IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

ANGELA K. CHARLSON,	)	
	)	
	)	APPEAL # 27943
Plaintiff /Appellee;	)	
	)	
vs.	)	
	)	
DONALD M. CHARLSON	)	
	)	
	)	
Defendant/Appellant.	)	

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
MEADE COUNTY, SOUTH DAKOTA
NOTICE OF APPEAL FILED: JULY 28, 2016

The Honorable Michael W. Day, Circuit Court Judge, presiding

APPELLANT'S BRIEF

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PRELIMINARY STATEMENT

Appellant Don Charlson will be referred to as "Don." Appellee Angela Charlson will be referred to as "Angela." Exhibits are referred to as Don's trial exhibit followed by a letter and number (for e.g. "DTE A (1)") or Angela's trial exhibit followed by an exhibit number (for e.g. "ATE 1"). The Appendix ("App.") contains documents referenced in SDCL § 15-26A-60 (8), including but not limited to the Court's Findings of Fact and Conclusions of Law ("FOF" or "COL"; App. 2) as well as the Pre-Marriage Agreement ("PMA" and "App. 3") at issue on appeal. Docket items are referred to as "Docket" with a corresponding docket number (for e.g. Docket No. 173 is the PMA). References to the transcript, page, and line numbers will be referred to as "CT Pg., lines" Excerpts from transcript cited below are attached as App. 4. Other citations to the record or legal precedent will be as governed by SDCL 15-26A generally.

JURISDICTIONAL STATEMENT

On June 27, 2016, the Honorable Michael Day entered a final judgment from which this appeal is being taken (App. 1). Appellee filed Notice of Entry of Judgment and Order on July 1, 2016 (App. 5). This Court has jurisdiction over this appeal due to the fact the Trial Court entered a final Judgment and Order and Notice of Appeal was timely filed by Don on July 28, 2016 (Docket No. 3385).

CONCISE STATEMENT OF LEGAL ISSUES

Angela initiated a declaratory judgment action in this case to have the Court interpret and enforce a Premarital Agreement ("PMA") (Docket No. 2). Don answered the declaratory action denying such PMA was enforceable and also disputing Angela's interpretation and application of the PMA to marital assets obtained by the parties

through joint accounts during the lengthy marriage. The Court bifurcated enforceability and interpretation and conducted a trial on October 16, 2014, ruling that the PMA was enforceable (Docket No. 351). A subsequent trial was conducted in which the Court ultimately ruled on interpretation and application of the PMA. Don appeals the interpretation and application decision (App. 1). Don further reasserts on appeal that if the PMA is interpreted as the Trial Court interpreted it there exists a lack of mutual consent rendering the PMA unenforceable as a matter of law. Therefore, the legal issues before this Court, with the most relevant authority, would be as set forth below.

1. The Trial Court erred in interpreting the PMA in a way that permits tracing of earnings or property through the joint marital bank account of the parties and in the application of marital loans that neither party testified existed.

Most Relevant Authority

Sanford v. Sanford, 2005 SD 34, 694 NW2d 283;
Prunty Const., Inc. v. City of Canistota, 2004 SD 78, 682 NW2d 749;
State v. Schouten, 2005 SD 122, 707 NW2d 820.

2. Whether the Trial Court's adoption of Angela's expert report constituted reversible error based on the a lack of foundation.

Most Relevant Authority

Meligan v. Dept. of Revenue and Regulation, 2006 SD 26, 712 NW2d 12;

Johnson v. Albertson's, 2000 SD 47, 610 NW2d 449.

3. If tracing is allowed into the joint marital bank account, and if the PMA is interpreted to create "marital loans," mutual consent did not exist.

Most Relevant Authority

Geraets v. Halter, 1999 SD 11, 588 NW2d 231;

Read v. McKennan Hosp., 2000 SD 66, 610 NW2d 782;

SDCL 53–3–3.

STATEMENT OF THE CASE AND FACTS

The parties were married in Deadwood, South Dakota, on January 23, 1993 (FOF 1; App. 2). Angela retained Attorney Dick Pluimer to draft the PMA on January 21, 1993 (FOF 5; App. 2). The parties met with Angela's attorney and signed the PMA on January 22, 1993 and were married the next day (FOF 4; App. 2). Plaintiff and Defendant are parties to a divorce action filed in Minnesota, *In Re Marriage of Donald M. Charlson and Angela K. Charlson*, Olmsted County Court File No. 55-FA-13-1830 (FOF 1). The Minnesota Court bifurcated the case and granted the parties a divorce on February 18, 2014 but has yet to rule on a division of marital property (FOF 1; App. 2). Plaintiff initiated this Declaratory Judgment action to determine the enforceability and interpretation of the PMA (Docket No. 2).

The PMA provides for a parties right to maintain separate assets which existed as of the date or marriage (App. 3). As to separate property, the PMA provides in paragraph two that "Each party acknowledges and agrees that all property acquired or owned by the other as of the date of this Agreement shall be and remain the sole and separate property of that party" (App. 3). The PMA further addressed in paragraph four that any property acquired from and after the date of marriage through the utilization of joint marital bank accounts shall be considered marital property and "shall remain marital regardless of designation of title or ownership:"

> 4. Marital Property. Except as specifically provided above, property acquired by the parties *from and after the date of the marriage, and continuing through the course of the marriage, shall remain marital property.* No waiver, release or relinquishment of any right, title, claim or interest in and to the separate property of the other shall be construed as a relinquishment of any right or interest in marital property. Property acquired from *and after the date of the marriage, and continuing through the course of the*

> *marriage, shall remain marital property regardless of designation of title or ownership of such assets*. (App. 3) (emphasis added).

As noted, The PMA addresses the relinquishment of rights in separate property. *Id*.

The PMA provided a mechanism for the acquisition of marital property "from and after" the date of marriage (App. 3). The PMA states in paragraph seven that the parties are to create a "joint marital bank account" in which each party is to deposit earnings or separate property to both fund ordinary marital expenses *and* acquire any marital property from and after the date of marriage:

> "The parties agree to create, upon marriage, a jointly owned bank account, and each agrees to deposit into such account, earnings or separate property, at an amount necessary to pay ordinary and necessary living expenses of the parties, *and any acquisition of marital property*." The payment of other ordinary living expenses, such as taxes, insurance, utilities and miscellaneous repairs shall be paid from *the joint marital bank account* (App. 3) (emphasis added).

The joint marital bank account, therefore, had two identified purposes per the terms of the PMA. The first purpose is payment of ordinary and necessary living expenses from and after the date of marriage. The second stated purpose is the acquisition of marital property during the marriage. No other purpose, or interest, is identified for the joint marital bank account. Given these exclusive stated purposes, the funds identified in the joint marital bank account obtained the irrevocable character of marital.

The PMA also protected separate earnings or property which the parties chose to not deposit into the joint martial bank account through a commingling clause found in paragraph five of the PMA (App. 3). In sum, Don's interpretation is that the joint marital bank account contains only marital funds and no party maintains any separate interest in that joint martial bank account or the marital property acquired by that account. Don's

interpretation also allows for the parties to keep separate earnings or property separate if not otherwise deposited into the joint marital bank account that, again, had only two stated purposes under the terms of the PMA.

The parties opened the joint marital bank account ("7183") contemplated by paragraph seven of the PMA in April of 1993 (FOF 250; App. 3). The parties also later opened another joint marital bank account ("2730") (FOF 451). Angela continued to maintain separate accounts throughout the twenty plus year marriage (FOF 155; CT Pg. 345; lines 1-2).

Although the record in this case is admittedly substantial in scope, the dispute over the interpretation of the PMA is not. The PMA required both parties to deposit earnings or separate property into the joint marital bank accounts ("7183"and"2730") to pay ordinary marital living expenses and for the acquisition of any marital property acquired "from and after" the date of marriage (FOF 21; App. 3). Those were the only two purposes of that account under the terms of the PMA. Don's interpretation yields the result that a party relinquishes any claim to separate earnings or property by depositing it into the joint marital account identified in paragraph seven of the PMA because funds in the joint marital account were only to be utilized for the two identified purposes; one being the acquisition of "marital" property acquired from and after the date of marriage (FOF 21; App. 3). Further, Don's interpretation is that a party could, and did, maintain separate earnings or property, even if comingled, if the party did not deposit the same into the joint marital bank account from and after the date of marriage (FOF 21). Don does not dispute that if Angela made a decision to utilize separate accounts maintained during the marriage to acquire or manage separate property that it remained Angela's

separate property under the PMA.

Angela interprets the PMA to protect her separate property or earnings in the joint marital account even when the joint marital account was utilized to acquire marital property from after the date of marriage. Angela proposed and the Court adopted the following findings of fact:

> FOF 20. Any separate property interest in funds Plaintiff transferred into the joint 7183 account did not change the character of her separate property interest or otherwise result in a change of her separate property to marital…..(App. 2)
>
> FOF 86. Plaintiff's position is if her separate funds are traced into an asset, *despite her separate funds flowing through joint accounts prior to the purchase of that asset*, the acquired asset remains Plaintiff's separate property. Ex. 1K, P.3, Bate #27551 (App. 2) (emphasis added).

As a result of this interpretation Angela retained experts to attempt to "trace" those separate earnings or property deposited into the joint marital bank account for the entire twenty plus years of the marriage (FOF 88). Despite the fact that the PMA identifies the joint marital bank account as a joint marital bank account Angela labels it ("7183") as a "pass through account" (FOF 127) and that it contains "a combination of Plaintiff's separate property and marital property" (COL 27). In addition, Angela's experts took it a step further and created alleged "marital loans" in such joint marital bank account when those alleged separate interests were paid towards a separate asset from and after the date of marriage (FOF 26). This interpretation, in an approximate estate of six million dollars, awarded Angela approximately eighty seven percent of assets and Don approximately thirteen percent of assets (CT Pg. 776; lines 14-25; Pg. 777; lines 1-9). Angela testified that she did not understand either tracing or the marital loan created by her retained experts (FOF 154).

Angela submitted a Finding which was adopted by the Trial Court that stated that the characterization of the separate earnings or property deposited into the joint marital accounts over a twenty year plus marriage really depended on what the parties "want to be marital" (FOF 23). In regards to tracing earnings or separate property after Angela decided to deposit the same into the joint marital bank accounts, and the issue of loans, Angela admitted that such was not her understanding of the PMA but rather she "had to agree" to "marital loans" that her experts created:

> …. But in my heart of hearts, and at absolutely – I can – like I'm testifying right now, I did not make a marital loan. And *they*[1]*did* in their way of doing things. *I had to agree*. I *had* to say "We *have* to let that be a marital loan." But I know and Donny knows that I didn't borrow any money from our joint account for my 7191 account. I kept that separate.
>
> Q: So when you transferred money from your 7183 [joint marital bank account] to 7191 and your expert treated it as a loan, it's your testimony it was not meant to be a loan?
>
> A: It was not meant to be a loan.
>
> Ms. Lawrence: Your Honor, I would move to exclude the Value Tracing Report, as it clearly does not follow what Ms. Charlson believed they were doing during the marriage and what her testimony is today, what these transfers were meant to be. It's the fictitious methodology report that doesn't match their life or her intention or *her* interpretation of the pre-marriage agreement.
>
> The Court: Ms. Rohr?
>
> Ms. Rohr: Thank you, your Honor. Ms. Charlson testified yesterday she is not a financial expert, and she didn't know how financial tracing going back 25 years works. *She is able to testify to what she intended*. *This is what the tracing experts have come up with* and she's not qualified to answer that question. Thank you.

[1] If not immediately clear, "they" are Angela's retained experts.

> The Court: Thank you. Your motion is denied. (CT Pg. 375, lines 11-25; Pg. 376; 1-12) (emphasis added; bracketed material added).
>
> *See also* CT Pg. 442; lines 18-21, Pg. 449; lines 9-13; Pg. 461; lines 23-25; Pg. 462; lines 24-25).

Based on the testimony above, Angela proposed Findings of Fact which were subsequently adopted that set out to avoid the implications of Angela's testimony:

> FOF 152. Both parties acknowledged they did not keep track of any marital loans
>
> FOF 153. Plaintiff was unaware she was creating any marital loans.
>
> FOF 154. Both Plaintiff's and Defendant's[2] expert testified it is common for parties *to not understand* the movement of funds and how that impacts separate tracing. It is also common for parties *to not understand* how movements of funds impacts marital and separate property claims. Tr. 970; 1-9. But that is not dispositive of whether or not loans were created. (emphasis added).
>
> FOF 155. *It was Plaintiff's practice to transfer her separate property to joint accounts when there was going to be a larger purchase of an asset*. Tr. 345, 460-462. During the marriage, there were occasions that an asset would be purchased and Plaintiff would either transfer her separate funds prior to or just after the purchase. Although Plaintiff used her separate funds at times, if a marital loan existed in the account, the marital loan was paid back first, and VCG did not credit the Plaintiff with the use of her separate funds. *Despite the fact Plaintiff was unaware of how the marital loan concept worked*, the methodogy used by the Plaintiff's experts is consistent with the contract terms of the PMA. (emphasis added).
>
> FOF 157. Both parties deposited funds into various accounts to pay living expenses. Plaintiff also deposited her separate funds into joint accounts. *Plaintiff's funds were, in part, funding ordinary living expenses in addition to purchasing assets that have martial value and separate value* (emphasis added) (App. 2).

[2] The cite Angela provided for the allegation that Defendant's expert agreed was Tr. 970; 1-9. A review of that portion of the transcript does not support that conclusion.

No explanation is provided for why Angela did not utilize a separate account to fund purchases if Angela had, at that time, wanted to preserve a separate interest in the marital property being acquired from and after the date of marriage. Also no explanation has ever been provided for how to segregate Angela's separate earnings or property deposited into the joint marital bank account between ordinary living expenses and the acquisition of any marital property as provided for in paragraph seven of the PMA.

In sum, Don's interpretation is that if a party chose to deposit separate earnings or property (as each was required to do by the PMA) into the joint marital bank account that any alleged separate interest in such earnings or funds terminated. This is, again, because the joint marital bank account only had two purposes; payment of ordinary expenses from and after the date of marriage, and the acquisition of marital property.[3] Further, Don agrees with Angela that the parties never agreed to any alleged marital loans, that no marital loans were made throughout the marriage, and that there was never any written consent to any alleged marital loan (FOF 152, 153, 154, 155,157; App. 2). Don respectfully request that this Court conduct its de novo review of the PMA and interpret it consistent with the interpretation advanced by Don.

ARGUMENT AND AUTHORITIES

1. The Trial Court erred in interpreting the PMA in a way that permits tracing of earnings or property through the joint marital bank account of the parties and in the application of marital loans that neither party testified existed.

[3] Don's expert Tom Harjes analyzed the financial history of the parties joint bank account and opined based on such financial analysis that Angela earned a total of $1,613,231.00 during the marriage and contributed 37.3 % of her available funds to the parties monthly living expenses and acquisition of marital property while Defendant earned $2,964,667.00 during the marriage and contributed 70.9 % of his available funds for the same. DTE V; Schedule 1, (CT Pg. 1367; lines 11-25; Pgs. 1392 lines 1-25; Pg.1393 lines 1- 25).

A. Interpretation and construction of the PMA is done under a de novo review.

Under South Dakota law, a PMA is a contract which is subject to the rules of contract interpretation. *Sanford v. Sanford*, 2005 SD 34, 694 NW2d 283. Interpretation of a contract is a question of law reviewed de novo. *Prunty Const., Inc. v. City of Canistota,* 2004 SD 78, ¶ 10, 682 NW2d 749, 753 (citing *Fenske Media Corp. v. Banta Corp.*, 2004 SD 23, ¶ 8, 676 NW2d 390, 393). This Court gives no deference to a circuit court's conclusions of law and applies the de novo standard. *State v. Schouten,* 2005 SD 122, ¶ 9, 707 NW2d 820, 822-23 (citing *City of Deadwood v. Summit, Inc.*, 2000 SD 29, ¶ 9, 607 NW2d 22, 25).

B. No separate interest exists in joint marital bank account.

As set forth above, the Trial Court adopted Angela's FOF 155 which interpreted the language of the PMA to allow for the tracing of separate earnings or deposits in which a party made the decision to deposit into the joint marital bank account from and after the date of marriage. This interpretation was adopted despite the fact that Angela had separate accounts available to her throughout the marriage and chose to deposit such funds into the joint marital bank account (FOF 155; CT Pg. 345; lines 1-2). Don's interpretation yields the result that either party's decision to deposit separate earnings or property into the joint marital bank account terminated any separate interest. Angela's decision to deposit separate earnings or funds into the joint marital bank account relinquished any separate property claim because, by the terms of the PMA, the stated purpose of that account was only to fund ordinary living expenses of the parties and the acquisition of *martial* property. This is why the PMA identifies the account as a "joint marital bank account" (App. 3).

Upon deposit into the joint marital bank account, the PMA states only two purposes for the joint marital bank account and does not make any reference to tracing or loans. Based on the fact there were only two purposes of the joint marital bank account, one being the acquisition of any marital property, the lack of any such language about tracing or loans is not unexpected. That type of tracing language would have been expected if earnings or property deposited into the joint marital bank account were to be considered something other than marital (App. 3). Upon deposit, the PMA does not treat these as "comingled" funds because they are, by definition, marital funds which could not have been utilized for any purpose other than marital based upon the language of the PMA (App. 3). Again, the parties were required by the PMA to deposit separate earnings or property into the joint marital bank account for ordinary marital expenses *and* to acquire any marital property acquired from and after the date of marriage (App. 3). The PMA does not contemplate reliance on the alleged intent of either party as to such funds from and after a twenty year plus marriage; rather, it defines the account as a joint marital bank account and identifies the marital purpose for which it was created (App. 3).

Angela acknowledged in FOF 155 it was "Plaintiff's practice to transfer her separate property to joint accounts where there was going to be a larger purchase of an asset" CT Pg. 345 lines 1-25; Pgs. 460-462. Despite such transfers to the joint martial bank account prior to the acquisition of marital property from and after the date of marriage, Angela still wants the PMA interpreted to preserve a separate interest or "part" in the joint marital bank account:

> FOF 157. Both parties deposited funds into various accounts to pay living expenses. Plaintiff also deposited her separate funds into joint accounts. *Plaintiff's funds were, in part, funding ordinary living expenses in addition to purchasing assets that have marital*

value and separate value. (emphasis added) (App. 2).

The words "that have marital value and separate value" do not exist in the PMA (App. 3). Paragraph seven only states that it is a joint marital bank account to be utilized to acquire marital property. This Court has routinely held that "[c]ontracting parties are held to the terms of their agreement, and disputes cannot be resolved by adding words the parties left out." *Gettysburg School Dist. 53-1 v. Larson*, 2001 SD 91, ¶ 11, 631 NW2d 196, 200-01 (citation omitted). This Court should not add the words that Angela's attorney did not include when he drafted and finalized the PMA the day before the parties were married.

Angela's interpretation of the PMA would also have this Court interpret the use of "any" in "any acquisition of marital property" in paragraph seven as a term of restriction rather than inclusion. In fact, Angela's proposed COL 23 which was adopted by the Trial Court wants the Court to find that it really all just depends on what the parties "want" (COL 23). That COL provides in pertinent part:

> 23. Paragraph 7 of the PMA does not say "all" property purchased with from the joint account is martial property. Rather it provides that the account *may* be used to acquire property the parties want to be marital. …. (App 2).

This is inconsistent with the plain language of the PMA. The intent of the parties as to the purpose of the joint marital bank account is clearly stated in the PMA. Paragraph seven does not use "may" nor does it reference what the parties "want" (App. 3). Don further submits that Angela's attorney could have drafted a PMA that utilized terms such as those now proposed by Angela but did not. This Court has held "it is not the function of this Court to rewrite a contract." *South Dakota Cement Plant Com'n v. Wasau Underwriters Ins. Co.* 2000 SD 116, ¶ 24, 616 NW2d 397, 404. This Court should not now rewrite the PMA to include terms such as "may" or "want." The purpose of the joint

marital account was to acquire marital property.

As stated above, Angela's interpretation of the PMA adopted by the Trial Court requires the parties to litigate what each party "want[s] to be martial" (COL 23). As this Court understands, the problem with attempting to determine what a divorce litigant "wants" in regards to classifying transfers and property up to twenty years old is that the litigant may not remember such things and, if an assumption is to be made, such interpretation invites post hoc revisionist history. Angela testified generally:

> Q: When you transferred money from 7183 to 7191 what was your intention for that money?
>
> A: I don't know what date. I can't remember these things. This is – that's why I got experts to do all this. This is 20 years of different accounts and into different accounts. It's very confusing to me and – I'm sorry. I just have to rely on my experts…. (CT Pg. 449; lines 19-25).

In addition to this general testimony, Angela also testified as to numerous instances where she had no idea what her intent, or her "want" had been over a twenty plus year marriage with thousands of transactions being reviewed:

> Q: So you transferred $9,500 from your joint account to the home federal account, $7,500 from 7191 to your Simple IRA; correct?
>
> A: Yes.
>
> Q: And your claiming that entire transfer is your separate property?
>
> A: That's the experts – I – this is – that's for the people, yes.
>
> Q: What was your intent at the time?
>
> A: I have no idea. (CT Pg. 445; lines 13-22).
>
> . . . .
>
> Q: Yet your claiming those are all your separate property?

A: That's what the experts say.

Q: So, throughout this, were you transferring money from your 7191 account to your IRA's while, at the same time, borrowing money from the marital estate? Are you maintaining a separate interest in the money?

A: I had no idea at the time (CT Pg. 452; lines 21-25, Pg. 453; lines 1-3).

. . . .

Q: So when there's that much marital funds in the joint account, how is it that you're claiming transfers to 7191 are your separate property?

A: That is a question for the experts. I have no clue.

Q: And as the same time of that transfer, look back at Page 65, you had borrowed $73,537 from the joint account; correct?

A: What line is that?

Q: Line 861.

A: I don't – this is something the experts have to tell you what happened. I am not capable of doing this. This is – you're going to have to see how they did it with their formulas and that kind of stuff. They tried to explain it to me and I …. (CT Pg. 448; lines 16-25, Pg. 449; line 1-4).

The plain language of the PMA did not require such speculation, guesswork, or conjecture about the joint marital bank account. It does not depend on a litigant's post-divorce "intent" or "want[s]." Once a party made a decision to deposit separate earnings or property into the joint marital bank account the decision, or "intent" was clear. That joint marital bank account was to be used for two purposes – again, one of those stated purposes was the acquisition of any marital property acquired from and after the date of marriage. Further, paragraph four also provides "property acquired from and after the date of the marriage, and continuing through the course of the marriage, shall remain

marital property regardless of designation of title or ownership of such assets" (App. 3).

Angela had separate accounts throughout the marriage (FOF 155). When Angela made the decision to put separate earnings or deposits into the joint marital bank account from and after the date of the marriage any separate interest in those separate funds terminated because the joint marital bank account could only be used for the marital purposes identified by paragraph seven of the PMA (App. 3). Angela cannot now be permitted to revisit her decision, or, as set forth below, have her experts create a fiction of a marital loan to further bolster her allegations of separate interests.

C. No marital loans existed.

As noted above, Angela's experts created "marital loans" from Angela's alleged "separate interests" in the joint marital bank account referenced in the PMA when such alleged separate interests were subsequently transferred back into other accounts. Angela testified, however, no such marital loans ever existed during the marriage:

> …. But in my heart of hearts, and at *absolutely* – I can – like I'm testifying right now, I did not make a marital loan. And *they did* in their way of doing things. *I had to agree*. I *had* to say "We *have* to let that be a marital loan." But I know and Donny knows that I didn't borrow any money from our joint account for my 7191 account. I kept that separate.
>
> Q: So when you transferred money from your 7183 to 7191, and your expert treated it as a loan, it's your testimony it was not meant to be a loan?
>
> A: It was not meant to be a loan (CT Pg. 375; lines 11-21).

This testimony resulted in Angela's need to acknowledge the following in her proposed Findings which the Court adopted in full:

> FOF 152. Both parties acknowledged they did not keep track of any marital loans (App. 2).

> FOF 153. Plaintiff was unaware she was creating any marital loans (App. 2).

To adopt an interpretation creating fictitious marital loans, when no written consent or mutual understanding of the same ever existed, defies logic. A retained litigation expert cannot and should not dictate to a client what that party to a contract wanted, or allegedly intended. This is especially so when that litigation expert, as here, must then rely upon such alleged "intent" of that same party. This Court has repeatedly noted that a party, nor its expert can claim a version of facts more favorable to their position that that which they testified to under oath:

> Plaintiff cannot claim a version of the facts more favorable to his position than he gave in his own testimony. *Swee, supra; Meyers, supra.* It follows that a party who has testified to the facts cannot now claim a material issue of fact which assumes a conclusion contrary to his own testimony. *See Also Lien v. Lien* 2004 SD 8, P. 31, 674 NW2d 816, 827 (stating that a party "cannot now claim a better version of the facts than he testified to himself" and as a result "the trial court did not err in dismissing the claim"); *Loewen v. Hyman Freightways, Inc.*, 557 NW2d 764 (SD 1997) (stating that a party "cannot now assert a better version of the facts than his prior testimony and 'cannot now claim a material issue of fact which assumes a conclusion contrary to [his] own testimony.").

Lalley v. Safeway Steel Scaffolds, Inc., 364 NW2d 139, 141 (SD 1985). Angela's experts are bound to this settled precedent. Angela's proposed a FOF adopted by the Trial Court that states her experts concluded it is also common for "parties to not understand how movement of funds impacts marital and separate funds" (FOF 154). This is the proverbial attempt at an end run around this settled precedent. Angela testified in her "heart of hearts" there were "absolutely" no loans and "it was not meant to be a loan" (CT. Pg. 375; lines 11-21). This is not a misunderstanding of any sort – it is the sworn testimony of Angela as to a fact. This Court should not only reject the attempt to trace

separate earnings or property into the joint martial bank account of the parties utilized to acquire any marital property from and after the date of marriage, but it should also reject the attempt of Angela's experts to create the fiction of a marital loan when the parties testified that no such loans existed during the marriage of these two parties.

The PMA dictates in 8 (c) that neither party shall bind, or attempt to bind, the other to any indebtedness except on "written consent" (App. 3). The "marital loans" created by Angela's experts were never in writing because Angela testified "it was not meant to be a loan" (CT Pg. 375; line 21). Plaintiff testified she did not obtain Defendant's written permission before borrowing money from the marital estate to pay expenses for an asset she now claims is her separate property (CT. Pg. 441; lines 20-22; CT Pg. 804; lines 15-20). Again, for any and all of the reasons above Angela's interpretation of the PMA, identified through report of her retained experts, should be rejected as it ignores the language of the PMA as to the purpose of the joint bank account and ignores the parties testimony as to the allegation of loans.

2. The Trial Court erred in adopting Angela's expert report which lacked foundation and which was inconsistent with the terms of the PMA.

This Court has routinely held that value of expert opinions is no better than the facts upon which it is based. *Meligan v. Dept. of Revenue and Regulation*, 2006 SD 26, 712 NW2d 12, 18. In *Meligan* the Court noted:

> We have consistently noted that "[t]he value of the opinion of an expert witness is no better than the facts upon which it is based. It cannot rise above its foundation and proves nothing if its factual basis is not true." *Haynes*, 2004 SD 99, ¶ 29, 686 NW2d at 664 (quoting *Wiedmann v. Merillat Indus.*, 2001 SD 23, ¶ 17, 623 N.W.2d 43, 47-48).

In this case, the report and opinions of Angela's experts are based on their own

interpretation of the PMA (*See*, for *e.g*. CT Pgs. 1202-1204). Settled law dictates that this Court gives no deference to the Trial Court's interpretation of the PMA, and this Court should certainly not give deference to a retained litigation expert's interpretation. If this Court's interpretation of the PMA is that the deposit of separate earnings or property into the joint marital bank account to pay ordinary marital expenses and to acquire any marital property after the date of marriage terminates any separate interest of either party the entire report of Angela's expert is fatally flawed and must be rejected.

Angela's experts also base the report largely on the "intent" of their client. As set forth above, the provisions of the PMA, as to the joint marital bank account acquisitions of marital property, does not require or permit an examination of the parties subjective intent after the decision was made to deposit funds. Even if a party's "want" or "intent" up to twenty years after the fact mattered, however, Angela is not a competent source for foundation on any such conclusion because the record is replete with her own admissions as to transactions that she "can't remember" (CT Pg. 449; line 21); "I have no idea" (CT Pg. 445; line 22), and that "I have no clue" (CT pg. 448; line 19). Angela's experts cannot rise above the flawed foundation upon which they rest their opinions as to alleged intent.

Angela's experts also create the fiction of a marital loan, obtained without written consent, that even their client testified under oath never existed nor was it the intent of the parties for their ever to be martial loans (CT Pg. 375; lines 11-25; Pg. 376; lines 1-12). Again, Angela's experts rely on their interpretation of the PMA to create a marital loans even though it had to be first admitted neither party kept track of any alleged loans (FOF 152) and Angela herself was unaware she was creating loans (FOF 153). Angela's

Findings conclude by stating that "*Despite the fact Plaintiff was unaware of how the marital loan concept worked*, the methodology used by the Plaintiff's experts is consistent with the contract terms of the PMA" (FOF 155). Neither is correct. Neither party knew how any such loans worked because no such loans were ever contemplated, considered, discussed, nor did either party receive written consent for the same as required by paragraph eight (c) of the PMA (App. 3).

This Court addressed the appropriate role of an expert in South Dakota in *Johnson v. Albertson's*, 2000 SD 47, ¶ 25, 610 NW2d 449, 455 where it stated in pertinent part that:

> The purpose of expert testimony is to assist the trier of fact and not supplant it. Experts do not determine credibility. This state is not a trial by expert jurisdiction (citations omitted). The value of the opinion of the expert witness is no better than the facts upon which is it based. It cannot rise above its foundation and proves nothing if its factual basis is not true."

Angela's expert report should be rejected as it has no basis in fact or the terms of the PMA and therefore proves nothing. This Motion was made, and denied, by the Trial Court at the appropriate time in the trial and after Angela testified contrary to her expert's report (CT. Pg. 375; lines 11-25; Pg. 376; lines 1-12). Angela's sworn testimony demonstrates that the "factual basis [for her expert's report and testimony] is not true" and it should have been excluded as lacking in proper foundation.

3. If tracing is allowed into the joint marital bank account, and if the PMA is interpreted to create "marital loans," mutual consent did not exist.

An agreement is the result of a mutual assent of two parties to certain terms, and, if it be clear that there is no consensus, what may have been written or said becomes immaterial." *Geraets v. Halter,* 1999 SD 11, ¶ 16, 588 NW2d 231, 234 (quoting *Watters*

v. Lincoln, 29 SD 98, 100, 135 NW 712, 713 (1912) (citation omitted)). "There must be mutual assent or a meeting of the minds on all essential elements or terms in order to form a binding contract." *Read v. McKennan Hosp.*, 2000 SD 66, ¶ 23, 610 NW2d 782, 786 (citations omitted). Whether there is mutual assent is a fact question determined by the words and actions of the parties. *Id.* ¶ 25 (citation omitted).

Consent is an essential element of a contract. SDCL 53–1–2(2). "Consent must be free, mutual and communicated." *Richter v. Industrial Finance Co. Inc.*, 88 SD 466, 472, 221 NW2d 31, 35 (1974) (citing SDCL 53–3–1). "Consent is not mutual unless the parties all agree upon the same thing in the same sense." SDCL 53–3–3. The existence of mutual consent is determined by considering the parties' words and actions. *In re Estate of Neiswender*, 2003 SD 50, ¶ 20, 660 NW2d 249, 253 (citing *Coffee Cup Fuel Stops v. Donnelly*, 1999 SD 46, 592 NW2d 924). "An enforceable contract requires [mutual assent]." SDCL 53–1–2(2); *Braunger v. Snow*, 405 NW2d 643, 646 (SD 1987). "There must be mutual assent or a meeting of the minds on all essential elements or terms in order to form a binding contract." 17A Am.Jur.2d *Contracts* § 26 at 54 (1991); *See Miller v. Tjexhus*, 20 SD 12, 16, 104 N.W. 519, 520 (1905). A unilateral intent is not enough to make a contract binding. *Langer v. Stegerwald Lumber Co.*, 262 Wis. 383, 55 NW2d 389, 392 (1952).

This Court has already reviewed ample testimony from Angela that she did not understand the tracing analysis nor ever contemplate such would need to be done on the joint marital bank account of the parties. To summarize, though, Angela testified:

Q: Yet your claiming those are all your separate property?

A: That's what the experts say.

> Q: So throughout this, you were transferring money from your 7191 to your IRAs while, at the same time, borrowing money from the marital estate? Are you maintaining a separate interest in the money?
>
> A: I had no idea at the time.
>
> Q: You had not idea at the time what?
>
> A: That I would have to do a tracing.
>
> Q: What do you mean by that?
>
> A: I had no idea I would have to do a tracing and what was going on, that it would be like this. That this would be – this was – this is what's happened (CT Pg. 452; Line 21-25; Pg. 453; lines 1- 9).

Don also did not agree with the Angela's expert report, or the allegation that once separate earnings or property were deposited into the joint martial bank account that they allegedly retained a separate interest:

> Q: So when Ms. Charlson claims that she has a separate property interests in all of these assets, it is her position that she maintains – every time she deposited money to your joint account, she maintained a separate property interest in it. Do you understand that?
>
> A: Yes I do. I understand what she said.
>
> Q: Do you agree with that?
>
> A: No. I don't agree with that. There was never a discussion relating to the fact that she was doing this. She would have had the ability to keep her assets separate, *had she wanted to. She could have easily written checks from other places if she was trying to keep assets separate. It was never understood by me that was what her intent was. She could have wired money. She could have transferred monies. If she didn't – she could have written checks on her 7191 account* (CT Pg. 755; lines 11-25; Pg. 756 lines 1- 3) (emphasis added).
>
> . . . .
>
> Q: There's been a lot of testimony about the different businesses

that you two own. Were those businesses acquired with funds from your joint account?

A: All of them.

Q: So the Buffalo Wild Wings, Sioux Falls Massage Envy, Rogers Massage Envy, Taco Johns of Pine Ridge, Edward Jones Partnership, those were all acquired with assets from your joint account?

A: All of them were (CT Pg. 762; lines 17-25).

. . . .

A: I interpret it that, again, if we're just speaking about the joint account that – she had income, I had income. You could classify it as hers was distributions, mine was Edward Jones income. You could classify that mine was a much greater number than hers, but I still call it joint income. That's the way I interpret it.

Q: Do you know your total earnings over the course of the marriage, approximately?

A: Yes. The Baker Tilly Group said it was 2.6 million.

Q: Do you know, approximately, how much Ms. Charlson earned during the course of the marriage?

A: $1.6 million.

Q: Do you know the approximate size of the estate?

A: Five and a half to six million.

Q: And under Ms. Charlson's interpretation of the pre marriage agreement, approximately what percentage do you get compared to what she would get?

A: I think the Value Consulting Group said I'm at about 13 percent and she's at about 87 percent (CT Pg. 776; lines 14-25; Pg. 777; lines 1-9).

If the Court's interpretation of the PMA is that a tracing is appropriate, and that a separate interest was maintained in the joint marital bank account, neither party understood that. "There must be mutual assent or a meeting of the minds on all essential

elements or terms in order to form a binding contract." *Read v. McKennan Hosp.*, 2000 SD 66, ¶ 23, 610 NW2d 782, 786 (citations omitted). Whether there is mutual assent is a fact question determined by the words and actions of the parties. *Id.* ¶ 25 (citation omitted). The *testimony and actions* of the parties in this case contradict Angela's interpretation on the two key points and dictates that if such interpretation is upheld there was no mutual consent to it at the time the PMA was signed. Angela cannot now claim a version of facts contrary to her own sworn testimony. *Lalley*, 364 NW2d at 141.

In addition to neither parties' testimony, or actions, supporting an interpretation allow for tracing through the jointly owned joint marital bank account, the parties also both testified there were no marital loans. Angela, in fact, testified there were "absolutely" no loans nor were transfers meant to be loans at any point during the marriage (CT Pg. 375; 11-21). Don's testimony was no different than Angela's testimony:

> A: When I look back, if that was what her actual intention was, I guess I'd say I'd be upset about it. I never had any idea at all she was borrowing money from our account, which she doesn't either, she stated yesterday. I had no idea records were back and forth record and records were being taken of her owing marital assets to our joint account. The Value Consulting Group has to have 50 assumptions, maybe even 100. I didn't count them, but there was many statements that say they assume this or they assume that. We're dealing with millions of dollars and the assumptions didn't make sense to me (CT Pg. 766; lines 15-25; Pg. 767; line 1).
>
> . . . .
>
> Q: And you heard Ms. Charlson's testimony yesterday that that wasn't what – there was no marital loan?
>
> A: As she stated, she nor I ever used the word "loan." We never discussed the word "loan." I had no idea that she as borrowing money from this account, again, the one that I put most the money in, that she was borrowing money from it.
>
> Q: So she never asked your permission to borrow money from

7183?

A: The word "loan" was never used (CT Pg. 771; lines 23-25; Pg. 772; lines 1-7).

Again, the Trial Court's interpretation allowing for "marital loans" in the parties joint marital bank account has no basis in the PMA. There are no separate interests in a joint marital bank account. If the Trial Court's interpretation is affirmed, neither party consented to that interpretation and accordingly no mutual consent existed. Don submits that under the Trial Court's interpretation there was a lack of mutual consent resulting in the conclusion that the PMA is not an enforceable contract.

CONCLUSION

This Court should conduct its de novo review and reverse the Trial Court's interpretation of the PMA. Tracing through a joint marital bank account with only two stated marital purposes was not provided for by the terms of the PMA and neither party testified they either understood or conducted themselves in such a fashion throughout the marriage. Interpreting the PMA to create marital loans, which was the fiction of Angela's experts and in direct contradiction to Angela's testimony, is also a flawed interpretation. Last, and if the Trial Court's Interpretation were to be affirmed neither party consented, through actions or through understanding, to an application of the PMA as set forth by the flawed report of Angela's experts. This Court should reverse the Trial Court, remand this case to address the assets consistent with an interpretation of the PMA consistent with its terms and the parties mutual understanding. Such an interpretation will allow Angela to preserve any separate interests that she decided she wanted to protect during a twenty plus year marriage, identify marital assets acquired through the utilization of the joint marital bank account, and subsequently allow the Minnesota

divorce Court to divide all marital property in that proceeding.

Appellant respectfully requests oral argument.

Respectfully submitted this 9th day of September 2016.

CLAYBORNE, LOOS & SABERS LLP

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4) counsel for Appellant states that the foregoing brief is typed in proportionally spaced typeface in Times New Roman 12 point. The word processor used to prepare this Brief indicated that there were a total of 7,811 words and a total of 45,668 characters (with spaces) in the body of the Brief including footnotes.

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of September, 2016, I filed and served via Supreme Court Electronic Filing a true and correct copy of the foregoing **Appellant's Brief** to the following:

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_____/s/Michael K. Sabers_____
Michael K. Sabers

APPELLANT'S APPENDIX

APP. No.	Description	Appellant's Appendix Page Numbers
1.	Judgment and Order	0001-0003
2.	Trial Court's Findings of Fact and Conclusions of Law	0004-0191
3.	Premarital Agreement	0192-0202
4.	Transcript Excerpts	0203-0236
5.	Notice of Entry of Judgment and Order	0237-0238

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APPELLANT'S APPENDIX NO. 1

JUDGMENT AND ORDER

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	SS.	
COUNTY OF BUTTE	)	FOURTH JUDICIAL CIRCUIT
ANGELA K. CHARLSON,	)	File No. 09CIV14-000006
Plaintiff,	)	
v.	)	**JUDGMENT AND ORDER**
DONALD M. CHARLSON,	)	
Defendant.	)	

This matter came before the Court on the 8th day of July, 2014, to determine the validity of the Pre-Marriage Agreement of the parties. Pursuant to the Findings of Fact and Conclusions of Law filed August 5, 2014 and Order of Validity of the Pre-Marriage Agreement filed October 16, 2014, this Court found that the Pre-Marriage Agreement between Plaintiff, Angela K. Charlson and Defendant, Donald M. Charlson was valid and enforceable, and a trial on the interpretation of the Pre-Marriage Agreement was ordered.

The trial was held before the Honorable Michael W. Day in the Circuit Courthouse in Belle Fourche, Butte County, South Dakota on April 20-24, 2015, and August 24-27, 2015, to interpret the Pre-marriage Agreement as it relates to the assets and debts of the parties, which included a determination of what, of the existing assets and debts, is separate property, what is marital, or a combination of both separate and marital property, as well as, to the extent necessary, the value of said assets.

Plaintiff was personally present and represented by counsel, Shelly D. Rohr, Esq. of Wolf, Rohr, Gemberling & Allen, PA (Order to Admit Nonresident Attorney dated

FILED
JUN 27 2016
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT
By

March 9, 2015); Linda Lea M. Viken, Esq. of Viken & Riggins Law Firm; and Eva Cheney-Hatcher, Esq. of Cheney-Hatcher & McKenzie Dispute Resolution Center, PLLC. Defendant was personally present and represented by counsel, Amber Lawrence, Esq. of Dittrich & Lawrence, PA (Order to Admit nonresident Attorney dated February 23, 2015) and Michael K. Sabers, Esq. of Clayborne, Loos, & Sabers, LLP.

The Court has considered the testimony and evidence offered by the parties, the arguments of counsel, all the files and records, and has been fully advised herein. The Court entered and filed its Findings of Fact and Conclusions on April 8, 2016, which Findings and Conclusions are incorporated herein by reference; and the parties were provided notice of such Findings and Conclusions of the Court on June 13, 2016, now, therefore, it is hereby;

ORDERED, ADJUDGED AND DECREED that the Court's determination of the parties' debts and separate property, marital property, or a combination of both separate and marital property, pursuant to the Court's interpretation of the Pre-Marriage Agreement, as well as, to the extent necessary, the value of said assets, shall be as set forth in this Court's Findings and Conclusions.

Dated this 27th day of June, 2016.

BY THE COURT:

THE HONORABLE MICHAEL W. DAY
CIRCUIT COURT JUDGE

ATTEST:

LAURA SCHMOKER
Clerk of Court

Deputy

FILED

JUN 27 2016

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT

By

APPELLANT'S APPENDIX NO. 2

TRIAL COURT'S FINDINGS OF FACT

AND CONCLUSIONS OF LAW

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	SS.	
COUNTY OF BUTTE	)	FOURTH JUDICIAL CIRCUIT
ANGELA K. CHARLSON	)	Civ. No. 14-06
Plaintiff,	)	
v.	)	
DONALD M. CHARLSON	)	**FINDINGS OF FACT AND CONCLUSIONS OF LAW**
Defendant.	)	

The above-entitled matter came on for trial before the Court on July 8, 2014 to determine the validity of the Pre-Marriage Agreement of the parties. Pursuant to the Findings of Fact and Conclusions of Law filed August 5, 2014 and Order on Validity of Pre-Marriage Agreement filed October 16, 2014, this Court found that the Pre-Marriage Agreement between Plaintiff, Angela K. Charlson, and Defendant, Donald M. Charlson, was valid and enforceable and a trial on the interpretation of the Pre-Marriage Agreement was ordered.

A trial was held on April 20-24, 2015 and August 24-27, 2015 to interpret the Pre-Marriage Agreement as it relates to the assets and debts of the parties, which included a determination of what, of the existing assets and debts, is separate property, what is marital property, or a combination of both separate and marital property, as well as to the extent necessary, the value of said assets. Plaintiff was personally present and represented by counsel, Shelly D. Rohr, Esq. of Wolf, Rohr, Gemberling & Allen, PA (Order to Admit Nonresident Attorney dated March 9, 2015); Linda Lea M. Viken, Esq. of Viken & Riggins Law Firm; and Eva Cheney-Hatcher, Esq. of Cheney-Hatcher & McKenzie Dispute Resolution Center, PLLC. Defendant was personally present and represented by counsel, Amber Lawrence, Esq. of Dittrich & Lawrence, PA (Order to Admit nonresident Attorney dated February 23, 2015) and Michael K. Sabers, Esq. of Clayborne, Loos, & Sabers, LLP.

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4TH CIRCUIT CLERK OF COURT
By

The parties submitted pre-trial submissions as well as post-trial proposed findings, conclusions and legal arguments. The parties also filed objections to the other parties' proposed findings and conclusions. Testimony at trial was provided by:

Plaintiff, Angela Charlson
Defendant, Donald Charlson
Jennifer Loeffler, CPA/ABV, ASA
Quinn Driscoll, CPA/ABV, AM
Carol Joy O'Rourke Johnston (Midge)
John M. Mitchell, CPA, CVA, CFP
Rachel M. Buse-Flaskey, CPA/ABV/CFF/CGMA
Thomas W. Harjes, CPA/APV/CFF, CVA; and
Staci Smoot.

Defendant submitted the testimony of Alicia Brader, a Records Custodian for Edward Jones, and Todd Robertson, a shareholder in two businesses with Defendant, via trial deposition transcripts. (Cites to the trial transcript will be described as "*Tr. Page:Line*" *(for example: "Tr. 45:10-15")*. Cites to trial deposition for Todd Robertson will be described as "*D. Robertson Tr. Page:Line*". Cites to trial deposition for Alicia Brader will be described as "*D. Brader Tr. Page:Line*").

On February 9, 2016 Defendant submitted a Motion to Reopen the evidence in this matter to take into evidence Plaintiff's Second Amended 2011 and 2012 Federal Income Tax Returns as well as an Amended Schedule 1 to the Baker Tilly Report based on the same. A telephonic hearing was held on March 2, 2016. On March 6, 2016 this Court entered an Order Denying Motion to Reopen.

Having considered the sworn testimony of the parties and their witnesses, all the records[1] and files herein, including all submissions, as well as the evidence introduced, both oral and documentary, the arguments of counsel, and being fully advised as to all matters pertinent hereto, the Court makes the following:

[1] The Court notes that over 27,000 pages of evidence was submitted in this matter.

FINDINGS OF FACT

1. The parties were married on January 23, 1993 in Pennington County, South Dakota. The Defendant sought a dissolution of the marriage in the State of Minnesota, which was served upon Plaintiff on June 11, 2012. *In Re Marriage of Donald M. Charlson v. Angela K. Charlson, Court File No. 55-FA-13-1830, District Court Family Division, Third Judicial Circuit, State of Minnesota, County of Olmsted. Exhibit 18.* The Minnesota Court bifurcated the case and granted the parties a divorce on February 18, 2014. The issues remaining before the Minnesota Court are spousal maintenance, division of property and debts, attorney fees, and other financial matters involving the parties. A division of property and debts as well as other financial matters cannot be determined in Minnesota until this Court interprets the provisions of the Pre-Marriage Agreement.

2. At the time of the parties' marriage Plaintiff had two minor children, ages 11 and 7 from her previous marriage and Defendant had three minor children, ages 13, 11, and 9 from his previous marriage. Plaintiff had an ownership interest in three Taco John's restaurants and Defendant was working as a financial advisor at Edward Jones.

3. At the time of marriage, Plaintiff owned a home in Belle Fourche, South Dakota and ownded a a fifty percent interes in the following businesses: Taco John's Pine Ridge ("TJPR, Inc."); Taco John's Belle Fourche, Inc. ("STI"); and Taco John's Mission, Inc. ("JMCCS"). Plaintiff was in the process of selling her interest in TJPR, Inc. as well as her home in Belle Fourche. Plaintiff had a Norwest checking account, an Edward Jones Investment Account (4012), miscellaneous personal property and two vehicles. Plaintiff had an existing mortgage of $58,000.00 on her Belle Fourche home and approximately $90,000.00 of personally guaranteed business debts. (Ex. 1.A.(1), Bates 000011).

4. The parties entered into a Pre-Marriage Agreement (hereinafter "PMA") in the State of South Dakota on the 22nd day of January 1993, in Belle Fourche, South Dakota. *Ex. 1A(1).*

5. The parties' PMA was drafted with assistance of counsel[2] after the disclosure of assets. Plaintiff was interested in protecting her business interests and other separate property as Defendant had a negative net worth at the time of their marriage. Defendant previously testified at the trial in July 2014 and the court found that part of the reason for the PMA was to protect the Plaintiff's assets and businesses.

6. The Plaintiff filed this Declaratory Judgment action to determine the enforceability and interpretation of the PMA.

7. A hearing on the enforceability of the PMA came before the Court on July 8, 2014. By Findings of Fact and Conclusions of Law dated August 5, 2014, the Court found the parties' PMA valid and enforceable.

8. This Court is now interpreting the PMA executed by the parties in the State of South Dakota, to determine whether the assets and debts of the parties are separate property, marital property, or a combination of both separate and marital property. *See Order on Scope of Issues for Trial filed March 6, 2015.* The Court is not deciding what is an "equitable" division of the parties' debts and assets. The Court previously found the PMA was not unconscionable when executed and the reasons for the PMA were valid. *Conclusion of Law 8 of Findings of Fact and Conclusions of Law filed August 5, 2014.*[3]

9. Courts are dealers of equity in the courtroom day in and day out. However, Pre-Marriage Agreements are creatures of contract. While one party may feel the contract terms are no longer fair at the time of enforcement, the court's role is to enforce what the parties previously contracted for. *Walker v. Walker*, 2009 S.D. 31, 765 N.W.2d 747; *Smetana v. Smetana*, 2007 S.D. 5, 726 N.W.2d 887; *Sanford v. Sanford*, 2005 S.D. 34, 694 N.W.2d 283.

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[2] Attorney Richard A. Pluimer, law firm of Carr & Pluimer, P.C. of Belle Fourche, South Dakota, counsel for Plaintiff, drafted the PMA.

[3] The Court is taking judicial notice of all the records and files in this case.

10. Since this Court found that the PMA is valid and enforceable, that matter is now *res judicata*, and the law of the case.[4] The PMA governs the parties' rights and obligations upon legal separation/divorce.

11. The PMA protects separate business interests of the parties hereto as well as other assets in the event of dissolution of their marriage.

12. Defendant claims that at the time of the marriage he owned a retirement plan through his employment with Edward Jones which consisted of a 401(k) and a profit sharing plan. However, Defendant's Exhibit A to the PMA stated that Defendant had "0 assets" at the time his signed the PMA. The issue of whether Defendant had retirement accounts at the time of the marriage is res judicata having been litigated in the previous hearing on July 8, 2014. Therefore, the Defendant did not have a retirement account at the time of the marriage.

13. During the parties' marriage, they acquired an interest in the following assets for which Plaintiff is making a separate property claim: Superior Financial Center, Buffalo Wild Wings, LLC ("BDUBS"), Sioux Falls Massage Envy, Inc. ("SFME"), Rogers Massage Envy, Inc. ("ME Rogers"), Homestead, Fondominium in Norman, Oklahoma, Edward Jones Joint Account 7183, Edward Jones Joint Tax Account 6236, Edward Jones Individual Account 7272, Edward Jones Individual Account 7191, Edward Jones Investment Account 1297, Edward Jones IRA 0592, Edward Jones Simple IRA 0314, Edward Jones IRA 7610, Edward Jones Roth IRA 7583, Edward Jones Limited Partnership, Edward Jones Subordinated Partnership, Home Federal Joint Checking 2730, Hardcore Computer Stock and real property in the Badlands of South Dakota which Plaintiff was gifted from her mother.

14. The parties have an interest in other assets not at issue in these proceeding as Plaintiff is not making a separate property claim to those assets and such assets are subject to the jurisdiction of the Court in Olmsted County, Minnesota.

[4] See also Order on Validity of Pre-Marriage Agreement dated October 16, 2014.

FINANCIAL EXPERTS

15. The Plaintiff and Defendant each retained financial experts to testify in this matter regarding the value of certain business interests[5] and issues regarding the tracing of Plaintiff's separate property claims. The Plaintiff hired Jennifer L. Loeffler, CPA/ABV, ASA and Quinn A. Driscoll, CPA/ABV/AM of Value Consulting Group, Inc., (hereinafter referred to as "VCG" or "Plaintiff's experts") to conduct business appraisals and a separate property tracing report relating to Plaintiff's separate property claims in certain assets. Ms. Loeffler is the Vice President and owner of Value Consulting Group located in Minneapolis, Minnesota. Her firm provides business valuations and litigation support including expert reports and testimony. It is noteworthy that Ms. Loeffler was previously employed as a manager with Baker Tilly Virchow Krause, Defendant's experts in this matter, working in the areas of business valuation and litigation support. She has been working as a CPA since 1997 and doing business valuation work since 2001. Her professional designations and affiliations include the following:

- Certified Public Accountant (CPA), American Institute of Certified Public Accountants
- Accredited in Business Valuation (ABV), American Institute of Certified Public Accountants
- Accredited Senior Appraiser (ASA), American Society of Appraisers
- Member, Minnesota Society of Certified Public Accountants
- Member, American Institute of Certified Public Accountants
- Member, Collaborative Law Institute and Cooperative Practice Network

16. Ms. Loeffler has been a speaker at numerous engagements on business valuation matters. Ms. Loeffler is the author of the topic on nonmarital claims in the Family Law Financial Deskbook (2008). *Ex. 1E, Bate #1850-1852 and Tr. 145-146.* Ms. Jennifer Loeffler testified regarding the value of the parties' business interest in Buffalo Wild Wings, Rapid City, South Dakota, known as BDUBS, as well as offered rebuttal testimony on the valuation of Taco John's Pine Ridge, LLC. Ms. Loeffler has valued thousands of businesses and has experience in valuation of franchise businesses. *Tr. 146.* Ms. Loeffler also testified regarding the methodology used in the separate tracing report of Plaintiff's assets, which will be discussed below.

[5] The parties agreed to use a valuation date of December 31, 2013.

17. Ms. Quinn Driscoll is a senior financial analyst with VCG. She provides business valuation and litigation support including separate tracing and expert testimony. Ms. Driscoll was formerly a Performance Auditor for the North Dakota Office of the State Auditor and an accountant at Ernst & Young LLP in Minneapolis, Minnesota. Her Professional Designations and Affiliations are as follows:

- Certified Public Accountant (CPA) - Minnesota
- Accredited in Business Valuation (ABV) – American Institute of Certified Public Accountants (AICPA)
- Accredited Member (AM) – American Society of Appraisers, Business Valuation

Ex. 1E – Quinn Driscoll CV, Bate #1853

18. Ms. Driscoll has been qualified as an expert in cases related to separate property tracings. Ms. Driscoll testified regarding the separate tracing report. Ms. Driscoll was involved in the gathering of documents for the Plaintiff's separate tracing report. She was in charge of tracking the documentation and figuring out what additional documents were needed to complete the tracing. She was responsible for entering all of the financial information into the tracing model, which is an *Excel* spreadsheet that is used by VCG in tracing cases and applying generally accepted methodologies. *Tr. 1032.*

19. The Defendant hired Baker Tilly Virchow Krause, LLP, (hereinafter referred to as "Baker Tilly" or "Defendant's experts") as his financial experts to provide business values as well as a rebuttal report to Plaintiff's separate tracing report. Mr. Thomas Harjes is a partner at Baker Tilly Virchow Krause, LLP. His professional designations and affiliations include the following:

- Certified Public Accountant (1991)
- Certified Valuation Analyst (1997)
- Accredited in Business Valuation (1999)
- Certified in Financial Forensics (2009)

Ex. B3 – Thomas Harjes CV

20. Ms. Rachel Buse-Flaskey is a senior valuation services manager who joined Baker Tilly in 2013. Her professional designations and affiliations include the following:

- American Institute of Certified Public Accountants: ABV – Accredited in Business

Valuation; CFF – Certified in Financial Forensics; CGMA – Chartered Global Management Accountant
- Minnesota Society of Certified Public Accountants
- South Dakota Society of Certified Public Accountants
- Business Finance Instructor – University of South Dakota
- Author of several articles related to business valuation and litigation support

Ex. B1 – Rachel Buse-Flaskey CV

Ms. Buse-Flaskey testified regarding her business valuations of the business interests known as BDUBS and Taco Johns Pine Ridge, LLC.

21. The parties stipulated to the expert credentials of both VCG and Baker Tilly. Plaintiff called Mr. John Mitchell as a rebuttal expert witness at trial to rebut the testimony of Ms. Buse-Flaskey as it related to the business valuation of Taco John's Pine Ridge, LLC. Mr. Mitchell is a CPA with Casey Peterson and Associates in Rapid City, South Dakota, which is a full-time accounting firm. *Tr. 108:2-6.* He is a certified public accountant and has been in public accounting since 1979. He is a member of the American Institute of CPAs, the South Dakota CPA Society, and the chairman of the South Dakota Board of Accountants. *Tr. 108:17-19.* He is a certified valuation analyst and obtained that certification in 1996. He is also a certified financial planner and obtained his certification in 1995. Mr. Mitchell has performed approximately 290 business valuations and he frequently testifies in South Dakota courts as an expert regarding business valuations. *Tr. 107:14-19.* Plaintiff provided proper foundation as to Mr. Mitchell's expert credentials.

22. This Court is faced with the consideration of various issues in this matter. First, this Court is deciding the valuation of two businesses, namely BDUBS, LLC and Taco John's of Pine Ridge, LLC. Business valuations were completed, in part, to complete and finalize the separate property tracing for the Plaintiff. Defendant completed business valuations to ascertain the claimed marital value of property.

23. Next, this Court considered Plaintiff's claimed separate property as set forth in the separate property tracing report prepared by VCG. *Ex. 1K.* In doing so, this Court examined the

tracing of the parties' various investment accounts, retirement accounts, businesses interests, real estate and some miscellaneous matters.

24. The Plaintiff's tracing report is extremely detailed and this Court's findings contain only a sampling of tracing regarding transactions within identified asset categories.

25. Defendant contends that VCG prepared and submitted its tracing analysis utilizing different methodologies "based upon Plaintiff's interpretation of the parties' PMA." Loeffler's direct testimony explained what methodologies were used in the tracing analysis and that they were based upon generally accepted methods of tracing as well as the terms of the PMA, not based upon Plaintiff's interpretation of the PMA. Tr. 952:5-8.

26. Defendant contends that under VCG's analysis a "marital loan concept" was created. Loeffler explained in her testimony that the marital loan was created by the PMA, that if marital funds get paid toward a separate asset, it creates a marital loan. Tr. 968:3-13.

BUSINESS VALUATIONS

27. The parties agreed to value their assets as of December 31, 2013 in their dissolution of marriage action in the State of Minnesota. *In Re Marriage of Donald M. Charlson v. Angela K. Charlson, Court File No. 55-FA-13-1830, District Court Family Division, Third Judicial Circuit, State of Minnesota, County of Olmsted.* This valuation date is also be used by this Court. The parties agreed to the values of the following assets *(see Stipulation Regarding Business Valuations and Order filed April 20, 2015)*:

ASSET	VALUE AS OF 12/31/13:
Oklahoma Condo Proceeds (being held in trust)	$102,782
Sioux Falls Massage Envy (SFME) (75% interest)	$1,220,000
Rogers Massage Envy (ME Rogers) (25% interest)	$40,000
Superior Financial Center (33.3% interest)	$30,000
Edward Jones Limited Partnership	$236,800
Edward Jones Subordinated Partnership	$100,000

28. The parties were unable to agree on the value of the parties' interest in BDUBS, LLC and Plaintiff's Taco John's of Pine Ridge, LLC. Expert testimony was provided by both

parties regarding these two business entities. Plaintiff claims the parties' 16.67% interest in BDUBS is worth $160,000 while Defendant claims the value is $310,000. Defendant claims Plaintiff's Taco John's of Pine Ridge, LLC business is valued at $860,000 while Plaintiff asserts the business is separate property pursuant to the terms of the PMA and no valuation is needed.

VALUATION OF BDUBS, LLC

29. BDUBS, LLC[6] (the "Company") was organized as a partnership in the State of South Dakota on February 1, 2010. The Company owns and operates a Buffalo Wild Wings restaurant franchise located in Rapid City, South Dakota. The restaurant opened on February 1, 2010. *Tr. 181:24-25.*

30. Defendant's ownerhship interest was financed with four capital contributions from the parties' joint 7183 account: $15,000.00 on June 25, 2009, $75,000.00 on September 10, 2009, $35,000.00 on October 13, 2009 and $136,000.00 on September 2, 2011[7].

31. Defendant argues that this "final capital contribution of $136,000.00 created a margin loan" in the joint 7183 account as Plaintiff did not contribute a sufficient amount of funds to cover acquisition of marital property and pay ordinary and necessary living expenses that month in violation of paragraph 7 of the parties' PMA. However, the evidence presented does not support Defendant's claim as Plaintiff deposited $100,000.00 into the 7183 account during September 2011: TJPR Member Draw (09/01/11) of $20,000.00, STI, Inc. distribution (09/13/11) of $15,000.00, and a transfer from 7191 account (09/19/11) of $65,000.00. Plaintiff contributed $100,000.00 while Defendant contributed only $12,614.64.

32. The 7183 account had a balance of $290,957.97 as of August 26, 2011, and after payment of all of the check and withdrawls and $100,000.00 in contributions made by Plaintiff

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[6] Defendant's interest in the Company was acquired in 2009.

[7] The $136,000.00 payment made on September 2, 2011 was to pay off a corporate loan. Tr. 836:8-10. Both BDUBS and Defendant treated this payment as a capital contribution. This corporate debt payment is identical in nature to the SFME corporate debt payments made by Plaintiff in early 2012, however, Defendant treated Plaintiff's corporate loan payments for SFME differently than the corporate loan payments for BDUBS.

in September, 2011, the account balance was $228,515.34 at the end of September, 2011. Defendant was in charge of the investments in the 7183 account and could have sold investments that month to free up cash and avoid a margin loan. Defendant did not do so.

33. Defendant also argues that "During the time frame the parties were making capital contributions from their joint 7183 account, Plaintiff's 7191 account was "borrowing" funds from the parties' joint 7183 account. Defendant argues that at the time of the initial three capital contributions to BDUBS, LLC in 2009, Plaintiff had "borrowed" over $73,000.00 of funds from 7183. (Exhibit 1.K., Schedule AC-1, P. 65-66, lines 877, 886 and 891). He also argues that at the time of the fourth capital contribution in September of 2011, the "loan" balance in Plaintiff's 7191 account had grown to $74,786.00. (Exhibit 1.K., Schedule AC-1, line 1003)." See Defendants Proposed Finding of Fact 165.

34. Contrary to Defendant's claim, the evidence shows that Plaintiff did not "borrow" funds from the 7183 account as alleged by Defendant in this proposed finding. No marital loan existed in Plaintiff's 7191 account as of December 31, 1998. Between January 1, 1999 and September 19, 2011, a period of 12 ½ years, a marital loan was created by applying the terms of Paragraph 9F of the PMA and the balance of the marital loan slowly increased over time with the deposit of funds which could not be directly tied to Plaintiff's separate property, thereby being treated conservatively by VCG as marital deposits instead of deposits of separate funds such as deposits of payroll, child support, unknown cashier's checks, other miscellaneous checks and some TJPR expense reimbursements. A transfer of $20,000 from the 7183 account into 7191 occurred on March 21, 2011; of which, $13,681.68 was categorized as a marital loan due to the pro rata approach being applied to the transfer by VCG. Another transfer from 7183 into 7191 occurred on June 7, 2011 in the amount of $10,000; of which $6,975.56 was categorized as a marital loan due to the pro rata approach being applied to the transfer by VCG. However, those marital funds together with an additional $5,342.76 were thereafter transferred back into 7183 on July 15, 2011. No other transfers from 7183 to 7191 occurred prior to the $136,000 BDUBS capital contribution on September 1, 2011. With the transfer of $65,000 from Plaintiff's 7191

into 7183 on September 19, 2011, the marital loan balance existing in her 7191 account was $11,474.52. By December 2011, the marital loan balance in 7191 was $0. Ex. 1 K, p. 73, Line 1032, Bate, 27621. The marital loan in 7191 is not a debt owed by the marital estate; it is a debt owed by the 7191 account to the marital estate.

35. Defendant also claims that "Outside her regular contributions of distributions from STI and member draws from TJPR, Plaintiff did not "build up the account" or make a "big deposit" into the joint 7183 account to contribute to the acquisition of BDUBS, LLC in 2009. In fact, during 2009, the joint account was financing the remodel of TJPR with payments of over $167,000.00 from the joint 7183 account." See Defendant's Proposed Finding of Fact 168.

36. Contrary to Defendant's claim, the evidence shows that the 7183 account's balance grew from a balance of less than $1,800 in May 1993 to over $280,000 in August 2011. Clearly the account was built up through the years. While it is true the evidence indicates approximately $167,000 in payments were made from the 7183 account toward the 2009 remodel of TJPR, the evidence also reflects deposits from TJPR as reimbursement for those payments totaling over $110,443. The difference of approximately $53,000 was paid for by Plaintiff's separate funds in the 7183 account at the time of the payments on behalf of TJPR's remodel.

37. Defendant alleges that "Plaintiff's experts, VCG, applied a pro-rata share methodology in an effort to trace a separate property interest from the joint 7183 account to capital contributions used to acquire an interest in BDUBS, LLC." See Defendant's Proposed Finding of Fact 169. VCG did apply the pro rata approach at the time the capital contributions were made to acquire BDUBS, the reason given was to remain consistent with the treatment of payments made from the 7183 account when VCG could not tie a specific deposit of Plaintiff's separate funds directly to acquisition of property; in this instance, the capital contributions to BDUBS. VCG's pro rata approach was not done solely to try to create a separate property interest in an asset; the same pro rata approach was applied to all checks cleared/withdrawals made from the 7183 account during the same time period as the capital contributions.

38. Defendant also argues that "VCG ignored Plaintiff's intent at the time of the transfer and applied the $65,000.00 to pay down the marital "loan" in Plaintiff's 7191 account and continued utilizing the pro-rata share methodology to determine Plaintiff's separate property interest in BDUBS, LLC."

"VCG testified that, despite the fact Plaintiff thought she was transferring her separate funds into 7183 to go to BDUBS, they had to pay the marital loan back to be consistent with their methodology. (Tr. P. 1081, line 25, P. 1082, lines 1-23). However, the testimony contradicts the methodology used to determine Plaintiff's claimed separate property interest in Taco John's Pine Ridge."

"With TJPR, VCG applied a direct tracing methodology to the $15,000.00 transfer from 7191 to 7183 on July 7, 1997 and the payments from 7183 to the acquisition of TJPR that same month ..... In that instance, VCG relied upon Plaintiff's intent for TJPR to be her separate property despite a marital "loan" of $7,765.54 existing in Plaintiff's 7191 account at the time of the transfer."

"Furthermore, the final capital contribution from the 7183 account on September 2, 2011 created a margin loan of $61,195.42 on the 7183 account..... Plaintiff had $445,258.17 in her individual 7191 account at the beginning of September 2011 ($74,786.09 she had "borrowed" from the 7183 account) yet she failed to transfer funds from 7191 to 7183 in an amount sufficient to cover the ordinary and necessary living expense and acquisition of marital property.... Plaintiff's actions were a violation of paragraph seven of the PMA." See Defendant's Proposed Findings of Fact 170-173.

39. Contrary to Defendant's assertions, VCG's methodology was based upon the terms of the PMA and generally accepted tracing methods, not on Plaintiff's intent or how the parties lived their life during the marriage and therefore, at times, VCG's tracing contradicted Plaintiff's intent regarding her separate property. Plaintiff testified numerous times that her intent was to purchase separate property with her separate funds, however, the documents reflect the $65,000 transfer occurred "two weeks plus after the capital contribution to BDUBS and to Sioux

Falls Massage Envy." Quinn Driscoll Cross Exam - Tr. 1259:23-25. Therefore, VCG did not link those as a direct event. Tr. 1260:1-5. The value of the asset had no bearing on what methodology was used.

The direct separate-to-separate tracing methodology used by VCG in association with the reacquisition of TJPR was applied as TJPR was distinguished as a separate asset per the pre-marriage agreement to begin with, based upon the following facts that were in existence prior to VCG's analysis:

a. TJPR was listed as Plaintiff's separate asset on Exhibit B to the PMA and the complete sale to Cindy Palmier "never materialized as there was a default by the purchaser." See Defendant's sworn Response to Request for Admissions dated September 27, 2013 – Exhibit 1C(2), Bate #157;

b. Plaintiff's separate property 1990 Pontiac Sunbird was exchanged for the reacquisition of TJPR;

c. Plaintiff is the sole owner of TJPR; and

d. All TJPR debts assumed by Plaintiff were her separate obligations pursuant to Paragraph 8B of the PMA. (Plaintiff's separate obligations: pay the seller's business taxes owing, the outstanding loans to be paid back to TJPR, Inc., and the BIA loan balance that existed by Ms. Palmier.)

Thereafter, the only tracing required by VCG for this reacquisition was related to the $10,000 cash payment to Cindy Palmier, which occurred on July 7, 1997. Jennifer Loeffler's Direct Testimony @ Tr. 974-975.

When the 16.67% interest in BDUBS was acquired, the evidence reflected Defendant was named as a 16.67% shareholder and both parties were obligated for the corporate debt; (See Spouse's Consent - Defendant's Exhibit A.1, Page 16, Bate #016). The initial capital contribution was therefore pulled pro rata from a mixture of both marital and separate funds. This differs in how TJPR was reacquired.

Plaintiff contributed over $100,000 to the 7183 account during September 2011, as

opposed to Defendant's contribution of just over $12,600. The 7183 account balance was in excess of $290,000 at the end of August, 2011 and as Defendant was in charge of the investments in the parties' accounts at Edward Jones, he could have arranged for the sale of some investments to contribute further toward the payments made from the 7183 account in September to avoid a margin loan, however, he chose not to.

40. The Company operates subject to the Franchise Agreement with Buffalo Wild Wings International, Inc. (the "Franchisor") dated August 3, 2009. The Company is required to make weekly royalty payments of 5% of net sales, weekly advertising fee payments of 3% of net sales, and local marketing and promotion expenditures of 0.5% of net sales. The Franchisor has the right of first refusal in a proposed transfer of an ownership interest in the franchise, subject to certain exceptions. Transfers require the approval of the Franchisor. The Company receives a weekly regional ranking report from the Franchisor. According to management, the Company generally ranks between 12 and 19 out of 35 or 36 stores in the region based on revenue.

41. The Company employed approximately 60 total employees as of the date of the appraisals in this matter, including Matt Benne (Business Manager and Plaintiff's nephew). *Ex. 1E(1), Bate #1862 Tr. 25:9-10.* The Company leases approximately 10,500 square feet of retail space located at 715 Mountain View Road in Rapid City, South Dakota. The Company leases this space from an unrelated third party under an agreement that expires August 14, 2019. *Ex 1E(1), Bate #1862.*

42. At formation the Company invested approximately $1.1 million in leasehold improvements. Management estimated another $300,000 to $500,000 investment would be required by the Franchisor in three to five years. *Ex. 1E(1), Bate #1862.*

43. The Company's ownership structure at the date of the appraisals is as follows:

Matthew Benne	16.67%
Sam Benne	16.67%
Jack Benne	16.67%
Brian Shepard Nevada Management LLC	16.67%
Don Charlson	16.67%
Brad Estes & Associates, Inc.	16.67%
Total	100.00%

**The Benne family is Plaintiff's relatives.*

Ex. 1E(1) Organizational Documents (a), Bate #1960.

44. Transfers of the Company's stock are restricted by the BDUBS, LLC Operating Agreement dated May 1, 2009. *Ex. 1E(1) Organizational Documents (d), Bate #2022.* In the event of a proposed transfer, the Company and remaining Members have the first and second rights of refusal to purchase the offered interests. *Tr. 154:10-12.*

45. Many factors must be considered in the appraisal of a business enterprise. Among them are the pattern of historical performance and earning, the company's competitive market position, experience and quality of management and marketability.

46. Both experts considered the factors listed above in their appraisals. Plaintiff's experts and Defendant's experts used the fair market value approach to value the Charlsons' 16.67% interest in this restaurant. This is based on the accepted method of valuation practice for the State of Minnesota. It is also common in Minnesota to apply a lack of marketability discount in certain cases.

47. Each expert considered three different approaches to valuation: (1) the cost approach; (2) the income approach; and (3) the market approach. *Ex. 1E(1) & Ex. A2.* After each method is examined, the appraisers correlate the indicated values of the methods employed in each approach. The weight given to each method is largely a function of judgment by the valuation consultant, but is based on the quality of the inputs into each method. *Tr. 187:2-9.* Both experts agree that little or no consideration was given to the cost approach, as the cost approach does not consider intangible value. *Tr. 165-166, 185.* Based on the analysis of the income and market approach there is intangible value to the Company (good will). Both experts placed the greatest weight on the income approach, which is also referred to as the capitalized income

method. The market approach is simply used as a means of corroborating the results of the income approach.

48. Ms. Rachel Buse-Flaskey, Defendant's expert, issued two valuation reports for BDUBS. Her first report dated August 29, 2014 valued the Charlsons' interest at $190,000. *Ex. 1L(a).* Ms. Buse-Flaskey claimed that report was issued in error and was intended to be a draft report. The report was, however, signed and sent to counsel for the Plaintiff. After receiving a phone call from Defendant, the second report was sent out valuing the Charlsons' interest at $310,000. *Ex. A2.* Even assuming the first report was a draft report, Ms. Buse-Flaskey admitted the report was altered after Defendant reviewed the report. *Tr. 46:17-19.*

49. Ms. Buse-Flaskey's first report is similar to the valuation report of Plaintiff's expert and Ms. Buse-Flaskey admitted that the second report was sent out after she received the valuation report of Ms. Jennifer Loeffler. *Tr. 75.* The difference in value between Ms. Buse-Flaskey's first report and Ms. Loeffler's report is only $30,000. Both of Ms. Buse-Flaskey's reports were signed. *Ex. A2, Bate #34 & Ex. 1L(a), Bate #27859.*

50. The change in valuation after doing a first report with a value of $190,000, and a second report with a value of $310,000, is substantial and certainly raises the question of the credibility and reliability of the inputs used in her second report.

51. Plaintiff's expert, Ms. Jennifer Loeffler, prepared a business valuation of BDUBS. *Ex. 1E(1), Bates #1854-1921.* Her report indicates the fair market value of the Charlsons' 16.67% non-marketable, minority ownership interest in the outstanding common stock of the Company is $160,000. *Ex. 1E(1), Bate #1855 & Tr. 187:12-16.*

52. While both experts utilized similar methods of valuation and the reports on the value of BDUBS differed in several areas, there were only three primary areas of difference in the two expert reports:

a. The first difference is the capital expenditures assumptions used in the income approach method. This issue has a $70,000 impact on the value of the business. *Tr. 194:25.*

b. The second difference was the application of the pass-through premium used by Defendant's experts, also used in the income approach method. This difference has a $50,000 impact on the value of the business. *Tr. 195:2.*

c. The third difference was is the lack of control discount applied. *Tr. 195:3-4.*

The differences occurred in the treatment of the assumptions used in the income approach methodology. This income approach methodology assumes that future growth will be at a constant rate and entails developing an estimated ongoing earning amount based on consideration of the Company's recent historical financial results. The estimated ongoing earnings base is converted to value dividing by a factor called the capitalization rate, which assumes earnings will grow at a long-term sustainable growth rate. Buyers and sellers of businesses typically place a great deal of weight on a company's historical earnings if they are representative of future expectations. *Ex. 1E(1), Bate #1866.*

53. ***Capital Expenditures.*** The Company spent nearly $1.7 million in capital improvements and fixed assets as of December 31, 2013. The Company has fixed asset needs on an ongoing basis. The company has routine annual capital expenditures for general replacement of items such as televisions, tables and chairs that are part of the normal upkeep of the restaurant. In addition, the Company is routinely required by the Franchisor to make additional capital improvements. The expert assumptions for the capital expenditures differed. Ms. Buse-Flaskey used $50,000 annually and Ms. Loeffler used $147,500 for annual capital improvements. Ms. Loeffler's higher number incorporates both the routine annual expenses and the ongoing improvements required by the Franchisor. The Franchisor is requiring a major remodel of the restaurant in 2017, which, at the time of the valuation report, was expected to cost between $300,000 and $500,000. VCG used a three-year average when weighing 2011, 2012 and 2013 for capital improvements. Baker Tilly used only $50,000 a year for future expected capital improvements. While $50,000 is reflective of an annual regular need for general replacement of items, this figure does not represent capital improvements required by the Franchisor in the future. *Tr. 173-174.*

54. Expert testimony also differed on how to normalize accelerated depreciation. Due

to start-up costs of the business, it is common to accelerate the depreciation of certain assets as a tax advantage. VCG normalized accelerated depreciation to be more reflective of the economic useful life of assets in the valuation approach. Baker Tilly capitalized the cash flow and essentially removed the depreciation expenses. It is reasonable that any potential buyer of this business would consider the possible capital improvements that will be necessary in 2017, which would either affect the distributions to the shareholders or require a capital contribution by the shareholder to make the improvements. *Tr. 175-176.* Based on the historical spending of capital improvements and the current improvements that will be required by the franchisor, the VCG assumption of $147,500 of future capital improvements is the more reasonable assumption based on the year-to-date expenditures already made by the company.

55. By adjusting just the capital expenditure number in the Baker Tilly report to $147,500 as referenced in the VCG report, the Baker Tilly concluded value of $310,000 would be reduced to a value of $240,000. *Tr. 175.*

56. ***Pass Through Premium.*** Schedule 4 of the VCG report made adjustments to the income statement in the valuation process for income taxes. This theory recognizes that a buyer of the business would consider the fact that some level of tax is going to have to be paid on the earnings generated by the company. An adjustment was made for C Corporation tax rights. Baker Tilly made this adjustment, however, they also applied a pass through entity premium to the valuation conclusion, which adjustment VCG did not apply. The application of the pass through entity premium is being debated within the financial industry. The concept is that there should be some benefit to buying a company that is a pass-through entity as compared to a C Corporation, as income flows through to the individual in a pass-through entity. VCG indicated this pass through premium is not applicable as the individual tax rate for Defendant, who pays taxes as a Minnesota taxpayer, is higher than the South Dakota corporate rates, thereby eliminating any benefit. *Tr. 176-181.* If the pass through entity alone were eliminated from the Baker Tilly report, the valuation of the business would go from $310,000 to $260,000. *Tr. 179.* The Court finds the application of the pass through entity for this business is not a reasonable

assumption.

57. ***Lack of Control Discount***. Once all of the approaches of valuation are applied, the ownership interest is determined along with discounts for lack of control and lack of marketability. The lack of control discount is determined by utilizing studies for transactions that have occurred in the market place based on businesses whose owners don't have complete control. In this case, there are six owners of BDUBS. They need a majority shareholder vote to effectuate any major decisions within the business. *Tr. 188:20-25.* The Charlsons' interest of 16.67% by itself does not provide complete control for making decisions within the business. In addition, the Franchisor has significant control over the business. The Franchisor can dictate items that can significantly impact the earnings or cash flow of the owner of the business. VCG applied a 15% lack of control discount. *Ex. 1E(1), Bate #1907 and Tr. 189:14.*

58. The first Baker Tilly report applied a lack of control discount rate of 20%. *Ex. 1L(a), Bate #27878.* Baker Tilly eliminated this discount in the second report. If all of the Baker Tilly assumptions remained the same between the first report and the second report, except for the lack of control discount being applied; the Baker Tilly valuation of the business would go from $310,000 to $250,000. *Tr. 195.* The court finds the 15% lack of control discount as applied by VCG is appropriate to BDUBS.

59. A lack of marketability discount relates to the liquidity of an investment. Investors generally prefer investments that have access to a liquid secondary market that can be readily converted into cash. A lack of marketability discount is commonly applied to the ownership capital of closely held entities, as such interests are not readily transferable. *Ex. 1E(1), Bate #1910.* In other words, the lack of marketability discount looks at what a buyer is willing to pay for a stock that cannot be bought and sold on the public marketplace. Both expert reports applied the same a lack of marketability discount of 20%. *Ex. 1E(1), Bate#1870.*

60. Examining the three major adjustment differences in the VCG report and the Baker Tilly report, and averaging the adjusted values on an isolated basis, the Baker Tilly value of the Charlsons' 16.67% minority interest would be reduced to $180,000, which is more

reflective of their first report. *Tr. 196.* The Baker Tilly second report has an inflated value for BDUBS.

61. To consider the fair market value of the Charlsons' 16.67% non-marketable, minority ownership interest in the outstanding common stock of the Company, it is necessary to consider applicable discounts for lack of control and lack of marketability. This Court finds the discounts of the VCG report were based on appropriate considerations as follows:

	Fair Market Value
Value estimate of 100% controlling interest	$1,430,000
Times: Subject Ownership Interest	x 16.67%
Value estimate for 16.67% Interest (*Controlling ownership basis*)	$238,333
Less: Lack of Control Discount (15%)	($35,750)
Value estimate for 16.67% Interest (*Marketable, Minority Ownership Basis*)	$202,583
Less: Lack of Marketability Discount (20%)	($40,517)
Fair Market Value Estimate for 16.67% Interest (*Non-Marketable, Minority Basis*) (*Rounded*)	$160,000

62. This Court adopts the valuation report of VCG regarding BDUBS, LLC. The Charlsons' 16.67% non-marketable, minority ownership interest in the outstanding common stock of BDUBS, LLC is $160,000 as of December 31, 2013. *Tr. 187:12-15* and *Ex. 1E(1), Bate#1870.*

VALUATION OF TACO JOHN'S OF PINE RIDGE, LLC

63. Taco John's of Pine Ridge (TJPR, Inc.) was initially started by Plaintiff in 1988. She owned a 50% interest with her sister, Joyce Benne. *Tr. 258:4-5.* Plaintiff and her sister attempted to sell the business in 1993 to the then manager of TJPR, Inc., Cindy Palmier, shortly after the parties' marriage. *Tr. 258:17-21.* Plaintiff reacquired the business in 1997 after Ms. Palmier defaulted in the seller-financed payments to Plaintiff, Joyce Benne and the loan with the Bureau of Indian Affairs. *Tr. 976:8.* The business went from a corporation to a single-member limited liability corporation as Plaintiff's sister was no longer involved in the business. Plaintiff claims Taco John's of Pine Ridge, LLC (hereinafter "TJPR") is her separate property based on the terms of the PMA. Defendant claims TJPR was an asset acquired during the marriage as a result of the sale and reacquisition and is a marital asset.

64. TJPR is a limited liability company in the State of South Dakota. The business is located on the Pine Ridge Indian Reservation. As indicated by the Franchise Agreement, *(Tr. 96:15-17)* Taco Johns would need to approve any sale or transfer of the business or individual ownership interest, and the most likely approved buyer of the entire business would be an existing Taco John's franchisee.

65. Taco John's also retains a first right of refusal on any potential sale or transfer of the business. Since this business is located on the Pine Ridge Indian Reservation, any sale of the business would also need to be approved by the Oglala Sioux Tribe. *Tr. 96:18-20.* It would be difficult to facilitate a sale to someone not of Native American descent. *Tr. 96:23-25 & 97:1-2.*

66. The demographic and economic information does not indicate a healthy economy on the Pine Ridge Indian Reservation given the level of poverty, unemployment, and amount of households receiving public assistance. Shannon County, South Dakota, has more than half its residents (52%) living under the poverty line, and the median household income is $25,048. Unemployment in Shannon County based on the South Dakota Department of Labor estimates is well above national average at 13.1% and unemployment based on total reservation population based on a Bureau of Indian Affairs estimate is at 89%. *Ex. H2, Bate#347.*

67. Plaintiff's expert did not prepare a business valuation of Taco John's of Pine Ridge, LLC based on the terms of the PMA. Plaintiff's position is TJPR remains her separate property as it was listed as separate property at the time of the marriage and the buyer of the business shortly after the marriage defaulted on the sale terms resulting in Plaintiff taking back the business.

68. Ms. Buse-Flaskey prepared a business valuation of TJPR and opined the value of the business was $860,000. *Ex. H2.* Ms. Buse-Flaskey has never been involved in the sale of a business on the Pine Ridge Indian Reservation nor did she make a site visit to TJPR, which is a common practice when valuing a business. She has never valued a Taco John's business. *Tr. 74:11-12.*

69. Plaintiff's rebuttal expert was Mr. John Mitchell, a CPA with the accounting firm

of Casey Peterson and Associates in Rapid City, South Dakota. He has performed numerous business valuations. In addition, about one-third of his practice is transaction-based which involves the actual buying or selling of a business. Mr. Mitchell has numerous clients on the Pine Ridge Reservation and previously worked on the Reservation. *Tr. 110:13-14.* He testified that making a site visit to this business is extremely important. *Tr. 109-110.*

70. There are political issues and problems on the Pine Ridge Reservation. The number of potential buyers is enormously small and it is very possible a non-tribal member could not own this business. Plaintiff already attempted to sell the business to a tribal member and the sale failed. There could be problems for a future buyer with the Tribal Council or the Bureau of Indian Affairs, which could make it difficult to obtain financing. *Tr. 119-120.*

71. Plaintiff has experienced problems with the Tribal Council in the past. TJPR is located on tribal grounds. Plaintiff does not own the underlying land and she currently has six or seven years remaining on the existing lease with the Oglala Sioux Tribe. Plaintiff previously had a 99-year lease term which lease term was unilaterally changed by the tribe several years ago. *Tr. 227-228.* It is extremely difficult to get traditional commercial financing on the reservation. *Tr. 120.*

72. The Defendant points out and argues that "The PMA lists Plaintiff's three Taco John's stores of having a combined value of $270,000 as of January 1993.... Plaintiff increased the value of the stores by $72,500 in the parties' PMA in order to inflate her separate property interest in the stores." See Defendant's Proposed Finding of Fact 49.

73. This Court has already found: "Donald has not alleged that Angela's disclosure of debts and assets was deficient in any way." See Finding 41 of Findings of Fact and Conclusions of Law filed August 5, 2014. Further, pursuant to Paragraphs 1 and 2C of the PMA, Defendant's allegation that Plaintiff inflated the value of an asset listed on Exhibit B to the PMA, has no affect on this Court's interpretation of whether an asset is separate property or not. Paragraph 2C of the PMA states:

C. Separate property as used in this Agreement shall include not only the assets

described on attached Exhibits "A" and "B" but also include gains, income, income, (sic) interests, dividends, profits, and ***any other increases in value*** or decreases in debt, and issues therefrom. [Emphasis added].

74. It is illogical for Defendant to claim Plaintiff purposely inflated a value of an asset on Exhibit B of the PMA given the language in Paragraph 2C that any increase in value to an asset described on Exhibit B is Plaintiff's separate property.

75. Defendant is taking two opposite positions on his interpretation of Paragraph 1 of the PMA. He asks this Court to make a finding against Plaintiff's credibility for allegedly inflating the value of an asset she lists on Exhibit B to the PMA, yet he asks this Court to make a finding in his favor that "Defendant's failure to list the retirement plan on Exhibit A to the PMA does not eliminate Defendant's separate property interest in his retirement plan" relying upon Paragraph 1 of the PMA to support his request as "...each party used their best efforts at creating their list of assets and debts at the time of signing the PMA." Paragraph one further states "the listing of the assets and the value placed on the assets constitutes a reasonable approximation of each party's assets and liabilities, but neither party represents that the balance sheet is a precise complications, (sic) and further understands that the information was prepared informally by each party and was not prepared by professional accountants or appraisers." See also Defendant's proposed Findings 301 and 302, p. 94.

76. While discrepancies exist in Defendant's expert report resulting in TJPR being overvalued, it is not necessary for this Court to address those discrepancies.

77. This Court finds that based on the Plaintiff's tracing report (discussed below), any funds and assets used to reacquire the business came from Plaintiff's separate property. There is no need for the court to determine the value of TJPR as it remains Plaintiff's separate property.

VALUATION OF STI, INC.
(TACO JOHN'S OF BELLE FOURCHE, SD)

78. Plaintiff's expert and Defendant's expert both acknowledged that Plaintiff's interest in STI, Inc. remains her separate property pursuant to the terms of the PMA. There is no need for this Court to determine the value of STI, Inc.

DETERMINATION OF SEPARATE PROPERTY/MARITAL PROPERTY/COMBINATION OF BOTH SEPARATE AND MARITAL PROPERTY IN THE PARTIES' ASSETS AS OF DECEMBER 31, 2013

79. This Court must interpret the terms of the parties' PMA in order to determine what assets and liabilities of the parties is separate property as of December 31, 2013. The introductory paragraph of the PMA states the purpose and intent of the PMA is four-fold:

> (1) specifically identify the separate assets and liabilities of each party accumulated prior to the marriage and existing as of the date of this Agreement;
>
> (2) to relinquish the right of each party that may or will arise solely by virtue of the marriage relationship as against the separate property of the other;
>
> (3) to define the rights of each party to the property acquired during the course of the marriage; and
>
> (4) to recognize the rights of each party to dispose of separate property during their lifetime and upon death.

80. The PMA defines "separate property" in paragraph 2 as follows:

> 2. **SEPARATE PROPERTY:**
>
> A. Each party acknowledges and agrees that all property acquired and owned by the other as of the date of this Agreement shall be and remain the sole and separate property of that party. Each party, for himself or herself, and his or her heirs, executors, administrators, successors and assigns specifically relinquishes and disclaims any and all right, title, interest and claim of every kind or nature, regardless of the nature or source of that right, which will or may otherwise arise by virtue of the marriage.
>
> B. During lifetime, each party shall retain the sole and separate ownership and control of his or her separate property, and shall be free to manage, sell, control or otherwise dispose of such separate property.

C. Separate property as used in this Agreement shall include not only the assets described on attached Exhibits "A" and "B" but shall also include gains, income, income, (sic) interests, dividends, profits, and any other increases in value or decreases in debt, and issues therefrom.

D. Each party shall be free to replace assets owned by him or her at the time of this Agreement, and to sell or otherwise receive proceeds attributable to separate property of each. The replacement and proceeds of separate property shall be and remain separate property, and shall not lose their character as separate property solely by change of the form or nature of the asset.

E. Property received by either party through gift or inheritance shall remain the sole and separate property of the party so receiving or inheriting.

F. Employment benefits including, but not limited to, pension, profit-sharing or any other employee benefit programs or plans shall remain the sole and separate property of the party so employed, and such benefit plan shall remain separate property, even following the marriage of the parties. Each party relinquishes any claim, right, interest or title to the employee benefit plans of the other, and such plans shall not be subject to division in the event of death, separation, or dissolution of the marriage.

81. The PMA identifies each party's separate assets and liabilities that existed at the time of the marriage in January 1993. Defendant had "0 assets" at the time he signed the PMA.[8] *Ex. 1A(1)-Exhibit A*. Plaintiff had the following assets at the time she signed the PMA:

Asset	Value
TJPR, Inc. (50%) *Ex. 1A(1)-Exhibit B*	$100,000
STI, Inc. (50%) *Ex. 1A(1)- Exhibit B*	$160,000
JMCCS, Inc. (50%) *Ex. 1A(1)- Exhibit B*	Less than $10,000
House Equity *Ex. 1A(1)- Exhibit B*	$2,800
Checking Account *Ex. 1A(1)- Exhibit B*	Approximately $2,000

[8] This Court found Defendant was not credible in his testimony at the July 8, 2014 trial that he did not know his debts and assets at the time he signed the PMA. (*See Finding 42 of Findings of Fact, Conclusions of Law filed August 5, 2014*).

Asset	Value
Edward D. Jones & Co. Account No. 570-04012-1-8 consisting of money market accounts, stocks and mutual funds having an accumulated balance as of December 31, 1992 *Ex. 1A(1)- Exhibit B*	$68,646
Personal property consisting of two vehicles, household furnishings and miscellaneous personal property *Ex. 1A(1)- Exhibit B*	$20,000
Edward Jones IRA #0085-1-9 *Ex. 1G(1)(a), Bate #11724*	$7,373.20
Liabilities	
Remaining balance on mortgage for residence *Ex. 1A(1)- Exhibit B*	$58,000
Business debts personally guaranteed *Ex. 1A(1)- Exhibit B*	$90,000

Any gains, income, interest, dividends, profits and any other increases in value, or decreases in debt, from the above assets/liabilities are Plaintiff's separate property pursuant to Paragraph 2C of the PMA. The replacement and proceeds of separate property shall be and remain Plaintiff's separate property, and shall not lose their character as separate property solely by change of the form or nature of the asset pursuant to Paragraph 2D of the PMA. Defendant relinquished and disclaimed any and all right, title, interest and claim of every kind or nature, regardless of the nature or source of that right which may otherwise arise by virtue of his marriage, to Plaintiff's separate property pursuant to Paragraph 2A of the PMA.

82. The PMA addresses the issue of the commingling of separate property in two paragraphs: Paragraph 5 and Paragraph 9C. Paragraph 5 states as follows:

> 5. **COMMINGLING:**
>
> Parties shall use their best efforts to prevent any ***commingling*** of separate property. The ***commingling*** of separate property, or the failure to segregate separate property, shall not be construed as to change the character of separate property or otherwise result in a change of separate property to marital property. [*Emphasis added*]

The introductory language in paragraph 9C makes it clear that no statement or act modifies the PMA:

> 9. **ORAL STATEMENTS:**
>
> ***No statement or act*** by either party, from and after the date of this Agreement, shall have the effect of amendment, or modifying this Agreement. . . . In addition, ***under no circumstances*** shall the following event, either individually or collectively, be construed as evidence of any intention, express or implied, or of any agreement, actual or implied, to change the character of separate property:
>
> ***
>
> C. The ***commingling*** of either spouse of his or her separate funds with the separate funds of the other party or with any marital property. [*Emphasis added*]

83. The parties contracted for a "marital loan" provision in their PMA. Paragraph 9F of the PMA provides:

> 9F. In the event that marital property or separate property of either party is contributed toward separate property or debt of the other, such contribution shall be deemed a loan, payable on demand, without interest, unless the parties agree otherwise, in writing.

84. Plaintiff has provided an interpretation of the marital loan concept set forth in Paragraph 9F of the PMA in the Plaintiff's expert tracing report. VCG has viewed the PMA taking into consideration all of the paragraphs collectively. VCG has assumed Plaintiff's separate assets remain separate property in accordance with Paragraph 2A of the PMA, with any marital contributions to those separate assets designated as a loan from the marital estate. VCG therefore considered any assets acquired with marital and separate contributions after the date of the marriage to have both marital and separate components.

85. The separate interest in various assets is reflected as a percentage and dollar value of the asset. Generally, income and losses, appreciation, withdrawals, and other activity are apportioned between the marital and separate interests based on the percentage of separate and marital property calculated at the end of the prior reporting period.

86. Plaintiff's position is if her separate funds are traced into an asset, despite her separate funds flowing through joint accounts prior to the purchase of that asset, the acquired asset remains Plaintiff's separate property. *Ex. 1K, P. 3, Bate#27551.*

87. The Baker Tilly rebuttal report ***is not*** a tracing analysis; it is a schedule to identify each party's contribution to one of their joint accounts, the Edward Jones 7183 joint account. *Tr. 509.* Baker Tilly assumed the joint 7183 account was used to acquire property and pay ordinary living expenses pursuant to Paragraph 7 of the PMA. Defendant's position is any funds that flowed through a joint account to acquire property, becomes marital property.

88. VCG was hired to apply the provisions of the parties' PMA to assets acquired during the parties' marriage. Plaintiff's financial expert, Ms. Loeffler, has been qualified as an expert in other cases related to separate property tracings. She is routinely appointed by the Minnesota Courts as a neutral financial expert and about 50 percent of her cases are working as a neutral financial expert. The remaining 50 percent is done by private hire. She has been working as a separate tracing expert for 10 years. Ms. Loeffler was in charge of overseeing and managing the overall case and worked on the development of the methodology using both generally accepted methods of tracing in her field of expertise as well as giving consideration to the PMA and how the language of the PMA would change normal methodology. *Tr. 951:3-10.*

89. VCG provided a written analysis regarding their findings. *Ex. 1K.* VCG reviewed over 27,000 pages of documentation, and spent hundreds of hours interviewing Plaintiff and her counsel to identify separate property in existence as of December 31, 2013. The document gathering process started in June 2013 and it took VCG nearly 15 months to complete their written analysis. After VCG received the initial bulk of documents, Ms. Quinn Driscoll spent approximately six days with Plaintiff and her counsel, Eva Cheney-Hatcher, going through each account statement and analyzing the different transactions. *Tr. 1033:22-25 & 1034:1-3.*

90. VCG issued a report in August 2014. After the conclusion of the parties' mediation in Minnesota in January 2015, which did not result in a settlement of this matter, VCG prepared an amended report to account for some additional documents that were received after

August 31, 2014, including, but not limited to, documents on the business known as Innovative Enterprises and additional information regarding SFME. *Tr. 957:7-12.* Ms. Driscoll is the financial expert that physically input all activity in each account into the tracing model, and analyzed and created the schedules on pages 19 through 310 of the tracing report. *Ex. 1K, Bates #27567-27858.*

91. The narrative summary of the VCG report explains the methodology used for tracing the Charlsons' assets. *Ex. 1K, Pp. 1-18, Bates #27549-27566.* The various schedules following the narrative summary take the data from the documents and physically use that data to trace the assets between separate and marital property. Tracing is the act of taking document data and determining what portion of those assets are separate versus what portion of those assets are marital. The VCG report uses several tracing methods as follows:

a. **"Direct Tracing"** is done when specific events happen within a close period of time. *Tr. 954:19-20*

b. The **"Pro Rata Approach"** is applied by looking at an account balance over time and distinguishing what portion of that account balance is comprised of separate funds and what portion is marital funds. As transactions occur, those transactions are carried forward based upon the previous month's percentage of separate versus marital funds in the account. *Tr. 955:3-14.* For example, if a withdrawal takes place in December, the percentage of separate versus marital funds from the prior month's end (November) is applied to December's withdrawal(s).

92. Tracing cases are very document driven. The VCG report used banks statements, check registers, investment statements and retirement account statements. For the businesses, the report used business tax returns, financial statements and general ledgers. For real estate, the report used check registers, bank statements, appraisals, settlement statements and mortgage documents.

93. VCG started with the generally accepted methodologies of "direct tracing" and the "pro rata approach" and then considered what other aspects of the parties' terms in the PMA

affected those general methodologies. The language in the PMA contract supersedes generally accepted methodologies and the contracted language in the PMA was applied, when relevant, to the tracing analysis. *Tr. 960:9-16.*

94. The following assets acquired during the marriage were identified by VCG in their tracing report as being either Plaintiff's separate property, or contain a portion of Plaintiff's separate property: (*Ex. 1K, Schedule S-1, P. 19-20, Bate #27567-#27568)*:

Investment Accounts:

1. Plaintiff's Edward Jones Investment Act. #7191-1-8
2. Joint Edward jones Investment Account #7183-1-8
3. Defendant's Edward Jones Investment Account #7272-1-9
4. Joint Edward Jones Investment Account #6236-1-6
5. Plaintiff's Edward Jones Investment Account #1297-1-3
6. Joint Home Federal Checking Account #2730

Retirement Accounts:

1. Plaintiff's Edward Jones IRA #0592-1-9
2. Plaintiff's Edward Jones Taco John's Simple IRA #0314-1-6
3. Plaintiff's Edward Jones Taco John's Simple IRA #7610-1-2
4. Defendant's Edward Jones Roth IRA #7583-1-5

Business Interests:

1. Edward Jones Limited Partnership Interest
2. Edward Jones General Partnership Interest
3. Edward Jones Subordinated Limited Partnership Interest
4. Superior Financial Group, LLC
5. BDUBS, LLC (Buffalo Wild Wings Rapid City)
6. SFME, Inc. (Sioux Falls Massage Envy)
7. ME Rogers Inc. (Rogers Massage Envy)
8. TJPR (Taco John's of Pine Ridge, LLC)

Real Estate:

1. 3244 Lake Street NW, Rochester, Minnesota
2. Norman, Oklahoma condo sale proceeds

Miscellaneous:

1. Hardcore Computers Stock
2. 2013 Tax Refund Receivable

95. Defendant disputes VCG's analysis of Plaintiff's separate property, and hired Thomas W. Harjes and Carol R. Devitt of Baker Tilly Virchow Krause, LLP (hereinafter

"Baker Tilly") to review VCG's tracing analysis of March 30, 2015. Baker Tilly prepared a rebuttal report to the VCG report. *Ex. V.*

96. Ms. Devitt was not a witness at the trial of this matter. However, Ms. Devitt primarily drafted the rebuttal report and she prepared the inputs on Schedules 2, 3, and 4 of the rebuttal report. *Tr. 1324.* Baker Tilly prepared amended schedules to the July 2, 2015 report on August 5, 2015. Defendant's counsel did not provide the amended schedules to Plaintiff's counsel until August 19, 2015. *Tr. 387.* Mr. Harjes had limited knowledge of his own report, other than reviewing and making edits.

97. It was evident to this Court during Mr. Harjes' testimony that he was not familiar with the underlying documents VCG used to prepare the tracing analysis report. Mr. Harjes corrected several errors in his report during his testimony including an incorrect reference to the parties' ownership interest in BDUBS, which was listed as 33.3% when the interest is actually 16.67%. *Tr. 1353.* He also corrected an error on SFME capital contributions of $65,000.00 when the contributions were $61,500 (*Tr. 1342)*; and he corrected an error referencing loan payments of $273,678.00, when the loan payments were $212,178.00. *Tr. 1342.*

98. Mr. Harjes' has been a speaker on separate tracing claims. He acknowledged that his teaching materials discuss the "direct tracing" method and the "pro rata approach" method used by VCG and he uses those methods in his own reports. He further acknowledged that the VCG report is a typical tracing report using the generally accepted methodologies for tracing. *Tr. 1435.*

99. Both Plaintiff's experts and the Defendant's expert agree that when a PMA is involved in tracing, the methodology is tailored to the terms of the contract, thereby departing from the standard methodologies because of the contract terms. *Tr. 961-962 & 1436:2-7.*

100. The Baker Tilly report (*Ex. V)* is an analysis of the parties' contributions to pay ordinary and necessary living expenses and claimed acquisition of marital property. Schedule 1 provides a summary of funds each party contributed to the joint Edward Jones account 7183 as compared to the funds each party had available. *Ex. V, Bate #814.* Schedule 2 analyzes each

party's contributions by year to the joint Edward Jones account 7183. *Ex. V, Bate #815-827.* Schedules 3 and 4 are summaries of the historical income and estimated cash flow for the Plaintiff and Defendant respectively. *Ex. V, Bate #828-#831.*

101. The Baker Tilly report is not a separate tracing report. The rebuttal report prepared by Baker Tilly does not contain a tracing analysis of Defendant's claimed separate property.

102. Defendant's experts acknowledge that Plaintiff has a separate property interest in the following assets:

a. STI, Inc.; *Tr. 1427:3-6*

b. Any distributions from STI, Inc., other than those going in the 7183 Edward Jones account; *Tr. 1427:7-10*

c. Plaintiff's Edward Jones IRA 0592; *Tr. 1427:20-24*

d. Plaintiff's Edward Jones Taco John's Simple IRA 0314; *Tr. 1429:10-17*

e. Current Minnesota home of the parties; *Tr. 491:24-25 & 1430:1-4*

f. Plaintiff's Edward Jones 7191 account; *Tr. 1430:11-13*

g. Oklahoma condominium sale proceeds. *Tr. 1430:15-18*

103. Baker Tilly did not quantify the value of Plaintiff's separate interest in those assets. The only tracing schedule in evidence regarding Plaintiff's separate property claims is the VCG report. *Ex. 1K.*

PLAINTIFF'S SEPARATE PROPERTY AS OF DECEMBER 31, 2013

104. In order to determine whether separate property as defined in Paragraph 2C of the PMA was traced, this Court must first examine whether Plaintiff's income and profits from her various business interests listed in the PMA continue to remain separate property.

105. Plaintiff had three Taco John's businesses at the time of the marriage identified as her separate property on Exhibit B of the PMA. This Court will address each business and the applicable separate tracing methodology to determine Plaintiff's separate property interest.

(1) STI, INC. (TACO JOHN'S OF BELLE FOURCHE, SD)

106. Plaintiff continues to have a 50% interest in STI, Inc. d/b/a Taco John's of Belle Fourche, South Dakota (hereinafter referred to as "STI"). Defendant acknowledges Plaintiff's interest in this business is her separate property. *Tr. 676:13-21 & 750:1-4. & Ex. V, Bate #806. Ex. V, Bate #806.*

107. STI, Inc. is Plaintiff's separate property.

108. STI is organized as an S-Corporation. In preparing the tracing analysis, VCG examined business tax returns, general ledgers and financial statements. *TR. 1038.* Plaintiff has received separate income and separate distributions from STI throughout the parties' marriage, and said income and distributions are Plaintiff's separate property pursuant to Paragraph 2C of the PMA. VCG traced Plaintiff's separate income and profit distributions to the extent records were available. Due to the unavailability of bank records, VCG did not trace distributions totaling $38,000 from 1994 to 1995. *Tr. 1038.* Plaintiff also had W2 wages from STI. VCG was unable to trace $61,000 from 1993 to 1997. *Tr. 1039.* Those wages have been classified as marital, which benefits the marital estate. *Ex. 1K, Bate #27552.* According to the STI general ledgers, expense reimbursement checks from STI were deposited into the parties' accounts. VCG was unable to confirm that separate funds were used to pay for the expenses. As such, any expense reimbursements, totaling approximately $17,000, were classified as marital. The marital estate benefits from the marital classification of expense reimbursements. *Ex. 1K, Bate #27552.*

109. Plaintiff received distributions from STI totaling approximately $416,000 from 1993 through 2013. These distributions are Plaintiff's separate property pursuant to Paragraph 2C of the PMA. From 1996 through 2012, Plaintiff received separate distributions of $291,000 from STI and those distributions have been traced toward the accumulation of other separate property as set forth below.

110. The distributions received in 1993, 1994 and 1995 totaling $125,000, were not deposited into the joint Edward Jones 7183 investment account, nor were they deposited into Plaintiff's separate Edward Jones 7191 account as no such deposits appear in either account

statements for that period of time. *Ex. 1F(1) & 1F(2)(b).* Those distributions were not traced and therefore, benefit the marital estate. Bank statements could not be obtained from Plaintiff's bank to trace Plaintiff's separate STI distributions for the years 1993-1995. However, Plaintiff did produce a copy of her Norwest Bank 5458 checking account register for the period September 1993 - September 1994. *Ex. 1I(1) – Belle Fourche, SD Home (c).* During the one-year period of time the checking account register covered, over $22,000 was deposited into the account with a notation on the register related to "STI" or "TJBF" or simply "TJ." These are abbreviations for Plaintiff's Taco John's stores. Some of those deposits may have been from STI distributions. The checking account register reflects the account was used toward the Belle Fourche, South Dakota home build, which will be addressed below.

111. This Court finds the VCG report's treatment of the STI distributions, W-2 wages and expenses reimbursements are reasonable.

(2) <u>JMCCS, INC. (TACO JOHN'S MISSION)</u>

112. Plaintiff owned a 50% interest in JMCCS, Inc. (herein after referred to as "JMCCS") as of the date of the marriage. Based on the tax returns the store was sold in June 1994 to Plaintiff's sister, Lulu. *Tr. 269.* Plaintiff received $25,897 for the sale as reflected on Schedule D of her 1994 federal tax return. *Ex. 1J(1) & 1B(1).*

113. VCG was only able to identify $11,483 in payments to Plaintiff due to the lack of bank records. VCG was unable to trace $14,414 of the sale proceeds, which benefitted the marital estate. *Ex. 1K, Bate #27555-#27556.* Plaintiff may have received profit distributions however no documentation was found. Plaintiff received no wages during the marriage from this business and VCG did not trace any separate distributions or wages.

114. Plaintiff produced a copy of her Norwest Bank 5458 checking account register for the period September 1993 - September 1994. *Ex. 1I(1) – Belle Fourche, SD Home (c).* During the one-year period of time the checking account register covered, over $28,000 was deposited into the account with a notation related to "TJ Mission," "Mission," or "TJM." Those deposits were from sale proceeds or distributions from JMCCS and are Plaintiff's separate property. The

checking account register reflects that account was used toward the Belle Fourche, South Dakota home build.

115. The Court finds the VCG report's treatment of JMCCS distributions, W-2 wages and the sale proceeds are reasonable.

(3) TACO JOHN'S OF PINE RIDGE, LLC, FORMERLY TJPR, INC.

116. Plaintiff had a 50% interest in TJPR, Inc. d/b/a Taco John's of Pine Ridge, South Dakota (hereinafter referred to as "TJPR, Inc.") at the time of the marriage and was listed as Plaintiff's separate property in the PMA. Plaintiff attempted to sell the business, which she later reacquired. Below is a summary of how VCG traced the sale and reacquisition and allocated the income and profit distributions from Taco John's of Pine Ridge, LLC.

117. ***Sale of TJPR, Inc.*** TJPR, Inc. was sold approximately two months after the date of marriage to the then manager of TJPR, Inc., Cindy Palmier. *See Commitment Order dated March 9, 1993 - Ex. 1J(3), Bates #20215-20216.* The sale price of $215,000 was financed through a Bureau of Indian Affairs (BIA) direct loan of $153,770, seller financing of $41,250 and buyer funds totaling $20,000. The seller loan represented a contingent liability bearing interest at 9% annually. Plaintiff's proceeds from the sale of this entity are her separate property per Paragraphs 2B, 2C and 2D of the PMA.

118. There were two parts of sale proceeds traced from TJPR, Inc. The first piece VCG traced was the BIA loan proceeds. Based upon the BIA loan amount of $153,750, (*Ex. 1J(3), Bate #20215)*, Plaintiff's 50% portion of that amount is $76,875. VCG identified a $76,000 deposit in Plaintiff's Edward Jones 7191 account approximately two months after the Commitment Order date. *Ex. 1F(1)(d), Bate #6448.* Based upon the timing of the $76,000 deposit into Plaintiff's 7191 account compared to the Commitment Order, the Court finds this deposit to be Plaintiff's 50% portion of the BIA loan proceeds, and is Plaintiff's separate property pursuant to Paragraph 2D of the PMA. These separate property proceeds have been traced into other separate property as set forth in Schedules AC-1 and JT-1 of VCG's tracing report. *Ex. 1K.*

119. The second piece of the TJPR, Inc. sale proceeds is the seller-financed loan. Cindy Palmier made only a few payments on the seller-financed loan and VCG traced those payments into Plaintiff's 7191 account as well as deposits noted on Plaintiff's Norwest bank check register (*Ex. II(1)-Belle Fourche, SD Home-(c))* and the parties' joint Home Federal Account. *Ex. 1F(6)*. Plaintiff and her sister, Joyce Benne, continued to keep TJPR, Inc. as an active entity until the seller-financed debt was retired. As loan payments were made to TJPR, Inc., disbursements were paid to Plaintiff and her sister, 50% each.

120. Cindy Palmier eventually defaulted on her seller-financed payments and Plaintiff reacquired the Taco John's of Pine Ridge in July 1997. *See Business Purchase Agreement - Ex. 1J(4) – Default Back to Angie, folder (B)*. At the time of the default, Plaintiff was still owed $39,534 from Ms. Palmier. *Tr. 1063:5-15*. Part of Plaintiff's reacquisition of the Taco John's of Pine Ridge was the assumption of the seller-financed loans to TJPR, Inc. (which consisted of Plaintiff and her sister, Joyce Benne).

121. Ms. Driscoll was able to trace all but $875 in seller financed loan payments from her research of general ledgers for TJPR, LLC and the tax returns for Plaintiff. *Tr. 1047:23-24*. VCG traced $31,250 in payments to Plaintiff from TJPR, Inc. from 1996 to 2002, representing approximately $20,625 in principal and $10,625 in interest. These payments are Plaintiff's separate property pursuant to Paragraph 2D of the PMA and have been traced into other separate property.

122. ***Reacquisition of Taco John's of Pine Ridge.*** In July 1997, Plaintiff negotiated the reacquisition of Taco John's of Pine Ridge from Cindy Palmier as Ms. Palmier was defaulting on various other debts associated with Taco John's of Pine Ridge in addition to the seller financed loans. *Ex. 1J(4) – 1997 Default back to Angie (b)*. In 1997, while Plaintiff was in Rochester, Minnesota, Cindy Palmier called her indicating she needed to speak with Plaintiff.

123. Plaintiff was already aware there was a problem with the seller-financed portion of the payments. Plaintiff and Ms. Palmier met at Charlsons' home in Rochester and reached a

deal on the reacquisition of the business. Defendant was not present nor did he sign the Business Purchase Agreement signed on July 1, 1997. *Ex. 1J(4)(b), Bate #20224.* In fact, Defendant admitted that the sale of the Taco John's business in Pine Ridge never materialized and there was a default by the purchaser. *Ex. 1C(2), P. 4, Bate #157.*

124. Plaintiff reacquired Taco John's of Pine Ridge based on the following consideration provided to Ms. Palmier:

Value	Description	Notes
$8,000	1990 Pontiac Sunbird	Owned by Plaintiff at the date of marriage (*PMA, Paragraph 2D*)
$10,000	Cash	Plaintiff transferred $15,000 from her separate Edward Jones 7191 account to Edward Jones #7183 account on July 7, 1997. Check #756 to the seller for $10,000 cleared the joint account on July 7, 1997. (*PMA, Paragraphs 2B, 2D, 9C*)
$15,027	Seller's Business Taxes	Debts assumed by Plaintiff and paid primarily through Taco John's of Pine Ridge business bank account per general ledger. *Ex. 1J(4) – Generdl Ledgers – (a)* (*PMA, Paragraph 8B*)
$39,534	TJPR, Inc. Loans	
$120,291	BIA Loan	
$192,852	**Total**	

125. There is no credible evidence that marital money was used to reacquire this business. There is no dispute that Plaintiff owned the 1990 Pontiac Sunbird before the marriage, and said vehicle was given to Ms. Palmier as part of the Business Purchase Agreement.

126. Plaintiff paid Ms. Palmier the sum of $10,000 on the same day she transferred $15,000 from her Edward Jones 7191 account to the joint Edward Jones 7183 account. This is a direct tracing of separate funds to a separate asset. *Tr. 1049:23-25 & 1050:1-13.*

127. Plaintiff did not have check-writing capabilities on her 7191 account so she transferred money to the joint 7183 account in order to pay Ms. Palmier. The 7183 account acted as a "pass through" account for Plaintiff. *Tr. 345:8-22.*

128. Pursuant to Paragraph 2 of the PMA, separate assets remain separate assets, even if exchanged for a different asset. In this case, the Pontiac Sunbird and the $10,000 check were

Plaintiff's separate property and were exchanged for the reacquisition of Taco John's of Pine Ridge.

129. Plaintiff paid off the IRS debts and the BIA loan from the income generated from TJPR in accordance with the Business Purchase Agreement. She treated these as her separate debts in accordance with Paragraph 8B of the PMA.

130. In the tracing analysis by VCG, if transfers came out of the 7191 account into the TJPR business account, those transactions were treated as a separate-to-separate tracing and only Plaintiff's separate funds in 7191 were allocated toward those transactions, regardless of whether a marital loan existed in the account at the time of the transaction(s). This methodology is consistent with the PMA for those transactions.

131. Defendant's interpretation of the PMA is that any funds that went into the joint Edward Jones 7183 account lost its separate property characteristic and were used for the purchase of marital assets pursuant to Paragraph 7 of the PMA. Defendant's position suggests the intent of Paragraph 7 of the PMA was to benefit the marital estate only. However, nothing in the PMA suggests the purpose of the contract was to limit a party's separate property; the purpose was to protect a party's separate property.

132. Defendant's interpretation ignores the commingling provisions of the PMA. The application of Defendant's position is the Plaintiff would have benefited more if there were no PMA to enforce, as general tracing methodology alone would have protected Plaintiff's separate property if comingled in joint accounts. In cases where there's a pre-marriage agreement, the PMA should be more beneficial to separate property, not less beneficial. *Tr. 1026-1027.*

133. At the time of the reacquisition of Taco John's of Pine Ridge, Plaintiff deposited other separate funds into the joint Edward Jones 7183 account in July 1997. Plaintiff's expert reviewed the general ledgers for TJPR and year-end financial statements. At the time Plaintiff reacquired the business, there was no working capital for the business and Plaintiff used her personal funds to pay business expenses. *Ex. 1K, Schedule JT-1, P. 87, Bate #27635. Tr. 1053:15-19.*

134. During July and August 1997, Plaintiff paid various TJPR expenses from the joint Edward Jones 7183 investment account and from the joint Home Federal bank account 2730. *Ex. 1K, Schedule JT-1, P. 87, Bate #27635 & Schedule JT-3, P. 171, Bate #27719.* The payments were tracked as owner's equity transactions in the TJPR general ledger. *Ex. 1J4 – 1997 Default Back to Angie (c), Bate #20243.* For example, the TJPR general ledger reflects:

2815	Draw			
	CINDY PALMIER – PURCHASE	7/01/97	EDJ756	$10,000.00

VCG tied this general ledger entry to check #756 in the amount of $10,000 *(Ex. 1F(2)(b), Bates #9162)* written from the parties' Edward Jones 7183 account to Cindy Palmier. "EDJ" stands for "Edward Jones" and the number "756" stands for "check #756." *Tr. 1053:23-25.*

135. Many of the initial checks in the beginning of Plaintiff's reacquisition of Taco John's of Pine Ridge came out of the joint Edward Jones 7183 account. All "EDJ" notations on the general ledger represent a check that came out of the Edward Jones 7183 account at that time, which VCG traced to Plaintiff's separate funds in 7183 as those funds were going directly toward the separate assets of Plaintiff. *Tr. 1054:3-6.* The total Edward Jones 7183 account funds used during said time period was $15,368.

136. All "HF" notations on the general ledger represent a check that came out of the parties' joint Home Federal 2730 account at that time, which VCG traced to Plaintiff's separate funds in the Home Federal 2730 account as those funds were going directly toward the separate assets of Plaintiff. *Tr. 1054:7-12.* The total Home Federal funds used during that time period was $947. These funds were drawn only from Plaintiff's separate funds located within the joint Edward Jones 7183 account and the joint Home Federal 2730 account at that time and therefore, no marital funds were used to pay on Plaintiff's separate debt pursuant to Paragraph 9F of the PMA.

137. This Court finds Plaintiff reacquired Taco John's of Pine Ridge entirely with separate property and separate liabilities and therefore TJPR, including any gains, income,

interests, dividends, profits and increase/decrease in value, remains Plaintiff's separate property pursuant to Paragraphs 2C and 2D of the PMA.

138. ***Member Draws, Capital Contributions and Member Loans.*** From 1997 through 2013, TJPR paid member draws totaling approximately $1.1 million, which includes profit distributions, health insurance premiums, and retirement contributions. *Ex. 1L(4) – Financial Statements and Exhibit 1L(4) – General Ledgers.*

139. This Court finds said $1.1 million in member draws are Plaintiff's separate property pursuant to Paragraph 2C of the PMA. TJPR is treated as a sole proprietorship for income tax purposes. Therefore, all of the company's profits are considered income to Plaintiff as reflected on Schedule C of her personal tax returns. *Ex. 1D(2).* Since its inception, the company's tax accountant has prepared monthly and annual financial statements and general ledger reports, which report owner draws. *Ex. 1K, P. 6, Bate #27554.*

140. VCG traced Plaintiff's income from TJPR after the reacquisition in 1997 and examined the financial statements and general ledgers of TJPR to track distributions that would be separate property. If VCG was unable to trace the income from TJPR, the income was treated as a marital deposit benefitting the marital estate. *Tr. 1055:19-25 & 1056:1-2.*

141. ***TJPR Expense Reimbursements.*** Plaintiff's experts reviewed the TJPR general ledgers and identified expense reimbursement checks deposited in the parties' accounts totaling approximately $254,000. VCG determined it would have been time-consuming and expensive for VCG to go through approximately 30 credit cards used by Plaintiff throughout the years to identify individual transactions that were then reimbursed. VCG determined it would not be a cost benefit to Plaintiff. *Tr. 1020.* Therefore, VCG made an assumption that deposits of TJPR expense reimbursements into the either Plaintiff's 7191 account or the parties' joint 7183 account are marital, thereby benefitting the marital estate. *Tr. 978-979. Ex. 1K, P. 6, Bate #27555 & Tr. 1056:13-16.*

142. Defendant's Exhibit L is allegedly a summary of TJPR reimbursements to Plaintiff's Edward Jones 7191 account, which created a marital loan in her account. Plaintiff's

expert, Ms. Driscoll, testified that Defendant's Exhibit L contained errors. The totals reflected on Exhibit L are not only TJPR expense reimbursements, but contain other deposits not related to TJPR. *Tr. 1088-1089.* Defendant failed to examine the deposit details in the actual investment accounts and as a result, Exhibit L overstates the marital loan in the 7191 account caused by the deposit of TJPR expense reimbursements.

143. It is evident to this Court that Ms. Driscoll examined the transaction details prior to putting together the separate tracing report. She corrected Defendant's Exhibit L and Plaintiff's Exhibit 22 accurately reflects the correct marital loan of the expense reimbursements into Plaintiff's Edward Jones 7191 account is $85,735.05. *Tr. 1090:18-19.*

144. The business debts personally guaranteed by Plaintiff associated with TJPR, Inc., STI, and JMCCS were Plaintiff's separate liabilities as set forth in the Paragraph 8B of the PMA. Any asset purchased by Plaintiff with TJPR's gains, income, interests, dividends, profits and increase/decrease in value, is Plaintiff's separate property pursuant to Paragraph 2C and 2D of the PMA. To the extent member draws and loans and capital contributions have been traced, they are Plaintiff's separate property.

145. Based on the foregoing findings regarding Plaintiff's separate sales proceeds and income and profits from her business interests, the treatment of the separate property was traced by VCG through various assets.

INVESTMENT/BANK ACCOUNTS

146. The parties had several bank and investment accounts as of December 31, 2013. Plaintiff's experts, VCG, examined every transaction in the accounts referenced to prepare the detailed tracing schedule in Exhibit 1K. VCG gathered all of the account statements, entered all transactions in their model tracing formula, and then identified transfers going between accounts. The accounts, which have dividends and interest, were treated in accordance with the terms of the PMA. The dividends and interest were treated differently in the separate accounts verses the joint accounts. Dividends and interest (gains) as well as losses in separate accounts were treated as separate pursuant to Paragraph 2C of the PMA. *Tr. 1064:15-16.*

147. In the joint/marital accounts, the dividends and interest (gains) were allocated on a pro rata percentage basis based on the separate and marital balances in the account at the end of the previous statement period. *Ex. 1K, P. 15 -16, Bate #27563-#27564 and Tr. 1063:17-18.*

148. Pursuant to VCG's report of March 30, 2015, (*Ex. 1K)* if Plaintiff transferred or deposited separate funds toward the purchase of another asset on the same day or close in time to the purchase, VCG tied those two events together and directly traced those funds from one asset to another. *Tr. 954:19-25.* This methodology is "direct tracing." For example, Plaintiff did not have check-writing privileges for her Edward Jones 7191 account. *Tr. 255:21-22.* As an alternative to the inconvenience, cost and time delay of arranging wire transfers into her Norwest checking account 5458 when she needed immediate access to her separate funds, Plaintiff used her Edward Jones financial advisor (Defendant, or his office) to transfer her separate funds from 7191-1-0 into 7183-1-0, which did have check-writing capabilities. *346:5-12.* Since both accounts were handled by Defendant at Edward Jones, transactions could be done with little time or effort. This was during the years before banking was available on-line. *Tr. 395:18-20.* Plaintiff could then write checks from 7183 to access her separate funds, which she found more convenient than calling Norwest or First Western Bank to make arrangements to obtain her funds from her individual Edward Jones investment account. *Tr. 345:5-12.*

149. The joint Edward Jones 7183 investment account became a "pass through" account for Plaintiff. *Tr. 345:8-13.* Pursuant to Paragraphs 5 and 9C of the PMA, Plaintiff retained any separate property interest in funds transferred from 7191 into 7183, as the transfers did not change the character of her separate property interest or otherwise result in a change of her separate property to marital property simply because the funds were commingled in 7183-1-0. *See* findings regarding Edward Jones 7183 account below.

150. If VCG was not able to tie-out a purchase/withdrawal through direct tracing, the other method of tracing used was the pro rata approach. For example, the ending balance of account 7183 as of September 27, 1996 was $3,787.30, of which, 100% of the account was marital. *Ex. 1K, Schedule JT-1, P. 84, L. 49, Bate #27632.* During the following month

(9/28/96-10/25/96), $10,428.56 in checks cleared the account (*Ex. 1K, Schedule JT-1, P. 84, L. 54, Bate #27632),* which was allocated 100% from the marital funds in the account as the prior month's ending balance was 100% marital and 0% separate. During that same period of time (9/28/96-10/25/96), Plaintiff deposited a TJPR, Inc. seller-financed loan payment in the amount of $1,600. *Ex. 1K, Schedule JT-1, P. 84, L. 51.* Plaintiff also transferred $4,959.55 from her Edward Jones 7191 account into 7183, of which $2,809.63 represented repayment of the marital loan that existed in the 7191 account at the time of the transfer, and the remaining $2,149.92 of the deposit was Plaintiff's separate funds. *Ex. 1K, Schedule JT-1, P. 84, L. 52, Bate #27632.* The ending balance of the account as of 10/25/96 was $5,949.01, of which 63% consisted of Plaintiff's separate funds. *Ex. 1K, Schedule JT-1, P. 84, L. 56, Bate #27632.* The following period (10/26/96-11/29/96), a total of $7,307 in checks cleared *(Ex. 1K, Schedule JT-1, P. 84, L. 61, Bate #27632)* the account, of which 63%, or $4,605.92, of Plaintiff's separate funds were allocated toward payment of those checks.

151. Paragraph 9F of the PMA contains a provision for a "marital loan." Marital loans were created when marital funds where paid toward a separate asset. *Tr. 967:8-13.* Marital loans in Plaintiff's separate assets are an asset of the marital estate. *Tr. 969:1-4.*

152. Both parties acknowledged they did not keep track of any marital loans.

153. Plaintiff was unaware she was creating any marital loans. *Tr. 374-375.*

154. Both Plaintiff's and Defendant's experts testified that it is common for parties not to understand the movement of funds and how that impacts separate tracing. It is also common for parties to not understand how movement of funds impacts marital and separate property claims. *Tr. 970:1-9.* But that is not dispositive of whether or not loans were created.

155. It was Plaintiff's practice to transfer her separate property funds to joint accounts when there was going to be a larger purchase of an asset. *Tr. 345, 460-462.* During the marriage, there were occasions that an asset would be purchased and Plaintiff would either transfer her separate funds prior to or just after the purchase. Although Plaintiff used her separate funds at times, if a marital loan existed in the account, the marital loan was paid back first, and VCG did

not credit Plaintiff with the use of her separate funds. Despite the fact Plaintiff was unaware of how the marital loan concept worked, the methodology used by Plaintiff's experts is consistent with the contract terms of the PMA.

156. To prepare the separate property tracing analysis of the parties' bank and investment accounts, VCG relied upon the following information:

*Edward Jones account statements
*Home Federal bank statements
*Various check registers.
*Plaintiff's individual income tax returns.
*Defendant's individual income tax returns.
*Miscellaneous other documents noted in the tracing report.
*Reasonable assumptions.

Ex. 1K, Bate #27563.

This Court will examine each of the parties' bank accounts and investment accounts as it pertains to Plaintiff's separate property claims.

157. Both parties deposited funds into various accounts to pay living expenses. Plaintiff also deposited her separate funds into joint accounts. Plaintiff's separate funds were, in part, funding ordinary living expenses in addition to purchasing assets that have marital value and separate value. Plaintiff also had marital income consisting of some W-2 wages she received from Edward Jones and child support. *Tr. 965:21-25.*

158. When marital funds were deposited into Plaintiff's separate asset account 7191, it created a marital loan pursuant to Paragraph 9F of the PMA. *Tr. 967:8-13.*

159. Defendant's income is 100% marital because it came from employment and not from separate assets.

160. This court examined the transactions in and out of Plaintiff's 7191 account and the various methodologies used to determine the separate property value. Not every transaction is being referenced in this Order. Examples are being referenced to demonstrate the application of the methodologies to certain transactions, which include the acquisition of additional separate property and marital property and the value of Plaintiff's separate property in her 7191 account.

PLAINTIFF'S EDWARD JONES INVESTMENT ACCOUNT 7191-1-8

Ex. 1K, Schedule AC-1, Pp. 21-81, Bate #27569-27629

161. Plaintiff's Edward Jones 4012 account was owned by Plaintiff prior to the marriage and is listed as her separate property on Exhibit B to the PMA. *Ex. 1A(1), Bate #11.* Evidence reflects Plaintiff had check-writing abilities with this account and wrote checks or transferred funds from this account toward the purchase of separate property early in the parties' marriage, for example:

Date	Transactions out of 4012	Amount
2/12/93	Check #5 payable to Plaintiff's Norwest Bank checking account 5458 *Ex. 1F(1)(b), Bate #06406* *Ex. 1K, Schedule AC-1, P. 21, L. 3, Bate #27569*	$3,000
4/13/93	Transfer to Plaintiff's Edward Jones IRA 0085 *Ex. 1G(1)(a), Bate #11729* *Ex. 1K, Schedule AC-1, P. 21, L. 10, Bate #27569*	$2,000

162. Plaintiff's separate funds in Edward Jones account 4012 were transferred two times during the parties' marriage by Defendant, who was Plaintiff's financial advisor at Edward Jones for most of the parties' marriage:

a. In April 1993, Defendant opened a new investment account for Plaintiff (hereinafter referred to as "7191-1-0") and also opened a jointly held investment account (hereinafter referred to as "7183-1-0"). On April 14, 1993, Defendant began transferring the funds and assets located in 4012 to 7191-1-0. *Ex. 1F(1)(d), Bate #6439;*

b. On June 23, 1995, 7191-1-0 was transferred to Edward Jones 7191-1-8, which account exists today. *Ex. 1F(1)(e).* (Hereinafter, Plaintiff's separate Edward Jones investment account 7191-1-8 will be referred to as "7191").

PLAINTIFF'S EDWARD JONES INVESTMENT ACCOUNT 7191-1-0

163. On May 10, 1993, Plaintiff deposited a check in the amount of $76,000 to her 7191-1-0 account. *Ex. 1F(1)(d), Bate #6448.* Said deposit was approximately two months after the sale of TJPR, Inc. *Ex. 1J(3).* Based upon the timing of the $76,000 deposit into Plaintiff's 7191-1-0 account compared to the Commitment Order, the deposit is Plaintiff's 50% portion of

the TJPR, Inc. BIA loan proceeds, and is Plaintiff's separate property pursuant to Paragraph 2D of the PMA. *Ex. 1K, Schedule AC-1, P. 21, L. 15, Bate #27569.*

164. On June 4, 1993, Plaintiff transferred $18,000 from her 7191-1-0 account (*Ex. 1F(1)(d), Bate #645)* to her individual Norwest checking account 5458 via wire. In doing so, she incurred $30 in wire transfer fees with Edward Jones. *Ex. 1F(1)(d), Bate #6456.* Those separate funds were used to purchase the lot upon which a home was built in Belle Fourche. *Ex. 1I(1) – Belle Fourche, SD Home (b). Bate #17054 and Ex. 1K, Schedule AC-1, P. 22, L. 19, Bate #27570. See also Tr. 1066:18-20.*

165. The following use of Plaintiff's separate funds in 7191-1-0 have been traced to the accumulation of additional separate property:

Date	Transactions out of 7191-1-0	Amount
9/2/93	Transfer to 7183-1-0 for payment to Round-Up Building Center, the contractor building the Belle Fourche, South Dakota home. *Ex. 1F(2)(b), Bate #8841* *Ex. 1I(1) Belle Fourche, SD Home (d), Bate #17078* *Ex. 1K, Schedule AC-1, P. 22, L. 29, Bate #27570*	$35,000
10/19/93	Transfer to 7183 for payment to Round-Up Building Center, the contractor building the Belle Fourche, South Dakota home. *Ex. 1F(2)(b), Bate #8847* *Ex. 1I(1) Belle Fourche, SD Home (e), Bate #17080* *Ex. 1K, Schedule AC-1, P. 22, L. 33, Bate #27570*	$20,000
11/18/93	Funds Wired (Funds were transferred to Norwest 5458 and used for building the Belle Fourche home) *Ex. 1I(1) – Belle Fourche, SD Home (c), Bate #17061* *Ex. 1K, Schedule AC-1, P. 23, L. 37, #27571*	$27,000
1/14/94	Funds Wired (Funds were transferred to Norwest 5458 and used for building the Belle Fourche home) *Ex. 1I(1) – Belle Fourche, SD Home (c), Bate #17064* *Ex. 1K, Schedule AC-1, P. 23, L. 44, #27571*	$16,406.39
4/17/95	Transfer to Plaintiff's Edward Jones IRA 0592-1-1 *Ex. 1F(1)(d), Bate #6616* *Ex. 1K, Schedule AC-1, P. 25, L. 90, #27573*	$1,000

See also Tr. 1066-1073. Said transfers ultimately contributed to Plaintiff's separate value in the current Rochester, Minnesota home, the Oklahoma condo proceeds, and in her Edward Jones IRA 0592, which will be addressed below.

PLAINTIFF'S EDWARD JONES INVESTMENT ACCOUNT 7191-1-8

166. In May 1995, Defendant moved to Rochester, Minnesota to work in an Edward Jones office. *Tr. 641:10-12.* As the financial advisor for the parties' Edward Jones accounts, Defendant transferred all of the parties' Edward Jones accounts to his new office in Rochester, Minnesota and assigned new account numbers. Plaintiff's investment account 7191-1-"0" (*Ex. 1F(2)(d), Bate #6638)* was transferred to 7191-1-"8". *Ex. 1F(2)(e), Bate #6639.* Plaintiff's separate funds in 7191-1-8 (hereinafter referred to as "7191") have been traced to the accumulation of separate property as more fully set forth below:

Date	Transactions out of 7191-1-8	Amount
11/1/95[9]	Transfer to 7183-1-8 to purchase Edward Jones Limited Partnership Interest *Ex. 1F(1)(e), Bate #6680*	$5,000
4/12/96	Transfer to Plaintiff's Edward Jones IRA 0592 *Ex. 1F(1)(e), Bate #6716*	$2,000

167. In July 1996, Plaintiff sold her home in Belle Fourche, South Dakota. *Ex. 1I(1) Belle Fourche, SD (f), Bate #17082.* As Plaintiff funded the purchase and building of the home entirely with her separate funds, the sale proceeds from the homestead of $143,947.71 are Plaintiff's separate property pursuant to Paragraphs 2C and 2D of the PMA.

168. The proceeds were deposited into the parties' joint Home Federal checking account 2730 on August 2, 1996. *Ex. 1F(6), Bate #11436.* Four days later on August 6, 1996, $100,000 of said separate property sale proceeds were deposited into the joint 7183 account, *(Ex. 1F(2), Bate #9070)* and then transferred into Plaintiff's separate 7191 account on August 16, 1996. *Ex. 1F(1)(e), Bate #6744.*

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[9] The VCG report had a typographical error that was corrected during testimony. The report referenced 11/20/95, however the underlying documents verified the date was 11/1/95. *Tr. 1070:9-11. Ex. 1 K, Schedule AC-1, P. 26, L. 114, Bate #27574.*

169. This Court adopts VCG's direct tracing methodology as it applies to the deposit of $100,000 on August 16, 1996. *Ex. 1K, Schedule AC-1, P. 28, L. 147, Bate #27576.* Defendant's expert, Mr. Harjes, also acknowledged that Plaintiff has a separate property interest in the current home based on the sale proceeds from the former home; however, he did not quantify the value of her interest. *Tr. 1429:22-25 & 1430:1-4.*

170. When Plaintiff sold the Belle Fourche home in the summer of 1996, the parties purchased a house located in Rochester, Minnesota, where Defendant was working and living. The bank for Plaintiff's Norwest Bank checking account 5458 was located in Belle Fourche, South Dakota. *Tr. 262:20 & 766:2-6.* In July 1996, Plaintiff began depositing distributions and proceeds from her separate property (STI distributions, JMCCS sale proceeds, TJPR, Inc. seller-financed loan repayments) into her 7191 account (*Ex. 1F(1)(e), Bate #6738)* and/or the parties joint Home Federal checking account.

171. For example, on July 11, 1996, Plaintiff deposited a TJPR, Inc. seller-financed loan repayment in the amount of $1,600. *Exhibit 1F(1)(e), Bate #6737 & Ex. 1K, Schedule AC-1, P. 28, L. 142, Bate #27576.* On July 19, 1996, Plaintiff deposited JMCCS sale proceeds in the amount of $1,814.60. *Ex. 1K, Schedule AC-1, P. 28, L. 143, Bate #27576.* Plaintiff's 7191 account began to increase in value due to the deposit of separate property as well as appreciation, gains and losses, which are Plaintiff's separate property pursuant to Paragraph 2C of the PMA. *Ex. 1K, Schedule AC-1, P. 28, L. 143, Bate #27576.*

172. Plaintiff believed when she used funds from her 7191 account to purchase property, or when she transferred funds from 7191 to another account, she was using her separate funds to purchase separate property. *Tr. 256:17-25.* In addition to depositing Plaintiff's separate property into her 7191 account, Plaintiff began depositing other funds into her 7191 account which she believed, at the time of the deposits, were her separate funds, such as child support, personal checks and Edward Jones W-2 income. *Exhibit 1F(1)(e), Bate #6796.*

173. This Court finds this is how Plaintiff lived her life during the marriage. VCG's methodology was based upon the terms of the PMA, not necessarily on how Plaintiff lived her

life during the marriage and therefore, at times, VCG's tracing contradicted Plaintiff's belief regarding her separate property. This Court finds VCG's methodology was consistently applied and some of Plaintiff's deposits made into 7191 after July 1996 were appropriately deemed a marital loan pursuant to Paragraph 9F of the PMA.

174. Where VCG was unable to tie the use of funds from the 7191 account to the purchase of Plaintiff's separate property, the marital estate was enhanced to the benefit of Defendant.

175. Between September 1, 1996 and March 27, 1997, Plaintiff transferred $59,459.55 from her 7191 account to the 7183 account. *Ex. 1F(1)(e), Bate #6750-6816.* VCG could not identify those transfers to the purchase of separate assets. Therefore, this Court adopts VCG's methodology whereby the transfers first repaid any marital loan existing in 7191 at the time of the transfer, and any funds remaining in the transfer after repayment of the loan, are allocated as Plaintiff's separate property. *Ex. 1K, Schedule AC-1, Pp. 28-30, Bate #27576-27578.*

176. On February 20, 1997, Plaintiff transferred $2,000 into her separate Edward Jones IRA 0592. *Ex. 1F(1)(e), Bate #6806.* This Court adopts VCG's methodology that this is a tracing of a separate-to-separate event and therefore, only Plaintiff's separate funds in 7191 were allocated toward the $2,000 IRA contribution. *Ex. 1K, Schedule AC-1, P. 30, L. 187, Bate #27578.*

177. The total account balance of 7191 as of June 27, 1997 was $113,334.69. *Ex. 1F(1)(e), Bate #6843.* A marital loan existed in Plaintiff's 7191 account at the end of June 1997 in the amount of $7,379.67. *Ex. 1K, Schedule AC-1, P. 31, L. 210, Bate #27579.* The marital loan was created in 7191 in part, due to the deposit of federal tax refunds of $4,909.72 and a Minnesota state refund of $1,427 for jointly filed taxes in 1996. *Ex. 1F(1)(e), Bate #6836 & #6846.* The remaining $1,042.95 of the marital loan is comprised of miscellaneous deposits that could not be identified as having come from Plaintiff's separate property. *Ex. 1K, Schedule AC-1, P. 31, L. 210, Bate #27579.*

178. Plaintiff reacquired TJPR from Cindy Palmier in July 1997. *Tr. 976:5-12.* As indicated previously, part of the agreement for Plaintiff to reacquire TJPR, was a $10,000 cash payment to Ms. Palmier. *Ex. 1J(4) Default Back to Angle (b), Bate #20219.* On July 1, 1997, Plaintiff withdrew $10,000 from her 7191 margin account and on July 2, 1997, she withdrew an additional $5,000 from her 7191 margin account. *Ex. 1F(1)(e), Bate #6858.* As Plaintiff's 7191 account did not have check-writing capabilities, on July 7, 1997, she transferred $15,000 to 7183 in order to utilize the 7183 check-writing capabilities to access her separate funds. *Ex. 1F(2)(b), Bate #9161.* VCG tied the $15,000 transfer of funds on July 7, 1997 directly to check 756 in the amount of $10,000 which cleared 7183 on July 7, 1997. *Ex. 1F(2)(b), Bate #9162.* Check #756 in the amount of $10,000 was paid to Cindy Palmier. *Ex. 1F(2)(a), Bate #8798.*

179. Based upon Paragraph 2A of the PMA, separate assets are to remain separate. The replacement of separate property shall remain separate property pursuant to Paragraph 2D of the PMA. In order to avoid a marital loan in a separate asset, separate funds should be used toward a separate asset pursuant to Paragraph 9F of the PMA. *Tr. 976:15-18.* As VCG tied the $15,000 transfer from 7191 into 7183 to the reacquisition of a separate asset (TJPR), this Court adopts VCG's treatment of these transactions as separate-to-separate events and therefore, only Plaintiff's separate funds were allocated toward each transaction associated with TJPR. Any marital loan in 7191 at the time of the transfer was left intact so as to avoid a marital loan in a separate asset (TJPR). *Tr. 1227:19-24. See* also *Ex. 1K, Schedule AC-1, P. 31, L. 213, Bate #27579.*

180. On July 28, 1997, Plaintiff deposited a $3,000 STI distribution into account 7191. *Ex. 1F(1)(e), Bate #6868.* STI is Plaintiff's separate property and all STI distributions deposited into 7191 are Plaintiff's separate property pursuant to Paragraph 2C of the PMA. *Ex. 1K, P. 31, L. 217, Bate #27574.*

181. On August 13, 1997, Plaintiff deposited check #1036 from TJPR account 3388 in the amount of $2,000. *Ex. 1F(1)(a), Bate #686.* Pursuant to the General Ledger of TJPR, said check represents a Member Draw from TJPR. *Ex. 1J(4)-General Ledgers (a), Bate #25669.*

TJPR is Plaintiff's separate property and therefore, all TJPR Member Draws deposited into 7191 are Plaintiff's separate property pursuant to Paragraph 2C of the PMA. *Ex. 1K, Schedule AC-1, P. 31, L. 218, Bate #27579.*

182. On September 3, 1997, Plaintiff deposited a $2,000 Taco John's distribution into 7191. *Ex. 1F(1)(e), Bate #6878.* While the bank statement reflects this deposit is from TJPR, based on the general ledgers, it appears the deposit is an STI distribution. In either event, as both STI, Inc. and TJPR are Plaintiff's separate property, all distributions from TJPR or STI, Inc. deposited into 7191 are Plaintiff's separate property pursuant to Paragraph 2C of the PMA. *Ex. 1K, Schedule AC-1, P. 32, Line 224, Bate #27580.*

183. On September 11, 1997, Plaintiff deposited $405 from TJPR. *Ex. 1F(1)(a), Bate #6878.* Pursuant to the General Ledger of TJPR, said payment is Plaintiff's one-half portion of an $810 TJPR, Inc. seller loan payment. *Tr. 1223-1225. Ex. 1J(4)-General Ledgers (a), Bate #25670. Ex. 1K, Schedule AC-1, P. 32, L. 223, Bate #27580.*

184. On September 12, 1997, Plaintiff transferred $2,000 to TJPR's Edward Jones 3388 (hereinafter referred to as "TJPR 3388"). *Ex. 1F(1)(e), Bate #6878.* As TJPR is Plaintiff's separate asset, this Court adopts VCG's methodology that this is a separate-to-separate event and therefore, so long as sufficient separate funds are available in 7191 at the time of the transfer, only Plaintiff's separate funds in 7191 were allocated toward the transfer to TJPR 3388. *Tr. 1061-1062. Ex. 1K, Schedule AC-1, P 32, L. 225, Bate #27580.*

185. On October 15, 1997, Plaintiff transferred $21,000 to 7183 in order to access her separate funds via check. *Ex. 1F(1)(e), Bate #6889.* Plaintiff believed the transfer could have been to purchase a vehicle or something else for TJPR. *Tr. 380:19-21.* However, VCG could not directly tie the $21,000 transfer to the purchase of a separate asset.

186. Therefore, as a separate-to-separate event could not be identified by VCG for this transaction, this Court adopts VCG's methodology to first repay any marital loan existing in 7191 at the time of the transfer, and allocate any remaining funds from Plaintiff's separate property. Therefore, of the $21,000 transferred to 7183 on October 15, 1997, $9,947.59 is

deemed payment of the marital loan existing at that time in account7191, and the remaining $11,052.41 of the transfer is Plaintiff's separate property. *Ex. 1K, Schedule AC-1, P. 32, L. 233, Bate #27580.*

187. On October 28, 1997, Plaintiff deposited into 7191 check #1223 in the amount of $2,559.57. *Ex. 1F(1)(e), Bate #6888.* The General Ledger for TJPR indicates $2,001.23 of the check represents a Member Draw from TJPR and the remaining $558.34 represents expense reimbursement. *Ex. 1J(4)-General Ledger(a), Bate #25688.* This Court finds $2,001.23 of the check is Plaintiff's separate property and the remaining $558.34 represents TJPR expense reimbursements and that portion of the check deposited is allocated as a marital loan in 7191. *Ex. 1K, Schedule AC-1, P. 30, L. 230, Bate #27580.*

188. On December 31, 1997, Plaintiff transferred $6,000 to account 7183. *Ex. 1F(1)(e), Bate #6913.* Five days later, on January 5, 1998, check #831 in the amount of $6,000 was issued from 7183 to Plaintiff's TJPR Simple IRA 0314. VCG did not connect these two events so as to apply the direct separate-to-separate methodology, as they were not aware of the tie between the events. Therefore, instead of allocating only separate funds from the $6,000 transfer to 7183, VCG first repaid the $527.87 loan existing at that time in 7191, and the remaining $5,473.13 of the transfer was allocated as Plaintiff's separate property. *Ex. 1K, Schedule AC-1, P. 33, L. 242, Bate #27581.*

189. TJPR had a fire in 1998, which burned the store to the ground. *Tr. 265:18-19 & 805:17-22.* In May and June 1998, Plaintiff deposited insurance proceeds resulting from fire damage to TJPR as follows:

Date	Transaction	Amount
5/6/98	Travelers Property CA Deposit *Ex. 1F(1)(e), Bate #6974*	$75,000
5/26/98	Traveler's Insurance Taco John's Deposit *Ex. 1F(1)(e), Bate #6974*	$53,883
6/2/98	Traveler's Insurance Deposit *Ex. 1F(1)(e), Bate #6985*	$100,000

Ex. 1 K, Schedule AC-1, P. 34, L. 269, Bate #27582 & P. 35, L. 275, Bate #27582. As the insurance proceeds were a result of damage to Plaintiff's separate property, this Court finds the proceeds are Plaintiff's separate property pursuant to Paragraphs 2C and 2D of the PMA.

190. The insurance proceeds were eventually transferred to TJPR's Edward Jones 3388 account where the proceeds remained separate property. *Ex. 1 K, Schedule AC-1, P. 35, Ll. 277, 283, 289, Bate #27583.*

191. Plaintiff rebuilt Taco John's Pine Ridge and used the insurance proceeds to do so. *Tr. 1076-1077.*

192. Plaintiff made three transfers from account 7191 to account 7183 between June 1, 1998 and January 1, 1999 totaling $34,000. As separate-to-separate events could not be identified by VCG for those transactions, This Court adopts VCG's methodology to first repay any marital loan existing in 7191 at the time of each transfer and allocate the remaining funds from Plaintiff's separate property. *Ex. 1K, Schedule AC-1, Pp. 35-36, Bate #27583-27584.*

193. On January 11, 1999, Plaintiff deposited check #3111 in the amount of $1,567.15 from Rapid City Mexican Food. *Ex. 1F(1)(e), Bate #7074.* The check is related to a rebate for TJPR's advertising. *Tr. 1078:23-25 & 1079:1-2.*

194. This Court adopts VCG's treatment of check #3111 as Plaintiff's separate property. *Ex. 1K, Schedule AC-1, P. 36, L. 310, Bate #27584.* All Rapid City Mexican Food rebates received by Plaintiff were paid to TJPR to return part of the advertising costs originally paid by TJPR. *Tr. 392:9-18.* For example, the general ledger for TJPR reflects check #1353 payable to RC Mexican Food Corp on 1/16/98 in the amount of $934.04. *Ex. 1J(4) General Ledgers (a), Bate #25724.* A corresponding check #1353 in the amount of $934.04 cleared TJPR's EJ #3388 account on 2/17/98. *Ex. 1J(4) Bank Accounts (a), Bate #20422.*

195. As TJPR is Plaintiff's separate property, all TJPR rebates received are also Plaintiff's separate property pursuant to Paragraph 2C and 2D of the PMA. *Tr. 1371:20-21.*

196. On May 4, 1999 Plaintiff transferred $4,000 to TJPR 3388 and on May 26, 1999, Plaintiff transferred $10,000 to TJPR 3388. *Ex. 1F(1)(e), Bate #7112.* Pursuant to the TJPR

General Ledger, these transfers represent a capital contribution in the amount of $10,117 (*Ex. 1J(4), General Ledgers (a), Bate #25844)* and a shareholder loan of $3,883 (*Ex. 1J(4) General Ledgers (a), Bate #25812).* As TJPR is Plaintiff's separate property, any obligations of TJPR are Plaintiff's separate obligations pursuant to Paragraph 8B of the PMA.

197. This Court adopts VCG's allocation of only Plaintiff's separate funds toward the transfers. *Ex. 1K, Schedule AC-1, P. 37, L.334, Bate #27585.*

198. On July 17 and July 26, 2000, Plaintiff deposited inherited funds from her son: check #6101 in the amount of $58.60, check #6100 in the amount of $2,200, check #63016 in the amount of $435; and Sioux Funeral Home check #2160 in the amount of $17.64. *Exhibit 1F(1)(e), Bate #7237-#2738.*

199. Said inherited funds are Plaintiff's separate property pursuant to Paragraph 2E of the PMA. *Ex. 1K, Schedule AC-1, P. 41, L. 398, Bate #27589. Tr. 1079:8-12.*

200. On February 4, 2002, Plaintiff deposited funds from Zumbro River Photography in the amount of $1,570.85. *Ex. 1K, Schedule AC-1, P. 47, L. 498, Bate #27595.* Plaintiff originally thought the payment related to TJPR advertising; however during trial believed the payment may have been for her daughter's graduation pictures. Plaintiff and her attorney, Eva Cheney Hatcher, meet with VCG for 5 days going over the transactions in the accounts. Given the level of detail in the tracing report and the value of the deposited funds, said deposit does not make a substantial impact on the tracing analysis.

201. On June 24, 2004, Plaintiff deposited a US Treasury federal tax refund of $3,344. *Ex. 1F(1)(e), Bate #7701.* The parties filed separate tax returns throughout the marriage except for year 1996.

202. Plaintiff generally paid her tax liabilities directly from the TJPR business account. *Tr. 1080.* VCG treated all tax refunds as marital. *Tr. 1004-1005.* This deposit increased the marital loan in the account, thereby benefitting the marital estate. *Ex. 1K, Schedule AC-1, P. 54, L. 632, Bate #27602.*

203. During a trip to Mexico at the end of January 2011, Plaintiff discovered Defendant was having an affair with a mutual friend and co-worker who was a subordinate agent at Edward Jones. While this created difficulty in the parties' marriage, Plaintiff was committed to working on the marriage and believed at that time, Defendant was as well. At that time, the parties were acquiring a franchise for a Massage Envy in Sioux Falls (SFME) as well as other assets. *Tr. 690-693.* The parties continued to operate their finances in the same manner.

204. On March 21, 2011, the sum of $20,000 was transferred into account 7191 from the joint account, 7183. *Ex. 1F(1)(e), Bate #8390.* This Court adopts VCG's pro rata approach of applying a percentage of Plaintiff's separate property in 7183 at that time to the previous month's ending balance to each transfer from 7183 into 7191. Therefore, of the $20,000 transferred on March 21, 2011, $6,318.31 is separate and the remaining $13,681.68 is deemed a loan from the marital estate. *Ex. 1K, Schedule AC-1, P. 70, L. 969, Bate #27618.*

205. On June 7, 2011, $10,000 was transferred from 7183 into 7191. *Ex. 1F(1)(e), Bate #8415.* This Court adopts VCG's pro rata approach to the transfer into #7191. Therefore, $3,024.44 is separate and the remaining $6,975.56 is deemed a loan from the marital estate. *Ex. 1K, Schedule AC-1, P. 71, L. 987, Bate #27619.*

206. On July 15, 2011, Plaintiff transferred $26,000 out of 7191 to 7183. *Ex. 1F(1)(e), Bate #8424.* Plaintiff believed at the time she was acquiring her 2011 Chevy Avalanche automobile with separate funds. *Tr. 458-461.* However, the Avalanche was also acquired with the trade-in of a marital vehicle (*Tr. 1119:12-14)* and therefore, VCG did not consider the Avalanche a separate asset. *Tr. 1119:18-20.*

207. To be consistent with the methodology used when a separate-to-separate event cannot be identified, this Court adopts VCG's methodology to repay the marital loan existing in #7191 at the time of the transfer and the entire $26,000 was allocated as repayment on the then existing marital loan balance in #7191, *Ex. 1K, Schedule AC-1, P. 71, L. 993, Bate #27619.*

208. On July 26, 2011, Plaintiff transferred $7,356.45 into her 7191 account from 7183. *Ex. 1F(1)(e), Bate #8423.* VCG tied this transaction to the July 25, 2011 deposit into 7183

of insurance proceeds in the amount of $7,356.45 for hail damage to TJPR's 2007 Jeep Compass which is separate pursuant to Paragraph 2D of the PMA. *Ex. 1J(4) Insurance-Litigation (c), Bate #27546.* VCG tied these two events together given the close proximity in time between the two events and the amount of the deposit being the same as the withdrawal.

209. This Court adopts VCG's treatment of these transactions as separate-to-separate events and allocation of only Plaintiff's separate funds in 7183 were transferred into 7191. *Ex. 1K, Schedule AC-1, P. 71, L. 994 Bate #27619.*

210. On September 2, 2011, Plaintiff deposited check #5019 from Sioux Falls Massage Envy (hereinafter referred to as "SFME") in the amount of $754.09. *Ex. 1F(1)(a), Bate #8440.* This Court adopts VCG's methodology whereby any deposit assumed to be an SFME expense reimbursement which could not be identified as having been originally paid by Plaintiff's separate property, is deemed marital and allocated as a marital loan in 7191. *Ex. 1K, Schedule AC-1, P. 72, L. 1004, Bate #27620.*

211. On September 19, 2011, Plaintiff transferred $65,000 from 7191 into 7183. *Ex. 1F(1)(a), Bate #8443.* While it may have been Plaintiff's intention that the $65,000 transferred into 7183 was to use her separate funds to assist with the capital contribution to BDUBS, *(Tr. 460-462),* VCG was consistent with their methodology. A direct separate-to-separate event could not be tied to this transaction. *Tr. 1081-1082.*

212. This Court adopts VCG's methodology to repay the marital loan existing in 7191 at the time of the transfer and the entire $65,000 was allocated as repayment on the then existing marital loan balance in 7191. *Ex. 1K, Schedule AC-1, P. 72, L. 1008, Bate #27620.*

213. On October 13, 2011, the sum of $15,000 was transferred into 7191 from 7183. *Ex. 1F(1)(a), Bate #8450.* This Court adopts VCG's pro rata approach to the transfer to 7191. Therefore, 22.6% (or $3,392.22) is Plaintiff's separate property and the remaining $11,607.78 is deemed a loan from the marital estate into 7191. *Ex. 1K, Schedule AC-1, P. 72, L. 1015, Bate #27620.*

214. On December 21, 2011, Plaintiff transferred $30,000 into 7183 from her 7191 account. *Ex. 1F(1)(a), Bate #8469.* This Court adopts VCG's methodology to repay the marital loan existing in 7191 at that time of $23,241.01. The remaining $6,758.97 of the transfer is Plaintiff's separate property. *Ex. 1K, Schedule AC-1, P. 73, L. 1029, Bate #27621.*

215. At the end of December 2011, no marital loan existed in Plaintiff's 7191 account. *Ex. 1K, Schedule AC-1, P. 73, L. 1032, Bate #27621.*

216. Plaintiff obtained check-writing privileges in her 7191 account sometime in early 2012. Thereafter, on February 22, 2012, check #1001 in the amount of $15,000 payable to SFME's First Premier Loan #0002 cleared the account. *Ex. 1F(1)(a), Bate #8483.* A direct separate-to-separate event could not be tied to this transaction. *Tr. 1083-1084.* However, there was no marital loan existing in 7191 on February 22, 2012. Therefore, only Plaintiff's separate property was allocated toward the $15,000 SFME First Premier Loan #0002 payment. *Ex. 1K, Schedule AC-1, P. 73, L. 1040, Bate #27621.*

217. On February 27, 2012, Plaintiff deposited into 7191, TJPR expense reimbursement check #1647 in the amount of $5,560.12 and a $100 personal check that VCG could not tie to a separate asset. *Ex. 1F(1)(e), Bate #8491.* This Court adopts VCG's allocation of both deposits totaling $5,660.12 as a marital loan in 7191. *Ex. 1K, Schedule AC-1, P. 74, Ll. 1044 & 1045.*

218. On February 28, 2012, Plaintiff transferred into 7191 a total of $35,000 from her individual Edward Jones 8486-1-5 account. *Ex. 1F(1)(e), Bate #8492 & Ex 1F(1)(f), Bate #8734.* As a separate-to-separate event could not be tied to this transaction, this Court adopts VCG's pro rata approach to the transfers into 7191. Therefore, $33,381.19 is separate and the remaining $1,618.81 is deemed a loan from the marital estate. *Ex. 1K, Schedule AC-1, P. 74, L. 1047, Bate #27622.*

219. Two days later, on March 2, 2012, check #1003 in the amount of $35,000 payable to SFME's First Premier Loan #0002 cleared the account. *Ex. 1F(1)(a), Bate #8493.* VCG tied

these two events together given the close proximity in time between the two events and the amount of the deposit matching check #1003.

220. This Court adopts VCG's direct tracing methodology for this transaction whereby the same percentage of separate versus marital applied to the $35,000 deposit, is applied to the $35,000 check. *Ex. 1K, Schedule AC-1, P. 74, Ll. 1046 & 1047, Bate #27622.*

221. On March 1, 2012, Plaintiff deposited into 7191 a TJPR member draw in the amount of $5,329. *Ex. 1F(1)(e), Bate #8492.* On March 21, 2012, Plaintiff deposited another TJPR member draw in the amount of $20,000. *Ex. 1F(1)(e), Bate #8493.* Both deposits are Plaintiff's separate property pursuant to Paragraph 2D of the PMA. *Ex. 1K, Schedule AC-1, P. 74, L. 1048, Bate #27622.*

222. On March 27, 2012, Plaintiff deposited into 7191 check #1658 in the amount of $5,001.87. *Ex. 1F(1)(e), Bate #8491.* Said check is for TJPR expense reimbursements pursuant to the TJPR general ledger and as such, is deemed a marital loan to 7191. After the deposit of this check, the marital loan balance in 7191 as of March 27, 2012 was $10,661.99. *Ex. 1K, Schedule AC-1, P. 74, L. 1050, Bate #27622.*

223. On March 27, 2012, check #1005 from 7191 in the amount of $30,000 payable to SFME's First Premier Bank Loan #0002 cleared the account. *Ex. 1F(1)(e), Bate #8493.* A direct separate-to-separate event could not be tied to this transaction. *Tr. 1083-1084.* This Court adopts VCG's methodology to repay any marital loan existing in 7191 at the time of the transaction.

224. Therefore, $10,661.99 was allocated as repayment of the marital loan existing in 7191 at the time of the transaction, and the remaining $19,338.01 of the $30,000 SFME First Premier Loan #0002 payment is Plaintiff's separate property.

225. After said payment, no marital loan existed in 7191. *Tr. 1081. Ex. 1K, Schedule AC-1, P. 74, L. 1050, Bate #27622.*

226. On March 29, 2012, Plaintiff transferred $3,000 to 7183. *Ex. 1F(1)(e), Bate #8494.* No marital loan existed in 7191 at that time so only Plaintiff's separate funds were allocated to the transfer. *Ex. 1K, Schedule AC-1, P. 74, L. 1051, Bate #27622.*

227. On April 3, 2012, Plaintiff paid $120,944.02 on SFME's First Premier Loan #0001 and $11,234.32 on SFME's First Premier Loan #0002 via wire transfer from 7191 (for a total of $132,178.34). *Ex. 1F(1)(a), Bate #8502.* There was no marital loan existing in 7191 at that time so only Plaintiff's separate funds were allocated toward the loan payments. *Ex. 1K, Schedule AC-1, P. 75, L. 1058, Bate #27623. Tr. 1084-1085.*

228. Plaintiff's pay off of the SFME loans were capital contributions and increased Plaintiff's separate property interest in SFME. Plaintiff paid off the loans as she had personally guaranteed the corporate loans and she could get a better interest rate on her 7191 margin account. *Tr. 323:12-13.* Plaintiff was adamant that SFME was set up to be her business. This Court also finds that SFME was taking loan advances from First Premier Loan #0001 to pay Loan #0002's monthly payments as well as interest-only payments on Loan #0001. *Tr. 873:11-19 and Ex. 1H(7)(h), Bate #16617-16618.*

229. After Plaintiff paid off the SFME First Premier loans, the parties began receiving substantial distributions from SFME. *Tr. 1085.* Defendant was critical of Plaintiff's reasoning for the pay off of the loans and he believed Plaintiff paid off the loans only to create a separate property interest for the divorce.

230. It is clear to this Court that neither Plaintiff nor Defendant had any knowledge as to how the separate tracing process would work when Plaintiff paid off the SFME loans. Said payments occurred prior to Defendant filing for divorce in the State of Minnesota.

231. This Court adopts VCG's methodology whereby 83.9% of the total funds contributed to SFME were from Plaintiff's separate property pursuant to Paragraph 2C and 2D of the PMA. *Ex. 1K, Schedule B-7, P. 286, L.9 Bate #27834.*

232. On April 23, 2012, a deposit of $15,000 was made into 7191 representing a distribution from SFME. *Ex. 1F(1)(e), Bate #8501.* This Court adopts VCG's methodology

whereby 83.9% of all distributions received by SFME are Plaintiff's separate funds, and the remaining 16.1% is marital. Therefore, of the $15,000 SFME distribution, $12,589.76 is separate and the remaining $2,410.24 is deemed a marital loan. *Ex. 1K, Schedule AC-1, P. 75, L. 1060, Bate #27623.*

233. Defendant remained Plaintiff's financial advisor with Edward Jones during this time. He directed the SFME distributions into Plaintiff's 7191 account thereby lending credibility to Plaintiff's claim that SFME was set up to be her business and that the parties were working on their marriage. Defendant continued to direct monthly SFME distributions into Plaintiff's 7191 account *(Tr. 705:18-20)* until he started the divorce action in Minnesota on June 11, 2012.

234. The continual deposits of the SFME distributions into Plaintiff's 7191 continued to create a marital loan value to the extent 16.1% of the deposits were marital in nature.

235. On April 30, 2012, Plaintiff made what she described as a capital contribution to ME Rogers in the amount of $10,000. *Ex. 1F(1)(e), Bate #8510.* At the time of her contribution, Plaintiff believed she was working on her marriage and was still having a sexual relationship with Defendant. *Tr. 291:12-23.*

236. Defendant told Plaintiff they needed to contribute $10,000 to ME Rogers as their portion of a capital contribution. Instead of her historical process of transferring her funds from 7191 into 7183 for such a payment, Plaintiff went directly to Home Federal Bank and paid $10,000 on the ME Rogers Home Federal business loan via check #1007. *Ex. 1H(8)(h), Bate #17043.*

237. Unbeknownst to Plaintiff, the $10,000 payment was booked as a shareholder loan to ME Rogers. *Tr. 1086.* As the payment was not a separate-to-separate event, this Court adopts VCG's methodology to repay the marital loan existing in 7191 at the time of the transaction. Therefore, the entire $10,000 was allocated as repayment toward the marital loan existing at that time in 7191. *Ex. 1K, Schedule AC-1, P. 75, L. 1069, Bate #27623.*

238. On May 10, 2012, two deposits totaling $18,000 were made into 7191 representing a distribution from SFME. *Ex. 1F(1)(e), Bate #8501.* This Court adopts VCG's

methodology whereby 83.9% of all SFME distributions paid to the parties are Plaintiff's separate funds, and the remaining 16.1% is marital based on the acquisition of SFME. *Ex. 1K, Schedule AC-1, P. 75, L. 1064, Bate #27623.*

239. On June 11, 2012, Defendant served Plaintiff with a Summons and Petition for Dissolution of Marriage *In Re Marriage of Donald M. Charlson v. Angela K. Charlson, Court File No. 55-FA-13-1830, District Court Family Division, Third Judicial Circuit, State of Minnesota, County of Olmsted. Ex. 18.* Shortly before Respondent commenced the divorce action, at the end of May 2012, there was a nominal marital loan of $6,256.37 in Plaintiff's 7191 account. *Ex. 1K, Schedule AC-1, P. 75, L. 1071, Bate #27623.*

240. On the same day Defendant served Plaintiff with divorce papers in Minnesota, June 11, 2012, Defendant directed a $15,000 SFME distribution into the 7183 account rather than Plaintiff's 7191 account, as had been the practice. *Ex. 1F(2)(b), Bate #10933.*

241. On June 12, 2012, Plaintiff transferred $15,000 from 7183 to 7191. Another $24,500 was transferred from 7183 to 7191 on June 21, 2012 for total transfers from 7183 of $39,500. *Ex. 1F(2)(e), Bate #8521.* This Court adopts VCG's pro rata approach to each transfer from 7183 into 7191. *Ex. 1K, Schedule AC-1, P. 75, L. 1077, Bate #27623.*

242. On July 27, 2012, Plaintiff transferred into 7191 the funds remaining in her Edward Jones 0484-1-8 World Ventures account in the amount of $788.88. *Ex. 1F(1)(e), Bate #8529.* This Court adopts VCG's methodology whereby these funds were entirely marital and the transfer is a marital loan. *Ex. 1K, Schedule AC-1, P. 76, L. 1083, Bate #27624.*

243. On January 7, 2013, Plaintiff transferred into 7191 cash in the amount of $18,889.26 and securities in the amount of $12,174.77 previously held in her individual Edward Jones 8486-1-5 investment account. *Ex. 1F(1)(e), Bate #8583-8584.* As a direct separate-to-separate event could not be tied to this transaction, this Court adopts VCG's pro rata approach to each transfer into 7191. *Ex. 1K, Schedule AC-1, P. 77, Ll. 1119 & 1120, Bate #027625. See* also *Ex. 1K, Schedule AC-6, P. 185, Ll. 65 & 66, Bate #27733.*

244. On July 10, 2013, Defendant transferred $9,500 from his Edward Jones 7272 account into 7191. *Ex. 1F(1)(a), Bate #8648.* Said transfer was in accordance with the Stipulation and Temporary Order in the Minnesota divorce matter. Regardless of the reason for the transfer, in order to be consistent with their methodology, VCG applied the pro rata approach to the transfer from 7272 into 7191. *Ex. 1K, Schedule AC-1, P. 79, L. 1162, Bate #27627.*

245. On August 12, 2013, $8,000 was transferred into 7191 from 7183 in accordance with the terms of the Stipulation and Temporary Order in the Minnesota divorce action. *Ex. 1F(1)(e), Bate #8659.* Regardless of the reason for the transfer, in order to be consistent with their methodology, VCG applied the pro rata approach to the transfer into 7191. *Ex. 1K, Schedule AC-1, P. 80, L. 1168, Bate #27628.*

246. A like amount of $8,000 was transferred into Defendant's 7272 account per the Minnesota Court Order and the same pro rata approach was applied to that transaction. *Plaintiff's Ex. 1 K, Schedule DC-1, P. 150, L. 40, Bate #27698.*

247. On September 13, 2013, $7,500 was transferred two times for a total of $15,000 into 7191 from 7183 in accordance with the terms of the Stipulation and Temporary Order in the Minnesota divorce action. *Ex. 1F(1)(e), Bate #8674.* In order to be consistent with their methodology used, VCG applied the pro rata approach to the transfer into 7191. *Ex. 1K, Schedule AC-1, P. 80, L. 1176, Bate #27628.*

248. On October 22, 2013, $7,500 was transferred into 7191 from 7183 in accordance with the terms of the Stipulation and Temporary Order in the Minnesota divorce action. *Ex. 1F(1)(e), Bate #8687.* In order to be consistent with their methodology used, VCG applied the pro rata approach to the transfer into 7191. *Ex. 1K, Schedule AC-1, P. 80, L. 1181, Bate #27628.*

249. This court adopts the VCG methodologies and separate tracing analysis as it pertains to Plaintiff's Edward Jones 7191 account. The account is Plaintiff's separate property subject to a marital loan. *Ex. 1K, Schedule AC-1, P. 81, L. 1195, Bate #27629.*

JOINT EDWARD JONES INVESTMENT ACCOUNT 7183

Ex. 1K, Schedule JT-1, Bate #27630-#27696

250. Defendant opened the Edward Jones investment account 7183-1-0 (hereinafter "7183") in April 1993. *Ex. 1F(2)(b), Bate #8810.* The account is a jointly held investment account. VCG, Plaintiff's experts, prepared a report tracing Plaintiff's separate funds through the account using commonly accepted tracing methodologies of direct tracing and pro rata tracing. The account was considered by VCG to have both marital and separate property funds.

251. The dividends and interest in the VCG tracing schedule were allocated to 7183 pro rata because the account was considered to have both marital and separate funds.

252. Baker Tilly, Defendant's experts, take the position that any separate funds that flowed through the 7183 account were used solely to pay ordinary and necessary living expenses and to obtain marital property. In other words, any of Plaintiff's separate property in the account became marital.

253. At times, Baker Tilly contradicted their position. Mr. Harjes acknowledged that Plaintiff has a separate interest in assets that were purchased with separate funds that flowed through the joint 7183 account or the joint Home Federal 2730 account. For example, Mr. Harjes agrees Plaintiff has a separate interest in her Taco John's Simple IRA 0314. *Tr. 1429:15-17.*

254. Although Mr. Harjes does not quantify the separate interest, the IRA was created with funds transferred through the joint account. *See Ex. 1K, Schedule AC-4, Bates #27764.* Mr. Harjes agrees Plaintiff has a separate interest in the current marital home and the condo sale proceeds although he does not quantify the separate interest. *Tr. 1429:22-25 & 1430:1-4.* These assets were purchased with transfers through the 7183 account. *Ex. 1K, Schedule RE-1, Bate #27838, & Schedule RE-2, Bate # 27850.* Mr. Harjes further agreed that commingling of marital and separate property does not necessarily extinguish a separate property interest. *Tr. 1436:24-25 and 1437:1-4.*

255. Defendant places great weight upon the amount of each party's contribution to account 7183 toward payment of the ordinary and necessary living expenses. The parties filed

separate tax returns during the marriage, except for year 1996. Both parties made efforts to keep Plaintiff's (separate) income separate from Defendant's marital income. Despite the fact that Paragraph 7 of the PMA allows for payment of taxes from a joint account, Plaintiff generally paid any tax liabilities from her TJPR business account. *Tr. 1080:1-5.*

256. Schedule 1 of Defendant's expert report attempts to compare each party's contributions to the joint Edward Jones 7183 account with their available cash flow during the marriage. *Ex. V, Bate #810.* Baker Tilly analyzes years 1994 to 2013 as it relates to contributions by each party to the 7183 account. According to Schedule 1, Defendant contributed 70.9% of the total contributions made to the account during those years while Plaintiff contributed 37.3%.

257. Paragraph 7 of the PMA does not require an equal contribution to the joint account, nor does it specify a percentage that each party is required to make. Theoretically, a contribution could be one dollar. *Tr. 1449:21-24.* Defendant's Schedule 1, however, ignores contributions made to other joint accounts during that period of time such as the parties' joint First Western Bank checking 151890 (*Ex. 27*), which account was used for payment of ordinary living expenses since 1993, the year prior to Baker Tilly's analyses.

258. During the early years of the marriage, Plaintiff earned more income than Defendant, so more of Plaintiff's monies were necessarily used toward payment of the ordinary and necessary living expenses. *Tr. 621:14-21*

259. At the time the parties entered into their PMA in January, 1993, Defendant had no assets and his income was not sufficient to pay the court ordered obligations to his former wife, Teresa Charlson, and his other court-ordered obligations such as attorney fees, his automobile loan and personal loan from Plaintiff. *Tr. 615-619.*

260. It was clearly contemplated at that time, Defendant would not be able to contribute a like amount as would Plaintiff toward the payment of the ordinary and necessary living expenses of the parties. The specific language of paragraph 7 of the PMA states the deposits should be "at an amount necessary" to pay ordinary and necessary living expenses, but

it does not dictate a specific amount of each party's deposit. At no time during their marriage did either party go without their ordinary and necessary needs being met.

261. The parties never resided together on a full-time basis during their marriage as Plaintiff maintained her residence in South Dakota. *Tr. 353:3.* She is a member of the Oglala Sioux community on the Pine Ridge Indian Reservation. During the first 2½ years of their marriage, Defendant worked out of an Edward Jones office in St. Louis, Missouri during the workweek and traveled extensively around the United States in his position with Edward Jones. *Tr. 622:5-7.*

262. Plaintiff and her minor children resided in Belle Fourche, South Dakota, and Defendant's three minor children resided with their mother in Brookings, South Dakota, some 400 miles from Belle Fourche. Defendant would travel to Brookings, South Dakota to see his children frequently. *Tr. 622:8-9. Ex. 1I(1)-Belle Fourche, SD-(c) & Ex. 28.*

263. Baker Tilly Schedule 1 does not provide a complete analysis of how the parties paid for expenses through other accounts, and their sole focus on account 7183 is misplaced.

264. The parties also used the following accounts during their marriage:

a. First Western Bank joint checking 1890 in 1993 (*Ex. 27);*
b. Home Federal joint checking 2730 (*Ex. 1F(6));*
c. Edward Jones joint investment 6236 (*Ex. 1F(4)); and*
d. Plaintiff's Norwest Bank checking 5458 (*Ex. 1I(1)-Belle Fourche, SD-(c) & Ex. 28.)*

265. Plaintiff's expert, Ms. Quinn Driscoll, prepared a rebuttal exhibit to the Baker Tilly Report, (*Ex. 26)* which compared contributions to the parties' 7183 account during the years 1996-2011 which was during the time the parties were living together on a more regular basis. Based on her analysis, of the funds available for contribution, Plaintiff contributed 70.3% of her available funds to the 7183 account, and Defendant contributed 75.3% of his available funds during that time period which clearly reflects a more balanced contribution. However, since the PMA does not require an equal or even balanced contribution to any joint account, the

analysis by Defendant is moot. Defendant's income is marital and available for both parties to use for marital expenses.

266. Plaintiff contributed to the ordinary and necessary living expenses of the parties, whether through the 7183 account, the joint Home Federal 2730 account, the joint First Western 1890 account or through her individual Norwest Bank account. She also purchased separate property with her separate funds that were transferred through the Edward Jones 7183 account. The transfer of Plaintiff's separate funds through 7183 did not extinguish the separate property characteristic.

267. The purposes of the PMA was to protect Plaintiff's separate property in the event of a divorce, not to eradicate her separate property. This Court has previously found that tracing is appropriate in this case, and that applies to the joint Edward Jones 7183 account as set forth elsewhere in these findings.

268. Schedule JT-1 of the VCG tracing report (*Ex. 1K, Bates #27630-27696)* is a detailed analysis of all deposits, checks and withdrawals in the 7183 account from inception through December 2013. The "Source / Notes" column on the schedule references other back up statements, cancelled checks, general ledgers and other schedules to their report, to authenticate the entries inputted on Schedule JT-1.

269. It is evident to this Court, that Plaintiff's experts looked at every single transaction in this account, reviewed transactions in other accounts and also reviewed tax returns, real estate documents and business general ledgers when tracing separate funds. The methodology used by VCG allocating percentages, (pro rata tracing) is consistent with the terms of the PMA.

270. This Court will not make findings on every transaction in the 7183 account identified in the VCG report. The account was examined over a period of 20 years and a sampling of transactions will be addressed for each year regarding the acquisition of additional assets or to demonstrate the consistent methodologies used by Plaintiff's experts in the tracing of the 7183 account.

1993 Activity

271. While there is no question the Edward Jones 7183 is a jointly held investment account used by the parties at times during the marriage to pay certain expenses and to acquire assets, the evidence does not support Defendant's position this account was created to be "the" jointly held bank account referred to in Paragraph 7 of the PMA, nor that every asset purchased through the account is automatically marital as the use of separate property must be considered.

272. The parties opened a joint checking account with First Western Bank in Belle Fourche, South Dakota with a deposit of funds from each party on May 17, 1993, *(Ex. 27)* prior to the initial deposit into 7183 on May 25, 1993. *Ex. 1F(2)(b), Bates #8817.* During 1993, the First Western Bank account was used by the parties to pay ordinary and necessary living expenses, as well as Defendant's alimony and child support obligations to his former wife, Teresa Charlson, *(Ex. 27, check #1060)*, attorney fees owed to Teresa Charlson's attorney, Ron Abo (*Ex. 27, check #1055)*, and Defendant's automobile loan with Western Bank *(Ex. 27, check #1056)* which are all Defendant's separate liabilities pursuant to Paragraph 8 of the PMA.

273. Any marital funds used to pay Defendant's separate liabilities, should be deemed a loan from the marital estate pursuant to Paragraph 9F of the PMA. Although Defendant paid his separate obligations from joint funds, neither party prepared a tracing analysis reflecting the amount of the marital loan that Defendant might owe the marital estate, which could be substantial. In addition to the First Western Bank checking account, Plaintiff's separate Norwest Bank checking 5458 was also used to pay living expenses for the parties. *Ex. 1I(1) Belle Fourche, SD home (c).*

274. The first deposit in 7183-1-0 was made on May 25, 1993 in the amount of $1,736.40. *Ex. 1F(2)(b), Bate #8817.* Other than being used by Plaintiff as a means to conveniently access her separate funds in her 7191-1-0 account, the account saw limited activity in 1993: *Ex. 1F(2)(b)*

Date	Transaction	Amount
5/25/93	Deposit - EDJ & Co Check *Bate #8817*	$1,736.40
7/27/93	Withdrawal – Check #001593681 *Bate #8830*	($689.00)
9/2/93	Transfer from Plaintiff's 7191 account *Bate #8841*	$35,000.00
9/7/93	Withdrawal – Check #1 to Roundup Building Center for construction costs on Belle Fourche, SD Home *Bate #8841*	($35,000.00)
10/19/93	Transfer from Plaintiff's 7191 account *Bate #8847*	$20,000.00
10/21/93	Withdrawal – Check #2 to Roundup Building Center for construction costs on Belle Fourche, SD Home *Bate #8847*	($20,000.00)

No other deposits (other than earnings on the money market account) or withdrawals were made until the end of 1993.

275. It appears Defendant began using the 7183 account for his Edward Jones business expenses starting in December 1993 when Edward Jones reimbursements of $804.99 were deposited on December 16, 1993 and $1,375.45 on December 17, 1993. *Ex. 1F(2)(b), Bate #8859.*

276. This Court finds the parties' ordinary and necessary living expenses were paid from accounts other than 7183 during 1993. Plaintiff's separate funds flowing through the 7183 account did not become marital property.

1994 Activity

277. During 1994, the 7183 account became more active with payment of Defendant's business expenses as evidenced by significant deposits of Defendant's Edward Jones business expense reimbursements totaling $32,134.81: *Ex. 1F(2)(b)*

Statement Date	Transaction	Deposit Amount
January, 1994	EDJ Expense Reimbursements *Bate #8865*	$5,827.69
February, 1994	EDJ Expense Reimbursements *Bate #8871*	$1,520.97

Statement Date	Transaction	Deposit Amount
March, 1994	EDJ Expense Reimbursements *Bate #8877*	$5,223.66
April, 1994	EDJ Expense Reimbursements *Bate #8884*	$2,664.98
May, 1994	EDJ Expense Reimbursements *Bate #8892*	$2,012.65
June, 1994	EDJ Expense Reimbursements *Bate #8899*	$1,949.58
July, 1994	EDJ Expense Reimbursements *Bate #8906*	$3,236.90
August, 1994	EDJ Expense Reimbursements *Bate #8913*	$1,622.30
September, 1994	EDJ Expense Reimbursements *Bate #8919*	$359.56
October, 1994	EDJ Expense Reimbursements *Bate #8925-#8926*	$3,208.57
November, 1994	EDJ Expense Reimbursements *Bate #8933-#8934*	$2,275.55
December, 1994	EDJ Expense Reimbursements *Bate #8942-#8941*	$2,232.40
	Total expense reimbursements	**$32,134.81**

278. The PMA did not require Plaintiff to deposit funds in an amount necessary to pay Defendant's business expenses. This Court finds the parties' ordinary and necessary living expenses were paid from an account other than 7183 during 1994.

1995 Activity

279. Defendant moved to Rochester, Minnesota in May 1995 to work at an Edward Jones office. *Tr. 784:6-14.* Plaintiff remained living with her minor children in Belle Fourche, South Dakota. When Defendant moved his office to Rochester, Minnesota, all of the parties' Edward Jones accounts he handled moved with Defendant as evidenced by the change in the account numbers; the joint investment account 7183-1-0 was moved to 7183-1-8. *Ex. 1F(2)(b), Bate #8988.* At some point in time after Defendant's move to Rochester, the parties opened joint checking account 2730 at Home Federal in Rochester because the Edward Jones office did not carry cash and Edward Jones did not provide local banking benefits such as types of credit or the ability to deposit monies and have access, short term, to monies.

280. Defendant admitted the parties needed a checking account in addition to the joint Edward Jones investment account 7183. *Tr. 760:11-21.* Investment account 7183 is not a checking account; it is an investment account that does not have the same characteristics as a checking account. This is further evidence 7183 was not the intended jointly owned bank account for payment of ordinary and necessary living expenses of the parties.

281. On November 1, 1995, the parties purchased a limited partnership interest in The Jones Financial Companies, LLLP. The cash down payment of $5,000 was withdrawn from the cash portion of the parties' joint Edward Jones 7183 investment account on October 30, 1995. However, the cash balance in the account on October 30, 1995 was $0 at the time of the withdrawal, which resulted in the cash balance being overdrawn by $5,000 on October 31, 1995. *Ex. 1F(1)(b), Bate #9014.*

282. On November 1, 1995, Plaintiff transferred $5,000 from her separate Edward Jones 7191 account into 7183 to cover the $5,000 Limited Partnership down payment. Defendant argued there were sufficient funds in the 7183 account at the time of the purchase of the Limited Partnership to fund the $5,000 cash purchase price without Plaintiff's deposit of her separate funds, however the bank statements contradict his allegation.

283. Defendant was paying his child support and spousal maintenance obligations from this account at that time. But for Plaintiff's transfer of $5,000 from her separate 7191 account, the 7183 account would not have had sufficient funds to cover the $5,000 down payment for the purchase of the Limited Partnership. *Tr. 1071-1072.*

1996 & 1997 Activity

284. Plaintiff sold the Belle Fourche, South Dakota home in July 1996 (*Ex. 1I(1) Belle Fourche, SD (f)*) and the parties purchased a home in Rochester, Minnesota in August 1996. *Ex. 1I(1) 3316 Lake Street NW, Rochester, MN (a).* From June 1996 through May, 1997 Plaintiff made the following deposits/transfers into 7183: *Ex. 1F(2)(b)*

Date	Transaction	Amount
6/5/96	US Treasury for Plaintiff's 1995 income tax refund *Bate #9056*	$4,110.00
7/10/96	Child Support payment – Bill Smoot *Bate #9063*	$300.00
8/1/96	Gift – Charles Johnston (Plaintiff's brother) *Bate #9070*	$400.00
8/1/96	Home Federal Check #1210 (Plaintiff's homestead sale proceeds) *Bate #9070*	$100,000.00
8/16/96	Transfer to 7191	($100,000.00)
9/26/96	Transfer from 7191 *Bate #9078*	$2,000.00
10/16/96	Taco John's Loan Payment (Plaintiff's Separate Property) *Bate #9087*	$800.00
10/16/96	Taco John's Loan Payment (Plaintiff's Separate Property) *Bate #9087*	$800.00
10/17/96	Transfer from 7191 *Bate #9087*	$4,959.55
11/6/96	Transfer from 7191 *Bate #9096*	$10,000.00
12/6/96	Transfer from 7191 *Bate #9104*	$15,000.00
1/9/97	Transfer from 7191 *Bate #9113*	$5,000.00
1/15/97	Transfer from 7191 *Bate #9113*	$5,000.00
1/15/97	Transfer from 7191 *Bate #9113*	$6,000.00
1/28/97	Transfer from 7191 *Bate #9114*	$2,000.00
3/4/97	Transfer from 7191 *Bate #9131*	$5,000.00
3/27/97	Transfer from 7191 *Bate #9131*	$4,500.00
5/12/97	Taco John's (STI) Distribution *Bate #9145*	$2,000.00

This Court adopts VCG's direct tracing methodology as it applies to the deposit/withdrawal of $100,000 in August 1996, as it is tied to sale proceeds from the sale of Plaintiff's separate property interest in the Belle Fourche, South Dakota home, and as such, is entirely Plaintiff's separate funds. The remaining activity in this account during said period of time is allocated on a pro rata basis. *Ex. 1K, Schedule JT-1, Bates #27631-#27634.*

285. When Plaintiff reacquired TJPR from Cindy Palmier in July 1997, she transferred funds from her 7191 to 7183 in order to utilize the 7183 check-writing capabilities to access her separate funds to reacquire the business.

286. Based upon Paragraph 2A and 9F of the PMA, separate assets are to remain separate, otherwise a marital loan would be created. *Tr. 976:15-18.* This Court adopts VCG's treatment of this transaction as a separate-to-separate event, based upon Paragraph 2A of the PMA, and any marital loan in 7191 at the time of the transfer(s) was left intact so as to avoid a marital loan in a separate asset; in this transaction, TJPR.

287. Plaintiff did not immediately have a business checking account for TJPR when she reacquired TJPR and therefore, she deposited/withdrew funds from 7183 to cover the initial operation costs of TJPR, which are Plaintiff's separate obligations pursuant to Paragraph 8B of the PMA. The following is a break-down of costs associated with the reacquisition and payment of expenses of TJPR from the 7183 account: *Ex. 1F(2)(a) and (b)*

Date	Transaction	Amount
7/7/97	Transfer in of separate funds from 7191 *Bate #9161*	$15,000.00
7/7/97	Check #756 to Cindy Palmier (cash payment) *Bate #8798*	($10,000.00)
7/8/97	Check #755 to American Family Insurance *Bate #8797*	($370.88)
7/14/97	Check #760 to IRS (Cindy Palmier) *Bate #8799*	($600.00)
7/14/97	Check #804 to Multi-Foods *Bate #8799*	($1,988.39)
7/15/97	Transfer in of separate funds from TJPR's EJ 3388 *Bate #9162*	$5,000.00
7/17/97	Deposit Money Orders from TJPR (separate funds) *Bate #9161*	$700.00
7/17/97	Deposit Money Orders from TJPR (separate funds) *Bate #9161*	$412.87
7/17/97	Deposit Money Orders from TJPR (separate funds) *Bate #9161*	$322.97
7/17/97	Deposit Money Orders from TJPR (separate funds) *Bate #9161*	$700.00

Date	Transaction	Amount
7/17/97	Check #806 to Multi-Foods *Bate #8798*	(3,363.27)
7/22/97	Deposit Money Orders from TJPR (separate funds) *Bate #9161*	$6,748.04
7/23/97	Check #803 to Golden West (Sandra Yellowboy) *Bate #8798*	($602.03)
7/24/97	Check #810 to Home Federal to cover checks written from 2730 for TJPR *Bate #8799 & #11448*	($4,000.00)
7/25/97	Deposit Money Orders from TJPR (separate funds) *Bate #9161*	$128.53
7/25/97	Deposit Money Orders from TJPR (separate funds) *Bate #9161*	$700.00
7/25/97	Check #807 to SFG Foods *Bate #8798*	($640.78)
7/29/97	Check #811 to Office Max *Bate #8799*	($108.80)
7/31/97	Check #809 to Harlan Schmidt *Bate #8798*	($142.28)
7/31/97	Check #813 to Multi-Foods *Bate #8799*	($1,815.85)
8/5/97	Check #757 to BIA payment for Cindy Palmier *Bate #8798*	($1,736.00)
8/13/97	Deposit Check #1038 TJPR *Bate #9171*	$3,695.54
	Balance of Plaintiff's separate funds remaining in 7183 after TJPR deposits/payments	**$8,039.67**

288. As TJPR is Plaintiff's separate property, any obligations of TJPR are Plaintiff's separate obligations pursuant to Paragraph 8B of the PMA. As there were sufficient separate funds in the account at the time of the transactions, this Court adopts VCG's methodology whereby only Plaintiff's separate funds were allocated toward each TJPR transaction, regardless of the existence of a marital loan in 7191 at the time of the transfer(s) into 7183. The separate funds remaining after the payment of TJPR obligations set forth above were considered in determining the separate percentage applied to subsequent withdrawals from the account. *Ex. K, Schedule JT-1, P. 88, Bate #027635.*

289. During the period 9/27/97-10/31/97, a total of $28,011.18 of checks cleared the account. *Ex. 1K, Schedule JT-1, P. 88, L. 126, Bate #27636.* Based upon VCG's pro rata

methodology, the percentage of Plaintiff's separate funds to be allocated toward those cleared checks is 5.9% *(Line 122)*, or $1,652.66 and the marital funds to be allocated is 94.1%, or $26,358.52. However, there was not sufficient marital funds in the account to pay its 94.1% ($26,358.52) of the cleared checks that month. *Ex. 1K, Schedule JT-1, P. 88, L. 126, Bate #27636.* Therefore, this Court adopts VCG's methodology in instances such as this to first allocate all marital funds in the account that month toward the checks that cleared, and the remaining funds are allocated from Plaintiff's separate funds. *Ex. 1K, Schedule JT-1, P. 88, L. 126, Bate #27636.*

290. This Court adopts this same methodology throughout VCG's report as reasonable when there are not sufficient funds (either separate or marital) to pay its pro rata percentage toward the checks cleared in any given period of time.

291. On December 31, 1997, Plaintiff transferred $6,000 from her 7191 account into 7183. *Ex. 1K, Schedule JT-1, P. 88, L. 136, Bate #27636.* On January 5, 1998, a $6,000 contribution was made to Plaintiff's separate Edward Jones Taco John's Simple IRA 0314. *Schedule JT-1, L. 143, Bate #27637.* However, VCG was not aware of the connection of these two separate-to-separate events at the time they drafted their report. *Tr. 1273:7-19.* As a result, VCG applied the pro rata methodology to the $6,000 contribution to Plaintiff's Edward Jones Taco John's Simple IRA 0314 resulting in a marital loan in Plaintiff's separate IRA. *Ex. 1K, Schedule AC-4, P. 216, L. 6, Bate #27764.*

1998 Activity

292. Plaintiff deposited member draws from TJPR during 1998 into 7183 as follows:

Date	Amount	Ex. 1F(2)(b) Bate #
1/28/98	$2,000	*#9210*
4/8/98	$2,000	*#9234*
4/28/98	$5,000	*#9241*
12/8/98	$2,000	*#9296*
Total	**$11,000**	

As TJPR is Plaintiff's separate property, all TJPR member draws are Plaintiff's separate property pursuant to Paragraph 2C of the PMA.

293. On July 22, 1998, Plaintiff transferred in $11,154.19 from the TJPR EJ 3388 account. *Ex. 1F(2)(b), Bate #9258.* On July 22, 1998, check #961 in the same amount ($11,154.19) was cashed. *Bate #9259.* Pursuant to the TJPR General Ledger, this check was to Holmes Equipment and is Plaintiff's separate obligation associated with her separate interest in TJPR pursuant to Paragraph 8B of the PMA. *Ex. 1J(4) – General Ledgers (a), Bate #25728.* This Court adopts VCG's methodology whereby only Plaintiff's separate funds were allocated toward this expense. *Ex. 1K, Schedule JT-1, P. 90, Ll. 176-177, Bate #27638.*

294. On July 31, 1998, Plaintiff transferred $10,000 from her separate 7191 account into 7183. *Ex. 1F(2)(b), Bate #9259.* This Court adopts VCG's methodology to repay the marital loan existing in 7191 at that time of $438.42. *Ex. 1K, Schedule AC-1, L. 284, Bate #27583.* The remaining $9,561.58 (or 95.6% of the transfer) is Plaintiff's separate property. The marital estate benefited by these separate funds paying expenses from 7183 on a pro rata basis. *Ex. 1K, Schedule JT-1, P. 90, L. 179, Bate #27638.*

295. On the same date as the $10,000 transfer, the parties purchased a limited partnership interest in Jones Financial Companies, LLLP via a $4,000 down payment. *Ex. 1F(2)(b), Bate #9259.* This Court adopts VCG's direct tracing methodology for this transaction whereby the same percentage of Plaintiff's separate funds transferred that same day (95.6%) is allocated toward the $4,000 down payment. This Court finds Plaintiff's separate interest in the $4,000 limited partnership down payment is $3,824.63. *Ex. 1K, Schedule JT-1, P. 90, Ll. 179 & 180, Bate #27638.*

1999 Activity

296. Plaintiff deposited TJPR member draws or TJPR, Inc. loan repayments during 1999 into 7183 as follows:

Date	Amount	Deposit Source	Ex. 1F(2)(b) Bate #
3/5/99	$2,000	Member Draw	*#9318*

Date	Amount	Deposit Source	Ex. 1F(2)(b) Bate #
5/12/99	$725	TJPR, Inc. loan repayment	*#9328*
9/29/99	$2,000	Member Draw	*#9359*
Total	**$4,725**		

The deposits are Plaintiff's separate property. The marital estate benefited by separate funds paying expenses from 7183 on a pro rata basis. *Ex. 1K, Schedule JT-1, Bate #27639-#27642.*

297. On December 29, 1999, Plaintiff transferred $3,000 from #7183 to her separate TJPR #3388 account. *Ex. 1F(2)(b), Bate # 9376.* As TJPR is Plaintiff's separate property, any obligations of TJPR are Plaintiff's separate obligations pursuant to Paragraph 8B of the PMA. As there were not sufficient separate funds in the account at the time of the transaction, this Court adopts VCG's pro rata approach to apply a percentage of the previous month's ending balance to the transferred funds. Plaintiff's separate property interest in the prior month's ending balance was 5.5%. Therefore, of the $3,000 transferred on December 29, 1999, 5.5% or $165.24 is separate and the remaining $2,834.76 is deemed a loan from the marital estate into TJPR. *Ex. 1K, Schedule JT-1, P. 94, L. 269, Bate #27642 & Schedule L-1, P. 261, L. 1, Bate #27809.*

2000 Activity.

298. Plaintiff deposited TJPR member draws and STI distributions during 2000 into 7183 as follows:

Date	Amount	Deposit Source	Ex. 1F(2)(b) Bate #
2/25/00	$3,500.00	TJPR Member Draw	*#9388*
3/7/00	$3,000.00	TJPR Member Draw	*#9397*
3/7/00	$2,000.00	TJPR Member Draw	*#9397*
4/13/00	$2,000.00	TJPR Member Draw	*#9404*
5/2/00	$5,455.45	STI Distribution	*#9411*
6/27/00	$2,000.00	TJPR Member Draw	*#9491*
10/3/00	$2,000.00	TJPR Member Draw	*#9448*
12/18/00	$2,000.00	TJPR Member Draw	*#9463*
Total	**$21,955.45**		

The deposits are Plaintiff's separate property. *Ex. 1K, Schedule JT-1, Pp. 94-97, Bate #27642-#27645.*

299. On January 31, 2000, Plaintiff transferred $3,000 from 7183 to her Edward Jones Taco John's Simple IRA 0314. *Ex. 1F(2)(b), Bate #9390.* As no direct deposit of Plaintiff's

separate funds could be tied to this event, this Court adopts VCG's pro rata approach to each withdrawal. Therefore of the $3,000 transferred on January 31, 2000, $102.65 is separate and the remaining $2,897.35 is deemed a loan from the marital estate into Plaintiff's Edward Jones IRA 0314. *Ex. 1K, Schedule JT-1, P. 94, L. 280, Bate # 27642 & Schedule AC-4, P.220, L. 85, Bate #27768.*

300. On March 14, 2000, Plaintiff deposited an inheritance from her son's estate in the form of life insurance proceeds in the amount of $10,084. *Ex. 1F(2)(b), Bate #9398.* Said inherited funds are Plaintiff's separate property pursuant to Paragraph 2E of the PMA. From said proceeds, Plaintiff paid funeral expenses in the amount of $4,665.04 on February 22, 2000. *Ex. 1F(2)(b), Bate #9389.* The net funds of $5,418.96 are Plaintiff's separate property. The marital estate benefited by these separate funds paying expenses from 7183 on a pro rata basis. *Ex. 1K, Schedule JT-1, P. 95, L. 284, Bate #27643.*

301. On April 16, 2000, Plaintiff transferred $20,000 from 7183 to her separate TJPR 3388 account. *Ex. 1F(2)(b), Bate #9406.* As there were not sufficient separate funds in the account at the time of the transaction, this Court adopts VCG's pro rata approach to each withdrawal. Plaintiff's separate property interest in the prior month's ending balance was 24.6%. Therefore, of the $20,000 transferred on April 16, 2000, 24.6% or $4,915.16 is separate and the remaining $15,084.84 is deemed a loan from the marital estate into TJPR. *Ex. 1K, Schedule JT-1, P. 95, L. 294, Bate #27643.*

302. On August 25, 2000, the parties' purchased an Edward Jones Limited Partnership in the amount of $11,500. *Ex. 1F(2)(b), Bate #9432.* As no direct deposit of Plaintiff's separate funds could be tied to this event, this Court adopts VCG's pro rata approach to each withdrawal. Plaintiff's separate property interest in the prior month's ending balance was 13.9%. Therefore, of the $11,500 limited partnership purchase on August 25, 2000, 13.9% or $1,601.05 is separate and the remaining $9,898.94 is deemed marital. *Ex. 1K, Schedule JT-1, P. 96, L. 314, Bate #27644.*

303. On October 18, 2000, Plaintiff made a shareholder loan to TJPR in the amount of $5,000. *Ex. 1F(2)(b), Bate #9450.* As there were sufficient separate funds in the account at the time of the transaction, only Plaintiff's separate funds in 7183 were used in payment of the shareholder loan. *Ex. 1K, Schedule JT-1, P. 97, L. 327, Bate #27645.*

2001 Activity

304. Plaintiff deposited TJPR member draws or TJPR, Inc. loan repayments into 7183 during 2001 as follows:

Date	Amount	Deposit Source	Ex. 1F(2)(b) Bate #
1/16/01	$1,215	TJPR, Inc. loan repayment	*#9470*
8/3/01	$4,000	TJPR Member Draw	*#9520*
11/2/01	$4,000	TJPR Member Draw	*#9545*
11/28/01	$2,000	TJPR Member Draw	*#9546*
12/5/01	$4,000	TJPR Member Draw	*#9556*
Total	**$15,215**		

The deposits are Plaintiff's separate property. *Ex. 1K, Schedule JT-1, Pp. 98-100, Bate #27646-#27648.*

305. On January 23, 2001, Plaintiff deposited an Inheritance from her son's estate in the form of insurance proceeds in the amount of $1,215. *Ex. 1F(2)(b), Bate #9470.* Said inherited funds are Plaintiff's separate property pursuant to Paragraph 2E of the PMA. The marital estate benefited by these separate funds paying expenses from 7183 on a pro rata basis. *Ex. 1K, Schedule JT-1, P. 97, L. 342, Bate #27646.*

306. On March 20, 2001, Plaintiff deposited a check from Chestnut Cambronne in the amount of $3,037.50 representing a refund of a retainer paid from Plaintiff's son's estate. *Ex. 1F(2)(b), Bate #9484.* Said inherited funds are Plaintiff's separate property pursuant to Paragraph 2E of the PMA. The marital estate benefited by these separate funds paying expenses from 7183 on a pro rata basis. *Ex. 1K, Schedule JT-1, P. 98, L. 353, Bate #27646.*

307. On December 31, 2001, Plaintiff wrote check #307 to TJPR in the amount of $2,352.46. *Ex. 1F(2)(b), Bate #9557.* As there were sufficient separate funds in the account at the time of the transactions, this Court adopts VCG's methodology whereby only Plaintiff's separate

funds were allocated toward the payment of check #307. *Ex. 1K, Schedule JT-1, P. 100, L. 402, Bate #27648.*

2002 Activity

308. Plaintiff deposited TJPR member draws or TJPR, Inc. loan repayments into 7183 during 2002 as follows:

Date	Amount	Deposit Source	Ex. 1F(2)(b) Bate #
4/12/02	$4,000.00	TJPR Member Draw	*#9590*
8/6/02	$4,000.00	TJPR Member Draw	*#9625*
9/9/02	$4,000.00	TJPR Member Draw	*#9634*
11/13/02	$1,948.35	TJPR, Inc. loan repayment	*#9651*
12/6/02	$4,000.00	TJPR Member Draw	*#9660*
Total	**$17,948.35**		

The deposits are Plaintiff's separate property. *Ex. 1K, Schedule JT-1, Bate #27648-#27651.*

309. On February 5, 2002, Plaintiff transferred $2,500 from 7183 to her separate TJPR 3388 as a shareholder loan pursuant to TJPR's General Ledger. *Ex. 1J(4) General Ledgers (b), Bate #26219 & Ex. 1F(2)(b), Bate #9574.* As there were sufficient separate funds in the account at the time of the transactions, this Court adopts VCG's methodology whereby only Plaintiff's separate funds were allocated toward said transfer. *Ex. 1K, Schedule JT-1, P. 101, L. 413, Bate #27649.*

310. On February 21, 2002, Plaintiff deposited a gift from her mother, Mrs. Johnston, in the amount of $2,500. *Ex. 1F(2)(b), Bate #9573.* This deposit is Plaintiff's separate property pursuant to Paragraph 2E of the PMA. *Ex. 1K, Schedule JT-1, P. 101, L. 410, Bate #27649.*

311. On April 17, 2002, Plaintiff transferred $10,000 from 7183 to her separate TJPR 3388 as a TJPR shareholder loan. *Ex. 1F(2)(b), Bate #9592.* As there were not sufficient separate funds in the account at the time of the transfer, this Court accepts VCG's pro rata approach to the transferred funds. Therefore, of the $10,000 transferred on April 17, 2002, $1,040.65 is separate and the remaining $8,959.35 is deemed a loan from the marital estate into Plaintiff's TJPR 3388. *Ex. 1K, Schedule JT-1, P. 101, L. 422, Bate #27649.*

312. On April 22, 2002, Plaintiff transferred $22,517 from her 7191 account to 7183, *Ex. 1F(2)(b), Bate #9591.* As a separate-to-separate event was not identified by VCG for this transaction, this Court adopts VCG's methodology to allocate the entire transfer as a payment on the marital loan existing in 7191 at that time. *Ex. 1K, Schedule JT-1, P. 101, L. 423, Bate #27649.*

313. On April 29, 2002, Plaintiff deposited money orders from TJPR in the total amount of $1,798.30. *Ex. 1F(2)(b), Bate #9598.* Funds in the same amount ($1,798.30) were transferred to TJPR 3388 on May 20, 2002. *Ex. 1F(2)(b), Bate #9600.* VCG was able to tie these two events together and this Court adopts VCG's allocation of only Plaintiff's separate funds toward the transfer to TJPR 3388. *Ex. 1K, Schedule JT-1, P. 102, Ll. 431 & 432, Bate #27650.*

314. On May 17, 2002, Plaintiff transferred $1,495.08 from 7183 to her separate TJPR 3388 account. *Ex. 1F(2)(b), Bate #9600.* As there were sufficient separate funds in the account at the time of the transfer, this Court adopts VCG's methodology whereby only Plaintiff's separate funds were allocated toward the transfer. *Ex. 1K, Schedule JT-1, P. 102, L. 433, Bate #27650.*

315. On October 28, 2002, Plaintiff deposited a gift from her mother, Mrs. Johnston, check #6173 in the amount of $500. *Ex. 1F(2)(b), Bate #9650.* This deposit is Plaintiff's separate property pursuant to Paragraph 2E of the PMA. *Ex. 1K, Schedule JT-1, P. 103, L. 464, Bate #27651.*

316. On November 14, 2002, Plaintiff transferred $5,000 from 7183 to her separate TJPR 3388 account as a shareholder loan pursuant to TJPR's General Ledger. *Ex. 1F(2)(b), Bate #9652 & Ex. 1J(4) General Ledgers (b), Bate #26219.* As there were sufficient separate funds in the account at the time of the transfer, this Court adopts VCG's methodology whereby only Plaintiff's separate funds were allocated toward TJPR 3388. *Ex. 1K, Schedule JT-1, P. 103, L. 468, Bate #27651.*

317. On December 16, 2002, Plaintiff wrote check #383 from 7183 to TJPR in the amount of $808.07. *Ex. 1F(2)(b), Bate #9661.* As there were sufficient separate funds in the account at the time of the transaction, this Court adopts VCG's methodology whereby only

Plaintiff's separate funds were allocated toward check #383. *Ex. 1K, Schedule JT-1, P. 103, L. 474, Bate #27651.*

2003 Activity

318. Plaintiff deposited STI, Inc. distributions, TJPR member draws or TJPR, Inc. loan repayments during 2003 as follows:

Date	Amount	Deposit Source	Ex. 1F(2)(b) Bate #
3/28/03	$5,000	STI Distribution	*#9687*
7/1/03	$4,000	TJPR loan repayment	*#9721*
7/31/03	$4,000	TJPR Member Draw	*#9729*
8/5/03	$4,000	TJPR Member Draw	*#9729*
9/15/03	$4,000	TJPR Member Draw	*#9739*
9/19/03	$5,000	STI Distribution	*#9740*
11/7/03	$4,000	TJPR Member Draw	*#9755*
12/8/03	$4,000	TJPR Member Draw	*#9764*
12/19/03	$10,000	STI Distribution	*#9764*
Total	**$44,000**		

The deposits are Plaintiff's separate property. *Ex. 1K, Schedule JT-1, Bate #27652-#27655.*

319. Plaintiff wrote checks or transferred funds from 7183 to Plaintiff's separate TJPR 3388 during 2003 as follows:

Date	Description	Amount	Ex. 1F(2)(b) Bate #
1/9/03	Check #389	$1,004.19	*#9670*
3/28/03	Check #433	$1,298.53	*#9660*
4/23/03	Transfer to 3388	$1,244.70	*#9696*
7/2/03	Check #552	$104.00	*#9722*
8/29/03	Check #570	$1,160.00	*#9730*
9/4/03	Check #578	$561.19	*#9741*
9/17/03	Check #473	$413.01	*#9740*
10/14/03	Check #583	$12.62	*#9747*
11/19/03	Check #588	$400.00	*#9755*
11/24/03	Check #617	$112.82	*#9756*
11/26/03	Check #618	$26.00	*#9756*

As there were sufficient separate funds in the account at the time of the transactions, this Court adopts VCG's methodology whereby only Plaintiff's separate funds were allocated toward each transaction. *Ex. 1K, Schedule JT-1, Bate #27652-#27655.*

320. Defendant deposited Edward Jones Companies, LLLP distributions into 7183 during 2003 as follows:

Date	Amount	Deposit Source	Ex. 1F(2)(b) Bate #
6/19/03	$248.26	EJ Limited Partnership distribution	*#9713*
7/18/03	$517.50	EJ Limited Partnership distribution	*#9722*
8/19/03	$517.50	EJ Limited Partnership distribution	*#9729*
9/19/03	$517.50	EJ Limited Partnership distribution	*#9740*
Total	**$1,800.76**		

A portion of the Edward Jones Companies, LLLP distributions are Plaintiff's separate property as Plaintiff's separate property was used toward the purchase of the parties' interest pursuant to Paragraph 2C of the PMA. The marital estate benefited by these separate funds paying expenses from 7183 on a pro rata basis. *Ex. 1K, Schedule JT-1, P. 104-107, Bate #27652-#27655.*

321. On January 15, 2003, Plaintiff transferred $1,000 from 7183 to her separate TJPR 3388 account and transferred $10,000 on January 24, 2003 to her separate TJPR 3388 as a shareholder loan pursuant to TJPR's General Ledger. *Ex. 1F(2)(b), Bate #9670 & Ex. 1J(4) General Ledger (b), Bate #26362.* As there were not sufficient separate funds in #7183 at the time of the transactions, this Court adopts VCG's methodology whereby $10,154.70 of the $11,000 transferred is deemed a loan to the marital estate into Plaintiff's TJPR #3388. *Ex. 1K, Schedule JT-1, P. 104, L. 482, Bate #27652.*

322. On April 14, 2003, Plaintiff deposited a TJPR rebate from Dr. Pepper in the amount of $75. *Ex. 1F(2)(b), Bate #9694.* On April 22, 2003, Plaintiff deposited a TJPR rebate from Rapid City Mexican Food in the amount of $375. *Ex. 1F(2)(b), Bate #9695.* These rebates are Plaintiff's separate property pursuant to Paragraph 2C of the PMA, as the TJPR 3388 account initially paid the advertising costs to Dr. Pepper and Rapid City Mexican Food. However, these funds were allocated as marital when deposited in the joint account, which benefitted the marital estate. *Ex. 1K, Schedule JT-1, P. 105, L. 498, Bate #27653.*

323. On May 23, 2003, Plaintiff deposited her 2002 federal tax refund in the amount of $14,463. *Ex. 1F(2)(b), Bate #9702.* VCG allocated the entire refund to the marital estate, even

though the majority of Plaintiff's taxes were paid by Plaintiff's separate TJPR accounts. *Tr. 1004, Ll. 17-21.* Although a portion of this refund is Plaintiff's separate property pursuant to paragraph 2C of the PMA, the marital estate benefitted from the deposit being treated as marital. *Ex. 1K, Schedule JT-1, P. 105, L. 504, Bate #27652.*

2004 Activity

324. Plaintiff deposited STI distributions and TJPR member draws into 7183 during 2004 as follows:

Date	Amount	Deposit Source	Ex. 1F(2)(b) Bate #
1/20/04	$4,000	TJPR Member Draw	*#9773*
3/15/04	$4,000	TJPR Member Draw	*#9791*
4/5/04	$4,000	TJPR Member Draw	*#9800*
5/10/04	$4,000	TJPR Member Draw	*#9808*
5/13/04	$4,000	TJPR Member Draw	*#9808*
5/24/04	$5,000	STI Distribution	*#9808*
6/11/04	$4,000	TJPR Member Draw	*#9817*
6/24/04	$4,000	TJPR Member Draw	*#9818*
7/15/04	$4,000	TJPR Member Draw	*#9826*
7/19/04	$3,000	STI Distribution	*#9827*
10/25/04	$18,000	STI Distribution	*#9853*
11/1/04	$4,000	TJPR Member Draw	*#9860*
11/11/04	$4,000	TJPR Member Draw	*#9860*
12/09/04	$4,000	TJPR Member Draw	*#9860*
Total	**$70,000**		

All deposits are Plaintiff's separate property. *Ex. 1K, Schedule JT-1, Bate #27655-#27659.*

325. Plaintiff wrote checks or transferred funds from 7183 to her separate TJPR 3388 during 2004 as follows:

Date	Description	Amount	Ex. 1F(2)(b) Bate #
2/5/04	Check #593	$540.95	*#9782*
2/11/04	Check #595	$461.00	*#9782*
3/8/04	Check #488	$1,451.00	*#9792*
3/23/04	Check #509	$1,742.00	*#9792*
3/19/04	Check #624	$805.19	*#9792*
3/31/04	Check #627	$312.00	*#9800*
4/5/04	Check #628	$174.00	*#9800*
4/30/04	Check #635	$1,088.00	*#9801*
4/30/04	Check #636	$1,551.00	*#9801*

Date	Description	Amount	Ex. 1F(2)(b) Bate #
4/30/04	Check #637	$1,730.00	*#9801*
5/18/04	Check #522	$1,640.00	*#9808*
5/3/04	Check #638	$267.00	*#9809*
7/16/04	Check #533	$1,465.19	*#9827*
8/17/04	Check #536	$3,434.18	*#9835*
9/15/04	Check #538	$513.65	*#9845*
11/23/04	Check #711	$3,160.57	*#9861*

All such withdrawals are Plaintiff's separate obligations. *Ex. 1K, Schedule JT-1, Bate #27655-#27659.*

326. Defendant deposited Edward Jones Companies, LLLP distributions into 7183 during 2004 as follows:

Date	Amount	Deposit Source	Ex. 1F(2)(b) Bate #
6/1/04	$517.50	EJ Limited Partnership distribution	*#9817*
7/1/04	$517.50	EJ Limited Partnership distribution	*#9826*
7/30/04	$517.50	EJ Limited Partnership distribution	*#9827*
9/3/04	$517.50	EJ Limited Partnership distribution	*#9844*
10/1/04	$517.50	EJ Limited Partnership distribution	*#9853*
11/02/04	$517.50	EJ Limited Partnership distribution	*#9860*
11/30/04	$517.50	EJ Limited Partnership distribution	*#9871*
12/31/04	$517.50	EJ Limited Partnership distribution	*#9871*
Total	**$4,140.00**		

A portion of the Edward Jones Companies, LLLP distributions are Plaintiff's separate property pursuant to Paragraph 2C of the PMA, as Plaintiff's separate property was used toward the purchase of the parties' interest. *Ex. 1K, Schedule JT-1, Bate #27655-#27659.*

327. On March 8, 2004, Plaintiff transferred $5,500 from 7183 to her separate TJPR 3388 account as a capital contribution pursuant to TJPR's General Ledger. *Ex. 1F(2)(b), Bate #9793 & Ex. 1J(4) General Ledger (b), Bate #26451.* As there were sufficient separate funds in the account at the time of the transaction, this Court adopts VCG's methodology whereby only Plaintiff's separate funds were allocated toward the transfer. *Ex. 1K, Schedule JT-1, P. 108, L. 575, Bate #27656.*

328. On July 29, 2004, Plaintiff deposited a TJPR rebate from Pepsi in the amount of $6,913.50. *Ex. 1F(2)(b), Bate #9827.* This rebate is Plaintiff's separate property pursuant to

Paragraph 2C of the PMA, as TJPR initially paid the advertising costs to Pepsi. However, these funds were allocated as marital when deposited in the joint account, which benefitted the marital estate. *Ex. 1K, Schedule JT-1, page 109, L. 598, Bate #27657.*

2005 Activity

329. Plaintiff deposited STI, Inc. distributions and TJPR member draws into 7183 during 2005 as follows:

Date	Amount	Deposit Source	Ex. 1F(2)(b) Bate #
1/10/05	$4,000	TJPR Member Draw	*#9879*
2/3/05	$4,000	TJPR Member Draw	*#9887*
5/2/05	$4,000	TJPR Member Draw	*#9915*
5/12/05	$4,000	TJPR Member Draw	*#9915*
7/11/05	$4,000	TJPR Member Draw	*#9936*
7/11/05	$4,000	TJPR Member Draw	*#9936*
8/15/05	$4,000	TJPR Member Draw	*#9947*
8/29/05	$4,000	TJPR Member Draw	*#9957*
9/16/05	$15,000	STI Distribution	*#9957*
9/26/05	$4,000	TJPR Member Draw	*#9958*
Total	**$51,000**		

The deposits are Plaintiff's separate property. *Ex. 1K, Schedule JT-1, Bate #27659-#27662.*

330. Plaintiff wrote checks or transferred funds from 7183 to her separate TJPR's EJ 3388 account during 2005 as follows:

Date	Description	Amount	Ex. 1F(2)(b) Bate #
3/9/05	Check #665	$1,600.00	*#9899*
4/8/05	Check #747	$2,436.01	*#9908*
5/9/05	Check #750	$1,821.00	*#9915*
6/22/05	Check #755	$518.00	*#9926*
8/03/05	Check #767	$361.37	*#9947*
10/25/05	Check #758	$1,994.55	*#9968*
10/11/05	Check #820	$25.35	*#9969*

All such withdrawals are Plaintiff's separate obligations. *Ex. 1K, Schedule JT-1, Bate #27659-#27662.*

331. Defendant deposited Edward Jones Companies, LLLP distributions into 7183 during 2005 as follows:

Date	Amount	Deposit Source	Ex. 1F(2)(b) Bate #
01/31/05	$517.50	EJ Limited Partnership distribution	*#9887*
2/28/05	$517.50	EJ Limited Partnership distribution	*#9898*
3/31/05	$517.50	EJ Limited Partnership distribution	*#9907*
6/27/05	$517.50	EJ Limited Partnership distribution	*#9936*
7/28/05	$517.50	EJ Limited Partnership distribution	*#9937*
8/29/05	$517.50	EJ Limited Partnership distribution	*#9957*
10/10/05	$517.50	EJ Limited Partnership distribution	*#9968*
10/27/05	$517.50	EJ Limited Partnership distribution	*#9968*
12/7/05	$517.50	EJ Limited Partnership distribution	*#9987*
Total	**$4,657.50**		

A portion of the Edward Jones Companies, LLLP distributions is Plaintiff's separate property pursuant to Paragraph 2C of the PMA. The marital estate benefited by Plaintiff's separate funds paying expenses from 7183 on a pro rata basis. *Ex. 1K, Schedule JT-1, Bate #27659-#27662.*

332. On October 31, 2005, the parties purchased an interest in Superior Financial Center with a down payment in the amount of $10,000, check #791. *Ex. 1F(2)(b), Bate #9978.* This Court adopts VCG's pro rata methodology whereby 28.5% of the $10,000 payment toward the purchase of the Superior Financial Center interest is Plaintiff's separate property based on the percentage of her separate funds in the account at the end of the previous statement period. *Ex. 1K, Schedule JT-1, L. 712, P. 114, Bate #27662.*

2006 Activity

333. Plaintiff deposited STI, Inc. distributions and TJPR member draws into 7183 during 2006 as follows:

Date	Amount	Deposit Source	Ex. 1F(2)(b) Bate #
1/3/06	$4,000	TJPR Member Draw	*#9999*
1/4/06	$4,000	TJPR Member Draw	*#9999*
2/9/06	$5,000	STI Distribution	*#10009*
2/16/06	$4,000	TJPR Member Draw	*#10009*
3/9/06	$4,000	TJPR Member Draw	*#10021*
5/10/06	$4,000	TJPR Member Draw	*#10043*
7/6/06	$4,000	TJPR Member Draw	*#10066*
7/27/06	$4,000	TJPR Member Draw	*#10066*
8/25/06	$18,000	TJPR Member Draw	*#10077*
9/29/06	$4,000	TJPR Member Draw	*#10091*

Date	Amount	Deposit Source	Ex. 1F(2)(b) Bate #
10/27/06	$4,134.44	TJPR Member Draw	*#10104*
11/27/06	$4,134.44	TJPR Member Draw	*#10129*
11/30/06	$9,577.64	TJPR Member Contribution	*#10130*
Total	**$72,846.52**		

The deposits are Plaintiff's separate property. *Ex. 1K, Schedule JT-1, Bate #27662-#27666.*

334. Plaintiff wrote checks or transferred funds from 7183 to TJPR's EJ 3388 account during 2006 as follows:

Date	Description	Amount	Ex. 1F(2)(b) Bate #
1/30/06	Check #796	$1,569.00	*#10010*
3/10/06	Check #799	$719.00	*#10023*
4/19/06	Check #778	$510.45	*#10033*
7/11/06	Check #862	$1,084.53	*#10067*
11/14/06	Transfer to 3388	$5,107.78	*#10116*
12/20/06	Transfer to 3388	$5,000.00	*#10132*

All such withdrawals are Plaintiff's separate obligations. *Ex. 1K, Schedule JT-1, Bate #27662-#27666.*

335. Defendant deposited Edward Jones Companies, LLLP distributions into 7183 during 2006 as follows:

Date	Amount	Deposit Source	Ex. 1F(2)(b) Bate #
1/3/06	$517.50	EJ Limited Partnership distribution	*#9999*
2/3/06	$517.50	EJ Limited Partnership distribution	*#10009*
4/6/06	$517.50	EJ Limited Partnership distribution	*#10032*
4/27/06	$517.50	EJ Limited Partnership distribution	*#10033*
6/30/06	$517.50	EJ Limited Partnership distribution	*#10055*
7/28/06	$517.50	EJ Limited Partnership distribution	*#10066*
9/5/06	$517.50	EJ Limited Partnership distribution	*#10089*
9/29/06	$517.50	EJ Limited Partnership distribution	*#10090*
11/3/06	$517.50	EJ Limited Partnership distribution	*#10113*
12/4/06	$517.50	EJ Limited Partnership distribution	*#10127*
Total	**$5,175.00**		

A portion of the Edward Jones Companies, LLLP distributions is Plaintiff's separate property. The marital estate benefitted by separate funds paying expenses from 7183 on a pro rata basis. *Ex. 1K, Schedule JT-1, Bate #27662-#27666.*

336. On October 12, 2006, check #889 from 7183 in the amount of $9,500 was deposited into the parties' joint Home Federal 2730 checking account. *Ex. 1F(2)(b), Bate #10104.* This Court adopts VCG's pro rata approach to the withdrawal. Plaintiff's separate property interest in the prior month's ending balance was 27.3%. *Ex. 1K, Schedule JT-1, L. 787, Bate #27665.* Therefore, of the $9,500 check, 27.3% or $2,596.93 is separate and the remaining $6,903.07 is deemed marital. *Ex. 1K, Schedule JT-1, P. 117, L. 792, Bate #27665.*

337. On November 20, 2006, the parties deposited check #1620 from their Home Federal checking account 2730 to 7183 in the amount of $4,000. *Ex. 1F(2)(b), Bate #10114.* This Court adopts VCG's pro rata approach to apply a percentage of the previous month's ending balance to each withdrawal made from the Home Federal 2730. Plaintiff's separate property interest in the prior month's ending balance of Home Federal 2730 was $546.72, or 24.2% of the total account balance. *Ex. 1K, Schedule JT-3, P. 173, L. 87, Bate #27721.* However, there were not sufficient separate funds available in Home Federal 2730 to allocate 24.2% (or $968) of Plaintiff's separate to the $4,000 check. Therefore, VCG allocated $403.25 of the check as separate and the remaining $3,597.75 as marital. *Ex. 1K, Schedule JT-3, P. 173, L. 90, Bate #27721 and Schedule JT-1, P. 117, L. 797, Bate #27665.*

338. On December 26, 2006, the parties received a distribution from Superior Financial in the amount of $500. *Ex. 1F(2)(b), Bate #10128.* As Petitioner has a 28.5% separate interest in Superior Financial pursuant to Paragraph 2C of the PMA, she has a 28.5% separate interest in all distributions received from Superior Financial. The marital estate benefitted by Plaintiff's separate funds from said entity paying expenses from 7183 on a pro rata basis. *Ex. 1K, Schedule JT-1, P. 118, L. 806, Bate #27666.*

2007 Activity

339. Plaintiff deposited STI, Inc. distributions and TJPR member draws into 7183 during 2007 as follows:

Date	Amount	Deposit Source	Ex. 1F(2)(b) Bate #
1/4/07	$4,134.44	TJPR Member Draw	*#10142*

Date	Amount	Deposit Source	Ex. 1F(2)(b) Bate #
2/5/07	$13,328.82	TJPR Member Draw	*#10154*
2/6/07	$5,000.00	STI Distribution	*#10152*
2/28/07	$4,134.44	TJPR Member Draw	*#10167*
3/28/07	$4,134.44	TJPR Member Draw	*#10167*
4/25/07	$5,000.00	STI Distribution	*#10177*
4/9/07	$10,000.00	TJPR Member Draw	*#10178*
4/27/07	$4,134.44	TJPR Member Draw	*#10178*
5/17/07	$3,000.00	STI Distribution	*#10187*
5/25/07	$4,134.44	TJPR Member Draw	*#10188*
6/25/07	$5,000.00	STI Distribution	*#10202*
6/28/07	$4,134.44	TJPR Member Draw	*#10203*
7/18/07	$5,000.00	STI Distribution	*#10214*
8/1/07	$4,134.44	TJPR Member Draw	*#10225*
8/27/07	$4,134.44	TJPR Member Draw	*#10225*
9/4/07	$5,000.00	STI Distribution	*#10237*
10/15/07	$4,134.44	TJPR Member Draw	*#10250*
12/27/07	$8,268.88	TJPR Member Draw	*#10276*
Total	**$96,807.66**		

The deposits are Plaintiff's separate property. *Ex. 1K, Schedule JT-1, Bate #27666-#27669.*

340. Plaintiff wrote checks or transferred funds from 7183 to TJPR's EJ 3388 account during 2007 as follows:

Date	Description	Amount	Ex. 1F(2)(b) Bate #
7/26/07	Check #953	$6,634.84	*#10215*
8/6/07	Check #957	$467.33	*#10225*
12/4/07	Transfer to 3388	$5,197.96	*#10278*
12/5/07	Transfer to 3388	$10,000.00	*#10278*

All such withdrawals are Plaintiff's separate obligations. *Ex. 1K, Schedule JT-1, Bate #27666-#27669.*

341. On January 2, 2007, the parties made a $23,750 purchase of the Edward Jones limited partnership. *Ex. 1F(2)(b), Bate #10141.* As no direct deposit of Plaintiff's separate funds could be tied to this event, this Court adopts VCG's pro rata approach. Plaintiff's separate property interest in the prior month's ending balance was 23.3%. Therefore, of the $23,750 purchase, 23.3% or $5,542.31 is Plaintiff's separate property that was used for the purchase and the remaining $18,207.69 is marital. *Ex. 1K, Schedule JT-1, page 118, L. 816, Bate #27666.*

342. On January 3, 2007, Plaintiff made a member contribution to TJPR in the amount of $8,328.83 from the 7183 account. *Ex. 1F(2)(b), Bate #10143.* As there were sufficient separate funds in the account at the time of the transaction, this Court adopts VCG's methodology whereby only Plaintiff's separate funds were allocated toward the contribution. *Ex. 1K, Schedule JT-1, P. 118, L. 820, Bate #27666.*

343. On July 26, 2007, Plaintiff paid for TJPR expenses via check #953 from 7183 in the amount of $6,634.84. *Ex. 1F(2)(b), Bate #10224.* As there were sufficient separate funds in the account at the time of the transaction, this Court adopts VCG's methodology whereby only Plaintiff's separate funds were allocated toward the transaction. *Ex. 1K, Schedule JT-1, P. 118, L. 860, Bate #27666.*

344. On August 2, 2007, the parties deposited into 7183 the net sale proceeds from the sale of their home located at 3316 Lake Street NW, Rochester, Minnesota in the amount of $64,312.81. *Ex. 1F(2)(b), Bate #10224.* Plaintiff had a separate property interest in the homestead proceeds in the amount of 57.5% at the time of sale. *Ex. K1, Schedule RE-1, L. 83, Bate #27843.* Therefore, 57.5% (or $37,000.86) of the sale proceeds deposited into 7183 is Plaintiff's separate property. *Ex. 1K, Schedule JT-1, L. 864, page 120, Bate #27668.* On the same date as these funds were deposited, check #959 to Holt Title was paid in the amount of $59,742.59 toward the purchase of the parties' home located at 3244 Lake Street NW, Rochester, Minnesota. VCG tied those two events together and directly traced those funds from one asset to another resulting in 57.5% of check #959, or $34,371.49, being allocated as separate and the remaining $25,371.10 as marital. *Ex. 1K, Schedule JT-1, P. 120, L. 865, Bate #27668.* As noted above, Mr. Harjes, Defendant's expert, acknowledged that Plaintiff has a separate interest in the home pursuant to the direct tracing methodology used by VCG. *Tr. 1429:25 & 1430:1-4.*

345. On November 13, 2007, Plaintiff transferred $6,000 to her Edward Jones Simple IRA 0314 from 7183. *Ex. 1F(2)(b), Bate #10262.* As no direct deposit of Plaintiff's separate funds could be tied to this event, this Court adopts VCG's pro rata approach to the transferred funds. This Court adopts VCG's methodology whereby 27.4% (or $1,643.56) of the $6,000

contribution toward Plaintiff's Edward Jones Simple IRA 0314 is Plaintiff's separate property interest. *Ex. 1K, Schedule JT-1, P. 121, L. 885, Bate #27669.*

2008 Activity

346. Plaintiff deposited STI, Inc. distributions and TJPR member draws into 7183 during 2008 as follows:

Date	Amount	Deposit Source	Ex. 1F(2)(b) Bate #
1/31/08	$4,134.44	TJPR Member Draw	*#10300*
4/8/08	$4,134.44	TJPR Member Draw	*#10325*
4/18/08	$4,134.44	TJPR Member Draw	*#10325*
5/6/08	$4,134.44	TJPR Member Draw	*#10336*
5/27/08	$4,134.44	TJPR Member Draw	*#10336*
6/23/08	$10,000.00	Return of TJPR capital contribution	*#10351*
6/27/08	$4,134.44	TJPR Member Draw	*#01351*
7/16/08	$5,000.00	STI Distribution	*#10361*
7/25/08	$4,134.44	TJPR Member Draw	*#10362*
8/27/08	$4,134.44	TJPR Member Draw	*#10372*
9/10/08	$10,000.00	STI Distribution	*#10385*
9/26/08	$4,134.44	TJPR Member Draw	*#10386*
10/10/08	$2,500.00	STI Distribution	*#10396*
10/27/08	$6,000.00	STI Distribution	*#10397*
10/28/08	$4,134.44	TJPR Member Draw	*#10398*
12/2/08	$4,134.44	TJPR Member Draw	*#10423*
12/05/08	$4,234.44	TJPR Member Draw	*#10423*
Total	**$83,213.28**		

The deposits are Plaintiff's separate property. *Ex. 1K, Schedule JT-1, Bate #27669-#27672.*

347. Plaintiff wrote checks or transferred funds from 7183 to TJPR's EJ 3388 account during 2008 as follows:

Date	Description	Amount	Ex. 1F(2)(b) Bate #
2/22/08	Transfer to 3388	$1,000.00	*#10302*
2/25/08	Transfer to 3388	$1,000.00	*#10302*
3/11/08	Check #1093	$2,561.55	*#10316*
3/14/08	Transfer to 3388	$6,000.00	*#10316*
8/4/08	Transfer to 3388	$4,340.61	*#10372*

All such withdrawals are Plaintiff's separate obligations. *Ex. 1K, Schedule JT-1, Bate #27669-#27672.*

348. On January 2, 2008, the parties refinanced their home mortgage and paid closing costs of $6,314.38 via check #909 from 7183. *Ex. 1F(2)(b), Bate #10289.* As the home mortgage is a joint obligation pursuant to Paragraph 8C of the PMA, this Court adopts VCG's pro rata methodology whereby 22.3% (or $1,407.86) of said check was paid with Plaintiff's separate property in account 7183. *Ex. 1K, Schedule JT-1, page 121, L. 901, Bate 27669.*

349. On May 30, 2008, Plaintiff's 2007 federal tax refund in the amount of $4,215 was deposited into the account. *Ex. 1F(2)(b), Bate #10335.* A significant portion of taxes paid by Plaintiff to the IRS for her 2007 income taxes was paid from her separate property, even though Paragraph 7 of the PMA allowed payment of taxes to be made by the joint account. This Court adopts VCG's methodology to treat all income tax refunds as marital throughout their report thereby benefitting the marital estate. *Ex. 1K, Schedule JT-1, P. 122, L. 925, Bate #27670.*

2009 Activity

350. Significant purchases of assets occurred in 2009. During this year, Plaintiff remodeled TJPR as required by her franchisor, which remodel will be addressed below. While it is clear Plaintiff was transferring funds from STI Inc. and TJPR to cover the acquisition of BDUBS (a business primarily owned by Plaintiff's family members), with an intent that said business was going to be, in part, her separate property, the accounts had separate and marital property components and Plaintiff's experts were consistent in applying the pro rata approach to the purchases. As a result, VCG could not adopt Plaintiff's position that all the funds transferred from her separate assets were a direct tracing to purchase separate property and VCG had to apply the pro rata approach to stay consistent with the applicable methodology used throughout the tracing analysis.

351. Plaintiff deposited STI, Inc. distributions and TJPR member draws into 7183 during 2009 as follows:

Date	Amount	Deposit Source	Ex. 1F(2)(b) Bate #
1/27/09	$4,134.44	TJPR Member Draw	*#10437*
3/2/09	$4,134.44	TJPR Member Draw	*#10460*

Date	Amount	Deposit Source	Ex. 1F(2)(b) Bate #
3/24/09	$39,209.43	TJPR Member Draw (portion of $66,015.26 HF Check #2020 related to member draw portion per the GL)	*#10460*
3/30/09	$4,134.44	TJPR Member Draw	*#10473*
4/27/09	$4,134.44	TJPR Member Draw	*#10485*
5/29/09	$4,134.44	TJPR Member Draw	*#10485*
6/22/09	$2,500.00	STI Distribution	*#10500*
7/2/09	$4,134.44	TJPR Member Draw	*#10513*
7/28/09	$4,134.44	TJPR Member Draw	*#10513*
8/13/09	$7,000.00	STI Distribution	*#10523*
8/27/09	$4,134.44	TJPR Member Draw	*#10525*
10/2/09	$4,134.44	TJPR Member Draw	*#10551*
10/19/09	$5,000.00	STI Distribution	*#10550*
11/18/09	$4,134.44	TJPR Member Draw	*#10564*
12/30/09	$4,134.44	TJPR Member Draw	*#10578*
Total	**$99,188.27**		

The deposits are Plaintiff's separate property. *Ex. 1K, Schedule JT-1, Bate #27673-#27677.*

352. Plaintiff wrote checks or transferred funds from 7183 to TJPR's EJ 3388 account or Home Federal 8523 account during 2009 as follows:

Date	Description	Amount	Ex. 1F(2)(b) Bate #
2/17/09	Transfer to 3388	$5,000.00	*#10448*
6/18/09	Transfer to 3388	$6,967.40	*#10500*
12/23/09	Check #1227 to HF	$1,000.00	*#10578*

All such withdrawals are Plaintiff's separate obligations. *Ex. 1K, Schedule JT-1, Bate #27673-#27677.*

353. Defendant deposited Edward Jones Companies, LLLP Limited Partnership distributions into 7183 during 2009 as follows:

Date	Amount	Deposit Source	Ex. 1F(2)(b) Bate #
8/20/09	$865.32	EJ Limited Partnership Distribution	*#10524*
12/31/09	$1,111.25	EJ Limited Partnership Distribution	*#10577*
Total	**$1,976.57**		

A portion of the Edward Jones Companies, LLLP Limited Partnership distributions are Plaintiff's separate property based on contribution sources for the purchase. *Ex. 1K, Schedule JT-1, Bate #27676-#27677.*

354. On March 24, 2009, the parties paid Superior Financial $500 via check #1154 from 7183. *Ex. 1F(2)(b), Bate #10461.* As no direct deposit of Plaintiff's separate funds could be tied to this event, this Court adopts VCG's pro rata approach to the withdrawal to ascertain Plaintiff's separate property interest. *Ex. 1K, Schedule JT-1, P. 126, L. 994, Bate #27674.*

355. In 2009, the Taco John's Franchise required Plaintiff to remodel the Taco John's restaurant in Pine Ridge, South Dakota. Plaintiff applied for and received a Bureau of Indian Affairs (BIA) loan through Home Federal. However, due to significant delays with the BIA to release the loan proceeds in a timely manner, Plaintiff was required to front initial costs of the remodel project to limit adverse effects on the business. *Tr. 266-267.* The parties 7183 account, was initially utilized to pay for some remodel costs with transfers from 7183 to either the TJPR Edward Jones 3388 account or the TJPR Home Federal 8523 account.

356. The cost of the remodel is a separate debt obligation of Plaintiff pursuant to paragraph 8 B of the PMA. As loan proceeds became available to Plaintiff, she reimbursed the 7183 account. This Court adopts VCG's methodology for payment of the TJPR remodel through the 7183 account as follows:

Date	Description	Plaintiff's Separate Portion	Marital Portion (assumed to be expense reimbursements)	Ex. 1F(2)(b), Bate #
1/8/09	Check #1193 to HF 8523	($20,000.00)		*#10437*
3/10/09	Deposit from HF 8523		$5,000.00	*#10459*
3/13/09	Deposit from HF 8523		$8,000.00	*#10459*
3/24/09	Deposit from HF 8523 (Remaining portion of Check #2020 after deducting Member Draw amount per GL)		$26,805.83	*#10460*
3/11/09	Check #1178 to Max Construction	($40,000.00)		*#10461*

Date	Description	Plaintiff's Separate Portion	Marital Portion (assumed to be expense reimbursements)	Ex. 1F(2)(b), Bate #
3/30/09	Deposit Check #10565		$4,663.53	*#10472*
5/11/09	Check #1322 to HF 8523	($107,000.00)		*#10486*
5/12/09	Deposit Check #2031 from HF 8523	$75,000.00		*#10484*

357. On April 14, 2009, Plaintiff contributed $369 from 7183 to her Edward Jones Simple IRA 0314. *Ex. 1F(2)(b), Bate #10474.* As no direct deposit of Plaintiff's separate funds could be tied to this event, this Court adopts VCG's pro rata approach to the IRA contribution. Therefore, 14.6% (or $53.87) is Plaintiff's separate property interest in the contribution and the remaining $315.12 is considered a marital loan. *Ex. 1K, Schedule JT-1, P. 126, L. 1005, Bate #27674.*

358. On May 15, 2009, the parties made a capital contribution from 7183 of $4,500 to Superior Financial Center via check #1322. *Ex. 1F(2)(b), Bate #10486.* As no direct deposit of Plaintiff's separate funds could be tied to this event, this Court adopts VCG's pro rata approach to ascertain Plaintiff's separate property interest in the capital contribution. *Ex. 1K, Schedule JT-1, P. 127, L. 1013, Bate #27675.*

359. On June 4, 2009, the parties purchased Hardcore Computer stock via check #1325 from 7183 in the amount of $12,500. *Ex. 1F(2)(b), Bate #10502.* As no direct deposit of Plaintiff's separate funds could be tied to this event, this Court adopts VCG's pro rata approach to ascertain Plaintiff's separate property interest in the Hardcore Computer stock purchase. *Ex. 1K, Schedule JT-1, P. 127, L. 1021, Bate #27675.*

360. On June 25, 2009, the parties made a capital contribution to BDUBS, LLC in the amount of $15,000 via check #1297 from account 7183. *Ex. 1F(2)(b), Bate #10501.* This Court adopts VCG's pro rata approach to the capital contribution to BDUBS, LLC. *Ex. 1K, Schedule JT-1, page 127, L. 1022, Bate #27675.*

361. On September 10, 2009, the parties made a capital contribution to BDUBS, LLC in the amount of $75,000 via check #1330 from account 7183. *Ex. 1F(2)(b), Bate #10539.* This

Court adopts VCG's pro rata approach to the capital contribution to BDUBS, LLC. *Ex. 1K, Schedule JT-1, P. 128, L. 1046, Bate #27676.*

362. On October 13, 2009, the parties made a capital contribution to BDUBS, LLC in the amount of $35,000 via check #1354 from 7183. *Ex. 1F(2)(b), Bate #10551.* This Court adopts VCG's pro rata approach to the capital contribution to BDUBS, LLC. *Ex. 1K, Schedule JT-1, P. 129, L. 1054, Bate #27677.*

2010 Activity

363. Plaintiff deposited a STI, Inc. distribution, TJPR member draws or shareholder loan repayments from TJPR into 7183 during 2010 as follows:

Date	Amount	Deposit Source	Ex. 1F(2)(b) Bate #
2/3/10	$4,134.44	TJPR Member Draw	*#10600*
2/11/10	$3,270.38	TJPR Shareholder loan repayment	*#10599*
2/11/10	$4,134.44	TJPR Member Draw	*#10600*
3/1/10	$5,134.44	TJPR Member Draw	*#10614*
3/9/10	$15,000.00	TJPR Member Draw	*#10614*
3/25/10	$3,358.99	TJPR Shareholder loan repayment	*#10614*
4/1/10	$5,134.44	TJPR Member Draw	*#10624*
4/7/10	$20,000.00	TJPR Member Draw	*#10625*
4/30/10	$5,284.44	TJPR Member Draw	*#10625*
6/2/10	$5,284.44	TJPR Member Draw	*#10648*
6/4/10	$10,000.00	TJPR Member Draw	*#10648*
6/17/10	$15,000.00	TJPR Member Draw	*#10648*
7/13/10	$6,000.00	STI Distribution	*#10658*
7/6/10	$5,284.44	TJPR Member Draw	*#10659*
8/2/10	$5,284.44	TJPR Member Draw	*#10670*
9/1/10	$5,284.44	TJPR Member Draw	*#10685*
10/4/10	$5,284.44	TJPR Member Draw	*#10696*
10/18/10	$3,486.75	TJPR Member Draw	*#10695*
11/1/10	$5,284.44	TJPR Member Draw	*#10707*
12/1/10	$5,329.00	TJPR Member Draw	*#10722*
12/17/10	$4,868.65	TJPR Member Draw	*#10722*
Total	**$141,842.61**		

The deposits are Plaintiff's separate property and all TJPR shareholder loan repayments are Plaintiff's separate obligations. *Ex. 1K, Schedule JT-1, Bate #27678-#27681.*

364. Plaintiff wrote a check to TJPR's checking account during 2010 as follows:

Date	Description	Amount	Ex. 1F(2)(b) Bate #
4/30/10	Check #1419 to TJPR 1st Security Act 9691	$2,767.43	*#10625*

All such withdrawals are Plaintiff's separate obligations. *Ex. 1K, Schedule JT-1, P. 133, L. 1103, Bate #27678-#27681.*

365. Defendant deposited Edward Jones Companies, LLLP Limited Partnership distributions into 7183 during 2010 as follows:

Date	Amount	Deposit Source	Ex. 1F(2)(b) Bate #
1/29/10	$1,111.25	EJ Limited Partnership distribution	*#10588*
3/4/10	$1,111.25	EJ Limited Partnership distribution	*#10613*
4/5/10	$1,111.25	EJ Limited Partnership distribution	*#10624*
5/10/10	$1,111.25	EJ Limited Partnership distribution	*#10635*
6/1/10	$1,111.25	EJ Limited Partnership distribution	*#10648*
7/30/10	$1,111.25	EJ Limited Partnership distribution	*#10659*
9/10/10	$1,111.25	EJ Limited Partnership distribution	*#10684*
10/29/10	$1,111.25	EJ Limited Partnership distribution	*#10696*
Total	**$8,890.00**		

Ex. 1K, Schedule JT-1, Bate #27678-#27681.

366. Defendant deposited BDUBS, LLC distributions into 7183 during 2010 as follows:

Date	Amount	Ex. 1F(2)(b) Bate #
8/26/10	$4,000.00	*#10669*
9/27/10	$4,000.00	*#10695*
11/1/10	$4,000.00	*#10706*
12/6/10	$4,000.00	*#10720*
Total	**$16,000.00**	

A portion of the Edward Jones limited partnership distributions and BDUBS, LLC distributions are Plaintiff's separate property pursuant to Paragraph 2C of the PMA as Plaintiff's separate property was used toward the purchase of the parties' interest thereby the return on the investment includes a portion of Plaintiff's separate funds. The marital estate benefited by these separate funds paying expenses from 7183 on a pro rata basis. *Ex. 1K, Schedule JT-1, Bate #27680-#27681.*

367. Commencing March 3, 2010 and continuing throughout 2010, the parties made capital contributions to Innovative Enterprises of Rochester, LLC in a monthly amount of $1,735, which then paid rent to Superior Financial Group, LLC in order to cover the costs of a vacant unit. *Ex. 1H(5)(a)-(j).* Once the unit was occupied in 2011, the capital contributions were no longer required. *Tr. 610-611.* As no direct deposit of Plaintiff's separate funds could be tied to this event, this Court adopts VCG's pro rata approach to apply a percentage of the previous month's ending balance to each capital contribution. *Ex. 1K, Schedule JT-1, P. 130, L. 1094. See also Bate #27678-27683.*

368. On February 26, 2010, Defendant contributed $6,000 to his Edward Jones IRA 7485. *Ex. 1F(2)(b), Bate #10602.* In order to be consistent throughout their tracing, VCG applied the pro rata approach to the contribution. This Court adopts VCG's allocation that 11.7% (or $703.56) is Plaintiff's separate property interest in the $6,000 contribution to Defendant's IRA #7485. *Ex. 1K, Schedule JT-1, P. 130, L. 1084, Bate #27678.*

369. On March 15, 2010, the parties made an additional purchase of Hardcore Computer stock via check #1386 in the amount of $12,500 from 7183. *Ex. 1F(2)(b), Bate #10615.* This Court adopts VCG's pro rata approach to the purchase. Therefore, 15.1% (or $1,885.85) is Plaintiff's separate property interest in the Hardcore Computer stock purchase. *Ex. 1K, Schedule JT-1, P. 130, L. 1092, Bate #27678.*

370. On March 8, 2010, Defendant contributed $6,000 to his Edward Jones IRA 8785 from 7183. (Account is later converted to Roth IRA 7583). *Ex. 1F(2)(b), Bate #10616.* In order to be consistent throughout their tracing, VCG applied the pro rata approach to the contribution. This Court adopts VCG's allocation that 15.1% (or $905.21) is Plaintiff's separate property interest in the $6,000 contribution toward Defendant's IRA 7485 (later becomes IRA 7583). *Ex. 1K, Schedule JT-1, P. 130, L. 1095, Bate #27678; Schedule DC-2, P. 257, L. 6, Bate #27805; Tr. 673:11-13.*

371. In June 2010, the parties refinanced the home mortgage and incurred closing costs of $21,225.26, which were paid via check #1396 on June 15, 2010 from 7183. *Ex. 1F(2)(b), Bate*

#10649. As the mortgage is a joint debt pursuant to Paragraph 8C of the PMA, this Court adopts VCG's pro rata approach to apply a percentage of the previous month's ending balance to the closing costs withdrawal. Therefore, $5,501.10 of said check was paid from Plaintiff's separate property interest in 7183. *Ex. 1K, Schedule JT-1, P. 131, L. 1120, Bate #27679.*

372. On August 11, 2010, Plaintiff transferred $3,938.41 from her separate 7191 account into 7183. *Ex. 1F(2)(b), Bate #10670.* As the exact same amount was deposited into Plaintiff's 7191 account from her separate TJPR 3388 account prior to the transfer, VCG was able to tie these two events together as a direct transaction. *Ex. K1, Schedule AC-1, L. 939, Bate #27616.* Therefore, this Court adopts VCG's direct tracing approach and applied Plaintiff's separate funds to this transaction. *Ex. 1K, Schedule JT-1, P. 132, L. 1136, Bate #27680.*

2011 Activity

373. During 2011, the parties continued to make purchases of assets. Plaintiff transferred monies from her 7191 account to 7183 with the intent of acquiring separate property during that time, specifically BDUBS, SFME, her automobile, Edward Jones partnership interests, Superior Financial and RCME (Massage Envy Rapid City).

374. During this year, unbeknownst to Plaintiff, pursuant to the terms of the PMA as applied by VCG, at times she was repaying the value of the marital loan when transferring funds for those purchases. *Tr. 460-462.* The accounts had separate and marital property components and Plaintiff's experts were consistent in applying the pro rata approach to the purchases. As a result, VCG could not adopt Plaintiff's position that all the funds transferred from her 7191 was a direct tracing to purchase separate property and VCG had to apply the pro rata approach to stay consistent with the applicable methodology used throughout the tracing analysis.

375. Plaintiff deposited an STI, Inc. distribution and TJPR member draws into 7183 during 2011 as follows:

Date	Amount	Deposit Source	Ex. 1F(2)(b) Bate #
1/3/11	$5,329.00	TJPR Member Draw	*#10735*
1/24/11	$3,451.66	TJPR Member Draw	*#10734*

2/1/11	$5,329.00	TJPR Member Draw	*#10745*
3/1/11	$5,329.00	TJPR Member Draw	*#10759*
4/1/11	$5,329.00	TJPR Member Draw	*#10769*
5/19/11	$5,329.00	TJPR Member Draw	*#10779*
9/1/11	$20,000.00	TJPR Member Draw	*#10827*
9/13/11	$15,000.00	STI Distribution	*#10827*
12/21/11	$10,000.00	TJPR Member Draw	*#10863*
Total	**$75,096.66**		

The deposits are Plaintiff's separate property. *Ex. 1K, Schedule JT-1, Bate #27682-#27686.*

376. Plaintiff wrote a check from 7183 to TJPR's EJ 8933 account during 2011 which is her separate obligation:

Date	Description	Amount	Ex. 1F(2)(b) Bate #
10/18/11	Check #1623 to 8933	$1,304.09	*#10839*

Ex. 1K, Schedule JT-1, P. 137, L. 1259, Bate #27685.

377. Defendant deposited BDUBS, LLC distributions during 2011 as follows:

Date	Amount	Ex. 1F(2)(b) Bate #
1/3/11	$4,000.00	*#10733*
4/4/11	$4,000.00	*#10769*
4/15/11	$4,000.00	*#10769*
5/31/11	$4,000.00	*#10792*
8/5/11	$4,000.00	*#10813*
9/6/11	$4,000.00	*#10826*
9/29/11	$5,000.00	*#10827*
10/31/11	$8,000.00	*#10848*
12/2/11	$10,000.00	*#10861*
12/19/11	$6,500.00	*#10862*
Total	**$53,500.00**	

A portion of the BDUBS, LLC distributions are Plaintiff's separate property pursuant to Paragraph 2C of the PMA as Plaintiff's separate property was used toward the purchase of the parties' interest. The marital estate benefited by these separate funds paying expenses from 7183 on a pro rata basis. *Ex. 1K, Schedule JT-1, Bate #27680-#27681.*

378. Until June 2011, the parties made capital contributions to Innovative Enterprises of Rochester, LLC in a monthly amount of $1,735, which then paid rent to Superior Financial Group, LLC in order to cover the costs of a vacant unit. *Ex. 1H(5)(a)-(f.* Once the unit was

occupied in approximately July 2011, the capital contributions were no longer required. *Tr. 610-611.* As no direct deposit of Plaintiff's separate funds could be tied to this event, this Court adopts VCG's pro rata approach to apply a percentage of the previous month's ending balance to each capital contribution. *Ex. 1K, Schedule JT-1, Bate #27682-27683.*

379. On January 3, 2011, the parties purchased a limited partnership interest in The Jones Financial Companies, LLLP with a payment of $14,750 from 7183. *Ex. 1F(1)(b), Bate #10736.* This Court adopts VCG's pro rata approach to the payment. Therefore, 31.9% (or $4,700.78) is Plaintiff's separate property interest in said partnership interest. *Ex. 1A(1), Schedule JT-1, P. 134, L. 1179, Bate #27682.*

380. On January 25, 2011, while Plaintiff was in Cabo San Lucas, Mexico, Defendant transferred $39,000 from 7183 into the joint Home Federal checking account 2730 in order to pay the franchise fee for SFME. *Ex. 1F(2)(b), Bate #10736.* This Court adopts VCG's pro rata approach to the withdrawal. Therefore, 31.9% (or $12,429.17) is Plaintiff's separate property interest in said $39,000 capital contribution to SFME. *Ex. 1A(1), Schedule JT-1, P. 134, L. 1180, Bate #27682.*

381. On March 21, 2011, $20,000 was transferred from 7183 to Plaintiff's 7191 account. *Ex. 1F(2)(b), Bate #10761.* As no direct deposit of Plaintiff's separate funds could be tied to this event, this Court adopts VCG's pro rata approach to the transferred funds. Therefore, 31.6% (or $6,318.32) is Plaintiff's separate property interest in the transfer and the remaining $13,681.68 is deemed a loan from the marital estate. *Ex. 1K, Schedule JT-1, P. 134, L. 1196, Bate #27682.*

382. On April 4, 2011, the parties made a capital contribution to SFME in the amount of $7,500 by check #1513 to SFME's Home Federal checking account 5344. As no direct deposit of Plaintiff's separate funds could be tied to this event, this Court adopts VCG's pro rata approach to the capital contribution. Therefore, 31.7% (or $2,376) is Plaintiff's separate property interest in the $7,500 capital contribution. *Ex. 1K, Schedule JT-1, P. 135, L. 1205, Bate #27683.*

383. On July 15, 2011, Plaintiff transferred $26,000 from her 7191 account to 7183 to purchase her 2011 Chevy Avalanche. *Ex. 1F(2)(b), Bate #10804.* On July 28, 2011, check #1562 from 7183 for $27,958.50 was paid for the Avalanche. VCG was able to tie these two events together, and therefore this Court adopts VCG's direct tracing methodology based on Plaintiff's position that the funds transferred from her 7191 account were intended to purchase the automobile. Plaintiff believed at the time she was acquiring her 2011 Chevy Avalanche automobile with her separate funds. However, Plaintiff's experts were consistent in repaying the marital loan existing in 7191 at the time of the transfer and the entire amount was deemed a repayment of a loan from the marital estate. *Ex. 1K, Schedule JT-1, page 136, Ll. 1230 and 1232, Bate #27684* and *Tr. 1119.*

384. On July 25, 2011, Plaintiff deposited into 7183 insurance proceeds in the amount of $7,356.45 for hail damage to TJPR's 2007 Jeep Compass. *Ex. 1F(2)(b), Bate #01803.* The 2007 Jeep Compass was owned by TJPR, and therefore the insurance proceeds are Plaintiff's separate property pursuant to Paragraph 2D of the PMA. *Ex. 1J(4)-Insurance-Litigation (c), Bate #27546.* The following day, on July 26, 2011, Plaintiff transferred the insurance proceeds of $7,356.45 to her separate 7191 account. VCG was able to tie these two events together and therefore, this Court adopts VCG's direct separate-to-separate tracing methodology whereby both the deposit and the withdrawal were treated as Plaintiff's separate property and did not affect the marital estate. *Ex. 1K, Schedule JT-1, P. 136, L. 1231, Bate #27684.*

385. On August 19, 2011, the parties made a capital contribution to Superior Financial Center in the amount of $2,550 via check #1534 from 7183. *Ex. 1F(2)(b), Bate #10814.* This Court adopts VCG's pro rata approach to the contribution. *Tr. 1120.* Therefore, 26.7% (or $680.70) is Plaintiff's separate property interest in the $2,550 capital contribution to Superior Financial Center. *Ex. 1K, Schedule JT-1, P. 136, L. 1240, Bate #27684.*

386. Commencing in September 2011 the parties were required to make capital contributions to BDUBS, SFME and Superior Financial and activity increased in the 7183 account. *Tr. 1120:11-23.*

387. On September 1, 2011, Plaintiff deposited a TJPR member draw in the amount of $20,000 into 7183. After issuing the August 31, 2014 tracing report, VCG was made aware the deposit of Plaintiff's separate funds occurred on the same day the parties' paid the $15,000 capital contribution to SFME, resulting in a direct-tracing event. This Court adopts VCG's change of the $15,000 SFME capital contribution made on September 1, 2011 from "pro rata" (as referenced in their August 31, 2014 tracing report) to "direct" (as referenced in their March 30, 2015 tracing report) whereby the same percentage of Plaintiff's separate funds deposited that day (100%) is allocated toward the $15,000 capital contribution. *Ex. 1K, Schedule JT-1, P. 137, Ll. 1244-1245 Bate #27685.*

388. On September 2, 2011, the parties made a capital contribution to BDUBS in the amount of $136,000 via check #1591 from 7183. *Ex. 1F(2)(b), Bate #10828.* As no direct deposit of Plaintiff's separate funds could be directly tied to this event, this Court adopts VCG's pro rata approach to the contribution. Therefore, 25.3% (or $34,419.43) is Plaintiff's separate property interest in the $136,000 capital contribution to BDUBS,. *Ex. 1K, Schedule JT-1, P. 137, L. 1246, Bate #27685.*

389. On September 19, 2011, Plaintiff transferred $65,000 from her 7191 account to 7183. *Ex. 1F(2)(b), Bate #10828.* While it may have been Plaintiff's intention that the $65,000 transferred into 7183 from her separate 7191 account was to assist with the capital contribution to BDUBS, *(Tr. 460-462).* VCG treated BDUBS as a partial marital asset. Therefore, a direct separate-to-separate event could not be tied to this transaction. This Court adopts VCG's methodology to repay the marital loan existing in 7191 at the time of the transfer and the entire $65,000 was allocated as repayment on the existing marital loan balance in 7191 rather than Plaintiff's separate property contribution to BDUBS. *Ex. 1K, Schedule JT-1, P. 137, L. 1248, Bate #27685.*

390. On September 30, 2011, the parties made a capital contribution to Superior Financial Center in the amount of $850 via check #1612 from 7183. *Ex. 1F(2)(b), Bate #10828.*

This Court adopts VCG's pro rata approach to Plaintiff's separate property interest in the capital contribution. *Ex. 1K, Schedule JT-1, P. 137, L. 1249, Bate #27685.*

391. On November 2, 2011, the parties made a capital contribution to Superior Financial Center in the amount of $1,700 via check #1565 from 7183. *Ex. 1F(2)(b), Bate #10849.* This Court adopts VCG's pro rata approach to Plaintiff's separate property interest in the capital contribution. *Ex. 1K, Schedule JT-1, P. 138, L. 1267, Bate #27686.*

392. Plaintiff began the process of opening a Massage Envy in Rapid City and filed Articles of Organization for RCME, LLC with the State of South Dakota in November. 2011. *Ex. 1H(9)(a), Bate #17046 & Tr. 293:9-12.* On November 28, 2011 the parties issued check #1630 to RCME, LLC in the amount of $1,000 from their 7183 account. *Ex. 1F(2)(b), Bate #10863.* As no direct deposit of Plaintiff's separate funds could be tied to this event, this Court adopts VCG's pro rata approach to the withdrawal. The account was eventually closed on August 1, 2012. *Ex. 1H(9)(b), Bate #17051.* Plaintiff does not have a separate interest in RCME's US Bank checking account 4104 as the account no longer exists. Plaintiff's experts traced this transaction demonstrating the tracing of every transaction that occurred in the 7183 account. *Tr. 1121:22-24.*

393. On December 5, 2011, the parties made a capital contribution via a wire transfer to ME Rogers in the amount of $10,000 from 7183. *Ex. 1F(2)(b), Bate #10865.* This Court adopts VCG's pro rata approach to Plaintiff's separate property interest in the capital contribution. *Ex. 1K, Schedule JT-1, P. 138, L. 1273, Bate #27686.*

394. On December 21, 2011, Plaintiff transferred $30,000 from her 7191 account to 7183. *Ex. 1F(2)(b), Bate #10863.* As no separate-to-separate event could be identified by VCG for this transaction, this Court adopts VCG's methodology to repay any marital loan existing in 7191 at that time of $23,241.01. The remaining $6,758.97 of the transfer is Plaintiff's separate property. *Ex. 1K, Schedule JT-1, P. 138, L. 1275, Bate #27686.*

2012 Activity

395. The parties were having marital difficulties in the early part of 2012, and physically separated, although Plaintiff believed they were continuing to work on their marriage. *Tr. 291:20-25 & 292:1-7.* Assets continued to be purchased by the parties in 2012 and they continued to use the investment accounts in the same manner.

396. On May 24, 2012, Plaintiff deposited a TJPR member draw in the amount of $6,945.49 into 7183. *Ex. 1F(2)(b), Bate #10920.* The marital estate benefited by these separate funds paying expenses from 7183 on a pro rata basis. *Ex. 1K, Schedule JT-1, Bate #27686-#27691.*

397. Plaintiff wrote checks or transferred funds from 7183 to TJPR's EJ 3388 account or TJPR's EJ 8933 account during 2012 as follows:

Date	Description	Amount	Ex. 1F(2)(b) Bate #
2/21/12	Check #1700 to 8933	$3,251.13	*#10886*
4/24/12	Account Link Payment to Lakota Plains Propane	$439.06	*#10910*
5/8/12	Transfer to 8933	$5,000.00	*#10922*
5/15/12	Account L. Payment to Lakota Plains Propane	$620.94	#10921
5/25/12	Account Link Payment to Nebraska Public Power District	$1,151.30	*#10922*
6/14/12	Account Link Payment to Nebraska Public Power District	$1,370.59	*#10935*
6/26/12	Account Link Payment to Lakota Plains Propane	$457.82	*#10935*
7/25/12	Account Link Payment to Lakota Plains Propane	$457.82	*#10947*
12/4/12	Account Link Payment to Lakota Plains Propane	$791.26	*#11010*

These payments are Plaintiff's separate obligations. As there were sufficient separate funds in the account at the time of the transactions, this Court adopts VCG's methodology whereby only Plaintiff's separate funds were allocated toward each transaction. *Ex. 1K, Schedule JT-1, Bate #27686-#27691.*

398. Defendant deposited Edward Jones Companies, LLLP Limited Partnership/General Partnership/Subordinate Partnership distributions into 7183 during 2012 as follows:

Date	Amount	Deposit Source	Ex. 1F(2)(b) Bate #
4/11/12	$1,446.05	General Partnership/Subordinate Partnership cash distribution	*#10908*
4/11/12	$12,170.00	General Partnership/Subordinate Partnership tax distribution	*#10908*
6/6/12	$902.00	General Partnership/Subordinate Partnership cash distribution	*#10934*
6/6/12	$11,381.00	General Partnership/Subordinate Partnership tax distribution	*#10933*
9/11/12	$1,495.00	General Partnership/Subordinate Partnership cash distribution	*#10971*
9/11/12	$12,644.00	General Partnership/Subordinate Partnership tax distribution	*#01971*
12/12/12	$6,100.00	General Partnership/Subordinate Partnership tax distribution	*#11008*
Total	**$46,138.05**		

A portion of the Edward Jones Companies, LLLP distributions are Plaintiff's separate property as Plaintiff's separate property was used toward the purchase of the parties' interest. *Ex. 1K, Schedule JT-1, Bate #27686-#27691.*

399. Defendant deposited BDUBS, LLC distributions during 2012 as follows:

Date	Amount	Ex. 1F(2)(b) Bate #
2/15/12	$7,500.00	*#10885*
3/30/12	$14,000.00	*#10898*
4/26/12	$10,000.00	*#10909*
5/29/12	$9,500.00	*#10932*
6/22/12	$4,500.00	*#10933*
9/4/12	$7,600.00	*#10971*
9/19/12	$7,500.00	*#10971*
10/22/12	$7,500.00	*#10971*
12/4/12	$8,500.00	*#11008*
Total	**$76,600.00**	

A portion of the BDUBS, LLC distributions are Plaintiff's separate property as Plaintiff's separate property was used toward the purchase of the parties' interest and subsequent capital contributions. *Ex. 1K, Schedule JT-1, Bate #27687-#27691.*

400. The parties deposited SFME distributions into 7183 during 2012 as follows:

Date	Amount	Ex. 1F(2)(b) Bate #
6/11/12	$15,000.00	*#10933*
8/6/12	$15,000.00	*#10956*
10/15/12	$15,000.00	*#10983*
10/17/12	$15,000.00	*#10983*
11/12/12	$15,000.00	*#10994*
12/20/12	$15,000.00	*#11008*
12/20/12	$30,000.00	*#11008*
Total	**$120,000.00**	

This Court adopts VCG's methodology whereby Plaintiff's separate property interest in the parties' 75% interest in SFME is 83.9% (*Ex. 1K, Schedule B7, L. 9, Bate #27834)* and therefore, 83.9% is Plaintiff's separate property interest in all SFME distributions to the parties pursuant to Paragraph 2C of the PMA. *Ex. 1K, Schedule JT-1, Bate #27687-#27691.* (See SFME findings below).

401. Plaintiff paid attorney fees during 2012 from 7183 as follows:

Date	Amount	Party Associated with Payment	Ex. 1F(2)(b) Bate #
8/7/12	$3,887.50	Plaintiff	*#10958*
9/10/12	$1,512.50	Plaintiff	*#10972*
12/26/12	$12,922.45	Plaintiff	*#11011*

Likewise, Defendant's attorney fees were also paid by funds in 7183 although said funds were not quantified during trial. *Tr. 612:23-25 & 613:1-16.* This Court accepts VCG's pro rata approach to apply a percentage of the previous month's ending balance to each withdrawal whereby both marital and Plaintiff's separate funds were allocated toward all attorney fees paid in 2012. *Ex. 1K, Schedule JT-1, Bate #27690-27691.*

402. On January 27, 2012, the parties purchased a General Partnership interest in Jones Financial Companies, LLLP with a down payment in the amount of $72,375 from 7183. *Ex. 1F(2)(b), Bate #10874.* This Court adopts VCG's pro rata approach to the purchase. Therefore,

21.7% (or $15,709.94) is Plaintiff's separate property interest in the down payment of the General Partnership interest in Jones Financial Companies, LLLP. *Ex. 1K, Schedule JT-1, page 138, L. 1281, Bate #27686. Tr. 1123:2-4.*

403. On February 8, 2012, the parties transferred $9,000 from 7183 to their newly opened Edward Jones joint tax-free money market account 6236. *Ex. 1F(2)(b), Bate #10886.* The newly opened account 6236 was created for the purpose of paying the parties' income taxes. As no direct deposit of Plaintiff's separate funds could be tied to this event, this Court adopts VCG's pro rata approach to apply a percentage of the previous month's ending balance to the transfer. *Ex. 1K, Schedule JT-1, P. 139, L. 1293, Bate #27687.*

404. Defendant's opening of this new joint account corroborates Plaintiff's testimony that the parties were continuing to work on their marriage. If they were not working on the marriage, there would be no reason to continue to purchase assets together and open joint accounts for purposes of paying taxes.

405. On February 17, 2012, Plaintiff transferred $17,368.30 from her separate 7191 account to account 7183. *Ex. 1F(2)(b), Bate #10885.* As a separate-to-separate event could not be identified by VCG for this transaction, this Court adopts VCG's methodology to repay the marital loan existing in 7191 at that time of $732.86. *Ex. 1K, Schedule JT-1, page 139, L. 1290, Bate #27687.* The remaining $16,635.94 of the $17,368.30 transfer is Plaintiff's separate property.

406. On March 29, 2012, Plaintiff transferred $3,000 from her separate 7191 account to 7183. *Ex. 1F(2)(b), Bate #10898.* As no marital loan existed in 7191 at the time of said transfer, this Court adopts VCG's allocation of the entire transfer as Plaintiff's separate property. *Ex. 1K, Schedule JT-1, P. 139, L. 1299, Bate #27687.*

407. On April 16, 2012, Plaintiff made a $9,267.73 contribution to her Edward Jones Simple IRA 0314 from 7183. *Ex. 1F(2)(b), Bate #10911.* As no direct deposit of Plaintiff's separate funds could be tied to this event, this Court adopts VCG's pro rata approach to the IRA contribution. Therefore, 22.3% (or $2,068.73) of said contribution is separate and the remaining

$7,199 is deemed a marital loan in Plaintiff's IRA 0314. *Ex. 1K, Schedule JT-1, P. 140, L. 1314, Bate #27688.*

408. Between May 30, 2012 and June 29, 2012 the parties transferred $17,500 from 7183 to their Edward Jones joint tax-free money market account 6236. *Ex. 1F(2)(b), Bate #10937.* This Court adopts VCG's pro rata approach to the transfer. *Ex. 1K, Schedule JT-1, P. 141, L. 1332, Bate #27689.*

409. On June 11, 2012, Defendant served Plaintiff with a Summons and Petition for Dissolution of Marriage *In Re Marriage of Donald M. Charlson v. Angela K. Charlson, Court File No. 55-FA-13-1830, District Court Family Division, Third Judicial Circuit, State of Minnesota, County of Olmsted. Ex. 18.*

410. After Plaintiff was served with the divorce matter in Minnesota, she continued to reimburse the joint 7183 account for TJPR expense reimbursements. For example:

a. On July 10, 2012, she deposited check #1702 from TJPR 8933. *Ex. 1K, Schedule JT-1, L. 1342, Bate #27689 & Ex. 1J(4) Bank Accounts (b), Bate #21714.*

b. On August 10, 2012, she deposited check #1716, #1717, #1719 and #1721 totaling $7,111.46 from TJPR 8933. *Ex. 1K, Schedule JT-1, L. 1350, Bate #27690 & Ex. 1F(2)(b), Bate #10956.*

c. On September 4, 2012, she deposited check #1727 in the amount of $18,087.55 from TJPR 8933. *Ex. 1K, Schedule JT-1, P. 142, L. 1357, Bate #27690 & Ex. 1F(2)(b), Bate #10971.*

d. On October 9, 2012, she deposited check #1729 in the amount of $9,884.16 *(Ex. 1F(2)(b), Bate #10982)* and check #1743 in the amount of $3,639.30 *(Ex. 1F(2)(b), Bate #10983)* from TJPR 8933. *Ex. 1K, Schedule JT-1, P. 142, L. 1365, Bate #27690.*

e. On November 2, 2012 she deposited check #1746 in the amount of $4,589.01 and on November 28, 2012, she deposited check #1764 in the amount of $2,192.14. *Ex. 1F(2)(b), Bate #10994 & Ex. 1K, Schedule JT-1, P. 143, L. 1374, Bate #27691.*

As noted above, this Court adopts VCG's methodology to allocate all TJPR expense reimbursements to the marital estate, despite Plaintiff's separate property having paid the original business expense on a pro rata basis. By continuing to make said deposits into the joint

account Plaintiff was creating marital value in the account after the divorce action was commenced in Minnesota.

411. On the same day Defendant served divorce papers upon Plaintiff, June 11, 2012, he directed a $15,000 SFME distribution to be deposited into 7183. *Ex. 1F(2)(b), Bate#10933. Ex. 1K, Schedule JT-1, page 141, L. 1330, Bate #27689.* Up until this point in time, all previous SFME distributions were directly deposited into Plaintiff's 7191 account. *Ex. 1K, Schedule AC-1, Ll. 1060, 1064 & 1072.* The next day, on June 12, 2012, Plaintiff transferred $15,000 to her #7191 account from #7183. *Ex. 1F(2)(b), Bate #10937.* Plaintiff testified she believed SFME was her separate property as she had either used funds from her 7191 account or TJPR 8833 account when capital contributions were needed for the business. *Tr. 468:23-25.* In addition, Plaintiff made two separate transfers on June 21, 2012 into her 7191 account; one in the amount of $15,000 and one in the amount of $9,500. *Ex. 1F(2)(b), Bate #10937.* While Plaintiff may have transferred the $15,000 to her 7191account on June 12, 2012 to recoup what she believed was the $15,000 SFME distribution, in which she has an 83.9% separate interest, nonetheless, in order to maintain consistency with their methodology, VCG allocated all transfers to her 7191 account that month based upon a pro rata approach. Therefore, 15.6% (or $6,176.62) of the $39,500 in total transfers made to 7191 that month was allocated as separate, and the remaining 84.4% (or $33,323.38) was deemed a marital loan in Plaintiff's 7191 account. *Ex. 1K, Schedule JT-1, P. 141, L. 1334, Bate #27689.*

412. On June 19 and June 20, 2012, Defendant transferred $6,350.12 from the parties' joint 6236 tax account to 7183. *Ex. 1F(2)(b), Bate #10934.* This Court adopts VCG's pro rata approach to each transfer between the 6236 and 7183 account. *Ex. 1K, Schedule JT-1, P. 141, L. 1333, Bate #27689.*

413. On November 13, 2012, the parties made a capital contribution to Superior Financial Center in the amount of $1,800 via check #1894 from 7183. *Ex. 1F(2)(b), Bate #10995.* This Court adopts VCG's pro rata approach to the contribution. *Ex. 1K, Schedule JT-1, P. 143, L. 1378, Bate #27691.*

2013 Activity

414. During 2013, the parties were litigating divorce issues in the Minnesota action. A temporary order was issued regarding the use and deposit of funds into 7183 after June 1, 2013. The Minnesota temporary order required all businesses distributions from Edward Jones, BDUBS, SFME, ME Rogers and Superior Financial to be deposited into the 7183 account and a portion of the distributions were required to be transferred to the Edward Jones 6236 for payment of taxes. *Ex. 19.*

415. Defendant deposited into 7183, Edward Jones Companies, LLLP Limited Partnership/General Partnership/Subordinate Partnership distributions during 2013 as follows:

Date	Amount	Deposit Source	Ex. 1F(2)(b) Bate #
1/10/13	$2,022.00	General Partnership/Subordinate Partnership cash distribution	*#11021*
1/10/13	$18,645.00	General Partnership/Subordinate Partnership tax distribution	*#11021*
1/31/13	$8,004.50	General Partnership/Subordinate Partnership excess profit distribution	*#11029*
6/27/13	$962.00	Partnership distribution	*Ex. 17*
8/12/13	$990.00	Partnership distribution	*#11087*
8/26/13	$1,480.00	Partnership distribution	*#11088*
9/24/13	$1,480.00	Partnership distribution	*#11097*
10/24/13	$9,472.00	Partnership distribution	*#11108*
11/4/13	$962.00	Partnership distribution	*#11117*
11/26/13	$962.00	Partnership distribution	*#11118*
Total	**$44,979.50**		

A portion of the Edward Jones Companies, LLLP distributions are Plaintiff's separate property as Plaintiff's separate property was used toward the purchase of the parties' interest. The marital estate benefited by these separate funds paying expenses from 7183 on a pro rata basis. *Ex. 1K, Schedule JT-1, Bate #27692-#27696.*

416. Unbeknownst to Plaintiff, and contrary to the restraining provisions of the Summons in the Minnesota divorce proceeding, Defendant unilaterally sold the Edward Jones Companies, LLLP General Partnership and received sale proceeds of $141,703.69; $100,000 of

which was used to purchase the Edward Jones Subordinated Limited Partnership. *Tr. 284.* Plaintiff has a separate interest in said General Partnership funds pursuant to Paragraph 2C of the PMA as her separate funds were allocated toward the original purchase. The remaining sale funds of $41,703.69 were originally deposited into 7183 on March 15, 2013. *Ex. 1F(2)(b), Bate #11041.* Three days later, on March 18, 2013, the funds were withdrawn from 7183 and deposited into Defendant's newly created individual Edward Jones 7272 account. *Ex. 1F(3), Bate #11135.* Three days after that, on March 21, 2013, Defendant used $35,000 of those funds to purchase a new BMW vehicle. *Ex. 1F(3), Bate #11136.*

417. Defendant deposited BDUBS, LLC distributions in 7183 during 2013 as follows:

Date	Amount	Ex. 1F(2)(b) Bate #
1/7/13	$7,000.00	*#11021*
1/22/13	$8,000.00	*#11021*
3/5/13	$8,500.00	*#11041*
4/3/13	$6,500.00	*#11049*
4/26/13	$8,000.00	*#11050*
5/23/13	$6,500.00	*#11061*
6/25/13	$4,000.00	*Ex. 17*
7/26/13	$10,000.00	*#11078*
8/20/13	$9,000.00	*#11087*
10/1/13	$9,000.00	*#11107*
10/28/13	$9,000.00	*#11117*
12/31/13	$9,000.00	*#11129*
Total	**$94,500.00**	

A portion of the BDUBS, LLC distributions are Plaintiff's separate property as Plaintiff's separate property was used toward the purchase of the parties' interest and subsequent capital contributions. The marital estate benefited by these separate funds paying expenses from 7183 on a pro rata basis. *Ex. 1K, Schedule JT-1, Bate #27692-#27696.*

418. The parties deposited SFME distributions into 7183 during 2013 as follows:

Date	Amount	Ex. 1F(2)(b) Bate #
2/13/13	$48,000.00	*#11030*
3/8/13	$24,000.00	*#11041*
5/3/13	$20,000.00	*#11060*
6/4/13	$15,600.00	*Ex. 17*

Date	Amount	Ex. 1F(2)(b) Bate #
7/10/13	$15,600.00	*#11078*
8/12/13	$15,600.00	*#11087*
8/28/13	$30,000.00	*#11088*
9/16/13	$15,600.00	*#11097*
10/15/13	$15,600.00	*#11108*
11/8/13	$15,600.00	*#11118*
12/13/13	$15,600.00	*#11129*
Total	**$231,200.00**	

This Court adopts VCG's methodology whereby Plaintiff's separate property interest in the parties' 75% interest in SFME is 83.9% (*Ex. 1K, Schedule B7, P. 286, L. 9, Bate #27834)* and therefore, 83.9% is Plaintiff's separate property interest in all SFME distributions to the parties pursuant to Paragraph 2C of the PMA. The marital estate benefited by these separate funds paying expenses from #7183 on a pro rata basis. *Ex. 1K, Schedule JT-1, Bate #27692-#27696.*

419. On April 9, 2013, a distribution from SFME in the amount of $45,000 was deposited into 7183, however, two days later on April 11, 2013, the payment was stopped. *Ex. 1F(2)(b), Bate #11050.* Defendant redirected these funds into the joint EJ 6236 account. *Ex. 1K, Schedule JT-1, P. 145, L. 1423, Bate #27693 & Schedule JT-2, P. 154, L. 39, Bate #27702.*

420. The parties paid attorney fees during 2013 from 7183 as follows:

Date	Amount	Party Associated with Payment	Ex. 1F(2)(b) Bate #
2/4/13	$27,922.45	Plaintiff	*#11031*
4/4/13	$25,000.00	Plaintiff	*#11051*
4/11/13	$5,000.00	Plaintiff	*#11051*
4/12/13	$5,000.00	Plaintiff	*#11052*
4/15/13	$2,825.00	Plaintiff	*#11051*
4/25/13	$5,000.00	Plaintiff	*#11052*
5/16/13	$5,000.00	Plaintiff	*#11062*
5/16/13	$5,000.00	Plaintiff	*#11062*

During this time, Plaintiff began the process of discovery and gathering numerous documents for the separate property tracing report, which Plaintiff's experts indicate took over one year. *Tr. 1033:9-12.* Due to insufficient cash funds in 7183, two $15,000 payments to Plaintiff's then attorney, Cheney Hatcher Family Law, were returned for insufficient funds. *Ex. 1F(2)(b), Bate #11062.* This Court adopts VCG's pro rata approach to each payment. Therefore, a portion of

Plaintiff's separate funds (ranging from 23.8% to 36.6%) were allocated to each payment, including the payment of Defendant's attorney fees, the amount of which was not quantified by Defendant during trial. *Ex. 1K, Schedule JT-1, Pp. 144-145, Ll. 409, 1417, 1425 & 1434, Bate #27692-27693. Tr. 613:14-20.*

421. Defendant made estimated tax payments toward his income taxes during 2013 from 7183 as follows:

Date	Amount	Ex. 1F(2)(b) Bate #
1/16/13	$10,000	*#11024*
4/24/13	$23,889	*#11053*

This Court adopts VCG's pro rata approach to each payment which resulted in 33.1% to 36.6% of Plaintiff's separate funds being allocated toward Defendant's estimated tax payments. *Ex. 1K, Schedule JT-1, P. 144-148, Ll. 1399 & 1427, Bate #27692-27696.*

422. On June 6, 2013, Plaintiff transferred $2,651.20 from her 7191 into 7183. *Ex. 17.* As a separate-to-separate event could not be identified by VCG for this transaction, this Court adopts VCG's methodology to allocate the entire transfer toward the marital loan existing in 7191 at the time of the transfer. *Ex. 1K, Schedule JT-1, P. 146, L. 1443, Bate #27694.*

423. On August 12, 2013, Defendant transferred $3,500 from 7183 to the parties' 6236 tax account. *Ex. 1F(2)(b), Bate #11089.* On August 22, 2013, Defendant transferred $3,150 from 7183 to the parties' 6236 tax account. On August 29, 2013, Defendant transferred $10,500 from 7183 to the parties' 6236 tax account. *Ex. 1F(2)(b), Bate #11090.* Said transfers were in accordance with a Stipulation and Temporary Order in the Minnesota divorce matter wherein a percentage of the business distributions into 7183 were to be transferred to account 6236 for the purpose of paying tax on the business distributions. *Ex. 19.*

424. Thereafter, the parties were able to divide funds in the 7183 account. The 7183 account had a margin loan at the time and the division of funds therefore did not occur on a regular basis. *Ex. 1F(2)(b), Bate #11040-#11133.* However, in order to maintain consistency

throughout the tracing, this Court adopts VCG's pro rata approach to each transfer between #7183 and #6236. *Ex. 1K, Schedule JT-1, Bate #27694.*

425. On August 12, 2013, Defendant transferred $8,000 into Plaintiff's 7191 account and $8,000 into Defendant's 7272 account. *Ex. 1F(2)(b), Bate #11090.* Said transfers were in accordance with a Stipulation and Temporary Order in the Minnesota divorce matter *(Ex. 19)* whereby the parties were able to divide funds in the 7183 account. However, in order to maintain consistency throughout the tracing, this Court adopts VCG's pro rata approach to each transfer between accounts. *Ex. 1K, Schedule JT-1, P. 146, Ll. 1462 and 1463, Bate #27694.*

426. Similar transfers were made to Plaintiff's 7191 account and Defendant's 7272 account on September 13, 2013 and October 22, 2013, which continued to increase Plaintiff's separate property value in Defendant's account. *Ex. 1K, Schedule JT-1, P., 147, Ll. 1470, 1471, 1482 & 1483, Bate #27695.*

427. On October 17, 2013, the parties made a capital contribution to Superior Financial Center in the amount of $2,000 from 7183. *Ex. 1F(2)(b), Bate #11109.* As no direct deposit of Plaintiff's separate funds could be tied to this event, this Court adopts VCG's pro rata approach to the contribution. Therefore, $1,062.22 is Plaintiff's separate property interest in said capital contribution. *Ex. 1K, Schedule JT-1, P. 147, L. 1480, Bate #27695.*

428. This Court adopts the VCG's methodologies and tracing analysis as it pertains to the joint Edward Jones 7183 account. The account is a combination of both Plaintiff's separate and marital property. *Ex. 1K, Schedule JT-1, P. 148, L. 1501, Bate #27696.*

DEFENDANT'S EDWARD JONES INVESTMENT ACCOUNT #7272
Ex. 1K, Schedule DC-1, Bate #27697

429. In January 2013, seven months after Defendant commenced a divorce action in the State of Minnesota, he opened Edward Jones investment account 7272 in his individual name. On January 30, 2013, Defendant deposited his Edward Jones payroll of $18,147.90 into #7272. *Ex. 1F(3), Bate #11134.* Up until this time, Defendant had been depositing his payroll into the parties' joint 7183 account. The Defendant's payroll deposits into 7272 are marital funds.

The 7272 account has both marital and separate property components based on the nature of the contribution sources. *PMA, Paragraphs 4, 5, 9C* and *Ex. 1K, Bate #27563.* This Court adopts VCG's pro rata approach to apply a percentage of each transaction to the previous month's ending balance. *Tr. 1128:20-25 & 1129:1.* Earnings, gains and losses, and withdrawals are also allocated pro-rata based on the separate and marital balances in the account at the end of the previous statement period. *PMA, Paragraph 2C.*

430. On March 19, 2013, Defendant stopped payment on the deposit of the sale proceeds of the Edward Jones General Partnership into the joint 7183 account. Instead, he directed the sale proceeds into his individual 7272 account. *Ex. 1F(3), Bate #11135.* This Court adopts VCG's methodology whereby Plaintiff's separate property interest in the General Partnership is 11.1% based on the use of her separate funds toward the purchase and therefore $37,079.31 of the sale proceeds is marital and the remaining $4,623.38 (or 11.1%) is Plaintiff's separate property interest in the General Partnership sale proceeds deposited in Defendant's individual #7272 account. With the deposit of these funds, a separate property component for Plaintiff is created in #7272. *Ex. 1K, Schedule DC-1, P. 149, L. 7, Bate #27697.*

431. On March 21, 2013, Defendant purchased a 2011 BMW from Kuehn Motors and made a down payment with funds from his 7272 account in the amount of $35,000 via check #1001. *Ex. 1F(3), Bate #11136.* Defendant obtained a loan through Harris Banks in his individual name for the remaining balance of the purchase price, and this Court finds said automobile loan to be solely Defendant's separate obligation pursuant to Paragraph 8B of the PMA. Commencing April 16, 2013, Defendant began making monthly payments from 7272 in the amount of $897.96 toward his separate obligation to Harris Banks. This Court adopts VCG's methodology whereby said automobile loan payments from 7272 are paid pro rata based upon the previous month's ending balance of 7272. This Court finds that of the $897.96 April 16, 2013 payment to Harris Banks, 5.5% (or $49.37) is a loan owing to Plaintiff's separate property interest in #7272. *Ex. 1K, Schedule DC-1, P. 149, L. 10, Bate #27697.*

432. On April 24, 2013, Defendant transferred $1,000 from 7272 to the parties' joint Home Federal checking account 2730. *Ex. 1F(3), Bate #11138.* This Court adopts VCG's pro rata approach to each withdrawal. *Ex. 1K, Schedule DC-1, P. 149, L. 18, Bate #27697.*

433. On April 30, 2013, Defendant deposited a distribution check from the Edward Jones Limited Partnership Interest in the amount of $1,480. *Ex. 1F(3), Bate #11140.* This Court adopts VCG's methodology whereby Plaintiff's separate property interest in the Edward Jones Limited Partnership Interest was 8.7% based on the percentage of separate funds used to purchase the asset. *Ex. 1K, Schedule DC-1, P. 150, L. 22, Bate #27698.*

434. The Defendant made transfers during 2013 to the parties' joint Edward Jones 6236-1-6 account for payment of taxes. See for example *Ex. 1F(3), Bate #11142.* He also continued to make transfers to the parties' joint 7183 account as well as Plaintiff's 7191 account. This Court adopts VCG's pro rata approach in 7272 to each transfer. *See* for example, *Ex. 1K, Schedule DC-1, P. 150, Ll. 30, 31, 35, 40, Bate #27698.*

435. On August 12, 2013, Defendant transferred $8,000 into his 7272 account from the parties' joint 7183 account in accordance with the terms of the Stipulation and Temporary Order in the Minnesota divorce action. Regardless of the reason for the transfer, in order to be consistent with their methodology, VCG applied the pro rata approach as a percentage of the previous month's ending balance in 7183 to the transfer into 7272. *Ex. 1F(3), Bate #11146.* Therefore, $3,190 is separate and the remaining $4,810 is marital. *Ex. 1K, Schedule DC-1, P. 150, L. 40, Bate #27698.* A like amount of $8,000 was transferred into Plaintiff's 7191 account per the Minnesota Court Order and the same pro rata approach was applied to that transaction.

436. On September 16, 2013, Defendant transferred $15,000 into his 7272 account from the parties joint 7183 account in accordance with the Stipulated Temporary Order entered in the Minnesota divorce action. *Ex. 1F(3), Bate #11148. Ex. 1K, Schedule DC-1, P. 151, L. 47, Bate #27699.* The same amount was transferred into Plaintiff's 7191 account on September 13, 2015 and VCG was consistent in treating that transfer into Plaintiff's 7191 based upon the pro rata approach. *Ex. 1K, Schedule AC-1, P. 80, L. 1176, Bate #27628.*

437. On October 23, 2013, Defendant transferred $9,891 into his 7272 account from the parties' joint 7183 account; $7,500 of which was in accordance with the Stipulated Temporary Order entered in the Minnesota divorce action, and the remaining $2,391, was unilaterally transferred by Defendant. *Ex. 1F(3), Bate #11151.* This Court adopts VCG's pro rata approach to apply a percentage of the previous month's ending balance in 7183 to the transfer into 7272. *Ex. 1K, Schedule DC-1, P. 151, L. 53, Bate #27699.* However, unlike the prior month's equal transfer of funds from 7183 into each party's individual account, Defendant only transferred $7,500 to Plaintiff's 7191 account. VCG treated the transfer to Plaintiff's account with the same pro rata approach. *Ex. 1K, Schedule AC-1, P. 80, L. 1181, Bate #27628.*

438. On November 4, 2013, Defendant deposited a distribution from the Edward Jones Limited Partnership Interest in the amount of $518. *Ex. 1F(3), Bate #11153.* This Court adopts VCG's methodology whereby Plaintiff's separate property interest in the Edward Jones Limited Partnership Interest was 8.7% at the time of said distribution. This Court finds 8.7% (or $45.21) is Plaintiff's separate property interest in the $518 Edward Jones Limited Partnership interest distribution. *Ex. 1K, Schedule DC-1, P. 151, L. 60, Bate #27699.*

439. On November 8, 2013, Defendant deposited a distribution from SFME in the amount of $8,400. *Ex. 1F(3), Bate #11153.* This Court adopts VCG's methodology whereby Plaintiff's separate property interest in SFME was 83.9% at the time of said distribution based on the percentage of her separate funds used to acquire SFME. *Ex. 1K, Schedule DC-1, P. 151, L. 62, Bate #27699.*

440. This Court adopts the VCG's methodologies and tracing analysis as it pertains to Defendant's Edward Jones #7272 account. The account is a combination of both Plaintiff's separate property and marital property. *Ex. 1K, Schedule DC-1, P. 152, L. 72, Bate 27700.*

JOINT EDWARD JONES INVESTMENT ACCOUNT 6236
Ex. 1K, Schedule JT-2, Bate #27701

441. The parties opened the joint Edward Jones investment account 6236-1-6 in January 2012 as a tax escrow account with funds primarily transferred from the joint Edward

Jones 7183 account. Funds were also deposited into this account from Defendant's Edward Jones 7272 account. The 6236 account has both marital and separate property components based on the nature of the contribution sources. *PMA Paragraphs 4, 5, 9C* and *Ex. 1K, Bate #27564.* This Court adopts VCG's pro rata approach to apply a percentage of the previous month's ending balance to each transaction within the account. *Tr. 1128:20-25 & 1129:1.* Earnings, gains and losses, and withdrawals are also allocated pro-rata based on the separate and marital balances in the account at the end of the previous statement period. *PMA Paragraph 2C.*

442. On June 18, 2012, check #1002 to United States Treasury in the amount of $12,150 cleared the account. *Ex. 1F(4), Bate #11161.* This Court adopts VCG's pro rata approach to the tax payments whereby a portion of Plaintiff's separate property was used toward the tax payments in this account. *Ex. 1K, Schedule JT-2, P. 153, L. 8, Bate #27701.*

443. On July 3, 2012, Defendant deposited an SFME distribution check #5129 in the amount of $15,000. *Ex. 1F(4), Bate #11162.* As noted previously, after Plaintiff paid off the First Premier loans for SFME, the parties started to receive distribution checks. Based on Plaintiff's use of separate funds to acquire the interest in SFME, Plaintiff has an 83.9% separate property interest in SFME and therefore, 83.9% of the distributions are Plaintiff's separate property interest in this account. *Ex. 1K, Schedule JT-2, P. 153, L. 13, 14, Bate #27701.*

444. For the period June 30, 2012 through July 27, 2012, checks were paid in the total amount of $8,449.12 from 6236. *Ex. 1K, Schedule JT-2, P. 153, L. 16, Bate #27701.* The Court notes of the $8,449.12 in checks paid during said period of time, check #1010 in the amount of $1,200 was to Defendant's former wife, Teresa Charlson, and check #1011 in the amount of $3,845.46 was to Defendant's American Express card. *Ex. 1F(4), Bate #11163.* Based upon VCG's pro rata approach to each transaction, Plaintiff's separate property was used toward Defendant's debt obligations.

445. On July 30, 2012, Defendant deposited a BDUBS distribution check #2257 in the amount of $7,000. *Ex. 1F(4), Bate #11164.* This Court finds Plaintiff has a separate property interest in BDUBS based on her use of separate funds to acquire the asset. Therefore, Plaintiff

has a separate property interest in said distributions into this account. *Ex. 1K, Schedule JT-2, P. 153, L. 19, Bate #27701.*

446. On June 17, 2013, Defendant transferred $8,012.75 from his individual 7272 account into 6236. *Ex. 1F(4), Bate #11175.* This Court adopts VCG's pro rata approach whereby the previous month's ending balance of 7272 is Plaintiff's separate property. *Ex. 1K, Schedule JT-2, P. 155, L. 50, Bate #27703.*

447. On June 27, 2013, Defendant deposited an Edward Jones Limited Partnership distribution check #8297 in the amount of $518. *Ex. 1F(4), Bate #11175.* This Court adopts VCG's methodology whereby Plaintiff has a separate property interest in the Edward Jones Limited Partnership based on the use of her separate funds to acquire the asset. Therefore, a portion of the distributions into this account are Plaintiff's separate property. *Ex. 1K, Schedule JT-2, P. 155, L. 52, Bate #27703.*

448. This Court adopts the VCG's methodologies and tracing analysis as it pertains to the joint Edward Jones 6236 account. The account is a combination of both Plaintiff's separate and marital property. *Ex. 1K, Schedule JT-3, P. 157, L. 85, Bate #27704.*

PLAINTIFF'S EDWARD JONES INVESTMENT ACCOUNT 1297
Ex. 1K, Schedule AC-2, Bate #27705

449. On January 10, 2008, Plaintiff deposited a gift from her mother in the amount of $10,510.48 into her Edward Jones investment account 1297. *1F(5)(a), Bate #11201.* After Ms. Johnston testified at trial, Defendant conceded this account is Plaintiff's separate property. *Tr. 670:14-20.* Pursuant to Paragraph 2C of the PMA, gains and losses on Plaintiffs separate property were allocated solely to her. Plaintiff's Edward Jones investment account 1297 is 100% Plaintiff's separate property.

JOINT HOME FEDERAL CHECKING 2730
Ex. 1K, Schedule JT-3, Bate #27717

450. The Home Federal 2730 account has both marital and separate property components based on the nature of the contribution sources. *PMA Paragraphs 4, 5, 9C* and *Ex.*

1K, Bate #27564. This Court adopts VCG's pro rata approach to apply a percentage of the previous month's ending balance to each transaction within the account. *Tr. 1128:20-25 & 1129:1.* Earnings, gains and losses, and withdrawals are also allocated pro-rata based on the separate and marital balances in the account at the end of the previous statement period. *Paragraph 2C of the PMA.* After Plaintiff reacquired TJPR, deposits from TJPR and STI, Inc. are separate property for Plaintiff as said entities are Plaintiff's separate assets.

451. Neither party could recall when the joint Home Federal checking account 2730 was created, however the earliest statement provided as evidence indicates the account was in existence prior to January 1996, as the February 23, 1996 statement reflected a previous balance of $495.83 as of January 25, 1996. *Ex. 1F(6), Bate #11427.* The address noted on the February 23, 1996 statement is Windsor Court, 1232 4th Avenue SW, Apt B, Rochester, Minnesota. Defendant moved to Rochester, Minnesota in 1995 to work for Edward Jones while Plaintiff continued to reside in Belle Fourche, South Dakota. Defendant indicated this account was opened because Edward Jones offices, including Defendant's office, do not carry cash or provide local banking benefits. Defendant also acknowledged a local bank gives the parties the ability of other types of credit as well as establishing savings accounts and checking accounts and having the ability to deposit monies and have access short term to monies. The parties paid bills automatically through the account. *Tr. 760:13-21.*

452. The statements for 1996 reflect numerous deposits and payments to and from the account, which includes, but is not limited to, monthly payments to State Farm Insurance, Rochester YMCA and natural gas. *See* for example, *Ex. 1F(6), Bate #11427-#11442.* During this time period some of Plaintiff's separate property may have been deposited into this account, however the statements do not reflect details on the source of the deposits. Therefore, this Court finds the deposits are considered marital, unless VCG was able to tie a deposit to Plaintiff's separate funds. *Ex. 1K, Schedule JT-3, P. 169, L. 3, 7, 17, Bate #27717.*

453. On August 2, 1996, the sum of $143,947.71 was deposited into the account. *Ex. 1F(6), Bate #11436.* VCG was able to tie this deposit to Plaintiff's sale proceeds from the sale of

her home in Belle Fourche, South Dakota, which occurred approximately four days previous. Plaintiff received funds in the amount of $143,957.71. *Ex. 1I(1) Belle Fourche, SD (f), Bate #17083.* Since this Court finds the Belle Fourche, South Dakota home to be entirely Plaintiff's separate property, the entire deposit of sale proceeds of $143,947.71 is Plaintiff's separate property pursuant to Paragraph 2D of the PMA. *Ex. 1K, Schedule JT-3, P. 169, L. 8, Bate #27717.*

454. The balance in 2730 prior to the $143,947.71 deposit of Plaintiff's separate property sale proceeds was $1,727.66. *Ex. 1F(6), Bate #11436.* On the same date as the deposit of Plaintiff's separate sale proceeds, August 2, 1996, a withdrawal of $42,446.06 was made toward the purchase of the home located at 3316 Lake Street NW in Rochester, Minnesota. VCG tied these two events together. This Court adopts VCG's direct tracing methodology for this transaction whereby the same like percentage of Plaintiff's separate funds deposited that same day (100%) is allocated toward the $42,446.06 withdrawal. This Court finds the entire $42,446.06 withdrawal and ultimate use of those funds, to be 100% Plaintiff's separate property. *Ex 1K, Schedule JT-3, P. 169, L. 8, 11, Bate #27717.*

455. On August 7, 1996, Plaintiff withdrew the sum of $100,000 from the Home Federal Checking account 2730 via check #1210 and deposited said amount into the parties' joint 7183 investment account, leaving the remaining $1,501.65 from Plaintiff's separate sale proceeds in the Home Federal Checking 2730. *Ex 1K, Schedule JT-3, P. 169, L. 12, Bate #27717.* VCG tied the $100,000 withdrawn to the deposit of Plaintiff's separate sale proceeds deposited a few days previous. Therefore, this Court adopts VCG's direct tracing methodology for this transaction whereby the same like percentage of Plaintiff's separate sale proceeds deposited days previous (100%) is allocated toward the $100,000 check. This Court also finds the entire $100,000 check is Plaintiff's separate property. *Ex. 1K, Schedule JT-3, P. 169, L. 12, Bate #27717.*

456. On February 18, 1997, $800 was deposited into 2730. *Ex. 1F(6), Bate #11443.* VCG tied the deposit to a TJPR, Inc. seller-financed loan repayment in the same amount. This

Court finds said deposit is Plaintiff's TJPR, Inc. seller-financed loan repayment. The marital estate benefited by these separate funds paying expenses from 2730 on a pro rata basis. *Ex. 1K, Schedule JT-3, P. 170. L. 29, Bate #27718.*

457. On October 10, 2006, the parties deposited into Edward Jones 7183 check #889 in the amount of $9,500. *Ex. 1F(6), Bate #11557.* Said check cleared the 7183 account on October 12, 2006. *Ex. 1F(2)(b), Bate #10104.* This Court adopts VCG's pro rata approach to said deposit. *Ex. 1K, Schedule JT-3, P. 173, L. 84, Bate #27721.*

458. On October 12, 2006, check #1619 in the amount of $7,500 cleared 2730. *Ex. 1F(6), Bate #11557.* VCG tied said check to a deposit in the same amount to Plaintiff's 7191 account on October 11, 2006. *Ex. 1F(1)(e), Bate #7964.* This Court adopts VCG's direct tracing methodology for this transaction whereby the same like percentage of Plaintiff's separate funds deposited a few days prior (27.3%) is allocated toward the $7,500 check. This Court also finds Plaintiff's separate interest in the $7,500 is $2,050.21. *Ex. 1K, Schedule JT-3, P. 173, L. 86, Bate #27721.*

459. On June 25, 2008, the parties deposited SBA loan proceeds in the amount of $31,8000 for home repairs. *Ex. 1F(6), Bate #11578.* As said loan was a debt incurred in the name of both parties, the proceeds were allocated as entirely marital pursuant to Paragraph 8C of the PMA. *Tr. 1132. Ex. 1K, Schedule JT-3, P. 175, L. 152, Bate #27723.*

460. On August 4, 2008, check #1856 in the amount of $29,000 cleared the account. *Ex. 1F(6), Bate #11579.* VCG tied the check to the SBA loan proceeds deposited earlier to the account. This Court adopts VCG's direct tracing methodology for this transaction whereby the same like percentage of Plaintiff's separate funds deposited with the SBA loan proceeds (0%) is allocated toward the $29,000 payment. The entire $29,000 check is allocated as marital funds. *Tr. 1132. Ex. 1K, Schedule JT-3, P. 176, L. 156, Bate #27724.*

461. On January 26, 2011, while Plaintiff was in Cabo San Lucas, Mexico, Defendant transferred funds totaling $39,000 from the parties' joint Edward Jones 7183 to 2730. *Ex. 1F(6), Bate #11640.* This Court adopts VCG's pro rata approach to apply a percentage of the previous

month's ending balance in 7183 to each transfer out of 7183. Plaintiff's separate property interest in the prior month's ending balance in 7183 was 31.9%. *Ex. 1K, Schedule JT-1, P. 133, L. 1173, Bate #27681.* Therefore, of the $39,000 transferred into #2730, 31.9% or $12,429.17 is separate and the remaining $26,570.83 is marital.

462. On the same date as the funds were transferred in, the exact amount was transferred to the SFME Home Federal checking 5344 in payment of the SFME Franchise Fee. *Ex. 1E(3) Supporting Documents (i), Bate #4496.* VCG tied these two events together and this Court adopts VCG's direct tracing methodology for this transaction whereby the same like percentage of Plaintiff's separate funds transferred that same day (31.9% or $12,429.17) is allocated toward the $39,000 transfer to SFME. *Ex. 1K, Schedule JT-3, P. 178, L. 219-220, Bate #27726.*

462. This Court adopts the VCG's methodologies and tracing analysis as it pertains to the joint Home Federal checking 2730. The account is a combination of both Plaintiff's separate property and marital property. *Ex 1K, Schedule JT-3, P. 182, L. 303, Bate #27730. Tr. 1133: 15-17.*

PLAINTIFF'S EDWARD JONES INVESTMENT ACCOUNT 8486
Ex. 1K, Schedule AC-6, Bate #27731

464. Plaintiff established this account in September 2010 with distributions from STI, Inc. totaling $5,000 and an expense reimbursement from STI, Inc. in the amount of $200. *Ex. 1F(1)(f), Bate #8719 & Ex. 1J(2)(b).* VCG treated all expense reimbursements from STI, Inc. as marital. The account is considered to have both marital and separate property components based on the contribution sources. The nonmarital tracing report allocates earnings, gains and losses and withdrawals pro rata based on the separate and marital balances in the account pursuant to Paragraph 2C of the PMA. Expense reimbursements and deposits that could not be traced to separate funds that were deposited into this account are marital. Plaintiff's distributions from STI, Inc. and member draws from TJPR are separate. *Tr. 1134: 7-16.*

465. On April 8, 2011, Plaintiff deposited an SFME expense reimbursement in the amount of $1,028.55. *Ex. 1F(1)(f), Bate #8722.* This Court adopts VCG's treatment of said expense reimbursements as marital. *Ex. 1K, Schedule AC-6, P. 183, L. 10, Bate #27731.*

466. On February 15, 2012, Plaintiff deposited $15,000 from TJPR 8933 as a member draw. *Ex. 1F(1)(f), Bate #8732. Ex. 1K, Schedule AC-6, P. 184, L. 33, Bate #27732.*

467. On February 24, 2012, check #1148811 from Pepsi Cola Fountain Co. was deposited. *Ex. 1F(1)(f), Bate #8732.* As TJPR directly paid Pepsi from their EJ 8933, *(Ex. 1J(4) Bank Accounts (b))* all TJPR rebates are Plaintiff's separate property pursuant to Paragraph 2C and 2D of the PMA. *1K, Schedule AC-6, P. 184, L. 34, Bate #27732.* Likewise, any other TJPR vendor rebates are Plaintiff's separate property.

468. On February 25, 2012, Plaintiff transferred a total of $35,000 from 8486 to her 7191 account. *Ex. 1F(1)(f), Bate #8734.* As the account has both marital and separate components, this Court adopts VCG's pro rata approach to each withdrawal to Plaintiff's separate property interest in the prior month's ending balance. *Ex. 1K, Schedule AC-1, P. 184, L. 37, Bate #27732.*

469. On January 7, 2013, Plaintiff transferred all of the securities in the account totaling $12,174.77 and all of the cash in the account totaling $18,889.26 to her 7191 account. *Ex. 1F(1)(f), Bate #8749.* This Court adopts VCG's pro rata approach to each transfer. Plaintiff's separate property interest in the prior month's ending balance was 95.6%. *Tr. 1135:6-9.* Therefore, $18,056.75 of the cash transferred is separate and $11,638.19 of the securities transferred is separate. *Ex. 1K, Schedule AC-1, L. 185, Ll. 65-66, Bate #27733.* After said transfers, the account had a $0 balance and was closed. VGC created the tracing of this account to demonstrate the transfer of funds into Plaintiff's 7191 account. The account was not in existence as of December 31, 2013.

470. This Court adopts the VCG's methodologies and tracing analysis as it pertains to the Edward Jones 8486 account.

PLAINTIFF'S EDWARD JONES WORLD/VENTURES INVESTMENT ACCOUNT 0484-1-8
Ex. 1K, Schedule AC-7, Bate #27734

471. Plaintiff established this account in March 2007 with deposits totaling $1,200 of income from her World/Venture Travel Services business. *Ex. 1F(1)(g), Bate #3751.* All of said income is marital and the account is entirely marital based on the nature of the contribution sources pursuant to Paragraph 4 of the PMA. VGC created the tracing of this account to demonstrate the transfer of funds into Plaintiff's 7191 account. *Tr. 1135:16-21.* As the entire account balance of $788.88 was marital at the time it was transferred to Plaintiff's Edward Jones 7191 in July 2012, said transfer is deemed a marital loan into 7191. *Ex. 1F(1)(g), Bate #8790 and Ex 1K, Schedule AC-7, P. 188, L. 52, Bate #27736.* The account was not in existence on December 31, 2013.

472. This Court adopts the VCG's methodologies and tracing analysis as it pertains to the Edward Jones 0484-1-8 account.

RETIREMENT ASSETS

473. VCG prepared a tracing analysis of Plaintiff's claimed separate property in her three retirement accounts as well as Defendant's Roth IRA 7583. The process used for tracing the retirement accounts is similar to the process used for tracing the investment accounts as referenced above and will not be restated here. VCG obtained the account statements, entered all of the data into their tracing model and then tied out the transfers that were going in between the accounts to ascertain from where various deposits originated. Appreciation as well as losses and account fees as it relates to Plaintiff's separate property was allocated as separate pursuant to Paragraph 2C of the PMA. *Tr. 1136:2-23.* There were years that significant losses occurred in Plaintiff's separate property. See *Ex. 1K, Schedule AC-4, P. 246, Ll. 576, 585, Bate #246 & P. 247, L. 604, Bate #27795.* The separate tracing report treats any contribution of marital funds to separate assets as a loan from the marital estate. *Ex. 1K, Schedule AC-4, Bate #27564-27565.*

474. The Defendant acknowledged at trial *(Tr. 750:1-7)*, and this Court finds, the monies from STI, Inc. that went into Plaintiff's IRA's are her separate property pursuant to Paragraph 2C and 2D of the PMA.

PLAINTIFF'S EDWARD JONES IRA 0592

Ex. 1 K, Schedule AC-3, Bate #27737 & Ex. 1G(1), Bate #12676

475. Plaintiff owned Edward Jones IRA 0085-1-9 prior to the marriage and the account was listed as her separate property on Exhibit B of the PMA. *Exhibit 1A(1).* The balance in the account prior to the parties' marriage was $7,373.20. *Exhibit 1G(1)(a), Bate #11724.* On April 13, 1993, Plaintiff contributed $2,000 to the account from her separate property funds in her Edward Jones 4012. *Exhibit 1G(1)(a), Bate #11729. Ex. 1K, Schedule AC-3, P. 189, L. 2, Bate #27737.*

476. The funds in this account were transferred to Plaintiff's Edward Jones IRA 0592-1-1 on April 15, 1993. *Exhibit 1G(1)(a), Bate #11729.* This IRA eventually became 0592-1-9 and is still in existence. *Ex. 1K, Schedule AC-3, Bate #27737.*

477. Throughout the history of the account, only the following marital contributions were made:

March 31, 1994	$200.00	*Ex. 1K, Schedule AC-1, P. 191, L. 42*
April 17, 1995	$1,000	*Ex. 1K, Schedule AC-1, P. 192, L. 66*
December 22, 2006	$1,294.93	*Ex. 1K, Schedule AC-1, P. 210, L. 417*

The separate tracing report properly treats the above contributions as a marital loan pursuant to Paragraph 9F of the PMA.

478. Defendant acknowledged at trial that Plaintiff has a separate interest in her Edward Jones IRA 0592 and admitted that the entire account may be all separate. *Tr. 672:1-10.*

479. This Court adopts the VCG's methodologies and tracing analysis as it pertains to Plaintiff's Edward Jones IRA 0592. This Court finds the Plaintiff's Edward Jones IRA account is Plaintiffs' separate property with a marital loan therein. *Ex 1K, Schedule AC-3, P. 215, L. 519, Bate #27763 Tr. 1137: 4-13.*

PLAINTIFF'S EDWARD JONES TACO JOHN'S SIMPLE IRA 0314

Ex. 1 K, Schedule AC-4, Bate 27764 & Ex. 1G(2), Bate #13488

480. This is a Simple IRA account that was established in October 1997 with contributions from the TJPR Edward Jones 3388 account. *Exhibit 1G(2), Bate #12684.* As the initial contribution was entirely from Plaintiff's separate property, the IRA is Plaintiff's separate property pursuant to Paragraph 2C and 2D of the PMA. To the extent that contributions coming into this account originated from TJPR or STI, Inc. those contributions are Plaintiff's separate property. Pursuant to Paragraph 9F of the PMA, if deposits could not be identified as coming from Plaintiff's separate funds, those contributions are deemed a marital loan. For example, *See Ex. 1K, Schedule AC-4, P. 236, L. 373, Bate #27784.* Dividends and interest and gains and losses are allocated solely to separate property based on the fact this is a separate asset with a marital loan. *Tr. 1137 - 1138.*

481. Throughout the history of this IRA, very few marital contributions were made to this account. Plaintiff transferred the sum of $85,130.80 on April 5, 2010 to establish Taco John's Simple IRA account 7610-1-2. *Ex. 1G(3), Bate #13492 & Ex. 1 K, Schedule AC-4, P. 242, L. 507, Bate #27790.* Plaintiff also transferred the sum of $19,698.06 on October 24, 2013 to her Taco John's Simple IRA account 7610-1-2. *Ex. 1G(3), Bate #13604* and *Ex. 1 K, Schedule AC-4, P. 250, L. 658, Bate 27799.* As VCG treated Plaintiff's Taco John's Simple IRA 7610-1-2 as Plaintiff's separate asset, this Court adopts VCG's methodology that transfers between the 0314 IRA and the 7610 IRA are separate-to-separate events and therefore, only Plaintiff's separate funds in the 0314 IRA were allocated toward the transfers into the 7610 IRA.

482. Defendant acknowledged at trial Plaintiff had a separate interest in her Taco John's Simple IRA 0314 although he did not quantify the value of the interest. *Tr. 673:6.*

483. This Court adopts the VCG's methodologies and tracing analysis as it pertains to Plaintiff's Edward Jones Taco John's Simple IRA 0314. This Court also finds the Plaintiff's Edward Jones IRA account is Plaintiffs' separate property with a marital loan. *Ex 1K, Schedule AC-3, P. 250, L. 667, Bate #27798 Tr. 1139.*

PLAINTIFF'S EDWARD JONES TACO JOHN'S SIMPLE IRA 7610
Ex. 1 K, Schedule AC-5, Bate 27799 & Ex. 1G(3), Bate #13610

484. This Simple IRA was established in March 2010 with funds transferred from Simple IRA 0314-1-6 as referenced above. As VCG treated Plaintiff's Taco John's Simple IRA 7610-1-2 as Plaintiff's separate asset, this Court adopts VCG's methodology that transfers between the 0314 IRA and the 7610 IRA are separate-to-separate events and therefore, only Plaintiff's separate funds in 0314 were allocated toward the transfers into 7610. The sum of $85,130.80 was transferred from IRA 0314 on April 5, 2010 (*Ex. 1G(3), Bate #13492)* and an additional sum of $19,698.06 was transferred from IRA 0314 during September/October 2013. *Ex. 1G(3), Bate #13604.* Dividends and interest and gains and losses are allocated solely to separate property pursuant to Paragraph 2C of the PMA. The only marital funds contributed to this account was in the amount of $1,090 on June 19, 2012 *Ex. 1 K, Schedule AC-5, P. 254, L. 80, Bate 27802* and $402.98 on November 15, 2013 *Ex. 1 K, Schedule AC-5, P. 256, L. 137, Bate 27804* thereby creating the marital loan. Limited activity occurred in this Simple IRA account.

485. Defendant acknowledged Plaintiff had a separate interest in her Taco John's Simple IRA 7610, although he did not quantify the value of her interest. *Tr. 673:7-103.*

486. This Court adopts the VCG's methodologies and tracing analysis as it pertains to Plaintiff's Edward Jones Taco John's Simple IRA 7610. This Court also finds the Plaintiff's Simple IRA is Plaintiff's separate property with a marital loan. *Ex 1K, Schedule AC-5, P. 256, L. 145, Bate #27804, Tr. 1140: 8-11.*

DEFENDANT'S EDWARD JONES ROTH IRA 7583
Ex. 1 K, Schedule DC-2, Bate 27805 & Ex. 1G(4), Bate #13652

487. This traditional IRA account was established on February 22, 2010 with contributions from the Joint Edward Jones 7183 joint account and an unknown account 4388-5-3. The account was later converted to a Roth IRA. The Roth IRA has both marital and separate property components based on the nature of the contribution sources. *See* Paragraphs 4, 5 and 9C of the PMA. As this account was created with both marital and Plaintiff's separate funds from #7183, the standard methodology was used of drawing contributions pro rata from the joint

#7183 account at the time the account was established and/or when transfers were made. Dividends and interest and gains and losses are allocated pro rata based on the separate percentage in the account pursuant to Paragraph 2C of the PMA. *Ex. 1K, P. 17, Bate #27565 & Tr. 1140-1141.*

488. The original contribution on February 22, 2010 in the amount of $6,000 was transferred from the parties joint Edward Jones 7183. This Court adopts VCG's pro rata approach to apply the percentage of separate and marital funds that comprise the previous month's ending balance in 7183 to the transfer. Plaintiff's separate property interest in the prior month's ending balance of 7183 was 11.7%. *Ex. 1K, Schedule JT-1, P. 130, L. 1077, Bate #27678.* Therefore, of the $6,000 transferred, 11.7% (or $703.56) is separate and the remaining $5,296.44 is marital. *Exhibit 1K, Schedule DC-1, P. 257, L. 1, Bate #27805.* An additional transfer was made to this IRA from the 7183 account in the amount of $6,000 on March 8, 2010. Based upon the pro rata approach, Plaintiff's separate interest in the transferred funds is $905.21. *Ex. 1 K, Schedule DC-2,P. 257, L. 1, 6, Bate #27805.*

489. Defendant acknowledged at trial Plaintiff had a separate interest in his Edward Jones Roth IRA 7583, although he did not quantify the value of the interest. *Tr. 673:11-13.*

490. This Court adopts the VCG's methodologies and tracing analysis as it pertains to Defendant's Edward Jones Roth IRA 7583. This Court also finds the Defendant's Roth IRA account is a combination of both Plaintiffs' separate property and marital property. *Ex 1K, Schedule DC-2, P. 260, L. 86, Bate #27808, Tr. 1141: 20-21.*

DEFENDANT'S CLAIMED SEPARATE PROPERTY

491. Defendant did not have any retirement benefits at the time of the marriage according to the PMA. Defendant claimed at trial that he failed to remember at the time of the PMA that he did have a retirement benefit with Edward Jones prior to the marriage. However, according to Defendant's list of assets and liabilities in his divorce from Teresa Charlson, he had no retirement assets. *Ex. 1A(4), Bate #23.*

492. Defendant was served with formal discovery requests in the Minnesota divorce matter. Defendant was asked to disclose what assets he brought into the marriage. He did not disclose a retirement or a profit sharing account with Edward Jones despite the fact he is an employee of Edward Jones. *Ex. 1C(1) Bate #101.* Defendant was also served with a Request for Admissions in the Minnesota matter. Defendant was asked to disclose if he had assets at the time of the PMA. Defendant responded that he did not understand the legal ramifications of failing to detail his assets. Again, he failed to mention any type of retirement account or profit sharing account in his response dated September 27, 2013. *Ex. 1C(2), Bates #156-157.* Defendant stated in his response that he denied understanding the legal consequences of the PMA and that the purpose of the PMA was to maintain Plaintiff's assets for her children and herself. According to Mr. Michael McKnight's correspondence dated January 25, 1993, Defendant's attorney for the PMA, *(Ex. 1C(2), Bate #156 & #163)* Defendant understood the PMA and legal consequences of the agreement when he signed as this Court so concluded in its Order on Validity of Pre-Marriage Agreement. Defendant was not credible during his testimony.

493. The parties' case has been in litigation in the State of Minnesota since June 2012 and in the State of South Dakota since early 2014. Defendant had ample time to gather his account statements and provide a tracing of retirement assets. He failed to do so. Plaintiff was able to obtain copies of her Edward Jones retirement statements from as far back as 1992. Defendant, who is an Edward Jones Agent and arguably in a better position to obtain his Edward Jones account statements than is Plaintiff, did not even provide a statement regarding the value of his retirement accounts as of the date of marriage or even as of December 31, 2013, nor did he provide a tracing of any claimed separate retirement assets. This court previously found the Defendant had a zero net worth at the time the PMA was signed. *See Finding of Fact and Conclusions of Law filed August 5, 2014, Finding 42.*

DEFENDANT'S EDWARD JONES RETIREMENT PLAN &
DEFENDANT'S EDWARD JONES PROFIT SHARING PLAN
Ex. D1-6, Bate #108-113

494. The trial deposition of Alicia Brader was taken on April 10, 2015. While Ms. Brader claimed to be the custodian of records for Edward Jones, Ms. Brader did not independently review any records regarding Defendant's claimed retirement accounts. Ms. Brader allegedly obtained a letter and screen shots of a computer screen from an unknown Edward Jones attorney. *D. Brader Tr. 12:19.* She did not have the ability to print any account information from 1992. *D. Brader Tr. 14-15.* She did not have knowledge whether a profit sharing account for Defendant was created prior to the marriage. Ms. Brader's testimony was not sufficient to provide foundation for the underlying statements. Additionally, the information is contrary to Defendant's testimony at the earlier trial on July 8, 2014. Defendant failed to offer the evidence at the earlier trial or timely at this trial, even though he was and still is employed at Edward Jones. Therefore, this Court finds none of Defendant's alleged underlying statements regarding the existence of any retirement benefits with Edward Jones prior to the parties' marriage on January 23, 1993 are reliable and the Court places no weight on Ms. Brader's testimony, and strikes the trial exhibit. *Ex. D16, Bate #108-113.*

BUSINESS INTERESTS

495. The parties acquired the following business interests during their marriage:

a. Defendant's Edward Jones Limited Partnership.

b. Defendant's Edward Jones General Partnership. (Defendant sold in January 2013 allegedly in violation of the Minnesota Summons restraining provisions) *Ex. 1H(7)(k), Bate #16621 and Tr. 679-680.*

c. Defendant's Edward Jones Subordinated Limited Partnership.

d. Superior Financial Group, LLC (commercial building). Defendant's interest is 33.3%.

e. BDUBS, Inc. (Buffalo Wild Wings in Rapid City). Defendant's interest is 16.67%.

f. Sioux Falls Massage Envy, Inc. (hereinafter referred to as "SFME"). Defendant's interest is 75%.

g. Massage Envy Rogers (commonly referred to as "ME Rogers"). Defendant's interest is 25%.

h. RCME, LLC (Rapid City Massage Envy). This is a non-operating corporation.

i. Innovative Enterprises of Rochester, LLC. This is a non-operating corporation.

496. VCG, Plaintiff's experts, prepared a report tracing Plaintiff's separate funds into the acquisition of the parties' business interests. VCG used commonly accepted tracing methodologies of direct tracing and pro rata tracing. The businesses acquired during the marriage were considered by VCG to have both marital and separate property funds. VCG applied the same methodologies to the tracing of separate property to the businesses interests as they did with the parties' investment and retirement accounts referenced above.

497. Pursuant to VCG's report of March 30, 2015, *(Exhibit 1K)* if Plaintiff transferred or deposited separate funds toward the purchase of an asset, and it is on the same day or close in time to the transaction, VCG tied those two events together and directly traced those funds from one asset to another using direct tracing. *Tr. 954:19-25.* If VCG was not able to tie-out a purchase/withdrawal through direct tracing, they applied the pro rata approach. *Tr. 955:3-10.*

498. Plaintiff has traced her separate property interests into a number of business interests discussed below and in addition, marital property was contributed toward some of Plaintiff's separate property, thereby creating a marital loan in her separate property pursuant to Paragraph 9F of the PMA.

EDWARD JONES LIMITED PARTNERSHIP INTEREST
Ex. 1 K, Schedule B-1, P. 262, Bate #27810

499. As a result of Defendant being employed as a financial advisor with Edward Jones, he had opportunities to purchase interests in The Jones Financial Companies, LLLP. During the marriage, the parties' purchased a limited partnership interest on five different occasions. Plaintiff's experts traced the purchases and the use of Plaintiff's separate funds toward those purchases. In doing so, Plaintiff's experts reviewed the partnership agreement, the capital history and the partnership year-end statements for 2008 through 2013. *Ex. 1H(1)(a-c), Bate #13657-1375. Tr. 1143 & Ex. 1K, P. 8, Bate #27556.* A 25% cash payment was required for

each purchase and the remaining 75% of the purchase was financed through The Jones Financial Companies LLLP.

500. The first purchase of interest was on November 1, 1995 for $20,000. *Ex. 1H(1)(b), Bate #13703.* The first purchase was made with a 25% cash down payment of $5,000 and The Jones Financial Companies, LLLP, financed the remaining $15,000 or 75%. The sum of $5,000 was withdrawn from the cash portion of the parties' joint Edward Jones 7183 investment account on October 30, 1995. The cash balance in 7183 was $0 at the time of the withdrawal for the purchase of the limited partnership, which resulted in the cash balance having a negative $5,000 balance as of October 31, 1995. *Ex. 1F(1)(b), Bate #9014.* On November 1, 1995, Plaintiff transferred $5,000 from her separate Edward Jones 7191 account into 7183 to cover the $5,000 Limited Partnership down payment. This payment, originating from Plaintiff's Edward Jones 7191 account, is a direct tracing of her separate funds. *Tr. 1071.*

501. Defendant argued there were sufficient funds in the 7183 account at the time of the purchase of the Limited Partnership to fund the $5,000 cash purchase price without Plaintiff's deposit of her separate funds. Defendant was using 7183 investment account at that time to pay his spousal maintenance and child support obligations to his former wife, Teresa Charlson, as well as to pay for Edward Jones business expenses. But for Plaintiff's transfer of $5,000 from her separate 7191 account, the 7183 account would not have had sufficient funds to cover the $5,000 down payment for the purchase of the limited partnership interest.

502. This Court finds Plaintiff's separate property purchased the Edward Jones Limited Partnership interest of $5,000 on November 1, 1995. *Ex. 1K, Schedule B-1, P. 262, L. 1, Bate #27810.*

503. A second purchase of interest occurred on July 31, 1998 in the amount of $16,800. Similar to the first purchase, the cash down payment was $4,000 and The Jones Financial Companies financed the remaining 75% in the amount of $12,800. The $4,000 cash down payment was paid from 7183. At the time of the cash payment, Plaintiff had separate funds in the 7183 account. VCG followed the methodology pulling a pro rate share of separate

and marital funds toward the purchase of the second interest. *Ex. 1K, Schedule B-1, P. 262, L. 5, Bate #27810.*

504. The third purchase of interest occurred on August 25, 2000 in the amount of $46,000. The 25% cash down payment was $11,500 and the remaining 75% was financed by The Jones Financial Companies, LLLP in the amount of $34,500. The $11,500 cash down payment was paid from 7183. At the time of the cash payment, Plaintiff had separate funds in 7183. VCG followed the methodology pulling a pro rata share of separate and marital funds toward the purchase of the third interest. *Ex. 1K, Schedule B-1, P. 262, L. 9, Bate #27810.*

505. The fourth purchase of interest occurred on January 2, 2007 in the amount of $95,000. The cash down payment was $23,750 and the remaining 75% was financed by The Jones Financial Companies, LLLP in the amount of $71,250. The $23,750 cash down payment was paid from 7183. At the time of the cash payment, Plaintiff had separate funds in 7183. VCG followed the methodology pulling a pro rata share of separate and marital funds toward the purchase of the fourth interest. *Ex. 1K, Schedule B-1, P. 267, L. 72, Bate #27815*

506. A fifth purchase of interest occurred on January 3, 2011 in the amount of $59,000. The cash down payment was $14,750 and the remaining 75% was financed by The Jones Financial Companies, LLLP in the amount of $44,250. The $14,750 cash down payment was paid from #7183. At the time of the cash payment, Plaintiff had separate funds in 7183. VCG followed the methodology pulling a pro rata share of separate and marital funds toward the purchase of the fifth interest. *Ex. 1K, Schedule B-1, P. 271, L. 123, Bate #27819.*

507. Upon each purchase of interest, each limited partner is paid 7.5% of his capital contribution annually in the form of guaranteed payments. Limited partners are also paid at least annually a percentage of net income. VCG applied the guaranteed payments and net income first to Defendant's loan balance. Once the loans were repaid, Defendant received cash distributions. Guaranteed payments were disbursed on a monthly basis. Net income distributions were made in October for the current year and February for the previous year. Plaintiff's experts allocated guaranteed payments pro rata based on the percentage of separate and marital funds used for

capital contributions from 7183. Distributions of net income were considered entirely marital. *Ex. 1K, P. 8, Bate #27556.* Said methodology follows the contract terms in the PMA. *Ex. 1 K, Bate #27556*

508. The value of the Charlsons' capital contributions was $236,800 as of December 31, 2013. *Ex. 1H(1)(b,) Bate #13703.* This is also the value of the business. This Court adopts VCG's methodologies and tracing analysis as it pertains to the Edward Jones Limited Partnership. The business is a combination of Plaintiff's separate property and marital property. *Ex. 1K, Schedule B-1, P. 273, L. 165, Bate #27821. Tr. 1148:20-23.*

EDWARD JONES GENERAL PARTNERSHIP INTEREST
Ex. 1K, Schedule B-2, P. 275, Bate #27823

509. During the marriage, the parties' purchased a General Partnership interest on two different occasions. Plaintiff's experts traced the use of Plaintiff's separate funds toward those purchases. In doing so, VCG reviewed the Edward Jones Partnership Agreement, the financing documents regarding the terms of the transactions and the profit distribution statements. *Ex. 1H(2)-(3) & Tr. 1149.*

510. The first General Partnership interest in The Jones Financial Companies, LLLP interest was purchased on January 27, 2012 for $289,450. The first purchase required 25% cash down payment with the remaining 75% financed by The Jones Financial Companies. The cash down payment was $72,375 and the remaining 75% was financed by The Jones Financial Companies, LLLP in the amount of $217,075. The $72,375 cash down payment was paid from 7183. At the time of the cash payment, Plaintiff had separate funds in 7183. VCG followed the methodology pulling a pro-rata share of separate and marital funds toward the purchase of the first interest. *Ex. 1K, Schedule B-2, P. 275, L. 1, Bate #27823.*

511. Defendant purchased an additional General Partnership interest on January 1, 2013 for $106,258 which was 100% financed by The Jones Financial Companies. *Ex. 1K, Schedule B-2, P. 276, L. 19, Bate #27824.*

512. The General Partners received distributions of up to 8% of net income remaining after payments to the Limited Partners and the Subordinated Partners. A sum of 20%-30% of the remaining net income is retained by the Partnership as capital credited to the General Partners' capital accounts. The balance of the net income is distributed to the General Partners based on their ownership percentages. *Ex. 1K, P. 9, Bate #27557.*

513. In March 2013, after the commencement of the Minnesota divorce action, Defendant sold his General Partnership interest for $429,230, which was used to pay off his remaining loans in the amount of $287,527. As noted above, he sold this General Partnership interest allegedly in violation of the Minnesota restraining provisions, *Ex. 1H(2), Bate #13716.* Defendant did not inform Plaintiff of the sale nor did he seek court permission for the sale. The sum of $100,000 was used to purchase the Subordinated Partnership interest referenced below. Defendant put the sales proceeds of $41,703 into his own Edward Jones account and failed to inform Plaintiff of of the placement of said proceeds. *Tr. 679-682. Ex. 1F(3), Bate #11136*

514. VCG considered distributions and retention of net income to be entirely marital. The sale proceeds were allocated pro-rata based on the percentage of separate and marital funds used for the capital contributions. *Ex. 1A(1), Paragraphs 2C & 2D. Ex. 1K, P. 9, Bate #27557.*

515. This Court adopts VCG's methodology and tracing analysis as it pertains to the Edward Jones General Partnership when it was sold on March 15, 2013 is $11,087, or 11.1%. Said separate property was used to purchase the Edward Jones Subordinated Limited Partnership interest described below. *Ex. 1K, Schedule B-2, P. 276, L. 30, Bate #27824. Tr. 1150:20.*

516. On March 19, 2013 when Defendant sold his General Partnership interest, the sale proceeds of $41,703 was transferred to his individual 7272. These funds contained a portion of Plaintiff's separate funds based on the pro rata methodology. Plaintiff had a separate interest in the sale proceeds and the transfer of funds to Defendant's individual 7272 created, in part, Plaintiff's separate interest in 7272. *Ex. 1K, Schedule B-2, P. 276, L. 31, Bate #27824.*

EDWARD JONES SUBORDINATED LIMITED PARTNERSHIP INTEREST
Ex. 1K, Schedule B-3, P. 277, Bate #27825

517. As reflected above, Defendant purchased a Subordinated Limited Partnership interest in The Jones Financial Companies, LLLP for $100,000 using the sale proceeds from his General Partnership interest. The value of Defendant's capital contribution was $100,000. This asset is considered to have both marital and separate property components based on the nature of the contribution sources. *Ex. 1K, Schedule B-3, P. 277, Bate #27825.* At the time of purchase, Plaintiff had a separate interest in the funds from the sale of the General Partnership interest as reflected above. VCG followed the methodology pulling a pro-rata share of separate and marital funds toward the purchase. *Ex. 1K, Schedule B-3, P. 277, L. 1, Bate #27825.*

518. The Subordinated Limited Partners are paid at least annually a percentage of income. The capital account balance at the beginning and end of the year do not change and all of the profits are fully distributed. VCG considered distributions and retention of net income to be entirely marital. *Ex. 1K, P. 9, Bate #27557. Tr. 1152.* The sale proceeds were allocated pro-rata based on the percentage of separate and marital funds used for the capital contributions. *Ex. 1A(1), Paragraphs 2C & 2D. Ex. 1K, P. 9, Bate #27557.* Said methodology follows the contract terms in the PMA.

519. The value of the Charlsons' capital contributions was $100,000 as of December 31, 2013. *Ex. 1H(3)(a)-(b), Bate #13754-13757.* This is also the value of the business. This Court adopts VCG's methodology and tracing analysis as it pertains to the Edward Jones Subordinated Limited Partnership. The business is a combination of Plaintiff's separate property and marital property. *Ex. 1K, Schedule B-3, P. 277, L. 12, Bate #27825. Tr. 1152:21-23.*

SUPERIOR FINANCIAL GROUP, LLC (33.33%) INTEREST
Ex. 1K, Schedule B-4, P. 278, Bate #27826

520. Superior Financial Group, LLC is a real estate holding company, which owns commercial property in Rochester, Minnesota. On October 31, 2005, the parties purchased a 25% ownership interest for $10,000. Since the company was established in 2005, the parties have made additional capital contributions, resulting in an increased ownership interest to 33.3% as of December 31, 2013. There have been minimal distributions since inception. The asset is

considered to have both marital and separate property components based on the nature of the contribution sources. *Ex. 1K, P. 10, Bate #27558 and Schedule B-4, P. 278, Bate #27826.*

521. Plaintiff's experts reviewed the financial records for Superior Financial and examined the K-1's to determine how much capital was going into this business and the distributions, if any, were then matched up to those amounts in other accounts. *Ex. 1H(4)(f), Bate #14430.*

522. The parties paid $10,000 cash for an equity interest in Superior Financial on October 31, 2005. The payment originated from the parties' joint 7183 account. At the time of the cash payment, Plaintiff had separate funds in 7183. VCG followed the methodology pulling a pro-rata share of separate and marital funds toward the purchase of the interest. *Ex. 1K, Schedule B-4, P. 278, L. 2, Bate #27826.*

523. The parties' share of net income and losses and return of any partner capital was allocated pro rata based on the percentage of separate and marital capital contributions, due to the passive nature of the investment. *Ex. 1A(1), Paragraph 2C.* Additional capital contributions and return of any contributions was likewise allocated pro-rata. Plaintiff's experts were unable to trace all of the return of contributions. *Tr. 1154.*

524. Plaintiff's expert report used a value of $40,000 for the Charlsons' interest in Superior Financial Group. Subsequent to the report, the parties agreed the value was $30,000, thereby changing Plaintiff's separate interest. This Court adopts VCG's methodology and tracing analysis as it pertains the Superior Financial Group, LLC. The business is a combination of Plaintiff's separate property and marital property. *Exhibit 1K, Schedule B-4, p. 279, L. 33, Bate #27827. Tr. 1157:18-20*

INNOVATIVE ENTERPRISES OF ROCHESTER, LLC
Ex. 1K, Schedule B-5, P. 280, Bate #27828

525. Innovative Enterprises of Rochester, LLC was established by the owners of Superior Financial Group, LLC on December 28, 2009. During 2010 and 2011 the partners made capital contributions, which then paid rent to Superior Financial Group, LLC in order to cover

the costs of a vacant unit in the building. Once the unit was rented, the capital contributions were no longer required.

526. The parties' share of distributions, net income and losses and return of any partner capital was allocated pro rata based on the percentage of separate and marital capital contributions, due to the passive nature of the investment. *Ex. 1A(1), Paragraph 2C.* Additional capital contributions and return of any contributions was likewise allocated pro-rata. Plaintiff's experts were unable to trace $5,850 in partner capital contributions returned to Defendant by Superior Financial Group, LLC. VCG was unable to trace and confirm that $1,700 in transfers was paid to Innovative Enterprises of Rochester, LLC as claimed by Defendant. *Ex. 1K, P. 10-11, Bate #27558 – 27559. Tr. 1155.*

527. The first payment was made on January 12, 2010 in the amount of $1,735 from account 7183. A series of payments throughout 2010 and 2011 continued in the same monthly amount of $1,735. At the time of the payments, Plaintiff had separate funds in 7183. VCG followed the methodology pulling a pro-rata share of separate and marital funds toward the payments. *Ex. 1K, Schedule B-5, P. 280, Ll. 1-20, Bate #27828.* The percentage of separate funds and marital funds differs for each payment based on the different percentages in 7183 at the time the payments were made. *Tr. 1155.*

528. As of December 31, 2013 Innovative Enterprises of Rochester, LLC was inactive. Plaintiff has no separate value interest in this entity. The asset had no value as of December 31, 2013. *Ex. 1K, P. 10, Bate #27558. Ex. 1H(5)(a)–(j), Bate #14743-14798.* VCG traced this business and the transactions because payments originated from 7183 and were transferred to the Innovative account 3421. Additionally, a small percentage of Plaintiff's separate funds were distributed to Superior Financial Group, thereby creating a further separate interest in that business. *Ex. 1K, Schedule B-5, P. 280, L. 26, Bate #27828. Tr. 1154-1156.*

BDUBS, LLC (BUFFALO WILD WINGS RAPID CITY) (16.67%) INTEREST
Ex. 1K, Schedule B-6, P. 282, Bate #27830

529. The organizational structure of this business was discussed above and will not be

restated. The parties made capital contributions at various times to the business beginning in 2009. They have also received distributions since August 2010. Based on the nature of the contribution sources the Charlsons' interest in this asset has both marital and separate property components. Plaintiff's experts looked at tax returns and general ledgers of this business when preparing the tracing analysis. *Tr. 1158:13-15.*

530. The parties began making capital contributions for the purchase of their interest in BDUBS in 2009. As noted in the findings addressing the investment accounts above, the first payment was made on June 25, 2009 in the amount of $15,000. Said payment was issued from 7183. At the time of the cash payment, Plaintiff had separate funds in 7183. VCG followed the methodology pulling a pro rata share of separate and marital funds toward the capital contribution. *Ex. 1K, Schedule B-6, P. 282, L. 2, Bate #27830.*

531. The next contribution was made on September 10, 2009 in the amount of $75,000. Said payment was issued from account 7183. VCG followed the methodology pulling a pro rata share of separate and marital funds toward the capital contribution. *Ex. 1K, Schedule B-6, P. 282, L. 3, Bate #27830.*

532. The third payment was made on October 31, 2009 in the amount of $35,000. Said payment was issued from account 7183. VCG followed the methodology pulling a pro rata share of separate and marital funds toward the capital contribution. *Ex. 1K, Schedule B-6, P. 282, L.5, Bate #27830.*

533. The parties made capital contributions of $125,000 in 2009. There were no distributions made in that year. The parties made only one other capital contribution in the amount of $136,000 on September 2, 2011. Said payment was issued from 7183. VCG followed the methodology pulling a pro rata share of separate and marital funds toward the capital contribution. *Ex. 1K, Schedule B-6, P. 283, L.23, Bate #27831.*

534. Beginning on August 18, 2010 the parties began receiving monthly distributions. The distributions varied every month. Said payments started at $4,000 a month and increased thereafter with the highest monthly distribution being $14,500. *Ex. 1K, Schedule B-6, Pp. 282-*

285, Bate #27830-27833. All but two distributions were deposited into 7183; a $4,000 distribution on June 23, 2011 was not traced and the whereabouts are unknown (*Ex. 1K, Schedule B-6, P. 283, L. 20, Bate #27831);* and one deposit went into the Edward Jones 6236 tax escrow account. *Ex. 1K, Schedule B-6, P. 284, L. 37, Bate #27832.*

535. The total capital contributions made to BDUBS in 2009 and 2010 was $261,000 with total distributions during this same period of time at $251,600. The parties paid tax on those distributions. On a gross basis after four years of operations, the parties had not yet recovered their original investment in BDUBS. *Tr. 1158:21-25 & 1159:1-13.*

536. The parties' share of net income and losses was allocated pro rata based on the percentage of separate and marital capital contributions, due to the passive nature of the investment. *Ex. 1A(1), Paragraph 2C.* Additional capital contributions and distributions were likewise allocated pro-rata. This methodology is consistent with the contract terms of the PMA and generally accepted tracing methodology. *Ex. 1A(1), Paragraphs 2, 5, and 9C. Exhibit 1K, Schedule B-6, P. 283, Bate #27831.*

537. The value of the Charlsons' interest in BDUBS as stated above is $160,000 as of December 31, 2013. *Ex. 1E(1), Bate #1854.* This Court adopts VCG's methodology and tracing analysis as it pertains to BDUBS, LLC. The business is a combination of Plaintiff's separate property and marital property. *Ex. 1K, Schedule B-6, P. 285, L. 57, Bate 27833 and Tr. 1159.*

SFME, INC. (SIOUX FALLS MASSAGE ENVY) (75%) INTEREST
Ex. 1K, Schedule B-7, P. 286, Bate #27834

538. This business was incorporated in the State of South Dakota as an S-Corporation on January 18, 2011. The company owns and operates the Massage Envy Spa franchise in Sioux Falls, South Dakota. The business operates subject to a Franchise Agreement dated February 1, 2011. There are four shareholders in the business. Defendant is the 75% shareholder and three of Defendant's personal friends are the other minority shareholders, each having an 8.33% ownership interest, namely: Darren Groteboer, Lonny Hickey and Todd Robertson. The parties agreed the business value of the Charlsons' 75% interest is $1,220,000 as of December 31, 2013.

539. Defendant was designated as the shareholder because he could receive a $6,000 discount on the franchise fee for being a veteran. *Tr. 311:20.* Plaintiff was instrumental in the set up and opening of the business. Plaintiff has extensive experience in starting and operating businesses that are franchises. Defendant's daughter, Jenny Devine, has managed SFME since it opened. However, Ms. Devine had no previous experience owning or managing a business. Plaintiff set up the office, inventoried the products and lived with Ms. Devine during the set up of the company. Plaintiff talked with the contractors during the build out, had to deal with the electrical issues and interviewed the employees and massage therapists. *Tr. 313-314.* Plaintiff and Ms. Devine attended the required franchise training in Scottsdale, Arizona. Defendant did not attend. *Tr. 315.* Plaintiff attended the franchisees' annual convention and was treated as a franchisee by the regional operations manager. *Tr. 317. Ex. 1H(7)(e), Bate #16517.*

540. Plaintiff was instrumental in the establishment of the business. For example, all but one check written from SFME's Home Federal Checking 5344 was signed by Plaintiff. *Ex. 1E(3) Supporting Documents (i), Bate #4501, #4504, #4507, #4510.* SFME was intended to be Plaintiff's business. *Tr. 317-318.* SFME opened on July 29, 2011.

541. VCG reviewed the corporate documents for SFME including the general ledgers, tax returns and bank statements. They also reviewed the bank loan histories from First Premier Bank. *Tr. 1171.* VCG traced Plaintiff's separate funds into the acquisition of SFME as well as traced her share of the distributions from said business.

542. Plaintiff learned the signing of the SFME franchise agreement was done in a manner contrary to Plaintiff's wishes. The parties were vacationing in Cabo San Lucas, Mexico in January 2011. During that trip, Plaintiff discovered Defendant was having multiple affairs. *Tr. 318.* As a result, the parties had a disagreement regarding the franchise papers. Plaintiff indicated she wanted her name on the franchise in lieu of Defendant's name. *Tr. 319.* Defendant left Plaintiff in Cabo San Lucas on January 31, 2011, telling Plaintiff he had an Edward Jones regional meeting to attend in Chicago. *Tr. 319:11-12.* Instead, unbeknownst to Plaintiff, Defendant flew back to Minneapolis, Minnesota on January 31, 2011. This is confirmed by

Defendant's credit card transaction showing airport charges at the Minneapolis airport on January 31, 2011. *Ex. 14, P. 2.* The other credit card transactions indicate Plaintiff remained in Cabo San Lucas. Defendant and his other shareholder friends signed the franchise agreement and the Guaranty and Assumption of Obligations for SFME on February 1, 2011. *Ex. 1H(7)(d), Bate #16467 & #16516. See also Ex. 15.*

543. The above-referenced document purports to have the shareholder wives' signatures; however, Plaintiff did not sign the document and it is not her signature. *Tr. 321:12-17.* The signatures of the other wives also appear to be different than their notarized signatures on the Guaranty and Assumption of Obligations regarding ME Rogers. *Ex. 1H(8)(g), Bate #17032 & #17033.* Defendant admitted the signatures were different. *Tr. 697:20-25.* The trial deposition of Todd Robertson took place on September 23, 2015. Mr. Robertson acknowledged that he routinely signs his wife's name on documents. *Tr. D. Robertson Pp. 21 & 58.* It is clear to this Court, Defendant and the other shareholders signed their wives' names to the SFME document. When Defendant did so, he obligated Plaintiff to a debt in violation of Paragraph 8C of the PMA.

544. Despite the argument between the parties in January 2011, they continued to live together, work on their marriage and continued to invest and make substantial contributions in various other business interests.

545. On January 26, 2011, while Plaintiff was in Cabo San Lucas, Mexico, the sum of $39,000 was transferred from the parties' 7183 account to their Home Federal 2730 account (*Ex. 1F(6), Bate #11640)* and then into SFME Home Federal 5344 account to pay the Massage Envy Franchise Fee. *Ex. 1E(3) Supporting Documents (i), Bate #4496.* At the time of the cash payment, Plaintiff had separate funds in 7183 (the originating account). This Court adopts VCG's pro rata approach to apply a percentage of separate and marital funds from the originating account (7183) and directly tying the same percentage of the transferred funds into Home Federal 2730, then into SFME Home Federal 5344, and into the payment of SFME's Massage Envy franchise fee. *Ex. 1K, Schedule B-7, P. 286, L. 1, Bate #27834.*

546. On April 4, 2011, check #1513 in the amount of $7,500 was written from account 7183 to the SFME Home Federal checking 5344. *Ex. 1F(2)(b), Bate #10770.* At the time of the payment, Plaintiff had separate funds in 7183. VCG followed the methodology pulling a pro-rata share of separate and marital funds toward check 1513. *Ex. 1K, Schedule B-7, P. 286, L. 2, Bate #27834.*

547. On September 1, 2011, check #1592 in the amount of $15,000 was written from account 7183. VCG tied the funds to a deposit on the same date of Plaintiff's TJPR Member Draw in the amount of $20,000. *Ex. 1F(2)(b), Bate #20827.* The entire $20,000 member draw deposited on September 1, 2011 is Plaintiff's separate property pursuant to Paragraph 2C and 2D of the PMA. *Tr. 1169-1170 & 1172.* This Court adopts VCG's direct tracing of check #1592 to Plaintiff's $20,000 TJPR member draw which occurred on the same day and therefore, the entire $15,000 capital contribution made on September 1, 2011 is Plaintiff's separate property pursuant to Paragraph 2D of the PMA. *Ex. 1K, Schedule B-7, P. 286, L. 3, Bate #27834.* A total of $61,500 was contributed to SFME in 2011 and of this amount, $28,805.50 came from Plaintiff's separate property funds. *Ex. 1K, Schedule B-7, P. 286, L. 4, Bate #27834.*

548. SFME took out lines of credit/loans from First Premier Bank in Sioux Falls. *Ex. 1H(7)(h), (i) & (j), Bate #16617-16620.* SFME was taking advances on loan #0001 to pay the interest payments on loan #0001 and monthly payments on loan #0002. *Ex. 1E(3) Supporting Documents (h), Bate #4468-#4477.* Plaintiff was concerned about this practice and could get a lower interest rate on her margin loan in her 7191 account. At the time she paid the balance remaining on First Premier Loan #0001 and Loan #0002 on April 3, 2012, the interest rate on her margin account in 7191 was 4.75%. *Ex. 1F(1)(e), Bate #8499.* The interest rate on Loan #0001 was 5%. *Ex. 1H(7)(h), Bate #16617.* The interest rate on Loan #0002 was 6.29%. *Ex. 1H(7)(i), Bate #16619.* She was also a guarantor on the SFME corporate loan. Plaintiff made a series of payments on the First Premier Bank loans as set forth below.

549. On February 22, 2012 Plaintiff paid $15,000 from her 7191 account directly to First Premier Bank Loan #0002 (interest rate 6.29%). At the time of said payment, Plaintiff had

sufficient cash in her 7191 account so as not to incur a margin loan. *Ex. 1F(2)(e), Bate #8483.* No marital loan existed in 7191 at the time of said payment. *Ex. 1K, Schedule AC-1, P. 73, L. 1040, Bate #27621.* Therefore, only Plaintiff's separate funds in 7191 were used toward the $15,000 payment. *Ex. 1K, Schedule B-7, P. 286, L. 5, Bate #27834.*

550. On March 2, 2012, Plaintiff paid $35,000 from her 7191 account directly to First Premier Bank Loan #0002 (interest rate 6.29%). Approximately two days prior to said $35,000 payment, on February 28, 2012, Plaintiff transferred $35,000 into 7191 from her individual Edward Jones 8486 account. *Ex. 1F(2)(e), Bate #8492 and Ex. 1 F (1) (f).* This Court adopts VCG's direct tracing methodology for this transaction whereby the same like percentage of Plaintiff's separate funds in 8486 (95.4%) transferred to 7191 on February 28, 2012 is allocated toward the $35,000 payment from 7191 on First Premier Loan #0002. *Ex. 1K, Schedule AC-1, P. 74, L. 1047, Bate #27622 and Ex. 1K, Schedule B-7, P. 286, L. 6, Bate #27834.* Due to the transfer of funds from 8486, there was sufficient cash in 7191 at the time of the payment to avoid a margin loan in the account. *Ex. 1F(2)(e), Bate #8493.*

551. On March 27, 2012, Plaintiff paid $30,000 from her 7191 account directly to First Premier Bank Loan #0002 (interest rate 6.29%). At the time of said payment, Plaintiff had sufficient cash in her 7191 account so as not to incur a margin loan. A small marital loan existed in 7191 when the payment was made. VCG followed the methodology to pay off the marital loan existing in 7191 at the time of $10,661.99. *Ex. 1K, Schedule AC-1, P. 74, L. 1050, Bate #27622.* The remaining $19,338.01 of said payment is Plaintiff's separate property. *Ex. 1K, Schedule B-7, P. 286, L. 7, Bate #27834.*

552. On April 3, 2012 Plaintiff paid $132,178.34 from her 7191 account directly to First Premier Bank Loan #0001 and Loan #0002, which triggered a margin loan in 7191 at 4.75%. *Ex. 1F(1)(e), Bate #8502.* At the time of said payment, no marital loan existed in 7191. *Ex. 1K, Schedule AC-1, P. 75, L. 1058, Bate #27623.* Therefore, only Plaintiff's separate funds in 7191 were used toward the entire payment. *Ex. 1K, Schedule B-7, P. 286, L. 8, Bate #27834.*

Plaintiff contributed separate property funds to SFME totaling $229,703. Her payments created Plaintiff's separate interest in SFME of 83.9%. *Ex. 1K, Schedule B-7, P. 286, L. 9, Bate #27834.*

553. Plaintiff paid off the bank loans over two months before Defendant commenced a divorce action in Minnesota in June 2012. Plaintiff also paid off the loans at a time when the parties were still involved in a sexual relationship. *Tr. 291:17-21 & 323:20-25.* Plaintiff had no knowledge at the time she paid off the bank loans as to how a separate tracing report would treat those bank payments. She believed SFME was her business and she was paying off debt on her business.

554. Shortly after Plaintiff paid off the corporate loans of SFME, the parties began receiving substantial distributions from the business. VCG allocated distributions based on the percentage of separate and marital funds used for the capital contributions (83.9%). *Ex. 1A(1), Paragraphs 2C & 2D. Ex. 1K, Schedule B-7, Pp. 286-287, Bate #27834-#27835.* Said methodology follows the contract terms in the PMA.

555. The transactions surrounding the payments on the bank loans were disputed at trial. Defendant's position that Plaintiff paid off the SFME loans in February, March and April 2012 to create a separate interest in SFME for purposes of a divorce is not plausible. While Defendant may have been secretly contemplating divorce at that time, Plaintiff was not as she believed the parties were still working on their marriage. *Tr. 291-292.* Defendant is the party who initiated the divorce action in Minnesota in June 2012. *Ex. 18.*

556. Plaintiff's payment on the business debts was done months prior to the service of the divorce. Furthermore, Plaintiff repeatedly testified and the court finds her testimony credible that she did not understand the expert tracing methodology of her expert report from VCG. *Tr. 251:10-13 & 252:21-25.* Defendant acknowledged during his cross-examination *(Tr. 869:13-19 & 872:19-24)* that Plaintiff would not have known about the tracing requirements to create a separate interest. Further, SFME was borrowing money just to pay the interest on the loans. *Ex. 1E(3) Supporting Documents (h), Bate #4468-#4477 & Tr. 873:13-19.* Plaintiff was a personal

guarantor on SFME's First Premier Bank loans and she had an interest in paying off those debts, which she considered as capital contributions.

557. Defendant testified he was moving in and out of the home in late 2011 and early 2012. *Tr. 820:4-10; 858-859.* Plaintiff testified the parties were working on their marriage during this period of time. *Tr. 468:18-20.* It defies logic that Plaintiff would invest substantial sums of money in the parties' joint businesses if she was contemplating a divorce. The parties were still working on joint business ventures during this time period. Her testimony that the parties were working on the marital relationship and having sexual relations is corroborated by Defendant's own testimony that he was moving in and out of the marital home.

558. Plaintiff considered her payments as capital contributions similar to how the parties had funded all of their other business interests. *Tr. 324:8 & Tr. 673-676.* Since Plaintiff perceived herself as the owner of the business, *(Tr. 479:19-22)* she was in the best position to determine the intention of her funds. Plaintiff's expert tracing analysis assumed the loan payments were capital contributions by Plaintiff.

559. Plaintiff was unaware of SFME's treatment of her payments as a shareholder loan until almost two years after Defendant commenced the divorce and Plaintiff was forced to subpoena the SFME records. *Ex. 1H(7)(m), Bate #16649-#16653.* The SFME general ledger indicates some of the shareholders contributions were initially categorized as shareholder loans. *Tr. 709-712.* A portion of those shareholder loans were later reclassified as capital contributions, however, none of Plaintiff's corporate debt payments were reclassified as capital contributions. *Ex. 1H(7)(a), Bate #15366-#15367; #15745; #16092-#16094.*

560. It is noteworthy the SFME general ledgers were printed on April 2, 2014, some 22 months after the divorce action was started. VCG also noted other accounting discrepancies in SFME. *Ex. 1K, P. 304-305, Bate #27852-#27853.* The shareholder loan balances reported on SFME tax returns and financial information contradicts First Premier Bank's loan history statements. VCG noted many payments and draws on the bank loans that were not recorded in

the financial records of SFME. *Tr. 1175-1176.* The characterization of the initial funding affects the value/percentage of Plaintiff's separate property claim.

561. At the time SFME was organized, there was an understanding with all shareholders that Defendant's daughter, Ms. Jenny Devine, would eventually purchase the other shareholders interest (remaining 25%) in SFME sometime prior to August 2014. The intent was for the business to be Plaintiff and Ms. Devine's business. *Tr. 312:12-18.* Defendant acknowledged there was an understanding that his daughter was to buy-out the other partners. *Tr. 733:15-20.* The minority shareholder, Todd Robertson, also acknowledged this fact. *D. Robertson Tr. 50-51.*

562. As part of the discovery process in the Minnesota dissolution matter, Plaintiff made a request for Defendant to produce all SFME financial documents, general ledgers and any Buy Sell Agreements regarding SFME. The District Court Judge issued an Order to Show Cause on Defendant's partner in SFME, Mr. Darren Groteboer, due to Mr. Groteboer's failure to respond to a Subpoena Ducus Tecum requesting records of SFME. *Ex. 1H(7)(m), Bate #16643.* The Subpoena included a request for any Buy Sell Agreements and accounting records such as general ledgers for SFME. Mr. Groteboer responded on May 9, 2014 with SFME's general ledgers and other financial documents, however, he responded he was not aware of the existence of a Buy Sell Agreement for SFME. *Ex. 1H(7)(m), Bate #16653.* Defendant testified in his affidavit of May 7, 2014 there were no such documents. *Ex. 1H(7)(l), Bate #16640.*

563. One month later, a "reaffirmed" Buy Sell Agreement was produced, which had been signed by all shareholders on June 4, 2014. Notably, this agreement appeared after the valuation date of December 31, 2013 established by the Minnesota Court and after previous discovery responses indicated no such document existed. The timing of the production of the Buy Sell Agreement, as well as the general ledgers, is suspect. Defendant claims the original Buy Sell was prepared in 2011 but he could not locate the original. Defendant claimed the shareholders also signed an Amended Buy Sell Agreement in June 2014. However, this Amended Buy Sell Agreement has no signature date. *Ex. 21 and Ex. 1H(7)(g), Bate #16599.* The

Amended Buy Sell Agreement was provided to Plaintiff's counsel in a letter dated September 2, 2014 via US Mail. *Ex. 21.* Said Buy Sell Agreement contradicts the intent to sell the 25% interest to Defendant's daughter.

564. Plaintiff's financial expert, Ms. Jennifer Loeffler, testified regarding the financial terms in the Amended Buy Sell Agreement. The Amended Buy Sell Agreement is designed so that Plaintiff would not be able to obtain an ownership interest in SFME as part of the parties' divorce. There were two articles in the first Buy Sell Agreement that were deleted and replaced in the Amended Buy Sell Agreement. Article 9 was replaced with similar but more specific language which allowed the remaining shareholders to buy out the interest of any shareholder whose change in marital status resulted in a transfer of shares. *Tr. 990:11-17.* Article 16 was deleted and replaced with a Put agreement, which allowed any shareholder that held less than a 20% interest to exercise a Put option that would force the majority shareholder to buy their interest at 8.333 percent of SFME corporations annual sales as measured by the 12 month sales figure immediately preceding the Put notice. *Tr. 991:5-11 and Ex. 1H(7)(g), Bate #16599.*

565. This equates to a price of $501,579 for the 25% minority shareholder interest based upon the 2013 figures. *Tr. 992:14-16.* However, the minority shareholders can buy out Defendant, the 75% shareholder, for the price of $286,211. *Tr. 991:21-25 & 992:1.* This Court finds the testimony surrounding the alleged Buy Sell Agreement not credible.

566. VCG issued an initial tracing report on August 29, 2014. *Ex. I.2, Bate #394-695.* After issuing the initial report, additional documents regarding SFME were produced by Defendant. *Tr. 957-958 and Exhibit 21.* VCG updated the report after the parties attempted to settle the matter in mediation in January 2015. *Tr. 959.* Mediation was not successful and the VCG updated report was completed on March 30, 2015. *Ex. 1K.*

567. The stipulated value of the Charlsons' interest in SFME is $1,220,000 as of December 31, 2013. This Court adopts VCG's methodology and tracing analysis as it pertains to SFME, Inc. The business is a combination of Plaintiff's separate property and marital property. *Exhibit 1K, Schedule B-7, P. 287, L. 41, Bate #27835 and Tr. 1174:3-4.*

ME ROGERS, INC. (ROGERS MASSAGE ENVY) (25%) INTEREST
Ex. 1K, Schedule B-8, P. 288, Bate #27836

568. This business was incorporated in the State of Minnesota as an S-Corporation on April 1, 2012. The company owns and operates a Massage Envy franchise in Rogers, Minnesota and is subject to a Franchise Agreement. The company has four shareholders, (the same four shareholders as SFME) with each having an equal ownership interest of 25%. Defendant is one of the four shareholders.

569. The parties contributed capital on December 5, 2011 in the amount of $10,000. Said payment was issued from 7183. VCG followed the methodology pulling a pro rata share of separate and marital funds toward the capital contribution. During the period reviewed by Plaintiff's financial expert, no distributions had been paid to the Charlsons. The original capital contribution has a marital and separate component based on the contribution source. *Ex. 1K, Schedule B-8, P. 288, Bate #27836.*

570. Plaintiff made a loan payment of $10,000 to the Home Federal Bank loan for ME Rogers on April 25, 2012, *(Ex. 1H(8)(h), Bate #17043)* after Defendant told her they needed to make their 25% capital contribution. *Tr. 292:10-17.* ME Rogers returned the payment to Plaintiff in July 2014, more than two years later, and after the Minnesota court valuation date of December 31, 2013. *Tr. 292:18-25 and Ex. 1K, P. 12, Bate* #27560. VCG was consistent in their treatment of the $10,000 payment made on the ME Rogers loan as a repayment of the marital loan that existed in Plaintiff's 7191 account at the time of the payment, and is a marital asset. *Ex. 1 K, Schedule AC-1, P. 75, L. 1069, Bate #27623.*

571. The stipulated value of the Charlsons' interest in ME Rogers is $40,000 as of December 31, 2013. This Court adopts VCG's methodology and tracing analysis as it pertains to ME Rogers, Inc. The business is a combination of Plaintiff's separate property and marital property. *Exhibit 1K, Schedule B-8, P. 288, L. 2, Bate #27836 and Tr. 1168:11-14.*

RCME, LLC
Ex. 1K, Schedule B-9, P. 289, Bate #27837

572. This entity was established by the parties for the purpose of owning and operating a Massage Envy franchise in Rapid City, South Dakota. The Articles of Organization were filed on or about November 21, 2011. *Ex. 1H(9)(a), Bate #17046.* The date of the Articles of Organization coincides with Plaintiff's testimony wherein she planned to make a "little kingdom of Massage Envy's." *Tr. 312:13-15.* Two payments came from the parties' joint Edward Jones #7183 account totaling $3,177, which were deposited into RCME, LLC's U.S. Bank checking account 4104. As of December 31, 2013, the account was closed. The account was identified and traced by VCG as part of the tracking of transactions in and out of the Edward Jones 7183 account.

MARITAL LOAN IN TACO JOHN'S OF PINE RIDGE, LLC

573. Unbeknownst to either party, a marital loan was created in Plaintiff's TJPR due to the treatment of all TJPR reimbursements being considered marital property and not separate property. *Ex. 1A(1), Paragraph 8B, 9F.* Due to VCG's treatment of all reimbursements as marital, the separate property existing in the joint Edward Jones 7183 account or the joint Home Federal 2730 accounts was insufficient at times to fund a few transfers to TJPR's Edward Jones 8833 account solely from Plaintiff's separate funds, causing marital funds to be allocated toward those few transfers. VCG traced a total of $44,239.51 of marital funds that were allocated to TJPR's 8833 account from either the Edward Jones' 7183 account or the Home Federal 2730 account. This Court adopts VCG's methodology and tracing analysis as it pertains to the marital loan in TJPR. The total marital loan owed by TJPR to the marital estate is $44,239.51 as of December 31, 2013. *Ex. 1K, Schedule L-1, P. 261, L. 8. Bate #27809.*

PLAINTIFF'S SEPARATE PROPERTY INTEREST IN REAL ESTATE

574. Plaintiff's experts, VCG, relied upon various documents to prepare the separate tracing analysis regarding real estate. VCG reviewed closing statements, settlement statements, loan applications, mortgage notes, appraisals, checkbook registers, copies of checks, Edward Jones account statements, Home Federal bank statements, property tract search reports and property data from Cleveland County, Oklahoma. *Ex. 1K, Bate #27560-#27561, Tr. 1178.*

575. VCG's real estate tracing analysis is based upon generally accepted methodologies typically relied upon by VCG and also utilized by Defendant's expert, Baker Tilly, when performing their own real estate tracings. Appreciation in real estate is apportioned between marital and separate interests where there have been marital and separate contributions to the purchase. *Tr. 1000-1001.* The separate interest is established based on a percentage to the total property value. When a property that has both marital and separate components is refinanced, VCG considers the marriage borrows against their marital interest in that asset, first. If there is not enough marital equity to fund the borrowing, the separate interest is invaded. *Tr. 1000:15-21.* When closing costs occur at the time of purchase, those typically are allocated against the marital estate portion only. *Tr. 1000:22-25.* This Court finds VCG's methodology to be appropriate. Defendant's expert, Mr. Tom Harjes, acknowledged Plaintiff has a separate interest in the parties' Rochester, Minnesota homestead and the Oklahoma condo sale proceeds. *Tr. 1429-1430 & 1471-1473.*

HOMESTEAD EQUITY, ROCHESTER, MINNESOTA
Ex. 1, Schedule RE-1, P. 290, Bate #27838

576. ***Belle Fourche, South Dakota Home.*** Plaintiff owned a home in Belle Fourche, South Dakota at the date of marriage which was Plaintiff's separate property listed on Exhibit B to the PMA. *Ex. 1A(1).* The home was sold in 1993 and Plaintiff received approximately $4,000 in net proceeds, which is Plaintiff's separate property pursuant to Paragraph 2D of the PMA. Plaintiff used those proceeds toward the building of the new home in Belle Fourche. *Tr. 271:24-25 & 272:1-12.* Those funds were not deposited into the joint Edward Jones 7183 investment account nor were they deposited into Plaintiff's separate Edward Jones 7191 account as no such deposits appear in either account statements for that period of time. *Exhibits 1F(1) & 1F(2).*

577. Plaintiff's Norwest checking account 5458 was in existence prior to the marriage and was listed on Exhibit B of the PMA as having a balance of $2,000 as of January 1993 and is Plaintiff's separate property. *Ex. 1A(1).* Plaintiff used this account in the early years of the parties' marriage to fund the building of the Belle Fourche home. *Tr. 345:1-2.*

578. The land[10] the Belle Fourche home was built upon was purchased in June 1993 for $17,000. *Ex. 1I(1) Belle Fourche, SD (a), Bate #17053.* The $500 earnest money was paid from Plaintiff's Norwest bank funds as no corresponding withdrawal or payment was reflected on either the joint Edward Jones 7183 account statements or Petitioner's Edward Jones 7191 account statements for that period of time. Defendant did not have any funds available at that time with which to fund the earnest money payment. *Tr. 272:2-4. Ex. 1, Schedule RE-1, P. 290, L. 1, Bate #27838.*

579. On June 4, 1993, Plaintiff wired $18,000 from her separate Edward Jones 7191 account directly into her separate Norwest Bank 5458 checking account.[11] *Ex. 1F(1)(d), Bate #6455.* Plaintiff's separate funds in 7191 remained her separate funds in Norwest 5458 pursuant to Paragraphs 2A and 2D of the PMA. Plaintiff then wrote check #1314 from her Norwest Bank 5458 account in the amount of $16,655 to pay the balance due on the lot purchase. *See cancelled check - Ex. 1I(1) Belle Fourche, SD (b), Bate #17054.* This Court adopts VCG's direct tracing methodology whereby Plaintiff's separate funds originating in her 7191 account were transferred to her Norwest 5458 account and check #1314 was written to purchase the lot. Said funds were Plaintiff's separate property pursuant to Paragraph 2D of the PMA. *Ex. 1K, Schedule RE-1, P. 290, L. 2, Bate #27838.*

580. On September 2, 1993, Plaintiff transferred $35,000 from her separate 7191 account to the 7183 account (*Ex. 1F(2)(b), Bate #8841)* to access her separate funds. Check #0001 was written payable to Round Up Building Center in the amount of $35,000. *See cancelled check - Ex. 1I(1) Belle Fourche, SD (d), Bate #17078.* This Court adopts VCG's direct tracing methodology whereby Plaintiff's separate funds originating in her 7191 account were transferred to account 7183 and check #0001 was written to the builder, Roundup Building

[10] The lot was purchased through Century 21 real estate agency.

[11] While some of the details set forth in the findings regarding the real estate may be repetitious with findings made previously regarding the investment accounts, they are stated again to eliminate any confusion on where Plaintiff's separate funds originated.

Center. Said funds are Plaintiff's separate property pursuant to Paragraph 2D of the PMA. *Ex. 1K, Schedule RE-1, P. 280, L. 4, Bate #27838.*

581. On October 6, 1993, Plaintiff deposited a distribution from STI in the amount of $6,000 into her Norwest Bank Checking 5458. Said $6,000 distribution is Plaintiff's separate property pursuant to Paragraph 2C of the PMA. *Ex. 1I(1) Belle Fourche, SD (c), Bate #17057.* On October 15, 1993, Plaintiff wrote check #1521 in the amount of $5,000 to Roundup Building.[12] *Ex. 1I(1) Belle Fourche, SD (c), Bate #17057. Ex. 1K, Schedule RE-1, P. 290, L. 6, Bate #27838.* This Court adopts VCG's direct tracing methodology whereby Plaintiff's separate funds from the $6,000 STI distribution was used to write check #1521 to Roundup Building Center. *Tr. 1017:3-8. Ex. 1K, Schedule RE-1, P. 290, L. 6, Bate #27838, Tr. 1179 -1180.*

582. On October 19, 1993, Plaintiff transferred $20,000 from her separate 7191 account to 7183 account *(Ex. 1F(2)(b), Bate #8847)* to access her separate funds. Check #0002 was written payable to Round Up Building Center in the amount of $20,000. *See cancelled check – Ex. 1I(1) Belle Fourche, SD (e), Bate #17080.* This Court adopts VCG's direct tracing methodology whereby Plaintiff's separate funds originating in her 7191 account were transferred to 7183 account and check #0002 was written to the builder, Roundup Building Center. Said $20,000 payment is Plaintiff's separate property pursuant to Paragraph 2D of the PMA. *Ex. 1K, Schedule RE-1, P. 280, L. 5, Bate #27838.*

583. On November 18, 1993, Plaintiff wired $27,000 from her 7191 account directly to her Norwest Bank Checking 5458 account. *Ex. 1F(1)(d), Bate #6493.* On November 18, 1993, Plaintiff wrote a check to Roundup Building Center in the amount of $25,000. *Ex. 1I(1) Belle Fourche, SD (c), Bate #17061.* This Court adopts VCG's direct tracing methodology whereby Plaintiff's separate funds originating in her 7191 account were transferred to Norwest 5458 to

[12] During trial, Petitioner's expert, Ms. Quinn Driscoll, testified there was a discrepancy with one of the checks they originally interpreted to be $15,000. *Bate #17057.* The line item in the report was amended to reflect the sum of $5,000 instead of $15,000. *Tr. 1017:3-8. Ex. 1K, Schedule RE-1, P. 290, L. 6, Bate #27838.*

pay Roundup Building Center. The payment is Plaintiff's separate property pursuant to Paragraph 2D of the PMA. *Ex. 1K, Schedule RE-1, P. 290, L. 7, Bate #27838.*

584. On January 14, 1994, Plaintiff wired $16,400 from her 7191 account directly to her Norwest Bank Checking 5458. *Ex. 1F(1)(d), Bate #6509.* On January 20, 1994, Plaintiff wrote check #1545 to Roundup Building Center in the amount of $10,000. *Ex. 1I(1) Belle Fourche, SD (c), Bate #17065.* This Court adopts VCG's direct tracing methodology whereby Plaintiff's separate funds originating in her 7191 account were transferred to Norwest 5458 to pay Roundup Building Center. The payment is Plaintiff's separate property pursuant to Paragraph 2D of the PMA. *Ex. 1K, Schedule RE-1, P. 290, L. 8, Bate #27838.* The total funds paid to Roundup Builder for the building of the Belle Fourche, South Dakota home from Plaintiff's separate property funds above is $95,000. *Ex. 1K, Schedule RE-1, P. 290, L. 9, Bate #27838 (as amended).*

585. Defendant describes the Belle Fourche home as "marital residence" and claims that because the home was held in joint tenancy[13] between the parties that the home was marital property, not Plaintiff's separate property. See Defendant's Proposed Finding of Fact 54. However, Defendant concedes the Belle Fourche home was Plaintiff's separate property. See Defendant's Proposed Finding of Fact 63. Defendant's proposed findings are contradictory.

586. Defendant also claims that the "parties" subsequently paid $55,000 to the Roundup Building Center for the construction of the "marital home." See Defendant's Proposed Finding of Fact 57. However, as stated herein, the evidence presented reflects that Plaintiff, not the parties, paid the $55,000 to Roundup with her separate funds. Again, Defendant concedes that the Belle Fourche home was entirely Plaintiff's separate property. See Defendant's Proposed Finding of Fact 63.

587. Defendant also claims that his pre-marital vehicle, a 1995 Oldsmobile valued at approximately $5,000 was used to pay the painter for work done on the Belle Fourche home. See

[13] There was no evidence produced at trial as to how title to the Belle Fourche home was held.

Defendant's Proposed Finding of Fact 61. The home was built in 1993. How could Defendant give a 1995 vehicle to a painter for work done in 1993?

588. In addition, Defendant's claimed vehicle was not a listed asset on the PMA.

589. The parties were involved in a lawsuit with the builder of the home, Roundup Building Center, Inc. In 1994 which resulted in the parties obtaining a judgment against Roundup in the amount of $18,104.10, and a judgment against the parties in favor of Roundup in the amount of $26,493.88, for a net judgment in favor of Roundup in the amount of $8,389.78. *Ex. J.1, Bate #731-739.* The Memorandum Decision dated February 23, 1995 from said lawsuit indicates a total of $95,000 had been paid to Roundup Builders prior to the $8,389.78 judgment. Defendant introduced into evidence one page from a check register that noted a payment to the parties' attorney for said lawsuit, Mr. Harlan Schmidt, on or about May 3, 1994 in the amount of $948.68. *Exhibit J.2, Bate #740.*

590. Defendant mistakenly believed this checkbook register was from the parties' joint 7183 account. *Tr. 880-882.* However, Defendant's Exhibit J.2 matches a page from Plaintiff's Exhibit 1I(1) Belle Fourche, SD (c), Bate #17071, which is Plaintiff's Norwest Checking 5458 register. *Tr. 910-911.* A check payable to Harlan Schmidt for $8,389.78, the exact amount of the judgment against the Charlsons by Roundup Builders is listed in Plaintiff's Norwest Bank check register. *Tr. 911-912.* This Court finds Plaintiff's separate funds paid for the judgment, thereby reducing her separate funds in the Norwest account at that time.

591. There was no mortgage on the Belle Fourche, South Dakota home. The entire equity in said home was Plaintiff's separate property pursuant to Paragraph 2D of the PMA. *Ex. 1K, Schedule RE-1, P. 290, L. 13, Bate #27838.*

592. On July 29, 1996, the Belle Fourche, South Dakota home was sold. *Ex. 1I(1) Belle Fourche, SD (f), Bate #17082.* After payment of closing costs of $15,042, the net proceeds were $143,957.71. *Line 603 of Exhibit 1I(1) Belle Fourche, SD (f), Bate #17082.* Said sale proceeds are 100% Plaintiff's separate funds pursuant to Paragraph 2D of the PMA. *Ex. 1K, Schedule RE-1, P. 291, L. 21, Bate #27839, Tr. 1180: 10-12.*

593. On August 2, 1996, a deposit was made into the parties' joint Home Federal 2730 account in the amount of $143,947.71. *Ex. 1F(6), Bate #11436.* Based upon the amount and timing of the deposit, VCG directly tied this deposit to the net sale proceeds of the Belle Fourche home. This Court adopts VCG's treatment of the $143,947.71 deposit as entirely Plaintiff's separate sale proceeds pursuant to Paragraph 2D of the PMA.

594. ***Purchase of 3316 Lake Street NW, Rochester, MN.*** On August 2, 1996, a withdrawal of $42,446.06 was made from the parties' joint Home Federal 2730. *Ex. 1F(6), Bate #11436.* Based upon the deposit of Plaintiff's separate funds and timing of the withdrawal, VCG directly tied these two events together and this Court adopts VCG's treatment of the $42,446.06 withdrawal as entirely Plaintiff's separate sale proceeds pursuant to Paragraph 2D of the PMA. *Ex. 1K, Schedule RE-1, P. 291, L. 23, Bate #27839*

595. On the same date, August 2, 1996, the parties closed on the purchase of 3316 Lake Street NW, Rochester, Minnesota. The parties were required to pay cash at time of closing in the amount of $42,446.06. *Ex. 11(1) 3316 Lake Street NW, Rochester, MN (a), Bate #17084.* Based upon the amount of the cash at closing and timing of the withdrawal of funds from the parties' joint Home Federal 2730 account, VCG directly tied these events together and this Court adopts VCG's treatment of the $42,446.06 cash paid at time of closing as Plaintiff's separate property pursuant to Paragraph 2D of the PMA. *Ex. 1K, Schedule RE-1, P. 291, L. 23, Bate #27839, Tr. 1180.*

596. The total purchase price of the home was $210,500. Of that amount $42,446 was paid from Plaintiff's separate property, and the remaining $168,400 was a mortgage through Midwest assigned to Old Kent. Plaintiff's separate property interest in said homestead at the time of purchase was 20% ($42,446 divided by $210,500 = .20). *Ex. 1K, Schedule RE-1, P. 291, L. 25, Bate #27839* and *Ex. 1K, Schedule RE-1, P. 291, L. 29-30, Bate #27839.*

597. The parties refinanced the mortgage on the property five times before taking out a second mortgage to purchase a condo in Oklahoma in 2005. When a property has both marital and separate interests is refinanced and equity is removed, the marital interest is invaded first, as

the marital estate is borrowing against its interest in the property. Each time the home was refinanced, VCG recalculated the interest to determine if the separate interest had been invaded or if debt exceeded the marital equity. If debt exceeds the marital equity then the separate value, equity is invaded. *Tr. 1182: 3-10.* The first refinance occurred in November 1997 for the sole purpose of obtaining a lower mortgage interest rate and the parties paid the closing costs via cash and did not increase the mortgage balance. *Ex. 1I(1) 3316 Lake Street NW, Rochester, MN (b), Bate #17087.* Therefore, no invasion of Plaintiff's separate property interest in the home occurred by said refinance. *Ex. 1K, Schedule RE-1, P. 292, Ll. 36-37, Bate #27840.*

598. The parties again refinanced on October 18, 2001 and increased the mortgage to $172,250, *(Ex. 1I(1) 3316 Lake Street NW, Rochester, MN (c), Bate #17122),* however, as the value of the property increased as well, no invasion of Plaintiff's separate property interest in the home occurred by said refinance. *Ex. 1K, Schedule RE-1, P. 292, Ll. 43-44, Bate #27840.*

599. The parties refinanced their mortgage for a third time on October 8, 2002 and a fourth time on December 11, 2002. *Ex. 1I(1) 3316 Lake Street NW, Rochester, MN (c), Bate #17170.* Each refinance was to lower the mortgage interest rate and any additional increase in the mortgage invaded the marital equity first. As the value of the home was increasing, there was sufficient marital equity to invade by the increased mortgage obtained in December 2002. *Ex. 1K, Schedule RE-1, P. 293, Ll. 57-58, Bate #27841, Tr. 1183.*

600. In February 2004, the December 2002 mortgage was refinanced to a new loan with ABN AMRO. *Ex. 1I(1) – 3316 Lake Street NW, Rochester, MN (f), Bate #17177.* The new loan did not invade Plaintiff's separate interest in the home, which remained at 20%. *Ex. 1K, Schedule RE-1, P. 294, Ll. 64-65, Bate #27842, Tr. 1184.*

601. In May 2005, the parties took out a second mortgage with Edward Jones Mortgage for $143,000 and the funds were used to purchase a condominium in Norman, Oklahoma. *Ex. 1K, Schedule RE-1, P. 294, L. 73, Bate #27842.* As there was not sufficient marital equity in the homestead to invade to cover the entire newly obtained second mortgage of $143,000, Plaintiff's separate interest in the home was invaded, thereby decreasing Plaintiff's

separate interest in the homestead. *Ex. 1K, Schedule RE-1, P. 294, Ll. 73-74, Bate #27842, Tr. 1185: 1-4.*

602. On August 1, 2007, the home was sold (*Ex. 1I(1) 2216 Lake Street NW, Rochester, MN (h), Bate #17194)* and the net proceeds of $64,313 were deposited into the parties' joint Edward Jones 7183 account. *Ex. 1F(2)(b), Bate #10224.* This Court adopts VCG's calculation of Plaintiff's separate portion of the net sale proceeds is 57.5% ($37,001 divided by $64,313 = .575). *Ex. 1K, Schedule RE-1, P. 295, Ll. 79 & 83, Bate #27843, Tr. 1185:16-17.*

603. ***Purchase of 3244 Lake Street NW, Rochester, MN:*** On August 1, 2007, the parties purchased a home located at 3244 Lake Street NW, Rochester, Minnesota for $580,000. They took out a first mortgage of $417,000 and a second mortgage of $104,400. The down payment of $59,743 was withdrawn from the parties' joint 7183 account on the same date the sale proceeds of $64,313 were deposited into 7183. *Tr. 1186: 4-10.* VCG directly tied these two events together. This Court adopts VCG's direct tracing to apply the same separate percentage interest in the $59,743 down payment 57.5% or $34,371 as was applied to the sale proceeds deposited that same date, and the remaining $25,371 is marital. *Ex. 1K, Schedule RE-1, P. 295, L. 85 - 88, Bate #27843.* Based on the purchase price of $580,000, Plaintiff's separate interest at the date of purchase was 6% ($34,371 divided by $580,000 = 0.06). *Ex. 1K, Schedule RE-1, P. 295, L. 89 & 94, Bate #27843.*

604. In December 2007, the first and second mortgages were refinanced to new loans; the first mortgage with Cherry Creek Mortgage, and the second mortgage with TCF Bank. *Ex. 1I(1) 3244 Lake Street NW Rochester, MN (d), Bate #17204.* The new loans did not invade Plaintiff's separate interest in the home, which remained at 6%. *Ex. 1K, Schedule RE-1, P. 296, Ll. 102-103, Bate #27844.*

605. In June 2010, the December 2007 Cherry Creek mortgage was refinanced to a new loan with Edward Jones Mortgage. *Ex. 1I(1) 3244 Lake Street NW, Rochester, MN (f)(g) & (h).* The parties made improvements to the property, however, because the value of the homestead declined between the previous refinance and after the improvements were made, the

improvements did not add significant value. The costs of the improvements were being paid from the joint 7183 account. At the time of the improvements, Plaintiff's separate interest in the home was 6% and the separate percentage in the 7183 account was significantly higher than 6%. Therefore, a higher percentage of Plaintiff's separate funds were used toward the improvements. However, VCG did not prepare any calculations regarding the improvements, and the marital estate is benefitting from Plaintiff's separate funds that paid for said improvements. *Tr. 1187:3-19.* This Court adopts VCG's treatment of any improvements having no affect on Plaintiff's separate property interest in the home. *Ex. 1K, Schedule RE-1, P. 296, L. 111-112, Bate #27844.*

606. This Court adopts VCG's methodology, tracing analysis and amortization of loan schedules as it pertains to the Rochester, Minnesota home. Plaintiff has a separate property interest in said real property and the home is a combination of Plaintiff's separate property and marital property. *Ex. 1K, Schedule RE-1, P. 297, L. 113, Bate #27845.*

OKLAHOMA CONDO SALE PROCEEDS
Ex. 1 K, Schedule RE-2, P. 302, Bate #27850

607. The parties purchased a condominium[14] in Norman, Oklahoma in September 2005 for $143,000. As indicated above, they took out a second mortgage on the Rochester home to purchase the property. *Exhibit 11(2)(a).* There was no debt on this property. *Tr. 1190:13.* The condo was purchased for the Plaintiff's daughter, Staci Smoot, to live in while she attended the University of Oklahoma. Ms. Smoot lived in Oklahoma from 2004 to 2009, spending four of those years living in the condo. *Tr. 1560:19-23.*

608. Plaintiff makes a separate property claim in the condo; while Defendant claims it is marital.

609. Defendant claimed that Plaintiff allegedly began depositing the rent from the condo inot her 7191 account.[15]

[14] Defendant states that the condo was owned by the parties as joint tenants. See Defendant's Proposed Finding of Fact 142. There is no evidence how the title to the condo was held.
[15] Defendant did not provide a reference to the trial transcript or to the exhibits to support this allegation.

610. The condo was subsequently awarded to Plaintiff. See Exhibit 7 to the July 2014 trial.

611. Both marital property and Plaintiff's separate property in the equity of the homestead were invaded to purchase the condo. Plaintiff's separate interest in the second mortgage proceeds was 23%; therefore, Plaintiff's separate interest in the purchase was 23% or $33,454. *Ex. 1K, Schedule RE-2, P. 302, L. 1-4, Bate# 27850, Tr. 1190:12-13.* The condo was subsequently sold in July 2014 and the parties received net sale proceeds of $102,781. *Exhibit 11(2)(c).* This Court adopts VCG's methodology and tracing analysis as it pertains to the Oklahoma Condo sale proceeds. The proceeds are a combination of Plaintiff's separate property and marital property. *Ex. 1K, Schedule RE-2, P. 302, L.1-8, Bate #27850. Tr. 1191:1-2.*

HOUSEHOLD FURNISHINGS AND MISCELLANEOUS PERSONAL PROPERTY

612. Plaintiff owned household furnishings and miscellaneous personal property prior to the marriage. *Exhibit 1A(1), Exhibit B.* Plaintiff created a list of personal property she claims is separate property. *Ex. 1A(3), Bate #14.* Defendant acknowledged[16] many of the below items are Plaintiff's separate property. This Court finds the following items are Plaintiff's separate property

Master:

- Mission style mirrors and end tables – gift made by friend
- Chair – premarital
- 4 Howard prints – premarital
- Bedroom Set – came into marriage with one
- Samsung TV – separate funds
- Hair Feathers – France print
- Electric Fireplace
- Leather bench seat – separate

Master Bath:

- Shelves – premarital

Upstairs:

[16] See Defendant's Proposed Findings of Fact 371-373.

First Bedroom (Indian Doll)

- Indian Doll – gift Plaintiff
- Bifold with purses – separate
- Bedroom furniture – premarital
- Badlands Oil by Ben Von Nuys – gift from Plaintiff's mother
- Watercolor by Karen Hill – premarital painting by friend

Hallway

- 2 saddles – one of Plaintiff's Mom's side saddles and Plaintiff's Dad's saddle
- Badlands Print – gift from Plaintiff's Mom

Guest Bedroom

- Partial of premarital bedroom set split between 2 bedrooms – split between 2 bedrooms
- Bench – premarital
- Lamp – after 2013
- Small Table – after 2013
- Mirror – gift from Plaintiff's friends
- Copper art work

Staci's Bedroom:

- Queen size bed and set – Staci
- Toy chest – kids
- Stool – Plaintiff made in shop
- Star Quilts – separate

Downstairs Bathroom:

- Knick Knacks

Exercise Room:

- Elliptical trainer – 2010 Valentine's gift from Defendant
- Hutch – premarital
- TV – Plaintiff won at TJ convention
- Shelves – premarital
- Queen Size Couch – Plaintiff bought prior to marriage
- Bifold Picture Holder – Plaintiff won at golf

Movie Room:

- Leather Furniture – premarital
- K. Costner print – belongs to Plaintiff's sister Lulu
- Coffee table and end table – separate funds

Office & Nook:

- Pictures of my kids – separate
- Office furniture – separate – TJ paid for all

Downstairs:

- Indian Dolls -- separate – gifts

Wine Room:
- Liquor / wine
- Stool, Shelves, Wall hangings – gifts

Family Room:
- Singer Sewing Machine – gift (Grandma's)
- 3 B. Doolittle Prints – bought with separate funds
- Wicker Rocker – premarital (baby gift from Kim and Cindy Benne)
- Squaw dress – Lulu
- Bow and arrow, quiver, pipe and tomahawk – gift Lulu separate
- Hope Chest – gift from Dad (graduation)
- Altar – separate – bought with cash Jan Dutelle
- Leather furniture large pic – separate funds
- Pic (within sunrise) – premarital
- High table and two chairs – Plaintiff won at charity event
- End tables – premarital
- Buffet – 2 were give to us by Bill Bruegger – one is at Defendant's office

Living Room:
- 2 Lindberg shelves – gift made by friend
- Flower arrangement – separate after 2013
- Horse hair vase – gift (niece made it)
- Knick knacks – separate
- 2 mission style chairs and end table – gift – made by friend
- Indian Drum – gift from Rosie Gilbertson
- 3 mission style end tables – separate
- Cowhide Chair – separate bought after 2013
- 5 B. Doolittle prints – separate (gifts and separate funds)
- Sheepskin – after 2013
- War shield and eagle statue and knick knacks – premarital

Deck:
- Patio furniture – separate
- Grill – separate funds
- Picnic tables and benches – first husband built
- 2 kayaks – separate – Plaintiff bought after 2013

Office off Kitchen:
- Wine glasses – gift
- Stereo system – premarital
- Mirror (brass frame) and picture – premarital
- Lazy Susan's, wine holders (wood) – gift

Front Entryway:

- Bench – separate property
- 2 oil paintings by Jim Whartman – premarital
- Buffalo skull – gift from Jerry (brother) raised buffalo
- 2 Badlands pictures – gift from Mom
- Dad's Cowboy picture – gift from Don
- Print – B. Doolittle – premarital
- Cowboy and Indian horses – gift from Defendant

Downstairs Bathroom off Kitchen:
- 2 pictures – gift from Lulu

Kitchen:
- Cutco Knives – bought after divorce with separate funds
- Platters – dishes – gifts
- China (set of 12) – first wedding
- Crystal – first wedding
- Bejeweled glassware – gifts
- Plants – ferns – gifts – Bubba's funeral
- Keurig Coffee – gift – Joyce
- Wine holder – gift
- Table and 8 chairs – premarital
- Glass book case – premarital
- Display case – gift Mom
- Plant stand – Aunt Jean Colvin made for me
- Butter churn – premarital
- Dishes / silverware – pots and pans – premarital (first marriage)

Coat Room:
- Electric Roaster – gift from Mom
- 3 slow cooker buffet – gift from Joyce
- Rice Cooker – gift from Staci and Bubba
- Slow Cookers – first wedding gift
- Waffle Maker – first wedding gift
- Folding Trays – first wedding gift

Laundry Room:
- Christmas wrap
- Benne dog stuff

Vestibule:
- Coat Rack – gift made by friend
- Brass shelves – first marriage

Garage:
- Tools – separate funds
- Bike

- Shelves – premarital
- Golf stuff won in tournaments

Guns:

- Shot gun – 20 gauge – gift from first husband
- 22 long pistol – gift from mother

Basement:

- Rain soft water softener – separate

Items Throughout Home:

- Rugs throughout the home
- Leather chair and ottoman – separate – Staci Ann

Don's Office:

- Cowboy in slicker print – separate
- 2 night stands that belong to my bedroom set – separate
- Plant stand
- Round table and 4 chairs
- 2 Indian oil paintings given to me by Julie Domaille – separate
- Big leaf print – gift from Don for my birthday
- 4 new prints – marital

Jewelry:

- 5 jewelry boxes and cases – one is a standing one with drawers
- 5 Black Hills gold necklaces
- 2 complete Black Hills gold earrings
- 3 Black Hills gold rings (one is brand ring)
- 1 Black Hills gold bracelet
- 6 zirconium (fake) diamond rings
- 2 diamond rings and one matching bracelet
- 1 diamond tennis bracelet, (probably fake)
- 1 diamond necklace (one cross) (probably fake).
- Cameo necklace & earrings
- 2 black pearls necklaces and earrings
- Gold boot necklace
- Amethyst ring
- Silpada jewelry
- 2 turquoise rings
- Turquoise necklaces and earrings
- All kinds of cocktail jewelry
- Jade necklace, earrings, and rings
- Pearl ring
- Pearl earrings,
- 2 Swarovski necklaces (red) earrings & ring & bracelet.

- Cross necklaces that are cocktail jewelry.
- 14 watches, cocktail jewelry.

All jewelry items were gifts. *Ex. 1A(3), Bate #14, Tr. 246: 17-24.*

HARDCORE COMPUTERS STOCK
Ex. 1K, Schedule M-1, P. 303, Bate #27851

613. The parties invested funds in Hardcore Computers stock during the marriage. On June 4, 2009, $12,500 was drawn from the parties' joint Edward Jones 7183 account for said purchase. *Ex. 1F(2)(b), Bate #10502.* This Court adopts VCG's pro rata approach to the Hardcore Computers stock purchase. *Ex. 1K, Schedule JT-1, P. 127, L. 1016, Bate #27675.* Therefore, of the $12,500 invested in Hardcore Computers Stock, 5.9%, or $739.25 is Plaintiff's separate pursuant to Paragraph 2D of the PMA, and the remaining $11,760.75 is marital. *Ex. 1K, Schedule ME-1, P. 303, L. 1, Bate #27851. Tr. 1109:25 and Tr. 1110.*

614. On March 15, 2010, $12,500 check #1386 cleared the parties' joint 7183 account for an additional purchase of Hardcore Computers stock. *Ex. 1F(2)(b), Bate #10615.* This Court adopts VCG's pro rata approach to the Hardcore Computers stock purchase. Plaintiff's separate property interest in the prior month's ending balance of the 7183 account was 15.1%. *Ex. 1K, Schedule JT-1, P. 130, L. 1086, Bate #27678. Ex. 1K, Schedule ME-1, P. 303, L. 2, Bate #27851.*

615. The total funds invested in Hardcore Computers Stock was $25,000. This Court adopts VCG's methodology and tracing analysis as it pertains to the Hardcore Computers Stock. Plaintiff has a separate interest in the stock and the stock is a combination of Plaintiff's separate property and marital property. *Ex. 1K, Schedule M-1, P. 303, L. 3, Bate #27851, Tr. 1110:17.*

2013 TAX REFUND RECEIVABLE

616. On April 25, 2013, Defendant made an estimated tax payment of $15,000 via check #1004 from his 7272 account. *Ex. 1F(3), Bate #11138.* This Court adopts VCG's pro rata approach to apply a percentage of the previous month's ending balance in account 7272 to check #1004. Plaintiff's separate property interest in the prior month's ending balance of #7272 was 5.5%. *Ex. 1K, Schedule DC-1, P. 149, L. 12, Bate #27697.* This Court adopts VCG's methodology and tracing analysis as it pertains to the 2013 Tax Refund receivable. Plaintiff has a

separate property interest in said refund. *Ex. 1K, Schedule DC-1, P. 149, L. 19, Bate #27697, Tr. 1191-1192.*

VEHICLES

617. Defendant argues that Plaintiff testified that the Mercedes, the Jeep Compass, the Avalanche pickup, and the Thunderbird were all Taco John vehicles and that Defendant gifted those vehicles to her but that TJPR paid the lease on the Mercedes until the time the parties mediated on May 29, 2013. See Defendant's Proposed Findings of Fact 305-307.

618. Plaintiff did not testify the Jeep Compass and Avalanche were gifts, only the Thunderbird and Mercedes. Tr. 457:17-18.

619. The Jeep Compass is listed as an asset of TJPR on the tax returns. *Ex.1 D (2), Bate # 802.*

620. While marital funds may have been used to purchase the 2003 Ford Thunderbird titled in Defendant's name, the vehicle was gifted to Plaintiff by Defendant. Defendant did not dispute the car was a gift to Plaintiff. *Tr. 861-863.*

621. The parties agree that an award of attorney's fees is not legally allowable in this action.

622. Except as may be incorporated in the above Findings of Fact, any Proposed Finding of Fact of the Defendant is hereby refused and overruled.

Any Conclusion of Law deemed to properly constitute a Finding of Fact shall be incorporated herein by reference.

Based on the foregoing Findings of Fact, this Court hereby enters the following:

CONCLUSIONS OF LAW

1. This matter came before this Court based on this Court's Order on Validity of Pre-Marriage Agreement dated October 16, 2014[17] and the Court's Notice of Court Trial dated November 24, 2014, and this Court's Order on Scope of Issues for Trial dated March 6, 2015.

[17] Notice of Entry of Order on Validity of Pre-Marriage Agreement was given March 11, 2015.

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

3. This Court is to interpret the Pre-Marriage Agreement as it relates to the assets and debts of the parties, which will include the determination of what of the existing assets and debts is separate property, what is marital property, and what is mixed, as well as to the extent necessary the value thereof pursuant to the Order of March 6, 2015.

4. This Court has gauged the credibility of the witnesses and weighed the significance of their testimony. *Kost v. Kost,* 515 N.W.2d 209, 212 (S.D. 1994).

5. SDCL 21-24-3 gives this Court the authority in a declaratory judgment action to determine any question of construction or validity arising under an instrument, in this case, the parties' Pre-Marriage Agreement.

6. One of the primary goals of Pre-Marriage Agreements is to alter state-prescribed property rights, which would otherwise arise on dissolution of marriage. Pre-marriage agreements include the right to contractually dispose of separate and marital property. *Walker v. Walker,* 2009 S.D. 31, ¶21, 765 N.W.2d 747. Additionally, traditional contract law provides that a contract is a promise, or set of promises, to which the law attaches a legal obligation. This long established rule of contract construction continues in modern legal practice. The fact that one party to a contract decides he/she does not like the terms after execution does not make the contract unenforceable.

7. The parties' Pre-Marriage Agreement (hereinafter "PMA") was drafted with assistance of counsel after the disclosure of assets as this Court previously concluded. Plaintiff wanted a guarantee that her separate property would be safe from judicial apportionment in the future. The South Dakota Supreme Court has held that these agreements are "favored in law since they allow parties to protect the inheritance rights of their respective estates." *Smetana v. Smetana,* 2007 S.D. 5, ¶9, 726 N.W. 2d 887.

8. Plaintiff was adamant that she wanted to protect her business interests and assets when she married Defendant. She had been through a previous divorce and did not want to lose assets. Accordingly, she negotiated an agreement prior to entering into marriage, which did just

that. A written Pre-Marriage Agreement "proclaims the ultimate intention of the parties." *Sanford v. Sanford*, 2005 S.D. 34, ¶25, 694 N.W.2d 283. This protection is supported by South Dakota Codified Law and case law. SDCL 25-2-8. *Id.* at ¶17. In the course of the parties' 22-year marriage, Plaintiff's original business interests increased in value and produced income, which is defined as separate property under Paragraph 2C of the PMA. These circumstances were all reasonably foreseen at the time of the agreement. There was clearly an imbalance of assets at the time of the agreement, benefitting Plaintiff. The income from her separate assets was used to acquire additional separate assets during the marriage. Now that the Plaintiff wants to enforce her rights per the agreement, Defendant does not like the contract he made, and wants this Court to consider virtually all of the property as marital so that it is subject to apportionment in the Minnesota dissolution matter.

9. Defendant knew why Plaintiff desired the PMA and agreed with those reasons. He himself desired the Agreement. The Supreme Court has:

> [E]ndorsed property agreements between spouses as a method of protecting the inheritance rights of their children by previous marriages....Moreover, we noted that "courts have recognized that it is nature and proper for a parent to desire to provide for the children of his or her first marriage." *Estate of Smid*, 2008 S.D. ¶21, 756 N.W.2d 1.[18]

And the desire to protect the parties' net worth and assets was recognized in *Sanford. Supra* at ¶35.

10. Defendant voluntarily executed the PMA.

> [O]ne who accepts a contract is conclusively presumed to know its contents and to assent to them, in the absence of fraud, misrepresentation or other wrongful act by another contracting party. ¶17. [Citations omitted].

11. Under South Dakota law, "[t]racing is an equitable principle which allows a party with the right to property to trace that property through any number of transactions in order to reach the final proceeds or result." *Temple v. Temple*, 365 N.W.2d 561, 567 (S.D.1985). When looking at commingled funds, courts have found that "[i]n a variety of contexts, Courts have

[18] While this is not an Agreement between spouses, the right to be protected is the same.

traced commingled funds in a bank account by using the "lowest intermediate balance" rule 2 *In re Columbia Gas Sys., Inc.*, 997 F.2d 1039, 1063 (3rd Cir.1993) (rights of trust beneficiaries in a commingled account); *Harley-Davidson Motor Co. v. Bank of New Eng.-Old Colony*, 897 F.2d 611, 622 (1st Cir.1990) (secured party's interest in a commingled account); *First Wis. Fin. Corp. v. Yamaguchi*, 812 F.2d 370, 375 (7th Cir.1987) (liability of guarantor for commingled funds); *United States v. Banco Cafetero Pan.*, 797 F.2d 1154, 1159(2d Cir.1986) (commingled funds in drug forfeiture case); *Universal C.I.T. Credit Corp. v. Farmers Bank of Portageville*, 358 F.Supp. 317, 325 (E.D.Mo.1973) (secured party's interest in commingled account). Under the lowest intermediate balance rule, it is assumed the traced proceeds are the last funds withdrawn from a contested account. Not only does Plaintiff's expert tracing report follow the contract terms in the PMA, it is consistent with South Dakota law.

12. This Court previously ruled on the validity and enforceability of the PMA. In that determination this Court found that both parties agreed that the main purpose of the PMA was to protect Plaintiff's assets. There was no testimony by the parties that the purpose of the PMA was to create marital property.

13. This Court concludes that the methodologies used by Plaintiff's experts, VCG, as approved by Defendant's expert, Baker Tilly, are appropriate and the VCG separate tracing model effectively traced Plaintiff's separate property in accordance with the contract terms set forth in the PMA.

14. To determine the value of Plaintiff's separate property in certain assets, this Court is required to establish marital and separate values for two of the parties' business interests, namely BDUBS and Taco John's Pine Ridge.

VALUATION OF BUSINESSES

15. Based on the findings set forth above, the Charlsons' 16.67% non-marketable, minority ownership interest in the outstanding common stock of BDUBS, LLC is $160,000 as of December 31, 2013.

16. Based on the findings set forth above, this Court concludes that based on the VCG tracing report, Plaintiff used separate property to reacquire Taco John's of Pine Ridge. There is no need for this Court to determine the value of Taco John's Pine Ridge, LLC, as the entire business is Plaintiff's separate property under the terms of the PMA.

17. The Plaintiff's 50% interest in STI, Inc. is Plaintiff's separate property and there is no need for the Court to value said business interest.

18. The parties agreed to the values of the following assets *(see Stipulation Regarding Business Valuations and Order filed April 20, 2015)*:

ASSET	VALUE AS OF 12/31/13:
Oklahoma Condo Proceeds (being held in trust)	$102,782
Sioux Falls Massage Envy (SFME) (75% interest)	$1,220,000
Rogers Massage Envy (ME Rogers) (25% interest)	$40,000
Superior Financial Center (33.3% interest)	$30,000
Edward Jones Limited Partnership	$236,800
Edward Jones Subordinated Partnership	$100,000

This Court adopts these values and concludes the values were appropriately incorporated into the VCG tracing model when determining Plaintiff's separate property.

PLAINTIFF'S EDWARD JONES INVESTMENT ACCOUNT 7191-1-8

19. Plaintiff's Edward Jones investment account 7191-1-8 is Plaintiff's separate property. As of December 31, 2013, the account balance was $730,177.55. The sum of $684,647.29 is Plaintiff's separate property and the remaining $145,530.26 is marital property.

JOINT EDWARD JONES INVESTMENT ACCOUNT 7183

20. Any separate property interest in funds Plaintiff transferred from 7191 into the joint 7183 account did not change the character of her separate property interest or otherwise result in a change of her separate property to marital. Commingling of funds was contemplated pursuant to Paragraphs 5 and 9C of the PMA. VCG was consistent in the analysis regarding the application of direct tracing and pro rata tracing as well as applying the terms of the PMA to the 7183 account.

21. Defendant argues the joint 7183 investment account was created to be used as the parties' "jointly owned bank account" for payment of ordinary and necessary living expenses and to acquire marital property in satisfaction of Paragraph 7 of the PMA which states as follows:

> 7. **ORDINARY LIVING EXPENSES:**
>
> The parties agree to create, upon marriage, a jointly owned bank account, and each agrees to deposit into such account, earnings or separate property, at an amount necessary to pay ordinary and necessary living expenses of the parties, and any acquisition of marital property. The payment of other ordinary living expenses, such as taxes, insurance, utilities, and miscellaneous repairs shall be paid from the joint marital bank account.

22. Defendant isolates one sentence in Paragraph 7 of the PMA to support his claim that all property purchased with funds from the 7183 account, or any other joint account for that matter, is marital property:

> The parties agree to create, upon marriage, a jointly owned bank account, and each agrees to deposit into such account, earnings or separate property, at an amount necessary to pay ordinary and necessary living expense of the parties, *and any acquisition of marital property*. (*Emphasis added.*

Contrary to Defendant's assertion, Paragraph 7 of the PMA does not define "marital property." The PMA defines "marital property" in paragraph 4:

> 4. **MARITAL PROPERTY:**
>
> *Except as specifically provided above*, property acquired by the parties from and after the date of their marriage, and continuing throughout the marriage, shall be deemed marital property. No waiver, release or relinquishment of any right, title, claim or interest in and to the separate property of the other shall be construed as a relinquishment of any right or interest in marital property. Property acquired from and after the date of the marriage, and continuing through the course of the marriage, shall remain marital property regardless of title or ownership of such assets.
>
> *Emphasis added.*

23. Paragraph 7 of the PMA does not say that "all" property purchased with funds from the joint account is marital property. Rather it provides that the account may be used to acquire property the parties want to be marital. Whether property purchased during the marriage

is marital is subject not only to that provision, but also to the separate property provisions found in Paragraph 4 which begins with "[e]xcept as specifically provided above." "Provided above" Paragraph 4 of the PMA is Paragraph 2, which provides the definition of "separate property." Therefore, *except for separate property*, any property obtained during the marriage is "marital property."

24. Defendant's position that depositing separate funds into a jointly held bank account changes the character of a party's separate property to marital property, renders Paragraphs 5 and 9C of the PMA meaningless. Defendant's position ignores the PMA language regarding commingling of funds.

> 5. **COMMINGLING:** Parties shall use their best efforts to prevent any commingling of separate property. The commingling of separate property, or the failure to segregate separate property, *shall not be construed as to change the character of separate property or otherwise result in a change of separate property to marital property*. *(Emphasis added)*
>
> 9. **ORAL STATEMENTS:** No statement *or act* by either party, from and after the date of this Agreement, shall have the effect of amendment, or modifying this Agreement. All property which may otherwise be designated as marital property may become or be treated as marital property, except by specific, written amendment to this instrument. *In addition, under no circumstances shall the following events,* either individually or collectively, *be construed as evidence of any intention,* express or implied, or of any agreement, actual or implied, *to change the character of separate property:*
>
> ***
>
> *C. The commingling of either spouse of his or her separate funds with the separate [sic] or separate funds of the other party or with any marital property. (Emphasis added.)*

25. In construing the document, this Court is mindful of the objectives of the parties and will construe the document as a whole. The goal of contract interpretation is to determine the parties' intent. *Tri-City Associates, L.P. v. Belmont, Inc.* 2014 S.D. 23 ¶11, 845 N.W.2d 911, 915. This Court does not interpret particular words or phrases in isolation, nor does it interpret the language in a manner that renders a portion of the contract meaningless. *Id.* This Court cannot support Defendant's interpretation or intent of Paragraph 7 that all property purchased

with funds from the 7183 account is marital, unless this Court renders paragraphs 5 and 9C of the PMA meaningless. This Court cannot accept Defendant's interpretation as his position of isolating certain contract terms to the exclusion of other contract terms fails to give effect to the meaning of all the terms. An interpretation which gives a reasonable, lawful, and effective meaning to *all the terms* is preferred to an interpretation which leaves a part unreasonable, unlawful or *of no effect*. *Jones v. Siouxland Surgery Center*, 2006 S.D. 97, ¶15, 724 N.W.2d at 345. *[Emphasis added]*

26. This Court is to enforce and give effect to the unambiguous language of the contract. *Bunkers v. Jacobson*, 2002 S.D. 135 ¶15, 653 N.W.2d 732, 738. "Whether the language of a contract is ambiguous is a question of law." *Id.* Ambiguity exists when such language is capable of more than one meaning "when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement." *Id.* (quoting *Singpiel v. Morris*, 582 N.W.2d 715, 719 (1998). Defendant claims the language in Paragraph 7 is ambiguous and therefore, should be interpreted and construed against Plaintiff because her attorney drafted the PMA. However, Plaintiff included three paragraphs (Nos. 2, 5 and 9) to the PMA to prevent any "mistakes in meaning" or "ambiguity" of how separate property is to be protected throughout the parties' marriage, and the context of the entire integrated agreement needs to be viewed, not just paragraph 7. Paragraph 9 contains the strongest language of the entire contract: "...under no circumstances, shall ..... the commingling of either spouse of his or her separate funds ..... with any marital property ..... change the character of separate property." *[Emphasis added]*

27. The parties' joint Edward Jones 7183 account is a combination of both Plaintiff's separate property and marital property. As of December 31, 2013, the account balance was $189,349.71. The sum of $99,690.29 is Plaintiff's separate property interest and the marital property interest is $89,659.42.

DEFENDANT'S EDWARD JONES INVESTMENT ACCOUNT 7272

28. Defendant's Edward Jones 7272 account is a combination of both Plaintiff's separate property and marital property. As of December 31, 2013, the account balance was $110,813.14. The sum of $15,080.51 is Plaintiff's separate property interest and the marital property interest is $95,732.63.

JOINT EDWARD JONES INVESTMENT ACCOUNT 6236

29. The joint Edward Jones 6236 account is a combination of both Plaintiff's separate property and marital property. As of December 31, 2013, the account balance was $36,257.98. The sum of $21,745.30 is Plaintiff's separate property interest and the marital property interest is $14,512.68.

PLAINTIFF'S EDWARD JONES INVESTMENT ACCOUNT 1297

30. Plaintiff's Edward Jones 1297 account is entirely Plaintiff's separate property.

JOINT HOME FEDERAL CHECKING 2730

31. The joint Home Federal Checking 2730 account is a combination of both Plaintiff's separate property and marital property. As of December 31, 2013, the account balance was $3,319.87. The sum of $1,549.07 is Plaintiff's separate property interest and the marital property interest is $1,770.80.

PLAINTIFF'S EDWARD JONES IRA 0592.

32. Plaintiff's Edward Jones IRA 0592 is Plaintiff's separate property. As of December 31, 2013, the account balance was $58,840.57. The sum of $56,345.64 is Plaintiff's separate property and the remaining $2,494 is marital property.

PLAINTIFF'S EDWARD JONES TACO JOHN'S SIMPLE IRA 0314.

33. Plaintiff's Edward Jones Taco John's Simple IRA 0314 is Plaintiff's separate property. As of December 31, 2013, the account balance was $184,302.15. The sum of $128,871.04 is Plaintiff's separate property and the remaining $55,431.11 is marital property.

PLAINTIFF'S EDWARD JONES TACO JOHN'S SIMPLE IRA 7610.

34. Plaintiff's Edward Jones Taco John's Simple IRA 7610 is Plaintiff's separate property. As of December 31, 2013, the account balance was $150,743.06. The sum of $149,250.08 is Plaintiff's separate property and the remaining $1,492.98 is marital property.

DEFENDANT'S EDWARD JONES ROTH IRA 7583.

35. Defendant's Edward Jones Roth IRA 7583 is a combination of both Plaintiff's separate property and marital property. As of December 31, 2013, the account balance was $24,624.78. The sum of $2,632.95 is Plaintiff's separate property interest and marital property interest is $21,991.83.

DEFENDANT'S EDWARD JONES RETIREMENT PLAN
AND
DEFENDANT'S EDWARD JONES PROFIT SHARING PLAN

36. The South Dakota Supreme Court in *Sanford v. Sanford,* 2005 S.D. 34, ¶44, 695 N.W.2d 283, states:

> It is not necessary, given the language in SDCL 25-2-21, for a spouse to provide a detailed and exact valuation of his or her net worth in a prenuptial agreement. It is sufficient for a spouse to provide, within the best of his or her abilities, a list of assets and liabilities with approximate valuations. The listing must be sufficiently precise to give the other spouse a reasonable approximation of the magnitude of the other spouse's net worth.

37. While this Court received Defendant's Exhibits D1-5 at the valuation portion of the trial in April 2015, this Court concludes that the issue of whether Defendant had a retirement account is *res judicata* having been litigated in the previous hearing. The law of the case is therefore that Defendant did not have a retirement account at the time of marriage. As our Supreme Court stated in a declaratory action case:

> Although the principles of the law of the case doctrine and res judicata are similar, their application differs. The law of the case rule involves the effect of a previous ruling within one action on a similar issue of law raised subsequently within the same action. The rules of res judicata apply to previous rulings in an action on a similar determination in a subsequent action.

In re Pooled Advocate Trust, 2002 S.D. 14, ¶24, 813 N.W.2d 130. Defendant's net worth prior to the marriage was a minus figure, making his disclosure he had "0" assets accurate. Therefore, Defendant's Edward Jones Retirement Plan is all marital property and Defendant's Edward Jones Profit Sharing Plan is all marital property.

EDWARD JONES LIMITED PARTNERSHIP INTEREST

38. Defendant's Edward Jones Limited Partnership interests in The Jones Financial Companies, LLLP is a combination of both Plaintiff's separate property and marital property. As of December 31, 2013, the value of Defendant's limited partnership interest is $236,800. The sum of $20,669 is Plaintiff's separate property interest and the marital property interest is $216,131.

EDWARD JONES SUBORDINATED LIMITED PARTNERSHIP INTEREST

39. Defendant's Edward Jones Subordinated Limited Partnership interest in The Jones Financial Companies, LLLP is a combination of both Plaintiff's separate property and marital property. As of December 31, 2013, the value of Defendant's Subordinated Limited Partnership interest is $100,000. The sum of $11,087 is Plaintiff's separate property interest and the marital property interest is $88,914.

SUPERIOR FINANCIAL GROUP, LLC (33.33%) INTEREST

40. Defendant's 33.33% interest in Superior Financial Group, LLC is a combination of both Plaintiff's separate property and marital property. As of December 31, 2013, the value of Defendant's interest is $30,000. The sum of $8,280 is Plaintiff's separate property interest and the marital property interest is $21,720.

BDUBS, LLC (BUFFALO WILD WINGS RAPID CITY) (16.67%) INTEREST

41. Defendant's 16.67% interest in BDUBS, LLC is a combination of both Plaintiff's separate property and marital property. As of December 31, 2013, the value of Defendant's

16.67% interest is $160,000. The sum of $27,155 is Plaintiff's separate property interest and the marital property interest is $132,845.

SFME, INC. (SIOUX FALLS MASSAGE ENVY) (75%) INTEREST

42. Defendant's 75% interest in SFME, Inc. is a combination of both Plaintiff's separate property and marital property. As of December 31, 2013, the value of Defendant's 75% interest is $1,220,000. The sum of $1,023,967 is Plaintiff's separate property interest and the marital property interest is $196,033.

ME ROGERS, INC. (ROGERS MASSAGE ENVY) (25%) INTEREST

43. Defendant's 25% interest in ME Rogers, Inc. is a combination of both Plaintiff's separate property and marital property. As of December 31, 2013, the value of Defendant's 25% interest is $40,000. The sum of $7,670 is Plaintiff's separate property interest and the marital property interest is $32,330.

STI, INC. (TACO JOHN'S OF BELLE FOURCHE)

44. Plaintiff's 50% interest in STI, Inc. d/b/a Taco John's of Belle Fourche, South Dakota, is 100% Plaintiff's separate property. Any gains, income, interests, dividends, profits and increase/decrease in value, and distributions from STI, Inc., are Plaintiff's separate property.

45. Any business debts personally guaranteed by Plaintiff associated with STI, Inc. are Plaintiff's separate liabilities.

TACO JOHN'S OF PINE RIDGE, LLC

46. Taco John's of Pine Ridge, LLC, is 100% Plaintiff's separate property. Any gains, income, interests, dividends, profits and increase/decrease in value, and member draws from Taco John's of Pine Ridge, LLC, are Plaintiff's separate property.

47. Any business debts personally guaranteed by Plaintiff associated with Taco John's of Pine Ridge, LLC are Plaintiff's separate liabilities.

HOMESTEAD EQUITY, ROCHESTER, MINNESOTA

48. The homestead located at 3244 Lake Street, NW, Rochester, Minnesota is a combination of Plaintiff's separate property and marital property. As of December 31, 2013, the home equity is valued at $200,110. The sum of $31,112 is Plaintiff's separate property interest and the marital property interest is $168,998.

OKLAHOMA CONDO SALE PROCEEDS

49. The sale proceeds from the Oklahoma Condo is a combination of Plaintiff's separate property and marital property. The condo was subsequently sold after the Minnesota valuation date of December 31, 2013. The sale proceeds were $102,782. The sum of $25,967 is Plaintiff's separate property interest and the marital property interest is $76,814.

HOUSEHOLD FURNISHINGS AND MISCELLANEOUS PERSONAL PROPERTY

50. The following items of household goods and furnishings and miscellaneous personal property are 100% Plaintiff's separate property:

Master:

- Mission style mirrors and end tables – gift made by friend
- Chair – premarital
- 4 Howard prints – premarital
- Bedroom Set – came into marriage with one
- Samsung TV – separate funds
- Hair Feathers – France print
- Electric Fireplace
- Leather bench seat – separate

Master Bath:

- Shelves – premarital

Upstairs:

First Bedroom (Indian Doll)

- Indian Doll – gift Angie
- Bifold with purses – separate
- Bedroom furniture – premarital
- Badlands Oil by Ben Von Nuys – gift from Plaintiff's mother

- Watercolor by Karen Hill – premarital painting by friend

Hallway

- 2 saddles – one of Plaintiff's Mom's side saddles and Plaintiff's Dad's saddle
- Badlands Print – gift from Plaintiff's Mom

Guest Bedroom

- Partial of premarital bedroom set split between 2 bedrooms – split between 2 bedrooms
- Bench – premarital
- Lamp – after 2013
- Small Table – after 2013
- Mirror – gift from Plaintiff's friends
- Copper art work

Staci's Bedroom:

- Queen size bed and set – Staci
- Toy chest – kids
- Stool – Plaintiff made in shop
- Star Quilts – separate

Downstairs Bathroom:

- Knick Knacks

Exercise Room:

- Elliptical trainer – 2010 Valentine's gift from Defendant
- Hutch – premarital
- TV – Plaintiff won at TJ convention
- Shelves – premarital
- Queen Size Couch – Plaintiff bought prior to marriage
- Bifold Picture Holder – Plaintiff won at golf

Movie Room:

- Leather Furniture – premarital
- K. Costner print – belongs to Plaintiff's sister Lulu
- Coffee table and end table – separate funds

Office & Nook:

- Pictures of my kids – separate
- Office furniture – separate – TJ paid for all

Downstairs:

- Indian Dolls – separate – gifts

Wine Room:

- Liquor / wine

- Stool, Shelves, Wall hangings – gifts

Family Room:

- Singer Sewing Machine – gift (Grandma's)
- 3 B. Doolittle Prints – bought with separate funds
- Wicker Rocker – premarital (baby gift from Kim and Cindy Benne)
- Squaw dress – Lulu
- Bow and arrow, quiver, pipe and tomahawk – gift Lulu separate
- Hope Chest – gift from Dad (graduation)
- Altar – separate – bought with cash Jan Dutelle
- Leather furniture large pic – separate funds
- Pic (within sunrise) – premarital
- High table and two chairs – Plaintiff won at charity event
- End tables – premarital
- Buffet – 2 were give to us by Bill Bruegger – one is at Defendant's office

Living Room:

- 2 Lindberg shelves – gift made by friend
- Flower arrangement – separate after 2013
- Horse hair vase – gift (niece made it)
- Knick knacks – separate
- 2 mission style chairs and end table – gift – made by friend
- Indian Drum – gift from Rosie Gilbertson
- 3 mission style end tables – separate
- Cowhide Chair – separate bought after 2013
- 5 B. Doolittle prints – separate (gifts and separate funds)
- Sheepskin – after 2013
- War shield and eagle statue and knick knacks – premarital

Deck:

- Patio furniture – separate
- Grill – separate funds
- Picnic tables and benches – first husband built
- 2 kayaks – separate – Plaintiff bought after 2013

Office off Kitchen:

- Wine glasses – gift
- Stereo system – premarital
- Mirror (brass frame) and picture – premarital
- Lazy Susan's, wine holders (wood) – gift

Front Entryway:

- Bench – separate property
- 2 oil paintings by Jim Whartman – premarital
- Buffalo skull – gift from Jerry (brother) raised buffalo
- 2 Badlands pictures – gift from Mom

- Dad's Cowboy picture – gift from Don
- Print – B. Doolittle – premarital
- Cowboy and Indian horses – gift from Defendant

Downstairs Bathroom off Kitchen:
- 2 pictures – gift from Lulu

Kitchen:
- Cutco Knives – bought after divorce with separate funds
- Platters – dishes – gifts
- China (set of 12) – first wedding
- Crystal – first wedding
- Bejeweled glassware – gifts
- Plants – ferns – gifts – Bubba's funeral
- Keurig Coffee – gift – Joyce
- Wine holder – gift
- Table and 8 chairs – premarital
- Glass book case – premarital
- Display case – gift Mom
- Plant stand – Aunt Jean Colvin made for me
- Butter churn – premarital
- Dishes / silverware – pots and pans – premarital (first marriage)

Coat Room:
- Electric Roaster – gift from Mom
- 3 slow cooker buffet – gift from Joyce
- Rice Cooker – gift from Staci and Bubba
- Slow Cookers – first wedding gift
- Waffle Maker – first wedding gift
- Folding Trays – first wedding gift

Laundry Room:
- Christmas wrap
- Benne dog stuff

Vestibule:
- Coat Rack – gift made by friend
- Brass shelves – first marriage

Garage:
- Tools – separate funds
- Bike
- Shelves – premarital
- Golf stuff won in tournaments

Guns:

- Shot gun – 20 gauge – gift from first husband
- 22 long pistol – gift from mother

Basement:

- Rain soft water softener – separate

Items Throughout Home:

- Rugs throughout the home
- Leather chair and ottoman – separate – Staci Ann

Don's Office:

- Cowboy in slicker print – separate
- 2 night stands that belong to my bedroom set – separate
- Plant stand
- Round table and 4 chairs
- 2 Indian oil paintings given to me by Julie Domaille – separate
- Big leaf print – gift from Don for my birthday
- 4 new prints – marital

Jewelry:

- 5 jewelry boxes and cases – one is a standing one with drawers
- 5 Black Hills gold necklaces
- 2 complete Black Hills gold earrings
- 3 Black Hills gold rings (one is brand ring)
- 1 Black Hills gold bracelet
- 6 zirconium (fake) diamond rings
- 2 diamond rings and one matching bracelet
- 1 diamond tennis bracelet, (probably fake)
- 1 diamond necklace (one cross) (probably fake)
- Cameo necklace & earrings
- 2 black pearls necklaces and earrings
- Gold boot necklace
- Amethyst ring
- Silpada jewelry
- 2 turquoise rings
- Turquoise necklaces and earrings
- All kinds of cocktail jewelry
- Jade necklace, earrings, and rings
- Pearl ring
- Pearl earrings
- 2 Swarovski necklaces (red) earrings & ring & bracelet
- Cross necklaces that are cocktail jewelry
- 14 watches, cocktail jewelry

HARDCORE COMPUTERS STOCK

51. The Hardcore Computers Stock owned by the parties is a combination of Plaintiff's separate property and marital property. As of December 31, 2013, the value of the Hardcore Computers Stock is $25,000. The sum of $2,625 is Plaintiff's separate property interest and the marital property interest is $22,375.

2013 TAX REFUND RECEIVABLE

52. The $15,000 tax refund from the United States Treasury is a combination of Plaintiff's separate property and marital property. The sum of $824 is Plaintiff's separate property interest and the marital property interest is $14,176.

VEHICLES

53. The 2003 Ford Thunderbird was gifted to Plaintiff by Defendant and is 100% her separate property pursuant to Paragraph 6 of the PMA. The Jeep Compass is an asset of TJPR.

54. In summary, the value of Plaintiff's separate property in the following assets is:

Investment Accounts:	
Plaintiff's Edward Jones #7191	$584,648
Joint Edward Jones #7183	$99,692
Defendant's Edward Jones #7272	$15,081
Joint Edward Jones #6236	$21,746
Plaintiff's Edward Jones #1297	100% separate
Plaintiff's Joint Home Federal Checking #2730	$1,549
Retirement Accounts:	
Plaintiff's Edward Jones IRA #0592	$56,346
Plaintiff's Edward Jones Taco John's Simple IRA #0314	$128,873
Plaintiff's Edward Jones Taco John's Simple IRA #7610	$149,250
Defendant's Edward Jones Roth IRA	$2,633
Business Interests:	
Taco John's of Pine Ridge, LLC (including all bank accounts, assets and debts associated therewith)	100% separate

Plaintiff's 50% Interest in STI, Inc. (including all bank accounts, assets and debts associated therewith)	100% separate
Defendant's Limited Partnership Interest in The Jones Financial Companies, LLLP	$20,669
Defendant's Subordinated Limited Partnership Interest in The Jones Financial Companies, LLLP	$11,087
Defendant's 33.33% interest in Superior Financial Group, LLC	$8,280
Defendant's 16.67% interest in BDUBS, LLC	$27,155
Defendant's 75% interest in SFME, Inc.	$1,023,967
Defendant's 25% interest in ME Rogers, Inc.	$7,670
Real Estate:	
Rochester, Minnesota Home	$31,112
Oklahoma Condo Sale Proceeds	$25,967
Miscellaneous:	
Household Goods and Furnishings and Miscellaneous Personal Property	100% separate
Hardcore Computers Stock	$2,625
2013 Tax Refund	$824
2003 Ford Thunderbird	100% separate - Gift

**Values rounded up/down to nearest dollar value.*

55. Plaintiff transferred marital funds to Taco John's of Pine Ridge, LLC creating a marital loan. Taco John's of Pine Ridge, LLC owes the marital estate $44,240.

56. Except as set forth in the above Conclusions of Law, any Proposed Conclusion of Law of the Defendant is refused and overruled.

Any Finding of Fact deemed to properly constitute a Conclusion of Law shall be incorporated herein by reference.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 8th day of April, 2016.

BY THE COURT:

Michael W. Day
Circuit Court Judge

ATTEST:

Clerk

Deputy

(seal)

FILED
APR 08 2016
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT
By

APPELLANT'S APPENDIX NO. 3

PREMARITAL AGREEMENT

PRE-MARRIAGE AGREEMENT

THIS AGREEMENT is made and entered into this 22nd day of January, 1993, by and between **DONALD M. CHARLSON** of St. Louis, Missouri, and **ANGELA K. (JOHNSON) SMOOT** of Belle Fourche, South Dakota.

PURPOSE AND INTENT

The parties intend to be married to each other on January 23, 1993. Both Don and Angie have been previously married and divorced. Don has three children from a prior marriage, namely Jeremiah, age 13; Jennifer, age 11; and, Christina, age 9. Angie has two children from her prior marriage, namely Christopher, age 11; and Staci, age 7. Both of the parties recognize certain realities of life, namely the certainty of death and the potential for divorce or separation. The purpose and intent of this agreement is to (1) specifically identify the separate assets and liabilities of each party accumulated prior to the marriage and existing as of the date of this Agreement; (2) to relinquish the right of each party that may or will arise solely by virtue of the marriage relationship as against the separate property of the other; (3) to define the rights of each party to the property acquired during the course of the marriage; and, (4) to recognize the rights of each party to dispose of separate property during their lifetime and upon death. It is <u>not</u> the purpose and intent of this Agreement to provide for, facilitate or otherwise induce separation or divorce; to the contrary, this Agreement is made and entered into specifically in contemplation of marriage.

1. **DISCLOSURE OF ASSETS:**

Each party has, prior to the execution of this Agreement, provided to the other a full and complete accounting of all assets and liabilities existing as of the date of this Agreement. Don has attached his list of assets and liabilities to this Agreement as Exhibit "A". Angie has attached her list of assets and liabilities to this Agreement as Exhibit "B". Both exhibits are specifically incorporated herein by reference, as though

each exhibit had been specifically set out in detail. The parties have utilized their best business judgment and good faith in placing values on the assets listed in the various exhibits, but have not obtained formal appraisals of any such assets. Each party represents to the other, however, that the listing of assets and the value placed on the assets constitutes a reasonable approximation of each party's assets and liabilities, but neither party represents that the balance sheet is a precise compilation, and further understands that the information was prepared informally by each party and was not prepared by professional accountants or appraisers. Variation in the value of the assets, at any time in the future, shall not affect the validity of this agreement.

2. **SEPARATE PROPERTY:**

A. Each party acknowledges and agrees that all property acquired and owned by the other as of the date of this Agreement shall be and remain the sole and separate property of that party. Each party, for himself or herself, and his or her heirs, executors, administrators, successors and assigns specifically relinquishes and disclaims any and all right, title, interest and claim of every kind or nature, regardless of the nature or source of that right, which will or may otherwise arise by virtue of the marriage.

B. During lifetime, each party shall retain the sole and separate ownership and control of his or her separate property, and shall be free to manage, sell, control or otherwise dispose of such separate property.

C. Separate property as used in this Agreement shall include not only the assets described on attached Exhibits "A" and "B" but shall also include gains, income, income, interests, dividends, profits, and any other increases in value or decreases in debt, and issues therefrom.

D. Each party shall be free to replace assets owned by him or her at the time of this Agreement, and to sell or otherwise receive proceeds attributable to separate property of each. The replacement and proceeds of separate property shall be and

remain separate property, and shall not lose their character as separate property solely by change of the form or nature of the asset.

E. Property received by either party through gift or inheritance shall remain the sole and separate property of the party so receiving or inheriting.

F. Employment benefits including, but not limited to, pension, profit-sharing or any other employee benefit programs or plans shall remain the sole and separate property of the party so employed, and such benefit plan shall remain separate property, even following the marriage of the parties. Each party relinquishes any claim, right, interest or title to the employee benefit plans of the other, and such plans shall not be subject to division in the event of death, separation, or dissolution of the marriage.

3. **ELECTIVE SHARE:**

Upon death, each party shall be free to dispose, by will or otherwise, all of the property or property rights that each party now has freely and voluntarily, as though the marriage did not exist. The claim of each party relinquished and disclaimed herein shall include, but is not limited to, the right to elect against the will, or to receive any award of an elective share against the estate of the deceased spouse, as provided by SDCL Ch. 30-5A.

4. **MARITAL PROPERTY:**

Except as specifically provided above, property acquired by the parties from and after the date of their marriage, and continuing throughout the marriage, shall be deemed marital property. No waiver, release or relinquishment of any right, title, claim or interest in and to the separate property of the other shall be construed as a relinquishment of any right or interest in marital property. Property acquired from and after the date of the marriage, and continuing through the course of the marriage, shall remain marital property regardless of designation of title or ownership of such assets.

5. **COMMINGLING:**

Parties shall use their best efforts to prevent any commingling of separate property. The commingling of separate property, or the failure to segregate separate property, shall not be construed as to change the character of separate property or otherwise result in a change of separate property to marital property.

6. **DISPOSITION OF PROPERTY:**

As set forth above, each party shall be free, at all times, to dispose, transfer or convey, for consideration, gift or otherwise, any and all interest in his or her separate property. Each party agrees to join, as may be necessary, in any document of conveyance, transfer or mortgage requested by the other, in order to carry out transfer or conveyance of separate property.

7. **ORDINARY LIVING EXPENSES:**

The parties agree to create, upon marriage, a jointly owned bank account, and each agrees to deposit into such account, earnings or separate property, at an amount necessary to pay ordinary and necessary living expenses of the parties, and any acquisition of marital property. The payment of other ordinary living expenses, such as taxes, insurance, utilities, and miscellaneous repairs shall be paid from the joint marital bank account.

8. **DEBTS:**

A. Debts incurred by either party prior to marriage shall remain the sole and separate obligation of the party which incurred the debt. Neither party shall be liable for the debts of the other party incurred prior to marriage.

B. Debts incurred by either party after the marriage, relating to the separate property of each party, shall be and remain the sole obligation of the party which incurred the debt. Any indebtedness incurred by Angie after marriage shall remain her sole and separate obligation; and, any indebtedness incurred by Don during the course of the marriage shall remain his sole and separate obligation.

C. The parties shall be mutually liable only for debts incurred in the name of both parties, and with the specific knowledge, consent and written undertaking of any such obligation. Neither party shall bind, or attempt to bind, the other to any indebtedness except on written consent.

D. Neither party shall submit or prepare any financial statement or document of similar nature, for submission to any creditor or prospective creditor of the parties, making reference to any marital assets or the separate assets of the other party, without written consent.

E. Each party shall indemnify and hold harmless the other from any liability arising from failure to comply with this provision.

9. **ORAL STATEMENTS:**

No statement or act by either party, from and after the date of this Agreement, shall have the effect of amendment, of modifying this Agreement. All property which may otherwise be designated as marital property may become or be treated as marital property, except by specific, written amendment to this instrument. In addition, under no circumstances shall the following events, either individually or collectively, be construed as evidence of any intention, express or implied, or of any agreement, actual or implied, to change the character of separate property:

A. The filing of a joint income tax return;

B. The designation of either spouse as a beneficiary of the other spouse's estate, by will or by life insurance;

C. The commingling of either spouse of his or her separate funds with the separate or separate funds of the other party or with any marital property;

D. Any oral statements by either party;

E. Any written document by either party, other than an express written agreement specifically amending this agreement;

F. Payment of any marital funds toward any separate obligation of the other party, other than as provided for ordinary and reasonable living expenses. In the event that marital property or separate property of either party is contributed toward separate property or debts of the other, such contribution shall be deemed a loan, payable on demand, without interest, unless the parties agree otherwise, in writing.

10. **AMENDMENT:**

This Agreement may be amended by the parties only by express, written document, specifically referring to and amending this Agreement. Any such amendment shall be executed by the parties with the same formality as this Agreement, shall be executed in duplicate, and shall be specifically attached to and made a part of this Agreement. No other type of agreement, oral or written, shall have the effect of amendment.

11. **LEGAL REPRESENTATION:**

Don acknowledges that this Agreement has been prepared by legal counsel for Angie, the law firm of Carr & Pluimer, P.C. of Belle Fourche, South Dakota. Angie's attorneys have not and do not purport to advise Don or to make any representations to him. Each party has had the benefit of separate representation by legal counsel of their choice. Each party further represents they have read this Agreement in its entirety, have fully examined the schedule of assets of the other, have had an opportunity to have any matters explained to them by the other or by their attorney. Each party fully understands the purposes, terms, provisions and legal consequences of this Agreement.

12. **OTHER DOCUMENTS:**

Each party agrees to execute any and all other formal document that may be deemed necessary or advisable to carry out the terms of this Agreement.

13. **BINDING EFFECT:**

This Agreement shall be binding upon the parties, their legal representatives, heirs and creditors.

14. **EFFECTIVE DATE:**

This Agreement shall become effective upon the date of the marriage of the parties whether before or after the anticipated date.

15. **GOVERNING LAW:**

This Agreement is made and executed in the State of South Dakota, and shall be governed by the laws of the State of South Dakota notwithstanding the fact that the parties may, from time to time, reside in some other jurisdiction. Venue of all proceedings to interpret this Agreement shall be held in Butte County, South Dakota.

16. **SEVERABILITY OF PROVISIONS:**

In the event that any portion of this Agreement is determined to be invalid or unenforceable, such determination shall not effect the validity or enforceability of any other provision herein.

17. **REVIEW:**

The parties intend to review this Agreement five (5) years from the date hereof. No modifications will be implied by such a review, and any amendments or changes shall conform to the requirements of paragraph 9. This provision for review is optional with the parties, and the failure to review shall not affect the validity of any portion of this agreement.

18. **ENTIRE AGREEMENT:**

This document represents the entire understanding and agreement between the parties, and incorporates all prior discussions. There are no oral agreements or representations made by either party other than is specifically set forth herein.

Executed in duplicate this 22nd day of January, 1993.

DONALD M. CHARLSON

ANGELA K. (JOHNSON) SMOOT

STATE OF SOUTH DAKOTA)
)SS.
COUNTY OF BUTTE)

On this, the 22nd day of January, 1993, before me, the undersigned Notary Public, personally appeared Angela K. (Johnson) Smoot, known to me or satisfactorily proven to be the person whose name is subscribed to the within Pre-Marriage Agreement and acknowledged that she executed the same for the purposes therein contained, as her free act and deed.

In Witness Whereof, I hereunto set my hand and official seal.

NOTARY PUBLIC

(SEAL)

STATE OF SOUTH DAKOTA)
)SS.
COUNTY OF BUTTE)

On this, the 22nd day of January, 1993, before me, the undersigned Notary Public, personally appeared Donald M. Charlson, known to me or satisfactorily proven to be the person whose name is subscribed to the within Pre-Marriage Agreement and acknowledged that he executed the same for the purposes therein contained, as his free act and deed.

In Witness Whereof, I hereunto set my hand and official seal.

NOTARY PUBLIC

(SEAL)

ATTORNEY'S CERTIFICATION

COMES NOW Richard A. Pluimer of the law firm of Carr & Pluimer, P.C., Attorneys at Law, Belle Fourche, South Dakota, and hereby acknowledges that he has represented the interests of Angela K. (Johnson) Smoot in matters relating to the Agreements set forth herein. I represent that I have fully advised Angie of her property rights and the legal significance of the Agreement. Angie has represented to me that she understands the terms and legal consequences of this Agreement, and has freely and voluntarily executed the Agreement in my presence.

CARR & PLUIMER, P.C.

BY: 

RICHARD A. PLUIMER, Attorney for
Angela K. (Johnson) Smoot
P.O. Box 580
Belle Fourche, SD 57717-0580
(605) 892-6383

Don's attorney, Michael McKnight, will provide letter certification to follow and be attached hereto.

Financial Statement for Don Charleson
1/22/73
~~[illegible]~~
0 assets

Don Charleson

EXHIBIT 'B'

Financial Statement of Angela K. Smoot

Social Security No. 503-72-1160
Date of birth: July 27, 1956

Assets:		Value of Angie's interest
1.	Family corporations[1]	
	a. TJPR, Inc.[2]	$100,000.00
	b. STI, Inc.	160,000.00
	c. JMCCS, Inc.	Less than 10,000.00
2.	House equity[3]	2,800.00
3.	Checking account	Approximately 2,000.00
4.	Edward D. Jones & Co. Account No. 570-04012-1-8 consisting of money market accounts, stocks and mutual funds having an accumulated balance as of December 31,1992	68,645.65
5.	Personal property consisting of two vehicles, household furnishings and miscellaneous personal property	20,000.00

Liabilities:		
1.	Remaining balance on mortgage for Angie's residence	58,000.00
2.	Business debts personally guaranteed by Angie	90,000.00

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[1]The corporations listed herein consist of three Taco John's business operations, in which Angie owns 50% of the stock of each corporation. The corporations own Taco John's businesses in Pine Ridge, Belle Fourche, and Mission, South Dakota.

[2]At the time this exhibit is prepared, an offer has been made to purchase the sole asset of this corporation, which consists of the Taco John's business located in Pine Ridge. The terms of the pending offer contemplate a sale of the entire asset for $200,000. Angie's 50% interest will generate approximately $100,000--$75,000 in the near future and the additional $25,000 payable at some future date, the exact time and circumstances of which have not been determined.

[3]At the time of the making of this agreement, Angie is in the process of and has accepted an offer to sell her residence in Belle Fourche, which according to realtor's projected closing statement, will yield net equity to Angie of $2,800 after deduction of all costs of sale and payment of all existing debt.

APPELLANT'S APPENDIX NO. 4

TRANSCRIPT EXCERPTS

STATE OF SOUTH DAKOTA | IN CIRCUIT COURT

COUNTY OF BUTTE | FOURTH JUDICIAL CIRCUIT

ANGELA CHARLSON,

Plaintiff,

vs.

DONALD CHARLSON

Defendant.

Court Trial

Volume II of V
Pages 296-537

Civ. 14-06

BEFORE: THE HONORABLE MICHAEL DAY
Circuit Court Judge
Belle Fourche, South Dakota
April 21, 2015 at 8:00 a.m.

Reported By: Kathryn M. Mack
Official Court Reporter

A No. I had expenses paid through my separate Norwest account. And I paid expenses --

Q So my question was: If you didn't deposit money into this account in '93, other than for Round Up Builder, '94, and all through '95, until this $5,000 deposit, any expense paid from the 7183 account would have been paid from Mr. Charlson's income?

A I was buying my separate property with the money that I was depositing into this separate -- this joint account. I bought the LP, I bought my house in Belle Fourche. I deposited money from my separate account into this joint account, because this account was, basically, to buy my separate property. I could trace from my 7191 account to this. I could follow it.

I did not have checking capabilities out of my separate savings and investment account, so I would put a big amount, $35,000, $25,000, $5,000 in to buy a separate property. We had another joint account in Belle Fourche, which we had check-writing capabilities, and I had my separate Norwest account with check-writing abilities. Okay. And that's how we paid expenses.

Q If you were trying to maintain separate property interest, for example, your house in Belle Fourche, why wouldn't you have transferred the money from 7191

my joint account to my separate account. And Don knew that it was my money going from my joint account to my separate account. Because, believe me, Don Charlson did not allow one penny to go from our joint account into my separate account unless it was from, like, Taco Johns, Massage Envy, Buffalo Wild Wings, or one of my businesses. So if there was money going into that account and my accountants couldn't trace it and say exactly what it was, they put it as a marital loan.

But in my heart of hearts, and at absolutely -- I can -- like I'm testifying right now, I did not make a marital loan. And they did this in their way of doing things. I had to agree. I had to say, "We have to let that be a marital loan." But I know and Donny knows that I didn't borrow any money from our joint account for my 7191 account. I kept that separate.

Q So when you transferred money from 7183 to 7191, and your expert treated it as a loan, it's your testimony that it was not meant to be a loan?

A It was not meant to be a loan.

MS. LAWRENCE: Your Honor, I would move to exclude the Value Tracing Report, as it clearly does not follow what Ms. Charlson believed they were doing during the marriage and what her testimony is today, what these

transfers were meant to be. It's this fictitious methodology report that doesn't match their life or her intention or her interpretation of the pre-marriage agreement.

THE COURT: Ms. Rohr?

MS. ROHR: Thank you, Your Honor. Ms. Charlson testified yesterday she is not a financial expert, and she didn't know how financial tracing going back 25 years works. She is able to testify what she intended. This is what the tracing experts have come up with and she's not qualified to answer that question. Thank you.

THE COURT: Thank you. Your motion is denied.

Q (By Ms. Lawrence, continuing) So is it your testimony that the Value Tracing Report does not match how you lived your life? Or what your intention was during the marriage?

A. No.

Q So it's your testimony that it does -- it does follow how you lived your life and what your intention was during the marriage?

MS. ROHR: Objection. Asked and answered.

THE COURT: Objection sustained.

Q (By Ms. Lawrence, continuing) Okay. And if you're saying that you never borrowed money from the joint

Q And it says it's a loan from you?
A Yes.
Q Do you think if you had deposited all the of the rebates and reimbursements back to the business, you wouldn't have had to borrow money or loan money?
A I don't know.
Q Why would you have been loaning money to Taco Johns of Pine Ridge?
A From my 7191, that's my separate account -- or, I mean, it's my separate property. I probably didn't get in a deposit and it needed money.
Q So throughout the report, where it shows that it was a loan from you to Taco Johns, that would be because the business needed money?
A Yes.
Q With the expense reimbursements that you paid from the joint account and reimbursed into 7191, your attorney said that's a marital loan; correct?
A Yes.
Q Did you obtain Mr. Charlson's written permission before taking that loan from him?
A No.
Q And that's money that Mr. Charlson could have used and relied on for marital expenses or acquisition of the marital property, is that not true?

A Yes.
Q And, instead, that money has been sitting in your 7191 account; correct?
A Yes.
Q And had Value Consulting Group not applied this accounting methodology to the last 20 years of your financials, Mr. Charlson would never known that his marital funds were in your account, would he?
MS. ROHR: Objection. Calls for legal conclusion and lack of foundation.
THE COURT: Overruled.
A What was the question, again?
Q (By Ms. Lawrence, continuing) Would Mr. Charlson have known that his marital funds were sitting in your 7191 account had your expert not applied an accounting methodology to the last 20 years of your financial life?
A He knew that there was no loan in my 7191 from our joint account.
Q That there was no loan?
A Right.
Q Can you go to Page 50, Line 544. Are you there?
A Yes.
Q On November 18, 2002, you deposited a check from Ohly Law Office into your 7191 account; correct?

A No, it wasn't.
Q Go to Page 173.
A (Witness complies.)
Q Do you see at Line 84?
A Yes.
Q There was a $9,500 transferred from 7183 into the Home Federal account; correct? That was in October, 2006.
A Yes.
Q And two lines down is where that transfer from the Home Federal of $7,500 to your 7191 account occurs. Do you see that?
A Yes.
Q So you transferred $9,500 from your joint account to the Home Federal account, $7,500 from 7191 to your simple IRA; correct?
A Yes.
Q And you're claiming that entire transfer is your separate property?
A That's the expert's -- I -- this is -- that's for the people, yes.
Q What was your intent at the time?
A I have no idea.
Q Go to Page 61, Line 770.
A Yes.
Q You deposited $2,000 into your account from 2730;

Q Line 858. You transferred $771.28 from the joint account to your 7191 account. Do you see that?
A Yes.
Q And part of it is treated as separate and part of it is treated as marital; correct?
A Yes.
Q In December of 2008, there was over $220,000 in your joint, per your expert's report. Does that sound accurate?
A Can I see that?
Q Yes. If you go to Page 124. Do you see Line 975 of your expert's report, the way they categorized your funds, there was $228,000 marital funds in the joint account?
A Yes.
Q So when there's that much marital funds in the joint account, how is it that you're claiming transfers to 7191 are your separate property?
A That is a question for the experts. I have no clue.
Q And at the same time of that transfer, look back at Page 65, you had borrowed $73,537 from the marital account; correct?
A What line is that?
Q Line 861.
A I don't -- this is something the experts have to tell

you what happened. I am not capable of doing this. This is -- you're going to have to see how they did it with their formulas and all that kind of stuff. They tried to explain it to me and I...

Q Well, it shows there's a loan of $73,537.37. Your previous testimony was that you had never borrowed any money from the joint account; correct? That this isn't actually a loan?

A I think my testimony was the fact that I knew in my heart, Donny knew in his heart, that I didn't have any -- I had not taken anything from our joint account and put it into my separate account. My tracing that I had to do says that I have a marital loan. My prenup says that I have to go by this tracing, and I have to do that. So you'll have to ask my experts about this, because I don't know how the percentages that they figured out. $200 goes to marital and $500 goes to joint. I don't know.

Q When you transferred money from 7183 to 7191, what was your intention for that money?

A I don't know what date -- I can't remember these things. This is -- that's why I got experts to do all of this. This is 20 years of different accounts into different accounts. It's very confusing to me and it's -- I'm sorry. I just have to rely on my experts

individual 7191.

A I probably -- yes. I found a secret phone on that date.

Q Where did you find the secret phone?

A In my pickup.

Q And because of that secret phone, you transferred $10,000 from --

A Don transferred $10,000.

Q Can you go to Page 66 at Line 889.

A (Witness complies.)

Q So you transferred $630 to your 7191 to your IRA?

A Yes.

Q If you go down to Line 894, you transferred $942 from 7191 to your IRA?

A Yes.

Q And at the time of those two transfers, the 7191 account held over $74,000 of marital funds; correct?

A What was -- oh, down below that?

Q Yeah. Line 896, $74,000.

A Yes.

Q Yet you're claiming those are all your separate property?

A That's what the experts say.

Q So throughout this, were you transferring money from your 7191 to your IRAs while, at the same time,

borrowing money from the marital estate? Are you maintaining a separate interest in the money?

A I had no idea at that time.

Q You had no idea at the time what?

A That I would have to have a tracing.

Q What do you mean by that?

A I had no idea that I would have to have a tracing and what was going on, that it would be like this. That this would be -- this was -- this is what's happened.

Q I'll have you go to Page 71. Do you see at Line 994?

A Yes.

Q You transferred $7,356.45 from 7183; correct?

A Yes.

Q And on the schedule for the joint account, it says that is from -- the separate portion is the insurance payment for the Jeep Compass. Would that be accurate?

A Yes.

Q And if you look at the exhibit book in front of you, the exhibit is Bates Stamp 0717 --

MS. ROHR: That is the Defendant's exhibit book?

MS. LAWRENCE: Yes.

Q (By Ms. Lawrence, continuing) -- 0717 through 0721.

MS. VIKEN: Can you tell us what...

MS. LAWRENCE: It's the hail damage for the Jeep.

MS. VIKEN: Can you tell us what exhibit it is.

marital, so I allowed it to go into marital. But I -- I can't dispute what they did with the tracing. But in my heart of hearts and -- I can follow it myself. This is what I'd do: I would put a huge amount in, and that was for my separate property.

Q The $26,000 you're talking about?

A Yes.

Q Okay. So if you go to Page 71 at Line 993.

A (Witness complies.)

Q Do you see that $26,000 transfer out of 7191?

A Which line?

Q 993.

A Yes.

Q That $26,000 was treated as marital to pay down the alleged loan from the marital estate. Do you see that?

A Yes. That's what my accountants did -- my experts.

Q If you look at the next page, Line 72 -- I'm sorry -- Page 72, Line 1008, there's a $65,000 transfer. And that, again, was treated as marital, to pay down the marital loan. Do you see that?

A Yes.

Q Is it your testimony that those large transfers were not to pay down the loan, they were meant for your separate property?

A I have to go by the rules.
Q What was the intent at the time?
A I'm sure it was to go for my separate property. But, like I said, when they started doing this tracing, I wasn't -- I didn't know that I -- that this is the way they did it. When I was spending my money and buying my property, I had no idea that this is how it would come about. I had no idea I would be getting a divorce. I never -- if someone would have told me when I did this that it would come down to this, believe me, I would have done a lot of things different. What I was intending all along was to keep my stuff separate. And I tried very hard to do that. And in my accounting -- in my head, I did do that. I did keep my stuff separate and I did try to preserve, for my family and myself, my work.
Q On the next page, Page 73, Line 1029, do you see you transferred $30,000 from 7191 to 7183?
A Yes.
Q Was it your intent at the time for that $30,000 to be your separate property? Or were you meant to be paying down a marital loan?
A I didn't even know about a marital loan. So I don't know -- like I said, I didn't know about a marital loan. This is what the experts have said that I have

in a marital loan, and so I have to abide by it.
Q And so with those transfers back out from 7191 to 7183, and the way your experts have characterized those as "repaying the marital loan," it takes the marital loan balance to 0. Do you see that at the bottom of the page?
A Yes.
Q So if you look at the next page, that would have been just in time for you to start purchasing or transferring funds to the Sioux Falls Massage Envy loan. Do you see that?
A What line is that?
Q Line 1047, Line 1050. Do you see those transfers?
A Yes, I do.
Q Okay. So you it was your intent that the $26,000 transfer was meant for your vehicle, and that these transfers were not going to pay down a loan. But it looks like your experts have paid down this loan, so that the account had a 0 balance of a marital loan right before you started paying off the Sioux Falls Massage Envy loan. Would that be accurate?
A No.
Q Tell me where that's inaccurate.
A Because I never dreamt I had a marital loan in any of these accounts.

STATE OF SOUTH DAKOTA | IN CIRCUIT COURT

COUNTY OF BUTTE | FOURTH JUDICIAL CIRCUIT

ANGELA CHARLSON,

Plaintiff,

vs.

DONALD CHARLSON

Defendant.

Court Trial

Volume IV of V
Pages 653-896

Civ. 14-006

BEFORE: THE HONORABLE MICHAEL DAY
Circuit Court Judge
Belle Fourche, South Dakota
April 23, 2015 at 8:00 a.m.

Reported By: Kathryn M. Mack
Official Court Reporter

marriage?

A You know, I believe that everything that we bought during our marriage from our joint account was marital.

Q And it states that in Paragraph 4 of your pre-marriage agreement?

A It does.

Q Does it state that throughout your pre-marriage agreement?

A In bits and pieces, yes.

Q So when Ms. Charlson claims that she has a separate property interest in all of these assets, it is her position that she maintains -- every time she deposited money to your joint account, she maintained a separate property interest in it. Do you understand that?

A Yes, I do. I understand what she said, yes.

Q Do you agree with that?

A No. I don't agree with that. There was never a discussion relating to the fact that she was doing this. She would have had the ability to keep her assets separate, had she wanted to. She could easily have written checks from other places if she was trying to keep assets separate. It was never understood by me that that was what her intent was.

She could have wired money. She could have transferred monies. If she didn't -- she could have written checks on her 7191 account.

Q Paragraph 4 of your pre-marriage agreement specifically states, "Property acquired after the date of marriage and continuing throughout the course of the marriage, shall remain marital property, regardless of its designation of title or ownership." Do you see that?

A Yes, I do.

Q What does Paragraph 7 state?

A "The parties agree to created upon marriage a jointly owned bank account and each agrees to deposit into such account earnings or separate property at an amount necessary to pay ordinary and necessary living expenses of the parties in any acquisition of marital property, the payment of other ordinary living expenses, such as, taxes, insurance, utilities and miscellaneous expenses shall be paid from the joint account."

Q And is that how you lived your life during the marriage?

A Yes. That's how we lived our life.

Q At the time you signed the pre-marriage agreement, you had previously testified you were working in St.

A You know, I never transferred any monies from anywhere. I have an assistant that does it, but I never do.

Q And would Ms. Charlson have instructed your assistant with any transfers she acquired?

A Ms. Charlson -- Angie, could have made a request to my assistant, yes.

Q Was Ms. Charlson able to make transfers, herself?

A When she was working at Edward Jones, she could do it online and she could make transfers, as well, and pay bills.

Q Did Ms. Charlson ever give you checks to deposit into specific accounts?

A Yes, she did.

Q Did she instruct you on where to deposit those checks?

A Yes, she did.

Q There's been a lot of testimony about the different businesses that you two own. Were those businesses acquired with funds from your joint account?

A All of them.

Q So the Buffalo Wild Wings, Sioux Falls Massage Envy, Rogers Massage Envy, Taco Johns of Pine Ridge, Edward Jones Partnership, those were all acquired with assets or funds from your joint account?

A All of them were.

Q Which accounts would those have been?
A Probably at the time, a Norwest Bank account back in Belle Fourche -- or out west, her -- in '95, the -- personally, for Belle Fourche -- or her own account, personally, she had her Belle Fourche for STI account, and she had our joint account, along with myself.
Q Now that you have reviewed all the of the statements and the Value Consulting Group accounting methodology report, how do you interpretate how Ms. Charlson used -- well, I guess I'm going to strike that.

When you reviewed the accounting methodology report provided by Value Consulting Group, how do you interpret that, as far as Ms. Charlson's use of your accounts?
A When I look back, if that was what her actual intention was, I guess I'd say I'd be upset about it. I never had any idea at all that she was borrowing money from our account, which she doesn't either, she stated yesterday. I had no idea records were back and forth and records were being taken of her owing marital assets to our joint account. The Value Consulting Group has to have 50 assumptions, maybe even 100. I didn't count them, but there was many statements that say they assume this or they assume that. We're dealing with millions of dollars and the

assumptions didn't make sense to me.

Q When you would say "assumptions," do you mean they're assuming a deposit is meant or was a specific deposit.

A They're assuming this was to be a deposit to cover a loan, or they're assuming that the deposit was meant to go to cover a -- an expense from our account for covering a credit card expense. The term "assume" is used oftentimes. But, you know, it makes many assumptions. The entire 300-some pages shows the co-mingling that existed. Every movement that's made, especially with the last one that I was able to spend some looking at, is designed to make it so that Angie -- everything is designed to benefit Angie.

Q Her separate property interest?

A As far as her separate property interest, I would assume that that company would be basing their decisions on what she told them of facts that occurred, of actual activities that took place. And to me, it appears that they were asked to present a story and they did it.

Q Does that story, at all, match the way you two lived your lives?

A Not all at all.

Q How is it different?

A We lived our lives. I went to work everyday, built a

would make investments in the account with my help most of the time. Sometimes she'd make her own decisions.

Q And under the Value Consulting Group methodology, it appears that money from 7183 that went into 7191 is now considered a marital loan. Did you see that?

A Yes. I'm sorry. Could you repeat that.

Q Under the Value Consulting Group methodology, the transfers from 7183 to 7191 created a marital loan in the 7191 account. Did you see that?

A I did see that.

Q Did you see at times, depending on which report you're looking at that, the marital loan was $200,000?

A I did see that, yes.

Q And under their methodology, Ms. Charlson is maintaining that she still maintained a separate property interest while borrowing money from the 7183 account. Did you see that?

A Yes. I assumed by making the borrowing, it makes it to so that the 7191 does not provide me to have any marital interest in that account. They call it a "loan."

Q And you heard Ms. Charlson's testimony yesterday that that wasn't what -- there was no marital loan?

A As she stated, she nor I ever used the word "loan."

We never discussed the word "loan." I had no idea that she was borrowing money from this account, again, the one that I put most of the money in, that she was borrowing from it.

Q So she never asked your permission to borrow money from 7183?

A The word "loan" was never used.

Q During your marriage, did you have an expectation that Ms. Charlson would contribute to the monthly living expenses?

A Yes, I did.

Q The pre-marriage agreement specifies that earnings and separate property will be deposited into the joint account for that purpose, does it not?

A It does say that.

Q It doesn't state an amount, does it?

A No, it does not.

Q Is it your interpretation -- or was it your intent that you would pay the majority of the household expenses while Ms. Charlson's funds go to acquire interest in separate property?

A You know, the first couple years that we were married, I think she contributed more than I did. For most of the years after, I contributed more than she did. Again, I wasn't keeping score. I didn't keep track of

a separate property interest in everything you own?
A Can you repeat that. I'm sorry.
Q When you agreed to sign the pre-marriage agreement, did you believe it would result in Ms. Charlson having a separate property interest in everything you own?
A You know, this was in 1993. I had no idea what we would own. If somebody would have explained to me that this is the way it would have worked, or an interpretation could be led to be that way, there would be no way I'd sign that agreement.
Q When you review it now, is that how you interpret it?
A No.
Q How do you interpret it?
A I interpret it that, again, if we're just speaking about the joint account that -- she had income, I had income. You could classify it as hers was distributions, mine was Edward Jones income. You could classify that mine was a much greater number than hers, but I still call it all a joint income. That's the way I interpret it.
Q Do you know your total earnings over the course of the marriage, approximately?
A Yes. The Baker Tilly group said it was $2.6 million.
Q Do you know, approximately, how much Ms. Charlson earned during the course of your marriage?

A $1.6 million.
Q Do you know the approximate value of your entire estate?
A Five and a half to six million.
Q And under Ms. Charlson's interpretation of the pre-marriage agreement, approximately, what percentage do you get compared to what she would get?
A I think the Value Consulting Group said I'm at about 13 percent and she's at 87 percent.
Q Does that seem equitable to you?
A No.
Q Why not?
A A lot of reasons. But just dollars-wise, those numbers don't add up. Especially when -- well, we'll just leave it at that. Those numbers don't add up.
THE COURT: Counsel, I think this is the time we'll take a noon recess. We'll come back at 1:15.
Thank you.
(WHEREUPON, a noon recess was taken.)
MS. LAWRENCE: Thank you, Your Honor.
DIRECT EXAMINATION, CONTINUED
BY MS. LAWRENCE:
Q Mr. Charlson, before your marriage in 1993 -- or shortly after your marriage in '93, did the two of you build a house together in Belle Fourche?

money out, and she had no checks.

Q Could she have wired money from 7191 to the Taco Johns business -- or the business account?

A She could have "transferred," would be a better word. She could have transferred money from -- as she did. She transferred money from all of the accounts, from the joint account to the 7191 account, to the Taco Johns account and back. The monies all moved from one place to another.

Q If Taco Johns of Pine Ridge was meant to be Ms. Charlson's separate asset, would you have agreed to use your joint account to pay its expenses or your personal credit card to charge its expenses?

A No.

Q She never sought or got your written permission for that?

A I knew she was doing it. But I had thought that it was joint. I thought we owned it jointly. She didn't ask for permission to put money into an account that was her own.

Q Did you contribute any efforts to the success of Taco Johns of Pine Ridge?

A I went there from time to time. And while I was there, I would do things. I would shovel, I would sweep, I would stripe the parking lot.

STATE OF SOUTH DAKOTA | IN CIRCUIT COURT

COUNTY OF BUTTE | FOURTH JUDICIAL CIRCUIT

ANGELA CHARLSON,

Plaintiff,

vs.

DONALD CHARLSON

Defendant.

Court Trial

Volume VI of IX
Pages 939-1161

Civ. 14-06

BEFORE: THE HONORABLE MICHAEL DAY
Circuit Court Judge
Belle Fourche, South Dakota
August 24, 2015 at 8:00 a.m.

Reported By: Kathryn M. Mack
Official Court Reporter

Q Now, in your experience as a financial expert, is it common for parties to not understand the consequence of certain movement of funds and how that impacts a formal tracing?

A Yes. I would say it's very common. When we meet with parties doing tracing, they often don't realize that by certain actions and movements of their funds that their separate or non-marital claims can be negatively impacted.

Q I'm going to turn to Page 3 of your report. Ms. Charlson's separate assets are listed there. There are three Taco Johns restaurants; is that correct?

A Yes, that is correct.

Q And one of those restaurants is called STI, Inc., which is doing business as Taco Johns of Belle Fourche. Is that your understanding?

A Yes, that is my understanding.

Q Does Ms. Charlson continue to have an ownership interest in that business today?

A Yes. She had a 50 percent interest at the date of marriage, and she still has a 50 percent interest as of the date of valuation.

Q Now, another interest is called JMCCS, Inc. That was Taco Johns of Mission. Is that your understanding?

STATE OF SOUTH DAKOTA | IN CIRCUIT COURT

COUNTY OF BUTTE | FOURTH JUDICIAL CIRCUIT

ANGELA CHARLSON,

Plaintiff,

vs.

DONALD CHARLSON

Defendant.

Court Trial

Volume VII of IX
Pages 1162-1400

Civ. 14-06

BEFORE: THE HONORABLE MICHAEL DAY
Circuit Court Judge
Belle Fourche, South Dakota
August 25, 2015 at 8:00 a.m.

Reported By: Kathryn M. Mack
Official Court Reporter

A No.

Q When creating your report, how did you attempt to harmonize Paragraph 2 of the PMA with Paragraph 7 of the PMA?

A I have to look at those provisions. Paragraph 2 relates to separate property. So these are A through F6, different separate provisions that talk about how, "Separate property is going to be maintained, retained by the party who owns them, include gains, losses, and income." You're free to replace them with other assets.

And Section 6 relates to ordinary living expenses, which says that "Both parties agree to deposit into an account earnings or separate property necessary to pay ordinary and necessary living expenses and acquisition of marital property."

So I think the general interpretation of this is there are many provisions that are in this agreement to protect separate property, many specific provisions to protect separate property. And the fact that Paragraph 7 says that separate property goes into a joint account, doesn't mean that it's automatically marital. And it doesn't mean that marital property can't have a separate component.

I think, basically, we looked at the overall

agreement, how many times it's specific that separate property is protected in their commingling provisions, and the fact that marital property is acquired, doesn't necessarily mean that there can't be a separate interest.

Q Does it say in Paragraph 7 that separate property that goes into their joint account or marital assets would retain a separate interest?

A No. But it also doesn't say that it would become marital.

Q And under your methodology, you're protecting the separate property interest before the marital estate or the contribution towards living expenses?

A I would say we're protecting the separate property interest based on the documents we reviewed and following those funds through their movements, through different accounts and assets.

Q And sometimes based on Ms. Charlson's intent and sometimes based on better methodology?

A I would say sometimes based on Ms. Charlson's intent, yes.

Q What assets did you determine were completely marital?

A None of the assets included within this analysis were completely marital.

Q Are there any assets of the Charlson's that are

completely marital?
A I believe there are.
Q What would those be?
A I don't know, specifically.
Q Anything of real value that you're aware of?
A I don't know, specifically.
Q They have timeshares; correct?
A Yes, I believe so.
Q And they're not included in your report as having a separate property interest?
A Yes.
Q And they have furniture; is that correct?
A I assume so.
Q And that's not included on your report of having any separate property interest?
A Correct.
Q And there's the Chevy Avalanche; correct?
A Correct.
Q And that's included in your report, but not given a separate property interest?
A Right.
Q So of those three, at least, nothing of real value that would be completely marital under your methodology?
A I assume that the furniture has marital value, so,

Q And under Value Consulting Group's methodology, only Ms. Charlson benefits from that?
A Correct.
Q You note in your report that all deposits except for three were made from the parties' 7183 account after Taco Johns of Pine Ridge was acquired; is that accurate?
A Yes.
Q You provided some different schedules with your report. Can you describe Schedule 1.
A Yes. So this is on Bates Stamp 0815 in my report. And it's a landscape schedule. And at the heading, it indicates, "Comparison summary of contributions versus funds available for living expenses."

In this example with the analysis that VCG did for this account, 7183, they identified the monies going in and out of the account. And it was coupled with monies going out and investments and so forth.

So I was asked to focus on this account, 7183, which are those first two columns, and to go through each year and to try to identify the amounts that each party was contributing into that account.

While there were other accounts being referenced to 703, for example, that had activity, as well, this was the main account that had the activity being

point out how the schedule works. If you go back to Bates Stamp 815, Schedule 1 in the upper right-hand corner, this just simply, now, rolls up in a summary all of the data that was just looked at. And you can see, then, on Line 21, for that 20-year period, there was total contributions by Mr. Charlson of one million nine, and Ms. Charlson of $600,000.

Now, one of the things that we looked at, as I explained before, was in Mr. Charlson's column, I did attribute to him these general partnership or limited partnership amounts of income, and then, also, any expenses associated with purchasing them.

And one of the questions might be: What impact did that have on the report? So I thought it might be helpful, I went into my computer model, and for each one of these 20 years, I took those out. So all of the positives for the limited partnerships, and the general partnerships, any payments to him, and any purchases, and when I netted those together, it was a net contribution to his bottom line of $3,444. So whether those do get attributed to him in this analysis or whether they all get pushed over to him, it really wouldn't change the results more than a $3,000 item. So I wanted to at least point that out.

If you look at the Line 21 with the contributions

going in of $2.5 million, with the sources, roughly 76 percent would be Mr. Charlson's contribution, which is different than Lines 22 and 23. That's a different percentage I'm going to explain in a minute. I'm just looking at their overall contributions in total of the $2.5 combined.

So when we did this analysis, originally, it was helpful to see what was being contributed. But then one of the questions can be: How does that compare if one person has more resources, they may be in a better capacity to contribute to an account?

So one of the ways we tried to help address that was to take a look at tax returns, which often will give you all of the information or a lot of the information, or at least a lot of the information to draw some of those conclusions.

So the last few pages of the analysis help explain these last two columns. And the idea is, as it's explained here, we're trying to identify, as monies go into the 7183 account, how does that compare with what funds the parties had available? Because they could have put them in different accounts, as well, as opposed to the 7183.

So what I might ask is to turn to the schedule that's maybe a little easier to start with, which

APPELLANT'S APPENDIX NO. 5

NOTICE OF ENTRY OF

JUDGMENT AND ORDER

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	SS.	
COUNTY OF BUTTE	)	FOURTH JUDICIAL CIRCUIT
ANGELA K. CHARLSON	)	File No. 09CIV14-000006
Plaintiff,	)	
v.	)	**NOTICE OF ENTRY OF JUDGMENT AND ORDER**
DONALD M. CHARLSON	)	
Defendant.	)	

TO THE ABOVE-NAMED DEFENDANT, DONALD M. CHARLSON, MICHAEL SABERS AND AMBER LAWRENCE, ATTORNEYS OF RECORD,

YOU ARE HEREBY NOTIFIED that the Judgment and Order, incorporating the Court's Findings of Fact and Conclusions of Law was executed on the 27th day of June, 2016, by the Honorable Michael W. Day and filed in the Office of the Butte County Clerk of Courts on the 27th day of June, 2016.

Dated this 1st day of July, 2016.

Linda Lea M. Viken
VIKEN & RIGGINS LAW FIRM
Attorneys for
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CERTIFICATE OF SERVICE

I certify that on the 1st day of July 2016, I served a copy of this document upon the listed person by the following means:

[ ] First Class Mail
[X] Hand Delivery on attorney Sabers by Sperry Service
[X] Facsimile on Amber Lawrence
[ ] Electronic Mail [ ] Odyssey File and Serve

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Linda Lea M. Viken

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

ANGELA K. CHARLSON,

Plaintiff/Appellee

v. **Appeal No. 27943**

DONALD M. CHARLSON,

Defendant/Appellant

APPEAL FROM CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
BUTTE COUNTY, SOUTH DAKOTA

THE HONORABLE MICHAEL W. DAY,
CIRCUIT COURT JUDGE, PRESIDING

APPELLEE'S BRIEF

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NOTICE OF APPEAL FILED JULY 28, 2016

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PRELIMINARY STATEMENT

In this brief, the Appellant, Donald Charlson, will be referred to as "Don." The Appellee, Angela Charlson, will be referred to as "Angela." The Register of Actions will be referred to as "RA" followed by the beginning page number of the document. References to the Trial Transcript will be referred to as "TR," followed by the page number, a colon and the line numbers as applicable. Trial Exhibits will be referred to as "EX" followed by the number or letter and the bate stamp number (for e.g. EX 1E, Bates #1850-1852). For reference, Plaintiff's exhibits at trial were numbers and Defendant's exhibits at trial were letters. The trial court's Findings of Fact and Conclusions of Law dated April 8, 2016, will be referred to as "FOF" and "COL" followed by their applicable number, the date, and Register of Action (RA) followed by the beginning page number of the document. The trial court's Findings of Fact and Conclusions of Law dated August 5, 2015, will be referred to as "FOF" and "COL" followed by their applicable number, the date, and Register of Action (RA) followed by the beginning page number of the document. Appendices will be referred to as "APP." The Pre-Marriage Agreement will be referred to as "PMA."

JURISDICTIONAL STATEMENT

This is an appeal from a Judgment and Order signed and filed June 27, 2016. RA 3382. It determined the parties' debts

and separate property, marital property, or a combination of both separate and marital property, pursuant to the trial court's interpretation of the PMA, as well as, to the extent necessary, the value of said assets. A Notice of Entry was served on July 1, 2016. This appeal was filed on July 28, 2016. RA 3385. This appeal was brought pursuant to SDCL 15-26A-3(1) seeking review of the trial court's Judgment and Order.

STATEMENT OF LEGAL ISSUES

ISSUE 1

WHETHER THE TRIAL COURT'S ADOPTION OF ANGELA'S EXPERT REPORT CONSTITUTED REVERSIBLE ERROR.

The trial court held that Angela's expert was well qualified and used appropriate methodology, as verified by Don's expert.

State v. Johnson, 2015 S.D. 7, 860 N.W.2d 235

State v Bingham, 1999 S.D. 78, 600 N.W.2d 521

State v. Fisher, 2011 S.D. 74, 805 N.W.2d 571

SDCL 19-19-702

ISSUE 2

WHETHER THE TRIAL COURT ERRED IN INTERPRETING THE PMA TO PERMIT TRACING OF EARNINGS OR PROPERTY THROUGH THE JOINT MARITAL BANK ACCOUNT.

The trial court held that tracing was appropriate under the terms of the PMA, and that the PMA authorized the creation of marital loans.

Jameson v. Jameson, 1999 S.D. 129, 600 N.W.2d 577

Roth v. Roth, 1997 S.D. 75, 565 N.W.2d 782

Gail M. Benson Living Tr. v. Physicians Office Bldg., Inc., 2011 S.D. 30, 800 N.W.2d 340

ISSUE 3

WHETHER THE TRIAL COURT'S ADOPTION OF THE MARITAL LOAN CONCEPT WAS ERROR.

The trial court found that the PMA established the concept of marital loans and adopted Angela's expert tracing methodology as it pertained to the marital loans.

Smetana v. Smetana, 2007 S.D. 5, 726 N.W.2d 887

ISSUE 4

WHETHER THE MARTIAL LOANS AUTHORIZED BY THE PREMARITAL AGREEMENT REQUIRED CONSENT.

The trial court held that Don had voluntarily consented to the terms of the PMA, which included the concept of a marital loan without requiring consent.

Pesicka v. Pesicka, 2000 S.D. 137, 618 N.W.2d 275

STATEMENT OF THE CASE AND FACTS

CASE HISTORY

Don filed for a dissolution of his marriage to Angela in the State of Minnesota, which was served upon Angela on June 11, 2012. *In Re Marriage of Donald M. Charlson v. Angela K. Charlson,* Court File No. 55-FA-13-1830, Third Judicial District, State of Minnesota, County of Olmsted. EX 18. RA 890. The Minnesota Court bifurcated the case and granted the parties a divorce on February 18, 2014, and reserved the issues of spousal maintenance, division of property and debts, attorney fees, and other financial matters involving the parties, pending the outcome of the interpretation of the PMA in South Dakota. EX 11, 7-8-14 trial. RA 226. The terms of the PMA required that the law of the

State of South Dakota would govern and the venue of any proceedings to interpret would be in Butte County, South Dakota. PMA, APP A, paragraph 15, p. 7.

This matter originated as a result of an Order from the Third Judicial District, State of Minnesota, County of Olmsted, Court File No. 55-FA-13-1830, executed by the Honorable Jodi L. Williamson on October 29, 2013, and filed on October 30, 2013, to determine the validity of the parties' PMA. The Order directed that the issue of the validity and enforcement of the parties' PMA was to be heard in Butte County. South Dakota. EX 9, 7-8-14 Trial. APP B. RA 220. This Order was reinforced by the Minnesota Court by Supplemental Order entered April 21, 2014. EX 10, 7-8-14 trial. APP C. RA 224.

On January 20, 2014, Angela filed a Summons and Complaint for Declaratory Judgment in the Sixth Circuit, Butte County, South Dakota, File No. 09CIV14-000006. RA 1, 2, 21, 22.

On February 18, 2014, Don answered the declaratory action with a Motion to Dismiss and a Limited Purpose Answer as well as a Memorandum in Support of Motion to Dismiss. RA 42, 44, 124.

The trial court bifurcated the matters of validity/ enforceability and interpretation. A trial on the validity/enforceability of the PMA was held on July 8, 2014. The trial court issued Findings of Fact and Conclusions of Law on August 5, 2014, RA 319. APP D. The PMA was found to be valid and

enforceable pursuant to the Order on Validity of Pre-Marriage Agreement filed thereafter on October 16, 2014. RA 351. A Notice of Entry was filed on March 11, 2015. RA 384. Don is not appealing the validity of the PMA.

A trial was held for a period of 9 days on April 20-24, 2015 and August 24-27, 2015 to interpret the PMA as it related to the assets and debts of the parties, which included a determination of what of the existing assets and debts was separate property, what was marital property, or a combination of both separate and marital property. To the extent necessary the trial Court also determined the value of said assets.

The trial court entered its Findings of Fact and Conclusions of Law on April 8, 2016, RA 3194, and its Judgment and Order on June 27, 2016. RA 3382.

The Notice of Appeal was filed July 27, 2016. RA 3385.

STATEMENT OF THE FACTS

The parties were married on January 23, 1993, in Pennington County, South Dakota. FOF 1, 4-8-16, p. 3. RA 3194. Prior to the marriage, Don and Angela entered into a Pre-Marriage Agreement and each party had separate counsel during the drafting of the PMA. Angela had been through a previous divorce and wanted to protect her separate assets. Don had a negative net worth at the time of their marriage and they both wanted to protect her assets from his former wife.

> Both had been through "messy" divorces. Angela had given up assets in her previous divorce; assets that she had counted on for retirement. Both parties had children from their previous marriage which they wished to independently provide for. Angela testified that there was also concern regarding whether her assets would be considered for Donald's child support and alimony purposes. Donald also testified that part of the reason for the Agreement was to protect Angela's assets and businesses. FOF 10, 8-5-14, RA 319. APP D.

The trial court considered Angela's separate property claims as set forth in the separate property tracing report prepared by her financial experts, VCG. EX 1K, Bates #27549-27858. FOF 23, 4-8-16, pp. 8-9. In doing so, the trial court examined the extensive tracing of the parties' various investment accounts, retirement accounts, business interests, real estate and other miscellaneous assets. Angela's tracing report, consisting of 310 pages, is extremely detailed and the trial court's findings contain a sampling of the tracings regarding transactions within identified asset categories. The trial court only examined and made findings and conclusions as to those assets in which Angela claimed a separate interest as of December 31, 2013.[1]

The trial court was charged with interpreting the contract of the parties as set forth in the terms of the PMA. In doing so, it was important for the trial court to understand the purpose

[1] December 31, 2013 is the valuation date for the division of assets in the Minnesota case. The parties have other assets that are marital and subject to division by the Minnesota Court and were not subject to review by the trial court in this matter.

and intent of the PMA, which is set forth in the introductory paragraph of the PMA, and is four-fold:

> (1) specifically identify the separate assets and liabilities of each party accumulated prior to the marriage and existing as of the date of this Agreement;
>
> (2) to relinquish the right of each party that may or will arise solely by virtue of the marriage relationship as against the separate property of the other;
>
> (3) to define the rights of each party to the property acquired during the course of the marriage; and
>
> (4) to recognize the rights of each party to dispose of separate property during their lifetime and upon death.

APP A, p. 1. RA 173

The trial court was further guided by the PMA in the definition of "separate property" which is contained in paragraph 2, as follows:

> 2. **SEPARATE PROPERTY:**
>
> A. Each party acknowledges and agrees that all property acquired and owned by the other as of the date of this Agreement shall be and remain the sole and separate property of that party. Each party, for himself or herself, and his or her heirs, executors, administrators, successors and assigns specifically relinquishes and disclaims any and all right, title, interest and claim of every kind or nature, regardless of the nature or source of that right, which will or may otherwise arise by virtue of the marriage.
>
> B. During lifetime, each party shall retain the sole and separate ownership and control of his or her separate property, and shall be free to manage, sell, control or otherwise dispose of such separate property.

C. Separate property as used in this Agreement shall include not only the assets described on attached Exhibits "A" and "B" but shall also include gains, income, income, (sic) interests, dividends, profits, and any other increases in value or decreases in debt, and issues therefrom.

D. Each party shall be free to replace assets owned by him or her at the time of this Agreement, and to sell or otherwise receive proceeds attributable to separate property of each. The replacement and proceeds of separate property shall be and remain separate property, and shall not lose their character as separate property solely by change of the form or nature of the asset.

E. Property received by either party through gift or inheritance shall remain the sole and separate property of the party so receiving or inheriting.

F. Employment benefits including, but not limited to, pension, profit-sharing or any other employee benefit programs or plans shall remain the sole and separate property of the party so employed, and such benefit plan shall remain separate property, even following the marriage of the parties. Each party relinquishes any claim, right, interest or title to the employee benefit plans of the other, and such plans shall not be subject to division in the event of death, separation, or dissolution of the marriage.

APP A, p. 2-3. RA 173.

The PMA identifies each party's separate assets and liabilities that existed at the time of the marriage in January 1993. Don had "0 assets" at the time he signed the PMA. FOF 81, 4-6-16, p. 26. APP A. RA 173. Angela had the following assets at the time she signed the PMA:

Asset	**Value**
TJPR, Inc. (50%) EX 1A(1)- Exhibit B to PMA	$100,000
STI, Inc. (50%) EX 1A(1)- Exhibit B to PMA	$160,000
JMCCS, Inc. (50%) EX 1A(1)- Exhibit B to PMA	Less than $10,000
House Equity EX 1A(1)- Exhibit B to PMA	$2,800
Checking Account EX 1A(1)- Exhibit B to PMA	Approximately $2,000
Edward D. Jones & Co. Account No. 570-04012-1-8 consisting of money market accounts, stocks and mutual funds having an accumulated balance as of December 31, 1992 EX 1A(1)- Exhibit B to PMA	$68,646
Personal property consisting of two vehicles, household furnishings and miscellaneous personal property EX 1A(1)- Exhibit B to PMA	$20,000
Edward Jones IRA #0085-1-9 EX 1G(1)(a), Bate #11724	$7,373.20
Liabilities	
Remaining balance on mortgage for residence EX 1A(1)- Exhibit B to PMA	$58,000
Business debts personally guaranteed EX 1A(1)- Exhibit B to PMA	$90,000

FOF 81, 4-8-16, p. 26-27. APP A, p. 10. RA 173.

Don relinquished and disclaimed any and all right, title, interest and claim of every kind or nature, regardless of the nature or source of that right which may otherwise arise by virtue of his marriage, to Angela's separate property pursuant to Paragraph 2A of the PMA. APP A, p 2. RA 173. FOF 81, 4-8-16, p. 27. RA 3194.

The trial court was provided further guidance by the terms of the PMA on how to address the issue of commingling of separate property. The PMA addresses commingling in two separate paragraphs: Paragraph 5 and Paragraph 9C. Paragraph 5 states as follows:

> 5. **COMMINGLING:**
>
> Parties shall use their best efforts to prevent any *commingling* of separate property. The *commingling* of separate property, or the failure to segregate separate property, shall not be construed as to change the character of separate property or otherwise result in a change of separate property to marital property. [*Emphasis added*]

APP A, p. 4. RA 173. FOF 82, 4-8-16, p. 27. RA 3194.

The introductory language in paragraph 9C makes it clear that no statement or act modifies the PMA:

> 9. **ORAL STATEMENTS:**
>
> *No statement or act* by either party, from and after the date of this Agreement, shall have the effect of amendment, or modifying this Agreement. . . In addition, *under no circumstances* shall the following event, either individually or collectively, be construed as evidence of any intention, express or implied, or of any agreement,

actual or implied, to change the character of separate property:

***

C. The *commingling* of either spouse of his or her separate funds with the separate funds of the other party or with any marital property. [Emphasis added.]

APP A, p. 5. RA 173. FOF 82, 4-8-16, p. 28. RA 3194.

The Court also needed to apply the marital loan concept found in Paragraph 9F of the PMA, which provides:

9F. In the event that marital property or separate property of either party is contributed toward separate property or debt of the other, such contribution shall be deemed a loan, payable on demand, without interest, unless the parties agree otherwise, in writing.

APP A, p. 6. RA 173. FOF 83, 4-8-16, p. 28. RA 3194.

The VCG tracing report, Angela's expert report, takes into consideration all of the PMA paragraphs collectively. TR 962:20-24. VCG assumed Angela's separate assets remained separate property in accordance with Paragraph 2A of the PMA, with any marital contributions to those separate assets designated as a loan from the marital estate, as described in Paragraph 9F. Most noteworthy is the provision of paragraph 2C in the PMA that states Angela's gains, income, income, (sic) interests, dividends, profits, and any other increases in value remain separate. APP A, p. 2. RA 173.

This included the income from her businesses at the time, Taco John's Pine Ridge (TJPR), Taco John's Belle Fourche, (STI,

Inc.) and Taco John's Mission (JMCCS, Inc.). Her income and profits from those businesses were used by the parties to fund other business interests during the marriage, thereby creating a separate interest in the above referenced assets. VCG considered any assets acquired with marital and separate contributions after the date of the marriage to have both marital and separate components. If Angela's separate funds were traced into an asset, despite her separate funds flowing through joint accounts prior to the purchase of that asset, the acquired asset remains Angela's separate property. EX 1K, P. 3, Bates #27551. FOF 86, 4-8-16, p. 29. RA 3194.

The following assets that either existed prior to the marriage or were acquired during the marriage were identified by VCG in their tracing report as being either Angela's separate property, or containing a portion of Angela's separate property: EX 1K, Schedule S-1, P. 19-20, Bates #27567-#27568. FOF 94, 4-8-16, p. 31. RA 3194.

Investment Accounts:

1. Angela's Edward Jones Investment Act. #7191-1-8
2. Joint Edward Jones Investment Account #7183-1-8
3. Don's Edward Jones Investment Account #7272-1-9
4. Joint Edward Jones Investment Account #6236-1-6
5. Angela's Edward Jones Investment Account #1297-1-3
6. Joint Home Federal Checking Account #2730

Retirement Accounts:

1. Angela's Edward Jones IRA #0592-1-9
2. Angela's Edward Jones Taco John's Simple IRA #0314-1-6
3. Angela's Edward Jones Taco John's Simple IRA 7610-1-2
4. Don's Edward Jones Roth IRA #7583-1-5

Business Interests:

1. Edward Jones Limited Partnership Interest
2. Edward Jones General Partnership Interest
3. Edward Jones Subordinated Limited Partnership Interest
4. Superior Financial Group, LLC
5. BDUBS, LLC (Buffalo Wild Wings Rapid City)
6. SFME, Inc. (Sioux Falls Massage Envy)
7. ME Rogers Inc. (Rogers Massage Envy)
8. TJPR (Taco John's of Pine Ridge, LLC)

Real Estate:

1. 3244 Lake Street NW, Rochester, Minnesota
2. Norman, Oklahoma condo sale proceeds

Miscellaneous:

1. Hardcore Computers Stock
2. 2013 Tax Refund Receivable

Don disputed VCG's analysis of Angela's separate property, and hired Baker Tilly Virchow Krause, LLP (hereinafter "Baker Tilly") to review VCG's tracing analysis. Baker Tilly prepared a report, EX V. However, the Baker Tilly report is simply a

schedule to identify each party's contribution to only *one* of the parties' joint accounts, the Edward Jones #7183 joint account. TR 1447:11-14. APP E. Baker Tilly assumed the joint Edward Jones #7183 account was used to acquire marital property and pay ordinary living expenses.[2] Baker Tilly, did *not* prepare a rebuttal tracing report to the VCG report.

Mr. Harjes has been a speaker on separate tracing claims in the State of Minnesota. In addition, he has been a financial neutral in cases involving Ms. Rohr's firm (Minnesota counsel for Plaintiff). TR 1440:3-13. APP E. Mr. Harjes acknowledged that his own teaching materials discuss the "direct tracing" method and the "pro rata approach" method used by VCG in their report and he uses those same methodologies in his own reports. He further acknowledged that the VCG report is a typical tracing report using the generally accepted methodologies for tracing in Minnesota. TR 1435:1-3. APP E.

Both Angela's experts and Don's expert agreed that when a PMA is involved in tracing, the methodology is tailored to the terms of the contract, thereby often creating a need to depart from the standard tracing methodologies if the contract terms dictate otherwise. TR 961-962. APP H. 1436:2-7. APP E.

[2] There were many flaws in the assumptions used in this report. TR 1449:3-24; 1453:2-6; 1473:5-17; 1481:10-25. EX 26. APP F. TR 1482:15-25; 1483:1-18. EX 29. APP G. 1531:22-25; 1532; 1533:1-6.

Don's expert acknowledged that Angela has a separate property interest in the following assets:

a. STI, Inc. (Taco John's Belle Fourche); TR 1427:3-6

b. Any distributions from STI, Inc., other than those going in the 7183 Edward Jones account; TR 1427:7-10

c. Angela's Edward Jones IRA #0592; TR 1427:20-24

d. Angela's Edward Jones Taco John's Simple IRA #0314; TR 1429:10-17

e. Current Minnesota home of the parties; TR 1429:24-25 & 1430:1-4

f. Angela's Edward Jones #7191 account; TR 1430:11-13

g. Oklahoma condominium sale proceeds. TR 1430:15-18

Baker Tilly did not quantify the value of Angela's separate interest in those assets.[3] The only tracing schedule in evidence regarding Angela's separate property claims is the VCG report. EX 1K. FOF 103, 4-8-16, p. 33. RA 3194.

The trial court examined over 27,000 pages of exhibits and had the benefit of judging the credibility of the witnesses over the course of nine days, as well as in the previous hearing on validity/enforceability.

The trial court agreed with, and properly adopted, the VCG tracing report.

LEGAL ARGUMENT

[3] It is noteworthy that the tracing of some of these assets involved the marital loan concept.

STANDARD OF REVIEW

The trial court's "findings of facts, reviewed under the clearly erroneous standard, will not be overturned unless the reviewing court is left with a firm conviction that a mistake has been made." *Smetana v. Smetana*, 2007 S.D. 5, ¶7, 726 N.W.2d 887, 891 (quoting *Godfrey v. Godfrey*, 2005 S.D. 101, ¶11, 705 N.W.2d 77, 80). Conversely, conclusions of law are reviewed de novo. *Id*. (quoting *Sanford v. Sanford*, 2005 S.D. 34, ¶12, 694 N.W.2d 283, 287).

> The credibility of the witnesses, the import to be accorded their testimony, and the weight of the evidence must be determined by the trial court, and we give due regard to the trial court's opportunity to observe the witnesses and examine the evidence. *In re Estate of Gustafson*, 2007 S.D. 46, ¶13, 731 N.W.2d 922, 926 (quoting *In re Estate of Schnell*, 2004 S.D. 80, ¶8, 683 N.W.2d 415, 418). *Estate of Smid*, 2008 S.D. 82, ¶11, 756 N.W.2d 1.

ISSUE 1

THE TRIAL COURT PROPERLY ADOPTED ANGELA'S EXPERT REPORT. THE REPORT DID NOT LACK FOUNDATION AND WAS CONSISTENT WITH THE TERMS OF THE PMA.

This Court has stated: "We review a [circuit] court's decision to admit or deny an expert's testimony under the abuse of discretion standard." *State v. Johnson*, 2015 S.D. 7, ¶30, 860

N.W.2d 235, 247. In reviewing evidentiary rulings of a trial court, this Court has held it is not free to substitute its own judgment for that of the trial court. "Our test on review is not whether we would make a similar ruling, but rather whether a judicial mind, in view of the law and the circumstances, could have reasonably reached the same conclusion." *State v. Bingham* 1999 S.D. 78, ¶6, 600 N.W.2d 521 (citing *State v. Chamley*, 1997 S.D. 107, ¶7, 568 N.W.2d 607, 611).

Angela's expert report EX 1K., from Value Consulting Group, hereinafter referred to as "VCG", was received into evidence after the parties stipulated to the foundation of the exhibit on the first day of trial. TR 14-15. The admittance of the exhibit was later confirmed by Defendant's counsel and the trial court when trial resumed on August 24, 2016. TR 952-953. APP H.

Don, having stipulated as to the foundation of Angela's expert report prepared by VCG, EX 1K, TR 14, cannot now argue there was a lack of foundation when no timely foundational objection was made at the trial court level nor was a Daubert challenge ever made. Even if the objection was timely, it was correctly rejected.

SDCL 19-19-702 governs the admissibility of expert testimony. It provides:

> Testimony by expert. A witness who is qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise if:

(a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) The testimony is based on sufficient facts or data;

(c) The testimony is the product of reliable principles and methods; and

(d) The expert has reliably applied the principles and methods to the facts of the case.

This Court has stated on previous occasions that:

> Whether a witness is qualified as an expert can only be determined by comparing the area in which the witness has superior knowledge, skill, experience or education with the subject matter of the witness's testimony. *State v. Fisher*, 2011 S.D. 74, ¶41, 805 N.W.2d at 571, 580 … (citations omitted)

Don's claim that Angela's experts based their report "largely" on the "intent" of Angela is factually incorrect. FOF 39, 4-8-16, p. 13. RA 3194. VCG provided a written analysis regarding their findings. EX 1K.

Tracing cases are common in the State of Minnesota and are document driven. TR 955:24. Angela's experts were very experienced in doing tracing reports.[4] Tracing is the act of taking document data and determining what portion of those assets are separate versus what portion of those assets are marital. VCG reviewed over 27,000 pages of documentation, TR 958:20-21, provided by Angela. The document gathering process started in

[4] Don stipulated to the expert credentials of Angela's expert. TR 11:l, 15-17.

June 2013 and it took VCG nearly 15 months to complete their written analysis. TR 956:19-22.

The VCG report used bank statements, check registers, investment statements and retirement account statements. TR 956:1-3. For the businesses, the report used business tax returns, financial statements and general ledgers. TR 956:3-5. For real estate, the report used check registers, bank statements, appraisals, settlement statements and mortgage documents. TR 956:5-7. After VCG received the initial bulk of documents, spanning 20 years, VCG spent approximately six days with Angela and her then counsel, going through each account statement and analyzing the different transactions. TR 1033:22-25; 1034:1-3. It is in this process that they obtained factual information from Angela, not what her "intent" was.

The narrative summary of the VCG report explains the methodology used for tracing the Charlsons' assets. EX 1K, pp. 1-18, Bates #27549-27566. The various schedules following the narrative summary take the data from the documents and physically use that data to trace the assets between separate and marital property. TR 954:3-5. FOF 91 4-8-16, p. 30. RA 3194.

The VCG report used several tracing methods commonly used in the State of Minnesota,[5] as follows:

[5] There are few tracing cases in the State of South Dakota and none involving premarital agreements.

a. *"Direct Tracing"* is done when specific events happen within a close period of time. TR. 954:19-20

b. The *"Pro Rata Approach"* is applied by looking at an account balance over time and distinguishing what portion of that account balance is comprised of separate funds and what portion is marital funds. As transactions occur, those transactions are carried forward based upon the previous month's percentage of separate versus marital funds in the account. TR 955:3-12. For example, if a withdrawal takes place in December, the percentage of separate versus marital funds from the prior month's end (November) is applied to December's withdrawal(s). TR 955:12-14

The language in the PMA contract supersedes generally accepted methodologies and the contracted language in the PMA was applied, when relevant, to the tracing analysis. TR 960:12-16; TR 961:17-21. The different methodologies used by VCG in the report were based upon generally accepted methods of tracing as well as the terms of the PMA, *not* based upon Angela's interpretation of the PMA. Angela's expert testimony explained what the methodologies used in the tracing analysis were based upon:

> …development of the methodology, using both ***generally accepted methods of tracing in our field, as well as giving consideration to the pre-marriage agreement*** and how that may change what our normal methodology might look like… [Emphasis added.] TR 952:5-9.

Don's expert, Mr. Harjes, agreed Angela's experts used methodologies that are commonly used. TR 1435:3. He further admitted sometimes one has to stray from the standard methodology

because the contract terms of the pre-marriage agreement would dictate what you had to do. TR 1436:8-12.

The trial court correctly admitted the VCG report and accepted the application of its methodologies to the terms of the PMA.

ISSUE 2

THE TRIAL COURT WAS CORRECT IN INTERPRETING THE PMA AS PERMITING TRACING OF EARNINGS OR PROPERTY THROUGH THE JOINT MARITAL BANK ACCOUNT OF THE PARTIES.

The trial court did not err in finding and concluding separate property traced through joint bank accounts remained separate property and the trial court enforced the agreement the parties previously contracted for in the PMA. The trial court relied, in part, on the following relevant portions of the PMA:

> *Paragraph 2 C of the PMA defines separate property as "…not only the assets described on attached Exhibits "A" and "B" but shall also include gains, income, income (sic) interests, dividends, profits, and any other increases in value or decreases in debt. . ."

> *Paragraph 2 D of the PMA provides, "proceeds of separate property shall be and remain separate property, and shall not lose their character as separate property solely by change of the form or nature of the asset."

> *Paragraph 5 of the PMA provides, "The commingling of separate property, or the failure to segregate separate property, shall not be construed as to change the character of separate property or otherwise result in a change of separate property to marital property."
>
> *Paragraph 9 of the PMA provides, "No statement or act by either party, from and after the date of the this Agreement, shall have the effect of amendment, of modifying this Agreement." Additionally, "under no circumstances shall the following events, either individually or collectively, be construed as evidence of any intention, express or implied, or of any agreement, actual or implied, to change the character of separate property:" 9C provides, "The commingling of either spouse of his or her separate funds with the separate or separate funds of the other party or with any marital property."
>
> APP A, p. 2-3, 4, 5-6. RA 173.

The trial court found Don's position at trial ignored the commingling language in the PMA. COL 24-26 4-8-16, p. 175-176. RA 3194. Further the trial court found Angela's experts were consistent in their analysis regarding the application of methodologies of direct tracing and pro rata tracing and the marital loan concept to the terms of the PMA. FOF 130, 4-8-16, p. 39. RA 3194.

Paragraph 7 of the PMA provides for a bank account to be established, what payments are allowed to be made from said account, and that the account *may* be used for any acquisition of

marital property.[6] APP A, p. 4, RA 173. The definition of marital property is provided for in Paragraph 4, which is subject to Paragraph 2.

4. MARITAL PROPERTY:

> *Except as specifically provided above*, property acquired by the parties from and after the date of their marriage, and continuing through the marriage, shall be deemed marital property. No waiver, release or relinquishment of any right, title, claim or interest in and to the separate property of the other shall be construed as relinquishment of any right or interest in marital property. Property acquired from and after the date of the marriage, and continuing through the course of the marriage, shall remain marital property regardless of designation of title or ownership of such assets. [Emphasis added.] APP A, p. 3. RA 173.

Paragraph 4 of the PMA does not state *all* property acquired during the marriage will be marital. It states "*[E]xcept as specifically provided above*" (Paragraphs 2 and 3), property acquired by the parties during their marriage shall be deemed marital property." [Emphasis added.]

One first determines what is separate property, which remains separate. After that determination, the remaining property would be deemed marital.

[6] Appellant's Brief at page 12 references "Angela's proposed COL 23 which was adopted by the Trial Court". Angela's proposed COL 23 was not adopted by the trial court as COL 23.

Don's singular focus on Paragraph 7 of the PMA is misplaced. Paragraph 7 simply provides for an account under the heading ORDINARY LIVING EXPENSES (not as denoted by Appellant as a "joint marital bank account"). The account, as the title implies, is to fund ordinary living expenses of the parties. It can also be used to acquire marital property. Marital property is defined in Paragraph 4 of the PMA including it's reference to the Separate Property provisions. There is no evidence or testimony that either party intended on acquiring *marital* property when entering into the PMA, nor that they were required to acquire marital property. The PMA is void of any language regarding such intent. The parties' intent was to protect Angela's separate property which not only included those assets described on Exhibit B to the PMA, but also gains, income, interests, dividends, profits and any other increases in value or decreases in debt and issues therefrom. APP A, p. 2. RA 173.

Don's interpretation of Paragraph 7 of the PMA is that any funds that went into a joint account, specifically the joint Edward Jones #7183 account, lost their separate property characteristic and were used for purchases of marital assets. Don's position suggests the intent of Paragraph 7 of the PMA was to benefit the marital estate only. However, nothing in the PMA suggests the purpose of the contract was to *limit or destroy* a party's separate property; the purpose was to ***protect*** a party's separate property. In cases where there's a pre-marriage agreement, the PMA should be more beneficial to separate

property, not less beneficial. TR 1026:21-24. As the trial court found, Don's position renders Paragraphs 5 and 9C of the PMA meaningless. COL 24, 4-8-16, p. 175. RA 3194.

Paragraph 7 of the PMA is void of any language to suggest that separate property put into and commingled with marital property in a jointly owned bank account suddenly becomes marital property. FOF 271, 4-8-16, p. 68. RA 3194. Paying for ordinary necessary living expenses with a person's separate property does not create marital property; separate property is simply being used to pay a debt or to pay an expense. Paragraph 5 of the PMA insures that while Angela can put money into the joint account, it is simply the act of her putting some of her separate property into the account; not the magical changing of that property into marital property. COL 28, 4-8-16, p. 174. FOF 149, 4-8-16, p.43, and FOF 266 4-8-16, p. 67. RA 3194.

> 5. COMMINGLING:
>
> Parties shall use their best efforts to prevent any commingling of separate property. The commingling of separate property, or the failure to segregate separate property, shall not be construed as to change the character of separate property or otherwise result in a change of separate property to marital property. APP A, p. 4. RA 173.

It is necessary to remember that Don's income *is* all marital money,[7] so anything that is traceable to the expenditure of his funds is going to create marital property.

Now that the terms of the contract are being enforced and interpreted, Don no longer likes the agreement he made, but the evidence is quite clear that it was the intent of both parties to maintain a separate property interest, even if it was commingled. This Court has held that even when a person makes a bad bargain, it is not for the trial court to provide relief for a party who voluntarily enters into an agreement. *Jameson v. Jameson*, 1999 S.D. 129, ¶20, 600 N.W.2d 577.

Don's suggestion that the parties' actions during the marriage are better indicators of the parties' intent simply ignores the requirements of contract interpretation. The parties' intent during the marriage (as opposed to at the time of entry into the PMA) is not relevant to the contract interpretation before this Court. The only time intent is relevant is when a contract is ambiguous, in which case the court must determine the intent of the parties *at the time of the making of the agreement*: "when there is an ambiguous contract, evidence must be introduced to determine what the intentions of the parties were and … such evidence creates a question of fact[.]" *Gail M. Benson Living Tr. v. Physicians Office Bldg., Inc.,* 2011 S.D. 30, ¶16, 800 N.W.2d 340. However this Court has also made clear in *Roth v. Roth*, 1997

[7] This is in contrast to Angela's income which comes from her separate property.

S.D. 75, ¶16, 565 N.W.2d 782, when discussing a premarital agreement, that the contract was not ambiguous simply because the parties did not agree on its construction or their intent upon executing the contract, but it was ambiguous only if it was capable of more than one meaning when read objectively by a "reasonably intelligent person who examined the *context of the entire integrated document.*" [Emphasis added.]

Angela's decision to deposit her separate funds into joint accounts does not defeat her claim to separate property as set forth in Paragraph 9 of the PMA. APP A, p. 3, RA 173. Further, she testified the reasons she would deposit money into joint accounts was based on the following:

- Her separate #7191 account did not have check-writing privileges. TR 255:21-22

- She could easily trace transfers into a joint account. TR 256:4-7; 20-23

- She would deposit her separate funds into a joint account that did have check writing capabilities to purchase separate property. TR 345:8-18.

- It was convenient to transfer her separate funds to the joint #7183 account. TR 347:8-11. Don was her investment advisor at Edward Jones. TR 347:22-23.

-There was no bank in Pine Ridge, South Dakota. TR 592:3-5.

While her reasoning is irrelevant to the tracing, Paragraph 9 of the PMA is clear that no *act* has the effect of amending the PMA. In fact, Don completely ignores the preamble language in Paragraph 9 which has two compelling provisions consistently over-looked by Don. First, Paragraph 9 states: "No ***statement or act*** by either party, from and after the date of this Agreement, shall have the effect of amendment, of modifying this Agreement." [Emphasis added]. Paragraph 9 goes on to state:

> In addition, *under no circumstances* shall the following events, either individually or collectively, be construed as evidence of any intention, express or implied, or of any agreement, actual or implied, to change the character of separate property:
>
> ****
>
> C. The commingling of either spouse of his or her separate funds with the separate or separate (sic) funds of the other party *or with any marital property*;

[Emphasis added]. APP A, p. 5. RA 173.

Further Don's own financial expert, Mr. Harjes, acknowledged Angela had a separate interest in assets that were purchased with separate funds that flowed through joint accounts. For example, Mr. Harjes agreed Angela has a separate interest in her Taco John's Simple IRA #0314. TR 1429:15-17. Although Mr. Harjes did not quantify the separate interest, the IRA was created with funds transferred through the joint account. See EX 1K, Schedule AC-4, Bates #27764. Mr. Harjes agreed Angela has a separate interest in the current marital home and the condo sale

proceeds, although he does not quantify the separate interest. TR 1429:22-25; 1430:1-4, 15-18. These assets were purchased with transfers through the joint #7183 account. EX 1K, Schedule RE-1, Bates #27838, & Schedule RE-2, Bates #27850. Mr. Harjes further agreed that commingling of marital and separate property does not necessarily extinguish a separate property interest. TR 1436:24-25; 1437:1-4. Don's current position is contrary to his own trial expert's testimony regarding the tracing of separate funds through joint accounts.[8]

The mere act of Angela putting her separate funds into a joint account did not extinguish her separate property interest, as she could not modify the PMA by virtue of her actions. Her expert tracing report preserved her separate property claim in accordance with the application of all the terms of the PMA. The terms of the PMA determine if an asset is Angela's separate property, marital or a combination of both marital and separate property. Don is reading paragraph 7 of the PMA in a vacuum and is ignoring the other provisions of the contract.

The trial court properly construed the document as a whole.

ISSUE 3

THE CONCEPT OF A MARITAL LOAN EXISTS PURSUANT TO PARAGRAPH 9F OF THE PRE-MARRIAGE AGREEMENT.

[8] Appellant states on his page 10, under section B, "the Trial Court adopted Angela's FOF 155." Angela's proposed Findings did not contain a FOF 155.

Paragraph 9F of the PMA provides:

> In the event that marital property or separate property of either party is contributed toward separate property or debts of the other, such contribution shall be deemed a *loan*, payable on demand, without interest, unless the parties agree otherwise, in writing. [Emphasis added.] APP A, p. 6. RA 173.

Contrary to Don's claim, VCG did *not* invent the concept of the marital loan; the parties did that in January 1993 during the drafting of the PMA.

The trial court adopted Angela's expert tracing methodology as it pertained to the marital loans. FOF 158, 4-8-16, p. 45. RA 3194. FOF 573, 4-6-16, p. 153. RA 3194. The general methodology used when tracing Angela's separate property was that separate assets remained separate property, with any marital contributions designated as a loan from the marital estate. See PMA paragraph 9F, APP A, p. 6. RA 173. Don is quick to criticize Angela's experts' use of the marital loan methodology, yet Don did not provide any alternative theory at trial as to how to deal with the marital loan language in Paragraph 9F. Nor did Don point out to the trial court the effect of eliminating the loan concept. The only party setting forth a methodology on how to treat the marital loan concept in Paragraph 9F of the PMA was Angela.

Paragraph 9F of the PMA defines how a marital loan is created. APP A, p. 6. RA 173. Angela's financial expert explained the marital loan as follows:

> Yes. Looking at Page 6 of the pre-marriage agreement, which was provision 9F,…… "In the event that marital property or separate property of either party is contributed toward separate property or debts of the other, such contribution shall be deemed a loan, payable on demand without interest unless the parties agree otherwise." So it's based on this provision that if marital funds get paid toward a separate asset, it creates a marital loan. TR 968:3-13.

Don's claim the marital loan concept was "fiction" lacks merit. Don's own expert, Mr. Harjes, acknowledged at trial that he uses the same direct tracing methodology and the pro rata approach when preparing his own tracing analysis. TR 1435:8-19. Don's expert also acknowledged the terms of a PMA supersede traditional tracing methodologies.

> Q. Yes. If you have an antenuptial contract that's provided to you, or a pre-marriage agreement, and you're asked to do a tracing, you have to formulate your methodology to the terms of the pre-marriage agreement; is that correct?
>
> A. Yes.
>
> Q. And sometimes you have to stray from the standard methodology, because the contract terms of the pre-marriage agreement would dictate what you had to do?
>
> A. Yes.
>
> TR 1436:2-12.(*Testimony of T. Harjes*)

VCG had to apply the marital loan methodology in certain circumstances in accordance with Paragraph 9F of the PMA. APP A, p. 6. RA 173.

The actions of the parties created marital loans during the marriage, whether or not the parties understood that was occurring. The issue of Angela's "intent" during the marriage is irrelevant as to how VCG treated repayment of the marital loan balances noted in the tracing report.[9] The intention is manifested by the language of the agreement and thus is to be enforced. *Smetana v. Smetama*, 2007 S.D. 5, ¶16, 726 N.W.2d 877. Both parties' experts testified it is common for parties not to understand the movement of funds and how that impacts tracing. Ms. Loeffler of VCG stated:

> Q. Now, in your experience as a financial expert, is it common for parties to not understand the consequence of certain movement of funds and how that impacts a formal tracing?
>
> A. Yes. I would say it's very common. When we meet with parties doing tracing, they often don't realize that by certain actions and movements of their funds that their separate or non-marital claims can be negatively impacted.

TR 970:1-9.

Mr. Harjes testified to the following on cross examination:

[9] Don misapplies the case law on a party being bound to their stated "facts." What Angela thought she was doing is not the same as what the contract actually does.

Q. Well, have you worked with clients who have not been financially savvy?

A. Yes.

Q. Have you worked with clients who do not have an understanding of financial issues?

A. Yes.

Q. Have you worked with clients who did not understand contract terms?

A. Yes.

Q. Have you worked with clients who do not understand how to read a financial statement?

A. Yes.

Q. And have you worked with clients that do not understand how your firm has handled his or her nonmarital tracing analysis?

A. Initially, that's usually the case. But by the end, typically, they're on board.

Q. Not always, though; right?

A. They might not like the results. I'll say that."

TR 1496:3-25; TR 1497:1.

Angela should not be held to the standard of an attorney to understand contract interpretation. Angela did not graduate from college. TR 304:25; 305:1. The fact she failed to understand how the marital loan concept worked does not extinguish the concept

set forth in the PMA. The document speaks for itself. On more than one occasion during the trial, Judge Day confirmed his understanding that Angela was relying on her experts and that she accepted their tracing methodology and conclusions. See for example: TR 356:4, 12, 15, 19; 357:2.

The trial court Court adopted VCG's methodology and tracing analysis as it pertained to the marital loan concept in Paragraph 9F of the PMA. It was the *only* methodology on the marital loan concept set forth at trial.

ISSUE 4

THE CREATION OF THE MARITAL LOANS DID NOT REQUIRE MUTUAL CONSENT.

The trial court previously concluded in the August 5, 2014 Findings of Fact and Conclusions of Law the PMA was valid and enforceable. COL 16, 8-5-14, p 14. APP D. RA 319. The trial court found that the parties voluntarily entered into the agreement, which included the provision on the creation of marital loans.

Don's argument that mutual consent was needed to create a marital loan is contrary to the terms of the PMA. Once again, Don ignores the clear and unambiguous language in Paragraph 9F of the PMA which states,

> In the event that marital property or separate property of either party is contributed to separate property or debts of the other, such contribution *shall* be deemed a loan, payable on demand, without

> interest, unless the parties agree otherwise, in writing. [Emphasis added.]
>
> APP A, p. 6. RA 173.

Don argues that because the section states the loan is payable on demand without interest that consent is necessary. He confuses the creation of the loan with the payment of the loan. The tracing showed the payoff of the loans and the remaining loan, which is a marital asset.

Marital loans were created automatically pursuant to this paragraph as the word "shall" is used in this section. No consent was needed. In fact, the language regarding written agreement is necessary *only if the parties did not want it to be a marital loan.* "When the meaning of contractual language is plain and unambiguous, construction is not necessary." Pesicka v. Pesicka, 2000 S.D. 137, ¶6, 618 N.W.2d 275. The trial court's interpretation is consistent with the language of the PMA, and the parties mutually consented to the PMA terms, including the concept of a marital loan.

CONCLUSION

One of the primary goals of Pre-Marriage Agreements is to alter state-prescribed property rights, which would otherwise arise on dissolution of marriage. Pre-marriage

agreements include the right to contractually dispose of separate and marital property. *Walker v.Walker,* 2009 S.D. 31, ¶21, 765 N.W.2d 747. COL 6, p. 170. RA 3194.

This case involved a long trial with thousands of pages of exhibits. Judge Day paid close attention during the trial as was obvious by his clear understanding of the exhibits and the testimony.[10]

The parties disagreed on factual matters, but "The trial court is the judge of credibility and it is the trial court's duty to weigh the testimony and resolve any conflicts." *Estate of Smid,* 2008 S.D. 82, 756 N.W.2d 1.

The trial court was charged with interpreting the terms of a valid contract. The trial court did not rewrite the contract, the court interpreted the terms in the manner as written and as a whole, and with the understanding of the stated purposes of the PMA. Don's attempt to pick and choose which portions should apply was properly rejected by the trial court.

This Court should affirm, in its entirety, the trial court's decision.

NOTICE OF REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests Oral Argument.

[10] See for example: TR 357:20; 430:2; 497:6; 726:2,5; 781:23; 893:5,18; 894:10-16.

Respectfully submitted this 27th day of October, 2016.

/s/ Linda Lea M. Viken

Linda Lea M. Viken

VIKEN & RIGGINS LAW FIRM

Co-Counsel for Appellee

4200 Beach Drive, Ste. 4

Rapid City SD 57702

(605) 721-7230

/s/ Shelly D. Rohr

Shelly D. Rohr, Minnesota Attorney

I.D. No. 0216392*

WOLF, ROHR, GEMBERLING, & ALLEN, P.A.

Co-Counsel for Appellee

400 North Robert Street

Suite 1860

St. Paul, MN 55101

(651) 222-6341

*Order to Admit Nonresident Attorney dated March 9, 2015.

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of October 2016, I filed and served via Supreme Court Electronic Filing, SCClerkBriefs@ujs.state.sd.us, a true and correct copy of the foregoing Appellant's Brief to the following persons at the following email addresses:

Michael K. Sabers

CLAYBORNE, LOOS & SABERS

PO Box 9129

Rapid City, SD 57709

msabers@clslawyers.net

Amber Lawrence

DITTRICH & LAWRENCE

3143 Superior Drive MN, Ste. C

Rochester, MN 55901

Amber@DittrichLawrence.com

/s/ Linda Lea M. Viken

Linda Lea M. Viken

CERTIFICATE OF PROOF OF FILING

The undersigned certifies that pursuant to Rule 13-11 she served the original and two (2) copies of the above and foregoing **Appellee's Brief** on the Clerk of the Supreme Court by depositing the same on the 27th day of October, 2016, in the United States

mail, postage prepaid, at Rapid City, South Dakota, addressed as follows:

Ms. Shirley Jameson-Fergel

Clerk of the Supreme Court

State Capitol Building

500 East Capitol Avenue

Pierre, SD 57501

and submitted the **Appellee's Brief** and appendixes in the format pursuant to Rule 13-11 by email attachment to SCClerkBriefs@ujs.state.sd.us on the 27th day of October, 2016.

/s/ Linda Lea M. Viken

Linda Lea M. Viken

APPENDIX

TABLE OF CONTENTS

APPENDIX A

PRE-MARRIAGE AGREEMENT

THIS AGREEMENT is made and entered into this 22nd day of January, 1993, by and between **DONALD M. CHARLSON** of St. Louis, Missouri, and **ANGELA K. (JOHNSON) SMOOT** of Belle Fourche, South Dakota.

PURPOSE AND INTENT

The parties intend to be married to each other on January 23, 1993. Both Don and Angie have been previously married and divorced. Don has three children from a prior marriage, namely Jeremiah, age 13; Jennifer, age 11; and, Christina, age 9. Angie has two children from her prior marriage, namely Christopher, age 11; and Staci, age 7. Both of the parties recognize certain realities of life, namely the certainty of death and the potential for divorce or separation. The purpose and intent of this agreement is to (1) specifically identify the separate assets and liabilities of each party accumulated prior to the marriage and existing as of the date of this Agreement; (2) to relinquish the right of each party that may or will arise solely by virtue of the marriage relationship as against the separate property of the other; (3) to define the rights of each party to the property acquired during the course of the marriage; and, (4) to recognize the rights of each party to dispose of separate property during their lifetime and upon death. It is not the purpose and intent of this Agreement to provide for, facilitate or otherwise induce separation or divorce; to the contrary, this Agreement is made and entered into specifically in contemplation of marriage.

1. **DISCLOSURE OF ASSETS:**

Each party has, prior to the execution of this Agreement, provided to the other a full and complete accounting of all assets and liabilities existing as of the date of this Agreement. Don has attached his list of assets and liabilities to this Agreement as Exhibit "A". Angie has attached her list of assets and liabilities to this Agreement as Exhibit "B". Both exhibits are specifically incorporated herein by reference, as though

each exhibit had been specifically set out in detail. The parties have utilized their best business judgment and good faith in placing values on the assets listed in the various exhibits, but have not obtained formal appraisals of any such assets. Each party represents to the other, however, that the listing of assets and the value placed on the assets constitutes a reasonable approximation of each party's assets and liabilities, but neither party represents that the balance sheet is a precise compilation, and further understands that the information was prepared informally by each party and was not prepared by professional accountants or appraisers. Variation in the value of the assets, at any time in the future, shall not affect the validity of this agreement.

2. **SEPARATE PROPERTY:**

A. Each party acknowledges and agrees that all property acquired and owned by the other as of the date of this Agreement shall be and remain the sole and separate property of that party. Each party, for himself or herself, and his or her heirs, executors, administrators, successors and assigns specifically relinquishes and disclaims any and all right, title, interest and claim of every kind or nature, regardless of the nature or source of that right, which will or may otherwise arise by virtue of the marriage.

B. During lifetime, each party shall retain the sole and separate ownership and control of his or her separate property, and shall be free to manage, sell, control or otherwise dispose of such separate property.

C. Separate property as used in this Agreement shall include not only the assets described on attached Exhibits "A" and "B" but shall also include gains, income, income, interests, dividends, profits, and any other increases in value or decreases in debt, and issues therefrom.

D. Each party shall be free to replace assets owned by him or her at the time of this Agreement, and to sell or otherwise receive proceeds attributable to separate property of each. The replacement and proceeds of separate property shall be and

remain separate property, and shall not lose their character as separate property solely by change of the form or nature of the asset.

E. Property received by either party through gift or inheritance shall remain the sole and separate property of the party so receiving or inheriting.

F. Employment benefits including, but not limited to, pension, profit-sharing or any other employee benefit programs or plans shall remain the sole and separate property of the party so employed, and such benefit plan shall remain separate property, even following the marriage of the parties. Each party relinquishes any claim, right, interest or title to the employee benefit plans of the other, and such plans shall not be subject to division in the event of death, separation, or dissolution of the marriage.

3. **ELECTIVE SHARE:**

Upon death, each party shall be free to dispose, by will or otherwise, all of the property or property rights that each party now has freely and voluntarily, as though the marriage did not exist. The claim of each party relinquished and disclaimed herein shall include, but is not limited to, the right to elect against the will, or to receive any award of an elective share against the estate of the deceased spouse, as provided by SDCL Ch. 30-5A.

4. **MARITAL PROPERTY:**

Except as specifically provided above, property acquired by the parties from and after the date of their marriage, and continuing throughout the marriage, shall be deemed marital property. No waiver, release or relinquishment of any right, title, claim or interest in and to the separate property of the other shall be construed as a relinquishment of any right or interest in marital property. Property acquired from and after the date of the marriage, and continuing through the course of the marriage, shall remain marital property regardless of designation of title or ownership of such assets.

5. **COMMINGLING:**

Parties shall use their best efforts to prevent any commingling of separate property. The commingling of separate property, or the failure to segregate separate property, shall not be construed as to change the character of separate property or otherwise result in a change of separate property to marital property.

6. **DISPOSITION OF PROPERTY:**

As set forth above, each party shall be free, at all times, to dispose, transfer or convey, for consideration, gift or otherwise, any and all interest in his or her separate property. Each party agrees to join, as may be necessary, in any document of conveyance, transfer or mortgage requested by the other, in order to carry out transfer or conveyance of separate property.

7. **ORDINARY LIVING EXPENSES:**

The parties agree to create, upon marriage, a jointly owned bank account, and each agrees to deposit into such account, earnings or separate property, at an amount necessary to pay ordinary and necessary living expenses of the parties, and any acquisition of marital property. The payment of other ordinary living expenses, such as taxes, insurance, utilities, and miscellaneous repairs shall be paid from the joint marital bank account.

8. **DEBTS:**

A. Debts incurred by either party prior to marriage shall remain the sole and separate obligation of the party which incurred the debt. Neither party shall be liable for the debts of the other party incurred prior to marriage.

B. Debts incurred by either party after the marriage, relating to the separate property of each party, shall be and remain the sole obligation of the party which incurred the debt. Any indebtedness incurred by Angie after marriage shall remain her sole and separate obligation; and, any indebtedness incurred by Don during the course of the marriage shall remain his sole and separate obligation.

C. The parties shall be mutually liable only for debts incurred in the name of both parties, and with the specific knowledge, consent and written undertaking of any such obligation. Neither party shall bind, or attempt to bind, the other to any indebtedness except on written consent.

D. Neither party shall submit or prepare any financial statement or document of similar nature, for submission to any creditor or prospective creditor of the parties, making reference to any marital assets or the separate assets of the other party, without written consent.

E. Each party shall indemnify and hold harmless the other from any liability arising from failure to comply with this provision.

9. **ORAL STATEMENTS:**

No statement or act by either party, from and after the date of this Agreement, shall have the effect of amendment, of modifying this Agreement. All property which may otherwise be designated as marital property may become or be treated as marital property, except by specific, written amendment to this instrument. In addition, under no circumstances shall the following events, either individually or collectively, be construed as evidence of any intention, express or implied, or of any agreement, actual or implied, to change the character of separate property:

A. The filing of a joint income tax return;

B. The designation of either spouse as a beneficiary of the other spouse's estate, by will or by life insurance;

C. The commingling of either spouse of his or her separate funds with the separate or separate funds of the other party or with any marital property;

D. Any oral statements by either party;

E. Any written document by either party, other than an express written agreement specifically amending this agreement;

F. Payment of any marital funds toward any separate obligation of the other party, other than as provided for ordinary and reasonable living expenses. In the event that marital property or separate property of either party is contributed toward separate property or debts of the other, such contribution shall be deemed a loan, payable on demand, without interest, unless the parties agree otherwise, in writing.

10. **AMENDMENT:**

This Agreement may be amended by the parties only by express, written document, specifically referring to and amending this Agreement. Any such amendment shall be executed by the parties with the same formality as this Agreement, shall be executed in duplicate, and shall be specifically attached to and made a part of this Agreement. No other type of agreement, oral or written, shall have the effect of amendment.

11. **LEGAL REPRESENTATION:**

Don acknowledges that this Agreement has been prepared by legal counsel for Angie, the law firm of Carr & Pluimer, P.C. of Belle Fourche, South Dakota. Angie's attorneys have not and do not purport to advise Don or to make any representations to him. Each party has had the benefit of separate representation by legal counsel of their choice. Each party further represents they have read this Agreement in its entirety, have fully examined the schedule of assets of the other, have had an opportunity to have any matters explained to them by the other or by their attorney. Each party fully understands the purposes, terms, provisions and legal consequences of this Agreement.

12. **OTHER DOCUMENTS:**

Each party agrees to execute any and all other formal document that may be deemed necessary or advisable to carry out the terms of this Agreement.

13. **BINDING EFFECT:**

This Agreement shall be binding upon the parties, their legal representatives, heirs and creditors.

14. **EFFECTIVE DATE:**

This Agreement shall become effective upon the date of the marriage of the parties whether before or after the anticipated date.

15. **GOVERNING LAW:**

This Agreement is made and executed in the State of South Dakota, and shall be governed by the laws of the State of South Dakota notwithstanding the fact that the parties may, from time to time, reside in some other jurisdiction. Venue of all proceedings to interpret this Agreement shall be held in Butte County, South Dakota.

16. **SEVERABILITY OF PROVISIONS:**

In the event that any portion of this Agreement is determined to be invalid or unenforceable, such determination shall not effect the validity or enforceability of any other provision herein.

17. **REVIEW:**

The parties intend to review this Agreement five (5) years from the date hereof. No modifications will be implied by such a review, and any amendments or changes shall conform to the requirements of paragraph 9. This provision for review is optional with the parties, and the failure to review shall not affect the validity of any portion of this agreement.

18. **ENTIRE AGREEMENT:**

This document represents the entire understanding and agreement between the parties, and incorporates all prior discussions. There are no oral agreements or representations made by either party other than is specifically set forth herein.

Executed in duplicate this 22nd day of January, 1993.

DONALD M. CHARLSON

ANGELA K. (JOHNSON) SMOOT

STATE OF SOUTH DAKOTA)
)SS.
COUNTY OF BUTTE)

On this, the 22nd day of January, 1993, before me, the undersigned Notary Public, personally appeared Angela K. (Johnson) Smoot, known to me or satisfactorily proven to be the person whose name is subscribed to the within Pre-Marriage Agreement and acknowledged that she executed the same for the purposes therein contained, as her free act and deed.

In Witness Whereof, I hereunto set my hand and official seal.

NOTARY PUBLIC

(SEAL)

STATE OF SOUTH DAKOTA)
)SS.
COUNTY OF BUTTE)

On this, the 22nd day of January, 1993, before me, the undersigned Notary Public, personally appeared Donald M. Charlson, known to me or satisfactorily proven to be the person whose name is subscribed to the within Pre-Marriage Agreement and acknowledged that he executed the same for the purposes therein contained, as his free act and deed.

In Witness Whereof, I hereunto set my hand and official seal.

NOTARY PUBLIC

(SEAL)

ATTORNEY'S CERTIFICATION

COMES NOW Richard A. Pluimer of the law firm of Carr & Pluimer, P.C., Attorneys at Law, Belle Fourche, South Dakota, and hereby acknowledges that he has represented the interests of Angela K. (Johnson) Smoot in matters relating to the Agreements set forth herein. I represent that I have fully advised Angie of her property rights and the legal significance of the Agreement. Angie has represented to me that she understands the terms and legal consequences of this Agreement, and has freely and voluntarily executed the Agreement in my presence.

CARR & PLUIMER, P.C.

BY: 

RICHARD A. PLUIMER, Attorney for
Angela K. (Johnson) Smoot
P.O. Box 580
Belle Fourche, SD 57717-0580
(605) 892-6383

Don's attorney, Michael McKnight, will provide letter certification to follow and be attached hereto.

Financial Statement for Don Chalmers
1/22/93

~~Assets~~

0 assets

Don Chalmers

EXHIBIT 'B'

Financial Statement of Angela K. Smoot

Social Security No. 503-72-1160
Date of birth: July 27, 1956

Assets:		Value of Angie's interest
1.	Family corporations[1]	
	a. TJPR, Inc.[2]	$100,000.00
	b. STI, Inc.	160,000.00
	c. JMCCS, Inc.	Less than 10,000.00
2.	House equity[3]	2,800.00
3.	Checking account	Approximately 2,000.00
4.	Edward D. Jones & Co. Account No. 570-04012-1-8 consisting of money market accounts, stocks and mutual funds having an accumulated balance as of December 31,1992	68,645.65
5.	Personal property consisting of two vehicles, household furnishings and miscellaneous personal property	20,000.00

Liabilities:		
1.	Remaining balance on mortgage for Angie's residence	58,000.00
2.	Business debts personally guaranteed by Angie	90,000.00

---

[1]The corporations listed herein consist of three Taco John's business operations, in which Angie owns 50% of the stock of each corporation. The corporations own Taco John's businesses in Pine Ridge, Belle Fourche, and Mission, South Dakota.

[2]At the time this exhibit is prepared, an offer has been made to purchase the sole asset of this corporation, which consists of the Taco John's business located in Pine Ridge. The terms of the pending offer contemplate a sale of the entire asset for $200,000. Angie's 50% interest will generate approximately $100,000--$75,000 in the near future and the additional $25,000 payable at some future date, the exact time and circumstances of which have not been determined.

[3]At the time of the making of this agreement, Angie is in the process of and has accepted an offer to sell her residence in Belle Fourche, which according to realtor's projected closing statement, will yield net equity to Angie of $2,800 after deduction of all costs of sale and payment of all existing debt.

APPENDIX B

State of Minnesota
Olmsted County

District Court
Third Judicial District
Court File Number: **55-FA-13-1830**
Case Type: Dissolution without Child

JILL I FRIEDERS
206 S BROADWAY STE 611
P O BOX 968
ROCHESTER MN 55903-0968

Notice of:
[X] **Filing of Order**
[ ] **Entry of Judgment**
[ ] **Docketing of Judgment**

In Re the Marriage of: Donald M. Charlson, Petitioner, and Angela K. Charlson, Respondent

You are hereby notified that the following occurred regarding the above-entitled matter:

[X] An Order was filed on October 30, 2013.
[ ] Judgment was entered on .
[ ] You are notified that judgment was docketed on
at in the amount of $. Costs and interest will accrue on this amount from the date of entry until the judgment is satisfied in full.

Dated: October 31, 2013

Charles L. Kjos
Court Administrator
Olmsted County District Court
151 S.E. 4th Street 5th Floor
Rochester MN 55904
507-206-2400

cc: AMBER MARIE LAWRENCE

A true and correct copy of this notice has been served pursuant to Minnesota Rules of Civil Procedure, Rule 77.04.

O'Brien & Wolf, L.L.P.
Law Offices
Received 11/01/13

55-FA-13-1830
ORD
Order-Other
852710

STATE OF MINNESOTA

COUNTY OF OLMSTED

DISTRICT COURT
FAMILY DIVISION
THIRD JUDICIAL DISTRICT

In Re the Marriage of:

Donald M. Charlson,

Petitioner,

and

Angela K. Charlson,

Respondent.

ORDER

Court File No. 55-FA-13-1830

The above-entitled matter came before the Honorable Jodi L. Williamson, Judge of Olmsted County District Court, on October 15, 2013, at the Olmsted County Government Center, Rochester, Minnesota, upon Petitioner's Motion to establish venue regarding the parties' Pre-Marriage Agreement.

APPEARANCES: Amber M. Lawrence, Esq., and **Arianna B. Halper, Esq.,** Lawrence & Dittrich, P.A., Rochester, Minnesota, appeared on behalf of Petitioner who was personally present. **Jill I. Frieders, Esq.,** O'Brien & Wolf, L.L.P., Rochester, Minnesota, and **Eva Cheney Hatcher, Esq.,** Cheny-Hatcher & McKenzie, PLLC, Apple Valley, Minnesota, appeared on behalf of Respondent who was also personally present.

The parties agreed to defer all other pending motions for future hearing in Olmsted County.

The parties executed a Pre-Marriage Agreement on January 22, 1993.The Agreement is clear and unambiguous. Each party was competent at the time of the signing and had access to competent counsel.

Paragraph 15 of the parties' Pre-Marriage Agreement states:

FILED
OCT 30 2013
COURT ADMINISTRATOR
Olmsted County, MN

O'Brien & Wolf, L.L.P.
Law Offices
Received

> This Agreement is made and executed in the State of South Dakota, and shall be governed by the laws of the State of South Dakota notwithstanding the fact that the parties may, from time to time, reside in some other jurisdiction. Venue of all proceedings to interpret this Agreement shall be held in Butte County, South Dakota.

Petitioner moved the Court to find that Olmsted County was the proper venue for determining all issues pertaining to the Pre-Marriage Agreement. Respondent argued that the proper venue for deciding such issues is Butte County, South Dakota, the venue that the parties agreed to when the Agreement was executed.

Public policy favors enforcing a forum selection clause in a contract freely entered into by parties who engaged in arm's length negotiations. *Hauenstein & Bermeister, Inc. v. Met-Fab Indus., Inc.*, 320 N.W.2d 886, 889 (Minn. 1982). Such a clause is enforceable unless it is shown by the party seeking to avoid the agreement that to do so would be unfair or unreasonable. *Id.* at 890. Factors to consider in determining whether the clause is unreasonable are (1) whether the chosen forum is a seriously inconvenient forum; (2) the agreement is one of adhesion; and (3) the agreement is otherwise unreasonable. *Id.*

To be "seriously inconvenient," one party would have to be "effectively deprived of a meaningful day in court." *Id.* (*quoting M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 7, 19 (1972)). Petitioner has not established that such a consequence would result if the issues pertaining to the Agreement were determined in Butte County, South Dakota.

The Pre-Marriage Agreement was also not a contract of adhesion. In a letter dated January 25, 1993, it appears that Petitioner reviewed the Agreement with an attorney and was advised of its legal significance prior to its signing. In addition, the letter indicates that the Agreement was proposed by Petitioner and that he would be

"freely and voluntarily" signing it. Petitioner has not provided any additional evidence to suggest that forum selection clause in the Agreement is unfair or unreasonable.

IT IS HEREBY ORDERED:

1. That Butte County, South Dakota, is the proper venue to determine any issues regarding the validity and enforceability of the parties' Pre-Marriage Agreement.

Dated: October 29, 2013

BY THE COURT:

Honorable Jodi L. Williamson
District Court Judge

cc: Amber M. Lawrence and Arianna B. Halper, Attorneys for Petitioner
Jill I. Frieders and Eva Cheney Hatcher, Attorneys for Respondent

APPENDIX C

STATE OF MINNESOTA

COUNTY OF OLMSTED

DISTRICT COURT
FAMILY DIVISION
THIRD JUDICIAL DISTRICT

In Re the Marriage of:

Donald M. Charlson,

Petitioner,

and

Angela K. Charlson,

Respondent.

SUPPLEMENTAL ORDER

Court File No. 55-FA-13-1830

The above-entitled matter came before the Honorable Jodi L. Williamson, Judge of District Court, on April 15, 2014, at the Dodge County Courthouse, Mantorville, Minnesota, upon Petitioner's Motion for New Hearing, Amended Findings of Fact, and Conclusions of Law.

APPEARANCES: Amber M. Lawrence, Esq., Lawrence & Dittrich, P.A., Rochester, Minnesota, appeared on behalf of Petitioner who was personally present. **Jill I. Frieders, Esq.,** O'Brien & Wolf, L.L.P., Rochester, Minnesota, and **Eva Cheney Hatcher, Esq.,** Cheny-Hatcher & McKenzie, PLLC, Apple Valley, Minnesota, appeared on behalf of Respondent who was also personally present.

On October 30, 2013 the Court issued an Order regarding a forum selection clause of a pre-nuptial agreement executed by the parties on January 22, 1993. Petitioner moved to amend the order and the Court granted a time extension for good cause to January 14, 2014. The Court was on medical disability leave commencing January 13, 2014. The case was heard at the earliest convenience of the parties and Court and no inference shall be made for against either party due to the delay in hearing Petitioner's motion.

FILED
APR 21 2014
COURT ADMINISTRATOR
O'Brien & Wolf, L.L.P.
Law Offices
Received

The forum-selection clause of the Pre-Marriage Agreement is clear and unambiguous. At no time did this Court intend to interpret the validity or enforceability of the Pre-Marriage Agreement as a whole, as that must be decided by the Court in Butte County, South Dakota.

IT IS HEREBY ORDERED:

1. That Petitioner's motion is denied in its entirety.
2. That Respondent's motion for attorney fees is denied.

Dated: April 21, 2014

BY THE COURT:

Honorable Jodi L. Williamson
District Court Judge

APPENDIX D

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTY OF BUTTE	)	FOURTH JUDICIAL CIRCUIT
ANGELA K. CHARLSON	)	Civ. No. 14-06
Plaintiff,	)	
v.	)	
DONALD M. CHARLSON	)	**FINDINGS OF FACT AND CONCLUSIONS OF LAW**
Defendant.	)	

The above-entitled matter having come before this Court for a trial to the court on the 8th day of July, 2014, the Honorable Michael W. Day presiding. The issue to be determined is the validity of the Pre-Marriage Agreement of the parties. The Plaintiff was personally present and represented by her counsel, Linda Lea M. Viken. The Defendant was personally present and represented by his counsel, Michael K. Sabers. Eva Cheney Hatcher, one of the Minnesota attorneys for Plaintiff in her divorce action, was also present.

The parties stipulated to the admission of all exhibits, Plaintiff's Exhibits 1 through 14 and Defendant's Exhibits A through G which were received and admitted. The parties submitted pre and post-trial submissions as well as proposed findings and conclusions. Testimony at trial was provided by Defendant, attorney Michael McKnight, attorney Richard A. Pluimer, and the Plaintiff. The Court having considered all the records and files herein, including all the submissions, as well as the evidence introduced, both oral and documentary, the arguments of counsel, and having heard the testimony, and being fully advised as to all matters pertinent hereto, the Court makes the following:

FILED
AUG 05 2014
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT

FINDINGS OF FACT

1.

The matter before the Court is not a divorce action but instead an interpretation of a document, a Pre-Marriage Agreement executed by the parties in the state of South Dakota.

2.

Plaintiff filed a Declaratory Judgment action, which included in part, an Order from the District Court, Third Judicial District, Olmstead County, Minnesota, concluding that Butte County, South Dakota, was the proper venue to determine issues of validity and enforceability of the parties' Pre-Marriage Agreement (hereinafter "Agreement"). *Plaintiff's Exhibits 9 and 10.* Angela's verified pleadings list assets in South Dakota. Donald testified that he has interests in property in South Dakota.

3.

The Summons and verified Complaint for Declaratory Judgment were personally served upon Defendant on January 20, 2014.

4.

Defendant, Donald Charlson, (hereinafter "Donald") filed a Limited Purpose Answer to Complaint for Declaratory Judgment and a Motion to Dismiss or Stay.

5.

Plaintiff, Angela Charlson, (hereinafter "Angela") did not pursue this matter until the Minnesota Court decided the Motion referenced by Defendant in the Motion to Dismiss or Stay. In essence, Plaintiff granted the Defendant his requested stay.

6.

Defendant did not pursue his Motion to Dismiss, and the Court's Order for this hearing, agreed to by both counsel, established that the hearing was to determine the validity of the Pre-Marriage Agreement (hereinafter "Agreement").

7.

Angela testified that the parties had previously discussed having a Pre-Marriage Agreement and both agreed it was necessary.

8.

The parties herein entered into the Agreement in the state of South Dakota, on the 22nd day of January, 1993, in Belle Fourche, South Dakota. *Plaintiff's Exhibit 1.*

9.

At that time the parties entered into the Agreement both owned property in the state of South Dakota. Angela was living in Belle Fourche, South Dakota, and Donald was also living in Belle Fourche, South Dakota. The Agreement was supplemented with a letter written by Attorney Michael McKnight, who represented Donald in issues relating to the Pre-Marriage Agreement. *Plaintiff's Exhibit 2.*

10.

Both parties testified as to the reasons for the Agreement. Both had been through "messy" divorces. Angela had given up assets in her previous divorce; assets that she had counted on for retirement. Both parties had children from their previous marriage which they wished to independently provide for. Angela testified that there was also a concern regarding

whether her assets would be considered for Donald's child support and alimony purposes. Donald also testified that part of the reason for the Agreement was to protect Angela's assets and businesses.

11.

An alienation of affection lawsuit was served on Angela during the process of Donald's divorce. She hired Terry Quinn to be her attorney. Once Donald signed the settlement agreement with his then wife, Teresa Charlson, her alienation of affection lawsuit against Angela was dismissed, however, without prejudice. *Plaintiff's Exhibit 14.* This was also a concern for the parties.

12.

The parties' Pre-Marriage Agreement provides as follows:

> **GOVERNING LAW:**
> This Agreement is made and executed in the State of South Dakota, and shall be governed by the laws of the State of South Dakota notwithstanding the fact that the parties may, from time to time, reside in some other jurisdiction. Venue of all proceedings to interpret this Agreement shall be held in Butte County, South Dakota. [Emphasis added.]

13.

> The parties signed the Pre-Marriage Agreement in South Dakota and selected South Dakota as the forum and venue to determine its validity and interpretation.

14.

The parties herein are parties to a divorce action filed in Minnesota, *In Re Marriage of Donald M. Charlson v. Angela K. Charlson, Court File No. 55-FA-13-1830, District Court Family Division, Third Judicial Circuit, State of Minnesota, County of Olmstead.* Angela did not raise the Agreement in her filing for her Minnesota divorce in her Verified Answer. Counsel for

Angela represented to this Court at trial that neither Minnesota law nor South Dakota law would require such disclosure.

15.

Angela, with leave of the Minnesota Court amended her Counter-Petition and included the existence of the Agreement. *Plaintiff's Exhibits 5, 6 and 7.*

16.

Angela has not taken two inconsistent positions in front of two separate courts. In both the Minnesota Court and in the South Dakota Court Angela has asserted the validity of the subject Agreement.

17.

The Minnesota Court bifurcated the case and granted the parties a divorce on February 10, 2014. The issues remaining before the Minnesota Court are spousal maintenance, division of property and debts, and other financial matters involving the parties. *Plaintiff's Exhibit 11.*

18.

The Minnesota Court made the following Findings in its Order of October 29, 2013. *Plaintiff's Exhibit 9.*

a. Each party was competent at the time of signing and had access to competent counsel.

b. The Pre-Marriage Agreement was not a contract of adhesion.

19.

Upon Motion of Donald to modify the Order, the Minnesota Court sustained its former position in its Order of April 21, 2014. *Plaintiff's Exhibit 10.*

20.

Donald testified that he had little recollection of any of the events surrounding the preparation or signing of the Agreement, but alleged that he did not have the advice of competent counsel prior to signing the Agreement.

21.

Donald waived his attorney/client privilege and allowed his attorney, Michael McKnight to testify.

22.

Mr. McKnight testified that he wrote the letter, *Plaintiff's Exhibit 2*, and that while he had no independent recollection of the writing of the letter, he could verify that the letter was on his letterhead and signed by him. He further testified that he would not have written the letter were it not factually accurate.

23.

The letter, *Plaintiff's Exhibit 2*, stated that Mr. McKnight had counseled Donald regarding his rights and that Donald would be freely and voluntarily signing the Agreement, and that, in fact, it was his idea

24.

Mr. McKnight had represented Donald in a divorce that was completed approximately five months before the signing of the Agreement. He verified that *Plaintiff's Exhibit 13* was a document he had prepared and sent to the Divorce Court on behalf of Donald which accurately sets forth Donald's assets and debts at the time of his divorce. Shortly thereafter the parties were

divorced. *Plaintiff's Exhibit 3.*

25.

While he had no independent recollection, Mr. McKnight verified that the fax, *Plaintiff's Exhibit 12*, was properly directed to his then office and contained a rough draft of a Pre-Marriage Agreement from Richard Pluimer, attorney for Angela.

26.

The document sent with the fax stated that it was "for discussion purposes only," and contained the financial disclosure statement of Angela (then known as Angela Smoot).

27.

Angela waived her attorney/client privilege and allowed her attorney, Richard Pluimer, to testify.

28.

Mr. Pluimer, Angela's attorney, testified that he had placed a call to Mr. McKnight to see if he was representing Donald, and then faxed *Plaintiff's Exhibit 12* to Mr. McKnight. He then had a subsequent conversation with Mr. McKnight.

29.

Plaintiff's Exhibit 4 is a billing statement from Mr. Pluimer's office at the time he was representing Angela. It sets forth services on January 21 and January 22, 1993, including a telephone call with Mr. McKnight on January 21st. A further telephone call took place on January 22nd with Mr. McKnight after which the bill indicates that the final version of the Pre-Marriage Agreement was drafted. The billings for the disbursements for the time period of the

bill indicate that there were photocopies made, a fax was sent, and that there were telephone charges. *Plaintiff's Exhibit 4* corroborates the testimony of Mr. Pluimer and Mr. McKnight.

30.

Donald did not raise an objection with his attorney, with Mr. Pluimer, nor with Angela, that he was not prepared to sign the Pre-Marriage Agreement on the date that it was signed. While he knew other South Dakota attorneys, he did not seek their counsel.

31.

Donald offered no testimony that he was coerced into signing the Agreement. He testified that the wedding would have gone forward even if he had not signed it.

32.

Angela testified that if Donald had expressed concern about signing the Agreement, the wedding could have been postponed, or they could have discussed changing the Agreement.

33.

The Court finds no significance in the fact that the parties did not initial the pages or that Mr. Pluimer asked them to come back to his office and initial the pages afterwards. The Court finds no such legal requirement in the law.

34.

Mr. Pluimer testified that he would not have allowed either party to sign the Agreement if he had any doubt whatsoever that the parties were freely and voluntarily entering into the Agreement.

35.

Mr. McKnight testified that he would not have allowed his client to sign the document if

he felt he was not voluntarily doing so.

36.

The Court finds that Mr. McKnight and Mr. Pluimer are credible witnesses.

37.

Angela testified, and it was uncontroverted, that the parties were both given a copy of the Pre-Marriage Agreement to read prior to signing; that Mr. Pluimer left the room while the parties reviewed the documents, and that Donald raised no questions regarding her financial disclosure or his own.

38.

Donald did not testify as to how the Agreement was "unconscionable." Donald testified that Angela did not force him to sign the Agreement.

39.

In Paragraph 1 of the Agreement, the parties agreed that they had a "full and complete accounting of all assets and liabilities" and that the "listing of the assets and the value placed on the assets constitutes a reasonable approximation of each parties' assets and liabilities, but neither party represents that the balance sheet is a precise compilation," and that the variation in "the value of the assets, at any time in the future, shall not affect the validity of the agreement". *Plaintiff's Exhibit 2.*

40.

Paragraph 11 of the Agreement, reads in pertinent part:

> 11. **LEGAL REPRESENTATION:**
>
> Don acknowledges that this Agreement has been prepared by legal counsel for Angie, the law firm of Carr & Pluimer, P.C. of Belle Fourche, South Dakota. Angie's attorneys have not and do not purport to advise Don or to make any

representations to him. Each party has had the benefit of separate representation by legal counsel of their choice. Each part further represents they have read this Agreement in its entirety, have fully examined the schedule of assets of the other, have had an opportunity to have any matters explained to them by the other or by their attorney. Each party fully understands the purposes, terms, provisions and legal consequences of this Agreement. [Emphasis added.]

41.

Donald was (and continues to be) a Financial Planner at the time he signed the Agreement and was Angela's Financial Planner. He had discussed her debts and assets in that capacity. Angela testified that she and Donald had indeed discussed her debts and assets because that was instrumental in determining how much she could invest safely and still have money to pay her debts. Donald has not alleged that Angela's disclosure of debts and assets was deficient in any way.

42.

Donald had just completed a divorce approximately five months prior to the signing of the Agreement and was aware of his debts and assets. As shown by *Plaintiff's Exhibits 3 and 13*, Donald had a negative net worth, so his asserting he had a zero net worth on his attachment to the Agreement was correct and accurate. Donald's testimony that he did not know his debts and assets is not credible.

43.

Any Conclusion of Law deemed to properly constitute a Finding of Fact shall be incorporated herein by reference.

Based on the foregoing Findings, the Court hereby enters the following:

CONCLUSIONS OF LAW

1.

The Court has gauged the credibility of the witnesses and weighed the significance of their testimony. *Kost v. Kost*, 515 N.W.2d 209, 212 (S.D. 1994).

2.

This Court has personal jurisdiction over the parties herein and the Agreement. The parties signed a Pre-Marriage Agreement with a valid forum selection provision, which gives this Court personal jurisdiction. Additionally, the parties own, or have an interest in, real property located in the state of South Dakota, as shown by the parties' affidavits and testimony.

3.

This Court has subject matter jurisdiction over Declaratory Judgment actions. SDCL Chapter 21-24. The Court has jurisdiction to determine the validity of a Pre-Marriage Agreement. SDCL Chapter 25-2.

4.

SDCL 21-24-3 gives this Court authority in a declaratory judgment action to determine any question of construction or validity arising under an instrument, in this case, the parties' Pre-Marriage Agreement.

5.

SDCL 25-2-21 provides that when this court reviews a challenge to the validity of a premarital agreement, certain factors must be considered. And furthermore, that the burden of proof rests upon the party challenging the premarital agreement, in this case, Donald.

6.

SDCL 25-2-21(2) has a two part provision relating to whether a premarital agreement is

unconscionable. One seeking to avoid enforcement of a premarital agreement must first show that it was unconscionable when executed, and second, that they:

> (i) [Were] not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
>
> (ii) Did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and
>
> (iii) Did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

7.

In this case Donald knew why Angela desired the Pre-Marriage Agreement and agreed with those reasons. He himself desired the Agreement. The Supreme Court has:

> [E]ndorsed property agreements between spouses as a method of protecting the inheritance rights of their children by previous marriages. . . . Moreover, we noted that "courts have recognized that it is nature and proper for a parent to desire to provide for their children of his or her first marriage." *Estate of Smid*, 2008 S.D. ¶21, 756 N.W.2d 1.

While this is not an Agreement between spouses, the right to be protected is the same.

8.

Based upon the facts, the Pre-Marriage Agreement was not unconscionable when executed. The reasons for the Agreement were valid.

9.

Donald voluntarily executed the Pre-Marriage Agreement. He was not under duress and the shortness of time did not affect his ability to consult with competent counsel. Angela did not force him to sign the Agreement.

> [O]ne who accepts the contract is conclusively presumed to know it contents and to assent to them in, in the absence of fraud, misrepresentation or other wrongful act by another contracting party. ¶17. [Citations omitted].

10.

Both parties had the advice of competent counsel and the Agreement was desired by both parties for valid reasons.

11.

Donald had a fair and reasonable disclosure of the property and financial obligations of Angela. He expressly waived in writing any right to a further disclosure and as her Financial Planner, Donald had adequate knowledge of her property and financial obligations.

12.

The South Dakota Supreme Court in *Sanford v. Sanford,* 2005 S.D. 34, ¶44, 694 N.W.2d 283, states:

> It is not necessary, given the language in SDCL 25-2-21, for a spouse to provide a detailed and exact valuation of his or her net worth in a prenuptial agreement. It is sufficient for a spouse to provide, within the best of his or her abilities, a list of assets and liabilities with approximate valuations. The listing must be sufficiently precise to give the other spouse a reasonable approximation of the magnitude of the other spouse's net worth.

13.

Angela is not contesting the disclosure of Donald's property and debts, and his disclosure, or failure to disclose is not an issue under the law. Even if it were an issue, his net worth, which, as shown by *Plaintiff*'s *Exhibits 3 and 13*, was a minus figure, making his disclosure accurate.

14.

The Court concludes that Angela did not waiver her rights to enforce the Agreement by the nature of her pleadings in the Minnesota Court.

15.

Donald cites *Kellar v. Estate of Kellar*, 172 Wash. App. 562, ¶47, 291 P.3d 906 (Wash. App. Div. 1, 2012) and *Bailey v. Duling*, 2013 S.D. 15, 827 N.W. 2d 351. Applying the criteria set forth in those cases to the facts in this case clearly establish that estoppel has not occurred.

16.

The Court concludes that the burden of proving the invalidity of the Pre-Marriage Agreement is Donald's and that he failed to meet his burden of proof under SDCL 25-2-21(2)(i). The Pre-Marriage Agreement between the parties is valid and enforceable.

17.

Any Finding of Fact deemed to properly constitute a Conclusion of Law shall be incorporated herein by reference.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 5th day of August, 2014.

BY THE COURT:

Hon. Michael W. Day
Circuit Court Judge

ATTEST:

Shawn Sorenson
Clerk

Deputy

(SEAL)

STATE OF SOUTH DAKOTA
Fourth Judicial Circuit Court
I hereby certify that the foregoing instrument is a true and correct copy of the original as the same appears on file in my office on this date:

AUG 05 2014

Shawn Sorenson
Butte County Clerk of Courts

By

FILED

AUG 05 2014

UNIFIED JUDICIAL SYSTEM
CIRCUIT CLERK OF COURT

APPENDIX E

STATE OF SOUTH DAKOTA — IN CIRCUIT COURT

COUNTY OF BUTTE — FOURTH JUDICIAL CIRCUIT

ANGELA CHARLSON,

Plaintiff,

vs.

DONALD CHARLSON

Defendant.

Court Trial

Volume VIII of IX
Pages 1401-1546

Civ. 14-06

BEFORE: THE HONORABLE MICHAEL DAY
Circuit Court Judge
Belle Fourche, South Dakota
August 26, 2016 at 8:00 a.m.

Reported By: Kathryn M. Mack
Official Court Reporter

Q And would you agree that the Value Consulting Group report is a rather typical tracing report?
A They use the methodologies that are commonly used.
Q And, in fact, your firm also has a similar methodology model that you use; is that correct?
A On an asset-by-asset basis, there are different models; but tracing-wise, there are similarities.
Q And do you agree that direct tracing is a common methodology used in tracing?
A It can be.
Q Do you use direct tracing when you are involved in your own tracing analysis?
A At times, we do.
Q Would you agree that the pro rata share model is also a common methodology in tracing?
A Yes.
Q And do you use the pro rata share model when doing your own tracing analysis?
A Yes.
Q Mr. Harjes, in your years in doing tracing reports, have you had to incorporate into those reports -- strike that -- have you had to incorporate methodologies, based on what the terms of a pre-marriage agreement may say? Or in Minnesota, we call them "antenuptial contracts."

A I'm sorry. Could you repeat that, please.
Q Yes. If you have an antenuptial contract that's provided to you, or a pre-marriage agreement, and you're asked to do a tracing, you have to formulate your methodology to the terms of the pre-marriage agreement; is that correct?
A Yes.
Q And sometimes you have to stray from the standard methodology, because the contract terms of the pre-marriage agreement would dictate what you had to do?
A Yes.
Q In your years of doing tracing, have you seen pre-marriage agreements that address the issue of commingling?
A Yes.
Q And would you agree that is not an unusual provision to have in a pre-marriage agreement, a provision on commingling?
A I guess, as I think about ones that I recall, some would have commingling provisions and some might not. I don't know that I would say it's common, but I've seen it in agreements.
Q Would you agree that commingling does not necessarily extinguish separate interest?

would view it as alignment more to the activities of the parties.

Q Mr. Harjes, do you recall in 2012 and 2013, you and Ms. Devitt were financial neutrals in a case that my firm was involved in, and the last name of the client was Gullickson? Do you recall that?

A I do.

Q Do you recall that being a very large document-intensive case?

A Yes.

Q Do you recall that your firm prepared a very large tracing report, particularly on dissipation?

A Yes, 187 pages.

Q Wasn't there other pages behind that that had backup documents to it?

A Probably with backup documents.

Q Wasn't it over 500 pages?

A With backup documents, it may have been.

Q Would you agree that, in your experience, that it is common to make assumptions in tracing reports if not all of the documents are available?

A In some cases, that may be the case.

Q In fact, you just testified with regard to your Schedule 2 that you made some assumptions and estimates, didn't you?

APPENDIX F

Exhibit _
Baker Tilly Schedule 1 Recalculation
Considers 1996 - 2011 Only

		Contributions to #7183		Funds Available	
Line	**Year**	**Don**	**Angie**	**Don**	**Angie**
1	1996	$ 57,077	$ 37,670	$ 75,511	$ 19,720
2	1997	$ 58,400	$ 72,696	$ 79,906	$ 20,369
3	1998	$ 70,567	$ 39,000	$ 91,866	$ 33,588
4	1999	$ 95,750	$ (7,762)	$ 117,143	$ 53,861
5	2000	$ 107,357	$ (33)	$ 124,931	$ 51,045
6	2001	$ 91,591	$ 14,078	$ 111,333	$ 65,154
7	2002	$ 84,513	$ 21,313	$ 96,832	$ 22,325
8	2003	$ 90,291	$ 37,430	$ 113,087	$ 43,606
9	2004	$ 110,984	$ 51,078	$ 134,660	$ 85,053
10	2005	$ 119,100	$ 46,509	$ 147,360	$ 78,484
11	2006	$ 124,047	$ 62,185	$ 173,022	$ 70,282
12	2007	$ 144,994	$ 60,429	$ 184,747	$ 83,376
13	2008	$ 143,114	$ 81,909	$ 208,342	$ 65,748
14	2009	$ 91,815	$ (10,662)	$ 138,865	$ 47,291
15	2010	$ 137,364	$ 149,051	$ 207,623	$ 119,576
16	2011	$ 137,625	$ 121,834	$ 206,183	$ 245,510
17	Total	$ 1,664,589	$ 776,725	$ 2,211,411	$ 1,104,988
18	% of "Funds Available" to #7183			75.3%	70.3%
19	$ Not Contributed to #7183			$ 546,822	$ 328,263

APPENDIX G

Exhibit _
Baker Tilly Schedule 4 Recalculation
Total Business Income from TJPR (Line 5)

Line	Year	Business Income - TJPR	
1	1997	$	12,345
2	1998	$	31,253
3	1999	$	69,311
4	2000	$	45,908
5	2001	$	84,775
6	2002	$	34,583
7	2003	$	24,541
8	2004	$	87,069
9	2005	$	91,224
10	2006	$	90,291
11	2007	$	53,596
12	2008	$	60,214
13	2009	$	43,642
14	2010	$	124,835
15	2011	$	278,071
16	2012	$	247,267
17	2013	$	279,603
18	Total	$	1,658,528

PLAINTIFF'S EXHIBIT
tabbies
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Exhibit _
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Line	Year		Business Income - TJPR
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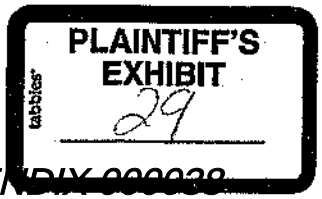
17	2013	$	279,603
18	Total	$	1,658,528



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18	Total	$	1,658,528

APPENDIX H

STATE OF SOUTH DAKOTA — IN CIRCUIT COURT

COUNTY OF BUTTE — FOURTH JUDICIAL CIRCUIT

ANGELA CHARLSON,

Plaintiff,

vs.

DONALD CHARLSON

Defendant.

Court Trial

Volume VI of IX
Pages 939-1161

Civ. 14-06

BEFORE: THE HONORABLE MICHAEL DAY
Circuit Court Judge
Belle Fourche, South Dakota
August 24, 2015 at 8:00 a.m.

Reported By: Kathryn M. Mack
Official Court Reporter

Q Can you describe your involvement in the tracing in this case.

A Yes. The involvement in the tracing by myself was to oversee and manage the overall case, to work on the development of the methodology, using both generally accepted methods of tracing in our field, as well as giving consideration to the pre-marriage agreement and how that may change what our normal methodology might look like, as well as work with my associate, Ms. Driscoll, to obtain the data and review the analysis.

Q And if you could turn to Page 18 of your report.

A (Witness complies.)

Q Is that your signature?

A Yes, it is.

Q Who else signed the tracing report?

A Ms. Quinn Driscoll.

Q Can you describe Ms. Driscoll's involvement in this tracing report.

A Yes. Quinn was working with obtaining the documentation, managing the documents, inputting the data, and then taking the data and applying the methodology that was determined.

Q Can you describe -- strike that.

MS. ROHR: Your Honor, I believe that when we were here in April, that the tracing report was already

admitted. At least that's what I have marked Plaintiff's Exhibit 1K. If not, I'd offer the report.

MS. LAWRENCE: I believe it was.

MS. ROHR: You have it going in, too?

MS. LAWRENCE: I do, yes.

THE COURT: It's been admitted.

MS. ROHR: Thank you, Your Honor. That's what I have, as well.

Q (By Ms. Rohr, continuing) Can you describe Ms. Charlson's involvement in the tracing analysis in this case.

A Yes. Ms. Charlson was integral in gathering all of the documents, which as we know in this case was a very large task, 20 years of data. So she was key to getting the information that we needed for purposes of preparing the report and then providing us some context to that document information.

Q Your report contains a narrative summary. What is the purpose of the narrative summary?

A The narrative summary is designed to explain to the Court what the methodology of the tracing is for each and every asset that was traced. So you'll see the report first discusses the pre-marriage agreement, then discusses our methodology, and then goes asset by asset, describing how that methodology was applied.

traced in this particular matter.

Q And have you traced these types of assets before in your work as a financial expert?

A Yes, I have.

Q Do you routinely do those types of tracing in your line of work?

A Yes, we do.

Q Now, is this report, Plaintiff's Exhibit 1K, reflective of a typical tracing analysis that you perform?

A It is typical in some approaches, but in areas where the pre-marriage agreement would alter that methodology, it differs.

Q Did you consider the pre-marriage agreement when selecting the methodologies that you applied in this tracing report?

A Yes. The pre-marriage agreement is very key when determining the general methodologies that we typically use would still apply or whether there's something in the pre-marriage agreement that would change that methodology.

Q I'm going to direct your attention to Page 1 of your report, dated March 30, 2015. And could you describe the -- strike that.

Could you describe how the pre-marriage agreement

was considered in selecting the methodology in your tracing analysis.

A The pre-marriage agreement was considered related to various provisions. Those provisions that we felt were most impacting how our methodology would be developed are described in Pages 1 and 2 of our report.

So we go through each of the provisions that we have considered. And then you'll see throughout the written report in parentheses, we will relate back the tracing methodology to the specific provisions of the pre-marriage agreement.

So Pages 1 and 2 of the report are where we describe the various provisions that we reference, then, throughout the report. And then at the top of Page 3 of our report, there's a paragraph on -- based on those provisions of the pre-marriage agreement, what was the methodology that we utilized for the remainder of the analysis.

Q While your report lists certain provisions of the pre-marriage agreement on Pages 1 and 2, did you give consideration to all of the provisions when putting together your tracing analysis?

A Yes, we did.

Q Did you consider Paragraph 7 of the pre-marriage

APPENDIX I

Printed from Dakota Disc

19-19-702 Testimony by expert.

19-19-702. Testimony by expert. A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) The testimony is based on sufficient facts or data;

(c) The testimony is the product of reliable principles and methods; and

(d) The expert has reliably applied the principles and methods to the facts of the case.

Source:(1)

Endnotes

1 (Popup - Source)

Source:

SL 1979, ch 358 (Supreme Court Rule 78-2, Rule 702); SL 2011, ch 235 (Supreme Court Rule 10-11); SDCL § 19-15-2; SL 2016, ch 239 (Supreme Court Rule 15-50), eff. Jan. 1, 2016.

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

ANGELA K. CHARLSON,	)	
	)	
	)	APPEAL # 27943
Plaintiff /Appellee;	)	
	)	
vs.	)	
	)	
DONALD M. CHARLSON	)	
	)	
	)	
Defendant/Appellant.	)	

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
MEADE COUNTY, SOUTH DAKOTA
NOTICE OF APPEAL FILED: JULY 28, 2016

The Honorable Michael W. Day, Circuit Court Judge, presiding

APPELLANT'S REPLY BRIEF

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TABLE OF AUTHORITIES

Cases

Statutes

OVERVIEW

Don hereby incorporates the legal precedent, facts, testimony, and argument in support of his position as is set forth in the Appellant's Brief. Don utilizes the same references and abbreviations to the record, exhibits, and testimony that were originally utilized in the Appellant's Brief. Don will reply to each of the three issues identified in the Appellee Brief in the same order in which they were presented.

REPLY

The parties agree on the standard of review. Angela states on page seven of her Appellee Brief that the "Trial Court was charged with interpreting the contract of the parties as set forth in the terms of the PMA." This Court stated in *Ziegler Furniture and Funeral Home, Inc. v. Cicmanec*, 2006 SD 6 ¶ 14, 709 N.W.2d 350, 354:

> Contract interpretation is a question of law reviewable de novo. *Schulte v. Progressive Northern Ins. Co.*, 2005 SD 75, ¶ 5, 699 N.W.2d 437, 438 (citation omitted). Because we can review the contract as easily as the trial court, there is no presumption in favor of the trial court's determination. *Cowan v. Mervin Mewes, Inc.*, 1996 SD 40, ¶ 6, 546 N.W.2d 104, 107 (quoting *Commercial Trust & Sav. Bank v. Christensen*, 535 N.W.2d 853, 856 (S.D.1995)).

Angela further acknowledges on page sixteen of her Appellee Brief that "Conclusions of Law are reviewed de novo."

1. Any inference that Don waived the issue of interpretation or that Don did not timely move to strike Angela's expert report should be rejected.

As Angela notes, the parties stipulated to the foundation of all expert reports in this case. Angela infers strongly, however, that such stipulation as to foundation somehow binds Don to the opinions expressed within the reports. No case precedent is cited for that proposition. Don is not more bound to Angela's experts than she is to his. By way of example, Angela admits on page fourteen of the Appellee Brief that Don's

expert "Baker Tilly assumed the joint Edward Jones #7183 account was used to acquire marital property and pay ordinary living expenses." Under Angela's inference or argument this would equate to Angela stipulating to such Baker Tilly conclusion or opinion when Angela stipulated to the foundation of the Baker Tilly report. Neither party did any such thing in this case. Stipulating to the foundation of an expert report does not equate to stipulating to the opinions found within the report. Any inference or argument of Angela to the contrary should be rejected.

A preliminary foundation as to stipulation also does not bind a party when the entire basis for the stipulation is later revealed to be absent. The motion to strike the report of Angela's expert was timely made because it was presented promptly following the admissions of Angela on the stand. Those admissions eliminated the foundation of her own expert's opinions. Angela testified that her actions, intention, and understanding regarding the PMA did not include the "marital loan" concept engineered by her Minnesota litigation experts:

> …. But in my heart of hearts, and at absolutely – I can – like I'm testifying right now, I did not make a marital loan. And *they*[1] *did* in their way of doing things. *I had to agree*. I *had* to say "We *have* to let that be a marital loan." But *I know and Donny knows* that I didn't borrow any money from our joint account for my 7191 account. I kept that separate.
>
> Q: So when you transferred money from your 7183 [joint marital bank account] to 7191 and your expert treated it as a loan, it's your testimony it was not meant to be a loan?
>
> A: It was not meant to be a loan.
>
> Ms. Lawrence: Your Honor, I would move to exclude the Value Tracing Report, as it clearly does not follow what Ms. Charlson

[1] "They" are Angela's retained Minnesota experts, as opposed to the parties who signed the PMA in this case.

> believed they were doing during the marriage and what her testimony is today, what these transfers were meant to be. It's the fictitious methodology report that doesn't match their life or her intention or *her* interpretation of the pre-marriage agreement.
>
> The Court: Ms. Rohr?
>
> Ms. Rohr: Thank you, your Honor. Ms. Charlson testified yesterday she is not a financial expert, and she didn't know how financial tracing going back 25 years works. *She is able to testify to what she intended*. *This is what the tracing experts have come up with* and she's not qualified to answer that question. Thank you.
>
> The Court: Thank you. Your motion is denied. (CT Pg. 375, lines 11-25; Pg. 376; 1-12) (emphasis added; bracketed material added). *See also* CT Pg. 442; lines 18-21, Pg. 449; lines 9-13; Pg. 461; lines 23-25; Pg. 462; lines 24-25).

As the transcript reflects, the motion to strike was properly and timely made after this testimony was presented. "[T]he trial judge… has the 'task of ensuring that an expert's testimony rests on a reliable foundation and is relevant to the task at hand.'" *State v. Hofer*, 512 NW2d 482, 484. "[T]he value of the opinion of an expert witness is no better than the facts upon which it is based. It cannot rise above its foundation and proves nothing if its factual basis is not true." *Meligan v. Dept. of Revenue and Regulation*, 2006 SD 26, 712 NW2d 12, 18. In this case, the opinions of Angela's experts, which Angela's Appellee Brief admits at page twenty were "not based on Angela's interpretation of the PMA," must be rejected as they lack any factual basis.

SDCL 19-19-702 (formerly 19-15-2) provides that an expert may testify to an opinion if certain criteria is found to exist:

(b) The testimony is based on sufficient facts or data;
(c) The testimony is the product of reliable principles and methods;
d) The expert has reliably applied the principles and methods to the facts of the case.

Obviously, neither Angela's expert report nor the expert's testimony identified that the entire foundation upon which such opinions were based was inconsistent with Angela's intent, actions, and understanding. Angela's testimony demonstrated that her retained experts' opinions were not based on sufficient facts or data (b), were not the product of reliable methods (c), and Angela's experts had not applied the methodologies to the facts of this case or even the testimony of their client (c). The motion to strike was then timely made.[2] The fact that Angela's Appellee Brief at page twenty admits that her experts' opinions were "not based upon Angela's interpretation of the PMA" further supports this conclusion. The Trial Court's refusal to strike the experts' opinions that lacked this requisite foundation and was inconsistent with the interpretation of the party who signed the contract was error and should be reversed by this Court.

2. The parties' joint marital bank account was a joint marital bank account and had only two clear purposes per the terms of the PMA.

Appellee argues to this Court that the Trial Court did not error in interpreting the PMA to permit tracing of separate funds deposited into the joint marital bank account. Appellee's argument hinges on the following position in which she strenuously urges:

> There is no evidence of testimony that either party intended on acquiring marital property when entering in the PMA, nor that they were required to acquire marital property. The PMA is void of any language regarding such intent" (Appellee Brief Pg. 24).

Appellee's argument that the PMA is "void" of any language regarding "acquiring marital property" ignores the PMA language. In the "purpose and intent" paragraph, and specifically section (3) of that paragraph, it states that one of the purposes of the PMA is

[2] The failure of Angela's attorney to raise any allegation of untimeliness at the time the motion to strike was made was the only position arguably waived in this case.

"to define the rights of each party to the property acquired during the course of the marriage…." Paragraph four and seven of the PMA then go about defining such rights to property acquired during the marriage under paragraph (3) cited:

> 4. Marital Property.
> Except as specifically provided above, property acquired by the parties from and after the date of the marriage, and continuing through the course of the marriage, shall remain marital property. No waiver, release or relinquishment of any right, title, claim or interest in and to the separate property of the other shall be construed as a relinquishment of any right or interest in marital property. Property acquired from and after the date of the marriage, and continuing through the course of the marriage, shall remain marital property regardless of designation of title or ownership of such assets. (App. 3) (emphasis added).

Contrary to Angela's bold assertion, paragraph four therefore addresses in plain and ordinary language the intent of the parties to acquire marital property and defines marital property as "property acquired by the parties from and after the date of marriage." In sum, the PMA clearly contemplates that two parties, who are to be married the following day, intended on acquiring marital property.

Paragraph seven of the PMA further addresses the mechanism in which the parties utilize to acquire marital property from and after the date of marriage. That paragraph provides a "joint marital bank account" that, as the title of the account itself states, is to be utilized to acquire "any" marital property from and after the date of marriage:

> The parties agree to create, upon marriage, a jointly owned bank account, and each agrees to deposit into such account, earnings or **separate** property, at an amount necessary to pay ordinary and necessary living expenses of the parties, and **any** acquisition of marital property." The payment of other ordinary living expenses, such as taxes, insurance, utilities and miscellaneous repairs shall be paid from the **joint marital bank account** (App. 3) (emphasis added).

Angela's argument, therefore, that the PMA is "void" of language of the parties' intent to

acquire marital property during the marriage, has no basis. The PMA both defines marital property and provides a clear and simple mechanism for its acquisition.

The PMA addresses the fact that separate property deposited into the joint marital bank account is to be used for the two specific and stated purposes identified. The use of terms such as "joint marital bank account" and "any acquisition of marital property" clearly provides notice to the parties of the implications of the utilization of this joint marital bank account. This is also why no party or even Angela's experts contemplated or even attempted to trace separate funds through the joint marital bank account that were utilized for the other stated purpose of the joint marital bank account; namely the payment of ordinary living expenses from and after the date of marriage. That fact cannot be lost on anyone, or the implication that Angela's experts not only ignored their client's own interpretation but also had to create a further fiction to distinguish between separate funds going into the joint marital bank account for ordinary living expenses and those deposited to acquire marital property from and after the date of marriage.

Although commonly used when discussing insurance contracts, this Court's precedent that Courts are to construe a contract "according to its plain and ordinary meaning" is equally applicable in this case. See *e.g. Dakota Fire Ins. Co. v. J & J McNeil, LLC*, 2014 SD 37, ¶ 7, 849 NW2d 648, 650. The plain and ordinary meaning of a "joint marital bank account" is that it is a joint marital bank account. The reference to "any acquisition of marital property" means "any" and it does not mean some, part, or a contrived percentage to be determined once parties are in litigation. Angela's attorney could have defined the joint marital bank account as something other than a joint marital bank account but did not do so. The plain and ordinary meaning of these terms and

phrases dictates that "any" property acquired from and after the date of marriage (the definition of marital property in paragraph four) from the joint marital bank account identified in paragraph seven is marital property.

Angela argues that the commingling provision found in paragraph five of the PMA defeats the clear implication of paragraph four and seven of the PMA. As set forth at length in Appellant's Brief, if Angela's intent was to preserve assets held "as of the date of this Agreement" she had separate accounts available to her to do just that throughout the marriage.[3] An example from during the marriage is straightforward and illustrates how paragraph four, five, and seven can (and were) reconciled. The parties utilized the joint marital bank account during the marriage to fund the start-up of a business managed by Don's daughter (Sioux Falls Massage Envy) (CT Pg. 762; lines 17-25). The other investors who infused payments into the business were Don's three long term friends Todd Robertson, Lonny Hickey, and Darrin Groteboer (CT Pg. 839; lines 2-4). Had Angela wanted to establish a separate interest in that new entity acquired long after the date of marriage she could have utilized one of her separate accounts or assets that existed "as of the date of the Agreement" to fund a portion of the start-up cost. Angela had accounts in place to be able to do this but did not do so. The parties chose to utilize the joint marital bank account to fund the start-up of Sioux Falls Massage Envy (and the other businesses identified by Don at CT Pg. 762; lines 17-25) after the date of

[3] On page twenty eight of Appellee's Brief a laundry list of excuses for why Angela did not utilize her separate accounts is provided this Court. Don would respond by stating that Angela testified she had "nine different checkbooks" available to her during the marriage (CT Pg. 256; lines 3-4), she testified she could easily trace from her 7191 separate account to her other separate accounts (CT Pg. 256; line 20-24), that "I had expenses I paid through my separate Northwest Account" again confirming separate accounts could be utilized (CT Pg. 345; lines 1-2), and that all Angela had to do to make transfer to her separate accounts was "make a call" (CT Pg. 346; Lines 7-8).

their marriage.

Don's interpretation of the PMA yields a result wherein the interest of the married couple in Sioux Falls Massage Envy (valued $1,220,000.00) is a marital asset to be divided equitably by the Minnesota divorce court. The interpretation of Angela's experts, on the other hand, claiming to trace through the marital joint bank account identified in paragraph seven of the PMA, and applying the "marital loan" fiction, yields a conclusion wherein "1,023,967.00 is a separate property interest [of Angela] and the marital property interest is $196,033." (COL No. 42; bracketed material added for clarification). The expert's contrived separate interest was done in stark contrast to the interpretation and testimony of Angela as well as the plain and ordinary language of the PMA as set forth above. Again, Angela's Appellee Brief at page twenty not only admits her experts' opinions are "not based on Angela's interpretation of the PMA" but Angela made it clear in her testimony that her experts could not even explain it to her so she (the party who signed the contract) could understand it:

> A: I don't – this is something the experts have to tell you what happened. I am not capable of doing this. This is – you're going to have to see how they did it with their formulas and that kind of stuff. They tried to explain it to me and I …. (CT Pg. 448; lines 16-25, Pg. 449; line 1-4).

COL No. 42, and any Conclusion of Law based on Angela's experts' flawed opinion that allows for a separate property interest in marital property acquired through the joint marital bank account from and after the date of marriage, lacks both foundation and is contrary to the language in the PMA.

Had Angela expressed an intent during the marriage to separately fund start-up costs in a new business which would be operated by Don's daughter and was also funded

by Don's long-time friends such as Sioux Falls Massage Envy, three things would have occurred. First, Don would have had notice of such fact. Second, the married couple who had substantial marital funds available in the joint marital bank account[4] could have discussed why Angela desired to have a separate interest in a new business acquired during the marriage (the definition of marital property as provided in paragraph four of the PMA). Third, Angela's use of a separate account could be traced and under paragraph five the comingling of separate funds would not have extinguished the separate interest that was extinguished when separate funds were deposited in the joint marital bank, which per paragraph seven, was intended to acquire any marital property from and after the date of marriage.

Don's interpretation of paragraph four, five, and seven as set forth above reconciles and gives contextual meaning and application to all of the provisions and stated purposes of the PMA. The purpose of the PMA was to protect separate property that existed "as of the date of this Agreement" (paragraph two) as well as to "define the rights of the parties to the property acquired during the marriage (purpose and intent paragraph)(emphasis added). Reviewing Appellee's Brief very carefully, it is clear that Appellee acknowledges Don's interpretation can be reconciled with all provisions of the PMA:

> "Baker Tilly assumed the joint Edward Jones #7183 account was used to acquire marital property and pay ordinary living expenses." (Appellee Brief Pg. 14);

[4]For example, Angela testified there was $220,000.00 in the joint marital bank account in December of 2008 (CT: Pg. 448; lines 7-11). Angela was asked how she could justify claiming a separate property interest in assets acquired from such joint marital bank account when it had that substantial balance and her testimony was "That is a question for the experts. I have no clue." (CT Pg. 44; lines 16-20).

> "Don's expert acknowledged that Angela has a separate property interest in the following assets: …… b. Any distributions from STI Inc. *other than those going in the 7183 Edward Jones account* (Appellee Brief Pg. 15) (emphasis added).

Don's position, therefore, and the testimony of his expert based on the review of Angela's experts as to separate accounts (as opposed to the joint marital bank account), reconciled all three paragraphs of the PMA and is consistent with both of the stated purposes – not just that purpose that would benefit Angela.

"Conventional principles of contract interpretation require agreements to be construed in their entirety giving contextual meaning to each term." *Spiska Engineering Inc. v. SPM Thermo-Shield, Inc*., 2007 SD 31, ¶ 21, 730 NW2d 638, 646. "[A]n interpretation which gives a reasonable and effective meaning to all the terms is preferred to an interpretation which leave a part unreasonable or of no effect." *Nelson v. Schellpfeffer*, 2003 SD 7, ¶ 14, 656 NW2d 740, 744. Don's interpretation allows for both the protection of separate property interests that existed "as of the date of this Agreement," and also gives meaning to the specific, direct, and unambiguous provisions of the PMA that dictate that "any" property acquired from and after the date of marriage by the use of the "joint marital bank account" is (not surprisingly) joint marital property. The term "any" paints with a broad brush. Reconciliation of all terms must be done and when it is done in this case Don's interpretation should be adopted by this Court.

3. Angela's words, actions, and understanding are in stark contrast to the fiction of marital loans, and even if such were not the case, there is no written consent for such alleged loans.

Angela breaks out the existence of marital loans (Issue 3) and the mutual consent issue (Issue 4) separately in her Appellee Brief. Don will address these issues together because they are so interwoven they cannot be separated. South Dakota law requires

mutual consent to terms of a contract and whether consent existed is determined by the words and actions of the parties who signed the contract:

> Mutual consent to a contract does not exist "unless the parties all agree upon the same things in the same sense." *See* SDCL 53–3–3; *Braunger*, 405 N.W.2d at 646. Its existence is determined by considering the parties' words and actions. *See* 17A Am.Jur.2d *Contracts* § 29 (1991). *Coffee Cup Fuel Stops & Convenience Stores, Inc. v. Donnelly*, 1999 S.D. 46, ¶ 22, 592 N.W.2d 924, 927

Angela's word (testimony) was that no loans existed, she did not understand her experts' creation of marital loans, and even if such amounts could be broken out, Angela testified under oath clearly "It was not meant to be a loan." (CT Pg. 375; lines 11-21). It is difficult to contemplate how Angela's words and actions could be any clearer.

Based on Angela's admissions and the implications of the same, Angela's attorneys argue on page thirty five of the Appellee Brief that "Don's argument that mutual consent was needed to create a marital loan is contrary to the terms of the PMA." It is further argued on page thirty six "no consent was needed" to create marital loans. The proposition that the parties who sign contracts need not mutually consent or understand contract terms to be bound to the same is a novel one and no South Dakota law is cited in the Appellee Brief to support it.

Angela argues that Don confuses "the creation of the marital loan with the payment of the loan" and that "the language regarding written agreement is necessary only if the parties did not want it to be a marital loan." As to the first allegation, Don confuses nothing because neither parties understanding, actions, or words ever established they intended or understood they were allegedly creating marital loans. Second, and had the parties ever created "marital loans," those loans were "indebtedness" that by definition and as provided for in paragraph 8 (c) of the PMA required written

consent. That paragraph provides "neither party shall bind, or attempt to bind, the other party to any indebtedness except on written consent." Written consent was never obtained because the parties never discussed this issue because neither of them understood, nor believed, any such loans existed.

The Trial Court's FOF No. 152 stated that Angela "acknowledged they did not keep track of marital loans" and FOF No. 153 stated that Plaintiff was "unaware" of marital loans. Angela further admits at page twenty of her Appellee Brief that her expert's opinions and methodologies were "not based on Angela's interpretation of the PMA." The long standing legal precedent of this Court states: "[T]he construction given by the parties themselves to the contract as shown by their acts, if reasonable, will be accorded great weight and usually will be adopted by the court." *Huffman v. Shevlin*, 72 NW2d 852, 855 (SD 1955). Angela signed the contract, not her experts.[5] The admission that Angela's retained litigation experts' opinions were "not based on Angela's interpretation of the PMA" is fatal to the Trial Court's interpretation of the PMA in this case. *See* Appellee Brief, Pg. 20.

Mutual consent cannot exist when, as Angela argues at footnote nine of her Appellee Brief, "What Angela thought she was doing is not the same as what the contract actually does." Mutual consent requires that what a party thought they were doing be precisely what the contract does. Mutual consent does not exist "unless the parties all agree upon the same things in the same sense" and in making the determination of

[5]Appellee alleges in footnote 3, without cite to the record or any authority, that some of the Baker Tilly review of Angela's experts' report involved the marital loan concept. Failure to cite to the record, or provide any authority for the same, waives any such allegation. SDCL 15–26A–60 (5), (6); *State v. Pellegrino,* 1998 SD 39, ¶ 22, 577 N.W.2d 590, 599.

whether that occurred "the existence is determined by considering the parties words and actions." *Coffee Cup Fuel Stops & Convenience Stores, Inc. v. Donnelly*, 1999 S.D. 46, ¶ 22, 592 N.W.2d 924, 927. As noted above, this Court further stated in *Malcolm*, 365 NW2d 863, 865 that "another test to be applied in determining the meaning of a contract is the construction *actually placed on the contract as evidenced by their subsequent behavior*" and that "the construction given by the *parties themselves* will be accorded great weight and will be adopted by the Court" (emphasis added). Allowing a retained Minnesota litigation expert to create loans contrary to the words, actions, understanding and construction actually placed on the PMA by the parties who signed the PMA is a position not supported by South Dakota law. In fact, it is directly contrary to it. If such interpretation is affirmed by this Court, there exists a lack of mutual consent of the parties who actually signed the PMA that is necessary to form a binding contract.

CONCLUSION

Contract interpretation is a question of law reviewable de novo. The PMA in this case provides for the protection of assets held "as of the date of this Agreement" as well "to define the rights of each party to the property acquired during the course of the marriage…." Angela's argument that PMA is void of language expressing intent to acquire marital property during a marriage is baseless. Paragraph four defines marital property as any property acquired from and after the date of marriage and paragraph seven provides the mechanism, namely a "joint marital bank account" to acquire any such marital property.

Don's interpretation of paragraph four, five, and seven of the PMA not only gives contextual meaning to all of the terms but also allows all terms to be reconciled. It also

gives effect to the plain and ordinary meaning of the words used in the PMA. Angela had numerous separate accounts she could have utilized to maintain a separate interest in property from and after the date of marriage. As noted, Angela's decision to do that would have raised questions or issues never discussed during the marriage because the parties utilized the joint marital bank account to acquire "any" marital property from and after the date of marriage. Paragraph seven of the PMA should not be revised by this Court to reference the acquisition of "some," "part," or a contrived portion of marital property acquired after the date of marriage from the joint marital bank account. The fact that no party attempted to distinguish a separate interest in funds deposited into the joint marital bank account to fund marital expenses (the other stated purpose of the joint marital bank account of the married parties) from and after the date of marriage drives this point home. The word "any" has a broad, plain, and ordinary meaning and further defeats any such interpretation as advanced by Angela's experts.

Mutual consent is needed to form a contract in South Dakota. This Court should look at the admitted and undisputed testimony of Angela to determine whether mutual consent to the loan concept created by her Minnesota litigation experts existed. This Court should conclude mutual consent did not exist. That conclusion if further supported by the lack of written consent to alleged indebtedness "payable on demand." It is impossible to pay a loan or indebtedness "on demand" if neither party believes it existed and there is no written document (consent) identifying its existence. Written consent would have required a conversation of the parties, which of course never occurred, because only Angela's experts testified that such loans or "separate" interest in the joint marital bank account ever existed.

Don asks this Court to reverse the Trial Court's interpretation of the PMA. Adopting Don's interpretation as provided for herein as well as the Appellant's Brief would allow Angela to preserve any separate interest in assets held "as of the date" of the PMA, identify marital assets acquired from and after the date of marriage through the utilization the joint marital bank account identified in paragraph seven, and subsequently allow the Minnesota Divorce Court to divide those marital assets equitably.

Don reiterates his request for oral argument.

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4) counsel for Appellant states that the foregoing brief is typed in proportionally spaced typeface in Times New Roman 12 point. The word processor used to prepare this Reply Brief indicated that there were a total of 4,717 words and a total of 28,380 characters (with spaces) in the body of the Reply Brief including footnotes.

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of November, 2016, I filed and served via Supreme Court Electronic Filing a true and correct copy of the foregoing **Appellant's Reply Brief** to the following:

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APPELLANT'S APPENDIX

APP No.	Description	Appellant's Appendix Page Numbers
1	Transcript Excerpts	0239-0254

APPELLANT'S APPENDIX

APP No.	Description	Appellant's Appendix Page Numbers
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APPELLANT'S APPENDIX NO. 1

TRANSCRIPT EXCERPTS

STATE OF SOUTH DAKOTA | IN CIRCUIT COURT

COUNTY OF BUTTE | FOURTH JUDICIAL CIRCUIT

ANGELA CHARLSON,

Plaintiff,

vs.

DONALD CHARLSON

Defendant.

Court Trial

Volume I of V
Pages 1-295

Civ. 14-06

BEFORE: THE HONORABLE MICHAEL DAY
Circuit Court Judge
Belle Fourche, South Dakota
April 20, 2015 at 8:00 a.m.

Reported By: Kathryn M. Mack
Official Court Reporter

really not reflective of the cash flow of the business, which is really what somebody is going to consider. They kind of give consideration to the underlying assets to kind of look at, "Okay. What's going to happen worse-case scenario, if this business fails?" But, obviously, the business is running and running well and kicking off a fair amount of cash to each of the owners each year. And so we didn't feel it was fair to, really, rely on that sort of valuation. The other one that we usually consider is a market approach.

So, like I said, we attempted to search for transactions within our database that have transactions of private companies. We just weren't able to find a sufficient amount of recent transactions to really define the market or get a really good statistical sample.

And so that's why we didn't show that approach, because it really wasn't something we could consider reliable. We just kind of kept it in the back end and just said, "Okay. Here's where our rules of thumb landed. Here's, in general, where the market multiples we could find ended." They all kind of flow through to support where we ended up with our income approach.

was doing the bookwork for Belle Fourche, because I was managing Belle Fourche Taco Johns and doing the bookwork for Pine Ridge, and I had probably nine different checkbooks that I was reconciling. And so it's very easy to trace transfers out of 7191 into 71 -- the joint account or into another joint account or my Taco Johns.

Q And if you transferred your separate property out of 7191 into your joint account, 7183, what would be the purpose of doing that?

A To purchase something as a separate property.

Q So would your joint account, at times, have marital funds in it?

A Yes.

Q And sometimes it had separate funds in it?

A Yes.

Q Now, if you were purchasing something, how would we follow that you took it out of your 7191 account into your 7183 account?

A On the Edward Jones statements, it would show a transfer to, say, 7183 or to 3388, which is a Taco Johns account, or wherever I was transferring it to. That's how you got my money out of it.

Q And then would you write a check out for whatever you were purchasing, out of the 7183 account?

STATE OF SOUTH DAKOTA | IN CIRCUIT COURT

COUNTY OF BUTTE | FOURTH JUDICIAL CIRCUIT

ANGELA CHARLSON,

Plaintiff,

vs.

DONALD CHARLSON

Defendant.

Court Trial

Volume II of V
Pages 296-537

Civ. 14-06

BEFORE: THE HONORABLE MICHAEL DAY
Circuit Court Judge
Belle Fourche, South Dakota
April 21, 2015 at 8:00 a.m.

Reported By: Kathryn M. Mack
Official Court Reporter

A No. I had expenses paid through my separate Norwest account. And I paid expenses --

Q So my question was: If you didn't deposit money into this account in '93, other than for Round Up Builder, '94, and all through '95, until this $5,000 deposit, any expense paid from the 7183 account would have been paid from Mr. Charlson's income?

A I was buying my separate property with the money that I was depositing into this separate -- this joint account. I bought the LP, I bought my house in Belle Fourche. I deposited money from my separate account into this joint account, because this account was, basically, to buy my separate property. I could trace from my 7191 account to this. I could follow it.

I did not have checking capabilities out of my separate savings and investment account, so I would put a big amount, $35,000, $25,000, $5,000 in to buy a separate property. We had another joint account in Belle Fourche, which we had check-writing capabilities, and I had my separate Norwest account with check-writing abilities. Okay. And that's how we paid expenses.

Q If you were trying to maintain separate property interest, for example, your house in Belle Fourche, why wouldn't you have transferred the money from 7191

to Norwest? Because the Norwest account was in your individual name; correct?

A Because my husband --

Q Which one?

A Don Charlson -- at the time was an investment broker and could watch and see what was going on with our accounts there. With Norwest and First Western Bank, I would have to call or do anything like that. But my husband could direct my funds. He was in charge of my funds, and that's what he did. He could transfer a huge amount and it took no time. I didn't have to worry about it. If I wanted $35 -- he was traveling at the time and we talked every night for -- our phone bills were outrageous. And I paid the phone bills out of our other -- you'll notice -- I don't believe there's any phone bills in the 7183 where we paid those out of the 7183 account during that time. I paid those separately, or I paid those with our other joint account.

Q So my previous questions to you that you didn't answer was: If you didn't deposit any funds into 7183 in '93 and '94, other than the house, and '95, the only person paying the expenses from 7183 during that time would have been Mr. Charlson from his income that was being deposited into that account?

my joint account to my separate account. And Don knew that it was my money going from my joint account to my separate account. Because, believe me, Don Charlson did not allow one penny to go from our joint account into my separate account unless it was from, like, Taco Johns, Massage Envy, Buffalo Wild Wings, or one of my businesses. So if there was money going into that account and my accountants couldn't trace it and say exactly what it was, they put it as a marital loan.

But in my heart of hearts, and at absolutely -- I can -- like I'm testifying right now, I did not make a marital loan. And they did this in their way of doing things. I had to agree. I had to say, "We have to let that be a marital loan." But I know and Donny knows that I didn't borrow any money from our joint account for my 7191 account. I kept that separate.

Q So when you transferred money from 7183 to 7191, and your expert treated it as a loan, it's your testimony that it was not meant to be a loan?

A It was not meant to be a loan.

MS. LAWRENCE: Your Honor, I would move to exclude the Value Tracing Report, as it clearly does not follow what Ms. Charlson believed they were doing during the marriage and what her testimony is today, what these

transfers were meant to be. It's this fictitious methodology report that doesn't match their life or her intention or her interpretation of the pre-marriage agreement.

THE COURT: Ms. Rohr?

MS. ROHR: Thank you, Your Honor. Ms. Charlson testified yesterday she is not a financial expert, and she didn't know how financial tracing going back 25 years works. She is able to testify what she intended. This is what the tracing experts have come up with and she's not qualified to answer that question. Thank you.

THE COURT: Thank you. Your motion is denied.

Q (By Ms. Lawrence, continuing) So is it your testimony that the Value Tracing Report does not match how you lived your life? Or what your intention was during the marriage?

A No.

Q So it's your testimony that it does -- it does follow how you lived your life and what your intention was during the marriage?

MS. ROHR: Objection. Asked and answered.

THE COURT: Objection sustained.

Q (By Ms. Lawrence, continuing) Okay. And if you're saying that you never borrowed money from the joint

A Yes.
Q And, instead, that money has been sitting in your 7191 account; correct?
A Yes.
Q And had Value Consulting Group not applied this accounting methodology to the last 20 years of your financials, Mr. Charlson would never known that his marital funds were in your account, would he?
MS. ROHR: Objection. Calls for legal conclusion and lack of foundation.
THE COURT: Overruled.
A What was the question, again?
Q (By Ms. Lawrence, continuing) Would Mr. Charlson have known that his marital funds were sitting in your 7191 account had your expert not applied an accounting methodology to the last 20 years of your financial life?
A He knew that there was no loan in my 7191 from our joint account.
Q That there was no loan?
A Right.
Q Can you go to Page 50, Line 544. Are you there?
A Yes.
Q On November 18, 2002, you deposited a check from Ohly Law Office into your 7191 account; correct?

Q Line 858. You transferred $771.28 from the joint account to your 7191 account. Do you see that?
A Yes.
Q And part of it is treated as separate and part of it is treated as marital; correct?
A Yes.
Q In December of 2008, there was over $220,000 in your joint, per your expert's report. Does that sound accurate?
A Can I see that?
Q Yes. If you go to Page 124. Do you see Line 975 of your expert's report, the way they categorized your funds, there was $228,000 marital funds in the joint account?
A Yes.
Q So when there's that much marital funds in the joint account, how is it that you're claiming transfers to 7191 are your separate property?
A That is a question for the experts. I have no clue.
Q And at the same time of that transfer, look back at Page 65, you had borrowed $73,537 from the marital account; correct?
A What line is that?
Q Line 861.
A I don't -- this is something the experts have to tell

you what happened. I am not capable of doing this. This is -- you're going to have to see how they did it with their formulas and all that kind of stuff. They tried to explain it to me and I...

Q Well, it shows there's a loan of $73,537.37. Your previous testimony was that you had never borrowed any money from the joint account; correct? That this isn't actually a loan?

A I think my testimony was the fact that I knew in my heart, Donny knew in his heart, that I didn't have any -- I had not taken anything from our joint account and put it into my separate account. My tracing that I had to do says that I have a marital loan. My prenup says that I have to go by this tracing, and I have to do that. So you'll have to ask my experts about this, because I don't know how the percentages that they figured out. $200 goes to marital and $500 goes to joint. I don't know.

Q When you transferred money from 7183 to 7191, what was your intention for that money?

A I don't know what date -- I can't remember these things. This is -- that's why I got experts to do all of this. This is 20 years of different accounts into different accounts. It's very confusing to me and it's -- I'm sorry. I just have to rely on my experts

A I have to go by the rules.
Q What was the intent at the time?
A I'm sure it was to go for my separate property. But, like I said, when they started doing this tracing, I wasn't -- I didn't know that I -- that this is the way they did it. When I was spending my money and buying my property, I had no idea that this is how it would come about. I had no idea I would be getting a divorce. I never -- if someone would have told me when I did this that it would come down to this, believe me, I would have done a lot of things different. What I was intending all along was to keep my stuff separate. And I tried very hard to do that. And in my accounting -- in my head, I did do that. I did keep my stuff separate and I did try to preserve, for my family and myself, my work.
Q On the next page, Page 73, Line 1029, do you see you transferred $30,000 from 7191 to 7183?
A Yes.
Q Was it your intent at the time for that $30,000 to be your separate property? Or were you meant to be paying down a marital loan?
A I didn't even know about a marital loan. So I don't know -- like I said, I didn't know about a marital loan. This is what the experts have said that I have

in a marital loan, and so I have to abide by it.
Q And so with those transfers back out from 7191 to 7183, and the way your experts have characterized those as "repaying the marital loan," it takes the marital loan balance to 0. Do you see that at the bottom of the page?
A Yes.
Q So if you look at the next page, that would have been just in time for you to start purchasing or transferring funds to the Sioux Falls Massage Envy loan. Do you see that?
A What line is that?
Q Line 1047, Line 1050. Do you see those transfers?
A Yes, I do.
Q Okay. So you it was your intent that the $26,000 transfer was meant for your vehicle, and that these transfers were not going to pay down a loan. But it looks like your experts have paid down this loan, so that the account had a 0 balance of a marital loan right before you started paying off the Sioux Falls Massage Envy loan. Would that be accurate?
A No.
Q Tell me where that's inaccurate.
A Because I never dreamt I had a marital loan in any of these accounts.

STATE OF SOUTH DAKOTA | IN CIRCUIT COURT

COUNTY OF BUTTE | FOURTH JUDICIAL CIRCUIT

ANGELA CHARLSON,

Plaintiff,

vs.

DONALD CHARLSON

Defendant.

Court Trial

Volume IV of V
Pages 653-896

Civ. 14-006

BEFORE: THE HONORABLE MICHAEL DAY
Circuit Court Judge
Belle Fourche, South Dakota
April 23, 2015 at 8:00 a.m.

Reported By: Kathryn M. Mack
Official Court Reporter

A You know, I never transferred any monies from anywhere. I have an assistant that does it, but I never do.

Q And would Ms. Charlson have instructed your assistant with any transfers she acquired?

A Ms. Charlson -- Angie, could have made a request to my assistant, yes.

Q Was Ms. Charlson able to make transfers, herself?

A When she was working at Edward Jones, she could do it online and she could make transfers, as well, and pay bills.

Q Did Ms. Charlson ever give you checks to deposit into specific accounts?

A Yes, she did.

Q Did she instruct you on where to deposit those checks?

A Yes, she did.

Q There's been a lot of testimony about the different businesses that you two own. Were those businesses acquired with funds from your joint account?

A All of them.

Q So the Buffalo Wild Wings, Sioux Falls Massage Envy, Rogers Massage Envy, Taco Johns of Pine Ridge, Edward Jones Partnership, those were all acquired with assets or funds from your joint account?

A All of them were.

Q Who are your partners in that?
A Todd Robertson, Darren Groteboer, and Lonny Hickey.
Q Who are those individuals to you?
A They're friends of mine, long-term friends.
Q How did you become involved in -- or how did the idea come about to open the Sioux Falls Massage Envy?
A The three of them opened their store in Rochester, Minnesota, three years previous -- two years previous. They started the business three years, but it was open for two. And it was doing very well.

It was a company -- a business that Angie and I belonged to. We were members of the Massage Envy store. Frequent conversations occurred between Todd and I as to whether or not, maybe, another business venture should be established.

There were two reasons why we chose Sioux Falls, the main one was just Sioux Falls is a booming town. I took Todd, Darren, and Lonny to Sioux Falls a couple times and we decided that this would be a good place. We met with realtors together. We didn't find any place, initially, but we applied for a franchise and we were awarded a franchise.

We felt that the city of Sioux Falls was going to be a wonderful place to have a business. And, as I said, there's two reasons: I have a daughter who's a