell.

Date of birth of decedent: 07/10/1943.

Date of death of decedent: 07/11/2022.

Domicile at time of death: Grant County, South Dakota.

3. Venue is proper in this county because the decedent's domicile was located in this county at the date of death.

4. No appointment of a general personal representative has previously been made in the State of South Dakota.

5. Appointment of a special administrator is necessary because: At the time of decedent's death, she was involved as a party in a lawsuit in Grant County, South Dakota, (25CIV22-000038), and also, there are pending negotiations involving possible foreclosure proceedings that would have considerable adverse effects on the estate of the decedent. Pursuant to SDCL 29A-3-614, petitioner is an interested person, and it is necessary to protect the estate of the decedent pending the search for a Will and determination of whether the decedent died testate or intestate. Petitioner believes that the decedent did have a Will that nominated petitioner Raymond A. O'Farrell as general Personal Representative. However, if no Will is found, then

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petitioner Raymond A. O'Farrell, as the spouse of the decedent, has the highest priority to be appointed as the general Personal Representative.

6. An emergency exists requiring appointment without further notice because: The pending litigation requires immediate attention of a Special Administrator to protect the estate of the decedent, as well as addressing the possible foreclosure affecting the decedent's estate.

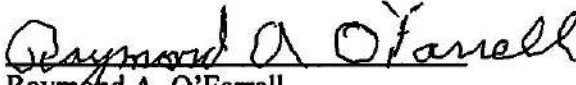
7. Petitioner nominates Raymond A. O'Farrell, who is a qualified person, to serve as special administrator with the power of a personal representative.

The special administrator's powers should not be limited.

The special administrator's term should be limited to such time as it necessary to investigate whether the decedent has a Will, and such is offered and accepted in probate or upon determination that the decedent died intestate and intestate proceedings properly commenced.

Petitioner requests that Raymond A. O'Farrell be appointed as special administrator without notice and hearing and without bond and letters be issued to the special administrator.

Dated this 18th day of July, 2022.


Raymond A. O'Farrell
46658 143rd St.
Marvin, SD 55251
(605) 432-6801 (Attorney George Boos)

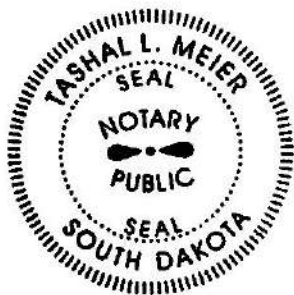
STATE OF SOUTH DAKOTA)
) SS)
COUNTY OF GRANT)


Raymond A. O'Farrell, being first duly sworn, deposes and says; that he is the Petitioner named in the within and foregoing Petition and that he has read the same and knows the contents thereof and that the same are true to his best knowledge, information and belief, except as to matters stated on information and belief, and as to those matters, he believes them to be true.


Raymond A. O'Farrell

Subscribed and sworn to before me on the 18th day of July, 2022.

(Seal)




Tashal L. Meier
Notary Public: State of South Dakota
My commission expires: 11/05/2027.

STATE OF SOUTH DAKOTA)
)
COUNTY OF GRANT)

IN CIRCUIT COURT

THIRD JUDICIAL CIRCUIT

25PRO22-000011

ESTATE OF
VICTORIA O. O'FARRELL,
Deceased.

*
*
*

ORDER APPOINTING
SPECIAL ADMINISTRATOR

Upon consideration of the petition for the appointment of a special administrator, the court finds:

1. The venue is proper in this court and it is proper to appoint the petitioner, Raymond A. O'Farrell, as Special Administrator without further notice for the reasons presented in the petition for appointment as Special Administrator without bond. The court is satisfied that at the time of decedent's death, she was involved as a party in a lawsuit in Grant County, South Dakota, (25CIV22-000038), and also, there appears to be pending negotiations involving possible foreclosure proceedings that would have considerable adverse effects on the estate of the decedent. Pursuant to SDCL 29A-3-614, petitioner is an interested person, and it is necessary to protect the estate of the decedent pending the search for a Will and determination of whether the decedent died testate or intestate.
2. The decedent died on the 11th day of July, 2022.
3. The decedent was domiciled at death in Grant County, South Dakota.
4. The appointment of a Special Administrator is necessary to protect the estate pending the search for a Will and determination of the proper probate proceedings.

IT IS ORDERED:

- A. The findings are made a part of this order.
- B. Raymond A. O'Farrell is appointed as Special Administrator of the estate of Victoria O. O'Farrell with the powers of a general personal representative until such time as the duties have been completed.

The personal representative's term should be limited to such time as it necessary to investigate whether the decedent has a Will, and such is offered and accepted in probate or

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upon determination that the decedent died intestate and intestate proceedings properly commenced.

And letters shall be issued to the special administrator to serve without bond.

BY THE COURT:

7/18/2022 3:00:58 PM



Attest:
Reichling, Sandy
Clerk/Deputy



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EXHIBIT A

Agreement for Indemnification

The undersigned vOr, Inc. and the Raymond and Victoria O'Farrell Living Trust dated January 14, 2011, restated March 29, 2017 and amended August 26, 2021, are the sellers of certain property located in Grant County legally described as:

Parcel 1: The S ½ SE ¼ and the S ½ SW ¼ of Section 22; the S ½ NW ¼, the S ½ NE ¼, the N ½ NE ¼, the SE ¼, except Lot 1, Hopewell Subdivision, and the N ½ SW ¼ of Section 23, all in Township 121 North, Range 50 West of the 5th P.M., Grant County, South Dakota.

Parcel 2: Lot 2A of the Plat of Lots 2A and 2B, O'Farrell Subdivision, a replat of Lot 2 of the Plat of Lots 1 and 2, O'Farrell Subdivision, located in the S ½ SE ¼ of Section 14, Township 121 North, Range 50 West of the 5th P.M., Grant County, South Dakota.

Parcel 3: S ½ SW ¼, except road, and except Lot H2, of Section 23, Township 121 North, Range 50 West of the 5th P.M., Grant County, South Dakota.

to Grand Valley Hutterian Brethren, Inc. The parties understand and recognize that the subject property is involved in a pending court case 25CIV22-000038 between Victoria O'Farrell, individually and as Trustee of the Raymond and Victoria O'Farrell Living Trust dated January 14, 2011, restated March 29, 2017 and amended August 26, 2021, plaintiff, and Raymond O'Farrell, individually and as Trustee of the Raymond and Victoria O'Farrell Living Trust dated January 14, 2011, restated March 29, 2017 and amended August 26, 2021, and Kelly O'Farrell, defendants.

The parties also recognize that Paul O'Farrell has built a home on the property being sold to Purchaser and it is Seller's belief that he does not have a valid ownership interest in the land or home located on said property.

The undersigned warrant that they have started an eviction process against Paul O'Farrell to remove him, and anyone claiming through him, from the premises so that said real property will belong to the Purchaser free and clear of any third-party claims.

The undersigned hereby agree to complete the eviction of Paul O'Farrell and to take all matters necessary for the complete eviction and removal of Paul O'Farrell such that Purchaser can enjoy the property free of any claim of Paul O'Farrell or any of his heirs.

The undersigned warrant that they will pay for all legal costs associated with said eviction and the above lawsuit and the undersigned will indemnify and hold harmless Purchaser from any and all claims, actions, liabilities, or legal expenses concerning the above eviction, lawsuit, or any other activities necessary to remove Paul O'Farrell from the property so that Purchaser has full and complete use of the real property that it is purchasing.

In the event the undersigned are unable to give Purchaser the property free and clear of all claims by Paul O'Farrell or anyone claiming through him, by December 31, 2023, then the

COPY 99

undersigned shall reimburse Purchaser the sum of \$300,000.00. The Seller shall retain \$300,000.00 in the Trust Account of George Boos until said claim of Paul O'Farrell or anyone claiming through Paul O'Farrell, have been resolved so that no cloud appears on the title to said real property or if the property is not free and clear of all claims, then said sum shall be provided to Purchaser.

Further, the Seller specifically agrees to be responsible for all utility expenses associated with the above premises through the date of delivery of possession.

Dated this 17th day of October, 2022.

SELLER:

PURCHASER:

vOr, Inc.

Grand Valley Hutterian Brethren, Inc.

By: Raymond A. O'Farrell
Its: President

By: Tom Wijn
Its: President

Secretary

Agreement for Indemnification

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Parcel 1: The S ½ SE ¼ and the S ½ SW ¼ of Section 22; the S ½ NW ¼, the S ½ NE ¼, the N ½ NE ¼, the SE ¼, except Lot 1, Hopewell Subdivision, and the N ½ SW ¼ of Section 23, all in Township 121 North, Range 50 West of the 5th P.M., Grant County, South Dakota.

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Parcel 3: S ½ SW ¼, except road, and except Lot H2, of Section 23, Township 121 North, Range 50 West of the 5th P.M., Grant County, South Dakota.

to Grand Valley Hutterian Brethren, Inc. The parties understand and recognize that the subject property is involved in a pending court case 25CIV22-000038 between Victoria O'Farrell, individually and as Trustee of the Raymond and Victoria O'Farrell Living Trust dated January 14, 2011, restated March 29, 2017 and amended August 26, 2021, plaintiff, and Raymond O'Farrell, individually and as Trustee of the Raymond and Victoria O'Farrell Living Trust dated January 14, 2011, restated March 29, 2017 and amended August 26, 2021, and Kelly O'Farrell, defendants.

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The undersigned warrant that they have started an eviction process against Paul O'Farrell to remove him, and anyone claiming through him, from the premises so that said real property will belong to the Purchaser free and clear of any third-party claims.

The undersigned hereby agree to complete the eviction of Paul O'Farrell and to take all matters necessary for the complete eviction and removal of Paul O'Farrell such that Purchaser can enjoy the property free of any claim of Paul O'Farrell or any of his heirs.

The undersigned warrant that they will pay for all legal costs associated with said eviction and the above lawsuit and the undersigned will indemnify and hold harmless Purchaser from any and all claims, actions, liabilities, or legal expenses concerning the above eviction, lawsuit, or any other activities necessary to remove Paul O'Farrell from the property so that Purchaser has full and complete use of the real property that it is purchasing.

In the event the undersigned are unable to give Purchaser the property free and clear of all claims by Paul O'Farrell or anyone claiming through him, by December 31, 2023, then the

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COPY

undersigned shall reimburse Purchaser the sum of \$300,000.00. The Seller shall retain \$300,000.00 in the Trust Account of George Boos until said claim of Paul O'Farrell or anyone claiming through Paul O'Farrell, have been resolved so that no cloud appears on the title to said real property or if the property is not free and clear of all claims, then said sum shall be provided to Purchaser.

Further, the Seller specifically agrees to be responsible for all utility expenses associated with the above premises through the date of delivery of possession.

Dated this 17th day of October, 2022.

SELLER:

PURCHASER:

vOr, Inc.

Grand Valley Hutterian Brethren, Inc.

By: Raymond A. O'Farrell
Its: President

By: Tom Wijn
Its: President

Secretary

COPY

STATE OF SOUTH DAKOTA)
):: §§§
COUNTY OF GRANT)

IN CIRCUIT COURT
THIRD JUDICIAL CIRCUIT

IN THE MATTER OF THE GUARDIANSHIP
AND CONSERVATORSHIP OF

RAYMOND O'FARRELL,

A PERSON ALLEGED TO NEED
PROTECTION.

25GDN23—_____
25GDN23-000001

PETITION FOR APPOINTMENT OF
GUARDIAN AND CONSERVATOR

INTRODUCTION

1. This Petition seeks to establish a guardianship and conservatorship over Raymond O'Farrell. The Petition is brought by his son, Paul O'Farrell.
2. Raymond is 84 years old and currently resides at his home near Marvin, South Dakota.
3. Raymond's wife died in July of 2022. As a widower, Raymond has 5 children that qualify as interested parties to this proceeding: Kelly O'Farrell, Lance O'Farrell, Marcie Reyelts, Paul O'Farrell and Rita O'Farrell.
4. Prior to her death, Raymond's wife Victoria noted that Raymond was exhibiting symptoms and behaviors of a person in need of protection. Paul O'Farrell and other relatives agree. Raymond's physical and mental condition makes him susceptible to the influence of others, specifically, Kelly O'Farrell.
5. And, in fact, **prior to her death, Raymond's wife Victoria was so concerned about Raymond's deficits, and about Kelly O'Farrell's problematic influence over Raymond, that she sought to remove Kelly from their home.** Victoria's affidavit is

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attached to this Petition as Exhibit 1.

6. In conjunction with her concerns about Raymond, Victoria initiated a lawsuit in order to unwind numerous financial transactions for which Kelly had manipulated Raymond. That lawsuit is sealed and is on file with the Clerk. *See*, 25CIV22-000038 (Grant County, S.D.)
7. Paul has initiated a similar lawsuit to unwind those, and other transactions. This new lawsuit is on file with the Clerk. *See*, 25CIV23—000015 (Grant County, S.D.).
8. Raymond relies on the assistance of others for transportation and other basic living activities. Raymond requires the use of a walker to move around and has suffered at least three strokes. In addition, he has a long history of alcohol abuse and is in poor health.
9. Raymond’s family members have observed that Kelly continues to exert the same isolation of Raymond and influence over Raymond that Victoria observed in the summer of 2022.
10. This influence and isolation increased after the passing of Raymond’s wife Victoria.

STATEMENT OF FACTS LEADING TO THE FILING OF THIS PETITION

11. In early 2022, Kelly O’Farrell secretly began an orchestrated effort to alienate and isolate Raymond from his family, with the intent of thwarting various features of Raymond and his wife’s Estate plan, and disrupting their farming operations.
12. Kelly’s efforts resulted in such actions as: Raymond signing documents which

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“withdrew” shares of the family farm corporation from the Family Trust; “separated” Raymond’s and Victoria’s assets; interfered in Paul’s lending and family farming activities; “removed” Paul and Victoria as officers and directors of the family farm corporation; attempted to fire the attorneys that Victoria hired to stop all of this; and, ultimately, entered into a secret agreement to purportedly sell nine parcels of family farm ground to the Grand Valley Hutterian Brethren.

13. Some of these actions were accomplished via the misuse of Power of Attorney documents.
14. In addition, Kelly began taking or diverting funds from his parents and converted them to his own use, including checks for \$1,200 alleged to be for labor/services.
15. Kelly has isolated Raymond from his family members. Kelly has given Raymond false information about his family members, in order to alienate Raymond from Paul and other family members, and as part of a plan and scheme to enrich himself and harm his other family members.
16. The problems appear to have started when Kelly moved in with his parents in 2021, where he and his wife began living rent-free.
17. Despite the free rent, by 2022, Kelly was demanding that his siblings pay him \$1,200 per month to care for Raymond and Victoria. Kelly threatened that he would leave the house and take Raymond with him if the siblings didn’t pay Kelly the money he was demanding.

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18. Raymond's wife Victoria temporarily moved out of the home after she fell and broke her leg in April 2022. This required surgery and recuperation outside of the home, first a hospital and then a nursing home in Garretson, South Dakota.
19. Raymond had long relied upon his wife Victoria.
20. In the vacuum created by her absence, Victoria realized that Kelly was isolating Raymond. In the summer of 2022, she submitted an affidavit outlining her observations and concerns, which is attached as Exhibit 1.
21. Kelly convinced Raymond to terminate Victoria as his power of attorney and to appoint Kelly as his power of attorney, instead.
22. Kelly then took further steps to disempower Victoria. He directed his sister Rita to solicit a letter from an Avera physician in June 2022 which purported to advise that their mother Victoria was unable to make financial decisions. The physician letter was issued, and then Kelly acted upon it. However, less than two weeks later, the same Avera doctor learned that the letter had been procured under false pretenses and disavowed its contents. Instead, the doctor advised that she knew of no issues with Victoria's cognition nor with her ability to make financial decisions.
23. At all times, Victoria was fully capable of making decisions, and, she was keenly aware that Kelly had been engaging in a pattern of wrongdoing.
24. Victoria voiced concerns about Kelly in her affidavit: "[I]t became clear that Kelly was trying to influence how Raymond thought about vOr, Inc's [*i.e.*, the family farming

corporation's] relationship with Paul and about what the corporation should do in regard to [Paul's farming] loans coming due [for which family trust land had long-served as collateral]. Since coming to live with us, Kelly seems to have attempted to influence Raymond more and more, and I believe that was part of an effort to undo or disrupt estate planning decisions that my husband and I had already made about what would be done with the family land.”

25. Victoria also reaffirmed the validity of her and Raymond's estate plans: “Raymond and I put a lot of thought into our estate plan, and the specific distributions that are called for in the Trust Instrument are the result of a lot of reflection and discussion between us about what we believe and how we want our estate distributed.”

26. As of June of 2022, Victoria noted that Raymond had “never expressed to me any inclination to change the estate plan or to make any alteration to the trust. The recent actions that he has taken relating to the Trust and the changes to [the family farm corporation's] directors and officers were not his idea, and I do not believe he even understands what he purports to have done.” This was based on Victoria's conversations with Raymond at that time.

27. Victoria remained grateful to Kelly's wife, Donna, for her help and care, as well as to Kelly's and Donna's children. But, Victoria concluded, “based on the series of actions that have been taken, **I no longer want Kelly to live in my home**. It saddens me to come to that conclusion, but I feel I have no other choice, based on what has gone on in

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the last month.”

28. Victoria planned to return home after recuperating in the nursing home, and, stated that as part of her plan to return home, “**I want the Court to compel [Kelly] to leave.**”
29. Victoria died unexpectedly on July 11, 2022, before she could return home.
30. Since that time, Raymond has continued to live with Kelly O’Farrell and his wife Donna. And, since that time, Kelly has continued to exert influence and control, and, Raymond has continued to sign documents which ostensibly seek to carry out substantial changes to the original family estate plan, and which put Raymond’s finances at risk.
31. These attempted actions (carried out in Raymond’s name) were contrary to years and years of prior understanding, and they were carried out without proper authority, consent, or comprehension.
32. In the months since, Kelly has continued to isolate Raymond and exert influence, which has resulted in other wrongful actions and transactions that are not in Raymond’s best interests.
33. Each of the various actions and transactions was legally ineffective because of a failure of notice, consent, capacity, authority, undue influence, and/or estoppel.
34. The Petitioner’s parallel civil lawsuit seeks to remedy and unwind those various actions and transactions.
35. This conservatorship and guardianship proceeding seeks to prevent such misdeeds from occurring again.

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36. Raymond’s ability to respond to people, events, and environments is impaired to such an extent that he lacks the capacity to manage property or financial affairs without the assistance or protection of a conservator.
37. Raymond’s impairments also prevent him from meeting the essential requirements for his health care, safety, habilitation, or therapeutic needs without the assistance or protection of a guardian.

STATEMENT OF FACTS REQUIRED BY STATUTE

Pursuant to SDCL 29A-5-305(1) through (12), Paul O’Farrell provides the following information:

1. The contact information for the proposed guardian is as follows:

Paul O’Farrell
 14551 466th Ave.
 Marvin, SD 57251

Date of Birth: 06/30/1938

2. Raymond’s nearest relatives, including those entitled to notice of these proceedings, and who “would be entitled to succeed the person’s estate by intestate succession”:

Name	Address	Relationship
Kelly O’Farrell	46658 143 rd St., Marvin, SD 57251	Son
Lance O’Farrell	14845 465 th Ave., South Shore, SD 57263	Son
Marcie Reyelts	24700 W. 265 th St., Paola, KS 66071, <i>or</i>	Daughter

12601 Robinson St., #11-207,
Overland Park, KS 66213

Paul O'Farrell	14551 466 th Ave., Marvin, SD 57251	Son
Rita O'Farrell	4657 Melbourne Ave., #13 Los Angeles, CA 90027, <i>or</i> 36101 Bob Hope Dr., #E5, Rancho Mirage, CA 92270	Daughter

3. Raymond is currently living at his home with the assistance of Kelly or Donna O'Farrell, 46658 143rd St., Marvin, SD 57251.
4. Kelly O'Farrell claims to be the current attorney-in-fact for Raymond under durable power of attorney dated March 1, 2022. The validity of that instrument is disputed.
5. It is not known whether Raymond's incapacity will prevent his attendance at a hearing in this matter, although he may not understand or fully understand the proceedings.
6. Raymond O'Farrell is not an absentee.
7. The petitioner seeks a full guardianship and conservatorship, for the reasons and facts outlined above.
 - a. A conservatorship is warranted because Raymond's ability to respond to people, events, and environments is impaired to such an extent that he lacks the capacity to manage property or financial affairs without the assistance or protection of a conservator.

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- b. A guardianship is warranted because those same impairments result in a lack of capacity to meet the essential requirements for his health care, safety, habilitation, or therapeutic needs without the assistance or protection of a guardian.
 - c. The Petitioner's interest in this appointment is as an interested relative.
8. The contact information of the proposed guardian and conservators is:

Proposed conservators:

Paul O'Farrell & Lance O'Farrell
14551 466th Ave. 14845 465th Ave.
Marvin, SD 57251 South Shore, SD 57263

Proposed guardians:

Paul O'Farrell & Lance O'Farrell
14551 466th Ave. 14845 465th Ave.
Marvin, SD 57251 South Shore, SD 57263

9. *n/a.* (The identity of any validly nominated conservator or guardian is unknown at this time.)
10. No guardian has previously been appointed in this state or elsewhere.
11. *n/a.* (A full conservatorship is sought.)
12. *n/a.* (A full guardianship is sought.)

RELIEF REQUESTED

- A. The Petitioner seeks leave to file the petition without an evaluation report, and, thus requests that the Court order the appropriate assessments or examinations, and order

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that a report be prepared and filed with the Court.

- B. The Petitioner requests the court set a time and place for a hearing on this Petition and enter an order appointing a guardian and conservator.
- C. The Petitioner requests that his legal fees and costs be paid in accordance with the statute or as the court determines appropriate.
- D. The Petitioner also requests any additional relief that the Court deems appropriate.

Dated this 8th day of March, 2023.

HOVLAND, RASMUS,
BRENDTRO, & TRZYNKA, PROF. LLC

/s/ Daniel K. Brendtro

Daniel K. Brendtro
326 E. 8th Street, Suite 107
P.O. Box 2583
Sioux Falls, SD 57101-2583
(605) 951-9011
dbrendtro@hovlandrasmus.com
Attorneys for Petitioner, Paul O'Farrell

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STATE OF SOUTH DAKOTA)
 : §§§ :
COUNTY OF GRANT)

IN CIRCUIT COURT
THIRD JUDICIAL CIRCUIT

<p>IN THE MATTER OF THE GUARDIANSHIP AND CONSERVATORSHIP OF</p> <p>RAYMOND O'FARRELL,</p> <p>A PERSON ALLEGED TO NEED PROTECTION.</p>	<p>25GDN23— _____ 25GDN23-000001</p> <p>APPLICATION FOR WAIVER OF FILING AN EVALUATION REPORT WITH PETITION</p>
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Petitioner has prepared and submitted a petition for appointment of a Guardian and Conservator. Petitioner requests a waiver of filing of the evaluation report, because he does not have access to Raymond’s medical records. Thus, Petitioner requests that this Court enter an Order pursuant to SDCL 29A-5-306 finding that good cause exists to waive the filing of an evaluation report with the Petition; and further requests that this Court order the evaluation of Raymond O’Farrell for the purpose of obtaining the evaluation report required by statute in these proceedings.

Dated this 8th day of March, 2023.

HOVLAND, RASMUS,
BRENTRO, & TRZYNKA, PROF. LLC

/s/ Daniel K. Brentro

Daniel K. Brentro
326 E. 8th Street, Suite 107
P.O. Box 2583
Sioux Falls, SD 57101-2583
(605) 951-9011
dbrentro@hovlandrasmus.com
Attorneys for Petitioner, Paul O’Farrell

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STATE OF SOUTH DAKOTA)
):: §§§
COUNTY OF GRANT)

IN CIRCUIT COURT

THIRD JUDICIAL CIRCUIT

<p>IN THE MATTER OF THE GUARDIANSHIP AND CONSERVATORSHIP OF</p> <p>RAYMOND O'FARRELL,</p> <p>A PERSON ALLEGED TO NEED PROTECTION.</p>	<p style="text-align: right;">25GDN23-000001</p> <p>25GDN23-_____</p> <p style="text-align: center;">ORDER WAIVING THE FILING OF AN EVALUATION REPORT WITH PETITION AND SETTING HEARING ON REQUEST FOR EVALUATION OF RAYMOND O'FARRELL</p>
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The court having reviewed the Petition and Application for Waiver of Filing an Evaluation Report provided to the Court by Petitioner's counsel, Daniel K. Brendtro, the Court finds that good cause has been shown to permit the filing of the Petition without an evaluation report.

IT IS THEREFORE ORDERED that the Petition shall be filed without an evaluation report.

IT IS FURTHER ORDERED that the Petitioner and/or his counsel, Raymond O'Farrell and/or his counsel, and all other interested parties shall appear before the court on _____, 2023, at which time the court will determine what appropriate assessments or examinations shall be ordered of Raymond O'Farrell.

BY THE COURT:

Denied: 03/09/2023
Please contact judge.
/s/ Spears, Robert

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IN THE
Supreme Court
of the
State of South Dakota

<p>VOR, INC., AND GRAND VALLEY HUTTERIAN BRETHERN, INC.,</p> <p>Plaintiffs/Appellees</p> <p>vs.</p> <p>PAUL O'FARRELL, AND SKYLINE CATTLE COMPANY, A SOUTH DAKOTA CORPORATION,</p> <p>Defendants/Appellants</p>	<p># 30344</p> <p>AFFIDAVIT OF PAUL O'FARRELL</p>
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STATE OF SOUTH DAKOTA)
 : §§§ :
COUNTY OF GRANT)

Paul O'Farrell after being duly sworn on oath, deposes and states as follows:

1. I am Paul O'Farrell, a defendant/appellant in this matter. I am also the sole shareholder and director of Skyline Cattle Company, the other defendant/appellant.
2. The real estate at issue in this lawsuit includes several hundred acres of farm ground, as well as a residence, shop, and other miscellaneous buildings.
3. Because this is my primary residence, all of my personal possessions are in my home, including furniture, etc.

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4. I operate my trucking and farming business out of the shop. Because of this, I have hundreds of thousands of dollars' worth of equipment, vehicles, and machinery stored in and around the shop.

5. It has been my position in this lawsuit that both Skyline and I are entitled to ongoing possession of the entire premises, including the house, buildings and farm ground.

6. Accordingly, I had been making preparations to continue operating the farm this year, including planting soybeans on the tillable acres for the 2023 crop season, and, to continue grazing out the pasture.

7. There is no immediate deadline by which it is necessary to begin grazing the pastures. It can begin at any time. I was currently planning for the grazing to begin around June 1, 2023.

8. The deadline for planting soybeans is generally regarded as June 1, 2023. Soybeans could still be planted after that date, but, there would be a penalty associated with crop insurance. Thus, my plan for operation of the farm has intended for planting soybeans prior to June 1st.

9. The weather in this area has been rainy, and, I would regard the fields as a bit too wet for planting at the present time. And, based on my experience with this farm, planting soybeans on May 12th would be considered somewhat early. In other words, there is no emergency to begin planting this week or next week.

10. An estimated value of the use and occupation of the property is as follows:

i. House/Shop: \$19,200 (\$2,100 per month, 9 months)

ii. Pasture: \$35,584.50 (508.35 acres, \$70 per acre)

iii. Tillable: \$25,678.50 (171.19 acres, \$150 per acre)

iv. Total: \$80,463.00

11. The improvements to the property (including the house and shop) were paid for with financing through Skyline Cattle. I am the owner of Skyline. I have been living on the property for the past several years.

12. The home I live in was built new, offsite, and then placed upon a new foundation upon the land.

13. My house and shop sit on land that my parents had designated in their trust to be given to me. Their trust and estate plan was in place for almost a decade. (The family's land was held by my family's farming company, VOR, Inc., and the shares of the farming company, in turn, were held by the family trust. And, in turn, the farming operations were conducted through Skyline Cattle Company.)

14. Things began changing last year (in Spring 2022) when my mother was living away from home, while recuperating from surgery. In her absence, my brother Kelly continued to live with my father Raymond, and Kelly now had unlimited access to Raymond, but without the protection of my mother.

15. Within a matter of weeks, sudden and substantial changes were being made to my parents' estate plan. Many of those changes were initially concealed from my mother. Raymond's attorneys also claimed that I had been removed as President of my family's farming company, VOR, Inc., (a position I had held for several years).

16. My mother started a lawsuit to try and stop and unwind these changes. My mother attributed these problems to the influence and manipulation of Raymond by my brother Kelly. My mother announced her concerns about Raymond's mental acuity and susceptibility to manipulation. My mother also announced that when she returned home from the nursing home, she no longer would allow Kelly to live there.

17. Shortly after announcing this, and, shortly after her lawsuit was filed, my mother died in July 2022. Raymond was immediately appointed as 'special administrator' of my mother's estate. Through counsel, Raymond sought to use his power over my mother's Estate to dismiss the same lawsuit that she had filed against him.

18. In addition, in August 2022, Raymond (again through counsel) arranged for a hasty sale of family real estate to the Grand Valley Hutterian Brethren. The portions to

be sold to the Colony were specifically the parcels that my parents' trust had designated for me to inherit. Or, in other words, the location where I had built my shop and house.

19. In the Fall of 2022, I hired counsel and tried to intervene in my mother's lawsuit. I was not permitted to intervene. Raymond then directed my late mother's attorney to dismiss that lawsuit (the one she had brought against him).

20. The Colony apparently participated in a real estate closing for this land, and, a deed was filed purporting to give them ownership.

21. During the next few months, I discussed the possibility of entering into a rental agreement with the Colony, but, I did not enter into an agreement.

22. I hired an additional attorney and began my own lawsuit, which, similar to my mother's lawsuit, seeks to unwind the various changes to my family's trust, and, asks the Court to rescind the real estate sale to the Colony.

23. My lawsuit was filed on March 3, 2023. Summonses were served soon thereafter.¹

24. After the time for answering that Complaint, the Colony began this eviction lawsuit.

25. In this eviction action, I filed a motion to dismiss the eviction case because it embraces the same set of facts and disputes that are already being litigated in the civil lawsuit that I started in March 2023. I also brought other motions and objections.

26. All of my motions and objections were denied.

27. On April 27, 2023, the Circuit Court held a court trial on very short notice, and, contrary to my demand for a jury trial.

28. The Court entered a judgment and order of eviction on May 1, 2023.

¹ On the same date that I filed my civil Complaint, I also commenced a proceeding for a guardianship and conservatorship, alleging that my father Raymond is an individual in need of protection. *See*, 25GDN23-1. Because my brother Kelly has isolated my father from our family, I do not have access to his medical records, nor the ability to take him for an evaluation. I requested (twice) that the Circuit Court permit the conservatorship petition to be filed without an evaluation, pursuant to SDCL 29A-5-306. The Circuit Court denied both requests.

29. At the trial, the Circuit Court took judicial notice of all of the various court files relating to my family's dispute, including:

- i. 25CIV22-38 (my mother's lawsuit)
- ii. 25PRO22-11 (my mother's probate)
- iii. 25CIV23-15 (my civil lawsuit)
- iv. 25GDN23-1 (the guardianship/conservatorship proceeding I started for my father Raymond)

30. Following the trial, I immediately began making efforts to propose and finalize an undertaking for this appeal.

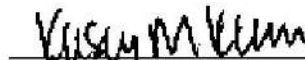
31. The Circuit Court rejected the undertaking that we initially proposed. There was no dispute about the rental value of the property. Instead, the Circuit Court added \$300,000 to the bonding requirement in connection with an indemnity agreement between VOR and the Colony; and, the Circuit Court believed that the appeal would last longer than just the 2023 crop season, and doubled the bonding requirement for an additional year's worth of rental value.

32. In light of that denial, the Appellants have filed this Motion.

Dated this 12 day of May, 2023.


Paul O'Farrell

Subscribed and sworn to before me
This 12th day of May, 2023.


Notary Public - South Dakota
My Commission Expires: 01/30/2026

(SEAL)



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CERTIFICATE OF SERVICE

Counsel certifies that on May 16, 2023, the foregoing has been filed via Odyssey with service upon the following:

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Daniel K. Brendtro

Daniel K. Brendtro

IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

No. 30344

**VOR, INC. & GRAND VALLEY HUTTERIAN
BRETHREN, INC.**

Plaintiffs and Appellees,

vs.

**PAUL O'FARRELL &
SKYLINE CATTLE COMPANY**

Defendants and Appellants.

Appeal from the Circuit Court
Third Judicial Circuit
Codington County, South Dakota

HONORABLE ROBERT L. SPEARS
Presiding Judge

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PRELIMINARY STATEMENT

Appellants, Paul O'Farrell and Skyline Cattle Company, will be referred to collectively as "Paul" or "Appellant"; Appellees, VOR, Inc. and Grand Valley Hutterian Brethren, Inc., will be referred to as "VOR" "Grand Valley" or collectively as "Appellees"; and the trial transcript in this matter is contained in the Settled Record at SR 198-257, but will be referred to throughout this brief as "TT" followed by the page number, and exhibits to the trial transcript will be referred to as "TT Ex." followed by the exhibit number.

Two additional hearing transcripts from proceedings that the Appellants requested the Trial Court take judicial notice of (TT 12) will be included in Appellees' Appendix and referred to throughout this brief. The first is a joint motions hearing on October 18, 2022, in *Victoria O'Farrell, et al. v. Raymond O'Farrell, et al.*, 25CIV.22-38 and the *Estate of Victoria O. O'Farrell*, 25PRO.22-11, which will be referred to as "Victoria's HT" followed by the page number. The second is a motions hearing on July 11, 2023, in *Paul O'Farrell, et al. v. Kelly O'Farrell, et al.*, 25CIV.23-15, which will be referred to as "Paul's HT" followed by the page number.

Additionally, the following pleadings from *Paul O'Farrell, et al. v. Kelly O'Farrell, et al.*, 25CIV.23-15, which proceeding will be referred to in this brief as "Paul's Lawsuit", will be included in the Appellees' Appendix: (1) Paul's Complaint dated August 9, 2023, referred to as "Paul's Complaint"; (2) Answer, Counterclaim, and Motions of VOR, Inc. Estate of Victoria O'Farrell, and the Raymond and Victoria O'Farrell Living Trust dated April 5, 2023, referred to as

“VOR’s Answer/Motions”; (3) Memorandum Decision dated August 9, 2023, referred to as “Memo Decision”; (4) Grand Valley’s Motion to Dismiss and supporting Brief; and (5) Grand Valley’s Reply Brief in Support of Motion to Dismiss.

The Appendix will be referred to as “App.” followed by the page number; and the Settled Record will be referred to as “SR” followed by the page number.

JURISDICTIONAL STATEMENT

VOR, Inc. and Grand Valley agree with Paul’s Jurisdictional Statement.

STATEMENT OF LEGAL ISSUES

- 1. Does the legal procedures set forth in the forcible entry and detainer chapter, SDCL 21-16, control over conflicts with the Rules of Civil Procedure, SDCL 15-6?**

The Trial Court ruled that it does.

SDCL 15-6-81(a), Appendix A
SDCL 21-16-7
SDCL 21-16-8

- 2. Did the Trial Court follow the forcible entry procedure set forth in SDCL 21-16?**

The Trial Court ruled that it did.

SDCL 21-16-6
SDCL 21-16-7
SDCL 21-16-4

- 3. Did the Trial Court correctly conduct the forcible entry and detainer eviction trial?**

The Trial Court held in the affirmative.

SDCL 21-16

STATEMENT OF THE CASE

On August 20, 2022, the Grant County Sheriff's Office served on Paul O'Farrell and Skyline Cattle Company, Inc. a Notice of Termination and Non-Renewal of Farm Lease – Agricultural & Grassland and a Notice of Termination of Lease of Residential and Non-Agricultural Land and Buildings, which documents were executed by the attorney for VOR, Inc., Susan Yexley Jennen. (TT Exs. 1-2, SR 92-98.)

On March 29, 2023, VOR, Inc. and Grand Valley, through their attorney of record, Lee Schoenbeck, had the Grant County Sheriff's Office serve a Notice to Quit on Paul O'Farrell and Skyline Cattle Company. (SR 15-18.)

On April 17, 2023, the Grant County Sheriff's Office served the Summons and Complaint in this proceeding upon Paul O'Farrell and Skyline Cattle Company. (SR 19-20.)

On April 21, 2023, pursuant to SDCL 21-16-7, Attorney Brendtro, on behalf of Paul and Skyline Cattle Company, filed Defendants' 04/21/2023 Motions. (SR 23-33.) On April 24, 2023, pursuant to SDCL 21-16-8, VOR, Inc. and Grand Valley filed a Notice of Court Trial, setting the court trial for 10:00 a.m. on April 27, 2023. (SR 34-35.) On April 25, 2023, Paul filed an Objection to the Notice of Court Trial (SR 37-42), and VOR, Inc. and Grand Valley responded the same day (SR 47-51). On April 25, 2023, VOR, Inc. and Grand Valley filed Plaintiffs' Answer to Defendants' Motion to Dismiss. (SR 43-46.) On April 27, 2023, the Circuit Court entered the Order Denying Motion to Dismiss. (SR 85.)

A court trial was commenced at 10:00 a.m. on April 27, 2023, before the Honorable Robert L. Spears and, on the morning of the trial, at the court trial, Paul appeared and filed an Answer that included a demand for jury trial. (SR 86-91.)

At the outset of the court trial, Paul asked the Trial Court to take judicial notice of the following four Grant County proceedings (TT 12):

- **25CIV.22-38: Victoria O'Farrell**, in her individual capacity and as Trustee of the Raymond and Victoria O'Farrell Living Trust dated January 14, 2011, restated March 29, 2017, and amended August 26, 2021 **v. Raymond O'Farrell**, in his individual capacity and as Trustee of the Raymond and Victoria O'Farrell Living Trust dated January 14, 2011, restated March 29, 2017, and amended August 26, 2021, and Kelly O'Farrell;
- **25PRO.22-11: Estate of Victoria O. O'Farrell**;
- **25CIV.23-15: Paul O'Farrell**, individually and as beneficiary of the family trust; and for the benefit of **The Estate of Victoria O'Farrell; Skyline Cattle Company**, a South Dakota Corporation; and **VOR, Inc.**, a South Dakota Corporation, **v. Kelly O'Farrell**, an individual; **Grand Valley Hutterian Brethren, Inc.**, a South Dakota Corporation; and **The Raymond and Victoria O'Farrell Living Trust**, a South Dakota Trust; and
- **25GDN.23-01: In the Matter of the Guardianship and Conservatorship of Raymond O'Farrell**, a person alleged to need protection;

The Trial Court granted the request. (TT 13.)

After the conclusion of the court trial, the Trial Court entered Findings of Fact and Conclusions of Law on May 1, 2023. (SR 115-119, App. 1-5.) VOR, Inc. and Grand Valley applied for the taxation of costs, and the Trial Court awarded attorney's fees in the amount of \$8,775.60 and costs in the amount of \$333.87 on or about May 15, 2023. (SR 120-122.)

Paul filed the Notice of Appeal on May 8, 2023. (SR 143-144.) There was a protracted dispute about the supersedeas bond, which was ultimately decided by the Supreme Court on May 24, 2023, which set the supersedeas bond at \$160,926.¹ On May 30, 2023, Paul posted his supersedeas bond.¹

STATEMENT OF THE FACTS

1. Eviction Proceeding

Paul rented land from VOR, Inc. (TT 19.) The lease was an oral lease. (TT 22.) Paul was served with a notice to terminate the lease. (TT 19-21; TT Exs.1-2, SR 92-98.) Paul did not enter into a new oral lease with VOR, Inc. (TT 23.)

Paul knew that Grand Valley had purchased the property. (TT 36.) He knew that Grand Valley had purchased the property from VOR, Inc. (TT 37.) The new purchaser, Grand Valley, wanted Paul to pay rent. (TT 36.) Paul didn't have the money to pay rent to stay on the property. (TT 38.) Paul testified he got a draft of a lease, but he didn't make any payments under it. (TT 39.)

At trial, Paul testified he received a written lease from Grand Valley, but admitted that he never returned a signed copy to them. (TT 40.) Grand Valley testified at the eviction trial that they purchased the real property from VOR, Inc. (TT 41-42; TT Ex.4, SR 109.) Grand Valley testified that they did not rent the land in TT Exhibit 4 to Paul. (TT 42.) They did propose a lease to Paul, but he wouldn't sign it and didn't make any payments under it. (TT 42.)

¹ Paul's Motion for Approval of Undertaking, the Court's subsequent approval, and Paul's posting of bond were filed in the appeal matter and are not part of the settled record for citation purposes.

2. Paul had his parents' corporation, VOR, Inc., in a foreclosure action.

Absent from Paul's summary of the facts² are the important predicate events that led to him being removed from the corporation.

First Interstate Bank initiated a foreclosure on VOR, Inc.'s real property on July 22, 2022. (Ex. C³ from Victoria's HT, App. 181-190.) Page 3 of the foreclosure complaint summarizes the four notes Paul took out, pledging VOR, Inc.'s land as collateral, which had a remaining balance at the time of the foreclosure, according to pages 6 and 7, of \$1,248,420.10. (Ex. C from Victoria's HT, App. 183.) Paul had been able to get his father to sign mortgages on VOR, Inc.'s land, until his father received independent legal counsel from Susan Yexley Jennen of Clark, South Dakota. (Victoria's HT, p.83, App. 88.)

To resolve the foreclosure, Raymond, VOR, Inc., and their attorney were able to sell part of the land to Grand Valley to pay off the debt. (Victoria's HT, pp.54, 61-62, 111, 127, App. 59, 66-67, 116, 132.)

While Raymond and his attorneys were working to solve the debt problem Paul had created, Paul took a retainer to a law firm in Sioux Falls to initiate a lawsuit against his father. (Victoria's HT, p.53, App. 58.) Additionally, Paul wired \$100,000 out of his mother's checking account to his son. (Victoria's HT, pp.53-54, App. 58-59.) One day after his mother died, Paul took the rest of the

² Paul's "Statement of the Facts" largely relies on affidavits of he and his mother and relies upon the allegations in his Complaint in Paul's Lawsuit. (Paul's Brief pp.9-16.) None of these "facts" are testimony in a judicial proceeding and, as noted by Paul on page 45 his Brief, are hearsay.

³ This is a document in the court file that the Trial Court took judicial notice of at Paul's request. (TT 12.)

money out of the checking account. (Victoria's HT, p.54, App. 59.) Paul was able to do this because at approximately this point in time he was able to get his mother to change the joint owner on the bank account from his sisters to himself. (Victoria's HT, pp.50-51, App. 55-56.)

3. After VOR, Inc. sold land to Grand Valley and stopped the foreclosure, Paul sued.

The Trial Court took judicial notice of Paul's Lawsuit at Paul's request. (TT 12-13.) Paul's Lawsuit is the subject-matter of the "equitable defenses" and compulsory counterclaim issues that Paul is asserting in this appeal.

In Paul's Lawsuit, he is also represented by Attorney Dan Brendtro, and in that Complaint, Mr. Brendtro has identified as the plaintiffs both Paul O'Farrell and Skyline Cattle Company that he represents in the current proceeding before this Court, but Mr. Brendtro has also identified VOR, Inc. as one of the plaintiffs and his client, as well as the Estate of Victoria O'Farrell. (Paul's Complaint, App. 229-252.) The logical sequence of the factual allegations in the Complaint are discussed under the next section below.

Raymond O'Farrell, as the special administrator of the Estate of Victoria O'Farrell and as the Trustee of the Raymond and Victoria O'Farrell Living Trust and on behalf of his company, VOR, Inc., filed an Answer, Counterclaim, and Motions to Dismiss. (VOR's Answer/Motions, App. 253-268.) The motions to dismiss included in that filing point out that Mr. Brendtro is claiming to represent VOR, Inc., who he doesn't represent, and in the same Complaint, he is seeking a damage claim against VOR, Inc. at paragraphs 107 and 108. (Paul's Complaint, App. 249.) Additionally, a motion to dismiss is included on behalf of

the Estate of Victoria O'Farrell, as Raymond O'Farrell is the special administrator of the Estate of Victoria O'Farrell, and Mr. Brendtro had no authority to file a complaint on the Estate's behalf. (VOR's Answer/Motions, App. 255-256.) There is, additionally, a motion to dismiss the rescission count, as Paul was asserting rescission based on his claim that the land the corporation sold was land that he was supposed to benefit from eventually in an estate plan. (VOR's Answer/Motions, App. 256-258.) The Answer included other motions and a counterclaim.

The Trial Court held a hearing on July 11, 2023, on Paul's Lawsuit and his Complaint. On August 9, 2023, the Honorable Robert Spears issued an eight-page Memorandum Decision that dismissed Paul's Lawsuit in its entirety. (Memo Decision, App. 269-276.) The Trial Court's Opinion includes many relevant observations, but the following excerpt is particularly insightful to the specious nature of Paul's lawsuit that constitutes his "equitable defenses":

In addition, Paul's complaint names Vor, Inc. as a plaintiff, yet, in the complaint Paul has named Vor, Inc. as a defendant in the same complaint. This simply is an untenable legal position, defies logic and is disingenuous. A complaint must not be based on mere speculation and the complaint must be plausible on its face. (*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).) The way this complaint is worded, its practical effect is treating Vor, Inc. as both a plaintiff and a defendant. Thus, the complaint as it applies to Vor, Inc., is not plausible on its face and Vor, Inc. is dismissed as both a plaintiff and a defendant.

(Memo Decision, pp.4-5, App. 272-273.)⁴

⁴ In Paul's Lawsuit he identified VOR, Inc. as a plaintiff that Mr. Brendtro is representing, and in the same Complaint Mr. Brendtro is seeking damages against VOR, Inc. On page 13 of Paul's Brief, footnote 2, Mr. Brendtro makes

With respect to the current landowner in the eviction proceeding, Grand Valley, the Trial Court in Paul's Lawsuit ordered as follows in his Memorandum Decision:

As to the claim of rescission [sic] stated in Paul's complaint, the Court will dismiss that count as it applies to Vor, Inc. The rescission [sic] claim in the complaint pertains to the sale of real estate. The parties to the sales contract were Vor, Inc. and the Grand Valley Hutterian Brethren, Inc. As I determined above, Paul is not the president of Vor, Inc. and has no authority to act on its behalf. I already dismissed the rescission [sic] claim against Grand Valley for the reasons stated on the record at the close of the hearing I conducted on July 11, 2023.

(Memo Decision, p.6, App. 274; Paul's HT, pp.36-37, App. 226-227.)

4. The "equitable defenses" that were asserted by Paul's Lawsuit.

Because Paul's Lawsuit is the purported basis for the "equitable defenses" that Paul is asserting should have been allowed in the eviction proceeding, the factual allegation of Paul's Lawsuit, and the logical progression required by them, are part of the facts of this case. They are summarized below using Paul's Complaint:

- Paul was the primary beneficiary of his parents' estate plan. (Paul's Complaint ¶4, App. 230.)
- Paul was the president of VOR, Inc. (Paul's Complaint ¶5, App. 230.)
- Paul believes his mother's Estate has claims that aren't being pursued. (Paul's Complaint ¶6, App. 230-231.)

clear that he knows that conduct is inappropriate. In the footnote he says, "It is elementary that a party cannot serve on both sides of a lawsuit."

- Paul’s company rented VOR, Inc.’s land. (Paul’s Complaint ¶7, App. 231.)
- Paul’s father, Raymond, needs protection. (Paul’s Complaint ¶9, App. 231.)
- Paul’s father was being manipulated by Paul’s brother, Kelly. (Paul’s Complaint ¶¶8, 11-14, App. 231-232.)
- Raymond should be found in need of protection. (Paul’s Complaint ¶19, App. 233.)
- Paul should be appointed as the guardian and conservator of Raymond. (Paul’s Complaint ¶19, App. 233.)
- Raymond shouldn’t be allowed to serve as trustee of his family trust. (Paul’s Complaint ¶20, App. 233.)
- Paul should be named the successor co-trustee of the family trust. (Paul’s Complaint ¶4, App. 230.)
- Any changes in the family trust agreement that diminish Paul’s inheritance should be voided by the Trial Court. (Paul’s Complaint ¶¶75-77, App. 243-244.)
- The Trial Court should declare the sale of VOR, Inc. land to Grand Valley invalid. (Paul’s Complaint ¶67, App. 241-242.)
- The Trial Court should “unwind the \$3.2 million real estate transaction.” (Paul’s Complaint ¶67, App. 241-242.)

- That the Trial Court should void any corporate actions that kept Paul from controlling the company. (Paul’s Complaint ¶¶72-75, App. 242-243.)
- Paul should receive the right to farm VOR, Inc. land. (Paul’s Complaint ¶86, App. 245.)
- Paul should be able to keep living on the residential property on VOR, Inc. land. (Paul’s Complaint ¶88, App. 245.)
- If the Trial Court doesn’t find rescission “available,” then Mr. Brendtro is pleading that Paul, one of the plaintiffs, should receive a damage award against VOR, Inc., who Mr. Brendtro has also named as one of his plaintiffs/clients. (Paul’s Complaint ¶¶107-108, App. 249.)

STANDARD OF REVIEW

The bulk of this appeal relates to the interpretation of statutes, and “the construction and application of statutes are reviewed de novo, without deference to the trial court.” *LPN Trust v. Farrar Outdoor Advertising, Inc.*, 1996 S.D. 97, ¶8, 552 N.W.2d 796, 798.

With respect to a continuance, the standard of review is that the decision is within the sound discretion of the circuit court, and its ruling will not be reversed absent a clear abuse of discretion. *Meadowland Apartments v. Schumacher*, 2012 S.D. 30, ¶16, 813 N.W.2d 618, 622.

With respect to the Trial Court’s factual findings, they won’t be set aside unless they are clearly erroneous. *Stockwell v. Stockwell*, 2010 S.D. 79, ¶16, 790

N.W.2d 52, 59. The question isn't whether this Court would have made the same findings, but whether "on the entire evidence, we are left with the definite and firm conviction that a mistake has been made." *Id.*

With respect to the Trial Court's evidentiary rulings, this Court reviews the Trial Court decisions under an abuse of discretion standard, *Taylor v. Taylor*, 2019 S.D. 27, ¶14, 928 N.W.2d 458, 465, which is whether a "fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable."

ARGUMENT

Introduction

Paul's appeal is predicated on asking this Court to effectively repeal SDCL 21-16, the forcible entry and detainer chapter. A review of the source references under the statutes in this chapter show that in some form it has existed since before statehood. SDCL 21-16-2. Eight years after statehood, in *Browne v. Haseltine*, 9 S.D. 524, 70 N.W.2d 648 (1897), the Court was already issuing decisions upholding the forcible entry and detainer statute and, in that particular case, noting that the chapter modified the otherwise applicable Rules of Civil Procedure.⁵

Paul is particularly asking the Court to repeal SDCL 21-16-4, based upon the joinder statute and the Rules of Civil Procedure. SDCL 15-6-13(a). SDCL 21-16-4 has been a part of the Code in some form since 1881. See SDCL 21-16-4,

⁵ The number of modifications within the forcible entry and detainer chapter have increased through the years from the simpler chapter that existed in 1897.

Source notes. The procedural argument made by Paul is the special concurrence from Justice Coler in *Heiser v. Rodway*, 247 N.W.2d 65, 69 (S.D. 1976). Justice Coler’s special concurrence was issued in 1976, and at no point in time since then has either the Supreme Court proposed that change in the Rules of Civil Procedure, nor has the legislature acted upon the suggestion and repealed any part of SDCL 21-16.

More importantly, Paul ignores the substantive purpose for SDCL 21-16, which this Court has described as:

Forcible detainer actions are intended to prevent protracted litigation by limiting the scope so collateral issues not connected with the question of possession do not burden the proceeding.

LPN Trust v. Farrar Outdoor Advertising, Inc., 1996 S.D. 97, ¶9, 552 N.W.2d 796, 798.

Paul can only prevail if this Court judicially rewrites the process set forth and intended by Chapter SDCL 21-16.

1. Chapter SDCL 21-16 controls.

a. The legislature created the limited scope of forcible entry and detainer actions.

The long-established law and the scope of forcible entry and detainer actions are set forth in SDCL 21-16-4:

An action under the provisions of this chapter cannot be brought in connection with any other except for rents and profits or damages but the plaintiff may bring separate actions for the same if he so desire.

Until the decision in *Heiser v. Rodway*, 247 N.W.2d 65 (S.D. 1976), South Dakota had a bright-line rule that “[i]n an action in forcible entry and detainer

only the immediate right of possession is involved,” “[t]he equitable rights of parties cannot be litigated in this form of action.” *Aegerter v. Hayes*, 226 N.W. 345, 347 (S.D. 1929) (citations omitted).

b. The Court has created a limited exception to the limited scope.

The Court has created a limited exception to the limited scope of a forcible entry and detainer action. In 1976, a majority of the Court created an exception to the scope of SDCL 21-16:

[I]nquiry may be made into equitable considerations in an unlawful detainer action, as long as those considerations are relevant to the right of possession.

Heiser v. Rodway, at 68 (S.D. 1976).

It’s important to look at the facts of *Heiser*, and the subsequent decision in *LPN Trust v. Farrar Outdoor Advertising, Inc.*, 1996 S.D. 97, ¶9, 552 N.W.2d 796, 798, to understand the scope of the exception. The statute, SDCL 21-16-4, has not been repealed or stricken by the South Dakota Supreme Court. Instead, a limited exception has been created.

In *Heiser*, the only parties were the landlord and the tenant. The landlord sought an eviction, and the tenant contended there had been an oral extension of the lease. The Majority in *Heiser* allowed evidence “pertinent to the issue of possession” and allowed evidence that “tends to show acts by the defendant consistent with the existence of an oral lease.” *Heiser*, at 68. Even a cursory view of the *Heiser* decision reveals that it is a limited exception on a very narrow set of facts. Paul’s Lawsuit that he claims reflects “equitable defenses” to the immediate right to possession, instead involve an attack on his father’s actions

with respect to his estate plan, with respect to his corporate organization, and with respect to the sale of the land to an independent third party. (Paul's Complaint, App. 229-252.) Paul's purported "equitable defenses" would be the quintessential example of exactly what the forcible entry and detainer action chapter is designed to foreclose.

In the subsequent *LPN Trust v. Farrar Outdoor Advertising, Inc.*, the Court favorably noted the continuing purpose of the forcible entry and detainer chapter, even after and while citing the *Heiser* decision:

Forcible detainer actions are intended to prevent protracted litigation by limiting the scope so collateral issues not connected with the question of possession do not burden the proceeding.

LPN Trust, at 798.

In *LPN Trust*, a landlord initiated an eviction proceeding concerning advertising display billboard sites, and in the forcible entry and detainer action, sought to reform, rescind, or terminate the lease that was the subject matter of the forcible entry and detainer action. *Id.* at 797. The only expansion of the issues allowed in *LPN Trust* concerned interpretation of the lease that was the subject-matter of the eviction.

Paul's underlying lawsuit that he claims to be subsumed into the "equitable defenses" that should be allowed in this forcible entry and detainer action involve a challenge to his father's estate plan, a challenge to six months' worth of legal work by a corporation that Paul is not a shareholder of, and then a rescission of a contract to purchase real estate involving the land buyer and a lender that was paid over a million dollars from the land sale proceeds. (Ex. C

from Victoria's HT, App. 181-190; Paul's Complaint, App. 229-252; VOR's Answer/Motions, App. 253-268.) The logical chain necessary for Paul to make his case involves substantial collateral matters, and does not involve an equitable defense to the possession of the real property until and unless they successfully proceed through several litigation steps that would ultimately involve needing to find \$3.2 million to repay the property purchasers, Grand Valley Hutterian Brethren, Inc., (Paul's Complaint, App. 229-252.), and over a million dollars to the foreclosing First Interstate Bank (Ex. C from Victoria's HT, App. 181-190). Paul's "equitable defenses" are not an effort to merely assert equitable defenses to litigate the right to possession of the land now owned by Grand Valley.

c. There is no legal basis to support the conclusion that the limited scope of the forcible entry and detainer chapter has been repealed.

Pages 20 through 34 of Paul's Brief are an argument that by adopting SDCL 15-6-13(a), the Supreme Court repealed SDCL 21-16-4.

The South Dakota Supreme Court adopted SDCL 15-6-81(a). It provides that for the procedures identified in Appendix A thereto, which includes SDCL 21-16 forcible entry and detainer, the Rules of Civil Procedure apply when they are not "inconsistent or in conflict with the chapter." As the rule clearly states, the Rules of Civil Procedure fill in the gaps. SDCL 21-16 has very specific time periods, and the party resisting eviction cannot use the Rules of Civil Procedure to change the substantive time periods set forth in SDCL 21-16.

Paul spent 14 pages arguing about the scope and reach of SDCL 15-6-13(a), the compulsory counterclaim provision in the Rules of Civil Procedure. Paul's argument is the special concurrence of Justice Coler in the *Heiser* decision from

1976. Since 1976, no court has stricken SDCL 21-16-4. Additionally, while the Rules of Civil Procedure are created through the Supreme Court rule-making process, the forcible entry and detainer chapter is created by the legislature. No legislature has repealed the scope of the forcible entry and detainer chapter, SDCL 21-16-4, since the suggestion was made by Justice Coler in 1976.

When this Court has on two occasions addressed the scope of the exception that is judicially created, it has both times continued to cite the purpose for which the chapter exists and explained why the facts they were addressing involved limited exceptions for equitable defenses that addressed immediate right to possession, and did not involve bringing into the proceeding substantial collateral matters.

As set forth in the above Statement of the Facts, under section 4, the “equitable defenses” asserted by Paul’s Lawsuit would have brought substantial collateral matters into the eviction proceeding. In any event, Paul’s separate lawsuit has now been dismissed as well. (Memo Decision, App. 269-276.)

d. Paul’s Lawsuit was brought in bad faith.

Pages 24 through 26 of Paul’s Brief include a discussion of the situation where an action like Paul’s Lawsuit is brought in bad faith. On page 26 of Paul’s Brief, Paul alleges that Paul’s Lawsuit was “not brought in bad faith.” This Court does not need to rely upon Paul’s assertion that he didn’t bring a lawsuit in bad faith. Instead, this Court has the advantage of the documents from the file for which Paul asked the Trial Court to take judicial notice: Paul’s Lawsuit. The source documents, which tell a very different story, are Paul’s Complaint (App. 229-252), the Answer, Counterclaim, and Motions of VOR, Inc. (App. 253-268),

and the Trial Court's Memorandum Decision (App. 269-276). The bad faith nature of Paul's Lawsuit is summarized for the Court's review in sections 3 and 4 of the Statement of the Facts in this Brief.

2. The Trial Court followed the forcible entry and detainer procedure set forth in SDCL Chapter 21-16.

a. What are the rules that apply?

SDCL 21-16-6 provides unique procedural rules and timing deadlines for a forcible entry and detainer action.

The first unique rule in a forcible entry and detainer statute can be found in SDCL 21-16-2, which includes requirements involving a notice to quit that must be served before a proceeding is commenced.

The second unique rule for this chapter is the limitation on actions that can be joined, SDCL 21-16-4, which has been discussed above.

A particularly unique procedure involves the timing of when actions must be taken. From the time that Paul was served, he had four days to make his "appearance and pleading." SDCL 21-16-7. In other words, at the end of four days, the issues in the case are joined. The statute creates discretion to extend the time for pleading up to fourteen days, but beyond fourteen days only if the defendant meets certain conditions involving posting a sufficient surety.

After the issues are joined, pursuant to SDCL 21-16-7, the trial shall be brought with two days' notice. SDCL 21-16-8. If a jury trial had been demanded, there's a process to provide for that jury trial.

b. The Trial Court followed the law under the circumstances presented.

There's no dispute that Paul was served on April 17, 2023. (Finding No. 9, App. 3.)

There's no dispute that on the fourth day, Paul's counsel filed a notice of appearance and "Defendants' 04/21/2023 Motions." (Finding Nos. 10 & 11, App. 3.)

There's no dispute that when Paul made his "appearance and pleading" within the four days, as required by SDCL 21-16-7, he did not request a jury trial. (Finding Nos. 10-11, App. 3; SR 21-33.)

On April 24, 2023, the Plaintiffs filed a "Notice of Court Trial," which was to commence on April 27, 2023. (Finding No. 12, App. 3.) The time for that trial is within the two-day framework set forth in SDCL 21-16-8.

On the day after the Notice of Court Trial was filed, Paul filed "Defendants' Objection to Notice of Court Trial," but still did not request a jury trial. (Finding No. 13, App. 3; SR 37-42.)

The Trial Court denied Paul's objection on April 26, 2023. (Finding No. 14, App. 3; SR 83.)

On the morning the court trial commenced, April 27, 2023, Paul filed a new pleading, denominated as an Answer, and requested a jury trial. (Finding No. 15, App. 3; SR 86-91.)

The Trial Court ruled that Paul waived his right to assert a jury trial by not filing an answer requesting one within the four days required by statute. (Conclusion No. 8, App. 5.)

The court trial took place and witnesses were heard and cross-examined on April 27, 2023. (Findings & Conclusions, App. 1-5.)

3. Paul's arguments ignore statutory procedures established for a forcible entry and detainer action.

a. The Trial Court correctly set the jury trial in compliance with SDCL 21-16-8.

On pages 35 through 37, Paul is arguing that the jury trial couldn't be set until two days "after issue was joined," SDCL 21-16-8, and arguing that "after issue is joined" is in reference to an answer being filed. (Paul's Brief, p. 35.) Missing from Paul's analysis is that SDCL 21-16-7 very specifically required the defendants to file their "pleading" within four days. Rules of Civil Procedure define what pleadings are, and those are contained in SDCL 15-6-7(a), and that includes "an answer." Clear language of the forcible entry and detainer chapter requires that an answer be filed within four days. SDCL 21-16-7. Paul's argument asks the Court to ignore the "pleading" requirement contained in SDCL 21-16-7.

b. A Motion to Dismiss does not change the statutory deadlines.

Paul argues that filing a motion to dismiss extended the time for a pleading to be filed, pursuant to SDCL 15-6-12(b). Paul is asking the Court to ignore the language of SDCL 21-16-7. Section 7 says that the pleading has to be filed in four days. Paul's argument that the Rules of Civil Procedure allow the pleading to be delayed indefinitely when a motion to dismiss is filed would clearly run afoul of the substantive and specific time periods and procedures set forth in

SDCL 21-16-7 & 8. Paul is free to file a motion to dismiss, he still must have his pleadings filed within four days.

Paul has no authority for ignoring the statutory language contained in SDCL 21-16-7 & 8. The reference to *Riley v. Young*, 2016 S.D. 39, 879 N.W.2d 108, is a habeas corpus proceeding, and not one containing the special statutes that apply in a forcible entry and detainer action.

c. Paul did not timely request a jury trial.

Paul did not request a jury trial in his pleadings, which was the pleading that had to be filed within four days pursuant to SDCL 21-16-7. Furthermore, the demand for a jury trial contained in SDCL 15-6-38(b) includes a requirement that it be included in the answer, which would have been the pleading filed within four days. It was not. SDCL 15-6-38(b) includes language that would allow an additional ten days, but that section is inconsistent with the substantive time periods provided for in the forcible entry and detainer chapter, as the trial can take place within six days of service upon the defendant. SDCL 21-16-7 & 8. SDCL 21-16-8 references the issues being joined, and the time period in which the statute required that to happen was within four days. SDCL 21-16-7. Paul had the statutory time period contained in SDCL 21-16-7 to ask for a jury trial, and he chose not to.

d. Paul did not request a continuance in the manner required by the statute.

On page 40 of Paul's Brief, he references the Trial Court's refusal to grant the continuance pursuant to SDCL 21-16-7. SDCL 21-16-7 is the statute that provides four days within which to appeal and plead. The statute provides that

there can't be an adjournment or continuance for more than fourteen days unless certain undertakings are made.

Paul did not request a continuance, pursuant to SDCL 21-16-7, so as to delay the time period for an appearance and pleading. The answer that was provided within the statutory time period is entitled "Defendants' 04/21/2023 Motions" (SR 23-33), and that includes no request for a continuance. Even the later filing, denominated "Answer" (SR 86-91), does not request the continuance for the time to appear and plead, and does not offer to post a surety. In fact, the only reference in that document to a continuance is in a prayer for relief that pleads:

- d. In the alternative, a stay of these proceedings until the resolution of the other, pre-existing litigation.

(SR 88.)

This is not a request for the continuance provided under SDCL 21-16-7, and it's not a request to do so for a period of less than fourteen days.

At the trial, for the first time, Paul asked for a continuance, and did not post a surety with that request.⁶ (TT 8-10, 13-15.)

On the record, the Trial Court specifically found that Paul's request for a continuance was part of a pattern to use dilatory tactics to delay the eviction. (TT 15-16.) The Trial Court's findings are consistent with the standards in *Meadowland Apartments v. Schumacher*, 813 N.W.2d 618, 623 (S.D. 2012), where the Court can consider "whether the continuance motion was motivated by

⁶ Paul never made a motion to consolidate Paul's Lawsuit with the eviction proceeding, pursuant to SDCL 15-6-42(a).

procrastination, bad planning, dilatory tactics, or bad faith on the part of the moving party or his counsel. *Id.*

Furthermore, no continuance would have changed that Paul admitted the following facts at the court trial:

- Paul admitted that he was served with a Notice of Termination of Lease of Residential Non-Agricultural Lease and Building and a Notice of Termination of Non-Renewal of Farm Lease-Agricultural and Grassland on August 20, 2022. (Finding No. 7, App. 2-3.)
- Paul admitted that he was served with a Notice to Quit on March 29, 2023. (Finding No. 8, App. 3.)
- Paul admitted that he had an oral lease with VOR, Inc. (Finding No. 16, App. 3.)
- Paul admitted that the oral lease could be terminated by VOR, Inc. (Finding No. 17, App. 3.)
- Paul admitted that he knew VOR, Inc. had sold the property to Grand Valley. (Finding No. 18, App. 3.)
- Paul admitted that he couldn't reach an agreement with Grand Valley to lease the property. (Finding No. 19, App. 4.)

No continuance would have changed any of these facts, so there was no ability for Paul to be prejudiced by going to trial on April 27, 2023.

4. **The Trial Court correctly decided, or Paul wasn't prejudiced by decisions which make up, the miscellaneous section of Paul's Brief.**
 - a. **The Trial Court correctly limited the evidence as provided in SDCL Chapter 21-16, and consistent with this Court's Decisions.**

The scope of admissible evidence in a forcible entry and detainer action is addressed under issue "1. Chapter SDCL 21-16 controls" above. Paul's Brief on pages 42 and 43 highlight for this Court just how far afield from a forcible entry and detainer action, and even an "equitable defense," Paul is attempting to go with these proceedings. On page 42, this Court can see that while Paul was evicted by the corporation that used to own the land (SR 92, 95, 15-16), and admitted receiving that notice (SR 96-94, 97-98, 17-18); and the forcible entry and detainer action was brought by the current owners of the property (SR 1-5), Paul's claims go to completely different topics. On page 42, Paul is arguing that his father, the principal shareholder of the corporation that owned the land, changed his estate plan and that the change was due to undue influence. Paul is making the argument for a damage claim that he purports to have with respect to an estate plan of a parent who is not deceased. *Estate of Lynch v. Lynch*, 2023 S.D. 23, ¶41, 991 N.W.2d 95, 109. This is exactly the type of collateral issue that the statute and the subsequent decisions in *Heiser* and *LPN Trust* do not authorize.

- b. **The Court's judgment is not based upon extraneous evidence.**

On pages 44 through 48, Paul is arguing that the judgment was based on extraneous evidence. While there's no dispute that the Circuit Court made an

observation about the principal shareholder of the prior owner of the real property, Raymond O'Farrell, there is no finding or conclusion that relates to that observation. Oddly, Paul asked the Trial Court to take judicial notice of the prior proceeding in which Raymond O'Farrell testified. (TT 12.) The transcript of that testimony is part of this appellate record,⁷ Victoria's HT, App. 6-180. Raymond O'Farrell's testimony is contained on pages 109-129, and those 20 pages are Paul's attorney cross-examining Paul's father. (Victoria's HT pp.109-129, App. 114-134.)

The Trial Court did what Paul asked the Trial Court to do. (TT 12-13.) Paul now alleges that the Trial Court committed error! *Taylor Realty Co. v. Haberling*, 365 N.W.2d 870, 873-4 (S.D. 1985) ("The doctrine of 'invited error' embodies the principle that a party will not be heard to complain on appeal of errors which he himself induced or provoked the court or the opposite party to commit.")

On page 50 of Paul's Brief, he asked this Court to reassign the underlying matter from Judge Spears to a different circuit judge. (Paul's Brief p.50.) The arguments on pages 45 through 50 in support of that are entirely based upon the Trial Court granting Paul's request to take judicial notice of the prior proceedings. (TT 12-13.) In fact, the Appellees would ask the Court to look at Paul's request at the trial (TT 12-13), and compare it to the statement on page 44 of Paul's Brief that "the Circuit Court also erred by considering extrinsic evidence

⁷ While the transcript indicates that the witness was not sworn, there is no indication in the actual record whether that's accurate. In any event, both parties examined and cross-examined the witness, without raising the issue before the Trial Court at that time.

from *outside* of the eviction trial.” (Paul’s Brief p.44.) The Trial Court is doing exactly what Paul asked the Trial Court to do. There is no basis for removing Judge Spears from these proceedings.

c. The ten-day provision concerning removal of personal property is moot.

The argument contained on pages 48 and 49 of Paul’s Brief is moot. Paul sought and received a supersedeas bond, and no action could be taken with respect to that provision.

CONCLUSION

The forcible entry and detainer chapter has time limits that are substantive and go to the essence of the chapter. The Rules of Civil Procedure specifically provide that they supplement, but cannot conflict with, the substantive law in the forcible entry and detainer chapter. Paul’s efforts, and his Brief, are about trying to ignore the substantive law in the forcible entry and detainer chapter, and subvert it by using the Rules of Civil Procedure to substitutionally alter the forcible entry and detainer chapter. The law is that he cannot do that.

Paul’s own testimony admits all of the substantive facts to support that Grand Valley was entitled to a judgment evicting Paul from the property. Paul’s ancillary issues, and they are ancillary and odd at best, reflected in Paul’s Lawsuit, are exactly the kind of arguments that the forcible entry and detainer chapter is designed to not be mired down in. The Trial Court heard the evidence, ruled correctly, and should be affirmed.

DATED this 17th day of August, 2023.

Respectfully submitted,

SCHOENBECK & ERICKSON, PC

By: ___/s/ Lee Schoenbeck_____

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements set forth in SDCL 15-26A-66(b)(4). This brief was prepared using Microsoft Word 2013, with 12 point Georgia font. This brief contains 6,389 words, excluding table of contents, table of authorities, jurisdictional statement, statement of legal issues, and certificate of counsel. I relied on the word count feature in Microsoft Word 2013 to prepare this certificate.

DATED this 17th day of August, 2023.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on August 17, 2023, I served a true and correct copy of the foregoing *Appellees' Brief* via electronic means on the following:

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**APPENDIX
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1.	Findings of Fact and Conclusions of Law (5/1/23)	APP. 1-5	SR 115-119
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3.	Motions Hearing Transcript (7/11/23) <i>Paul O'Farrell, et al. v. Kelly O'Farrell, et al.</i> , 25CIV.23-15 (Appellants requested that the Trial Court take judicial notice of the above lawsuit. TT 12.)	APP. 191-228	SR ---
4.	Complaint (8/9/23) <i>Paul O'Farrell, et al. v. Kelly O'Farrell, et al.</i> , 25CIV.23-15 (Appellants requested that the Trial Court take judicial notice of the above lawsuit. TT 12.)	APP. 229-252	SR ---
5.	Answer, Counterclaim, and Motions of VOR, Inc., Estate of Victoria O'Farrell, and the Raymond and Victoria O'Farrell Living Trust (4/5/23) <i>Paul O'Farrell, et al. v. Kelly O'Farrell, et al.</i> , 25CIV.23-15	APP. 253-268	SR ---

	(Appellants requested the Trial Court take judicial notice of the above lawsuit. TT 12.)		
6.	<p>Memorandum Decision (8/9/23) <i>Paul O'Farrell, et al. v. Kelly O'Farrell, et al.</i>, 25CIV.23-15</p> <p>(Appellants requested that the Trial Court take judicial notice of the above lawsuit. TT 12.)</p>	APP. 269-276	SR ---
7.	<p>Defendant Grand Valley Hutterian Brethren, Inc.'s Motion to Dismiss and Brief (4/10/23) <i>Paul O'Farrell, et al. v. Kelly O'Farrell, et al.</i>, 25CIV.23-15</p> <p>(Appellants requested that the Trial Court take judicial notice of the above lawsuit. TT 12.)</p>	APP. 277-294	SR ---
8.	<p>Reply Brief in Support of Grand Valley Hutterian Brethren's Motion to Dismiss (7/7/23) <i>Paul O'Farrell, et al. v. Kelly O'Farrell, et al.</i>, 25CIV.23-15</p> <p>(Appellants requested that the Trial Court take judicial notice of the above lawsuit. TT 12.)</p>	APP. 295-301	SR ---

STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
	:ss	
COUNTY OF GRANT)	THIRD JUDICIAL CIRCUIT
<hr/>		
VOR, INC., and GRAND VALLEY HUTTERIAN BRETHERN, INC.)	25CIV.23-18
Plaintiffs,)	
v.)	FINDINGS OF FACT AND CONCLUSIONS OF LAW
PAUL O'FARRELL, and SKYLINE CATTLE COMPANY, a South Dakota Corporation,)	
Defendants.)	
<hr/>		

The court trial in this matter having come on before the Court at 10:00 a.m. on April 27, 2023, in the courtroom of Grant County, Milbank, South Dakota, before the Honorable Robert L. Spears; and the Plaintiffs, VOR, Inc. and Grand Valley Hutterian Brethren, Inc., having been represented in this proceeding by Lee Schoenbeck of Schoenbeck & Erickson, PC and Kiera Leddy of Siegel, Barnett & Schutz, I.L.P; and the Defendants, Paul O'Farrell and Skyline Cattle Company, having been represented by Daniel Brendtro of Hovland, Rasmus, Brendtro & Trzynka, Prof. L.L.C; and the Court having reviewed the pleadings and listened to the evidence, does hereby make the following Findings of Fact:

FINDINGS OF FACT

1. This dispute involves the right to possession of ag land and buildings in Grant County, South Dakota.
2. The real property involved in the dispute includes land and buildings located at:

The South Half of the Southeast Quarter and the South Half of the Southwest Quarter of Section 22, Township 121, Range 50, West of the 5th P.M.; and the South Half of the Northwest Quarter, the South Half of the Northeast Quarter, the North Half of the Northeast Quarter, the Southeast Quarter, except Lot 1, Hopewell Subdivision of the Southeast Quarter, and the North Half of the Southwest Quarter, of Section 23, Township 121, Range 50, West of the 5th P.M.; and

Lot 2A of Lots 2A and 2B, O'Farrell Subdivision, a RePlat of Lot Two (2) of the Plat of Lots One (1) and Two (2), O'Farrell Subdivision, all located in the South Half of the Southeast Quarter of Section 14, Township 121, Range 50, West of the 5th P.M., all according to plats now on file and of record in the office of the Register of Deeds, Grant County, South Dakota; and

The South Half of the Southwest Quarter of Section 23, Township 121, Township 50, West of the 5th P.M.;

all of the above in Grant County, South Dakota.

3. Paul O'Farrell, and the company he owns, Skyline Cattle Company, are in possession of the real property and buildings.
4. Grand Valley Hutterian Brethren, Inc. (hereinafter "Grand Valley") are the owners of the real property and buildings at issue.
5. The real property and buildings at issue were conveyed by VOR, Inc., a South Dakota corporation, to Grand Valley on October 17, 2022.
6. Prior to October 17, 2022, the real property and buildings at issue were owned by VOR, Inc.
7. Paul O'Farrell admitted, both individually and as the representative of Skyline Cattle Company, that he was served by the Grant County Sheriff with both a Notice of Termination of Lease of Residential and Non-Agricultural Land and Buildings

and a Notice of Termination and Non-Renewal of Farm Lease—Agriculture and Grassland on August 20, 2022.

8. Paul O'Farrell admitted that he, individually and as a representative of Skyline Cattle Company, was served with a Notice to Quit by the Grant County Sheriff's office on March 29, 2023.

9. Paul O'Farrell, individually and as a registered agent of Skyline Cattle Company, was served with the Summons and Complaint in this matter on April 17, 2023.

10. On April 21, 2023, Daniel Brendtro filed a Notice of Appearance on behalf of the Defendants, Paul O'Farrell and Skyline Cattle Company.

11. On April 21, 2023, Defendants filed a document entitled "Defendants 4/21/2023 Motions."

12. On April 24, 2023, the Plaintiffs' filed a Notice of Court Trial, the Court having set the court trial to commence at 10:00 a.m. on April 27, 2023.

13. On April 25, 2023, the Defendants filed a document entitled "Defendants' Objection to 'Notice of Court Trial'," but still did not request a jury trial.

14. On April 26, 2023, this Court denied the Objection to the court trial.

15. On April 27, 2023, the morning of trial, Defendants filed an Answer.

16. Paul O'Farrell admitted that he and Skyline Cattle Company had an oral lease with VOR, Inc.

17. Paul O'Farrell admitted that the oral lease could be terminated by VOR, Inc.

18. Paul O'Farrell admitted that he knew VOR, Inc. sold the real property and buildings at issue to Grand Valley.

19. Paul O'Farrell admitted that he was unable to reach an agreement to lease the real property and buildings at issue from Grand Valley.

20. Grand Valley has no lease with Paul O'Farrell or Skyline Cattle Company.

21. Grand Valley wants Paul O'Farrell and Skyline Cattle Company evicted from the real property and buildings at issue.

22. The Court finds the testimony of Paul O'Farrell to not be credible, when it conflicts with the Findings made by the Court.

23. The Court finds that Paul O'Farrell did not have a lease for the real property and buildings at issue.

24. The Court finds that Paul O'Farrell has allowed damage to be done to at least one of the buildings on the real property at issue.

Based upon the above Findings of Fact, the Court makes the following Conclusions of Law:

CONCLUSIONS OF LAW

1. Grand Valley is entitled to an order of eviction pursuant to the forcible entry and detainer statutes, because the Defendants, Paul O'Farrell and Skyline Cattle Company, have held over after the termination of their lease.

2. The Court finds that the oral agricultural lease and the building lease were terminated by VOR, Inc.

3. The Court finds that the Notice to Quit was served upon the Defendants on approximately March 29, 2023.

4. The Court finds that the Summons and Complaint were served upon the Defendants on April 17, 2023.

5. The Court finds that the Defendants made the appearance within the four days required by statute.

6. While the Defendants didn't file an Answer within the four days required by statute, the Court did allow the Defendants to interpose their defenses at the court trial.

7. The Court finds there was not sufficient evidence to support claims of laches, equitable estoppel, or waiver.

8. The Defendants waived their right to assert a jury trial by not filing an Answer requesting one within the four days required by statute.

9. The Defendants committed waste upon at least one building on the real property.

10. The Court will award attorney's fees, pursuant to SDCL 21-16-11.

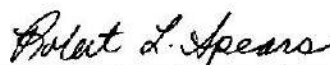
11. **The Court requires the Defendants to vacate the real property and buildings by 8:00 a.m. on May 8, 2023.**

Any Conclusions of Law deemed to be a Finding of Fact or vice versa shall be appropriately incorporated into the Findings of Fact or Conclusions of Law as the case may be.

Let Judgment be entered accordingly.

BY THE COURT:

5/1/2023 4:52:19 PM



Hon. Robert L. Spears
Circuit Court Judge

1 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
)
 2 COUNTY OF GRANT) THIRD JUDICIAL CIRCUIT

3 _____)
)
 4 Victoria O'Farrell, in her)
 individual capacity and as)
 5 Trustee of the Raymond and)
 Victoria O'Farrell Living Trust)
 6 dated January 14, 2011, restated)
 March 29, 2017, and amended)
 7 August 26, 2021,)
)
 8 Plaintiff,)
)
 9 vs.)
)
 10 Raymond O'Farrell, in his)
 individual capacity and as)
 11 Trustee of the Raymond and)
 Victoria O'Farrell Living Trust)
 12 dated January 14, 2011, restated)
 March 29, 2017, and amended)
 13 August 26, 2021, and Kelly)
 O'Farrell,)
 14)
 Defendants.)
 15 _____)

Motions Hearing

25CIV22-000038

16
 17 BEFORE: **THE HONORABLE ROBERT L. SPEARS**
 Circuit Court Judge
 Watertown, South Dakota
 18 October 18, 2022, at 2:06 p.m.

19
 20 APPEARANCES:

21
 22 For the Plaintiff: **MR. ALEX HAGEN**
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 25

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1 (WHEREUPON, the following proceedings were duly had:)

2 THE COURT: The record should reflect that my name is
3 Circuit Court Judge Robert Spears. And I have two files
4 set for a hearing at the same time. They are both Grant
5 County civil files that are being heard by consent of the
6 parties involved and all the attorneys involved here in
7 Courtroom 219 located in Watertown, South Dakota.

8 The cases are Victoria O'Farrell versus Raymond
9 O'Farrell and Kelly O'Farrell. This is file number
10 25CIV22-0038. And the other file on my docket for the
11 same time this afternoon is the matter of the Estate of
12 Victoria O'Farrell. This is Grant County probate number
13 25PRO22-0011. Between these two files, there are several
14 motions pending before the Court and set for hearing this
15 afternoon.

16 Counsel, please note your formal appearance on this
17 record starting with the plaintiffs and the moving parties
18 first, please.

19 MR. GEYER: David Geyer appearing with and on behalf of
20 Paul O'Farrell, the petitioner in the Estate and the
21 intervenor in the lawsuit.

22 MR. HAGEN: Alex Hagen on behalf of Victoria.

23 MR. SCHOENBECK: Your Honor, Lee Schoenbeck appearing on
24 behalf of Raymond O'Farrell and I am joined by co-counsel.

25 MS. JENNEN: Susan Jennen on behalf of Raymond O'Farrell.

1 THE COURT: Thank you.

2 MR. HIEB: Then Jack Hieb on behalf of Kelly O'Farrell in
3 the action for intervention.

4 THE COURT: All right. And anybody else?

5 MR. SCHOENBECK: For the record, Your Honor, George Boos
6 is also co-counsel and he is here with us.

7 MR. BOOS: Yes, Your Honor. I am the attorney of record
8 in the matter of the special administration of the Vicki
9 O'Farrell estate file.

10 THE COURT: All right. Thank you, everyone. And there's
11 several other people seated in my courtroom. Is there
12 going to be any testimony or witness testimony this
13 afternoon during these two hearings?

14 MR. GEYER: Yes, Your Honor.

15 THE COURT: All right. Then on the Court's own motion, I
16 will sequester such witnesses until they testify. That
17 sequestration order brought forth by the Court's motion
18 applies to both sides. So what that means in plain simple
19 English, other than parties and the attorneys, if you are
20 going to be a witness in these proceedings, you will have
21 to have a seat outside the courtroom until you're called
22 as a witness.

23 All right. Anything else that the Court needs to
24 address before we start with the hearings?

25 MR. GEYER: Not that I'm aware of, Your Honor.

1 MR. SCHOENBECK: Your Honor, I just wonder which file we
2 are taking first. I have an opening statement with
3 respect to the intervention motion if that's what we will
4 hear first.

5 THE COURT: All right. Let's take file number 25 22-0038
6 first simply because that's the one that appears on my
7 calendar first and I can only call one file up at a time
8 electronically on this system.

9 All right. And, Mr. Geyer, you filed -- you're the
10 moving party in this file; am I correct?

11 MR. GEYER: Yes, Your Honor. Which file? I'm sorry. I
12 was opening a binder.

13 THE COURT: That's okay. 25CIV22-0038 simply because that
14 file appears on my calendar first.

15 MR. GEYER: Yes.

16 THE COURT: And that's the one I have on the screen.

17 MR. GEYER: I guess since Mr. Schoenbeck stated that he
18 wants an opening statement, I guess I would make the
19 comment that we are going to provide the testimony today
20 that shows that Mr. O'Farrell, Paul O'Farrell, has an
21 interest in the current lawsuit such to allow him to
22 intervene to protect his interests. He is a trustee under
23 the trust of Victoria O'Farrell and Raymond O'Farrell
24 which he is named in the heading.

25 Due to that, Your Honor, and also based upon the

1 inadequacy that he's being represented since the current
2 special administrator for Victoria O'Farrell is not
3 proceeding on prosecuting the claim.

4 THE COURT: All right. And your client is also mentioned
5 in the beneficiary and the trust that's part of the
6 probate proceeding, correct, did I catch that?

7 MR. GEYER: Correct. Yes.

8 THE COURT: All right. Anything else?

9 MR. GEYER: Not at this time, Your Honor.

10 THE COURT: All right. Now, Mr. Schoenbeck, please
11 proceed with your opening statement.

12 MR. SCHOENBECK: Thank you, Your Honor. And I am going to
13 hand the Court -- these will be exhibits that will be --
14 these are parts of exhibits that will be before the Court.
15 I think it's beneficial for the Court to see these now,
16 though, so that there will be no misunderstanding at the
17 end of this process about the speciousness of this motion
18 to intervene.

19 Paul O'Farrell has no standing to make this motion.
20 He has none at all as a matter of law. The trust
21 document, and the Court has it in front of it, in Section
22 1.03, Sub D --

23 MR. GEYER: I am going to object, Your Honor, as to
24 testifying to -- or making an argument as to exhibits not
25 on the record.

1 THE COURT: What's that, Mr. Geyer?

2 MR. GEYER: I guess I am going to object to argument in
3 opening regarding documents that are not in evidence as
4 exhibits.

5 THE COURT: Well, he's making an opening statement.
6 There's no jury to impress here. I am going to take this
7 matter under advisement. I am not going to rule from the
8 bench, and I will give both sides some leeway on this
9 issue. And I am competent in my ability to separate the
10 wheat from the chaff, so to speak. Objection is
11 overruled.

12 Go ahead, Mr. Schoenbeck.

13 MR. SCHOENBECK: Thank you, Your Honor. And when the
14 Court has this trust before it, the Court is going to see
15 in Section 103, Sub D, that if there's separate property,
16 the party putting it in has an unrestricted ability to
17 take it out. They can do it.

18 And if it's joint property, half the joint property
19 is treated as separate property. Again, they have an
20 unrestricted right to take it out. 25,000 shares of vOr
21 were put into the corporate -- the trust. There's no
22 dispute about that.

23 Raymond took half of it out, 25,500 shares. He had
24 every right to do it. There's no irrevocable part of the
25 trust that stops him.

1 Paul O'Farrell was never a beneficiary as to those
2 shares, never ever, ever. It's like suing somebody to
3 say: You had me in your will and if you'd have died while
4 that version was around, I would be a beneficiary. I want
5 to intervene in a lawsuit to stop you from changing your
6 will.

7 That's exactly what the parties are positioned here.
8 The trust says he can do it. Paul has no standing. It's
9 irrevocable -- or it's not irrevocable. Besides that, the
10 second reason why as a matter of law this should be over
11 is that it's moot. The complaint wants to intervene in
12 when the Court looks at the prayer for relief, it's all
13 personal to Victoria. It's a collection of equitable
14 relief for Victoria who is a shareholder -- or as trustee,
15 as a shareholder in the corporation.

16 There isn't any part of the relief sought that if
17 he's allowed to intervene so that he can keep the lawsuit
18 going, we'll get summary judgment against him because
19 there isn't anything in that prayer for relief that he be
20 entitled. He's not entitled to be a director of the
21 corporation. He's not entitled to be a shareholder in the
22 corporation. He's not entitled to be an officer in the
23 corporation.

24 He makes no reason for why he would be entitled to
25 any of those positions. And the last thing I'd say by

1 opening statement, after the Court has to endure, we have
2 two professionals out here who can testify. We have an
3 attorney involved and an accountant that was involved for
4 over a decade. And we'll have the tax returns so the
5 Court can see what the documents say.

6 When it's all done, every single thing I've said is
7 true. Every story he's telling, it's going to look worse
8 than it does, even just the fact that the Court can decide
9 as a matter of law. But when the facts are in, it's even
10 worse for them. And we're going to be making a motion for
11 attorney's fees for a frivolous filing and the same theory
12 as the Healy case where the Supreme Court awarded us fees.
13 Thank you.

14 THE COURT: Alright. Thank you, Mr. Schoenbeck.

15 Mr. Hagen, do you have a dog in this hunt on this
16 issue?

17 MR. HAGEN: Only the result, Your Honor. I don't have any
18 argument or statement to make to the Court.

19 THE COURT: Mr. Hieb, same question to you.

20 MR. HIEB: Yeah, I represent a party who was sued in that
21 lawsuit. And my sentiments are echoed by Mr. Schoenbeck.
22 I want my client to be able to move on with life and no
23 longer be a party to this thing.

24 And I think with Victoria's death, this lawsuit is
25 over, if you look at the prayer for relief. If there is

1 some claim he wants to try to make that he thinks he has
2 standing to make, he should be able to make it
3 independently. We shouldn't have to use this as a
4 vehicle. I would hope that --

5 THE COURT: When you say "this," the record should reflect
6 you are tapping on a binder notebook. Is that trust
7 documents?

8 MR. HIEB: This is actually the pleadings binder for the
9 lawsuit that we are talking about, the lawsuit that Paul
10 seeks to intervene in. And the only point that I would
11 make is that if he has standing to bring the type of
12 claims that he evidently wants to bring, because he
13 certainly can't ask for the relief Victoria was asking
14 for, none of that would apply to him, then I would hope
15 that everybody could take a fresh look at it and decide
16 whether my client really needs to be a party at this point
17 or not. So I would --

18 THE COURT: Okay.

19 MR. HIEB: I believe the case should be dismissed.

20 THE COURT: I thought I reviewed both files but your
21 binder looks significantly larger than both my electronic
22 files.

23 MR. HIEB: That's what it is.

24 THE COURT: All right. Well, Mr. Geyer, are you ready to
25 proceed? And, if so, please call your first witness.

1 MR. GEYER: We would call Paul O'Farrell, Your Honor.

2 THE COURT: And thank you, counselors, for your opening
3 statements and overview of the case.

4 PAUL O'FARRELL,

5 was called as a witness and, being first duly
6 sworn, was examined and testified as follows:

7 THE COURT: When you're ready, Mr. Geyer.

8 MR. GEYER: Thank you, Your Honor. Just to be clear we
9 are proceeding under 22 --

10 THE COURT: 0038.

11 MR. GEYER: Thank you.

12 Could you mark that, please.

13 (Exhibit Number 1 marked for identification by the court
14 reporter.)

15 MR. GEYER: Will you stipulate to the entry of the trust?

16 MR. SCHOENBECK: Yes.

17 THE COURT: Exhibit 1 is received.

18 DIRECT EXAMINATION

19 BY MR. GEYER

20 Q Will you state your name for the record?

21 A Paul Raymond O'Farrell.

22 Q And I am going to call you Paul, because there's several
23 O'Farrells, there's several Mr. O'Farrells. Okay?

24 A Okay. Correct.

25 Q Mr. Paul, how old are you?

1 A What's that?

2 Q How old are you?

3 A Forty -- or 55.

4 Q What is your relationship to Raymond O'Farrell?

5 A He's my father.

6 Q Okay. What was your relationship to Victoria O'Farrell?

7 A That was my mother.

8 Q Okay. And I handed you a copy of Exhibit 1, which has
9 been stipulated into entry, can you grab that? Have you
10 seen that document before?

11 A Yes.

12 Q When did you first -- or how did you receive a copy of
13 that? Do you remember?

14 A It was sent to me in the mail by my mom and dad's lawyer.

15 Q Okay. And can you please turn to page 9-1 of that
16 document?

17 THE COURT: Did you say page 91?

18 MR. GEYER: Nine, one. Nine dash one, Your Honor.

19 THE COURT: Nine dash one.

20 BY MR. GEYER

21 Q Tell me when you've done so, Paul.

22 A Yes.

23 Q Okay. Do you see in the bottom where it talks about
24 Section 9.03?

25 A Yes.

1 Q And do you see where it's titled "Specific Distribution to
2 the Trust Share for Paul R. O'Farrell"?

3 A Yes.

4 Q Who is Paul R. O'Farrell?

5 A That's myself.

6 Q Okay. And under Section 9.03, do you see the land
7 distribution or specific distribution that is discussed
8 going to you?

9 A Yes.

10 Q Okay. And you also see a version of that -- or excuse
11 me -- reference in there to vOr, Incorporated, correct?

12 A Yes.

13 Q Okay. What is vOr, Incorporated?

14 A Vicki or Raymond O'Farrell.

15 Q vOr, Incorporated, stands for Vicki or Raymond O'Farrell?

16 A Yes.

17 Q Okay. Is it a corporation organization by the -- under
18 the State of South Dakota?

19 A Yes.

20 Q Okay. Who owned the shares -- or who created vOr,
21 Incorporated? Do you know?

22 A Well, it would have been Vicki and Raymond.

23 Q And that being Victoria O'Farrell and Raymond O'Farrell?

24 A Yes.

25 Q And what does vOr, Incorporated, do as a company? Do you

1 know?

2 A They own the land that I farm.

3 Q Okay. And when you say you farm, do you farm under a
4 different company?

5 A Yeah, Skyline Cattle Company.

6 Q And who created Skyline Cattle Company?

7 A I did with my parents Raymond and Vicki.

8 Q And you rent -- or Skyline Cattle Company operates the
9 land owned by VNO [sic] Incorporated?

10 A Yes. We own both corporations, yes.

11 Q You've done a motion to intervene -- let me ask you this:
12 Did you know that your mother Victoria O'Farrell started a
13 lawsuit against Raymond O'Farrell and Kelly O'Farrell?

14 A Yes.

15 Q Did she tell you that?

16 A Yes.

17 Q What was your understanding of why she did that?

18 A Because they tried to basically push her out of her own
19 corporation, which they tried to declare her incompetent
20 and get her removed.

21 Q Okay. And so she expressed to you that's why she sued
22 Raymond O'Farrell and Kelly O'Farrell?

23 A That's correct.

24 Q Okay. Was your mother upset about the actions taken by
25 Raymond O'Farrell?

1 A Yes.

2 Q What was her expressions regarding his conduct?

3 A Yeah, she just wanted things left the way they were and --
4 yeah. Of course, yeah -- I'm not sure what you want for
5 an answer.

6 Q You've answered it. So did you have any -- or were you
7 involved in the formation of this trust?

8 A No.

9 Q It was already done when you were provided with it?

10 A Yes.

11 Q How is your relationship with your father?

12 A Well, not real good right now.

13 Q Has it always been not good?

14 A No. We always had a -- I mean, I used to work for him for
15 how many years.

16 Q When did it deteriorate?

17 A After my brother moved in there.

18 Q Who is your brother?

19 A Kelly O'Farrell.

20 Q How did it deteriorate?

21 A Well, he just set out in the garage with Raymond and drink
22 beer all night and feed him a bunch of lies about me and,
23 of course, Raymond believed it all.

24 MR. HIEB: I will object to that as hearsay and lacking
25 foundation.

1 THE COURT: The objection is sustained.

2 MR. HIEB: Thanks.

3 THE COURT: It is hearsay, Mr. Geyer.

4 BY MR. GEYER

5 Q So what did Raymond say to you or what conversations did
6 you start having with Raymond O'Farrell that you're saying
7 that your relationship deteriorated?

8 A When we were gonna redo our loan or renew our loan and he
9 wasn't going to go along with it.

10 Q Who wasn't going to go along with it?

11 A Well, Raymond was told by Kelly not to sign it.

12 MR. HIEB: Objection; same --

13 MR. SCHOENBECK: Hearsay.

14 MR. HIEB: -- basis, hearsay.

15 THE COURT: I will sustain the objection. It is hearsay.
16 There's statements by, so far, a non-testimonial witness
17 stated out of court to assert the truth of -- or to affirm
18 the truth of the matter asserted. That's classic hearsay.
19 The law requires I sustain the objection.

20 Mr. O'Farrell, you can testify to what you heard your
21 father say or any other party to this lawsuit say, but you
22 can't testify to what you heard others say who are not
23 parties to this lawsuit or anybody else that's not going
24 to testify here in court. Do you understand the rules?

25 THE WITNESS: Understood.

1 THE COURT: Okay. Thank you.

2 Go ahead, Mr. Geyer.

3 MR. GEYER: Thank you.

4 BY MR. GEYER

5 Q So, Paul, did you ever hear Kelly O'Farrell have a
6 conversation with your father where he made a misstatement
7 about you?

8 A Yes.

9 Q Okay. When did that happen and what did Kelly O'Farrell
10 say?

11 A Well, it was over -- or renewing our loan with vOr.

12 Q When did it happen? Did it happen when the banker was
13 there or was this prior to that?

14 A I would say it was -- I don't know -- six, eight months
15 ago.

16 Q And what did Kelly say to your father that was not
17 truthful?

18 A Not to sign any documents.

19 Q Kelly told your father that?

20 A Yes.

21 Q Did he say why?

22 A Because I had to get my operating loan renewed and it was
23 my mom, Raymond, and myself that were on the loan.

24 Q But why would Kelly tell your father not to sign the --

25 A Because the loan -- then I couldn't borrow the money.

1 Q Did Kelly say why Raymond shouldn't sign it?

2 A Yeah, he just agreed or -- you know, over my operating and
3 my mom not being in real good health. So, yeah, then
4 that's when things all got started.

5 Q Okay. So let's go back to -- so the loans that you guys
6 were refinancing, who were those loans with?

7 A Great Western Bank.

8 Q Okay. And what companies were borrowing money? Who were
9 the borrowers on the notes?

10 A VOr and Skyline Cattle Company.

11 Q Okay. So let's go back and talk. So Skyline Cattle
12 Company, that was created by you and your parents,
13 correct?

14 A Yes.

15 Q And that was for the purpose of farming and ranching,
16 correct?

17 A Yes. We were a partnership together.

18 Q And at the beginning, do you remember what percentage of
19 ownership you had versus your parents?

20 A I think it was half and half.

21 Q Half to who and half to who?

22 A Vicki and Raymond half and then half to me.

23 Q Okay. Did that change?

24 A Yes, it did, several years ago when they released
25 everything that was in Skyline Cattle Company. They

1 released it into my name.

2 Q Okay. So Raymond and Victoria signed over their shares to
3 you?

4 A That's correct.

5 Q So right now, as you sit here, you are the sole owner of
6 Skyline Cattle Company?

7 A Yes.

8 Q So let's go back to the start of Skyline Cattle Company.
9 Approximately, when was it created?

10 A 2003.

11 Q Okay. Where in relation was that when the land your
12 parents have was put into vOr? Do you know?

13 A Well, Raymond was partners with his four other brothers
14 and they dissolved the corporation and they split all the
15 land up and some equipment between the five of them.

16 Q Okay. And what corporation was that where Raymond was a
17 partner with his brothers?

18 A O'Farrells, Incorporated.

19 Q So Raymond and his brothers split up and Raymond's share
20 went into vOr?

21 A No. It was O'Farrells, Incorporated, and that's when they
22 formed Vicki or Raymond.

23 Q Okay. What I am getting at is what from O'Farrells
24 Incorporated went into vOr, if you know?

25 A Oh, land.

1 Q Okay. So at the inception, who was managing or operating
2 Skyline Cattle Company?

3 A I was.

4 Q And what were your duties with Skyline Cattle Company?

5 A Taking care of livestock and doing the grain farming and
6 just keeping things up.

7 Q Okay. What was your mom Victoria O'Farrell's involvement
8 with Skyline Cattle Company?

9 A She handled all the bookwork and the bills.

10 Q And who wrote checks for Skyline Cattle Company?

11 A Vicki O'Farrell, my mother.

12 Q What was Raymond O'Farrell's involvement with Skyline
13 Cattle Company when it was first began in approximately
14 2003?

15 A He used to help buy a few cattle when he was in better
16 shape.

17 Q Okay.

18 A But then that's been probably six years or more ago.

19 Q So did there become a time where Raymond stopped buying
20 cattle?

21 A Yes.

22 Q And when was that?

23 A I would say six, eight years ago.

24 Q And is there a time where Victoria O'Farrell stopped
25 managing books and writing the checks?

1 A Yes. That was three years ago.

2 Q Okay. Who was doing the books for Skyline Cattle Company
3 since Victoria stopped?

4 A Marie Chapin.

5 Q And who is Marie Chapin?

6 A She is the bookkeeper who keeps all the books now.

7 Q Other -- I assume Marie gets paid by Skyline Cattle
8 Company?

9 A What's that?

10 Q I assume Marie gets paid by Skyline Cattle Company?

11 A Yes.

12 Q Okay. Who writes the checkbooks -- or who writes the
13 checks since Vicki stopped being the bookkeeper?

14 A Marie Chapin.

15 Q Okay. And have you -- do you receive a salary from
16 Skyline Cattle Company now?

17 A Yes.

18 Q And what is your salary?

19 A It's like 2200 bucks a month.

20 Q \$2,200 a month?

21 A Yeah.

22 Q Is that before --

23 A After taxes.

24 Q And you just have to wait for me to ask the whole
25 question, Paul. So is that before or after taxes?

1 A After.

2 Q And do you have a company pickup?

3 A Yes.

4 Q Okay. And who is that titled with?

5 A Skyline Cattle Company.

6 Q And do they pay the expenses and payments on that pickup?

7 A Yes, Skyline did.

8 Q And where do you reside?

9 A It's -- where do I reside?

10 Q Yeah.

11 A On Skyline -- vOr's property.

12 Q Okay. And you recently built a house, correct?

13 A Yes.

14 Q Okay. When was your house built?

15 A Probably three years ago.

16 Q And who makes the payment on that mortgage?

17 A It's through Skyline Cattle Company.

18 Q Okay. And if you need fuel for your pickup, who pays

19 that?

20 A Skyline Cattle Company.

21 Q So you get a wage from Skyline Cattle Company but you also

22 get some other expenses paid from them, correct?

23 A Yes.

24 Q Okay. Is the home that you recently built, who owns the

25 land that that's on?

1 A vOr.

2 Q Have you ever taken a distribution from Skyline Cattle
3 Company?

4 A No.

5 Q Are you aware of any dividends that you've taken from
6 Skyline Cattle Company?

7 A Nothing.

8 Q We were talking about the meaning -- or the notes with the
9 bank. Does Skyline Cattle Company -- I mean, you
10 testified it has notes with Great Western Bank, correct?

11 A What now?

12 Q Skyline Cattle Company has notes with Great Western Bank,
13 correct?

14 A Yes.

15 Q Okay. How are those notes secured? Specifically, is
16 there any land that secures those notes?

17 A Yeah. Vicki or Raymond or -- yeah.

18 Q Vicki or Raymond, is that vOr, Incorporated?

19 A Well, it is vOr, but they would sign for Skyline Cattle
20 Company.

21 Q Okay. What I am driving at is, is the vOr land used to
22 secure the Skyline --

23 A Oh, yes, my expenses.

24 Q You gotta let me ask the question. So is the vOr land
25 used to secure the debts for Skyline Cattle Company?

1 A Correct.

2 Q How often -- let me ask you this: What kind of debt does
3 Skyline Cattle Company have?

4 A I believe it's just 1.2 million.

5 Q Okay. And what is the -- I mean, how does that debt --
6 how often do you have to refinance that debt? Let me ask
7 you that.

8 A Once a year.

9 Q And how long has Skyline Cattle Company been refinancing
10 that debt?

11 A Since 2003, I guess.

12 Q So every year, since 2003, Skyline Cattle Company has to
13 refinance their debt?

14 A Yes.

15 Q Is it a line of credit?

16 A Yes. There's operating, yes.

17 Q And who is present when Skyline Cattle Company is
18 refinancing the debt?

19 A Raymond and Vicki O'Farrell.

20 Q And who else?

21 A And myself.

22 Q Okay.

23 A Paul.

24 Q And where does that take place at?

25 A Usually, at my parents' house, dining room.

1 Q Okay. And who is present other than you and your parents?

2 A And the banker.

3 Q Okay. And what would be discussed when the banker would
4 come out to refinance?

5 A Well, Raymond likes to discuss a lot of things, but, yeah,
6 we would just -- he'd have the paperwork there to
7 refinance and all three of us would sign and it'd be
8 done -- done deal.

9 Q Okay. Do you believe your father -- let me ask you this:
10 Do you think your father is currently competent?

11 A No.

12 Q Why do you say that?

13 A Because of his memory and -- and he pretty much drinks
14 beer all day. He has a hard time functioning. I mean,
15 he's had a stroke and -- yeah, he's just deteriorating
16 with his mental ability to do anything. He's kind of told
17 what to do.

18 Q How about is your father able to drive himself?

19 A No.

20 Q When did that cease?

21 A I am guessing eight years ago.

22 Q And what about -- you talked about his drinking. What
23 concerns do you have about your father's drinking?

24 A Well, yeah, that's all he would do. He never left the
25 garage.

1 Q From, I mean, when? When did that start?

2 A Oh, a few years ago. He might get out once a week.

3 Q Okay. And what kind of drinking does he do in the garage?

4 A He might probably drink eight, ten beers a day.

5 Q Have you ever kept any information about Skyline's
6 finances from either Victoria O'Farrell or Raymond
7 O'Farrell?

8 A Never.

9 Q Did -- so Skyline Cattle Company rented land from vOr,
10 Incorporated, correct?

11 A Yes.

12 Q Was there a set rental agreement with vOr, Incorporated?

13 A No. My mom paid the rent, paid all the bills out of
14 Skyline Cattle Company when they were part ownership in
15 that.

16 Q Okay. So when you say your mom paid the bills in regard
17 to rent, what do you mean by that?

18 A Well, everything went through her. I never wrote a check
19 to anybody. It all went to my mom. She paid whatever she
20 wanted for rent and then whatever bills that got mailed to
21 her. Because all my business mail, if I had a bill, would
22 be mailed to my folks' house because that's where her
23 office was at.

24 MR. GEYER: Your Honor, I would ask the Court to take
25 judicial notice of all the pleadings on file, specifically

1 the affidavit of Plaintiff Victoria O'Farrell offered in
2 support of Plaintiff's application for temporary
3 restraining order.

4 THE COURT: And that's the affidavit in this file?

5 Any objection, Mr. Schoenbeck?

6 MR. SCHOENBECK: Yes, Your Honor. I would objection to
7 that affidavit as it's hearsay.

8 MR. GEYER: Your Honor --

9 MR. SCHOENBECK: She's not here to be cross-examined.
10 There's no exception to that rule.

11 MR. GEYER: Your Honor, there is an exception. I just
12 can't remember if it's 804 or 80B.

13 THE COURT: Well, the affiant is deceased, correct,
14 Mr. Geyer?

15 MR. GEYER: She is.

16 THE COURT: Okay. Go ahead.

17 MR. GEYER: Under 804.5, Your Honor, decedent's statement,
18 which is SDCL 19-19-804, we would ask that it be
19 authorized as it was made by the decedent. It is her
20 statement. It was made in good faith and on decedent's
21 personal knowledge.

22 THE COURT: Now, is this the affidavit in file number
23 22-0038 offered in support for a temporary restraining
24 order that was subsequently withdrawn --

25 MR. GEYER: Yes, Your Honor.

1 THE COURT: -- or it's another affidavit? All right.

2 Anything else?

3 MR. GEYER: No. We would just state that it fits under
4 the exception since it's Victoria O'Farrell and she's the
5 decedent. It was made by the decedent because it was
6 signed by her under notary. It was made in good faith as
7 she made it under oath and it is her personal knowledge as
8 stated in it.

9 THE COURT: Mr. Schoenbeck?

10 MR. SCHOENBECK: Your Honor, I don't think that statement
11 that somebody typed up for her that runs for nine pages
12 could in any way be construed as a statement by Victoria
13 O'Farrell. And we can't cross-examine. Most importantly,
14 we can't cross-examine her or know who actually typed up
15 and prepared this legal document.

16 MR. GEYER: There's no requirement --

17 THE COURT: Well, what are the rules, counselor? And I
18 will pose this to Mr. Geyer first. You're asking me to
19 take judicial notice. What are the rules pertaining to a
20 document, a court file, or anything else that I am
21 supposed to take judicial notice on?

22 MR. GEYER: Well, I think the Court is free to do it.

23 THE COURT: Aren't there conditions? Doesn't it have to
24 be -- it has to be a statement that is so straightforward
25 that there's no debate or there's no question as to what

1 it stands for?

2 MR. GEYER: Yes, Your Honor.

3 THE COURT: And the truth is fairly established in the
4 document itself that it's beyond further debate of
5 question? I mean, that's not what the statute says, but
6 that's my simple language interpretation. Isn't that the
7 standard I have to apply when I'm asked to take judicial
8 notice?

9 MR. GEYER: Well, it may be under the judicial notice
10 statute, Your Honor, but even -- other than that being
11 offered, the objection made by counsel is hearsay. And
12 there's a straight-up exception to the --

13 THE COURT: Well, I heard -- I was well aware of Counselor
14 Schoenbeck's hearsay. But, honestly, I am asking the
15 question pertaining to judicial notice, not hearsay,
16 because that's how you offered it.

17 MR. GEYER: Yes. And I believe that under what you've
18 stated, Your Honor, it falls under that category.

19 Ms. O'Farrell started this lawsuit in a complaint. She
20 signed a sworn statement in support of her position in
21 this lawsuit. So I believe that satisfies the requirement
22 of the Court.

23 As far as her not being here to testify, you know,
24 obviously under perfect conditions she would have been
25 here, but she can't be here because she died. And so

1 that's why it would fall under 804.5 which allows us to
2 have her testify under the affidavit because she died.

3 THE COURT: Now, is that under the judicial notice code or
4 the evidentiary code pertaining to the hearsay?

5 MR. GEYER: That is under the evidentiary code based on
6 the objection by his counsel.

7 THE COURT: All right. Mr. Hieb?

8 MR. HIEB: Yeah. Well, I think you've hit the judicial
9 notice issue on the head. It's not something you can take
10 judicial notice of, at least not properly, because you
11 properly characterized what you can take judicial notice
12 of, and an affidavit certainly isn't that. It's got to be
13 a document that has inherent credibility such that the
14 Court doesn't need to look further for foundation for the
15 statements --

16 THE COURT: Inherent capability. That's the --

17 MR. HIEB: Right.

18 THE COURT: Go ahead.

19 MR. HIEB: Yes. And there is an exception for -- and I
20 think we all learned about it as a dying declaration.
21 There is an exception for hearsay when someone believes
22 their death is imminent. They make a statement. It's
23 being offered. And I think what we were all taught is
24 that, if their death is imminent, they are more likely to
25 tell the truth.

1 THE COURT: In anticipation of death.

2 MR. HIEB: Right. There's obviously been no showing that
3 this affidavit was signed by her at a time when she
4 believed her death to be imminent, at least there's been
5 no foundation for that. And to simply suggest that you
6 can take a statement and because it was notarized it
7 somehow gets you around the rule involving hearsay, I
8 think, is incorrect.

9 So, remember, this person was not allowed to be
10 cross-examined, even in the affidavit. So if this had
11 been a deposition that they had taken of her, then I
12 believe the rule being cited by Mr. Geyer might be
13 applicable. You know, you're saying she's unavailable. I
14 need to use this in the deposition form. I can show the
15 Court she's unavailable. She's either outside the
16 subpoena power of the Court, she's too ill to be here.
17 She's now dead.

18 It would all be unavailable examples, but that does
19 not comport with the use of an affidavit. If it's
20 cross-examined sworn testimony, you can do that. And we
21 are all familiar with that, with the fact that if you show
22 up here and she was deposed and she's now dead or
23 unavailable, you lay that foundation and you say: Your
24 Honor, I want to put the deposition testimony in instead
25 of her live testimony.

1 But the reason for that rule is because she can be
2 cross-examined at that time. Thank you.

3 MR. GEYER: And that's just not true, Your Honor.

4 THE COURT: Well, let's -- I will get back to you,
5 Mr. Geyer.

6 Mr. Hagen, do you have anything to add? Maybe I am
7 misreading something, but was this affidavit that we are
8 talking about prepared in your office?

9 MR. HAGEN: It -- well, Your Honor, I am hesitant to make
10 the argument. I can respond to that actual question. It
11 was prepared in my office. It wasn't signed in my office.

12 THE COURT: All right. So -- but the reason I am allowing
13 you a chance is because that was my understanding. If you
14 have anything add to this discussion, I'd like to hear it;
15 if you don't, that's fine too.

16 MR. HAGEN: I am constrained by the current posture. I
17 will be submitting argument as to how it should be viewed.

18 THE COURT: Okay.

19 MR. HAGEN: And, obviously, I can't get into privileged
20 matters, so --

21 THE COURT: All right. Thank you.

22 Mr. Geyer, then, back to you.

23 MR. GEYER: Thank you, Your Honor. I mean, I appreciate
24 the position Mr. Hagen is in, but, you know, you can have
25 it on your computer. Mr. Hagen notarized it. And so --

1 THE COURT: I am not trying to put anybody on the spot. I
2 am just making sure everybody has the opportunity to
3 address me if they want to. That's the only reason I ask
4 questions like that. Go ahead.

5 MR. GEYER: And to address Mr. Hieb's argument, it's just
6 not true. The dying declaration statement is not part of
7 Rule 408. When the rules of evidence got changed, 408
8 under 5 does not say it has to be a dying declaration.

9 It can be any declaration, as long as it falls under
10 those elements, which is that the statement was made by
11 the decedent. Well, I don't know how a written statement
12 made by the decedent, notarized by her attorney at the
13 time, is challenged as being factually her statement.

14 The other thing is it was made in good faith. She
15 obviously made it for the purpose of this litigation that
16 she cared deeply about. And we are here right now trying
17 to prosecute on her behalf. In good faith means that she
18 made it honestly in good faith. She swore under oath to
19 her own attorney that that was true. And the third one is
20 personal knowledge. Well, she claims right in there, it's
21 of her own personal knowledge.

22 To say that she didn't make these statements when she
23 swore under oath that she -- these are her words doesn't
24 fall under that. I mean, it's the antithesis. There is
25 no requirement that she be cross-examined. If she was

1 here today, she would be on the stand. But she's not.
2 She's unavailable and the law allows us to come in under
3 that section. Thank you, Your Honor.

4 THE COURT: All right. Talk to me more about the dying
5 declaration Mr. Hieb brought up.

6 MR. GEYER: It doesn't exist under 804B -- or excuse me.

7 THE COURT: Is it in the case law?

8 MR. GEYER: No. Well it is, but that was under the old
9 statute. As the Court is aware, I think it was in 2017 --

10 MR. HIEB: It's in 804, David.

11 MR. GEYER: It says here. It doesn't say anything about
12 it having to be a dying declaration under Section 5. It
13 says decedent's statements. That's it. Those three
14 things are the only things that need to be determined. It
15 doesn't have to be a dying declaration.

16 THE COURT: Mr. Schoenbeck.

17 MR. HIEB: Can I jump in quickly just to make a
18 suggestion?

19 THE COURT: Mr. Hieb, go ahead.

20 MR. HIEB: Yeah. Instead of getting wound around the axle
21 when the Court hasn't had a chance to actually look at
22 this rule that's being bantered, it's a court trial, maybe
23 the Court can just take the admission of that exhibit
24 under advisement and then the Court can --

25 THE COURT: That's exactly where I was going with this.

1 MR. HIEB: All right.

2 THE COURT: But I was giving everybody the professional
3 courtesy to be heard fully.

4 All right. I will take that admission of that
5 affidavit under advisement when I have a chance to review
6 it and when I have a chance to study and analyze
7 everything as I am writing my memorandum opinion. I've
8 already said at the start of this hearing, I will take the
9 matter under advisement. And when I do that, I write, as
10 detailed as I can, a memorandum opinion explaining my
11 rationale. And that's exactly what I am going to do in
12 this case.

13 Anything further, gentlemen, on that issue?

14 MR. GEYER: No, Your Honor.

15 THE COURT: All right. Thank you. I will defer ruling on
16 the admissibility of that affidavit when I issue my
17 memorandum opinion and I will address it in detail in my
18 written opinion.

19 All right. Please go on. Thank you.

20 MR. GEYER: Thank you, Your Honor.

21 BY MR. GEYER

22 Q Paul, why did you move -- let me ask you this: So your
23 mom told you about the lawsuit that she filed against your
24 father Raymond O'Farrell and your brother Kelly O'Farrell,
25 correct?

1 A Yes.

2 Q Okay. And you moved to intervene in that lawsuit,
3 correct?

4 A Yes.

5 Q Okay. Because you want to preserve the claim brought by
6 your mom, correct?

7 A Yes.

8 Q Okay. Do you feel that you have an interest in the trust
9 that's been presented to the Court?

10 A Yes.

11 Q Why?

12 A Because I worked for my family for 20-some years.

13 Q Okay. I mean, what about the distribution that we talked
14 about earlier? You understand that you are to receive the
15 lion's share --

16 A Yes.

17 Q -- of the distribution out of the estate -- or trust,
18 correct?

19 A Yes.

20 MR. GEYER: I have no further questions, Your Honor.

21 THE COURT: Mr. Schoenbeck, I will start with you on
22 cross-examination.

23 MR. SCHOENBECK: Thank you, Your Honor.

24 CROSS-EXAMINATION

25 BY MR. SCHOENBECK

1 Q Paul, Skyline -- I am going to use vOr and Skyline, okay,
2 when I refer to the corporations. Do you understand that?

3 A Yes.

4 Q Skyline has been leasing all of vOr's land, hasn't it?

5 A They were partnership with me and Skyline. And over the
6 years, my mom and dad turned it all into me because
7 they -- Skyline Cattle Company owned all of the equipment.

8 Q So when you say they turned it all over to you, your
9 parents gave you all of their stock in Skyline, right?

10 A Yes.

11 Q And then Skyline leased the land from vOr because vOr
12 owned the land, right?

13 A Yes.

14 Q And did you have a written lease?

15 A Well, a witness, like, for -- well, the bank was there.

16 Q Did you have a written lease?

17 A Oh, a written lease. No. No. It was verbal. I couldn't
18 hear that.

19 Q Okay. And vOr could terminate Skyline's lease at any
20 time, couldn't they?

21 A Yes. My mom paid herself whatever she wanted.

22 Q Okay. But that corporation that owned the land, vOr, they
23 could terminate Skyline's lease if vOr wanted to, couldn't
24 they?

25 MR. GEYER: Objection; calls for a legal conclusion.

1 THE COURT: Overruled.

2 THE WITNESS: Yes, they probably could have.

3 BY MR. SCHOENBECK

4 Q And, in fact, you've been served by the sheriff with a
5 notice terminating your lease, haven't you?

6 A No, not yet.

7 Q You haven't been -- has somebody in your family been
8 served?

9 A Unless my son Conner.

10 Q Did you know that the lease had been terminated?

11 A No.

12 Q And the house that you live in, that's owned by vOr, isn't
13 it?

14 A Yes.

15 Q The money to build that house, you borrowed it, right?

16 A Yes.

17 Q But you used vOr's land as collateral, didn't you?

18 A I ran it through my corporation, yes.

19 Q And then you used vOr's land as collateral to build your
20 house, didn't you?

21 A Well, previously, I had an engineer come in and plot off
22 six acres, but Raymond won't sign off on it.

23 Q So one of the shareholders in vOr wouldn't let you have
24 the land that you wanted to build the house on, right?

25 A That's -- yes.

1 Q And so you built the house on vOr's land?

2 A Yes.

3 Q And you used vOr's money to build it, didn't you?

4 A No.

5 MR. GEYER: Objection; asked and answered.

6 THE COURT: Overruled.

7 THE WITNESS: No. I borrowed it from Skyline Cattle
8 Company.

9 BY MR. SCHOENBECK

10 Q And you signed the note through Skyline Cattle Company but
11 you pledged vOr's land as the collateral for that loan,
12 didn't you?

13 A When we were partners together, yes, but we were partners,
14 like, five, six years ago. And they -- they owned part of
15 Skyline Cattle Company.

16 Q When vOr was created in 2003, how much debt did they have?

17 A Oh, I don't know. Two -- I don't know. Probably 250,000.

18 Q Okay. So maybe 250,000?

19 A Yes.

20 Q Okay. Today isn't it true --

21 A Well, no. There was debt on the land. I shouldn't say
22 that. I should say when we started Skyline up, we had
23 borrowed -- but, yeah, I am not sure what vOr owed on all
24 that land back then.

25 Q They didn't owe very much, did they?

1 A I couldn't tell ya.

2 Q This loan that you wanted your dad to sign was this
3 spring, right?

4 A Yes.

5 Q Okay. Did you think that he was mentally capable of
6 signing that loan document?

7 A No. I don't think he was making his own decision.

8 Q Okay. Was he mentally capable of making the decision?

9 A I don't think on his own.

10 Q Well, why did you want him to sign the documents if you
11 thought he wasn't --

12 A Well, because we did it for all these years. I didn't
13 think it was going to be an issue. I mean, I was partners
14 with him for over 20-some years.

15 Q And the loan you wanted him to sign was actually your
16 operating loan, right?

17 A Yes.

18 Q And you weren't paying off your last year's operating
19 loan, correct?

20 A No. When I put my house there, no.

21 Q And for several years, you've just been increasing the
22 debt with your operating loan, haven't you?

23 A No. There's been other issues with cattle and farming.
24 It's not like every year is a huge profit. I mean, I had
25 to buy equipment, and I had buildings up, shop. And that

1 was all when Raymond and I were partners.

2 Q And the money for all of those purchases, you bought them
3 through Skyline capital -- or Skyline, correct?

4 A Yes, but we were business partners together. Yes.

5 Q And you always used the vOr land as collateral for those
6 loans, didn't you?

7 A Yes.

8 Q In fact, up until just a few days ago, that debt had
9 gotten up to about 1.6 million, hadn't it?

10 A No. I think it's only at one-two.

11 MR. SCHOENBECK: Judge, I want to inquire with counsel.
12 I've got the accountant out here to testify to the tax
13 returns that he prepared, and I'll lay that foundation
14 when he's on the stand. But while this witness is here,
15 I'd like to ask him about those tax returns. Counsel --

16 THE COURT: Is this exhibit -- or the binder that you
17 handed Mr. Geyer, is this witness's tax returns?

18 MR. SCHOENBECK: No. They are vOr's tax returns for
19 Exhibits 0 through Z plus AA. They are the tax returns
20 from 2008 on.

21 THE COURT: All right. Go ahead with your interrogatories
22 or questions to this witness.

23 MR. GEYER: And, Your Honor, I will object. I am not
24 going to stipulate to them.

25 MR. SCHOENBECK: And, Your Honor, I will have the

1 accountant here.

2 THE COURT: Well, it's not being offered. He's going to
3 ask questions about these tax returns. Your client is
4 free to answer if he knows.

5 MR. GEYER: Beg my pardon, Your Honor, but I think I would
6 object to testimony regarding exhibits not yet in
7 evidence. I mean, you can't testify to something --

8 THE COURT: Go ahead, Mr. Schoenbeck.

9 MR. SCHOENBECK: Thank you.

10 THE COURT: It's overruled.

11 BY MR. SCHOENBECK

12 Q Paul, who owned the shares in vOr?

13 A Vicki or Raymond.

14 Q Is that who you thought owned them?

15 A Yes.

16 Q Did you ever see any documents on that?

17 A No, not until the trust come out.

18 Q And you already testified your mother is the one who did
19 all the paperwork, right?

20 A Yeah, she handled everything.

21 Q So I'd like you to look at the 2008, you see the vOr tax
22 return?

23 A Yep.

24 Q And do you see the K-1, that's the shareholder's shares of
25 income and deductions for vOr, Inc? Do you see that?

1 A Yeah.

2 Q Okay. And who does it say owns 100 percent of the shares?

3 MR. GEYER: Objection; I believe that's a miss --

4 THE WITNESS: It really don't say.

5 THE COURT: Okay. Hang on before anybody says anything
6 else. There's an objection, Mr. Geyer?

7 MR. GEYER: I will withdraw the objection, Your Honor.

8 THE COURT: All right. Go ahead, Mr. Schoenbeck.

9 BY MR. SCHOENBECK

10 Q Does it say Raymond O'Farrell owns 100 percent?

11 A Yes.

12 Q And I am not going to go through each of them here with
13 you now, but let's go ahead to Exhibit T, 2013. You see
14 that's the vOr, Inc., tax return?

15 A Okay. What year is that?

16 Q 2013. Do you see that?

17 A Yes.

18 Q And if we go ahead to the K-1 again, do you see where it
19 says Raymond O'Farrell owns 100 percent of the shares?

20 A Well, I think it's a mistake.

21 Q Okay. But your mother did all the books, right?

22 A Yes.

23 Q And if you look at the form 8879-S, the authorization to
24 e-file, whose signature is that on behalf of the
25 corporation?

1 A It looks like my mother's.

2 Q And that would make sense, your mother would have done
3 that --

4 A Well, let me look. Yes.

5 Q So if we --

6 A Well, that was kind of because Raymond was incapable of
7 doing it.

8 Q So your mother was the one who would have told the
9 accountant the 100 percent of the shares were owned by
10 Raymond?

11 MR. GEYER: Objection; speculation.

12 THE COURT: Sustained.

13 THE WITNESS: I have no idea. The accountant might have
14 made a mistake.

15 THE COURT: All right. I sustained the objection.

16 There's no question on the floor. You have to wait until
17 another question is asked. Thank you.

18 BY MR. SCHOENBECK

19 Q Let's jump ahead to Exhibit AA. You see that's the 2020
20 tax return for vOr, Inc.?

21 A Yes.

22 Q And you see, again, the 8879 form for authorizing the
23 e-filing, is that your mother's signature again?

24 A Yes.

25 Q And that's dated May 13th of 2021?

1 A Yes.

2 Q And who does your mother say on the K-1 owns 100 percent
3 of the shares?

4 A Raymond O'Farrell.

5 Q Do you know of any documents that you've seen that would
6 indicate somebody other than Raymond O'Farrell owns
7 100 percent of the shares?

8 A Have I?

9 Q Yeah.

10 A Just in the trust.

11 Q Now you're talking about the trust document?

12 A Yes.

13 Q And in there, does it say who owns what percentage of the
14 corporate shares?

15 A I didn't look, I guess.

16 Q Okay. Is there any document that you've seen that tells
17 you that somebody other than Raymond owns some of those
18 shares?

19 A I'd have to look at it.

20 Q No. I want to know if you've seen anything that you could
21 tell us about.

22 A I couldn't tell you right now.

23 Q Okay. You referenced the trust. I want you to look at
24 Exhibit 1 and I want you to go to Section 103.

25 MR. HIEB: Excuse me. Is it Exhibit 1 or Exhibit A?

1 MR. SCHOENBECK: It's Exhibits A in my book and it won't
2 get offered because Exhibit 1 is already offered.

3 MR. HIEB: Thank you.

4 MR. SCHOENBECK: Sorry. Thank you.

5 BY MR. SCHOENBECK

6 Q Looking at Exhibit 1, Section 103, Sub D, about separate
7 property, do you see where it says: Each of us has the
8 unrestricted right to remove all or any part of our
9 separate property at any time?

10 A Yes.

11 Q Did you know that before you sat right here today?

12 A No.

13 Q Any reason to argue with Ray's ability to remove any of
14 the shares from the trust?

15 A Well, he couldn't read it.

16 Q So you don't think he could read that?

17 A I don't think so.

18 Q Other than that, any argument about his power to remove
19 shares from the trust?

20 A I don't know. I don't.

21 Q There was a sale barn your father had and mother had a
22 third interest in, right?

23 A I'm not sure how they had that set up with vOr.

24 Q Well, there was a sale barn here in Watertown that they
25 owned a third of that burned down?

1 A Oh, yes.

2 Q And then that was sold just within the last year, wasn't
3 it?

4 A Yes.

5 Q And how much money did your parents get?

6 A I believe they each got like 170-some thousand dollars
7 each.

8 Q And you didn't want your father to have his money
9 separately, did you?

10 A No. That wasn't my decision.

11 Q But you actually went and hired Pam Reiter to try and stop
12 him from getting half of the sale barn proceeds?

13 A No, I didn't.

14 Q Was Pam your lawyer?

15 A She was, yeah, but I never contacted any of Raymond's
16 business partners about trying to split that money up.

17 Q Did you want your dad to have his half of --

18 A Yeah. Well, the check would have come in vOr's name so it
19 would have been in both their name.

20 Q And you're okay with your father having one half?

21 A I wasn't there. I never made any decision on any of that.

22 Q Did you take any efforts to try and stop your father from
23 having part of the sale barn proceeds?

24 A No.

25 Q The part your mother got, that went into a bank account,

1 didn't it?

2 A Yes.

3 Q First Bank and Trust?

4 A Yes.

5 Q And, originally, you weren't named as a payable on death
6 beneficiary on that account, were you?

7 A I took her down to open that account, but --

8 Q Let me help you, if I might.

9 MR. SCHOENBECK: And, Judge, I am not going to use
10 Exhibit A in my book because it's already marked as
11 Exhibit 1.

12 THE COURT: All right.

13 MR. SCHOENBECK: So if we could call this Exhibit A.
14 (Exhibit A was marked for identification by the court
15 reporter.)

16 BY MR. SCHOENBECK

17 Q Paul, you said you took your mother to the bank to open
18 the account?

19 A Yeah -- well, what happened on here has got to do with
20 Vicki's lawyer when she -- she got upset with them because
21 they tried to kick her out of her own -- tried to kick her
22 out of vOr. And that's when she transferred.

23 Q Okay. Well, first off, I think you testified under oath a
24 little bit ago you took your mother down to the bank to
25 open the account, didn't you?

1 A Well, she asked me to drive her down there. Yes.

2 Q And that was at what is now First Interstate Bank in
3 Milbank, right?

4 A Yes.

5 Q And if you look at the first page of Exhibit A --
6 actually, just to help you, look at the second page. Is
7 that your signature?

8 MR. GEYER: Objection, Your Honor. This exhibit has not
9 been entered into evidence.

10 THE COURT: Well, just hang on. The objection is
11 overruled at this point.

12 Go ahead, Mr. Schoenbeck.

13 BY MR. SCHOENBECK

14 Q On the second page of Exhibit A, that's your signature,
15 isn't it?

16 A Yes.

17 Q And this is the bank account that you testified first you
18 took your mother to open it up in Milbank, right?

19 A Yes.

20 Q And, originally, Rita and Marcie were the payable on death
21 beneficiaries, weren't they?

22 A But that's when they --

23 MR. GEYER: Objection, Your Honor. He is now testifying
24 about the exhibit.

25 THE COURT: Let's clear this up, Mr. Schoenbeck. Make an

1 offer of proof. The foundation question was whether that
2 was his signature. Let's have an offer now.

3 MR. SCHOENBECK: Your Honor, I'm going to offer Exhibit A.
4 It's the documents from the bank account that he took his
5 mother to set up and he's actually a signor on one of the
6 documents which he's recognized.

7 THE COURT: Any objection to Exhibit A, Mr. Geyer?

8 MR. GEYER: No.

9 THE COURT: Exhibit A is received. Thank you, counselors.

10 BY MR. SCHOENBECK

11 Q So it looks like it was opened on April 5, 2002. That's
12 when you took your mom to the bank, right?

13 A Yes.

14 Q And that's where she put her half of the sale proceeds
15 from the sale barn, right?

16 A Yes. I was with her.

17 Q Then it looks like you went back in on June 8th and then
18 do you see where it says: Add Paul as joint owner?

19 A Well, what happened was she got upset with the rest of the
20 family. That's what that lawsuit was about. And she was
21 upset with Marcie and Rita.

22 Q So you were changed and added as a joint owner on
23 June 8th, correct?

24 A That's what my mom wanted.

25 Q And then with that bank account -- did you have any

1 involvement with the lawsuit that your mother started
2 against your father?

3 A Did I have what?

4 Q Did you have any involvement with the lawsuit your
5 mother --

6 A No.

7 Q No involvement?

8 A No. She was -- I know she was upset with everybody. And
9 she wanted -- well, she wanted Kelly kicked out of the
10 house.

11 Q But you didn't have any involvement in the lawsuit,
12 correct?

13 A No.

14 Q That was a bad -- that was a double negative.

15 A Oh.

16 Q I should have said it this way: Did you have any
17 involvement with the lawsuit?

18 A No.

19 Q Okay. You had Pam Reiter representing you in Sioux Falls
20 at the time, right?

21 A Yes.

22 Q Did you do anything to retain a different law firm to
23 represent your mother?

24 A I was given his number to give to her.

25 Q Did you contact those lawyers?

1 A No.

2 Q Now, when we work through Exhibit A, do you see this check
3 right here to the Cadwell Sanford Deibert and Garry Law
4 Firm for \$15,000 on June 22nd? Do you see that?

5 A Yeah, I don't remember writing that out.

6 Q Yeah, whose signature is on that check to that law firm?

7 A Yeah, mine is.

8 Q And that's the law firm that you said your mother hired to
9 sue your father?

10 A I don't know for sure.

11 Q Okay. Your mother was in the hospital at the time, right?

12 A Yes.

13 Q Did she go down to the Sioux Falls law office with that
14 check or did you?

15 A I guess I did.

16 Q Then if we keep looking through this account --

17 A Otherwise it was mailed.

18 Q Let's see. Take a look at the second to last page of
19 Exhibit A. Do you see where there's \$100,000 wire
20 transfer out of this account to Conner Miles-O'Farrell?

21 A Yes.

22 Q Who is Conner Miles-O'Farrell?

23 A My son.

24 Q And did you make that wire transfer out of that account of
25 \$100,000 to your son?

1 A Yes.

2 Q And then when you were all done --

3 A But when I was at the bank, though, the bank said it was
4 legal.

5 Q And then your mom died. And how long after your mom died
6 did you remove all of the rest of the money from that bank
7 account?

8 A I don't know how much was in there.

9 Q But how many days after she died was it before you took
10 the money out?

11 A One day.

12 Q So the next day you went down and took the rest of the
13 money?

14 A Yes.

15 Q Were you aware that vOr has now sold 700 acres of the land
16 to the bank to pay off the debt?

17 A I didn't think it was done yet.

18 Q Did you know it was in the works?

19 A Well, that's why we are here.

20 Q You knew the bank was foreclosing, right?

21 A And it didn't have to.

22 Q But you knew they were, didn't you?

23 A I know we had to do something, yes.

24 Q You went to a mediation, right?

25 A Yeah, I tried talking to them. Yep.

1 Q The mediation wasn't successful, correct?

2 A No.

3 Q Was I correct -- was the mediation successful?

4 A Well, I just talked to them one on one but, yeah, I had --
5 Kelly and -- Raymond would have signed it, but my sister
6 and my brother started telling him not to sign anything
7 for Skyline Cattle Company. And that's when I kind of got
8 in trouble.

9 Q So the mediation was not successful, correct? Is that
10 correct?

11 A Well, we never went to mediation. I had a restraining
12 order on me. So I just quit going over there. So I
13 couldn't even talk to them.

14 Q And the foreclosure papers that the bank started, from the
15 action the bank started, did you get a copy of those?

16 A No.

17 Q You didn't know the bank had started a foreclosure action?

18 A No.

19 Q But you understood they were going to be foreclosing,
20 didn't you?

21 A Yeah, if we didn't get something done. That's why we're
22 working on -- yeah.

23 Q And what you needed to do was to get your father to sign a
24 new mortgage so that -- or a new note or a new guarantee,
25 one of those, so that you could borrow more money against

1 his vOr land, correct?

2 A Well, that's the way we always operated. Yes.

3 Q And the whole time you were running Skyline, you just kept
4 borrowing more and more money against vOr's land, didn't
5 you?

6 A Not the land.

7 Q Well, the land was pledged as collateral, wasn't it?

8 A Well, yeah, we used it for operating expenses, which
9 everything gets paid down at the end of the year.

10 Q Besides your house being paid for against the vOr land,
11 was your brother Lance also using the vOr farmland for
12 collateral for his house?

13 A I don't know.

14 Q You didn't know that?

15 A I don't know how he had it set up. I mean, Raymond --
16 yeah, I know he went to my parents.

17 Q So you're not currently a shareholder -- or are you
18 currently a shareholder of vOr, Inc.?

19 A I was the president of vOr.

20 Q Are you currently a shareholder of vOr, Inc.?

21 A Not currently.

22 Q Have you ever been a shareholder of vOr, Inc.?

23 A No.

24 Q Are you currently a director of vOr, Inc.?

25 A I was.

1 Q You've been removed, haven't you?

2 A Yes.

3 Q And that all happened after vOr didn't want to pledge
4 their land for the renewal of your debts with then Great
5 Western Bank; is that right?

6 A I -- yeah. Yeah, we was partners with cattle and
7 buildings and equipment and, yeah, it all added up.

8 Q You're not an officer anymore of vOr, correct?

9 A No.

10 Q Sorry. I said that bad on my part. Are you an officer
11 now of vOr?

12 A No.

13 MR. SCHOENBECK: I have no further questions, Your Honor.

14 THE COURT: Mr. Hieb?

15 MR. HIEB: It's going to be a long enough day as it is,
16 Your Honor.

17 THE COURT: All right. Mr. Geyer, any redirect?

18 MR. GEYER: Yes, Your Honor.

19 THE COURT: Go ahead.

20 REDIRECT EXAMINATION

21 BY MR. GEYER

22 Q Paul, do you still have a copy of Exhibit A that was
23 presented to you by Mr. Schoenbeck?

24 A What's that?

25 Q Do you still have a copy of Exhibit A?

1 A Yeah.

2 Q Go to page 2 of Exhibit A, please. Now, Mr. Schoenbeck
3 asked you about on June 8, 2002, you being a joint owner
4 added to that. Do you know who authorized you to be added
5 as a joint owner?

6 A Well, my mom did.

7 Q And your mom was the sole owner prior to that, right?

8 A Yes.

9 Q And so it was her bank account and it was her right to add
10 you as a joint owner, if she wanted, right?

11 A Yes.

12 Q Do you remember, did your mom have any conversation with
13 you about writing a check to Cadwell Sanford Deibert and
14 Garry?

15 A What was the name?

16 Q Well, go to the second to last page -- excuse me -- third
17 to last page on Exhibit A.

18 A Yes.

19 Q Okay. Do you see that check there?

20 A Yep.

21 Q Okay. Who told you to write that, if you remember?

22 A Oh, I -- it looks like Vicki signed it. I -- that's not
23 my handwriting. I didn't write that check out.

24 Q What check number -- are you looking at this check?

25 THE COURT: I think he's looking at check 10,001.

1 BY MR. GEYER

2 Q Yeah, not that one. Go to the third to the last page.

3 Sorry if you couldn't hear me.

4 A Okay.

5 Q Okay. So now you're on that check. And it's check 5,001.

6 Do you see that?

7 A For 15,000?

8 Q 5,001 in the top, the number of the check?

9 A Oh, yeah.

10 Q Okay. Now you testified before that that's your signature
11 on that check, correct?

12 A I don't think it is.

13 Q Well, let me ask you this: Did you hire Cadwell Sanford
14 Deibert and Garry?

15 A No.

16 Q Have you ever met Alex Hagen before?

17 A No.

18 Q Back in June of 2022, who was your attorney that you had
19 retained?

20 A In what year?

21 Q This year, back in June of this year.

22 A Oh, Pamela Reiter.

23 Q And she's not a attorney at Cadwell Sanford Deibert and
24 Garry, correct?

25 A No.

1 Q Now, you testified that it was your understanding that at
2 the -- that the shares of vOr, Incorporated, were in
3 Raymond and Vicki O'Farrell's trust, which is Exhibit A,
4 correct?

5 A Correct.

6 Q Or excuse me. Exhibit 1, correct?

7 A Yes.

8 Q Do you remember having conversations with your mom? Was
9 that her understanding?

10 MR. SCHOENBECK: I am going to object; that's hearsay. He
11 wants to testify to what somebody else said who is not
12 here to be cross-examined.

13 THE COURT: I will sustain the objection.

14 BY MR. GEYER

15 Q Now, grab Exhibit 1, please. Now going -- we already
16 talked about Section 9.03 on page 9-1, correct?

17 A Yeah.

18 Q Please go to that. Are you there?

19 A Yes.

20 Q Now, the property that's listed there, who owns that
21 property that's stated in there?

22 A Well, that would be vOr.

23 Q Okay. But in there it states that the corporation was
24 going to be dissolved prior to the distribution under this
25 trust, correct?

1 A Yes.

2 Q And, again, it was your understanding that the shares of
3 vOr, Incorporated, were in the trust of your mom and
4 dad's, correct?

5 A Yes.

6 MR. GEYER: I have no further questions, Your Honor.

7 THE COURT: Recross, Mr. Schoenbeck?

8 MR. SCHOENBECK: I have none.

9 THE COURT: Mr. Hieb? Mr. Hagen?

10 MR. HIEB: No.

11 MR. HAGEN: No, Your Honor.

12 THE COURT: All right. Thank you, sir. You may step
13 down.

14 Counselors, how many more witnesses do we have? At
15 least, two, right?

16 MR. SCHOENBECK: Yes.

17 THE COURT: All right. I think it's a good time to let
18 the Court and my reporter take a five-minute recess.

19 Thank you.

20 (A brief recess was taken.)

21 (A brief discussion was held off the record.)

22 THE COURT: Let's go on the record.

23 MR. GEYER: You Honor, I do have to address one issue.

24 There's two things I was going to bring up on the cross of
25 Mr. O'Farrell, and I want to bring them up now.

1 Mr. O'Farrell needs to correct some of his testimony. He
2 did receive the foreclosure documents. They weren't
3 served on him, but he did get them. And then he also
4 received at least a copy -- I don't know if it was served
5 on him, I think that was the testimony -- but the notice
6 of termination for the ag land. I apologize. I was going
7 to bring that up to correct it. I can put him up there
8 now if you'd like.

9 THE COURT: You are an officer of the Court.

10 But, Mr. Schoenbeck?

11 MR. SCHOENBECK: Your Honor, I want to cross-examine him
12 on the topics that's why I asked him about them and I was
13 pretty sure he wasn't telling the truth.

14 THE COURT: All right. Let's recall -- in the interests
15 of justice then, even though your client Mr. O'Farrell was
16 excused, he will be called back to the stand.

17 MR. GEYER: Thank you.

18 THE COURT: Mr. O'Farrell, come back to my witness stand,
19 please. And I must remind you, you are still under oath.
20 Thank you.

21 When you're ready, Mr. Geyer.

22 MR. GEYER: Thank you, Your Honor.

23 FURTHER REDIRECT EXAMINATION

24 BY MR. GEYER

25 Q Paul, you had made a couple statements during the

1 cross-examination by Mr. Schoenbeck. One, Mr. Schoenbeck
2 asked you a question about the foreclosure regarding the
3 land of vOr in relation to Skyline Cattle's debt as well
4 as other matters. You had said that you did not -- you
5 made some allegation or denied knowing about it.

6 You've actually seen those documents, haven't you?

7 A Yes, after you explained it to me. I wasn't sure, but,
8 yes.

9 Q And there's also a statement about a notice of
10 termination. Now, I think, I could be wrong. I don't
11 have a 100 percent memory, but I think Mr. Schoenbeck
12 asked if you were served with that. And I don't know the
13 answer to that.

14 But you did get a copy of that or know that there was
15 a notice of termination, correct?

16 A Yes.

17 Q Okay. Now, Paul, I don't think it takes a rocket
18 scientist to figure out that you're pretty nervous today,
19 aren't you?

20 A Yes.

21 Q Okay. Did you intent to mislead anybody when you made
22 those statements?

23 A No, I didn't.

24 Q Why did you make those misstatements?

25 A I just wasn't forgetting about -- I've had a lot of

1 documents come through my -- yeah.

2 MR. GEYER: Okay. That's all I have, Your Honor.

3 THE COURT: Mr. Schoenbeck, recross?

4 MR. SCHOENBECK: Your Honor, I would like to mark as
5 Exhibit C and I've provided copies to the Court and
6 counsel.

7 (Exhibit C was marked for identification by the court
8 reporter.)

9 FURTHER RECROSS-EXAMINATION

10 BY MR. SCHOENBECK

11 Q Paul, I want you to look at Exhibit C. Is this the
12 complaint you just told us about for the foreclosure that
13 you've had a copy of? If you need time to look at it, we
14 will wait until you read through it.

15 A Yeah, I don't remember seeing it, but I must -- I did get
16 it, I guess. I usually take everything up to my
17 accountant.

18 Q You just testified under oath a little bit ago that you
19 saw a copy of the complaint for foreclosure that --

20 A Well, I didn't remember seeing it.

21 Q But you remember it now?

22 A Yeah, well, not really. Well, I mean, I do, but yeah,
23 it's -- like I said, I've had a lot of documents, but
24 after looking at it, yes.

25 Q Okay. Looking at Exhibit C, this is the complaint against

1 your company Skyline Cattle for foreclosure, isn't it?

2 A Yes.

3 MR. SCHOENBECK: Your Honor, I'd offer Exhibit C.

4 THE COURT: Mr. Geyer, any objection?

5 MR. GEYER: Well, it's fully hearsay, Your Honor. There
6 are statements in there that aren't made by Mr. O'Farrell.

7 THE COURT: Well, it's being offered as a document that
8 he's testified as to whether or not he's seen it before or
9 he hasn't. That's the purpose it's being offered.

10 Mr. Schoenbeck, am I correct or am I missing
11 something?

12 MR. SCHOENBECK: That's correct, Your Honor, and it's --

13 THE COURT: Any other objection, Mr. Geyer?

14 MR. GEYER: Well, I mean, I guess the hearsay -- I guess
15 my hearsay objection, I believe Mr. Schoenbeck is using
16 it --

17 THE COURT: Mr. Schoenbeck, what?

18 MR. GEYER: Is using it to prove the truth of the matter
19 asserted in some of the exhibits that are attached to the
20 complaint. As I understand, Exhibit C, there are
21 several --

22 THE COURT: All right. That objection is overruled.

23 That's not my interpretation of what's going on. He's
24 either seen the document or he hasn't.

25 Go on, Mr. Schoenbeck.

1 BY MR. SCHOENBECK

2 Q So, Mr. O'Farrell, the other defendant besides your
3 company is vOr, Inc., correct?

4 A Yes.

5 Q And the bank that's suing, it's First Interstate Bank that
6 used to be called Great Western Bank, right?

7 A Yes.

8 Q And this would be the bank that you wanted your father to
9 sign vOr's land as collateral for loans from that bank --

10 A Nope. That was actually still Great Western.

11 Q It was called Great Western then?

12 A Yeah.

13 Q Now it's called First Interstate, isn't it?

14 A Okay.

15 Q Okay. But this Exhibit C, this foreclosure, is because
16 your dad wouldn't sign, correct?

17 A Yes.

18 Q And attached, we can go through the exhibits and see your
19 signature, like, where it's -- that's your signature,
20 isn't it?

21 A Yes.

22 MR. GEYER: I guess I would ask for clarification on the
23 page.

24 MR. SCHOENBECK: Fair enough.

25 BY MR. SCHOENBECK

1 Q I am looking at a document that says: Change in Terms
2 Agreement for a \$500,250 note. It's -- I can show you the
3 page.

4 MR. SCHOENBECK: If I might, Your Honor?

5 THE COURT: Go ahead.

6 MR. SCHOENBECK: Dave, his signature is on just about all
7 of these documents. If you want, I can go through every
8 single one of these signatures. It's going to take a half
9 hour, but I'll do it.

10 MR. GEYER: Well, I guess, if you are going to ask my
11 client a question about a significant document, I would
12 just like to know which one you are talking about.

13 BY MR. SCHOENBECK

14 Q Okay. What I want to ask you generally, Paul -- and you
15 can take all the time you want to look through every one
16 of these if you want. But you signed loan documents
17 either as a personal guarantor or for Skyline Cattle or as
18 president of vOr to this bank, didn't you?

19 A Yeah, we always banked there -- well, yeah, for quite a
20 few years.

21 Q And if the complaint in its prayer for relief --

22 MR. SCHOENBECK: And, David, that's going to be on page 7
23 of Exhibit C.

24 BY MR. SCHOENBECK

25 Q Let me back up. Excuse me. Go back to page 6. If the

1 bank lays out six different notes that are owing to them,
2 do you disagree with that? I can go through each of them
3 individually, if you want.

4 A No, that's fine. Like I said, my bookkeeper has all of
5 this information.

6 Q But you signed a lot of different notes --

7 A Okay.

8 Q -- right? And every one of them you used vOr's land to
9 collateralize it, didn't you?

10 A Yeah.

11 Q And so when the bank --

12 A Well, not every everything, plus equipment and --

13 Q And when the bank says they want a little over \$2 million,
14 do you see that?

15 A Yep.

16 Q Now, I am going to tell you, that's too high. I don't
17 want to ask you to agree with that. If I tell you it's
18 about 1.6 million, would you disagree with that?

19 A About 1.2.

20 Q You think it's 1.2?

21 A Yes.

22 Q Okay. Then you also -- we talked about whether or not the
23 corporation was evicting you. Do you remember that
24 discussion?

25 A Yes.

1 Q Okay. And you said that you didn't get served with any
2 papers evicting you?

3 A Actually, I just talked to my son. He's the one who got
4 served. He was living with me at the time.

5 Q At your house?

6 A Yes.

7 Q And he's an adult?

8 A Yes.

9 Q And did he show you the papers then?

10 A No.

11 Q So you never knew about the eviction papers the sheriff
12 served?

13 A No. I wasn't served by them.

14 Q Did you ever ask to see the eviction papers?

15 A No.

16 Q But you knew that the person you were renting from --

17 A Well, I didn't -- yeah, I knew -- yeah, I do remember now,
18 but, yeah, I did get them. And after I look at that, I
19 can recognize it.

20 MR. SCHOENBECK: I am going to ask to mark Exhibits F and
21 G.

22 (Exhibit F and Exhibit G were marked for identification by
23 the court reporter.)

24 BY MR. SCHOENBECK

25 Q And if you take a minute to look at Exhibit F and

1 Exhibit G and tell me if these are the papers the sheriff
2 served on you for eviction.

3 A Like I say, they were served on -- to my son.

4 Q Just take a moment. You said that you'd recognize them if
5 you saw them, so if you could take a look at Exhibits F
6 and G.

7 A Yes.

8 MR. SCHOENBECK: I'd offer Exhibits F and G.

9 THE COURT: Mr. Geyer, any objection?

10 MR. GEYER: No.

11 THE COURT: Exhibits F and G are received. Thank you.

12 BY MR. SCHOENBECK

13 Q So, Paul, I want to make sure I understand. You know that
14 the bank is foreclosing on vOr's land over your company's
15 debts?

16 A Yeah, I figured I was -- that's why we were trying to get
17 refinanced so they wouldn't have to foreclose or sell any
18 land.

19 Q And you know that vOr is evicted -- has served you with
20 eviction papers, right?

21 A Yes.

22 Q And you want the judge to let you pursue a lawsuit where
23 you are asking for the relief to be made the president and
24 the director of vOr; is that right?

25 A Could you say that again?

1 Q You're asking the judge to let you intervene in a lawsuit
2 that's asking in its prayer for relief that you be allowed
3 to serve as a director and the president of vOr; is that
4 right?

5 A Well, yes, because I always have.

6 Q And you want to continue doing that?

7 A Yes.

8 Q Will you fairly foreclose upon your notes -- let me strike
9 that.

10 The debts that your company Skyline Cattle ran up, if
11 you are made a president of vOr by the judge, will you
12 then sue yourself and your company to get that money back
13 in vOr?

14 A No. I think it was changed, I guess.

15 Q I mean, you'd have the responsibility to sue yourself to
16 get the money back to the corporation?

17 A No, I wouldn't.

18 Q You wouldn't pursue Skyline Cattle for that money, would
19 you?

20 A Not if I was president of it.

21 Q If you were president of vOr, you'd stop that, wouldn't
22 you?

23 A Well, we were partners for many years.

24 Q If you were president of vOr, would you try and recover
25 from Skyline Capital the money that Skyline Capital --

1 Skyline Cattle. Excuse me.

2 A I would have been financed is what -- but, yes, I guess I
3 would.

4 Q Yeah, Skyline Cattle got money from the bank and you used
5 vOr's land for collateral, right?

6 A Basically, yes.

7 Q And now if vOr has to sell their land to pay off your
8 company's debts at the bank, would you be willing as
9 president of vOr to sue Skyline Cattle and get that money
10 back?

11 A Well, it would depend on the circumstances.

12 Q The circumstances are your company took money --

13 A I wouldn't have let it happen, number one.

14 Q I'm sorry?

15 A Well --

16 THE COURT: He said he wouldn't let it happen, number one.

17 BY MR. SCHOENBECK

18 Q Okay. You wouldn't let --

19 A Well, yeah. All right.

20 Q What is it you wouldn't let happen?

21 A Well, all of this.

22 Q You would have kept pledging vOr's land for Skyline
23 Cattle's debt, wouldn't you have?

24 A Well, I didn't write any of the checks out. I never had
25 the checkbook.

1 Q Is the solution in your mind that vOr should have kept
2 pledging their collateral for the growing amount of
3 Skyline's debt?

4 A They did through vOr and Skyline Cattle Company.

5 Q On January 1 of this year, vOr just owned land, didn't
6 they?

7 A Yes.

8 Q VOr doesn't have any cattle, correct?

9 A Have any what?

10 Q Does vOr have any cattle?

11 A Not right now.

12 Q Does vOr have any machinery?

13 A Well, it's all gone to Skyline.

14 Q Skyline owns the machinery, right?

15 A Yes.

16 Q Skyline owns the capital, right?

17 A But I don't know how much money was still borrowed against
18 some of that equipment.

19 Q But Skyline has the equipment, doesn't it?

20 A Yes.

21 Q All vOr gets is their rent, isn't it?

22 A Yes.

23 Q And they have to pay off Skyline's debt at the bank,
24 right?

25 A I didn't handle the banking. My mom did. I just wrote

1 out whatever she wanted for rent checks, whatever bills
2 that had to be paid. I would just write Vicki -- or Vicki
3 would write herself a check, actually.

4 MR. SCHOENBECK: I have no further questions.

5 THE COURT: No further questions?

6 MR. SCHOENBECK: No.

7 THE COURT: Any redirect?

8 MR. GEYER: Yes, Your Honor.

9 THE COURT: All right. Go ahead.

10 FURTHER REDIRECT EXAMINATION

11 BY MR. GEYER

12 Q So, Paul, I am directing you to Exhibit C. And there's
13 several exhibits attached to the complaint which is
14 Exhibit C. Do you see that?

15 A Yeah.

16 Q Now, looking at Exhibit 2 of Exhibit C, do you see that as
17 a borrower of vOr, Incorporated?

18 A Yes, that's vOr's. Yes.

19 Q And that's a promissory note from vOr. They borrowed
20 money from Great Western Bank; is that right?

21 A Yeah, I couldn't read all of it.

22 Q Well, read it.

23 A Okay.

24 Q Do you see where it has vOr listed as a borrower and Great
25 Western Bank listed as a lender?

1 A Yes.

2 Q Okay. And you know Mr. Schoenbeck asked you about the
3 notes that were listed in this complaint. And going to
4 page 6, it lists those notes. Were all those notes notes
5 from Skyline, or were there other borrowers that were on
6 that foreclosure?

7 A I was -- no. No. It was just would have been Vicki,
8 Raymond, and me.

9 Q Right. But what about did vOr have any debts associated
10 with that foreclosure that weren't paid off?

11 A Yeah.

12 Q And that's what we are looking at in Exhibit 1 of the
13 complaint, correct? Or excuse me. Exhibit 2 of the
14 complaint, correct?

15 A Okay. I see what --

16 Q Okay. Now you had talked about you wouldn't have let it
17 happen. Every time that the bank met with you to
18 refinance, who was present?

19 A Vicki, Raymond, and myself, and the banker.

20 Q Okay. Was there ever a time that you remember signing a
21 bank document for Skyline Cattle Company where Raymond
22 O'Farrell wasn't sitting in the room?

23 A Never.

24 Q And Mr. Schoenbeck likes to characterize it as you
25 pledging vOr Incorporated's land?

1 A Well, I am not sure on every loan. I'd have to talk to my
2 bookkeeper, but I know when we did our operating loans it
3 was always Raymond and Vicki.

4 Q Okay. And other than the last time, did Raymond O'Farrell
5 ever object to Skyline refinancing?

6 A No. We just -- the banker would show up and we -- my mom
7 and myself would just sign off on the note and it would be
8 a done deal.

9 Q I mean, Raymond O'Farrell never once said: I don't want
10 any more debt on vOr land. Did he ever say that?

11 A No.

12 Q How many times do you remember sitting with a banker with
13 your mom and your dad going over these notes?

14 A We do it at least once a year.

15 Q For how many years?

16 A Well, probably since 2003.

17 Q And up until this last time, Raymond never objected?

18 A Never.

19 Q Every time that the notes were refinanced, would the bank
20 try to foreclose on vOr?

21 A No.

22 Q Why not?

23 A Because they want their money.

24 Q This last time, was Great Western Bank going to refinance
25 again?

1 A Yeah, they were going to refinance, I mean, until Raymond
2 refused to sign it.

3 Q And is that what triggered the foreclosure was Raymond's
4 failure to act?

5 A Yes.

6 Q And who was there telling Raymond not to sign?

7 A My brother Kelly and my sister Rita.

8 Q And --

9 A Otherwise it was signed.

10 Q Where did Kelly O'Farrell live at the time?

11 A At this it was -- we moved in with my folks. He lived
12 over by Corona and rented a house.

13 Q Do you know, was Kelly upset about the small amount of
14 land he was going to get out of the trust?

15 A Yes.

16 Q Who was he going to have to split the small amount of land
17 with pursuant to the trust that he was going to get?

18 A Well, with my sisters, Rita and Marcie, and then my
19 brother Lance has some grassland property and then --
20 yeah.

21 Q And, again, we talked about the trust. And you are going
22 to get the lion's share of all the land that was owned by
23 vOr in that trust according to those terms, right?

24 A Yes.

25 Q So all this debt that was put on and vOr's land was used

1 to collateralize it, if the trust stayed the same way, who
2 was going to get that land anyway?

3 A Yeah, Skyline.

4 Q You, right?

5 A Yeah.

6 MR. GEYER: No further questions.

7 THE COURT: Go ahead, Mr. Schoenbeck, redirect.

8 MR. SCHOENBECK: Thank you, Your Honor.

9 FURTHER RECROSS-EXAMINATION

10 BY MR. SCHOENBECK

11 Q So, Paul, you were going through a couple of the notes. I
12 want you to go back to the complaint your counsel was
13 asking you about in Exhibit C. If we go to paragraph 7
14 and it goes A through about F and you see it goes through
15 notes. And I want to real quickly go through those with
16 you.

17 You see A, that's a 2011 note and vOr is the debtor
18 on that, isn't it?

19 A Yes, it looks like it.

20 Q And that would have been the money probably that was some
21 part left over from when they split off from O'Farrell?

22 A Yes.

23 Q But that was in 2011 and was it paid down over the last 11
24 years?

25 A I don't know. I never carried the checkbook. I never

1 wrote a check. My mom handled all the finances.

2 Q Okay. Now, B, the 2016, that's a Skyline debt, isn't it?

3 A It looks like it, yeah.

4 Q For 600,000, isn't it?

5 A What year is that?

6 Q 2016, you borrowed -- your company borrowed 600,000

7 against the vOr land, didn't you?

8 A I didn't.

9 Q Well, your company did?

10 A Yeah.

11 Q Then if we go to C, in 2018, and by now, your parents have

12 nothing to do with Skyline, right?

13 A Well, I am not sure on the exact year.

14 Q Well, you testified under oath on direct?

15 A Yeah, well, I am not exactly -- that was 2018, but --

16 Q In 2018, Skyline is borrowing again, isn't it?

17 A I think that was Skyline -- I think that might have been

18 when my mom quit doing the bookkeeping.

19 Q Okay. And now Skyline is borrowing another 500,000,

20 hasn't it?

21 A I -- how long ago was that?

22 Q Well, it says -- and we can pull the note if you want.

23 It's attached. The 2018 note by Skyline for 500,000, do

24 you see that?

25 A Yeah.

1 Q Then if we go to D, here's another 2018 note by Skyline,
2 this time for 300,000. Do you see that?

3 A Yeah, but I don't think it went to Skyline.

4 Q Well, that's who the note is signed out, you signed the
5 debt instrument, right? I can pull it up. It's attached.

6 A I'd have to have Marie come in here and talk to you.

7 Q Well, let's look at E. You see this 2019 note to vOr for
8 300,250 bucks? Do you see that? Do you see that? It
9 says vOr 300,000 --

10 A I never borrowed a large sum -- sums of money like that.

11 Q No. We are going to talk about that one. I'm going to
12 pull that note up. I just want to see if you see it.
13 That's now the second time vOr has been a debtor, right?

14 A Yeah.

15 Q Then the last note, again, it's Skyline, 2021, and there
16 you got just a little over quarter of a million you
17 borrowed, didn't you?

18 A That one might be mine.

19 Q So let's look at this E, this 2019, the other vOr note,
20 and it's says that that's Exhibit 5 or 6. It's attached
21 to Exhibit C. Do you see that number \$300,250 on
22 Exhibit 6?

23 A Yeah.

24 Q And that's vOr, isn't it, as a borrower?

25 A Yeah.

1 Q And who is the other borrower?

2 MR. GEYER: Are you on Exhibit 6 of Exhibit C?

3 MR. SCHOENBECK: Yes.

4 BY MR. SCHOENBECK

5 Q Who is the other borrower?

6 A Oh, Lance O'Farrell.

7 Q So vOr -- so Lance O'Farrell is one of the borrowers on
8 this one for a little over 300,000, right?

9 A Okay. Yep.

10 Q And Lance O'Farrell is the guy that you want to have be
11 the co-special administrator of your mother's estate with
12 you, right?

13 A Well, that's what my mom wanted.

14 Q And Lance O'Farrell, this 300,000 -- and he's gonna be
15 here so we'll ask him. I'm not sure if he knows. This is
16 the money he used to build his house?

17 A I have no idea what he did with it.

18 Q Do you know why he would have been pledging -- why he
19 would have been getting the corporation to pledge their
20 land to secure a \$300,000 loan that he's part of?

21 A It went through my mom, I guess.

22 MR. SCHOENBECK: I have no further questions.

23 FURTHER REDIRECT EXAMINATION

24 BY MR. GEYER

25 Q Mr. O'Farrell, looking at Exhibit 6 that Mr. Schoenbeck

1 just asked you, just switch it over to the next page to
2 the signatures, would you?

3 A Yeah.

4 Q Who signed that document?

5 A What's that?

6 Q Who signed that document? Let me make sure you have the
7 right --

8 A There ain't no signature on it.

9 Q I am sorry. I am talking about the second page of
10 Exhibit C. Right there. Who signed that?

11 A Oh, my mom.

12 Q Who else?

13 A Lance O'Farrell.

14 Q And who else?

15 A Raymond O'Farrell.

16 Q I mean, who is the first signature on there? Raymond
17 O'Farrell, right?

18 A Yeah.

19 Q Did you have any reason to believe he was objecting to it
20 at that time?

21 A No. He would have -- he would have asked for it and we'd
22 have gotten it.

23 Q I mean, do you think your father was hoodwinked by Lance
24 O'Farrell to debt his own land to help his son out?

25 A I -- no. I think he did help him out. I just didn't know

1 what -- how much he borrowed.

2 Q So Raymond O'Farrell agreed to debt his own land in the
3 benefit of his son, correct?

4 A Yes.

5 Q Is that the same thing he did for you for years?

6 A Yes, because I worked for him all them years.

7 MR. GEYER: No further questions.

8 MR. SCHOENBECK: One question, Judge.

9 THE COURT: All right. Go ahead.

10 FURTHER RECROSS-EXAMINATION

11 BY MR. SCHOENBECK

12 Q So, Paul, up until Raymond had that attorney from Clark,
13 Susan Jennen, helping him beginning this spring, until
14 then you've been able to get Raymond's signature on every
15 single loan document you wanted at the bank, hadn't you?

16 A Well, my sister took him down to the lawyer, and that's
17 when I had trouble.

18 Q So was that -- were you agreeing? Did I say that
19 correctly? Were you agreeing that up until your father
20 got legal counsel this spring you were able to get him to
21 sign every document you wanted?

22 A Yes, because we worked together. Yes.

23 MR. SCHOENBECK: No further questions.

24 THE COURT: All right. Thank you, sir. You may step
25 down.

1 Call your next witness.

2 MR. GEYER: Marie Chapin, Your Honor. Your Honor, Marie
3 Chapin just went to the restroom so we'd call Lance
4 O'Farrell.

5 THE COURT: Lance O'Farrell?

6 MR. GEYER: Yes.

7 THE COURT: Raise your right hand.

8 LANCE O'FARRELL,
9 was called as a witness and, being first duly
10 sworn, was examined and testified as follows:

11 THE COURT: When you're ready, Mr. Geyer.

12 MR. GEYER: Thank you, Your Honor.

13 DIRECT EXAMINATION

14 BY MR. GEYER

15 Q Please state your name.

16 A Lance O'Farrell.

17 Q Mr. O'Farrell, what is your relationship with Raymond
18 O'Farrell?

19 A He's my father.

20 Q Okay. And I assume that your relationship with your
21 mother was -- or Victoria O'Farrell was that she was your
22 mother, correct?

23 A Yes.

24 Q How has your relationship been with your father Raymond
25 O'Farrell?

1 A It was pretty good up until about six, eight months ago.

2 Q Okay. Do you know why it deteriorated?

3 A I guess my mom started getting into the nursing home.

4 With Kelly and Rita living there, I guess, you can call it

5 kind of brainwashing him on what they thought after they

6 looked at the trust when they should have never looked at

7 the trust until after they passed away, finding out that

8 they weren't getting as much as they thought they should.

9 Q Okay. Who is Rita?

10 A My sister.

11 Q Rita O'Farrell?

12 A Yes.

13 Q Who is Kelly?

14 A My brother.

15 Q Kelly O'Farrell?

16 A Yes.

17 Q When you say lived there, where were they living?

18 A About eight, ten years ago, Kelly moved back to live with

19 them for a year and a half, two years. And then when he

20 moved out about two years ago when mom was having issues

21 with her health, Rita moved in there for like a year or

22 two. And she kind of kicked off everything. And then

23 when she moved back out, Kelly moved back in. And

24 that's --

25 Q This was living with your parents?

1 A Yes.

2 Q What do you mean by deteriorating? I mean, what have you
3 seen about your father that's different than prior to when
4 Kelly lived there?

5 A Well, he was just mad at me and Paul and Mom about, I
6 guess, money.

7 Q Okay. What kind of statements would Raymond make about
8 your mom?

9 A Just asking, you know, wondering where the money went and
10 saying: Where is she going to live when she gets out of
11 the nursing home?

12 Q Meaning he wasn't going to let her return home?

13 A Well, that, I don't know, because Kelly was living there
14 at the time and she was putting a restraining order
15 against him at the time.

16 Q Now, you borrowed some money to purchase a house or build
17 a house?

18 A They just cosigned on it.

19 Q Who is "they"?

20 A Raymond and Vicki.

21 Q Okay. Do you remember when that was?

22 A No. Probably would have been eight, ten years ago.

23 Q Okay. Do you know -- how did you approach your parents
24 about that?

25 A I just asked them if they would cosign it for me.

1 Q Okay. And what was their response?

2 A That they would.

3 Q Okay. And did you have that conversation with both of
4 them?

5 A Yeah.

6 Q Okay. What was Raymond's response specifically?

7 A I don't remember.

8 Q Did he ever object and say: No, I am not pledging my
9 land?

10 A No.

11 Q Raymond didn't have anyway issues with borrowing you the
12 money or putting up land to help you borrow the money, did
13 he?

14 A No, and it was just a cosign. I made the payment. They
15 were just cosigning it.

16 Q What was Paul's relationship with his parents, let's say,
17 going back to five years ago?

18 A They had a good relationship.

19 Q Both of them?

20 A Yeah, they worked together for years, so --

21 Q Did you ever hear Raymond talk negatively about Paul --
22 let me ask you this: Do you think Paul and your father's
23 relationship has deteriorated?

24 A Yes.

25 Q Why do you say that?

1 A Because somehow they think that Paul was spending money
2 and buying properties overseas with their money.

3 Q Okay. And I am going to get into that. Raymond has told
4 you that Paul is buying property overseas?

5 A Yeah.

6 Q When did he tell you that?

7 A Probably four months ago.

8 Q Okay. What other statements has he said about Paul's
9 spending and his belief of it?

10 A I don't know that. He was just spending the money and
11 buying his ex-wife a house in Hawaii and Australia.

12 Q Was it your understanding that Raymond thought that Paul
13 was an exorbitant spender?

14 A Yes.

15 Q And was this a conversation that Paul -- or excuse me. Is
16 this a thought that Raymond would echo prior to Kelly
17 moving in?

18 A Probably not.

19 Q Did you ever hear him say it prior to Kelly moving in?

20 A No.

21 Q Where do you reside?

22 A South Shore.

23 Q Okay. Do you keep in touch with your brother Paul
24 frequently?

25 A Yes.

1 Q You been to his house?

2 A Yes.

3 Q Okay. You've seen him around?

4 A Yes.

5 Q How would you say your relationship with Paul is?

6 A Good.

7 Q Would you classify Paul as an exorbitant spender?

8 A No.

9 Q Would you say he probably lives pretty meagerly?

10 A Yes.

11 Q Did that conflict with what your father was saying about
12 these houses in foreign countries and the spending habits
13 that he was alleging Paul had?

14 A Correct. And, I guess, I had no idea. It's just what he
15 told me and I don't know --

16 Q Okay.

17 A -- what the truth is.

18 Q Okay. Did Paul -- or excuse me. Prior to Kelly moving
19 in, did Raymond ever complain about Paul borrowing too
20 much money for Skyline?

21 A No, not that I know of.

22 Q Okay. Tell me about your mom. Was she pretty involved in
23 family finances?

24 A Yes. She did the books.

25 Q Is it fair to say she was in charge of the finances?

1 A Yes.

2 Q And that was kind of evident to everyone, correct?

3 A What's that?

4 Q That was kind of evident to everyone, correct?

5 A Yes.

6 Q Do you believe that your father is competent?

7 A No.

8 Q Why do you say that?

9 A Well, he's had multiple strokes and he drinks a lot of
10 alcohol.

11 Q Tell me about what you know about your dad's alcohol
12 consumption.

13 A As far as the last I know that he usually starts about 10
14 in the morning, has beers. And I don't know how long that
15 lasts. And then in the evening, he gets a couple of
16 whiskeys.

17 Q And you've seen that?

18 A Yeah.

19 Q How long has he had that type of drinking pattern that you
20 know of?

21 A His whole life.

22 Q Did he used to be worse?

23 A Yeah.

24 Q Have -- do you know anything that leads you to believe
25 that -- well, strike that.

1 You're aware that your mom sued Raymond O'Farrell and
2 Kelly O'Farrell, correct?

3 A Yes.

4 Q Okay. What did -- how did you first learn about that?

5 A She told me.

6 Q Okay. Where was she at when she told you about that?

7 A I do believe she was in the nursing home.

8 Q Where at?

9 A Down by Sioux Falls.

10 Q Okay. And you actually signed an affidavit in support of
11 your mom's lawsuit, correct?

12 A Yes.

13 Q Was Paul ever around during any of those conversations?

14 A No.

15 Q Okay. Did you remember an attorney coming down and
16 visiting your mom?

17 A Yes, a couple times.

18 Q Okay. And where did that attorney visit your mom?

19 A At the nursing home.

20 Q Okay. And was that Mr. Hagen sitting behind me?

21 A Yes.

22 Q Okay. And did Mr. Hagen ever excuse you from the room?

23 A I was not there. I was never in the same room with them.

24 Q Okay. But, I mean, did he meet with your mom then out of
25 view from you?

1 A Yeah, I was not there.

2 Q You weren't there when he showed up?

3 A No.

4 Q When did you meet with Mr. Hagen?

5 A I didn't. We just talked on the phone.

6 Q Do you know if Paul had any involvement in hiring

7 Mr. Hagen?

8 A No, not to my knowledge.

9 Q Okay. Do you support -- let me ask you this: Do you
10 know, did Kelly or Rita ever say anything to you showing
11 displeasure in how their parents had set up the trust and
12 how it was going to be distributed?

13 A Yes.

14 Q What did they say?

15 A That it wasn't fair.

16 Q Anything else?

17 A That it just wasn't fair that they -- Paul was getting the
18 majority of it and I was getting more than the other
19 three.

20 Q Okay. Do you remember seeing a copy of the trust?

21 A Yes.

22 Q Okay. Do you know who your parents had as cotrustees once
23 the last surviving trustee died?

24 A I think it was me and Paul.

25 Q Now, Paul has filed an amended petition in the alternative

1 to have you and him appointed -- well, let me ask as
2 special administrators. I'm just going to ask you now not
3 to duplicate it.

4 Do you support Paul's petition to have Raymond
5 removed?

6 A Yes.

7 Q Why?

8 A Because he's not competent.

9 Q Paul's subsequent amended petition or supplement to
10 alternatively have you and him appointed as co-special
11 administrators. Do you support that?

12 A Yes.

13 Q And you'd be willing to fill that role with Paul?

14 A Yes.

15 Q Are you trying to cheat Ray out of anything?

16 A No.

17 Q When I say "Ray," I am talking about Raymond O'Farrell,
18 correct?

19 A No.

20 Q What do you want to see happen?

21 A I want to see the trust stay how it was set up.

22 Q Are you trying to cheat any of your other siblings out of
23 anything?

24 A No.

25 Q Were you present when Raymond signed any other loan

1 documents for Skyline or vOr?

2 A (Witness shakes head.)

3 Q No?

4 A No.

5 Q You have to say it out loud.

6 A Okay. Sorry.

7 Q When he signed the loan documents pledging land for your
8 promissory note, was there any inkling in your mind that
9 he didn't understand what he was doing?

10 A Yeah, he knew what he was doing.

11 MR. GEYER: I have no further questions.

12 THE COURT: Mr. Schoenbeck, cross-examination?

13 MR. SCHOENBECK: Thank you.

14 CROSS-EXAMINATION

15 BY MR. SCHOENBECK

16 Q Have you ever seen any stock certificates that showed who
17 owned the shares in vOr, Inc.?

18 A Who owns the share? On the -- like, the trust, you mean?

19 Q The corporate -- you know what vOr, Inc., is?

20 A Yep, yep.

21 Q And you understand it's a corporation?

22 A Okay.

23 Q Do you understand corporations are owned by shareholders?

24 A Okay.

25 Q And they have share certificates. Do you understand that?

1 A Yep.

2 Q Have you ever seen any share certificates as to who the
3 owners of vOr, Inc., are?

4 A No.

5 Q Do you know who the owners of vOr, Inc., are?

6 A Raymond and Vicki.

7 Q And why do you say that?

8 A Because they're married and they set it up.

9 Q But as far as who actually owns the shares or how many,
10 who owns, do you have any knowledge about that?

11 A No. I would assume it's 50/50.

12 Q You testified that the attorney had been at the nursing
13 home two times. It made it sound like you actually saw
14 him there. Did you see him there?

15 A No. I never met him.

16 Q So you don't know if he was there, Alex Hagen was there
17 two times, correct?

18 A Mm-hmm.

19 MR. SCHOENBECK: I'd move to strike his prior testimony,
20 Your Honor. It would have been hearsay at best.

21 THE COURT: Mr. Geyer?

22 MR. GEYER: Yeah, I don't have any issue with that.

23 THE COURT: Motion to strike is granted.

24 BY MR. SCHOENBECK

25 Q Mr. O'Farrell, how old are you?

1 A Forty-eight.

2 Q You had your parents cosign how many different notes for
3 you?

4 A Two.

5 Q Okay. So there's a home that you borrowed for through
6 Wells Fargo, right?

7 A Yep.

8 Q Your parents cosigned that?

9 A Yep.

10 Q And then the building in Milbank, you had your parents
11 cosign that note too, right?

12 A Yeah, it was an operating note for real estate and
13 livestock.

14 Q And how many of those notes did you have them use their
15 farmland to collateralize?

16 A That was up to the bank, I guess, so I don't know if they
17 used the land or what they used. But they used their
18 assets.

19 Q Why would your parents -- why would you need your parents
20 to collateralize your purchase of a house when you're 48
21 years old?

22 A I wasn't 48 when I bought it.

23 Q How old were you when you bought it?

24 A Ten years ago.

25 Q So you were 38?

1 A Yeah.

2 Q You were 38 years old and could you afford to buy the home
3 that you were buying?

4 A Yeah, I could make the payments.

5 Q Why did your parents have to cosign on it?

6 A Because I didn't have very good credit.

7 Q How come you didn't have very good credit?

8 A I had a lot of debt at the time.

9 Q You'd run debts up in different endeavors?

10 A Yep.

11 Q And then this -- we have the note for 300-some thousand
12 that the corporation signed with you at Great Western
13 Bank?

14 A Yep.

15 Q That involved a commercial building in Milbank, didn't it?

16 A No.

17 Q Okay. It was for an operating loan?

18 A Operating loan.

19 Q Why did you need to have the corporation pledge its land
20 for your operating loan?

21 A Because the bank wouldn't borrow me the money on my own.

22 Q You didn't have good enough credit?

23 A Right.

24 Q And that's because of the way you handled your prior
25 business dealings?

1 A I guess.

2 Q And would it surprise you if that debt when it was paid
3 off yesterday was about \$283,498.60?

4 A Sounds about right.

5 Q Do you intend to pay that money back to vOr, Inc.?

6 A No. I am going to pay the bank. It's my note. It's not
7 theirs.

8 Q Okay. If the bank got paid off yesterday, then are you
9 going to pay vOr, Inc.?

10 A Pay them what?

11 Q The money that they had from the land they had to sell to
12 pay off your note?

13 A That's my note. It's not their note. That's my note.
14 It's in my name. Their the cosigner. Same as the house,
15 I make payments. It has nothing to do with them, unless I
16 default. Then they pay.

17 Q Did you understand you were pledging their farmland for
18 your note?

19 A Yes.

20 Q So if they wanted to sell their farmland, did you
21 understand they needed to get rid of that mortgage?

22 A Nope.

23 Q You didn't understand that?

24 A Nope. There was no plan to sell any land.

25 Q So your dad was drinking his whole life and now he's cut

1 back? Is that what you --

2 A He's cut back some, yeah.

3 Q So is he better now?

4 A I guess. I don't know. I haven't been over there. I
5 guess I don't know.

6 Q You testified on direct that you knew. How could you not
7 know now?

8 A Six months ago.

9 Q And in the spring of this year when Paul wanted your dad
10 to sign loan documents at the bank --

11 A Yep.

12 Q -- was your dad mentally competent?

13 A Was he competent?

14 Q Sure.

15 A Well, he signed them for -- every year for the last 40
16 years.

17 Q So did you think that he was mentally competent when your
18 brother wanted your dad to sign those loan documents this
19 spring?

20 A Mom and Dad were both there and they were in business
21 together. It's an operating loan. For them to not have
22 to sell land, they'd have to sign for it.

23 THE COURT: All right. Listen to the question being asked
24 and answer that question. The question was: Did you
25 think your dad was competent earlier this spring when he

1 did or did not sign loan documents? Did you understand
2 the question?

3 THE WITNESS: Yeah.

4 THE COURT: All right. Let's answer it.

5 BY MR. SCHOENBECK

6 Q Was your dad competent when your brother went to him to
7 sign the loan documents in the spring this year?

8 A Yes.

9 Q And you haven't seen your dad for six months, did you say?

10 A Five months, probably.

11 Q So when did you decide your dad became incompetent?

12 A On some of the decisions, yeah, I guess, I don't know.

13 Q Well, you disagree with some of your dad's decisions,
14 right?

15 A Right.

16 Q I want to get to, though, you said he's not mentally
17 competent. You said that, didn't you?

18 A Right.

19 Q When did that happen after the spring up until you haven't
20 seen him for five months? You gotta tell us what you mean
21 by saying when did he become mentally incompetent.

22 A I guess I really don't know the timeframe of that.

23 Q You understand that trust, your dad, that's his estate
24 plan, isn't it?

25 A Mm-hmm.

1 Q You have to answer yes or no.

2 A Yes.

3 Q Do you feel your dad is not allowed to change his estate
4 plan?

5 A I don't think so. I think it should be set to how they
6 set it up when they were married.

7 Q And your parents, they needed some help with the day to
8 day activities in life when they were both in the home,
9 didn't they?

10 A Yes.

11 Q And who was -- who --

12 RAYMOND O'FARRELL: Wasn't in a home.

13 BY MR. SCHOENBECK

14 Q When they were in their own home, who helped with those
15 day-to-day activities?

16 A I guess everybody did.

17 Q Well, actually, didn't Rita actually live with them and
18 help?

19 A Yep. Rita lived there.

20 Q And then before Rita, Kelly and his wife had been there
21 helping?

22 A Yep.

23 Q And after Rita left, Ray didn't have to go into a nursing
24 home, correct?

25 A Correct.

1 Q Ray's got to stay in his home?

2 A Yep.

3 Q Who stayed there then and helped?

4 A Kelly and Donna were there.

5 Q Kelly and his wife, right?

6 A Yep.

7 MR. SCHOENBECK: I have no further questions.

8 THE COURT: Mr. Hieb?

9 MR. HIEB: I have a couple.

10 CROSS-EXAMINATION

11 BY MR. HIEB

12 Q You seem to testify that you had some direct knowledge of
13 statements that my client Kelly O'Farrell made to Raymond
14 that caused Raymond to somehow decide he no longer wanted
15 to sign loan documents.

16 Did I hear that correctly?

17 A Say that again.

18 Q Well, you seem to indicate in the leading question from
19 your counsel that you agreed that my client Kelly
20 O'Farrell made some statements to your dad that caused
21 your dad to no longer want to sign loan documents with the
22 bank.

23 Did I hear you correctly?

24 A Yeah, there was never an issue of signing documents until
25 Kelly moved in.

1 Q What statement did you hear?

2 A What statement did I hear?

3 Q Yeah, what statement did you hear my client make to your
4 dad?

5 A That Paul is a terrible farmer, he's losing money, this
6 and that. And that's after seeing the trust and then they
7 are, like, well, we are going to have to sell land.

8 Q Let's be more specific. When did that conversation take
9 place?

10 A It was probably a year.

11 Q A year ago from today?

12 A Right.

13 Q Okay. And any other conversations you heard my client
14 have with his dad that you're alluded to in your testimony
15 here today?

16 A Not that I can think of off the top of my head.

17 Q Okay. So that would be the one -- the one conversation
18 you've heard that caused you to believe the reason why
19 your dad would no longer back your brother's increasing
20 debt was because of that statement?

21 A Mm-hmm.

22 Q Yes?

23 A Yeah.

24 Q And you're aware that your dad went down to see an
25 attorney who started to help him try to understand where

1 he was at with his estate plan, right?

2 A After my mom's death?

3 Q No.

4 A Or before?

5 Q Before your mom's death.

6 A Yep.

7 Q You were aware of that, right?

8 A Yeah.

9 Q In fact, that was after meeting with that attorney and
10 working with that attorney that's when he started
11 transferring his -- what he deemed to be his part of that
12 corporation out of that trust, isn't it?

13 MR. GEYER: Objection; lack of personal knowledge.

14 THE COURT: Overruled.

15 THE WITNESS: What's the question again?

16 BY MR. HIEB

17 Q It was after your dad started to go down to Clark to meet
18 with an attorney to get advice that he started to move
19 what he thought was his part of that corporation out of
20 that trust, right?

21 A Yes.

22 Q And Kelly O'Farrell didn't have anything to do with him
23 going down to see that attorney, did he?

24 A That, I don't know.

25 Q You don't know, do you? So when you say that it was my

1 client and his wife moving into your dad's house to assist
2 him, that in your opinion caused your dad to decide I
3 don't want to loan anymore money to your brother, don't
4 you think it's as likely or more likely that it could have
5 been the attorney that he was talking to helping him
6 understand things?

7 MR. GEYER: Objection; speculation.

8 THE COURT: Overruled. I will instruct the witness to
9 answer the question if he knows.

10 THE WITNESS: He's not borrowed any money. It's an
11 operating loan that they've had going for years.

12 BY MR. HIEB

13 Q Okay. So don't you think --

14 A If you know anything about farming, you have to have an
15 operating loan.

16 Q Yeah, I am aware of that. Let's go there. How much money
17 has Kelly O'Farrell borrowed using your parents' land as
18 collateral?

19 A Oh, I have no idea.

20 Q In fact, if I told you none, would you have any reason to
21 disagree with that?

22 A Sure. I don't know.

23 Q Okay. How much money have your sisters borrowed using
24 your dad's land as collateral to assist them?

25 A My folks have helped all of them. They bought them plane

1 tickets. They've given them cash.

2 Q I think you misunderstand my question. Are you aware of
3 any promissory notes where --

4 A No. I don't know. I didn't go digging either.

5 THE COURT: All right. You have to wait until counsel
6 asks the question. Then you answer it. I have a court
7 reporter sitting here and her job is to take down
8 everything that's said during this court proceeding. When
9 two people are talking, that's impossible.

10 Go ahead, Mr. Hieb.

11 MR. HIEB: Thank you, Your Honor.

12 BY MR. HIEB

13 Q Are you aware of any loans that Kelly O'Farrell has
14 received the proceeds from using your parents' land as
15 collateral?

16 A No, I have no idea.

17 Q Are you aware of any loans that your sisters have received
18 using your parents' land as collateral?

19 A Nope.

20 Q The only two people that have done that are you and your
21 brother Paul, aren't you?

22 A Yep.

23 Q But it's your testimony today that the reason why your dad
24 has now decided to essentially cut the two of you off must
25 be because my client moved in with him?

1 A Yep.

2 Q It couldn't be because you guys collectively have already
3 borrowed over a million dollars using that land and your
4 dad is just tired of it?

5 A That, I don't know.

6 Q I don't either.

7 MR. HIEB: I have no further questions.

8 THE COURT: All right. Now, Mr. Geyer, any redirect for
9 your witness?

10 MR. GEYER: Just a little bit, Your Honor.

11 THE COURT: All right.

12 REDIRECT EXAMINATION

13 BY MR. GEYER

14 Q Lance, I'd call you Mr. O'Farrell but there's several
15 O'Farrells. Lance, Mr. Schoenbeck asked you questions
16 about your loan that was collateralized by land in vOr.

17 Do you remember that?

18 A Yes.

19 Q And he asked you about it getting paid off by vOr and you
20 making payments back to vOr. Did you hear that?

21 A Correct.

22 Q Okay. Did anybody -- have you ever defaulted on that
23 loan?

24 A No.

25 Q Have you made every payment on that loan?

1 A Yeah.

2 Q Is it your understanding that vOr has paid it off for you?

3 A Correct.

4 Q No, no.

5 A That what?

6 Q Is it your understanding that vOr is paying that note off
7 for you?

8 A No, it's not.

9 Q When is the first time you ever heard of that?

10 A That's the first time.

11 Q When?

12 A Today.

13 Q Was it your intention just to pay the loan off like the
14 note instructed?

15 A Yes.

16 MR. GEYER: No further questions.

17 MR. SCHOENBECK: No recross, Your Honor.

18 THE COURT: All right. Thank you, sir, you may step down.

19 THE WITNESS: Want me to step out?

20 THE COURT: No. You're done testifying. You're welcome
21 to stay in the courtroom and observe if you wish.

22 THE WITNESS: Okay.

23 THE COURT: Call your next witness.

24 MR. GEYER: We'd call Raymond O'Farrell, Your Honor.

25 THE COURT: All right. Kelli -- all right.

1 Is he okay to come up to the stand?

2 MR. SCHOENBECK: You want me to help you get up there or
3 can you make it on your own?

4 RAYMOND O'FARRELL: Huh?

5 MR. SCHOENBECK: You got it?

6 RAYMOND O'FARRELL: Oh, yeah.

7 THE COURT: There is a step here, sir, so be careful.
8 That witness chair has wheels, so if you slide too far
9 that way then your going to go off the step and off the
10 stand. Please be careful.

11 Go ahead, Mr. Geyer.

12 MR. GEYER: Thank you, Your Honor.

13 RAYMOND O'FARRELL,

14 was called as a witness and was not duly sworn,

15 was examined and testified as follows:

16 DIRECT EXAMINATION

17 BY MR. GEYER

18 Q Please state your name.

19 A Raymond Alvin O'Farrell.

20 Q And, Mr. O'Farrell, can you hear me?

21 A Yep.

22 Q Okay. How old are you, Mr. O'Farrell?

23 A Seventy-four, June 30th.

24 Q And what is your relationship to Paul O'Farrell?

25 A Nothing right now.

1 Q Okay. Is he your biological son?

2 A Yes, I guess.

3 Q Okay. Are you married right now?

4 A No. My wife passed away.

5 Q Okay. What was her name?

6 A Victoria.

7 Q Okay. Are you upset with your son Paul?

8 A Well, I guess it's -- he was taking liquor, using liquor.

9 I have too, but he carried a little bit too far, too much
10 liquor, whiskey. I drink a lot of beer and so I don't
11 really get that intoxicated.

12 Q Okay. If I can paraphrase, are you saying that you are
13 upset with your son Paul?

14 MR. GEYER: And, Your Honor, I am just standing this close
15 so I can hear him.

16 THE WITNESS: Sir?

17 THE COURT: What's that?

18 MR. GEYER: I'm just standing this close so I can hear
19 him.

20 THE COURT: Go ahead, approach the witness.

21 BY MR. GEYER

22 Q So you're saying you're upset with your son Paul because
23 of his drinking?

24 A Well, he was. I guess he changed things a little while
25 and got way from it.

1 Q Okay.

2 A But he -- I went there one day and he was pretty well
3 intoxicated.

4 Q Okay. Are you -- there's been testimony today --

5 A Yes.

6 Q -- that you're the owner or you have all the shares for
7 vOr, Incorporated. Have you heard that?

8 A State that again, sir.

9 Q I will restate the question. I will take it back.

10 What is vOr, Incorporated?

11 A Well, it's been something that's been dissolved and now
12 it's no longer there.

13 Q You dissolved vOr, Incorporated? When did you do that?

14 A Well, I guess when we sold some property.

15 Q When did you sell some property?

16 A A couple of months ago.

17 Q Okay. And so now vOr is no longer incorporated with the
18 State of South Dakota?

19 A As far as I am concerned, it ain't.

20 Q Okay. How did vOr come into existence?

21 A Many years ago when I was with the family yet or not VO --
22 the -- the Scholes (phonetic) section which was a quarter
23 of hay land in Skyline Cattle Company. And it was really
24 all mine at the beginning from the corporation, O'Farrell,
25 Incorporated.

1 Q Okay. When you -- when Skyline was created, you owned it
2 with your son Paul and your wife, correct?

3 A No. No. I owned it before that.

4 Q Okay.

5 A I just told you I owned all of it that I have got now,
6 which it was a thousand, a little over a thousand acres.

7 Q Why did you sell the land in vOr, Incorporated?

8 A To pay off a note that they were foreclosing on him.

9 Q Who is him?

10 A Your -- my son setting there.

11 Q Paul?

12 A Yes.

13 Q Okay. Was it just one note?

14 A No. I don't know. A big note and it was big enough so it
15 had to get quite a few notes in. And my other son, he had
16 some money too out of there, and the bank was just -- was
17 closing on it.

18 Q Do you remember a time when you and Paul and your wife
19 were sitting down with a banker to talk about refinancing
20 the notes?

21 A I would not sign no papers. I would not.

22 Q Okay. And when was that?

23 A See, I didn't really keep track of these dates, but a
24 couple of years ago, maybe.

25 Q Okay. So two years ago, you think, is when you sat down

1 with a banker and would not refinance the notes?

2 A Probably.

3 Q Okay. I mean, you say "probably." Do you think it was
4 two years ago or do you have a different date?

5 A No. I'm an old man and I ain't -- I don't remember
6 everything. I'm 84 years old.

7 Q Do you have trouble with your memory Raymond?

8 A No, sir. But you -- at 84, and I've had some strokes, and
9 you just don't calculate quite as good as you did when you
10 were 15 or 20 or something like that.

11 Q So a couple of years ago, probably, you decided you
12 weren't going to sign the refinance papers, correct?

13 A Well, no. They were foreclosing.

14 Q I am talking about the conversation with your wife and
15 Paul and the banker about refinancing. You just testified
16 that you were not going to sign the documents, correct?

17 A Well, that's right. I -- the bankers wanted money. And
18 that's what come from the sale of Skyline to pay off that.

19 Q Because you wouldn't refinance with the bank, correct?

20 A Pardon?

21 Q Because you wouldn't refinance with the bank, correct?

22 A Well, no. We were -- nobody had any money to be sold.

23 Q But the bank was going to refinance and they would have
24 accepted refinancing the notes using vOr land as
25 collateral?

1 A No. The bank didn't want to refinance.

2 Q They bank would not --

3 A They wanted money.

4 Q You're telling me that the bank would not refinance the
5 notes with Skyline Cattle Company, vOr, Incorporated, and
6 vOr's cosigning note with your son lance, that they
7 wouldn't agree to refinance that?

8 A Well, Lance was in a different situation than Paul. He
9 had some other holdings and -- but I guess he owed plenty
10 of money on them holdings too. Why? I don't know why he
11 was in debt like he was. And the same way many years ago
12 when I left the main ranch, that was over a thousand
13 acres. I owed very little -- yeah, owed very little money
14 on it.

15 Q And this was back in 2002, correct?

16 A Well, before that.

17 Q When did you leave -- because you were in a business with
18 your brothers called "O'Farrells, Incorporated," correct?

19 A Right.

20 Q When did that land from O'Farrells Incorporated go into
21 vOr, Incorporated?

22 A Well, I am just not sure.

23 Q I am going to show you what's been entered as Exhibit C.

24 Do you see that?

25 A Yep.

1 Q What's that? What's Exhibit C?

2 A I can't see that. You can read it to me.

3 Q Go ahead and read it.

4 A I can't read it.

5 Q Why can't you read it?

6 A I can't see it good enough.

7 Q Do you need it closer?

8 A No. I just can't see.

9 Q Do you have glasses?

10 A Just some cheap things.

11 Q Where are they at?

12 A Right here.

13 Q Can you please put them on?

14 A No. I just said I ain't going to read it.

15 Q You're not going to read it?

16 A No. What do you want me to answer?

17 MR. GEYER: Your Honor, I would ask that the witness
18 please be instructed to read the document.

19 THE COURT: You're asking this witness to read the entire
20 document consisting of with exhibits, notes?

21 MR. GEYER: No, Your Honor. I am asking the witness to
22 identify the document.

23 THE WITNESS: Well, what's the problem?

24 THE COURT: All right. Then ask him that question.

25 BY MR. GEYER

1 Q Please identify what Exhibit C is.

2 THE COURT: Please take a look at the exhibit and then the
3 question is: Can you identify what that document is?

4 THE WITNESS: No.

5 THE COURT: You cannot?

6 THE WITNESS: No.

7 THE COURT: All right.

8 THE WITNESS: Can you read it to me?

9 THE COURT: No. That's not my role.

10 Mr. Geyer, do you have a follow-up question on that
11 issue?

12 MR. GEYER: I do.

13 THE COURT: Go ahead.

14 BY MR. GEYER

15 Q Mr. O'Farrell, you can't read Exhibit C, right?

16 A No. Well, why won't you read it to me?

17 Q Sir, I am asking the questions. I just need you to answer
18 them.

19 A Well, I am just telling you --

20 THE COURT: All right. Let's do this. This witness
21 says -- he's under oath. He's on my witness stand in a
22 formal court proceeding. He said he cannot read this
23 document. He can't see it.

24 So, Mr. Geyer, why don't you ask a specific question
25 on that exhibit.

1 MR. GEYER: Thank you, Your Honor.

2 BY MR. GEYER

3 Q Mr. O'Farrell, when people ask you to sign a document, do
4 you read it?

5 A No.

6 Q Okay. How do you know what it says?

7 A Well, I owned a cattle barn years ago. And I could keep
8 track of weight. And I would buy hundreds of cows and all
9 they did was sign -- just sign my name was all I had to
10 do.

11 Q Okay. And I'm not trying to beat you up, but I just
12 really want to know.

13 A Speak up.

14 Q Is it an issue where you've never been able to read or is
15 this something that's happened --

16 A No. I've had some strokes and --

17 Q So at one time you were able to read?

18 A Yes.

19 Q But after your strokes, you've been unable to read?

20 A Yeah, I've lost interest in books and stuff. And, like,
21 years ago, I used to read some of the papers and stuff,
22 but I just lost interest. So I listen to the radio and
23 keep up on the markets and everything.

24 Q Okay. How do you know that the bank was foreclosing on
25 the land?

1 A I was in there.

2 Q Where is "in there"?

3 A In Milbank at the bank.

4 Q Okay. And when was this?

5 A A couple of years ago.

6 Q Okay. So you're saying that the bank started foreclosure
7 proceedings two years ago?

8 A (No response.)

9 Q Now, Mr. O'Farrell, I am going to draw your attention and
10 represent to you that on page 9 of Exhibit C, this is the
11 foreclosure complaint that everybody has been talking
12 about today and it's signed and dated on July 22, 2022.

13 A Yep.

14 Q Okay. But you think that there was actually a foreclosure
15 action started two years ago?

16 A Well -- me started?

17 Q No. Your testimony is that you think there was a
18 foreclosure action started against --

19 A Yes.

20 Q -- vOr two years ago?

21 A Well, something like that.

22 Q Okay.

23 A He was in way over his head in payments.

24 Q Okay. Who told you that?

25 A The banker.

1 Q Okay. But you didn't read any documents, right?

2 A No. Isn't it good enough to hear the banker? Do I have
3 to read everything?

4 Q So you trusted the banker and what he told you?

5 A Well, I -- and, yes, I do. I trusted the banker.

6 Q What about your wife Victoria? Did you trust her?

7 A Yes, I did.

8 Q Did you guys have a good marriage?

9 A I would say, yes, and -- but she was being good to the
10 boys. And I did not know that they was just going to keep
11 spending and spending.

12 Q Who are the boys?

13 A Well, the one Paul setting right there and Lance setting
14 back there.

15 Q Who is your other son back there?

16 A Lance.

17 Q Lance is sitting back there?

18 A Yeah, you can see him.

19 Q Okay. Oh, sorry. My mistake.

20 A You going blind?

21 Q I might be. Did you have a concern -- you talk about keep
22 spending and spending and the boys. Did you have a
23 concern of the spending that Paul was doing?

24 A Hell yes, I did.

25 Q Okay. What spending?

1 A What spending?

2 Q Yes.

3 A Well, that's a good question. What was he spending all
4 the money on?

5 Q Well, if you had concerns about it, did you know anything
6 specific that you were upset about?

7 A Well, I was down to the bank. Hell yes, I was concerned.

8 Q Yeah, but you said -- was it just the amount of money or
9 were there certain things that you were upset about?

10 A Well, the amount of money when it gets over a million
11 dollars, wouldn't you be a little concerned?

12 Q Well, but I am asking. You said you had concerns and I'm
13 wondering if it was --

14 A Well, that's just what I told you.

15 Q Okay. What about anything else other than just the amount
16 itself?

17 A That's the big thing, ain't it?

18 Q Well, but I am just asking if there was anything else.

19 A Like what?

20 Q Like, were you concerned that Paul had spent money on
21 houses in Hawaii?

22 A The money had been spent. It doesn't give a damn where he
23 spent it, does it?

24 Q Well, I am asking you if it did?

25 A Well, hell no. If he spent the money, I didn't put a

1 tally down where he spent the money, Hawaii, and some over
2 there, I know.

3 Q Okay. Did you ever sign a document? I know you stated
4 that you can't read documents, correct?

5 A Well, I --

6 Q Did you ever sign a document not knowing what it said?

7 A I would say no.

8 Q Okay. So every time that you signed --

9 A I'd done business deals signing and stuff. I did nothing,
10 no signing, for probably 10 years.

11 Q You didn't sign anything for 10 years?

12 A Probably not. I am 84. I am not doing any business. I
13 listen to the radio. I don't read the papers.

14 Q So in the last 10 years, you don't remember signing any
15 documents?

16 A Well, I'm sure I signed -- yeah, I've signed plenty of
17 papers.

18 Q Okay. So you do remember signing documents?

19 A Yes.

20 Q Well, now, Exhibit 2 of Exhibit C, are you able to read
21 that document?

22 A No.

23 Q And if I represent to you that that's a loan back in 2011
24 where the borrower is vOr, Incorporated, and your
25 signature is on the second page, do you remember that?

1 A No. Yeah, I see my signature right there.

2 Q All right. Do you remember signing it?

3 A No. Twenty-two, three years ago?

4 Q Well, it was 2011, so you --

5 A Oh, ten, eleven years.

6 Q Prior to when you wouldn't re-sign the financial documents
7 for Skyline, did you ever object prior to that about
8 signing documents for Skyline?

9 A Yes, I did.

10 Q Okay. Who did you make those objections to?

11 A Well, Paul was one.

12 Q Okay.

13 A He was the main one.

14 Q But you went ahead and signed the documents anyway?

15 A No, didn't sign them.

16 Q Okay. But what about -- I am talking about prior to the
17 last time you wouldn't sign.

18 A Yeah, what about it?

19 Q Was there other times when you objected?

20 A I couldn't say for sure.

21 Q All right.

22 A And you just said you seen my signature. I've signed
23 plenty of papers. Maybe somebody else or my son or
24 somebody might have read it to me if I didn't understand
25 it.

1 Q Okay. What I am trying to get at, Raymond, is --

2 A Yeah.

3 Q -- I understand your position that you objected this last
4 time. But prior to that, when you signed the documents
5 refinancing --

6 A Oh, I've refused some other signatures too.

7 Q Okay. But if you refused, you wouldn't have signed the
8 document, correct?

9 A (No response.)

10 Q Meaning, you understood --

11 MR. SCHOENBECK: Your Honor, I'm going to object. This
12 has been asked and answered. He's been over this a couple
13 different times.

14 MR. GEYER: I don't think we have. I'm just trying to
15 clarify.

16 THE COURT: I will sustain the objection. It has been
17 asked and answered.

18 BY MR. GEYER

19 Q You understood that you had pledged vOr land as collateral
20 for Skyline debts, correct?

21 A Well, yeah, Skyline, and we had a couple other quarters of
22 land.

23 You were gonna call a witness that's right out here
24 and --

25 THE COURT: All right. There's no question on the floor.

1 So please don't say anything. That's the rules.

2 THE WITNESS: Okay.

3 THE COURT: You can talk when there's a question and you
4 can answer the question.

5 Now, let's go ahead, Mr. Geyer, and ask your
6 questions.

7 BY MR. GEYER

8 Q Do you remember signing anything having your son Kelly
9 O'Farrell become your power of attorney?

10 A No.

11 Q You didn't do that?

12 A Well, I might have signed something, but I could see it
13 was trouble. And I wouldn't re-sign it. I wouldn't sign
14 anything more.

15 Q Okay. Who do you think is your power of attorney right
16 now?

17 A Well, like I said, I am the boss, I guess, right now.

18 Q Do you have a power of attorney right now?

19 A Well, someone in the family, I suppose, the girls, my one
20 son, he signs the paper I have for him. And I -- Paul, he
21 would put me in a home.

22 Q Who told you that?

23 A Pardon?

24 Q Who told you Paul was going to put you in a home?

25 A Well, I know he was going to have somebody else move into

1 my house, a nephew of mine. And I was going to go bye-bye
2 and all that kind of stuff. Yeah.

3 Q Okay. But I am asking you, did someone tell you, either
4 Paul or anyone else, that they were going to put you in a
5 home?

6 A Yes, sir.

7 Q I'm sorry?

8 A Yes, they were.

9 Q Who said that?

10 A I got another son back there who was gonna too.

11 Q And who's that?

12 A Lance.

13 Q Okay. So what did Lance tell you?

14 A Well, I just said he agreed that they were going to put me
15 in a home.

16 Q He told you that?

17 A My wife too.

18 Q Okay.

19 A But she passed away. And my son and his wife -- I'm at my
20 house yet for about 60 years and I'm fixing to stay.

21 Q So your mother -- or excuse me. Your wife and your son
22 Lance had a conversation with you about putting you in a
23 nursing home?

24 A Well, I know they had it figured out who they was going to
25 move in my house and his wife or a girlfriend. And they

1 had a nephew from Duluth, Minnesota.

2 Q Who told you that?

3 A Oh, I had different talk -- I don't know.

4 Q But who specifically?

5 A Well, that had been quite a while ago. And like I said, I
6 am an old fella and I don't think it makes a hell of a lot
7 of difference, does it?

8 Q Well, it does to me and that's why I'm asking it. I'd
9 like to know if you know.

10 A Well, I am saying that I got the notice that they were
11 going to move me out and were gonna bring my nephew from
12 Duluth and move into my place there, the house. And I had
13 only been there about 60 years, and I think I am going to
14 stay there.

15 Q Did your son Kelly ever tell you that Paul bought a house
16 for his ex-wife in Hawaii?

17 A What was that, sir?

18 Q Did your son Kelly ever tell you that Paul bought a house
19 for his ex-wife in Hawaii?

20 A Yes.

21 Q He told you that?

22 A Well, we had -- you know, when that kind of stuff takes
23 place and other people are involved, you're going to hear
24 about it. They said -- the comment was 60,000 or 75,000.
25 Well, you don't buy no damn house in Hawaii for 75,000.

1 It's the highest priced place in the country to live in.

2 Q And you believed Kelly that that's what happened?

3 A I don't know just what did happen, but I am just telling
4 you, you don't buy a house in Hawaii for \$75,000. Or was
5 it 750,000? Or how many thousand was it? There's a lot
6 of money disappearing.

7 Q Money was disappearing?

8 A Well, yes. We had to sell land and stuff to pay that bill
9 or debt off.

10 Q Who signed the documents for the sale of that land?

11 A What was that sir?

12 Q Who signed the documents for the sale of that land?

13 A Me, for one.

14 Q Okay. Did you read the documents?

15 A Well, I know I had nothing to worry about, so, yes, I --
16 well, what did I read?

17 Q Did you read the documents for the sale of the land that
18 you are talking about?

19 A Well, I guess I come up with -- well, no. One of my sons,
20 he's the one that priced it.

21 Q Which son is that?

22 A Well, I am just -- okay. I don't know as it makes any
23 difference, does it?

24 Q Well, yes, it does to me. Which son?

25 A Oh, it does.

1 Q Who?

2 A Well, he's setting right there with the fellas.

3 Q Okay. Do you know his name?

4 A He's got the red shirt.

5 Q A red shirt?

6 A Reddish or what the hell.

7 Q Okay. Do you know his name?

8 A Kelly.

9 Q Okay.

10 THE COURT: All right. Mr. Geyer, it's now 5:00, as you
11 could probably and everybody in this courtroom determine,
12 maintenance has shut down the heating and the air flow to
13 this courtroom. How many more questions do you have? And
14 pretty soon security is going to lock up the courthouse,
15 so --

16 MR. GEYER: Well, Your Honor, obviously, we are not going
17 to get done today. Mr. Schoenbeck hasn't even had an
18 opportunity to present his witnesses and I have one more.
19 So I would be happy to continue this matter.

20 THE COURT: Well, the purpose in asking my question that I
21 just did is can we get done with this witness in the next
22 few minutes or should we adjourn and I'll have to set
23 another hearing date?

24 THE WITNESS: Well, I think --

25 THE COURT: Well, I am talking to counsel.

1 MR. GEYER: I can promise it, Your Honor, but I still have
2 some documents based upon his statements --

3 THE COURT: So your adverse direct examination -- and this
4 is an adverse witness to your case in the sense it's an
5 opposing party -- is going to take several more minutes
6 and we are not going to get done in 15 or 20 if I go a
7 little bit late. Is that what you are telling me?

8 MR. GEYER: Yes.

9 THE COURT: All right. Then we will adjourn for the day.

10 Sir, you may step down and have a seat next to your
11 attorney. You're excused for the day.

12 THE WITNESS: So we are done?

13 THE COURT: Yes, you're done for today.

14 MR. GEYER: Your Honor, I would just note I did subpoena
15 Mr. O'Farrell.

16 THE COURT: What's that?

17 MR. GEYER: I did subpoena Mr. O'Farrell and I would like
18 him here again.

19 THE COURT: Well, that's in the file and he will have to
20 come back.

21 But you're excused for today. We are stopping the
22 hearing today because it's late.

23 All right. We are going to have to reschedule this
24 at some other time. So I usually do these hearings on
25 Tuesdays but I believe next Tuesday, at least in the

1 afternoon, I will be over in Hamlin County conducting
2 regular court sessions.

3 MR. SCHOENBECK: And I'm out.

4 RAYMOND O'FARRELL: Well, we've --

5 THE COURT: I'm talking to the attorneys now.

6 MR. SCHOENBECK: Are we off the record now, Judge?

7 THE COURT: Let's go off the record.

8 (A brief discussion was held off the record.)

9 THE COURT: Let's go back on the record then. All right.
10 I am trying to reschedule a second day of hearings in the
11 O'Farrell matters, the probate file, and the motion to
12 remove Mr. Schoenbeck's firm because of an alleged
13 conflict of interest. We did not have time to cover that
14 today. And I'm trying to reschedule dates.

15 I came up with a date, November 4th, that's available
16 to the Court. I think it would be available to everybody
17 involved in this case, the other attorneys involved.

18 But, Mr. Geyer, you're bringing something to the
19 attention of the Court?

20 MR. GEYER: Yes, Your Honor. So in file 22-38, the
21 defendant in that case, Raymond O'Farrell, filed a
22 suggestion of death with the Court and served it on
23 Victoria O'Farrell's attorney at the time, Alex Hagen.

24 THE COURT: You are correct. That's in the file.

25 MR. GEYER: That triggers a 90-day requirement from that

1 being served on Mr. Hagen for the special administrator or
2 personal representative of the Estate of Victoria
3 O'Farrell to substitute. If they don't, then her claims
4 are going to automatically be dismissed.

5 And so my understanding is that timeline is coming up
6 to be October 25th. And so while I am available on the
7 4th and I don't have a problem continuing it to the 4th
8 with the problem that it's going to automatically make
9 that time period lapse unless we can get an extension.

10 THE COURT: Mr. Schoenbeck?

11 MR. SCHOENBECK: A couple things, Your Honor. First off,
12 the only reason the 90 days is an issue is because they
13 waited for two and a half months to do anything about
14 this. And, secondly, they represented to the Court that
15 this was going to be a half-hour hearing and then they
16 proceeded to go for a lot longer than that and they are
17 going to go a lot longer yet. So the problem is --

18 THE COURT: I remember sending an email out when this was
19 scheduled to all the attorneys involved, if I schedule
20 double hearings, double files, can we get done in two
21 hours. I was told yes.

22 MR. SCHOENBECK: And, Your Honor, you've seen now
23 Mr. Geyer's examination. And I've asked very few -- I'm
24 asking questions but I haven't used 20 minutes. I
25 certainly haven't used a half hour.

1 The other thing that's going on here and I've again
2 pointed out, I think it's a matter of law he doesn't have
3 any standing. But what he can do, even if Victoria's case
4 goes away, he actually has a claim, that's not affected,
5 he can file his own lawsuit. Now, he will get dismissed
6 on summary judgment and probably get sanctioned if he does
7 it, but he can do it.

8 This 90-day thing does not affect his ability if he
9 has some claim to assert it. They dawdled for most of the
10 90 days is why they have a problem.

11 THE COURT: Mr. Hieb, you came forward to the railing
12 there like you have something to say.

13 MR. HIEB: Yeah, this goes back to what I tried to say at
14 the beginning, Your Honor, and it echos or dovetails
15 somewhat onto what Mr. Schoenbeck is saying. The Court
16 has now had a chance to kind of get a sense of what's
17 going on here to look at the pleadings. And the Court is
18 obviously going to have some time to consider this
19 argument, but I don't understand why there is a motion to
20 intervene being filed.

21 The litigation that we were involved in was Victoria
22 O'Farrell who was alive and the prayer for relief
23 requested a whole bunch of different things that Victoria
24 was seeking. None of those are anything that Paul
25 O'Farrell can or could seek.

1 And if there's some claim that he believes he can
2 make as a beneficiary of the trust that he was somehow
3 disenfranchised, whether it be through undue influence or
4 lack of capacity or what have you, then he should be able
5 to just bring that lawsuit.

6 The reason that interests me is my client got drug
7 into this thing, I think, because they needed to bring
8 somebody in to try to claim undue influence. Why?
9 Because Victoria O'Farrell was sitting in a nursing home
10 and Raymond O'Farrell is doing what he's doing with the
11 assistance of his attorney. And they certainly have to
12 have a reason to say what he's doing is invalid.

13 That was the reason why my client got brought in. My
14 hope would be that when he brings this new lawsuit, my
15 client is not going to have to be a party to it. I think
16 Mr. Hagen is here trying to inform the Court: My client
17 is now deceased, I don't have a client anymore, and would
18 probably not like to have to be involved in this anymore
19 either.

20 All I am getting at is when the Court gets a chance
21 to look at this, maybe in the next week or two before
22 there's another hearing, the Court might actually
23 conclude, you know, there's no point in intervening in
24 this thing. If you got a claim, bring it, and let's start
25 this thing fresh with allegations that are relevant to

1 where things sit right now.

2 THE COURT: Mr. Hagen, again, as I asked you at the start
3 of this hearing, do you have a dog in this hunt?

4 MR. HAGEN: Your Honor, obviously, my client started the
5 litigation and certainly believed that she does have a dog
6 in the fight. Based on the current posture right now, the
7 special administrator is the person who gives me marching
8 orders. And I don't -- I am not here to suggest or take a
9 position of what should happen with the motion.

10 I don't think it's really in anybody's benefit for me
11 to keep coming to the hearing because I am not going to
12 take a position. I'm not going to present argument to the
13 Court. I am not going to testify to the Court, and I am
14 not going to offer the Court anything.

15 I am interested in the outcome because it will
16 determine whether I have any role in the lawsuit going
17 forward on behalf of Victoria, whether I'm gone or whether
18 there's something else. So that's why I showed up because
19 like the Court, I thought two hours out I will hear what
20 the outcome is and then I will know what happens next.

21 So I don't intend to come to the next hearing if
22 there is a hearing. My client certainly believed that she
23 had interests to vindicate when she was alive. But beyond
24 that, I am sort of standing here waiting to be pointed in
25 a direction by someone.

1 And so that's my posture and my position and that's
2 why I am not really participating. I need to know what
3 happens. I don't know that I need to be here to know what
4 happens, but --

5 THE COURT: All right.

6 MR. GEYER: Your Honor?

7 THE COURT: Is everybody available -- oh.

8 MR. GEYER: If I may?

9 THE COURT: Be brief.

10 MR. GEYER: Yeah, I mean, my conversation here or my
11 argument here for the extension is talking about the
12 special administrator. I mean, I appreciate Mr. Hieb
13 wants to get up and argue for his client on the underlying
14 civil lawsuit and my client's motion to intervene, but
15 that's not what we are talking about with the extension of
16 the 90 days.

17 The extension of the 90 days relates to Raymond
18 O'Farrell being a defendant in this case and also being
19 the special administrator. Mr. Schoenbeck argues that my
20 client waited too long. The only reason that he can't
21 step in the shoes of the special administrator is because
22 Raymond O'Farrell did and hasn't done anything in the
23 estate since, at least in the filings.

24 All we are asking for is that, Victoria's claims,
25 what she asserted. This has nothing to do with the motion

1 to intervene by my client. We are talking about
2 Victoria's claims.

3 THE COURT: Well, when I called this hearing, I
4 specifically called 25CIV22-0038. The only motion in this
5 file is the motion to intervene. That's what we spent
6 well over three hours now. It's 5:15 p.m. I convened
7 this shortly after 2 p.m. and that's what I thought I was
8 dealing with.

9 MR. GEYER: Well, Your Honor --

10 THE COURT: Can you help me out on that?

11 MR. GEYER: Well, Your Honor, initially, the motion to
12 have Mr. O'Farrell, Raymond O'Farrell, removed and my
13 client substituted was the initial filing and that's what
14 the initial hearing was set on. In hindsight, I would
15 have never filed a motion to intervene if I would have
16 known it was going to take this long, because the motion
17 to intervene was done simply in judicial economy.

18 And I used that same word in the email. Because,
19 essentially, the arguments are twofold because obviously
20 Paul O'Farrell has got an interest to protect in the trust
21 as he stated and whether or not those -- I mean, and
22 that's the same claim that Victoria was asserting. And
23 that's why I wanted him to be substituted against for
24 Mr. O'Farrell, Raymond O'Farrell.

25 I mean, it just -- if we don't have an extension on

1 the 90 days, then simply just because this hearing took
2 too long and that wasn't my intent, then Victoria's estate
3 and Victoria's claims are going to be barred. And they
4 are going to lose by default. And I don't think that's
5 what the intent is of the Court.

6 All we are asking for is an extension so that when we
7 have this continuance until November 4th, that it isn't
8 made moot --

9 THE COURT: Let me ask counsel this. When I said I am
10 taking this case first simply because it appears on the
11 calendar first and are we going to get done today, why
12 didn't someone correct me and say, well, if this is an
13 issue, Victoria's claims will be moot? Why didn't someone
14 correct me? Can you answer that question for me?

15 MR. GEYER: Your Honor, I didn't think it would take this
16 long. I thought we would have been done. And I guess,
17 you know, if I miscalculated it, then I did, but that
18 wasn't my intent.

19 And, Your Honor, the same testimony is going to be
20 duplicative. I don't know that there's going to need to
21 be a rehashing. I think the Court can take judicial
22 notice of the testimony in this file in the special
23 administrator.

24 That was my whole purpose of filing them together
25 because I thought we could do them at the same time. I

1 believe that's the way my email was portrayed, and I
2 believe that's how I thought the Court understood it.

3 THE COURT: All right. What about the -- we never got to
4 the issue of Mr. Schoenbeck's conflict of interest that
5 your client is bringing.

6 MR. GEYER: Well, Your Honor, I guess that's this whole
7 separate issue. I mean, the Court -- I put that in front
8 of the Court because Raymond O'Farrell as a special
9 administrator has a separate hat than Raymond O'Farrell
10 the person. And so Mr. Schoenbeck is undoubtedly
11 representing Raymond O'Farrell in the civil litigation
12 defending against the claims by Victoria O'Farrell.

13 But at the same time, Raymond O'Farrell is wearing
14 the hat as a special administrator for the estate of
15 Victoria O'Farrell. And I don't believe that
16 Mr. Schoenbeck can represent him wearing both hats because
17 he's against himself. I think it's a concurrent client.

18 THE COURT: Go ahead.

19 MR. SCHOENBECK: If I might try, first off, Raymond
20 O'Farrell is also a director, a shareholder, an officer.
21 He has many hats. He can have whoever he wants to
22 represent him. There's no law that lets the other side
23 knock off Raymond O'Farrell's attorney if he's comfortable
24 having me handle both those roles.

25 In fact, the irony is that they want to put somebody

1 who has an actual conflict, Paul O'Farrell, in. Paul
2 O'Farrell owes money to this corporation that they want to
3 make him the president of. He owes a pile of money, like
4 over a million dollars. And so, I mean, that makes it
5 almost humorous, if we hadn't been wasting three hours of
6 the Court's time.

7 I want to come back, though, again, to where I
8 started this whole thing, which I think -- and now they
9 even admitted -- they never read the sentence in the trust
10 that says that he has an unrestricted right to move all or
11 any part of our separate property at any time.

12 And that underlying lawsuit that they want to
13 intervene in that's all moot now because she died, it's
14 all about he removed shares, half the shares of the
15 corporation and put them in his name alone. He's always
16 had the right. He can change his will. He can change his
17 estate plan any time he wants.

18 There's nothing -- there's no basis for that first
19 lawsuit. And this intervening gets even more ridiculous
20 because there's no way Paul O'Farrell has a right to stop
21 his father from changing his estate plan. He's being sued
22 for changing his estate plan.

23 THE COURT: All right. What about this, counselors,
24 Mr. Geyer just represented to me in the remarks that the
25 testimony was duplicative. If I agree with that, will

1 both sides agree that I take the issue under advisement,
2 the motion to intervene and what's duplicative is the
3 motion to remove Raymond O'Farrell? Can I take that under
4 advisement now based on the testimony that's been
5 presented, or do I need a second day to hear more evidence
6 and conclude the evidence on that topic?

7 I think I've heard enough, but I am not going to
8 force anybody to do anything.

9 Mr. Geyer.

10 MR. GEYER: Your Honor, unfortunately, I believe that
11 Marie Chapin is the accountant for -- or bookkeeper for
12 Skyline Cattle. And I believe she's instrumental in my
13 client's claims in both files.

14 THE COURT: And why is that?

15 MR. GEYER: Because she knows all of the accounting and
16 the control that Victoria had over Skyline Cattle Company
17 and the understanding between the parties regarding the
18 debt and where the money went and didn't go, for that
19 fact, meaning it didn't go to Paul.

20 THE COURT: How does that fact impact Mr. O'Farrell
21 Senior's decision not to loan any more money and he was
22 foreclosed upon this summer and then paid off the debt?

23 MR. GEYER: Well, I believe --

24 THE COURT: How is that going to change the evidence
25 that's been presented so far?

1 MR. GEYER: Your Honor, I think it goes to the credibility
2 that Paul O'Farrell was doing what was understood between
3 all the parties. When the Court hears the testimony --

4 THE COURT: Well, it's evident everybody understood
5 different things, but the fact is Mr. O'Farrell Senior
6 decided not to put up any more of his assets for
7 collateral and not go into any debt any further and sell
8 out and, quote, "the bank wanted money." So he was
9 foreclosed upon. And then he paid these debts. That's
10 the state of the testimony that I heard this afternoon.
11 Do you agree?

12 MR. GEYER: I don't believe that Mr. O'Farrell understands
13 the nature of what he did. And I believe that the
14 documents that I want to continue to have him testify to
15 will establish that to the Court.

16 MR. HIEB: Can I?

17 THE COURT: All right. Go ahead, Mr. Hieb.

18 MR. HIEB: You're tracking it, Your Honor, but that's not
19 the issue. If -- first of all, the trust, which is in
20 front of you, it's an exhibit, talks about -- he's having
21 his client read what he would have gotten when the last of
22 the two of them died. They are dead. Raymond is sitting
23 there. It's a revocable trust. That is absolutely
24 without dispute.

25 So, really, what they've got, if they've got

1 anything, is somebody trying to make some kind of a claim
2 that Mr. O'Farrell had no right or didn't have the
3 requisite amount of capacity or he was unduly influenced
4 or he was duress or any of the other things that have ever
5 been recognized under South Dakota jurisprudence, to try
6 to set that aside, what he did aside. If he's got
7 standing to make that claim, he can bring that claim in
8 its own right. It doesn't need to be brought as part of
9 this lawsuit.

10 And what Mr. Geyer has done today is spend almost all
11 of his time trying to disprove or prove things that are
12 not relevant to the litigation that's in front of the
13 Court. And I think you're tracking that.

14 And that's why I am showing the frustration I am
15 showing. Because for him to sit here and try to prove
16 that Raymond O'Farrell agreed to loan money to Paul,
17 nobody is disputing that, nobody, not Lee Schoenbeck or
18 nobody has pled Raymond O'Farrell didn't agree to sign
19 those notes.

20 MR. SCHOENBECK: Hell, we paid them off yesterday.

21 MR. HIEB: Yeah, and what happened was at some point
22 Raymond said: Enough, I'm done, I am not doing anymore,
23 which then triggered the events that have now occurred.

24 The question is: Did Raymond know what he was doing when
25 he was doing that? That's a different case for a

1 different day. That's not even pled in here.

2 If you look at the pleadings of the lawsuit they are
3 trying to intervene in, that's not the allegation at this
4 point. Because the difference is under that trust when
5 Victoria was alive, when this lawsuit was started, nobody
6 knew who was going to die first. Nobody knew if it was
7 going to be him or her.

8 And her allegation was: I don't think he should be
9 able to take my half, what I think is my half of the trust
10 assets or any part of them, I think they are joint and I
11 don't think he should be able to take his half and remove
12 them because I don't think it's his half to do that with.

13 That's what this fight was about. Under the trust,
14 once she died, it went to him. So now it's all his. He's
15 the only beneficiary of that trust as we sit here right
16 now, until he dies, assuming it's still in existence,
17 which I don't think it is because I think the steps have
18 been taken now to maybe remove it.

19 But that's why this is a whole different case. Paul
20 was never a vested beneficiary in that trust. It's a
21 revocable trust. There was a reason for the fight when
22 Victoria was alive because she was saying: I don't think
23 my spouse should be able to take half of what's in that
24 trust and move it.

25 Guess what? He outlived her. That's over. It's

1 done. And so there's two reasons. The first is he
2 doesn't have standing, but the second is the question
3 would be: So what? It all went to him anyway now. It's
4 all his under that trust. And the Court has it to look
5 at. The Court can see that. So I am not sure what the
6 fight is going to be if we allow the intervention.

7 MR. GEYER: And, Your Honor, they keep going back to the
8 intervention. I am talking about the extension of the 90
9 days that was triggered by Raymond O'Farrell.

10 MR. HIEB: Which is irrelevant without the intervention.

11 MR. GEYER: No, it's not. Your Honor, the whole thing
12 that is trying to be lost here is this isn't the
13 underlying trial. Victoria never got her day in court.
14 But the provisions of the law allow for her estate to step
15 in and continue the fight that she started.

16 And Raymond O'Farrell is never going to step in the
17 shoes and fight himself.

18 RAYMOND O'FARRELL: Well, he didn't --

19 MR. GEYER: That's the main thing we're talking about
20 here.

21 THE COURT: All right.

22 MR. GEYER: It's not the underlying case.

23 THE COURT: Mr. Schoenbeck?

24 MR. SCHOENBECK: Your Honor, and the law also allows the
25 special administrator to look at the trust documents and

1 say: You know what, now that lawsuit is BS and we are not
2 going to continue litigation against the surviving spouse.
3 He had every right to make that decision and they -- if
4 they -- this argument that they are making is one about
5 what Ray would sue himself.

6 The day after she died, they could have made -- I bet
7 he's not going to sue himself. They waited for months.
8 That's their problem. But the fact is they have no case.
9 And the special administrator's job is to conserve
10 resources, not keep paying -- God bless Alex, you're a
11 good man -- but a lawsuit that now has no basis.

12 It would be ridiculous for the estate, which is Ray
13 spending Ray's money, to sue Ray himself so that Paul can
14 be a shareholder and director -- or an officer and
15 director of a corporation he has no right to be in. The
16 lawsuit makes zero sense today and that's his problem.
17 And, no, we are not going to give you an extension.

18 MR. GEYER: And it just seems so self-serving that once
19 Raymond gets into the shoes, he can decide: You know
20 what, Victoria shouldn't have sued me.

21 Boy, isn't that convenient. That's all I am going to
22 say, Your Honor.

23 THE COURT: Well, that's the decision I am going to make,
24 not Raymond.

25 All right. Here's what I am going to do. It's the

1 decision of this Court that, based on the developments, I
2 am trying to schedule day two for November 4th; but if I
3 do that, issues will be moot. That is not the Court's
4 fault. That is not my scheduling staff's fault.

5 And as I mentioned earlier in this proceeding -- and
6 we're going well after 5:00. It's nearly 5:30. I
7 indicated about a half an hour ago, when I called the
8 first case, why wasn't it brought to my attention that
9 this was going to be an issue, but we proceeded well over
10 now three hours, three and a half hours, in file number
11 22-0038, the motion to intervene.

12 Based on the exhibits, the testimony presented, I am
13 going to reverse myself when I said I would not rule from
14 the bench. I am going to rule from the bench this
15 afternoon based on the three hour and 30 minute hearing
16 and the testimony I've taken, it appears to this Court
17 that the law is pretty clear and the law requires I deny
18 the motion to intervene.

19 Nothing in that ruling or the order prevents this
20 plaintiff from filing further claims against the estate
21 such as undue influence or anything else.

22 Now, I heard a lot of evidence that Mr. O'Farrell
23 Senior and that's who I am going to call him, the father
24 here, didn't have -- didn't know what he was doing on
25 this, didn't have capacity to do that. But that is just

1 bold testimony and statements unsupported in the record.

2 There's nothing in front of the Court that I've heard
3 today that would suggest that Mr. O'Farrell is
4 incompetent, doesn't know who his heirs are, and was
5 subjected to undue influence. Perhaps, that's a claim for
6 another day. But I am going to dismiss the motion to
7 intervene in file number 0038 for the reasons I just
8 stated.

9 This was a revocable living trust. It's clear on
10 this Court's review of the trust document and the
11 testimony presented that Mr. O'Farrell had every right to
12 withdraw certain trust assets and assign them to himself,
13 at least 50 percent of the joint property pursuant to the
14 trust document. Therefore, the plaintiff in file number
15 0038, motion to intervene, will be denied.

16 Now, on the other issue, whether or not I should
17 remove Mr. Schoenbeck because of an alleged conflict of
18 interest and his partners or any attorneys employed by
19 him, I've heard nothing on that except argumentative
20 statements from both sides. Both sides know that I, long
21 before I was a circuit court judge, I was on the ethics
22 committee. So I feel I have a good handle on the ethics
23 rules. But do we need a hearing on that?

24 Mr. Geyer?

25 MR. GEYER: We are fine with that, Your Honor.

1 MR. SCHOENBECK: Your Honor, I think it's moot now because
2 the only thing that would remain is the estate. There's
3 no lawsuit pending.

4 THE COURT: All right. I just wanted to make sure.
5 That's why -- it's been a long day and so far a long week.
6 And it's only 5:30 on Tuesday afternoon for this Court
7 with everything going on. I just wanted to make sure I
8 covered everything.

9 Any questions about the Court's ruling this
10 afternoon?

11 MR. GEYER: Just to be clear, Your Honor, you denied my
12 client's --

13 THE COURT: Motion to intervene.

14 MR. GEYER: What about motion for removal and petition for
15 an appointment.

16 THE COURT: Well, do we need a hearing on November 4th on
17 that?

18 MR. GEYER: We do, Your Honor. Again, so now the motion
19 to intervene is out. We don't have an issue with that.

20 THE COURT: Right.

21 MR. GEYER: I just -- so I don't have any problem -- I
22 mean, we want to have our day in court on that, Your
23 Honor. Obviously, this ran long and we run into the same
24 90-day problem on the suggestion of death. And we'd ask
25 for an extension on that until after the hearing.

1 MR. SCHOENBECK: That's -- he's not -- I am not sure what
2 he's talking about. The law on the suggestion of death
3 applies to the pending lawsuit so that has nothing to do
4 with a petition to --

5 THE COURT: Removal for personal representatives.

6 MR. SCHOENBECK: Yeah, that's got -- there's no need --

7 THE COURT: That can be made at almost any time.

8 MR. GEYER: But, Your Honor, the underlying lawsuit is not
9 dismissed. I mean, you didn't dismiss Victoria's claims
10 against Raymond O'Farrell and Kelly O'Farrell, correct?

11 THE COURT: I denied the motion to intervene. That's what
12 was in front of me.

13 MR. GEYER: Sure. But that -- my intent was and I believe
14 it's in the document was to have him intervene, but
15 there's still the plaintiff Victoria O'Farrell. And her
16 estate still has until the 25th to substitute. I mean, if
17 the special administrator -- I mean, Raymond O'Farrell has
18 until the 25th to substitute himself against himself in
19 that lawsuit. And that's what we want to do. We want to
20 have Raymond O'Farrell removed.

21 THE COURT: Well, based on what I heard, he's not going to
22 do that, so --

23 MR. GEYER: Right. So but the problem we have is --

24 THE COURT: So if he's not going to do that, then you can
25 bring a motion to have him removed as a personal

1 representative at any time.

2 MR. GEYER: We have that, Your Honor, in front of you.
3 That was also going to be heard today.

4 THE COURT: All right. So I'll reschedule that for
5 November 4th.

6 MR. GEYER: But the problem is, is that will already be
7 past the time for the 90 days in the civil file for the
8 estate to substitute itself. So, essentially, it would
9 make the whole procedure moot. That's what I've been --

10 THE COURT: Mr. Schoenbeck?

11 MR. SCHOENBECK: Your Honor, it's interesting because what
12 the Court noted about why it didn't make any sense to let
13 him intervene is actually -- parallels exactly with the
14 problem with that lawsuit, which is he could do what he
15 did under the trust.

16 The fact that he doesn't have standing is it will
17 equally -- whoever is assessing that estate should make
18 the exact same assessment, wait a minute, he can do what
19 he can do, that lawsuit doesn't make any sense. And that
20 lawsuit will expire on Monday. And it should expire for
21 all the reasons the Court said that applied to Paul trying
22 to intervene.

23 And so they have a frivolous claim that they are now
24 trying to -- and, actually, they should have never bought
25 the motion to intervene and taken up all this time with

1 that. They could have had a hearing but they didn't want
2 to on the motion to substitute --

3 MR. GEYER: That does not true.

4 MR. SCHOENBECK: That actually is true.

5 MR. GEYER: That's not true.

6 MR. SCHOENBECK: It absolutely is true. The Court asked
7 us which file to take first. They should have dismissed
8 their motion to intervene. That was a ridiculous claim to
9 start with. We could have had a hearing this afternoon on
10 substituting special administrators. And we'd have that
11 fight. And we are still going to have that fight whenever
12 they want to have it.

13 And they can make that motion any time as to any
14 assets that -- and, by the way, they are going to have the
15 exact same problem. Paul has to sue himself in the estate
16 because he owes the estate a pile of money, over a million
17 bucks.

18 MR. GEYER: The problem is, Your Honor, is Raymond
19 O'Farrell is the one who is sitting in the way of
20 Victoria's claim against him. I mean, it's a self-serving
21 position that he's put himself in to stop himself from
22 being sued by Victoria.

23 THE COURT: Did he have priority over as personal
24 representative in this case?

25 MR. GEYER: No one's presented a will. So I don't believe

1 there's any designation of him. I have not seen a will.
2 If there is a will, I don't know about it. He didn't
3 appoint himself as special administrator -- or as personal
4 representative. He appointed himself as special
5 administrator. He has not presented a will and has not
6 substituted himself as personal representative. And, I
7 mean, if the parties wanted to --

8 THE COURT: All right. I will hear the removal of the
9 personal representative, special administrator on
10 November 4th. That's as soon as I can hear it. Whatever
11 else happens on the deadlines, that's not the Court's
12 problem.

13 MR. GEYER: Okay. So just to be clear, the Court is
14 denying a motion for an extension on the 90 days, Your
15 Honor?

16 THE COURT: Yes.

17 MR. GEYER: Okay.

18 THE COURT: This should have been brought to my attention
19 much earlier than it did. Anything else?

20 MR. SCHOENBECK: No, Your Honor. Thank you.

21 THE COURT: All right. Mr. Schoenbeck, you are --

22 MR. GEYER: I just want to say --

23 THE COURT: -- the prevailing party on the order that I
24 just entered on the motion to intervene. Prepare an
25 orders consistent with the oral pronouncement that I made

1 earlier a few minutes ago. I will sign it as soon as I
2 see it, findings of facts and conclusions of law, unless
3 waived. Thank you. Court will be in recess.

4 (WHEREUPON, the foregoing proceedings concluded.)
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1 STATE OF SOUTH DAKOTA)
) SS. CERTIFICATE
2 COUNTY OF DAY)

3
4
5 I, KELLI LARDY, RPR, an Official Court Reporter and
6 Notary Public in the State of South Dakota, Third Judicial
7 Circuit, do hereby certify that I reported in machine
8 shorthand the proceedings in the above-entitled matter and
9 that Pages 1 through 154, inclusive, are a true and correct
10 copy, to the best of my ability, of my stenotype notes of
11 said proceedings had before the HONORABLE ROBERT L. SPEARS,
12 Circuit Court Judge.

13 Dated at Watertown, South Dakota, this 20th day of
14 January, 2023.

15
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17
18
19 /s/ Kelli Lardy
20 KELLI LARDY, RPR
 Certified Court Reporter
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22
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25

<p>MR. BOOS: [1] 5/7 MR. GEYER: [123] 4/19 5/14 5/25 6/11 6/15 6/17 7/7 7/9 7/23 8/2 12/1 12/8 12/11 12/15 13/18 18/3 27/24 28/8 28/11 28/15 28/17 28/25 29/3 29/16 29/22 30/2 30/9 30/17 31/5 33/3 33/23 34/5 35/6 35/8 35/11 36/14 36/20 37/20 38/25 40/5 42/23 43/5 44/3 44/7 45/11 50/8 50/23 51/8 57/18 61/6 61/23 62/17 62/22 64/2 65/5 65/14 65/18 66/22 67/10 70/10 74/8 78/6 81/2 83/7 84/2 84/6 84/12 94/11 95/22 104/13 105/7 107/10 108/16 108/24 109/12 110/14 110/18 115/17 115/21 116/12 117/1 123/14 128/16 129/1 129/8 129/14 129/17 130/20 130/25 135/6 135/8 135/10 136/9 136/11 137/15 138/6 140/10 140/15 140/23 141/1 141/12 144/7 144/11 144/19 144/22 145/18 147/25 148/11 148/14 148/18 148/21 149/8 149/13 149/23 150/2 150/6 151/3 151/5 151/18 151/25 152/13 152/17 152/22 MR. HAGEN: [7] 4/22 10/17 33/9 33/16 33/19 61/11 134/4 MR. HIEB: [29] 5/2 10/20 11/8 11/19 11/23 16/24 17/2 17/12 17/14 31/8 31/17 31/19 32/2 35/10 35/17 35/20 36/1 46/25 47/3 57/15 61/10 102/9 106/11 107/7 132/13 141/16 141/18 142/21 144/10 MR. SCHOENBECK: [62] 4/23 5/5 6/1 7/12 8/13 12/16 17/13 28/6 28/9 29/10 37/23 42/11 42/18 42/25 43/9 47/1 47/4 49/9 49/13 51/3 57/13 60/10 61/8 61/16 62/11 64/4 65/3 65/12 66/24 67/4 67/6 67/22 69/20 70/8 74/4 74/6 78/8 81/3 81/22 83/8 83/23 94/13 95/19 102/7 108/17 109/2 109/5 123/11 130/3 130/6 131/11 131/22</p>	<p>138/19 142/20 144/24 148/1 149/1 149/6 150/11 151/4 151/6 152/20 MS. JENNEN: [1] 4/25 RAYMOND O'FARRELL: [5] 101/12 109/4 109/6 130/4 144/18 THE COURT: [184] THE WITNESS: [18] 17/25 39/2 40/7 44/4 45/13 100/3 104/15 105/10 108/19 108/22 110/16 115/23 116/4 116/6 116/8 124/2 128/24 129/12 \$ \$100,000 [2] 53/19 53/25 \$15,000 [1] 53/4 \$2 [1] 68/13 \$2 million [1] 68/13 \$2,200 [1] 22/20 \$283,498.60 [1] 98/3 \$300,000 [1] 81/20 \$300,250 [1] 80/21 \$500,250 [1] 67/2 \$75,000 [1] 127/4 / /s [1] 154/19 0 000038 [1] 1/14 0011 [1] 4/13 0038 [9] 4/10 6/5 6/13 12/10 28/23 136/4 146/11 147/7 147/15 1 1.03 [1] 7/22 1.2 [2] 68/19 68/20 1.2 million [1] 25/4 1.6 million [2] 42/9 68/18 10 [4] 90/13 121/10 121/11 121/14 10,001 [1] 58/25 100 percent [7] 44/2 44/10 44/19 45/9 46/2 46/7 63/11 1013 [1] 2/11 102 [1] 3/13 103 [3] 8/15 46/24 47/6 1030 [1] 2/14 107 [1] 3/13 109 [1] 3/16 10th [1] 1/23 11 [1] 78/23 12 [4] 3/5 3/20 3/20 3/20</p>	<p>1325 [1] 2/6 13th [1] 45/25 14 [2] 1/6 1/12 15 [2] 113/10 129/6 15,000 [1] 59/7 154 [1] 154/9 170-some [1] 48/6 18 [1] 1/18 19-19-804 [1] 28/18 2 2 p.m [1] 136/7 20 [3] 113/10 129/6 131/24 20-some [2] 37/12 41/14 200 [2] 1/23 1/23 2002 [3] 51/11 58/3 114/15 2003 [6] 20/10 21/14 25/11 25/12 40/16 76/16 2008 [2] 42/20 43/21 2011 [6] 1/6 1/12 78/17 78/23 121/23 122/4 2013 [2] 44/13 44/16 2016 [2] 79/2 79/6 2017 [3] 1/6 1/12 35/9 2018 [5] 79/11 79/15 79/16 79/23 80/1 2019 [2] 80/7 80/19 2020 [1] 45/19 2021 [4] 1/7 1/13 45/25 80/15 2022 [3] 1/18 59/18 118/12 2023 [1] 154/14 20th [1] 154/13 219 [1] 4/7 22 [2] 12/9 118/12 22-0038 [3] 6/5 28/23 146/11 22-38 [1] 130/20 2200 [1] 22/19 22nd [1] 53/4 25 [1] 6/5 25,000 [1] 8/20 25,500 [1] 8/23 250,000 [2] 40/17 40/18 254 [1] 2/8 25CIV22-000038 [1] 1/14 25CIV22-0038 [3] 4/10 6/13 136/4 25PRO22-0011 [1] 4/13 25th [3] 131/6 149/16 149/18 26 [2] 1/7 1/13 29 [2] 1/6 1/12 2:06 [1] 1/18</p>	<p>3 30 [1] 146/15 300,000 [4] 80/2 80/9 81/8 81/14 300,250 [1] 80/8 300-some [1] 97/11 30th [1] 109/23 37 [1] 3/5 38 [3] 96/25 97/2 130/20 4 40 [1] 99/15 408 [2] 34/7 34/7 48 [2] 96/20 96/22 49 [1] 3/21 4th [8] 130/15 131/7 131/7 137/7 146/2 148/16 150/5 152/10 5 5,001 [2] 59/5 59/8 50 [1] 95/11 50 percent [1] 147/13 50/50 [1] 95/11 500,000 [2] 79/19 79/23 51 [2] 3/21 3/21 55 [1] 13/3 57 [1] 3/6 57104 [1] 1/23 57201 [1] 2/6 57225 [1] 2/9 57252 [1] 2/11 57262 [1] 2/3 57402 [1] 2/14 5:00 [2] 128/10 146/6 5:15 p.m [1] 136/6 5:30 [2] 146/6 148/6 6 60 [2] 125/20 126/13 60,000 [1] 126/24 600,000 [2] 79/4 79/6 62 [1] 3/6 64 [2] 3/7 3/22 65 [2] 3/22 3/22 69 [2] 3/23 3/24 7 70 [4] 3/23 3/23 3/24 3/24 700 [1] 54/15 74 [1] 3/7 75,000 [2] 126/24 126/25 750,000 [1] 127/5 78 [1] 3/8 8 804 [3] 28/12 28/18 35/10 804.5 [2] 28/17 31/1 804B [1] 35/6 80B [1] 28/12</p>	<p>81 [1] 3/8 83 [1] 3/9 84 [4] 3/12 113/6 113/8 121/12 8879 [1] 45/22 8879-S [1] 44/23 8th [2] 51/17 51/23 9 9-1 [2] 13/15 60/16 9.03 [3] 13/24 14/6 60/16 90 [8] 131/12 132/10 135/16 135/17 137/1 144/8 150/7 152/14 90-day [3] 130/25 132/8 148/24 91 [1] 13/17 94 [1] 3/12 A AA [2] 42/19 45/19 Aberdeen [1] 2/14 ability [6] 8/9 8/16 26/16 47/13 132/8 154/10 able [12] 10/22 11/2 26/18 83/14 83/20 117/14 117/17 121/20 133/4 143/9 143/11 143/23 about [118] 7/17 8/22 11/9 13/23 15/24 16/22 18/7 24/8 26/18 26/22 26/22 26/23 27/5 31/20 33/8 34/16 35/4 35/11 36/23 37/13 37/14 42/9 42/15 43/3 46/11 46/21 47/6 47/18 48/16 50/24 51/20 58/3 58/13 60/16 62/12 63/2 63/5 63/9 63/25 64/12 67/6 67/11 67/12 68/18 68/19 68/22 69/11 75/2 75/9 75/16 77/13 77/21 78/13 78/14 80/11 82/9 85/1 85/18 85/20 86/3 86/5 86/7 86/24 87/21 88/8 89/11 89/19 89/22 90/11 90/11 90/13 91/4 91/6 93/17 95/10 98/3 98/4 105/14 107/16 107/19 112/19 113/14 113/15 118/12 119/6 119/21 120/5 120/6 120/9 120/15 122/7 122/16 122/16 122/18 125/20 125/22 126/13 128/24 127/15 127/18 131/13 135/11 135/15 136/1 138/3 139/14 139/23 141/20 143/13 144/8 144/19 145/4 146/7 148/9 148/14 149/2 150/12 152/2</p>
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(1) MR. BOOS: - about

<p>A</p> <p>above [1] 154/8</p> <p>above-entitled [1] 154/8</p> <p>absolutely [2] 141/23 151/6</p> <p>accepted [1] 113/24</p> <p>according [1] 77/23</p> <p>account [13] 48/25 49/6 49/7 49/18 49/25 50/17 51/4 51/25 53/16 53/20 53/24 54/7 58/9</p> <p>accountant [7] 10/3 42/12 43/1 45/9 45/13 64/17 140/11</p> <p>accounting [1] 140/15</p> <p>acres [4] 39/22 54/15 112/6 114/13</p> <p>act [1] 77/4</p> <p>action [5] 5/3 55/15 55/17 118/15 118/18</p> <p>actions [1] 15/24</p> <p>activities [2] 101/8 101/15</p> <p>actual [2] 33/10 139/1</p> <p>actually [22] 11/8 29/14 35/21 41/15 48/11 50/6 51/5 63/6 68/10 69/3 74/3 91/10 95/9 95/13 101/17 101/17 118/14 132/4 133/22 150/13 150/24 151/4</p> <p>add [4] 33/6 33/14 51/18 58/9</p> <p>added [4] 51/22 57/7 58/4 58/4</p> <p>address [5] 5/24 34/3 34/5 36/17 61/23</p> <p>adjourn [2] 128/22 129/9</p> <p>administration [1] 5/8</p> <p>administrator [15] 7/2 81/11 131/1 134/7 135/12 135/19 135/21 137/23 138/9 138/14 144/25 149/17 152/3 152/5 152/9</p> 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138/17 145/2 146/20 149/10 149/18 151/20</p> <p>ago [39] 18/15 19/24 21/18 21/23 22/1 23/15 26/21 27/2 40/14 42/8 49/24 64/18 79/21 85/1 85/18 85/20 86/22 87/17 88/7 96/24 99/8 103/11 111/16 111/21 112/24 112/25 113/4 113/11 114/11 117/7 117/21 118/5 118/7 118/15 118/20 122/3 126/5 146/7 153/1</p> <p>agree [6] 68/17 114/7 139/25 140/1 141/11 142/18</p> <p>agreed [5] 19/2 83/2 102/19 125/14 142/16</p> <p>agreeing [2] 83/18 83/19</p> <p>agreement [2] 27/12 67/2</p> <p>ahead [27] 8/12 18/2 28/16 31/18 34/4 35/19 42/21 43/8 44/8 44/13 44/18 45/19 50/12 57/19 67/5 74/9 78/7 83/9 106/10 109/11 110/20 115/3 116/13 122/14 124/5 138/18 141/17</p>	<p>ain't [5] 82/8 111/19 113/5 115/14 120/17</p> <p>air [1] 128/12</p> <p>alcohol [2] 90/10 90/11</p> <p>ALEX [6] 1/22 4/22 59/16 95/16 130/23 145/10</p> <p>alive [4] 132/22 134/23 143/5 143/22</p> <p>all [135] 4/6 5/4 5/10 5/15 5/23 6/5 6/9 7/4 7/8 7/10 7/20 9/12 10/6 11/24 16/22 16/23 19/4 20/14 21/9 22/6 26/7 26/14 26/24 27/13 27/19 27/21 27/25 29/1 31/7 31/20 31/23 32/18 32/21 33/12 33/21 35/4 36/1 36/4 36/15 36/19 38/4 38/6 38/7 38/8 38/9 40/23 41/12 42/1 42/2 42/21 43/19 44/8 44/21 45/15 47/8 49/12 54/2 54/6 57/3 57/7 57/17 61/12 61/17 62/14 64/2 65/22 67/6 67/15 68/4 72/19 72/21 73/13 73/21 74/9 74/21 75/4 77/22 77/25 79/1 83/6 83/9 83/24 99/23 100/4 105/25 106/5 107/8 107/11 108/18 108/25 108/25 111/6 111/24 112/5 115/24 116/7 116/20 117/8 117/9 120/3 122/2 122/21 123/25 125/2 128/10 129/9 129/23 130/9 131/19 133/20 135/5 135/24 137/6 138/3 139/10 139/13 139/14 139/23 140/15 141/3 141/17 141/19 142/10 143/14 144/3 144/4 144/21 145/21 145/25 148/4 150/4 150/21 150/25 152/8 152/21</p> <p>allegation [3] 63/5 143/3 143/8</p> <p>allegations [1] 133/25</p> <p>alleged [2] 130/12 147/17</p> <p>alleging [1] 89/13</p> <p>allow [3] 6/21 144/6 144/14</p> <p>allowed [4] 9/17 32/9 71/2 101/3</p> <p>allowing [1] 33/12</p> <p>allows [3] 31/1 35/2 144/24</p> <p>alluded [1] 103/14</p> <p>almost [3] 139/5 142/10 149/7</p>	<p>alone [1] 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(17) special... - that's

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(18) that's... - trustee

T	123/3 132/19 understanding [10] 15/17 33/13 60/1 60/9 61/2 88/12 108/2 108/6 131/5 140/17 understands [1] 141/12 understood [7] 17/25 55/19 123/10 123/19 138/2 141/2 141/4 undoubtedly [1] 138/10 undue [4] 133/3 133/8 146/21 147/5 unduly [1] 142/3 unfortunately [1] 140/10 unless [4] 39/9 98/15 131/9 153/2 unrestricted [4] 8/16 8/20 47/8 139/10 unsupported [1] 147/1 until [21] 5/16 5/21 42/8 43/17 45/16 64/14 76/17 77/1 83/12 83/13 83/19 85/1 85/7 100/19 102/24 106/5 137/7 143/16 148/25 149/16 149/18 up [57] 6/7 20/15 20/19 21/6 29/11 29/14 30/12 32/22 35/5 40/22 41/25 42/8 42/9 47/23 48/16 50/18 50/25 51/5 56/15 57/7 61/24 61/25 62/7 62/7 64/16 67/25 71/10 76/6 76/17 80/5 80/12 83/12 83/19 85/1 87/12 92/2 92/11 93/21 95/8 96/16 97/9 100/19 101/6 109/1 109/2 116/10 117/11 117/13 117/23 127/19 128/14 130/15 131/5 134/18 135/13 141/6 150/25 upon [5] 6/25 71/8 129/2 140/22 141/9 upset [11] 15/24 49/20 51/19 51/21 52/8 77/13 110/7 110/13 110/22 120/6 120/9 us [10] 5/6 10/12 26/7 31/1 35/2 46/21 47/7 64/12 100/20 151/7 use [6] 11/3 32/14 32/19 38/1 49/9 96/14 used [22] 16/14 21/15 24/21 24/25 39/17 39/19 40/3 42/5 56/8 66/6 68/8 72/4 77/25 81/16 90/22 96/17 96/17 96/17 117/21 131/24 131/25 136/18 using [10] 56/11	65/15 65/18 105/17 105/23 106/14 106/18 107/3 110/8 113/24 usually [4] 25/25 64/16 90/13 129/24	V vehicle [1] 11/4 verbal [1] 38/17 version [2] 9/4 14/10 versus [2] 4/8 19/19 very [6] 40/25 97/6 97/7 114/13 114/13 131/23 vested [1] 143/20 Vicki [22] 5/8 14/14 14/15 14/22 15/7 19/22 20/22 21/11 22/13 24/17 24/18 25/19 43/13 58/22 60/3 74/2 74/2 75/7 75/19 76/3 86/20 95/6 Vicki's [1] 49/20 Victoria [41] 1/4 1/5 1/11 4/8 4/12 4/22 6/23 7/2 9/13 9/14 11/13 13/6 14/23 15/12 20/2 21/7 21/24 22/3 27/6 28/1 29/4 29/12 84/21 110/6 119/6 130/23 131/2 132/21 132/23 133/9 134/17 136/22 138/12 138/15 140/16 143/5 143/22 144/13 145/20 149/15 151/22 Victoria's [9] 10/24 132/3 135/24 136/2 137/2 137/3 137/13 149/9 151/20 view [1] 91/25 viewed [1] 33/17 vindicate [1] 134/23 visit [1] 91/18 visiting [1] 91/16 VNO [1] 15/9 VO [1] 111/21 vOr [110] 8/20 14/11 14/13 14/15 14/20 14/25 18/11 19/10 20/12 20/20 20/24 24/1 24/18 24/19 24/21 24/24 27/9 27/12 38/1 38/11 38/11 38/19 38/22 38/23 39/12 39/23 40/16 40/23 42/5 43/12 43/21 43/25 44/14 45/20 47/23 49/22 54/15 56/1 56/10 56/11 56/18 56/19 56/20 56/22 56/24 57/3 57/8 57/11 60/2 60/22 61/3 63/3 66/3 67/18 70/19 70/24 71/3 71/11 71/13 71/21 71/24 72/7 72/9 73/1 73/4 73/5	73/8 73/10 73/12 73/21 74/17 74/19 74/24 75/9 75/25 76/10 76/20 77/23 78/17 79/7 80/7 80/9 80/13 80/19 80/24 81/7 94/1 94/17 94/19 95/3 95/5 98/5 98/9 107/16 107/19 107/20 108/2 108/6 111/7 111/10 111/13 111/17 111/20 112/7 113/24 114/5 114/21 118/20 121/24 123/19 vOr's [18] 23/11 38/4 39/17 39/19 40/1 40/3 40/11 42/18 48/18 56/4 66/9 68/8 70/14 72/5 72/22 74/18 77/25 114/6 vs [1] 1/9	W wage [1] 23/21 wait [5] 22/24 45/16 64/14 106/5 150/18 waited [3] 131/13 135/20 145/7 waiting [1] 134/24 waived [1] 153/3 want [55] 9/4 10/22 16/4 32/24 34/3 37/5 41/10 42/11 46/20 46/23 46/24 48/8 48/17 57/3 61/25 62/11 64/11 67/7 67/14 67/15 67/16 68/3 68/13 68/17 70/13 70/22 71/6 76/9 76/23 78/12 78/15 79/22 80/12 81/10 93/20 93/21 100/16 102/21 105/3 108/19 109/2 114/1 115/16 117/12 138/25 139/2 139/7 139/12 141/14 148/22 149/19 149/19 151/1 151/12 152/22 wanted [27] 16/3 27/20 38/21 38/23 39/24 41/2 41/15 51/24 52/9 52/9 58/10 66/8 74/1 81/13 83/15 83/21 98/20 99/9 99/18 102/14 113/17 114/3 136/23 141/8 148/4 148/7 152/7 wants [8] 6/18 9/11 11/1 11/12 60/11 135/13 138/21 139/17 was [352] wasn't [22] 17/9 17/10 33/11 41/11 48/2 48/10 48/21 55/1 56/7 62/13 63/7 63/25 69/13 75/22 86/12 92/15 92/17 96/22 101/12 137/2	137/18 146/8 wasting [1] 139/5 Watertown [5] 1/17 2/6 4/7 47/24 154/13 way [14] 16/3 29/12 52/16 56/2 78/1 97/24 109/9 110/25 114/11 118/23 138/1 139/20 151/14 151/19 we [118] 5/24 6/1 6/3 6/19 10/1 10/2 11/3 11/9 12/1 12/8 15/10 16/14 17/8 19/17 24/8 26/6 28/18 29/3 29/13 29/14 31/20 31/23 32/20 33/7 34/16 37/13 40/13 40/13 40/22 40/22 41/12 42/4 44/18 45/5 49/13 53/2 53/16 54/19 54/23 55/11 55/21 56/2 56/8 57/6 60/15 61/14 64/13 66/18 67/19 68/22 70/16 71/23 75/12 76/2 76/6 76/6 76/14 77/11 77/21 78/13 79/11 79/22 80/1 80/11 83/22 92/5 97/11 103/7 111/14 113/22 123/14 123/21 126/22 127/8 128/16 128/21 128/22 129/6 129/9 129/12 129/21 129/23 130/6 130/13 131/9 131/20 132/21 135/15 135/24 136/1 136/5 136/25 137/6 137/6 137/11 137/16 137/25 138/3 139/5 142/20 143/15 144/6 145/1 145/17 146/9 147/23 147/25 148/16 148/18 148/19 148/22 148/23 149/19 149/19 149/23 150/2 151/9 151/11 we'd [5] 82/21 84/3 108/24 148/24 151/10 we'll [3] 9/18 10/4 81/15 we're [4] 10/10 55/21 144/19 146/6 we've [1] 130/4 wearing [2] 138/13 138/16 week [3] 27/2 133/21 148/5 weight [1] 117/8 welcome [1] 108/20 well [168] Wells [1] 96/6 went [22] 20/20 20/24 27/18 27/19 48/11 48/25 51/17 54/12 54/24 55/11 56/16 80/3 81/21 84/3 86/9 100/6
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(19) trustee... - went

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(20) went... - years

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 64/13 83/14 89/3 90/17
 103/18 117/14 117/19
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your [343]
yourself [2] 71/12
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zero [1] 145/16

STATE OF SOUTH DAKOTA
COUNTY OF GRANT

IN CIRCUIT COURT
THIRD JUDICIAL CIRCUIT

FIRST INTERSTATE BANK, a Montana
banking corporation, successor by merger to
GREAT WESTERN BANK, a South Dakota
banking corporation,

CIV 25CIV22-000041

Plaintiff,

vs.

vOr, INC., a South Dakota corporation; and
SKYLINE CATTLE COMPANY CO. aka
Skyline Cattle Company, a South Dakota
corporation

COMPLAINT FOR FORECLOSURE
AND JUDGMENT ON NOTES

Defendants.

**NOTICE: PLAINTIFF INTENDS TO SEEK A DEFICIENCY JUDGMENT AGAINST
THE OBLIGORS OF A PROMISSORY NOTES. THIS COMPLAINT INCLUDES A
REQUEST FOR THE COURT TO DETERMINE THE FAIR AND REASONABLE
VALUE OF THE MORTGAGED PREMISES.**

COMES NOW First Interstate Bank ("Bank" or "Plaintiff"), for its Complaint for
Foreclosure and Judgment on Notes, and states and alleges as follows:

PARTIES

1. The Plaintiff, First Interstate Bank ("Bank" or "Plaintiff"), is a Montana banking
corporation and is successor by merger to Great Western Bank, a South Dakota banking
corporation, with offices in several locations throughout South Dakota.

2. Defendant, vOr, Inc. ("vOr") is a South Dakota corporation. Said Defendant's
rights, if any, to the Mortgaged Property which is the subject of this action, are junior and
inferior to that of the Plaintiff.

3. Defendant, Skyline Cattle Co. aka Skyline Cattle Company ("Skyline") is a South
Dakota corporation. Said Defendant's rights, if any, to the Mortgaged Property which is the
subject of this action, are junior inferior to that of the Plaintiff.



4. Jurisdiction and venue are proper because the transactions giving rise to this Complaint occurred in the state of South Dakota and the Property that is the subject of this Complaint is within Grant County, South Dakota.

GENERAL ALLEGATIONS

5. On or about January 14, 2003, Defendant, vOr, took fee simple title by virtue of a Quit Claim Deed which was filed at the Grant County Register of Deed's Office on January 15, 2002, as Document No. 203184, in Book 109 at Page 103 to the Property legally described as:

Parcel 1: The SE1/4, except Lot 1, Kane Subdivision, and except the West 100 feet of the East 133 feet of the South 100 feet of the SE1/4, and except Lot H-3, of Section 1, Township 121 North, Range 50 West of the 5th P.M., Grant County, South Dakota

Parcel 2: The NW1/4 of Section 16, Township 121 North, Range 50 West of the 5th P.M., Grant County, South Dakota

Parcel 3: The S1/2SE1/4 and the S1/2SW1/4 of Section 22, and the S1/2NW1/4, and the S1/2NE1/4, and the N1/2NE1/4, and the SE1/4, except Lot 1, Hopewell Subdivision in the SE1/4, and the N1/2SW1/4 of Section 23, all in Township 121 North, Range 50 West of the 5th P.M., Grant County, South Dakota

Parcel 4: Lot 2A of the Plat of Lots 2A and 2B, O'Farrell Subdivision, a Replat of Lot 2 of the Plat of Lots 1 and 2, O'Farrell Subdivision, located in S1/2SE1/4 of Section 14, Township 121 North, Range 50 West of the 5th P.M., Grant County, South Dakota

Parcel 5: The S1/2SW1/4 of Section 23, Township 121 North, Range 50 West of the 5th P.M., Grant County, South Dakota.

(the "Mortgaged Property"). A copy of the Quit Claim Deed together with the Register of Deed's Certificate is attached hereto as Exhibit "1" and by this reference is incorporated herein.

6. Defendants are engaged in a farming operation upon the Mortgaged Property.

7. Plaintiff has provided financing to the Defendants evidenced by certain Promissory Notes as follows:

A. A Promissory Note dated February 2, 2011 executed by vOr in favor of Plaintiff in the original principal sum of Three Hundred Fifty Thousand, One Hundred Eighty-Two and 00/100 Dollars (\$350,182.00), as amended by those

certain Change in Terms Agreements dated November 4, 2016, December 14, 2016 and November 30, 2021 (collectively, "Note 1"). A copy of the redacted Note 1 is attached hereto as Exhibit "2" and by this reference is incorporated herein.

- B. A Promissory Note dated February 29, 2016 executed by Skyline in favor of Plaintiff in the original principal sum of Six Hundred Thousand and 00/100 Dollars (\$600,000.00), as amended by those certain Change in Terms Agreements dated December 13, 2016, January 10, 2018, and December 15, 2021 (collectively, "Note 2"). A copy of the redacted Note 2 is attached hereto as Exhibit "3" and by this reference is incorporated herein.
- C. A Promissory Note dated July 9, 2018 executed by Skyline in favor of Plaintiff in the original principal sum of Five Hundred Thousand Two Hundred Fifty and 00/100 Dollars (\$500,250.00), as amended by those certain Change in Terms Agreements dated July 10, 2018, February 5, 2019, January 27, 2020, February 13, 2020, March 31, 2021 and December 15, 2021 (collectively, "Note 3"). A copy of the redacted Note 3 is attached hereto as Exhibit "4" and by this reference is incorporated herein.
- D. A Promissory Note dated December 28, 2018 executed by Skyline in favor of Plaintiff in the original principal sum of Three Hundred Thousand, Two Hundred Fifty and 00/100 Dollars (\$300,250.00) ("Note 4"). A copy of the redacted Note 4 is attached hereto as Exhibit "5" and by this reference is incorporated herein.
- E. A Promissory Note dated January 31, 2019 executed by vOr in favor of Plaintiff in the original principal sum of Three Hundred Thousand, Two Hundred Fifty and 00/100 Dollars (\$300,250.00) ("Note 5") A copy of the redacted Note 5 is attached hereto as Exhibit "6" and by this reference is incorporated herein.
- F. A Promissory Note dated May 6, 2021 executed by Skyline in favor of Plaintiff in the original principal sum of Two Hundred Fifty Thousand, One Hundred Forty-Nine and 99/100 Dollars (\$250,149.99) ("Note 6," and

together with Notes 1-5, the "Notes"). A copy of the redacted Note 6 is attached hereto as Exhibit "7" and by this reference is incorporated herein.

8. To secure payment of the Notes, vOr executed and delivered to Plaintiff that certain Mortgage dated February 2, 2011 which Mortgage was recorded February 4, 2011, as Document No. 221384 in Book 382 at Page 332 of the Grant County Register of Deed's Office, upon the Mortgaged Property, which Mortgage was modified by that certain Addendum to Collateral Real Estate Mortgage dated January 15, 2016 and recorded January 22, 2016 as Document No. 230549 in Book 422 at Page 351 in the Grant County Register of Deed's Office, and further modified by that certain Addendum to Collateral Real Estate Mortgage dated December 1, 2020, and recorded December 2, 2020 as Document No. 240244 in Book 466 at Page 454 in the Grant County Register of Deed's Office, as further modified by that certain Modification of Mortgage dated January 27, 2020 and recorded January 31, 2020 as Document No. 238518 at Book 454 at Page 941 in the Grant County Register of Deed's Office, as further modified by that certain Modification of Mortgage dated March 31, 2021 which was recorded April 15, 2021 at Document 241042 in Book 470 at Page 433 in the Grant County Register of Deed's Office on the parcels (the Mortgage and all Addendums and Modifications, collectively, "Mortgage 1"). Mortgage 1 is a first lien upon the parcels. A true and correct copy of the redacted Mortgage 1, together with the Register of Deed's Certificate thereon is attached hereto as Exhibit "8" and by this reference is incorporated herein.

9. To secure payment of the Notes, vOr executed and delivered to Plaintiff one certain Mortgage-Collateral Real Estate Mortgage dated August 3, 2015 which Mortgage was recorded August 3, 2015, as Document No. 229676 in Book 418 at Page 615 of the Grant County Register of Deed's Office, upon the Mortgaged Property, which Mortgage was modified by that certain Modification of Mortgage dated January 31, 2019 and recorded February 4, 2019 as Document No. 236760 at Book 446 at Page 672 in the Grant County Register of Deed's Office, as further modified by that certain Modification of Mortgage dated March 31, 2021 and recorded April 15, 2021 as Document No. 241043 at Book 470 at Page 448 in the Grant County Register of Deed's Office, and as further modified by that certain Addendum to Collateral Real Estate Mortgage dated June 30, 2020 and recorded July 1, 2020 as Document No. 1013958 in Book 460 at Page 752 in the Grant County Register of Deed's Office (the Mortgage and all Addendums and Modifications, collectively, "Mortgage 2", and collectively with Mortgage 1, the Mortgage).

Mortgage 2 is a second lien upon the parcels. A true and correct copy of the redacted Mortgage 2, together with the Register of Deed's Certificate thereon is attached hereto as Exhibit "9" and by this reference is incorporated herein.

10. The Notes and Mortgages provide that in case of default the holder may declare the entire principal and the interest accrued thereon due and payable and the Mortgages may be foreclosed.

11. There has been a failure to pay the Notes and interest thereon as provided by the terms of the Notes and Mortgages.

12. On or about May 2, 2022, Plaintiff sent demands for payment to the Defendants on the Notes. Copies of the redacted demand letters are attached hereto as Exhibits "10" through "15" and by this reference is incorporated herein.

13. The Defendant have failed or refused to pay the sums demanded in said demand letters.

14. On June 3, 2022, the South Dakota Department of Agriculture and Natural Resources issued an Agricultural Mediation Release with respect to the Defendants pursuant to SDCL §§ 54-13 and 54-13-1 in connection with above-described Notes, Mortgages, and demand letters. A true and correct copy of said Agricultural Mediation Release is attached hereto as Exhibit "16" and by this reference is incorporated herein.

15. In order to commence this foreclosure proceeding, the Plaintiff has incurred costs and attorneys' fees and costs, which includes the sum of Three Hundred Sixty Two and 10/100 Dollars (\$362.10) expended for a title report. Plaintiff is entitled to a judgment for costs and accruing costs, and also reasonable attorneys' fees and costs.

COUNT 1 – FORECLOSURE

16. Plaintiff incorporates by reference herein the allegations contained in the foregoing paragraphs.

17. The Plaintiff reserves the right to pursue deficiency against the Defendants and recognizes their right of redemption, which length of redemption shall be later determined by the court under applicable law.

18. The Plaintiff is the holder of the Notes and Mortgages, and due demand has been made for payment and payment has been refused.

19. No proceedings at law or otherwise for the recovery of the debt evidenced by the Note and the Mortgage have been had.

20. By reason of the failure to pay the Notes and interest, the Plaintiff has elected and does hereby elect in accordance with the terms and conditions of the Notes to declare the whole of the Notes due and payable forthwith and to exercise its right to enforce payment of the entire Notes as provided by the Notes and to foreclose the Mortgages given to secure the same.

21. The total unpaid balance of the Notes as of April 12, 2022 after allowing all credits due to the Defendants, is \$2,116,920.08, with aggregate accruing interest thereafter of \$259.63271 per diem, as follows:

- A. Note 1: The sum of One Hundred Ten Thousand, Two Hundred Ninety-Two and 49/100 Dollars (\$110,292.49) which sum includes interest calculated at the current contractual rate through April 12, 2022. Interest continues to accrue on the unpaid principal balance at the rate of \$13.50795 per diem;
- B. Note 2: The sum of Four Hundred Forty-Three Thousand, Four Hundred Thirty-Six and 12/100 Dollars (\$443,436.12) which sum includes interest calculated at the current contractual rate through April 12, 2022. Interest continues to accrue on the unpaid principal balance at the rate of \$69.46196 per diem;
- C. Note 3: The sum of Two Hundred Twenty-Seven Thousand, Five Hundred Eighty-Four and 66/100 Dollars (\$227,584.66) which sum includes interest calculated at the current contractual rate through April 12, 2022. Interest continues to accrue on the unpaid principal balance at the rate of \$29.85501 per diem;
- D. Note 4: The sum of Two Hundred Ninety-Three Thousand, One Hundred Fifty-Two and 11/100 Dollars (\$293,152.11) which sum includes interest calculated at the current contractual rate through April 12, 2022. Interest continues to accrue on the unpaid principal balance at the rate of \$44.76377 per diem;
- E. Note 5: The sum of Two Hundred Eighty Four Thousand Two Hundred Forty Seven and 30/100 Dollars (\$284,247.30) which sum includes interest calculated at the current contractual rate through April 12, 2022. Interest

continues to accrue on the unpaid principal balance at the rate of \$51.07344 per diem;

F. Note 6: The sum of Two Hundred Fifty-Nine Thousand, Two Hundred Seventy-Two and 47/100 Dollars (\$259,272.47) which sum includes interest calculated at the current contractual rate through April 12, 2022. Interest continues to accrue on the unpaid principal balance at the rate of \$26.75215 per diem.

22. A Receiver may be necessary and is allowed if requested by the Plaintiff pursuant to the terms of the Mortgages.

23. The Plaintiff is entitled to recover attorneys' fees and costs as provided in the Notes and Mortgages.

COUNT 2 – JUDGMENT ON THE NOTE

24. Plaintiff incorporates by reference herein the allegations contained in the foregoing paragraphs.

25. Plaintiff is entitled to an *in personam* deficiency judgment against the Defendant, vOr, for such deficiency as may remain owing on the Note 1 and Note 5 indebtedness after application of the foreclosure sale proceeds.

26. Plaintiff is entitled to an *in personam* deficiency against the Defendant, Skyline, for such deficiency as may remain owing on the Note 2, 3, 4 and 6 indebtedness after application of the foreclosure sale proceeds.

WHEREFORE, the Plaintiff, First Interstate Bank, prays for the following:

A. A judgment for the sums prayed for in this Complaint will be entered *in rem* against the Mortgaged Property legally described as:

Parcel 1: The SE1/4, except Lot 1, Kane Subdivision, and except the West 100 feet of the East 133 feet of the South 100 feet of the SE1/4, and except Lot H-3, of Section 1, Township 121 North, Range 50 West of the 5th P.M., Grant County, South Dakota

Parcel 2: The NW1/4 of Section 16, Township 121 North, Range 50 West of the 5th P.M., Grant County, South Dakota

Parcel 3: The S1/2SE1/4 and the S1/2SW1/4 of Section 22, and the S1/2NW1/4, and the S1/2NE1/4, and the N1/2NE1/4, and the SE1/4, except Lot 1, Hopewell Subdivision in the SE1/4, and the N1/2SW1/4 of

Section 23, all in Township 121 North, Range 50 West of the 5th P.M., Grant County, South Dakota

Parcel 4: Lot 2A of the Plat of Lots 2A and 2B, O'Farrell Subdivision, a Replat of Lot 2 of the Plat of Lots 1 and 2, O'Farrell Subdivision, located in S1/2SE1/4 of Section 14, Township 121 North, Range 50 West of the 5th P.M., Grant County, South Dakota

Parcel 5: The S1/2SW1/4 of Section 23, Township 121 North, Range 50 West of the 5th P.M., Grant County, South Dakota.

- B. That said judgment be declared a lien upon the Mortgaged Property from the date of the Plaintiff's Mortgage 1 and Mortgage 2, prior and superior to any right, title, lien or interest of the Defendants or any of them therein;
- C. That the Plaintiff's Mortgages be foreclosed;
- D. That any right, title, lien or interest of the Defendants in said Mortgaged Property be declared junior and inferior to the lien of Plaintiff's Mortgages;
- E. For the Court to determine the fair and reasonable value of the Mortgaged Property;
- F. That an Order be issued by the Court for the sale of the Mortgaged Property or so much thereof as may be necessary to satisfy the judgment including interest, costs, and accruing costs up to and including the sale,
- G. That such sale be subject to easements, reservations, declarations of restrictions and covenants to run with the land; that from and after said sale under Court Order, the right, title, lien or interest of the Defendants in and to the Mortgaged Property be forever cut off, barred and foreclosed, and the purchaser at said sale take free and clear of any right, title, lien or interest of the Defendants;
- H. That if the Court determines the fair and reasonable value of the Mortgaged Property to be less than the *in rem* judgment entered in favor of Plaintiff thereupon, that Plaintiff be authorized bid not less than the fair and reasonable value of the Property as thus determined at the sale of the Property;
- I. That if, pursuant to the Court's authorization, the Plaintiff bids less than the sum of the judgments for the Property, such sale proceeds be applied to Plaintiff's *in rem* judgment;

J. If a deficiency remains after application of the sale proceeds, that a judgment for the deficiency amount be entered *in personam* against the Defendants, and that Plaintiff be entitled to a general execution for such deficiency upon application to the Court; and

K. That a receiver be appointed upon request of the Plaintiff.

The Plaintiff further prays for a Writ of Possession to be issued under the seal of this Court, directed to the Sheriff of Grant County, South Dakota, commanding him or her to put the purchaser at said sale under Court Order or a successor in interest in the possession of the Mortgaged Property.

The Plaintiff further prays for such other and further relief as the Court may deem just and equitable under the circumstances.

Dated this 22nd day of July, 2022.

FIRST INTERSTATE BANK, a Montana banking corporation, successor by merger to GREAT WESTERN BANK, a South Dakota banking corporation, Plaintiff.

By: 

Craig A. Knickrehm, Attorney at Law (#4908)

Andrew R. Biehl, Attorney at Law (#4948)

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ATTORNEYS FOR PLAINTIFF

FAIR DEBT COLLECTION PRACTICES ACT NOTICE

This communication is an attempt to collect a debt and any information obtained will be used for that purpose. Unless, within thirty (30) days after your receipt of this Notice, you dispute the validity of the debt, or any portion thereof, the debt will be assumed to be valid by us. If you notify us in writing within such thirty (30) day period that the debt, or any portion thereof, is disputed, we will obtain verification of the debt and mail a copy of such verification to you. Upon your written request within the thirty (30) day period, we will provide you with the name and address of the original creditor, if different from the current creditor.

Notwithstanding the foregoing, this letter may contain a demand for payment within a period of time shorter than thirty (30) days, and the Creditor is entitled to proceed with its collection efforts if you fail to comply with its demand. Creditor is required to cease collection efforts only during the time period after you dispute the validity of the debt and before Creditor provides verification to you.

NOTICE: If the liability for this loan has been discharged in a personal Chapter 7 or Chapter 13 bankruptcy case, please be advised that we will not make a personal claim against that party for the amounts due and owing on the loan. We will, however, seek any recovery solely from the property that was pledged as security for the debt.

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STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF GRANT

THIRD JUDICIAL CIRCUIT

Paul O'Farrell, individually;
and as a beneficiary of the
family trust; and for the
benefit of the Estate of Victoria
O'Farrell; Skyline Cattle Company,
a South Dakota corporation, &
VOR, Inc., a South Dakota
Corporation,

25 CIV 23-15

Plaintiffs,

Motions to Dismiss

V.

Kelly O'Farrell, an individual;
Grand Valley Hutterian Brethren, Inc.,
a South Dakota corporation; & the
Raymond and Victoria O'Farrell Living
Trust, a South Dakota trust, by and
through its trustee; and any
Other necessary parties.

Defendants.

DATE & TIME

July 11, 2023
1:00 p.m.

BEFORE:

THE HONORABLE ROBERT L. SPEARS
CIRCUIT COURT JUDGE
Watertown, South Dakota

LOCATION:

Grant County Courthouse
Milbank, South Dakota

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APPEARANCES:

For Plaintiffs - Daniel Brendtro
Attorney at Law
PO Box 2583
Sioux Falls, SD 57101

For Defendant - Raymond O'Farrell,
The O'Farrell Trust,
and the Estate of Victoria O'Farrell
Joe Erickson
Attorney at Law
1200 Mickelson Dr. Ste 310
Watertown, SD 57201

For Defendant - Kelly O'Farrell
Jack Hieb
Attorney at Law
PO Box 1030
Aberdeen, SD 57402

For Defendant - Grand Valley Hutterian
Brethren
William Beck
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300 S. Phillips Ave #300
Sioux Falls, SD 57117

Reed Rasmussen
Kiera Leddy
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PO Box 490
Aberdeen, SD 57402

For Defendant - Raymond O'Farrell
George Boos
Attorney at Law
PO Box 1013
Milbank, SD 57252

1 THE COURT: The record should reflect my name is Circuit
2 Court Judge Robert L. Spears. I'm presiding over this Grant
3 County case this afternoon as I have been in the past in previous
4 hearings.

5 This is Paul O'Farrell, Skyline Cattle, VOR, Inc., vs.
6 Kelly O'Farrell, Grand Valley Hutterian Brethren, Incorporated,
7 Raymond O'Farrell as special administrator for the Estate of
8 Victoria O'Farrell.

9 Would counsel note their formal appearance on this record,
10 please.

11 MR. ERICKSON: Joe Erickson on behalf of Raymond and
12 Victoria O'Farrell Living Trust and the Estate of Victoria
13 O'Farrell and on behalf of Raymond O'Farrell.

14 MR. BECK: Your Honor, Bill Beck, here on behalf of the
15 Colony. Reed Rasmussen and Kiera Leddy also appear on behalf of
16 the Colony.

17 MR. BRENDTRO: Judge, Dan Brendtro on behalf of the
18 plaintiffs.

19 THE COURT: All right. As I understand it, the Hutterian
20 Brotherhood has made a motion to dismiss where other parties have
21 joined in that motion. Who would like to go first? I believe
22 the Hutterian Brotherhood filed first, is that correct?

23 MR. BECK: I think everybody filed several months ago. I
24 think Mr. Erickson was planning to go first.

25 THE COURT: All right. Go ahead, Mr. Erickson.

1 MR. ERICKSON: Your Honor, as a guide, I'm using my reply
2 brief from -- that was filed at the end of last week. Our
3 motions to dismiss were included in our answer to the complaint,
4 and there's really five different parts to our motion to dismiss,
5 five different motions.

6 The first motion, and you can tell by the caption of the
7 complaint, one of the plaintiffs listed is actually VOR,
8 Incorporated, which is the corporation in which my client,
9 Raymond O'Farrell, serves as the president.

10 Paul O'Farrell within his complaint is purportedly acting
11 on behalf of VOR, Inc. He has no authority to do so, and the
12 more surprising part of the complaint by Paul O'Farrell on behalf
13 of, what he says, VOR Inc. is that he then makes a damage claim
14 against the same corporation he says that he's acting on behalf
15 of.

16 It's hard to understand how you can represent somebody and
17 also sue them for damages and it's because you can't do that.

18 So our first motion is that VOR, Inc. be dismissed as a
19 plaintiff because the party alleging to act on behalf of VOR,
20 Inc. is not allowed to do so.

21 We've provided the documents and response to the complaint
22 that show that the president of the corporation is Raymond
23 O'Farrell, so there's no standing for Paul O'Farrell to make any
24 action on behalf of the corporation.

25 The second piece of our motion to dismiss is on behalf of

1 the Estate of Victoria O'Farrell. Again, this is an estate where
2 there's been a special administrator appointed by this Court, and
3 that special administrator is Raymond O'Farrell, and he is the
4 only person authorized by statute and by South Dakota law to
5 bring any action on behalf of that estate. Paul O'Farrell is not
6 allowed to bring an action on behalf of the estate.

7 I cited in my reply brief a recent South Dakota Supreme
8 Court opinion, the *Matter of the Estate of Jones*, where the
9 supreme court was discussing a case where parties were trying to
10 be appointed as a special administrator to bring a wrongful death
11 action.

12 Of course, nothing in that opinion stated that anybody
13 who's an interested party can bring claims on behalf of an
14 estate. You have to be appointed in that role.

15 Paul O'Farrell has not been appointed in that role and
16 cannot bring any action on behalf of the Estate of Victoria
17 O'Farrell.

18 THE COURT: I'm familiar with the *Jones* case out of
19 Codington County. I've been -- part of that case is mine and
20 pending in front of me at the present time. Go on.

21 MR. ERICKSON: So then our third motion to dismiss is one
22 of the counts within the complaint by Paul O'Farrell and Skyline
23 Cattle is a claim of rescission. And he is asking that a contract
24 be rescinded that was made between VOR and the Colony.

25 Paul does not have any standing to bring a rescission claim.

1 He's not a party to the contract in any fashion.

2 THE COURT: That rescission claim pertains to the sale of
3 real estate, right?

4 MR. ERICKSON: Correct. Specifically, a 3.2 million
5 dollar sale of ag land between VOR, Inc and the Colony. And Paul
6 O'Farrell and Skyline Cattle are asking for this Court to act on
7 behalf of Paul O'Farrell where he does not have any relationship
8 to that contract.

9 And it goes back to that Paul O'Farrell cannot act on
10 behalf of VOR, Inc. and he most definitely cannot act on behalf
11 of the Colony.

12 Our fourth motion to dismiss, it appears to be agreed to by
13 Paul O'Farrell, in that all tort damages are dismissed as to the
14 trust. He agreed in his response brief that he's not seeking
15 tort damages against the trust.

16 The next point in conjunction with that is that the trust
17 should be entirely dismissed from this complaint because there
18 are no damages sought against it.

19 And the declaratory judgment action brought in Count 1,
20 which is our fifth part of our motion to dismiss, should be
21 dismissed as well.

22 And this fifth part of our motion to dismiss stems from the
23 fact that we have statutory frameworks in South Dakota for trust
24 proceedings and probate proceedings, and within those proceedings
25 is where you can bring different petitions to allege undue

1 influence or whatever the allegations may be, and you can't just
2 file a declaratory judgment to have the court come in and do the
3 work that should be happening within a trust and probate
4 proceeding.

5 And the reason for that is pretty simple. Those statutory
6 frameworks include notice requirements for interested parties
7 beyond those that would be served in a declaratory judgment.

8 So as to Count 1, all the declaratory judgments in
9 reference to any trust act or probate act should be dismissed
10 from this civil action.

11 The remaining counts in Count 1 should be dismissed because
12 we provided the documents that show that VOR, Inc. has a
13 president and it's Raymond O'Farrell and these documents are a
14 bar to the claims that Paul makes in the declaratory judgment in
15 Count 1.

16 Finally, on our motion to dismiss, we also ask for an award
17 of attorney's fees and it's primarily because Paul O'Farrell
18 knows he's not the president of VOR, Inc., and then files a
19 complaint on behalf of VOR, Inc., and within the same complaint
20 then asks for damages from VOR, Inc.

21 On the face of the Complaint, that's a frivolous filing.
22 You can't say you're representing a party when you're not and
23 then also ask for damages against that same party you say you're
24 representing.

25 Finally, as to the estate, the same principle applies, it

1 was frivolous on its face. You have to be a special
2 administrator or you have to be the personal representative of an
3 estate to bring a claim on behalf of an estate.

4 There's no law that supports that anybody who's interested
5 in an estate can then bring a claim on behalf of that estate. If
6 that were true, we'd be left with civil actions at an endless
7 amount by interested parties on behalf of the estate. And
8 there's a reason we have the statutes that guide what personal
9 representatives can do and special administrators.

10 So that's our five motions and if the Colony has more to
11 add on our -- or on their side, it would probably make sense that
12 they argue next.

13 THE COURT: All right. Thank you, Mr. Erickson. Who
14 would like to go next? Mr. Beck?

15 MR. BECK: Yes, sir. Your Honor, and I'll be brief, I
16 think -- or I should say, I'll try to be succinct. We briefed
17 this up both in the opening brief and a reply brief and we think
18 we --

19 THE COURT: I've read the briefs.

20 MR. BECK: Okay. And I think we've covered all the
21 bases, Your Honor, and I think we can really concentrate on just
22 a few things and they mostly come out of the rescission statute,
23 which is paragraph 32 of our opening brief. The right to rescind
24 is limited to those against -- if you're going to rescind against
25 someone, it's somebody who's exercised undue influence or

1 connives with them to do so.

2 There's no allegation that the Colony exercised undue
3 influence or connived with anybody to do so, so the case should
4 fall apart right there.

5 The second thing the statutes require is an offer to
6 rescind. A legitimate offer to rescind. And what's in front of
7 the Court are two things, a complaint would just recite that
8 statutory portion, and then secondly, a notice, which again, just
9 recite the statutory portion.

10 It does not indicate that Paul O'Farrell, who -- on Mr.
11 Paul O'Farrell's behalf that was sent, doesn't indicate that he
12 had any right to rescind on behalf of any party to the land deal.
13 Doesn't indicate that he's trying to give back the \$3.2 million
14 dollars. Doesn't indicate that the right to rescind was sent to
15 the bank, which of course, was a part of the land deal and the
16 closing. Doesn't try to rescind as to the siblings who, if Mr.
17 Paul O'Farrell has rights to any of this, so do the siblings, I
18 suppose, and for that reason, independent reason, because there's
19 been no attempt to rescind, no legitimate attempt to rescind even
20 pled, the case should be dismissed.

21 Your Honor, otherwise, I would stand on my brief and I
22 might address more things in reply, in particular, I think, after
23 the Court rules, if you rule today or later, we would like to be
24 heard on the Rule 54(b) certification, but I think that makes
25 sense to wait on that until after the Court has had a chance to

1 consider the motions.

2 THE COURT: All right. Thank you, Mr. Beck, anything
3 else?

4 MR. BECK: Not right now.

5 THE COURT: On your behalf? Anything from Mr. Rasmussen?

6 MR. RASMUSSEN: No, Your Honor.

7 THE COURT: Anything from Mr. Hieb?

8 MR. HIEB: No, Your Honor. My client is Kelly O'Farrell,
9 for the record, and there are no motions pending that he's a
10 party to.

11 THE COURT: All right. That's what I thought, but I
12 thought I'd ask the questions on the record anyway.

13 MR. HIEB: Thank you.

14 THE COURT: All right. Mr. Brendtro. I always
15 mispronounce your last name. I apologize for that. And as I
16 understand, based on my review of the file, you oppose the motion
17 to dismiss.

18 MR. BRENDTRO: Correct.

19 THE COURT: All right. Go ahead.

20 MR. BRENDTRO: Thank you, Judge. The curious part I
21 think about most of these motions is how fact intensive they are.
22 And it is skipping ahead a couple of steps in what we're supposed
23 to be looking at.

24 Rule 12 motion to dismiss looks at the allegations in the
25 complaint. Do they form the basis of a plausible cause of

1 action? And then that's the end of it. If they do, then the
2 remedies that these moving parties are seeking are elsewhere
3 because they would involve questions about viability of facts or
4 other legal theories.

5 Taking them in the same order that they were argued,
6 several motions that Mr. Erickson discussed. His argument about
7 VOR first is that it has -- Paul has no authority to bring that.

8 That's the crux of what Count 1 is getting at, which is,
9 that there were illegitimate transfers of purported power within
10 the company from one person to the another and that those actions
11 were invalid.

12 Paragraph 73, specifically, identifies that the election of
13 subsequent officers was not carried out in the proper fashion.

14 We cited case law in our briefing that identifies that the
15 last duly elected officer remains the officer, if indeed the
16 officer is correct that those elections were void.

17 And so Paul, as the most recent duly elected officer, as he
18 alleges, would have standing to bring this set of claims as well
19 as standing to have the Court resolve this and ask the Court to
20 resolve that dispute.

21 Skipping ahead to the very end, they're arguing this is
22 somehow frivolous. Paul, as a duly elected officer of a
23 corporation, if he thinks that something has gone wrong with that
24 process, would have a fiduciary duty to stand up and say
25 something about it and would be given the business judgment rule

1 to guide what he did in order to protect what he thought the
2 company's interests were, and so it's not frivolous, it is a
3 factual and legal allegation that is not -- it's not dismissible
4 under Rule 12.

5 Someone coming in here and showing you a document filed
6 with the secretary of state doesn't prove that that person has
7 authority. It proves that somebody filed something with the
8 secretary of state. It's really just hearsay.

9 If Paul were to go in and try to correct that, file his own
10 version of who he thought the president should be in the annual
11 report, whoever else thought that they had the authority would
12 then file a new document and Paul would file a new document and
13 they would compete like that forever. The fact that the document
14 exists is not proof of anything, other than the fact that
15 somebody filed it.

16 The other argument that they make is that the complaint is
17 both factually frivolous and factually problematic because in the
18 alternative, Paul identifies the idea that he would be entitled
19 to equitable damages from VOR in the event that his other claims
20 are not viable.

21 Paragraph 107, Judge, is where that's at. It literally
22 says, if rescission is not available, then in that case, Paul
23 O'Farrell is entitled to an award of damages for unjust
24 enrichment and otherwise.

25 In their brief, Mr. Erickson and his client asserted that

1 there's no such law that allows somebody to plead in the
2 alternative. And that law is Rule 8(a) of the Rules of Civil
3 Procedure. Relief in the alternative or of several different
4 types may be demanded.

5 There's extensive case law on the idea that, at this stage
6 of the proceedings, bringing a motion to dismiss, you don't
7 dismiss complaints because they are arguing things in the
8 alternative, that's not the stage at which we do that.

9 If something is amiss with our complaint, Judge, and this
10 applies to not just this particular motion, but all of these
11 motions to dismiss, Paul and the rest of the plaintiffs ask for
12 the opportunity to amend their pleadings in order to conform with
13 whatever it is that's permissible as far as a recovery.

14 Again, the factual basis that underlies all of this is
15 something that Victoria O'Farrell saw last summer. She pursued
16 relief in her own right to try to stop this. After her death,
17 Paul then attempted to do the same thing.

18 The facts aren't changing, the things that Victoria saw
19 last summer and the concerns that she had are the same ones that
20 other family members have. So if, for some reason, this
21 complaint doesn't allow Paul to pursue this remedy at this time,
22 we ask for the opportunity to amend it to conform with whatever
23 that remedy is supposed to look like.

24 Part two of Mr. Erickson's argument that relates to his
25 motion about the Estate of Victoria --

1 THE COURT: I'm sorry, I didn't catch that.

2 MR. BRENDTRO: Part two of Mr. Erickson's set of motions
3 is the one that relates to the Estate of Victoria O'Farrell. He
4 says that there's a special administrator, Paul can't bypass this
5 process. And he cites the *Estate of Jones*.

6 What's curious about that, Judge, and you know from dealing
7 with that case, is that the issue in the *Estate of Jones* is that
8 there is a specific statute saying who can bring a wrongful death
9 claim.

10 That's the issue there and it's -- the legislature has
11 defined that and set that apart and that's why that case is being
12 decided the way it is. Otherwise, you'd have lots of people
13 bringing different versions of a wrongful death claim, but the
14 legislature saw that that's the way to fix that, is limit it to
15 the one party that's named in the statute.

16 That's not what this is, this is not a wrongful death
17 claim. That statute doesn't apply. The theory of that --

18 THE COURT: I don't think the *Jones* decision limited it
19 to a wrongful death case, it was any type of case being brought
20 on behalf of the estate, wasn't it?

21 MR. BRENDTRO: I don't believe so. I don't believe that
22 was what the holding was. We directed the Court, in our
23 briefing, to the *Beachy* case from Nebraska as well as the line of
24 cases from secondary authority that the same rule is followed in
25 numerous states, which is, that when you're faced with a personal

1 representative or a fiduciary for the estate, like a special
2 administrator, who is either at odds with the relief that's being
3 pursued by, for example, Paul here, or is refusing to pursue
4 those claims, then in that case, another interested party, like
5 Paul, is allowed to pursue those claims. That's the basis upon
6 which we pursued that. Again, it's not frivolous. Frivolous
7 being, that there's no basis of law or fact for that concept.

8 The concepts exists in numerous states in secondary
9 authority. We readily cited that back in April when asked, and
10 so it's not a frivolous claim, Judge. It's maybe a difference of
11 opinion about what those cases mean, but we assert that because
12 Mr. O'Farrell, Raymond, is adverse to himself in Victoria's
13 lawsuit and all of the claims that Victoria was making against
14 him, he is unable to pursue remedies on behalf of both parties.

15 It's a problem that's structural and the solution that Paul
16 proposes, is to pursue the claims on behalf of Victoria's estate.
17 So those claims should not be dismissed nor his right to pursue
18 those claims.

19 The third area relates to the dismissal of recission. And
20 the theory, I guess, is that Paul was not a signatory to the
21 contract and therefore has no right to assert recission.

22 The first argument is that it's an action in equity, and as
23 long as you have all the proper parties together -- you know,
24 whether Paul was a signatory to the contract, is not pertinent.

25 The second argument just goes back to the issue of VOR,

1 which is that Paul acting as the most recent duly elected officer
2 of VOR, identified there's a problem with the corporation and is
3 attempting to remedy that.

4 At the complaint stage, he's allowed to do so. He's
5 identified a viable claim. It is a claim that if we step out of
6 this lawsuit, you could envision existing in any other claim,
7 that some corporation has made an act that's either ultra vires
8 or by undue influence and the executives then attempt to fix
9 that. It's not frivolous and it's a viable claim that's based on
10 fact. At this pleading stage, it's not dismissible under
11 Rule 12.

12 The fourth theory Mr. Erickson identified was tort damages.
13 And again, I think I'm maybe misunderstanding what their argument
14 was in the first place, but we're not seeking damages against the
15 trust in tort, at least at this time, so it's not dismissing the
16 trust, it's just saying that that doesn't apply to them at this
17 time.

18 The fifth area relates to the trust -- idea that there are
19 statutory boxes for trust proceedings and statutory boxes for
20 probate proceedings. I would agree that those boxes exist. I
21 would disagree that they are the sole area in which -- sole
22 method by which you can resolve questions related to that.

23 The declaratory judgment action by their nature are
24 designed to ask the court to decide questions of law or fact when
25 parties have disputes about what such documents mean or what

1 their application is or about other statutes or duties or rules.

2 When you have a situation where you have both a probate
3 proceeding that's implicated and a trust that's implicated as
4 well as third parties that are not part of those, a declaratory
5 judgment action where they're all parties, would seem, to me, the
6 most efficient way to go about that.

7 There's nothing in the declaratory judgment statute that
8 says that they cannot resolve trust and probate disputes nor is
9 there anything in the probate or trust code that says you cannot
10 use a declaratory judgment action to resolve those types of
11 issues.

12 So his argument first is, that you can't just go file these
13 things. The answer is yes, that's what the statutes are about.

14 His second argument, as far as substance, is that we're
15 missing interested parties which is what would be resolved if we
16 had ordinary, for example, trust proceedings.

17 If we're missing interested parties, solution would be to
18 add them as parties or give them notice on that and join them in
19 rather than to dismiss this all and send Paul on another wild
20 goose chase to pursue a different theory of relief somewhere
21 else. The pertinent parties though are here and if notice is
22 what we need to do, we can do that.

23 His sixth argument, again, was related to recovery of
24 attorney's fees for a frivolous action. The two arguments he
25 made, again, were that you can't plead relief in the alternative,

1 that's what Rule 8(a) permits, and that you can't bring claims on
2 behalf of an estate, and we beg to differ, there's case law that
3 says that you can. It's not frivolous to ask the Court to follow
4 the rules that's held in other states. In particular, when
5 there's not a bright-line rule that says this type of relief is
6 not permitted here.

7 THE COURT: All right. You're trailing off and I'm
8 having trouble hearing you at times. Can you move the mic
9 closer, please.

10 MR. BRENDTRO: Yes, Judge. I'm going to move then into
11 Mr. Beck's motion related to rescission. I believe that his
12 argument today, first, is that there's no evidence that the
13 Colony unduly influenced Raymond. That's a new argument that
14 wasn't raised in the briefing.

15 That is an argument that would not be appropriate for a
16 Rule 12 motion to dismiss. That is not the standard by which
17 rescission claims are gauged.

18 THE COURT: I think what Mr. Beck was referring to is,
19 the complaint didn't get into that in specific details -- or
20 maybe I misunderstood the arguments in the briefs. But go ahead.

21 MR. BRENDTRO: Sure. And maybe he can clear that up and
22 maybe I can respond once he does. What I understood the argument
23 to be is, that because the complaint doesn't assert that the
24 Colony unduly influenced Raymond, therefore the rescission claim
25 must fail. That's not the standard by which we judge rescission

1 claims. Nor undue influence. If someone has been unduly
2 influenced and we get the parties together that were affected by
3 it --

4 THE COURT: But how would the absent -- the statement to
5 the contrary in your complaint, if there was undue influence, and
6 I just ask that question, hypothetically, for the purposes of
7 this argument in front of me this afternoon, there was nothing
8 stated in the complaint that the Brotherhood, Hutterian
9 Brotherhood, had any involvement in that. They're claiming
10 they're good faith purchasers, if I'm reading this file
11 correctly. Could you address that and help me out on that issue.

12 MR. BRENDTRO: Sure. Judge, the assertion that they're
13 innocent parties would be a factual argument that they're making
14 in a Rule 12 motion. We can't do that. That would be based upon
15 other facts and other witnesses and other testimony later.

16 I believe --

17 THE COURT: But don't you have to raise that in your
18 complaint against this particular defendant in your civil
19 complaint? That's the point of my question. Maybe I'm missing
20 something.

21 MR. BRENDTRO: Maybe I'm missing what the question --
22 what is it that you're asking that I should include in the
23 complaint?

24 THE COURT: There's no allegation that the Brotherhood
25 was involved in any undue influence and doesn't that have to be

1 specific in the complaint? That's what I'm struggling with.

2 MR. BRENDTRO: Correct. No, Judge, I would say the
3 answer is no, that does not have to be in the complaint.
4 Recission action could be pursued without them actively exerting
5 the undue influence.

6 The authority for that, I believe, comes from Mr. Beck's
7 own brief in paragraph 47 -- section 47, which gets into the
8 common law back from 1921, *Whitford v Dodson*, which I think is
9 then quoted again in 1998 in the *Vanderwerf* case.

10 V-A-N-D-E-R-W-E-R-F.

11 And the question is, would the circumstances of whatever
12 the sale was, put a prudent man on inquiry as to the manner in
13 which the seller procured the land.

14 It's the analogy or the application of that general rule
15 would be that as long as the Hutterites were on notice or there
16 were circumstances sufficient to put them on notice about the
17 viability of this transaction, that would be sufficient. And so,
18 no, I don't believe the Hutterites have to be accused of undue
19 influence in order for a recission claim based upon undue
20 influence to apply to them.

21 Keep in mind, that the recission action also is based, not
22 just on undue influence, but upon problems with the corporate
23 formalities not being followed. So if the corporate formalities
24 aren't being followed, then you're missing pieces of the
25 authority by the corporation or by the trust to do these certain

1 things, or by Victoria's estate, you can rescind based upon that
2 without even getting into the undue influence question. So, no,
3 I don't believe that needs to be the part of the complaint.

4 To my understanding, it's a new argument as of either the
5 reply or this oral argument, and if I'm misunderstanding it, I'd
6 like an opportunity to address that in more detail.

7 The second claim that they're making, meaning the Colony is
8 making, regarding the rescission claim is that there was never a
9 legitimate offer to rescind.

10 Again, this is a factual argument that is not part of a
11 Rule 12 motion. There is nothing in any of the statutes which
12 requires a rescission action to have specificity in the pleading
13 relating to how the rescission was offered or whatever the nature
14 of the offer to rescind was.

15 There are statutes that tell you what should be done.
16 53-11-5. Party rescinding a contract must offer to restore
17 everything of value which is received from the other party and
18 upon a condition that such party do likewise. And that's in the
19 notice of rescission that they've asked to look at.

20 So to the extent that it was necessary to include that in
21 the complaint, there's no basis for that. The rescission notice
22 was given. It puts them on notice of exactly what the issue is
23 and does exactly what the statute offers to do, and moreover, the
24 Colony then rejected the notice of rescission.

25 They didn't say, oh, by the way, it doesn't meet some sort

1 of statutory metrics. They sent a letter, which now has been
2 attached as Exhibit F to one of the pleadings, where the Colony
3 says they do not intend to agree to rescission, so they reject
4 this idea.

5 So whatever defects there were in the notice of rescission
6 have been waived by the Colony's own efforts to reject the idea
7 of rescission in the first place.

8 It's -- again, there's a very long motion to dismiss by the
9 Colony, with very little actual substance that gets you to the
10 point of what a basis would be to find -- to dismiss all of the
11 claims against the Colony on a Rule 12 motion.

12 Mr. Beck didn't get into any of the issues related to Mr.
13 O'Farrell and Skyline Cattle's claims within Count 1. He didn't
14 brief it in the first-hand and he doesn't address it in oral
15 argument here, but it's clear that both of those plaintiffs are
16 seeking declaratory relief relating to their right to occupy this
17 property that would directly impact the Colony. It's -- and the
18 questions that are raised there would require resolution of
19 questions of the title to the property, questions to the
20 corporate formalities, questions to undue influence of Raymond,
21 and at this stage of the pleadings, it's not a viable request to
22 the Court to ask that all those additional claims be dismissed on
23 a Rule 12 motion.

24 I'll defer on this Rule 54 thing until such time everybody
25 else argues it. I believe that's all I have, Judge.

1 THE COURT: All right. Thank you. Mr. Erickson, do you
2 have a response to this?

3 MR. ERICKSON: Yes, Your Honor, and I'll try to be brief.
4 We have five different motions to dismiss in front of the Court
5 today and a lot of different arguments. But I want to start with
6 VOR, Inc., that's captioned as a plaintiff in this case.

7 The argument that you can plead in the alternative, I agree
8 you can plead complaints in the alternative, and that's where you
9 have two different types of negligence or contract actions and
10 you plead in the alternative.

11 You cannot plead in the alternative as to whether you're
12 representing somebody or if they're a defendant. And that's what
13 this complaint does. He said, hey, I'm acting on behalf of VOR,
14 Inc., but if I'm not, I'm also suing VOR, Inc. And they're not
15 listed as a defendant. That's not pleading in the alternative.
16 That's putting VOR, Inc. on both sides without the corporation
17 being a defendant.

18 I don't know who's defending VOR, Inc., because they're not
19 listed as a defendant. All there is, is that Paul made these
20 allegations in the complaint and on their face, it should be
21 dismissed because you can't act on both sides of the same
22 corporation. You can't be acting for them and then also be suing
23 them and list them as a plaintiff.

24 Secondly, the crux of a lot of the argument from the
25 plaintiffs is that this should not be dismissed at a 12(b)(5)

1 motion, because I've made allegations that support the theory.

2 Well, because of the allegations he's made, he incorporates
3 documents that we have given the Court, and those documents show
4 who the president of VOR, Inc. is. It shows that Raymond
5 O'Farrell is the president of VOR, Inc. That is allowed under a
6 motion to dismiss.

7 As soon as you make allegations that incorporate some type
8 of document, then the responding party can put those documents in
9 front of the Court at a motion to dismiss.

10 If I go sue Coca-Cola telling them that I'm the president
11 of Coca-Cola, they're going to respond with a motion to dismiss
12 saying, you're not the president of Coca-Cola, here's the
13 documents showing it.

14 That's what's happening here. We're responding with clear
15 documents that show that his allegations are not true, and we
16 don't have to go through discovery to do that. And if it's
17 required, then it would allow these lawsuits to continue when
18 there's a clear basis showing documents that are contrary to the
19 allegation.

20 Just alleging something does not allow the door to continue
21 open for summary judgment proceedings and discovery and all that
22 would be entailed with that.

23 With the estate issue, there's no South Dakota law that's
24 been argued or briefed or that's available for what he's trying
25 to do here with the estate. He is not acting on behalf of the

1 estate, even though he's captioned it that way, he's alleging
2 that he can act on behalf of the estate. There's no law to
3 support it.

4 The matter of the *Estate of Jones* case is an example of the
5 supreme court deciding an issue about having to have a special
6 administrator or a personal representative to bring a claim on
7 behalf of the estate.

8 Further, if you look at the statutory framework within the
9 Uniform Probate Code, there's within it, the general powers of a
10 special administrator and the powers of a personal
11 representative.

12 There is no power within the statutory framework for an
13 interested party to bring suits on behalf of the estate. Those
14 are powers of a special administrator and a personal
15 representative, by statute.

16 So for that reason, to bring an action on behalf of an
17 estate when you're not either of those, is a frivolous
18 allegation.

19 The next three motions to dismiss are rescission motion,
20 which I believe Mr. Beck will probably address more in his
21 argument, but I will stand by, there's no right for Paul to act
22 on either VOR or the Colony to ask for a rescission from this
23 Court.

24 The fact that he has some interest in a trust or some
25 interest in an estate does not allow him to rescind the contract.

1 The fourth motion to dismiss, agreed upon, that there are
2 no tort damages being sought against the trust.

3 And then number five, the response to our motion, the
4 argument is, is that they shouldn't be sent on a wild goose chase
5 to determine the correct proceeding to bring their allegations.

6 I'm not asking the Court to send them on a wild goose
7 chase. I'm asking the Court to enforce the statutes that are in
8 South Dakota that require certain proceedings to be in a certain
9 forum. And a probate proceeding related to probate actions and
10 trust proceedings related to trust actions are statutorily
11 required.

12 Throwing them into a dec. action defeats the purpose of
13 having all the different statutes within the trust chapter and
14 the probate chapter. So I'm not asking the Court to send anybody
15 on a wild goose chase. I'm just asking the Court to require what
16 the law requires.

17 As far as the attorney's fees, it's a frivolous factual
18 allegation to bring allegations where you're asking to act on
19 behalf of VOR and then ask for damages against that same
20 corporation. That's frivolous. You can plead in the alternative
21 as to different remedies, but you can't plead in the alternative
22 to who you are acting on behalf of. You can't be this person and
23 then against that person the next minute.

24 So for that reason, we believe that there's a basis for the
25 Court to find the complaint frivolous and to award attorney's

1 fees for this motion to dismiss.

2 THE COURT: All right. Thank you, Mr. Erickson. Mr.
3 Beck.

4 MR. BECK: Your Honor, let's start with the complaint.
5 The complaint takes until paragraph 21 under a section called
6 Related Litigation and Venue to introduce my client. And it
7 simply says who they are. South Dakota company, principal office
8 in Forbes, North Dakota.

9 We then fast forward to paragraph 34, which doesn't really
10 talk about my client. It talks about my client as the object of
11 a sentence in which Kelly O'Farrell is subject.

12 Paragraph 34 starts off instead, Kelly O'Farrell -- long
13 conversation about Kelly O'Farrell, and then finally says,
14 ultimately signed a secret agreement to sell nine parcels of
15 family farm ground to the Hutter -- Hutterian Brethren. The
16 object of a sentence. That's not an allegation that my folks did
17 anything or that my folks knew anything.

18 Paragraph 58 and paragraph 59, it's talking about what Ray
19 did and it's talking one of the things he did was to sell the
20 land to my client. It doesn't say my clients did anything to
21 encourage Ray to do that, to unduly influence him or that they
22 had noticed that anything was, in the words of the plaintiffs,
23 somehow wrong or undue influence.

24 Count 1, which is the Declaratory Judgment: Void and
25 Voidable Acts. I can't find my client in it, Your Honor. I

1 can't find their name. And I looked again this morning. I can't
2 find them. Don't know how there would be a cause of action in
3 Count 1, if they're not named.

4 Count 2, Rescission: \$3.2 Million Land "Sale". Rescission
5 is not a cause of action. That's a remedy. You can't just plead
6 a remedy against somebody and hope to get it, and that's what the
7 plaintiff is hoping, is to get some remedy against my client.

8 Again, Count 2, there's allegations, nothing about what my
9 client did or didn't do other than sign a deal to buy land and
10 the deal to get an option on the land. It doesn't even go on to
11 allege there was a closing where a bank was involved or a
12 mortgage got paid off. As the Court knows from the companion
13 foreclosure case of which you can take judicial notice.

14 Count 3, Tort Damages. We get down to paragraph 114. No
15 tort damages are sought from the Hutterian Brethren and Paul
16 sincerely apologies that they must be made part of this ordeal.

17 How does that state a cause of action? My clients have not
18 been mentioned up to this point in this complaint about knowing
19 anything or doing anything wrong. They just signed the land
20 deal.

21 Here, there's an apology issued to them for having to be
22 part of this ordeal. There is no cause of action pled against my
23 client.

24 So we turn then to what do you need to do to rescind. And
25 I'm somewhat at a loss. I filed a pretty long brief because it

1 was chock-full of legal authority, such as at paragraph 32,
2 statute 53-11-2.

3 So among other things, a party to a contract, which of
4 course, Paul isn't, may rescind the same in the following cases
5 only: (1) If consent of the party rescinding or of any party
6 jointly contracting with him....was given by undue influence
7 exercised by or with the connivance of the party as to whom he
8 rescinds.

9 So Paul's trying to rescind a contract, that he's not a
10 party to, with the Colony, but he doesn't allege that the Colony
11 exercised undue influence over Ray. He doesn't say that somehow
12 there was some connivance, whatever that might mean in this
13 circumstance, that the Colony engaged in. There's no cause of
14 action pled. And without a cause of action pled, my client has
15 to be dismissed.

16 And I'll hit a few more highlights here, but I don't want
17 to miss this. There's no cause of action against my client.
18 Recission isn't a cause of action. Because my client is one side
19 of this contract, the entire recission claim against anybody and
20 everybody needs to go away, and you're left with a lawsuit that
21 is, what Mr. Brendtro cited, paragraph 107 of his complaint, and
22 that is, the damages lawsuit -- I might have the wrong paragraph,
23 Your Honor. The damages lawsuit of Paul v Kelly, that's all that
24 should be left here. Everything else should get dismissed.
25 Every other cause of action. Every other remedy. Every other

1 party and that should be sent up to the supreme court on Rule
2 54(b) because we already have an eviction notice where Paul has
3 been evicted and that's up on appeal, and of course, we ask you
4 to take judicial notice of that, which you can, there's no reason
5 to have that set of issues go to the supreme court prior to this
6 identical set of issues.

7 And, Your Honor, we can talk that until we're blue in the
8 face. I think the 54(b) issue really comes up when the proposed
9 orders come in once the Court rules.

10 So, Your Honor, there is no recission claim against anyone,
11 because there is no recission claim against the Colony.

12 I do need to address this. Counsel claims that Paul
13 doesn't need to be the correct party. The Declaratory Judgment
14 Act does not get rid of the doctrine of standing. It can't.
15 Standing is a constitutional thing. You can't have a Declaratory
16 Judgment Act that says, oh, we're throwing standing out the
17 window where anybody can sue anybody about anything. You need to
18 have standing before you can sue.

19 Also, Your Honor, I would object to any opportunity to
20 amend. Generally speaking, you're supposed to amend before
21 responsive pleadings. There's been at least two filed, and I
22 would think, before the hearing on any motions to dismiss.

23 I'm not aware of anything under South Dakota law that would
24 say once your lawsuit is dismissed on a motion to dismiss that
25 you get to amend it. I'm not aware of a statute that says that,

1 Your Honor.

2 With that, Your Honor, I don't having anything else to add.

3 THE COURT: All right. Thank you, Mr. Beck. Mr.
4 Brendtro.

5 MR. BRENDTRO: Thanks, Judge.

6 THE COURT: I'll go to you this last time, and then I'll
7 give the attorneys making the motion, since the burden of proof
8 is on them, I'll give them the last word.

9 MR. BRENDTRO: Okay. Judge, you have documents in the
10 file that undisputedly would prove that the Colony was on notice
11 of these concerns related --

12 THE COURT: Where are those documents?

13 MR. BRENDTRO: Okay. They were attached by various
14 parties, including the purchase agreement for the land. And the
15 purchase agreement for the land recites the existence of
16 Victoria's lawsuit against Raymond.

17 By reciting its existence, the Colony was on notice of the
18 lawsuit itself and the contents of the pleadings in which it's
19 alleged that Raymond lacks capacity or is being unduly influenced
20 by Kelly.

21 And so from the moment this transaction existed, the Colony
22 was on notice of that, and so to the extent that a complaint or
23 the documents embracing the complaint must identify the Colony's
24 awareness or knowledge of that, following this -- you have that
25 in front of you.

1 The complaint, however, does not need to get into specifics
2 on that and the rule on that is Rule 9(b). It's used usually for
3 the idea that fraud must be pled with particularity but all other
4 aspects of knowledge can just be pled generally.

5 And so there's no need to go into specifics about what they
6 knew and when, but if necessary, you can find the facts that
7 would be necessary to support that within these various documents
8 that they're offering to you that allegedly embrace the arguments
9 in the complaint.

10 Mr. Beck is claiming that rescission is not a cause of
11 action. I'm not sure what that means. Rescission is a thing that
12 people can pursue. The way to pursue it is with a lawsuit, and
13 it happens with regularity --

14 THE COURT: I think Mr. Beck was making the argument to
15 me, rescission is a remedy, in the sense of the judicial remedy,
16 but maybe I misunderstood his argument. Go on.

17 MR. BRENDTRO: But it's a remedy that can be pursued in a
18 lawsuit. It's a claim -- I'm not sure what distinction we're
19 trying to make here, but to say that people can't pursue
20 rescission as a remedy by alleging it in a complaint that gives
21 factual detail about why rescission is warranted, I'm not clear
22 what the argument is.

23 THE COURT: I think Mr. Beck made the argument to me
24 under rescission you have to plead a few things, either consent,
25 undue influence.

1 MR. BRENDTRO: So if we're following notice of pleading,
2 then the answer is no, we don't have to do any of those things in
3 the complaint.

4 Beyond that, Mr. Beck identified that rescission is both
5 something that can be pursued as a matter legally under 53-11 or
6 as a matter of equity under 21-12. The complaint doesn't specify
7 either and in the prayer it asks for all other equitable relief
8 that's available. If for some reason, relief is not available
9 under 53-11, we ask the Court to then assert it under 21-12.

10 The -- I'm hard-pressed to figure out why the Colony should
11 be dismissed. If we start with the premise that there's a
12 transaction that is problematic and it needs to be sorted out to
13 figure out whether it should have happened in the first place,
14 and the Colony is an interested party to that because they were
15 the buyer. If they would prefer not to participate in the
16 proceeding and us to resolve this and then have a judgment
17 binding upon them, that's one thing, but for them to say there's
18 no such thing, is incorrect.

19 The code in two different places identifies rescission as a
20 remedy and it's an equitable remedy or it's a legal remedy and it
21 can be either at this stage of the pleadings. We've identified
22 facts that would support the idea that it is available here and
23 should be investigated and should be resolved.

24 I point out paragraph 107, it gets talked a lot about, the
25 paragraph that identifies damages as an alternative remedy. It

1 doesn't identify any specific defendant against whom they are to
2 be recovered from.

3 This notion that Mr. Erickson has been proceeding upon is
4 that obviously this must be a claim against VOR. It's not
5 necessarily the case. I think it's an argument in the
6 alternative that if the rest of this doesn't work, we're going to
7 have to deal with the problem that somebody equitably owes Paul
8 damages, at which point we can resolve that. So I think it's
9 incorrect to say that this is somehow limiting of what Paul's
10 arguing.

11 This idea of standing, that's why we're here. Paul has
12 identified numerous aspects that would give him standing to
13 request this relief, and that's all he's asking is for his day in
14 court.

15 The fascinating thing about this transaction, in all of
16 this, but dating back to Victoria in June of 2022, is virtually
17 none of the proceedings thus far have involved anything related
18 to facts. It's procedure and the procedural barriers are being
19 put out to keep the facts from being heard. That's a red flag
20 for me because if there's nothing wrong with this transaction,
21 it's all fair and above-board, let's hear the facts and let
22 someone hear the facts and have them decide upon the facts rather
23 than this procedural run-around that is occurring in Paul's
24 attempt to have his case heard.

25 I think that's it, Judge. The motions should be denied in

1 their entirety.

2 THE COURT: All right. Thank you. Mr. Erickson, as I
3 indicated a couple minutes ago, you're one of the attorneys on
4 behalf of your client bringing a motion to dismiss, so you'll
5 have the last word on your motion.

6 MR. ERICKSON: Right, Your Honor. I don't want to be
7 overly repetitive, which I think I will be.

8 THE COURT: Well, if you think you need it, please go on.

9 MR. ERICKSON: My only comment would be to the last
10 comment by Mr. Brendtro about having his day in court. These
11 motions to dismiss are a product of the law that requires people
12 to file complaints that they have allegations to support and our
13 motions to dismiss are asking the Court to dismiss parts of his
14 complaint that he doesn't have allegations to support.

15 You don't get your day in court just because you make some
16 allegation, that doesn't give you cause of action to pursue it.

17 It's not about a procedural run-around. It's about his
18 clients not having the capacity to do what he wants to do. He
19 doesn't get to do things just because he says he wants to in the
20 complaint.

21 So that's why the motions to dismiss are filed and that's
22 why they should be granted.

23 THE COURT: Thank you. Mr. Beck.

24 MR. BECK: Your Honor, I just need to hit this nail one
25 more time.

1 THE COURT: Go ahead.

2 MR. BECK: Recission is a remedy. SDCL 21-12-1 talks
3 about when you can have recission of a written contract. First
4 option, you kick it to 53-11-2, which I've talked about a lot.
5 The second option, the contract is unlawful for not -- for causes
6 not apparent upon its face and that parties were not equally in
7 fault. It has nothing to do with the situation.

8 Three, when the public interest will be prejudiced by
9 permitting it to stand. So 21-12-1 does not save the plaintiff.
10 He's got to go to 53-11-2, and what do you have for recission.
11 Mistake, duress, fraud or undue influence exercised by or with
12 the connivance of the party as to whom he rescinds. That's the
13 Colony. He hasn't pled any of those. He hasn't pled them
14 legally. He has not pled them factually. The case is over and
15 the recission count has to go away and it should be sent up to
16 the supreme court, if Paul chooses to appeal it, under 54(b). We
17 need to catch up this lawsuit to the other one. Thank you, Your
18 Honor.

19 THE COURT: All right. Thank you.

20 As to the motion to dismiss brought by the Grand Valley
21 Hutterian Brethren, Incorporated, I'm going to grant that motion
22 to dismiss.

23 I think there is a failure of the pleadings to specify the
24 state law that applies on the recission issue. The complaint
25 doesn't specify exactly what or how the Hutterian Brotherhood

1 knew of any undue influence or anything amiss when they purchased
2 the real estate that is the dispute in this legal proceeding.

3 So I'm going to grant the motion to dismiss on behalf of
4 the Grand Valley Hutterian Brethren, Incorporated. I'm going to
5 take the other motion to dismiss under advisement.

6 I have several things I need to review and I will get a
7 written memorandum out on that issue, Mr. Erickson, within a few
8 days. That is the ruling of the Court. Any questions about it,
9 Mr. Erickson.

10 MR. ERICKSON: I don't have any questions, Your Honor.

11 THE COURT: Mr. Beck?

12 MR. BECK: No, sir.

13 THE COURT: Mr. Brendtro?

14 MR. BRENDTRO: No, Your Honor.

15 THE COURT: All right. Thank you, gentlemen. Court will
16 be in the recess.

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STATE OF SOUTH DAKOTA)

:SS CERTIFICATE

COUNTY OF CODINGTON)

I, Michelle Gaikowski, Notary Public and Court Reporter in the above-named County and State do certify that I reported in stenotype the proceedings of the foregoing matter; that I thereafter transcribed said stenotype notes into typewriting; that the foregoing 37 pages are a true, full and correct transcription of my stenotype notes.

Dated at Watertown, South Dakota, this 20th day of July, 2023.

Michelle Gaikowski
Official Court Reporter
My Commission Expires:
April 28, 2028

STATE OF SOUTH DAKOTA)
: §§§ :
COUNTY OF GRANT)

IN CIRCUIT COURT

THIRD JUDICIAL CIRCUIT

<p>PAUL O’FARRELL, individually; and, as a beneficiary of the family trust; and, for the benefit of the Estate of Victoria O’Farrell; SKYLINE CATTLE COMPANY, a South Dakota corporation; & VOR, INC., a South Dakota corporation PLAINTIFFS</p> <p>v.</p> <p>KELLY O’FARRELL, an individual; GRAND VALLEY HUTTERITE BRETHERN, INC.; a South Dakota corporation; & THE RAYMOND AND VICTORIA O’FARRELL LIVING TRUST, a South Dakota trust, by and through its trustee; and any other necessary parties. DEFENDANTS</p>	<p>25CIV23—_____</p> <p>25CIV23-000015</p> <p>COMPLAINT</p>
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Plaintiffs’ Complaint is based upon the following law and facts:

NATURE OF THE ACTION

1. For the past year, Kelly O’Farrell has orchestrated a scheme to interfere with the long-standing trust and estate plans of his parents, (Raymond and Victoria). This resulted in the precipitous and illegal sale of nearly all of the family’s farm ground.
2. The nature of this lawsuit is three-fold:
 - *First*, to declare ‘void’ the improper corporate/trust maneuvers (Count 1, below);
 - *Second*, to rescind and unwind the \$3.2 million real estate transaction (Count 2);
 - And *third*, to recover damages for the injured parties (Count 3).

INITIAL BACKGROUND

3. **Paul O'Farrell**, a Plaintiff, is the son of Raymond and Victoria O'Farrell. His interest in this lawsuit stems from several interrelated aspects of his family's farming operations and his family's estate plans. Those include the "Family Trust"; the "Trust Corporation"; Victoria's Estate; and Skyline Cattle.
4. **Family Trust.** Paul was the primary beneficiary of his parents' long-standing estate plans, as set forth in the Family Trust, which is called "The Raymond and Victoria O'Farrell Living Trust." It was created on January 14, 2011, and was Restated on March 29, 2017. The primary Family Trust provisions have remained unchanged since 2011. Paul is named as a Successor Co-Trustee under §3.03 of the Family Trust in the event Raymond is "unable" to serve. As an interested person to the Family Trust, Paul brings this suit to restore the property taken from it, and, to effectuate the appointment of Successor Co-Trustees.
5. **Trust Corporation.** Paul is also the most recent individual to be duly-elected as President of the family's Trust Corporation, known as "vOr, Inc." Subsequent attempts in 2022 to remove Paul as its President were invalid, as were various other corporate acts. Thus, Paul also brings this suit on behalf of the Trust Corporation.
6. **Victoria's Estate.** By statute, Paul is an interested party of his mother Victoria's Estate, which is the subject of a 2022 probate proceeding in Grant County. Victoria's Estate holds various claims and rights, but the Estate has failed to act or

to pursue them. Paul therefore brings this suit for the benefit of Victoria's Estate, in order to preserve and protect her Estate's rights and interests.

7. **Skyline Cattle.** Paul is the owner of Skyline Cattle Company, through which Paul and his family have conducted farming operations (grain and cattle). Paul has been the sole owner of the company since 2019. Through a related entity he has carried on a trucking business (cattle hauling). For many years, Skyline has rented and farmed the Trust Corporation's land. Skyline brings suit to assert its rights, and, to recover damages.
8. **Kelly O'Farrell.** In 2022, Paul's brother, Kelly O'Farrell manipulated his father Raymond and engaged in other misconduct, in order to set in motion an improper and illegal set of maneuvers, all of which were designed to enrich himself at the expense of his parents and his brother Paul.
9. **Raymond O'Farrell, a person in need of protection.** Raymond has been described by his family as a person in need of protection. His wife Victoria described Raymond's condition in 2022 as having a "history of health problems" and a "history of alcohol abuse." She also noted that "there are often times when he is not fully aware of what is going on, and sometimes acts like the date is 1972, not 2022. Also, my husband was never a strong reader or writer and had a limited education. I do not say that lightly, nor as a criticism of my husband."
10. Among his health issues, Raymond has suffered three strokes, which caused a

further decline in his limited literacy.

11. Starting in approximately March of 2022, various maneuvers began to be taken, ostensibly in the name of Raymond O'Farrell, the Family Trust, the Trust Corporation, Victoria O'Farrell, and the Estate of Victoria O'Farrell. Kelly was at the center of it all.
12. Kelly O'Farrell's efforts have caused substantial financial harm, and, ultimately culminated in the wrongful sale of \$3.2 million worth of O'Farrell family farmland to the Grand Valley Hutterian Brethren.
13. The victims of Kelly's scheme are several. It caused financial harm to their mother Victoria (and her Estate); to their father Raymond; to the Trust; to their family company (vOr, Inc.); and to Paul, because the intent and effect of the scheme was to orchestrate his disinheritance.
14. The scheme also greatly interfered with Paul's farming operations, business operations, and business relationships.
15. And the improper and unplanned sale of \$3.2 million of Family Trust Land will result in a substantial taxable event, which the Family Trust was designed to avoid.
16. Paul brings this action to do three things: (i) to invalidate the void, *ultra vires*, and illegal maneuvers (including corporate, trust, individual, and probate) which occurred without appropriate notice, consent, or authority, or, as a result of undue influence; (ii) to unwind the \$3.2 million real estate transaction, ostensibly

undertaken from vOr, Inc., to the Grand Valley Hutterite Brethren; and (iii) to recover damages for the injured parties and entities.

RELATED LITIGATION & VENUE

17. Various O'Farrell family members are residents of Grant County, as are its entities.
18. Victoria O'Farrell (mother), died during the summer of 2022. Her estate is being probated in a separate proceeding in Grant County. *See*, 25PRO22—11. Prior to her death, Victoria started a lawsuit to address some of these same claims. *See*, 25CIV22—38. A copy of her Complaint is attached here, as Exhibit 1, along with a Brief outlining her arguments and claims, which is Exhibit 2.
19. Raymond O'Farrell (father), is a vulnerable person in need of protection. In a separate proceeding, Paul has petitioned for the appointment of a guardian and conservator in Grant County. *See*, 25GDN23— _____. After appointment, his conservator will be an interested party to these proceedings.
20. Because of Raymond's pending conservatorship, and for other reasons, Raymond is "unable" to serve as Trustee of the Family Trust, within the meaning of Section 3.03(a). Paul is named as a Successor Co-Trustee under §3.03 of the Family Trust. Following the appointment of Successor Co-Trustees, it is the intent that the Family Trust would then be realigned as a Plaintiff in this matter.
21. Defendant Grand Valley Hutterian Brethren, Inc., is a South Dakota company with a principal office in Forbes, North Dakota, and, as listed on the Secretary of State's

website under entity number of NS011229, its registered agent is Jeffrey T. Sveen, 415 S. Main St., 400 Capitol Bldg, Aberdeen, SD 57401-4364.

22. Defendant Kelly O'Farrell lives with Raymond in Grant County, South Dakota.
23. Venue is proper in Grant County pursuant to SDCL 15-5-1, 15-5-8, and 15-5-6.

FACTS

24. In 2011, Raymond and Victoria O'Farrell created a trust, which was the key component of their estate plan.
25. Into this Family Trust, Raymond and Victoria each deposited all (or most) of their assets. This included 100% of their shares of "vOr, Inc.," which is a South Dakota corporation created in 2002 to hold their farm assets, including substantial real estate holdings. In this Complaint, "vOr" is referred to as the Trust Corporation.
26. In total, Raymond and Victoria owned approximately 1,000 acres of farmland near Marvin, South Dakota. They also owned a share of a livestock auction barn in Watertown, South Dakota, along with other various assets.
27. Since 2011, the terms of Raymond and Victoria's Family Trust designated specific land parcels for inheritance by their five children: Paul, Lance, Marcie, Rita, and Kelly.
28. Of their five children, Paul had the most involvement with the family's farm. Paul has served as an officer of the Trust Corporation for numerous years. And, for many years, Paul's mother served as the bookkeeper for Paul's farming and

trucking operations. Paul also rented and farmed the family's land. And Paul worked at his parents' livestock auction barn.

29. In line with Paul's higher level of contributions and involvement with his parents' farm, Raymond and Victoria's Family Trust designated the majority of their land to be inherited by him. Those were nine contiguous parcels comprising 703.33 acres. The Family Trust owned two other quarters of ground, which are designated to be inherited by Lance, and to Marcie, Kelly, and Rita. However, the Family Trust also granted Paul an option to purchase those two parcels, to allow Paul to keep the farm together.
30. Raymond and Victoria used an estate planning law firm to create their Trust in 2011.
31. Raymond and Victoria returned to that same estate planning law firm to make minor adjustments to it in 2017 and 2021. On both occasions, they affirmed their original intentions.
32. In March of 2022, statutory notice was given to the five O'Farrell children under SDCL 55-4-57, along with a copy of the Trust. In this notice, the beneficiaries were advised that they had "60 days from today to commence a judicial proceeding to contest the validity of our restated trust, [and] if no claim is made within the 60-day period, you will be barred from contesting the trust's validity at our passing."
33. Nobody initiated an action to contest the Trust during that 60-day period.

34. Instead, Kelly O'Farrell secretly began an orchestrated effort to alienate and isolate Raymond from his family, with the intent of thwarting various features of Raymond and Victoria's Estate plan and disrupting farming operations. This included, for example: "removing" shares of vOr, Inc., from the Trust; "separating" Raymond's and Victoria's assets; interfering in Paul's lending and farming activities; "removing" Paul and Victoria as officers and directors of vOr, Inc.; attempting to fire the attorneys that Victoria hired to stop all of this; and, ultimately, signing a secret agreement to sell nine parcels of family farm ground to the Hutterite Brethren.
35. Some of these actions were accomplished via the misuse of Power of Attorney documents.
36. In addition, Kelly began taking funds from his parents and converted them to his own use.
37. Kelly has isolated Raymond from his family members, and Kelly has given Raymond false information about his family members, in order to alienate Raymond from Paul and other family members, and as part of a plan and scheme to enrich himself and harm his other family members.
38. The problems appear to have started when Kelly moved in with his parents in 2021, where he and his wife lived rent-free.
39. By 2022, Kelly was demanding that his siblings pay him \$1,200 per month to care

for Raymond and Victoria, and Kelly threatened that he would leave the house and take Raymond if they didn't.

40. Victoria temporarily moved out of the home after she fell and broke her leg in April 2022. This required surgery and recuperation outside of the home, first a hospital and then a nursing home in Garretson, South Dakota.
41. Raymond had long-relied upon his wife Victoria.
42. In the vacuum created by her absence, Victoria realized that Kelly was isolating Raymond. In the summer of 2022, she submitted an affidavit outlining her observations and concerns, which is attached as Exhibit 3.
43. Kelly convinced Raymond to terminate Victoria as his power of attorney and to appoint Kelly in her place.
44. Kelly then took steps to disempower Victoria. He directed his sister Rita to solicit a letter from an Avera physician in June 2022 which purported to advise that their mother Victoria was unable to make financial decisions. The letter was issued, and then Kelly acted upon it. However, less than two weeks later, the same Avera doctor learned that the letter had been procured under false pretenses and disavowed its contents. Instead, the doctor advised that she knew of no issues with Victoria's cognition nor with her ability to make financial decisions. The doctor's affidavit is attached as Exhibit 4.
45. At all times, Victoria was fully capable of making decisions, and, she was keenly

aware that Kelly had been engaging in a pattern of wrongdoing.

46. Victoria voiced concerns about Kelly, and said in her affidavit that “it became clear that Kelly was trying to influence how Raymond thought about vOr, Inc’s relationship with Paul and about what the corporation should do in regard to the [Skyline] loans coming due.¹ Since coming to live with us, Kelly seems to have attempted to influence Raymond more and more, and I believe that was part of an effort to undo or disrupt estate planning decisions that my husband and I had already made about what would be done with the family land.”
47. Victoria also reaffirmed the validity of her and Raymond’s estate plans: “Raymond and I put a lot of thought into our estate plan, and the specific distributions that are called for in the Trust Instrument are the result of a lot of reflection and discussion between us about what we believe and how we want our estate distributed.”
48. As of June of 2022, Victoria noted that Raymond had “never expressed to me any inclination to change the estate plan or to make any alteration to the trust. The recent actions that he has taken relating to the Trust and the changes to vOr, Inc.’s directors and officers were not his idea, and I do not believe he even understands

¹ There was a long-standing arrangement by which Skyline’s operating loans were secured by the land owned by the Trust Corporation. This continued for years without incident, and Skyline paid down a sizable portion of the debt in the past few years. As Victoria explained in her affidavit, “there was never any issue with any of our lenders or concerns that assets of vOr, Inc., would be at risk....[N]one of the other loans for which vOr, Inc. assets had been pledged as security were in arrears on any debt service or loan payments.” But, as a result of Kelly’s influence, financial information was not provided to the Bank for the 2022 refinancing process, which led to the declaration of default.

what he purports to have done.” This was based on Victoria’s conversations with Raymond at that time.

49. Victoria hired an attorney to help her, but, the following day, Raymond (via counsel) attempted to “fire” Victoria’s lawyer via Raymond’s power of attorney over her.
50. Victoria remained grateful to Kelly’s wife, Donna, for her help and care, as well as Kelly and Donna’s children. But, Victoria concluded, “based on the series of actions that have been taken, I no longer want Kelly to live in my home. It saddens me to come to that conclusion, but I feel I have no other choice, based on what has gone on in the last month.”
51. Victoria planned to return home after recuperating in the nursing home, and, stated that as part of her return home, “I want the Court to compel [Kelly] to leave.”
52. Victoria died unexpectedly on July 11, 2022, before she could return home.
53. By that time, Victoria had already started a lawsuit to try and unwind these improper actions and to repair the problems with the Family Trust and the Trust Corporation. *See*, 25CIV22-000038 (Grant County, S.D.)
54. However, one week after Victoria’s death, Raymond O’Farrell ostensibly started a probate action for Victoria, in which he filed a Petition seeking to be named as “Special Administrator” of Victoria’s Estate.
55. This Petition claimed that the appointment of a Special Administrator was urgently

necessary because Victoria was the Plaintiff in a lawsuit (i.e., the one which Victoria had filed to fix the trust and unwind the wrongdoing). The Petition alleged that “[a]n emergency exists requiring appointment without further notice because: The pending litigation requires immediate attention of a Special Administrator to protect the estate of decedent....”

56. In his Petition, Raymond nominated himself to be the Special Administrator, meaning that Raymond would now be acting as both the Plaintiff and the Defendant in the lawsuit which Victoria had commenced to stop Kelly and Raymond from further mischief.
57. The Petition was granted on the same day, without notice to any heirs or interested parties.
58. Despite the lack of notice, Raymond purported to take various legal actions under the Special Administrator status, including maneuvers which apparently resulted in the “sale” to the Hutterite Brethren of \$3.2 million worth of Family Trust land.
59. The land sale contract was purportedly signed between vOr, Inc., and the Hutterite Brethren on August 12, 2022. This contract was kept secret, and, no authority was obtained for it via the probate process. No notice was given until after a closing had purportedly occurred in October 2022.
60. Paul has been living on one of the parcels of Family Trust land for many years. As is typical with farm families, Paul not only lived on the Family Trust land but also

- operated the family farm. Both arrangements were without a written agreement.
61. In reliance upon the ongoing arrangement and family plan, Paul constructed a residence and a shop at his own expense. Both structures are situated on land that is designated for Paul to inherit. Their value greatly exceeds one million dollars.
 62. In August 2022, and in conjunction with this attempted land sale, the Trust Corporation attempted to issue notices of “non-renewal” to Paul O’Farrell, his company Skyline Cattle, and other occupants of the family’s trust land.
 63. The Trust Corporation’s attempts to “non-renew” Paul and Skyline were contrary to years and years of prior understanding, and they were carried out without proper authority, consent, or understanding.
 64. In the months since, Kelly has continued to isolate Raymond and exert influence, which has resulted in other wrongful actions and transactions that are not in Raymond’s or the Family Trust’s best interests.
 65. Each of the various actions and transactions was legally ineffective because of a failure of notice, consent, capacity, authority, undue influence, and estoppel.
 66. These actions have caused financial harm to multiple parties, including Raymond himself, the Trust, vOr, Inc., Victoria, Victoria’s estate, Paul, and Paul’s company, Skyline Cattle.
 67. The first step to fix and repair these problems is to declare the various corporate, trust, and probate maneuvers to be invalid. The second step is to unwind the \$3.2

million real estate transaction. And the third step is to rectify the harm by an award of damages.

COUNT 1

DECLARATORY JUDGMENT: VOID AND VOIDABLE ACTS

68. These various legal maneuvers were set into motion via a series of actions, made by those purporting to act on behalf of the Trust Corporation; by individuals purporting to act on behalf of the Family Trust; by individuals purporting to act as Victoria O'Farrell's power of attorney; by individuals purporting to act on behalf of Victoria's Estate; and by individuals purporting to act on behalf of Raymond O'Farrell or as his power of attorney.
69. Some of these maneuvers are known to the Plaintiffs; many are still unknown.
70. Plaintiffs seek a declaration that would avoid all of these improper corporate, trust, probate, and individual actions. Such declarations are available via Chapter 21-24.
71. Without limitation, some of the void or voidable actions include the following.
72. **Declaration as to Trust Corporation actions.** Various corporate actions of vOr, Inc., were taken by attempting to "vote" Victoria's stock shares on her behalf. This was done without her knowledge; without proper corporate notice; and, it persisted even after she disavowed such attempts.
73. The election of officers and board members was not carried out in accordance with corporate formalities, rules, or statutes, and, those elections are void, as are the

actions taken by those officers and directors. This includes, but is not limited to: (i) the” Action by Written Consent of All Directors of vOr, Inc.,” dated June 14, 2022; “Action by Written Consent of All Shareholders of vOr, Inc.,” dated June 14, 2022; “Action by Written Consent of All Shareholders of vOr, Inc.,” dated June 15, 2022; and actions at a purported “Special Meeting of Board of Directors” on June 19, 2022, and June 21, 2022, which attempted, among other things, to remove Paul and Victoria as directors and officers.

74. In addition, various corporate actions were taken in the name of Raymond O’Farrell. These were accomplished without proper corporate notice, without his full knowledge and understanding, and, as a result of undue influence and manipulation.
75. And, various corporate actions were taken in derogation of established agreements, including the Family Trust agreement. Such actions are void, *ultra vires*, or, of a nature that the Corporation or its shareholders would be estopped to undertake them.
76. **Declaration as to Family Trust actions.** Various trust actions were accomplished without proper notice, without consent, without the full knowledge and understanding of the trustees, as a result of undue influence and manipulation, in derogation of established trust agreements.
77. These Family Trust actions are thus void, or, *ultra vires*, or, prohibited by Title 55

and other trust laws and statutes, or, estopped by the Trust arrangement.

78. Such actions include an attempt to reverse the original Assignment Separate from Certificate dated January 14, 2011, via another such Assignment on June 10, 2022, which attempted to depopulate the Family Trust of land assets.
79. **Declaration as to Successor Trustee.** The trust documents, at Section 3.03(a), provide for the appointment of a successor trustee in the event that Raymond is unable to serve as trustee.
80. Raymond is unable to serve as Trustee.
81. Plaintiffs seek a declaration that Raymond is unable to serve as trustee, and, they will be filing a Petition for Removal within these proceedings.
82. **Declaration as to Victoria's Estate actions.** Various actions by Victoria's Estate were accomplished without proper notice, without valid consent, without the full knowledge and understanding of the fiduciaries, as a result of undue influence and manipulation, in derogation of well-established probate statutes. These actions of Victoria's Estate are thus void, or, *ultra vires*, or, of a nature that the Estate's fiduciaries would be estopped to undertake them.
83. **Declaration of Skyline Cattle's Rental Rights.** Further, Plaintiff Skyline Cattle is entitled to a declaration that it is legally permitted to continue farming the Family Trust Land. During the 2022 crop season, and for many years prior, Paul O'Farrell's company, Skyline Cattle, leased and farmed the Family Trust Land.

84. In South Dakota, an oral farming lease is deemed to renew automatically for the following crop season unless a written notice for termination is issued prior to September 1st, following the requirements of SDCL 43-32-22.1
85. Because of the failure of its corporate process, vOr, Inc., failed to issue a legally effective termination notice in 2022. Any purported notice was issued by individuals who were not duly elected officers, and, whose actions were *ultra vires*, or, whose actions were a product of undue influence. This includes an attempted termination and non-renewal notice dated August 18, 2022.
86. Skyline Cattle Company seeks an immediate declaration that it is the rightful tenant for the 2023 crop season.
87. Discovery is expected to identify further transactions and actions which would be subject to a declaratory judgment to nullify them. One of those transactions was a \$3.2 million land “sale” of the vast majority of Family Trust land.
88. **Declaration of Paul O’Farrell’s Occupancy Rights.** Further, Plaintiff Paul O’Farrell is entitled to a declaration that he is legally permitted to continue occupying the premises of the Family Trust Land, including residential and non-agricultural land and buildings which are the site of his home and shop.
89. Because of the failure of its corporate process, vOr, Inc., failed to issue a legally effective termination notice in 2022. Any purported notice (including a notice dated August 18, 2022) was issued by individuals who were not duly elected

officers, and, whose actions were *ultra vires*.

90. **Declaration as to Power of Attorney over Raymond.** A “Durable General Power of Attorney” was signed March 1, 2022, naming Kelly O’Farrell as power of attorney for Raymond O’Farrell. This document was procured without his full knowledge and understanding, and, as a result of undue influence and manipulation, and, without any notice of revocation of his March 29, 2017, power of attorney.
91. **Other Declarations.** Discovery is expected to identify further transactions and actions which would be subject to a declaratory judgment to nullify them, and, those are incorporated herein.

COUNT 2

RESCISSION: \$3.2 MILLION LAND “SALE”

92. Under the terms of the Family Trust, Raymond and Victoria O’Farrell had designated Paul to receive nine, contiguous parcels of farm ground on the edge of Marvin, South Dakota, along Highway 12.
93. Paul’s designated land is legally described as follows:

The South Half of the Southeast Quarter (S ½ SE ¼)² and the South Half of the Southwest Quarter (S ½ SW ¼)³ of Section Twenty-Two (22), Township One Hundred Twenty-One (121), Range Fifty (50) ; and the South Half of the Northwest Quarter (S ½ NW ¼),⁴ the South Half of the Northeast Quarter (S ½ NE ¼),⁵ the North Half of the Northeast Quarter (N ½ NE ¼),⁶ the Southeast Quarter (SE ¼),

² Parcel A (these letters correspond to the map of the parcels which follows)

³ Parcel B

⁴ Parcel C

⁵ Parcel D

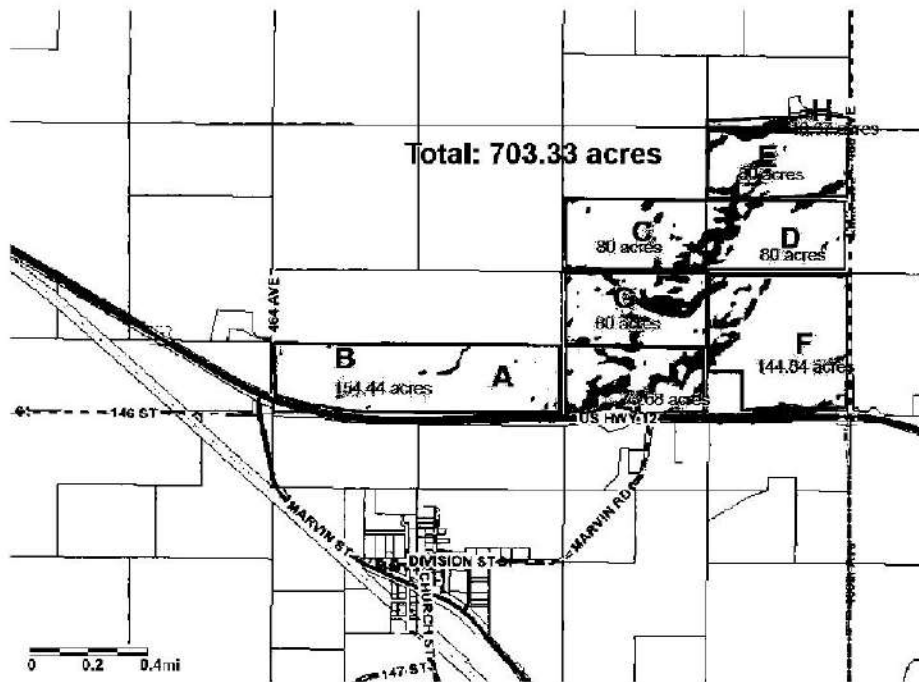
⁶ Parcel E

except Lot One (1) Hopewell Subdivision of the Southeast Quarter (SE ¼),⁷ and the North Half of the Southwest Quarter (N ½ SW ¼),⁸ of Section Twenty-Three (23), Township One Hundred Twenty-one (121), Range Fifty (50), Grant County, South Dakota

Lot 2A of Lots 2A and 2B, O'Farrell Subdivision,⁹ a Replat of Lot Two (2) of the Plat of Lots One (1) and Two (2), O'Farrell Subdivision, all located in the South Half of the Southeast Quarter (S1/2 SE ¼) of Section Fourteen (14) Township One Hundred Twenty-One (121), Range Fifty (50), and all according to plats now on file and of record in the office of the Register of Deeds, Grant County South Dakota

The South Half of the Southwest Quarter (S ½ SW ¼)¹⁰ of Section Twenty-Three (23), Township One Hundred Twenty-One (121), Township Fifty (50), Grant County, South Dakota

94. That land totals approximately 703.33 acres, and is shown here:



⁷ Parcel F

⁸ Parcel G

⁹ Parcel H

¹⁰ Parcel I

95. In October 2022, this land (which Paul was designated to inherit) was “sold” to the Defendant Grand Valley Hutterite Brethren, Inc., for a sale price believed to be \$3.2 million.
96. The “sale” was attempted through the O’Farrell family Trust Company (vOr, Inc.) via a purchase agreement dated August 12, 2022, which lists Raymond as its “President.”
97. The Purchase Agreement also purports to give Grand Valley a “right of first refusal to purchase the other two parcels of land currently owned by Seller.” This, too, violates and thwarts the intention and terms of the Trust Agreement.
98. In addition, the Purchase Agreement purports to lease those other two parcels to the Hutterite Brethren for \$230.00 per acre and \$90.00 per acre for tillable and grassland.
99. Raymond was not duly elected as the President of vOr, Inc., at any time during 2022. Instead, Paul O’Farrell was and remains the duly elected President of vOr, Inc., and any attempted change of officers is a nullity.
100. Victoria’s Estate was legally incapable of carrying out any actions because it failed to follow proper procedures and probate statutes.
101. The Trust Corporation (vOr, Inc.) was legally incapable of carrying out the transaction.
102. Raymond’s consent for the transaction was procured via undue influence, or

without his full understanding, and without following necessary corporate formalities.

103. The completed transaction was announced to the public for the first time in October 2022.
104. Upon information and belief, some of the funds of the transaction are still being held by the law firm(s) involved.
105. Paul O'Farrell has issued a Notice of Rescission to the Hutterite Brethren, on behalf of vOr, Inc., and has offered to restore to them that which vOr, Inc., has received from them under the contract, upon the condition that they shall do likewise.
106. The land transaction should be rescinded by this Court. This Court should impose a constructive trust on the deeds of the land conveyed, as well as upon any funds flowing from the transaction.
107. If rescission is not available, then, in that case Paul O'Farrell is entitled to an award of damages for unjust enrichment, and, otherwise.
108. Such damages would include a claim for unjust enrichment for the value of the capital improvements Paul has made to the Family Land at his expense, without compensation, including his residence and his shop, which, have an estimated value substantially in excess of one million dollars.
109. The Plaintiffs are also entitled to an accounting of the proceeds of the land sale.

COUNT 3:
TORT DAMAGES

110. An injured party is permitted a single, complete recovery of damages, even though he or she may plead multiple legal theories of recovery. Here, there are a series of damages to various parties that flow from the acts described above, and, which would fit into several, overlapping legal theories.
111. Discovery will determine the extent and nature of the tort claims. At present, as a result of Kelly O'Farrell's wrongful acts, a recovery of damages appears to be available for Raymond, Victoria, her Estate, the Family Trust, and the Trust Corporation. Such damages would be available as a result of conversion, breach of fiduciary duty, and tortious interference with their expected and established relationships.
112. Damages also appear to be available to Skyline Cattle and Paul O'Farrell as a result of Kelly O'Farrell's tortious interference in their expected and established relationships.
113. Because the extent of the various wrongdoing is not yet known, the Plaintiffs are entitled to an accounting of all funds and property of the Family Trust, the Trust Corporation, and the Estate, in order to ascertain the damages.
114. **No tort damages are sought from the Hutterite Brethren, and Paul sincerely apologizes that they must be made a part of this ordeal.**

PRAYER FOR RELIEF

The Plaintiffs seek the following relief, and pray for a judgment accordingly:

- A. For a declaratory relief as described above, and as otherwise merited.
- B. For the appointment of a successor trustee for the Family Trust.
- C. For an order enjoining further actions.
- D. For a declaration that Skyline Cattle is lawfully permitted to continue farming the Family Trust land for the 2023 crop year.
- E. For a rescission of the real estate transaction as described above, and, for the award of rescission damages and equalizing payments necessary to restore the parties to their prior positions.
- F. For monetary damages, whether in tort, contract, equity, or otherwise.
- G. For an award of attorney's fees as permitted by statute, including but not limited to Chapter 55-3, or, as permitted as underlying damages.
- H. For equitable relief as appropriate, including (i) a constructive trust; (ii) for unjust enrichment; (iii) accountings; and (iv) any other such relief necessary.

JURY TRIAL

The Plaintiffs request and demand a trial by jury on any and all claims.



Daniel K. Brendtro

Dated this 2nd day of March, 2023.

HOVLAND, RASMUS,
BRENDTRO, & TRZYNKA, PROF. LLC



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Attorneys for Plaintiffs

EXHIBITS TO COMPLAINT:

- Exhibit 1: "*Complaint*" originally filed in 25CIV22-38
- Exhibit 2: "*Brief*" originally filed in 25CIV22-38
- Exhibit 3: "*Affidavit of Victoria O'Farrell*" originally filed in 25CIV22-38
- Exhibit 4: "*Affidavit of Dr. Elizabeth Vanlith*" originally filed in 25CIV22-38

STATE OF SOUTH DAKOTA)
) ss:
COUNTY OF GRANT)

IN CIRCUIT COURT
THIRD JUDICIAL CIRCUIT

PAUL O'FARRELL, individually and as beneficiary of the family trust; and for the benefit of THE ESTATE OF VICTORIA O'FARRELL; SKYLINE CATTLE COMPANY, a South Dakota corporation; & VOR, INC., a South Dakota corporation,)		
)		
)		25CIV.23-15
)		
)		
Plaintiffs.)		ANSWER, COUNTERCLAIM, AND MOTIONS OF VOR, INC., ESTATE OF VICTORIA O'FARRELL, AND THE RAYMOND AND VICTORIA O'FARRELL LIVING TRUST
v.)		
)		
KELLY O'FARRELL, an individual; GRAND VALLEY HUTTERIAN BRETHREN, INC., a South Dakota corporation; and THE RAYMOND AND VICTORIA O'FARRELL LIVING TRUST, a South Dakota trust.)		
)		
Defendants.)		
)		

COMES NOW VOR, Inc., Estate of Victoria O'Farrell (hereinafter "Estate"), and the Raymond and Victoria O'Farrell Living Trust (hereinafter "Trust"), and make the following Answer, Counterclaim, and Motions to Dismiss.

INTRODUCTION

Plaintiff's counsel has wrongfully represented to the Court that he represents VOR, Inc. and the Estate of Victoria O'Farrell. Neither is true, and resolving these organizational issues at the offset is critical to properly resolving the litigation.

**MOTION TO DISMISS VOR, INC. AS A PLAINTIFF
PURSUANT TO SDCL 15-6-12(b) AND
FOR ATTORNEY'S FEES PURSUANT TO SDCL 15-17-51**

1. Daniel K. Brendtro has named VOR, Inc., a South Dakota corporation, as a plaintiff in this proceeding.

2. Mr. Brendtro makes the claim because his client, Paul O'Farrell, used to be an officer in the corporation. (Complaint ¶ 5.)

3. In multiple paragraphs in the Complaint, Mr. Brendtro recognizes that Paul is not a current officer or president of the corporation. (Complaint ¶¶ 34 & 73.)

4. Attached as Exhibit A is the 2022 Annual Report of VOR, Inc., which identifies the president as Raymond Alvin O'Farrell, and does not identify Paul O'Farrell as an officer, director, or shareholder.

5. VOR, Inc. has retained Schoenbeck & Erickson, PC to represent it in this litigation and other prior litigation.

6. Mr. Brendtro's pleadings are alleging actions against VOR, Inc., see Count 2, not for VOR, Inc. as a plaintiff. In fact, Count 2 is Mr. Brendtro's attempt to set aside a sale of land that VOR, Inc. entered into with the Defendant, Grand Valley Hutterian Brethren, Inc.

7. Further proof of that Mr. Brendtro doesn't represent VOR, Inc. is that he is seeking damages against VOR, Inc. in paragraphs 107 and 108 of his Complaint.

8. Wherefore, VOR, Inc. moves the Court that it be dismissed as a plaintiff in these proceedings.

9. Mr. Brendtro and his client should pay the reasonable attorney's fees to VOR, Inc. for defending this action, pursuant to SDCL 15-17-51, and as affirmed by the

Supreme Court in our recent case of *Healy v. Osborne*, 2019 S.D. 56, ¶¶ 34-38, 934 N.W.2d 557, 566-567.

10. After the Court decides the motion for attorney's fees, counsel for the Defendants will submit an itemized statement of attorney's fees for the Court.

**MOTION TO DISMISS THE ESTATE OF VICTORIA O'FARRELL AS A
PLAINTIFF PURSUANT TO SDCL 15-6-12(b), AND TO AWARD
ATTORNEY'S FEES PURSUANT TO SDCL 15-17-51**

1. Daniel K. Brendtro signed a Complaint naming the Estate of Victoria O'Farrell as a beneficial plaintiff.

2. Mr. Brendtro's pleadings allege that his client, Paul O'Farrell, is an interested party in Victoria's Estate, and therefore, he can bring this suit on behalf of Victoria's Estate. (Complaint ¶ 6.)

3. Mr. Brendtro's pleadings recognize that Paul O'Farrell is not the personal representative of the Estate of Victoria O'Farrell. (Complaint ¶¶ 6, 54-58.)

4. Attached as Exhibit B is the Order Appointing Special Administrator and the Letters of Special Administration in the Estate of Victoria O'Farrell showing that Raymond A. O'Farrell is the special administrator of the Estate of Victoria O'Farrell.

5. Schoenbeck & Erickson, PC is the law firm retained by Raymond O'Farrell, as the Special Administrator of the Estate of Victoria O'Farrell.

6. Mr. Brendtro has no basis for asserting claims on behalf of the Estate of Victoria O'Farrell.

7. Wherefore, the Estate of Victoria O'Farrell should be dismissed as a party to this lawsuit, pursuant to SDCL 15-6-12(b), and that attorney's fees be awarded to the Estate for defending this action, pursuant to SDCL 15-17-51, and as affirmed by the

Supreme Court in our recent case of *Healy v. Osborne*, 2019 S.D. 56, ¶¶ 34-38, 934 N.W.2d 557, 566-567.

8. After the Court decides the motion for attorney's fees, counsel for the Defendants will submit an itemized statement of attorney's fees for the Court.

**MOTION TO DISMISS COUNT 2 RECISSION OF
\$3.2 MILLION LAND "SALE" PURSUANT TO SDCL 15-6-12(b),
AND FOR ATTORNEY'S FEES PURSUANT TO SDCL 15-17-51**

1. Count 2 of Daniel K. Brendtro's Complaint seeks rescission of the \$3.2 million dollar land "sale." (Complaint pp. 18-21.)

2. Mr. Brendtro's Complaint references the August 12, 2022, Purchase Agreement. (Complaint ¶¶ 95-97, and incorporates the Purchase Agreement by reference.)

3. The actual Purchase Agreement is attached hereto as Exhibit C.

4. The seller under the Purchase Agreement is VOR, Inc., and the individual signing on behalf of the corporation is Raymond A. O'Farrell. (See Exhibit C, p. 10 of 10.)

5. As the Court has already seen from Exhibit A, Raymond A. O'Farrell was the president, director, and owner of VOR, Inc. in August of 2022.

6. Attached as Exhibit D is the Chicago Title Insurance Company Owner's Policy issued to Grand Valley Hutterian Brethren on completion of the transaction, which would indicate that VOR, Inc. conveyed good title to Grand Valley.

7. Mr. Brendtro does not represent any plaintiff that has the legal capacity to challenge a real estate transaction between VOR, Inc. and Grand Valley.

8. Mr. Brendtro's client, Paul O'Farrell, is alleging that he would have been the beneficiary of an estate plan, that would have given him some of the real property, if he had in fact inherited it. (Complaint ¶¶ 92-95, 97.)

9. There is no legal basis to assert a claim that you can bring a lawsuit because you had hoped to inherit certain assets that you in fact didn't inherit.

10. Mr. Brendtro alleges in paragraph 105 of the Complaint that Paul O'Farrell issued a Notice of Rescission to Grand Valley. A copy of the Notice of Rescission is attached as Exhibit E, and Grand Valley's Response Rejecting the Notice of Rescission is attached as Exhibit F.

11. Paul O'Farrell has no legal basis that he can produced for the Court for how a party that had hoped to inherit real property could rescind a contract where the owner of the property sold it, before the beneficiary ever inherited it.

12. To be clear, Exhibit C indicates in paragraph 11 on page 5 of 10 that no personal property was included in the transaction, it only included the real property owned by VOR, Inc.

13. Particularly offensive are Mr. Brendtro's paragraphs 107 and 108 of the Complaint where he is asserting a claim for money damages against his client, VOR, Inc.! He cannot ethically sue his own client in a lawsuit he allegedly started on behalf of that client!

14. Wherefore, Count 2 for Rescission should be dismissed pursuant to SDCL 15-6-12(b).

15. Attorney's fees should be awarded to the Defendants for defending this action, pursuant to SDCL 15-17-51, and as affirmed by the Supreme Court in our recent case of *Healy v. Osborne*, 2019 S.D. 56, ¶¶ 34-38, 934 N.W.2d 557, 566-567.

16. After the Court decides the motion for attorney's fees, counsel for the Defendants will submit an itemized statement of attorney's fees for the Court.

**MOTION TO DISMISS COUNT 3 PURSUANT TO SDCL 15-6-12,
AND FOR ATTORNEY'S FEES PURSUANT TO SDCL 15-17-51**

1. Mr. Brendtro has plead on page 22 of the Complaint a Count 3 for "Tort Damages."

2. Schoenbeck & Erickson, PC represent Raymond O'Farrell, the Estate of Victoria O'Farrell, VOR, Inc., and the Raymond and Victoria O'Farrell Living Trust.

3. Mr. Brendtro does not represent, as he alleges in paragraph 111 of the Complaint, "Raymond, Victoria, her Estate, the Family Trust, and the Trust Corporation.

4. Additionally, "tort damages" is not a cause of action, and the pleadings would not reflect a cause of action that could be asserted.

5. There are no tort claims properly plead against the Raymond and Victoria O'Farrell Living Trust.

6. Wherefore, the Raymond and Victoria O'Farrell Living Trust should be dismissed as a party to this lawsuit, pursuant to SDCL 15-6-12(b).

7. Attorney's fees should be awarded to the Estate for defending this action, pursuant to SDCL 15-17-51, and as affirmed by the Supreme Court in our recent case of *Healy v. Osborne*, 2019 S.D. 56, ¶¶ 34-38, 934 N.W.2d 557, 566-567.

8. After the Court decides the motion for attorney's fees, counsel for the Defendants will submit an itemized statement of attorney's fees for the Court.

**MOTION TO DISMISS COUNT 1 PURSUANT TO SDCL 15-6-12(b),
AND FOR ATTORNEY'S FEES PURSUANT TO SDCL 15-17-51**

1. Count 1 is a collection of claims vaguely asserted by Paul O'Farrell with respect to VOR, Inc., the Raymond and Victoria O'Farrell Living Trust, Victoria O'Farrell's Estate, and concerning occupancy rights of Skyline Cattle Company and Paul O'Farrell, pursuant to a 2022 oral ag lease.

2. As previously identified, Paul O'Farrell is not the personal representative of Victoria O'Farrell's Estate.

3. Paul O'Farrell also sought to intervene in the litigation referred to in paragraph 53 of his Complaint. Attached as Exhibit G is the Order from that proceeding, which hearing Mr. Paul O'Farrell was a party to, and Circuit Court Judge Robert Spears issued the following Order on October 26, 2022:

ORDERED, ADJUDGED, AND DECREED that the Motion to Intervene is denied, as the Trust at issue is a Revocable Living Trust and, at a minimum, it allowed Raymond O'Farrell to withdraw certain assets and assign them to himself, including at least 50% of the shares of VOR, Inc. that were contributed;

4. Paul O'Farrell has unsuccessfully litigated the issue of whether or not the Trust was a revocable trust, and he can't now relitigate that issue in these proceedings.

5. With respect to the occupancy right, Mr. Brendtro in paragraph 85 of his Complaint refers to the Notice received by Skyline Cattle and Paul O'Farrell, which Defendants now attach as Exhibit H.

6. In his pleadings, Mr. Brendtro isn't denying that his clients received Notice pursuant to SDCL 43-32-22.1 terminating the oral ag lease, he is instead

attempting to act on behalf of the corporation and deny that the corporation had the authority to issue the Notice.

7. As dealt with by the Court in the motion above, Mr. Brendtro has no authority to act on behalf of VOR, Inc.

8. Wherefore, Count 1 should be dismissed, pursuant to SDCL 15-6-12(b).

9. Attorney's fees be awarded to Defendants for defending this action, pursuant to SDCL 15-17-51, and as affirmed by the Supreme Court in our recent case of *Healy v. Osborne*, 2019 S.D. 56, ¶¶ 34-38, 934 N.W.2d 557, 566-567.

10. After the Court decides the motion for attorney's fees, counsel for the Defendants will submit an itemized statement of attorney's fees for the Court.

ANSWER

1. The allegations and responses set forth in the five motions above are incorporated herein by this reference, as they apply to many of the allegations contained in Plaintiff Paul O'Farrell's Complaint.

2. VOR, Inc. and the Defendants deny each and every matter in the Complaint, unless specifically admitted.

3. VOR, Inc. and the Defendants admits Paragraphs 17, 21, 22, 23, 40, 52, and 60.

4. VOR, Inc. and the Defendants deny Paragraphs 1, 8, and 11.

5. No response is required to Paragraphs 2 and 16.

6. With respect to Paragraph 3, it is denied that Paul O'Farrell has any interest in the lawsuit.

7. With respect to Paragraph 4, it's denied that Paul O'Farrell is the primary beneficiary of his parents' estate plan, and that he has any standing to raise allegations concerning his parents' estate plan and Revocable Trust. Furthermore, Paul is attempting to relitigate an issue that he already lost, which is res judicata.

8. Paragraph 5 is denied, and Paul has no standing to assert the claims in Paragraph 5, which claims are wrong.

9. With respect to Paragraph 6, it's denied that the Estate has failed to pursue any viable claims, or that Paul has any standing to assert any claim on behalf of Victoria's Estate. Furthermore, pursuant to SDCL 15-6-25, the claims Paul is alleging are time barred.

10. With respect to Paragraph 7, to the extent it alleges that Skyline has paid rent, that is denied, and it's denied that Skyline has any rights to assert or damages to recover with respect to any of the claims in the Complaint.

11. With respect to Paragraphs 9 and 10, it is denied that Raymond O'Farrell is a person in need protection and that he can't do business for himself.

12. Paragraphs 12-15 are denied, as the financial harm was caused by Paul O'Farrell and Skyline Cattle Company.

13. With respect to Paragraph 18, it's admitted that Victoria O'Farrell died in the summer of 2022 and that her probate is being probated in a separate proceeding, see Exhibit B mentioned above. It's denied that there is any viable lawsuit, the lawsuit having been dismissed pursuant to SDCL 15-6-25, and is, therefore, dismissed with prejudice.

14. Paragraph 19 is denied to the extent it alleges Raymond O'Farrell is a person in need of protection. Furthermore, Paul attempted to avoid the statutory of

protections and seek a guardianship without notice to the interested parties, which efforts have been unsuccessful.

15. Paragraph 20 is denied, as Raymond is the Trustee, and as the stock in VOR, Inc. that was in the Revocable Trust is no longer there. (See Exhibits I and J.) The allegations in Paragraph 20 make no sense.

16. With respect to Paragraph 24, it's admitted that they created a Trust, and that at the time it was a key component of their Estate plan.

17. Paragraph 25 is denied to the extent that implies that the shares of stock were owned by anyone other than Raymond O'Farrell.

18. Paragraph 26 is denied, as VOR, Inc. owned the real property referenced in the Complaint.

19. With respect to Paragraphs 27, 29-33, it's irrelevant, as there are no land parcels held by Raymond and Victoria's Family Trust, or any shares in stock in any corporation that owns any land parcels.

20. With respect to Paragraph 28, it's denied that Paul rented and farmed the family's land, to the extent it implies that Paul actually paid rent.

21. With respect to Paragraph 34, it's denied. The reference to the transfer of shares of VOR, Inc. stock has previously been litigated and Paul lost this issue. (See Exhibit G.) Beyond that, the pejorative nature of the paragraph misstates or exaggerates the reality of the real estate transaction.

22. Paragraphs 35-39 are denied and not relevant to any matter in this litigation.

23. Paragraph 41 is denied to the extent that it implies that Raymond and Victoria had anything other than a mutual reliance upon each other.

24. With respect to Paragraphs 42-51, 53, the Paragraphs are denied to the extent they reflect anything other than Paul's attempt to hire counsel to cause a division between Victoria and Raymond.

25. With respect to Paragraphs 54-55, 57, to the extent it's intentionally vague, it misstates the record. Raymond O'Farrell is the Special Administrator of Victoria O'Farrell's Estate. (See Exhibit B.)

26. With respect to Paragraph 56, Paul attempted to litigate this matter at the hearing that resulted in the Order, which is Exhibit G, and the proceedings only appear unusual in the sense that Paul was able to have a frivolous lawsuit filed against his father, Raymond, which his father had to resolve.

27. Paragraphs 58-59 is denied, as the Special Administrator didn't need to be and was not a party to the real property sale. (See Exhibits C and D.)

28. Paragraph 61 is denied, that Paul built the residence and shop at his own expense and that the value "greatly exceeds one million dollars." It is also denied that the structures are on land that is designated for Paul to inherit, as the land has obviously been sold, as the Plaintiff's Complaint admits.

29. With respect to Paragraphs 62-63, the corporation did in fact non-renew the oral lease that Paul O'Farrell and/or Skyline Cattle had with respect to the corporation's land. (See Exhibit H.)

30. Paragraphs 64-67 are denied, as the root cause of these issues is Paul's misuse of the corporate assets and funds. There is no basis to declare the corporation, the Trust, or probate actions invalid, and to unwind the completed real estate transaction. Furthermore, there is no basis to seek money damages.

31. Paragraphs 68-71 can't be responded to because of their vagueness.

32. Paragraphs 72-75 concerning the actions of VOR, Inc. are denied, particularly for the reasons set forth in the motions above.

33. All actions by VOR, Inc. were done according to proper corporate formalities, rules, and statutes, and properly memorialized, with the assistance of corporate counsel.

34. Paragraphs 76-78, with respect to the Raymond and Victoria O'Farrell Living Trust, are denied as, besides being nonsensical, they don't reflect an understanding of the terms of the Revocable Trust, or the rights or lack thereof of any party that purports to be a beneficiary of the Trust.

35. Paragraphs 79-81 are denied. Raymond O'Farrell is serving as the Trustee and is capable to do so.

36. Paragraph 82, with respect to Victoria's Estate, is an improperly plead way to address concerns with respect to an estate, which estate has had no involvement in the actual transactions alleged in the Complaint.

37. Paragraphs 83-87 are denied, as they are based upon the Plaintiff Skyline Cattle Company's efforts to stay in possession of the property after failing to pay rent, and after having received the Notice terminating its right to possession. (See Exhibit H.)

38. Paragraphs 88-89 concerning Paul O'Farrell's occupancy rights are denied, as Paul O'Farrell has no occupancy rights, those rights having been terminated pursuant to Exhibit H.

39. Paragraphs 90-91 are denied, as there is no basis for the allegations.

40. Paragraphs 92-94 are denied, as they are referring to a perspective inheritance as land over which Paul O'Farrell claims an ownership right—which he does not have.

41. Paragraphs 95-98 are denied, as they are Paul O'Farrell's attempt to challenge a real estate transaction that he is not a party to and over which he has no involvement or interest.

42. Paragraph 99 is denied because it's absolutely false and clearly a fiction of Paul O'Farrell's imagination.

43. Paragraph 100 is denied, as there isn't any action taken by Victoria's Estate that could be described as being illegal.

44. Paragraph 101 concerning VOR, Inc.'s ability to engage in a real estate transaction for property it owned is a fiction of the Plaintiff's imagination. A corporation in South Dakota does have the power to sell real property that it owns.

45. Paragraph 102 is denied, and in fact Raymond's consent was procured because he needed to pay off the substantial debts Paul O'Farrell and Skyline Cattle Company ran up, using VOR, Inc.'s property as collateral.

46. Paragraph 103 is denied. The corporation did not make any announcement to the public.

47. Paragraph 104 is denied in part, as a substantial amount of the funds went to pay the debts incurred by Paul O'Farrell and Skyline Cattle Company to the lender holding the mortgage against the property, that was commencing a foreclosure action.

48. With respect to Paragraphs 105-107, the actual Notice of Rescission that Paul O'Farrell, non-owner and non-party to the real estate transaction, sent to Grand Valley Hutterian Brethren, Inc., is attached as Exhibit E, and the rejection of that

recission is attached as Exhibit F. There is no recission and no basis for the relief that Paul O'Farrell seeks.

49. Paragraphs 108-109 are denied. Paul O'Farrell is not entitled to an accounting for the sale of VOR, Inc.'s land, and he has not paid for the capital improvements that he describes, the residence and shop, which in fact were ultimately paid for by VOR, Inc.

50. Paragraphs 110-113 are denied, as they don't describe any actionable tort claim.

51. Paragraph 114 does not require a response, but is contrary to the allegations contained in Paragraphs 105 and 106 in Plaintiff's Complaint.

AFFIRMATIVE DEFENSES

VOR, Inc. and the Defendants assert the following affirmative defenses of lack of standing by Paul O'Farrell to bring the claims, accord and satisfaction, estoppel, failure of consideration, fraud, illegality, laches, res judicata, statute of frauds, statute of limitations, waiver, and collateral estoppel.

COUNTERCLAIM

COUNT 1: Tortious Interference with Contractual Rights

1. The Notice of Recission filed by the Plaintiff (Exhibit H), is an attempt to interfere in the contractual rights of VOR, Inc. as reflected in Exhibit C.

2. The Plaintiff has caused damage to VOR, Inc.'s reputation.

COUNT 2: Barratry

3. Paul's assertions in this lawsuit are frivolous and/or malicious and the Complaint associated with this case has been filed in bad faith and under circumstances

where Paul knew or should have known that he has no authority to seek the relief he's seeking because he can't legally act for the Estate, the Trust, VOR, Inc., or Raymond.

4. Paul's knowledge of his lack of authority is apparent from the fact that he has tried, in previous proceedings, to obtain the authority to act for Raymond and the aforementioned entities and his attempts to gain such authority have been rejected.

5. The allegations made against the Raymond and Victoria O'Farrell Living Trust and VOR, Inc. constitute barratry and, pursuant to SDCL 20-9-6.1, the Trust and VOR, Inc. are entitled to an award of damages in an amount sufficient to compensate for the damages the Trust and VOR, Inc. have suffered, including, but not limited to, the amounts expended to defend against the claims made by Paul.

WHEREFORE, VOR, Inc. and the Defendants pray as follows:

1. Plaintiff's Complaint be dismissed for naught.
2. That the Court award attorney's fees pursuant to SDCL 15-17-51.
3. That the Court grant such other and further relief as is appropriate under the circumstances.

Dated this 5th day of April, 2023.

SCHOENBECK & ERICKSON, PC

/s/ Lee Schoenbeck
Lee Schoenbeck
Joe Erickson
*Attorney for Attorneys for Raymond
O'Farrell, The O'Farrell Trust, VOR,
Inc., and Estate of Victoria O'Farrell*
1200 Mickelson Dr., STE. 310
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(605) 886-0010

TRIAL BY JURY IS DEMANDED ON ALL ISSUES TRIABLE TO THE JURY.

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 5th day of April, 2023, I have served a true and correct copy of the foregoing *Answer, Counterclaim, and Motions of VOR, Inc., Estate of Victoria O'Farrell, and the Raymond and Victoria O'Farrell Living Trust* on the following via electronic means:

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/s/ Lee Schoenbeck
LEE SCHOENBECK

STATE OF SOUTH DAKOTA
THIRD JUDICIAL CIRCUIT COURT

CODINGTON COUNTY COURTHOUSE
14 1st Avenue S.E., Watertown, SD 57201
Fax Number (605) 882-5106

HON. ROBERT L. SPEARS
Circuit Judge
(605) 882-5107
Robert.Spears@ijs.state.sd.us



MICHELLE GAIKOWSKI
Court Reporter
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August 9, 2023

*Ref: Paul O'Farrell, Estate of Victoria O'Farrell, Skyline Cattle Co., Vor Inc.,
v. Kelly O'Farrell, Grand Valley Hutterian Brethren Inc., Raymond & Victoria
O'Farrell Living Trust. 25CIV23-0015.*

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William Beck
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Jack Hleb
One Court Street PO Box 1030
Aberdeen, SD 57402

Counselors, the opinion of the Court regarding the defendants' motions to dismiss the complaint captioned above for failure to state a claim is expressed below. Based on the foregoing rationale, the defendants' motions are granted.

FACTS

The plaintiff is a disgruntled member of the O'Farrell family. He commenced the above captioned lawsuit recently alleging several causes of action. He was, and perhaps still is, the principal in an agricultural venture known as the Skyline Cattle Company. Paul O'Farrell and Skyline Cattle conducted farming and ranching operations on land owned by Vor, Inc. Paul lost money on these operations for several years. His parents Victoria and Raymond allowed Paul to lease the land and even financed his losses by taking out several mortgages on the land his parents owned and leased to him. Things came to a head in early 2022.

Victoria fell and broke her hip. She was hospitalized and then transferred to a nursing facility. Unfortunately, Victoria never recovered and passed away in the spring of 2022. Prior to her passing, Victoria and Paul set up a couple of revocable trusts. Shortly after Victoria's death, Raymond, as the surviving spouse, was appointed by this Court as the Personal Representative of Victoria's Estate. Additionally, prior to Victoria's death, Raymond and Victoria set up individual revocable trusts as part of their respective estate plans and named their children as beneficiaries of the trust. Victoria and Raymond named themselves as trustees.

Shortly after Victoria's death, Raymond withdrew his shares and assets from his trust, removed Paul as president of VOR Inc., put Paul on notice that his lease to use the land for his farming and ranching operations would not be renewed and put the land up for sale. The land was subsequently sold to the defendant, Grand Valley Hutterian Brethren, Inc. (Grand Valley). Raymond also started a probate proceeding regarding Victoria's estate.

This Court has presided over at least three previous hearings concerning these parties, heard from various witnesses concerning several issues and disagreements between the individuals involved in these issues. In addition, this Court will take Judicial Notice of all previous hearings, witness testimony, exhibits, orders, attachments to the pending motions to dismiss, and all things mentioned or referred to in the complaint, answer and counterclaim. This Court conducted a hearing on the defendants' motion to dismiss the complaint on the afternoon of July 11, 2023. Additional facts, as necessary will be developed and discussed in the section below.

ANALYSIS/DECISION

The filing of this lawsuit and the motions to dismiss brought by the defendants raises several problematic and confusing issues for this Court. Generally speaking, the personal representative or a specially appointed administrator are the only persons allowed to bring a claim on behalf of an estate. (*SDCL 29A-3-617, SDCL 29A-3-711*). Paul O'Farrell is neither. Although Paul O'Farrell, one of the plaintiffs, attempted to make this issue as confusing and convoluted as he possibly could,

the analysis on this issue and applicable law is relatively straight forward and simple. The Court does not need to go any further on this issue. Consequently, the Court will dismiss all claims against the Estate Victoria O' Farrell.

Other aspects pertaining to this complaint are equally troubling and problematic for this Court. For example, Paul claims he is the president of Vor, Inc. Based on the record, this simply is not the case. Paul contends the Court must accept that as a fact as stated in the complaint and for the purposes of a 12(b)(5) motion to dismiss, and the Court cannot consider any other documents, records, or exhibits that fall outside the complaint. While this argument may sound appealing and even compelling as far as it goes, such reasoning does not take into account the well- settled law on this issue at best or is just flat wrong at worse. Trial courts can, and in many cases must, to achieve a just result, consider public records whose authentication cannot be reasonably questioned, and that includes exhibits or documents in the court records and things mentioned in the complaint, answer, or counterclaim even though such items are not attached to the complaint. (*Waldner v. N.Am. Truck and Traylor, Inc.* 277 F.R.D 401 (D.S.D), (*Nooney v. StubHub, Inc.*, 2015 S.D. 102).

Therefore, applying the above standards to the facts presented in this case, it is clear that Paul is not the president of Vor, Inc. and does not have the authority to bring a lawsuit on Vor's behalf. In addition, Paul's complaint names Vor, Inc. as a plaintiff, yet, in the complaint Paul has named Vor, Inc. as a defendant in the same complaint. This simply is an untenable legal position,

defies logic and is disingenuous. A complaint must not be based on mere speculation and the complaint must be plausible on its face. (*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, (2007)). The way this complaint is worded, its practical effect is treating Vor, Inc. as both a plaintiff and a defendant. Thus, the complaint as it applies to Vor, Inc., is not plausible on its face and Vor, Inc. is dismissed as both a plaintiff and a defendant.

Moreover, the Court will dismiss Count 1 of the Complaint in its entirety as to all defendants. Specifically, as Count 1 applies to the Estate of Victoria O'Farrell, actions must be brought within the estate/probate proceeding. This was not done as required by statute. As to Vor, Inc., the allegations contain multiple instances wherein legal conclusions are simply stated and devoid of specific facts to support such allegations, or are refuted by the public records, exhibits and attachments submitted by Vor in favor of its motion to dismiss. As stated above, this Court can consider such documents and is free to ignore legal conclusions cloaked as factual allegations. (*See Ashcroft v. Iqbal*, 556 U.S. 662, (2009)).

Likewise, this Court will dismiss the count in the complaint alleging tort damages. Such a charge is not recognized as an independent cause of action under South Dakota Law. Additionally, under our well-settled rules of pleadings, a complaint can include general allegations, but the complaint must put the defendants on notice as to exactly what is being alleged and put the defendants on notice as to what they should defend against. (*Kaiser Trucking Inc. v. Liberty Mutual Fire Insurance Company*, 981 N.W.2d 645, 2022 SD 64).

As to the claim of rescission stated in Paul's complaint, the Court will dismiss that count as it applies to Vor, Inc. The rescission claim in the complaint pertains to the sale of real estate. The parties to the sales contract were Vor, Inc. and the Grand Valley Hutterian Brethren, Inc. As I determined above, Paul is not the president of Vor, Inc. and has no authority to act on its behalf. I already dismissed the rescission claim against Grand Valley for the reasons stated on the record at the close of the hearing I conducted on July 11, 2023.

It is the intent of this Court to dismiss all claims brought by the plaintiff against all named defendants for the reasons stated herein. It is also the intent of this Court to certify this decision for immediate appeal pursuant to *SDCL 15-6-54(b)* for the following reasons. All the parties are linked together, (other than Grand Valley), as family members, heirs or beneficiaries of Victoria's Trust. As such, while it is true that Vor, Inc., the Victoria O'Farrell Trust, Victoria O'Farrell Estate, have all filed a counterclaim that has not been dismissed, certification for an appeal without delay will allow the resolution of the remaining issues in the sense that Victoria's Estate and Trust will know if they will be allowed a set-off once Victoria's Estate and Trust is administered and distributed.

Moreover, interest rates, attorney fees and other economic consequences continue to accrue if this Court does not certify the claims asserted by Plaintiff for an immediate appeal that are dismissed in this opinion. For example, Grand Valley is entitled to an immediate appellate decision on the Plaintiff's rescission claim. This Court will note that a similar claim involving this same real estate is already

on appeal regarding Paul O'Farrell's eviction from this same real estate. Additionally, it is the Court's opinion that if the certain claims and issues dismissed by this Court in this Memo Opinion are not certified for an immediate appeal, in all likelihood, this Court will have to hear and resolve the same or similar issues another time. As far as this Court is concerned, I have already done so on more than one occasion.

Finally, Vor, Inc. and Victoria's Estate are seeking attorney fees. These plaintiffs contend that the complaint filed in this matter was frivolous. The Court agrees with that assertion, at least to those aspects of the complaint that pertain to naming Vor, Inc. as a plaintiff, then treating Vor, Inc. as a defendant in the sense the complaint is seeking monetary damages from Vor. Additionally, this Court determines the portion of the complaint that names the Estate of Victoria O'Farrell as plaintiff is frivolous in the sense that only the personal representative or a specially appointed administrator can bring such a claim and the Estate incurred unnecessary legal expenses in dismissing the complaint. Consequently, Mr. Erickson shall file his time charges along with a supporting affidavit within the time prescribed by law and serve the same upon Paul O'Farrell. Once served and if he objects within the time prescribed by law, Paul O'Farrell shall file and serve an objection, schedule and notice a hearing.

CONCLUSION

Based on the foregoing, the motions to dismiss the complaint for failure to state a claim upon which relief pertaining to the above- mentioned defendants

are granted. In addition, Judicial Economy, along with the legal resources, expended by the parties are best served by this Court as stated in this Memo Opinion and for the reasons stated at the hearing on July 11, 2023, by certifying this decision as the final order of the Court for an immediate appeal under *SDCL 15-6-54(b)*. Mr. Erickson shall prepare findings of fact and conclusions of law, (unless waived), along with an Order consistent with this writing. Additionally, Mr. Beck will prepare the appropriate Order, findings of fact and conclusions of law, (unless waived), pertaining to the *SDCL 15-6-54(b)* Certification and consistent with this writing.


Robert L. Spears

Circuit Court Judge

STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF GRANT

FIFTH JUDICIAL CIRCUIT

PAUL O'FARRELL, individually; and, as a beneficiary of the family trust; and, for the benefit of the Estate of Victoria O'Farrell; SKYLINE CATTLE COMPANY, a South Dakota corporation; & VOR, INC., a South Dakota corporation,

25CIV 23-15

Plaintiffs,

DEFENDANT GRAND VALLEY HUTTERIAN BRETHREN, INC.'S MOTION TO DISMISS

vs.

KELLY O'FARRELL, an individual; GRAND VALLEY HUTTERIAN BRETHREN, INC.; a South Dakota corporation; & THE RAYMOND AND VICTORIA O'FARRELL LIVING TRUST, a South Dakota trust, by and through its trustee; and any other necessary parties.

Defendants.

Defendant Grand Valley Hutterian Brethren, Inc., hereby moves the Court, pursuant to SDCL 15-6-12(b)(5), for dismissal of Plaintiffs' Complaint against Grand Valley on the grounds the Plaintiffs' Complaint fails to state a claim upon which relief can be granted.

This Motion will be supported by a Brief that will be subsequently filed.

Dated this 10th day of April 2023.

SIEGEL, BARNETT & SCHUTZ, L.L.P.

/s/ Reed Rasmussen

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CERTIFICATE OF SERVICE

The undersigned, attorneys for Defendant Grand Valley Hutterian Brethren, Inc., hereby certifies that on the 10th day of April 2023, a true and correct copy of the foregoing DEFENDANT GRAND VALLEY HUTTERIAN BRETHREN, INC.'S MOTION TO DISMISS was served via Odyssey File and Serve on the following:

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Dated this 10th day of April 2023.

SIEGEL, BARNETT & SCHUTZ, L.L.P.

/s/ Reed Rasmussen

STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF GRANT

FIFTH JUDICIAL CIRCUIT

PAUL O’FARRELL, individually; and, as a beneficiary of the family trust; and, for the benefit of the Estate of Victoria O’Farrell; SKYLINE CATTLE COMPANY, a South Dakota corporation; & VOR, INC., a South Dakota corporation,

25CIV 23-15

Plaintiffs,

BRIEF IN SUPPORT OF GRAND VALLEY HUTTERIAN BRETHREN’S MOTION TO DISMISS

vs.

KELLY O’FARRELL, an individual; GRAND VALLEY HUTTERIAN BRETHREN, INC.; a South Dakota corporation; & THE RAYMOND AND VICTORIA O’FARRELL LIVING TRUST, a South Dakota trust, by and through its trustee; and any other necessary parties.

Defendants.

The Grand Valley Hutterian Brethren, Inc. (“Hutterian Brethren”), has moved to dismiss the complaint filed by Paul O’Farrell, Skyline Cattle Company, and vOr, Inc. (collectively, “Paul”) under SDCL § 15-6-12 and offer this brief in support of that motion.

1. In the Complaint, Paul alleges that “[t]he nature of this lawsuit is three-fold:
 - *First*, to declare ‘void’ the improper corporate/trust maneuvers (Count 1, below);
 - *Second*, to rescind and unwind the \$3.2 million real estate transaction (Count 2);
 - And *third*, to recover damages for the injured parties (Count 3).” (Complaint, ¶ 2).

2. As will be explained herein, Count 1 alleges no claim against the Hutterian Brethren, Count 2 pleads a remedy, but no valid cause of action, and Count 3 expressly disclaims

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damages against the Hutterian Brethren. Even if rescission is a cause of action, neither Paul nor the allegations of Count 2 state an actionable claim for rescission against the Hutterian Brethren.

3. Raymond and Victoria O'Farrell owned approximately 1,000 acres of farmland in Grant County, South Dakota (the "Property"). (Complaint, ¶ 26). Raymond and Victoria put the Property into a corporation named vOr, Inc. ("vOr"). (Complaint, ¶ 25). Raymond and Victoria owned all the shares of vOr and deposited these shares of vOr into the Raymond and Victoria Living Trust ("Revocable Trust"), which was a revocable trust created in 2011. (Complaint, ¶¶ 4, 24–25; *see also* Raymond and Victoria O'Farrell Living Trust, Ex. A).

4. The Revocable Trust conditionally designated the majority of the Property to be inherited by their son, Paul, which included nine contiguous parcels comprising 703.33 acres.¹ (Complaint, ¶ 29, 92). The Revocable Trust also conditionally designated two other quarters of ground to be inherited by Raymond and Victoria's other children, Lance, Marcie, Kelly, and Rita. (Complaint, ¶ 27, 29). The Revocable Trust granted Paul an option to purchase those two parcels. (Complaint, ¶ 29).²

5. Victoria died on July 11, 2022. (Complaint, ¶ 52). By operation of the Revocable Trust, Victoria's shares of vOr and her beneficial interest in the Revocable Trust went to Raymond. (*See* Raymond and Victoria O'Farrell Living Trust, Ex. A). Raymond removed all shares of vOr from the Revocable Trust. (Complaint, ¶ 34).

¹ The four conditions that must have occurred in order for Paul and his siblings to inherit the Property under the terms of the Revocable Trust were: (1) one of the parents had to die, (2) the other parent had to die, (3) the terms of the Revocable Trust must have remained unchanged upon the death of both parents, (4) the shares of vOr, which owned the Property, must have remained in the Revocable Trust.

² Lance, Marcie, and Rita are not parties to this action, or any of the related actions. The Court cannot grant full and adequate relief without the siblings being a party to this action. If the Court deems Paul to have an interest in the Property, the siblings would also have a similar interest in the Property pursuant to the terms of the Revocable Trust.

6. On or about August 12, 2022, the Hutterian Brethren executed a Purchase Agreement for the sale of the nine contiguous parcels for \$3.2 million ("Purchase Agreement"). (Complaint, ¶ 95; *see also* Purchase Agreement, Ex. B). The Purchase Agreement also gave the Hutterian Brethren a right of first refusal to purchase the other two parcels of land held by vOr and leased the two parcels to the Hutterian Brethren. (Complaint, ¶ 97, 98; *see also* Purchase Agreement, Ex. B).³

7. As the only owner of vOr, Raymond signed the Purchase Agreement on behalf of vOr in his capacity as President of vOr. (Complaint, ¶ 96; *see also* Purchase Agreement, Ex. B).

8. The land sale transaction closed in October 2022. (Complaint, ¶ 59).

9. It is clear that Paul's claims and issues raised in the Complaint are against Paul's brother, Kelly O'Farrell ("Kelly"). (*See* Complaint, ¶¶ 1, 8, 11–13, 34, 36–39, 42–46, 64, 111–12). Paul claims that "[i]n 2022, . . . Kelly O'Farrell manipulated his father Raymond and engaged in other misconduct, in order to set in motion an improper and illegal set of maneuvers, all of which were designed to enrich himself at the expense of his parents and his brother Paul." (Complaint, ¶ 8).

10. Paul asserts that Kelly was at the center of all the various maneuvers taken by Raymond, the Revocable Trust, vOr, Victoria, and the Estate of Victoria O'Farrell, *see* Complaint, ¶ 11, and Kelly "secretly began an orchestrated effort to alienate and isolate Raymond from his family, with the intent of thwarting various features of Raymond and Victoria's Estate plan and disrupting farming operations. This included, for example: 'removing' shares of vOr, Inc., from the Trust; 'separating' Raymond's and Victoria's assets; interfering in

³ The Hutterian Brethren and vOr initiated eviction proceedings, *vOr, Inc. and Grand Valley Hutterian Brethren v. Paul O'Farrell and Skyline Cattle Company* case number 25CIV23-000018, to evict Paul and Skyline Cattle Company from the Property. The Court ordered Paul and Skyline Cattle Company to vacate the Property. The Hutterian Brethren request this Court take judicial notice of the eviction proceedings pursuant to SDCL § 19-19-201.

Paul's lending and farming activities; 'removing' Paul and Victoria as officers and directors of vOr, Inc.; attempting to fire the attorneys that Victoria hired to stop all of this; and, ultimately, signing a secret agreement to sell nine parcels of family farm ground to the Hutterite Brethren." (Complaint, ¶ 34).

11. Paul further asserts the Purchase Agreement signed between vOr and the Hutterian Brethren on August 12, 2022, was kept secret, no authority was obtained via the probate process, and no notice was given until after the closing occurred in October 2022. (Complaint, ¶ 59). However, because Raymond owned all of Victoria's shares of vOr by operation of the Revocable Trust, and vOr owned all of the Property, the sale of the Property was not subject to the probate process.

12. Paul sent a wholly defective Notice of Rescission to the Hutterian Brethren, ostensibly on behalf of vOr, and offered to restore to them that which vOr received from them under the contract, upon the condition that they shall do likewise. (Complaint, ¶ 105; *see also* Notice of Rescission, Ex. C).

13. Paul did not include First International Bank in the Notice of Rescission.

14. Paul did not include his siblings or Raymond in the Notice of Rescission.

15. Paul has not tendered the \$3.2 million to the Hutterian Brethren.

16. Paul has not alleged that he has approval to restore the \$3.2 million or that he has \$3.2 million to give to the Hutterian Brethren on behalf of vOr.

17. Paul's Complaint requests the Court to rescind the land transaction and for the Court to "impose a constructive trust on the deeds of the land conveyed, as well as upon any funds flowing from the transaction." (Complaint, ¶ 106).

18. Alternatively, Paul requests “[i]f rescission is not available, then, in that case Paul O’Farrell is entitled to an award of damages for unjust enrichment, and, otherwise.” (Complaint, ¶ 107).

19. Paul claims damages are available for Raymond⁴, Victoria, Victoria’s Estate, the Revocable Trust, and vOr based on Kelly’s acts, and “[d]iscovery will determine the extent and nature of the tort claims. . . . Such damages would be available as a result of conversion, breach of fiduciary duty, and tortious interference with their expected and established relationships.” (Complaint, ¶ 111).

20. He also claims “[d]amages . . . appear to be available to Skyline Cattle and Paul O’Farrell as a result of Kelly O’Farrell’s tortious interference in their expected and established relationships.” (Complaint, ¶ 112).

21. However, Paul expressly disclaims any tort damages against the Hutterian Brethren. (Complaint, ¶ 114). He states, “**No tort damages are sought from the Hutterite Brethren, and Paul sincerely apologizes that they must be made a part of this ordeal.**” (*Id.*) (emphasis in original).

ARGUMENT

22. “A motion to dismiss under SDCL 15-6-12(b) tests the legal sufficiency of the pleading, not the facts which support it. For purposes of the pleading, the court must treat as true all facts properly pled in the complaint and resolve all doubts in favor of the pleader.” *LP6 Claimants, LLC v. S.D. Dep’t of Tourism*, 2020 S.D. 38, ¶ 11, 945 N.W.2d 911 (quoting *Guthmiller v. Deloitte & Touche, LLP*, 2005 S.D. 77, ¶ 4, 699 N.W.2d 493).

⁴ Raymond is not a party to this lawsuit.

23. To survive a motion to dismiss under SDCL 15-6-12(b)(5), a “complaint . . . does not need detailed factual allegations, [rather,] a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do (on a motion to dismiss, courts ‘are not bound to accept as true a legal conclusion couched as a factual allegation’). Factual allegations must be enough to raise a right to relief above the speculative level[.] [T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action on the assumption that all the allegations in the complaint are true (even if doubtful in fact)[.]” *Sisney v. Best Inc.*, 2008 S.D. 70, ¶ 7, 754 N.W.2d 804, 808 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 553, 127 S. Ct. 1955, 1964–65, 167 L. Ed. 2d 929 (2007) (alterations in original)).

24. While a court must accept allegations of fact as true, the court “is free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations.” *Nygaard v. Sioux Valley Hosps. & Health Sys.*, 2007 S.D. 34, ¶ 9, 731 N.W.2d 184 (quoting *Wiles v. Capitol Indemnity Corp.*, 280 F.3d 868, 870 (8th Cir. 2002)).

25. Additionally, for a court to have subject matter jurisdiction over a case, the plaintiff must establish standing as an aggrieved person. *Cable v. Union Cty. Bd. of Cty. Comm'rs*, 2009 S.D. 59, ¶ 21, 769 N.W.2d 817, 825. “Standing to sue is part of the common understanding of what it takes to make a justiciable case.” *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102, 118 S. Ct. 1003, 1016, 140 L. Ed. 2d 210 (1998). To establish standing, the plaintiff must show (1) injury-in-fact, (2) causation, and (3) redressability. *Cable*, 2009 S.D. 59, ¶ 21, 769 N.W.2d at 825–26. Injury in fact is “an invasion of a legally protected interest

which is (a) concrete and particularized and (b) actual or imminent, not ‘conjectural’ or ‘hypothetical.’” *Id.* (citation omitted). Second, a causal connection must exist between the plaintiff’s injury and the conduct in the plaintiff’s complaint. *Id.* The causal connection is met “when the injury is ‘fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.’” *Id.* (citation omitted). Finally, redressability is met when the plaintiff shows “it is likely, and not merely speculative, that the injury will be redressed by a favorable decision.” *Id.*

COUNT ONE

26. Count One of Paul’s Complaint pleads no action against the Hutterian Brethren. (See Complaint, ¶¶ 68–91).

COUNT TWO

27. In Count Two, Paul requests the Court to rescind the land transaction, arguing that “Raymond’s consent for the transaction was procured via undue influence, or without his full understanding, and without following necessary corporate formalities.” (Complaint, ¶¶ 102, 106).

28. “A contract may be extinguished . . . by rescission, alteration, and cancellation, as provided by statute.” SDCL § 53-11-1.

29. An action for rescission may be brought as a legal action under SDCL chapter 53–11, or as an equitable action pursuant to SDCL chapter 21–12. *Jones v. Bohn*, 311 N.W.2d 211, 213 (S.D. 1981). “If the action is in equity, the rescission is accomplished by court decree. When an action is brought pursuant to SDCL ch. 53-11, however, the rescission has already been accomplished by the unilateral act of one of the parties to the contract. The rescinding party

brings the legal action for rescission to enforce his rights arising from the rescission.” *Id.*
(emphasis added).

30. Rescission is a remedy that may be available to a party to a contract only after the party establishes grounds for rescission as provided in SDCL ch. 53–11 or SDCL ch. 21–12.

31. Pursuant to SDCL § 21-12-1,

The rescission of a written contract may be adjudged on the application of a party aggrieved:

- (1) In any of the cases mentioned in § 53-11-2;
- (2) Where the contract is unlawful, for causes not apparent upon its face, and the parties were not equally in fault;
- (3) When the public interest will be prejudiced by permitting it to stand.

32. Under SDCL § 53-11-2,

A party to a contract may rescind the same in the following cases only:

- (1) If consent of the party rescinding or of any party jointly contracting with him was given by mistake or obtained through duress, fraud, or undue influence exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party;
- (2) If through fault of the party as to whom he rescinds, the consideration for his obligation fails in whole or in part;
- (3) If the consideration becomes entirely void from any cause;
- (4) If such consideration before it is rendered to him fails in a material respect from any cause; or
- (5) By consent of all the other parties.

(Emphasis added.)

33. “Rescission, when not effected by consent can be accomplished only by the use, on the part of the party rescinding, of reasonable diligence to comply with §§ 53-11-4 and 53-11-5.” SDCL § 53-11-3 (emphasis added).

34. “The party rescinding a contract must rescind promptly, upon discovering the facts which entitle him to rescind, if he is free from duress, undue influence, or disability, and is aware of his right to rescind.” SDCL § 53-11-4.

35. Pursuant to SDCL § 53-11-5, “[t]he party rescinding a contract must restore to the other party everything of value which he has received from him under the contract, or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so.” *See also Halvorson v. Birkland*, 84 S.D. 328, 333, 171 N.W.2d 77, 80 (1969) (“As a condition to rescission ‘the party rescinding a contract must restore to the other party everything of value which he has received from him under the contract’.” (citation omitted)).

36. To date, Paul has not tendered the \$3.2 million to the Hutterian Brethren if he was the proper party to rescind the contract.

37. Raymond O’Farrell signed the Purchase Agreement on vOr’s behalf in his capacity as President of vOr. (Complaint, ¶ 96; *see also* Purchase Agreement, Ex. B).

38. No party to the land sale transaction has rescinded the Purchase Agreement or sought to unwind the land sale transaction.⁵

39. Paul’s attempt to rescind the land sale transaction through the Notice of Rescission was insufficient under SDCL ch. 53-11 because he was not a party to the Purchase Agreement, and therefore, has no authority or rights to rescind the contract.

40. Paul does not, and did not, own any shares of vOr. Paul was not the President of vOr at the time of execution of the Purchase Agreement. Paul is not a director, owner, or shareholder of vOr. As such, Paul did not possess the authority to enter into the Purchase Agreement on behalf of vOr and accordingly lacks any authority to challenge and rescind the Purchase Agreement on behalf of any party to the contract.

⁵ Paul is essentially seeking to rescind the entire land sale transaction, which includes the Purchase Agreement. However, there are several parties that are not included in this action whose interests would be affected if this Court grants rescission of the entire transaction.

41. Paul has not, and cannot, restore the consideration paid by Hutterian Brethren to vOr as required by SDCL § 53-11-5 because he has no rights or authority over the \$3.2 million nor did he receive anything of value from the Hutterian Brethren in the transaction.

42. Before rescission can be granted, this Court must determine whether there are sufficient grounds to award the extraordinary remedy of rescission. *See Knudsen v. Jensen*, 521 N.W.2d 415, 418 (S.D. 1994) (“The equitable relief of rescission, being extraordinary, should never be granted, except where the evidence is clear and convincing.”).

43. Paul claims Raymond’s consent was obtained via undue influence. Undue influence exists:

- (1) In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him; or
- (2) In taking an unfair advantage of another's weakness of mind; or
- (3) In taking a grossly oppressive and unfair advantage of another's necessities or distress.

SDCL § 53-4-7.

44. The Complaint fails to plead sufficient grounds for this Court to determine whether rescission is appropriate based upon undue influence under either SDCL ch. 21-12 or SDCL ch. 53-11.

45. Paul’s bare assertions that Kelly exerted undue influence over Raymond are insufficient to justify the extraordinary remedy of rescission under SDCL § 22-12-2 or SDCL § 53-11-2. Again, Raymond is not a party to this lawsuit and Paul has no authority to make a claim of undue influence on behalf of Raymond.

46. The Hutterian Brethren are not wrongdoers. Even if the Court finds that Raymond did not have authority to sell the Property or the sale was a result of undue influence,

the Hutterian Brethren are bona fide good faith purchasers and rescission is not an appropriate remedy.

47. “[S]ince Territorial days, this jurisdiction has operated under a legal system where a purchaser of realty, for value and without notice of restrictions, has a right to rely on a grant that is unconditional on its face.” *Vanderwerf v. Kirwan*, 1998 S.D. 119, ¶ 19, 586 N.W.2d 858, 862. Under South Dakota law, if “[a person] purchased the land for a valuable consideration, without knowledge of the fraud that had been practiced . . . and without knowledge of facts or circumstances sufficient to put an ordinarily prudent man upon inquiry as to the manner in which [the seller] procured the land, then he must prevail, and the [defrauded parties] only remedy is an action against [the wrongdoer] to recover the damage they have suffered.” *Id.* ¶ 16 (quoting *Whitford v. Dodson*, 44 S.D. 12, 17–8, 181 N.W. 962, 964 (S.D. 1921) (alterations in original)).

48. The Complaint does not allege that the Hutterian Brethren are wrongdoers or had any notice of any alleged undue influence or fraud. In fact, the Complaint explicitly excludes the Hutterian Brethren from any allegations of wrongdoing and apologizes for involving them in the litigation. (*See* Complaint, ¶ 114). This reinforces the Hutterian Brethren’s status as an innocent party, and shows Paul’s acknowledgment that his remedies lie solely with the alleged wrongdoers—not the Hutterian Brethren. Paul cannot obtain relief at the expense of innocent parties. *See Whitford*, 44 S.D. 12, 17–8, 181 N.W. 962, 964. If there was fraud or undue influence in the relation to the sale of the Property, Paul’s remedy would not lie in rescission against the Hutterian Brethren. Rather, Paul’s remedy would lie with any alleged wrongdoers.

49. Paul further alleges that he was damaged by the sale of the Property as a beneficiary of the Revocable Trust because he was set to inherit the Property pursuant to the terms of the Revocable Trust. (Complaint, ¶¶ 3, 4). However, the Revocable Trust was

revocable, and Paul has no enforceable interest until the Revocable Trust becomes irrevocable upon Raymond's death.

50. The South Dakota Supreme Court has declared that “[s]tanding is established through being a ‘real party in interest’ ‘The real party in interest requirement for standing is satisfied if the litigant can show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.’ ” *In re Florence Y. Wallbaum Revocable Living Tr. Agreement*, 2012 S.D. 18, ¶ 40, 813 N.W.2d 111, 121 (citation omitted).

51. Paul is not a real party in interest. He was not a trustee of the Revocable Trust. Paul had no interest in the Property as vOr was the sole owner of the Property and the Revocable Trust holds no shares of vOr. Therefore, Paul suffered no “actual or threatened injury” by the land sale transaction based on his status as a remainder beneficiary and has no standing to challenge the land sale transaction. *See In re Florence Y. Wallbaum Revocable Living Tr. Agreement*, 2012 S.D. 18, ¶ 41, 813 N.W.2d at 121 (finding the remainder beneficiaries had no standing to challenge the trustee's actions because they had no interest in the income distributed to the beneficiary of a revocable trust, even though the distributions did not adhere to the terms of the trust).

52. Paul's Complaint fails to show that he is entitled to rescission of the land sale transaction. As such, this Court should grant this Motion to Dismiss for failure to state a claim upon which relief can be granted.

COUNT THREE

53. In Count Three of the Complaint, Paul seeks damages on behalf of the Plaintiffs. (Complaint, ¶ 110–114). However, Paul expressly disclaimed any tort damages against the Hutterian Brethren stating “**[n]o tort damages are sought from the Hutterite Brethren, and**

Paul sincerely apologizes that they must be made a part of this ordeal.” (Complaint, ¶ 114)

(emphasis in original).

RULE 54(b) CERTIFICATION

54. The Hutterian Brethren request this Court to issue a SDCL § 15-6-54(b) certification to allow for any appeal of the Court's order on this Motion to Dismiss to be appealed to the South Dakota Supreme Court in conjunction with *vOr, Inc. and Grand Valley Hutterian Brethren v. Paul O'Farrell and Skyline Cattle Company* case number 25CIV23-000018, which is stayed on appeal before the South Dakota Supreme Court.

55. “When multiple claims for relief or multiple parties are involved in an action, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.” SDCL § 15-6-54(b).

56. The South Dakota Supreme Court has identified five factors to guide courts in a Rule 54(b) certification analysis:

(1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the [trial] court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in setoff against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.

First Nat'l Bank v. Inghram, 2022 S.D. 2, ¶ 31, 969 N.W.2d 471, 479 (quoting *Nelson v. Est. of Campbell*, 2021 S.D. 47, ¶ 28, 963 N.W.2d 560, 568–69).

57. “[T]he rule in this state does not permit a single cause of action to be split or divided among several suits.” *Sodak Distrib. Co. v. Wayne*, 77 S.D. 496, 499, 93 N.W.2d 791, 793 (1958).

58. In this case, a Rule 54(b) certification is appropriate because this is a time sensitive matter as the parties are dealing with farmland and crop seasons. If this Court denies this Motion to Dismiss and allows Paul's cause of action to proceed against the Hutterian Brethren, the status of the Property under the challenged the land sale transaction will remain unknown. Allowing a certification of final judgment on this single issue would improve the administration of justice as an appeal of this Motion would affect the appeal of the eviction proceedings as both cases involve the same Property and rights of the Hutterian Brethren in the Property. See *First Nat'l Bank*, 2022 S.D. 2, ¶ 31, 969 N.W.2d at 479 (“The purpose of Rule 54(b) certification is to ‘improve[] [the] administration of justice[.]’” (citation omitted)).

CONCLUSION

59. This Court should grant this Motion to Dismiss because rescission is not available to Paul, and in any event, Paul has not claimed the Hutterian Brethren are wrongdoers or requested any damages against the Hutterian Brethren. Accordingly, the Hutterian Brethren respectfully requests this Court dismiss with prejudice any claims pled or could be asserted by Paul against the Hutterian Brethren.

Dated this 23rd day of June, 2023.

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STATE OF SOUTH DAKOTA COUNTY OF GRANT	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
PAUL O'FARRELL, individually; and, as a beneficiary of the family trust; and, for the benefit of the Estate of Victoria O'Farrell; SKYLINE CATTLE COMPANY, a South Dakota corporation; & VOR, INC., a South Dakota corporation, Plaintiffs, vs. KELLY O'FARRELL, an individual; GRAND VALLEY HUTTERIAN BRETHREN, INC.; a South Dakota corporation; & THE RAYMOND AND VICTORIA O'FARRELL LIVING TRUST, a South Dakota trust, by and through its trustee; and any other necessary parties. Defendants.	25CIV 23-15 REPLY BRIEF IN SUPPORT OF GRAND VALLEY HUTTERIAN BRETHREN'S MOTION TO DISMISS

The Hutterian Brethren offer this reply brief in support of their motion to dismiss. The Court should remove the Hutterian Brethren from this family conflict between the O'Farrells by dismissing any request for the remedy of rescission from this lawsuit and against any party to this lawsuit.

1. Timeliness

Belying the weakness of his substantive arguments, Paul complains about the timing of the Hutterian Brethren's brief. Yet, the Defendants filed a notice of hearing on April 12, 2023 saying that the briefs would be filed in advance of the hearing in the time limits allowed by law. Paul did not complain when he received that notice of hearing. Paul does not claim that he has been prejudiced by the timing of the Hutterian Brethren's brief. Paul did not ask for the hearing to be

rescheduled, which, at best, would be his remedy if the Court found that the Hutterian Brethren's brief was filed late and to the prejudice of Paul.

Indeed, Paul's own Brief is untimely. Under SDCL §§ 15-6-6(a) and 1-5-1 and because of the court closure on July 3, 2023, Paul's response was due on or before June 30, 2023. Paul did not file his brief until July 3, 2023, making his submission untimely.

Under SDCL § 15-6-6(d), the Court has the discretion to permit different periods of time for the filing of motions and briefs. Because no party can claim to be prejudiced by the timing of any other parties' filings, the Court should deem all filings made to date timely.

2. Documents.

Also belying the weakness of his substantive arguments, Paul complains about the exhibits to the Hutterian Brethren's brief.¹ It is well-settled that, in ruling on a motion to dismiss under SDCL § 15-6-12(b), this Court "may consider documents or attachments incorporated by reference in the pleadings when deciding a motion to dismiss." *Healy Ranch P'ship v. Mines*, 2022 S.D. 44, ¶ 43, 978 N.W.2d 768, 780 n.10. *See also Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 322, 127 S. Ct. 2499, 2509, 168 L. Ed. 2d 179 (2007) ("courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice."); *Standard Fire Ins. Co. v. Cont'l Res., Inc.*, 2017 S.D. 41, ¶ 10, 898 N.W.2d 734, 737 (upholding trial court's review of the pleadings, the attachments to the pleadings, and documents incorporated by reference in the pleadings on a 12(b)(5) motion.); *Nooney v. StubHub, Inc.*, 2015 S.D. 102, ¶ 8, 873 N.W.2d 497, 499 (considering documents

¹ Ironically, Paul challenges the Court's consideration of uncontested documents, yet he references the Affidavit of Victoria O'Farrell. Victoria's affidavit is not an uncontested document, but instead is inadmissible hearsay under SDCL § 19-19-802.

incorporated by reference in the complaint); 5B Fed. Prac. & Proc. Civ. § 1357 (3d ed.) (courts may consider matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned; these items may be considered by the district judge without converting the motion into one for summary judgment.). In fact, the Eighth Circuit Court of Appeals has held

In a case involving a contract, the court may examine the contract documents in deciding a motion to dismiss. This is true even if contract documents not attached to the complaint refute a breach-of-contract claim, or a claim that defendant breached a statutory or common law duty.

Zean v. Fairview Health Servs., 858 F.3d 520, 526 (8th Cir. 2017). Similarly, where a trust document is involved, the Eighth Circuit has held that it necessarily must be considered:

The Employer Trustees did not attach the Trust Agreement to their complaint, instead attaching it only to their response in opposition to the Union Trustees' motion to dismiss. In deciding a motion to dismiss, courts ordinarily do not consider matters outside the pleadings. *See* Fed. R. Civ. P. 12(d). However, "documents necessarily embraced by the complaint are not matters outside the pleading[s]. Documents necessarily embraced by the pleadings include 'documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading.'" *Ashanti v. City of Golden Valley*, 666 F.3d 1148, 1151 (8th Cir. 2012) (citations omitted). Here, the content of several provisions of the Trust Agreement was alleged in the complaint. Additionally, no party has questioned the Trust Agreement's authenticity. Accordingly, we will consider the entire Trust Agreement because it was necessarily embraced by the pleadings.

Gillick v. Elliott, 1 F.4th 608, 610 (8th Cir. 2021). Thus, Paul's position that this Court is hamstrung in its analysis of his complaint or the very documents he is relying on to claim standing, is untenable and contrary to well-settled caselaw.

Although Paul's supposed claims surround his parents' trust document, the purchase agreement, and the purported Notice of Rescission, he argues this Court cannot consider them and suggests that testimony is required to prove their authenticity. Other than raising this concept,

Paul does nothing to challenge the authenticity of any of the exhibits submitted by the Hutterian Brethren or even allege that these documents are not what they purport to be. Paul's arguments on this point are a distraction and an improper attempt to force the Hutterian Brethren's motion to dismiss into a motion for summary judgment and all the time and expense that a summary judgment motion and any discovery leading up to it would entail. *Compare to Zean v. Fairview Health Servs.*, 858 F.3d 520, 527 (8th Cir. 2017) (recognizing plaintiff's arguments regarding authenticity were "a bogus issue[]" in case where court considered contract documents outside complaint and plaintiff failed to challenge authenticity of the same which directly refuted plaintiff's conclusory allegations in the complaint). *See also* SDCL 15-6-1.

Ultimately, this Court has ample authority to consider the documents attached to the Hutterian Brethren's brief, and it is not required to convert the pending motion into one for summary judgment. Paul, by the very nature of his complaint and recent filing, has not challenged their authenticity and has placed them at the center of this case. And, Paul has not explained why discovery and a motion for summary judgment are necessary to determine that the Hutterian Brethren are entitled to dismissal of any rescission request. *See* SDCL 15-6-56(f).

3. Cause of Action.

Paul's first substantive argument appears to be that counts 1 and 2 of his complaint somehow combine to state a cause of action against the Hutterian Brethren. However, neither the complaint nor Paul's brief sets forth any facts in support of any cause of action against the Hutterian Brethren. Simply stated, the execution of and closing on a purchase agreement does not give rise to any cause of action whether at law or in equity or whether in contract or in tort. And, Paul pleads nothing more against the Hutterian Brethren than the simple execution of and closing on a purchase agreement. Paul does not allege that the Hutterian Brethren exercised "duress, fraud,

or undue influence” on Raymond as required by SDCL § 53-11-2. Accordingly, Paul has pled neither a cause of action nor a remedy against the Hutterian Brethren. Instead, Paul’s complaint expressly apologizes for suing the Hutterian Brethren.

4. Rescission.

Paul’s second substantive argument² appears to be that, because his complaint recites the statutory language of an offer of rescission, the Court cannot dismiss his request for the remedy of rescission. Either Paul has failed to state a factual claim by refusing to attach the purported Notice of Rescission to his complaint or this Court must consider that purported Notice of Rescission to determine whether it even arguably meets the statutory requirements. Under either scenario, Paul’s rescission request fails.

Paul alleges he “issued a Notice of Rescission to the Hutterite Brethren, on behalf of vOr, Inc., and has offered to restore to them that which vOr, Inc., has received from them under the contract, upon the condition that they shall do likewise.” (Complaint, ¶ 105.) This allegation is insufficient as a matter of law for several reasons.

First, Paul has done nothing more than recite the notice of rescission statute, SDCL § 53-11-5, which is not sufficient under notice pleading standards. *Hallberg v. S. Dakota Bd. of Regents*, 2019 S.D. 67, ¶¶ 28-30, 937 N.W.2d 568, 577. Paul’s allegations are nothing more than a “formulaic recitation of the elements of a cause of action” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). This is not a “heightened pleading standard” as curiously claimed by Paul, but it is instead the basic pleading requirement to survive a motion under SDCL § 15-6-12(b).

² If Paul raises any other substantive arguments, the Hutterian Brethren’s original brief explains why they lack merit and, in any event, can be discussed at the hearing if and when Paul more clearly articulates them.

Paul cannot merely recite a statute, conceal the purported Notice of Rescission from this Court, and thereby create a cause of action.

Second, based on the authorities above, Paul's purported Notice of Rescission is incorporated by reference into the complaint and may be properly considered by this Court. The purported Notice of Rescission also does nothing more than recite the notice of rescission statute.

Third, when the document is considered in light of the transaction at issue, it is clear that the purported Notice of Rescission does not comply with SDCL § 53-11-5. Paul does not allege that he has tendered \$3.2 million to the Hutterian Brethren. Paul does not allege he is a "party" to the Purchase Agreement, and he therefore has no authority to seek rescission of the same. SDCL §§ 21-12-1, 53-11-2. Furthermore, Paul has not included the bank or all of his siblings in the purported Notice of Rescission or this lawsuit.

Dated this 7th day of July, 2023.

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IN THE
Supreme Court
of the
State of South Dakota

No. 30344

VOR, INC. & GRAND VALLEY
HUTTERIAN BRETHEREN, INC.
PLAINTIFFS/APPELLEES

VS.

PAUL O'FARRELL &
SKYLINE CATTLE COMPANY
DEFENDANTS/APPELLANTS

An appeal from the Circuit Court, Third Judicial Circuit
Codington County, South Dakota

The Hon. Robert Spears
CIRCUIT COURT JUDGE

APPELLANTS' REPLY BRIEF

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INTRODUCTION

The grave concerns initially raised by Victoria O'Farrell's lawsuit are central to questions about possession and title. These are not collateral questions. They must be answered before anyone is entitled to an eviction.

In turn, the litigation surrounding Raymond and Victoria's land holdings, corporation, and their estate plan is inherently complex. Its resolution will require a thoughtful and judicious process. This cannot occur in the compressed timeframe of an eviction.

In contrast, the Colony claims (without any practical explanation) that there is a need to hustle through this eviction. They concede (as they must) that this Court has already created exceptions to the eviction process like the one Paul seeks to use here. But they fail to explain why this limited exception does not apply here. Instead, they parrot the text of statutes in Chapter 21-16 without any effort to harmonize them with this Court's other rules and holdings. The result was an eviction process that short-circuited the fact-finding process.

Fortunately, the Rules of Civil Procedure are flexible, and, after *Heiser*, there is no longer a "bright line" rule about evictions. The Circuit Court erred. Its judgment must be reversed.

RESPONSE TO STATEMENT OF THE CASE & FACTS

The Colony's recitation of the Statement of the Case and Statement of the Facts is generally accurate, but with the following corrections. (And, due to the "legal" nature of some of the Colony's factual contentions, in some instances it was more efficient for Paul to lodge his legal "arguments-in-reply" within this section, rather than later in this reply brief.)

"Pursuant to..."

First, the Colony claims on page 3 that the Defendants' motions were filed "pursuant to SDCL 21-16-7." (emphasis added). This appears to be argumentative. Defendants did not file their motions "pursuant to" SDCL 21-16-7. Instead, they intended for their motions to be filed under Rule 12, on the belief that the Rules of Civil Procedure apply to eviction proceedings.

The significance of testimony from other proceedings

Second, Paul agrees that he asked the Circuit Court to take judicial notice of the related O'Farrell proceedings. However, that request did not seek to add the testimony of those proceedings into the court trial. Paul asked that it take judicial notice "for the existence of these other proceedings taking place and the contents of the file as far as what the litigants were arguing...." [[TT 12-13]]. The Circuit Court complied. *Id.*

Later in their brief (page 25), the Colony asserts that it was permissible for the Circuit Court to rely on the testimony and its recollections from those proceedings (including unsworn statements) because Paul "invited" this "error." Paul asks this Court to read the narrow request that he made for

judicial notice (related to the character of the underlying issues in dispute), and, the Court's response. [[TT 12-13]].

Paul did not invite error. Paul did not request four hours of prior testimony be added to the Record. And Paul did not request that the Circuit Court inject its observations of an unsworn witness¹ into the proceedings.

The significance of filings from other proceedings

Next, the Colony claims that “affidavits” and “allegations in his Complaint” are not “testimony in a judicial proceeding and...are hearsay.” *See*, Appellees’ Brief, p. 6, fn.2. This is an overbroad and incorrect assessment of the hearsay rule. For purposes of evaluating Paul’s motion to dismiss (and, in the alternative, his motion for a stay), the “facts” are not evaluated for their truth or weight; instead all of the facts in the extended record are construed in a light most favorable to Paul’s contentions. *Ex Parte Nautilus Insurance Company*, 260 So.3d 823, 830 (Ala. 2018) (to evaluate compulsory counterclaim “operative facts” include the “facts taken as a whole,” and, the “facts upon which the original claim rests”).

Kelly and Rita caused the family farm to go into foreclosure

In Section 2 on pages 6 to 7, the Colony asserts that Paul was responsible for the family’s land going into foreclosure. In making this

¹ The Colony quibbles with the Transcript, claiming that “there is no indication in the actual record whether [Raymond O’ Farrell] was not sworn.” Appellees’ Brief, p. 25, fn.7. Paul suggests that when a Court Reporter includes the phrase “not sworn” in the transcript, she did so because it is true.

allegation, the Colony omits key details, including the source of the debt, as well as the reason that the notes went delinquent.

As to the source of the debt: much of Skyline's and VOR's debt (which was secured by VOR's land) had been originally created by Raymond and Victoria back when they were the primary owners and operators of Skyline, and, some was borrowed directly by VOR. During that time, Paul "never had the checkbook," and "didn't write any of the checks out" for Skyline's or VOR's operations. [Victoria's HT, 72:24-25; Appellees' APP077]. "I didn't handle the banking. My mom did." [*Id.*, 73:25; APP078].

Later, when Paul's parents gave their Skyline shares to him, and when Paul took over the farming corporation, he began to inherit responsibility for managing that same debt (VOR's and Skyline's). But, Victoria continued to wield control over the checkbook until approximately 2018. [*Id.*, 79:17-18; APP84].

Eventually, Paul assumed full management of the finances, and he was then able to begin paying down the debt, including at the end of the year when harvest profits came in. [*Id.*, 56:8-9; APP061]. After Paul took over Skyline, Paul considered himself, Skyline, and VOR to be operating like "partners with cattle and buildings and equipment." [*Id.*, 57:6-7; APP062]. The debt was secured by the family's farming land (through VOR, which in turn was held by the Trust), and, throughout all of this time Paul remained the primary beneficiary of that Trust.

As to the reason for the debt going delinquent, it is Paul's claim (as was Victoria's claim) that Raymond was being unduly influenced not to renew the farming notes, and, that Raymond did not understand what he was doing by refusing to do so.

As background, each year, the operating notes would be renewed, including with Raymond and Victoria's signatures and consent. [*Id.*, 56:2; APP061]. It happened this way, without objection, every single year from 2003 until 2021. [*Id.*, 76:4-18; APP076].

In the spring of 2022, "Great Western Bank was going to refinance again," and "Raymond would have signed it [again], but [Paul's] sister [Rita] and [Paul's] brother [Kelly] started telling him not to sign anything...." [*Id.*, 76:24-25; APP081; and 55:4-7; APP060].

The foreclosure happened for the sole reason that Kelly would not let Raymond sign the renewal. [*Id.*, 66:15-17; APP071]. Kelly was living with his parents at this time, and he was "upset about the small amount of land he was going to get in the trust." [*Id.*, 77:6-15; APP082]. Kelly was coaching and manipulating his father into withholding his signature. *Id.*

The Colony also omits mention that Raymond's new and "independent legal counsel" was not someone Raymond found on his own, nor even someone he found in consultation with his wife Victoria; Rita "helped" Raymond hire this new attorney by taking him there. [*Id.*, 83:16; APP088].

To resolve the foreclosure, the only solution necessary was to renew the notes, as had been done for the past two decades, rather than to precipitously

sell nearly all of the family's land. It is incorrect for the Colony to claim that Paul caused the foreclosure.

Whether Paul's civil lawsuit was filed and pursued in "bad faith"

In Section 3 of their Facts, the Colony recount the procedural history of Paul's parallel, civil suit. Some of their descriptions are accurate; some are hyperbole. (The facts must be "stated fairly, with complete candor." *See*, Appellate Rule 60(5)).

The Colony asserts that they filed a motion to dismiss in an effort "point out that Mr. Brendtro is claiming to represent VOR, Inc., who he doesn't represent, and in the same Complaint, he is seeking a damage claim against VOR, Inc.,...and [that] Mr. Brendtro had no authority to file a complaint on the Estate's behalf." *See*, Appellees' Brief, pp. 7-8. The Colony offers these assertions as if they are legally undisputed.

Paul's Complaint chose to include VOR, Inc., as a Plaintiff, because Paul asserts that he is the most recent, validly elected president of that corporation. He asserts that subsequent attempts to remove him as President were invalid, along with other corporate acts. Paul's Complaint also chose to assert claims "for the benefit of Victoria's Estate, in order to preserve and protect her Estate's rights and interests," but not by claiming to represent the Estate. In his lawsuit, as well as in his opening brief, Paul demonstrated that there is legal authority for Paul to assert claims on behalf of the corporation, and on behalf of the Estate. *See*, Appellants' Brief, p. 15, fn.4 and 5.

Finally, Paul included a single paragraph in his Complaint, averring *in the alternative*, that he may be entitled to an award of damages for the value of the capital improvements he made upon the family land at his own expense and without compensation, which collectively have an estimated value in excess of a million dollars. [Appendix 29, Complaint ¶ 108.] In other words, Paul is pointing out that **if** his initial theory of relief on behalf of VOR, Inc., is incorrect, **then**, whoever is in charge of VOR will then be required to pay Paul those restitution damages. The Colony makes much ado about this, but it offers no legal authority why Paul cannot use his Complaint to mention alternate theories of relief. *See*, Rule 8(c).

Following Victoria's death, Paul has attempted to pick up where his mother left off. Like her, he seeks to preserve the farming operation established by his parents, and the estate plan contemplated by their estate plan prior to Rita and Kelly's meddling. Paul suggests this is not bad faith.

ARGUMENT-IN-REPLY

Litigants are entitled to the swiftest and most complete process warranted by the facts and issues of their unique dispute. This Court's standard in *Heiser* embraces a malleable approach to this principle. Some eviction cases are just more complicated than others.

The Colony's approach is the opposite of *Heiser*: a truncated proceeding in every instance, with minimal notice, and with a narrow view of the issues. The Colony's approach is self-serving. It is designed to avoid confronting the facts of what happened to Raymond O'Farrell. Their

approach would also result in a multiplicity of lawsuits. That is not the result mandated by *Heiser* and *LPN*.

1. The Colony begins with “strawmen” arguments about “repealing” SDCL 21-16-4.

In their Introduction, the Colony begins by asserting that Paul is “asking the Court to effectively repeal” SDCL 21-16-4, *See*, Appellees’ Brief 12. *See, also*, 16 (“Paul claims” that “the Supreme Court repealed SDCL 21-16-4); 17 (“No legislature has repealed...SDCL 21-16-4...”); and 14 (statute has not been “repealed or stricken”).

The Colony’s discussions of “repeal” are false and distracting. The rules governing litigation procedure emanate from this Court, which has broad and undisputed powers to make and then harmonize the process governing civil lawsuits. The Legislature’s silence on this issue does not defeat Paul’s argument. Harmonizing such rules does not require “repealing” them.

This Court wields broad authority to manage the judicial system and the cases which pass through it. *Matter of Appeal by Implicated Individual*, 2021 S.D. 61, ¶ 20. In addition to its more general “inherent authority” over the judicial process, *id.*, at fn.8, this Court recognizes that its rulemaking and interpretation powers can be “directly sourced to our ‘general superintending powers over all courts’ expressly granted under the provisions of the South Dakota Constitution....[by which it] may adopt rules on, among other topics, ‘practice and procedure and...the administration of all courts.’” *Id.* (quoting S.D. Const. art V § 12).

Concurrent with the Court's rulemaking power is its authority to interpret and harmonize its judicial rules with related statutes. *Id.* The Colony asserts the Legislature's silence on this issue is dispositive in the Colony's favor. But the opposite is true. On multiple occasions beginning in 1976, this Court has interpreted and harmonized Chapter 21-16 flexibly, in line with the practical needs of litigation. The Legislature's silence since then is best viewed as an acceptance of the Court's interpretation. Perhaps more instructive is that no Legislature has ever passed a statute prohibiting a Defendant in an eviction action from challenging the Landlord's title.

Finally, if the Court's interpretation leads to "unwise public policy" or conflicts with the Legislature's intention, "the Legislature is uniquely situated to create a [different rule] if its members become convinced the existing rules are unsound." *Id.*, ¶ 26.

This Court has ample authority to harmonize its civil litigation rules, along with the statutes creating the special proceeding framework. This does not require their "repeal." And the direct mandate of Rule 81(a) requires the blending of this Court's rulemaking process with the unique rules for those proceedings. In short, the notion of "repeal" is a misnomer.

2. The Colony's brief ignores several key issues.

By starting with a strawman issue, the Colony disguises the fact that it failed to confront most of the key arguments raised in Paul's opening brief.

Here is a list of Paul's arguments which the Colony has chosen to sidestep or ignore:

- The Colony does not refute Paul’s contention that “[w]hen the statutes pertaining to a ‘special proceeding’ are silent about a particular point of judicial procedure, the Circuit Court is required to follow the Rules of Civil Procedure on that topic.” Appellants’ Brief, p. 29.
- The Colony mentions Rule 81(a) in only cursory fashion (*i.e.*, once, on page 16). The Colony fails to explain why motions to dismiss are incompatible with eviction actions, and, does not even attempt to harmonize them.
- The Colony does not offer any authority or substantive argument about the definition of when “issue is joined,” which is the key question to determine the statutory timing of a jury demand in an eviction action.
- The Colony does not address the forfeiture problem, whereby the Circuit Court effectuated a million-dollar, 10-day forfeiture of Paul’s farm equipment without facts, notice, or a hearing. It argues only that the supersedeas stay makes the forfeiture “moot,” but ignores that the erroneous judgment would still be an issue *after* the appeal, when the supersedeas stay expires.
- The Colony does not offer any substantive argument about Rule 13(a) or the manner in which it should be applied. The Colony only discusses Rule 13(a) *once* in its brief; with a single sentence (on page 16) it attempts to “wave away” 14 pages of Paul’s arguments.

- The Colony does not refute Paul’s argument on *laches*, namely that “[w]hatever rights the [Colony] may have had to a speedy eviction trial appear to have been squandered long ago.” *See*, Appellants’ Brief, p. 27.
- The Colony does not refute Paul’s argument that “[i]t is self-evident that a party who does not actually and rightfully own land is not permitted to evict tenants from it.” *See*, Appellants’ Brief, p. 22.
- And, the Colony does not refute in any way Paul’s alternative suggestion that the eviction trial should be stayed until his prior, substantive lawsuit is fully and finally resolved.

If the Colony uses strawman arguments and sidesteps all of the primary issues, what is left of their brief? The Colony mostly focuses on two things. First, they accuse Paul of wrongdoing and of litigating in bad faith (pp. 6-11; 17-18). Second, the Colony parrots the text of statutes in Chapter 21-16 without any attempt to harmonize them, and in furtherance of an outdated, “bright-line rule” mentality relating to evictions (pp. 13-14; 16-17; 19-23). The Colony deploys its “bright line” argument in two ways: for the *scope* of evictions, as well as for the *procedure and timing* used for evictions.

The Colony’s “bright line” approach ignores a half-century of case law, it ignores Rule 81(a), and lacks common sense. In reply we discuss the evolution of this Court’s understanding of the proper scope of evictions, and, we compare it to how our neighboring jurisdictions address the same question.

3. South Dakota’s eviction law has evolved since the 1929 decision in *Aegerter*, which is similar to the approach followed in other states

On page 14 of their Brief, the Colony offers *Aegerter v. Hayes*, 226 N.W. 345 (S.D. 1929) as the original source of this Court’s historical, inflexible, “bright line” view about the scope of eviction actions. In the century that followed *Aegerter*, this Court departed from that rigid view. So did the surrounding jurisdictions.

Notable about *Aegerter* is that this Court borrowed the “bright-line rule” from five neighboring states.² A review of the past century of legal evolution in those neighboring jurisdictions *supports* the argument that Paul is making here. In other words, if Paul’s case were heard today in those neighboring states, the Circuit Court would not have allowed the Colony’s rushed eviction trial to take place.

For example, even though the Supreme Court of Minnesota has long constrained the scope of evictions, it has also consistently endorsed the principle of **pausing** the eviction action while the equitable issues are litigated in another lawsuit. *William Weisman Holding Co. v. Miller*, 188 N.W. 732, 733 (Minn. 1922) (court should “enjoin the prosecution of the unlawful detainer action if it be shown that the equitable rights of the defendant [raised in a parallel action] are such that he ought not to be ousted from possession”).

² Minnesota, Nebraska, Iowa, North Dakota, and Wisconsin.

In a recent case, the Court of Appeals of Minnesota solidified this procedure. When a defendant in an eviction action raises equitable defenses and counterclaims that “are necessary to a fair determination of the eviction action, it is an abuse of discretion **not** to grant a stay of the eviction proceedings when an alternate civil action that involves those counterclaims and defenses is pending.” *Bjorklund v. Bjorklund Trucking, Inc.*, 753 N.W.2d 312, 318–19 (Minn. Ct. App. 2008) (emphasis added). Any other result would force the Tenant to “present its claims piecemeal....” *Id.*, at 319.

Iowa no longer follows the harshest version of the rule attributed to it by *Aegerter* a century ago; instead, it now allows disputes about title to be litigated as part of an eviction. *Steele v. Northup*, 168 N.W.2d 785, 788 (Iowa 1969). North Dakota continues to follow a strict view of the eviction process, yet still entertained equitable arguments about the validity of the landlord’s title, because “[i]t is generally recognized that an eviction action frequently requires resolution of questions of title.” *United Bank of Bismarck v. Trout*, 480 N.W.2d 742, 745 (N.D. 1992) (citing 25 AM.JUR.2D EJECTMENT § 1 (1966) (deciding “equitable conversion” theory of title)).³

In Nebraska, the modern rule is that an eviction court “must dismiss the case for lack of jurisdiction” where there is a question about title to the property. *Fed. Nat’l Mortg. Ass’n v. Marcuzzo*, 854 N.W.2d 774, 779 (Neb. 2014). This rule is now codified in statute, but it is the same rule that the

³ North Dakota’s eviction code is similar to ours, however, they do not yet have a case like *Heiser*.

Nebraska Supreme Court has been following since the 19th century: “if on trial, a forcible entry and detainer action turns into an action to determine title, the court has no authority to proceed and the case must be dismissed.” *Id.* (citing, *inter alia*, *Petit v. Black*, 12 N.W. 841 (Nebr. 1882)).

South Dakota’s statutory scheme echoes these core principles. For example, SDCL 21-16-9 permits magistrate courts to hear summary eviction matters, but, “if the title to...the real property in any wise comes in question,” the magistrate must pause the proceedings and certify that question to the Circuit Court. At least implicitly, our statutory scheme contemplates that questions of title will arise from time to time, and that the process for resolving them will not be as swift as a simple eviction. (Certifying a question of title to a circuit judge and then awaiting her decision upon those proceedings is something that is expected would take a while.)

Beyond our neighboring states, other jurisdictions have adopted rules expanding the scope of eviction litigation, when so required by the interests of justice, and when there are complex disputes about title. Emblematic is the case of *Martin-Bragg v. Moore*, 161 Cal.Rptr. 3d 471, 490–91 (2013) (the “adjudication of complex issues of title to property should not be forced to adhere to the strictures that apply to summary proceedings for unlawful detainer.”) There, the appellate court held that the trial court abused its discretion by proceeding with a truncated eviction proceeding,

when it had before it allegations demonstrating a complex factual scenario under which the [landlord] might not hold title sufficient to justify an unlawful detainer judgment in her favor....Faced with

these circumstances, the trial court's...refusal to permit trial of the issue of title outside of those summary procedures, was an abuse of discretion requiring the judgment's reversal and remand....

Martin-Bragg, at 492-93. “[I]f there’s a suspicion that the power of the court is being used to oust someone from possession when there is a contest about title, usually the judge will not act to give the [unlawful detainer] judgment.” *Id.*, at 471.

In the century since *Aegerter*, the evolution of the law in South Dakota and beyond reflects the idea that eviction actions **can** be simple, swift, and summary; but they are not always that way. Unique aspects of some cases will require a broader departure from the ordinarily narrow eviction process. *Heiser* already allows for such departure.

On pages 14 to 16, the Colony attempts to constrain the *Heiser* and *LPN Trust* holdings as a “limited exception.” The Colony also describes the exception as being confined to issues “pertinent to the issue of possession.”

But what could be more pertinent to “possession” than a determination of who rightfully owns the land, and, further, who rightfully held the right to issue termination and ejection notices? The Colony does not provide an answer.

Paul’s lawsuit (like Victoria’s) seeks to resolve key questions including, *Who owns this land?* and *Who had legal authority to tell Paul to leave?* Those questions must be answered first before the Colony can receive a judgment of possession. And, at least in Nebraska, Minnesota, and even in

South Dakota magistrate court, the eviction process would come to a complete halt until the title questions were resolved.

4. The Colony offers no argument opposing Paul’s request to stay the eviction trial until the conclusion of his original lawsuit.

In Section 1 of Paul’s opening brief (as well as in the Circuit Court), he argued for one of two alternate paths forward: *either* that the eviction should be treated as a compulsory counterclaim and dismissed so it can be tried within Paul’s prior case, *or*, that the eviction suit should be stayed and paused until his lawsuit is first resolved. *See*, Appellant’s Brief , p. 20 (asking this Court “to dismiss the eviction claim, or, to at least stay the eviction proceedings until the pre-existing litigation concludes)); p. 34 (asking this Court “to reverse judgment and enter a dismissal, or, to hold the simple possession proceeding in abeyance until the parallel civil action has concluded”)); *see, also*, Trial Transcript at R.55 (asking Circuit Court “for a judgment in favor of the defendants, or in the alternative, an order staying these proceedings until the conclusion of the other related matters”); and Paul’s Answer, at R.88 (requesting “in the alternative, a stay of these proceedings until the resolution of the other, pre-existing litigation.”).

In light of how Minnesota and Nebraska approach these questions, Paul recognizes that perhaps the better solution is to stay the eviction action until Paul’s litigation has concluded (rather than to bolt the eviction proceeding into that case as a compulsory counterclaim).

Notably, the Colony does not offer any argument explaining why a stay of the eviction action would be unwise, unworkable, or outside of the Circuit Court's authority. The Colony concedes that such a stay "is not a continuance under SDCL 21-16-7." By logical inference, such a stay would not require an undertaking.

Accordingly, Paul reiterates his request that this Court issue a stay of the eviction action (if the eviction is not dismissed as a compulsory counterclaim).

Another key question that the Colony fails to confront is whether motions to dismiss are permissible and compatible with forcible entry and detainer cases.

5. How and when can a motion to dismiss be used in an eviction action?

On pages 16 to 17, the Colony concedes that Rule 81(a) means that "the Rules of Civil Procedure fill in the gaps" of Chapter 21-16. But the Colony fails to explain why a motion to dismiss cannot be a "gap-filler" procedure within eviction actions. [Appellee's Brief, 16-17].

Under the plain text of Rule 81(a), motions to dismiss would be part of the eviction process unless they are "inconsistent or in conflict with the chapter." The Colony does not identify any actual conflict or inconsistency, other than its general assertion that evictions should be fast.

The textual answer to how motions to dismiss function within eviction actions is found in the text of Rule 12(a). The Colony attempts to read SDCL 21-16-7 (four days for “appearance and pleading”) in isolation.

The first part of Rule 12(a) identifies the various deadlines for “pleading” in regular civil cases. These include 30 days for an Answer and 20 days for a Counterclaim. *Id.* The next part of Rule 12(a) explains that all of those deadlines are modified by the filing of a Rule 12 motion. “The service of a motion permitted under SDCL 15-6-12 alters these periods of time...unless a different time is fixed by order of the court.” *Id.*

The Colony does not explain why this sentence would not also apply to the four-day pleading timeline in eviction cases. In fact, the Colony offers no argument at all about the text of Rule 12(a). Within Chapter 21-16, the eviction process can be “adjourned” for up to 14 days without an undertaking. SDCL 21-16-7. This time limit (14 days) matches the life-cycle of motions under the Rules (10 days plus intervening weekends). All of this suggests that Chapter 21-16 is already designed to accommodate the short delays associated with motion practice. Further, even the short delay of a motion to dismiss is something that a Circuit Court has the discretion to manage. The usual timeline of motions can be adjusted by the Circuit Court at any time (*See*, SDCL 15-6-6(d) (ten-day motion cycle can be shortened “by order of the court”).

The text of Rule 12(a) and the practicalities of civil litigation both confirm that motions to dismiss are consistent with the special proceedings in

an eviction action. Pursuant to Rule 81(a), Paul was permitted to file the motions that he did, and, his timing was proper.

6. How and when can a motion to dismiss be used in an eviction action?

If Paul was permitted to file the motions that he filed at the time he filed them, then, by operation of Rule 81(a) and Rule 12(a), Paul was then permitted to file an Answer promptly after his motions were denied. Paul filed his Answer promptly, with a jury demand.

If Paul's Answer was timely, then, by operation of SDCL 21-16-8, "issue" had now been "joined," which then allowed Paul two days' notice before trial would commence, and, which made Paul's jury trial demand timely.

The Colony's view of the notice and jury issues is correct only if Paul's motions were impermissible and improperly timed in the first place.

7. The eviction judgment against Paul should be vacated because of the foregoing reasons; however, it should also be vacated because it was infected with errors of evidence and equity.

If this Court agrees with the analysis thus far, and, if it thereby vacates the judgment in its entirety, then the various issues relating to the content of the eviction trial become moot. We still address those briefly, so as not to waive them by not discussing them.

Beyond its misapplication of "invited error" (addressed above) the Colony does not offer any authority that would cure the Circuit Court's error of injecting into the proceeding its observations of a prior unsworn witness.

The Colony correctly recites facts on page 23 which would otherwise entitle it to judgment. But, each of those facts is infected with the *a priori* questions of title, possession, and corporate authority, which are issues the Circuit Court intentionally excluded from the trial. This, too, requires that the judgment be reversed. *Martin-Bragg*, at 492–93.

The Colony’s only argument in favor of the forfeiture provision in the judgment is that the supersedeas bond makes it “moot.” In reality, the supersedeas bond only makes it “moot for now.” If the judgment were upheld, the equipment would still be subject to a wrongful and inequitable forfeiture when the supersedeas stay expires.

CONCLUSION

Paul asks this Court to apply the rule it has already created in *Heiser*. (Paul is not asking for repeal of any statute.)

Paul asks that the eviction action be stayed (or joined with his lawsuit) so that critical questions about title and possession can be resolved prior to the granting of a sudden, inequitable eviction.

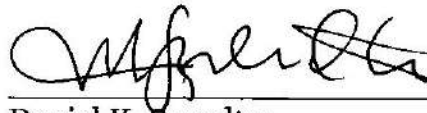
Paul asks that the judgment against him be vacated in its entirety, including the award of attorney’s fees, and that the case be remanded to halt the eviction process and allow his other claims to move forward.

Paul believes that he has pursued his claims in good faith, doggedly attempting to find the correct forum and remedies to repair the damage done to his family. He believes he has identified both the remedy and the forum via

his March 2023 lawsuit. If not, the prayer for relief in his Complaint requests “any other such relief necessary.” [[App. 31; Complaint, ¶ H(v)]]. Whatever the shape of such relief, Paul is asking for it.

Dated this 18th day of September, 2022.

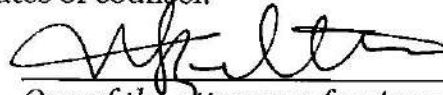
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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellant's Reply Brief does not exceed the word limit set forth in SDCL § 15-26A-66, said Brief containing 4,986 words, exclusive of the Table of Contents, Table of Authorities, any addendum materials, and any certificates of counsel.



One of the attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of September, 2023, I sent the original and two (2) copies of the foregoing by United States Mail, first class postage prepaid to the Supreme Court Clerk at the following address:

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