

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 29395

SMITH ANGUS RANCH Inc. (SAR),
Appellee/Plaintiff,

vs.

TRAVIS HURST, as an alleged DIRECTOR OF SAR, and as an individual,
Appellant/Defendant,

vs.

CRAIG SMITH and LANCE SMITH,
Third-Party Defendants.

Appeal from the Circuit Court, Fourth Judicial Circuit
Harding County, South Dakota

The Honorable Gordon D. Swanson
Circuit Court Judge

BRIEF OF APPELLANT TRAVIS HURST

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PRELIMINARY STATEMENT

For the convenience of the Court, Appellant Travis Hurst is referred to as “Travis”; Appellee Smith Angus Ranch is referred to as “SAR”; documents from the record of the Sixth Circuit Clerk of Court are cited as “R. ____”; the Appendix is cited as “App. ____”; the Transcript of Hearing Re: Motion for Partial Summary Judgment held on August 6, 2020, is referred to as “HT ____”; the Order Granting Plaintiff’s Motion for Partial Summary Judgment entered on August 11, 2020 by the Honorable Gordon D. Swanson, Circuit Court Judge is referred to as “Order”. All references will be followed by appropriate page and paragraph designations.

JURISDICTIONAL STATEMENT

On August 11, 2020, the Honorable Gordon D. Swanson, Fourth Judicial Circuit, entered an Order Granting Partial Summary Judgment. R. 259, (App. 1). That Order was filed with the Harding County Clerk of Court on August 11, 2020. R. 259, (App. 1). Notice of Entry of the Order was served and filed on August 12, 2020. R. 263, (App. 5).

On August 26, 2020, Travis filed a Petition for Permission to take Intermediate Appeal. *See* R. 300, (App. 11). This Court granted Travis’ Petition on September 21, 2020. R. 358-59.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

- I. Whether the Circuit Court erred in expanding this Court’s ruling in *Estate of Stoebner v. Huether* to impose a bright-line rule against introduction of evidence authorizing self-dealing onto all fiduciaries, absent express, written authorization. 2019 S.D. 58, 935 N.W.2d 262.**

The Court erred in granting Partial Summary Judgment in favor of Plaintiff because the bright line rule excluding evidence of an agent’s authority to

benefit from the principal should not be extended to a claim of self-dealing by a director of a corporation.

- Estate of *Stoebner v. Huether*, 2019 S.D. 58, 935 N.W.2d 262.
- *Bienash v. Moller*, 2006 S.D. 78, 721 N.W. 2d 431.
- SDCL § 47-1A-861.1.

STATEMENT OF THE CASE

On September 4, 2018, Plaintiff SAR filed a Complaint against Defendant Travis, alleging, inter alia, that Travis breached his fiduciary duty by self-dealing, converted SAR assets and usurped corporate opportunity in Travis's dealing with Smith Angus Ranch property during the time in which he was a director of SAR. R. 2, (App. 163). On July 21, 2020 SAR moved for Partial Summary Judgment on the question of whether Travis breached his fiduciary duty in self-dealing without written authorization to self-deal, and seeking an Order excluding any introduction of extrinsic evidence to establish authorization to self-deal. R. 53, (App. 23). The Circuit Court granted SAR's Motion for Partial Summary Judgment, concluding that Travis "had no written authority to convert SAR's assets for his personal gain, and any circumstantial/extrinsic evidence he might offer in support of his claim that [the sole shareholder, president and other director of SAR] expressly approved his self-dealing is not admissible." R. 261, (App. 3).

Travis sought this Court's permission to appeal the Circuit Court's Order, which this Court granted on September 21, 2020. R. 358 (App. 11). Travis now appeals the Circuit Court's Order Granting Partial Summary Judgment.

STATEMENT OF THE FACTS

Calvin and Emma "Dee" Smith had three children, Lance A. Smith ("Lance"), Craig J. Smith ("Craig") and Julie Hurst ("Julie"). R. 144, (App. 72) at ¶ 1. Dee and

her husband Calvin raised their children on a ranch in Jones County outside of Murdo until 2000. *Id.* at ¶ 2. In 2000, Dee and Calvin Smith sold their property in Jones County and bought a ranch in Harding County. *Id.* at ¶ 3. By this time, Julie Hurst and her husband Travis were fully engaged in the family ranching business, living and working on the ranch with Dee and Calvin. R. 145 (App. 73) at ¶ 5. Travis and Julie Hurst relocated their family to the Harding County ranch with Calvin and Dee. *Id.* at ¶ 5. When Calvin passed away in 2008, Dee stayed on her ranch, with the help of Travis and Julie and their children Dalton, Sadee and Macy. *Id.* at ¶ 6, 7, 9, 10.

Lance and Craig Smith spent time working on the family ranch; but both sons left the ranch prior to 2000, long before Calvin passed away in 2008. *Id.* at ¶ 8.

Travis and Julie raised their children with Calvin and Dee Smith on the ranch in Harding County. *Id.* at ¶ 9. The ranch operation was a collective effort. *Id.* at ¶ 10. Travis and Julie received no salary for their efforts, but were allowed to run their personal cattle on land owned by Dee and Calvin. *Id.* at ¶ 11, 12. After Calvin's death Travis became more instrumental in the operations and management of the ranch. *Id.* at ¶ 13.

Smith Angus Ranch, Inc. ("SAR") was established in approximately 1991. *Id.* at ¶ 14. During their marriage Calvin and Dee were the shareholders, officers and directors of SAR. *Id.* at ¶ 15. When Calvin died, Dee became the sole shareholder. *Id.* at ¶ 16. Dee was the sole officer and director until 2013. *Id.* at ¶ 17. Following Calvin's death, Dee was the president of SAR. See, R. 225 (App. 153).

Dee was diagnosed with cancer in 2013. R. 145, (App. 73) at ¶ 18. Treatment often took Dee away from the ranch. R. 146, (App. 74) at ¶ 19. In 2013, Dee added

Travis' name to SAR's Amended Annual Report filed with the South Dakota Secretary of State's office as vice president and director. *Id.* at ¶ 20. Travis was added as a director to allow for him to be able to authorize SAR cattle transactions at local sale barns. *Id.* at ¶ 21.

Operation of the ranch did not change in any meaningful way after Travis was listed as a director on the Amended Annual Reports. *Id.* at ¶ 22. Travis, Julie and Dee continued to operate the ranch collectively. *Id.* at ¶ 23. Travis had been a signatory on SAR checks since at least July 26, 2000. *Id.* at ¶ 24. Travis continued to utilize the SAR checking account as needed to make ranch related purchases, when directed by Dee, just as he had done for years before he was listed as a director. *Id.* at ¶ 25. Dee remained singularly in charge of corporate documents and decisions. *Id.* at ¶ 26. No arrangement was ever formalized placing the parties' respective obligations or authority in writing. *Id.* at ¶ 27. No shares of SAR were ever transferred to Travis or Julie, Dee remained the sole shareholder until her death. *Id.* at ¶ 28, 29.

After developing cancer, Dee began a concerted effort aimed at ensuring that Travis and Julie were able to stay on the ranch following her death. In 2015, Dee sold the 6,000 acre ranch to Travis and Julie. R. 147, (App. 75) at ¶ 30. The real property had never been a corporate asset, it was owned by Dee individually after Calvin's death. *Id.* at ¶ 31, 32. Dee executed a Last Will and Testament on April 3, 2015. *Id.* at ¶ 33. In her Will, Dee forgave the principal and interest payments due for the real property. *Id.* at ¶ 34. Dee knew her sons would not be happy with the distribution of her estate, her Will states: "I am aware that my sons may not be happy with the provisions I have made in my Will; however I ask them to honor my wishes and accept

what I have done. I love all my children very much, and equally.” *Id.* at ¶ 35. The Will devised all shares of SAR to Lance and Craig in equal shares. *Id.* at ¶ 36.

Dee’s efforts to pass the assets of SAR to Travis and Julie prior to her death did not begin and end with her Will. At Dee’s direction, the 2015 calf crop from the SAR cows were all branded with Travis and Julie’s personal brand, effectively transferring ownership to Travis and Julie. *Id.* at ¶ 37. The SAR cows, roughly 200 pairs, grazed on the real property purchased by Travis and Julie. *Id.* at ¶ 38. Approximately half of the 2015 calf crop was meant to pay for use of the pasture by the pairs during the 2015 grazing season, the other portion of the calf crop was a gift from Dee to Travis and Julie. *Id.* at ¶ 39. Dee also unilaterally went to the Harding County Treasurer’s office and placed Travis’s name on the SAR vehicles. *Id.* at ¶ 40.

In May of 2015, Dee also wrote personal checks to her sons for \$100,000 each; on the memo line of the checks Dee wrote “inheritance” or “inheritance share.” R. 148 (App. 76) at ¶ 41.

In late 2018, Smith Angus Ranch filed a “Complaint and Demand for Jury Trial” (“Complaint”) alleging, *inter alia*, that Travis breached his fiduciary duty to avoid self-dealing. R. 2, (App. 163).

SAR moved for partial summary judgement regarding its claim against Travis for self-dealing. Plaintiff’s Motion for Partial Summary Judgment rested entirely on this Court’s recent decision in *Estate of Stoebner v. Huether*, 2019 S.D. 58, 935 N.W.2d 262 (“*Stoebner*”). Plaintiff sought Summary Judgment on the issue of Travis’ breach of fiduciary duty arguing that no evidence other than explicit written authorization is admissible to demonstrate SAR’s (through Dee Smith the sole-shareholder, President and

other Director) authorization for Travis to use corporate assets for personal use and transfer corporate assets to himself. The Honorable Gordon D. Swanson entered an order granting SAR's Motion. Order, R. 259, (App. 1). The Circuit Court articulated the thrust of SAR's argument as follows:

In the context of a power of attorney, the South Dakota Supreme Court has adopted a bright-line rule that no oral extrinsic evidence may be used to prove that an attorney-in-fact has authority to self-deal. *Stoebner v. Huether*, 2019 S.D. 58. The Court went even farther, saying that "a written document must clearly articulate that the fiduciary is authorized to engage in self-dealing." Given the fiduciary relationship between an officer/director of a corporation and its shareholder(s), and the similarity between responsibilities in the two situations, SAR urges the Court to anticipate that, if called upon to rule, the South Dakota Supreme Court would extend application of that policy to officer/shareholder cases.

Order, R. 260, (App. 2).

The Circuit Court noted that SAR was urging extension of the power of attorney bright-line rule to the corporate context, even if it meant that the will of the sole shareholder would be subverted: "As indicated above, there may be direct evidence tending to support Travis's contention that Dee not only approved of, but directed Travis to convert assets of SAR to his personal use. SAR urges that such evidence – even if it means Dee's actual intent is subverted – must not be considered in the absence of explicit written authorization for Travis to self-deal from the corporation." Order, R. 261, (App.

3). The Circuit Court concluded:

Clearly, as an officer and director of SAR, Travis acted as a fiduciary to it. He had no written authority to convert SAR's assets for his personal gain, and any circumstantial/extrinsic evidence he might offer in support of his claim that Dee expressly approved his self-dealing is not admissible. SAR incurred damages, in the amount of his direct diversion of SAR

funds/assets to himself, and those damages (in an amount to be determined later) were caused by his unauthorized self-dealing.

Id.

ARGUMENT

I. The Circuit Court erred in extending the bright line prohibition on introduction of extrinsic evidence to establish authority to engage in self-dealing into the corporate director context.

Travis appeals from the Circuit Court’s granting partial summary judgment. This Court reviews a circuit court’s entry of summary judgment under the de novo standard of review. *Stoebner*, 2019 S.D. 58 at ¶ 16. No deference is given to the circuit court’s decision. *Id.*

Plaintiff’s Motion for Partial Summary Judgment, and the Court’s Order granting that Motion, rely on this Court’s recent decision in *Stoebner*. *Id.* “In the context of a power of attorney, the South Dakota Supreme Court has adopted a bright-line rule that no oral extrinsic evidence may be used to prove that an attorney-in-fact has authority to self-deal. *Stoebner v. Huether*, 2019 S.D. 58. The Court went even farther, saying that ‘a written document must clearly articulate that the fiduciary is authorized to engage in self-dealing.’” Order, R. 260, (App. 2). But *Stoebner*, and each of this Court’s decisions addressing the issue, make clear that this Court was not “going farther” when it referred to the requirement that a “written document must clearly articulate that the fiduciary is authorized to engage in self-dealing.” The bright-line rule from *Stoebner* cannot be applied to the present set of facts where there is no written document to construe defining the scope of Travis’s duty to SAR.

A. This Court’s precedent excluding introduction of extrinsic evidence to establish authority to self-deal is limited to the context of an agent acting under a strictly construed written power of attorney.

In each instance in which this Court applied the bright-line rule relied upon by the Circuit Court, the fiduciary referred to was an agent acting under a strictly construed written power of attorney. The facts of *Stoebner*, and this Court's other relevant decisions, make clear that those decisions dealt only with an agent's authority under a written power of attorney. This Court has never "gone farther" and applied the prohibition against introduction of extrinsic evidence authorizing self-dealing beyond the context of an agent operating under a written power of attorney.

In *Stoebner*, Curtis Huether and Kenneth Stoebner were cousins who occasionally assisted each other with farm work. *Stoebner*, 2019 S.D. 58. at ¶ 2. After Stoebner entered a nursing home, Huether took Stoebner to visit Stoebner's farm, assisted Stoebner with other tasks and leased Stoebner's farm ground. *Id.*

Stoebner arranged for an attorney to draft a General Durable Power of Attorney and Durable Power of Attorney for Health Care, which named Huether as Stoebner's attorney-in-fact. *Id.* at ¶ 3. The Power of Attorney allowed Huether "to acquire, purchase, exchange, grant options to sell, and sell and convey real or personal property, tangible or intangible, or interests herein, on such terms and conditions" as Huether deemed proper. *Id.*

A Purchase Agreement was drafted whereby Huether would purchase Stoebner's farm land. *Id.* at ¶ 7. Pursuant to the agreement, Huether would pay Stoebner's expenses up to the agreed-upon purchase price. *Id.* Upon Stoebner's death, Huether's obligation to pay for the real property was extinguished. *Id.*

Huether signed the purchase agreement both for himself and for seller as “Kenneth Stoebner by Curtis Huether POA.” *Id.* at ¶ 8. Stoebner passed away four (4) days later. *Id.*

Stoebner’s estate sued Huether for breach of fiduciary duty. *Id.* at ¶ 9. The estate claimed that Huether’s act of executing the purchase agreement constituted unauthorized self-dealing. *Id.* The Estate moved for summary judgement on its claim of breach of fiduciary duty. *Id.* at ¶ 10. The Circuit Court granted the estate’s Motion. *Id.* at ¶ 15. In affirming, this Court addressed the issue of admissibility of extrinsic evidence to show authority to self-deal. “We have adopted a bright-line rule that no oral extrinsic evidence may be introduced to raise a factual issue as to whether an attorney-in-fact was authorized to self-deal under a power of attorney... We have not precluded the introduction of written evidence providing such authority, but a written document must clearly articulate that the fiduciary is authorized to engage in self-dealing.” *Id.* at ¶ 23 (citing *Bienash v. Moller*, 2006 S.D. 78, ¶ 14, 721 N.W.2d 431,437 (“*Bienash*”).

In ruling that no evidence of Travis’ authority to personally benefit from transactions involving SAR assets would be admissible, the Circuit Court gave special credence to the second sentence of the quotation: “The Court went even farther, saying that ‘a written document must clearly articulate that **the fiduciary** is authorized to engage in self-dealing.’” R. 260, (App. 2). (quoting *Stoebner*, 2019 S.D. 58 at ¶ 23 (emphasis added)). It is based on this language that the Circuit Court anticipated this Court would, for the first time, extend the bright-line rule applying to agents acting pursuant to powers of attorney to other fiduciaries.

As noted above, the Order quotes this Court as saying “a written document must clearly articulate that **the fiduciary** is authorized to engage in self-dealing.” R. 260, (App. 2). (Emphasis added). This Court in *Stoebner* cites to *Bienash v. Moller* (2006 S.D. 78, 721 N.W.2d 431) for this standard. But the facts of *Bienash* make clear that “the fiduciary” discussed in *Bienash* was an agent acting under a written power of attorney, just as in *Stoebner*.

In 2002, Kenneth Duebendorfer signed a power of attorney naming his deceased sister’s great niece and the husband of the great niece, (“Mollers”) as his attorneys-in-fact. *Bienash*, 2006 S.D. 78 at ¶ 1, ¶ 5. The power of attorney authorized the Mollers to “do all things that Duebendorfer would personally have the right to do. Additionally, the power of attorney allowed Mollers to make gifts on Duebendorfer’s behalf in the amount of the annual exclusion limit pursuant to the Internal Revenue Code.” *Id.* at ¶ 5.

The Mollers used the power of attorney to make Payable on Death designations in their name on Duebendorfer’s bank accounts totaling over \$250,000.00. *Id.* at ¶ 7. Plaintiff brought suit claiming breach of fiduciary duty against Mollers. *Id.* at ¶ 8. The Circuit Court granted summary judgment in favor of Plaintiff on the breach of fiduciary duty claim. *Id.*

Considering the Circuit Court’s grant of summary judgment, this Court analyzed its precedent on construction of a written power of attorney. “This Court has held that a power of attorney must be strictly construed and strictly pursued... Only those powers specified in the document are granted to the attorney-in-fact.” *Id.* at ¶ 13 (internal citations and question marks omitted). Mollers sought to introduce extrinsic, written evidence authorizing them to self-deal, namely a document drafted subsequent to the

power of attorney and purportedly signed by Duebendorfer, authorizing the challenged transactions. *Id.* at ¶¶ 6, 7.

This Court identified the issue presented by Mollers: “Whether Mollers may introduce extrinsic evidence outside the terms of a strictly construed power of attorney to raise a factual issue; i.e., did they have authority to self-deal based on the document allegedly signed by Duebendorfer” *Id.* at ¶ 16. This Court noted the issue was one of first impression and turned to other courts for guidance. *Id.* at ¶ 17. Each of the extra-jurisdictional decisions this Court considered dealt with written powers of attorney, and strictly construing the powers of attorney to limit extrinsic evidence of authorization to self-deal. See *Crosby v. Luehes*, 266 Neb. 827, 669 N.W.2d 635, 644 (2003). (“In short, where a fiduciary argues that a power of attorney allowed for self-dealing, that power must be specifically authorized in the instrument.”); *Kunewa v. Joshua*, 82 Hawaii 65, 924 P.2d 559, 565 (1996) (“Where a power of attorney does not expressly authorize the attorney-in-fact to make gifts to himself or herself, extrinsic evidence of the principals’ intent to allow such gifts is not admissible.”); *Praefke v. American Enterprise Life Ins.*, 257 Wis.2d 637, 655 N.W.2d 456, 461 (Ct. App. 2002) (“an attorney-in-fact may not make gratuitous transfers of a principal’s assets unless the power of attorney from which his or her authority is derived expressly and unambiguously grants the authority to do so. As a corollary to this bright-line rule, extrinsic evidence of the principal’s intent to allow such gifts is not admissible.”).

This Court concluded:

[T]hat the appropriate rationale for this Court is to adopt a bright-line rule that no oral extrinsic evidence will be admitted to raise a factual issue. We leave for another day the issue of whether extrinsic evidence in the form of a writing should be admitted to

raise a factual issue because the subsequent writing in this case is inadequate, as a matter of law.

Bienash, 2006 S.D. 78, ¶ 24. This Court considered only whether extrinsic evidence could be introduced, outside of the terms of a strictly construed written power of attorney, to raise the factual issue of an agent's authority to self-deal.

The bright-line rule articulated in *Bienash* has its limits. In *Hein v. Zoss*, this Court again determined that because a written power of attorney did not contain express authority to self-deal, extrinsic evidence of that authorization was inadmissible. 2016 S.D. 73, ¶ 10, 887 N.W.2d 62. This Court noted, however that the bright-line rule excluding extrinsic evidence did not apply to pre and post-trusteeship transactions: "After becoming trustee, however, with a responsibility for protecting the trust estate . . . the handling of even a preexisting claim of this type will involve conflicting interests, requiring at least disclosure to beneficiaries and that the trustee act in good faith and in the interest of the beneficiaries." *Id.* at ¶ 12 (quoting Restatement (Third) of Trusts § 78).

On this issue, this Court concluded:

At the hearing on the motion in limine, counsel for Zoss explained that he wished to introduce evidence that, for many years prior to Margaret's death and prior to her execution of the power of attorney, Zoss and his brothers farmed Margaret's land without paying rent. Nonpayment of rent was not a practice unique to Zoss. He also planned to introduce evidence of Margaret's relationship with Zoss and her other sons. At trial, Zoss attempted to explain that rather than paying rent in the form of money, he paid his mother "in the terms of hard work of him taking care of her." This evidence was relevant to show whether Zoss acted with utmost good faith and for the benefit of Margaret, and its omission prejudiced Zoss. Therefore the court abused its discretion by excluding it.

Id. at ¶ 13.

Also in *Hein*, Justice Kern identified the rationale behind those courts rejecting the bright-line rule in the context of written powers of attorney. “The Supreme Court of Delaware, while acknowledging the adoption of the ‘bright line’ rule articulated in *Kunewa* and adopted by several states, nevertheless declined to adopt the rule stating that ‘[i]f the grantor’s intent is the primary concern in interpreting a durable power of attorney, a bright line rule might not always serve the interests of justice.’” *Id.* at ¶ 31 (Kern, J., concurring in part and dissenting in part)(quoting *Schock v. Nash*, 732 A.2d 217, 228-229 (Del. 1999)). This recognition that the intent of the principal and the interests of justice should be the primary concern caution against expanding the bright-line rule into the present context, where no written document exists articulating the intent of the sole shareholder of the corporation.

In *Bienash*, this Court addressed attorneys-in-fact operating under written powers of attorney. When relying on *Bienash*, in paragraph 23 of *Stoebner*, this Court’s use of “the fiduciary” was a clear reference to the fiduciary before the Court in *Bienash* and *Stoebner*-an attorney-in-fact operating pursuant to a written power of attorney *Stoebner*, 2019 S.D. 58, at ¶ 23. This Court did not expand that ruling in *Stoebner* by referring to the agent as “the fiduciary.”

The bright-line rule from *Bienash* and *Stoebner* applies only when authority is conferred upon an agent by a strictly construed written power of attorney. This bright-line rule does not apply absent a formal written conferral of authority. This Court has never expanded the bright-line rule excluding all non-written evidence of a fiduciary’s authority to personally benefit from a transaction out of the power of attorney context. The bright-line rule can have no application where there is no written document to “strictly

construe.” In the absence of a written power of attorney creating the fiduciary duty, all relevant circumstances must be considered to determine whether the fiduciary breached the duty of loyalty.

B. The applicable standard for director self-dealing is one of good faith and fairness to the corporation.

The ability of a shareholder or corporation to recover damages on the basis of a director’s self-dealing transaction is controlled by statute. SDCL § 47-1A-861.1 provides:

A director's conflicting interest transaction may not be enjoined, set aside, or give rise to an award of damages or other sanctions, in a proceeding by a shareholder or by or in the right of the corporation, because the director, or any person with whom or which the director has a personal, economic, or other association, has an interest in the transaction, if:

- (1) Directors' action respecting the transaction was at any time taken in compliance with §§ 47-1A-862 to 47-1A-862.3, inclusive;
- (2) Shareholders' action respecting the transaction was at any time taken in compliance with §§ 47-1A-863 to 47-1A-863.3, inclusive; or
- (3) The transaction, judged according to the circumstances at the time of commitment, is established to have been fair to the corporation.

Whether any specific transaction between Travis and SAR gives rise to liability on the part of Travis will be judged by this statute. The specific transactions must be judged for fairness “according to the circumstances at the time of commitment.” *Id.* The Circuit Court’s ruling that “any circumstantial extrinsic evidence [Travis] might offer in support of his claim that Dee expressly approved his self-dealing is not admissible,” cannot be reconciled with the relevant statutory standard to be used at trial. The Order excludes “the circumstances at the time of commitment” and requires the jury to turn a blind eye to the “fairness” of the transactions.

As noted by the Delaware Supreme Court, statutes such as SDCL section 47-1A-861.1 effectively modify the duty of loyalty. See, *Schock v. Nash*, 732 A.2d 217, 225

(Del. 1999). Such statutory modification of the fiduciary duty does not exist in the common law fiduciary duty owed by an attorney-in-fact. “Unlike corporate law and limited partnership law that provide statutory modifications to the common law of fiduciary duty, there is no statutory provision that alters the common law fiduciary duty of loyalty owed by an attorney-in-fact under a durable power of attorney.” *Id.* The *Schock* Court noted that the corporate statute cited “provide[s] corporate directors with a safe harbor from allegations of self-dealing if the transaction is approved by a majority of the informed and disinterested directors, or disclosed to and approved by the shareholders.” *Id.* at n. 21 (citing 8 Del. C. § 144). The statutory scheme cited in *Schock* is similar to that provided in SDCL § 47-1A-861.1 et seq. *Compare*, SDCL § 47-1A-861.1 *with* 8 Del. C. § 144.

Additionally, the statutes referenced by SDCL section 47-1A-861.1 focus on whether the other directors and/or shareholders were aware of, and approved, the challenged transactions. SDCL sections 47-1A-862 through 862.2 address transactions in which the other qualified directors on the board voted for the transaction after full disclosure of the relevant facts. SDCL sections 47-1A-863 through 863.3 address the same issue in the shareholder context.

Here, Dee Smith was the sole shareholder, president and only other director at the time of the challenged transactions. R. 145-46, (App. 73-74). Travis has presented facts demonstrating that Dee Smith instructed Travis to engage in the transactions that are being challenged. R. 146, (App. 74) at ¶ 26. Clearly then, Dee approved of each transaction, and was aware of all relevant circumstances surrounding the transactions. Travis must be allowed to demonstrate to the jury that the challenged transactions were

fair to the corporation, and that the sole shareholder and other director compelled those transactions.

The relevant authority from this Court addressing breach of fiduciary duty in the corporate context has applied the appropriate standard, looking to the director's good faith in dealing with the corporation. The South Dakota Supreme Court has long held that a director is not prohibited from dealing with the corporation. *Schurr v. Weaver*, 53 N.W.2d 290, 293 (S.D. 1952).

Plaintiff as director occupied a fiduciary relation to the corporate association and its members. He was required to exercise the utmost good faith in all transactions touching his duties thereto. While a director is not prohibited from dealing with his corporation, yet such transactions are not without restrictions which do not apply to strangers dealing with the corporation. It is his duty to make full and frank disclosure of the circumstances and not to undertake to deal indirectly without sanction of the corporation.

Id.

In order to prove that Travis breached his fiduciary duty to SAR, Plaintiff must establish that Travis failed to exercise the utmost good faith in his transactions with SAR. "We have held that corporate officers and directors are held to a high degree of diligence and due care in the exercise of their fiduciary duties to shareholders. Directors of a corporation occupy a fiduciary position in respect to the corporation and its shareholders, and are required to exercise the utmost good faith in all transactions touching a director's duty." *Case v. Murdock*, 488 N.W. 2d 885, 889, 890 (S.D. 1992).

In *Schultz v. Scandrett*, this Court approved of a jury instruction that read: "All officers and directors of a corporation, whether Plaintiff or Defendants, owe a fiduciary duty to the corporation and its shareholders. They are required to use a high degree of

diligence and due care and the utmost good faith and fair dealing in the exercise of their fiduciary duties to shareholders. They must act in good faith and refrain from transactions in which they receive an improper personal benefit.” 2015 S.D. 52, ¶ 23, 866 N.W.2d 128, 136-37. The Court disagreed that the fiduciary duty of loyalty “requires that there be *no conflict* between the Director’s fiduciary duty and self-interest.” *Id.* at n.5.

The Circuit Court distinguished the authority provided by Travis regarding applying a good faith standard to actions of corporate directors. “The authority cited by Travis in support of a ‘good faith standard’, versus the bright-line rule of written authorization to self-deal, arises from cases that do not involve self-dealing by officers or directors.” R. 261, (App. 3). While these decisions may not involve identical facts to those presented here, these decisions demonstrate that this Court consistently applies a “good faith” standard when addressing allegations of breach of the fiduciary duty of loyalty by directors and officers of a corporation. This standard is consistent with the statutes articulating the standards of conduct for both directors and officers.

SDCL section 47-1A-830 provides the standards of conduct for directors. “Each member of the board of directors, when discharging the duties of a director, shall act in good faith and in a manner the director reasonably believes to be in the best interest of the corporation.” *Id.* Similarly, SDCL section 47-1A-842 provides the standards of conduct for officers of a corporation. “An officer, when performing in such capacity, shall act: (1) In good faith; (2) With the care that a person in a like position would reasonably exercise under similar circumstances; and (3) In a manner the officer

reasonably believes to be in the best interests of the corporation.” *Id.* These statutes confirm the good faith standard that officers and directors are held to in South Dakota.

The nature in which SAR’s business was conducted is relevant to the “fairness to the corporation standard” found in SDCL section 47-1A-861.1, as well as to the “best interests of the corporation standard” found in sections 47-1A-830 and 47-1A-842. In this closely-held, family ranching corporation, Dee Smith, the sole shareholder, a director and president, made the decisions for the corporation. R. 146, (App. 74) at ¶ 26. This type of corporate structure is well-known in the law. “It is to be noted that a close corporation is one in which management and ownership are ‘substantially identical to the extent that it is unrealistic to believe that the judgment of the directors will be independent of that of the stockholders.’” *Case v. Murdock*, 528 N.W.2d 386, 391 (S.D. 1995)(Wuest, J., dissenting)(quoting *Thisted v. Tower Management Corp.*, 409 P.2d 813, 820 (1966)). As quoted by Justice Wuest, in a close corporation:

There usually is no division between the shareholder-owners and the director-managers. Either the stockholders themselves are the directors, or they so closely dominate and control the directors that the latter are little more than their agents. Frequently the shareholders go even further, and besides being directors are also the officers and executives of the company. In any event either through serving as the directors and officers themselves, or through detailed provisions in the charter, by-laws, or stockholder agreements, the shareholders personally manage and control the business directly or else perform these functions through others who in fact simply act as their agents.

Id. (quoting O’Neal & Thompson, O’Neal’s Close Corporations § 1.07, at 28 n.1 (3d ed. 1994)).

Here, the facts that will be presented to the jury, as discussed above, demonstrate a family ranching operation meeting every definition of “closely held.” Dee and Travis’s family lived, worked and played together. R. 145, (App. 73). But it was Dee Smith, the

sole shareholder of SAR who made all decisions impacting SAR property. R. 146, (App. 74) at ¶ 26. The context in which corporate decisions were made is necessary to paint for the jury a complete picture and allow them to reach a just determination as to whether Travis acted in good faith, and in a manner fair to the corporation. Excluding the relevant evidence of Dee's intent will work a manifest injustice, and needlessly confuse the jury.

Take for example the issue of the 2015 calf crop. Travis assisted in branding the 2015 calves from the SAR cows with his and Julie's brand. Travis, as well as others, will testify that this was done at the direction of Dee. R. 147, (App. 75) at ¶ 37. But according to the Circuit Court's ruling, none of the evidence demonstrating Dee's intent is admissible. The jury will never hear that Dee was present at the branding, like she was every year. If Dee's intent is irrelevant, how will the jury determine which calves were inappropriately branded with Travis and Julie's brand? Is it all calves, is it only those calves that Travis personally branded, as opposed to those branded by one of his children or one of the neighbors who helped? The Circuit Court's ruling will force the jury to make decisions on Travis's conduct without the benefit of the full picture, painted by all relevant, admissible evidence.

No authority, whether statutory, this Court's previous decisions, or decisions from other jurisdictions support the Circuit Court's expansion of the bright-line rule applicable to powers of attorney into the corporate context. Rather, the authority uniformly applies a good faith/fairness standard regarding alleged acts of self-dealing. There is no authority, nor reason, to expand the bright-line rule and remove from the jury the evidence of the circumstances of the challenged transactions, including all evidence of Dee's intent. The question of whether Travis acted in good faith, when personally dealing

with SAR assets is a question of fact. See, *Mueller v. Cedar Shore Resort*, 2002 S.D. 38, ¶ 11, 643 N.W.2d 56, 62 (“The question of whether there has been a breach of [a fiduciary] duty is one of fact . . .”). A fact question to be determined by the jury, armed with all evidence of the circumstances surrounding the transactions – including all evidence of Dee’s intentions.

The Circuit Court recognized that expanding the bright-line rule excluding evidence of authority to self-deal could subvert the intentions of Dee, the sole shareholder of SAR. “As indicated above, there may be evidence tending to support Travis’s contention that Dee not only approved of, but directed Travis to convert assets of SAR to his personal use. SAR urges that such evidence – even if it means Dee’s actual intent is subverted – must not be considered in the absence of explicit written authorization for Travis to self-deal from the corporation.” R. 261, (App. 3).

But that’s exactly what the Circuit Court’s Order did. Under that Order, Travis will be unable to bring forward the parade of friends, family and neighbors that will testify to his relationship with Dee, Dee’s articulated desire to keep Travis and Julie on the ranch, and the actions Dee took to accomplish that desire. Instead, he will be forced to sit silently at trial while his brothers-in-law tell a small fraction of the story of Dee’s legacy. The Order would not allow Travis to call family and neighbors to discuss the branding of the 2015 calf crop when that issue is raised. When Lance and Craig raise the issue of the pickup purchased for Travis’ daughter, Travis will be unable to ask Lance and Craig whether their children also received similarly priced vehicles from their grandmother at nearly the same age. R. 148 (App. 76) at ¶ 45. Travis won’t be able to mention Dee’s comment in her Will that: “I am aware that my sons may not be happy

with the provisions I have made in my Will; however I ask them to honor my wishes and accept what I have done.” R. 147, (App. 75) at ¶ 35. Travis won’t be able to ask Lance and Craig how they spent the \$100,000.00 checks their mother sent them marked “inheritance.” R. 148, (App. 76) at ¶ 41. Travis won’t be able to mention that Dee went to the Harding County Treasurer’s office and placed the SAR vehicles in Travis name – without Travis’s knowledge. R. 147, (App. 75) at ¶ 40. Travis will have to bite his tongue when he recalls how often Lance or Craig visited their mother, including while she was dying of cancer. R. 148, (App. 76) at ¶¶ 42, 44. Travis won’t be able to mention that he’s been writing checks on the SAR account since before Calvin Smith passed away. R. 146, (App. 74) at ¶ 24. The case will have absolutely nothing to do with whether or not Dee Smith actually intended for Travis to benefit from SAR assets (Lance and Craig have admitted they are challenging Travis’s actions based entirely on the lack of written authorization for the transactions, R. 148, (App. 76) at ¶ 43)) but instead solely on the lack of written authorization for Travis to receive those assets. The Circuit Court’s order will work a manifest injustice, an injustice that no judicial authority supports.

CONCLUSION

The Circuit Court’s Order granting partial summary judgment must be reversed. No authority requires the expansion of the bright-line rule against admission of extrinsic evidence to establish authorization to self-deal undertaken by the Circuit Court. In fact, statutes and previous decisions from this Court require that the bright-line rule not be expanded. The jury must be allowed to determine whether Travis breached a duty of loyalty to SAR based on all of the relevant circumstances, including the intent of Dee Smith, the sole shareholder of SAR. Travis Hurst respectfully requests this Court reverse

the Circuit Court's Order granting partial summary judgment.

REQUEST FOR ORAL ARGUMENT

Travis Hurst hereby requests oral argument.

GUNDERSON, PALMER, NELSON &
ASHMORE, LLP

By: /s/ Matthew E. Naasz
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*Attorneys for Appellant/Defendant and
Third-Party Plaintiff*
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with SDCL § 15-26A-66(4). The font is Times New Roman size 12, which includes serifs. The brief is 23 pages long and the word count is 6474, exclusive of the Cover, Table of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service. The word processing software used to prepare this brief is Microsoft Word and the word count from that program was relied upon in determining the word count of this brief.

Dated: November 2, 2020.

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& ASHMORE, LLP

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 2, 2020, the foregoing **BRIEF OF APPELLANT TRAVIS HURST** was filed with the South Dakota Supreme Court and that the original and two copies of the same were filed by mailing the same to:

Shirley A. Jameson-Fergel, Clerk
South Dakota Supreme Court
500 E. Capitol Avenue
Pierre, SD 57501-5070
SCClerkBriefs@ujs.state.sd.us

And the **BRIEF OF APPELLANT TRAVIS HURST** was served by electronic mail and mailed by U.S. Mail to the following:

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MICHAEL K. SABERS
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msabers@clslawyers.net

Dated November 2, 2020.

By: /s/ Matthew E. Naasz
Matthew E. Naasz

APPENDIX

1. Order Granting Partial Summary Judgment	App. 1
2. Notice of Entry of the Order and Judgment	App. 5
3. Petition for Permission to Take Intermediate Appeal	App. 11
4. Plaintiff and Third-Party Defendants' Motion for Partial Summary Judgment	App. 23
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STATE OF SOUTH DAKOTA)
)
COUNTY OF HARDING)

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

SMITH ANGUS RANCH, INC. (SAR),
 Plaintiff,

31CIV18-18

vs.

TRAVIS HURST, as an alleged
Director of SAR, and as an individual,
 Defendant and
 Third-Party Plaintiff,

ORDER GRANTING PARTIAL
SUMMARY JUDGMENT

vs.

CRAIG SMITH AND LANCE SMITH,
 Third-Party Defendants.

Plaintiff Smith Angus Ranch, Inc. (hereafter SAR), a South Dakota corporation, has moved for partial summary judgment regarding some of its claims against Defendant Travis Hurst (hereafter Travis). For reasons that follow, the motion is granted in part.

Calvin and Dee Smith owned a cattle ranch in Harding County. Smiths owned the ranch land in their own names. They also operated a corporation, SAR, which owned certain personal property, including livestock and equipment used in the ranch's operation. After Calvin died in 2008, Dee became the sole owner of the land and the sole shareholder of the corporation. The Smiths had 3 children, Lance Smith, Craig Smith, and Julie Hurst. Julie Hurst is married to Defendant Travis Hurst. The Hursts participated significantly in the operation of the Smith ranch, both before and after Calvin's demise.

In 2013, while Dee dealt with a serious health condition that required regular absences from the ranch, Travis became a Director and officer of SAR. This was apparently to enable him to authorize dealings with SAR cattle. He also received authority at some point prior to 2013 to write checks on the SAR checking account. In addition to entrusting Travis with much of her ranch and financial affairs, Dee gave things, such as pickups formerly titled to SAR, to the Hursts. Travis also maintains that she allowed him to brand all of the 2015 calf crop with the Hurst's brand, half as a gift from SAR and half as payment

for pasturing SAR livestock, given Hursts' acquisition the land pursuant to the contract for deed. Travis also purchased things with SAR funds, including vehicles and fence posts, for his personal use. He concedes that the things he bought for himself with SAR funds were not for the benefit of the corporation. There is no evidence in the record as to what, if any, compensation Travis received from SAR, in-kind or monetary. In 2015 Dee sold the ranch land, which she then owned individually, to the Hursts on a contract for deed, at a price that was potentially far below its market value.

Dee died in October 2015. Her will named Lance and Craig as co-personal representatives of her estate, a role which they undertook. The will left SAR and its assets entirely to Lance and Craig, and forgave the amounts due to her from Hursts on the purchase of her ranch land, essentially bequeathing it to them. Her will explicitly acknowledged the angst that might arise between her children because of her testamentary disposition.

In their capacity as the new owners of SAR, Lance and Craig brought this action against Travis, alleging that Travis committed acts with SAR assets, and at least one significant prospective asset (the ranch land), which were inappropriate and actionable. One of those claims is that Travis committed self-dealing, by using corporate funds to purchase various things for himself (examples noted above).

SAR's bylaws are not part of the record, but it appears undisputed that they do not explicitly authorize self-dealing by officers or directors. Travis has no specific evidence, beyond his assertion that Dee orally consented to his self-dealing, that she authorized the specific transfers of SAR assets that he made to himself during her lifetime.

In the context of a power of attorney, the South Dakota Supreme Court has adopted a bright-line rule that no oral extrinsic evidence may be used to prove that an attorney-in-fact has authority to self deal. *Stoebner v. Huether*, 2019 SD 58. The Court went even farther, saying that "a written document must clearly articulate that the fiduciary is authorized to engage in self-dealing." Given the fiduciary relationship between an officer / director of a corporation and its shareholder(s), and the similarity between responsibilities in the two situations, SAR urges the Court to anticipate that, if called upon to rule, the South Dakota Supreme Court would extend application of that policy to officer/shareholder cases.

As indicated above, there may be evidence tending to support Travis's contention that Dee not only approved of, but directed Travis to convert assets of SAR to his personal use. SAR urges that such evidence – even if it means Dee's actual intent is subverted – must not be considered in the absence of explicit written authorization for Travis to self-deal from the corporation.

SAR may have been loosely operated as a closely-held family corporation, but nonetheless it was a separate legal entity that at some point the Smiths chose to use for the operation of their ranching business. The authority cited by Travis in support of a 'good faith' standard, versus the bright-line rule of written authorization to self-deal, arises from cases that do not involve self-dealing by officers or directors. *Schurr v. Weaver*, 74 SD 378, a case which had no advocacy from a corporate party, involved a corporate officer who entered into a contract with his corporation via the use of a strawman. It discussed the corporate officer's duty to exercise good faith and make full and frank disclosure of his dealings with the corporation, and to get corporate permission to deal indirectly with it. *Case v. Murdock*, 488 N.W.2d 885 (SD 1992) involved officer/directors' buying the right to purchase a building out from under a corporation that had been negotiating with the seller, then trying to use the purchase agreement to increase their leverage in the corporation to the disadvantage of other shareholders. While the Court in *Case* discussed the requirement that officers and directors exercise good faith in all transactions related to their duties; it did not address allegations of taking corporate assets for personal gain, i.e. self-dealing. Again, *Schultz v. Scandrett*, 2015 SD 52, did not involve self-dealing by undocumented transfers of corporate property to individual officers/directors, but a dispute between shareholder / officers alleging that some of them had used their position to get the corporation to pay them excessively.

Clearly, as an officer and director of SAR, Travis acted as a fiduciary to it. He had no written authority to convert SAR's assets for his personal gain, and any circumstantial / extrinsic evidence he might offer in support of his claim that Dee expressly approved his self-dealing is not admissible. SAR incurred damages, in the amount of his direct diversion of SAR funds/assets to himself, and those damages (in an amount to be determined later) were caused by his unauthorized self-dealing.

Based on the foregoing, it is hereby

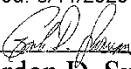
ORDERED that SAR's motion for partial summary judgment is granted insofar as it seeks a declaration that Travis Hurst's conveyance of SAR funds/assets to himself violated his duties as a director/officer of SAR. Beyond that, no opinion is expressed or decision rendered on the propriety of Dee's transfer of personal or corporate assets to Travis.

Dated this _____ day of _____, 20____.

BY THE COURT:

Attest:
Teigen, Karen
Clerk/Deputy

Signed: 8/11/2020 9:45:01 AM



Gordon D. Swanson
Circuit Court Judge

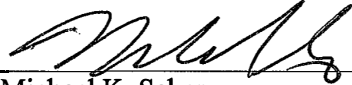


STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTY OF HARDING	)	FOURTH JUDICIAL CIRCUIT
)	
SMITH ANGUS RANCH Inc. (SAR),	)	31CIV18-000018
)	
)	
Plaintiff,)	
v.)	
)	
TRAVIS HURST, as an alleged)	
DIRECTOR OF SAR, and as an individual,)	
	)	NOTICE OF ENTRY OF
	)	ORDER GRANTING PARTIAL
Defendant and	)	SUMMARY JUDGMENT
Third-Party Plaintiff,)	
)	
v.)	
)	
CRAIG SMITH and LANCE SMITH,)	
)	
Third-Party Defendants.)	

YOU WILL PLEASE take notice that an Order Granting Partial Summary Judgment was entered in the above-captioned matter on the 11th day of August, 2020 by the Honorable Gordon Swanson, a copy of which is attached hereto and by reference incorporated herein, and attested by the Clerk and filed in the Harding County Clerk of Courts, Fourth Judicial Circuit, in Buffalo, South Dakota on the 11th day of August, 2020.

Dated this 12th day of August, 2020.

CLAYBORNE, LOOS & SABERS, LLP


 Michael K. Sabers
Attorneys for the Plaintiff
 PO Box 9129
 Rapid City, SD 57709-9129
 (605)721-1517

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of August, 2020, I sent a true and correct copy of the foregoing *Notice of Entry of Order Granting Partial Summary Judgment* to the following:

<input type="checkbox"/>	First Class Mail	<input type="checkbox"/>	Certified Mail
<input type="checkbox"/>	Hand Delivery	<input type="checkbox"/>	Facsimile
<input type="checkbox"/>	Electronic Mail	<input checked="" type="checkbox"/>	Odyssey File and Service

**David E. Lust
Matthew Naasz
GPNA, LLP
506 Sixth Street
P.O. Box 8045
Rapid City, SD 57709**

which is the last known address of the addressee known to the subscriber.



Michael K. Sabers

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)
COUNTY OF HARDING)

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

SMITH ANGUS RANCH, INC. (SAR),
 Plaintiff,

vs.

31CIV18-18

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Based on the foregoing, it is hereby

ORDERED that SAR's motion for partial summary judgment is granted insofar as it seeks a declaration that Travis Hurst's conveyance of SAR funds/assets to himself violated his duties as a director/officer of SAR. Beyond that, no opinion is expressed or decision rendered on the propriety of Dee's transfer of personal or corporate assets to Travis.

Dated this _____ day of _____, 20____.


BY THE COURT:

Attest:

Teigen, Karen
Clerk/Deputy



Signed: 8/11/2020 9:45:01 AM



Gordon D. Swanson
Circuit Court Judge

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal from the Circuit Court
Fourth Judicial Circuit
Harding County, South Dakota
Honorable Gordon D. Swanson

SMITH ANGUS RANCH Inc. (SAR),

Plaintiff,

vs.

TRAVIS HURST, as an alleged DIRECTOR OF SAR, and as an individual,

Defendant and Third-Party Plaintiff,

vs.

CRAIG SMITH and LANCE SMITH,

Third-Party Defendants.

PETITION FOR PERMISSION TO TAKE INTERMEDIATE APPEAL

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Defendant and Third Party Plaintiff, Travis Hurst through his attorneys of record, David E. Lust and Matthew E. Naasz of Gunderson, Palmer, Nelson & Ashmore, L.L.P., of Rapid City, South Dakota, respectfully petitions the South Dakota Supreme Court for permission to take an intermediate appeal to review the Order Granting Plaintiff's Motion for Partial Summary Judgment ("Order") dated August 11, 2020 and entered by the Honorable Gordon D. Swanson, Fourth Judicial Circuit, in the case 37CIV18-000018. Notice of Entry of the Order was served and filed on August 12, 2020.

STATEMENT OF FACTS

Travis and Julie Hurst raised their children with Calvin and Dee Smith, Julie's parents, on a ranch in Harding County. Affidavit of Travis Hurst at ¶ 10. The ranch operation was a collective effort. *Id.* at ¶ 11. Travis and Julie received no salary for their efforts, but were allowed to run their personal cattle on land owned by Dee and Calvin. *Id.* at ¶12, 13. Calvin passed away in 2008, Dee stayed on her ranch, with the help of Travis, Julie and their children Dalton, Sadee and Macy. *Id.* at ¶ 7,8,10. After Calvin's death Travis became more instrumental in the operations and management of the ranch. *Id.* at ¶ 14.

Smith Angus Ranch, Inc. ("SAR") was established in approximately 1991. *Id.* at ¶ 15. During their marriage Calvin and Dee were the shareholders, officers and directors of SAR. *Id.* at ¶16. When Calvin died, Dee became the sole shareholder. *Id.* at ¶ 17. Dee was the sole officer and director until 2013. *Id.* at ¶ 18.

Dee was diagnosed with cancer in 2013. *Id.* at ¶ 19. Treatment often took Dee away from the ranch, to Sioux Falls. *Id.* at ¶ 20. In 2013, Dee added Travis Hurst's name to the Amended Annual Report filed with the South Dakota Secretary of State's office as vice president and

director. *Id.* at ¶ 21. Travis was added as a director to allow him to be able to authorize SAR cattle transactions at local sale barns. *Id.* at ¶ 22.

Operation of the ranch did not change in any meaningful way after Travis was listed as a director on the Amended Annual Reports. *Id.* at ¶ 23. Travis, Julie and Dee continued to operate the ranch collectively. *Id.* at ¶ 24. Travis had been a signatory on SAR checks since at least July 26, 2000. *Id.* at ¶ 25. Travis continued to utilize the SAR checking account as needed to make ranch related purchases, when directed by Dee, just as he had done for years before he was listed as a director. *Id.* at ¶ 26. Dee remained singularly in charge of corporate documents and decisions. *Id.* at ¶ 27. No arrangement was ever formalized placing the parties' respective obligations or authority in writing. *Id.* at ¶ 28. No shares of SAR were ever transferred to Travis or Julie, Dee remained the sole shareholder until her death. *Id.* at ¶ 29, 30.

After developing cancer, Dee began a concerted effort aimed at ensuring that Travis and Julie were able to stay on the ranch following her death. In 2015, Dee sold the 6,000 acre ranch to Travis and Julie. *Id.* at ¶ 31. The real property had never been a corporate asset, it was owned by Dee individually after Calvin's death. *Id.* at ¶ 33. In her Will, Dee forgave the payments on the real property owed by Travis and Julie.

Dee's efforts to pass the assets of SAR to Travis and Julie prior to her death did not begin and end with her Will. At Dee's direction, the 2015 calf crop from the SAR cows were all branded with Travis and Julie's personal brand, effectively transferring ownership to Travis and Julie. *Id.* at ¶ 34. The SAR cows, roughly 200 pairs, grazed on the real property purchased by Travis and Julie. *Id.* at ¶ 35. Approximately half of the 2015 calf crop was meant to pay for use of the pasture by the pairs during the 2015 grazing season, the other portion of the calf crop was

a gift from Dee to Travis and Julie. *Id.* at ¶ 36. Dee unilaterally went to the Harding County Treasurer's office and placed Travis's name on the SAR vehicles. *Id.* at ¶ 37.

In late 2018, Smith Angus Ranch ("SAR") filed a "Complaint and Demand for Jury Trial" ("Complaint") alleging that Travis Hurst ("Travis") breached his fiduciary duty to avoid self-dealing.

SAR moved for partial summary judgement regarding its claim against Travis for self-dealing. Plaintiff's Motion for Summary Judgment rested entirely on this Court's recent decision in *Estate of Stoebner v. Huether*, 2019 S.D., 935 N.W.2d 262 ("*Stoebner*"). Plaintiff sought Summary Judgment on the issue of Travis' Breach of Fiduciary duty arguing that no evidence other than explicit written authorization is admissible to demonstrates SAR's (through Dee Smith the sole-shareholder, President and other Director) authorization for the transactions. The Honorable Gordon D. Swanson entered an order granting Plaintiff's Motion. The Circuit Court articulated the issue raised by Plaintiff's Motion as follows:

In the context of a power of attorney, the South Dakota Supreme Court has adopted a bright-line rule that no oral extrinsic evidence may be used to prove that an attorney-in-fact has authority to self-deal. *Stoebner v. Huether*, 2019 SD 58. The Court went even farther, saying that "a written document must clearly articulate that the fiduciary is authorized to engage in self-dealing." Given the fiduciary relationship between an officer/director of a corporation and its shareholder(s), and the similarity between responsibilities in the two situations, SAR urges the Court to anticipate that, if called upon to rule, the South Dakota Supreme Court would extend application of that policy to officer/shareholder cases."

Order at 2.

The Circuit Court then noted that SAR was urging extension of the power of attorney bright-line rule to the corporate context, even if it meant that the will of the sole shareholder would be subverted: "As indicated above, there may be direct evidence tending to support Travis's contention that Dee not only approved of, but directed Travis to convert assets of SAR

to his personal use. SAR urges that such evidence – even if it means Dee’s actual intent is subverted – must not be considered in the absence of explicit written authorization for Travis to self-deal from the corporation.” *Id.* at 3. The Circuit Court concluded:

Clearly, as an officer and director of SAR, Travis acted as a fiduciary to it. He had no written authority to convert SAR’s assets for his personal gain, and any circumstantial/extrinsic evidence he might offer in support of his claim that Dee expressly approved his self-dealing is not admissible.

Id.

STATEMENT OF THE QUESTION

1. Whether the Circuit Court improperly expanded this Court’s ruling in *Estate of Stoebner v. Huether* to impose a bright-line rule against introduction of evidence authorizing self-dealing onto all fiduciaries, absent express, written authorization to self-deal.

RELIEF SOUGHT

Travis requests permission to appeal the Circuit Court’s Order Granting Partial Summary Judgment so that the issue of admissibility of non-written evidence authorizing Travis’s actions can be determined by this Court before a trial on the merits occurs in which the Circuit Court will exclude all non-written evidence of the sole shareholder of SAR’s intent as to the disposition of SAR assets.

STATEMENT OF LAW IN SUPPORT OF REQUEST AND REASONS WHY APPEAL SHOULD BE ALLOWED

1. **Whether the Circuit Court’s Order Granting Partial Summary Judgment inappropriately extended the bright-line rule regarding admissibility of extrinsic evidence in power-of-attorney contexts to corporate director/shareholder cases.**

Plaintiff’s Motion for Partial Summary Judgment, and the Court’s Order granting that Motion, rest entirely on this Court’s recent decision in *Stoebner*. The applicable phrase from *Stoebner* states: “We have adopted a bright-line rule that no oral extrinsic evidence may be introduced to raise a factual issue as to whether an attorney-in-fact was authorized to self-deal

under a power of attorney.” 2019 S.D. 58 at ¶ 23. The Circuit Court gave special credence to the following sentence: “The Court went even farther, saying that ‘a written document must clearly articulate that the fiduciary is authorized to engage in self-dealing.’” Order at 2 (quoting *Stoebner*, 2019 S.D. 58 at ¶ 23). It is based on this language that the Circuit Court anticipated this Court would, for the first time, extend the bright-line rule applying to agents acting pursuant to powers of attorney into the corporate context.

As noted above, the Order quotes this Court as saying “a written document must clearly articulate that **the fiduciary** is authorized to engage in self-dealing.” This Court in *Stoebner*¹ cites to *Bienash v. Moller* (2006 S.D. 78, ¶ 23, 721 N.W.2d 431, 437) for this standard. *Bienash* also addressed attorneys-in-fact and breaches of fiduciary duty. *See generally id.* In *Stoebner* this Court found authority in ¶ 23 of *Bienash*:

The Court, relying on *Kunewa*'s “compelling reasons for the rule prohibiting extrinsic evidence,” [internal citation omitted], held “an attorney-in-fact may not make gratuitous transfers of a principal's assets unless the power of attorney from which his or her authority is derived expressly and unambiguously grants the authority to do so. As a corollary to this bright-line rule, extrinsic evidence of the principals' intent to allow such gifts is not admissible.”

Bienash, 2006 S.D. 78 at ¶ 23 (citations omitted).

In *Bienash*, this Court addressed attorney-in-fact situations. This Court's use of “the fiduciary” in paragraph 23 of *Stoebner* was a clear reference to the fiduciary before the Court, an attorney-in-fact operating pursuant to a written power of attorney.

Going further, the quoted authority in *Bienash* deals specifically with written instruments that confer authority. *Kunewa v. Joshua*, 83 Haw. 65, 71, 924 P.2d 559, 565 (*Ct. App.* 1996). “It is also well-established that powers of attorney ‘are subjected to a strict construction and are

¹ The phrase “power of attorney” is used sixteen (16) times throughout the *Stoebner* opinion. See *Stoebner*, 2019 S.D. 58, 935 N.W.2d 262.

never interpreted to authorize acts not obviously within the scope of the particular matter to which they refer.” *Id.* at 565. (citation omitted).

When authority is conferred upon an agent by a formal, written instrument, such as a power of attorney, the authority given the agent will be strictly construed so as to exclude any authority not specifically set forth, except authority necessary to effectuate the purpose of the authority granted. Accordingly, it is well-settled that an agent lacks authority to make a gift of the principal's property unless that authority is expressly given by the language of the power of attorney.

Id. (citations omitted). The bright-line rule from *Kunewa, Bienash and Stoebner* applies only when authority is conferred upon an agent by a formal, written instrument. This bright-line rule does not apply absent a formal written conferral of authority. There is no bright-line rule excluding all non-written evidence of a director’s authority to personally benefit from a transaction with the corporation.

2. Applicable standard for director self-dealing

The Circuit Court’s Order imposes strict liability on a director who benefited from a transaction with the corporation without written authorization. Strict liability in that context is not supported by the relevant authority. The appropriate standard is one of fairness and good faith, in light of all available circumstances.

The ability of a shareholder or corporation to recover damages on the basis of a director’s self-dealing transaction is controlled by statute. SDCL § 47-1A-861.1² provides:

² This statute effectively modifies the common law fiduciary duty of loyalty. See, *Schock v. Nash*, 732 A.2d 217, 225 (De. 1999). In *Schock*, the Delaware Supreme Court noted: “Unlike corporate law and limited partnership law that provide statutory modifications to the common law of fiduciary duty, there is no statutory provision that alters the common law fiduciary duty of loyalty owed by an attorney-in-fact under a durable power of attorney.” *Id.* The *Schock* Court noted that the corporate statute cited “provide[s] corporate directors with a safe harbor from allegations of self-dealing if the transaction is approved by a majority of the informed and disinterested directors, or disclosed to and approved by the shareholders.” *Id.* at n. 21 (citing 8 Del.C. § 144). The statutory scheme cited in *Schock* is similar to that provided in SDCL § 47-1A-861.1 et seq.

A director's conflicting interest transaction may not be enjoined, set aside, or give rise to an award of damages or other sanctions, in a proceeding by a shareholder or by or in the right of the corporation, because the director, or any person with whom or which the director has a personal, economic, or other association, has an interest in the transaction, if:

- (1) Directors' action respecting the transaction was at any time taken in compliance with §§ 47-1A-862 to 47-1A-862.3, inclusive;
- (2) Shareholders' action respecting the transaction was at any time taken in compliance with §§ 47-1A-863 to 47-1A-863.3, inclusive; or
- (3) The transaction, judged according to the circumstances at the time of commitment, is established to have been fair to the corporation.

Whether any specific transaction between Travis Hurst and Smith Angus Ranch gives rise to liability on the part of Travis Hurst will be judged by this statute. Critically, the statute refers to “fairness” and “the circumstances at the time of commitment” concepts diametrically opposed with exclusion of all evidence regarding the fairness or circumstances of those transactions. The Circuit Court’s ruling that “any circumstantial extrinsic evidence [Travis Hurst] might offer in support of his claim that Dee expressly approved his self-dealing is not admissible” cannot be reconciled with the relevant statutory standard to be used at trial.

Additionally, the statutes referenced by SDCL § 47-1A-861.1 focus on whether the other directors and/or shareholders were aware of, and approved, the challenged transactions. See, SDCL § 47-1A-862-863.3. Here, Dee Smith was the sole shareholder, president and only other director at the time of the challenged transactions. Travis must be allowed to demonstrate to the jury that the challenged transactions were fair to the corporation, and that the sole shareholder and other director compelled those transactions. The Circuit Court’s Order prevents the jury from hearing the evidence that will allow them to determine whether Plaintiff can recover from Travis pursuant to the applicable statute.

In this closely-held, family ranching corporation, Dee Smith, the sole shareholder, a director and president, made the decisions for the corporation. “It is to be noted that a close corporation

is one in which management and ownership are ‘substantially identical to the extent that it is unrealistic to believe that the judgment of the directors will be independent of that of the stockholders.’” *Case v. Murdock*, 528 N.W.2d 386, 391 (Wuest, J., dissenting)(quoting *Thisted v. Tower Management Corp.*, 409 P.2d 813, 820 (1966)). As quoted by Justice Wuest, in a close corporation:

There usually is no division between the shareholder-owners and the director-managers. Either the stockholders themselves are the directors, or they so closely dominate and control the directors that the latter are little more than their agents. Frequently the shareholders go even further, and besides being directors are also the officers and executives of the company. In any event either through serving as the directors and officers themselves, or through detailed provisions in the charter, by-laws, or stockholder agreements, the shareholders personally manage and control the business directly or else perform these functions through others who in fact simply act as their agents. *Id.* (quoting O’Neal & Thompson, O’Neal’s Close Corporations § 1.07, at 28 n.1 (3d ed. 1994)).

Under a duty of loyalty analysis guided by the relevant statutes, the focus should be on the good faith of the transaction and its inherent fairness from the viewpoint of the corporation and those interested, namely the sole shareholder, Dee. The South Dakota Supreme Court has long held that a director is not prohibited from dealing with his corporation. *Schurr v. Weaver*, 53 N.W.2d 290, 293 (S.D. 1952).³ “While a director is not prohibited from dealing with his corporation, yet such transactions are not without restrictions which do not apply to strangers dealing with the corporation. It is his duty to make full and frank disclosure of the circumstances and not to undertake to deal indirectly without sanction of the corporation.” *Id.* In order to prove that Travis Hurst breached his fiduciary duty to SAR, Plaintiff must establish that Hurst failed to exercise the utmost good faith in his transactions with SAR. “We have held that

³ The Circuit Court distinguished Travis Hurst’s authority applying the good faith standard in the director self-dealing context. See, Order at 3. But the South Dakota cases cited herein deal with breaches of fiduciary duty in the corporate context, much more closely factually analogous with the present matter than *Stoebner*. Also, the good faith standard found in the authority cited by Travis aligns with the relevant statutes and the authority from Delaware courts.

corporate officers and directors are held to a high degree of diligence and due care in the exercise of their fiduciary duties to shareholders. Directors of a corporation occupy a fiduciary position in respect to the corporation and its shareholders, and are required to exercise the utmost good faith in all transactions touching a director's duty." *Case v. Murdock*, 488 N.W. 2d 885, 890 (S.D. 1992) ("Case").⁴ The appropriate standard is not one of strict liability.

Corporate law from Delaware shares the "good faith" standard. "When directors are self-dealing, 'they are required to demonstrate their utmost good faith and the most scrupulous inherent fairness' of the transaction." *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983)). It is not a strict liability standard.

Thus, where, as here, directors make decisions about their own compensation, those decisions presumptively will be reviewed as self-dealing transactions under the entire fairness standard rather than under the business judgment rule.

Espinoza v. Zuckerberg, 124 A.3d 47, 54 (Del. Ch. 2015). No authority, whether statutory, South Dakota decisional authority, or decisions from other jurisdictions support the Circuit Court's expansion of the bright-line rule applicable to powers of attorney into the corporate context. Rather, the authority uniformly applies a good faith/fairness standard regarding alleged acts of self-dealing.

REASONS WHY THE APPEAL SHOULD BE ALLOWED

The Circuit Court improperly excluded all evidence Travis may "offer in support of his claim that Dee expressly approved him self-dealing...". Absent permission to appeal this

⁴ In *Schultz v. Scandrett*, this Court approved of a jury instruction that read: "All officers and directors of a corporation, whether Plaintiff or Defendants, owe a fiduciary duty to the corporation and its shareholders. They are required to use a high degree of diligence and due care and the utmost good faith and fair dealing in the exercise of their fiduciary duties to shareholders. They must act in good faith and refrain from transactions in which they receive an improper personal benefit." 2015 S.D. 52, ¶ 23, 866 N.W.2d 128, 136-37.

decision, Travis will be forced to try this case to a jury without introducing evidence of Dee's intentions. Then, after a lengthy, expensive trial, Travis will be forced to bring this identical issue back to this Court. This question is purely one of law, a question that should be answered prior to trial.

PAPERS AND EXHIBITS RELEVANT AND MATERIAL

1. Ex. 1- Order Granting Partial Summary Judgment.
2. Ex. 2- Transcript of Hearing Re: Motion for Partial Summary Judgment.
3. Ex. 3- Notice of Entry of Order Granting Partial Summary Judgment.
4. Ex. 4- Affidavit of Travis Hurst.

Dated this 26th day of August, 2020.

GUNDERSON, PALMER, NELSON &
ASHMORE, LLP

By: 

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CERTIFICATE OF SERVICE

I certify that on August 26, 2020, a true and correct copy of **PETITION FOR PERMISSION TO TAKE INTERMEDIATE APPEAL** were electronically filed through South Dakota's Odyssey File and Serve Portal, upon the following individuals:

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By: /s/ Matthew E. Naasz
Matthew E. Naasz

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

31CIV18-000018

**PLAINTIFF AND THIRD-PARTY
DEFENDANTS' MOTION FOR
PARTIAL SUMMARY JUDGMENT**

TRAVIS HURST, as an alleged
DIRECTOR OF SAR, and as an
individual,

VS.

Third-Party Defendants.

2. Plaintiff and Third-Party Defendants' Statement of Undisputed Facts
in Support of Motion for Partial Summary Judgment; and

3. Affidavit of Michael K. Sabers with Exhibits referenced or incorporated in pleadings.

Based on such pleadings, affidavit, and the record in this case, Plaintiff and Third-Party Defendants respectfully request that this Court grant their Motion for Partial Summary Judgment on the following issues:

1. That Defendant Hurst was a Director of SAR;
2. That Defendant Director Hurst owed SAR a fiduciary duty that included the duty to not self-deal or usurp corporate opportunity;
3. That Defendant Director Hurst breached his duty in self-dealing;
4. That no written authorization existed to justify self-dealing and Defendant Director's Hurst's attempt to utilize "oral" authorization fails as a matter of law; and
5. That damages, the extent of which will be determined at trial, exist.

Submitted this 21st day of July, 2020.

CLAYBORNE, LOOS & SABERS, LLP

/s/ Michael K. Sabers
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served true and correct copies of the foregoing **PLAINTIFF AND THIRD-PARTY DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT** upon the persons herein next named, on the date shown below, by serving the same through Odyssey File and Serve, to:

David Lust
Matthew Naasz
Gunderson, Palmer, Nelson & Ashmore
506 6th Street
P.O. Box 8045
Rapid City, SD 57709

and that such addresses are the last addresses known to the subscriber/undersigned.

Dated this 21st day of July, 2020.

/s/ Michael K. Sabers
MICHAEL K. SABERS

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HARDING)

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

SMITH ANGUS RANCH, INC. (SAR),

Plaintiff,

vs.

TRAVIS HURST, as an alleged
DIRECTOR OF SAR, and as an
individual,

Defendant and
Third-Party Plaintiff,

vs.

CRAIG SMITH and LANCE SMITH,

Third-Party Defendants.

31CIV18-000018

**PLAINTIFF AND THIRD-PARTY
DEFENDANTS' MEMORANDUM IN
SUPPORT OF MOTION FOR
PARTIAL SUMMARY JUDGMENT**

COME NOW the Plaintiff, Smith Angus Ranch, Inc. (hereinafter "SAR"), and Third-Party Defendants, Craig Smith and Lance Smith, through undersigned counsel, hereby submit this Memorandum in Support of Motion for Partial Summary Judgment pursuant to SDCL § 15-6-56(a). This Memorandum is submitted in support of the aforesaid Motion.

PRELIMINARY STATEMENT

Smith Angus Ranch (hereinafter "SAR") has filed this Motion for Partial Summary Judgment because there are no genuine issues as to material facts and Plaintiff is entitled to a judgment as a matter of law on Count 1-Breach of

Fiduciary Duty and Count 2-Self Dealing as set forth in its Complaint. The record is undisputed as to the following:

1. That Defendant Hurst was a Director of SAR;
 2. That Defendant Director Hurst owed SAR a fiduciary duty that included the duty to not self-deal or usurp corporate opportunity;
 3. That Defendant Director Hurst breached his duty in self-dealing;
 4. That no written authorization existed to justify self-dealing and Defendant Director Hurst's attempt to utilize "oral" authorization fails as a matter of law; and
 5. That damages, the extent of which will be determined at trial, exist.
- References to the Plaintiff's Statement of Undisputed Material Facts will be "SUMF" followed by the paragraph number. Deposition exhibits shall be referenced by "Ex.".

FACTUAL BACKGROUND

On September 11, 2018, Plaintiff commenced this action against Travis Hurst (hereinafter "Hurst") after learning Hurst engaged in self-dealing and breached the fiduciary duty he owed to SAR. (See Complaint ¶ 8,9,14). The Complaint also alleges three alternative causes of action against Hurst including usurpation of corporate opportunity, fraud and conversion. *Id* at ¶ 17-3. However, this motion is limited to Hurst's breach of fiduciary duty and self-dealing which now, based on discovery responses, and the sworn deposition testimony of Travis Hurst, is undisputed.

During her lifetime, Emma Dee Smith (hereinafter “Dee Smith”) was the sole shareholder of SAR and remained so at the time of her passing on October 24, 2015. (Complaint ¶ 2). SAR primarily ran cattle and was located in Harding County. Emma had three children Lance Smith, Craig Smith and Julie Hurst. Lance Smith (hereinafter “Lance”) and Craig Smith (hereinafter “Craig”) were appointed co-personal representatives of the Estate of Emma Dee Smith in her will. *Id.* at ¶ 3. Lance and Craig were also bequeathed any and all interest Emma had in SAR at the time of her death (primarily cattle, hay and equipment). *Id.* at ¶ 4. Lance and Craig were Directors of SAR and responsible for its wrapping up. *Id.* Prior to Emma’s death however, Hurst (Defendant and Julie Hurst’s husband) was a director of SAR. (Ex. 11; Hurst Depo. P. 11-14). Hurst worked on the ranch alongside his wife, Julie, during the period leading up to Dee Smith’s death.

In December 2014, Dee Smith signed a Power of Attorney while she was in treatment in Sioux Falls, SD. (Defendant’s Interrogatory Response No. 35; SUMF ¶ 6). Sometime thereafter, Dee Smith suffered a stroke which led her to become legally blind in the left eye and was admitted to the nursing home at Peaceful Prairie. (SUMF ¶ 7-9). She was there for one week until her passing in October 2015. (SUMF ¶ 6). Subsequently, the Estate hired counsel, and consistent with responsibilities as co-personal representative, Lance and Craig began looking into the Estate’s finances. They uncovered that Hurst had initiated and completed countless transactions that amounted to a breach of fiduciary duty and self-dealing.

ARGUMENT

A. Summary Judgement Standard

The standard for summary judgment is well known and settled in South Dakota. The Supreme Court as stated that the trial court,

... must determine whether the moving party demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law. The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party. The nonmoving party, however, must present specific facts showing that a genuine, material issue for trial exists.

Zochert v. Protective Life Ins. Co., 2018 S.D. 84, ¶19, N.W.2.

The burden of proof on a motion for summary judgment is placed on the moving party and the movant must show that there are no genuine issues of material fact and that the movant is entitled to a judgment as a matter of law. SDCL 15¶-6-56(c); *Wulf*, 2003 S.D. at 105, ¶17. The non-moving party, however, "... cannot merely rest on the pleading, but must present specific facts by way of 'affidavits or as otherwise provided in SDCL 15-6-56(e)'... setting forth specific facts showing the existence of genuine issues of material fact." *Wulf*, 2003 S.D. at 105, ¶18. Moreover, "... mere general allegations or denials will not prevent the issuance of summary judgment." *Id.*, at ¶18. A party opposing "... summary judgment must establish the specific facts which show that a genuine and material issue for trial exists." *Id.*, at ¶18. Finally, "... [s]ummary judgment is not the proper method to dispose of factual questions ..."; however, when "... fact questions are undisputed ..." they then become questions of law for the court to decide and are appropriately disposed

of on summary judgment. *Keystone Plaza Cond. Assn. v. Eastep*, 2004 S.D. 28, ¶8, 676 N.W.2d 842.

B. Hurst Creation of Fiduciary Duty and Breach

“The existence of a fiduciary duty and the scope of that duty are questions of law for the trial court.” *Landstrom v. Shaver*, 1997 SD 25, P25, 561 N.W.2d 1, 7. “A fiduciary is defined as ‘a person who is required to act for the benefit of another person on *all matters within the scope of their relationship*.’” *Dykstra v. Page Holding Co.*, 2009 SD 38, ¶ 27, 766 N.W.2d 491, 497 (quoting *Black's Law Dictionary* (8th ed. 2004)). “[D]irectors of a corporation occupy a fiduciary position in respect to the corporation and its shareholders, and are required to exercise the utmost good faith in all transactions touching a director's duty.” *Case v. Murdock*, 488 N.W.2d 885, 890 (citing *Schurr v. Weaver*, 74 SD 378, 384, 53 N.W.2d 290, 293 (1952)).

To recover for breach of fiduciary duty, a plaintiff must prove: (1) that the defendant was acting as plaintiff's fiduciary; (2) that the defendant breached a fiduciary duty to plaintiff; (3) that plaintiff incurred damages; and (4) that the defendant's breach of the fiduciary duty was a cause of plaintiff's damages. *Chem-Age Indus. v. Glover*, 652 N.W.2d 756, 761 (S.D. 2002).

The fiduciary relationship between SAR and Hurst is clearly established by Hurst's testimony and South Dakota case law. Hurst admitted that he was the director and vice president of SAR in his deposition and written discovery responses. (SUMF ¶ 2 and 3). Hurst admitted that directors of corporations owe

a fiduciary duty and that the purpose of becoming a director of the corporation is to benefit the corporation and not to benefit one's self. He testified,

Q: [I]f you look at 7, it says, Defendant admits as a general proposition directors owe a fiduciary duty to corporations. Can we agree on that basic premise here today?

Mr. Naaz: I'm going to object to the degree it calls for a legal conclusion. Go ahead and answer.

A: From what I know now, yes, I would agree.

Q: And so the purpose – and can we also agree on the general proposition the purpose of becoming a director of the corporation is to benefit the corporation, not to benefit one's self, is that fair?

A: Yeah, that's fair.

(Deposition of Travis Hurst p.7:19-8:7). More importantly though, Hurst throughout his deposition testimony, admitted that his actions were not for the benefit of SAR. (SUMF ¶ 19, 25, 30, 31, 32, 33, 36, 37, 39, 40). As shown below, Hurst's breach of his fiduciary duty to SAR was encompassed in many forms including: initiating wire transfers for personal vehicles, converting assets, writing checks for personal expenses, and buying real property that SAR would have had an interest in which amount to usurpation of corporate opportunity. Therefore, based upon Hurst own admissions and as director, his duty required him to have placed the interest of SAR ahead of all other interests to include his own and to have acted with utmost good faith to have avoided any type or kind of self-dealing. The record is clear that Hurst was acting as a fiduciary for SAR, that he breached that duty by engaging in acts not for the benefit of SAR and self-dealing and that due to that breach, Plaintiff has incurred damages.

Therefore, the Plaintiff is entitled to a judgment as a matter of law on Count 1 of the Complaint.

C. Hurst Acted In Self-Dealing

As previously stated herein, when a fiduciary relationship exists a corresponding duty to not self-deal is created as well. "A fiduciary must act with utmost good faith and avoid any act of self-dealing that places [his] personal interest in conflict with [his] obligations to the beneficiaries." In re Estate of Stevenson, 2000 SD 24, ¶ 9, 605 N.W.2d 818, 821 (quoting Am. State Bank v. Adkins, 458 N.W.2d 807, 811 (S.D. 1990)). In the corporate setting the South Dakota Supreme Court has repeated stated, "[T]hat a director of a corporation has a duty to make a full and frank disclosure of the circumstances in a deal affecting the corporation and was not to undertake such dealing without sanction of the corporation." *Case v. Murdock*, 488 N.W.2d 885, 890, (1992) citing *Schurr v. Weaver*, 74 S.D. 378, 384, 53 N.W.2d 290, 293 (1952)). The doctrine of corporate opportunity has a long history in the law. Essentially, the doctrine holds that one who occupies a fiduciary relationship to a corporation may not acquire, in opposition to the corporation, property in which the corporation has an interest or tangible expectancy. *Id.* Its decision in *Case*, the Court cited with approval 3 *Fletcher Cyc. of Corp.*, § 861.1, p. 288 (1986) stating:

If the doctrine of business opportunity is to possess any vitality, the corporation or association must be given the opportunity to decide, upon full disclosure of the pertinent facts, whether it wishes to enter into a business that is reasonably incident to its present or perspective operations. Since a director is under a duty to inform the corporation of the full circumstances of the transaction, mere

disclosure of the transaction, without revealing the surrounding circumstances, is not sufficient, and it has been held that the failure to make complete disclosure constitutes constructive fraud, thereby tolling the statute of limitations.

Id. Given the clear fiduciary relationship imposed upon Hurst, Hurst's duty was to protect SAR's interests above and beyond his own interests. However, as evidenced by his own testimony, Hurst regularly placed his own personal interest ahead of the corporation. A list of some of Hurst's self-dealings follows:

1. Pickup purchase - In July 2014, Hurst bought a pickup for his son, using funds from the SAR account. Hurst testified:

Q: And so in July of 2014, you would have utilized, while acting as a director of Smith Angus Ranch, Inc., funds from Smith Angus Ranch, Inc., to buy your son a pickup?

A: Yes. That's right.

Q: Can you tell me where in your director's hat how that purchase benefited Smith Angus Ranch, Inc.?

A: It didn't.

(Deposition of Travis Hurst p. 69:3-13)

2. Second pickup purchase - In October of 2015, after Dee had a stroke just days before her death, Hurst wired money from the SAR account to buy another pickup. He admitted:

Q: You wire transferred money on October 20, 2015, from Smith Angus Ranch, Inc., account for the purchase of a vehicle that was titled in your name, correct?

A: Correct.

Q: Can you tell me how the use of Smith Angus Ranch, Inc. funds to buy a pickup that was title in your own name benefited the entity?

A: No.

Q: Did it?

A: Did it benefit the entity?

Q: Correct.

A: No.

(Deposition of Travis Hurst p. 121:13-122:5)

3. Purchase of steel fence posts by SAR for land owned by Hurst - In May of 2015, Hurst admits purchasing steel fence posts and fencing supplies out of the SAR checking account to be used on land that allegedly was owned by Hurst. He testified:

Q: Let's look at check 12261. That is a check made out to Buffalo Hardware?

A: Correct.

Q: And that is for steel posts?

A: Yep.

Q: Would you agree with me that at the time that those posts were bought, Smith Angus Ranch, Inc., did not own land?

A: Correct.

Q: In fact, if the contract for deed is enforceable, Dee doesn't own land at this point either, does she?

A: No.

Q: And so these are still posts being bought on the Smith Angus Ranch, Inc., account for land you and your wife own?

A: I'm not sure exactly where the posts went, but probably.

Q: Are you aware of any other land that you would have been putting steel posts on other than your own?

A: No.

(Deposition of Travis Hurst p. 85:6-25)

4. Purchase of approximately 6,000 acres from Dee Smith - SAR which owned the cattle, kept those cattle on land owned by Dee Smith individually. In the spring of 2015, Hurst a director of SAR, signed a contract for deed personally purchasing the land for \$200 per acre from Dee Smith. (Deposition of Travis Hurst p. 56). Following Dee's death in October of 2015, an appraisal was done on the property which appraised the land in excess of \$600 per acre. *Id.* Hurst did not offer this property to SAR despite the fact that SAR was renting the property to run its cattle on it, he testified:

Q: In your role as a director of Smith Angus Ranch, did you ever contemplate having Smith Angus Ranch acquire the property?

A: No.

Q: Okay. Do you recall the per acre price that the purchase agreement detailed?

A: I believe it was 200.

Q: An acre?

A: Yes.

Q: You subsequently become aware through the estate work that an appraisal was done on that same property?

A: Correct.

Q: And you understand that appraisal is north of 600 an acre?

A: Correct.

Q: Okay. So, again, going back to my question in regards to your role or your hat as a director of Smith Angus Ranch, there is a transaction taking place where just assuming the appraisal number and the purchase number that land is being bought for 400 an acre less than what it's worth, fair?

A: Fair.

(Deposition of Travis Hurst p. 56:12-57:8). Additionally, after the Contract for Deed was entered Hurst charged SAR one half of the 2015 calf crop, a value of \$123,500.00, as compensation for pasture rent. He testified:

Q: On the date in which you and your wife would have entered into the contract for deed on that plus-minus 6,000 acres, what was your expectation for what you

would receive for pasture rent for the Smith Angus Ranch cattle?

A: Half the calf crop.

(Deposition of Travis Hurst p. 60:8-13). So not only did Hurst acquire the land for one third of its appraised value, he then turned around and charged SAR \$123,500.00 as rent to pasture its cattle.

None of the four examples of self-dealing listed above are disputed; they can't be. However, Hurst is now desperately attempting to claim that Dee Smith orally blessed his abhorrent profiting off of the back of SAR. As explained below, that argument is prohibited.

C. No Extrinsic Evidence is Admissible to Prove Oral Authorization to Self-Deal

According to Hurst's testimony and responses to written discovery, he has taken the position that Dee Smith had given him verbal authorization to self-deal. (SUMF ¶ 12). In responding to Plaintiff's Interrogatories on this topic, Hurst answered as follows:

Interrogatory No. 25: If you contend in this litigation that your actions were authorized by Smith Angus Ranch, Inc. please identify every written document that supports such position.

ANSWER NO. 25: There are no written documents. The authorizations were all verbal from Dee Smith.

Hurst admits that there are no written documents, in the bylaws or otherwise that authorized his self- dealing actions by SAR. (SUMF ¶ 11-12). Likewise, at his deposition he testified:

Q: And so as we sit here today, and I understand discovery is continuing, but as we sit here today, you are not aware of any

written document that would have given you written authority to transfer assets from Smith Angus Ranch to yourself?

A: No.

(Travis Hurst Depo. p.25:11-16). The Supreme Court has held that if the power to self-deal is not specifically articulated in the governing document, the power to do so does not exist. *Wyman v. Bruckner*, 908 N.W.2d 170, 176 (S.D. 2018). The Supreme Court in *Stoebner* recently addressed the issue of “oral” authority in cases of breach of fiduciary duty and self-dealing and adopted a bright line rule excluding oral extrinsic evidence to raise a factual issue as to whether an attorney in fact was authorized to self-deal under a power of attorney. The Court stated:

Because fiduciaries must strictly avoid any acts of self-dealing, the authority to self-deal exists only if the power of attorney provides "clear and unmistakable language" specifically authorizing acts of self-dealing. *Id.* ¶ 14, 721 N.W.2d at 435. "Self-dealing occurs when an agent pits their personal interests against their obligations to the principal." *Wyman*, 2018 S.D. 17, ¶ 23, 908 N.W.2d at 177. Self-dealing is precluded "even when the language of a power of attorney might logically entail the ability to self-deal" if there is no explicit provision allowing it. *Id.* ¶ 22, 908 N.W.2d at 177.

"No written evidence has been introduced that clearly articulates that Stoebner authorized this act of self-dealing. Regardless of Huether's intentions and even if Stoebner approved of the transaction, there is no admissible written evidence supporting Huether's ability to self-deal." *Id.* at 268-69.

"We have adopted a bright line rule that no oral extrinsic evidence may be introduced to raise a factual issue as to whether an attorney in fact was authorized to self deal under a power of attorney." *Id.* at 268 (emphasis added).

Estate of Stoebner v. Huether, 935 N.W.2d 262, 267-68 (S.D. 2019). Here, it is undisputed that the SAR by-laws or corporate documents appointing Hurst as Director did not contain the power to self-deal, and Hurst admitted this as true. (SUMF ¶ 11-12). As such, Hurst cannot use the allegation that Dee Smith gave him verbal authority to avoid summary judgment.

However, even if this Court were to consider Hurst's claim that Dee Smith gave him verbal authority to self-deal, a review of Hurst's testimony brings this allegation into serious doubt. For instance, after Dee Smith had a stroke she was admitted to Peaceful Prairie Nursing Home for nursing care. While Dee was at Peaceful Prairie, in a failing, unresponsive state of health, Hurst wired money out of the SAR checking account to purchase a pickup in Bozeman, Montana, that was titled solely in his name. He testified:

Q: If we go down October 20, 2015.

A: Down to where:

Q: Where it starts, Client required, fourth line, right side.

A: Okay.

Q: I'll read it. Client required extensive assistance. Complains ADLs throughout day. Client not responding to commands, total assist. And I think that - - I don't know what a C with a line over it means. But it says total assist, feedings & toileting & snacks. Did I read that correctly?

A: Yep.

Q: She is not doing very well on October 20th, 2015, is she?

A: No.

Q: You wire transferred money on October 20th, 2015, from Smith Angus Ranch, Inc., account for the purchase of a vehicle that was titled in your name, correct?

A: Correct.

Q: Can you tell me how the use of Smith Angus Ranch, Inc. funds to buy a pickup that was title in your own name benefited the entity?

A: No.

Q: Did it?

A: Did it benefit the entity?

Q: Correct.

A: No.

(Deposition of Travis Hurst p. 120:2-22, 121:13-122:5)

Despite the nursing notes showing Dee Smith was ‘not responding to commands’, Hurst claims that Dee gave him oral authority to purchase a personal pickup. This is exactly the type of self-serving statement that the Supreme Court does not allow. Based upon the bright line rule adopted by our South Dakota Supreme Court, Hurst is prohibited from arguing that his actions of self-dealing were done so at the oral direction of Dee Smith. Consequently, the undisputed facts in this case and the governing law clearly support the conclusion that Hurst was engaged in self-dealing and did not have the authority to self-deal in any respect. Therefore, the Plaintiff is entitled to a judgment as a matter of law on Count 2 of the Complaint.

CONCLUSION

For the foregoing reasons, Plaintiff is entitled to summary judgement as a matter of law on Count 1 and Count 2 of the Complaint in this case. By granting this Partial Summary Motion, this Court will simply be acknowledging admissions and the sworn testimony of Travis Hurst and applying settled South Dakota law. The only issue remaining for trial and a jury, therefore, would be the amount of special damages and the issue of punitive damages.

Submitted this 21st day of July, 2020.

CLAYBORNE, LOOS & SABERS, LLP

/s/ Michael K. Sabers_____

MICHAEL K. SABERS

TRAVIS B. JONES

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served true and correct copies of the foregoing **PLAINTIFF AND THIRD-PARTY DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT** upon the persons herein next named, on the date shown below, by serving the same through Odyssey File and Serve, to:

David Lust
Matthew Naasz
Gunderson, Palmer, Nelson & Ashmore
506 6th Street
P.O. Box 8045
Rapid City, SD 57709

and that such addresses are the last addresses known to the subscriber/undersigned.

Dated this 21st day of July, 2020.

/s/ Michael K. Sabers
MICHAEL K. SABERS

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HARDING)

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

SMITH ANGUS RANCH, INC. (SAR),

Plaintiff,

vs.

TRAVIS HURST, as an alleged
DIRECTOR OF SAR, and as an
individual,

Defendant and
Third-Party Plaintiff,

vs.

CRAIG SMITH and LANCE SMITH,

Third-Party Defendants.

31CIV18-000018

**PLAINTIFF AND THIRD-PARTY
DEFENDANTS' STATEMENT OF
UNDISPUTED MATERIAL FACTS IN
SUPPORT OF MOTION FOR
PARTIAL SUMMARY JUDGMENT**

COME NOW the Plaintiff, Smith Angus Ranch, Inc. (hereinafter "SAR"), and Third-Party Defendants, Craig Smith and Lance Smith, through undersigned counsel, and hereby submit this Statement of Undisputed Material Facts in Support of its Motion for Partial Summary Judgment.

STATEMENT OF UNDISPUTED FACTS

1. Smith Angus Ranch is a South Dakota Corporation. (Hurst Depo p. 7).
2. Hurst admits that as a general proposition, directors owe a fiduciary duty to corporations and that the purpose of becoming a director of the

corporation is to benefit the corporation and not to benefit one's self. (Hurst Depo p. 7-8).

3. SAR submitted an annual farm report dated October 30, 2013 designating Travis Hurst as vice president and director. (Hurst Depo. p. 11-14).

4. Hurst became an authorized user on a bank account in Dee Smith's name. (Hurst Depo p. 18-19).

5. Hurst was an authorized user to two accounts, the SAR corporate account and First Fidelity account. (Hurst Depo p. 19-20).

6. Dee Smith signed a Power of Attorney when she was in Sioux Falls for treatment prior to being put in Peaceful Prairie (nursing home), which she was there for a week before her passing. The Power of Attorney designated the three siblings as attorney-in fact. (Hurst Depo p. 111).

7. Prior to Dee Smith going to Peaceful Prairie she had a stroke. (Hurst Depo p. 113)

8. There were times leading up Dee's admission to Peaceful Prairie where she was incontinent. (Hurst Depo p. 114).

9. Dee became legally blind in the left eye after her stroke. (Hurst Depo p. 115).

10. That Julie Hurst was the designated authorized representative who signed the intake form when Dee was taken to Peaceful Pines. On that day, Dee was unable to sign because of her stroke and she was left side dominate. (Hurst Depo p. 117).

11. The bylaws of SAR do not authorize a director or vice president to transfer assets to themselves or any written authority to do so. (Hurst Depo. p. 26).

12. Hurst is not aware of aware of any document that would have given you authority to transfer assets from SAR to himself and asserts that they were all verbal authorizations from Dee Smith. (Hurst Depo. p. 25; Defendant's Responses to Interrogatory No. 19, 20, 25).

13. Hurst signed a check made out to West Tire out of the SAR account. (Hurst Depo p. 35).

14. Hurst admitted that West Tire is used for doing tire work on his personal vehicles and SAR vehicles. He stated that there was nothing written on the memo line of the check and that it is difficult to differentiate between personal and SAR related activities. (Hurst Depo p. 36).

15. Hurst wrote a check to Todd Anderson for hay in the amount of \$11,464.80. (Hurst Depo. p. 37).

16. The entirety of the hay bought from Todd Anderson was used for SAR and Hurst's personal cattle. (Hurst Depo p. 39).

17. The calf crop of SAR was sold at Belle Fourche Livestock Auction in 2015 between the time of Dee's death and her funeral. The revenue produced from that sale was \$212,000. (Hurst Depo. p. 61-62).

18. Hurst did not provide notice to Lance or Craig about the pending sale of the calves after Dee's passing. (Hurst Depo. p. 122).

19. In 2015, Hurst held back approximately 28 head of calves from SAR that he incorporated into his own herd. (Hurst Depo. p. 62).

20. Hurst wrote a check made out to Gary Clanton for \$720.00 for fencing supplies out of the SAR account in July 2014. In July 2014, SAR did not own any land nor did it ever (Ex. 14).

21. Hurst signed a check made out to Outlaw Motors on July 29, 2014 out of the SAR account for a pickup for his son, Dalton. (Hurst Depo. p. 68-69).

22. Hurst admitted that the purchase did not benefit SAR. (Hurst Depo. p. 68-69;122).

23. Hurst wrote a check in July 2014 made out to Bentz Equipment for \$1,974.96 out of the SAR account for a lawnmower that was located on the ranch. (Hurst Depo. p. 70-71).

24. Hurst signed a check made out to Woodys Feed & Grain in February 2015 for \$7,021 for cattle cake. (Hurst Depo. p. 81-82).

25. Hurst admitted to having his cattle herd and SAR cattle in the same winter pasture and all the cattle would have received the cake. (Hurst Depo. p. 81-82).

26. Hurst signed a check made out to Tri-County Lockers in February 2015 for \$860.00 for beef processing, which he acknowledges some of it ended up in his personal freezer. (Hurst Depo. p. 82).

27. Hurst admitted that as director of SAR, SAR entity covered the lion's share of the costs associated with his personal livestock in regards to vaccine, feed and cake. (Hurst Depo. p. 83).

28. In May of 2015, Hurst signed a check to Buffalo Hardware (check no. 12261) for steel posts out of the SAR account and admitted that the posts were bought for him and his wife, although being paid out of the SAR account. (Hurst Depo. p. 85).

29. Hurst signed a check to Harding County Highway Dept. in the amount of \$4,779.13 out of the SAR account for an auto gate and admits that the auto gate is located on land that himself and his wife own. (Hurst Depo. p. 93).

30. Hurst signed a check to Brian Williams (check no. 12272) out of the SAR account for \$1,854 for pasture rent for July 2015. Hurst admitted that there is probably not a corresponding check written to Brian by him personally for pasture rent for his cattle. (Hurst Depo. p. 96).

31. Hurst wrote a check one month prior to Dee's passing on September 16th, 2015 to Hersruds of Sturgis (Check No. 12279) for maintenance on a vehicle. (Hurst Depo. p. 99-100).

32. One month and two weeks away from Dee's passing, Hurst wrote a check for \$2,250 to Henderson Oil for fuel (Check No. 12278). Hurst acknowledges there is no way to differentiate what the fuel was being used for. (Hurst Depo. p. 100).

33. On October 22, 2015, Hurst initiated a wire transfer out of the SAR account to his son, Dalton in the amount of \$15,000. (Ex. 14; Hurst Depo. p. 102).

34. Hurst admits that it was not in the best interest of SAR, as director, to give up ownership of the entire calf crop at the branding. (Hurst Depo p. 93

35. Hurst admits that it was not in the best interest of SAR to transfer vehicles to himself in his personal name. (Hurst Depo. p. 99).

36. Hurst acknowledges that there was never any agreement about him drawing a salary. (Hurst Depo. p. 60).

37. Hurst believes that it was reasonable to receive \$123,000 for pasture rent from SAR livestock from March through the end of the year. (Hurst Depo. p. 64-65).

Submitted this 21st day of July, 2020.

CLAYBORNE, LOOS & SABERS, LLP

/s/ Michael K. Sabers
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served true and correct copies of the foregoing **PLAINTIFF AND THIRD-PARTY DEFENDANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT** upon the persons herein next named, on the date shown below, by serving the same through Odyssey File and Serve, to:

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Matthew Naasz
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506 6th Street
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Rapid City, SD 57709

and that such addresses are the last addresses known to the subscriber/undersigned.

Dated this 21st day of July, 2020.

/s/ Michael K. Sabers
MICHAEL K. SABERS

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTY OF HARDING	)	FOURTH JUDICIAL CIRCUIT
<hr/>		
SMITH ANGUS RANCH Inc. (SAR),	)	31CIV18-000018
)	
Plaintiff,)	
v.	)	DEFENDANT AND THIRD-PARTY
	)	PLAINTIFF'S RESPONSE TO
TRAVIS HURST, as an alleged	)	PLAINTIFF AND THIRD-PARTY
DIRECTOR OF SAR, and as an individual,	)	DEFENDANTS' MOTION FOR PARTIAL
	)	SUMMARY JUDGMENT
Defendant and)	
Third-Party Plaintiff,)	
)	
v.)	
)	
CRAIG SMITH and LANCE SMITH,)	
)	
Third-Party Defendants.)	
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COME NOW the Defendant, Travis Hurst and Third-Party Plaintiff, Smith Angus Ranch, Inc. (SAR), through their attorney of record, David E. Lust and Matthew E. Naasz of Gunderson, Palmer, Nelson & Ashmore, L.L.P., of Rapid City, South Dakota, and makes this response in opposition to Plaintiff and Third-Party Defendants' Motion for Partial Summary Judgment. Defendant and Third-Party Plaintiff's Statement of Undisputed Material Facts accompanying this response will be referenced below as "SUMF" followed by paragraph number.

FACTUAL BACKGROUND

Calvin and Emma "Dee" Smith had three children. Lance A. Smith ("Lance"), Craig J. Smith ("Craig") and Julie Hurst ("Julie"). SUMF 1. Dee and her husband Calvin raised their children on a ranch in Jones County outside of Murdo until 2000. SUMF 2. In 2000, Dee and Calvin Smith sold their property in Jones County and bought a ranch in Harding County. SUMF 3. By this time, Julie Hurst and her husband Travis Hurst ("Travis") were fully engaged in the

family ranching business, living and working on the ranch with Dee and Calvin. SUMF 4.

Travis and Julie Hurst relocated their family to the Harding County ranch with Calvin and Dee.

SUMF 5. Calvin passed away in 2008, Dee stayed on her ranch, with the help of Travis and Julie and their children Dalton, Sadee and Macy. SUMF 6, 7, 10.

Lance and Craig Smith spent time working on the family ranch; but both sons left the ranch prior to 2000, long before Calvin passed away in 2008. SUMF 8, 46.

Travis and Julie raised their children with Calvin and Dee Smith on the ranch in Harding County. SUMF 9. The ranch operation was a collective effort. SUMF 10. Travis and Julie received no salary for their efforts, but were allowed to run their personal cattle on land owned by Dee and Calvin. SUMF 11-12. After Calvin's death Travis became more instrumental in the operations and management of the ranch. SUMF 13.

Smith Angus Ranch, Inc. ("SAR") was established in approximately 1991. SUMF 14. During their marriage Calvin and Dee were the shareholders, officers and directors of SAR. SUMF 15. When Calvin died, Dee became the sole shareholder. SUMF 16. Dee was the sole officer and director until 2013. SUMF 17. Following Calvin's death, Dee was the president of SAR. SUMF 47.

Dee was diagnosed with cancer in 2013. SUMF 18. Treatment often took Dee away from the ranch, to Sioux Falls. SUMF 19. In 2013, Dee added Travis Hurst's name to the Amended Annual Report filed with the South Dakota Secretary of State's office as vice president and director. SUMF 20. Travis was added as a director to allow for him to be able to authorize SAR cattle transactions at local sale barns. SUMF 21.

Operation of the ranch did not change in any meaningful way after Travis was listed as a director on the Amended Annual Reports. SUMF 22. Travis, Julie and Dee continued to operate

the ranch collectively. SUMF 23. Travis had been a signatory on SAR checks since at least July 26, 2000. SUMF 24. Travis continued to utilize the SAR checking account as needed to make ranch related purchases, when directed by Dee, just as he had done for years before he was listed as a director. SUMF 25. Dee remained singularly in charge of corporate documents and decisions. SUMF 26. No arrangement was ever formalized placing the parties' respective obligations or authority in writing. SUMF 27. No shares of SAR were ever transferred to Travis or Julie, Dee remained the sole shareholder until her death. SUMF 28-9.

After developing cancer, Dee began a concerted effort aimed at ensuring that Travis and Julie were able to stay on the ranch following her death. In 2015, Dee sold the 6,000 acre ranch to Travis and Julie. SUMF 30. The real property had never been a corporate asset, it was owned by Dee individually after Calvin's death. SUMF 31-32. Dee executed a Last Will and Testament on April 3, 2015. SUMF 33. In her Will, Dee forgave the principal and interest payments due for the real property. SUMF 34. Dee knew her sons would not be happy with the distribution of her estate, her Will states: "I am aware that my sons may not be happy with the provisions I have made in my Will; however I ask them to honor my wishes and accept what I have done. I love all my children very much, and equally." SUMF 35. The Will devised all shares of SAR to Lance and Craig in equal shares. SUMF 36.

Dee's efforts to pass the assets of SAR to Travis and Julie prior to her death did not begin and end with her Will. At Dee's direction, the 2015 calf crop from the SAR cows were all branded with Travis and Julie's personal brand, effectively transferring ownership to Travis and Julie. SUMF 37. The SAR cows, roughly 200 pairs, grazed on the real property purchased by Travis and Julie. SUMF 38. Approximately half of the 2015 calf crop was meant to pay for use of the pasture by the pairs during the 2015 grazing season, the other portion of the calf crop was

a gift from Dee to Travis and Julie. SUMF 39. Dee unilaterally went to the Harding County Treasurer's office and placed Travis's name on the SAR vehicles. SUMF40.

In May of 2015, Dee also wrote personal checks to her sons for \$100,000 each; on the memo line of the checks Dee wrote "inheritance" or "inheritance share." SUMF 41.

ARGUMENT

Summary Judgment Standard.

The standard for summary judgment is found at SDCL § 15-6-56(c) which dictates that summary judgment be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. "When considering a motion for summary judgment, the court must view the evidence in a light most favorable to the nonmoving party." *Hoaas v. Griffiths*, (S.D. 2006) 27, ¶ 14, 714 N.W.2d 61, 66.

Breach of Fiduciary Duty.

Plaintiff's entire argument on summary judgment is premised on Plaintiff's position that an individual, while a director of a corporation, cannot receive a personal benefit from the corporation. In its Memorandum in Support of Motion for Partial Summary Judgment ("Plaintiff's Brief"), Plaintiff states: "Therefore, based upon Hurst['s] own admissions and as a director, his duty required him to have placed the interest of SAR ahead of all other interests to include his own[.]" Plaintiff's Brief at 5. Plaintiff requests this Court to, for the first time, declare that an individual, while a director of a closely held corporation, cannot personally receive any benefit from the closely-held corporation. There is no legal support for this position.

The South Dakota Supreme Court has long held that a director is not prohibited from dealing with his corporation. *Schurr v. Weaver*, 53 N.W.2d 290, 293 (S.D. 1952). "While a director is not prohibited from dealing with his corporation, yet such transactions are not without

restrictions which do not apply to strangers dealing with the corporation. It is his duty to make full and frank disclosure of the circumstances and not to undertake to deal indirectly without sanction of the corporation.” *Id.* In order to prove that Travis Hurst breached his fiduciary duty to SAR, Plaintiff must establish that Hurst failed to exercise the utmost good faith in his transactions with SAR. “We have held that corporate officers and directors are held to a high degree of diligence and due care in the exercise of their fiduciary duties to shareholders. Directors of a corporation occupy a fiduciary position in respect to the corporation and its shareholders, and are required to exercise the utmost good faith in all transactions touching a director’s duty.” *Case v. Murdock*, 488 N.W. 2d 885, 890 (S.D. 1992) (“*Case*”).¹ Contrary to Plaintiff’s accusations, the appropriate standard is not one of strict liability.

It is undisputed that at the time Travis engaged in any of the challenged transactions, Dee Smith was the president of SAR and the sole shareholder. SUMF 29, 47. In this closely-held corporation, Dee Smith, the sole shareholder and president, made the decisions for the corporation. “It is to be noted that a close corporation is one in which management and ownership are ‘substantially identical to the extent that it is unrealistic to believe that the judgment of the directors will be independent of that of the stockholders.’” *Case v. Murdock*, 528 N.W.2d 386, 391 (Wuest, J., dissenting)(quoting *Thisted v. Tower Management Corp.*, 409 P.2d 813, 820 (1966)). As quoted by Justice Wuest, in a close corporation:

There usually is no division between the shareholder-owners and the director-managers. Either the stockholders themselves are the directors, or they so closely dominate and control the directors that the latter are little more than their agents.

¹ In *Schultz v. Scandrett*, the South Dakota Supreme Court approved of a jury instruction that read: “All officers and directors of a corporation, whether Plaintiff or Defendants, owe a fiduciary duty to the corporation and its shareholders. They are required to use a high degree of diligence and due care and of the utmost good faith and fair dealing in the exercise of their fiduciary duties to shareholders. They must act in good faith and refrain from transactions in which they receive an improper personal benefit.” 2015 S.D. 52, ¶ 23, 866 N.W.2d 128, 136-37.

Frequently the shareholders go even further, and besides being directors are also the officers and executives of the company. In any event either through serving as the directors and officers themselves, or through detailed provisions in the charter, by-laws, or stockholder agreements, the shareholders personally manage and control the business directly or else perform these functions through others who in fact simply act as their agents.

Id. (quoting O’Neal & Thompson, O’Neal’s Close Corporations § 1.07, at 28 n.1 (3d ed. 1994)).

All relevant transactions touching SAR property were done not only with the blessing of, but at the direction of, Dee Smith, both the owner and manager of the corporation.

Throughout Travis Hurst’s lengthy history with SAR, Dee Smith directed his actions regarding SAR assets. This did not change after Dee listed him as a director on the Secretary of State’s annual report. Plaintiff has no evidence that Dee Smith, sole shareholder of SAR at the time of the relevant transactions, did not direct and authorize the challenged transactions. SUMF 43. Instead, Plaintiff relies entirely on Travis Hurst’s statements that SAR did not benefit from certain transactions. The operation of the ranch did not change; (SUMF 22-3) but, according to Plaintiff, when Travis’ name was added to the Annual Report, he became strictly liable for any benefit he received from the corporation. Whether SAR financially benefitted from a transaction is not the standard. The standard is one of good faith.

The question of whether Travis Hurst acted in good faith when personally dealing with SAR is a question of fact. *See, Stern Oil Co. v. Brown*, (S.D. 2012) 56, ¶ 20, 817 N.W.2d 395, 403 (“Furthermore, whether Stern Oil set the prices in good faith is a question of fact.”). *See also, Mueller v. Cedar Shore Resort*, (S.D. 2002) 38 ¶ 11, 643 N.W.2d 56, 62 (“The question of whether there has been a breach of [a fiduciary] duty is one of fact....”). A fact question to be determined by the jury, armed with all evidence of the circumstances surrounding the transactions – including all evidence of Dee Smith’s intentions.

Self-Dealing.

For their second cause of action, Plaintiff alleges Travis Hurst breached his fiduciary duty to SAR by engaging in self-dealing. This is the same argument made regarding the first cause of action. Plaintiff cites the same authority in both causes of action, and consistently misapplies it in its Brief. Again, the operative standard is one of “the utmost good faith.”

Plaintiff attempts to frame the issue with a citation to *In Re Estate of Stevenson*, (S.D. 2000) 24, ¶ 9, 605 N.W.2d 818, 821. That case discusses a trustee’s fiduciary responsibility towards the beneficiaries.

“[A] trustee's first duty as a fiduciary is to act ... wholly for the *821 benefit of the trust.” *Willers v. Wettestad*, 510 N.W.2d 676, 680 (S.D. 1994) (citations omitted). Pursuant to SDCL 55–2–1, “a trustee is bound to act in the highest good faith toward h[er] beneficiary and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind.” Nor may the trustee “use or deal with the trust property for h[er] own profit or for any other purpose unconnected with the trust.” SDCL 55–2–2. Thus, “a fiduciary must act with utmost good faith and avoid any act of self-dealing that places h[er] personal interest in conflict with h[er] obligations to the beneficiaries.”

In re Estate of Stevenson, 2000 S.D. 24, ¶ 9, 605 N.W.2d 818, 820–21. Even in the context of a trustee, the standard is not strict liability.

The standard is not one of strict liability, but good faith. Here, the corporation’s sole shareholder directed the relevant transactions. Travis Hurst is not personally liable for those transactions simply because they did not financially benefit SAR. Travis Hurst did not breach his fiduciary duty by acting at the direction of the president, director and sole shareholder of SAR. In fact, he would have breached his duty if he failed to perform the transactions directed by the president/director/sole shareholder as he would have acted in direct contravention of ownership and management.

The South Dakota Supreme Court, in *Case*, articulated the doctrine of corporate opportunity. “Essentially, the doctrine holds that one who occupies a fiduciary relationship to a corporation may not acquire, in opposition to the corporation, property in which the corporation has an interest or a tangible expectancy.” *Case*, 488 N.W.2d at 890. Again, this is not a strict liability standard. The Court did not say: one who occupies a fiduciary relationship to a corporation may not acquire property in which the corporation has an interest. Dee Smith, as sole shareholder of SAR, directed each of the transactions benefitting Travis Hurst. The challenged transactions did not occur “in opposition to the corporation.” Rather, the transactions occurred at the direction of the corporation’s ownership and management.

In discussing the general rule on the doctrine of corporate opportunity, the *Case* court goes on to provide the exception to the general rule. “A director may be free to personally pursue a business opportunity if the director informs the corporation of the opportunity and the corporation for one reason or another declines to pursue it. The director must disclose the existence of the opportunity to the Board of Directors and let them decide whether the corporation will pursue or reject the opportunity. Whether or not a valid corporate rejection occurs is contingent upon full disclosure of all material facts and circumstances, including the fiduciary’s interest in personally taking the opportunity.” *Case*, 488 N.W.2d at 890. Again, the standard is not one of strict liability. Here, the evidence establishes that Dee Smith, the sole shareholder, only other officer and director of SAR was fully aware of all aspects of the challenged transactions – she directed them. In fact, Plaintiff has no evidence to establish that the challenged transactions were not directed by Dee Smith. SUMF 43. Determining whether a corporate opportunity has been usurped is “a factual question to be decided by reasonable inferences from objective facts.” *Broz v. Cellular Info. Sys., Inc.*, 673 A.2d 148, 154 (Del.

1996)(citation omitted). The jury, after hearing all material facts and circumstances surrounding the transactions, will be tasked with determining whether Travis lacked good faith in his dealings with SAR.

Plaintiff walks through a laundry list of examples of Travis Hurst agreeing that SAR did not financially benefit from the transactions directed by Dee Smith as president, director and sole shareholder of the corporation. This line of reasoning is simply misplaced under a duty of loyalty analysis. While it is true that the transactions involved the transfer of assets out of the corporation, all such transactions were conducted under the direction and at the insistence of Dee Smith as president, director and sole shareholder of SAR. Plaintiff is unable to cite to any authority for the proposition that corporate assets cannot be gifted by the corporation.² Again, the standard for breach of fiduciary duty of loyalty, is one of utmost good faith to the corporation and its shareholders. A fact question exists as to whether or not Travis Hurst acted with the utmost good faith in any of his transactions with the corporation at the direction of Dee Smith. It is not the case however, that absent a writing, Travis Hurst will be unable to demonstrate his actions were performed in good faith.

Extrinsic Evidence.

Travis Hurst does not dispute the fact that there is no writing authorizing his transactions with SAR. The entire thrust of Plaintiff's argument, and indeed its entire case, hinges on Plaintiff's ability to prohibit the jury from hearing evidence of Dee Smith's intent to provide the relevant assets to Travis and Julie Hurst. In a desperate attempt to prohibit the jury from actually

² Gifts from corporations are recognized as being from the shareholders. "A transfer of property by a corporation to an individual (without full and adequate consideration) is a gift to that individual from the stockholders of the corporation." 34B Am. Jur. 2d Federal Taxation ¶ 147,552.

hearing and deciding this matter on the full relevant evidence, Plaintiff attempts to force the South Dakota Supreme Court's decisions regarding the interpretations of powers of attorney into the case at hand. What Plaintiff lacks is any actual authority prohibiting extrinsic evidence in the context of a director's dealing with his corporation.

Both of Julie Hurst's brothers, the current shareholders and directors of Smith Angus Ranch, admit that they have no evidence that Dee Smith did not direct Travis Hurst to conduct the challenged transactions. SUMF 43. Instead, their entire claim relies on the lack of written evidence supporting Dee Smith's intent. In Interrogatory # 25, Plaintiff was asked: "If you contend in this litigation that Emma Smith did not authorize the actions of Travis Hurst relating to SAR assets, state in detail the factual basis for this contention." Plaintiff responded: "SAR is aware of no document wherein Emma Smith would have authorized Travis Hurst's conduct as alleged in the Complaint." Dee's sons have challenged their mother's express intentions, made clear to them through her Will and gifts she provided to them before her death (SUMF 35-6, 41), based solely on the fact that their mother did not memorialize her decisions in writing.

There is no doubt of Dee Smith's intentions regarding the ranch. Travis and Julie Hurst had lived and worked with Dee Smith for decades; taking a more vital role upon the death of Dee's husband Calvin. SUMF 4, 5, 9, 13. Meanwhile, Lance and Craig almost never came to visit; and provided virtually no assistance on the ranch, even when they would come home. SUMF 42, 44, 46. After Dee was diagnosed with cancer, one son visited their mother at the family ranch one time. SUMF 42. The other son had not been to the ranch since his father's funeral. SUMF 44. During the time when she was transferring assets to Travis and Julie to allow them to stay on the ranch, Dee also wrote \$100,000 checks to each of her sons. SUMF 41. After forgiving the balance on the mortgage owed by Julie and Travis for the real property,

Dee's Will states: "I am aware that my sons may not be happy with the provisions I have made in my Will; however I ask them to honor my wishes and accept what I have done. I love all my children very much, and equally." SUMF 35. Yet Dee's sons seek to profit from their mother's failure to follow corporate formalities – despite the fact that her intentions could not be clearer. It is no surprise that Lance and Craig's entire theory rests on this Court denying the jury the opportunity to hear the full circumstances surrounding Dee's desires.

Unfortunately for Plaintiff, it seeks to apply the wrong law. In each of the decisions cited for the proposition that oral evidence should be excluded, the South Dakota Supreme Court was analyzing the four corners of a written power of attorney. *See, Estate of Stoebner v. Huether*, (S.D. 2019) 58, ¶ 19, 935 N.W.2d 262 and *Wyman v. Bruckner*, (S.D. 2018) 17, ¶20, 908 N.W.2d 170, 176-177. In such cases, the fiduciary relationship is created, and limited by, the written power of attorney. Here, Dee Smith, sole shareholder of SAR at the time, made the decision to list Travis Hurst as a director. There is no written document to analyze providing the scope and limitations of Travis' duties. Travis' actions must be reviewed by the trier of fact upon consideration of all relevant evidence – not in spite of all relevant evidence.

The reason Plaintiff cannot find relevant authority supporting its position in this context is that the law is not how Plaintiff desires it to be. As stated several times above, the standard for determining whether a director has breached the fiduciary duty of loyalty by engaging in self-dealing transactions is one of good faith. As noted in *Case*: "Whether or not a valid corporate rejection occurs is contingent upon full disclosure of all material facts and circumstances, including the fiduciary's interest in personally taking the opportunity." *Case*, 488 N.W.2d at 890. This is consistent with the statutory guidance on the subject. Pursuant to SDCL § 47-1A-861.1:

A director's conflicting interest transaction may not be enjoined, set aside, or give rise to an award of damages or other sanctions, in a proceeding by a shareholder or by or in the right of the corporation, because the director, or any person with whom or which the director has a personal, economic, or other association, has an interest in the transaction, if . . . or (3) The transaction, judged according to the circumstances at the time of commitment, is established to have been fair to the corporation.

The law does not support Plaintiff's contention that a director of a corporation cannot introduce oral evidence to demonstrate the propriety of a director's actions. The law is clear: a director's actions must be considered in light of all the relevant circumstances.

The jury should be able to hear all the relevant facts, and determine for itself whether Travis Hurst inappropriately transferred corporate assets to himself; or whether all transactions between Travis Hurst and SAR were done with the full knowledge, and under the direction of the corporation through its sole shareholder, Dee Smith.

CONCLUSION

The Court should deny Plaintiff's Motion for Partial Summary Judgment. Defendant respectfully requests this Court also deny Plaintiff's Motion to the extent it requests this Court determine that oral evidence is inadmissible to prove the intent of Dee Smith, an officer, director, and sole shareholder of Smith Angus Ranch at the time of the challenged transactions.

Dated this 30th day of July, 2020.

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

By /s/ Matthew E. Naasz
Matthew E. Naasz
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CERTIFICATE OF SERVICE

I certify that on July 30, 2020, a true and correct copy of Defendant and Third-Party Plaintiff's Response to Plaintiff and Third-Party Defendants' Motion for Partial Summary Judgment were electronically filed through South Dakota's Odyssey File and Serve Portal and served by U.S. Mail, first-class postage prepaid, upon the following individuals:

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By: /s/ Matthew E. Naasz
Matthew E. Naasz

STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
	)SS	
COUNTY OF HARDING	)	FOURTH JUDICIAL CIRCUIT
<hr/>		
SMITH ANGUS RANCH Inc. (SAR),	)	31CIV18-000018
)	
)	
Plaintiff,)	
v.	)	DEFENDANT AND THIRD-PARTY
	)	PLAINTIFF'S RESPONSE TO
TRAVIS HURST, as an alleged	)	PLAINTIFF AND THIRD-PARTY
DIRECTOR OF SAR, and as an individual,	)	DEFENDANTS' STATEMENT OF
	)	UNDISPUTED MATERIAL FACTS
Defendant and	)	IN SUPPORT OF MOTION FOR PARTIAL
Third-Party Plaintiff,)	SUMMARY JUDGMENT
)	
v.)	
)	
CRAIG SMITH and LANCE SMITH,)	
)	
Third-Party Defendants.)	
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COME NOW the Defendant, Travis Hurst and Third-Party Plaintiff, Smith Angus Ranch, Inc. (SAR), through their attorney of record, Matthew E. Naasz of Gunderson, Palmer, Nelson & Ashmore, L.L.P., of Rapid City, South Dakota, and makes this response in opposition to Plaintiff and Third-Party Defendants' Statement of Undisputed Material Facts in Support of Motion for Partial Summary Judgment.

PLAINTIFF'S STATEMENT OF UNDISPUTED FACTS

1. Smith Angus Ranch is a South Dakota Corporation. (Hurst Depo p.7).

ANSWER: Undisputed.

2. Hurst admits that as a general proposition, directors owe a fiduciary duty to corporations and that the purpose of becoming a director of the corporation is to benefit the corporation and not to benefit one's self. (Hurst Depo p. 7-8).

ANSWER: Objection, the deposition question called for a legal conclusion.

3. SAR submitted an annual farm report dated October 30, 2013 designating Travis Hurst as vice president and director. (Hurst Depo. p. 11-14).

ANSWER: Undisputed.

4. Hurst became an authorized user on a bank account in Dee Smith's name. (Hurst Depo p. 18-19).

ANSWER: Undisputed.

5. Hurst was an authorized user to two accounts, the SAR corporate account and First Fidelity account. (Hurst Depo p. 19-20).

ANSWER: Undisputed.

6. Dee Smith signed a Power of Attorney when she was in Sioux Falls for treatment prior to being put in Peaceful Prairie (nursing home), which she was there for a week before her passing. The Power of Attorney designated the three siblings as attorney-in fact. (Hurst Depo p. 111).

ANSWER: Objection, the document speaks for itself.

7. Prior to Dee Smith going to Peaceful Prairie she had a stroke. (Hurst Depo p. 113).

ANSWER: Undisputed.

8. There were times leading up Dee's admission to Peaceful Prairie where she was incontinent. (Hurst Depo p. 114).

ANSWER: Undisputed.

9. Dee became legally blind in the left eye after her stroke. (Hurst Depo p. 115).

ANSWER: Undisputed.

10. That Julie Hurst was the designated authorized representative who signed the intake form when Dee was taken to Peaceful Pines. On that day, Dee was unable to sign because of her stroke and she was left side dominate. (Hurst Depo p. 117).

ANSWER: Undisputed.

11. The bylaws of SAR do not authorize a director or vice president to transfer assets to themselves or any written authority to do so. (Hurst Depo. p. 26).

ANSWER: Objection. The document speaks for itself. Mr. Hurst testified that he did not see anything in the bylaws granting that authority. See Hurst Deposition page 6.

12. Hurst is not aware of any document that would have given you authority to transfer assets from SAR to himself and asserts that they were all verbal authorizations from Dee Smith. (Hurst Depo. p. 25; Defendant's Responses to Interrogatory No. 19, 20, 25).

ANSWER: Undisputed.

13. Hurst signed a check made out to West Tire out of the SAR account. (Hurst Depo p. 35).

ANSWER: Undisputed.

14. Hurst admitted that West Tire is used for doing tire work on his personal vehicles and SAR vehicles. He stated that there was nothing written on the memo line of the check and that it is difficult to differentiate between personal and SAR related activities. (Hurst Depo p. 36).

ANSWER: Objection, Travis Hurst made the statement articulated in the second sentence; such statement is not an "admission."

15. Hurst wrote a check to Todd Anderson for hay in the amount of \$11,464.80. (Hurst Depo. p. 37).

ANSWER: Undisputed.

16. The entirety of the hay bought from Todd Anderson was used for SAR and Hurst's personal cattle. (Hurst Depo p. 39).

ANSWER: Undisputed that the hay was used for both SAR and Hurst's personal cattle.

17. The calf crop of SAR was sold at Belle Fourche Livestock Auction in 2015 between the time of Dee's death and her funeral. The revenue produced from that sale was \$212,000. (Hurst Depo. p. 61-62).

ANSWER: Undisputed.

18. Hurst did not provide notice to Lance or Craig about the pending sale of the calves after Dee's passing. (Hurst Depo. p. 122).

ANSWER: Not material. At the time the calves were sold, they had all been transferred Travis and Julie Hurst. See Defendant's Answer to Interrogatory #20; Answer to Interrogatory #30.

19. In 2015, Hurst held back approximately 28 head of calves from SAR that he incorporated into his own herd. (Hurst Depo. p. 62).

ANSWER: Not Material. The calves did not belong to SAR at the time they were sold in the fall of 2015. See Response to Interrogatory #20; Answer to Interrogatory #30.

20. Hurst wrote a check made out to Gary Clanton for \$720.00 for fencing supplies out of the SAR account in July 2014. In July 2014, SAR did not own any land nor did it ever (Ex. 14).

ANSWER: Undisputed. It is also undisputed that in 2014, SAR cattle were grazed on real property owned by Travis and Julie Hurst, and/or Dee Smith.

21. Hurst signed a check made out to Outlaw Motors on July 29, 2014 out of the SAR account for a pickup for his son, Dalton. (Hurst Depo. p. 68-69).

ANSWER: Undisputed. It is also undisputed that Dee Smith purchased vehicles for each of her grandchildren, including the children of Lance Smith and Craig Smith. See Deposition of Lance Smith, pg. 65-66; and Deposition of Craig Smith pg. 35-36.

22. Hurst admitted that the purchase did not benefit SAR. (Hurst Depo. p. 68-69; 122).

ANSWER: Not Material. The relevant inquiry is whether Travis Hurst exercised the utmost good faith in transactions involving SAR.

23. Hurst wrote a check in July 2014 made out to Bentz Equipment for \$1,974.96 out of the SAR account for a lawnmower that was located on the ranch. (Hurst Depo. p. 70-71).

ANSWER: Not Material. Plaintiffs ultimately received the lawnmower. See Hurst deposition page 70.

24. Hurst signed a check made out to Woodys Feed & Grain in February 2015 for \$7,021 for cattle cake. (Hurst Depo. p. 81-82).

ANSWER: Undisputed. Travis Hurst also testified that he personally bought cake during that period. See Hurst Deposition pg. 81-82.

25. Hurst admitted to having his cattle herd and SAR cattle in the same winter pasture and all the cattle would have received the cake. (Hurst Depo. p. 81-82).

ANSWER: Disputed. This statement is not consistent with Travis Hurst's testimony from the cited deposition transcript pages.

26. Hurst signed a check made out to Tri-County Lockers in February 2015 for \$860.00 for beef processing, which he acknowledges some of it ended up in his personal freezer. (Hurst Depo. p. 82).

ANSWER: Undisputed. All transactions involving SAR funds were completed with the knowledge of Dee Smith who at the time was the sole shareholder of SAR. See, Defendant's Statement of Undisputed Material Facts, ¶ 26.

27. Hurst admitted that as director of SAR, SAR entity covered the lion's share of the costs associated with his personal livestock in regards to vaccine, feed and cake. (Hurst Depo. p. 83).

ANSWER: Objection. Travis Hurst made no such admission as director of SAR. See, Hurst Depo. p. 83. Again, the arrangement between Travis and Julie Hurst and Dee Smith was that Travis and Julie would be allowed to run their cattle with those belonging to SAR or the Smith family. Defendant's SUMF at ¶ 11, 12.

28. In May of 2015, Hurst signed a check to Buffalo Hardware (check no. 12261) for steel posts out of the SAR account and admitted that the posts were bought for him and his wife, although being paid out of the SAR account. (Hurst Depo. p. 85).

ANSWER: Not Material. The relevant inquiry is whether Travis Hurst exercised the utmost good faith in any transaction involving SAR property. Dee Smith, the sole shareholder of SAR at the time of each challenged transaction authorized the transaction. Defendant's SUMF at 26. Travis Hurst did not admit that the posts were bought for him and Julie, only that they likely ended up on land owned by Travis and Julie. (Hurst Depo p. 85).

29. Hurst signed a check to Harding County Highway Dept. in the amount of \$4,779.13 out of the SAR account for an auto gate and admits that the auto gate is located on land that himself and his wife own. (Hurst Depo. p. 93).

ANSWER: To the extent this statement suggests Travis Hurst has admitted to any breach of fiduciary duty regarding this transaction – Not Material. The relevant inquiry is whether Travis Hurst exercised the utmost good faith in any transaction involving SAR property. Dee Smith, the sole shareholder of SAR at the time of each challenged transaction authorized and directed the transaction. Defendant's SUMF at ¶ 26.

30. Hurst signed a check to Brian Williams (check no. 12272) out of the SAR account for \$1,854 for pasture rent for July 2015. Hurst admitted that there is probably not a corresponding check written to Brian by him personally for pasture rent for his cattle. (Hurst Depo. p. 96).

ANSWER: Not Material. The relevant inquiry is whether Travis Hurst exercised the utmost good faith in any transaction involving SAR property. Dee Smith, the sole shareholder of SAR at the time of each challenged transaction authorized the transaction. Defendant's SUMF at ¶ 26.

31. Hurst wrote a check one month prior to Dee's passing on September 16th, 2015 to Hersruds of Sturgis (Check No. 12279) for maintenance on a vehicle. (Hurst Depo. p. 99-100).

ANSWER: Not Material. The relevant inquiry is whether Travis Hurst exercised the utmost good faith in any transaction involving SAR property. Dee Smith, the sole shareholder of

SAR at the time of each challenged transaction authorized the transaction. Defendant's SUMF at ¶ 26.

32. One month and two weeks away from Dee's passing, Hurst wrote a check for \$2,250 to Henderson Oil for fuel (Check No. 12278). Hurst acknowledges there is no way to differentiate what the fuel was being used for. (Hurst Depo. p. 100).

ANSWER: Not Material. The relevant inquiry is whether Travis Hurst exercised the utmost good faith in any transaction involving SAR property. Dee Smith, the sole shareholder of SAR at the time of each challenged transaction authorized the transaction. Defendant's SUMF at ¶ 26.

33. On October 22, 2015, Hurst initiated a wire transfer out of the SAR account to his son, Dalton in the amount of \$15,000. (Ex. 14; Hurst Depo. p. 102).

ANSWER: To the extent this statement suggests Travis Hurst has admitted to any breach of fiduciary duty regarding this transaction – Not Material. The relevant inquiry is whether Travis Hurst exercised the utmost good faith in any transaction involving SAR property. Dee Smith, the sole shareholder of SAR at the time of each challenged transaction authorized and directed the transaction. Defendant's SUMF at ¶ 26.

34. Hurst admits that it was not in the best interest of SAR, as director, to give up ownership of the entire calf crop at the branding. (Hurst Depo p. 93).

ANSWER: To the extent this statement suggests Travis Hurst has admitted to any breach of fiduciary duty regarding this transaction – Disputed. The relevant inquiry is whether Travis Hurst exercised the utmost good faith in any transaction involving SAR property. Dee Smith, the sole shareholder of SAR at the time of each challenged transaction authorized and directed the transaction. Defendant's SUMF at ¶ 26.

35. Hurst admits that it was not in the best interest of SAR to transfer vehicles to himself in his personal name. (Hurst Depo. p. 99).

ANSWER: To the extent this statement suggests Travis Hurst has admitted to any breach of fiduciary duty regarding this transaction - Disputed. The relevant inquiry is whether Travis Hurst exercised the utmost good faith in any transaction involving SAR property. Dee Smith, the sole shareholder of SAR at the time of each challenged transaction authorized and directed the transaction. Defendant's SUMF at ¶ 26. Also, a misstatement of the record. Dee Smith herself transferred the vehicles into Travis Hurst's name. Defendant's SUMF at ¶ 40.

36. Hurst acknowledges that there was never any agreement about him drawing a salary.

(Hurst Depo. p. 60).

ANSWER: Objection, misstatement of the record. The question asked if Mr. Hurst understood that he was drawing a salary from a specific account. (Hurst Depo p. 60).

37. Hurst believes that it was reasonable to receive \$123,000 for pasture rent from SAR livestock from March through the end of the year. (Hurst Depo. p. 64-65).

ANSWER: Undisputed.

Dated this 30th day of July, 2020.

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

By /s/ Matthew E. Naasz
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CERTIFICATE OF SERVICE

I certify that on July 30, 2020, a true and correct copy of Defendant and Third-Party Plaintiff's Response to Plaintiff and Third-Party Defendants' Statement of Undisputed Material Facts in Support of Motion for Partial Summary Judgment were electronically filed through South Dakota's Odyssey File and Serve Portal, upon the following individuals:

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By: /s/ Matthew E. Naasz
Matthew E. Naasz

STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
)SS	
COUNTY OF HARDING)	FOURTH JUDICIAL CIRCUIT
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SMITH ANGUS RANCH Inc. (SAR),)	31CIV18-000018
)	
Plaintiff,)	
v.)	
)	
TRAVIS HURST, as an alleged)	DEFENDANT AND THIRD-PARTY
DIRECTOR OF SAR, and as an individual,	)	PLAINTIFF'S STATEMENT OF
	)	UNDISPUTED MATERIAL FACTS
Defendant and)	
Third-Party Plaintiff,)	
)	
v.)	
)	
CRAIG SMITH and LANCE SMITH,)	
)	
Third-Party Defendants.)	
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COMES NOW the Defendant, Travis Hurst and Third-Party Plaintiff, Smith Angus Ranch, Inc. (SAR), through their attorney of record, Matthew E. Naasz of Gunderson, Palmer, Nelson & Ashmore, L.L.P., of Rapid City, South Dakota, hereby submits this Statement of Undisputed Material Facts.

STATEMENT OF UNDISPUTED FACTS

1. Calvin Smith and Emma Smith ("Dee") had three children: Lance A. Smith ("Lance"), Craig J. Smith ("Craig") and Julie Hurst ("Julie"). *Affidavit of Travis Hurst at ¶ 2.*
2. Dee and her husband Calvin raised their children on a ranch in Jones County outside of Murdo, South Dakota until 2000. *Id. at ¶ 3.*
3. In 2000, Dee and Calvin Smith sold their property in Jones County and bought a ranch in Harding County. *Id. at ¶ 4.*

4. By 1994, Julie Hurst and her husband Travis Hurst (“Travis”) were fully engaged in the family ranching business, living and working on the ranch with Dee and Calvin. *Id. at* ¶ 5.
5. Travis and Julie Hurst relocated their family to the Harding County ranch with Calvin and Dee. *Id. at* ¶ 6.
6. Calvin passed away in 2008. *Id. at* ¶ 7.
7. Dee stayed on her ranch after Calvin’s death. *Id. at* ¶ 8.
8. Lance and Craig Smith left the ranch prior to 2000. *Id. at* ¶ 9.
9. Travis and Julie raised their children with Calvin and Dee Smith on the ranch in Harding County. *Id. at* ¶ 10.
10. The ranch operation was a collective effort with the help of Travis, Julie and their children Dalton, Sadee and Macy. *Id. at* ¶ 11.
11. Travis and Julie received no salary for their efforts. *Id. at* ¶ 12.
12. Travis and Julie were allowed to run their personal cattle on land owned by Dee and Calvin. *Id. at* ¶ 13.
13. After Calvin’s death, Travis became more instrumental in the operations and management of the ranch. *Id. at* ¶ 14.
14. Smith Angus Ranch, Inc. (“SAR”) was established in approximately 1991. *Id. at* ¶ 15.
15. During their marriage Calvin and Dee were the shareholders, officers and directors of SAR. *Id. at* ¶ 16.
16. When Calvin died, Dee became the sole shareholder. *Id. at* ¶ 17.
17. Dee was also the sole officer and director until 2013. *Id. at* ¶ 18.
18. Dee was diagnosed with cancer in 2013. *Id. at* ¶ 19.

19. Treatment often took Dee away from the ranch, to Sioux Falls, South Dakota. *Id. at ¶ 20.*
20. In 2013, Dee added Travis Hurst's name to the Amended Annual Report filed with the South Dakota Secretary of State's office as vice president and director. *Id. at ¶ 21; Defendant's Answer to Interrogatory #15.*
21. Travis was added as a director to allow for him to be able to authorize SAR cattle transactions at local sale barns. *Affidavit of Travis Hurst at ¶ 22.*
22. Travis, Dee and SAR's relationship did not change in any meaningful way after being listed as a director on the Amended Annual Reports, nor did operation of the family ranch. *Id. at ¶ 23; Defendant's Answer to Interrogatory #14.*
23. Travis, Julie and Dee continued to operate the ranch collectively. *Affidavit of Travis Hurst at ¶ 24.*
24. Travis had been a signatory on SAR checks since at least July 26, 2000. *Id. at ¶ 25.*
25. Travis continued to utilize the SAR checking account as needed and directed by Dee to make ranch related purchases, just as he had done for years before he was listed as a director. *Id. at ¶ 26.*
26. Dee remained singularly in charge of corporate documents and decisions. Anything received by Travis Hurst or his family from SAR was authorized and directed by Dee Smith. *Id. at ¶ 27; Defendant's Answers to Interrogatories #14, 19.*
27. No arrangement was ever formalized placing the parties' respective obligations or authority in writing. *Affidavit of Travis Hurst at ¶ 28.*
28. No shares of SAR were ever transferred to Travis or Julie. *Id. at ¶ 29.*
29. Dee remained the sole shareholder until her death. *Id. at ¶ 30. Deposition of Craig Smith pgs. 13, 47; Deposition of Lance Smith, pg. 23.*

30. In 2015, Dee sold the 6,000 acre ranch to Travis and Julie by a contract for deed. *Affidavit of Travis Hurst at ¶ 31.*
31. The real property had never been a corporate asset. *Id. at ¶ 32.*
32. The real property was owned by Dee individually after Calvin's death. *Id. at ¶ 33.*
33. Dee executed a Last Will and Testament on April 3, 2015. *Deposition of Lance Smith, pg. 102 and Exhibit 8.*
34. In her Will, Dee forgave the principal and interest payments due for the real property. *Deposition of Lance Smith, Exhibit 8.*
35. Dee's Will states "I am aware that my sons may not be happy with the provisions I have made in my Will; however I ask them to honor my wishes and accept what I have done. I love all my children very much, and equally." *Deposition of Lance Smith, Exhibit 8 at Article XI.*
36. The Will devised all shares of SAR to Lance Smith and Craig Smith in equal shares. *Id. at Article V.*
37. Under Dee's direction the 2015 calf crop from the SAR cows were all branded with Travis and Julie's personal brand. *Affidavit of Travis Hurst at ¶ 34.*
38. The SAR cows, roughly 200 pairs, grazed on the real property purchased by Travis and Julie. *Id. at ¶ 35.*
39. Half of the 2015 calf crop was meant to pay for use of the pasture by the pairs during the 2015 grazing season. The other half was a gift from Dee to Travis and Julie. *Id. at ¶ 36.*
40. Dee unilaterally went to the Harding County Treasurer's office and placed Travis's name on the SAR vehicles. *Id. at ¶ 37; Defendant's Response to Interrogatory #20.*

41. In May of 2015, Dee also wrote personal checks to her sons for \$100,000 each. On the memo line of the checks Dee wrote “inheritance” or “inheritance share.” *Deposition of Lance Smith*, pgs. 99-100; *Deposition of Craig Smith* pgs. 53-54; *Exhibit 7 to Affidavit of Lance Smith*.
42. Craig Smith visited his mother, Dee, one time at the family ranch in Harding County after Dee stopped seeking cancer treatment in Sioux Falls. *Deposition of Craig Smith*, pgs. 9-10.
43. Plaintiff challenges Travis’ actions in this matter based solely on the lack of written authorization for the transactions. *Deposition of Craig Smith* pgs. 27-28, 33-34, 46; *Deposition of Lance Smith* pgs. 56-57, 62, 74-76; *Plaintiffs Response to Defendants Interrogatories # 25-27*.
44. Lance Smith did not visit the family ranch between the time his father passed away and the time his mother passed away. *Deposition of Lance Smith*, pg. 11.
45. Dee Smith purchased a vehicle for each child of Lance Smith and Craig Smith. These vehicles were purchased between \$10,000 and \$16,000, about the time the children were juniors and seniors in high school. *Deposition of Lance Smith*, pgs. 65-66; *Deposition of Craig Smith* pgs. 35-36.
46. When visiting the ranch, Lance and Craig provided almost no assistance to their father and mother. *Deposition of Craig Smith* pgs. 7-8; *Deposition of Lance Smith* pgs. 8-10.
47. Following Calvin’s Death, Dee was the President of SAR. See, *2013 Amended Annual Report*, *Exhibit 2 to Lance Smith Deposition*.

Submitted this 30th day of July, 2020.

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

By /s/ Matthew E. Naasz
Matthew E. Naasz
*Attorneys for Defendant and Third- Party
Plaintiff*
506 Sixth Street
P.O. Box 8045
Rapid City, SD 57709-8045
Telephone: (605) 342-1078
Email: mnaasz@gpna.com

CERTIFICATE OF SERVICE

I certify that on July 30, 2020, a true and correct copy of Defendant and Third-Party Plaintiff's Statement of Undisputed Material Facts were electronically filed through South Dakota's Odyssey File and Serve Portal, upon the following individuals:

CLAYBORNE, LOOS & SABERS, LLP
MICHAEL K. SABERS
TRAVIS B. JONES
*Attorneys for Plaintiff and Third-Party
Defendants*
2834 Jackson Blvd., Suite 201
P.O. Box 9129
Rapid City, SD 57709-9129
msabers@clslawyers.net
tjones@clslawyers.net

By: /s/ Matthew E. Naasz
Matthew E. Naasz

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTY OF HARDING	)	FOURTH JUDICIAL CIRCUIT
<hr/>		
SMITH ANGUS RANCH Inc. (SAR),	)	31CIV18-000018
)	
Plaintiff,)	
v.)	
)	
TRAVIS HURST, as an alleged	)	AFFIDAVIT OF TRAVIS HURST
DIRECTOR OF SAR, and as an individual,)	
)	
Defendant and)	
Third-Party Plaintiff,)	
)	
v.)	
)	
CRAIG SMITH and LANCE SMITH,)	
)	
Third-Party Defendants.)	
<hr/>		

COME NOW the Defendant, Travis Hurst, Defendant and Third-Party Plaintiff, after being first duly sworn on his oath, and deposes and states as follows.


1. I am the Defendant and Third-Party Plaintiff in the above-captioned matter.
2. Calvin Smith and Emma Smith (“Dee”) had three children. Lance A. Smith (“Lance”), Craig J. Smith (“Craig”) and Julie Hurst (“Julie”).
3. Dee and her husband Calvin raised their children on a ranch in Jones County outside of Murdo, South Dakota until 2000.
4. In 2000, Dee and Calvin Smith sold their property in Jones County and bought a ranch in Harding County.
5. By 1994, Julie Hurst and I were fully engaged in the family ranching business, living and working on the ranch with Dee and Calvin.
6. Julie and I relocated our family to the Harding County ranch with Calvin and Dee.

7. Calvin passed away in 2008.
8. Dee stayed on her ranch after Calvin's death.
9. Lance and Craig Smith left the ranch prior to 2000.
10. Julie and I raised our children with Calvin and Dee Smith on the ranch in Harding County.
11. The ranch operation was a collective effort with the help of me, Julie and our children Dalton, Sadee and Macy.
12. Julie and I received no salary for our efforts.
13. Julie and I were allowed to run our personal cattle on land owned by Dee and Calvin.
14. After Calvin's death, I became more instrumental in the operations and management of the ranch.
15. It is my understanding that Smith Angus Ranch, Inc. ("SAR") was established in approximately 1991.
16. During their marriage Calvin and Dee were the shareholders, officers and directors of SAR.
17. When Calvin died, Dee became the sole shareholder.
18. Dee was also the sole officer and director until 2013.
19. Dee was diagnosed with cancer in 2013.
20. Treatment often took Dee away from the ranch, to Sioux Falls, South Dakota.
21. In 2013, Dee added my name to the Amended Annual Report filed with the South Dakota Secretary of State's office as vice president and director.
22. I was added as a director to allow me to authorize SAR cattle transactions at local sale barns.

23. The operation of the ranch did not change in any meaningful way after I was listed as a director on the Amended Annual Reports.
24. Julie, Dee and I continued to operate the ranch collectively.
25. I had been a signatory on SAR checks since at least July 26, 2000.
26. I continued to utilize the SAR checking account as needed, and as directed by Dee, to make ranch related purchases, just as I had done for years before being listed as a director.
27. Dee remained singularly in charge of corporate documents and decisions.
28. No arrangement was ever formalized placing the parties' respective obligations or authority in writing.
29. No shares of SAR were ever transferred to me or Julie.
30. Dee remained the sole shareholder until her death.
31. In 2015, Dee sold the 6,000 acre ranch to Julie and I.
32. The real property had never been a corporate asset.
33. The real property was owned by Dee individually after Calvin's death.
34. Under Dee's direction the 2015 calf crop from the SAR cows were all branded with my personal brand.
35. In 2015, the SAR cows, roughly 200 pairs, grazed on the real property purchased by Julie and I.
36. Approximately half of the 2015 calf crop was meant to pay for use of the pasture by the pairs during the 2015 grazing season. The other portion was a gift from Dee to Julie and I.
37. Dee unilaterally went to the Harding County Treasurer's office and placed my name on the SAR vehicles.

38. Dee began talking about getting a vehicle for my daughter before she had a stroke. She directed me to find a vehicle for Sadee and purchase the vehicle, just as she had done for her other grandchildren.

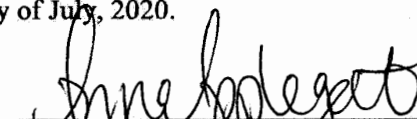
Dated this 30 day of July, 2020.


Travis Hurst

I hereby certify that I viewed Travis Hurst, the above named individual, sign and date this document on the 30th day of July, 2020, by way of video conference.

Subscribed and sworn before me this 30th day of July, 2020.




Notary Public, South Dakota
My Commission Expires: 9/11/2023

CERTIFICATE OF SERVICE

I certify that on July 30, 2020, a true and correct copy of Affidavit of Travis Hurst were electronically filed through South Dakota's Odyssey File and Serve Portal, upon the following individuals:

CLAYBORNE, LOOS & SABERS, LLP
MICHAEL K. SABERS
TRAVIS B. JONES
Attorneys for Plaintiff and Third-Party
Defendants
2834 Jackson Blvd., Suite 201
P.O. Box 9129
Rapid City, SD 57709-9129
msabers@clslawyers.net
tjones@clslawyers.net

By: /s/ Matthew E. Naasz
Matthew E. Naasz

STATE OF SOUTH DAKOTA)
)SS
COUNTY OF HARDING)

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

SMITH ANGUS RANCH Inc. (SAR),)

31CIV18-000018

Plaintiff,)

v.)

TRAVIS HURST, as an alleged)
DIRECTOR OF SAR, and as an individual,)

**AFFIDAVIT OF
MATTHEW E. NAASZ**

Defendant and)
Third-Party Plaintiff,)

v.)

CRAIG SMITH and LANCE SMITH,)

Third-Party Defendants.)

COMES NOW Matthew E. Naasz, after being first duly sworn on his oath, and deposes
and states as follows.

1. I am one of the attorneys for Defendant and Third-Party Plaintiff in the above-captioned action.
2. I make this Affidavit in support of Defendant and Third-Party Plaintiff's Response to Plaintiff's Motion for Partial Summary Judgment.
3. Attached hereto as Exhibit 1, is a true and correct copy of the relevant portions of the Deposition Transcript of Craig Smith.
4. Attached hereto as Exhibit 2, is a true and correct copy of the relevant portions of the Deposition of Lance Smith.

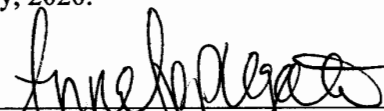
5. Attached hereto as Exhibit 3, is a true and correct copy of Defendant and Third-Party Plaintiff's Responses to Plaintiff's First Set of Interrogatories and Requests for Production of Documents.
6. Attached hereto as Exhibit 4, is a true and correct copy of Plaintiff's Answers and Responses to Defendant's First Set of Interrogatories and Requests for Production of Documents.
7. Attached hereto as Exhibit 5, is a true and correct copy of the Last Will and Testament of Emma Dee Smith, Exhibit 8 to the Affidavit of Lance Smith.
8. Attached hereto as Exhibit 6 is a copy of the 2013 Amended Annual Report from Smith Angus Ranch, Exhibit 2 to the Affidavit of Lance Smith.
9. Attached hereto as Exhibit 7, is a true and correct copy of checks written to Craig Smith and Lance Smith, Exhibit 7 to the Affidavit of Lance Smith.
10. Attached hereto as Exhibit 8, is a true and correct copy of the relevant portions of the Deposition of Travis Hurst.

Dated this 30th day of July, 2020.


Matthew E. Naasz

Subscribed and sworn to before me this 30th day of July, 2020.




Notary Public, South Dakota
My Commission Expires. 9/11/2023

CERTIFICATE OF SERVICE

I certify that on July 30, 2020, a true and correct copy of Affidavit of Matthew E. Naasz were electronically filed through South Dakota's Odyssey File and Serve Portal, upon the following individuals:

CLAYBORNE, LOOS & SABERS, LLP
MICHAEL K. SABERS
TRAVIS B. JONES
*Attorneys for Plaintiff and Third-Party
Defendants*
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Rapid City, SD 57709-9129
msabers@clslawyers.net
tjones@clslawyers.net

By: /s/ Matthew E. Naasz
Matthew E. Naasz

1 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
)
 2 COUNTY OF HARDING) FOURTH JUDICIAL CIRCUIT

3 SMITH ANGUS RANCH Inc.) 31CIV18-000018
 4 (SAR),)

5) Deposition of:
 6)

7) CRAIG SMITH
 8)

9 vs.)
 10)

11 TRAVIS HURST, as an alleged)
 12 DIRECTOR OF SAR, and as an)
 13 individual,)

14) Defendant and)
 15 Third-Party)
 16 Plaintiff,)

17 v.)
 18)

19 CRAIG SMITH and LANCE SMITH,)
 20)

21) Third-Party)
 22 Defendants.)
 23)

24 DATE: October 17, 2019, at 12:36 p.m.

25 PLACE: Clayborne, Loos & Sabers
 2834 Jackson Boulevard, Suite 201
 Rapid City, SD 57702

APPEARANCES:

FOR THE PLAINTIFF & MR. MICHAEL K. SABERS
 THIRD-PARTY DEFENDANTS: Clayborne, Loos & Sabers
 Attorneys at Law
 2834 Jackson Boulevard, Suite 201
 Rapid City, SD 57702

FOR THE DEFENDANT & MR. MATTHEW E. NAASZ
 THIRD-PARTY PLAINTIFF: Gunderson, Palmer, Nelson & Ashmore
 Attorneys at Law
 506 Sixth Street
 Rapid City, SD 57701

Also Present: Travis Hurst & Lance Smith

Carolyn M. Harkins, RPR (605)381-5427
 P.O. Box 1886, Rapid City, SD 57709

1 then don't talk over each other.

2 THE WITNESS: Okay.

3 MR. SABERS: So let him finish his question
4 before you answer.

5 Q And as Mr. Sabers indicated, I will try to let you
6 finish your response --

7 A Okay.

8 Q -- before I start the next one.

9 A Okay.

10 Q How often did you visit the ranch in Harding County
11 after they moved there?

12 A I suppose when my father was alive, it was probably
13 annually, guessing. And probably annually I think --
14 probably annually, I would say. At least once a year
15 we'd go out.

16 Q And that's both before and after your father passed
17 away?

18 A Yeah.

19 Q Okay.

20 A Yes.

21 Q How active were you in the ranching operation after
22 you moved to Harding County?

23 A I wasn't.

24 Q These annual visits that you made, did you assist
25 with any ranch work while you were there?

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P.O. Box 1886, Rapid City, SD 57709

1 A Dad always tried to get you to go out and count cows
2 with him or go out and check fences or maybe see what
3 the problem was with a piece of equipment or
4 something, but nothing major.

5 Q Your trips back to the ranch didn't coincide with
6 branding or sorting calves --

7 A No.

8 Q -- or anything like that?

9 A I mean, there might have been some times when I might
10 have assisted with some cow-calf operations, but no,
11 it was never, Okay, we've got to go out there because
12 we're getting ready to sell the cattle and we've got
13 -- no, there was never any of that.

14 Q Okay. And I apologize for the fact that some of this
15 is going to be quite repetitious from what you heard
16 this morning, but --

17 A That's okay.

18 Q -- it is what it is.

19 Can you describe in your words your mother's
20 final illness?

21 A It was cancer. It started as skin cancer and turned
22 and went into the nerves and chased the nerves into
23 the brain.

24 Q Where did you live when your mom was diagnosed with
25 cancer?

Carolyn M. Harkins, RPR (605)381-5427
P.O. Box 1886, Rapid City, SD 57709

1 A In Storm Lake, Iowa.

2 Q And we heard this morning that your mom treated in
3 Sioux Falls for a period of time following her
4 diagnosis. Is that true?

5 A Yes.

6 Q When she was treating in Sioux Falls, did you attend
7 those treatments?

8 A Many.

9 Q Okay. How often do you think you attended the
10 treatments with your mom?

11 A It varied on what she was having for treatments and
12 how many appointments and stuff. Lance and I tried
13 to switch off and on as far as who would be there.
14 Sometimes we both wanted to be there for some
15 meetings and stuff, but we would switch off and on
16 and go up to help with her treatment while she was
17 staying at Frank and Martha's. I stayed there -- I
18 don't know how many days total.

19 Q Frank and Martha, Frank and Martha Brost?

20 A Yes, sir.

21 Q Your mother's brother?

22 A Yes, sir.

23 Q And do you recall at what point your mom stopped
24 treating in Sioux Falls?

25 A Would have been the spring, springtime of '15. I was

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1 thinking early spring, late winter.

2 Q Okay.

3 A Somewhere in there.

4 Q And after that time, whenever it was that your mom no
5 longer was treating in Sioux Falls, how often did you
6 go visit her in Harding County before she passed
7 away?

8 A I think we still made it up there once that summer.

9 Q When was that?

10 A Well, she died in October of '15, so it would have
11 been the summer of '15. I believe, to the best of my
12 memory we did.

13 Q How often did you speak with her on the phone when
14 she was in Harding County after she stopped treating
15 in Sioux Falls?

16 A Sometimes weekly, sometimes more often or at least
17 once a month, I know she called me or I would call
18 her.

19 Q Okay. Did you ever run into a situation in which you
20 were unable to reach your mom by telephone?

21 A During the last week or so of life and stuff. And
22 other times she would not be at the home when you
23 would call her and stuff and cell reception up in
24 Harding County is somewhat spotty.

25 Q Was there ever a time when you didn't know where your

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1 A From the time I was a child. I mean, I always knew
2 there was a corporation involved when my grandparents
3 were alive and I knew it changed several times, went
4 through name changes and stuff. But as far as any
5 involvement I ever had in it, corporate meetings or
6 anything like that, none.

7 Q Were you aware of how the corporate formalities were
8 attended to by your mother and father and then your
9 mother?

10 A No.

11 Q Prior to your mom's passing, were you ever a
12 shareholder of Smith Angus Ranch, Incorporated?

13 A No.

14 Q A director?

15 A No.

16 Q Or an officer?

17 A Not to the best of my knowledge, no.

18 Q You agree that your mother was the only shareholder
19 for several years prior to her death?

20 A That's my understanding from the documents I've seen
21 and stuff.

22 Q Okay. That leads us then to Travis's role with Smith
23 Angus Ranch, the corporation. Looking at -- well,
24 strike that.

25 When did Travis become a director, based on your

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P.O. Box 1886, Rapid City, SD 57709

1 A I grew up 18 years and the only time I can remember
2 my mother being at a branding is when she would bring
3 out lunch.

4 Q Would it surprise you if she were on the ranch that
5 day?

6 A No.

7 Q Okay. What else do you know about the branding of
8 the calf crop?

9 A I saw it marked on a calendar that it happened, that
10 part of it happened on my birthday.

11 Q What day is that?

12 A June 11th.

13 Q What is the basis for your allegation that Travis
14 somehow acted improperly regarding that calf crop?

15 A Now those were Smith Angus cows. The calves were
16 those, too. The property of Smith Angus.

17 Q And that's the basis for your allegation that he did
18 something wrong?

19 A Well, you don't put your brand on somebody else's
20 property without proper documentation that you've
21 sold it, traded it, somehow, there has to be a paper
22 trail on something of that magnitude.

23 Q What information do you have to support an allegation
24 that Dee Smith did not approve of Travis and Julie's
25 brand going on those calves?

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P.O. Box 1886, Rapid City, SD 57709

1 A I loaned money from my mother at different times over
2 the years and every time we did it, we did a note.
3 My mother was a prolific note-maker and always --
4 everything had a paper trail to it. So it would
5 surprise the hell out of me if this didn't, why it
6 didn't.

7 Q And so it's the lack of authorization that leads you
8 to believe that she didn't approve of a brand going
9 on those calves, is that fair?

10 MR. SABERS: You'll need to answer his question,
11 Craig, but I'd just interpose to the extent that
12 calls for a legal determination by the Court. You
13 can answer as a layperson. Go ahead.

14 A The lack of any type of formal documentation or even
15 informal documentation.

16 Q You're aware of no one who says Dee wasn't aware of
17 Travis and Julie's brand going on those calves?

18 A No.

19 Q No one has told you that Travis and Julie coerced
20 your mother into putting their brand on those calves?

21 A No.

22 Q Do you think your mother was aware that Travis and
23 Julie's brand was going on those calves?

24 A I don't know.

25 Q The calves were branded in May or June, correct?

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1 they come in dressed in a costume or something really
2 off the wall.

3 Q Okay. What's the extent of the damages that Smith
4 Angus Ranch, Incorporated, suffered based on the
5 transfer of those five vehicles?

6 A Whatever their value was assigned. I think Jason
7 Tupper was the guy who did the assessment when he
8 went around and did the proper eval and stuff.

9 Q Justin maybe?

10 A Justin Tupper, I think, was his name.

11 Q Do you have any reason to dispute the value that he
12 put on those vehicles?

13 A I don't know what he based it off. If he was looking
14 at the NADA book, Kelley book, or whatever.

15 Q But that's the value that you're living with today?

16 A Yeah.

17 Q Okay. Fair enough.

18 What else about that vehicle transfer in your
19 mind is fraudulent or otherwise improper?

20 A Just the fact that those were SAR assets and they
21 were being...

22 Q Any information you're aware of that your mom didn't
23 approve of those transfers?

24 A No.

25 Q And that same question regarding the branding of the

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P.O. Box 1886, Rapid City, SD 57709

1 calf crop, is there any information that you've got
2 that your mom didn't approve of Travis and Julie
3 putting their brand on that calf crop?

4 A I have no information one way or another.

5 Q Okay. All right. The wire transfer. What wire
6 transfer are we talking about?

7 A We're talking about the wire transfer that was made
8 in the very last days of my mom's life.

9 Q What was the value of that transfer?

10 A It was \$15,000.

11 Q Do you know what that transfer -- what that money was
12 used for?

13 A It was used for a vehicle to purchase for Sadee but
14 it ended up going to Travis and it's a whole
15 confusing thing, so yes.

16 Q Do you have any reason to believe that Sadee did not
17 get a vehicle with the funds of those -- of that
18 transfer?

19 A No, I don't know anything about who drives what
20 vehicle up there.

21 Q And I guess my point is, you don't dispute that
22 there's a vehicle that was purchased with that money?

23 A I dispute the fact that they took the money out of an
24 SAR account when they had every opportunity to take
25 it out of Emma's account.

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P.O. Box 1886, Rapid City, SD 57709

1 Q Okay. We'll talk about that a little bit. And we'll
2 go at it this way.

3 Did your mom ever buy your children vehicles?

4 A Yes.

5 Q About how much did she spend on those vehicles?

6 A Ten to \$12,000, approximately.

7 Q At what age were your kids when they were bought for
8 them?

9 A Approximately in their last year or two of high
10 school.

11 Q So about the same age --

12 A Yes.

13 Q -- Sadee was?

14 A Yes.

15 Q Did your children ever utilize those vehicles on the
16 ranch?

17 A No.

18 Q Do you know if Sadee would have ever used her vehicle
19 on the ranch?

20 A I have no knowledge of that one way or another.

21 Q But Sadee lived on the ranch?

22 A I have no knowledge of that either.

23 Q You don't dispute that, though, do you?

24 A I don't dispute it. I don't know. I don't know it,
25 though.

Carolyn M. Harkins, RPR (605)381-5427
P.O. Box 1886, Rapid City, SD 57709

- 1 Q So explain to me why it was fraudulent for Sadee to
2 get a vehicle when all of the other grandkids
3 apparently got a vehicle under similar circumstances.
- 4 A Why would you take the money out of an SAR account?
- 5 Q So it's not the actual money you're concerned about.
6 It's where the money came from?
- 7 A Well, it is relocating SAR assets for personal family
8 gain.
- 9 Q So even if your mom would have blessed the
10 transaction, you would have had a problem with it?
- 11 A Mom was in no condition to bless anything at that
12 time.
- 13 Q And I understand that's the nature of your
14 allegation, but we talked with your brother some
15 about your mother, your mother handling corporate
16 assets for her own personal benefit?
- 17 A Yes, she did.
- 18 Q You would have had a problem with that, too, then?
- 19 A Hmm. I'll say I didn't -- I wasn't aware of most of
20 it until after my mother died and stuff and got to
21 looking at some of how they were spending and, yeah,
22 I'm surprised that her tax accountant or lawyer would
23 okay that. It didn't seem like proper ways to spend
24 corporate assets.
- 25 Q Okay. Let's talk about the hay.

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1 Dee and there should have been something in writing,
2 as I said earlier.

3 Q So we've got Travis as a director at this time when
4 we're talking about his conduct while a director,
5 fair?

6 A Yes.

7 Q Your mom as a director. She's -- well, let's say
8 this, your mom is the only shareholder.

9 A Okay.

10 Q So who else other than your mom should Travis have
11 disclosed these facts to?

12 A Whoever they would have did a bill of sale with.
13 Those usually have a witness. Sometimes I witness
14 any type of documentation just regarding the sale of
15 it.

16 Q So it's your allegation that there should have been a
17 paper trail?

18 A There should have been some documentation.

19 Q And without documentation, that rises to the level of
20 failing to disclose facts that Travis had an
21 obligation to disclose?

22 MR. SABERS: Object to the extent -- and you need
23 to answer, but object to the extent that it calls for
24 a legal conclusion as to the duties. You can answer.

25 A Yes. I guess he would have been obligated to do

Carolyn M. Harkins, RPR (605) 381-5427
P.O. Box 1886, Rapid City, SD 57709

1 something like that according to the corporate laws,
2 to the best of my understanding.

3 Q Even though the only one who would have seen those
4 would have been your mother?

5 A I don't --

6 MR. SABERS: Same objection.

7 A I don't know what is required for a legal document
8 sale of that magnitude. I just know that any time
9 transactions of that size happen, there's usually
10 paperwork that goes with it of some sort.

11 Q You agree with me that at the time of the branding,
12 your mother was the sole shareholder of Smith Angus
13 Ranch, Incorporated?

14 A Yes, to the best of my knowledge.

15 Q At the time the five vehicles were transferred from
16 Smith Angus Ranch, your mother was the sole
17 shareholder of Smith Angus Ranch?

18 A Yes, to the best of my knowledge.

19 Q At the time of wire transfer, your mother was the
20 sole shareholder?

21 A Yes, to the best of my knowledge.

22 Q During any time hay would have been accumulated
23 during 2015, your mother was the sole shareholder?

24 A Yes.

25 Q And Travis was no longer a director after your mother

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P.O. Box 1886, Rapid City, SD 57709

1 A No, I don't know what he did.

2 Q We've talked with your brother about the dissolution
3 of Smith Angus Ranch?

4 A Is that in here somewhere?

5 Q No, we're done with that.

6 Do you have any reason to disagree with anything
7 he said about that?

8 A No.

9 Q What assets have you received from the estate?

10 A None.

11 Q Your brother had a life insurance policy. Did you
12 receive the benefits of the life insurance policy as
13 well?

14 A Oh, yes. I'm sorry. Yes. Everybody received one of
15 those. I think each of us children did.

16 Q Was yours for \$100,000 as well?

17 A I believe.

18 Q Okay. Let's look at Exhibit 7. And this includes a
19 copy of a check made out to you for \$100,000, is that
20 right?

21 A Yes.

22 Q What does the memo line read?

23 A I believe it says inheritance share.

24 Q Did you ever have a conversation with your mother
25 about this check?

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P.O. Box 1886, Rapid City, SD 57709

1 A Not until after I got it.

2 Q What was the -- what was that conversation -- what

3 did that conversation entail after you received this

4 check?

5 A Thank you.

6 Q Did she describe why she was giving you the check?

7 A No.

8 Q Okay. Do you know if Julie received a \$100,000 check

9 from your mother?

10 A No, I don't know that.

11 Q Let's look at Exhibit 8, which is your mother's will.

12 I'll draw your attention to paragraph XI. It's on

13 page 3. Did your mother ever talk with you about

14 this paragraph?

15 A No.

16 Q Were you aware that she was updating a will in April

17 of 2015?

18 A Yes.

19 Q Did she tell that you she was doing that?

20 A Yeah, we talked about the will.

21 Q Were you present with her at the attorney's office

22 when it was drafted?

23 A No.

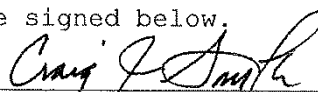
24 Q Okay. Do you know why, in your mind, your

25 understanding of why your mother would write

Carolyn M. Harkins, RPR (605) 381-5427
P.O. Box 1886, Rapid City, SD 57709

DEPONENT'S SIGNATURE PAGE

I, Craig Smith, the undersigned deponent, have this
12 day of Nov, 2019, read the forgoing pages 1
 through 57, inclusive, have made the following change(s) (if
 any) to said testimony, have stated my reason(s) for each
 change or correction, and have signed below.


 Craig Smith

Changes/Corrections

<u>Page</u>	<u>Line</u>	<u>Desired change and reason therefore:</u>
10		
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changes/corrections as

(Use a separate sheet similarly designated for additional changes, with signature of deponent on each sheet.)

Carolyn M. Harkins, RPR (605)381-5427
 P.O. Box 1886, Rapid City, SD 57709

1 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
 2 COUNTY OF HARDING) FOURTH JUDICIAL CIRCUIT

3
 4 SMITH ANGUS RANCH Inc.) 31CIV18-000018
 (SAR),)

5 Plaintiff,)

Deposition of:

) LANCE SMITH

6 vs.)

7 TRAVIS HURST, as an alleged)
 8 DIRECTOR OF SAR, and as an)
 individual,)

9 Defendant and)
 10 Third-Party)
 Plaintiff,)

11 v.)

12 CRAIG SMITH and LANCE SMITH,)

13 Third-Party)
 14 Defendants.)

15 DATE: October 17, 2019, at 8:50 a.m.

16 PLACE: Clayborne, Loos & Sabers
 2834 Jackson Boulevard, Suite 201
 17 Rapid City, SD 57702

18 APPEARANCES:

19 FOR THE PLAINTIFF & MR. MICHAEL K. SABERS
 20 THIRD-PARTY DEFENDANTS: Clayborne, Loos & Sabers
 Attorneys at Law
 21 2834 Jackson Boulevard, Suite 201
 Rapid City, SD 57702

22 FOR THE DEFENDANT & MR. MATTHEW E. NAASZ
 23 THIRD-PARTY PLAINTIFF: Gunderson, Palmer, Nelson & Ashmore
 Attorneys at Law
 24 506 Sixth Street
 Rapid City, SD 57701

25 Also Present: Travis Hurst & Craig Smith

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- 1 A Um-hmm.
- 2 Q So the ranch moves in 2000 to Harding County,
3 correct?
- 4 A Correct.
- 5 Q You were living in Redig in Harding County at the
6 time, correct?
- 7 A Right.
- 8 Q You said you had no involvement. Did you go help
9 with brandings, calfings, anything like that?
- 10 A I believe I helped with one branding.
- 11 Q And how many years were you in Redig?
- 12 A Four.
- 13 Q Did you do any other help on the ranch during those
14 four years?
- 15 A No.
- 16 Q Okay. So after your four years in Redig, you moved
17 to Minnesota, is that correct?
- 18 A Correct.
- 19 Q Describe for me your involvement with the family
20 ranch after you moved to Minnesota.
- 21 A No involvement.
- 22 Q During the past fifteen years, you've made it back
23 for no brandings?
- 24 A No.
- 25 Q Didn't go back to help with calving?

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1 A No.

2 Q When did your father die?

3 A It would have been eight years ago.

4 Q What was your father's name?

5 A Calvin Smith.

6 Q Was your father ill for any period of time prior to

7 his passing away?

8 A He had had a congestive heart failure, I believe, a

9 year or year and a half prior to his passing away

10 when he was in the Rapid City Hospital down here.

11 Q Did the congestive heart failure make it more

12 difficult for him to do the ranch work?

13 A After that surgery, I don't think so. He was back to

14 -- once he recovered from that, back to haying or

15 whatever, from what I remember.

16 Q How old was your father when he passed away?

17 A Do not recall exactly. Would have been in his 60s.

18 Q So during his period of congestive heart failure you

19 didn't go back to help with any of the ranching

20 activities?

21 A No.

22 Q While your father was alive and the family ranch was

23 in Harding County, how often did you get back to

24 Harding County just to visit?

25 A A handful of times. I would say three or four.

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1 Q Okay.

2 A And this would be at the most.

3 Q Okay. And when you got back to visit, what would you

4 do there?

5 A Just visit.

6 Q Didn't do any hunting?

7 A No.

8 Q Okay. Didn't do any fencing or ranch work like that?

9 A No.

10 Q How long was a typical visit?

11 A Maybe a day.

12 Q When did your mother pass away?

13 A Four years ago.

14 Q October of 2015?

15 A Yes.

16 Q And describe her -- what I'll call her final illness.

17 And if you need me to -- if we need to define that

18 further, we certainly can. But can you describe that

19 for me?

20 A She had cancer. I guess you have to be more specific

21 what...

22 Q I think that's fine. Let me ask you this.

23 How long was it between her diagnosis and when

24 she passed away, if you recall?

25 A Approximately two years. At least a year.

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1 Q Okay. And we just talked about how often you got
2 back to the ranch while your father was alive.

3 In between the time when your father passed away
4 and your mother passed away, how frequently did you
5 visit the ranch in Harding County?

6 A I don't believe that I was back, to my knowledge,
7 during that time period. I was back for my father's
8 funeral and I do not believe during those four years
9 that I was back.

10 Q Did that include after your mother was diagnosed with
11 cancer? Did you go back to Harding County between
12 the time your mother was diagnosed with cancer and
13 the time she passed away?

14 A I don't believe so, no.

15 Q Now, it's my understanding that your mother did some
16 treatment in Sioux Falls?

17 A Correct.

18 Q Did you visit your mother in Sioux Falls during any
19 of those times?

20 A Yes.

21 Q How often did you see her in Sioux Falls?

22 A Weekly.

23 Q Describe that for me.

24 A If there -- if she had a doctor appointment, I was
25 there for the majority of those, so sometimes it was

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1 Ranch?

2 A No.

3 Q Prior to your -- and this is prior to your mother's

4 passing, correct?

5 A Correct.

6 Q Prior to your mother's passing, were you ever a

7 director of Smith Angus Ranch?

8 A No.

9 Q Were you ever an officer of Smith Angus Ranch?

10 A No.

11 Q Who were the shareholders of Smith Angus Ranch while

12 your mother and father were alive?

13 A To my knowledge, my mother and father.

14 Q During that time, were there any other shareholders?

15 A Not to my knowledge.

16 Q And then after your father passed away, who were the

17 shareholders of Smith Angus Ranch?

18 A My mother.

19 Q Until she passed away?

20 A Correct.

21 Q To your knowledge, at any time were there other

22 shareholders of Smith Angus Ranch?

23 A Not to my knowledge.

24 Q What's your understanding of Travis Hurst's role with

25 the ranch activities as distinguished from any

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1 other fraudulent conduct are you accusing Travis of
2 committing that harmed Smith Angus Ranch?

3 A I'm not aware of anything additional. We are here
4 about Smith Angus Ranch Corporation.

5 Q And to be clear, when you say you're not aware of any
6 additional, you're not aware of any additional in
7 addition to the five things we've been talking about?

8 A Correct.

9 Q Okay. Same question as to Count VI: Conversion.
10 What assets of Smith Angus Ranch are you alleging
11 Travis to have converted improperly in addition to
12 the five areas we've mentioned this morning?

13 A I'm just reading this to refresh my memory --

14 Q Take your time.

15 A -- so...

16 (A brief pause.)

17 A Nothing additional at this time.

18 Q Okay. Let's talk about the branding.

19 Exactly what are you accusing Travis of doing
20 improperly regarding the branding of the 2015 Smith
21 Angus Ranch calf crop?

22 A By South Dakota law, there either needs to be a bill
23 of sale or a brand release. If you just put your
24 brand on, it is not legal to put your brand on
25 somebody else's livestock without one of those two

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1 pieces of paper to back it up.

2 Q So you see --

3 A That's my understanding of that.

4 Q When you say that, you're referring to South Dakota
5 law?

6 A Yes.

7 Q Okay. Were you at the branding?

8 A No, sir.

9 Q Do you know who was?

10 A Not specifically, no, I do not. But I believe at
11 some point in time we requested to know that and were
12 given a list of individuals that were there. But,
13 no, I do -- I do not know.

14 Q Did you ever talk with your mother about the branding
15 of the 2015 calf crop?

16 A No.

17 Q When were you made aware that the 2015 calf crop was
18 branded with the Travis and Julie Hurst brand?

19 A After Dee's death.

20 Q When did Travis and Julie, to your knowledge, enter
21 into a contract for deed for the purchase of the
22 Smith Angus real property?

23 A It was -- repeat that.

24 Q When did Travis and Julie enter a contract for deed
25 with your mother regarding the real property that was

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1 transfer of those vehicles that includes the
2 signature by Travis Hurst?

3 A No.

4 Q And I guess here's what I'm getting at and tell me if
5 this is wrong.

6 But you see no documentation, for example, title
7 transfers where Travis signed as a director for Smith
8 Angus Ranch that transferred those titles to he and
9 Julie's name personally?

10 A No. There was a distinct lack of any corporate
11 records concerning anything that was going on.

12 Q And that's pretty much the basis of your allegation
13 regarding the vehicles is you wanted a formal
14 corporate resolution allowing that transfer, fair?

15 A Fair.

16 Q What is the value, in your mind, of those five
17 vehicles? Do you have one?

18 A I believe we had a value put on those. What it is
19 off the top of my head, I do not know.

20 Q That's fair. And when you say we --

21 A Craig and I, the probate lawyers, there was a value
22 put on those. I believe there was a value put on
23 those by Justin Tupper.

24 Q Do you know if the value put on those by Justin
25 Tupper is the value used by the estate?

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1 early on when she was first in there, but I -- I'm
2 not certain on that or whether it was just prior to
3 her going in there that I spoke to her that last
4 time.

5 Q When you spoke with her the last time, was she
6 incoherent?

7 A No.

8 Q Did she know who you were?

9 A Yes.

10 Q I don't want to replot plowed ground, but you didn't
11 visit with her that last week when she was in
12 Peaceful Prairie, did you?

13 A No, I did not.

14 Q Do you know how old Sadee Hurst was in the fall of
15 2015?

16 A She would have been a senior in high school, roughly.

17 Q What was your mother's tradition for her
18 grandchildren, her traditional gift for her
19 grandchildren as they graduated from high school?

20 A I don't know as there was a tradition.

21 Q Did your mother buy any vehicles for any of your
22 children?

23 A Yes.

24 Q How many of your children did your mother buy
25 vehicles for?

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1 A Three.

2 Q And you have three children?

3 A Yes.

4 Q About what age in their lives did your mother buy
5 those vehicles for her children -- grandchildren,
6 pardon me?

7 A It varied. From junior in high school to senior.

8 Q About the age Sadee was at the time that your mother
9 passed away?

10 A About.

11 Q Do you recall what your mother paid for the vehicles
12 that she bought for your children?

13 A Somewhere between 12- and 16,000.

14 Q What was the amount of the wire transfer that you're
15 alleging Travis improperly authorized at the time?

16 A 15,000.

17 Q In that ballpark. Do you know if your mother bought
18 vehicles for any of Craig's children?

19 A I believe she did.

20 Q All of Craig's children, to your recollection?

21 A That I do not know.

22 Q We'll probably get into that later today.

23 So would it surprise you if your mother and
24 Travis and Julie had a conversation regarding buying
25 a vehicle for Sadee prior to your mother's death?

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1 A Nobody but her.

2 Q Because she was the sole shareholder?

3 A Correct.

4 Q And any actions by Travis that occurred while she was
5 the sole shareholder would only have hurt Dee, too?

6 A Correct.

7 MR. SABERS: To the extent that it calls for a
8 legal conclusion, I would object, but he can answer
9 to his understanding.

10 A Correct.

11 Q Okay. And until she passed away, she was the sole
12 shareholder of Smith Angus Ranch Corporation?

13 A Correct.

14 Q I'm going to try to do this in a way that will
15 expedite this process a little bit. We've talked
16 about five areas that you have problems with
17 regarding Travis's conduct.

18 Tell me, if possible, what information you have
19 suggesting that Dee did not authorize any of that
20 conduct by Travis Hurst?

21 A The \$15,000 wire transfer. I do not see, in my eyes,
22 that there's any way that she could have in the last
23 three days of her life authorized anything.

24 Q And we talked about that, right?

25 A (The witness indicated.)

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1 Q Correct?

2 A (The witness indicated.)

3 THE COURT REPORTER: You have to answer out loud.

4 A Correct.

5 Q Aside from that, what other information do you have
6 suggesting that Dee Smith did not authorize all of
7 the conduct that you accuse Travis of engaging in?

8 A I have nothing that says that he was authorized to do
9 any of this, the corporate resolution to authorize
10 it. So any kind of paperwork to authorize the
11 branding of 188 head of calves, nothing.

12 Q And so it's not that you have information suggesting
13 she authorized -- strike that. That was a terrible
14 question.

15 It's a lack of information authorizing the
16 transactions?

17 A Correct.

18 Q As you sit here today, you have no information
19 suggesting that she did not approve of those
20 transactions as a sole shareholder of Smith Angus
21 Ranch, Incorporated?

22 A Correct. Because as a corporation, you should have
23 some kind of documentation that that is explicitly
24 approved to do that.

25 Q But this lawsuit is entirely premised upon lack of

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1 formal corporate authorization, is that true?

2 MR. SABERS: Object to the extent it calls for
3 this witness to make a legal conclusion. He can
4 testify to his understanding.

5 A That would be my understanding, yes.

6 Q Okay. Let's talk for a minute about damages.

7 In total how much are you alleging that Travis
8 Smith harmed Smith Angus Ranch by his conduct?

9 A I would -- I would have to tally all that up. As of
10 today, I do not have a figure for you at this time.

11 Q Let's walk through the five areas of potential
12 liability. We've got the branding.

13 How much are you alleging Smith Angus Ranch was
14 harmed by Travis Hurst's conduct regarding the 2015
15 branding?

16 A \$258,000.

17 Q And this is based on what?

18 A Sale barn receipts at the time of calf sale.

19 Q Which was the fall?

20 A Yes.

21 Q Have you done any work to attempt to appraise the
22 value of those calves at the time they were branded?

23 A Yes.

24 Q And that is what?

25 A I do not know that figure because to me it is

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1 (Exhibit Number 7 marked for identification.)

2 Q I'm going to hand you what's been marked Exhibit 7.
3 It's Bates stamped Hurst 35. What is contained on
4 this document?

5 A It is a check to my brother and a check to myself.
6 And I cannot read what the top one is. I would
7 assume that's a deposit slip.

8 Q To be honest, I can't read it either, but we're going
9 to talk about the check, especially the check to you.
10 And it's check number 1048, is that right?

11 A Yes.

12 Q And that is a check from your mother?

13 A Correct.

14 Q To you personally?

15 A Correct.

16 Q For \$100,000?

17 A Correct.

18 Q What's the date on that check?

19 MR. SABERS: Do you want me to hold it?

20 A May 19th of 2015.

21 Q And what is --

22 A My best guess.

23 Q Oh, I'm sorry. It looks right to me. What does the
24 Memo line say?

25 A I cannot read it.

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1 Q It looks to me like it says inheritance. If that's
2 not what it looks like to you, tell me.

3 A That's close enough.

4 Q I think that would match the check then to Craig,
5 too, on top, fair?

6 A Fair.

7 Q Okay. Describe for me the circumstances under which
8 you received this check from your mother.

9 A That I received the check.

10 Q What conversations did you have with your mother
11 regarding this check?

12 A No conversations, to my knowledge.

13 Q You had no conversations with her prior to receiving
14 the check?

15 A Not that I recall.

16 Q When you get the check, do you call her up and say,
17 Hey, Mom, what's going on?

18 A We talked after I received the check, yes. I called
19 her and thanked her.

20 Q And what did she say the check was for?

21 A I do not recall other than what it says in the line,
22 you know, the Memo line.

23 Q Now, we agreed that that probably says inheritance.
24 Would that be consistent with the conversation you
25 had with your mother after you received the check?

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1 A Yes. It is Emma Dee Smith's Last Will.

2 Q Have you seen this before?

3 A Yes.

4 Q And as you look it, I'm not trying to play any tricks

5 here, but does this appear to be a copy of the last

6 will and testament that's been offered for probate in

7 your mother's estate?

8 A Yes.

9 Q What's the date on this will?

10 A The 3rd day of April, 2015.

11 Q Okay. And now I want to draw your attention to

12 paragraph XI. Did you ever discuss this paragraph

13 with your mother?

14 A No.

15 Q This indicates that her sons may not be happy with

16 the provisions I have made in my will.

17 What's your understanding of why she included

18 that in her will?

19 A I have no idea why she included that in the will.

20 Q She included the word sons, not children, is that

21 correct?

22 A Right.

23 Q Her sons are you and Craig --

24 A Correct.

25 Q -- correct? Okay.

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I, Lance Smith, the undersigned deponent, have this
6th day of November, 2019, read the forgoing pages 1
through 111, inclusive, have made the following change(s) (if
any) to said testimony, have stated my reason(s) for each
change or correction, and have signed below.

Lance Smith

Page	Line	Desired change and reason therefore:
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[illegible]

(Use a separate sheet similarly designated for additional changes, with signature of deponent on each sheet.)

App120

STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF HARDING

SS

FOURTH JUDICIAL CIRCUIT

SMITH ANGUS RANCH, INC.,

31CIV18-000018

Plaintiff,

v.

TRAVIS HURST as an alleged
DIRECTOR of SAR, and as an individual,

**DEFENDANT AND THIRD-PARTY
PLAINTIFF'S RESPONSES TO
PLAINTIFF'S FIRST SET OF
INTERROGATORIES AND REQUESTS
FOR PRODUCTION OF DOCUMENTS**

Defendant and Third-Party Plaintiff,

v.

CRAIG SMITH and LANCE SMITH,

Third-Party Defendants.

COMES NOW Defendant and Third-Party Plaintiff and hereby submits his answers and responses to Plaintiff's First Set of Interrogatories and Requests for Production of Documents to Defendant as follows:

INTERROGATORIES

REQUEST FOR PRODUCTION NO. 1

Provide the originals or copies of all documents or other written materials which you claim support your answers to any of the interrogatories set forth below and all documents and other written materials you intend to introduce at trial to support any of your assertions or defenses in this action.

ANSWER: Please see documents bates stamped Hurst 00001 – 00692.

REQUEST FOR PRODUCTION NO. 2

Provide copies of all documents in your possession, or in the possession of any representative, accountant, etc., regarding Smith Angus Ranch, Inc. from during the time period in which you allege you were a director. These shall include, but not be limited to, bank statements, including check images, and bank account statements for the three years prior to the passing of Emma Dee Smith and for the two years after the passing of Emma Dee Smith. This would include any account in which you either deposited or withdrew

- a. The nature and character thereof;
- b. The time and date obtained;
- c. The location or place obtained;
- d. The name and address of the person(s) conversing;
- e. The name and address of all persons present at the conversation; and
- f. The name and address of the person having present custody thereof.

ANSWER NO. 11: No.

Interrogatory No. 12: Describe each instance wherein Travis Hurst disclosed information to Plaintiff in regards to the conduct identified in the Complaint. Include the nature of the information and the individuals and / or entities entitled to receive this information from Mr. Hurst.

ANSWER NO. 12: Defendant had daily conversations with Dee Smith, the only shareholder of Plaintiff, about everything on the ranch.

Interrogatory No. 13: Describe in detail each instance in which you allege you followed corporate formality in your actions as a purported director of Smith Angus Ranch Inc.

ANSWER NO. 13: Defendant objects to this question as it calls for a legal conclusion. Notwithstanding the objection Defendant deferred to Dee Smith, the sole shareholder and long-time director and officer of the corporation, on all matters of corporate governance and procedure.

Interrogatory No. 14: Describe in detail each instance or transaction wherein you personally or otherwise financially benefited from your purported director position of Smith Angus Ranch Inc. or from Smith Angus Ranch Inc. generally.

ANSWER NO. 14: Julie and I had a long-standing relationship with Dee Smith and Smith Angus Ranch, Inc. We provided the labor for the ranch in exchange for various forms of remuneration. This relationship and exchange of services and assets was long-standing and unchanged from when it began. This relationship was not based on my status as a director of Smith Angus Ranch, Inc.

Interrogatory No. 15: Please identify with specificity each and every written document in which you rely upon regarding your allegation that you were a director of Smith Angus Ranch Inc.

ANSWER NO. 15: Dee Smith mentioned to me that she thought if I were a director I might be allowed to execute brand-related documents. Accordingly, in October of 2014 Dee and I completed the Annual Farm Report filed with the Secretary of State which indicates I was a director. Dee filled out the form on line and had me type in my name for the electronic signature.

Interrogatory No. 16: Please identify, and provide an accounting, including check number, date of check, and account number, for every check you allege you wrote as a director of Smith Angus Ranch Inc. for any reason. Further provide the check number, check date, account utilized, and the recipient of such check.

ANSWER NO. 16: See checkbook. I have been able to write checks on Smith Angus Ranch account since 2000. My ability to write checks on the Smith Angus Ranch account was not based on my status as a director.

Interrogatory No. 17: Please identify the date in which you allege you became a director of Smith Angus Ranch Inc. Please identify each and every document that supports such position, who signed it, who filed it, when it was filed, how it was filed, and where it was filed.

ANSWER NO. 17: See Answer to Interrogatory No. 15.

Interrogatory No. 18: Please identify whether any other person was present when you were conversing with Emma Dee Smith in the last three days of her life. If another person was present, identify such person.

ANSWER NO. 18: Neighbors and friends were constantly around. I do not recall a conversation with Dee during this time that did not include family or friends.

Interrogatory No. 19: Describe in detail each transaction you were involved in with Smith Angus Ranch Inc. wherein you personally acquired a financial interest or benefit to include vehicles, hay, groceries, livestock, lawn mower, or any type of monetary funds.

ANSWER NO. 19: Objection; vague and ambiguous. Subject to this objection and without waiving the same: Anything my family or I received from Smith Angus Ranch was authorized and directed by Dee Smith. Any transaction involving Smith Angus Ranch assets being transferred to me or members of my family directly benefitted our family ranching operation.

Interrogatory No. 20: Describe in detail each interest in property you received from Smith Angus Ranch Inc. during the time you allege you were a director of Smith Angus Ranch Inc.

ANSWER NO. 20: I was a director when Dee Smith transferred the vehicles to her name and my name. Defendant had no knowledge of her intention to do so prior to her taking that action. I was a director when Dee Smith instructed Julie and myself to place our brand on the entire 2015 calf crop.

Interrogatory No. 21: Describe in detail each instance in which you utilized the assets and business interests of Smith Angus Ranch Inc. to effectuate your own personal and financial gain.

ANSWER NO. 21: Daily activities using tractors and machinery were done to benefit both Smith Angus Ranch, Inc. and my family's operation. My family and I provided all the labor for Smith Angus Ranch, Inc. All such activities were performed with Dee Smith's full knowledge and authorization.

Interrogatory No. 22: Describe in detail each sale of assets (livestock), transfer of assets (wire transfer), vehicle purchased and hay converted in which you personally benefited or received some financial interest personally.

money from or utilized for any purpose either personally or as an alleged director of Smith Angus Ranch Inc.

ANSWER: The documents requested are in the possession of Plaintiffs. To the extent any documents may be in the possession of Defendant, see Response to Request for Production No. 1.

Interrogatory No. 1: Please state the full name, mailing address and current occupation of the person who prepared the answers to these Interrogatories.

ANSWER NO. 1: Travis Hurst, 12820 Moreau River Loop, Buffalo, SD 57720. Ranch owner and operator.

Interrogatory No. 2: Please identify all individuals who helped prepare the answers to these Interrogatories.

ANSWER NO. 2: Julie Hurst, Dalton Hurst, Sadee Hurst, and David Lust, attorney for Defendant and Third-Party Plaintiff.

Interrogatory No. 3: Prior to answering these Interrogatories, have you made due and diligent search of your books, records, papers, and documents and due diligent inquiry of your agents or representatives and their books, records, papers, and documents for the purpose of eliciting and securing all of the information which is required to answer these Interrogatories?

ANSWER NO. 3: Yes.

Interrogatory No. 4: Please identify and describe every legal action to which you have been a party, of any kind or nature, including civil, administrative, and bankruptcy.

ANSWER NO. 4: None.

Interrogatory No. 5: Please state the names, business and residence addresses, and telephone numbers of each person known or reasonably felt by you, your attorney or other representative to be:

- a. An eye witness to the matter, events or happenings concerning the allegations contained in Plaintiff's Complaint and all pleadings on file with the Court in this matter;
- b. Not an eye witness, but a person having knowledge of some fact or circumstance relevant to the causes of action set forth in Plaintiff's Complaint;
- c. A person having knowledge of some fact or circumstance relevant to the issue of damages related to this lawsuit;
- d. The substance of the information, facts, and circumstances that any and all such witnesses may have.

ANSWER NO. 5:

- a. Becky Brengle, 12338 Old Highway 85, Buffalo, SD, 605 375-3605, transfer of vehicle titles.
 Julie Hurst, 12820 Moreau River Loop, Buffalo, SD 57720, all events.
 Dalton Hurst, 12820 Moreau River Loop, Buffalo, SD 57720, all events.
 Sadee Hurst, 12820 Moreau River Loop, Buffalo, SD 57720, multiple events.
 Rock Thompson, 13004 Moreau River Loop, Buffalo, SD, 605-375-3712, branding.
 Chet Helmey, 12814 Moreau River Loop, Buffalo, SD, 605-375-3614, branding.
 Ty Fowler, 13927 US Hwy 85, Buffalo, SD, 605-375-3100, branding.
 Gary Clanton, PO Box 627, Buffalo, SD, 605-375-3398, branding.
- b. Vicky Coyle, past president of Pioneer Bank and Trust, 19140 Cattle Dr., Belle Fourche, SD, 605-641-1938.
 Jean Helmer, 11138 Stafford Loop, Belle Fourche, SD, 605-892-3037.
 Minnie Quick, 134 Old Hwy 85 S., Newcastle, WY, 307-746-4271.
 Danita Thompson, 13004 Moreau River Loop, Buffalo, SD, 605-375-3712.
 Jessica Floyd, PO Box 103, Buffalo, SD, 605-200-9110.
 Linda Helmey, 12814 Moreau River Loop, Buffalo, SD, 605-375-3614.
 Joyce Hurst, PO Box 16, Murdo, SD, 605-280-1450.
 James Walti, Pierre, SD, 605-224-5828.
 Jeanne Spawn, 5131 E 12th, Casper, WY, 307-267-2947.
- c. See (a) and (b) above
- d. The witnesses will testify to the relationship between Travis and Julie Hurst and Dee Smith, Dee's cognitive condition and her desires regarding ranch assets.

Interrogatory No. 6: List the names, addresses, official titles, if any, and other identification of all witnesses whom it is contemplated will be called upon to testify in support of your defenses in this action, indicate the nature and substance of the testimony which it is expected will be given by each such witness, and if any such prospective witnesses are related to you, state the relationship.

ANSWER NO. 6: No determination has been made at this time concerning trial witnesses. When such decision has been made the information will be provided to Plaintiff's counsel.

Interrogatory No. 7: Pursuant to SDCL § 15-6-26(b)(4), please state the name, business and residence address, and telephone number of each person whom you expect to call as an expert witness at trial or that you have consulted in anticipation of litigation or for trial, and as to each such person, please state:

- a. The occupation, profession, and field of specialization of any such expert;
- b. The subject matter on which the expert is expected to testify;
- c. The substance of the facts and opinions to which the expert is expected to testify;
- d. A summary of the grounds for each opinion; and
- e. The title, author, copyright date, and publisher's name and address of any book, report,

or written document upon which such expert shall rely or which such expert will utilize in the preparation of and the presentation of his testimony.

ANSWER NO. 7: No expert witnesses have been retained at this time.

Interrogatory No. 8: List, identify, and describe the contents of each document which is contemplated will be offered in support of the defenses set forth in your Answer to Complaint, and state whether you will furnish copies of them without the necessity of a formal motion.

ANSWER NO. 8: No determination on trial exhibits has been made at this time. Once trial exhibits have been identified they will be made available to Plaintiff pursuant to pre-trial procedures.

Interrogatory No. 9: Are you aware of or in possession of any photographs of any person, scene, instrumentality or other thing relevant to the subject matter of Plaintiff's Complaint or your Answer to Complaint which have not already been provided to SAR or its representatives? If so, please state:

- a. The subject matter and date of each photograph;
- b. The name, present address, and occupation of the person who took each photograph; and
- c. The custodian of each photograph.

ANSWER NO. 9: No.

Interrogatory No. 10: If, after or during the matters in question, any person or their agents or employees spoke or were heard to speak about the matters contained in or giving rise to the claims contained in the Complaint or your Answer, describe each such communication in detail, including but not limited to:

- a. The parties involved in the discussion;
- b. The date of the discussion;
- c. The location of the discussion; and
- d. The substance of the discussion.

ANSWER NO. 10: Objection; this interrogatory requests information protected from disclosure by the statutory and common law work product doctrine in that the statement of any person, obtained on behalf of Defendant or his attorney or an investigator employed by his attorney, would have been obtained in anticipation of litigation, or for trial. Subject to the following and without waiving the same; Discussions and communications between Dee, Travis and Julie were on-going on a daily basis.

Interrogatory No. 11: Do you have in your possession or under your control, any notes, reports of conversations or interviews, paraphrasing of conversations, phonetic records or other memoranda whatsoever, related to communications by any representative or shareholder of Smith Angus Ranch Inc. that pertain in any manner to the allegations set forth in the Complaint or your Answer? If so, as to each, state the following:

ANSWER NO. 22: Objection vague and ambiguous, and calls for a legal conclusion as to "converted." Subject to this objection and without waiving the same: I did not personally benefit from any of the above activities. My daughter, Sadee, benefitted from the wire transfer by receiving a vehicle for graduation from high school.

Interrogatory No. 23: Identify each asset of SAR which was transferred to you during the time you allege you were acting as a director of Smith Angus Ranch Inc.

ANSWER NO. 23: See response to Interrogatory No. 20.

Interrogatory No. 24: For each such asset listed in your response to the previous Interrogatory, state the amount that you benefitted, where such asset or benefit currently resides or is deposited and invested, and its current value.

ANSWER NO. 24: See response to Interrogatory No. 20. Some vehicles are utilized on my family's ranch; two pickups and the Buick Enclave have been sold; the 2015 calf crop has been sold, except for some replacement heifers that are now part of our family's cow herd.

Interrogatory No. 25: If you contend in this litigation that your actions were authorized by Smith Angus Ranch, Inc. please identify every written document that supports such position.

ANSWER NO. 25: There are no written documents. The authorizations were all verbal from Dee Smith.

Interrogatory No. 26: Identify each individual having information regarding any communication made by Emma Smith suggesting her approval of your conduct as identified and alleged in the Answer.

ANSWER NO. 26: Julie Hurst and the witnesses set forth in Defendant's Response to Interrogatory No: 5.

Interrogatory No. 27: Please identify when you communicated to Smith Angus Ranch Inc. that you had allegedly obtained approval to acquire a vehicle for your daughter that, as you testified, you ultimately ended up owning yourself.

ANSWER NO. 27: Dee Smith started talking about getting a vehicle for Defendant's daughter, Sadee, in her senior year of high school which was the fall of 2015. A vehicle was purchased and then traded for another vehicle of the same year from me that Sadee was more comfortable driving.

Interrogatory No. 28: As an alleged director of Smith Angus Ranch Inc., please describe in detail all assets of Smith Angus Ranch Inc. two years prior to the death of Emma Dee Smith. This should include a list of all livestock, hay, equipment, and bank accounts and balances.

ANSWER NO. 28: Objection, Overly-burdensome. Subject to this objection and without waiving the same: It was my understanding that I was not a director two years prior to the death of Dee Smith. Smith Angus Ranch, Inc., has all the corporate documents and information in its possession.

Interrogatory No. 29: As an alleged director of SAR, please described in detail all assets of Smith Angus Ranch Inc. on the day before the passing of Emma Dee Smith. This should include a list of all livestock, hay, equipment, and bank accounts and balances.

ANSWER NO. 29: Objection. Overly-burdensome. See Answer to Interrogatory No. 28.

Interrogatory No. 30: Identify the recipient of each asset of Smith Angus Ranch Inc. as identified in the time period commencing in Interrogatory No. 28 and ending on the date identified in Interrogatory No. 29 including the date of each distribution and the recipient.

ANSWER NO. 30: Assets identified above were used for ranch operations, other than the wired funds which were for the benefit of Sadee via the purchase of a vehicle. The vehicles were transferred into Dee Smith's and my name; the 2015 calf crop was transferred to Julie and myself based on the explicit instructions of Dee Smith.

Interrogatory No. 31: Identify the owner of all shares of SAR before and after the death of Emma Smith.

ANSWER NO. 31: Upon information and belief Dee Smith owned all the shares at her death which were then transferred to Third-Party Defendants.

Interrogatory No. 32: Identify the date(s) when you first became aware of the facts giving rise to this lawsuit.

ANSWER NO. 32: Objection; vague and ambiguous. Subject to this objection and without waiving the same; When I was served with the summons and complaint.

Interrogatory No. 33: Please identify each written document that you believe exists which would have justified the branding of Smith Angus Ranch Inc. cattle with your personal brand.

ANSWER NO. 33: Dee Smith verbally directed the branding of the cattle and was present during the branding.

Interrogatory No. 34: Identify each brand inspector that you have utilized in the last seven years, further providing their name, and each instance in which you have utilized their services. Further provide each and every instance in which you utilized a brand inspector in the alleged role as a director of Smith Angus Ranch Inc.

ANSWER NO. 34: There has never been a brand inspector at any branding and whatever inspector was working at the Belle Fourche sale barn was the one who looked at the calves and cows when we sold them.

REQUEST FOR PRODUCTION NO. 3

Provide the originals or copies of all documents or other written materials that you have received or obtained from any brand inspector for either your livestock operation or the livestock operation of Smith Angus Ranch Inc. in the last seven years.

RESPONSE NO. 3: None.

Interrogatory No. 35: On what date did you become aware of Emma Dee Smith's power of attorney dated December 9, 2014. If you cannot recall the exact date, please state whether you became aware of it before or after the month prior to Emma Dee Smith's passing.

ANSWER NO. 35: I recall Dee Smith's signing a power of attorney when she was in Sioux Falls for treatment.

Interrogatory No. 36: Identify each individual involved in the preparation of your financial documentation including but not limited to tax returns, accountings, financial statements, etc.

ANSWER NO. 36: Steve Martin and Jamie Thybo, both accountants.

Interrogatory No. 37: Identify each banking or other financial institution at which any assets of you, or Smith Angus Ranch, have been maintained in the last seven years.

ANSWER NO. 37: First Fidelity Bank, Pioneer Bank and Trust, First National Bank.

Interrogatory No. 38: Please identify any and all real property, including legal description, in which you have held an ownership interest since January 1, 2012.

ANSWER NO. 38: The requested information is public and can be obtained at the Harding County Courthouse and the Gallatin County Courthouse in Montana.

Interrogatory No. 39: Please:

- (a) Identify any and all real property, including legal descriptions, that you have purchased, received, sold, transferred, gifted, or otherwise conveyed since January 1, 2012, either as an alleged director of Smith Angus Ranch Inc. or personally; and
- (b) Identify all other party(ies) to each transaction (i.e., the person or other entity to/from whom the real property was purchased, received, sold, transferred, or otherwise conveyed).

ANSWER NO. 39:

See Response to Interrogatory No: 38.

Interrogatory No. 40: Please:

- (a) Identify any and all real property, including legal descriptions, in which you presently hold an ownership interest;
- (b) Provide the most recent assessed value of the same; and
- (c) State your opinion as to the present value of the same.

ANSWER NO. 40:

See Response to Interrogatory No: 38.

Interrogatory No. 41: Please identify any and all legal entities/structures (including, but not limited to, trusts of any type) in which you hold any type of membership or ownership interest, or of which you are an owner, trustee, or beneficiary, and describe the nature of your interest or relationship with the same.

ANSWER NO. 41:

None.

Interrogatory No. 42: Please:

- (a) Provide a complete list of your present assets (including, but not limited to, the balances of any accounts at any type of banking, lending, investment, or other financial institution);
- (b) Provide a complete list of your present liabilities; and
- (c) State your present net worth.

ANSWER NO. 42: Objection. Overly-burdensome, irrelevant. Pursuant to SDCL 21-1-4.1 Plaintiff is not entitled to this information until such time as the court has made a ruling on the punitive damages claim.

Interrogatory No. 43: Please identify any check or monetary transfer you made to Smith Angus Ranch Inc. to the hunting business in which you operated. Further, please explain where the proceeds from the hunting business were deposited, and whose name is on such bank account. Last, further identify the banking institution, and account number for any such bank account.

ANSWER NO. 43: The hunting business was separate from Smith Angus Ranch. I do not recall making any transfers from Smith Angus Ranch to the hunting business. The account is held at Pioneer Bank and Trust.

Interrogatory No. 44: In regards to any livestock owned by Smith Angus Ranch that you branded with your own brand, please identify the following:

- (a) The total number of livestock owned by Smith Angus Ranch that you branded with your own personal brand;
- (b) The value of such livestock at the time of branding;
- (c) If such livestock were sold, where such proceeds were deposited and who was on the bank account, further identifying the bank, bank address, and account number;
- (d) Whether any written document exists that you are aware of that would provide any authority for you to brand Smith Angus Ranch Inc. livestock with your personal brand.
- (e) The amount identified on a bill of sale, or the value or number of livestock identified on any brand report or certificate.
- (f) Please explain how you reported such transfer to the internal revenue service in each year in which you would have branded Smith Angus Ranch Inc. livestock with your personal brand.

ANSWER NO. 44:

- a. One hundred (100) head of calves were gifted to Defendant from Smith Angus Ranch and Dee Smith. Smith Angus Ranch owed two hundred (200) head of calves but the agreement with Dee Smith was that one-half (1/2) of the calf crop would be in exchange for her running cows on property owned by me and Julie Hurst.
- b. Baby calves at that age would have been worth \$200 to \$300.
- c. Proceeds were deposited into my ranch account.
- d. No written document exists.
- e. See response to d above.
- f. It was claimed as income when Defendant sold calves and it only happened one year.

REQUESTS FOR PRODUCTION

In addition to the Requests for Production above, Plaintiff also submits the following Requests for Production to Defendant.

Request for Production No. 4: Please provide copies of your federal income tax returns for the years 2012 through 2018, including, but not limited to, any and all schedules.

RESPONSE NO. 4: Objection. Irrelevant. Pursuant to SDCL 21-1-4.1 Plaintiff is not entitled to this information until such time as the court has made a ruling on the punitive damages claim.

Request for Production No. 5: Please produce any and all minutes of Smith Angus Ranch Inc. Board of Directors' for the time period in which you allege you served as a director.

RESPONSE NO. 5: I am not aware of any and if they exist they would be in Plaintiff's possession.

Request for Production No. 6: Please produce any and all appraisals performed on any assets of Smith Angus Ranch from 2012 to the date of Emma Dee Smith's passing.

RESPONSE NO. 6: I am not aware of any. If any appraisals exist, they would be in Plaintiff's possession.

Request for Production No. 7: Any and all documents, exhibits, or tangible items in your possession that are relevant to the issues in this lawsuit.

RESPONSE NO. 7: See documents provided in response to Request for Production No. 1.

Request for Production No. 8: Any and all items you intend to introduce at trial.

RESPONSE NO. 8: No trial exhibit decisions have yet been made.

Request for Production No. 9: A copy of all statements made by parties or non-parties concerning this lawsuit or its subject matter. For purposes of this request, a statement is:

- a. A written statement signed or otherwise adopted or approved by the person making it; or

- b. A stenographic, mechanical, electrical or other recording, or a transcription thereof which is a verbatim recital of an oral statement by the person making it and contemporaneously recorded.

RESPONSE NO. 9: None.

Request for Production No. 10: Any and all reports of experts or investigators regarding this lawsuit.

RESPONSE NO. 10: None.

Request for Production No. 11: Please provide a copy of any and all financial statements you have completed and/or provided to any financial or lending institution since January 1, 2012. This would include, but not be limited to the years in which you would have branded Smith Angus Ranch livestock with your personal brand.

RESPONSE NO. 11: Objection. Irrelevant. Pursuant to SDCL 21-1-4.1 Plaintiff is not entitled to this information until such time as the court has made a ruling on the punitive damages claim.

Request for Production No. 12: Please produce all of SAR's corporate documents, regardless of the date of such documents; including, but not limited to, articles of incorporation, by-laws, annual reports, minutes from all meetings, authorizations, resolutions, etc., including but not limited to any document that you allege supports your position that you were acting as a director of Smith Angus Ranch Inc.

RESPONSE NO. 12: All such documents are in the possession of Plaintiffs.

Request for Production No. 13: Please provide a copy of the most recent loan application that you completed.

RESPONSE NO. 13: Objection. Irrelevant. Pursuant to SDCL 21-1-4.1 Plaintiff is not entitled to this information until such time as the court has made a ruling on the punitive damages claim.

Request for Production No. 14: Please provide a copy of your most recently prepared Balance Sheet or other similar document listing all of your assets and liabilities.

RESPONSE NO. 14: Objection. Irrelevant. Pursuant to SDCL 21-1-4.1 Plaintiff is not entitled to this information until such time as the court has made a ruling on the punitive damages claim.

Request for Production No. 15: Please produce a copy of any hand written notes, letters, or documents which you will rely upon to allege you were authorized to conduct the actions alleged in the Complaint, to include but not be limited to any hand written document of Emma Dee Smith.

RESPONSE NO. 15: None

Dated this 28 day of June, 2019.

Travis Hurst
Travis Hurst

State of South Dakota)
) ss
County of Harding)

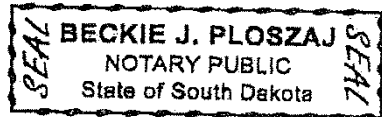
On this 28th day of June, 2019, before me, the undersigned officer, personally appeared Travis Hurst, know to me or satisfactorily proven to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same for the purposes therein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

Beckie J. Ploszaj
Notary Public -- South Dakota

My Commission expires: 6-16-24

(SEAL)



Dated this 2nd day of July, 2019

AS TO OBJECTIONS

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

/s/ David E. Lust

David E. Lust
Attorney for Defendant and
Third-Party Plaintiff
506 6th Street/PO Box 8045
Rapid City, SD 57709
605.342.1078
dlust@gpna.com

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of July, 2019, the foregoing **DEFENDANT AND THIRD-PARTY PLAINTIFF'S RESPONSES TO PLAINTIFF'S FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS** was served upon the below named individual by first-class U.S. Mail, postage prepaid, as follows:

Michael Sabers
Clayborne, Loos and Sabers, LLP
2834 Jackson Blvd., Suite 201
PO Box 9129
Rapid City, SD 57709
605.721.1517
msabers@clslawyers.net
Attorney for Plaintiff

/s/ David E. Lust

David E. Lust

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTY OF HARDING	)	FOURTH JUDICIAL CIRCUIT
SMITH ANGUS RANCH Inc. (SAR),	)	31CIV18-000018
Plaintiff,)	
v.)	
TRAVIS HURST, as an alleged)	
DIRECTOR OF SAR, and as an individual,	)	PLAINTIFF'S ANSWERS AND RESPONSES
Defendant and	)	TO DEFENDANT'S FIRST SET OF
Third-Party Plaintiff,	)	INTERROGATORIES AND REQUESTS
	)	FOR PRODUCTION OF DOCUMENTS
v.)	
CRAIG SMITH and LANCE SMITH,)	
Third-Party Defendants.)	

COMES NOW Plaintiff, Smith Angus Ranch, Inc. ("SAR"), and hereby submits its answers and responses to *Defendant's First Set of Interrogatories and Requests for Production of Documents to Plaintiff* as follows:

INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS

Interrogatory No. 1: Please state the full name, mailing address and current occupation of the person who prepared the answers to these Interrogatories.

ANSWER NO. 1: Plaintiff and its attorney.

Interrogatory No. 2: Please identify all individuals who helped prepare the answers to these Interrogatories.

ANSWER NO. 2: See Answer to Interrogatory No. 1.

Interrogatory No. 3: Prior to answering these Interrogatories, have you made due and diligent search of your books, records, papers, and documents and due diligent inquiry of your agents or representatives and their books, records, papers, and documents for the purpose of eliciting and securing all of the information which is required to answer these Interrogatories?

ANSWER NO. 3: Yes. And discovery is continuing.

Interrogatory No. 4: Please identify and describe every legal action to which you have been a party, of any kind or nature, including civil, administrative, and bankruptcy.

ANSWER NO. 4: It is not believed SAR has been in a prior legal action.

Interrogatory No. 5: Please state the names, business and residence addresses, and telephone numbers of each person known or reasonably felt by you, your attorney or other representative to be:

- a. An eye witness to the matter, events or happenings concerning the allegations contained in Plaintiff's Complaint and all pleadings on file with the Court in this matter;
- b. Not an eye witness, but a person having knowledge of some fact or circumstance relevant to the causes of action set forth in Plaintiff's Complaint;
- c. A person having knowledge of some fact or circumstance relevant to the issue of damages related to this lawsuit;
- d. The substance of the information, facts, and circumstances that any and all such witnesses may have.

ANSWER NO. 5: SAR would rely in part on the testimony of Defendant to identify such persons. It certainly includes Defendant, his wife, Lance and Craig Smith, Dee Smith, attorneys, medical providers, and neighbors. It is not known exactly what each person knows or understands but discovery is continuing and depositions will likely provide additional names. This Interrogatory will be supplemented as necessary.

Interrogatory No. 6: List the names, addresses, official titles, if any, and other identification of all witnesses whom it is contemplated will be called upon to testify in support of your claims or Plaintiff's claims in this action, indicate the nature and substance of the testimony which it is expected will be given by each such witness, and if any such prospective witnesses are related to you, state the relationship.

ANSWER NO. 6: Plaintiff will comply with any Court Order requiring the identification of witnesses. At this point, no final decision as to witnesses has been made.

Interrogatory No. 7: Pursuant to SDCL § 15-6-26(b)(4), please state the name, business and residence address, and telephone number of each person whom you or Plaintiff expects to call as an expert witness at trial or that you or Plaintiff have consulted in anticipation of litigation or for trial, and as to each such person, please state:

- a. The occupation, profession, and field of specialization of any such expert;
- b. The subject matter on which the expert is expected to testify;
- c. The substance of the facts and opinions to which the expert is expected to testify;
- d. A summary of the grounds for each opinion; and
- e. The title, author, copyright date, and publisher's name and address of any book, report, or written document upon which such expert shall rely or which such expert will utilize in the preparation of and the presentation of his testimony.

ANSWER NO. 7: Expert witnesses will be disclosed pursuant to Court Order.

Interrogatory No. 8: List, identify, and describe the contents of each document which is contemplated will be offered in support of the claims set forth in your Answer to Third-Party Complaint, and state whether you will furnish copies of them without the necessity of a formal motion.

ANSWER NO. 8: No final exhibit list has been finalized. All documents being made available, or which have been produced, however, may be offered as evidence at the trial in this matter.

Interrogatory No. 9: Are you aware of or in possession of any photographs of any person, scene, instrumentality or other thing relevant to the subject matter of Plaintiff's Complaint which have not already been provided to Travis Hurst? If so, please state:

- a. The subject matter and date of each photograph;
- b. The name, present address, and occupation of the person who took each photograph; and
- c. The custodian of each photograph.

ANSWER NO. 9: Not at this time.

Interrogatory No. 10: If, after or during the matters in question, Travis Hurst, Julie Hurst, or their agents or employees spoke or were heard to speak about the matters contained in or giving rise to the claims contained in the Complaint, describe each such communication in detail, including but not limited to:

- a. The parties involved in the discussion;
- b. The date of the discussion;
- c. The location of the discussion; and
- d. The substance of the discussion.

ANSWER NO. 10: Conversations with SAR representatives are known to have occurred in regards to the issues in dispute. This interrogatory will be supplemented after depositions of Travis Hurst and Julie Hurst and others are completed.

Interrogatory No. 11: Do you have in your possession or under your control, any notes, reports of conversations or interviews, paraphrasing of conversations, phonetic records or other memoranda whatsoever, related to communications by Travis Hurst, Julie Hurst or their agents that pertain in any manner to the allegations set forth in the Complaint? If so, as to each, state the following:

- a. The nature and character thereof;
- b. The time and date obtained;
- c. The location or place obtained;
- d. The name and address of the person(s) conversing;
- e. The name and address of all persons present at the conversation; and
- f. The name and address of the person having present custody thereof.

ANSWER NO. 11: As described, the answer is no. However, there are some documents being made available which address the facts and circumstances underlying the litigation which may be responsive to this interrogatory.

Interrogatory No. 12: Describe each instance in which Travis Hurst failed to disclose information Plaintiff alleges he was legally required to disclose. Include the nature of the information and the individuals and/or entities entitled to receive this information from Mr. Hurst.

ANSWER NO. 12: SAR would rely upon the Complaint allegations. In addition, if in fact Travis Hurst was an actual director of SAR he had a duty to disclose facts about branding, cattle sales, hay, leases, payments to himself and his family directly, indirectly, or otherwise. Mr. Hurst's deposition in the Estate matter identifies several of such instances. This interrogatory will be supplemented after depositions are complete to the extent necessary.

Interrogatory No. 13: Describe in detail each instance in which Travis Hurst failed to follow corporate formality as alleged in paragraph nine of the Complaint.

ANSWER NO. 13: SAR would rely upon the Complaint allegations. To the extent Travis Hurst was an actual director of SAR it is not believed he ever followed any corporate formality in his alleged role as director of SAR.

Interrogatory No. 14: Describe in detail each instance of self-dealing Plaintiff alleges Travis Hurst engaged in with respect to the allegations contained in the Complaint.

ANSWER NO. 14: SAR would rely upon the Complaint allegations. To the extent Travis Hurst was an actual director of SAR it is believed that each instance where he personally benefited, such as in regards to groceries, vehicles, equipment, hay, leases, branding, cattle sales, vehicle acquisitions, or other financial benefit would be self-dealing. This interrogatory will be supplemented after the deposition of Defendant is taken.

Interrogatory No. 15: Describe in detail each fraudulent misrepresentation regarding past and future events Plaintiff alleges Mr. Hurst engaged in regarding the allegations of the Complaint.

ANSWER NO. 15: SAR would rely upon the Complaint allegations. To the extent Travis Hurst was an actual director of SAR it is believed he made misrepresentations about branding and cattle sales. It is also believed he made fraudulent statements about vehicles, and the pretenses for the acquisition of the same. It is also believed he made fraudulent statements about personal expenses paid for by SAR that constituted self-dealing. This interrogatory will be supplemented as further discovery takes place and Mr. Hurst is placed under oath about certain checks written, expenses made or had, wire transfers, and in regards to other facts.

Interrogatory No. 16: Describe in detail each instance of surreptitious conduct and/or surreptitious communication you allege Mr. Hurst engaged in as relevant to the allegations in

the Complaint.

ANSWER NO. 16: SAR would rely upon the Complaint allegations. To the extent Travis Hurst was an actual director of SAR it is believed that each instance where he personally benefited, such as in regards to groceries, vehicles, equipment, leases, branding, cattle sales, vehicle acquisitions, would be surreptitious behavior. It is also believed that Travis Hurst's dealings with the deceased Dee Smith were inappropriate on many levels including levels of self dealing to which were admitted in the Estate matter when Mr. Hurst was deposed. This interrogatory will be supplemented after the depositions of Travis and Julie Hurst.

Interrogatory No. 17: List each and every item of compensatory damages which you claim in this case. As to each item of damages claimed, state the amount you claim in damages.

ANSWER NO. 17: Full damages are yet to be determined. However, the letter from the Estate attorney to Attorney for Travis Hurst dated May 17, 2018 outlines some of the compensatory damages sought. All checks written by Defendant for his own personal benefit will be sought to be recovered by SAR. This response will be supplemented after the deposition of Julie and Travis Hurst and after Travis Hurst fully answers interrogatories and requests for production of documents which have now been served upon him.

Interrogatory No. 18: Describe in detail the factual support for Plaintiff's claim for punitive damages against Mr. Hurst. State the amount you claim in punitive damages and describe in detail the manner in which this amount was determined.

ANSWER NO. 18: SAR would rely upon the Complaint allegations. To the extent Travis Hurst was an actual director of SAR it is believed that each instance where he personally benefited, such as in regards to groceries, vehicles, equipment, leases, branding, cattle sales, vehicle acquisitions, would be a basis for punitive damages. Furthermore, Mr. Hurst's conduct, self-dealing, and dealing with a person who lacked capacity or understanding at a minimum in their final days and hours wherein he made misrepresentation and misled constitutes a basis for punitive damages. This interrogatory will be supplemented with or after the deposition of Travis Hurst.

Interrogatory No. 19: Describe in detail each instance in which you allege Mr. Hurst placed his own interests, or interests other than Smith Angus Ranch's (SAR) interest, ahead of the interests of SAR.

ANSWER NO. 19: SAR would rely upon the Complaint allegations. To the extent Travis Hurst was an actual director of SAR it is believed that each instance where he personally benefited, such as in regards to groceries, vehicles, equipment, leases, branding, cattle sales, vehicle acquisitions, would be self-dealing.

Interrogatory No. 20: Describe in detail each interest in property you allege Mr. Hurst acquired in which you allege SAR had an interest or tangible expectancy.

ANSWER NO. 20: SAR would rely upon the Complaint allegations. To the extent Travis

Hurst was an actual director of SAR it is believed that each instance where he personally benefited, such as in regards to groceries, vehicles, hay, equipment, leases, branding, cattle sales, vehicle acquisitions, would be a situation wherein Mr. Hurst acquired property to which he had no interest.

Interrogatory No. 21: Describe in detail each instance in which you allege Travis Hurst utilized the assets and business interests of SAR to effectuate his own personal and financial gain.

ANSWER NO. 21: SAR would rely upon the Complaint allegations. To the extent Travis Hurst was an actual director of SAR it is believed that each instance where he personally benefited, such as in regards to groceries, vehicles, equipment, leases, branding, cattle sales, vehicle acquisitions, were such instances. Furthermore, each instance where Travis Hurst signed checks for his own personal benefits constitutes such instances. Last, this would or may well include utilization of SAR funds for the hunting business wherein SAR paid bills but received no reciprocal financial benefit.

Interrogatory No. 22: Describe in detail each sale of assets (livestock), transfer of assets (wire transfer), vehicle purchased and hay converted as articulated in paragraph twenty-five of the Complaint which gives rise to Plaintiff's allegation of fraud.

ANSWER NO. 22: SAR would rely upon the Complaint allegations. To the extent Travis Hurst was an actual director of SAR it is believed that each instance where he personally benefited, such as in regards to livestock, transfers of assets, and hay give rise to fraud. The deposition transcript of Travis Hurst from the Estate action touches on part of this as well, as does Mr. Hurst's admissions in regards to the same.

Interrogatory No. 23: Identify each asset of SAR you allege was converted by Travis Hurst.

ANSWER NO. 23: SAR would rely upon the Complaint allegations. To the extent Travis Hurst was an actual director of SAR it is believed that each instance where he personally benefited, such as in regards to groceries, vehicles, equipment, leases, branding, cattle sales, vehicle acquisitions, would be self-dealing. This interrogatory will be supplemented as necessary and after the deposition of Mr. Hurst.

Interrogatory No. 24: For each such asset listed in your response to the previous Interrogatory, state the amount you claim SAR was damaged by such conversion.

ANSWER NO. 24: SAR would generally rely, at this point, on the damages calculation referenced in Interrogatory No. 17 above.

Interrogatory No. 25: If you contend in this litigation that Emma Smith did not authorize the actions of Travis Hurst relating to SAR assets, state in detail the factual basis for this contention.

ANSWER NO. 25: SAR is aware of no document wherein Emma Smith would have authorized Travis Hurst's conduct as alleged in the Complaint.

Interrogatory No. 26: Identify each individual having information regarding any communication made by Emma Smith suggesting her dissatisfaction or disagreement with the conduct of Travis Hurst in dealing with the assets of SAR.

ANSWER NO. 26: Discovery is ongoing. However, SAR is not aware of any corporate document which would have authorized a director of SAR to conduct acts such as those taken by Travis Hurst.

Interrogatory No. 27: Describe in detail each instance in which Emma Smith communicated disagreement or dissatisfaction with the actions of Travis Hurst in dealing with the assets and/or corporate formalities of SAR. For each such instance, identify the date, location, substance and all individuals involved with each such communication.

ANSWER NO. 27: Discovery is ongoing. However, SAR is not aware of any corporate document which would have authorized a director of SAR to conduct acts such as those taken by Travis Hurst.

Interrogatory No. 28: Describe in detail all assets of Smith Angus Ranch at the time of Emma Smith's death.

ANSWER NO. 28: The Estate matter has identified and provided, to the best of its knowledge, a list of SAR assets at the time of Ms. Dee Smith's death. One of the purposes of this litigation is to further determine what assets SAR had an interest in, and which assets had been wrongfully transferred or otherwise misappropriated by Defendant from SAR.

Interrogatory No. 29: Describe in detail all current assets of Smith Angus Ranch.

ANSWER NO. 29: The current assets of SAR were provided in an accounting in the Estate matter.

Interrogatory No. 30: Identify the recipient of each asset of Smith Angus Ranch identified in Your response to Interrogatory No. 28. Include the date of each distribution.

ANSWER NO. 30: No assets of SAR have been distributed to date.

Interrogatory No. 31: Identify the owner of all shares of SAR before and after the death of Emma Smith.

ANSWER NO. 31: Prior to the death of Dee Smith she owned the shares of SAR. After the death of Dee Smith the shares were owned by Craig and Lance Smith.

Interrogatory No. 32: Identify the date(s) when you first became aware of the facts giving rise to this lawsuit.

ANSWER NO. 32: SAR became aware of the facts underlying this lawsuit after the death of

Dee Smith. It is impossible to provide a chronology of dates upon which facts were first discovered, although many were discovered on the date in which Mr. Travis Hurst was deposed in the Estate matter.

Interrogatory No. 33: Describe in detail how the decision to initiate this lawsuit was made, including the date such decision was made.

ANSWER NO. 33: The decision to initiate litigation was made by SAR after having consulted with legal counsel. To the extent the details of such consultation are being requested, such is objected to on the basis of the attorney client privilege.

Interrogatory No. 34: Identify each individual involved in the decision to initiate this lawsuit.

ANSWER NO. 34: Shareholders of SAR and its attorney.

Interrogatory No. 35: Identify all corporate assets owned by Smith Angus Ranch at the time the decision to initiate this lawsuit was made.

ANSWER NO. 35: The purpose of this lawsuit is to determine what assets of SAR existed or as alleged were wrongfully transferred from SAR. Subject to such objection, and without waiving the right to supplement, no assets of SAR have been distributed.

Interrogatory No. 36: Identify each individual involved in the preparation of any financial documentation regarding Smith Angus Ranch; including but not limited to tax returns, accountings, financial statements, etc.

ANSWER NO. 36: Ketel Thorstenson was utilized by SAR after the passing of Dee Smith to generate such returns or documents to the extent that such exist.

Interrogatory No. 37: Identify each banking or other financial institution at which any assets of Smith Angus Ranch have been maintained, at any time.

ANSWER NO. 37: This interrogatory is objected to as it vague, overbroad, and confusing as it makes no senses. Assets other than bank accounts are not maintained at financial institution. SAR maintained its corporate bank account at First Fidelity Bank in Murdo.

REQUESTS FOR PRODUCTION

Request for Production No. 1: Any and all internally prepared inventories, reports, analyses, statements, business plans, business goals, financial forecasts and/or projections and budgets reflecting Smith Angus Ranch's financial condition from 2015 to the present.

RESPONSE NO. 1: To the extent such documents exist, such are either contained in that portion of the Estate file which is not protected by the attorney client privilege, or which is being made available at the offices of Plaintiff's counsel for inspection by Defendant's attorneys.

Request for Production No. 2: Any and all statements, inventories, reports, outlines, summaries, and analyses pertaining to Smith Angus Ranch's financial condition prepared by outside accountants, consultants, or other third parties from 2015 to the present.

RESPONSE NO. 2: SAR objects to such Request for Production to the extent such requests document, to the extent they exist, which would have been generated in a time after the majority of the claims involved in this litigation, would have arisen. To the extent that such exist, such are being made available at the offices of Plaintiff's counsel for inspection by Defendant's attorneys.

Request for Production No. 3: All of Smith Angus Ranch's federal tax returns from 2015 to the present, including schedules and any documents used in the preparation of those tax returns.

RESPONSE NO. 3: SAR objects to such Request for Production to the extent such requests document, to the extent they exist, which would have been generated in a time after the majority of the claims involved in this litigation, would have arisen. To the extent that such exist, such are being made available at the offices of Plaintiff's counsel for inspection by Defendant's attorneys.

Request for Production No. 4: Any and all minutes of Smith Angus Ranch's Board of Directors' meetings from 2015 to the present.

RESPONSE NO. 4: Such are being made available at the offices of Plaintiff's counsel for inspection by Defendant's attorneys.

Request for Production No. 5: Any and all appraisals performed on any assets of Smith Angus Ranch from 2015 to the present.

RESPONSE NO. 5: SAR objects to such Request for Production to the extent such requests document, to the extent they exist, which would have been generated in a time after the majority of the claims involved in this litigation, would have arisen. To the extent that such exist, such are being made available at the offices of Plaintiff's counsel for inspection by Defendant's attorneys. An appraisal of certain assets was conducted by Justin Tupper of the St. Onge livestock auction.

Request for Production No. 6: Any and all documents you referenced, consulted, identified or relied upon in your answers to Defendants' Interrogatories.

RESPONSE NO. 6: The documents relied upon which are in the possession of SAR are being made available for inspection by Defendant's counsel at the office of Plaintiff's counsel.

Request for Production No. 7: Any and all documents, exhibits, or tangible items in your possession that are relevant to the issues in this lawsuit.

RESPONSE NO. 7: This interrogatory is overly broad and burdensome. It is not up to SAR to try to determine the scope of all documents which Defendant believes may be relevant to this lawsuit. To the extent documents exist, and were relied upon, such are being made available at the office of Plaintiff's counsel for inspection by Defendant's counsel.

Request for Production No. 8: Any and all items you intend to introduce at trial.

RESPONSE NO. 8: Plaintiff will comply with all pretrial orders which require the identification of trial exhibits.

Request for Production No. 9: A copy of all statements made by parties or non-parties concerning this lawsuit or its subject matter. For purposes of this request, a statement is:

- a. A written statement signed or otherwise adopted or approved by the person making it; or
- b. A stenographic, mechanical, electrical or other recording, or a transcription thereof which is a verbatim recital of an oral statement by the person making it and contemporaneously recorded.

RESPONSE NO. 9: At this point, no such statements exists which are not protected by the attorney work product doctrine.

Request for Production No. 10: Any and all reports of experts or investigators regarding this lawsuit.

RESPONSE NO. 10: Trial experts, and reports, will be produced consistent with the scheduling order in place.

Request for Production No. 11: Any and all photographs referenced in your answer to Interrogatory No. 9.

RESPONSE NO. 11: N/A at this time.

Request for Production No. 12: All of SAR's corporate documents, regardless of the date of such documents; including, but not limited to, articles of incorporation, by-laws, annual reports, minutes from all meetings, authorizations, resolutions, etc.

RESPONSE NO. 12: To the extent those documents exists, such are available for inspection at the offices of Plaintiff's counsel by Defendant's counsel.

Request for Production No. 13: All of SAR's financial documents regardless of the date of such documents; including but not limited to, inventories, financial statements, bank statements, etc.

RESPONSE NO. 13: To the extent those documents exist, and are in the possession of SAR, such are being made available for inspection at the offices of Plaintiff's counsel by Defendant's counsel.

STATE OF _____)
)SS
COUNTY OF _____)

Dated this 29 day of May, 2019.

Smith Angus Ranch, Inc.

By: _____

Title: Authorized Representative

Subscribed and sworn to before me this 29th day of May, 2019.



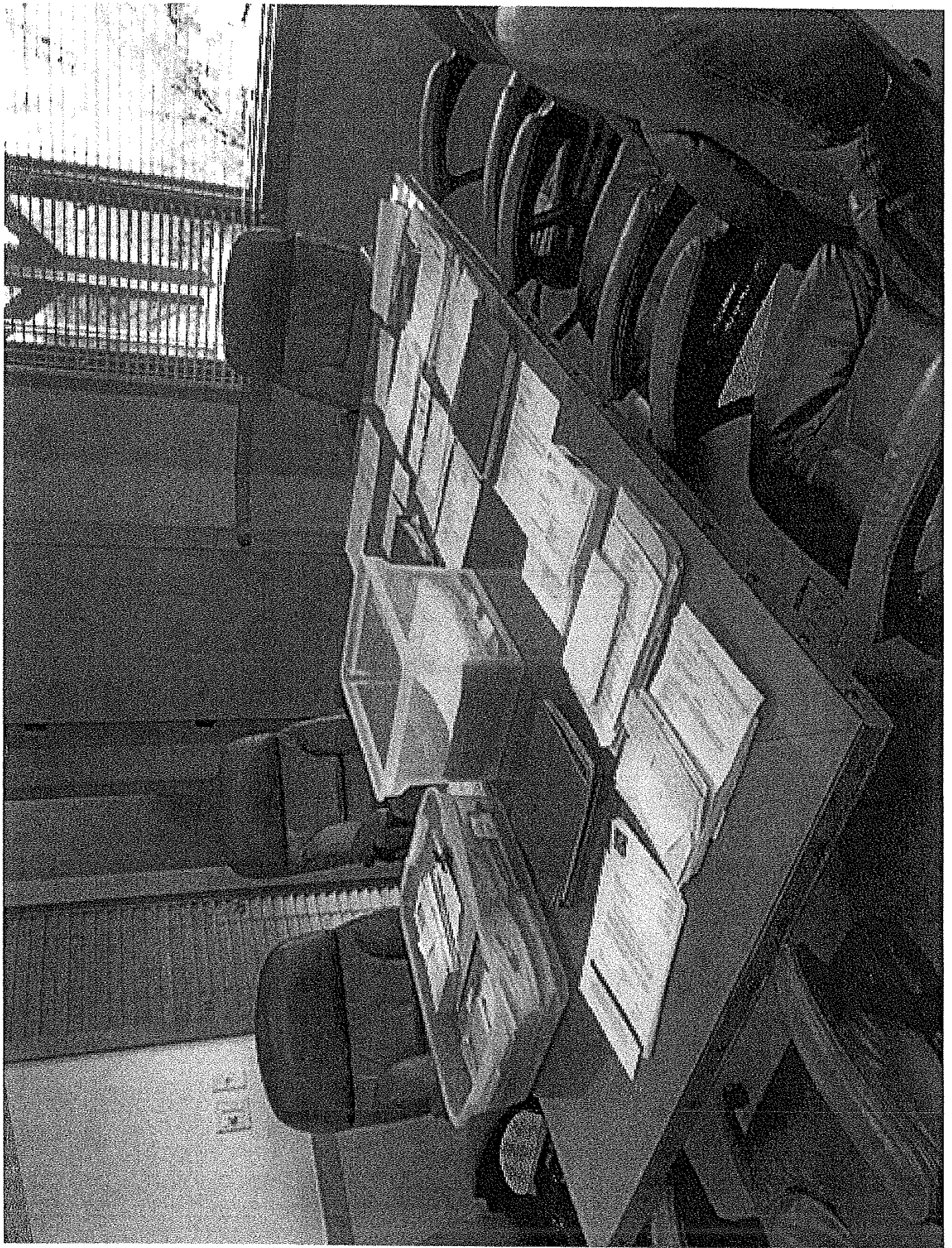
Notary Public
My Commission Expires: 1-31-22

AS TO OBJECTIONS:

CLAYBORNE, LOOS AND SABERS, LLP

Michael K. Sabers
Attorney for the Plaintiff
2834 Jackson Blvd., Ste 201
PO Box 9129
Rapid City, SD 57709
(605)721-1517





EXHIBIT**5****LAST WILL OF EMMA DEE SMITH**

I, Emma Dee Smith, also known as Dee Smith of Buffalo, Harding County, South Dakota, being of sound and disposing mind and memory, and of lawful age, and acting freely and without any influence other than my own will, do hereby make, declare, and publish the following as my last will and testament, hereby revoking any and all other wills or testamentary dispositions heretofore by me made as follows:

I.

I first direct that the personal representatives of my estate pay all of the expenses of my last sickness and death and all of my just debts and all expenses of administration of my estate as soon after my death as may be conveniently done, and that same be paid out of the residue of my estate.

I hereby provide that all federal estate taxes due as a result of my death, if any, and whether upon property passing under my will or otherwise, shall be paid by the beneficiaries or recipients of such property. Such tax, if any there be, shall be apportioned as provided by SDCL Chapter 29A-3-916; South Dakota state inheritance taxes, if any there be, assessed against the beneficiaries of my estate shall be in the amounts as determined by the South Dakota Department of Revenue, and such amounts shall be deducted from the distributions to such beneficiaries or shall be paid to my estate by such beneficiaries.

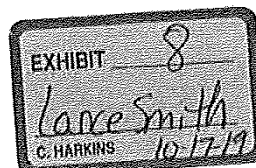
II.

I hereby declare that I have three children, namely Lance Alan Smith, Craig J. Smith, and Julie D. Hurst, and that my husband, Calvin Smith, preceded me in death.

III.

I intend that any property of any trust over which I had a power of withdrawal or power of revocation, any property in my name as trustee for the benefit of a named beneficiary, any property in my name and that of another as joint tenants, or any property which is otherwise payable to a co-owner, survivors, or named beneficiary, will pass to the survivor or beneficiary thereof, and I instruct my personal representatives to make no claim to such property.

Emma Dee Smith Will
Page 1 of 4



COPY

IV.

I hereby state that I have sold my ranch in Harding County, South Dakota to my daughter, Julie D. Hurst and her husband, Travis Hurst, under the terms of a Contract for Deed. I hereby provide that at my death any remaining unpaid payments due under said contract for principal and interest shall be forgiven, no further payments need be made, and said contract shall be considered fully and completely paid and performed, and I hereby devise all remaining right, title and interest under said contract and the property described therein to my daughter and her husband as specified in said contract.

V.

I next hereby give and devise all of my shares of stock and interest in Smith Angus Ranch Inc. to my sons, Lance Alan Smith and Craig J. Smith, in equal shares, share and share alike.

VI.

I next hereby give and devise to my children, Lance Alan Smith, Craig J. Smith, and Julie D. Hurst, in equal shares, an undivided one-third interest to each, all and any oil, gas and mineral rights which I own or have an interest.

In the event, and only in the event, I failed to reserve said oil, gas and mineral rights in the real property conveyed in the Contract for Deed referred to in Article IV with my daughter and her husband, as was my intent, I hereby direct my daughter and her husband to convey said oil, gas and mineral interests to my three children, an undivided one-third interest to each. I hereby make this conveyance by my daughter and her husband a condition of their receiving the interests devised in Article IV of this will.

VII.

I next give and devise all of the balance and residue of my estate, including all other personal and real property of whatever kind or description and regardless of where situated, as follows:

To my sons, Lance Alan Smith and Craig J. Smith, in equal shares, share and share alike, a one-half interest to each, to have and to hold the same unto themselves, their successors and assigns absolutely and forever.

VIII.

In the event any of my said children shall precede me in death, without leaving surviving issue, any share provided under any provision of this will for such child, shall instead be distributed equally to my other children, provided however, that if my deceased child shall leave surviving issue (issue to include legally adopted children), such issue shall take any share their parent would have received hereunder if alive, by right of representation, provided however that no distribution shall be made to my beloved granddaughter, Macy Hurst.

IX.

I do hereby nominate and appoint Lance Alan Smith and Craig J. Smith to serve as Co-personal representatives of this, my last will and testament, and I do hereby waive requirement of any bond of any kind for the performance of their duties. They shall have full authority to sell or dispose of any property of my estate, without necessity of first securing Order of Court for that purpose. In the event either is unable or unwilling to act, then and in that event only I do nominate and appoint the other to serve as sole personal representative instead also without bond and with the same powers. Any personal representative may purchase property of my estate in event of a sale thereof. Provided however, said Co-Personal Representatives shall not have authority to sell property devised to my daughter, Julie D. Hurst under Article IV hereof.

X.

If any devisee or beneficiary under this will shall contest it or any of its parts or provisions, any share or interest given to that person shall be revoked.

XI.

I am aware that my sons may not be happy with the provisions I have made in my will; however I ask them to honor my wishes and accept what I have done. I love all my children very much, and equally.

I, Emma Dee Smith, also known as Dee Smith, the testator, sign my name to this instrument this third day of April, 2015, and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my will and that I sign it willingly, that I execute it as my free and voluntary act for the purposes therein

expressed, and that I am eighteen years of age or older, of sound mind, and under no constraint or undue influence.

Emma Dee Smith

Testator

We, Deanna Juelfs and Nel Giannanatti, the witnesses, sign our names to this instrument, and being first duly sworn, do hereby declare to the undersigned authority that the testator signs and executes this instrument as her will and that she signs it willingly, that she executes it as her free and voluntary act for the purposes therein expressed, and that each of us, in the presence and hearing of the testator, hereby signs this will as witness to the testator's signing, and that to the best of our knowledge the testator is eighteen years of age or older, of sound mind, and under no constraint or undue influence.

Deanna Juelfs
Witness

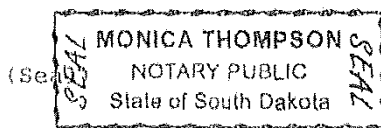
Nel Giannanatti
Witness

State of South Dakota:

:99

County of Harding :

Subscribed, sworn to and acknowledged before me by Emma Dee Smith, also known as Dee Smith, the testator, and subscribed and sworn to before me by Deanna Juelfs and Nel Giannanatti, witnesses, this 3 day of April, 2015.



Monica Thompson
Notary Public, South Dakota
My comm. exp. 4-18-2018

EXHIBIT**6****2013**

Enter Filing Year

Secretary of State Office
500 E Capitol Ave
Pierre, SD 57501
(605)773-4845

AMENDED ANNUAL REPORT**Corporation**

Please Type or Print Clearly in Ink

Make check payable to SECRETARY OF STATE

FILING FEE:

FILE DATE 10/4/2014

RECEIPT NO 236615

1. Corporate Name and Address:

DF031002
SMITH ANGUS RANCH, INC.
12814 MOREAU RIVER LOOP
BUFFALO, SD 57720-6504

2. The jurisdiction under whose law it is formed SOUTH DAKOTA

3. The address of the principal executive office (business address).

12814 MOREAU RIVER LOOP	BUFFALO	SD	57720-6504
Street Address	City	State	ZIP+4

Mailing Address	City	State	ZIP+4
-----------------	------	-------	-------

4. The name of the South Dakota Registered Agent

Agent Name: E DEE SMITH

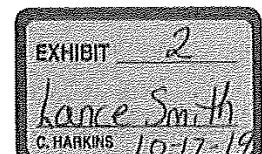
12814 MOREAU RIVER LOOP	BUFFALO	SD	57720-6504
Street Address or Rural Route Box Number in This State and	City	State	ZIP+4

Mailing Address in This State, if Different from Street Address	City	State	ZIP+4
---	------	-------	-------

5. The names and business addresses of its principal officers and directors. Please place a check mark next to the name if the principal officer serves as a director. South Dakota Law requires at least one director.

<input checked="" type="checkbox"/>	E DEE SMITH	12814 MOREAU RIVER LOOP	BUFFALO	SD	57720
	President	Street Address	City	State	ZIP+4
<input checked="" type="checkbox"/>	TRAVIS HURST	12820 MOREAU RIVER LOOP	BUFFALO	SD	57720
	Vice President	Street Address	City	State	ZIP+4
<input type="checkbox"/>					
	Secretary	Street Address	City	State	ZIP+4
<input type="checkbox"/>					
	Treasurer	Street Address	City	State	ZIP+4
<input type="checkbox"/>					
	Director	Street Address	City	State	ZIP+4
<input type="checkbox"/>					
	Director	Street Address	City	State	ZIP+4

6. List only the changes since the last report of the acreage and location by section, township and county of each lot or parcel of land in this state owned or leased by the corporation.



7. Please complete the appropriate section:

Family Farm Corporation	The NUMBER OF SHARES owned by person(s) who are members of a family as defined in SDCL 47-9A-2, one of such shareholders being a family member who is residing on the farm or actively operating the farm, or who has resided on or has actively operated the farm. (See SDCL 47-9A-14)	5000
Authorized Farm Corporation	The PERCENTAGE of gross receipts of the corporation derived from rent, royalties, dividends, interest and annuities.	

8. List changes only of names, address and number of membership interests owned by shareholders.

Name	Street Address	City	State	ZIP+4	Shares
------	----------------	------	-------	-------	--------

No person may execute this report knowing it is false in any material aspect. Any violation is subject to a civil penalty. By signing this form you agree to have both the fee and the form processed electronically.

Dated 10/04/2014

Signature Accepted Electronically

(Signature of an Authorized Person)

E DEE SMITH

(Printed Name)

10/4/2014 5:21:04 PM

EXHIBIT

7



Local.

Date 7/7/2015 Page 3

Primary Account 97260

Pioneer Bank & Trust
Miscellaneous Advice
Check # 0
Amount \$400.00
Date 7/1/2015

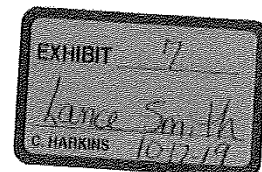
Check 0 Amount \$400.00 Date 7/1/2015

Pioneer Bank & Trust
Check # 1047
Amount \$100,000.00
Date 6/16/2015

Check 1047 Amount \$100,000.00 Date 6/16/2015

Pioneer Bank & Trust
Check # 1048
Amount \$100,000.00
Date 6/24/2015

Check 1048 Amount \$100,000.00 Date 6/24/2015



HURST 0035

1 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
)
 2 COUNTY OF HARDING) FOURTH JUDICIAL CIRCUIT

3 SMITH ANGUS RANCH Inc.) 31CIV18-000018
 4 (SAR),)

5) Deposition of:
 6)

7) TRAVIS HURST
 8)

9 vs.)
 10)

11 TRAVIS HURST, as an alleged)
 12 DIRECTOR OF SAR, and as an)
 13 individual,)

14)
 15) Defendant and)
 16) Third-Party)
 17) Plaintiff,)

18 v.)
 19)

20 CRAIG SMITH and LANCE SMITH,)
 21)

22) Third-Party)
 23) Defendants.)
 24)

25)
 DATE: October 18, 2019, at 8:55 a.m.

PLACE: Gunderson, Palmer, Nelson & Ashmore
 506 Sixth Street
 Rapid City, SD 57701

APPEARANCES:

FOR THE PLAINTIFF & MR. MICHAEL K. SABERS
 THIRD-PARTY DEFENDANTS: Clayborne, Loos & Sabers
 Attorneys at Law
 2834 Jackson Boulevard, Suite 201
 Rapid City, SD 57702

FOR THE DEFENDANT & MR. MATTHEW E. NAASZ
 THIRD-PARTY PLAINTIFF: Gunderson, Palmer, Nelson & Ashmore
 Attorneys at Law
 506 Sixth Street
 Rapid City, SD 57701

Also Present: Travis Hurst & Craig Smith

Carolyn M. Harkins, RPR (605)381-5427
 P.O. Box 1886, Rapid City, SD 57709

1 number 11815?

2 A Yeah.

3 Q That is a check dated July 29th, 2014, signed by you,

4 correct?

5 A Correct.

6 Q Made out to Bentz?

7 A Correct.

8 Q The amount of that check is \$1,974.96, correct?

9 A Correct.

10 Q What is that for?

11 A The Memo says lawnmower.

12 Q Do you remember making that purchase?

13 A Yeah.

14 Q For what purpose was that lawnmower being acquired?

15 A To mow lawns.

16 Q Okay. Do you believe that that was a purchase made

17 -- who owns that lawnmower when you bought it?

18 A There was no title made out. I guess I...

19 Q Where did it end up?

20 A Lance and Craig got it.

21 Q Okay. At the time that Dee passed, where was the

22 lawnmower?

23 A On the ranch.

24 Q Where?

25 A Around the houses somewhere.

Carolyn M. Harkins, RPR (605)381-5427
P.O. Box 1886, Rapid City, SD 57709

1 transportation costs, did that include those types of
2 kinds of things or not?

3 A We never really discussed that.

4 Q Okay. Okay. Going back to the page that starts with
5 the check in the top right-hand corner 11848.

6 February of 2015, there is a check in the amount of
7 \$7,021 made out to Woody's Feed & Grain. Do you see
8 that?

9 A Yes.

10 Q Woody's Feed & Grain, where is that?

11 A Dickinson, North Dakota.

12 Q Okay. And when it references feed, what type of feed
13 are you acquiring?

14 A Cake.

15 Q So it's February so it's winter, correct?

16 A Correct.

17 Q So would you have your herd and Smith Angus Ranch,
18 Inc., herd in that winter pasture that we were
19 talking about?

20 A Yes.

21 Q And at that point my expectation is that you're
22 feeding as well?

23 A Yes.

24 Q Okay. If we reviewed your personal account in the
25 January, February, March time period, do you believe

Carolyn M. Harkins, RPR (605)381-5427
P.O. Box 1886, Rapid City, SD 57709

1 we would find a corresponding check made out to
2 Woody's Feed & Grain for cake for your personal
3 cattle?

4 A I don't know that one would correspond exactly with
5 this date, but we did buy some cake, yes.

6 Q Okay. Any idea when or what amount or --

7 A No.

8 Q Moving down just one line to 11849, that check made
9 out in February of 2015?

10 A Yep.

11 Q That's Tri-County Lockers?

12 A Correct.

13 Q All right. And this is beef processing, a check
14 signed by you in the amount of \$860?

15 A Correct.

16 Q Written on the Smith Angus Ranch, Inc., account,
17 fair?

18 A Yep.

19 Q Did the beef end up in your freezer?

20 A Some of it, I'm sure.

21 Q Turning to the next page, sir, looking at the top
22 right corner, check number 11850.

23 A Yep.

24 Q If I look at that check, it's made out to the Bowman
25 Vet Clinic, fair?

Carolyn M. Harkins, RPR (605)381-5427
P.O. Box 1886, Rapid City, SD 57709

1 A Yes.

2 Q And this is for vaccine?

3 A Yes.

4 Q Do you have somebody vaccinate or do you vaccinate
5 yourself?

6 A I believe at this time we were vaccinating ourselves.

7 Q Okay. If we look at your personal checking account,
8 the one that has you and Julie on it, would I find
9 checks made out to the Bowman Vet Clinic for vaccine?

10 A Possibly.

11 Q Is it fair to say that Smith Angus Ranch, Inc., would
12 have covered the lion's share of the costs associated
13 with your livestock in regards to vaccine, feed,
14 cake?

15 A Yeah, I suppose you can say that.

16 Q Would it be fair to say that the only way you could
17 truly tell who was covering those expenses in total
18 would be to do a comparison between the Smith Angus
19 Ranch, Inc., account, the joint owner account we've
20 discussed, and your personal account?

21 A Can you repeat the question?

22 Q Would it be fair to say that the best way to tell who
23 would have covered the cake, vet, vaccine expenses
24 for livestock in '13, '14 and '15, the best way to
25 determine who had paid for it would be to do a

Carolyn M. Harkins, RPR (605) 381-5427
P.O. Box 1886, Rapid City, SD 57709

- 1 A Correct.
- 2 Q This would have been after you and your wife would
3 have signed the contract for deed to acquire the
4 6,000 acres, correct?
- 5 A Correct.
- 6 Q Let's look at check 12261. That is a check made out
7 to Buffalo Hardware?
- 8 A Correct.
- 9 Q And that is for steel posts?
- 10 A Yep.
- 11 Q Would you agree with me that at the time that those
12 posts were bought, Smith Angus Ranch, Inc., did not
13 own land?
- 14 A Correct.
- 15 Q In fact, if the contract for deed is enforceable, Dee
16 doesn't own land at this point either, does she?
- 17 A No.
- 18 Q And so these are still posts being bought on the
19 Smith Angus Ranch, Inc., account for land you and
20 your wife own?
- 21 A I'm not sure exactly where the posts went, but
22 probably.
- 23 Q Are you aware of any other land that you would have
24 been putting steel posts on other than your own?
- 25 A No.

Carolyn M. Harkins, RPR (605) 381-5427
P.O. Box 1886, Rapid City, SD 57709

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTY OF PENNINGTON	)	SEVENTH JUDICIAL CIRCUIT
)	
SMITH ANGUS RANCH Inc. (SAR),	)	--CIV - 000
)	
Plaintiff,	)	COMPLAINT AND DEMAND
vs.	)	FOR JURY TRIAL
)	
TRAVIS HURST, as an alleged)	
DIRECTOR OF SAR, and as an individual,)	
)	
Defendant.)	

Comes now the Plaintiff, and for its Complaint and Demand for Jury Trial, hereby states and alleges as follows:

1. That Smith Angus Ranch, Inc. (SAR) was, and for purposes of wrapping up business and collecting assets is, an incorporated entity in the State of South Dakota.
2. That during her lifetime Emma Dee Smith was the sole shareholder of SAR and was so at the time of her passing on October 24, 2015.
3. That Lance A. Smith (Lance) and Craig J. Smith (Craig) were appointed co-personal representatives of the Estate of Emma Dee Smith (Estate) in her will.
4. That Lance and Craig were also bequeathed any and all interest Emma Dee Smith had in SAR at the time of her death. That Lance and Craig are Directors of SAR and responsible for its wrapping up, as Directors of SAR.
5. That Travis Hurst (Defendant) was alleged and purports to have been a Director of SAR prior to the death of Emma Dee Smith.
6. That in the role in which Travis Hurst purports to have served he owed SAR a fiduciary duty to act only in its best interests, to avoid self-dealing, and to act consistent with the governing documents of SAR.

COUNT I: BREACH OF FIDUCIARY DUTY

7. That as a purported director of SAR Defendant had a fiduciary duty to the entity. This duty is the highest legal duty known to the law. This duty requires Defendant to have placed the interest of SAR ahead of all other interests to include his own and to have acted with utmost good faith to have avoided any type or kind of self-dealing.
8. That in his dealings with SAR, Defendant failed to meet and did breach the fiduciary duty owed SAR.
9. Defendant's breach of fiduciary duty included failure to disclose information, failure to follow corporate formality, self-dealing as further defined below, fraudulent misrepresentations regarding past or future events, and general surreptitious conduct and communications.
10. That as a direct and proximate result of the breach of the Defendant Plaintiff suffered damages in amount to be determined at trial and by a jury.
11. That based upon Defendant's conduct, Plaintiff also seeks punitive damages under South Dakota law.

COUNT II: SELF DEALING

12. That Defendant, as a purported director of SAR, had a duty to not engage in self dealings placing his own interests, or interests other than SAR interests, ahead of the interest of SAR.
13. The Defendant, as a purported director of SAR, had a duty not to act in any manner in which would place his own personal interest in conflict with the obligations or rights of the entity SAR.

14. That Defendant engaged in a practice of self-dealing which was violative of South Dakota Law, violative of the governing documents of SAR, and generally violated his duties and obligations both as a purported director and an individual under South Dakota law.
15. That as a direct and proximate result of the breaches of the Defendant, the Plaintiff suffered damages in an amount to be determined at trial and by a jury.
16. That based upon Defendant's conduct, Plaintiff also seeks punitive damages under South Dakota law.

COUNT III: USURPATION OF CORPORATE OPPORTUNITY

17. That as a purported director of SAR, Defendant had an obligation to provide full and frank disclosure of all rights and opportunities of SAR to SAR. This included any business opportunity, or opportunity to profit, from the business dealings of SAR.
18. That Defendant engaged in a practice, as set forth above, that constituted a breach of fiduciary duty as well as self-dealing. Defendant further acquired, in opposition to SAR, an interest or property which SAR had an interest or tangible expectancy.
19. Defendant had an obligation and duty to not usurp or otherwise utilize the assets or business interests of SAR for his own personal gain.
20. That Defendant breached his duty and obligations, and utilized the assets and business interests of SAR to effectuate his own personal and financial gain.
21. That as a direct and proximate result of the breaches of the Defendant, the Plaintiff suffered damages in an amount to be determined at trial and by a jury.
22. That based upon Defendant's conduct, Plaintiff also seeks punitive damages under South Dakota law.

COUNT IV: FRAUD

23. That as an individual, and purported director of SAR, Defendant had a duty to not commit fraud towards SAR.
24. That leading up to and after the death of Emma Dee Smith, Defendant knew that the sole shareholders of SAR were or would be Lance and Craig and that the entity could not act under the By-Laws without specific authorization.
25. That prior to and after the death of Emma Dee Smith, Defendant, as both a purported director and as an individual, did sell assets of SAR (livestock), did transfer assets of SAR (wire transfer), did either allegedly purchase assets not for the benefit of SAR (vehicles), and did otherwise converts assets of SAR (Hay). Defendant did so knowing that Dee Smith would either never be in a position to challenge such actions or, as Defendant knew, would pass away and that he would allege some alleged authorization to commit fraud or self-deal.
26. That such conduct occurred through either fraud, fraudulent representations, fraudulent omissions as Defendant as a purported director had a duty to speak, or just plain through egregious fraudulent conduct generally.
27. That Defendant's fraudulent conduct was the direct and proximate cause of damages suffered by SAR.
28. That Defendant's fraudulent conduct, as set forth above with specificity, and which will be further defined throughout discovery, constitutes willful, wanton, and malicious and egregious conduct which supports a claim of punitive damages that must be submitted to a jury for determination of amount.

COUNT VI: CONVERSION

29. That Defendant, as a purported Director and individual, had certain duties and obligations to SAR.
30. That SAR owned or had a possessory interest in property and other assets to include, but not be limited to accounts, livestock, and general commodities (collectively “SAR property.”).
31. That SAR’s interest in SAR property was greater than that of Defendant.
32. That Defendant exercised dominion and control, and seriously interfered, with SAR’s interest in SAR property.
33. That Defendant’s conduct deprived Plaintiff of its interests or rights in property.
34. That as a direct and proximate result of the acts of conversion of the Defendant, the Plaintiff suffered damages in an amount to be determined at trial and by a jury.
35. That based upon Defendant’s conduct, Plaintiff also seeks punitive damages under South Dakota law.

WHEREFORE, Plaintiff respectfully requests the following relief:

1. That a jury be empaneled to hear all claims of Plaintiff against Defendant;
2. An award of all damages caused by the conduct, and breaches of duties, owed by Defendant to Plaintiff, as well as on the Count of conversion;
3. An award of punitive or exemplary damages in favor of Plaintiff and against Defendant for conduct which was wanton, willful, and malicious, or which otherwise supports the Plaintiff’s claim of punitive or exemplary damages.
4. For statutory prejudgment interest on all damages to which prejudgment interest applies under South Dakota law;

5. For any and all other relief, or claims, under South Dakota law, supported by the evidence or which may be pled prior to trial based upon evidence and facts identified in discovery.

PLAINTIFF HEREBY DEMANDS A JURY ON ALL ISSUES SO TRIABLE

UNDER SOUTH DAKOTA LAW

Respectfully submitted this 4th day of September, 2018.

CLAYBORNE, LOOS AND SABERS, LLP



Michael K. Sabers
Attorney for Plaintiff
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Rapid City, SD 57709
(605) 721-1517

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HARDING)

IN CIRCUIT COURT

FOURTH JUDICIAL DISTRICT

SMITH ANGUS RANCH Inc. (SAR))
)
 Plaintiff,)
)
v.)
)
TRAVIS HURST, as an alleged)
DIRECTOR OF SAR, and as an individual,)
)
 Defendant.)

31CIV18-000018

ANSWER
AND COUNTERCLAIM

Comes now Defendant Travis Hurst, by and through his counsel of record, David E. Lust of Gunderson, Palmer, Nelson & Ashmore, LLP, and files this Answer and Counterclaim alleging as follows. All averments in the Complaint are denied except those admitted or otherwise qualified below. The paragraph numbers in this Answer correspond to the paragraph numbers in the Complaint.

GENERAL ALLEGATIONS

1. Defendant admits that Smith Angus Ranch, Inc. (SAR) was a South Dakota corporation. However, for purposes of clarification, SAR was dissolved through the South Dakota Secretary of State on September 26, 2016, but retains the ability to wrap up its business including the collection of assets.
2. Admit.
3. Admit.
4. Defendant admits that Lance and Craig were bequeathed any and all interest Emma Smith had in SAR at the time of her death. Defendant is without sufficient knowledge to either admit or deny the status of Lance and Craig as directors of SAR.
5. Admit.
6. Plaintiff 's interpretation of the law, no response required.

COUNT I: BREACH OF FIDUCIARY DUTY

7. Defendant admits as a general proposition directors owe a fiduciary duty to corporations. The balance of ¶ 7 calls for a legal opinion, and includes a general statement of the law which does not require a response.

8. Deny.

9. Deny.

10. Deny.

11. Deny.

COUNT II: SELF DEALING

12. Paragraph 12 constitutes Plaintiff's interpretation of the law and requires no response.

13. Paragraph 13 constitutes Plaintiff's interpretation of the law and requires no response.

14. Deny.

15. Deny.

16. Deny.

COUNT III: USURPATION OF CORPORATE OPPORTUNITY

17. Plaintiff's interpretation of the law, no response required.

18. Deny.

19. Plaintiff's interpretation of the law, no response required.

20. Deny.

21. Deny.

22. Deny.

COUNT IV: FRAUD

23. General statement of the law, no response required.

24. Deny.

25. Deny.

26. Deny.

27. Deny.

28. Deny.

COUNT V: CONVERSION

29. Admit.

30. Admit.

31. Paragraph 31 is a confusing statement, is difficult to interpret, and is not clear enough for Defendant to formulate a response.

32. Deny.

33. Deny.

34. Deny.

35. Deny.

AFFIRMATIVE DEFENSES

1. Plaintiff's Complaint should be dismissed for failure to state a claim upon which relief can be granted.

2. As a separate and affirmative defense, Defendant alleges that Plaintiff's causes of action are barred by the doctrine of waiver, and laches and estoppel, which affirmatively preclude Plaintiff from the relief requested.

3. Defendant further alleges any and all affirmative defenses available to it which currently exist but will not be evident until completion of the discovery process.

COUNTER-CLAIMS

Comes now Defendant Travis Hurst, and for his Counterclaim against Plaintiff alleges as follows:

1. Plaintiff Smith Angus Ranch, Inc. (SAR) was a South Dakota corporation during the time period in question, with its main office in Buffalo, Harding County, South Dakota.

2. Defendant Travis Hurst was and is a resident of Harding County, South Dakota.

3. Prior to her death on October 24, 2015, Emma Dee Smith owned 100% of the stock in SAR, and was the sole director and officer of SAR with the exception that Travis Hurst became a director in 2013 and 2014. Hurst also acted as vice president of SAR in 2013.

4. Following Ms. Smith's death, Craig Smith and Lance Smith acquired her stock in SAR and became directors of the corporation until its dissolution in September of 2016.

5. SAR has filed an action against Hurst alleging it suffered damages as a result of actions taken by Hurst in his capacity as a director of SAR.

COUNT ONE CLAIM FOR INDEMNIFICATION

6. Defendant Hurst restates and re-alleges paragraphs 1-5 above.

7. As a direct and proximate result of the allegations and claims asserted by Plaintiff, Defendant will incur damages, including attorney fees and costs in defense of said allegations.

8. Pursuant to SDCL 47-1A-852, if Defendant Hurst successfully defends against the claims and allegations asserted by Plaintiff he is entitled to indemnification by SAR for all reasonable expenses incurred in the defense, including but not limited to attorney fees and costs.

DEFENDANT DEMANDS TRIAL BY JURY

WHEREFORE, Defendant and Counterclaimant prays for judgment as follows:

1. That Plaintiff's Complaint be dismissed on the merits, with prejudice;
2. That Plaintiff be ordered to indemnify Defendant as set forth in the Counterclaims;
3. That Defendant recover its costs, disbursements, and attorney's fees where permissible under South Dakota law; and

4. For such other and further relief as the Court deems just and equitable in the premises.

Dated this 4th day of October, 2018.

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

By: /s/ David E. Lust
David E. Lust
Attorneys for Defendant
506 Sixth Street/P.O. Box 8045
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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of October, 2018, the foregoing Answer and Counterclaim was electronically filed and served via Odyssey File & Serve electronic filing system upon the following individual at his last know email address, namely:

Michael K. Sabers
Clayborne, Loos and Sabers, LLP
2834 Jackson Blvd., Suite 201
P.O. Box 9129
Rapid City, SD 5770909129
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/s/ David E. Lust
David E. Lust

STATE OF SOUTH DAKOTA)
)
 COUNTY OF HARDING)

IN CIRCUIT COURT
 FOURTH JUDICIAL CIRCUIT

SMITH ANGUS RANCH, INC.(SAR)

Plaintiff,

vs.

TRAVIS HURST, as an alleged
 DIRECTOR OF SAR, and as an
 individual,

Defendant and
 Third-Party Plaintiff,

vs.

CRAIG SMITH and LANCE SMITH,

Third-Party Defendants.

Motion Hearing

CIV File No. 18-18

BEFORE: THE HONORABLE GORDON D. SWANSON
 Circuit Court Judge
 Sturgis, South Dakota
 August 6, 2020, at 9:00 a.m.

APPEARANCES:

For the Plaintiff
 and Third-Party
 Defendants:

MR. MICHAEL K. SABERS
 Attorney at Law
 2834 Jackson Blvd., Suite 201
 Rapid City, SD 57709

For the Defendant
 and Third-Party
 Plaintiff:

MR. MATTHEW E. NAASZ
 Attorney at Law
 506 Sixth Street
 Rapid City, SD 57709

1 (WHEREUPON, the following proceedings were duly
2 had:)

3 **THE COURT:** All right. This is the time scheduled for
4 hearing in Harding County Case Number 31 CIV 18-18
5 involving Smith Angus Ranch versus Travis Hurst, and a
6 third party claim has been filed against Craig Smith and
7 Lance Smith. Mr. Naasz appears on behalf of Travis Hurst.

8 **MR. NAASZ:** Yes, Your Honor.

9 **THE COURT:** And Mr. Sabers on behalf of Smith Angus Ranch,
10 Incorporation.

11 **MR. SABERS:** Thank you, Your Honor.

12 **THE COURT:** A motion for partial summary judgment has been
13 filed. I have reviewed it; the response and the reply as
14 well as at least some of the case law that was brought up
15 in connection with that motion. So, Mr. Sabers, it's your
16 motion. Go ahead.

17 **MR. SABERS:** Thank you, Your Honor. And it doesn't
18 surprise me that the Court has already been through this,
19 so I will try to just summarize the larger points. The
20 first point is this is an action brought on behalf of Smith
21 Angus Ranch, which is a corporation against a director.
22 And, you know, you always ask, we're here on summary
23 judgment, so what's the standard or what should the Court
24 be looking at to determine what is being asked to do here
25 today? And so the reason why we think this is

1 appropriately before the Court -- and, again, this is in
2 our brief, but it says -- and the South Dakota Supreme
3 Court has said, what is kind of an infamous case of
4 *Landstrom v. Shaver*. It says, the existence of a fiduciary
5 duty and the scope of that duty are questions of law for
6 the trial Court. And in addition to questions of the law
7 being de novo reviewed, questions of law are to be decided
8 before trial so that a jury can be instructed, because you
9 have to instruct the jury on what the law is.

10 And so Smith Angus ranch has sought out a
11 determination as to the law on what we believe to be an
12 undisputed set of certain facts. So what are the cases --
13 or what are the principles that we are asking the Court to
14 address? Not just the fiduciary duty, but the fiduciary
15 duty scope. Well, it's primarily found in, first,
16 *Landstrom*, but second, the *Stoebner case*.

17 Now, the *Stoebner case* -- and we have kind of a
18 fundamental disagreement about this. Is the *Stoebner case*
19 a case about fiduciary duties, or is it a case about powers
20 of attorney? And our position is that that case is about
21 fiduciary duties. If you read that case -- and the quote
22 that I would draw the attention of the Court to is, it
23 says, "because fiduciaries must strictly avoid any acts of
24 self-dealing." The authority to self-deal must exist in
25 writing.

1 And it's my understanding that Mr. Hurst's position is
2 the fiduciary duty self-dealing rule either doesn't apply
3 to directors, or somehow the good faith that a director
4 must show to the corporation somehow is an exception to the
5 bright line rule.

6 Now, I think it's interesting in *Stoebner*, sometimes
7 it's interesting to look at the makeup of the Court. The
8 makeup of the Court -- the *Stoebner* case was written by
9 Chief Justice Gilbertson. It was written recently and
10 written by the same Supreme Court that is now sitting in
11 Pierre. And, as the Court knows, bright line rules aren't
12 terribly common in the law. If you actually search, like,
13 all other areas of the law for just bright line rules and
14 that phraseology, you're not gonna find them.

15 And so I think the fundamental decision that is before
16 this Court, and we believe is the scope of the fiduciary
17 duty, is does the bright line rule identified in *Stoebner*
18 apply to a fiduciary who acts as a director of a
19 corporation? And the reason why I think it's properly
20 before the Court is because if you look in Mr. Hurst's
21 brief, he does not dispute the fact that he was a
22 director -- that he was a director of a corporation. On
23 page 9 of his brief, it states, "Travis Hurst does not
24 dispute the fact that there is no writing authorizing his
25 transactions with Smith Angus Ranch." And so it's

1 undisputed because they actually say it in their answer to
2 Interrogatory Number 25. Mr. Hurst says the authorizations
3 were all verbal. Well, verbal is another word for oral.
4 And the bright line rule adopted in *Stoebner* is, quote, "We
5 have adopted a bright line rule that no oral extrinsic
6 evidence may be introduced to raise a factual issue as to
7 self-dealing." And so it takes this big case and it
8 focuses almost with, like, a laser focus on that one legal
9 issue which pertains to the scope of a fiduciary duty of a
10 director.

11 Now, I think by example, I think if the Court -- so
12 the Court either needs to decide, in our opinion, the
13 bright line rule applies or it doesn't. And with all due
14 respect to Mr. Hurst, we would respectfully submit that if
15 he wants to create an exception to a unanimous bright line
16 rule that the Supreme Court has announced as to fiduciaries
17 that maybe he should be the one to take that up to the
18 Supreme Court and argue for an exception. Because what we
19 also know is other fiduciaries have been held to this
20 bright line rule.

21 The South Dakota Supreme Court addressed the power
22 attorney authorizing the attorney-in-fact to make gifts to
23 any person. That is the *Studt* case -- S-T-U-D-T -- 2015
24 S.D. 33. See there's no writing authorizing here. In
25 *Studt*, there actually was a writing, and the writing was

1 pretty broad. It said "any person." But our South Dakota
2 Supreme Court said, oral extrinsic evidence is inadmissible
3 to raise a factual issue to prove the principles. And I
4 think it's important they say principle. They're not
5 saying power of attorney. A fiduciary is a principle. A
6 factual issue to prove the principle's intent. An
7 affidavit is merely oral evidence reduced to writing. And
8 they grant summary judgment in *Studt*. They say, listen,
9 when we're dealing with fiduciary duties we're not gonna
10 give you the a benefit of the doubt.

11 You then move into the *Bienash v. Moller* case. This
12 was a 2006 South Dakota Supreme Court decision. And this
13 case dealt with, again, the Court granting summary
14 judgment. It said the Court held as a matter of law that
15 the couple reached their fiduciary duty committed fraud
16 when they changed a POD -- or payment on death designation
17 -- to benefit themselves. That's another case where they
18 talk about a bright line rule.

19 So it's our position -- and one more example that may
20 be -- if I'm an attorney and I'm representing an elderly
21 person who passes away, I'm a fiduciary duty. I'm the
22 principle. And I've got \$5,000 left in my trust account
23 for pending matters that I was representing this elderly
24 woman on, and she passes away, and I go buy a pickup truck
25 for myself. I can only imagine trying to stand before our

1 South Dakota Supreme Court and say, she wanted me to.
2 Her -- I don't have anything in writing, but she told me,
3 or it was her oral intention, and I've signed an affidavit
4 saying she said -- her oral intention was to let me buy a
5 pickup truck. I can only imagine the response, especially
6 in light of the cases that they've already decided on the
7 issue of self-dealing.

8 **THE COURT:** Does it matter -- to your hypothetical -- if
9 the elderly client is your mom and she has given you all
10 kinds of other stuff throughout the years?

11 **MR. SABERS:** I believe it does not. And the reason it does
12 not is because it would almost -- because a fiduciary duty
13 is just different. It's the highest duty known to law.
14 Because my response to that would be how hard would it have
15 been for my mom to have put in writing, it's okay for
16 Michael to use the money I have in his trust account to buy
17 a truck? It's a sentence, and she signs it, and then it's
18 a written authorization. Because what these cases evolve
19 into and what this case will absolutely evolve into if the
20 bright line rule doesn't apply is the self-serving single
21 affidavit of the director accused of self-dealing talking
22 about how many times Lance and Craig might have visited
23 their mother at the ranch. What if it was three times?
24 What if it was five times? Why does that matter?

25 Because the Supreme Court said the important part is

1 if you look at the brief of Mr. Hurst on page 6, at the
2 bottom it says, a fact question to be determined by the
3 jury armed with all the evidence of the circumstances
4 surrounding transactions, including all evidence of Dee
5 Smith's intentions. Well, when you start to talk about
6 intentions, I think you need to go back to what the Supreme
7 Court has already said about, quote, intentions.

8 In *Stoebner* -- in the same quote that I quoted the
9 first part to the Court -- the Court said, "No written
10 evidence has been introduced that clearly articulates that
11 Stoebner authorized this act of self-dealing." And then
12 they go a lot farther. Regardless of Huether's intentions,
13 and even if Stoebner approved of the transaction, there is
14 no admissible written evidence to support Heuther's ability
15 to self-deal. And so you compare their brief where they
16 said you have to look at a dead woman's alleged intentions
17 from six years ago to excuse my self-dealing. I think it's
18 just powerful the Court went as far as saying regardless of
19 Heuther's intention. And even if she agreed, doesn't
20 matter. You've got to get it in writing.

21 And they talk about -- and this is in our brief too --
22 they talk about the purpose of it. So did you protect the
23 principle, or do you protect the person the principle is
24 bound to protect? And I think that's why they have gone as
25 far as they did to create a bright line rule, and to say

1 that an affidavit is merely oral evidence reduced to
2 writing. And it's inadmissible to create an issue of fact.
3 And so this all comes back to the -- and, again, the
4 focused question that we're asking the Court to decide as a
5 matter of law: Does the bright line rule apply to a
6 fiduciary that is a director of a corporation?

7 **THE COURT:** And by bright line rule, you mean something
8 giving him explicit and direct authority to do the precise
9 acts that he's doing?

10 **MR. SABERS:** Something in writing that -- I think the
11 terminology is for the explicit written authorization to
12 self-deal. Because what we know -- and the other reason I
13 why I think summary judgment is important, not as to the
14 amount of self-dealing -- I think we made that clear in the
15 brief -- but as to the fact that self-dealing occurred.
16 And just a couple undisputed examples they've admitted.

17 Mr. Hurst, when you bought yourself a pickup, did that
18 benefit the corporation? Did that benefit anybody but you?
19 No, it did not. And so since you can't sign an affidavit
20 that now changes that, since that's the sworn testimony, my
21 first question for Mr. Hurst, if I call him on
22 cross-examination or adversely at trial, is: Mr. Hurst, do
23 you have anything in writing to justify it? They've
24 admitted in their brief there will never be anything in
25 writing.

1 My second question will be: Mr. Hurst, when you
2 bought yourself that pickup with corporate funds, did that
3 benefit anyone but yourself? His answer will be the same
4 as it was in the deposition, no. And so then the question
5 will once again be before the Court: Do I apply the bright
6 line rule announced in *Stoebner* as to a director of a
7 corporation or don't I? And I think that's why I think
8 this is a unique and interesting case and that's why the
9 motion was brought. We obviously don't agree. And it's
10 been quite an issue as to whether that bright line rule
11 gets applied. And so I'm almost done talking.

12 **THE COURT:** No, that's fine.

13 **MR. SABERS:** And these are actually the interesting cases
14 you get because you get --

15 **THE COURT:** Agreed.

16 **MR. SABERS:** -- you get to look at these issues. As I'm
17 reading the reply brief and reading their brief again last
18 night getting ready, I think the big picture that just kind
19 of struck me is they want to use -- they say, this isn't
20 about self-dealing, this is about a director's good faith.
21 Well, good faith applies to an attorney who's acting as a
22 fiduciary. It applies to a trustee who's acting as a
23 fiduciary, and it applies to a power of attorney that's
24 acting as a fiduciary. That standard is not unique to a
25 director. But they're trying to use it as a sword saying,

1 no, wait a minute. The self-dealing bright line rule
2 doesn't apply to us because everything has to just be
3 viewed and we were exercising good faith. And so I think
4 it's also important to look at a director, you know,
5 they've got this -- it's a business. It's sometimes called
6 the business judgment rule.

7 And so I looked, and the case that I'm looking at is
8 it's called *Antioch Litigation Trust*; A-N-T-I-O-C-H. By
9 the way, the other thing I'll admit that I think really
10 puts the question before the Court on a legal issue is I
11 think the Court has said the self-dealing applies to all
12 fiduciaries. We're not gonna create exceptions because
13 they haven't so far. And if the Court created an
14 exception, I think it would be the first time an exception
15 has been made. So I will agree there isn't a case where
16 the director -- and since the bright line rule has been
17 enacted, I don't think there's a case where they let a
18 director out of -- nope, we're not going to apply the
19 bright line rule to a director who's a fiduciary. And so I
20 think it is kind of an issue of first impression for this
21 Court to look at.

22 But the *Antioch* case, which is 738 F.Supp.2d 758, and
23 the quote is from page 774. It kind of summarized kind of
24 what we're arguing about here. It said, quote, "Since the
25 business judgment rule was intended for directors who act

1 reasonably, and not for the purpose of protection against
2 self-dealing, the rule does not apply to the conflicted
3 directors with respect to the transaction."

4 And then in *Smith v. Wilbur*, which is a bankruptcy
5 case, another Court said, quote, "The business judgment
6 rule does not operate to protect self-dealing by directors
7 and officers or insulate from liability." There's a
8 Delaware case -- 823 F.Supp 448 and page 454. It says,
9 quote, "The business judgment rule presumes that in making
10 a business decision, actions have been on an informed basis
11 and in good faith." The rule was intended for those who
12 act reasonably, and it's not a protection against
13 self-dealing.

14 Another case *In Re National Century Financial*
15 *Enterprises*, 504 F.Supp.2d 287 at page 13. The business
16 judgment rule does not protect directors who engage in
17 self-dealing. Why does that make sense? That's not any
18 different than what South Dakota law has said. Fiduciaries
19 are held to a higher standard than everyone else. And the
20 good faith standard that they're saying, well, Mr. Hurst,
21 the rule isn't strict liability, it's good faith. Well,
22 that's not really saying anything different than I want to
23 use good faith as a shield to protect myself against the
24 bright line rule against self-dealing.

25 And so I think it's an issue. I think it's an issue

1 of law for the Court. I think it's a pretty narrow issue.
2 We're gonna have to decide it sooner or later, because
3 we're gonna have to instruct the jury sooner or later.

4 We are seeking the Court's guidance now because I
5 think it will also change discovery dramatically that's
6 still gonna happen before trial. And so we've put the
7 issue before the Court. So that's where we are on it. And
8 I appreciate you letting me kind of keep going. So thank
9 you, Your Honor.

10 **THE COURT:** I'm not putting my hand to my chin to look
11 impatient, but scholarly. So please don't feel rushed. I
12 have a few questions.

13 **MR. SABERS:** Yes.

14 **THE COURT:** Isn't there at least, arguably, some extrinsic
15 evidence written of Dee's intent to share her largess with
16 Travis and Julie? Number one, she personally transfers the
17 pickups to that SAR property to Travis and Julie. Number
18 two, she transfers -- on her own -- the land to Travis and
19 Julie for what we'll call a bargained rate. Turned out to
20 be even better bargain than one would have anticipated.
21 But she does those two things individually. Aren't those
22 two acts, at least arguably, extrinsic written evidence of
23 her intent to allow him to self-deal from SAR?

24 **MR. SABERS:** I would say two things. Number one, the
25 transfers of the two pickups that we are talking about and

1 relying upon in our brief are not those same pickups.

2 **THE COURT:** No, I know. I'm talking about the SAR. I'm
3 not talking about Travis buying pickups. I'm talking about
4 Dee going to the -- and I understand you objected as
5 irrelevant to their statement about Dee transferring those
6 two titles from SAR to -- or whatever pickup titles. I
7 don't know how many there were. So I'm not talking about
8 the transfers to Travis, I'm talking Dee's personal action
9 of moving those SAR pickups to the Hursts and then moving
10 her land to the Hursts knowing full well that she could
11 have given it to SAR at the time.

12 **MR. SABERS:** As to the pickups, if it was the -- Dee was
13 shareholder. She owned the corporation. If it was Dee,
14 the shareholder, and she did it, there could be a question.
15 But as to the two transactions where we're asking for the
16 application of the bright line rule -- in other words, as
17 to those two transactions, there is no question that that
18 was self-dealing and there's no extrinsic evidence. I
19 don't believe that that -- even if you look at -- like, one
20 of those cases is a power of attorney case, and it says any
21 person and it gives wide ranging discretion of power of
22 attorney. And the Court says no, no, it has to say --
23 literally -- has to say you can self-deal.

24 **THE COURT:** Your bright line rule.

25 **MR. SABERS:** Yeah.

1 **THE COURT:** And it has to say you can self-deal in this
2 instance.

3 **MR. SABERS:** Yeah.

4 **THE COURT:** My letting you self-deal with A, B, and C has
5 nothing to do with your authority to self-deal with Dee.

6 **MR. SABERS:** Correct.

7 **THE COURT:** That's what you're saying?

8 **MR. SABERS:** I think that's what the Court said. Because
9 they -- I mean, they admitted that they have cranked up the
10 standard, and I think they've done it, because they say
11 number one, the nature of the relationship. We have a
12 principle and it's the highest duty. And they also they
13 say -- and because the opportunities are there, because
14 it's a relationship of trust, the opportunities are there
15 for somebody to self-deal. So if you're gonna do it, you
16 should go to your principle and say, hey, will you write
17 something out that says yes, you can use corporate funds to
18 go buy yourself a pickup? That's not a difficult thing.
19 And that's kind of what the Court talks about.

20 It's not hard to put this in writing, but if you
21 don't, we're gonna hold you to it. And I know you're gonna
22 complain and I know you're gonna wanna talk about
23 somebody's intention and all these other things, but those
24 are simply oral statements. They use the word explicit
25 commonly. So, yeah, that's my position.

1 **THE COURT:** Okay.

2 **MR. SABERS:** As to the land, I think it's -- and that's
3 something I'm glad you brought up, because I think there is
4 a different -- okay, we have a self-dealing account and
5 you've got usurpation of corporate opportunity.

6 **THE COURT:** Right.

7 **MR. SABERS:** I think they're different. And I think
8 they're different because they're a different standard.
9 Now, I think Mr. Hurst's testimony is also undisputed that
10 that was a corporate opportunity and that he took advantage
11 of it. And I don't think there's anything in writing, but
12 I can tell you that I think the self-dealing law is
13 absolutely black and white. I'm not saying I don't think
14 we also get summary judgment as to usurpation of corporate
15 opportunity, but maybe that's a closer issue. I think
16 self-dealing is just -- it's -- I just think the Supreme
17 Court means business.

18 **THE COURT:** So you're saying a jury shouldn't have an
19 opportunity to hear Travis testify, "I believe that I had
20 the authority to engage in these transactions," and let the
21 jury decide whether to believe him or not, assuming that
22 we're gonna bar any evidence of Dee's statements to Travis
23 that these transactions were okay?

24 **MR. SABERS:** I believe as to the identified events in the
25 brief, I believe that's the question for the Court as a

1 matter of law. Because if you apply the bright line rule,
2 the Court said -- I mean, that's really what the Court has
3 put to the trial Courts. And they stated, quote, "We have
4 adopted a bright line rule that no oral extrinsic evidence
5 can be entered." He can't say well, you know, we were
6 sitting at the kitchen and she wanted me to have a pickup.
7 I don't believe you can say that as to the pickup he bought
8 for himself with corporate funds.

9 **THE COURT:** But can't he say I believed that I had the
10 authority to -- he gets around that ruling about her words
11 to him not being admissible by saying, I believed that I
12 had the authority to do that.

13 **MR. SABERS:** I don't believe that his beliefs matter one
14 bit. And I don't think the Supreme Court thought those
15 beliefs mattered either, otherwise they would have let
16 Mr. Stoebner out of his duty, they would allow Mr. Studt
17 out of his duty, they would have let Mr. Moller out of his
18 duty. All of these are summary judgments on fiduciary
19 duty.

20 I know that summary judgment isn't granted often. But
21 the Supreme Court, the last three cases on this issue, they
22 have affirmed summary judgment because there was nothing in
23 writing to authorize self-dealing after fiduciary. I hope
24 I answered the Court's question.

25 **THE COURT:** Does the scope of duty owed by a corporate

1 officer to the shareholders differ depending on what type
2 of corporation it is? Whether it's a closely held family
3 corporation that passed from Dad to Mom and then is gonna
4 pass in some fashion to kids versus arm's length people
5 like the folks in Deadwood who fought over the Hickock
6 hotel. Does the nature of the corporation or the
7 relationships between the director, that allegedly
8 malfeasing director, and the owner, does that matter to the
9 analysis?

10 **MR. SABERS:** As to the specific issue before the Court,
11 which is self-dealing and the bright line rule, I would say
12 no. As to other managerial duties, they've talked about
13 it, but the issue before the Court is self-dealing and
14 corporate usurpation. As to self-dealing, I would say I
15 haven't read anything with it that would change it.

16 **THE COURT:** So Dee's intent -- her subjective intent is
17 irrelevant to what we're talking about. And if you
18 prevail, her specific desires may be subverted. And I
19 understand that that may be hard facts make difficult law.
20 But that's what I hear you saying.

21 **MR. SABERS:** I am reciting to this Court the Supreme Court,
22 regardless of Heuther's intention and even if it was
23 approved -- the Supreme Court said -- even if they
24 approved, we don't care. You've got to have a writing.
25 So, yes, I think that's the law. I do. I think that's why

1 they call it a bright line rule.

2 **THE COURT:** All right. Thank you.

3 **MR. SABERS:** You're welcome. Thank you, Your Honor. And
4 thank you.

5 **THE COURT:** Yep. Mr. Naasz?

6 **MR. NAASZ:** Thank you, Your Honor. I think Mr. Sabers
7 correctly identified the issue that the Court is being
8 asked to address. I think the fundamental distinction is
9 the lack of application of *Stoebner* and the related cases
10 regarding the scope of fiduciary duties under powers of
11 attorney to this case to this closely held family
12 corporation in which Travis Hurst was named as a director
13 in order to exercise documents at the Belle Fourche sale
14 barn.

15 Now that that's done, plaintiff seeks to impose strict
16 liability on any actions taken by the corporation that
17 benefitted Mr. Hurst personally after that time. That's
18 simply not the law. There's no strict liability. As we
19 said in our brief numerous time, the issue is one for the
20 jury and it's one of good faith. Because at the end of the
21 day, the sole shareholders and president and other
22 director, Dee Smith, Travis' mother-in-law who Travis has
23 ranching with for decades, her intent does matter, and the
24 jury should be allowed to hear all circumstances relevant
25 to her intent, relevant to what she wanted to do with her

1 property, because she's the sole shareholder. That's
2 important to the determination at the end of the day as to
3 whether or not Travis Hurst breached any duty. And it's
4 not a strict liability standard. Not simply because Travis
5 was listed as a director can he no longer benefit from the
6 corporation. You go back to the *Schurr* case that we cited
7 in our brief, as cited in *Case v. Murdock*, which the Court
8 just discussed regarding the Hickock property.

9 Well, a director is not prohibited from dealing with
10 his corporation. It doesn't say anything about writing
11 authorizing the dealing with the corporation. It just says
12 the director is not prohibited from dealing with the
13 corporation. That decision was affirmed in *Case v. Murdock*
14 1992, addressed again in 1995. You look the at the statute
15 we cited in our brief, I believe it's 37-180-63-1.1.

16 It's a fair and standard at the end of the day. No
17 director can be held liable for a self-dealing transaction
18 if it was fair to the corporation. Here the Court very
19 clearly recognizes this is a family corporation closely
20 held. Let's be honest, these people are up in the ranch in
21 Harding County, and they ranched as a family and were
22 corporate formalities not specifically followed as maybe
23 they should have been, perhaps. And if they were, we
24 wouldn't need to be here today. But what this Court is
25 being asked to do is to apply a strict liability standard

1 that says without a writing specifically authorizing each
2 individual instance of a director's benefitting from the
3 corporation, the director is strictly liable for that. And
4 the cases cited by plaintiff simply don't state that.

5 I would like to quote the full sentence from the
6 Estate of Stoenner in paragraph 23 discussing the bright
7 line rule. Quote, "We have adopted a bright line rule that
8 no oral extrinsic evidence being introduce to raise a
9 factual issue as to whether an attorney-in-fact was
10 authorized to self-deal under a power of attorney," end
11 quote. That's the bright line rule the Court articulated.
12 And if you look at *Bienash*, that's their bright line rule
13 that was articulated in that case as well. There's simply
14 no case law expanding that bright line rule out of the
15 context of an agent's powers under a power of attorney.

16 And going back to fundamental evidentiary principles,
17 that makes sense when you've got a document identifying and
18 creating the fiduciary duty. Courts don't look beyond the
19 four corners of that document to identify the scope of that
20 duty. That bright line rule certainly exists, but this
21 isn't an application of that bright line rule. This is an
22 expansion of that bright line rule into an entirely
23 different context.

24 **THE COURT:** So you're saying that a corporate officer owes
25 less fiduciary responsibility to his shareholders than --

1 or a lower duty of responsibility to his shareholders than
2 a principle holds to -- or excuse me -- than an
3 attorney-in-fact holds to his principle?

4 **MR. NAASZ:** I think the standard to be applied is the
5 utmost good faith as we've said in our brief, and that will
6 be determined based on all of the circumstances presented
7 to the jury, and they will make that factual determination.

8 **THE COURT:** Which is a lighter standard. Which is a lower
9 standard than the obligation of a power of attorney.

10 Because what you're saying, then, is if I believed in good
11 faith that I had the authority to engage in these
12 transactions that's okay. Is that right?

13 **MR. NAASZ:** I don't think the director's subjective intent
14 carries anything, but whether or not the director did in
15 fact act in good faith as determined by the jury based on
16 all the surrounding circumstances. And I don't think that
17 it's a different standard. I think the evidentiary
18 requirements -- or the evidentiary rules do slightly
19 differ. Because in an attorney-in-fact situation, you have
20 four corners of a document, and unless that power of
21 attorney specifically articulates the ability to self-deal,
22 then from an evidentiary perspective, any extrinsic oral
23 evidence doesn't get before the jury, but then makes the
24 determination as to whether or not that agent under an
25 attorney-in-fact -- did in fact operate in utmost good

1 faith.

2 And so it's not -- I don't believe it's a different
3 standard. I believe the evidentiary rules are slightly
4 different when it's involving an attorney-in-fact situation
5 from a power of attorney, and that's the distinction.
6 That's the bright line rule that the Court has continually
7 articulated.

8 **THE COURT:** So you feel that extrinsic evidence should be
9 more liberally allowed to ascertain whether a director
10 acted in good faith towards his corporation than that
11 extrinsic evidence which would be allowed in a power of
12 attorney situation?

13 **MR. NAASZ:** Yes, Your Honor. And that's what the Court has
14 said. The Court has never expanded it beyond the power of
15 attorney situation. The Court has never said we have
16 adopted a bright line rule that no oral extrinsic evidence
17 may be introduced to raise a factual issue as to whether a
18 fiduciary has engaged in self-dealing. The Court has never
19 said that. They've never applied it outside of the power
20 of attorney context.

21 And to your point earlier, Your Honor, regarding the
22 written evidence that exists in this matter, all of those
23 things will come together to allow the jury to make the
24 factual question -- to answer the factual question of
25 whether or not Travis breached his duties to the

1 corporation. And Dee's intent as the sole shareholder,
2 director and president of that corporation are not a
3 relief. This isn't strict liability. Nowhere has the
4 Court articulated the strict liability for a standard as a
5 standard for director in dealing with this corporation.
6 It's always been one of the utmost good faith. And that's
7 what the jury should be allowed to hear.

8 Now, certainly there are evidentiary rules regarding
9 hearsay or other matters that may come up, and those will
10 be figured out via motions in limine, et cetera, and those
11 are the rules by which we'll play at trial. But the rule
12 at trial does not need to be -- is not that -- nothing
13 regarding Dee's intent is allowed to come in if there's not
14 a writing.

15 What plaintiffs are asking is that any time a director
16 deals with a corporation -- you know, specifically here in
17 ranch country when the family has created a corporation,
18 they better put it in writing. And if not, the Court's
19 gonna come in and overturn those decisions. And that is
20 not -- that bright line rule has never been articulated by
21 the South Dakota Supreme Court. It would be a new
22 expansion of the rule applying to attorneys of fact
23 entirely out of context.

24 **THE COURT:** By saying that, are you saying that a family
25 ranch situation like this -- it's a corporation -- should

1 be treated differently than a corporation of four unrelated
2 individuals in Deadwood as far as the strictness of the
3 requirement of written authorization?

4 **MR. NAASZ:** I think all those things come -- again, Your
5 Honor, they go back to the good faith of the director who's
6 actually being challenged. And we can't divorce Travis'
7 actions here from the closely held context of that
8 corporation. And we cite some authority in our brief for
9 the proposition that it closely held corporations like
10 this.

11 There is a lack of distinction between directors
12 officers and shareholders. Here we have Dee Smith, the
13 sole shareholder, whose -- at the end of the day -- whose
14 desires should not be subverted by an expansion of an
15 evidentiary policy that's never been applied to this
16 situation. And that's exactly what's being asked to do
17 here -- what you're being asked to do today, Your Honor. I
18 would just like to briefly --

19 **THE COURT:** Take all the time you want.

20 **MR. NAASZ:** I don't mean to drone on. I think the -- I
21 think we all know what the issues here are. But I would
22 like to address briefly the new authority by Mr. Sabers,
23 the *Antioch Litigation Trust* and those cases discussing the
24 business judgment rule. As I sit here today, I'm not
25 prepared to discuss those. I think Mr. Sabers will agree

1 that they weren't cited in any other pleadings. With that
2 said, that is the business judgment rule, and that's not
3 what you're being asked to consider here today. Although,
4 if the Court's determination hinges on application of that
5 authority, I would reserve -- I would like to reserve the
6 opportunity to read those and address the applicability to
7 the situation.

8 **MR. SABERS:** That would only be fair, Your Honor.

9 **THE COURT:** Right. Understood.

10 **MR. SABERS:** That's one of those things where you're
11 sitting up at night and can't sleep -- and you remember
12 those nights -- and all of a sudden -- then you go and
13 look.

14 **THE COURT:** Yep.

15 **MR. NAASZ:** And we've all been there, Your Honor. The
16 there's no question about that.

17 I think -- and I'll close with two brief thoughts to
18 conclude Dee Smith's intentions should not be subverted.
19 We've got her will articulating her understanding that her
20 sons are gonna be disappointed with what she's done.
21 Those -- that evidence and all evidence regarding her
22 intent as the sole shareholder, director, and officer of
23 Smith Angus Ranch should not be kept from the jury to
24 preclude them from deciding whether or not Travis breached
25 his duty. A breach of duty is a fact question. Good faith

1 is a fact question. And that should be left to the jury
2 based on, as we said in our brief, all the circumstances
3 surrounding those decisions.

4 And, finally, *Stoebner* isn't a new bright line rule
5 that's applicable here. It's an adopted bright line rule
6 by the Supreme Court that specifically addresses the
7 attorney-in-fact context from a written power of attorney.
8 And expanding it into this context would be an
9 unprecedented expansion of that bright line rule. If there
10 are no other questions, Your Honor --

11 **THE COURT:** Just one more. You say in your undisputed
12 facts that Travis was on the SAR checking account
13 since 2000. Assuming that's relevant -- maybe it is, maybe
14 it isn't -- is there any evidence that he made transfers
15 between 2000 and 2013 or whatever year that was that we're
16 talking about that were similar in nature to buying himself
17 or his child a vehicle or buying fence posts that were
18 clearly not for the benefit of the corporation, but him
19 individually?

20 **MR. NAASZ:** As I sit here today, Your Honor, I've not
21 brought any of that evidence forward. I honestly can't say
22 one way or the other, frankly. But what I can say is,
23 again, whether there is or whether there isn't, those are
24 the circumstances that the jury will be tasked with sorting
25 out in their contemplation of whether or not Travis

1 breached his fiduciary duty. That is a relevant fact. And
2 should Mr. Sabers and the plaintiff decide to bring those
3 circumstances before the jury, assuming there are none,
4 absolutely that's something the jury should consider in
5 determining whether there's been a breach of the relevant
6 duty.

7 **THE COURT:** Okay. All right. Thank you.

8 **MR. SABERS:** Briefly, Your Honor.

9 **THE COURT:** Yes. It's your motion.

10 **MR. SABERS:** I was not aware of the ranch country exception
11 to the bright line rule in South Dakota.

12 **MR. NAASZ:** I think it's in there somewhere, Your Honor.

13 **MR. SABERS:** The second issue is I do not -- and I would
14 just reiterate our position -- because *Stoebner* starts with
15 because fiduciaries must strictly avoid any acts of
16 self-dealing. And in that case they had a fiduciary.
17 There's a bright line rule. I don't think there are levels
18 of fiduciary or a fiduciary duty. I think the reason they
19 talk about power of attorney in *Stoebner* is because that's
20 what was before the Court. And I agree, there has not been
21 yet a director question on fiduciary duty in self-dealing
22 before the Supreme Court.

23 But I would refer back to *Stoebner* in paragraph 21
24 where I think the Court is maybe foreshadowing. It says,
25 "Arguing that he had the authority to carry out this sale,

1 Heuther points to language allowing him to acquire, sell,
2 and purchase real property as Stoebner might have in an
3 ability for Heuther to, in any manner, deal with my real
4 property or personal property." That's a pretty broad
5 grant. But the Court says, quote, "We have rejected
6 similar arguments urging us to imply the right to self-deal
7 under similar grants of authority."

8 They cite the *Wyman* case. That was an
9 attorney-in-fact. And they said here -- this is
10 *Stoebner* -- there is simply no clear and unmistakable
11 language in the document allowing Heuther to self-deal.
12 And I think that's important. I mean, not only is the
13 Court saying absolutely no oral, but they're saying wait a
14 minute, in this case there was even a writing. But the
15 writing said you could acquire, sell, and purchase real
16 property. That's a broad grant. The Court even said no as
17 a matter of law, because the broad grant must say you can
18 self-deal. So they've said no oral never. And even if the
19 writing gives broad discretion, it had better say you can
20 self-deal. And that's why -- you know, I know that
21 Mr. Stoebner probably complained about the application to
22 the rule and the rest of them did as well, but it is a rule
23 nonetheless.

24 **THE COURT:** I think *Stoebner* involved easier facts to come
25 to the conclusion that the Supreme Court did than we have

1 here with this personal lawyer shopping for someone that
2 would -- and all those other things are at least discussed
3 in the *Stoebner* case.

4 **MR. SABERS:** Yep.

5 **THE COURT:** I see how the question has been framed.

6 **MR. SABERS:** And then the last thing, again, because the
7 *Stoebner* fiduciaries must strictly avoid, I don't think
8 they're gonna create an exception. But, ultimately, that's
9 what the Court has to figure out, and that's what is before
10 the Court.

11 **THE COURT:** Okay. All right. Well, it's a little more to
12 think about than I want to issue an oral ruling on, so I'm
13 gonna take this under advisement. I will get you a written
14 decision. It will come quickly. I'm quasi retired, so I
15 have time to look back through everything, the authority
16 that's been cited, and come up with a conclusion.

17 **MR. SABERS:** Thank you, Your Honor.

18 **MR. NAASZ:** Thank you, Your Honor.

19 **THE COURT:** We'll be in recess.
20
21
22
23
24
25

1 **STATE OF SOUTH DAKOTA.**)
2 **COUNTY OF MEADE**) **SS. CERTIFICATE**

3
4 I, DENNON BOECKMANN, RPR, an Official Court Reporter
5 and Notary Public in the State of South Dakota, Fourth
6 Judicial Circuit, do hereby certify that I reported in
7 machine shorthand the proceedings in the above-entitled
8 matter and that Pages 1 through 30, inclusive, are a true
9 and correct copy, to the best of my ability, of my
10 stenotype notes of said proceedings had before the
11 **HONORABLE GORDON D. SWANSON**, Circuit Court Judge.

12 Dated at Sturgis, South Dakota, this 19th day of
13 August, 2020.

14
15
16
17
18 /s/ Dennon Boeckmann
19 DENNON BOECKMANN, RPR
20 Official Court Reporter
21 My Commission Expires: 10/29/21
22
23
24
25

IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

APPEAL NO. 29395

SMITH ANGUS RANCH INC. (SAR),

Plaintiff and Appellee

vs.

TRAVIS HURST, as an alleged DIRECTOR OF SAR, and as an individual,

Defendant and Appellant,

vs.

CRAIG SMITH and LANCE SMITH,

Third-Party Defendants

Appeal from the

Fourth Judicial Circuit

Harding County, South Dakota

The Honorable Gordon D. Swanson, Circuit Court Judge

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PRELIMINARY STATEMENT

For the convenience of the Court, Appellant-Defendant Travis Hurst will be referred to as a “Hurst;” Appellee-Plaintiff Smith Angus Ranch will be referred to as “SAR;” documents from the record of the Fourth Circuit Clerk of Court are cited as “R. ____;” the Appendix is cited as “App. ____;” the Transcript of the Hearing Re: Motion for Partial Summary Judgment held on August 6, 2020 is referred to as “HT ____;” and the Order Granting Plaintiff’s Motion for Partial Summary Judgment entered on August 11, 2020 by the Honorable Gordon D. Swanson, Circuit Court Judge is referred to as “Order.” All references will be followed by appropriate page and paragraph designations.

JURISDICTIONAL STATEMENT

SAR agrees that this Court has jurisdiction and that Hurst’s Petition for Permission to take Intermediate Appeal, which was granted, was timely filed.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

- I. Whether the Circuit Court properly granted SAR’s Motion for Partial Summary Judgment finding that Hurst breached his fiduciary duty to SAR by self-dealing and conversion of SAR assets without written authorization?

The Circuit Court correctly found that there were no issues of material fact related to Hurst’s admitted self-dealing and his conversion of corporate assets / funds to personal use because there was no evidence, written or otherwise, to support Hurst’s claim that acts were approved by the sole shareholder, president, and other director of SAR.

- *Estate of Stoebner v. Huether*, 2019 S.D. 58, 935 N.W.2d 262
- *Biensah v. Moller*, 2006 S.D. 78, 721 N.W.2d 431.
- *Wyman v. Bruckner*, 908 N.W.2d 170, 176 (S.D 2018)

STATEMENT OF THE CASE

On September 4, 2018, SAR commenced suit against Hurst alleging that, as a director of SAR, he breached his fiduciary duty, was guilty of self-dealing, usurpation of

corporate opportunity, fraud, and conversion. R. 2, (App. 142). On July 21, 2020, SAR moved for Partial Summary Judgment asking the Circuit Court to rule as a matter of law that: 1) Hurst was a director of SAR; 2) that Hurst owed SAR a fiduciary duty that included the duty not to self-deal or usurp corporate opportunity; 3) that Hurst breached his duty in self-dealing; 4) that no written authorization existed to justify self-dealing and Hurst's attempts to utilize "oral" authorization fails as a matter of law; and 5) that damages exist, the extent of which will be determined at trial. R. 53, (App. 36). On August 11, 2020, the Circuit Court granted SAR's Motion for Partial Summary Judgment. R. 261, (App. 1).

Hurst sought this Court's permission to appeal the Circuit Court's Order, which this Court granted on September 21, 2020. R. 358. Hurst now appeals the Order Granting Partial Summary Judgment. The only issue before the Court is whether a self-serving affidavit can constitute an issue of fact on self-dealing.

STATEMENT OF THE FACTS

Smith Angus Ranch, Inc. ("SAR") was established in 1991 by Calvin Smith (hereinafter "Calvin") and Dee Smith (hereinafter "Dee"). R. 144, (App. 137 at ¶ 14-15). Calvin and Dee had three children, Lance Smith, Craig Smith and Julie Smith (Hurst). R. (App. 136 at ¶ 1). Calvin and Dee were the sole shareholders, officers and directors of SAR during their lifetimes. R. 145, (App. 137 at ¶ 15). SAR operated a cattle ranch in Harding County, South Dakota. R. 144, (App. 136 at ¶ 3). Appellant Hurst, the son-in-law of Dee, worked on the ranch alongside his wife, Julie (Hurst) Smith (hereinafter "Julie").

Calvin died in 2008 and Dee became the sole shareholder and remained so at the time of her passing on October 24, 2015. R. 145, (App. 137 at ¶ 6 and 16). In 2013, Dee

was diagnosed with cancer. R. 145, (App. 137 at ¶ 18). In 2013, Hurst became a Director of SAR. R.136 (App. 128 at ¶3). Dee later suffered a stroke and became blind in her left eye. R. 136, (App. 129 at ¶ 9). Dee was later admitted to Peaceful Prairie Nursing Home where she resided at the time of her death. R. 136, (App. 129 at ¶ 6). Upon Dee's death, Dee's sons, Lance Smith (hereinafter "Lance") and Craig Smith (hereinafter "Craig"), were appointed co-personal representatives of her Estate. R. 147, (App. 139 at ¶ 33). In Dee's Will, she forgave the balance of the loan owed by Hurst and Julie Smith to the 6,000 acres of ranch land she had sold to them earlier in 2015 before her death on October 24, 2015. R. 147, (App. 139 ¶ 30 and 34). Dee's Will bequeathed any and all interest that Dee had in SAR at the time of her death to Lance and Craig. R. 147, (App. 139 at ¶ 36). Lance and Craig are now Directors of SAR and, as both Co-Personal Representatives and Directors, are statutorily responsible for its wrapping up and the collection of SAR assets. While wrapping up SAR, Lance and Craig discovered that Hurst had engaged in self-dealing and breached the fiduciary duty he owed to SAR.

On September 11, 2018, SAR commenced this action against Hurst alleging breach of fiduciary duty and self-dealing. R. 2, (App. 142). The Complaint also alleges three alternative causes of action against Hurst, including usurpation of corporate opportunity, fraud, and conversion. *Id.* Discovery disclosed, and Hurst has admitted, that without any written authorization, he branded SAR cattle to his own brand, utilized the SAR corporate account to purchase vehicles for himself, and bought ranch supplies for his own ranch with corporate funds. (See App. 151 and 149-150 [for calves], App. 152 [July, 2014 pickup purchase], App. 153 [fence posts], App. 154-155 [October, 2015

pickup purchase])). Hurst admitted those acts of self-dealing and also admitted that none of these acts benefited SAR. *Id.*

Hurst admitted in both pleadings and in his deposition that as a director, he owed a fiduciary duty to SAR. Hurst testified regarding his sworn discovery response:

Q: [I]f you look at 7 [Interrogatory], it says, Defendant admits as a general proposition directors owe a fiduciary duty to corporations. Can we agree on that basic premise here today?

A: From what I know now, yes, I would agree.

Q: And so the purpose – and can we also agree on the general proposition the purpose of becoming a director of the corporation is to benefit the corporation, not to benefit one’s self, is that fair?

A: Yeah, that’s fair.

(Deposition of Travis Hurst p.7:19-8:7)(App. 67-68). Hurst also admitted that there is no writing that authorized his self-dealings. (App. 101 at ¶ 25). In responding to Plaintiff’s Interrogatories on this topic, Hurst answered as follows:

Interrogatory No. 25: If you contend in this litigation that your actions were authorized by Smith Angus Ranch, Inc. please identify every written document that supports such position.

ANSWER NO. 25: There are no written documents. The authorizations were all verbal from Dee Smith.

Id.

Based upon these facts, SAR moved for partial summary judgment. The partial summary judgment Motion was based on admitted facts. SAR is a corporation. (App. 127 at ¶ 1). Hurst was a Director of SAR. (App. 128 at ¶ 3). Hurst owed SAR a fiduciary duty. (App. 67-68). Hurst admittedly self-dealt in multiple transactions. Among other things, in July of 2014 Hurst admitted he purchased a pickup with corporate funds for his son. (App. 152). Hurst admitted he purchased a second pickup truck in

October 2015 after Dee had a stroke just a week before her death when he had money wired from the SAR checking account to Montana for the purchase of a pickup truck in his name. (App. 154-155). Hurst also admitted he purchased bundles of fence posts from the SAR corporate account after Dee Smith had sold all of the ranch land to Julie and Hurst. (App. 153). Finally, Hurst also branded all of the 2015 SAR calf crop with his personal brand, claiming ½ was a gift from Dee, and claiming the other ½ was payment for pasture rent for the land he and Julie had just purchased from Dee on Contract for Deed. (App. 151 and 149-150).

Director Hurst admitted that nothing in writing or in any corporate documents authorized his self-dealing. (App. 129 at ¶ 11 and 12). The only evidence offered by Hurst in opposition to SAR's Motion for Summary Judgment was a self-serving Affidavit from Hurst claiming that Dee, deceased, gave Hurst oral authority to self-deal. Order. R.260, (App. 002).

The Trial Court applied the undisputed facts above to this Court's settled legal precedent cited below and granted partial summary judgment on the self-dealing claims as follows in its Order:

Clearly, as an officer and director of SAR, Travis acted as a fiduciary to it. He had no written authority to convert SAR's assets for his personal gain, and circumstantial / extrinsic evidence he might offer in support of his claim that Dee expressly approved his self-dealing is not admissible. SAR incurred damages, in the amount of his direct diversion of SAR funds / assets to himself, and those damages (in an amount to be determined later) were caused by his unauthorized self-dealing.

Based the foregoing, it is hereby

ORDERED that SAR's motion for partial summary judgment is granted insofar as it seeks a declaration that Travis Hurst's conveyance of SAR funds / assets to himself violated his duties as director / officer of

SAR. Beyond that, no opinion is expressed or decision rendered on the propriety of Dee's transfer of personal or corporate assets to Travis.

Order. R. 259, (App. 003).

ARGUMENT

- I. The Circuit Court did not error in granting partial summary judgment finding that Hurst breached his fiduciary duty to SAR.

This Court reviews a circuit court's entry of summary judgment under the *de novo* standard of review. *Estate of Stoebner v. Huether* 2019 SD 58 at ¶ 16. This Court's "task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied." *Id.* Unsupported conclusions and speculative statements do not raise a genuine issue of fact. *Id.* Whether a fiduciary relationship exists and the scope of the duty are questions of law, while breach of that duty is a question of fact. *Id.* at ¶ 17. This Court will affirm the circuit court's ruling granting a motion for summary judgment if any basis exists to support the ruling. *Id.* When challenging a summary judgment, the nonmoving party "must substantiate his allegations with 'sufficient probative evidence [that] would permit a finding in [his] favor on more than mere speculation, conjecture, or fantasy.'" *Himrich v. Carpenter*, 1997 SD 116, 18 (citations omitted).

Directors of a corporation occupy a fiduciary position in respect to the corporation and its shareholders, and are required to exercise the utmost good faith in all transactions touching a director's duty." *Case v. Murdock*, 488 N.W.2d 885, 890 (SD 1992). This Court has held that if the power to self-deal is not specifically articulated in the governing document, or any writing, the power to do so does not exist. *Wyman v. Bruckner*, 908 N.W.2d 170, 176 (S.D. 2018). In *Estate of Stoebner v. Huether*, 2019 SD 58, 935 N.W.2d 262 (2019), this Court, again, addressed the issue of "oral" or verbal authority in

cases of breach of fiduciary duty and self-dealing. This Court affirmed its bright line rule for fiduciaries in regard to self-dealing stating:

Because fiduciaries must strictly avoid any acts of self-dealing, the authority to self-deal exists only if the power of attorney provides "clear and unmistakable language" specifically authorizing acts of self-dealing. *Id.* ¶ 14, 721 N.W.2d at 435. "Self-dealing occurs when an agent pits their personal interests against their obligations to the principal." *Wyman*, 2018 S.D. 17, ¶ 23, 908 N.W.2d at 177. Self-dealing is precluded "even when the language of a power of attorney might logically entail the ability to self-deal" if there is no explicit provision allowing it. *Id.* ¶ 19.

Here, there is simply no "clear and unmistakable" language in the document allowing Huether to self-deal or personally benefit from his fiduciary role by selling Stoebener's real property to himself. *Id.* ¶ 21.

Huether attempts to generate an issue of fact regarding the circumstances of the sale by producing written affidavits that do not actually generate issues of material fact rebutting the language of the power of attorney. We have adopted a bright-line rule that no oral extrinsic evidence may be introduced to raise a factual issue as to whether an attorney-in-fact was authorized to self-deal under a power of attorney. *Bienash*, 2006 S.D. 78, ¶ 27, 721 N.W.2d at 437. We have not precluded the introduction of written evidence providing such authority, but a written document must clearly articulate that the fiduciary is authorized to engage in self-dealing. *See id.* ¶ 25, 721 N.W.2d at 437. We have also stated that affidavits are insufficient written evidence because they are "merely oral evidence reduced to writing." *Studt v. Black Hills Fed. Credit Union*, 2015 S.D. 33, ¶ 14, 864 N.W.2d 513, 517. No written evidence has been introduced that clearly articulates that Stoebner authorized this act of self-dealing. Regardless of Huether's intentions and even if Stoebner approved of the transaction, there is no admissible written evidence supporting Huether's ability to self deal. *Id.* ¶ 23.

It is undisputed that Hurst was a Director of SAR. (App. 128 at ¶ 3). It is also undisputed that Hurst was self-dealing. (See App. 151 and 149-150 [for calves], App. 152 [July, 2014 pickup purchase], App. 153 [fence posts], App. 154-155 [October, 2015 pickup purchase]). The instances of Hurst's self-dealing were set out above, as well as in SAR's Statement of Undisputed Material Fact and Brief In Support of Partial Summary Judgment. R. 73, 56. Hurst testified in his deposition that each of the identified transactions benefited Hurst and not SAR. *Id.* The Circuit Court noted "Travis [Hurst]

has no specific evidence, beyond his assertion that Dee orally consented to his self-dealing, that she authorized the specific transfers of SAR assets that he made to himself during her lifetime.” Order, R. 260, (App. 002).

The only evidence offered by Hurst to rebut SAR’s Motion for Partial Summary Judgment was that Hurst breached his fiduciary duty to SAR by converting corporate assets to his own was Hurst’s own self-serving unsupported Affidavit where Hurst claims that Dee Smith orally blessed each of his actions. Hurst did not produce any corporate minutes acknowledging or memorializing that Hurst was authorized to complete any of the transactions for his benefit. (App. 101 at ¶ 25). The By-Laws do not authorize self-dealing by directors. (App. 002). Hurst could not produce a single check signed by Dee paying for the identified items that were purchased to benefit Hurst to demonstrate that Dee knew of, and blessed, the actions. All of the checks were signed by Hurst. Hurst did not produce affidavits or testimony from any other witness to substantiate his claim that he was authorized to self-deal for any one of the identified transactions. The record is void of any written document that authorized Hurst’s conversion of SAR assets or funds for his personal benefit. Likewise, the record is void of any written document that demonstrates that Dee approved of Hurst’s actions.

When challenging a summary judgment, the nonmoving party "must substantiate his allegations with 'sufficient probative evidence [that] would permit a finding in [his] favor on more than mere speculation, conjecture, or fantasy.'" *Himrich v. Carpenter*, 1997 SD 116, 18 (citations omitted). Notwithstanding this Court’s bright line rule (discussed below) prohibiting the introduction of extrinsic oral evidence to create a question of fact as to authorization to self-deal, the record as it was presented to the Circuit Court and

now to this Court, is void of “any probative evidence that would permit a finding in favor of Hurst on something other than speculation, conjecture, or fantasy.” The absence of evidence was not lost on the Circuit Court as it inquired of Hurst at hearing if there were other examples of similar transactions from earlier time periods that could be reviewed by the court asked,

THE COURT: Just one more. You say in your undisputed facts that Travis was on the SAR checking account since 2000. Assuming that's relevant -- maybe it is, maybe it isn't -- is there any evidence that he made transfers between 2000 and 2013 or whatever year that was that we're talking about that were similar in nature to buying himself or his child a vehicle or buying fence posts that were clearly not for the benefit of the corporation, but him individually?

MR. NAASZ: As I sit here today, Your Honor, I've not brought any of that evidence forward. I honestly can't say one way or the other, frankly.

HT 27:11-22, (App. 031).

To the extent there was evidence that would support Hurst's allegations, it was his obligation to bring that forward to the Circuit Court in opposition to SAR's Motion for Partial Summary Judgment. Hurst did not do that. Hurst simply wants to be able to move forward so he can present unsubstantiated hearsay from a deceased woman that she orally said it was alright to self-deal corporate assets to purchase tens of thousands of dollars of personal items and to gift himself hundreds of thousands of dollars of corporate livestock. There is simply no legal authority that would allow Hurst to do so.

This Court has stated, “[b]ecause fiduciaries must strictly avoid any acts of self-dealing, the authority to self-deal exists only if the power of attorney provides ‘clear and unmistakable language’ specifically authorizing acts of self-dealing.” *Stoebner v. Huether*, 2019 S.D. 58, 935 N.W.2d 262 *Id.* ¶ 19 (citations omitted). Self-dealing is precluded “even when the language of a power of attorney might logically entail the

ability to self-deal" if there is no explicit provision allowing it. *Id.* As such, this Court has adopted a "bright line rule" that was reiterated in *Stoebner* wherein this Court stated "[w]e have adopted a bright line rule that no oral extrinsic evidence may be introduced to raise a factual issue as to whether an attorney in fact was authorized to self deal under a power of attorney." *Stoebner* at ¶ 23.

This Court has also ruled that, "[d]irectors of a corporation occupy a fiduciary position in respect to the corporation and its shareholders, and are required to exercise the utmost good faith in all transactions touching the director's duty." *Case v. Murdock* 488 N.W.2d 885, 889 (S.D. 1992). Despite the fact that both corporate directors and attorneys-in-fact are fiduciaries, Hurst wants this Court to treat them differently.

Hurst spends considerable amounts time in his Appellant's Brief attempting to distinguish the long line of cases where this Court has steadfastly held that "[i]n order for self-dealing to be authorized, the instrument creating the fiduciary duty must provide 'clear and unmistakable language' authorizing self-dealing acts." *Bienash v. Moller* 2006 S.D. 78, ¶ 13, 721 N.W.2d 431, 435. Hurst argues that this requirement can only apply to a written power of attorney saying, "the bright-line rule can have no application where there is no written document to 'strictly construe.'" (Appellant's Brief p. 13-14). What Hurst's argument ignores is the fact that a corporation only is given life by the Secretary of State by the filing of written documents including articles of incorporation and corporate by-laws and that but for those writings a director has no authority to act on behalf of a corporation. As noted by the Circuit Court, there is no evidence in the record in this case that the by-laws or any corporate document authorized conversion or self-dealing. Order. R.260, (App. 002).

Next, under Hurst's argument, only fiduciaries created by a power of attorney would be required to have a writing that provides 'clear and unmistakable language' authorizing self-dealing. Under Hurst's scenario, any lawyer, banker, trustee, investment broker, or corporate director could potentially avoid liability of self-dealing by simply claiming that they had been orally authorized to make a gift to themselves as Hurst is here. Such a rule would open a Pandora's box of excuses in self-dealing and/or conversion cases that could never be closed. Hurst's rule would make it nearly impossible for any self-dealing transaction to be challenged after the death of a party. Parties contesting the transaction would be forced into the position of challenging the word (i.e. "oral authorization") of a dead man/woman who is not available to be examined under oath. Conversely, if all fiduciaries are treated equally, then all that is required is a writing authorizing the self-dealing. Such a requirement would only take minutes for the parties to accomplish, and if both parties are on the same page with the self-dealing then there is no need for the writing to be burdensome on the parties.

For instance, in this case, Dee's assent to any of the challenged transactions could have been accomplished as easily as having her sign a piece of paper stating that she was directing, or had authorized, Hurst to purchase a pickup for himself or his son with corporate funds, or that she authorized Hurst to brand SAR calves with his personal brand. Even something as simple as Dee signing the check for the transaction or directing the wire transfer of money for the transaction would provide some evidence that Hurst had been given the authority to self-deal. It is important to keep in mind that the transactions that SAR challenged, and which the circuit court granted summary judgment, there is no evidence in the record, written or otherwise, to establish that Dee

authorized them. All the checks for purchases were signed by Travis and not Dee despite the fact that Dee was still signing checks for other purchases during these times. No evidence of a bill of sale or transfer documents were produced, nor do any exist, for the branding of new born calves from corporate cows with Hurst's personal cattle brand.

Hurst's attempt to create different evidentiary rules for fiduciaries also ignores the fact that this Court has repeatedly referenced the same "utmost good faith" standard when referring to a fiduciary, whether it be an attorney in fact, a corporate director, or a trustee. For instance, in *Hein v. Zoss*, 2016 S.D. 73, a case involving an attorney in fact, this Court stated, "[i]n South Dakota, as a matter of law, a fiduciary relationship exists whenever a power of attorney is created." *Id.* at ¶ 28. "A fiduciary must act with the utmost good faith and avoid any act of self-dealing that places [his] personal interest in conflict with [his] obligations to the beneficiaries." *Id.* In *In re Estate of Stevenson*, 2000 SD 24, a case involving a trustee this Court stated, "[a] trustee's first duty as a fiduciary is to act ... wholly for the benefit of the trust." *Id.* at ¶ 9 (citations omitted). "Thus, a fiduciary must act with utmost good faith and avoid any act of self-dealing that places her personal interest in conflict with her obligations to the beneficiaries." *Id.* (citations omitted). And in a corporate setting, this Court has said, "[t]he fiduciary duty that majority shareholders owe to minority shareholders in a closely held corporation 'is characterized by a high degree of diligence and due care, as well as the exercise of utmost good faith and fair dealing.'" *Shultz v. Scandrett*, 2015 SD 52, at ¶ 16 (citations omitted). Likewise, when you look up fiduciary duty in Black Law Dictionary it has one definition. It does not say "*But see*" fiduciary duty of an attorney or "*But see*" fiduciary duty of a lawyer or "*But see*" fiduciary duty of an attorney-in-fact, or "*But see*" fiduciary duty of a

corporate director. Given that this Court has placed the same duty of “the exercise of the utmost good faith and fair dealing” on fiduciaries of various types in caselaw, it is certainly logical that the same evidentiary rules apply when there has been an allegation of breach of that fiduciary-duty by self-dealing or gifting. This Court has never differentiated between fiduciaries and their duty not to self-deal and it should not start now. It is logical that the “bright line rule” that this Court has established not allowing the use of oral extrinsic evidence to create an issue of fact as to the ability to self-deal would apply to all fiduciaries as it was applied in *Stoebner* and the long line of cases before it.

SAR also disagrees with Hurst’s claim that the applicable standard of care for a director self-dealing is one of good faith and fairness to the corporation. See Hurst’s Brief, p. 14-20. Hurst argues that SDCL § 47-1A-861.1 modifies a director’s duty of loyalty. *Id.* at 14. Hurst does not cite any South Dakota case in support of this proposition, but rather a Delaware Supreme Court case titled *Schock v. Nash*, 732 A.2d 217,225 (Del. 1999). Hurst argues that “[a]s noted by the Delaware Supreme Court, statutes such as SDCL 47-1A-861.1 effectively modify the duty of loyalty.” *Id.* This is a completely inaccurate statement of the case. What the Delaware Supreme Court actually stated was “[a]lthough Delaware corporate law permits the waiver of liability for breach of the common law duty of care that directors owe to a corporation and its stockholders by including clear and unambiguous provision in the certificate of incorporation, *it does not allow for a waiver of the directors duty of loyalty.*” *Schock* at ¶ 18, fn 21. (*Emphasis added, Citations omitted*). Hurst cannot point to any language in SAR’s certificate of incorporation that waives the liability of directors for breaching their duty of care and has

not directed this Court to any South Dakota statute or case law that provides for same. Hurst's argument is without merit. Additionally, as noted above, the law of the case in *Schock* is actually contrary to what Hurst alleges, and clearly states that the duty of loyalty cannot be waived.

What Hurst is trying to do is use SDCL § 47-1A-861.1 as a gateway to allow him to make any possible argument he may want as an excuse to justify his self-dealing by emphasizing the final section of the statute indicates that "the [conflicting interest] transaction, judged according to the circumstances at the time of commitment, is established to have been fair to the corporation." Hurst argues to this Court that "[t]he Circuit Court's ruling that 'any circumstantial extrinsic evidence [Travis] might offer in support of his claim that Dee expressly approved his self-dealing is not admissible,'" cannot be reconciled with the relevant statutory standard to be used at trial. The Order excludes 'the circumstances at the time of commitment' and requires the jury to turn a blind eye to the 'fairness' of the transactions." See *Hurst Brief*, p. 14. Actually, it is Hurst's argument that turns a blind eye to the fact that every case involving fiduciaries is judged "according to the circumstance at the time of commitment." *Stoebner* was not decided in a vacuum nor with blinders on to the facts of the case. This Court went to great lengths in *Stoebner*, and each attorney-in-fact case involving self-dealing before that, setting out the facts of each particular case and the circumstances at the time of the making of the attorney-in-fact and at the time of the self-dealing.

What this Court has repeatedly said is that "no oral extrinsic evidence may be introduced to raise a factual issue as to whether an attorney-in-fact [fiduciary] was authorized to self deal..." *Stoebner* at ¶ 23. But that is exactly what Hurst wants this Court

to allow. Here, the Circuit Court analyzed the facts presented to it at summary judgment and noted that “Travis [Hurst] has no specific evidence, beyond his assertion that Dee orally consented to his self-dealing, that she authorized the specific transfers of SAR assets that he made to himself during her lifetime.” (App. 002). Finding that there was no evidence other than Hurst’s oral assertions, the Circuit Court granted summary judgment.

The remaining legal and statutory authority cited by Hurst is also not analogous to the facts of this case nor controlling. First, it should be noted that the only statute argued to the circuit Court in opposition to summary judgment was SDCL § 47-1A-861.1. (App. 60-61). Even then, Hurst only spent two paragraphs arguing that statute to the Circuit Court where he now spends countless pages arguing it and other statutes as reasons to overturn the Circuit Court’s partial summary judgment. This Court should not even consider the remainder of Hurst’s statutory arguments set out in his Brief because they were raised for the first time on appeal. This Court has consistently held that “[it] may not review theories argued for the first time on appeal. This is true even on appeal from summary judgment.” *Wyman v. Buckner*, 2018 SD 17, ¶ 16 (citing *Liebig v. Kirchoff*, 2014 S.D. 53, ¶ 35, 851 N.W.2d 743, 751 and *NattyMac Capital LLC v. Pesek*, 2010 S.D. 51, ¶ 19, 784 N.W.2d 156, 161.)

Similarly, the case of *Schurr v. Weaver* is not supportive or authoritative on the issues before this court. *Schurr v. Weaver*, 53 N.W.2d 290, 293 (S.D. 1952) was a case involving the Plaintiff (Schurr), who was a director of a rural electrical association (“REA”), who enticed Weaver with whom Schurr had a labor and crop share agreement for land Schurr owned to enter into a side contract for labor with REA for the moving of carloads of electric poles. *Id.* Plaintiff told Defendant that he could not enter into the

contract directly with REA because he was a director of the same. Later, a dispute arose between Plaintiff and Defendant over both the labor and crop share contract and the division of proceeds from the REA contract. While this Court did reiterate that plaintiff, as a director, was a fiduciary, and “required to exercise the utmost good faith in all transactions touching his duties thereto,” the holding of the court was that the contract with the REA was a “surreptitious dealing” between the parties and that the defendant would not be permitted to recover in the commission of a breach of duty because contracts contrary to public policy are unlawful and no right of action can be founded thereon. *Id at 292*. None of the cases cited by Hurst involve a director of a corporation self-dealing by gifting corporate property to themselves or their families.

Finally, throughout his Brief, Hurst states “Travis [Hurst] has presented facts demonstrating that Dee Smith instructed Travis to engage in the transactions that are being challenged.” Hurst cites to the Clerk’s Record page R.146 and Hurst Appendix page 74, ¶ 26 for support of this statement. *See Hurst Brief at p. 15*. However, when you dig deeper into the actual facts he cites, you see that the documents referenced as “facts” is Hurst’s Affidavit (paragraph 26) that refers to Hurst’s Answers to Interrogatories No. 14 and 19. These facts are nothing more than Hurst’s unsubstantiated claims that Dee directed his actions.

Interrogatory No. 14: Describe in detail each instance or transaction wherein you personally or otherwise financially benefited from your purported director position of Smith Angus Ranch Inc. or from Smith Angus Ranch Inc. generally.

ANSWER NO. 14: Julie and I had a long-standing relationship with Dee Smith and Smith Angus Ranch, Inc. We provided the labor for the ranch in exchange for various forms of remuneration. This relationship and exchange of services and assets was long-standing and unchanged from

when it began. This relationship was not based on my status as a director of Smith Angus Ranch, Inc.

Interrogatory No. 19: Describe in detail each transaction you were involved in with Smith Angus Ranch Inc. wherein you personally acquired a financial interest or benefit to include vehicles, hay, groceries, livestock, lawn mower, or any type of monetary funds.

ANSWER NO. 19: Objection; vague and ambiguous. Subject to this objection and without waiving the same: Anything my family or I received from Smith Angus Ranch was authorized and directed by Dee Smith. Any transaction involving Smith Angus Ranch assets being transferred to me or members of my family directly benefitted our family ranching operation.

(App. 100).

So, to suggest that Hurst has presented facts demonstrating Dee instructed him to self-deal is inaccurate. The only thing Hurst has relied upon in defense of the Motion for Partial Summary Judgment has been his own testimony reduced to writing. This is exactly the type of scenario this Court stated is unacceptable in *Stoebner* wherein this Court stated, “[w]e have also stated that affidavits **are insufficient written evidence** because they are “merely oral evidence reduced to writing.” *Id.* ¶ 23 (*Citing Studt v. Black Hills Federal Credit Union*, 2015 SD 33, ¶ 14).

CONCLUSION

The Circuit Court’s Order granting partial summary judgment must be upheld. There are no material facts in dispute. Hurst was a director of SAR. Hurst admittedly self-delt by purchasing personal vehicles and supplies with SAR funds. Hurst admittedly branded SAR calves with his personal brand. Hurst admitted that none of these transactions benefitted SAR. No evidence was provided to the Circuit Court that Dee Smith knew of, directed, or blessed any of these transactions, other than Hurst’s own testimony. This Court should not set separate standards for fiduciaries as Hurst is asking

the Court to do. Hurst's self-serving Affidavit should not provide a basis to create a question of fact when this Court's long standing, "bright line rule," has been that no oral extrinsic evidence may be introduced to raise a factual issue if self-dealing was authorized.

SAR respectfully requests this Court affirm the Circuit Court's Order Granting Partial Summary Judgment.

REQUEST FOR ORAL ARGUMENT

SAR hereby requests oral argument.

Dated this 4th day of January, 2021.

CLAYBORNE, LOOS & SABERS, LLP

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 4th day of January, 2021, he electronically filed the foregoing documents with the Clerk of the Supreme Court via email at SCClerkBriefs@ujs.state.sd.us, and further certifies that the foregoing document was also emailed and mailed via U.S. Mail, postage prepaid thereon, to:

DAVID LUST
MATTHEW E. NAASZ
Gunderson, Palmer, Nelson & Ashmore
506 Sixth Street
Rapid City, SD 57701

The undersigned further certifies that the original and two (2) copies of the Appellee's Brief in the above-entitled action were mailed to Ms. Shirley A. Jameson-Fergel, Clerk of the Supreme Court, State Capitol, 500 East Capitol, Pierre, SD 57501, by United States mail, first class, postage thereon prepaid, on the date written above.

/s/ Michael K. Sabers
MICHAEL K. SABERS

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), Michael K. Sabers, counsel for the Appellee, does hereby submit the following:

The foregoing brief is 18 total pages in length. It is typed in proportionally spaced typeface in Times New Roman 12 point. The word processor used to prepare this brief indicates that there are a total of 5,568 words, and 27,998 characters (no spaces) in the body of the Brief.

/s/ Michael K. Sabers
MICHAEL K. SABERS

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A

STATE OF SOUTH DAKOTA)
)
COUNTY OF HARDING)

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

SMITH ANGUS RANCH, INC. (SAR),
Plaintiff,

31CIV18-18

vs.

TRAVIS HURST, as an alleged
Director of SAR, and as an individual,
Defendant and
Third-Party Plaintiff,

ORDER GRANTING PARTIAL
SUMMARY JUDGMENT

vs.

CRAIG SMITH AND LANCE SMITH,
Third-Party Defendants.

Plaintiff Smith Angus Ranch, Inc. (hereafter SAR), a South Dakota corporation, has moved for partial summary judgment regarding some of its claims against Defendant Travis Hurst (hereafter Travis). For reasons that follow, the motion is granted in part.

Calvin and Dee Smith owned a cattle ranch in Harding County. Smiths owned the ranch land in their own names. They also operated a corporation, SAR, which owned certain personal property, including livestock and equipment used in the ranch's operation. After Calvin died in 2008, Dee became the sole owner of the land and the sole shareholder of the corporation. The Smiths had 3 children, Lance Smith, Craig Smith, and Julie Hurst. Julie Hurst is married to Defendant Travis Hurst. The Hursts participated significantly in the operation of the Smith ranch, both before and after Calvin's demise.

In 2013, while Dee dealt with a serious health condition that required regular absences from the ranch, Travis became a Director and officer of SAR. This was apparently to enable him to authorize dealings with SAR cattle. He also received authority at some point prior to 2013 to write checks on the SAR checking account. In addition to entrusting Travis with much of her ranch and financial affairs, Dee gave things, such as pickups formerly titled to SAR, to the Hursts. Travis also maintains that she allowed him to brand all of the 2015 calf crop with the Hurst's brand, half as a gift from SAR and half as payment

for pasturing SAR livestock, given Hursts' acquisition the land pursuant to the contract for deed. Travis also purchased things with SAR funds, including vehicles and fence posts, for his personal use. He concedes that the things he bought for himself with SAR funds were not for the benefit of the corporation. There is no evidence in the record as to what, if any, compensation Travis received from SAR, in-kind or monetary. In 2015 Dee sold the ranch land, which she then owned individually, to the Hursts on a contract for deed, at a price that was potentially far below its market value.

Dee died in October 2015. Her will named Lance and Craig as co-personal representatives of her estate, a role which they undertook. The will left SAR and its assets entirely to Lance and Craig, and forgave the amounts due to her from Hursts on the purchase of her ranch land, essentially bequeathing it to them. Her will explicitly acknowledged the angst that might arise between her children because of her testamentary disposition.

In their capacity as the new owners of SAR, Lance and Craig brought this action against Travis, alleging that Travis committed acts with SAR assets, and at least one significant prospective asset (the ranch land), which were inappropriate and actionable. One of those claims is that Travis committed self-dealing, by using corporate funds to purchase various things for himself (examples noted above).

SAR's bylaws are not part of the record, but it appears undisputed that they do not explicitly authorize self-dealing by officers or directors. Travis has no specific evidence, beyond his assertion that Dee orally consented to his self-dealing, that she authorized the specific transfers of SAR assets that he made to himself during her lifetime.

In the context of a power of attorney, the South Dakota Supreme Court has adopted a bright-line rule that no oral extrinsic evidence may be used to prove that an attorney-in-fact has authority to self deal. *Stoebner v. Huether*, 2019 SD 58. The Court went even farther, saying that "a written document must clearly articulate that the fiduciary is authorized to engage in self-dealing." Given the fiduciary relationship between an officer / director of a corporation and its shareholder(s), and the similarity between responsibilities in the two situations, SAR urges the Court to anticipate that, if called upon to rule, the South Dakota Supreme Court would extend application of that policy to officer/shareholder cases.

As indicated above, there may be evidence tending to support Travis's contention that Dee not only approved of, but directed Travis to convert assets of SAR to his personal use. SAR urges that such evidence – even if it means Dee's actual intent is subverted – must not be considered in the absence of explicit written authorization for Travis to self-deal from the corporation.

SAR may have been loosely operated as a closely-held family corporation, but nonetheless it was a separate legal entity that at some point the Smiths chose to use for the operation of their ranching business. The authority cited by Travis in support of a 'good faith' standard, versus the bright-line rule of written authorization to self-deal, arises from cases that do not involve self-dealing by officers or directors. *Schurr v. Weaver*, 74 SD 378, a case which had no advocacy from a corporate party, involved a corporate officer who entered into a contract with his corporation via the use of a strawman. It discussed the corporate officer's duty to exercise good faith and make full and frank disclosure of his dealings with the corporation, and to get corporate permission to deal indirectly with it. *Case v. Murdock*, 488 N.W.2d 885 (SD 1992) involved officer/directors' buying the right to purchase a building out from under a corporation that had been negotiating with the seller, then trying to use the purchase agreement to increase their leverage in the corporation to the disadvantage of other shareholders. While the Court in *Case* discussed the requirement that officers and directors exercise good faith in all transactions related to their duties; it did not address allegations of taking corporate assets for personal gain, i.e. self-dealing. Again, *Schultz v. Scandrett*, 2015 SD 52, did not involve self-dealing by undocumented transfers of corporate property to individual officers/directors, but a dispute between shareholder / officers alleging that some of them had used their position to get the corporation to pay them excessively.

Clearly, as an officer and director of SAR, Travis acted as a fiduciary to it. He had no written authority to convert SAR's assets for his personal gain, and any circumstantial / extrinsic evidence he might offer in support of his claim that Dee expressly approved his self-dealing is not admissible. SAR incurred damages, in the amount of his direct diversion of SAR funds/assets to himself, and those damages (in an amount to be determined later) were caused by his unauthorized self-dealing.


Based on the foregoing, it is hereby

ORDERED that SAR's motion for partial summary judgment is granted insofar as it seeks a declaration that Travis Hurst's conveyance of SAR funds/assets to himself violated his duties as a director/officer of SAR. Beyond that, no opinion is expressed or decision rendered on the propriety of Dee's transfer of personal or corporate assets to Travis.

Dated this ____ day of _____, 20__.

BY THE COURT:

Signed: 8/11/2020 9:45:01 AM



Gordon D. Swanson
Circuit Court Judge

Attest:

Teigen, Karen
Clerk/Deputy



B

1 STATE OF SOUTH DAKOTA)
 2 COUNTY OF HARDING)

IN CIRCUIT COURT
 FOURTH JUDICIAL CIRCUIT

4 SMITH ANGUS RANCH, INC. (SAR))

5 Plaintiff,)

6 vs.)

7 TRAVIS HURST, as an alleged)
 8 DIRECTOR OF SAR, and as an)
 9 individual,)

Motion Hearing

10 Defendant and)
 11 Third-Party Plaintiff,)

CIV File No. 18-18

12 vs.)

13 CRAIG SMITH and LANCE SMITH,)

14 Third-Party Defendants.)

15 BEFORE: THE HONORABLE GORDON D. SWANSON
 16 Circuit Court Judge
 17 Sturgis, South Dakota
 18 August 6, 2020, at 9:00 a.m.

19 APPEARANCES:

20 For the Plaintiff
 21 and Third-Party
 22 Defendants:

MR. MICHAEL K. SABERS
 Attorney at Law
 2834 Jackson Blvd., Suite 201
 Rapid City, SD 57709

23 For the Defendant
 24 and Third-Party
 25 Plaintiff:

MR. MATTHEW E. NAASZ
 Attorney at Law
 506 Sixth Street
 Rapid City, SD 57709

1 (WHEREUPON, the following proceedings were duly
2 had:)

3 **THE COURT:** All right. This is the time scheduled for
4 hearing in Harding County Case Number 31 CIV 18-18
5 involving Smith Angus Ranch versus Travis Hurst, and a
6 third party claim has been filed against Craig Smith and
7 Lance Smith. Mr. Naasz appears on behalf of Travis Hurst.

8 **MR. NAASZ:** Yes, Your Honor.

9 **THE COURT:** And Mr. Sabers on behalf of Smith Angus Ranch,
10 Incorporation.

11 **MR. SABERS:** Thank you, Your Honor.

12 **THE COURT:** A motion for partial summary judgment has been
13 filed. I have reviewed it; the response and the reply as
14 well as at least some of the case law that was brought up
15 in connection with that motion. So, Mr. Sabers, it's your
16 motion. Go ahead.

17 **MR. SABERS:** Thank you, Your Honor. And it doesn't
18 surprise me that the Court has already been through this,
19 so I will try to just summarize the larger points. The
20 first point is this is an action brought on behalf of Smith
21 Angus Ranch, which is a corporation against a director.
22 And, you know, you always ask, we're here on summary
23 judgment, so what's the standard or what should the Court
24 be looking at to determine what is being asked to do here
25 today? And so the reason why we think this is

1 appropriately before the Court -- and, again, this is in
2 our brief, but it says -- and the South Dakota Supreme
3 Court has said, what is kind of an infamous case of
4 *Landstrom v. Shaver*. It says, the existence of a fiduciary
5 duty and the scope of that duty are questions of law for
6 the trial Court. And in addition to questions of the law
7 being de novo reviewed, questions of law are to be decided
8 before trial so that a jury can be instructed, because you
9 have to instruct the jury on what the law is.

10 And so Smith Angus ranch has sought out a
11 determination as to the law on what we believe to be an
12 undisputed set of certain facts. So what are the cases --
13 or what are the principles that we are asking the Court to
14 address? Not just the fiduciary duty, but the fiduciary
15 duty scope. Well, it's primarily found in, first,
16 *Landstrom*, but second, the *Stoebner case*.

17 Now, the *Stoebner case* -- and we have kind of a
18 fundamental disagreement about this. Is the *Stoebner case*
19 a case about fiduciary duties, or is it a case about powers
20 of attorney? And our position is that that case is about
21 fiduciary duties. If you read that case -- and the quote
22 that I would draw the attention of the Court to is, it
23 says, "because fiduciaries must strictly avoid any acts of
24 self-dealing." The authority to self-deal must exist in
25 writing.

1 And it's my understanding that Mr. Hurst's position is
2 the fiduciary duty self-dealing rule either doesn't apply
3 to directors, or somehow the good faith that a director
4 must show to the corporation somehow is an exception to the
5 bright line rule.

6 Now, I think it's interesting in *Stoebner*, sometimes
7 it's interesting to look at the makeup of the Court. The
8 makeup of the Court -- the *Stoebner* case was written by
9 Chief Justice Gilbertson. It was written recently and
10 written by the same Supreme Court that is now sitting in
11 Pierre. And, as the Court knows, bright line rules aren't
12 terribly common in the law. If you actually search, like,
13 all other areas of the law for just bright line rules and
14 that phraseology, you're not gonna find them.

15 And so I think the fundamental decision that is before
16 this Court, and we believe is the scope of the fiduciary
17 duty, is does the bright line rule identified in *Stoebner*
18 apply to a fiduciary who acts as a director of a
19 corporation? And the reason why I think it's properly
20 before the Court is because if you look in Mr. Hurst's
21 brief, he does not dispute the fact that he was a
22 director -- that he was a director of a corporation. On
23 page 9 of his brief, it states, "Travis Hurst does not
24 dispute the fact that there is no writing authorizing his
25 transactions with Smith Angus Ranch." And so it's

1 undisputed because they actually say it in their answer to
2 Interrogatory Number 25. Mr. Hurst says the authorizations
3 were all verbal. Well, verbal is another word for oral.
4 And the bright line rule adopted in *Stoebner* is, quote, "We
5 have adopted a bright line rule that no oral extrinsic
6 evidence may be introduced to raise a factual issue as to
7 self-dealing." And so it takes this big case and it
8 focuses almost with, like, a laser focus on that one legal
9 issue which pertains to the scope of a fiduciary duty of a
10 director.

11 Now, I think by example, I think if the Court -- so
12 the Court either needs to decide, in our opinion, the
13 bright line rule applies or it doesn't. And with all due
14 respect to Mr. Hurst, we would respectfully submit that if
15 he wants to create an exception to a unanimous bright line
16 rule that the Supreme Court has announced as to fiduciaries
17 that maybe he should be the one to take that up to the
18 Supreme Court and argue for an exception. Because what we
19 also know is other fiduciaries have been held to this
20 bright line rule.

21 The South Dakota Supreme Court addressed the power
22 attorney authorizing the attorney-in-fact to make gifts to
23 any person. That is the *Studt* case -- S-T-U-D-T -- 2015
24 S.D. 33. See there's no writing authorizing here. In
25 *Studt*, there actually was a writing, and the writing was

1 pretty broad. It said "any person." But our South Dakota
2 Supreme Court said, oral extrinsic evidence is inadmissible
3 to raise a factual issue to prove the principles. And I
4 think it's important they say principle. They're not
5 saying power of attorney. A fiduciary is a principle. A
6 factual issue to prove the principle's intent. An
7 affidavit is merely oral evidence reduced to writing. And
8 they grant summary judgment in *Studt*. They say, listen,
9 when we're dealing with fiduciary duties we're not gonna
10 give you the a benefit of the doubt.

11 You then move into the *Bienash v. Moller* case. This
12 was a 2006 South Dakota Supreme Court decision. And this
13 case dealt with, again, the Court granting summary
14 judgment. It said the Court held as a matter of law that
15 the couple reached their fiduciary duty committed fraud
16 when they changed a POD -- or payment on death designation
17 -- to benefit themselves. That's another case where they
18 talk about a bright line rule.

19 So it's our position -- and one more example that may
20 be -- if I'm an attorney and I'm representing an elderly
21 person who passes away, I'm a fiduciary duty. I'm the
22 principle. And I've got \$5,000 left in my trust account
23 for pending matters that I was representing this elderly
24 woman on, and she passes away, and I go buy a pickup truck
25 for myself. I can only imagine trying to stand before our

1 South Dakota Supreme Court and say, she wanted me to.
2 Her -- I don't have anything in writing, but she told me,
3 or it was her oral intention, and I've signed an affidavit
4 saying she said -- her oral intention was to let me buy a
5 pickup truck. I can only imagine the response, especially
6 in light of the cases that they've already decided on the
7 issue of self-dealing.

8 **THE COURT:** Does it matter -- to your hypothetical -- if
9 the elderly client is your mom and she has given you all
10 kinds of other stuff throughout the years?

11 **MR. SABERS:** I believe it does not. And the reason it does
12 not is because it would almost -- because a fiduciary duty
13 is just different. It's the highest duty known to law.
14 Because my response to that would be how hard would it have
15 been for my mom to have put in writing, it's okay for
16 Michael to use the money I have in his trust account to buy
17 a truck? It's a sentence, and she signs it, and then it's
18 a written authorization. Because what these cases evolve
19 into and what this case will absolutely evolve into if the
20 bright line rule doesn't apply is the self-serving single
21 affidavit of the director accused of self-dealing talking
22 about how many times Lance and Craig might have visited
23 their mother at the ranch. What if it was three times?
24 What if it was five times? Why does that matter?

25 Because the Supreme Court said the important part is

1 if you look at the brief of Mr. Hurst on page 6, at the
2 bottom it says, a fact question to be determined by the
3 jury armed with all the evidence of the circumstances
4 surrounding transactions, including all evidence of Dee
5 Smith's intentions. Well, when you start to talk about
6 intentions, I think you need to go back to what the Supreme
7 Court has already said about, quote, intentions.

8 In *Stoebner* -- in the same quote that I quoted the
9 first part to the Court -- the Court said, "No written
10 evidence has been introduced that clearly articulates that
11 Stoebner authorized this act of self-dealing." And then
12 they go a lot farther. Regardless of Heuther's intentions,
13 and even if Stoebner approved of the transaction, there is
14 no admissible written evidence to support Heuther's ability
15 to self-deal. And so you compare their brief where they
16 said you have to look at a dead woman's alleged intentions
17 from six years ago to excuse my self-dealing. I think it's
18 just powerful the Court went as far as saying regardless of
19 Heuther's intention. And even if she agreed, doesn't
20 matter. You've got to get it in writing.

21 And they talk about -- and this is in our brief too --
22 they talk about the purpose of it. So did you protect the
23 principle, or do you protect the person the principle is
24 bound to protect? And I think that's why they have gone as
25 far as they did to create a bright line rule, and to say

1 that an affidavit is merely oral evidence reduced to
2 writing. And it's inadmissible to create an issue of fact.
3 And so this all comes back to the -- and, again, the
4 focused question that we're asking the Court to decide as a
5 matter of law: Does the bright line rule apply to a
6 fiduciary that is a director of a corporation?

7 **THE COURT:** And by bright line rule, you mean something
8 giving him explicit and direct authority to do the precise
9 acts that he's doing?

10 **MR. SABERS:** Something in writing that -- I think the
11 terminology is for the explicit written authorization to
12 self-deal. Because what we know -- and the other reason I
13 why I think summary judgment is important, not as to the
14 amount of self-dealing -- I think we made that clear in the
15 brief -- but as to the fact that self-dealing occurred.
16 And just a couple undisputed examples they've admitted.

17 Mr. Hurst, when you bought yourself a pickup, did that
18 benefit the corporation? Did that benefit anybody but you?
19 No, it did not. And so since you can't sign an affidavit
20 that now changes that, since that's the sworn testimony, my
21 first question for Mr. Hurst, if I call him on
22 cross-examination or adversely at trial, is: Mr. Hurst, do
23 you have anything in writing to justify it? They've
24 admitted in their brief there will never be anything in
25 writing.

1 My second question will be: Mr. Hurst, when you
2 bought yourself that pickup with corporate funds, did that
3 benefit anyone but yourself? His answer will be the same
4 as it was in the deposition, no. And so then the question
5 will once again be before the Court: Do I apply the bright
6 line rule announced in *Stoebner* as to a director of a
7 corporation or don't I? And I think that's why I think
8 this is a unique and interesting case and that's why the
9 motion was brought. We obviously don't agree. And it's
10 been quite an issue as to whether that bright line rule
11 gets applied. And so I'm almost done talking.

12 **THE COURT:** No, that's fine.

13 **MR. SABERS:** And these are actually the interesting cases
14 you get because you get --

15 **THE COURT:** Agreed.

16 **MR. SABERS:** -- you get to look at these issues. As I'm
17 reading the reply brief and reading their brief again last
18 night getting ready, I think the big picture that just kind
19 of struck me is they want to use -- they say, this isn't
20 about self-dealing, this is about a director's good faith.
21 Well, good faith applies to an attorney who's acting as a
22 fiduciary. It applies to a trustee who's acting as a
23 fiduciary, and it applies to a power of attorney that's
24 acting as a fiduciary. That standard is not unique to a
25 director. But they're trying to use it as a sword saying,

1 no, wait a minute. The self-dealing bright line rule
2 doesn't apply to us because everything has to just be
3 viewed and we were exercising good faith. And so I think
4 it's also important to look at a director, you know,
5 they've got this -- it's a business. It's sometimes called
6 the business judgment rule.

7 And so I looked, and the case that I'm looking at is
8 it's called *Antioch Litigation Trust*; A-N-T-I-O-C-H. By
9 the way, the other thing I'll admit that I think really
10 puts the question before the Court on a legal issue is I
11 think the Court has said the self-dealing applies to all
12 fiduciaries. We're not gonna create exceptions because
13 they haven't so far. And if the Court created an
14 exception, I think it would be the first time an exception
15 has been made. So I will agree there isn't a case where
16 the director -- and since the bright line rule has been
17 enacted, I don't think there's a case where they let a
18 director out of -- nope, we're not going to apply the
19 bright line rule to a director who's a fiduciary. And so I
20 think it is kind of an issue of first impression for this
21 Court to look at.

22 But the *Antioch* case, which is 738 F.Supp.2d 758, and
23 the quote is from page 774. It kind of summarized kind of
24 what we're arguing about here. It said, quote, "Since the
25 business judgment rule was intended for directors who act

1 reasonably, and not for the purpose of protection against
2 self-dealing, the rule does not apply to the conflicted
3 directors with respect to the transaction."

4 And then in *Smith v. Wilbur*, which is a bankruptcy
5 case, another Court said, quote, "The business judgment
6 rule does not operate to protect self-dealing by directors
7 and officers or insulate from liability." There's a
8 Delaware case -- 823 F.Supp 448 and page 454. It says,
9 quote, "The business judgment rule presumes that in making
10 a business decision, actions have been on an informed basis
11 and in good faith." The rule was intended for those who
12 act reasonably, and it's not a protection against
13 self-dealing.

14 Another case *In Re National Century Financial*
15 *Enterprises*, 504 F.Supp.2d 287 at page 13. The business
16 judgment rule does not protect directors who engage in
17 self-dealing. Why does that make sense? That's not any
18 different than what South Dakota law has said. Fiduciaries
19 are held to a higher standard than everyone else. And the
20 good faith standard that they're saying, well, Mr. Hurst,
21 the rule isn't strict liability, it's good faith. Well,
22 that's not really saying anything different than I want to
23 use good faith as a shield to protect myself against the
24 bright line rule against self-dealing.

25 And so I think it's an issue. I think it's an issue

1 of law for the Court. I think it's a pretty narrow issue.
2 We're gonna have to decide it sooner or later, because
3 we're gonna have to instruct the jury sooner or later.

4 We are seeking the Court's guidance now because I
5 think it will also change discovery dramatically that's
6 still gonna happen before trial. And so we've put the
7 issue before the Court. So that's where we are on it. And
8 I appreciate you letting me kind of keep going. So thank
9 you, Your Honor.

10 **THE COURT:** I'm not putting my hand to my chin to look
11 impatient, but scholarly. So please don't feel rushed. I
12 have a few questions.

13 **MR. SABERS:** Yes.

14 **THE COURT:** Isn't there at least, arguably, some extrinsic
15 evidence written of Dee's intent to share her largess with
16 Travis and Julie? Number one, she personally transfers the
17 pickups to that SAR property to Travis and Julie. Number
18 two, she transfers -- on her own -- the land to Travis and
19 Julie for what we'll call a bargained rate. Turned out to
20 be even better bargain than one would have anticipated.
21 But she does those two things individually. Aren't those
22 two acts, at least arguably, extrinsic written evidence of
23 her intent to allow him to self-deal from SAR?

24 **MR. SABERS:** I would say two things. Number one, the
25 transfers of the two pickups that we are talking about and

1 relying upon in our brief are not those same pickups.

2 **THE COURT:** No, I know. I'm talking about the SAR. I'm
3 not talking about Travis buying pickups. I'm talking about
4 Dee going to the -- and I understand you objected as
5 irrelevant to their statement about Dee transferring those
6 two titles from SAR to -- or whatever pickup titles. I
7 don't know how many there were. So I'm not talking about
8 the transfers to Travis, I'm talking Dee's personal action
9 of moving those SAR pickups to the Hursts and then moving
10 her land to the Hursts knowing full well that she could
11 have given it to SAR at the time.

12 **MR. SABERS:** As to the pickups, if it was the -- Dee was
13 shareholder. She owned the corporation. If it was Dee,
14 the shareholder, and she did it, there could be a question.
15 But as to the two transactions where we're asking for the
16 application of the bright line rule -- in other words, as
17 to those two transactions, there is no question that that
18 was self-dealing and there's no extrinsic evidence. I
19 don't believe that that -- even if you look at -- like, one
20 of those cases is a power of attorney case, and it says any
21 person and it gives wide ranging discretion of power of
22 attorney. And the Court says no, no, it has to say --
23 literally -- has to say you can self-deal.

24 **THE COURT:** Your bright line rule.

25 **MR. SABERS:** Yeah.

1 **THE COURT:** And it has to say you can self-deal in this
2 instance.

3 **MR. SABERS:** Yeah.

4 **THE COURT:** My letting you self-deal with A, B, and C has
5 nothing to do with your authority to self-deal with Dee.

6 **MR. SABERS:** Correct.

7 **THE COURT:** That's what you're saying?

8 **MR. SABERS:** I think that's what the Court said. Because
9 they -- I mean, they admitted that they have cranked up the
10 standard, and I think they've done it, because they say
11 number one, the nature of the relationship. We have a
12 principle and it's the highest duty. And they also they
13 say -- and because the opportunities are there, because
14 it's a relationship of trust, the opportunities are there
15 for somebody to self-deal. So if you're gonna do it, you
16 should go to your principle and say, hey, will you write
17 something out that says yes, you can use corporate funds to
18 go buy yourself a pickup? That's not a difficult thing.
19 And that's kind of what the Court talks about.

20 It's not hard to put this in writing, but if you
21 don't, we're gonna hold you to it. And I know you're gonna
22 complain and I know you're gonna wanna talk about
23 somebody's intention and all these other things, but those
24 are simply oral statements. They use the word explicit
25 commonly. So, yeah, that's my position.

1 **THE COURT:** Okay.

2 **MR. SABERS:** As to the land, I think it's -- and that's
3 something I'm glad you brought up, because I think there is
4 a different -- okay, we have a self-dealing account and
5 you've got usurpation of corporate opportunity.

6 **THE COURT:** Right.

7 **MR. SABERS:** I think they're different. And I think
8 they're different because they're a different standard.
9 Now, I think Mr. Hurst's testimony is also undisputed that
10 that was a corporate opportunity and that he took advantage
11 of it. And I don't think there's anything in writing, but
12 I can tell you that I think the self-dealing law is
13 absolutely black and white. I'm not saying I don't think
14 we also get summary judgment as to usurpation of corporate
15 opportunity, but maybe that's a closer issue. I think
16 self-dealing is just -- it's -- I just think the Supreme
17 Court means business.

18 **THE COURT:** So you're saying a jury shouldn't have an
19 opportunity to hear Travis testify, "I believe that I had
20 the authority to engage in these transactions," and let the
21 jury decide whether to believe him or not, assuming that
22 we're gonna bar any evidence of Dee's statements to Travis
23 that these transactions were okay?

24 **MR. SABERS:** I believe as to the identified events in the
25 brief, I believe that's the question for the Court as a

1 matter of law. Because if you apply the bright line rule,
2 the Court said -- I mean, that's really what the Court has
3 put to the trial Courts. And they stated, quote, "We have
4 adopted a bright line rule that no oral extrinsic evidence
5 can be entered." He can't say well, you know, we were
6 sitting at the kitchen and she wanted me to have a pickup.
7 I don't believe you can say that as to the pickup he bought
8 for himself with corporate funds.

9 **THE COURT:** But can't he say I believed that I had the
10 authority to -- he gets around that ruling about her words
11 to him not being admissible by saying, I believed that I
12 had the authority to do that.

13 **MR. SABERS:** I don't believe that his beliefs matter one
14 bit. And I don't think the Supreme Court thought those
15 beliefs mattered either, otherwise they would have let
16 Mr. Stoebner out of his duty, they would allow Mr. Studt
17 out of his duty, they would have let Mr. Moller out of his
18 duty. All of these are summary judgments on fiduciary
19 duty.

20 I know that summary judgment isn't granted often. But
21 the Supreme Court, the last three cases on this issue, they
22 have affirmed summary judgment because there was nothing in
23 writing to authorize self-dealing after fiduciary. I hope
24 I answered the Court's question.

25 **THE COURT:** Does the scope of duty owed by a corporate

1 officer to the shareholders differ depending on what type
2 of corporation it is? Whether it's a closely held family
3 corporation that passed from Dad to Mom and then is gonna
4 pass in some fashion to kids versus arm's length people
5 like the folks in Deadwood who fought over the Hickock
6 hotel. Does the nature of the corporation or the
7 relationships between the director, that allegedly
8 malfeasing director, and the owner, does that matter to the
9 analysis?

10 **MR. SABERS:** As to the specific issue before the Court,
11 which is self-dealing and the bright line rule, I would say
12 no. As to other managerial duties, they've talked about
13 it, but the issue before the Court is self-dealing and
14 corporate usurpation. As to self-dealing, I would say I
15 haven't read anything with it that would change it.

16 **THE COURT:** So Dee's intent -- her subjective intent is
17 irrelevant to what we're talking about. And if you
18 prevail, her specific desires may be subverted. And I
19 understand that that may be hard facts make difficult law.
20 But that's what I hear you saying.

21 **MR. SABERS:** I am reciting to this Court the Supreme Court,
22 regardless of Heuther's intention and even if it was
23 approved -- the Supreme Court said -- even if they
24 approved, we don't care. You've got to have a writing.
25 So, yes, I think that's the law. I do. I think that's why

1 they call it a bright line rule.

2 **THE COURT:** All right. Thank you.

3 **MR. SABERS:** You're welcome. Thank you, Your Honor. And
4 thank you.

5 **THE COURT:** Yep. Mr. Naasz?

6 **MR. NAASZ:** Thank you, Your Honor. I think Mr. Sabers
7 correctly identified the issue that the Court is being
8 asked to address. I think the fundamental distinction is
9 the lack of application of *Stoebner* and the related cases
10 regarding the scope of fiduciary duties under powers of
11 attorney to this case to this closely held family
12 corporation in which Travis Hurst was named as a director
13 in order to exercise documents at the Belle Fourche sale
14 barn.

15 Now that that's done, plaintiff seeks to impose strict
16 liability on any actions taken by the corporation that
17 benefitted Mr. Hurst personally after that time. That's
18 simply not the law. There's no strict liability. As we
19 said in our brief numerous time, the issue is one for the
20 jury and it's one of good faith. Because at the end of the
21 day, the sole shareholders and president and other
22 director, Dee Smith, Travis' mother-in-law who Travis has
23 ranching with for decades, her intent does matter, and the
24 jury should be allowed to hear all circumstances relevant
25 to her intent, relevant to what she wanted to do with her

1 property, because she's the sole shareholder. That's
2 important to the determination at the end of the day as to
3 whether or not Travis Hurst breached any duty. And it's
4 not a strict liability standard. Not simply because Travis
5 was listed as a director can he no longer benefit from the
6 corporation. You go back to the *Schurr* case that we cited
7 in our brief, as cited in *Case v. Murdock*, which the Court
8 just discussed regarding the Hickock property.

9 Well, a director is not prohibited from dealing with
10 his corporation. It doesn't say anything about writing
11 authorizing the dealing with the corporation. It just says
12 the director is not prohibited from dealing with the
13 corporation. That decision was affirmed in *Case v. Murdock*
14 1992, addressed again in 1995. You look the at the statute
15 we cited in our brief, I believe it's 37-180-63-1.1.

16 It's a fair and standard at the end of the day. No
17 director can be held liable for a self-dealing transaction
18 if it was fair to the corporation. Here the Court very
19 clearly recognizes this is a family corporation closely
20 held. Let's be honest, these people are up in the ranch in
21 Harding County, and they ranched as a family and were
22 corporate formalities not specifically followed as maybe
23 they should have been, perhaps. And if they were, we
24 wouldn't need to be here today. But what this Court is
25 being asked to do is to apply a strict liability standard

1 that says without a writing specifically authorizing each
2 individual instance of a director's benefitting from the
3 corporation, the director is strictly liable for that. And
4 the cases cited by plaintiff simply don't state that.

5 I would like to quote the full sentence from the
6 Estate of Stoenner in paragraph 23 discussing the bright
7 line rule. Quote, "We have adopted a bright line rule that
8 no oral extrinsic evidence being introduce to raise a
9 factual issue as to whether an attorney-in-fact was
10 authorized to self-deal under a power of attorney," end
11 quote. That's the bright line rule the Court articulated.
12 And if you look at *Bienash*, that's their bright line rule
13 that was articulated in that case as well. There's simply
14 no case law expanding that bright line rule out of the
15 context of an agent's powers under a power of attorney.

16 And going back to fundamental evidentiary principles,
17 that makes sense when you've got a document identifying and
18 creating the fiduciary duty. Courts don't look beyond the
19 four corners of that document to identify the scope of that
20 duty. That bright line rule certainly exists, but this
21 isn't an application of that bright line rule. This is an
22 expansion of that bright line rule into an entirely
23 different context.

24 **THE COURT:** So you're saying that a corporate officer owes
25 less fiduciary responsibility to his shareholders than --

1 or a lower duty of responsibility to his shareholders than
2 a principle holds to -- or excuse me -- than an
3 attorney-in-fact holds to his principle?

4 **MR. NAASZ:** I think the standard to be applied is the
5 utmost good faith as we've said in our brief, and that will
6 be determined based on all of the circumstances presented
7 to the jury, and they will make that factual determination.

8 **THE COURT:** Which is a lighter standard. Which is a lower
9 standard than the obligation of a power of attorney.

10 Because what you're saying, then, is if I believed in good
11 faith that I had the authority to engage in these
12 transactions that's okay. Is that right?

13 **MR. NAASZ:** I don't think the director's subjective intent
14 carries anything, but whether or not the director did in
15 fact act in good faith as determined by the jury based on
16 all the surrounding circumstances. And I don't think that
17 it's a different standard. I think the evidentiary
18 requirements -- or the evidentiary rules do slightly
19 differ. Because in an attorney-in-fact situation, you have
20 four corners of a document, and unless that power of
21 attorney specifically articulates the ability to self-deal,
22 then from an evidentiary perspective, any extrinsic oral
23 evidence doesn't get before the jury, but then makes the
24 determination as to whether or not that agent under an
25 attorney-in-fact -- did in fact operate in utmost good

1 faith.

2 And so it's not -- I don't believe it's a different
3 standard. I believe the evidentiary rules are slightly
4 different when it's involving an attorney-in-fact situation
5 from a power of attorney, and that's the distinction.
6 That's the bright line rule that the Court has continually
7 articulated.

8 **THE COURT:** So you feel that extrinsic evidence should be
9 more liberally allowed to ascertain whether a director
10 acted in good faith towards his corporation than that
11 extrinsic evidence which would be allowed in a power of
12 attorney situation?

13 **MR. NAASZ:** Yes, Your Honor. And that's what the Court has
14 said. The Court has never expanded it beyond the power of
15 attorney situation. The Court has never said we have
16 adopted a bright line rule that no oral extrinsic evidence
17 may be introduced to raise a factual issue as to whether a
18 fiduciary has engaged in self-dealing. The Court has never
19 said that. They've never applied it outside of the power
20 of attorney context.

21 And to your point earlier, Your Honor, regarding the
22 written evidence that exists in this matter, all of those
23 things will come together to allow the jury to make the
24 factual question -- to answer the factual question of
25 whether or not Travis breached his duties to the

1 corporation. And Dee's intent as the sole shareholder,
2 director and president of that corporation are not a
3 relief. This isn't strict liability. Nowhere has the
4 Court articulated the strict liability for a standard as a
5 standard for director in dealing with this corporation.
6 It's always been one of the utmost good faith. And that's
7 what the jury should be allowed to hear.

8 Now, certainly there are evidentiary rules regarding
9 hearsay or other matters that may come up, and those will
10 be figured out via motions in limine, et cetera, and those
11 are the rules by which we'll play at trial. But the rule
12 at trial does not need to be -- is not that -- nothing
13 regarding Dee's intent is allowed to come in if there's not
14 a writing.

15 What plaintiffs are asking is that any time a director
16 deals with a corporation -- you know, specifically here in
17 ranch country when the family has created a corporation,
18 they better put it in writing. And if not, the Court's
19 gonna come in and overturn those decisions. And that is
20 not -- that bright line rule has never been articulated by
21 the South Dakota Supreme Court. It would be a new
22 expansion of the rule applying to attorneys of fact
23 entirely out of context.

24 **THE COURT:** By saying that, are you saying that a family
25 ranch situation like this -- it's a corporation -- should

1 be treated differently than a corporation of four unrelated
2 individuals in Deadwood as far as the strictness of the
3 requirement of written authorization?

4 **MR. NAASZ:** I think all those things come -- again, Your
5 Honor, they go back to the good faith of the director who's
6 actually being challenged. And we can't divorce Travis'
7 actions here from the closely held context of that
8 corporation. And we cite some authority in our brief for
9 the proposition that it closely held corporations like
10 this.

11 There is a lack of distinction between directors
12 officers and shareholders. Here we have Dee Smith, the
13 sole shareholder, whose -- at the end of the day -- whose
14 desires should not be subverted by an expansion of an
15 evidentiary policy that's never been applied to this
16 situation. And that's exactly what's being asked to do
17 here -- what you're being asked to do today, Your Honor. I
18 would just like to briefly --

19 **THE COURT:** Take all the time you want.

20 **MR. NAASZ:** I don't mean to drone on. I think the -- I
21 think we all know what the issues here are. But I would
22 like to address briefly the new authority by Mr. Sabers,
23 the *Antioch Litigation Trust* and those cases discussing the
24 business judgment rule. As I sit here today, I'm not
25 prepared to discuss those. I think Mr. Sabers will agree

1 that they weren't cited in any other pleadings. With that
2 said, that is the business judgment rule, and that's not
3 what you're being asked to consider here today. Although,
4 if the Court's determination hinges on application of that
5 authority, I would reserve -- I would like to reserve the
6 opportunity to read those and address the applicability to
7 the situation.

8 **MR. SABERS:** That would only be fair, Your Honor.

9 **THE COURT:** Right. Understood.

10 **MR. SABERS:** That's one of those things where you're
11 sitting up at night and can't sleep -- and you remember
12 those nights -- and all of a sudden -- then you go and
13 look.

14 **THE COURT:** Yep.

15 **MR. NAASZ:** And we've all been there, Your Honor. The
16 there's no question about that.

17 I think -- and I'll close with two brief thoughts to
18 conclude Dee Smith's intentions should not be subverted.
19 We've got her will articulating her understanding that her
20 sons are gonna be disappointed with what she's done.
21 Those -- that evidence and all evidence regarding her
22 intent as the sole shareholder, director, and officer of
23 Smith Angus Ranch should not be kept from the jury to
24 preclude them from deciding whether or not Travis breached
25 his duty. A breach of duty is a fact question. Good faith

1 is a fact question. And that should be left to the jury
2 based on, as we said in our brief, all the circumstances
3 surrounding those decisions.

4 And, finally, *Stoebner* isn't a new bright line rule
5 that's applicable here. It's an adopted bright line rule
6 by the Supreme Court that specifically addresses the
7 attorney-in-fact context from a written power of attorney.
8 And expanding it into this context would be an
9 unprecedented expansion of that bright line rule. If there
10 are no other questions, Your Honor --

11 **THE COURT:** Just one more. You say in your undisputed
12 facts that Travis was on the SAR checking account
13 since 2000. Assuming that's relevant -- maybe it is, maybe
14 it isn't -- is there any evidence that he made transfers
15 between 2000 and 2013 or whatever year that was that we're
16 talking about that were similar in nature to buying himself
17 or his child a vehicle or buying fence posts that were
18 clearly not for the benefit of the corporation, but him
19 individually?

20 **MR. NAASZ:** As I sit here today, Your Honor, I've not
21 brought any of that evidence forward. I honestly can't say
22 one way or the other, frankly. But what I can say is,
23 again, whether there is or whether there isn't, those are
24 the circumstances that the jury will be tasked with sorting
25 out in their contemplation of whether or not Travis

1 breached his fiduciary duty. That is a relevant fact. And
2 should Mr. Sabers and the plaintiff decide to bring those
3 circumstances before the jury, assuming there are none,
4 absolutely that's something the jury should consider in
5 determining whether there's been a breach of the relevant
6 duty.

7 **THE COURT:** Okay. All right. Thank you.

8 **MR. SABERS:** Briefly, Your Honor.

9 **THE COURT:** Yes. It's your motion.

10 **MR. SABERS:** I was not aware of the ranch country exception
11 to the bright line rule in South Dakota.

12 **MR. NAASZ:** I think it's in there somewhere, Your Honor.

13 **MR. SABERS:** The second issue is I do not -- and I would
14 just reiterate our position -- because *Stoebner* starts with
15 because fiduciaries must strictly avoid any acts of
16 self-dealing. And in that case they had a fiduciary.
17 There's a bright line rule. I don't think there are levels
18 of fiduciary or a fiduciary duty. I think the reason they
19 talk about power of attorney in *Stoebner* is because that's
20 what was before the Court. And I agree, there has not been
21 yet a director question on fiduciary duty in self-dealing
22 before the Supreme Court.

23 But I would refer back to *Stoebner* in paragraph 21
24 where I think the Court is maybe foreshadowing. It says,
25 "Arguing that he had the authority to carry out this sale,

1 Heuther points to language allowing him to acquire, sell,
2 and purchase real property as Stoebner might have in an
3 ability for Heuther to, in any manner, deal with my real
4 property or personal property." That's a pretty broad
5 grant. But the Court says, quote, "We have rejected
6 similar arguments urging us to imply the right to self-deal
7 under similar grants of authority."

8 They cite the *Wyman* case. That was an
9 attorney-in-fact. And they said here -- this is
10 *Stoebner* -- there is simply no clear and unmistakable
11 language in the document allowing Heuther to self-deal.
12 And I think that's important. I mean, not only is the
13 Court saying absolutely no oral, but they're saying wait a
14 minute, in this case there was even a writing. But the
15 writing said you could acquire, sell, and purchase real
16 property. That's a broad grant. The Court even said no as
17 a matter of law, because the broad grant must say you can
18 self-deal. So they've said no oral never. And even if the
19 writing gives broad discretion, it had better say you can
20 self-deal. And that's why -- you know, I know that
21 Mr. Stoebner probably complained about the application to
22 the rule and the rest of them did as well, but it is a rule
23 nonetheless.

24 **THE COURT:** I think *Stoebner* involved easier facts to come
25 to the conclusion that the Supreme Court did than we have

1 here with this personal lawyer shopping for someone that
2 would -- and all those other things are at least discussed
3 in the *Stoebner* case.

4 **MR. SABERS:** Yep.

5 **THE COURT:** I see how the question has been framed.

6 **MR. SABERS:** And then the last thing, again, because the
7 *Stoebner* fiduciaries must strictly avoid, I don't think
8 they're gonna create an exception. But, ultimately, that's
9 what the Court has to figure out, and that's what is before
10 the Court.

11 **THE COURT:** Okay. All right. Well, it's a little more to
12 think about than I want to issue an oral ruling on, so I'm
13 gonna take this under advisement. I will get you a written
14 decision. It will come quickly. I'm quasi retired, so I
15 have time to look back through everything, the authority
16 that's been cited, and come up with a conclusion.

17 **MR. SABERS:** Thank you, Your Honor.

18 **MR. NAASZ:** Thank you, Your Honor.

19 **THE COURT:** We'll be in recess.
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22
23
24
25

1 STATE OF SOUTH DAKOTA.)
2 COUNTY OF MEADE) SS. CERTIFICATE
3

4 I, DENNON BOECKMANN, RPR, an Official Court Reporter
5 and Notary Public in the State of South Dakota, Fourth
6 Judicial Circuit, do hereby certify that I reported in
7 machine shorthand the proceedings in the above-entitled
8 matter and that Pages 1 through 30, inclusive, are a true
9 and correct copy, to the best of my ability, of my
10 stenotype notes of said proceedings had before the
11 **HONORABLE GORDON D. SWANSON**, Circuit Court Judge.

12 Dated at Sturgis, South Dakota, this 19th day of
13 August, 2020.

14
15
16
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18 /s/ Dennon Boeckmann
19 DENNON BOECKMANN, RPR
20 Official Court Reporter
21 My Commission Expires: 10/29/21
22
23
24
25

C

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HARDING)

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

SMITH ANGUS RANCH, INC. (SAR),

Plaintiff,

vs.

TRAVIS HURST, as an alleged
DIRECTOR OF SAR, and as an
individual,

Defendant and
Third-Party Plaintiff,

vs.

CRAIG SMITH and LANCE SMITH,

Third-Party Defendants.

31CIV18-000018

**PLAINTIFF AND THIRD-PARTY
DEFENDANTS' MOTION FOR
PARTIAL SUMMARY JUDGMENT**

COME NOW the Plaintiff, Smith Angus Ranch, Inc. (SAR), and Third-Party Defendants, Craig Smith and Lance Smith, pursuant to SDCL § 15-6-56 (a), and move the Court for Partial Summary Judgment. This Motion is based on the files of record of this Court, as well as the following separately filed pleadings and exhibits referenced and incorporated therein:

1. Plaintiff and Third-Party Defendants' Memorandum in Support of Motion for Partial Summary Judgment;
2. Plaintiff and Third-Party Defendants' Statement of Undisputed Facts in Support of Motion for Partial Summary Judgment; and

3. Affidavit of Michael K. Sabers with Exhibits referenced or incorporated in pleadings.

Based on such pleadings, affidavit, and the record in this case, Plaintiff and Third-Party Defendants respectfully request that this Court grant their Motion for Partial Summary Judgment on the following issues:

1. That Defendant Hurst was a Director of SAR;
 2. That Defendant Director Hurst owed SAR a fiduciary duty that included the duty to not self-deal or usurp corporate opportunity;
 3. That Defendant Director Hurst breached his duty in self-dealing;
 4. That no written authorization existed to justify self-dealing and Defendant Director's Hurst's attempt to utilize "oral" authorization fails as a matter of law; and
 5. That damages, the extent of which will be determined at trial, exist.
- Submitted this 21st day of July, 2020.

CLAYBORNE, LOOS & SABERS, LLP

/s/ Michael K. Sabers
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served true and correct copies of the foregoing **PLAINTIFF AND THIRD-PARTY DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT** upon the persons herein next named, on the date shown below, by serving the same through Odyssey File and Serve, to:

David Lust
Matthew Naasz
Gunderson, Palmer, Nelson & Ashmore
506 6th Street
P.O. Box 8045
Rapid City, SD 57709

and that such addresses are the last addresses known to the subscriber/undersigned.

Dated this 21st day of July, 2020.

/s/ Michael K. Sabers
MICHAEL K. SABERS

D

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HARDING)

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

SMITH ANGUS RANCH, INC. (SAR),

Plaintiff,

vs.

TRAVIS HURST, as an alleged
DIRECTOR OF SAR, and as an
individual,

Defendant and
Third-Party Plaintiff,

vs.

CRAIG SMITH and LANCE SMITH,

Third-Party Defendants.

31CIV18-000018

**PLAINTIFF AND THIRD-PARTY
DEFENDANTS' MEMORANDUM IN
SUPPORT OF MOTION FOR
PARTIAL SUMMARY JUDGMENT**

COME NOW the Plaintiff, Smith Angus Ranch, Inc. (hereinafter "SAR"), and Third-Party Defendants, Craig Smith and Lance Smith, through undersigned counsel, hereby submit this Memorandum in Support of Motion for Partial Summary Judgment pursuant to SDCL § 15-6-56(a). This Memorandum is submitted in support of the aforesaid Motion.

PRELIMINARY STATEMENT

Smith Angus Ranch (hereinafter "SAR") has filed this Motion for Partial Summary Judgment because there are no genuine issues as to material facts and Plaintiff is entitled to a judgment as a matter of law on Count 1-Breach of

Fiduciary Duty and Count 2-Self Dealing as set forth in its Complaint. The record is undisputed as to the following:

1. That Defendant Hurst was a Director of SAR;
 2. That Defendant Director Hurst owed SAR a fiduciary duty that included the duty to not self-deal or usurp corporate opportunity;
 3. That Defendant Director Hurst breached his duty in self-dealing;
 4. That no written authorization existed to justify self-dealing and Defendant Director Hurst's attempt to utilize "oral" authorization fails as a matter of law; and
 5. That damages, the extent of which will be determined at trial, exist.
- References to the Plaintiff's Statement of Undisputed Material Facts will be "SUMF" followed by the paragraph number. Deposition exhibits shall be referenced by "Ex.".

FACTUAL BACKGROUND

On September 11, 2018, Plaintiff commenced this action against Travis Hurst (hereinafter "Hurst") after learning Hurst engaged in self-dealing and breached the fiduciary duty he owed to SAR. (See Complaint ¶ 8,9,14). The Complaint also alleges three alternative causes of action against Hurst including usurpation of corporate opportunity, fraud and conversion. *Id* at ¶ 17-3. However, this motion is limited to Hurst's breach of fiduciary duty and self-dealing which now, based on discovery responses, and the sworn deposition testimony of Travis Hurst, is undisputed.

During her lifetime, Emma Dee Smith (hereinafter “Dee Smith”) was the sole shareholder of SAR and remained so at the time of her passing on October 24, 2015. (Complaint ¶ 2). SAR primarily ran cattle and was located in Harding County. Emma had three children Lance Smith, Craig Smith and Julie Hurst. Lance Smith (hereinafter “Lance”) and Craig Smith (hereinafter “Craig”) were appointed co-personal representatives of the Estate of Emma Dee Smith in her will. *Id.* at ¶ 3. Lance and Craig were also bequeathed any and all interest Emma had in SAR at the time of her death (primarily cattle, hay and equipment). *Id.* at ¶ 4. Lance and Craig were Directors of SAR and responsible for its wrapping up. *Id.* Prior to Emma’s death however, Hurst (Defendant and Julie Hurst’s husband) was a director of SAR. (Ex. 11; Hurst Depo. P. 11-14). Hurst worked on the ranch alongside his wife, Julie, during the period leading up to Dee Smith’s death.

In December 2014, Dee Smith signed a Power of Attorney while she was in treatment in Sioux Falls, SD. (Defendant’s Interrogatory Response No. 35; SUMF ¶ 6). Sometime thereafter, Dee Smith suffered a stroke which led her to become legally blind in the left eye and was admitted to the nursing home at Peaceful Prairie. (SUMF ¶ 7-9). She was there for one week until her passing in October 2015. (SUMF ¶ 6). Subsequently, the Estate hired counsel, and consistent with responsibilities as co-personal representative, Lance and Craig began looking into the Estate’s finances. They uncovered that Hurst had initiated and completed countless transactions that amounted to a breach of fiduciary duty and self-dealing.

ARGUMENT

A. Summary Judgement Standard

The standard for summary judgment is well known and settled in South Dakota. The Supreme Court as stated that the trial court,

... must determine whether the moving party demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law. The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party. The nonmoving party, however, must present specific facts showing that a genuine, material issue for trial exists.

Zochert v. Protective Life Ins. Co., 2018 S.D. 84, ¶19, N.W.2.

The burden of proof on a motion for summary judgment is placed on the moving party and the movant must show that there are no genuine issues of material fact and that the movant is entitled to a judgment as a matter of law. SDCL 15-6-56(c); *Wulf*, 2003 S.D. at 105, ¶17. The non-moving party, however, "... cannot merely rest on the pleading, but must present specific facts by way of 'affidavits or as otherwise provided in SDCL 15-6-56(e)'... setting forth specific facts showing the existence of genuine issues of material fact." *Wulf*, 2003 S.D. at 105, ¶18. Moreover, "... mere general allegations or denials will not prevent the issuance of summary judgment." *Id.*, at ¶18. A party opposing "... summary judgment must establish the specific facts which show that a genuine and material issue for trial exists." *Id.*, at ¶18. Finally, "... [s]ummary judgment is not the proper method to dispose of factual questions ..."; however, when "... fact questions are undisputed ..." they then become questions of law for the court to decide and are appropriately disposed

of on summary judgment. *Keystone Plaza Cond. Assn. v. Eastep*, 2004 S.D. 28, ¶8, 676 N.W.2d 842.

B. Hurst Creation of Fiduciary Duty and Breach

"The existence of a fiduciary duty and the scope of that duty are questions of law for the trial court." *Landstrom v. Shaver*, 1997 SD 25, P25, 561 N.W.2d 1, 7. "A fiduciary is defined as 'a person who is required to act for the benefit of another person on *all matters within the scope of their relationship*.'" *Dykstra v. Page Holding Co.*, 2009 SD 38, ¶ 27, 766 N.W.2d 491, 497 (quoting *Black's Law Dictionary* (8th ed. 2004)). "[D]irectors of a corporation occupy a fiduciary position in respect to the corporation and its shareholders, and are required to exercise the utmost good faith in all transactions touching a director's duty." *Case v. Murdock*, 488 N.W.2d 885, 890 (citing *Schurr v. Weaver*, 74 SD 378, 384, 53 N.W.2d 290, 293 (1952)).

To recover for breach of fiduciary duty, a plaintiff must prove: (1) that the defendant was acting as plaintiff's fiduciary; (2) that the defendant breached a fiduciary duty to plaintiff; (3) that plaintiff incurred damages; and (4) that the defendant's breach of the fiduciary duty was a cause of plaintiff's damages. *Chem-Age Indus. v. Glover*, 652 N.W.2d 756, 761 (S.D. 2002).

The fiduciary relationship between SAR and Hurst is clearly established by Hurst's testimony and South Dakota case law. Hurst admitted that he was the director and vice president of SAR in his deposition and written discovery responses. (SUMF ¶ 2 and 3). Hurst admitted that directors of corporations owe

a fiduciary duty and that the purpose of becoming a director of the corporation is to benefit the corporation and not to benefit one's self. He testified,

Q: [I]f you look at 7, it says, Defendant admits as a general proposition directors owe a fiduciary duty to corporations. Can we agree on that basic premise here today?

Mr. Naaz: I'm going to object to the degree it calls for a legal conclusion. Go ahead and answer.

A: From what I know now, yes, I would agree.

Q: And so the purpose – and can we also agree on the general proposition the purpose of becoming a director of the corporation is to benefit the corporation, not to benefit one's self, is that fair?

A: Yeah, that's fair.

(Deposition of Travis Hurst p.7:19-8:7). More importantly though, Hurst throughout his deposition testimony, admitted that his actions were not for the benefit of SAR. (SUMF ¶ 19, 25, 30, 31, 32, 33, 36, 37, 39, 40). As shown below, Hurst's breach of his fiduciary duty to SAR was encompassed in many forms including: initiating wire transfers for personal vehicles, converting assets, writing checks for personal expenses, and buying real property that SAR would have had an interest in which amount to usurpation of corporate opportunity. Therefore, based upon Hurst own admissions and as director, his duty required him to have placed the interest of SAR ahead of all other interests to include his own and to have acted with utmost good faith to have avoided any type or kind of self-dealing. The record is clear that Hurst was acting as a fiduciary for SAR, that he breached that duty by engaging in acts not for the benefit of SAR and self-dealing and that due to that breach, Plaintiff has incurred damages.

Therefore, the Plaintiff is entitled to a judgment as a matter of law on Count 1 of the Complaint.

C. Hurst Acted In Self-Dealing

As previously stated herein, when a fiduciary relationship exists a corresponding duty to not self-deal is created as well. "A fiduciary must act with utmost good faith and avoid any act of self-dealing that places [his] personal interest in conflict with [his] obligations to the beneficiaries." In re Estate of Stevenson, 2000 SD 24, ¶ 9, 605 N.W.2d 818, 821 (quoting Am. State Bank v. Adkins, 458 N.W.2d 807, 811 (S.D. 1990)). In the corporate setting the South Dakota Supreme Court has repeated stated, "[T]hat a director of a corporation has a duty to make a full and frank disclosure of the circumstances in a deal affecting the corporation and was not to undertake such dealing without sanction of the corporation." *Case v. Murdock*, 488 N.W.2d 885, 890, (1992) citing *Schurr v. Weaver*, 74 S.D. 378, 384, 53 N.W.2d 290, 293 (1952)). The doctrine of corporate opportunity has a long history in the law. Essentially, the doctrine holds that one who occupies a fiduciary relationship to a corporation may not acquire, in opposition to the corporation, property in which the corporation has an interest or tangible expectancy. *Id.* It its decision in *Case*, the Court cited with approval 3 *Fletcher Cyc. of Corp.*, § 861.1, p. 288 (1986) stating:

If the doctrine of business opportunity is to possess any vitality, the corporation or association must be given the opportunity to decide, upon full disclosure of the pertinent facts, whether it wishes to enter into a business that is reasonably incident to its present or perspective operations. Since a director is under a duty to inform the corporation of the full circumstances of the transaction, mere

disclosure of the transaction, without revealing the surrounding circumstances, is not sufficient, and it has been held that the failure to make complete disclosure constitutes constructive fraud, thereby tolling the statute of limitations.

Id. Given the clear fiduciary relationship imposed upon Hurst, Hurst's duty was to protect SAR's interests above and beyond his own interests. However, as evidenced by his own testimony, Hurst regularly placed his own personal interest ahead of the corporation. A list of some of Hurst's self-dealings follows:

1. Pickup purchase -In July 2014, Hurst bought a pickup for his son, using funds from the SAR account. Hurst testified:

Q: And so in July of 2014, you would have utilized, while acting as a director of Smith Angus Ranch, Inc., funds from Smith Angus Ranch, Inc., to buy your son a pickup?

A: Yes. That's right.

Q: Can you tell me where in your director's hat how that purchase benefited Smith Angus Ranch, Inc.?

A: It didn't.

(Deposition of Travis Hurst p. 69:3-13)

2. Second pickup purchase - In October of 2015, after Dee had a stroke just days before her death, Hurst wired money from the SAR account to buy another pickup. He admitted:

Q: You wire transferred money on October 20, 2015, from Smith Angus Ranch, Inc., account for the purchase of a vehicle that was titled in your name, correct?

A: Correct.

Q: Can you tell me how the use of Smith Angus Ranch, Inc. funds to buy a pickup that was title in your own name benefited the entity?

A: No.

Q: Did it?

A: Did it benefit the entity?

Q: Correct.

A: No.

(Deposition of Travis Hurst p. 121:13-122:5)

3. Purchase of steel fence posts by SAR for land owned by Hurst - In May of 2015, Hurst admits purchasing steel fence posts and fencing supplies out of the SAR checking account to be used on land that allegedly was owned by Hurst. He testified:

Q: Let's look at check 12261. That is a check made out to Buffalo Hardware?

A: Correct.

Q: And that is for steel posts?

A: Yep.

Q: Would you agree with me that at the time that those posts were bought, Smith Angus Ranch, Inc., did not own land?

A: Correct.

Q: In fact, if the contract for deed is enforceable, Dee doesn't own land at this point either, does she?

A: No.

Q: And so these are still posts being bought on the Smith Angus Ranch, Inc., account for land you and your wife own?

A: I'm not sure exactly where the posts went, but probably.

Q: Are you aware of any other land that you would have been putting steel posts on other than your own?

A: No.

(Deposition of Travis Hurst p. 85:6-25)

4. Purchase of approximately 6,000 acres from Dee Smith - SAR which owned the cattle, kept those cattle on land owned by Dee Smith individually. In the spring of 2015, Hurst a director of SAR, signed a contract for deed personally purchasing the land for \$200 per acre from Dee Smith. (Deposition of Travis Hurst p. 56). Following Dee's death in October of 2015, an appraisal was done on the property which appraised the land in excess of \$600 per acre. *Id.* Hurst did not offer this property to SAR despite the fact that SAR was renting the property to run its cattle on it, he testified:

Q: In your role as a director of Smith Angus Ranch, did you ever contemplate having Smith Angus Ranch acquire the property?

A: No.

Q: Okay. Do you recall the per acre price that the purchase agreement detailed?

A: I believe it was 200.

Q: An acre?

A: Yes.

Q: You subsequently become aware through the estate work that an appraisal was done on that same property?

A: Correct.

Q: And you understand that appraisal is north of 600 an acre?

A: Correct.

Q: Okay. So, again, going back to my question in regards to your role or your hat as a director of Smith Angus Ranch, there is a transaction taking place where just assuming the appraisal number and the purchase number that land is being bought for 400 an acre less than what it's worth, fair?

A: Fair.

(Deposition of Travis Hurst p. 56:12-57:8). Additionally, after the Contract for Deed was entered Hurst charged SAR one half of the 2015 calf crop, a value of \$123,500.00, as compensation for pasture rent. He testified:

Q: On the date in which you and your wife would have entered into the contract for deed on that plus-minus 6,000 acres, what was your expectation for what you

would receive for pasture rent for the Smith Angus Ranch cattle?

A: Half the calf crop.

(Deposition of Travis Hurst p. 60:8-13). So not only did Hurst acquire the land for one third of its appraised value, he then turned around and charged SAR \$123,500.00 as rent to pasture its cattle.

None of the four examples of self-dealing listed above are disputed; they can't be. However, Hurst is now desperately attempting to claim that Dee Smith orally blessed his abhorrent profiting off of the back of SAR. As explained below, that argument is prohibited.

C. No Extrinsic Evidence is Admissible to Prove Oral Authorization to Self-Deal

According to Hurst's testimony and responses to written discovery, he has taken the position that Dee Smith had given him verbal authorization to self-deal. (SUMF ¶ 12). In responding to Plaintiff's Interrogatories on this topic, Hurst answered as follows:

Interrogatory No. 25: If you contend in this litigation that your actions were authorized by Smith Angus Ranch, Inc. please identify every written document that supports such position.

ANSWER NO. 25: There are no written documents. The authorizations were all verbal from Dee Smith.

Hurst admits that there are no written documents, in the bylaws or otherwise that authorized his self-dealing actions by SAR. (SUMF ¶ 11-12). Likewise, at his deposition he testified:

Q: And so as we sit here today, and I understand discovery is continuing, but as we sit here today, you are not aware of any

written document that would have given you written authority to transfer assets from Smith Angus Ranch to yourself?

A: No.

(Travis Hurst Depo. p.25:11-16). The Supreme Court has held that if the power to self-deal is not specifically articulated in the governing document, the power to do so does not exist. *Wyman v. Bruckner*, 908 N.W.2d 170, 176 (S.D. 2018). The Supreme Court in *Stoebner* recently addressed the issue of “oral” authority in cases of breach of fiduciary duty and self-dealing and adopted a bright line rule excluding oral extrinsic evidence to raise a factual issue as to whether an attorney in fact was authorized to self-deal under a power of attorney. The Court stated:

Because fiduciaries must strictly avoid any acts of self-dealing, the authority to self-deal exists only if the power of attorney provides "clear and unmistakable language" specifically authorizing acts of self-dealing. *Id.* ¶ 14, 721 N.W.2d at 435. "Self-dealing occurs when an agent pits their personal interests against their obligations to the principal." *Wyman*, 2018 S.D. 17, ¶ 23, 908 N.W.2d at 177. Self-dealing is precluded "even when the language of a power of attorney might logically entail the ability to self-deal" if there is no explicit provision allowing it. *Id.* ¶ 22, 908 N.W.2d at 177.

“No written evidence has been introduced that clearly articulates that Stoebner authorized this act of self-dealing. Regardless of Huether’s intentions and even if Stoebner approved of the transaction, there is no admissible written evidence supporting Huether’s ability to self-deal.” *Id.* at 268-69.

“We have adopted a bright line rule that no oral extrinsic evidence may be introduced to raise a factual issue as to whether an attorney in fact was authorized to self deal under a power of attorney.” *Id.* at 268 (emphasis added).

Estate of Stoebner v. Huether, 935 N.W.2d 262, 267-68 (S.D. 2019). Here, it is undisputed that the SAR by-laws or corporate documents appointing Hurst as Director did not contain the power to self-deal, and Hurst admitted this as true. (SUMF ¶ 11-12). As such, Hurst cannot use the allegation that Dee Smith gave him verbal authority to avoid summary judgment.

However, even if this Court were to consider Hurst's claim that Dee Smith gave him verbal authority to self-deal, a review of Hurst's testimony brings this allegation into serious doubt. For instance, after Dee Smith had a stroke she was admitted to Peaceful Prairie Nursing Home for nursing care. While Dee was at Peaceful Prairie, in a failing, unresponsive state of health, Hurst wired money out of the SAR checking account to purchase a pickup in Bozeman, Montana, that was titled solely in his name. He testified:

Q: If we go down October 20, 2015.

A: Down to where:

Q: Where it starts, Client required, fourth line, right side.

A: Okay.

Q: I'll read it. Client required extensive assistance. Complains ADLs throughout day. Client not responding to commands, total assist. And I think that - - I don't know what a C with a line over it means. But it says total assist, feedings & toileting & snacks. Did I read that correctly?

A: Yep.

Q: She is not doing very well on October 20th, 2015, is she?

A: No.

Q: You wire transferred money on October 20th, 2015, from Smith Angus Ranch, Inc., account for the purchase of a vehicle that was titled in your name, correct?

A: Correct.

Q: Can you tell me how the use of Smith Angus Ranch, Inc. funds to buy a pickup that was title in your own name benefited the entity?

A: No.

Q: Did it?

A: Did it benefit the entity?

Q: Correct.

A: No.

(Deposition of Travis Hurst p. 120:2-22, 121:13-122:5)

Despite the nursing notes showing Dee Smith was 'not responding to commands', Hurst claims that Dee gave him oral authority to purchase a personal pickup. This is exactly the type of self-serving statement that the Supreme Court does not allow. Based upon the bright line rule adopted by our South Dakota Supreme Court, Hurst is prohibited from arguing that his actions of self-dealing were done so at the oral direction of Dee Smith. Consequently, the undisputed facts in this case and the governing law clearly support the conclusion that Hurst was in engaged in self-dealing and did not have the authority to self-deal in any respect. Therefore, the Plaintiff is entitled to a judgment as a matter of law on Count 2 of the Complaint.

CONCLUSION

For the foregoing reasons, Plaintiff is entitled to summary judgement as a matter of law on Count 1 and Count 2 of the Complaint in this case. By granting this Partial Summary Motion, this Court will simply be acknowledging admissions and the sworn testimony of Travis Hurst and applying settled South Dakota law. The only issue remaining for trial and a jury, therefore, would be the amount of special damages and the issue of punitive damages.

Submitted this 21st day of July, 2020.

CLAYBORNE, LOOS & SABERS, LLP

/s/ Michael K. Sabers

MICHAEL K. SABERS

TRAVIS B. JONES

*Attorneys for Plaintiff and Third-
Party Defendants*

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served true and correct copies of the foregoing **PLAINTIFF AND THIRD-PARTY DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT** upon the persons herein next named, on the date shown below, by serving the same through Odyssey File and Serve, to:

David Lust
Matthew Naasz
Gunderson, Palmer, Nelson & Ashmore
506 6th Street
P.O. Box 8045
Rapid City, SD 57709

and that such addresses are the last addresses known to the subscriber/undersigned.

Dated this 21st day of July, 2020.

/s/ Michael K. Sabers
MICHAEL K. SABERS

E

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HARDING)

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

SMITH ANGUS RANCH, INC. (SAR),

Plaintiff,

vs.

TRAVIS HURST, as an alleged
DIRECTOR OF SAR, and as an
individual,

Defendant and
Third-Party Plaintiff,

vs.

CRAIG SMITH and LANCE SMITH,

Third-Party Defendants.

31CIV18-000018

**PLAINTIFF AND THIRD-PARTY
DEFENDANTS' STATEMENT OF
UNDISPUTED MATERIAL FACTS IN
SUPPORT OF MOTION FOR
PARTIAL SUMMARY JUDGMENT**

COME NOW the Plaintiff, Smith Angus Ranch, Inc. (hereinafter "SAR"), and Third-Party Defendants, Craig Smith and Lance Smith, through undersigned counsel, and hereby submit this Statement of Undisputed Material Facts in Support of its Motion for Partial Summary Judgment.

STATEMENT OF UNDISPUTED FACTS

1. Smith Angus Ranch is a South Dakota Corporation. (Hurst Depo p. 7).
2. Hurst admits that as a general proposition, directors owe a fiduciary duty to corporations and that the purpose of becoming a director of the

corporation is to benefit the corporation and not to benefit one's self. (Hurst Depo p. 7-8).

3. SAR submitted an annual farm report dated October 30, 2013 designating Travis Hurst as vice president and director. (Hurst Depo. p. 11-14).

4. Hurst became an authorized user on a bank account in Dee Smith's name. (Hurst Depo p. 18-19).

5. Hurst was an authorized user to two accounts, the SAR corporate account and First Fidelity account. (Hurst Depo p. 19-20).

6. Dee Smith signed a Power of Attorney when she was in Sioux Falls for treatment prior to being put in Peaceful Prairie (nursing home), which she was there for a week before her passing. The Power of Attorney designated the three siblings as attorney-in fact. (Hurst Depo p. 111).

7. Prior to Dee Smith going to Peaceful Prairie she had a stroke. (Hurst Depo p. 113)

8. There were times leading up Dee's admission to Peaceful Prairie where she was incontinent. (Hurst Depo p. 114).

9. Dee became legally blind in the left eye after her stroke. (Hurst Depo p. 115).

10. That Julie Hurst was the designated authorized representative who signed the intake form when Dee was taken to Peaceful Pines. On that day, Dee was unable to sign because of her stroke and she was left side dominate. (Hurst Depo p. 117).

11. The bylaws of SAR do not authorize a director or vice president to transfer assets to themselves or any written authority to do so. (Hurst Depo. p. 26).

12. Hurst is not aware of aware of any document that would have given you authority to transfer assets from SAR to himself and asserts that they were all verbal authorizations from Dee Smith. (Hurst Depo. p. 25; Defendant's Responses to Interrogatory No. 19, 20, 25).

13. Hurst signed a check made out to West Tire out of the SAR account. (Hurst Depo p. 35).

14. Hurst admitted that West Tire is used for doing tire work on his personal vehicles and SAR vehicles. He stated that there was nothing written on the memo line of the check and that it is difficult to differentiate between personal and SAR related activities. (Hurst Depo p. 36).

15. Hurst wrote a check to Todd Anderson for hay in the amount of \$11,464.80. (Hurst Depo. p. 37).

16. The entirety of the hay bought from Todd Anderson was used for SAR and Hurst's personal cattle. (Hurst Depo p. 39).

17. The calf crop of SAR was sold at Belle Fourche Livestock Auction in 2015 between the time of Dee's death and her funeral. The revenue produced from that sale was \$212,000. (Hurst Depo. p. 61-62).

18. Hurst did not provide notice to Lance or Craig about the pending sale of the calves after Dee's passing. (Hurst Depo. p. 122).

19. In 2015, Hurst held back approximately 28 head of calves from SAR that he incorporated into his own herd. (Hurst Depo. p. 62).

20. Hurst wrote a check made out to Gary Clanton for \$720.00 for fencing supplies out of the SAR account in July 2014. In July 2014, SAR did not own any land nor did it ever (Ex. 14).

21. Hurst signed a check made out to Outlaw Motors on July 29, 2014 out of the SAR account for a pickup for his son, Dalton. (Hurst Depo. p. 68-69).

22. Hurst admitted that the purchase did not benefit SAR. (Hurst Depo. p. 68-69;122).

23. Hurst wrote a check in July 2014 made out to Bentz Equipment for \$1,974.96 out of the SAR account for a lawnmower that was located on the ranch. (Hurst Depo. p. 70-71).

24. Hurst signed a check made out to Woodys Feed & Grain in February 2015 for \$7,021 for cattle cake. (Hurst Depo. p. 81-82).

25. Hurst admitted to having his cattle herd and SAR cattle in the same winter pasture and all the cattle would have received the cake. (Hurst Depo. p. 81-82).

26. Hurst signed a check made out to Tri-County Lockers in February 2015 for \$860.00 for beef processing, which he acknowledges some of it ended up in his personal freezer. (Hurst Depo. p. 82).

27. Hurst admitted that as director of SAR, SAR entity covered the lion's share of the costs associated with his personal livestock in regards to vaccine, feed and cake. (Hurst Depo. p. 83).

28. In May of 2015, Hurst signed a check to Buffalo Hardware (check no. 12261) for steel posts out of the SAR account and admitted that the posts were bought for him and his wife, although being paid out of the SAR account. (Hurst Depo. p. 85).

29. Hurst signed a check to Harding County Highway Dept. in the amount of \$4,779.13 out of the SAR account for an auto gate and admits that the auto gate is located on land that himself and his wife own. (Hurst Depo. p. 93).

30. Hurst signed a check to Brian Williams (check no. 12272) out of the SAR account for \$1,854 for pasture rent for July 2015. Hurst admitted that there is probably not a corresponding check written to Brian by him personally for pasture rent for his cattle. (Hurst Depo. p. 96).

31. Hurst wrote a check one month prior to Dee's passing on September 16th, 2015 to Hersruds of Sturgis (Check No. 12279) for maintenance on a vehicle. (Hurst Depo. p. 99-100).

32. One month and two weeks away from Dee's passing, Hurst wrote a check for \$2,250 to Henderson Oil for fuel (Check No. 12278). Hurst acknowledges there is no way to differentiate what the fuel was being used for. (Hurst Depo. p. 100).

33. On October 22, 2015, Hurst initiated a wire transfer out of the SAR account to his son, Dalton in the amount of \$15,000. (Ex. 14; Hurst Depo. p. 102).

34. Hurst admits that it was not in the best interest of SAR, as director, to give up ownership of the entire calf crop at the branding. (Hurst Depo p. 93

35. Hurst admits that it was not in the best interest of SAR to transfer vehicles to himself in his personal name. (Hurst Depo. p. 99).

36. Hurst acknowledges that there was never any agreement about him drawing a salary. (Hurst Depo. p. 60).

37. Hurst believes that it was reasonable to receive \$123,000 for pasture rent from SAR livestock from March through the end of the year. (Hurst Depo. p. 64-65).

Submitted this 21st day of July, 2020.

CLAYBORNE, LOOS & SABERS, LLP

/s/ Michael K. Sabers

MICHAEL K. SABERS

TRAVIS B. JONES

*Attorneys for Plaintiff and Third-
Party Defendants*

2834 Jackson Blvd., Suite 201

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served true and correct copies of the foregoing **PLAINTIFF AND THIRD-PARTY DEFENDANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT** upon the persons herein next named, on the date shown below, by serving the same through Odyssey File and Serve, to:

David Lust
Matthew Naasz
Gunderson, Palmer, Nelson & Ashmore
506 6th Street
P.O. Box 8045
Rapid City, SD 57709

and that such addresses are the last addresses known to the subscriber/undersigned.

Dated this 21st day of July, 2020.

/s/ Michael K. Sabers
MICHAEL K. SABERS

F

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HARDING)

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

SMITH ANGUS RANCH, INC. (SAR),

Plaintiff,

vs.

TRAVIS HURST, as an alleged
DIRECTOR OF SAR, and as an
individual,

Defendant and
Third-Party Plaintiff,

vs.

CRAIG SMITH and LANCE SMITH,

Third-Party Defendants.

31CIV18-000018

**AFFIDAVIT OF
MICHAEL K. SABERS**

STATE OF SOUTH DAKOTA)
) SS)
COUNTY OF PENNINGTON)

Michael K. Sabers, being first duly sworn on oath, deposes and states as follows:

1. I am one of the attorneys of record for Plaintiff, Smith Angus Ranch, Inc., and Third-Party Defendants, Craig Smith and Lance Smith, in the above-entitled matter.

2. I make this Affidavit in support of Plaintiff's Statement of Undisputed Material Facts in Support of Motion for Partial Summary Judgment.

3. Attached hereto as Exhibit 1, is a true and correct copy of the relevant portions of the Deposition Transcript of Travis Hurst.

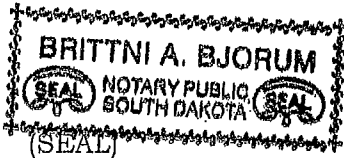
4. Attached hereto as Exhibit 2, is a true and correct copy of the relevant Responses to Defendant and Third-Party Plaintiff's Responses to Plaintiff's First Set of Interrogatories and Requests for Production of Documents.

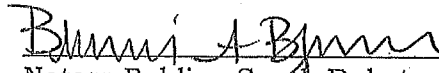
Dated this 21st day of July, 2020.



MICHAEL K. SABERS

Subscribed and sworn to before me by the said Michael K. Sabers on this 21st day of July, 2020.




Notary Public - South Dakota
My Commission Expires: 8/3/23

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served true and correct copies of the foregoing **AFFIDAVIT OF MICHAEL K. SABERS** upon the persons herein next named, on the date shown below, by serving the same through Odyssey File and Serve, to:

David Lust
Matthew Naasz
Gunderson, Palmer, Nelson & Ashmore
506 6th Street
P.O. Box 8045
Rapid City, SD 57709

and that such addresses are the last addresses known to the subscriber/undersigned.

Dated this 21st day of July, 2020.

/s/ Michael K. Sabers
MICHAEL K. SABERS

1 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
 2 COUNTY OF HARDING) FOURTH JUDICIAL CIRCUIT

3
 4 SMITH ANGUS RANCH Inc.) 31CIV18-000018
 (SAR),)
 5 Plaintiff,) Deposition of:
 6 vs.) TRAVIS HURST
 7 TRAVIS HURST, as an alleged)
 8 DIRECTOR OF SAR, and as an)
 individual,)
 9 Defendant and)
 10 Third-Party)
 Plaintiff,)
 11 v.)
 12 CRAIG SMITH and LANCE SMITH,)
 13 Third-Party)
 14 Defendants.)

15 DATE: October 18, 2019, at 8:55 a.m.

16 PLACE: Gunderson, Palmer, Nelson & Ashmore
 17 506 Sixth Street
 Rapid City, SD 57701

18 APPEARANCES:

19 FOR THE PLAINTIFF & MR. MICHAEL K. SABERS
 20 THIRD-PARTY DEFENDANTS: Clayborne, Loos & Sabers
 Attorneys at Law
 21 2834 Jackson Boulevard, Suite 201
 Rapid City, SD 57702

22 FOR THE DEFENDANT & MR. MATTHEW E. NAASZ
 23 THIRD-PARTY PLAINTIFF: Gunderson, Palmer, Nelson & Ashmore
 Attorneys at Law
 24 506 Sixth Street
 Rapid City, SD 57701

25 Also Present: Travis Hurst & Craig Smith

Carolyn M. Harkins, RPR (605) 381-5427
 P.O. Box 1886, Rapid City, SD 57709



1 Lance Smith, correct?

2 A Correct.

3 Q So as we look at this Answer, you understand that
4 there are several claims that have been brought, is
5 that fair?

6 A Yes.

7 Q So going through the general allegations, it looks
8 like you acknowledge that Smith Angus Ranch was a
9 South Dakota corporation, correct?

10 A Correct.

11 Q In fact, it was a South Dakota corporation for as
12 long as -- well, certainly for the five years prior
13 to the death of Dee Smith and for a period of time
14 after, correct?

15 A Correct.

16 Q All right. And if you look at paragraph 7, can we at
17 least agree on the general proposition, and I think
18 we do, in paragraph 7 that if you were a director of
19 a corporation that you would owe -- and if you look
20 at 7, it says, Defendant admits as a general
21 proposition directors owe a fiduciary duty to
22 corporations.

23 Can we agree on that just basic premise here
24 today?

25 MR. NAASZ: I'm going to object to the degree it

1 calls for a legal conclusion. Go ahead and answer.

2 A From what I know now, yes, I would agree.

3 Q Okay. And so the purpose -- and can we also agree on
4 the general proposition the purpose of becoming a
5 director of the corporation is to benefit the
6 corporation, not to benefit one's self, is that fair?

7 A Yeah, that's fair.

8 Q Okay. And, in fact, and you agree that at one point
9 you were a director of Smith Angus Ranch, Inc.?

10 A Correct.

11 Q All right. You've actually, based upon your status
12 as a director, have brought an affirmative claim
13 against Lance and Craig Smith, correct?

14 A Correct.

15 Q All right. If you look at your Counterclaim, which
16 is on page 4, if you look at your Counterclaim, and
17 specifically paragraph 3, go ahead and take a look at
18 that paragraph.

19 (A brief pause.)

20 Q So you've stated, as I understand it, through your
21 attorney, Mr. Lust, at that time, that Travis Hurst
22 became a director in 2013 and 2014 of Smith Angus
23 Ranch. Is that what is stated in your Counterclaim?

24 A Yes.

25 Q Okay. And you realize that your Counterclaim for

1 A No.

2 Q Okay. So who, if you look on that first page and
3 about halfway down it says, Remitter Name. And whose
4 name appears behind Remitter Name?

5 A I can't see it.

6 Q Right here (indicating). I have a better copy. For
7 the record, we'll reflect he's still looking at
8 Exhibit 11, just a little darker copy.

9 So about halfway down, sir, what does it say
10 behind Remitter Name?

11 A Julie Hurst.

12 Q Okay. This is an email -- do you have an email
13 account, travish@sdplains.com?

14 A Yes.

15 Q Okay. And so at least this document would reference
16 the fact that there is a receipt or a filing with the
17 South Dakota Secretary of State being made for Smith
18 Angus Ranch, Inc., through your email, is that fair?

19 A Yes.

20 Q Do you remember doing this?

21 A No.

22 Q Okay. If you look at the second page -- do you
23 remember -- let's do it this way.

24 Do you remember filing any electronic documents
25 with the South Dakota Secretary of State for Smith

Carolyn M. Harkins, RPR (605)381-5427
P.O. Box 1886, Rapid City, SD 57709

1 Angus Ranch, Inc.?

2 A I signed a statement once.

3 Q Okay. Electronically or physically?

4 A Electronically.

5 Q Okay. Do you remember what the purpose or what the
6 change was that you were effecting or believed to be
7 effecting when you made your electronic signature?

8 A I believe it was the report that made me director.

9 Q Okay. Let's take a look at the fourth page of
10 Exhibit 11.

11 What is the fourth page of Exhibit 11?

12 A Annual Report.

13 Q Okay. And I'm actually going to show you and your
14 attorney, just so we can work off the same, a copy of
15 the original document that was copied for purposes of
16 making Exhibit 11.

17 If you know, and you may or may not know, can you
18 tell me whose handwriting would have been on this
19 Annual Report? And the document would reflect that
20 it is an Annual Report for Smith Angus Ranch, Inc.

21 A It looks like Dee Smith's.

22 Q Okay. On this document, is there a box associated
23 with Vice President on that document?

24 A Yes.

25 Q Okay. The writing that says Vice President, and the

1 record should reflect it says, Vice President &
2 Director, there's a check by the box. Whose
3 handwriting is that?

4 A It looks like Dee Smith's.

5 Q Okay. And then at the bottom -- and this writing
6 references the fact that Travis Hurst is Vice
7 President & Director, correct?

8 A Correct.

9 Q Okay. Is this the document that you were relying
10 upon for purposes of filing that electronic filing
11 that we just discussed?

12 A No.

13 Q Okay. Was there a separate document that exists or
14 that you knew of that would have authorized you as
15 both the director and the vice president?

16 A No.

17 Q Okay. On the bottom of this page, and the reason why
18 I wanted to have the original here is there is an
19 email written in on this Annual Report.

20 Whose name or whose email appears to be written
21 in?

22 A Mine.

23 Q Okay. Is that the same email or a different email as
24 the one ultimately filed with the Secretary of State?

25 A It is different.

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1 Q Okay. Is that another email that you would commonly
2 or you would use?

3 A I don't think so. Not that I know of.

4 Q Okay. Whose handwriting is reflected on that email?

5 A It looks like Dee's.

6 Q Okay. So this is a document that you believe would
7 have been completely filled out by Dee Smith?

8 A Yes.

9 Q Did you have any input? Did you have any
10 corrections? Did you have -- did you write anything
11 on this document?

12 A No.

13 Q Okay. There is a place where it states, Dated, and
14 the reason I wanted to bring the original is, is it
15 fair to say that the Dated line has some type of a
16 sticker or whiteout over it?

17 A Yes.

18 Q Okay. What is the date that actually appears on this
19 document, however?

20 A In that Dated box?

21 Q Yes.

22 A October 30th, 2013.

23 Q Okay. And if you turn to the following page of
24 Exhibit 11 --

25 MR. SABERS: And I will try to get a better copy

- 1 A 2002 probably.
- 2 Q Have you continued to serve in that capacity or you
3 no longer do?
- 4 A No, I no longer do.
- 5 Q Okay. Have you or do you currently serve as the
6 director in any corporate entity?
- 7 A No.
- 8 Q Other than your position as the possible director of
9 the stockgrowers association in Harding County, have
10 you served as a director in other entities?
- 11 A No.
- 12 Q I'm not looking for a legal opinion, but do you
13 understand that when you become a director of an
14 entity, there are certain responsibilities that
15 you're voluntarily taking on?
- 16 A I guess so.
- 17 Q Well, you guess or you are?
- 18 A Yeah.
- 19 Q Okay. Let's just take as an example, in your
20 position as you perceived it being a director in the
21 stockgrowers association, would you have had the
22 ability to utilize stockgrowers association assets
23 for your own personal benefit?
- 24 A No.
- 25 Q Okay. My understanding is that at some point you

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1 became a joint owner or an authorized user on a bank
2 account in Dee Smith's name, is that correct?

3 A Yes.

4 Q All right. And the account that I'm talking about is
5 the account that you would have utilized on
6 approximately June 1st, 2015, to have acquired a UTV
7 or an ATV. That account, are you familiar with it?

8 A That account wouldn't be a Dee Smith account. It
9 would be a Smith Angus account.

10 Q Okay. So you think that the account that you would
11 have utilized to purchase the ATV on approximately
12 June 1st, 2015, it was a \$19,000 check, you believe
13 that was a Smith Angus Ranch account?

14 A A \$19,000 check?

15 Q Um-hmm.

16 A I'm not sure it was that check specifically, I guess.

17 Q Okay. So let's go back to that account. You were an
18 authorized signer on the Smith Angus, Inc., account
19 for quite some time, correct?

20 A Correct.

21 Q At some point you also became an authorized signer or
22 joint owner of an account that was in Dee Smith's
23 name, correct?

24 A Correct.

25 Q And which account -- do you know the ATV or the UTV

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1 I'm talking about that you would have bought in June
2 of '15?

3 A Yes.

4 Q Okay. And to be clear just for the record, because
5 we're going to be talking about these two accounts,
6 I'm going to call the Smith Angus Ranch, Inc.,
7 account, I'm going to call that the corporate
8 account, okay?

9 A All right.

10 Q Does that make sense?

11 A Yes.

12 Q Okay. And do you remember when you became a joint
13 owner or an authorized user on the account with Dee
14 Smith?

15 A No, I don't.

16 Q Do you know the account that I'm talking about,
17 however?

18 A I believe so, yeah.

19 Q Okay. What would we like to call that account just
20 so we have clarity in the record?

21 A First Fidelity account.

22 Q First Fidelity account. Okay. So we're going to
23 have the corporate account and the First Fidelity
24 account, okay?

25 A Okay.

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1 document that supports such position.

2 And that was the question, correct?

3 A Correct.

4 Q So your response are, There are no written documents.
5 The authorizations were all verbal from Dee Smith.

6 Is that correct?

7 A Correct.

8 Q Has that answer changed since the date in which you
9 would have signed these interrogatories?

10 A No.

11 Q Okay. And so as we sit here today, and I understand
12 discovery is continuing, but as we sit here today,
13 you are not aware of any written document that would
14 have given you written authority to transfer assets
15 from Smith Angus Ranch to yourself?

16 A No.

17 Q Would you agree with me at that at least to the
18 extent that it is difficult to know what a person who
19 is now deceased may or may not have said?

20 A Yes, I can understand that.

21 Q And just as a general rule, that's why it might be
22 good to have reduced things to writing?

23 A Yeah. Looking back, it would have been a good idea.

24 Q Okay. Sir, I am going to hand you what I'm going to
25 have marked as Exhibit 13.

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1 (Exhibit Number 13 marked for identification.)

2 Q Sir, what is Exhibit 13?

3 A It says, By-Laws of Smith Angus Ranch, Inc.

4 Q All right. I'll reference that to you, sir, that's
5 the bylaws of Smith Ranch Angus, Inc., and this is
6 more for the record than anything else, you don't
7 have to agree with me, I will represent to you at
8 least that these would have come out of a blue
9 three-ring binder that is entitled, Smith Angus
10 Ranch, Inc., the blue binder that we referenced
11 earlier, okay?

12 What I would like you to do for me, and you can
13 take as long as you want, is I would like you to
14 review these written bylaws and tell me if there is
15 anywhere in the bylaws where you see as a layperson
16 that would authorize the director or the vice
17 president of an entity to transfer assets to
18 themselves or written authority to do so?

19 MR. NAASZ: I'm going to object to the extent it
20 calls for a legal conclusion. Go ahead and take your
21 time reviewing the answer, please.

22 (A brief pause.)

23 A I don't see anything that gives that authority.

24 Q Okay. Thank you.

25 I'm going to, once again, hand you what has been

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1 personal expenses?

2 A Yes.

3 Q How long?

4 A At least four years.

5 Q Since the beginning of this lawsuit, which would have
6 been commenced in September of 2018, have you thrown
7 anything away in regards to accounts, account
8 statements, or bills?

9 A Probably not.

10 Q Okay. And I would just ask that you not do so, okay?

11 A Okay.

12 Q How do you differentiate from this check alone,
13 whether this would have been a four-wheeler that you
14 would have owned or a four-wheeler that Smith Angus
15 Ranch would have owned?

16 A I don't, I guess.

17 Q Okay. Moving down one check, still left column, we
18 have a check made out to West Tire. Do you see that?

19 A Yes.

20 Q So as we look at your signature on the West Tire
21 check, and this is your signature, correct?

22 A Correct.

23 Q There's nothing in the Memo line on that document.
24 Is that the entity that you would use for doing your
25 tire work?

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1 A Yes.

2 Q Is that the entity you would have used for doing your
3 tire work on your personal vehicles and on Smith
4 Angus Ranch vehicles?

5 A Yes.

6 Q Okay. So as we look at that check, would you agree
7 with me that it would be difficult to differentiate
8 between the two since there's nothing on the Memo
9 line?

10 A Yes.

11 Q All right. If you would turn to the next page, sir,
12 and it is top right corner and that would be check
13 number 11808. Do you see that?

14 A Yep.

15 Q Do you remember what the moisture -- whether it was
16 raining or not back in the 2014-2015 time period? Do
17 you remember dry time, wet time, or do you know?

18 A I don't know for sure.

19 Q Okay. Fair to say that Smith Angus Ranch, Inc., had
20 to purchase hay to feed its livestock?

21 A Occasionally, yes.

22 Q Okay. Who's Todd Anderson?

23 A He's a guy that had something for sale in northern
24 Harding County.

25 Q Okay.

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1 A He's a guy from northern Harding County that had hay
2 for sale.

3 Q All right. And we have to talk in some generalities
4 here because all we know is that you would have
5 written a check to Todd Anderson for hay in the
6 amount of \$11,464 and it looks like 80 cents, is that
7 fair?

8 A Yep.

9 Q And you heard Lance Smith say yesterday the only way
10 anybody ever sells hay is if per the ton --

11 A Yep.

12 Q -- is that correct? I just interrupted you. Is that
13 correct?

14 A Yes. That's correct.

15 Q All right. Do you have any idea what the per ton
16 price was in or about that time period?

17 A I don't recall that long ago.

18 Q Okay. Do you know what it is today?

19 A I've heard 40 to 50.

20 Q Okay. And do you remember the -- did you buy big
21 bales? Small bales? What did you buy from Todd, do
22 you remember?

23 A Large round bales.

24 Q Large round bales. And this is just a ballpark for a
25 kid that grew up in Sioux Falls, okay?

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1 A 1200.

2 Q Okay. Of course my clients explained to me that
3 depends on how much moisture is in the hay and a
4 bunch of other things, fair?

5 A Correct.

6 Q So just to come back to it. Was the entirety of this
7 hay, based upon your recollection, used for Smith
8 Angus cattle or would this have been used for your
9 personal cattle as well?

10 A Both.

11 Q Okay. So to ask a question I don't know an answer
12 to. So Todd Anderson would not have had cattle or he
13 would have a ranch and had excess hay? How do you go
14 about finding hay?

15 A Talk to people and Todd just had excess hay that
16 year.

17 Q Fair enough. As we move through that specific page,
18 the one that starts with 11808 on the top right
19 corner, do you see Dee's signature on Smith Angus
20 Ranch, Inc., checks?

21 A Yes.

22 Q Do you see the designation VP underneath her name?

23 A Yes.

24 Q And you may or may not know, but did she believe she
25 was the vice president of the entity during that time

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1 Q All right. When you filed your 2015 federal income
2 tax return, how would you have characterized that
3 \$19,000?

4 A I'm not sure.

5 Q Okay. As we sit here today, would it have been
6 income?

7 A I'm not sure.

8 Q Would it have been salary?

9 A I'm not sure.

10 Q Sir, do you recall in that joint account, do you
11 recall in the days leading up to that purchase what
12 the account balance would have been?

13 A No.

14 Q Are you aware of whether in the time period leading
15 up to the purchase of that UTV whether that account
16 would have had sufficient funds for that purchase,
17 that \$19,000 purchase?

18 A I probably did because Dee told me there was enough
19 in there.

20 Q Okay. Did you have discussions regarding transfer of
21 money into that account?

22 A No.

23 Q It was your understanding that you were drawing
24 income from that account?

25 A No.

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1 Q Was it your understanding you were drawing a salary
2 from that account?

3 A No.

4 Q Are you aware of anything in writing that would have
5 ever detailed any type of compensation package for
6 you as a director from Smith Angus Ranch?

7 A No.

8 Q On the date in which you and your wife would have
9 entered into the contract for deed on that plus-minus
10 6,000 acres, what was your expectation for what you
11 would receive for pasture rent for the Smith Angus
12 Ranch cattle?

13 A Half the calf crop.

14 Q Half the calf crop?

15 A Yes.

16 Q Okay. So it was not your expectation to continue to
17 receive rent from Smith Angus Ranch in 2015 after you
18 signed the contract for deed?

19 A Correct.

20 Q So if Smith Angus Ranch, Inc., would have paid into
21 that joint account an amount in excess of one-half of
22 the value of the calf crop after you signed the
23 purchase contract for deed, they would have given you
24 the value you expected to receive?

25 A Can you repeat the question?

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1 Q Sure can.

2 So if Smith Angus Ranch, after you signed the
3 contract for deed, would have transferred payments
4 for pasture rent to the joint account after you
5 signed the contract for deed in an amount in excess
6 of one-half of the value of the calves, you wouldn't
7 have expected additional compensation?

8 A The payment was supposed to be half the calf crop,
9 so...

10 Q Fair enough.

11 So it would either be the rent payment gets
12 returned to Smith Angus Ranch or you take half the
13 value of the calf crop, correct?

14 (A brief pause.)

15 A I suppose as the question's stated, yes.

16 Q You wouldn't expect to be double paid based upon your
17 understanding that existed at the time the contract
18 for deed was entered into, would you?

19 A No.

20 Q We know that the calf crop of the Smith Angus Ranch
21 -- Smith Angus Ranch, Inc., cattle went to the
22 Belle Fourche Livestock Auction in the time period
23 between Dee's death and Dee's funeral, correct?

24 A Correct.

25 Q And we know that the revenue produced from that calf

1 crop was \$212,000, correct?

2 A Sounds right.

3 Q Okay. And we know that you held back, approximately,
4 28 head that you now incorporated into your own herd,
5 correct?

6 A Correct.

7 Q And you take the 170 head you took to the
8 Belle Fourche Livestock Auction and you realized
9 212,000.

10 Have you ever done the math on what the value of
11 the remaining 28 head would have been assuming they
12 were all similar value?

13 A No.

14 Q Okay. Did you keep the good ones?

15 A Not necessarily.

16 Q Why do you say not necessarily?

17 A I kept the ones that got bred, the heifers.

18 Q Okay. I won't make you do math again.

19 A Okay.

20 MR. SABERS: Have you got a calculator? If you
21 don't want him doing the math, if you want me doing
22 it, I'll do it.

23 MR. NAASZ: It doesn't matter. It is what it is.

24 Q Let's do 212,000 and let's divide that by 170 head.
25 What is that per head?

- 1 A Yes.
- 2 Q And this is for vaccine?
- 3 A Yes.
- 4 Q Do you have somebody vaccinate or do you vaccinate
- 5 yourself?
- 6 A I believe at this time we were vaccinating ourselves.
- 7 Q Okay. If we look at your personal checking account,
- 8 the one that has you and Julie on it, would I find
- 9 checks made out to the Bowman Vet Clinic for vaccine?
- 10 A Possibly.
- 11 Q Is it fair to say that Smith Angus Ranch, Inc., would
- 12 have covered the lion's share of the costs associated
- 13 with your livestock in regards to vaccine, feed,
- 14 cake?
- 15 A Yeah, I suppose you can say that.
- 16 Q Would it be fair to say that the only way you could
- 17 truly tell who was covering those expenses in total
- 18 would be to do a comparison between the Smith Angus
- 19 Ranch, Inc., account, the joint owner account we've
- 20 discussed, and your personal account?
- 21 A Can you repeat the question?
- 22 Q Would it be fair to say that the best way to tell who
- 23 would have covered the cake, vet, vaccine expenses
- 24 for livestock in '13, '14 and '15, the best way to
- 25 determine who had paid for it would be to do a

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- 1 A Correct.
- 2 Q This would have been after you and your wife would
3 have signed the contract for deed to acquire the
4 6,000 acres, correct?
- 5 A Correct.
- 6 Q Let's look at check 12261. That is a check made out
7 to Buffalo Hardware?
- 8 A Correct.
- 9 Q And that is for steel posts?
- 10 A Yep.
- 11 Q Would you agree with me that at the time that those
12 posts were bought, Smith Angus Ranch, Inc., did not
13 own land?
- 14 A Correct.
- 15 Q In fact, if the contract for deed is enforceable, Dee
16 doesn't own land at this point either, does she?
- 17 A No.
- 18 Q And so these are still posts being bought on the
19 Smith Angus Ranch, Inc., account for land you and
20 your wife own?
- 21 A I'm not sure exactly where the posts went, but
22 probably.
- 23 Q Are you aware of any other land that you would have
24 been putting steel posts on other than your own?
- 25 A No.

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1 ownership of the entire calf crop at that branding?

2 MR. NAASZ: I'll impose an objection as it calls
3 for a legal conclusion as to director. Subject to
4 that, go ahead and answer, sir.

5 A Can you repeat the question?

6 MR. SABERS: Can I have it read back?

7 (Question: "You believe -- do you believe
8 wearing your director hat for Smith Angus Ranch,
9 Inc., that it was in the best interest of Smith Angus
10 Ranch, Inc., to give up ownership of the entire calf
11 crop at that branding?" read by the reporter.)

12 A No.

13 Q If we go back to check number 12266, that's the check
14 to the Harding County Highway Department?

15 A Right.

16 Q Who now owns the land in which that auto gate is
17 located?

18 A Julie and I do.

19 Q At some point did you acquire those two 80-acre
20 parcels?

21 A Yes.

22 Q And when was that?

23 A Upon Dee's death.

24 Q And what we know is June 10th, 2015, we know that at
25 that point she has cancer, doesn't she?

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1 corporate account, correct.

2 Q It is, yes.

3 A I can't say for sure, I guess, if that's the only one
4 I wrote or not.

5 Q Okay. Keep turning in Exhibit 14 to the page which
6 the check number 12272 exists.

7 A Okay.

8 Q And moving over into that left column, we discussed
9 this briefly, but at this point you are writing
10 checks to Brian Williams for Smith Angus Ranch, Inc.,
11 for \$1,854 for pasture rent for July, correct?

12 A Correct.

13 Q Is the corresponding check being written to Brian
14 Williams by you personally for pasture?

15 A Probably not.

16 Q In 2015, do you recall writing any checks out of your
17 personal account to Brian Williams for pasture?

18 A Not that I recall.

19 Q Moving on to check 12273.

20 A Okay.

21 Q That's a check written by you in July of 2015 to
22 Wick's Livestock Nutrition, LLC, and that is for
23 mineral?

24 A Correct.

25 Q Invoice number 6356 is referenced in that check,

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1 please answer.

2 A Yes.

3 Q If we look on this page, look at check 12279, bottom
4 left. We are now approximately one month of
5 September 16th, 2015, away from Dee's passing,
6 correct?

7 A Correct.

8 Q My expectation is Hersruds is Hersruds of Sturgis?

9 A Belle Fourche, probably.

10 Q Fair enough. When it references maintenance, does it
11 reference maintenance on what vehicle?

12 A I'm not sure.

13 Q In the Memo line, the reason we're not sure is it
14 simply says maintenance, right?

15 A Right.

16 Q Do you think it was in the best interest of Smith
17 Angus Ranch, Inc., for that entity to transfer
18 vehicles to you in your personal name?

19 MR. NAASZ: I'm going to object to the extent it
20 calls for a legal conclusion. Go ahead.

21 A No, it wasn't in the best interest.

22 Q That same page, check number 12278, a check in the
23 amount of \$2,250 to Henderson Oil Company. Do you
24 see that?

25 A Yes.

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1 Q We're about a month and two weeks away from Dee's
2 passing, are we not?

3 A Correct.

4 Q This is for fuel?

5 A Yes.

6 Q Is there any way to differentiate what that fuel was
7 being used for?

8 A No.

9 Q If you turn to the next page, sir, the check number
10 in the top right is 12234.

11 A Yep.

12 Q Right column, third check down, check number 12281?

13 A Yep.

14 Q That would be a check made out to Brian Williams
15 signed by you for pasture rent for October?

16 A Correct.

17 Q Okay. If you look at the top left, Debit
18 Miscellaneous, that is the documentation from the
19 bank for a wire transfer, is it not?

20 A Yes.

21 Q That is based upon a phone call that you would have
22 made to them on October 22nd, 2015, correct?

23 A Correct.

24 Q And instead of a -- and to be clear, the joint
25 account, as we've referred to it, and the Smith Angus

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- 1 Q What time during the day would Dee have passed away?
- 2 A I don't remember for sure.
- 3 Q Okay. Do you remember what time of the day that you
- 4 would have made this wire transfer?
- 5 A Which wire transfer? Oh.
- 6 Q Thank you. The wire transfer that is reflected in
- 7 the Exhibit 14, the page Smith Angus Ranch Wire To
- 8 Dalton in the amount of \$15,000?
- 9 A I don't recall what time of day it was.
- 10 Q Would it have been during banking hours?
- 11 A Yeah.
- 12 Q Okay. Moving back to just something that we
- 13 discussed. You had referenced the fact that the auto
- 14 gate that we discussed and was the subject of that
- 15 receipt, Exhibit 15, was on two parcels each of 80
- 16 acres?
- 17 A Correct.
- 18 Q Tell me about those two 80 acres, two parcels.
- 19 A They were purchased from a neighbor.
- 20 Q By whom?
- 21 A Dee.
- 22 Q When?
- 23 A When? I believe the fall of '13. I'm not positive
- 24 on that day.
- 25 Q Which neighbor?

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1 that she was in for the last, basically, week of her
2 life?

3 A Peaceful Prairie.

4 Q Peaceful Prairie. We have a Peaceful Pines and a
5 Pine Haven and a bunch of other places. But it's
6 Peaceful Prairie. All right.

7 So you would have been aware that Emma Dee Smith
8 had signed a power of attorney when she was in Sioux
9 Falls for treatment prior to being, basically, put in
10 the Peaceful Prairie entity?

11 A Correct.

12 Q What did you recall about how that power of attorney
13 worked?

14 A I didn't know anything about it other than she had
15 signed it.

16 Q Okay. Do you know whether or not Julie Hurst had
17 also signed that power of attorney?

18 A I don't know.

19 Q A question for her?

20 A Yeah.

21 Q Do you just file one tax return for everything?

22 A Yes.

23 Q Okay. In this case, and we have produced it, but
24 have you had the opportunity to review the medical
25 records that were created in the last days of Dee

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- 1 had a stroke, had she not?
- 2 A Yes. Yes.
- 3 Q She was left side deficient after her stroke?
- 4 A Correct.
- 5 Q And she was left side prominent? In other words, she
- 6 was left-handed, she was a southpaw, wasn't she?
- 7 A Yes.
- 8 Q Do your best to explain what you recall about her
- 9 condition when she would have first shown up at
- 10 Peaceful Prairie on October 16th.
- 11 A She was walking, speaking clearly. I mean, walking
- 12 with a limp. Her -- she slept a lot, but that's
- 13 about all I recall, I guess.
- 14 Q Had her speech been affected by the stroke?
- 15 A Not really, no.
- 16 Q Prior to today, have you seen these medical records?
- 17 A No.
- 18 Q If you look at the first page, when you took her to
- 19 Peaceful Prairie, was it both you and your wife who
- 20 would have done so?
- 21 A Yes.
- 22 Q Okay. Was it right that it would have occurred on
- 23 October 16th, 2015?
- 24 A Sounds right.
- 25 Q And so just for perspective, she would have -- that

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1 would have been eight days before her passing?

2 A Correct.

3 Q I understand, sir, and I guess I should ask, but my
4 expectation is you don't have any formal medical
5 training?

6 A No, I don't.

7 Q Okay. If you look at the fourth page, do you recall
8 or were you present when they did the intake
9 interview of Dee that day?

10 A I don't recall it, I guess.

11 Q Okay. Do you recall who might have done it? If it
12 was the PA or if it was the --

13 A I would imagine it would be Jesika Floyd.

14 Q So based on your recollection of how she was doing
15 October 16th, I just kind of want to go through that
16 checklist at the bottom, that is safety
17 considerations.

18 Were there times when Dee had been incontinent
19 leading up to the time where she was brought to
20 Peaceful Prairie?

21 A Yes.

22 Q Did she have no hearing in her left ear?

23 A I believe that's right. I don't remember for sure, I
24 guess.

25 Q And that's fair, sir.

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1 Do you remember if the hearing issue in her left
2 ear had been stroke-related or had it just been that
3 she was not young?

4 A No idea.

5 Q Okay. Ambulation, you understand that means walking?

6 A Right.

7 Q And it said some?

8 A Yep. Yep.

9 Q Okay. I understood that she walked into Peaceful
10 Prairie but would she get up and walk around after
11 her stroke in anything other than out of necessity?
12 Do you know what I mean by that? Unless she had to?

13 A After she went to Peaceful Prairie?

14 Q After she had her stroke?

15 A After she had her stroke? I believe she did, but I
16 guess I wasn't with her 24 hours.

17 Q Fair. When you said that she had walked with a limp,
18 was the limp associated with the stroke that she had
19 had or had she just had one?

20 A I assume it was associated with the stroke.

21 Q Okay. There's a reference to being legally blind in
22 the left eye. Do you see that?

23 A Yep.

24 Q Was that correct?

25 A Yeah.

Carolyn M. Harkins, RPR (605) 381-5427
P.O. Box 1886, Rapid City, SD 57709

1 Dressing, Toileting, Feeding, Dressing, Meal Prep,
2 Shopping, Medications, Other, and there's a reference
3 to sometimes, is that fair?

4 A Yep.

5 Q So if you did not provide this information to the
6 nurse on that day, it would have been either Julie or
7 Dee, fair?

8 A Yeah.

9 Q What we know is that the patient or authorized
10 representative signing for that day would have been
11 Julie, correct?

12 A Correct.

13 Q And on that day, if you look at the Admission Service
14 Agreement Home Health page, if you look down, Patient
15 unable to sign because, right at the bottom?

16 A Right.

17 Q It says stroke, does it not?

18 A Yep.

19 Q And so on that day her being left-side dominant, she
20 can't write?

21 A Correct.

22 Q All right. Turning to the next page, and to be
23 clear, if we look down, the date that this was
24 signed, at least, we've got a date of October 22nd,
25 2015?

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P.O. Box 1886, Rapid City, SD 57709

1 A No.

2 Q Did it?

3 A Did it benefit the entity?

4 Q Correct.

5 A No.

6 Q I believe I've already asked this, but that vehicle

7 -- or the value of that vehicle, how did you treat

8 that on your 2015 federal income tax return?

9 A I don't know.

10 Q Did you ever have discussions with Julie Hurst, your

11 wife, about the power of attorney that existed for

12 Dee on October 20th, 2015?

13 A No.

14 Q After Dee's passing and prior to the funeral, you

15 sell the calves that had been Smith Angus Ranch,

16 Inc., calves prior to the branding that occurred on

17 June 11th, 2015. You sell those calves between the

18 date she passes and the date of the funeral, correct?

19 A Correct.

20 Q Did you provide any notice to either Lance or Craig

21 Smith that you had intended to sell those calves in

22 that time period prior to doing so?

23 A No.

24 Q If you knew that there had been a power of attorney

25 signed in Sioux Falls when she was receiving medical

Carolyn M. Harkins, RPR (605)381-5427
P.O. Box 1886, Rapid City, SD 57709

STATE OF SOUTH DAKOTA

COUNTY OF HARDING

SS

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

SMITH ANGUS RANCH, INC.,

Plaintiff,

v.

TRAVIS HURST as an alleged
DIRECTOR of SAR, and as an individual,

Defendant and Third-Party Plaintiff,

v.

CRAIG SMITH and LANCE SMITH,

Third-Party Defendants,

31CIV18-000018

**DEFENDANT AND THIRD-PARTY
PLAINTIFF'S RESPONSES TO
PLAINTIFF'S FIRST SET OF
INTERROGATORIES AND REQUESTS
FOR PRODUCTION OF DOCUMENTS**

COMES NOW Defendant and Third-Party Plaintiff and hereby submits his answers and responses to Plaintiff's First Set of Interrogatories and Requests for Production of Documents to Defendant as follows:

INTERROGATORIES

REQUEST FOR PRODUCTION NO. 1

Provide the originals or copies of all documents or other written materials which you claim support your answers to any of the interrogatories set forth below and all documents and other written materials you intend to introduce at trial to support any of your assertions or defenses in this action.

ANSWER: Please see documents bates stamped Hurst 00001 – 00692.

REQUEST FOR PRODUCTION NO. 2

Provide copies of all documents in your possession, or in the possession of any representative, accountant, etc., regarding Smith Angus Ranch, Inc. from during the time period in which you allege you were a director. These shall include, but not be limited to, bank statements, including check images, and bank account statements for the three years prior to the passing of Emma Dee Smith and for the two years after the passing of Emma Dee Smith. This would include any account in which you either deposited or withdrew



ANSWER NO. 16: See checkbook. I have been able to write checks on Smith Angus Ranch account since 2000. My ability to write checks on the Smith Angus Ranch account was not based on my status as a director.

Interrogatory No. 17: Please identify the date in which you allege you became a director of Smith Angus Ranch Inc. Please identify each and every document that supports such position, who signed it, who filed it, when it was filed, how it was filed, and where it was filed.

ANSWER NO. 17: See Answer to Interrogatory No. 15.

Interrogatory No. 18: Please identify whether any other person was present when you were conversing with Emma Dee Smith in the last three days of her life. If another person was present, identify such person.

ANSWER NO. 18: Neighbors and friends were constantly around. I do not recall a conversation with Dee during this time that did not include family or friends.

Interrogatory No. 19: Describe in detail each transaction you were involved in with Smith Angus Ranch Inc. wherein you personally acquired a financial interest or benefit to include vehicles, hay, groceries, livestock, lawn mower, or any type of monetary funds.

ANSWER NO. 19: Objection; vague and ambiguous. Subject to this objection and without waiving the same: Anything my family or I received from Smith Angus Ranch was authorized and directed by Dee Smith. Any transaction involving Smith Angus Ranch assets being transferred to me or members of my family directly benefitted our family ranching operation.

Interrogatory No. 20: Describe in detail each interest in property you received from Smith Angus Ranch Inc. during the time you allege you were a director of Smith Angus Ranch Inc.

ANSWER NO. 20: I was a director when Dee Smith transferred the vehicles to her name and my name. Defendant had no knowledge of her intention to do so prior to her taking that action. I was a director when Dee Smith instructed Julie and myself to place our brand on the entire 2015 calf crop.

Interrogatory No. 21: Describe in detail each instance in which you utilized the assets and business interests of Smith Angus Ranch Inc. to effectuate your own personal and financial gain.

ANSWER NO. 21: Daily activities using tractors and machinery were done to benefit both Smith Angus Ranch, Inc. and my family's operation. My family and I provided all the labor for Smith Angus Ranch, Inc. All such activities were performed with Dee Smith's full knowledge and authorization.

Interrogatory No. 22: Describe in detail each sale of assets (livestock), transfer of assets (wire transfer), vehicle purchased and hay converted in which you personally benefitted or received some financial interest personally.

ANSWER NO. 22: Objection vague and ambiguous, and calls for a legal conclusion as to "converted." Subject to this objection and without waiving the same: I did not personally benefit from any of the above activities. My daughter, Sadee, benefitted from the wire transfer by receiving a vehicle for graduation from high school.

Interrogatory No. 23: Identify each asset of SAR which was transferred to you during the time you allege you were acting as a director of Smith Angus Ranch Inc.

ANSWER NO. 23: See response to Interrogatory No. 20.

Interrogatory No. 24: For each such asset listed in your response to the previous Interrogatory, state the amount that you benefitted, where such asset or benefit currently resides or is deposited and invested, and its current value.

ANSWER NO. 24: See response to Interrogatory No. 20. Some vehicles are utilized on my family's ranch; two pickups and the Buick Enclave have been sold; the 2015 calf crop has been sold, except for some replacement heifers that are now part of our family's cow herd.

Interrogatory No. 25: If you contend in this litigation that your actions were authorized by Smith Angus Ranch, Inc. please identify every written document that supports such position.

ANSWER NO. 25: There are no written documents. The authorizations were all verbal from Dee Smith.

Interrogatory No. 26: Identify each individual having information regarding any communication made by Emma Smith suggesting her approval of your conduct as identified and alleged in the Answer.

ANSWER NO. 26: Julie Hurst and the witnesses set forth in Defendant's Response to Interrogatory No: 5.

Interrogatory No. 27: Please identify when you communicated to Smith Angus Ranch Inc. that you had allegedly obtained approval to acquire a vehicle for your daughter that, as you testified, you ultimately ended up owning yourself.

ANSWER NO. 27: Dee Smith started talking about getting a vehicle for Defendant's daughter, Sadee, in her senior year of high school which was the fall of 2015. A vehicle was purchased and then traded for another vehicle of the same year from me that Sadee was more comfortable driving.

Interrogatory No. 28: As an alleged director of Smith Angus Ranch Inc., please describe in detail all assets of Smith Angus Ranch Inc. two years prior to the death of Emma Dee Smith. This should include a list of all livestock, hay, equipment, and bank accounts and balances.

ANSWER NO. 28: Objection, Overly-burdensome. Subject to this objection and without waiving the same: It was my understanding that I was not a director two years prior to the death of Dee Smith. Smith Angus Ranch, Inc., has all the corporate documents and information in its possession.

Dated this 28th day of June, 2019.

Travis Hurst
Travis Hurst

State of South Dakota)
) ss.
County of Harding)

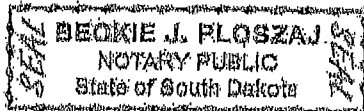
On this 28th day of June, 2019, before me, the undersigned officer, personally appeared Travis Hurst, known to me or satisfactorily proven to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same for the purposes therein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

Beckie J. Floszaj
Notary Public - South Dakota

My Commission expires: 6-16-24

(SEAL)



G

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HARDING)

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

SMITH ANGUS RANCH, INC. (SAR),

Plaintiff,

vs.

TRAVIS HURST, as an alleged
DIRECTOR OF SAR, and as an
individual,

Defendant and
Third-Party Plaintiff,

vs.

CRAIG SMITH and LANCE SMITH,

Third-Party Defendants.

31CIV18-000018

**PLAINTIFF AND THIRD-PARTY
DEFENDANTS' REPLY
MEMORANDUM IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY
JUDGMENT**

COME NOW the Plaintiff, Smith Angus Ranch, Inc. (hereinafter "SAR"), and Third-Party Defendants, Craig Smith and Lance Smith, through undersigned counsel, hereby submit this Reply Memorandum in Support of Motion for Partial Summary Judgment pursuant to SDCL § 15-6-56(a).

PRELIMINARY STATEMENT

Defendant Travis Hurst's Response is precisely the type of self-serving oral extrinsic evidence that our South Dakota Supreme Court has repeatedly stated is not admissible to raise of factual issue of whether there was authorization of a fiduciary to self-deal. Defendant's entire defense is predicated upon his claim that Dee Smith orally directed all of his admittedly self-serving transactions. As

noted, Hurst does not deny any of the acts of self-dealing set out by Plaintiff in its' original Memorandum. Rather, in an attempt to avoid summary judgment for these admitted acts, Defendant asks this court to overlook the bright line rule that our Supreme Court has established prohibiting oral extrinsic evidence so as to create a question of fact. Because Hurst has failed to cite to any statutory or case law supporting his arguments that distinguish the bright line fiduciary rule announced by our Court, this Court must grant Plaintiffs' Motion for Partial Summary Judgment.

FACTUAL BACKGROUND

On September 11, 2018, Plaintiff commenced this action against Travis Hurst (hereinafter "Hurst") after learning Hurst engaged in self-dealing and breached the fiduciary duty he owed to SAR. (See Complaint ¶ 8,9,14). The Complaint also alleges three alternative causes of action against Hurst including usurpation of corporate opportunity, fraud and conversion. *Id* at ¶ 17-3. However, this motion is limited to Hurst's breach of fiduciary duty and self-dealing which now, based on discovery responses, and the sworn deposition testimony of Travis Hurst, is undisputed.

During her lifetime, Emma Dee Smith (hereinafter "Dee Smith") was the sole shareholder of SAR and remained so at the time of her passing on October 24, 2015. (Complaint ¶ 2). SAR primarily ran cattle and was located in Harding County. Emma had three children Lance Smith, Craig Smith and Julie Hurst. Lance Smith (hereinafter "Lance") and Craig Smith (hereinafter "Craig") were appointed co-personal representatives of the Estate of Emma Dee Smith in her

will. *Id.* at ¶ 3. Lance and Craig were also bequeathed any and all interest Emma had in SAR at the time of her death (primarily cattle, hay and equipment). *Id.* at ¶ 4. Lance and Craig were Directors of SAR and responsible for its wrapping up. *Id.* Prior to Emma's death however, Hurst (Defendant and Julie Hurst's husband) was a director of SAR. (Ex. 11; Hurst Depo. P. 11-14). Hurst worked on the ranch alongside his wife, Julie, during the period leading up to Dee Smith's death.

In December 2014, Dee Smith signed a Power of Attorney while she was in treatment in Sioux Falls, SD. (Defendant's Interrogatory Response No. 35; SUMF ¶ 6). Sometime thereafter, Dee Smith suffered a stroke which led her to become legally blind in the left eye and was admitted to the nursing home at Peaceful Prairie. (SUMF ¶ 7-9). She was there for one week until her passing in October 2015. (SUMF ¶ 6). Subsequently, the Estate hired counsel, and consistent with responsibilities as co-personal representative, Lance and Craig began looking into the Estate's finances. They uncovered that Hurst had initiated and completed countless transactions that amounted to a breach of fiduciary duty and self-dealing.

ARGUMENT

A. Summary Judgement Standard

The standard for summary judgment is well known and settled in South Dakota. The Supreme Court as stated that the trial court,

... must determine whether the moving party demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law. The evidence must be viewed most favorably to the nonmoving party and

reasonable doubts should be resolved against the moving party. The nonmoving party, however, must present specific facts showing that a genuine, material issue for trial exists.

Zochert v. Protective Life Ins. Co., 2018 S.D. 84, ¶19, N.W.2.

B. Hurst Creation of Fiduciary Duty and Breach

"The existence of a fiduciary duty and the scope of that duty are questions of law for the trial court." *Landstrom v. Shaver*, 1997 SD 25, P25, 561 N.W.2d 1, 7. "A fiduciary is defined as 'a person who is required to act for the benefit of another person on *all matters within the scope of their relationship*.'" *Dykstra v. Page Holding Co.*, 2009 SD 38, ¶ 27, 766 N.W.2d 491, 497 (quoting *Black's Law Dictionary* (8th ed. 2004)). "[D]irectors of a corporation occupy a fiduciary position in respect to the corporation and its shareholders, and are required to exercise the utmost good faith in all transactions touching a director's duty." *Case v. Murdock*, 488 N.W.2d 885, 890 (citing *Schurr v. Weaver*, 74 SD 378, 384, 53 N.W.2d 290, 293 (1952)).

To recover for breach of fiduciary duty, a plaintiff must prove: (1) that the defendant was acting as plaintiff's fiduciary; (2) that the defendant breached a fiduciary duty to plaintiff; (3) that plaintiff incurred damages; and (4) that the defendant's breach of the fiduciary duty was a cause of plaintiff's damages. *Chem-Age Indus. v. Glover*, 652 N.W.2d 756, 761 (S.D. 2002).

The fiduciary relationship between SAR and Hurst is clearly established by Hurst's testimony and South Dakota case law. Hurst admitted that he was the director and vice president of SAR in his deposition and written discovery responses. (SUMF ¶ 2 and 3). Hurst admitted that directors of corporations owe

a fiduciary duty and that the purpose of becoming a director of the corporation is to benefit the corporation and not to benefit one's self. He testified,

Q: [I]f you look at 7, it says, Defendant admits as a general proposition directors owe a fiduciary duty to corporations. Can we agree on that basic premise here today?

Mr. Naaz: I'm going to object to the degree it calls for a legal conclusion. Go ahead and answer.

A: From what I know now, yes, I would agree.

Q: And so the purpose – and can we also agree on the general proposition the purpose of becoming a director of the corporation is to benefit the corporation, not to benefit one's self, is that fair?

A: Yeah, that's fair.

(Deposition of Travis Hurst p.7:19-8:7). More importantly though, Hurst throughout his deposition testimony, admitted that his actions were not for the benefit of SAR. (SUMF ¶ 19, 25, 30, 31, 32, 33, 36, 37, 39, 40). As shown below, Hurst's breach of his fiduciary duty to SAR was encompassed in many forms including: initiating wire transfers for personal vehicles, converting assets, writing checks for personal expenses, and buying real property that SAR would have had an interest in which amount to usurpation of corporate opportunity. Therefore, based upon Hurst own admissions and as director, his duty required him to have placed the interest of SAR ahead of all other interests to include his own and to have acted with utmost good faith to have avoided any type or kind of self-dealing. The record is clear that Hurst was acting as a fiduciary for SAR, that he breached that duty by engaging in acts not for the benefit of SAR and self-dealing and that due to that breach, Plaintiff has incurred damages.

Therefore, the Plaintiff is entitled to a judgment as a matter of law on Count 1 of the Complaint.

C. Hurst Acted In Self-Dealing

As previously stated herein, when a fiduciary relationship exists a corresponding duty to not self-deal is created as well. "A fiduciary must act with utmost good faith and avoid any act of self-dealing that places [his] personal interest in conflict with [his] obligations to the beneficiaries." In re Estate of Stevenson, 2000 SD 24, ¶ 9, 605 N.W.2d 818, 821 (quoting Am. State Bank v. Adkins, 458 N.W.2d 807, 811 (S.D. 1990)). In the corporate setting the South Dakota Supreme Court has repeated stated, "[T]hat a director of a corporation has a duty to make a full and frank disclosure of the circumstances in a deal affecting the corporation and was not to undertake such dealing without sanction of the corporation." *Case v. Murdock*, 488 N.W.2d 885, 890, (1992) citing *Schurr v. Weaver*, 74 S.D. 378, 384, 53 N.W.2d 290, 293 (1952)). The doctrine of corporate opportunity has a long history in the law. Essentially, the doctrine holds that one who occupies a fiduciary relationship to a corporation may not acquire, in opposition to the corporation, property in which the corporation has an interest or tangible expectancy. *Id.* It its decision in *Case*, the Court cited with approval 3 *Fletcher Cyc. of Corp.*, § 861.1, p. 288 (1986) stating:

If the doctrine of business opportunity is to possess any vitality, the corporation or association must be given the opportunity to decide, upon full disclosure of the pertinent facts, whether it wishes to enter into a business that is reasonably incident to its present or perspective operations. Since a director is under a duty to inform the corporation of the full circumstances of the transaction, mere

disclosure of the transaction, without revealing the surrounding circumstances, is not sufficient, and it has been held that the failure to make complete disclosure constitutes constructive fraud, thereby tolling the statute of limitations.

Id. Given the clear fiduciary relationship imposed upon Hurst, Hurst's duty was to protect SAR's interests above and beyond his own interests. However, as evidenced by his own testimony, Hurst regularly placed his own personal interest ahead of the corporation. A list of some of Hurst's self-dealings follows:

1. Pickup purchase -In July 2014, Hurst bought a pickup for his son, using funds from the SAR account. Hurst testified:

Q: And so in July of 2014, you would have utilized, while acting as a director of Smith Angus Ranch, Inc., funds from Smith Angus Ranch, Inc., to buy your son a pickup?

A: Yes. That's right.

Q: Can you tell me where in your director's hat how that purchase benefited Smith Angus Ranch, Inc.?

A: It didn't.

(Deposition of Travis Hurst p. 69:3-13)

2. Second pickup purchase - In October of 2015, after Dee had a stroke just days before her death, Hurst wired money from the SAR account to buy another pickup. He admitted:

Q: You wire transferred money on October 20, 2015, from Smith Angus Ranch, Inc., account for the purchase of a vehicle that was titled in your name, correct?

A: Correct.

Q: Can you tell me how the use of Smith Angus Ranch, Inc. funds to buy a pickup that was title in your own name benefited the entity?

A: No.

Q: Did it?

A: Did it benefit the entity?

Q: Correct.

A: No.

(Deposition of Travis Hurst p. 121:13-122:5)

3. Purchase of steel fence posts by SAR for land owned by Hurst - In May of 2015, Hurst admits purchasing steel fence posts and fencing supplies out of the SAR checking account to be used on land that allegedly was owned by Hurst. He testified:

Q: Let's look at check 12261. That is a check made out to Buffalo Hardware?

A: Correct.

Q: And that is for steel posts?

A: Yep.

Q: Would you agree with me that at the time that those posts were bought, Smith Angus Ranch, Inc., did not own land?

A: Correct.

Q: In fact, if the contract for deed is enforceable, Dee doesn't own land at this point either, does she?

A: No.

Q: And so these are still posts being bought on the Smith Angus Ranch, Inc., account for land you and your wife own?

A: I'm not sure exactly where the posts went, but probably.

Q: Are you aware of any other land that you would have been putting steel posts on other than your own?

A: No.

(Deposition of Travis Hurst p. 85:6-25)

4. Purchase of approximately 6,000 acres from Dee Smith - SAR which owned the cattle, kept those cattle on land owned by Dee Smith individually. In the spring of 2015, Hurst a director of SAR, signed a contract for deed personally purchasing the land for \$200 per acre from Dee Smith. (Deposition of Travis Hurst p. 56). Following Dee's death in October of 2015, an appraisal was done on the property which appraised the land in excess of \$600 per acre. *Id.* Hurst did not offer this property to SAR despite the fact that SAR was renting the property to run its cattle on it, he testified:

Q: In your role as a director of Smith Angus Ranch, did you ever contemplate having Smith Angus Ranch acquire the property?

A: No.

Q: Okay. Do you recall the per acre price that the purchase agreement detailed?

A: I believe it was 200.

Q: An acre?

A: Yes.

Q: You subsequently become aware through the estate work that an appraisal was done on that same property?

A: Correct.

Q: And you understand that appraisal is north of 600 an acre?

A: Correct.

Q: Okay. So, again, going back to my question in regards to your role or your hat as a director of Smith Angus Ranch, there is a transaction taking place where just assuming the appraisal number and the purchase number that land is being bought for 400 an acre less than what it's worth, fair?

A: Fair.

(Deposition of Travis Hurst p. 56:12-57:8). Additionally, after the Contract for Deed was entered Hurst charged SAR one half of the 2015 calf crop, a value of \$123,500.00, as compensation for pasture rent. He testified:

Q: On the date in which you and your wife would have entered into the contract for deed on that plus-minus 6,000 acres, what was your expectation for what you

would receive for pasture rent for the Smith Angus Ranch cattle?

A: Half the calf crop.

(Deposition of Travis Hurst p. 60:8-13). So not only did Hurst acquire the land for one third of its appraised value, he then turned around and charged SAR \$123,500.00 as rent to pasture its cattle.

None of the four examples of self-dealing listed above are disputed; they can't be. However, Hurst is now desperately attempting to claim that Dee Smith orally blessed his abhorrent profiting off of the back of SAR. As explained below, that argument is prohibited.

C. No Extrinsic Evidence is Admissible to Prove Oral Authorization to Self-Deal

According to Hurst's testimony and responses to written discovery, he has taken the position that Dee Smith had given him verbal authorization to self-deal. (SUMF ¶ 12). In responding to Plaintiff's Interrogatories on this topic, Hurst answered as follows:

Interrogatory No. 25: If you contend in this litigation that your actions were authorized by Smith Angus Ranch, Inc. please identify every written document that supports such position.

ANSWER NO. 25: There are no written documents. The authorizations were all verbal from Dee Smith.

Hurst admits that there are no written documents, in the bylaws or otherwise that authorized his self-dealing actions by SAR. (SUMF ¶ 11-12). Likewise, at his deposition he testified:

Q: And so as we sit here today, and I understand discovery is continuing, but as we sit here today, you are not aware of any

written document that would have given you written authority to transfer assets from Smith Angus Ranch to yourself?

A: No.

(Travis Hurst Depo. p.25:11-16). The Supreme Court has held that if the power to self-deal is not specifically articulated in the governing document, the power to do so does not exist. *Wyman v. Bruckner*, 908 N.W.2d 170, 176 (S.D. 2018). The Supreme Court in *Stoebner* recently addressed the issue of “oral” authority in cases of breach of fiduciary duty and self-dealing and adopted a bright line rule excluding oral extrinsic evidence to raise a factual issue as to whether an attorney in fact was authorized to self-deal under a power of attorney. The Court stated:

Because fiduciaries must strictly avoid any acts of self-dealing, the authority to self-deal exists only if the power of attorney provides "clear and unmistakable language" specifically authorizing acts of self-dealing. *Id.* ¶ 14, 721 N.W.2d at 435. "Self-dealing occurs when an agent pits their personal interests against their obligations to the principal." *Wyman*, 2018 S.D. 17, ¶ 23, 908 N.W.2d at 177. Self-dealing is precluded "even when the language of a power of attorney might logically entail the ability to self-deal" if there is no explicit provision allowing it. *Id.* ¶ 22, 908 N.W.2d at 177.

"No written evidence has been introduced that clearly articulates that Stoebner authorized this act of self-dealing. Regardless of Huether's intentions and even if Stoebner approved of the transaction, there is no admissible written evidence supporting Huether's ability to self-deal." *Id.* at 268-69.

"We have adopted a bright line rule that no oral extrinsic evidence may be introduced to raise a factual issue as to whether an attorney in fact was authorized to self deal under a power of attorney." *Id.* at 268 (emphasis added).

Estate of Stoebner v. Huether, 935 N.W.2d 262, 267-68 (S.D. 2019). Here, it is undisputed that the SAR by-laws or corporate documents appointing Hurst as Director did not contain the power to self-deal, and Hurst admitted this as true. (SUMF ¶ 11-12). As such, Hurst cannot use the allegation that Dee Smith gave him verbal authority to avoid summary judgment.

However, even if this Court were to consider Hurst's claim that Dee Smith gave him verbal authority to self-deal, a review of Hurst's testimony brings this allegation into serious doubt. For instance, after Dee Smith had a stroke she was admitted to Peaceful Prairie Nursing Home for nursing care. While Dee was at Peaceful Prairie, in a failing, unresponsive state of health, Hurst wired money out of the SAR checking account to purchase a pickup in Bozeman, Montana, that was titled solely in his name. He testified:

Q: If we go down October 20, 2015.

A: Down to where:

Q: Where it starts, Client required, fourth line, right side.

A: Okay.

Q: I'll read it. Client required extensive assistance. Complains ADLs throughout day. Client not responding to commands, total assist. And I think that - - I don't know what a C with a line over it means. But it says total assist, feedings & toileting & snacks. Did I read that correctly?

A: Yep.

Q: She is not doing very well on October 20th, 2015, is she?

A: No.

Q: You wire transferred money on October 20th, 2015, from Smith Angus Ranch, Inc., account for the purchase of a vehicle that was titled in your name, correct?

A: Correct.

Q: Can you tell me how the use of Smith Angus Ranch, Inc. funds to buy a pickup that was title in your own name benefited the entity?

A: No.

Q: Did it?

A: Did it benefit the entity?

Q: Correct.

A: No.

(Deposition of Travis Hurst p. 120:2-22, 121:13-122:5)

Despite the nursing notes showing Dee Smith was 'not responding to commands', Hurst claims that Dee gave him oral authority to purchase a personal pickup. This is exactly the type of self-serving statement that the Supreme Court does not allow. Based upon the bright line rule adopted by our South Dakota Supreme Court, Hurst is prohibited from arguing that his actions of self-dealing were done so at the oral direction of Dee Smith. Consequently, the undisputed facts in this case and the governing law clearly support the conclusion that Hurst was engaged in self-dealing and did not have the authority to self-deal in any respect. Therefore, the Plaintiff is entitled to a judgment as a matter of law on Count 2 of the Complaint.

CONCLUSION

Plaintiff believes all the arguments for and against summary judgment boil down to this; if the bright line rule applies then summary judgment is proper in favor of Plaintiff because Defendant does not dispute self-dealing in any of the transactions involving the corporation. If the bright line rule does not apply, then Plaintiff agrees that there remain questions of material facts and summary judgment should be denied. We believe that the statutory and case law clearly demonstrates that the undisputed material facts are that Travis Hurst owed a fiduciary to the corporation; that he breached that fiduciary duty by self-dealing; that there is no writing authorizing his self-dealing and that no oral extrinsic evidence can be admitted to create a question of fact. For these reasons, Plaintiff respectfully requests the Court enter an Order Granting Plaintiff's Motion for Partial Summary Judgment.

Submitted this 4th day of August, 2020.

CLAYBORNE, LOOS & SABERS, LLP

/s/ Michael K. Sabers
MICHAEL K. SABERS
TRAVIS B. JONES
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Party Defendants*
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msabers@clslawyers.net
tjones@clslawyers.net

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served true and correct copies of the foregoing **PLAINTIFF AND THIRD-PARTY DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT** upon the persons herein next named, on the date shown below, by serving the same through Odyssey File and Serve, to:

David Lust
Matthew Naasz
Gunderson, Palmer, Nelson & Ashmore
506 6th Street
P.O. Box 8045
Rapid City, SD 57709

and that such addresses are the last addresses known to the subscriber/undersigned.

Dated this 4th day of August, 2020.

/s/ Michael K. Sabers
MICHAEL K. SABERS

H

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HARDING)

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

SMITH ANGUS RANCH, INC. (SAR),

Plaintiff,

vs.

TRAVIS HURST, as an alleged
DIRECTOR OF SAR, and as an
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CRAIG SMITH and LANCE SMITH,

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31CIV18-000018

**PLAINTIFF AND THIRD-PARTY
DEFENDANTS' REPLY TO
DEFENDANT AND THIRD-PARTY
PLAINTIFF'S STATEMENT OF
UNDISPUTED MATERIAL FACTS**

COME NOW the Plaintiff, Smith Angus Ranch, Inc. (hereinafter "SAR"), and Third-Party Defendants, Craig Smith and Lance Smith, through undersigned counsel, and hereby submit this Reply in opposition to Defendant and Third-Party Plaintiff's Statement of Undisputed Material Facts in support of its Motion for Partial Summary Judgment.

Plaintiff objects to all of Defendant and Third-Party Plaintiff's Statement of Undisputed Material Facts that are based upon the Affidavit of Travis Hurst. The South Dakota Supreme Court has "adopted a bright line rule that no oral extrinsic evidence may be introduced to raise a factual issue as to whether an

attorney in fact was authorized to self-deal under a power of attorney.” See *Estate of Stoebner v. Huether*, 935 N.W.2d 262, 267-68 (S.D. 2019).

1. Calvin Smith and Emma Smith (“Dee”) had three children: Lance A. Smith (“Lance”), Craig J. Smith (“Craig”) and Julie Hurst (“Julie”). Affidavit of Travis Hurst at ¶ 2.

ANSWER: Objection, not relevant. Not material.

2. Dee and her husband Calvin raised their children on a ranch in Jones County outside of Murdo, South Dakota until 2000. Id. at ¶ 3.

ANSWER: Objection, not relevant. Not material.

3. In 2000, Dee and Calvin Smith sold their property in Jones County and bought a ranch in Harding County. Id. at ¶ 4.

ANSWER: Objection, not relevant. Not material.

4. By 1994, Julie Hurst and her husband Travis Hurst (“Travis”) were fully engaged in the family ranching business, living and working on the ranch with Dee and Calvin. Id. at ¶ 5.

ANSWER: Objection, not relevant. Not material.

5. Travis and Julie Hurst relocated their family to the Harding County ranch with Calvin and Dee. Id. at ¶ 6.

ANSWER: Objection, not relevant. Not material.

6. Calvin passed away in 2008. Id. at ¶ 7.

ANSWER: Objection, not relevant. Not material.

7. Dee stayed on her ranch after Calvin’s death. Id. at ¶ 8.

ANSWER: Objection, not relevant. Not material.

8. Lance and Craig Smith left the ranch prior to 2000. Id. at ¶ 9.

ANSWER: Objection, not relevant. Not material.

9. Travis and Julie raised their children with Calvin and Dee Smith on the ranch in Harding County. Id. at ¶ 10.

ANSWER: Objection, not relevant. Not material.

10. The ranch operation was a collective effort with the help of Travis, Julie and their children Dalton, Sadee and Macy. Id. at ¶ 11.

ANSWER: Objection, not relevant. Not material.

11. Travis and Julie received no salary for their efforts. Id. at ¶ 12.

ANSWER: Objection, not relevant. Not material.

12. Travis and Julie were allowed to run their personal cattle on land owned by Dee and Calvin. Id. at ¶ 13.

ANSWER: Objection, not relevant. Not material.

13. After Calvin's death, Travis became more instrumental in the operations and management of the ranch. Id. at ¶ 14.

ANSWER: Objection, not relevant. Not material.

14. Smith Angus Ranch, Inc. ("SAR") was established in approximately 1991. Id. at ¶ 15.

ANSWER: Admit.

15. During their marriage Calvin and Dee were the shareholders, officers and directors of SAR. Id. at ¶ 16.

ANSWER: Admit.

16. When Calvin died, Dee became the sole shareholder. Id. at ¶ 17.

ANSWER: Admit.

17. Dee was also the sole officer and director until 2013. Id. at ¶ 18.

ANSWER: Admit.

18. Dee was diagnosed with cancer in 2013. Id. at ¶ 19.

ANSWER: Admit.

19. Treatment often took Dee away from the ranch, to Sioux Falls, South Dakota. Id. at ¶ 20.

ANSWER: Objection, not relevant. Not material.

20. In 2013, Dee added Travis Hurst's name to the Amended Annual Report filed with the South Dakota Secretary of State's office as vice president and director. Id. at ¶ 21; Defendant's Answer to Interrogatory #15.

ANSWER: Denied. The dates included on the reports are inconsistent and suspect. Admitted that Travis was a director as he has admitted.

21. Travis was added as a director to allow for him to be able to authorize SAR cattle transactions at local sale barns. Affidavit of Travis Hurst at ¶ 22.

ANSWER: Objection, not relevant. Not material. There is nothing in writing to substantiate this allegation.

22. Travis, Dee and SAR's relationship did not change in any meaningful way after being listed as a director on the Amended Annual Reports, nor did operation of the family ranch. Id. at ¶ 23; Defendant's Answer to Interrogatory #14.

ANSWER: Objection, not relevant. Not material.

23. Travis, Julie and Dee continued to operate the ranch collectively. Affidavit of Travis Hurst at ¶ 24.

ANSWER: Objection, not relevant, vague.

24. Travis had been a signatory on SAR checks since at least July 26, 2000. Id. at ¶ 25.

ANSWER: Objection, not relevant. Not material.

25. Travis continued to utilize the SAR checking account as needed and directed by Dee to make ranch related purchases, just as he had done for years before he was listed as a director. Id. at ¶ 26.

ANSWER: Objection, not relevant. Not material. Deny that there is any evidence that Dee directed any of Travis' actions.

26. Dee remained singularly in charge of corporate documents and decisions. Anything received by Travis Hurst or his family from SAR was authorized and directed by Dee Smith. Id. at ¶ 27; Defendant's Answers to Interrogatories #14, 19.

ANSWER: Objection, vague as to time. Deny that there is any evidence that Dee directed or authorized any of the benefits received by Hurst or his family.

27. No arrangement was ever formalized placing the parties' respective obligations or authority in writing. Affidavit of Travis Hurst at ¶ 28.

ANSWER: Admit that there are no written documents authorizing any self-dealing by Hurst.

28. No shares of SAR were ever transferred to Travis or Julie. Id. at ¶ 29.

ANSWER: Admit.

29. Dee remained the sole shareholder until her death. Id. at ¶ 30. Deposition of Craig Smith pgs. 13, 47; Deposition of Lance Smith, pg. 23.

ANSWER: Admit.

30. In 2015, Dee sold the 6,000 acre ranch to Travis and Julie by a contract for deed. Affidavit of Travis Hurst at ¶ 31.

ANSWER: Admit.

31. The real property had never been a corporate asset. Id. at ¶ 32.

ANSWER: Admit.

32. The real property was owned by Dee individually after Calvin's death. Id. at ¶ 33.

ANSWER: Admit.

33. Dee executed a Last Will and Testament on April 3, 2015. Deposition of Lance Smith, pg. 102 and Exhibit 8.

ANSWER: Objection, not relevant. Not material. Notwithstanding said objections Admit.

34. In her Will, Dee forgave the principal and interest payments due for the real property. Deposition of Lance Smith, Exhibit 8.

ANSWER: Objection, not relevant. Not material. The document speaks for itself.

35. Dee's Will states "I am aware that my sons may not be happy with the provisions I have made in my Will; however I ask them to honor my wishes and accept what I have done. I love all my children very much, and equally." Deposition of Lance Smith, Exhibit 8 at Article XI.

ANSWER: Objection, not relevant. Not material. The document speaks for itself.

36. The Will devised all shares of SAR to Lance Smith and Craig Smith in equal shares. Id. at Article V.

ANSWER: Objection, not relevant. Not material. The documents speaks for itself.

37. Under Dee's direction the 2015 calf crop from the SAR cows were all branded with Travis and Julie's personal brand. Affidavit of Travis Hurst at ¶ 34.

ANSWER: Deny that there is any evidence that Dee directed that all the 2015 calf crop was to be branded with Travis and Julie's personal brand.

38. The SAR cows, roughly 200 pairs, grazed on the real property purchased by Travis and Julie. Id. at ¶ 35.

ANSWER: Admit.

39. Half of the 2015 calf crop was meant to pay for use of the pasture by the pairs during the 2015 grazing season. The other half was a gift from Dee to Travis and Julie. Id. at ¶ 36.

ANSWER: Deny that there is any evidence that Dee gifted half of the calf crop to Travis and Julie or that she directed that the other half was to served as payment for grazing.

40. Dee unilaterally went to the Harding County Treasurer's office and placed Travis's name on the SAR vehicles. Id. at ¶ 37; Defendant's Response to Interrogatory #20.

ANSWER: Objection, not relevant. Not material.

41. In May of 2015, Dee also wrote personal checks to her sons for \$100,000 each. On the memo line of the checks Dee wrote "inheritance" or "inheritance share." Deposition of Lance Smith, pgs. 99-100; Deposition of Craig Smith pgs. 53-54; Exhibit 7 to Affidavit of Lance Smith.

ANSWER: Objection, not relevant. Not material.

42. Craig Smith visited his mother, Dee, one time at the family ranch in Harding County after Dee stopped seeking cancer treatment in Sioux Falls. Deposition of Craig Smith, pgs. 9-10.

ANSWER: Objection, not relevant. Not material.

43. Plaintiff challenges Travis' actions in this matter based solely on the lack of written authorization for the transactions. Deposition of Craig Smith pgs. 27-28, 33-34, 46; Deposition of Lance Smith pgs. 56-57, 62, 74-76; Plaintiffs Response to Defendants Interrogatories # 25-27.

ANSWER: Objection, not relevant. Not material.

44. Lance Smith did not visit the family ranch between the time his father passed away and the time his mother passed away. Deposition of Lance Smith, pg. 11.

ANSWER: Objection, not relevant. Not material.

45. Dee Smith purchased a vehicle for each child of Lance Smith and Craig Smith. These vehicles were purchased between \$10,000 and \$16,000, about the time the children were juniors and seniors in high school. Deposition of Lance Smith, pgs. 65-66; Deposition of Craig Smith pgs. 35-36.

ANSWER: Objection, not relevant. Not material.

46. When visiting the ranch, Lance and Craig provided almost no assistance to their father and mother. Deposition of Craig Smith pgs. 7-8; Deposition of Lance Smith pgs. 8-10.

ANSWER: Objection, not relevant. Not material.

47. Following Calvin's Death, Dee was the President of SAR. See, 2013 Amended Annual Report, Exhibit 2 to Lance Smith Deposition.

ANSWER: Admit.

Submitted this 4th day of August, 2020.

CLAYBORNE, LOOS & SABERS, LLP

/s/ Michael K. Sabers
MICHAEL K. SABERS
TRAVIS B. JONES
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served true and correct copies of the foregoing **PLAINTIFF AND THIRD-PARTY DEFENDANTS' REPLY TO DEFENDANT AND THIRD-PARTY PLAINTIFF'S STATEMENT OF UNDISPUTED MATERIAL FACTS** upon the persons herein next named, on the date shown below, by serving the same through Odyssey File and Serve, to:

David Lust
Matthew Naasz
Gunderson, Palmer, Nelson & Ashmore
506 6th Street
P.O. Box 8045
Rapid City, SD 57709

and that such addresses are the last addresses known to the subscriber/undersigned.

Dated this 4th day of August, 2020.

/s/ Michael K. Sabers
MICHAEL K. SABERS

I

STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
)SS	
COUNTY OF HARDING)	FOURTH JUDICIAL CIRCUIT
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SMITH ANGUS RANCH Inc. (SAR),)	31CIV18-000018
)	
)	
Plaintiff,)	
v.)	DEFENDANT AND THIRD-PARTY
	)	PLAINTIFF'S RESPONSE TO
TRAVIS HURST, as an alleged	)	PLAINTIFF AND THIRD-PARTY
DIRECTOR OF SAR, and as an individual,	)	DEFENDANTS' STATEMENT OF
	)	UNDISPUTED MATERIAL FACTS
Defendant and	)	IN SUPPORT OF MOTION FOR PARTIAL
Third-Party Plaintiff,)	SUMMARY JUDGMENT
)	
v.)	
)	
CRAIG SMITH and LANCE SMITH,)	
)	
Third-Party Defendants.)	
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COME NOW the Defendant, Travis Hurst and Third-Party Plaintiff, Smith Angus Ranch, Inc. (SAR), through their attorney of record, Matthew E. Naasz of Gunderson, Palmer, Nelson & Ashmore, L.L.P., of Rapid City, South Dakota, and makes this response in opposition to Plaintiff and Third-Party Defendants' Statement of Undisputed Material Facts in Support of Motion for Partial Summary Judgment.

PLAINTIFF'S STATEMENT OF UNDISPUTED FACTS

1. Smith Angus Ranch is a South Dakota Corporation. (Hurst Depo p.7).

ANSWER: Undisputed.

2. Hurst admits that as a general proposition, directors owe a fiduciary duty to corporations and that the purpose of becoming a director of the corporation is to benefit the corporation and not to benefit one's self. (Hurst Depo p. 7-8).

ANSWER: Objection, the deposition question called for a legal conclusion.

3. SAR submitted an annual farm report dated October 30, 2013 designating Travis Hurst as vice president and director. (Hurst Depo. p. 11-14).

ANSWER: Undisputed.

4. Hurst became an authorized user on a bank account in Dee Smith's name. (Hurst Depo p. 18-19).

ANSWER: Undisputed.

5. Hurst was an authorized user to two accounts, the SAR corporate account and First Fidelity account. (Hurst Depo p. 19-20).

ANSWER: Undisputed.

6. Dee Smith signed a Power of Attorney when she was in Sioux Falls for treatment prior to being put in Peaceful Prairie (nursing home), which she was there for a week before her passing. The Power of Attorney designated the three siblings as attorney-in fact. (Hurst Depo p. 111).

ANSWER: Objection, the document speaks for itself.

7. Prior to Dee Smith going to Peaceful Prairie she had a stroke. (Hurst Depo p. 113).

ANSWER: Undisputed.

8. There were times leading up Dee's admission to Peaceful Prairie where she was incontinent. (Hurst Depo p. 114).

ANSWER: Undisputed.

9. Dee became legally blind in the left eye after her stroke. (Hurst Depo p. 115).

ANSWER: Undisputed.

10. That Julie Hurst was the designated authorized representative who signed the intake form when Dee was taken to Peaceful Pines. On that day, Dee was unable to sign because of her stroke and she was left side dominate. (Hurst Depo p. 117).

ANSWER: Undisputed.

11. The bylaws of SAR do not authorize a director or vice president to transfer assets to themselves or any written authority to do so. (Hurst Depo. p. 26).

ANSWER: Objection. The document speaks for itself. Mr. Hurst testified that he did not see anything in the bylaws granting that authority. See Hurst Deposition page 6.

12. Hurst is not aware of any document that would have given you authority to transfer assets from SAR to himself and asserts that they were all verbal authorizations from Dee Smith. (Hurst Depo. p. 25; Defendant's Responses to Interrogatory No. 19, 20, 25).

ANSWER: Undisputed.

13. Hurst signed a check made out to West Tire out of the SAR account. (Hurst Depo p. 35).

ANSWER: Undisputed.

14. Hurst admitted that West Tire is used for doing tire work on his personal vehicles and SAR vehicles. He stated that there was nothing written on the memo line of the check and that it is difficult to differentiate between personal and SAR related activities. (Hurst Depo p. 36).

ANSWER: Objection, Travis Hurst made the statement articulated in the second sentence; such statement is not an "admission."

15. Hurst wrote a check to Todd Anderson for hay in the amount of \$11,464.80. (Hurst Depo. p. 37).

ANSWER: Undisputed.

16. The entirety of the hay bought from Todd Anderson was used for SAR and Hurst's personal cattle. (Hurst Depo p. 39).

ANSWER: Undisputed that the hay was used for both SAR and Hurst's personal cattle.

17. The calf crop of SAR was sold at Belle Fourche Livestock Auction in 2015 between the time of Dee's death and her funeral. The revenue produced from that sale was \$212,000. (Hurst Depo. p. 61-62).

ANSWER: Undisputed.

18. Hurst did not provide notice to Lance or Craig about the pending sale of the calves after Dee's passing. (Hurst Depo. p. 122).

ANSWER: Not material. At the time the calves were sold, they had all been transferred Travis and Julie Hurst. See Defendant's Answer to Interrogatory #20; Answer to Interrogatory #30.

19. In 2015, Hurst held back approximately 28 head of calves from SAR that he incorporated into his own herd. (Hurst Depo. p. 62).

ANSWER: Not Material. The calves did not belong to SAR at the time they were sold in the fall of 2015. See Response to Interrogatory #20; Answer to Interrogatory #30.

20. Hurst wrote a check made out to Gary Clanton for \$720.00 for fencing supplies out of the SAR account in July 2014. In July 2014, SAR did not own any land nor did it ever (Ex. 14).

ANSWER: Undisputed. It is also undisputed that in 2014, SAR cattle were grazed on real property owned by Travis and Julie Hurst, and/or Dee Smith.

21. Hurst signed a check made out to Outlaw Motors on July 29, 2014 out of the SAR account for a pickup for his son, Dalton. (Hurst Depo. p. 68-69).

ANSWER: Undisputed. It is also undisputed that Dee Smith purchased vehicles for each of her grandchildren, including the children of Lance Smith and Craig Smith. See Deposition of Lance Smith, pg. 65-66; and Deposition of Craig Smith pg. 35-36.

22. Hurst admitted that the purchase did not benefit SAR. (Hurst Depo. p. 68-69; 122).

ANSWER: Not Material. The relevant inquiry is whether Travis Hurst exercised the utmost good faith in transactions involving SAR.

23. Hurst wrote a check in July 2014 made out to Bentz Equipment for \$1,974.96 out of the SAR account for a lawnmower that was located on the ranch. (Hurst Depo. p. 70-71).

ANSWER: Not Material. Plaintiffs ultimately received the lawnmower. See Hurst deposition page 70.

24. Hurst signed a check made out to Woodys Feed & Grain in February 2015 for \$7,021 for cattle cake. (Hurst Depo. p. 81-82).

ANSWER: Undisputed. Travis Hurst also testified that he personally bought cake during that period. See Hurst Deposition pg. 81-82.

25. Hurst admitted to having his cattle herd and SAR cattle in the same winter pasture and all the cattle would have received the cake. (Hurst Depo. p. 81-82).

ANSWER: Disputed. This statement is not consistent with Travis Hurst's testimony from the cited deposition transcript pages.

26. Hurst signed a check made out to Tri-County Lockers in February 2015 for \$860.00 for beef processing, which he acknowledges some of it ended up in his personal freezer. (Hurst Depo. p. 82).

ANSWER: Undisputed. All transactions involving SAR funds were completed with the knowledge of Dee Smith who at the time was the sole shareholder of SAR. See, Defendant's Statement of Undisputed Material Facts, ¶ 26.

27. Hurst admitted that as director of SAR, SAR entity covered the lion's share of the costs associated with his personal livestock in regards to vaccine, feed and cake. (Hurst Depo. p. 83).

ANSWER: Objection. Travis Hurst made no such admission as director of SAR. See, Hurst Depo. p. 83. Again, the arrangement between Travis and Julie Hurst and Dee Smith was that Travis and Julie would be allowed to run their cattle with those belonging to SAR or the Smith family. Defendant's SUMF at ¶ 11, 12.

28. In May of 2015, Hurst signed a check to Buffalo Hardware (check no. 12261) for steel posts out of the SAR account and admitted that the posts were bought for him and his wife, although being paid out of the SAR account. (Hurst Depo. p. 85).

ANSWER: Not Material. The relevant inquiry is whether Travis Hurst exercised the utmost good faith in any transaction involving SAR property. Dee Smith, the sole shareholder of SAR at the time of each challenged transaction authorized the transaction. Defendant's SUMF at 26. Travis Hurst did not admit that the posts were bought for him and Julie, only that they likely ended up on land owned by Travis and Julie. (Hurst Depo p. 85).

29. Hurst signed a check to Harding County Highway Dept. in the amount of \$4,779.13 out of the SAR account for an auto gate and admits that the auto gate is located on land that himself and his wife own. (Hurst Depo. p. 93).

ANSWER: To the extent this statement suggests Travis Hurst has admitted to any breach of fiduciary duty regarding this transaction – Not Material. The relevant inquiry is whether Travis Hurst exercised the utmost good faith in any transaction involving SAR property. Dee Smith, the sole shareholder of SAR at the time of each challenged transaction authorized and directed the transaction. Defendant's SUMF at ¶ 26.

30. Hurst signed a check to Brian Williams (check no. 12272) out of the SAR account for \$1,854 for pasture rent for July 2015. Hurst admitted that there is probably not a corresponding check written to Brian by him personally for pasture rent for his cattle. (Hurst Depo. p. 96).

ANSWER: Not Material. The relevant inquiry is whether Travis Hurst exercised the utmost good faith in any transaction involving SAR property. Dee Smith, the sole shareholder of SAR at the time of each challenged transaction authorized the transaction. Defendant's SUMF at ¶ 26.

31. Hurst wrote a check one month prior to Dee's passing on September 16th, 2015 to Hersruds of Sturgis (Check No. 12279) for maintenance on a vehicle. (Hurst Depo. p. 99-100).

ANSWER: Not Material. The relevant inquiry is whether Travis Hurst exercised the utmost good faith in any transaction involving SAR property. Dee Smith, the sole shareholder of

SAR at the time of each challenged transaction authorized the transaction. Defendant's SUMF at ¶ 26.

32. One month and two weeks away from Dee's passing, Hurst wrote a check for \$2,250 to Henderson Oil for fuel (Check No. 12278). Hurst acknowledges there is no way to differentiate what the fuel was being used for. (Hurst Depo. p. 100).

ANSWER: Not Material. The relevant inquiry is whether Travis Hurst exercised the utmost good faith in any transaction involving SAR property. Dee Smith, the sole shareholder of SAR at the time of each challenged transaction authorized the transaction. Defendant's SUMF at ¶ 26.

33. On October 22, 2015, Hurst initiated a wire transfer out of the SAR account to his son, Dalton in the amount of \$15,000. (Ex. 14; Hurst Depo. p. 102).

ANSWER: To the extent this statement suggests Travis Hurst has admitted to any breach of fiduciary duty regarding this transaction – Not Material. The relevant inquiry is whether Travis Hurst exercised the utmost good faith in any transaction involving SAR property. Dee Smith, the sole shareholder of SAR at the time of each challenged transaction authorized and directed the transaction. Defendant's SUMF at ¶ 26.

34. Hurst admits that it was not in the best interest of SAR, as director, to give up ownership of the entire calf crop at the branding. (Hurst Depo p. 93).

ANSWER: To the extent this statement suggests Travis Hurst has admitted to any breach of fiduciary duty regarding this transaction – Disputed. The relevant inquiry is whether Travis Hurst exercised the utmost good faith in any transaction involving SAR property. Dee Smith, the sole shareholder of SAR at the time of each challenged transaction authorized and directed the transaction. Defendant's SUMF at ¶ 26.

35. Hurst admits that it was not in the best interest of SAR to transfer vehicles to himself in his personal name. (Hurst Depo. p. 99).

ANSWER: To the extent this statement suggests Travis Hurst has admitted to any breach of fiduciary duty regarding this transaction - Disputed. The relevant inquiry is whether Travis Hurst exercised the utmost good faith in any transaction involving SAR property. Dee Smith, the sole shareholder of SAR at the time of each challenged transaction authorized and directed the transaction. Defendant's SUMF at ¶ 26. Also, a misstatement of the record. Dee Smith herself transferred the vehicles into Travis Hurst's name. Defendant's SUMF at ¶ 40.

36. Hurst acknowledges that there was never any agreement about him drawing a salary.

(Hurst Depo. p. 60).

ANSWER: Objection, misstatement of the record. The question asked if Mr. Hurst understood that he was drawing a salary from a specific account. (Hurst Depo p. 60).

37. Hurst believes that it was reasonable to receive \$123,000 for pasture rent from SAR livestock from March through the end of the year. (Hurst Depo. p. 64-65).

ANSWER: Undisputed.

Dated this 30th day of July, 2020.

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

By /s/ Matthew E. Naasz
Matthew E. Naasz
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Plaintiff*
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CERTIFICATE OF SERVICE

I certify that on July 30, 2020, a true and correct copy of Defendant and Third-Party Plaintiff's Response to Plaintiff and Third-Party Defendants' Statement of Undisputed Material Facts in Support of Motion for Partial Summary Judgment were electronically filed through South Dakota's Odyssey File and Serve Portal, upon the following individuals:

CLAYBORNE, LOOS & SABERS, LLP
MICHAEL K. SABERS
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By: /s/ Matthew E. Naasz
Matthew E. Naasz

J

STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
)SS	
COUNTY OF HARDING)	FOURTH JUDICIAL CIRCUIT
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SMITH ANGUS RANCH Inc. (SAR),)	31CIV18-000018
)	
)	
Plaintiff,)	
v.)	
)	
TRAVIS HURST, as an alleged)	DEFENDANT AND THIRD-PARTY
DIRECTOR OF SAR, and as an individual,	)	PLAINTIFF'S STATEMENT OF
	)	UNDISPUTED MATERIAL FACTS
Defendant and)	
Third-Party Plaintiff,)	
)	
v.)	
)	
CRAIG SMITH and LANCE SMITH,)	
)	
Third-Party Defendants.)	
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COMES NOW the Defendant, Travis Hurst and Third-Party Plaintiff, Smith Angus Ranch, Inc. (SAR), through their attorney of record, Matthew E. Naasz of Gunderson, Palmer, Nelson & Ashmore, L.L.P., of Rapid City, South Dakota, hereby submits this Statement of Undisputed Material Facts.

STATEMENT OF UNDISPUTED FACTS

1. Calvin Smith and Emma Smith ("Dee") had three children: Lance A. Smith ("Lance"), Craig J. Smith ("Craig") and Julie Hurst ("Julie"). *Affidavit of Travis Hurst at ¶ 2.*
2. Dee and her husband Calvin raised their children on a ranch in Jones County outside of Murdo, South Dakota until 2000. *Id. at ¶ 3.*
3. In 2000, Dee and Calvin Smith sold their property in Jones County and bought a ranch in Harding County. *Id. at ¶ 4.*

4. By 1994, Julie Hurst and her husband Travis Hurst (“Travis”) were fully engaged in the family ranching business, living and working on the ranch with Dee and Calvin. *Id. at* ¶ 5.
5. Travis and Julie Hurst relocated their family to the Harding County ranch with Calvin and Dee. *Id. at* ¶ 6.
6. Calvin passed away in 2008. *Id. at* ¶ 7.
7. Dee stayed on her ranch after Calvin’s death. *Id. at* ¶ 8.
8. Lance and Craig Smith left the ranch prior to 2000. *Id. at* ¶ 9.
9. Travis and Julie raised their children with Calvin and Dee Smith on the ranch in Harding County. *Id. at* ¶ 10.
10. The ranch operation was a collective effort with the help of Travis, Julie and their children Dalton, Sadee and Macy. *Id. at* ¶ 11.
11. Travis and Julie received no salary for their efforts. *Id. at* ¶ 12.
12. Travis and Julie were allowed to run their personal cattle on land owned by Dee and Calvin. *Id. at* ¶ 13.
13. After Calvin’s death, Travis became more instrumental in the operations and management of the ranch. *Id. at* ¶ 14.
14. Smith Angus Ranch, Inc. (“SAR”) was established in approximately 1991. *Id. at* ¶ 15.
15. During their marriage Calvin and Dee were the shareholders, officers and directors of SAR. *Id. at* ¶ 16.
16. When Calvin died, Dee became the sole shareholder. *Id. at* ¶ 17.
17. Dee was also the sole officer and director until 2013. *Id. at* ¶ 18.
18. Dee was diagnosed with cancer in 2013. *Id. at* ¶ 19.

19. Treatment often took Dee away from the ranch, to Sioux Falls, South Dakota. *Id. at ¶ 20.*
20. In 2013, Dee added Travis Hurst's name to the Amended Annual Report filed with the South Dakota Secretary of State's office as vice president and director. *Id. at ¶ 21; Defendant's Answer to Interrogatory #15.*
21. Travis was added as a director to allow for him to be able to authorize SAR cattle transactions at local sale barns. *Affidavit of Travis Hurst at ¶ 22.*
22. Travis, Dee and SAR's relationship did not change in any meaningful way after being listed as a director on the Amended Annual Reports, nor did operation of the family ranch. *Id. at ¶ 23; Defendant's Answer to Interrogatory #14.*
23. Travis, Julie and Dee continued to operate the ranch collectively. *Affidavit of Travis Hurst at ¶ 24.*
24. Travis had been a signatory on SAR checks since at least July 26, 2000. *Id. at ¶ 25.*
25. Travis continued to utilize the SAR checking account as needed and directed by Dee to make ranch related purchases, just as he had done for years before he was listed as a director. *Id. at ¶ 26.*
26. Dee remained singularly in charge of corporate documents and decisions. Anything received by Travis Hurst or his family from SAR was authorized and directed by Dee Smith. *Id. at ¶ 27; Defendant's Answers to Interrogatories #14, 19.*
27. No arrangement was ever formalized placing the parties' respective obligations or authority in writing. *Affidavit of Travis Hurst at ¶ 28.*
28. No shares of SAR were ever transferred to Travis or Julie. *Id. at ¶ 29.*
29. Dee remained the sole shareholder until her death. *Id. at ¶ 30. Deposition of Craig Smith pgs. 13, 47; Deposition of Lance Smith, pg. 23.*

30. In 2015, Dee sold the 6,000 acre ranch to Travis and Julie by a contract for deed. *Affidavit of Travis Hurst* at ¶ 31.
31. The real property had never been a corporate asset. *Id.* at ¶ 32.
32. The real property was owned by Dee individually after Calvin's death. *Id.* at ¶ 33.
33. Dee executed a Last Will and Testament on April 3, 2015. *Deposition of Lance Smith*, pg. 102 and Exhibit 8.
34. In her Will, Dee forgave the principal and interest payments due for the real property. *Deposition of Lance Smith*, Exhibit 8.
35. Dee's Will states "I am aware that my sons may not be happy with the provisions I have made in my Will; however I ask them to honor my wishes and accept what I have done. I love all my children very much, and equally." *Deposition of Lance Smith*, Exhibit 8 at Article XI.
36. The Will devised all shares of SAR to Lance Smith and Craig Smith in equal shares. *Id.* at Article V.
37. Under Dee's direction the 2015 calf crop from the SAR cows were all branded with Travis and Julie's personal brand. *Affidavit of Travis Hurst* at ¶ 34.
38. The SAR cows, roughly 200 pairs, grazed on the real property purchased by Travis and Julie. *Id.* at ¶ 35.
39. Half of the 2015 calf crop was meant to pay for use of the pasture by the pairs during the 2015 grazing season. The other half was a gift from Dee to Travis and Julie. *Id.* at ¶ 36.
40. Dee unilaterally went to the Harding County Treasurer's office and placed Travis's name on the SAR vehicles. *Id.* at ¶ 37; *Defendant's Response to Interrogatory #20*.

41. In May of 2015, Dee also wrote personal checks to her sons for \$100,000 each. On the memo line of the checks Dee wrote “inheritance” or “inheritance share.” *Deposition of Lance Smith*, pgs. 99-100; *Deposition of Craig Smith* pgs. 53-54; *Exhibit 7 to Affidavit of Lance Smith*.
42. Craig Smith visited his mother, Dee, one time at the family ranch in Harding County after Dee stopped seeking cancer treatment in Sioux Falls. *Deposition of Craig Smith*, pgs. 9-10.
43. Plaintiff challenges Travis’ actions in this matter based solely on the lack of written authorization for the transactions. *Deposition of Craig Smith* pgs. 27-28, 33-34, 46; *Deposition of Lance Smith* pgs. 56-57, 62, 74-76; *Plaintiffs Response to Defendants Interrogatories # 25-27*.
44. Lance Smith did not visit the family ranch between the time his father passed away and the time his mother passed away. *Deposition of Lance Smith*, pg. 11.
45. Dee Smith purchased a vehicle for each child of Lance Smith and Craig Smith. These vehicles were purchased between \$10,000 and \$16,000, about the time the children were juniors and seniors in high school. *Deposition of Lance Smith*, pgs. 65-66; *Deposition of Craig Smith* pgs. 35-36.
46. When visiting the ranch, Lance and Craig provided almost no assistance to their father and mother. *Deposition of Craig Smith* pgs. 7-8; *Deposition of Lance Smith* pgs. 8-10.
47. Following Calvin’s Death, Dee was the President of SAR. See, *2013 Amended Annual Report*, *Exhibit 2 to Lance Smith Deposition*.

Submitted this 30th day of July, 2020.

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

By /s/ Matthew E. Naasz
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CERTIFICATE OF SERVICE

I certify that on July 30, 2020, a true and correct copy of Defendant and Third-Party Plaintiff's Statement of Undisputed Material Facts were electronically filed through South Dakota's Odyssey File and Serve Portal, upon the following individuals:

CLAYBORNE, LOOS & SABERS, LLP
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By: /s/ Matthew E. Naasz
Matthew E. Naasz

K

STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
	)SS	
COUNTY OF PENNINGTON	)	SEVENTH JUDICIAL CIRCUIT
)	
SMITH ANGUS RANCH Inc. (SAR),	)	--CIV - 000.
)	
Plaintiff,	)	COMPLAINT AND DEMAND
vs.	)	FOR JURY TRIAL
)	
TRAVIS HURST, as an alleged)	
DIRECTOR OF SAR, and as an individual,)	
)	
Defendant.)	

Comes now the Plaintiff, and for its Complaint and Demand for Jury Trial, hereby states and alleges as follows:

1. That Smith Angus Ranch, Inc. (SAR) was, and for purposes of wrapping up business and collecting assets is, an incorporated entity in the State of South Dakota.
2. That during her lifetime Emma Dee Smith was the sole shareholder of SAR and was so at the time of her passing on October 24, 2015.
3. That Lance A. Smith (Lance) and Craig J. Smith (Craig) were appointed co-personal representatives of the Estate of Emma Dee Smith (Estate) in her will.
4. That Lance and Craig were also bequeathed any and all interest Emma Dee Smith had in SAR at the time of her death. That Lance and Craig are Directors of SAR and responsible for its wrapping up, as Directors of SAR.
5. That Travis Hurst (Defendant) was alleged and purports to have been a Director of SAR prior to the death of Emma Dee Smith.
6. That in the role in which Travis Hurst purports to have served he owed SAR a fiduciary duty to act only in its best interests, to avoid self-dealing, and to act consistent with the governing documents of SAR.

COUNT I: BREACH OF FIDUCIARY DUTY

7. That as a purported director of SAR Defendant had a fiduciary duty to the entity. This duty is the highest legal duty known to the law. This duty requires Defendant to have placed the interest of SAR ahead of all other interests to include his own and to have acted with utmost good faith to have avoided any type or kind of self-dealing.
8. That in his dealings with SAR, Defendant failed to meet and did breach the fiduciary duty owed SAR.
9. Defendant's breach of fiduciary duty included failure to disclose information, failure to follow corporate formality, self-dealing as further defined below, fraudulent misrepresentations regarding past or future events, and general surreptitious conduct and communications.
10. That as a direct and proximate result of the breach of the Defendant Plaintiff suffered damages in amount to be determined at trial and by a jury.
11. That based upon Defendant's conduct, Plaintiff also seeks punitive damages under South Dakota law.

COUNT II: SELF DEALING

12. That Defendant, as a purported director of SAR, had a duty to not engage in self dealings placing his own interests, or interests other than SAR interests, ahead of the interest of SAR.
13. The Defendant, as a purported director of SAR, had a duty not to act in any manner in which would place his own personal interest in conflict with the obligations or rights of the entity SAR.

14. That Defendant engaged in a practice of self-dealing which was violative of South Dakota Law, violative of the governing documents of SAR, and generally violated his duties and obligations both as a purported director and an individual under South Dakota law.
15. That as a direct and proximate result of the breaches of the Defendant, the Plaintiff suffered damages in an amount to be determined at trial and by a jury.
16. That based upon Defendant's conduct, Plaintiff also seeks punitive damages under South Dakota law.

COUNT III: USURPATION OF CORPORATE OPPORTUNITY

17. That as a purported director of SAR, Defendant had an obligation to provide full and frank disclosure of all rights and opportunities of SAR to SAR. This included any business opportunity, or opportunity to profit, from the business dealings of SAR.
18. That Defendant engaged in a practice, as set forth above, that constituted a breach of fiduciary duty as well as self-dealing. Defendant further acquired, in opposition to SAR, an interest or property which SAR had an interest or tangible expectancy.
19. Defendant had an obligation and duty to not usurp or otherwise utilize the assets or business interests of SAR for his own personal gain.
20. That Defendant breached his duty and obligations, and utilized the assets and business interests of SAR to effectuate his own personal and financial gain.
21. That as a direct and proximate result of the breaches of the Defendant, the Plaintiff suffered damages in an amount to be determined at trial and by a jury.
22. That based upon Defendant's conduct, Plaintiff also seeks punitive damages under South Dakota law.

COUNT IV: FRAUD

23. That as an individual, and purported director of SAR, Defendant had a duty to not commit fraud towards SAR.
24. That leading up to and after the death of Emma Dee Smith, Defendant knew that the sole shareholders of SAR were or would be Lance and Craig and that the entity could not act under the By-Laws without specific authorization.
25. That prior to and after the death of Emma Dee Smith, Defendant, as both a purported director and as an individual, did sell assets of SAR (livestock), did transfer assets of SAR (wire transfer), did either allegedly purchase assets not for the benefit of SAR (vehicles), and did otherwise converts assets of SAR (Hay). Defendant did so knowing that Dee Smith would either never be in a position to challenge such actions or, as Defendant knew, would pass away and that he would allege some alleged authorization to commit fraud or self-deal.
26. That such conduct occurred through either fraud, fraudulent representations, fraudulent omissions as Defendant as a purported director had a duty to speak, or just plain through egregious fraudulent conduct generally.
27. That Defendant's fraudulent conduct was the direct and proximate cause of damages suffered by SAR.
28. That Defendant's fraudulent conduct, as set forth above with specificity, and which will be further defined throughout discovery, constitutes willful, wanton, and malicious and egregious conduct which supports a claim of punitive damages that must be submitted to a jury for determination of amount.

COUNT VI: CONVERSION

29. That Defendant, as a purported Director and individual, had certain duties and obligations to SAR.
30. That SAR owned or had a possessory interest in property and other assets to include, but not be limited to accounts, livestock, and general commodities (collectively "SAR property.").
31. That SAR's interest in SAR property was greater than that of Defendant.
32. That Defendant exercised dominion and control, and seriously interfered, with SAR's interest in SAR property.
33. That Defendant's conduct deprived Plaintiff of its interests or rights in property.
34. That as a direct and proximate result of the acts of conversion of the Defendant, the Plaintiff suffered damages in an amount to be determined at trial and by a jury.
35. That based upon Defendant's conduct, Plaintiff also seeks punitive damages under South Dakota law.

WHEREFORE, Plaintiff respectfully requests the following relief:

1. That a jury be empaneled to hear all claims of Plaintiff against Defendant;
2. An award of all damages caused by the conduct, and breaches of duties, owed by Defendant to Plaintiff, as well as on the Count of conversion;
3. An award of punitive or exemplary damages in favor of Plaintiff and against Defendant for conduct which was wanton, willful, and malicious, or which otherwise supports the Plaintiff's claim of punitive or exemplary damages.
4. For statutory prejudgment interest on all damages to which prejudgment interest applies under South Dakota law;


5. For any and all other relief, or claims, under South Dakota law, supported by the evidence or which may be pled prior to trial based upon evidence and facts identified in discovery.

PLAINTIFF HEREBY DEMANDS A JURY ON ALL ISSUES SO TRIABLE

UNDER SOUTH DAKOTA LAW

Respectfully submitted this ^{4th} day of September, 2018.

CLAYBORNE, LOOS AND SABERS, LLP



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L

1 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
 2 COUNTY OF HARDING) FOURTH JUDICIAL CIRCUIT

3
 4 SMITH ANGUS RANCH Inc.) 31CIV18-000018
 (SAR),)
 5 Plaintiff,) Deposition of:
 6 vs.) TRAVIS HURST
 7 TRAVIS HURST, as an alleged)
 DIRECTOR OF SAR, and as an)
 8 individual,)
 9 Defendant and)
 Third-Party)
 10 Plaintiff,)
 11 v.)
 12 CRAIG SMITH and LANCE SMITH,)
 13 Third-Party)
 Defendants.)
 14

15 DATE: October 18, 2019, at 8:55 a.m.

16 PLACE: Gunderson, Palmer, Nelson & Ashmore
 17 506 Sixth Street
 Rapid City, SD 57701

18 APPEARANCES:

19 FOR THE PLAINTIFF & MR. MICHAEL K. SABERS
 20 THIRD-PARTY DEFENDANTS: Clayborne, Loos & Sabers
 Attorneys at Law
 21 2834 Jackson Boulevard, Suite 201
 Rapid City, SD 57702

22 FOR THE DEFENDANT & MR. MATTHEW E. NAASZ
 23 THIRD-PARTY PLAINTIFF: Gunderson, Palmer, Nelson & Ashmore
 Attorneys at Law
 24 506 Sixth Street
 Rapid City, SD 57701

25 Also Present: Travis Hurst & Craig Smith

Carolyn M. Harkins, RPR (605)381-5427
 P.O. Box 1886, Rapid City, SD 57709

1 Q On Smith Angus Ranch, more importantly, on Dee's
2 place in '14, did it cost 108,000 to run the 200 head
3 Smith Angus Ranch, Inc., owned?

4 A I don't know.

5 Q In '15 you acquire or you enter into a contract for
6 deed with Dee to acquire the land, correct?

7 A Correct.

8 Q At that point you understand that Dee -- that Smith
9 Angus Ranch had already issued a check to that joint
10 account, the First Fidelity account for pasture rent.
11 You knew that, right?

12 A No, I did not.

13 Q Were you aware that in June, Smith Angus Ranch made
14 another payment to that First Fidelity account,
15 another payment for pasture rent?

16 A No.

17 Q Okay. Were you aware that there was a \$100,000 check
18 written by Smith Angus Ranch to that joint account
19 for pasture rent in 2015?

20 A No.

21 Q Okay. And we'll get to those checks, but if Smith
22 Angus Ranch, Inc., paid in excess of \$150,000 in
23 pasture rent to that joint account, do you believe
24 that there is additional rent that would have been
25 due and owing considering the cattle were sold, the

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1 calves were sold in October and the cows were sold in
2 November?

3 A I didn't get a rent check.

4 Q Okay. You understand that those payments were made
5 to the joint account, that same account that you were
6 using to buy your four-wheeler, though, right?

7 A All right.

8 Q An account that you had the right to write checks on?

9 A Correct.

10 Q And the account that at the time of Dee's death you
11 claimed was yours?

12 A Correct.

13 Q Including the remaining balance that was in it?

14 A Correct.

15 Q If we just step back and just try to, from the
16 outside, look, would anyone stay in business in
17 Harding County running 200 head of cattle if they
18 gave their entire calf crop to pasture for a single
19 year?

20 A No.

21 Q And would anybody stay in business in Harding County
22 if they paid \$400,000 to lease pasture to run 200
23 head for a single year?

24 A No.

25 Q At the time that you would have acquired the land in

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1 Q Was it your understanding you were drawing a salary
2 from that account?

3 A No.

4 Q Are you aware of anything in writing that would have
5 ever detailed any type of compensation package for
6 you as a director from Smith Angus Ranch?

7 A No.

8 Q On the date in which you and your wife would have
9 entered into the contract for deed on that plus-minus
10 6,000 acres, what was your expectation for what you
11 would receive for pasture rent for the Smith Angus
12 Ranch cattle?

13 A Half the calf crop.

14 Q Half the calf crop?

15 A Yes.

16 Q Okay. So it was not your expectation to continue to
17 receive rent from Smith Angus Ranch in 2015 after you
18 signed the contract for deed?

19 A Correct.

20 Q So if Smith Angus Ranch, Inc., would have paid into
21 that joint account an amount in excess of one-half of
22 the value of the calf crop after you signed the
23 purchase contract for deed, they would have given you
24 the value you expected to receive?

25 A Can you repeat the question?

Carolyn M. Harkins, RPR (605)381-5427
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1 Q And Dalton is who?

2 A My son.

3 Q Okay. And so in July of 2014, you would have
4 utilized, while acting as a director of Smith Angus
5 Ranch, Inc., funds from Smith Angus Ranch, Inc., to
6 buy your son a pickup?

7 MR. NAASZ: I'm going to object to the extent it
8 calls for a legal conclusion as to director's role.
9 Subject to that, you can answer.

10 A Yes. That's right.

11 Q Can you tell me where in your director's hat how that
12 purchase benefited Smith Angus Ranch, Inc.?

13 A It didn't. Well, other than the pickup could have
14 been used for Smith Angus activities.

15 Q So how was that pickup titled?

16 A I can't tell you off the top of my head.

17 Q Would it surprise you if it was titled in your name?

18 A I wouldn't be surprised if my name were on there with
19 Dalton.

20 Q Okay. My next question was going to be, would it
21 surprise you if it was titled in Dalton's name?

22 A No, it wouldn't surprise me.

23 Q Okay. And Dalton, again, is your son?

24 A Yes.

25 Q Moving over to the check on the right side, check

Carolyn M. Harkins, RPR (605)381-5427
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1 A Correct.

2 Q This would have been after you and your wife would
3 have signed the contract for deed to acquire the
4 6,000 acres, correct?

5 A Correct.

6 Q Let's look at check 12261. That is a check made out
7 to Buffalo Hardware?

8 A Correct.

9 Q And that is for steel posts?

10 A Yep.

11 Q Would you agree with me that at the time that those
12 posts were bought, Smith Angus Ranch, Inc., did not
13 own land?

14 A Correct.

15 Q In fact, if the contract for deed is enforceable, Dee
16 doesn't own land at this point either, does she?

17 A No.

18 Q And so these are still posts being bought on the
19 Smith Angus Ranch, Inc., account for land you and
20 your wife own?

21 A I'm not sure exactly where the posts went, but
22 probably.

23 Q Are you aware of any other land that you would have
24 been putting steel posts on other than your own?

25 A No.

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1 A Right.

2 Q And as of 7:00 a.m. on October 21st, 2015, which is
3 the following day, it says, Client very restless &
4 disoriented through night hours. Correct?

5 A Correct.

6 Q At 1600 hours, which is 4 in the afternoon, the entry
7 from the nurse is, Client disoriented all day.
8 Refusing fluids, food, & oxygen. Refused to take
9 pills. Shallow resp. followed by deep breaths. O2
10 has not reached 90%, but client refusing oxygen.

11 Fair?

12 A Yeah.

13 Q You wire transferred money on October 20th, 2015,
14 from the Smith Angus Ranch, Inc., account for the
15 purchase of a vehicle that was titled in your name,
16 correct?

17 A Correct.

18 Q On that same date, October 20th, 2015, you also could
19 have written a check from the joint account, the same
20 account you had purchased the UTV from to acquire
21 that same vehicle, could you have not?

22 A Yes, I could have.

23 Q Can you tell me how the use of Smith Angus Ranch,
24 Inc., funds to buy a pickup that was titled in your
25 own name benefited the entity?

Carolyn M. Harkins, RPR (605)381-5427
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1 A No.

2 Q Did it?

3 A Did it benefit the entity?

4 Q Correct.

5 A No.

6 Q I believe I've already asked this, but that vehicle
7 -- or the value of that vehicle, how did you treat
8 that on your 2015 federal income tax return?

9 A I don't know.

10 Q Did you ever have discussions with Julie Hurst, your
11 wife, about the power of attorney that existed for
12 Dee on October 20th, 2015?

13 A No.

14 Q After Dee's passing and prior to the funeral, you
15 sell the calves that had been Smith Angus Ranch,
16 Inc., calves prior to the branding that occurred on
17 June 11th, 2015. You sell those calves between the
18 date she passes and the date of the funeral, correct?

19 A Correct.

20 Q Did you provide any notice to either Lance or Craig
21 Smith that you had intended to sell those calves in
22 that time period prior to doing so?

23 A No.

24 Q If you knew that there had been a power of attorney
25 signed in Sioux Falls when she was receiving medical

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1 care, you also knew that she had signed a will, did
2 you not?

3 A I believe I did at the time, yeah.

4 Q And so when you made the decision on October 22nd,
5 2015, to buy the truck, you had two accounts that you
6 could have made that decision from. You could have
7 written it out of the joint account or you could have
8 written it out of the Smith Angus Ranch, Inc.,
9 account, correct?

10 A Correct.

11 Q So you made a decision to use the Smith Angus Ranch,
12 Inc., account and wire those funds, correct?

13 A I didn't make the decision, no.

14 Q Who made the phone call to wire the funds?

15 A I did.

16 Q Is it your position that your son just happened to be
17 at the dealership that you wired the funds to for the
18 purchase of the vehicle?

19 A He found the vehicle in Bozeman, Montana, yes.

20 Q Would you understand if either an outsider or another
21 family member might look upon that transaction and be
22 very upset?

23 A Yeah, I guess I can.

24 MR. SABERS: Just give us a few minutes, okay?

25 MR. NAASZ: Okay.

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M

47-1A-861.1. Judicial action--Director's conflicting interest transaction.

A director's conflicting interest transaction may not be enjoined, set aside, or give rise to an award of damages or other sanctions, in a proceeding by a shareholder or by or in the right of the corporation, because the director, or any person with whom or which the director has a personal, economic, or other association, has an interest in the transaction, if:

- (1) Directors' action respecting the transaction was at any time taken in compliance with §§ 47-1A-862 to 47-1A-862.3, inclusive;
- (2) Shareholders' action respecting the transaction was at any time taken in compliance with §§ 47-1A-863 to 47-1A-863.3, inclusive; or
- (3) The transaction, judged according to the circumstances at the time of commitment, is established to have been fair to the corporation.

Source: SL 2005, ch 239, § 185.

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 29395

SMITH ANGUS RANCH Inc. (SAR),

Appellee/Plaintiff,

vs.

TRAVIS HURST, as an alleged DIRECTOR OF SAR, and as an individual,

Appellant/Defendant,

vs.

CRAIG SMITH and LANCE SMITH,

Third-Party Defendants.

Appeal from the Circuit Court, Fourth Judicial Circuit
Harding County, South Dakota

The Honorable Gordon D. Swanson
Circuit Court Judge

REPLY BRIEF OF APPELLANT TRAVIS HURST

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PRELIMINARY STATEMENT

For the convenience of the Court, Appellant Travis Hurst is referred to as “Travis”; Appellee Smith Angus Ranch is referred to as “SAR”; documents from the record of the Fourth Circuit Clerk of Court are cited as “R.____”; the Appellant’s Appendix is cited as “App. ____”; the Transcript of Hearing Re: Motion for Partial Summary Judgment held on August 6, 2020, is referred to as “HT ____”; the Order Granting Plaintiff’s Motion for Partial Summary Judgment entered on August 11, 2020 by the Honorable Gordon D. Swanson, Circuit Court Judge is referred to as “Order”; Appellee’s Brief is cited as “Appellee’s Brief”. All references will be followed by appropriate page and paragraph designations.

ARGUMENT

I. The Circuit Court erred in extending the bright-line prohibition on introduction of extrinsic evidence to establish authority to engage in self-dealing into the corporate director context.

At all times relevant to this matter, Dee Smith (“Dee”) was the sole shareholder of Smith Angus Ranch, Inc. (“SAR”) (APP. 73). Dee was also a director and the president of SAR. (APP. 73). Dee Smith was the mother of Julie Hurst; Julie and her husband Travis Hurst (“Travis”), the Defendant in this matter, lived and worked on the Harding County ranch with Dee for decades. (APP. 72 - 73).

Dee Smith was diagnosed with cancer in 2013. (APP. 73). Following the diagnosis, Dee listed Travis’ name on SAR’s Amended Annual Report filed with the South Dakota Secretary of State’s office as vice president and director. (APP. 74). Dee also began a concerted effort to ensure that Travis and Julie were able to stay on the ranch after her passing. Dee sold the real property she owned to Travis and Julie-the real

property was never owned by SAR. (APP. 75). The 2015 calf crop from the SAR cows was branded with Travis and Julie's personal brand, at Dee's direction. (APP. 75). Dee unilaterally went to the Harding County Treasurer's Office and transferred titles to SAR vehicles to Travis and Julie. *Id.*

Dee also provided for her sons, Lance and Craig. In May of 2015 Dee wrote personal checks to each of her sons for \$100,000. (APP. 155). On the memo line of the checks, Dee wrote "inheritance" or "inheritance share". *Id.* Dee's sons, Craig Smith and Lance Smith, were left the shares of SAR through Dee's Last Will and Testament ("Will"). (APP. 150).

In her Will, Dee made her intent to help Travis and Julie stay on the ranch crystal clear. She forgave the principle and interest payments due for the real property sold to Travis and Julie. (APP. 150). Dee's Will also states "I am aware that my sons may not be happy with the provisions I have made in my Will; however I ask them to honor my wishes and accept what I have done. I love all my children very much, and equally." (APP. 151).

Dee's sons inherited the shares of SAR through Dee's Will. (APP. 150). Through SAR, they are challenging certain transactions in which Travis personally benefitted from SAR assets, after he was named as a director. In response to SAR's Motion for Partial Summary Judgment, Travis submitted evidence through affidavit that Dee Smith directed Travis to perform all the transactions that are being challenged. (APP. 78-81).

In its brief, Appellees identify the transactions they are challenging. (Appellee's Brief at 7). Appellees challenge the 2015 calf crop that was branded with Travis and Julie's brand, a pickup purchased for Travis and Julie's son in July 2014, a pickup

purchased for Travis and Julie's daughter in October 2015, and a check written for steel fence posts. See *id.* and record citations included therein. SAR takes the position that Travis has brought forward no evidence of Dee's intent regarding these transactions. This is simply not true.

Travis has consistently taken the position that Dee Smith directed all transactions in which Travis or Julie, and their family, benefitted from SAR assets. In his affidavit in response to SAR's motion for summary judgment, Travis stated that all such transactions were conducted at the direction of Dee. (APP. 80). This is consistent with his responses to written discovery. (APP. 123). ("Anything my family or I received from Smith Angus Ranch was authorized and directed by Dee Smith."). It is also consistent with his position that there is no writing authorizing the transactions. Whether or not that lack of writing excludes Travis from testifying to, and providing other circumstantial evidence of, Dee's intent is the legal question facing this Court. Other circumstantial evidence was presented to the Circuit Court tending to corroborate Travis' testimony that Dee directed the transactions.

As discussed above, Dee sold her real property to Travis and Julie Hurst. Travis testified that one half of the 2015 calf crop from the SAR's cows was provided to Travis and Julie in order to pay the rent for the SAR cows to graze on the real property now owned by Travis and Julie. (APP. 80). The other half of the 2015 calf crop was a gift from Dee to Travis and Julie. *Id.* Dee instructed Travis to place his and Julie's brand on the entire 2015 calf crop. Based on the Circuit Court's ruling, because this instruction was not in writing, it will never be heard by the jury.

Dee Smith provided each of her grandchildren a vehicle about the time they graduated from high school. (APP. 81). Both Lance Smith and Craig Smith testified that their children received vehicles from Dee at about this time in their lives. (APP 96), (Deposition of Craig Smith); (APP. 112-113), (Deposition of Lance Smith). The pickups purchased in July 2014 and October 2015 were the fulfillment of Dee's desire that all of her grandchildren receive vehicles before graduation. See (APP. 81); see also Appellee's Brief at 7 and record material cited therein. Pursuant to the Circuit Court's order, the jury will never be able to hear from Lance Smith and Craig Smith that Dee also provided each one of their children a vehicle.

As to the fence posts, Travis provided evidence that all transactions regarding SAR property were conducted at Dee's direction. (APP. 74). This includes the fence posts purchased with SAR funds. Travis presented evidence that his involvement in the challenged transactions occurred at Dee's direction. The question is whether that evidence is inadmissible, based solely on the fact that there is no writing authorizing those transactions.

The question before the Circuit Court, and now this Court, is whether Dee's intent should be ignored regarding disposition of assets during her lifetime, solely because no writing exists expressly authorizing Travis to follow Dee's instructions regarding SAR property.

At the hearing on this matter the Court and Plaintiffs' attorney engaged in the following discussion:

Court: so Dee's intent - her subjective intent is irrelevant to what we are talking about. And if you prevail, her specific desires may be subverted. And I understand that that may be hard facts make difficult law. But that is what I hear you saying.
Mr. Sabers: I am reciting to this Court the Supreme Court, regardless of *Huether's*

intention and even if it was approved – the Supreme Court said – even if they approved, we don’t care. You have got to have a writing. So, yes, I think that’s the law. I do. I think that is why they call it a bright-line rule. (HT 18; APP. 191).

The question presented to the Circuit Court was whether extrinsic evidence of Dee’s intent as the sole shareholder, president, and one of the directors of the SAR would be inadmissible at trial to prove that Travis acted as directed by Dee Smith, his mother in law, to engage in the challenged conduct. (Order at 3; APP. 3).

The Circuit Court, in its opinion on the matter, recognized that it was being asked to expand a rule prohibiting extrinsic evidence into the corporate context for the first time. “Given the fiduciary relationship between an officer/director of a corporation and its shareholder(s) and the similarity between responsibilities in the two situations, SAR urges the Court to anticipate that, if called upon to rule, the South Dakota Supreme Court would extend application of that policy to officer/shareholder cases.” (Order at 2; APP. 2).

The Circuit Court, anticipating this Court’s extension of the bright-line rule, concluded: “clearly, as an officer and director of SAR, Travis acted as a fiduciary to it. He had no written authority to convert SAR’s assets for his personal gain, and any circumstantial/extrinsic evidence he might offer in support of his claim that Dee expressly approved his self-dealing is not admissible.” (Order at 3; APP. 3). The fundamental question this Court must address is whether Dee’s intent has any relevance in this proceeding. Can Travis attempt to establish Dee’s intent to transfer SAR’s property to him through oral and other extrinsic evidence, or is her intent irrelevant because there is no writing specifically expressing her intent to provide certain corporate assets to Travis?

The “bright-line rule” that the Circuit Court expanded is as follows: “we have adopted a bright-line rule that no extrinsic evidence may be introduced to raise a factual issue as to whether an attorney-in-fact was authorized to self-deal under a power of attorney.” *Estate of Stoebner v. Huether*, 2019 S.D. 58, ¶ 23, 935 N.W.2d 262, 268. Neither this Court, nor any other Court cited by either party, has ever extended this bright-line rule into the officer/director context. Each of the decisions relied upon SAR and the Circuit Court address self-dealing in the context of an agent operating under a written power of attorney. *See id.*; *Bienash v. Moller*, 2006 S.D. 78 ¶ 27, 721 N.W. 2d 431, 437; *Hein v. Zoss*, 2016 S.D. 73, ¶10; 887 N.W. 2d 62, 66.

This Court has consistently held that agents operating under written powers of attorney must establish the authority to self-deal through written language in the power of attorney. *Estate of Stoebner v. Huether*, 2019 S.D. 58, 935 N.W.2d 262; *Bienash v. Moller*, 2006 S.D. 78, 721 N.W.2d 431. Taken out of context, language in these decisions may lead to the conclusion that this Court has established a bright-line rule regarding all fiduciaries.

As noted by the Circuit Court, language exists from this Court stating that “a written document must clearly articulate that the fiduciary is authorized to engage in self-dealing.” However, read in context, this Court was clearly describing an agent’s responsibilities under a written power of attorney. The remainder of the sentence quoted by the Circuit Court, and the sentence immediately preceding that quotation state in full:

We have adopted a bright-line rule that no oral extrinsic evidence may be introduced to raise a factual issue as to whether an attorney-in-fact was authorized to self-deal under a power of attorney. (citation omitted) We have not precluded the introduction of written evidence providing such authority, but a written document must clearly articulate that the fiduciary is authorized to engage in self-dealing.

In context, the “fiduciary” is the attorney-in-fact operating under a power of attorney. This Court has never divorced the bright-line rule against admission of extrinsic evidence to establish authority to self-deal from the agent/power of attorney context.

The second page of Appellee’s argument is devoted almost entirely to a quotation from *Stoebner*. *Estate of Stoebner v. Huether*, 2019 S.D. 58, 935 N.W.2d 262. The very first line of the quoted language correctly identifies the issue this Court addressed in *Stoebner*. “Because fiduciaries must strictly avoid any acts of self-dealing, the authority to self-deal exists only if **the power of attorney** provides ‘clear and unmistakable language specifically authorizing acts of self-dealing.’” *Id.* at ¶ 19 (emphasis added). That paragraph goes on to say “self-dealing is precluded ‘even when the language of a power of attorney might logically entail the ability to self-deal’ if there is no explicit provision allowing it.” *Id.*

Appellee goes on to cite language in *Stoebner* referring to written affidavits. The cited language makes clear that written affidavits do not qualify as written evidence. This is clearly a red herring meant to distract this Court from the real legal issue presented. Appellee spends pages in its brief discussing evidence that was not presented. But the Circuit Court’s question at the hearing, as well as the Order on Summary Judgment make clear, extrinsic evidence of Dee Smith’s intent has been determined inadmissible. That was the question before the Court and that was the question the Court decided. As noted above, Travis submitted evidence that Dee directed him to engage in the challenged transactions. But the Circuit Court was not weighing the evidence to ascertain Dee’s intent, but determining whether, absent a writing, evidence of her intent is inadmissible.

The legal question presented was whether extrinsic evidence could be admissible to show Dee's intent – not the weight of the extrinsic evidence.

The bright-line rule prohibiting extrinsic evidence from establishing authorization to self-deal cannot be extended into the corporate context. There is no written power of attorney to construe. Appellee points to bylaws and articles of incorporation as documents that may provide written authority to self-deal. It is certainly conceivable that those documents could provide that authority. Appellee takes the position that because articles and bylaws could, they must, authorize self-dealing in the corporate context. Appellee provides no authority for this proposition. No authority is provided because no such authority exists.

The standards by which fiduciaries are judged simply do not allow a bright-line rule prohibiting extrinsic evidence in an action contesting a director's alleged self-dealing. The applicable standard is found at SDCL § 47-1A-861.1.¹ That statute states:

A directors conflicting interest transaction may not be enjoined, set aside, or give rise to an award of damages or other sanctions, in a proceeding by a shareholder or by or in the right of the corporation, because the director, or any person with whom or which the director has a personal, economic, or other association, has an interest in the transaction, if: (3) the transaction, judged according to the circumstances at the time of commitment, is established to have been fair to the corporation.

It is simply impossible to reconcile this statute with the Circuit Court's Order. The statute makes no mention of requiring a writing. The issue of "fairness" cannot be ascertained if, absent a writing authorizing the transaction, no evidence of the transaction's fairness is admissible.

¹ Despite Appellee's argument that Appellant did not raise this issue below, the statute was quoted in Hurst's response to Plaintiffs' Motion for Summary Judgment.

Appellants urge, and the Circuit Court adopted, a shortcut. Appellant fears allowing extrinsic evidence would open “a Pandora’s Box of excuses” that could never be closed; (Appellee’s Brief at paragraph 11) and that Travis is trying to “make any possible argument he may want as an excuse to justify his self-dealing. But the rules of evidence will keep Pandora’s Box closed, and allow only those “excuses” to justify Travis’ actions as are admissible. There is simply no reason to take the shortcut urged by Appellee. The Courts of this State are well equipped to address the evidentiary issues as they arise and determine how to instruct the jury.

For example, SDCL § 19-19-803 contains exceptions to the rule against hearsay. Subsection three of that statute excludes from the rule against hearsay “a statement of the declarant’s then-existing state of mind (such as motive, intent, or plan)[.]” Whether Dee’s oral statements are excluded by the rule against hearsay, or any other evidentiary rule, will be determined based on this, and other, rules of South Dakota evidence. There is no reason to take the shortcut urged by Appellee, simply because application of the relevant rules of evidence may be challenging. Applying statutes and rules to challenging situations is what lawyers and judges do.²

² As noted by the Delaware Supreme Court when rejecting the bright-line rule in the power of attorney context:

If the grantor’s intent is the primary concern in interpreting a durable power of attorney, a bright-line rule might not always serve the interest of justice, especially if a printed form of a durable power of attorney prepared by a bank is used. Where there are concerns of abuse by an attorney-in-fact because of self-dealing or taking advantage of the elderly, our current law is better able to protect those interests. A power of attorney is strictly construed and broad all-embracing expressions are discounted or discarded. Any admissible extrinsic evidence must be carefully considered by the trial court so that it may determine that it was indeed the intent of the principal to make a gift of consent to a strictly enumerated act of self-dealing after receiving a full disclosure of all the facts. The trial court can consider the witnesses’ credibility and possible bias or self-interest. Adopting a bright-line rule might preclude a court from carefully considering all the surrounding circumstances to the detriment of the principal. Although a few states have adopted a “bright-line” rule, we decline to do so. We are

Appellee argues that SDCL § 47-1A-861.1 does not modify the common law duty of loyalty. In support, Appellee takes issue with Hurst's citation to *Schock v. Nash*, 732 A.2d 217 (Del. 1999). Appellee goes so far as to call Hurst's characterization "a completely inaccurate statement of the case." See Appellee's Brief at 13. The Delaware Supreme Court's relevant language in *Schock* expressly notes the distinction between the modification to the common law duty of loyalty applicable in the corporate context that does not exist in the context of a written power of attorney. "Unlike corporate law that provides statutory modifications to the common law of fiduciary duty, there is no statutory provision that alters the common law fiduciary duty of loyalty owed by an attorney-in-fact under a durable power of attorney." The footnote following the phrase "corporate law" in that above quoted sentence reads as follows:

Although Delaware corporate law permits the waiver of liability for breach of the common law duty of care that directors owe to a corporation and its stock holders by including a clear and unambiguous provision in the certificate of incorporation, it does not allow for a waiver of the directors' duty of loyalty. 8 Del. C. § 102 (b)(7); See *Zirn v. VLI Corp.*, Del. Supr., 621A. 2d 773, 783 (1993).

The statute does, however provide corporate directors with the safe harbor from allegations of self-dealing if the transaction is approved by a majority of the informed and disinterested directors or disclosed to and approved by the shareholders. (citation omitted) The corporate law does not eliminate claims or the fiduciary duty of loyalty, but under certain circumstances it shifts the burden of proof to the Plaintiffs to approve the transaction was unfair.³

Id. at n. 21.

Appellee's comment that the certificate of incorporation for SAR does not include a waiver for the fiduciary duty of care is irrelevant. The fiduciary duty of loyalty is

not convinced that it is superior to our existing law and it might result in an injustice, where, for example, the power of attorney on its face did not disclose that inadequate disclosures were made to principal.

Schock v. Nash, 732 A.2d 217, 229-230 (Del. 1999)

³ As noted in Appellant's initial brief on this matter, the statutory scheme cited in *Schock* is similar to SDCL § 47-1A-861.1. Compare, SDCL §47-1A-861.1 with 8 Del. C. § 144.

relevant here, not the duty of care.⁴ As noted by the Delaware Supreme Court, the duty of loyalty, as modified by statute, does not impose strict liability when a director personally benefits from corporate assets. The fairness of the transaction and the intent of the sole shareholder is a critical component of the fairness to the corporation.

This fairness is highlighted in the closely-held context. As subsection (3) of SDCL § 47-1A-861.1 requires, no transaction benefitting a director can give rise to an award of damages if it is “established to have been fair to the corporation.” In a closely held corporation, like SAR:

There usually is no division between the shareholder-owners and the director-managers. Either the stockholders themselves are the directors, or they so closely dominate and control the directors that the latter are little more than their agents. Frequently the shareholders go even further, and besides being directors are also the officers and executives of the company. In any event either through serving as the directors and officers themselves, or through detailed provisions in the charter, by-laws, or stockholder agreements, the shareholders personally manage and control the business directly or else perform these functions through others who in fact simply act as their agents.

Case v. Murdock, 528 N.W. 2d 386, 391 (S.D. 1995) (Wuest J., dissenting). It is in the closely-held family ranching context, where Dee Smith, as sole shareholder, directed the corporate activities in which Travis’ actions will be judged. And according to SDCL § 47-1A-861.1, Travis’ actions cannot give rise to an award of damages if they are determined to be fair to closely-held SAR.

The *Schock* Court also identified the reasons against adopting a bright-line rule in the power of attorney context. As noted by Justice Kern “the Supreme Court of Delaware, while acknowledging the adoption of the ‘bright-line’ rule articulated in *Kunewa* and adopted by several states, nevertheless declined to adopt the rule, stating that

⁴ As this Court has noted, directors’ fiduciary duty includes a duty of care and a duty of loyalty. See, *Schultz v. Scandrett*, 2015 S.D 52, ¶ 23, 26, 866 N.W. 2d 128, 136-138.

‘if the Grantor’s intent is a primary concern in interpreting a durable power of attorney, a bright-line rule might not always serve the interest of justice.’” *Hein v. Zoss*, 2016 S.D. 73, 887 N.W. 2d 62, (Kern, J., concurring in part and dissenting in part) (quoting *Schock*, 732A.2d 217, 228-229). Justice Kern went on to note that other states have rejected the bright-line rule regarding extrinsic evidence of a Grantor’s intent of a durable power of attorney and “instead permit consideration of the surrounding circumstances and intentions of the Grantor”. *Id.*

The interests of justice are even more compelling in favor of introduction of evidence of Dee’s intent here. In the context of a written power of attorney, the Grantor identifies, in writing, the powers granted to the Agent. That written grant of power can then be strictly construed by the Courts. Here, however, no such writing exists in which Dee documented the extent of Travis’ authority. Travis was named a director to allow him to execute documents on behalf of SAR. (APP. 79). The ranching operation did not change after Travis was named a director. *Id.* Dee remained singularly in charge of corporate documents and decisions. *Id.*

The appropriate standard for measuring a director’s exercise of duties to a corporation is that of utmost good faith. *See Case v. Murdock*, 488 N.W. 2d 885, 889 (S.D. 1992). Appellee acknowledges this standard in his brief. (Appellee’s Brief at 10). Once again, Appellee over simplifies matters to take shortcuts with legal standards. Because this Court has applied an evidentiary standard regarding fiduciaries operating under written powers of attorney, Appellee seeks to apply that same evidentiary standard to corporate directors. In Appellee’s eyes, all fiduciaries’ actions must be considered under the same standard as those of an agent operating under a power of attorney. But

this is not the case. The law requires all fiduciaries to act in the utmost good faith. Only in the context of an agent operating under a written power of attorney is there an evidentiary prohibition on oral extrinsic evidence to determine the fiduciary's good faith. In the corporate director context, when considering a director's good faith in light of allegations of self-dealing, the statute requires that the determination be made in light of all circumstances existing at the time of the action. *See* SDCL § 47-1A-861.1.

This Court has approved jury instructions articulating that officers and directors of a corporation are required to exercise "utmost good faith and fair dealing in the exercise of their fiduciary duties to shareholders. They must act in good faith and refrain from transactions in which they receive an improper personal benefit." *Schultz v. Scandrett*, 2015 SD 52, ¶ 23. This is the standard that will be applied to Travis' conduct - whether or not Travis acted with the utmost good faith and fair dealing and whether he received an improper personal benefit. In considering that standard, the jury will also be instructed that damages cannot be awarded to Plaintiffs if Travis' conduct was fair to the closely held corporation based on all circumstances existing at the time of the transaction. *See* SDCL § 47-1A-861.1.

Imposing a bright-line rule excluding all extrinsic evidence from the jury when tasked with making determinations based on this standard was a clear error of law. The bright-line rule from *Stoebner* and *Bienash* has no place in the context of a corporate director action. The jury is entitled to, and statutorily required to, consider Dee's intent regarding the disposition of SAR assets in applying the appropriate standard to Travis' conduct. All evidence of Dee's intent must be admissible.

CONCLUSION

The bright-line rule prohibiting introduction of extrinsic evidence does not apply outside of the durable power of attorney context. A director's conduct will be judged based on the "utmost good faith" standard articulated in this Court's previous decisions. The jury will be tasked with determining whether Travis received an "improper" personal benefit. The statutory modification of the duty of loyalty found in SDCL § 47-1A-861.1 makes clear that the surrounding circumstances and intentions of the sole shareholder must be considered when determining a director's good faith when a transaction is challenged as self-dealing. The Circuit Court erred by excluding all evidence of Dee's intent regarding disposition of SAR assets, merely because her intent was not reduced to writing.

For the foregoing reasons, as well as those set forth in Travis' Appellant's Brief, Appellant, Travis Hurst, respectfully requests this Court reverse the Circuit Court's Order granting Summary Judgment.

Dated: February 3, 2021.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with SDCL § 15-26A-66(b). The font is Times New Roman size 12, which includes serifs. The brief is 14 pages long and the word count is 4,364, exclusive of the Cover, Table of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service. The word processing software used to prepare this brief is Microsoft Word and the word count from that program was relied upon in determining the word count of this brief.

Dated: February 3, 2021.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 3, 2021, the foregoing **REPLY BRIEF OF APPELLANT TRAVIS HURST** was filed with the South Dakota Supreme Court and that the original and two copies of the same were filed by mailing the same to:

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