

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 28588

LORETTA B. MEALY, Individually and as Personal Representative of the ESTATE OF
TERRENCE L. MEALY, and INVESTMENT ENTERPRISES, INC.,
Plaintiffs and Appellants,

vs.

BRUCE PRINS and CORRINE PRINS, and PRAIRIE SKY GUEST & GAME RANCH,
LLC,
Defendants and Appellees.

Appeal from the Circuit Court, Fifth Judicial Circuit
Roberts County, South Dakota

The Honorable Jon S. Flemmer
Circuit Court Judge

**BRIEF OF APPELLANTS LORETTA B. MEALY, Individually and as Personal
Representative of the ESTATE OF TERRENCE L. MEALY and INVESTMENT
ENTERPRISES, INC.**

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REQUEST FOR ORAL ARGUMENT

Plaintiffs/Appellants, Loretta B. Mealy (“Loretta Mealy”), individually and as personal representative of the Estate of Terrence L. Mealy, and Investment Enterprises, Inc. hereby request oral argument.

APPELLANTS' BRIEF

PRELIMINARY STATEMENT

References to the trial transcript will be designated as TR followed by the page number. References to the exhibits will be designated as TR EX followed by the exhibit number. The clerk's register will be referred to as CR followed by the page number. Finally, documents contained in the Appendix will be referred to as APP followed by the page number.

JURISDICTIONAL STATEMENT

Loretta B. Mealy ("Loretta Mealy"), individually and as personal representative of the Estate of Terrence L. Mealy, and Investment Enterprises, Inc. ("Investment Enterprises") (together, "Plaintiffs") appeal:

(1) the Partial Summary Judgment Memorandum Decision and related Order filed on November 23, 2015 and December 1, 2015 (APP 10, 50) and reaffirmed on September 26, 2017 (CR 1126-1127) in which the Trial Court dismissed their claims for breach of contract on forty-eight of fifty-five Promissory Notes based on the statute of limitations;

(2) the improper and prejudicial submission of a missing witness jury instruction; and

(3) portions of the final Judgment as it relates to the contractual prejudgment interest, which was filed March 8, 2018.

Notice of Appeal was filed April 6, 2018. Jurisdiction exists in accordance with SDCL 15-26A-3(1).

STATEMENT OF ISSUES

I. Did The Trial Court Commit Reversible Error When It Granted Defendants' Motion For Partial Summary Judgment?

Work v. Allgier, 2018 S.D. 56, ___ N.W.2d ___;

Libertyville Sav. Bank v. McKee, 820 N.W.2d 159 (table), 2012 WL 2411187 (Iowa Ct. App. 2012);

Habeck v. Sampson, 221 N.W.2d 483 (S.D. 1974);

Brose v. Intl. Milling Co., 129 N.W.2d 672 (Iowa 1964);

SDCL 15-2-29;

SDCL 21-11-1;

SDCL 21-11-3;

SDCL 44-1-13.

II. Did the Trial Court Commit Reversible Error By Giving a Missing Witness Instruction Regarding Plaintiffs' Expert Tim Frasier?

Vetter v. Cam Wal Elec. Co-op, Inc., 2006 S.D. 21, 711 N.W.2d 612;

City of Rapid City v. Brown, 252 N.W.2d 323 (S.D. 1977);

State v. McGarrett, 535 N.W.2d 765 (S.D. 1995);

SDCL 15-6-32(a);

SDCL 15-6-61.

III. Did the Trial Court Commit Reversible Error in the Special Verdict Form and in its Judgment Regarding the Computation of Prejudgment Interest on the Contract Claim?

SDCL 21-1-13.1.

STATEMENT OF THE CASE

Loretta Mealy and her now-deceased husband Terrence Mealy purchased the land currently known as Prairie Sky Ranch. For more than 15 years, Bruce and Corrine Prins operated their hospitality business, Prairie Sky Guest and Game Ranch, on the Mealys' land. Between April 1999 and January 2008, the Mealys and their company, Investment Enterprises, Inc. made numerous loans to the Prinses for the purpose of financing the Prinses' hospitality business. These loans were evidenced by fifty-five Promissory Notes totaling \$1,187,000.00. The Prinses never repaid these loans.

The Mealys and the Prinses also jointly owned a buffalo herd. The buffalo herd was not an asset of, and was separate from, the Prinses' hospitality business. The parties disputed what percentage of the herd was owned by each party. Bruce Prins sold buffalo from the herd for several years without notifying Plaintiffs and without giving Plaintiffs any proceeds from the sales.

The Trial Court granted partial summary judgment to Defendants holding: (1) the statute of limitations had run on forty-eight of fifty-five Notes; and (2) the related Mortgage did not secure a debt and therefore was invalid.

A jury trial was held in November 2017. The jury:

(1) found for Plaintiffs on the breach of contract claim for the Notes that were not time-barred;

(2) found for Plaintiffs on their unjust enrichment claim and awarded \$135,000;

(3) found for Defendants on Plaintiffs' claim for conversion relating to the buffalo herd; and

(4) found for Defendants on part of their conversion of property claim and awarded damages of \$135,000, which offset Plaintiffs' damages for unjust enrichment.

STATEMENT OF FACTS

I. Partial Summary Judgment to Defendants.

Plaintiffs' Complaint alleges a claim for breach of contract based on Defendants' failure to repay the money loaned to them as evidenced by the fifty-five Notes. CR 2, ¶¶ 69-72. Defendants filed a motion for partial summary judgment and made two arguments: (1) that the statute of limitations had run on forty-eight of the fifty-five notes; and (2) that the related Mortgage was unenforceable because it did not secure a debt. CR 94.

In response, Plaintiffs argued the Mortgage validly secured all of the Prinses past and future debts to the Mealys and future debt to Investment Enterprises, that numerous communications established the validity of the debt as well as the Mortgage, that Bruce Prins acknowledged the debt after the statute of limitations had passed, and that a 2009 Subordination Agreement acknowledged the debt in writing and removed the bar of the statute of limitations. CR 166; CR 788.

A. The Mortgage.

Bruce and Corrine Prins executed an Open-End Mortgage dated September 21, 2000 in the amount of \$325,000. APP 1. The Mortgagee is Investment Enterprises. Section 2(a) of the Mortgage contains blank spaces designed to list specified promissory notes. However, Section 2(b) of the Mortgage provides that it secures:

. . . [a]ll other obligations of the Mortgagors to Mortgagee, now existing or hereafter arising, whether direct or indirect, contingent or absolute and whether as maker or surety, including, but not limited to, future advances

and amounts advanced and expenses incurred by Mortgagee pursuant to the Mortgage.

In addition, the Mortgage provides that it “shall be governed by and construed in accordance with the laws of the State of Iowa.” APP 4.

At the time the Prinses executed the Mortgage, Investment Enterprises was not named as obligee on the Notes that the Prinses had executed to that point. Subsequently, the Prinses did execute Notes where Investment Enterprises was the obligee. *See, e.g.* CR 2, Exs II, JJ, PP, WW, XX, and BBB. At his deposition, Bruce Prins testified his understanding was that the Mortgage secured both the pre-existing debt, as well as any future debts. Specifically, Bruce Prins testified:

Q: So what was your understanding as to the, if you had any, as to the \$325,000 figure, what that represented?

A: I would – prior and oncoming debt.

Q: So prior notes and anticipated future notes?

A: Correct.

CR 778, Ex. A, at 49:11-15.

Bruce Prins also testified at his deposition that he originally suggested in writing to Terrence Mealy that the amount of the mortgage should be \$250,000, which he arrived at by taking the total amount owed pursuant to the notes that existed at that time (\$182,000) and adding five months of additional operating expenses that he expected he would need to be advanced. (*Id.*, 46:25-47:6.) The actual amount of the Mortgage was \$325,000, but Bruce Prins testified that he did not know why that amount was agreed upon. (*Id.* 48:15-19.) Plaintiffs also submitted numerous contemporaneous written communications acknowledging the debt and the Mortgage. CR 183, Exs. B to K.

D. The Subordination Agreement.

In 2009, the Prinses, Investment Enterprises, and Dacotah Bank entered into a Subordination Agreement. APP 6. The Subordination Agreement states the “parties recite and declare that”:

WHEREAS Investment Enterprises, Inc. is the owner and holder of a certain note for Three Hundred Twenty-five Thousand Dollars (\$325,000) and interest, secured by a certain mortgage for such sum and interest made by Investment Enterprises, Inc. to Mortgagor, dated the 21st day of September, 2000 . . .

The Subordination Agreement then provides that Dacotah Bank’s Mortgage has priority over Investment Enterprises. APP 6-7.

E. Post-Default Actions by Bruce Prins Acknowledging the Debt.

Plaintiffs submitted the affidavits of Plaintiffs’ bankers, Dan Stein and Jonathan Holthe. CR 201, CR 205. Stein attested to a meeting that he and Holthe had with Bruce Prins in June 2014 at Prairie Sky. CR 201, ¶ 3. At that meeting Bruce Prins “acknowledged the debts he owed under the promissory notes,” and made numerous statements that he would pay the debt such as: “I’m not going to run away from it;” “I intend to pay the debt;” and “I’m not going to cheat anyone out of the money.” *Id.* at ¶¶ 4-5. Holthe’s affidavit corroborated Stein, attesting that Bruce Prins “acknowledged the debts he owed under the promissory notes.” CR 205, ¶¶ 3-6.

Plaintiffs also submitted the affidavits of Patrick Mealy and Mark Motz. CR 207, CR 209. Patrick Mealy attested to a conversation he had on February 25, 2015 with Bruce Prins in the presence of Mark Motz. CR 207, ¶¶ 1-2. In that conversation, Bruce Prins stated he and Corrine Prins were handing over the Prins’ portion of the buffalo located near the lodge, the contents of the lodge, the lodge business, and the LLC name

of Prairie Sky Guest & Game Ranch as a payment towards the Notes. *Id.* at ¶¶ 3-7. Mark Motz's affidavit attested to this conversation. CR 209.

F. Grant of Partial Summary Judgment on Forty-Eight Notes.¹

On November 23, 2015, the Trial Court held:

(1) South Dakota's statute of limitations applied;

(2) forty-eight of the notes were time-barred by, as applicable, the six year statute of limitations for notes payable at a definite time (SDCL 57A-3-118(a)), or the ten year statute of limitations for notes payable on demand (SDCL 57A-3-118(b));

(3) the Subordination Agreement did not serve as a written acknowledgement to remove the forty-eight notes from the bar of the statute of limitations; and

(4) the Mortgage did not secure a debt and therefore was invalid.

APP 10-27.

II. The Trial.

A. The Parties' Business Relationship.

At trial, Loretta Mealy testified that in the 1990s the Mealys purchased the land now known as Prairie Sky Ranch. TR 95:5-24. The Mealys owned the land for approximately ten years before they met the Prinses. TR 95:24-96:13. In 1999, an intermediary introduced the Mealys to the Prinses. Prinses came to the Mealys' home in Iowa and presented a plan for running a hospitality business at Prairie Sky. TR 97:3-22.

After that meeting, the Mealys and Prinses reached an agreement in which Prinses received exclusive right to run a hospitality business, and Mealys agreed to loan money to the Prinses to get their business started. TR 98:15-25; TR 101:3-6. In addition, the

¹ On June 12, 2017, Plaintiffs filed a Motion to Reconsider the partial summary judgment on the notes, which was denied. CR 776; CR 1126.

Mealys agreed to pay for repairs and improvements to buildings and facilities, while the Prinses paid all bills relating to running the hospitality business. TR 104:8-13; TR 105:5-106:19.

Under the agreement, the Mealys continued to be sole owners of the land and the buildings. TR 260:1-3. The Prinses owned the business, called “Prairie Sky Guest and Game Ranch,” in which the Mealys had no ownership interest. TR 259:21-25; TR 107:13-108:6; TR 109:19-110:5. In regard to the hospitality business, there was no split of income or losses between the parties. TR 109:19-24.

B. Mealys’ Loans to the Prinses.

Beginning in 1999, the Mealys financed the business by providing loans to Prinses, evidenced by the Promissory Notes. TR 110:25-111:3. TR 111:13-20; TE 1. When the Prinses wanted more money, Bruce Prins would request an additional loan. TR 111:4-8. Over the course of nine years, the Prinses executed fifty-five Notes for a total of \$1,187,000.00. CR 2, at Exs. B through EEE. The notes were made payable to Terrence Mealy, Terrence and Loretta Mealy, Terrence or Loretta Mealy, or Investment Enterprises, Inc. *Id.*

C. The Buffalo Herd.

(i) Percentage Ownership of the Buffalo.

Beginning in 2000 or 2001, the Mealys and Prinses jointly owned a buffalo herd. TR 260:4-6. The herd was not an asset of, and was separate from, the Prinses’ hospitality business. TR 298:8-22.

<u>Date</u>	<u>Prinses' Representation of Mealys' % Ownership of Herd</u>
October 2004	About 2/3 ²
November 2004	71% ³
2007/2008	75% ⁴
January 2009	75% ⁵

After the lawsuit was filed, Bruce Prins created a document in which he went back sixteen years and calculated what he believed the percentage ownership of the buffalo herd was for each year. TR 343:24-344:20; TR EX 140. In this post-litigation document, Bruce Prins calculates that in 2008 he owned 75 percent of the herd. 430:23-431:2; TR EX 140. This is contrary to the report for 2007/2008 in which Bruce Prins stated that the Mealys owned 75 percent of the herd. TR 429:3-431:2; TR EX 110. This is also contrary to Bruce Prins' deposition, during which he testified that in 2008 he had a 25 percent ownership of the buffalo. TR 429:15-430:25.

At trial, Bruce Prins testified that the facsimile to Terrence Mealy in October of 2004, in which he stated that Terrence owned about two-thirds of the buffalo herd, was not correct and that he had given Terrence Mealy "false and misleading information." TR 436:24-438:10. Bruce Prins also testified that the January 8, 2009 document he

² Bruce Prins or his wife sent a facsimile to Terrence Mealy in October of 2004 stating that Terrence owned about two-thirds of the herd. TR 436:24-437:11; TR EX 207.

³ In November of 2004, Bruce Prins wrote to Terrence Mealy telling him that 71% of the buffalo were owned by Terrence Mealy and 29% by the Prinses. TR 311:16-312:3

⁴ Bruce Prins created a buffalo report for 2007/2008 stating that the Mealys owned 75 percent of the herd and the Prinses owned 25 percent. TR 427:5-13; TR EX 110

⁵ Bruce Prins prepared an invoice dated January 8, 2009 showing Investment Enterprises owned 75% of the buffalo and the Prinses owned 25% . TR 285:3-286:19; TR EX 161. Bruce Prins prepared the invoice based on his "knowledge of the operation," and the information on the invoice was "true and correct." TR 285:21-286:15

prepared showing that the Mealys owned 75 percent of the buffalo was not correct and that he had prepared a document with “false and misleading information.” TR 442:18-443:8.

(ii) Bruce Prins’ Sale of Buffalo Without Payment to Plaintiffs.

- In 2011, Bruce Prins sold buffalo from the herd and did not pay any of the proceeds to Loretta Mealy. TR 328:11-20.
- In 2012, Bruce Prins sold \$304,160.00 worth of buffalo from the herd and did not pay any proceeds to Loretta Mealy. TR 330:21-25. TR 332:20-333:5.
- In 2014, Bruce Prins sold \$293,510 worth of buffalo and did not pay any of the proceeds to Loretta Mealy. TR 339:19-340:3.
- In 2015, Bruce Prins sold \$258,141.23 worth of buffalo and did not pay any of the proceeds to Loretta Mealy, but instead paid off a loan that Bruce Prins had taken from Dacotah Bank. TR 342:3-343:14.

The total of Bruce Prins’ sales of buffalo from the herd for the years 2010 to 2015 was \$1,245,877.51. TR 345:20-346:8. None of these proceeds were paid to Plaintiffs even though they owned a percentage of the herd.

D. Missing Witness Jury Instruction.

Plaintiffs disclosed Tim Frasier as Plaintiffs’ buffalo expert. In his one page written report on the percentage ownership of the buffalo, Mr. Frasier opined that “there was only an agreement of 29% [Prins] 71% [Mealy] ownership of the Prairie Sky bison herd.” CR 1285, Ex. 1. Defendants took Mr. Frasier’s deposition on February 17, 2017. CR 1285, Ex. 2.

On October 16, 2017, Defendants filed a Motion to Exclude Certain Expert Testimony of Tim Frasier. CR 1276. Defendants argued that Mr. Frasier's opinion regarding the percentage ownership of the buffalo failed to meet the standards for the admission of expert testimony, and should therefore be barred. CR 1278. In response, Plaintiffs agreed that Mr. Frasier would not offer any opinion testimony as to the percentage of ownership of the bison herd. CR 1734. On November 8, 2017, the Trial Court granted Defendants' motion and barred Mr. Frasier from testifying with respect to the percentage ownership of the buffalo herd. CR 1823.

On November 1, 2017, Plaintiffs disclosed their witness list to Defendants, which did not include Mr. Frasier. CR 1947, at Ex. A. At trial, Plaintiffs did not call Mr. Frasier as a witness. During Defendants' cross-examination of Patrick Mealy, Defendants' counsel asked Patrick Mealy whether Plaintiffs had someone look at the percentage ownership of the buffalo herd:

- Q. Mealy, LLC could afford to hire somebody that knows something about buffalo to look at Bruce's year by year count of how many cows each person has and how many calves are produced and who gets which calves. You could afford to do that, couldn't you?
- A. Yes.
- Q. Did you do that?
- A. I don't know if we did that. I know that we had somebody look at it. And the guy thought it was horse pucky is basically what his answer was so I didn't spend much more time trying to unscramble the sheet, I'm sorry.
- Q. Who's the person that said it was horse pucky?
- A. Our bison consultant from Texas.
- Q. Is he going to be here testifying?
- A. No.

TR 535:9-24.

Defendants' counsel requested a missing witness instruction with respect to Mr. Frasier. TR 654:20-660:1. Plaintiffs' counsel opposed the missing witness instruction because:

(1) Defendants filed and prevailed on a motion in limine to preclude Mr. Frasier's testimony as to the percentage ownership of the buffalo;

(2) it was Defendants' counsel that had elicited Patrick Mealy's testimony regarding Mr. Frasier; and

(3) Mr. Frasier's testimony was equally available to both parties because Defendants could have introduced Mr. Frasier's deposition at trial.

TR 657:13-659:4.

The Trial Court granted the request for a missing witness instruction. TR 659:17-660:1. Plaintiffs filed a Motion to Reconsider the Missing Witness Instruction. CR 1947; TR 697:8-700:19. The Trial Court denied the Motion to Reconsider and gave the jurors, as Jury Instruction No. 20, the pattern missing witness jury instruction 1-30-100. TR 700:12-19. APP 28.

During closing arguments, Defendants counsel argued to the jury what the evidence showed regarding the percentage ownership of the buffalo herd. TR 741:23-744:17. Defendants' counsel pointed to the missing witness instruction and argued to the jury that it could assume: "that buffalo expert would have been bad for them if they had brought him here and that's why they didn't bring him here. Instruction number 20." TR 742:1-5.

E. The Special Verdict Form and the Computation of Prejudgment Interest Regarding the Notes.

Defendants' proposed Special Verdict Form included a question stating:

On what date (fill in date) _____ and in what amount of the contract claim do you find the Plaintiffs are entitled to pre-judgment interest?

\$ _____

APP 37. Plaintiffs objected to Defendants' proposed Special Verdict Form and instead proposed their own Special Verdict Form. APP 29-35. Plaintiffs' proposed Special Verdict Form did not include a prejudgment interest question because prejudgment interest was determined by the notes themselves, which set specific (but different) percentages per annum until the notes were paid. APP 29-30. CR 2, at Exs. B through EEE. The Trial Court denied Plaintiffs' proposed Verdict Form, and instead gave the jury Defendants' Verdict Form in its entirety, including the question regarding pre-judgment interest. TR 704:17-24. APP 36-43.

The verdict on prejudgment interest for the Notes was that Plaintiffs were entitled to interest beginning on January 2, 2008 on the amount of \$196,000. APP 37.

ARGUMENT

I. The Trial Court Committed Reversible Error in Granting Partial Summary Judgment to Defendants.

A. Standard of Review

Review of a trial court's decision regarding summary judgment is well established:

We must determine whether the moving party demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law. The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party. The nonmoving party, however, must present specific facts showing that a genuine, material issue for trial exists. Our task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied. If there exists any basis which supports the ruling of the [Trial] court, affirmance of a summary judgment is proper.

Johnson v. Hayman & Associates, Inc., 2015 S.D. 63, ¶ 11, 867 N.W.2d 698, 701 (citations omitted). Conclusions of law are reviewed de novo. *Id.* at 702, (quoting *Weitzel v. Sioux Valley Heart Partners*, 2006 S.D. 45, ¶ 16, 714 N.W.2d 884, 891).

B. Iowa Law Applies in Determining the Validity of the Mortgage.

The Trial Court erred in applying South Dakota law in analyzing the validity of the Mortgage. APP 23-25. The Mortgage contains an Iowa choice of law provision stating: “[t]his Mortgage shall be governed by and construed in accordance with the laws of the State of Iowa.” APP 4. The substantive law of Iowa thus applies to issues relating to the validity and interpretation of the Mortgage. *See Dunes Hosp., L.L.C. v. Country Kitchen Int’l, Inc.*, 2001 S.D. 36, ¶ 10, 623 N.W.2d 484, 488 (the South Dakota Supreme Court has “generally recognized that parties may agree to be bound by the law of a particular state”); *see also Milinkovich v. Progressive Cas. Ins. Co.*, 2013 S.D. 16, ¶ 10, 827 N.W.2d 366, 368.

C. The Mortgage Validly Secured All Past and Future Notes.

The Trial Court erred in ruling that “there is no question that the mortgage does not secure a debt.” APP 23. In actuality, pursuant to its express terms the Mortgage secured all past and future debts of the mortgagor to the mortgagee. Specifically, Section 2(b) of the Mortgage explicitly states that the Mortgage secures:

... [a]ll other obligations of the Mortgagors to Mortgagee, now existing or hereafter arising, whether direct or indirect, contingent or absolute and whether as maker or surety, including, but not limited to, future advances and amounts advanced and expenses incurred by Mortgagee pursuant to the Mortgage.

(emphasis added). Furthermore, the very first sentence of the Mortgage states: “THIS MORTGAGE . . . secures present and future loans and advances.” APP 1. This type of provision, known as a “dragnet clause,” is valid under Iowa law. *See Libertyville Sav.*

Bank v. McKee, 820 N.W.2d 159 (table), 2012 WL 2411187, at *6 (Iowa Ct. App. 2012) (holding “our supreme court has concluded these types of mortgages are valid”); *see also Freese Leasing, Inc. v. Union Trust Sav. Bank*, 253 N.W.2d 921, 925 (Iowa 1977) (dragnet clauses “have a proper and legitimate place in commerce” and “will be enforced to the extent it appears to have been within the intent of the parties”) (quoting *Brose v. Intl. Milling Co.*, 256 Iowa 875, 879, 129 N.W.2d 672, 675 (1964)).

In its ruling, the Trial Court ignored this dragnet clause and instead focused on the provision of the Mortgage immediately preceding Section 2(b), which provides:

2. Obligations. This Mortgage secures the following (hereinafter referred to as the "Obligations"): a. The payment of the loan made by Mortgagee to Bruce Prins & Corrine Prins/husband and wife advanced by a promissory notes “date _____, 19__ in this principal amount \$ _____ with a due date of _____, any renewals, extensions, modifications or refinancing thereof with and any promissory notes issued in substitution therefor

The Trial Court held that because this provision “does not list a single note, let alone any of the forty-eight promissory notes in dispute” it does not secure a debt. APP 23. The Trial Court erred in reaching this conclusion. As described above, no specific notes were listed because the Mortgage secured all past notes as well as all future notes, which could not be listed because those loans had not been made when the Mortgage was executed.

In *Brose*, for example, the mortgagee financed the mortgagor’s business. 256 Iowa. at 673. The indebtedness for which the relevant chattel mortgage was originally given as security was a single note for \$273.56. *Id.* at 674. The original note was paid and returned to the mortgagor, but the mortgage was not released. *Id.* at 675. At the end of every month, additional notes were prepared to cover the credit extended during the month. *Id.* at 673. The court rejected the mortgagor’s argument that the mortgage was discharged because the original obligation had been paid. *Id.* at 675. Instead, the court

held that the dragnet clause was valid and included debts of the business other than the one incurred at the time the mortgage was executed. *Id.*

Here, similarly, because the Mortgage secured all past and future notes between the mortgagor and mortgagee, it is irrelevant that no specific notes were listed. The Trial Court therefore erred in holding that the Mortgage secured no debt and was invalid.⁶

D. Extrinsic Evidence Also Confirms that the Mortgage Secured All Past and Future Debt.

The plain and unambiguous language of Section 2(b) establishes that the Mortgage secures all then-existing and future obligations of the Prins to the “Mortgagee.” Even if there were an ambiguity, extrinsic evidence establishes, at a minimum, a genuine issue of material fact regarding the parties’ intent to secure all notes between the parties, both those preceding the Mortgage and those relating to subsequent advances of funds. At his deposition, Bruce Prins specifically testified that the Mortgage was intended to secure all “prior notes and anticipated future notes.” CR 778, Ex A at 49:11-15.

Such evidence can properly be considered. Although the Iowa statute of frauds requires mortgages to be in writing (see Iowa Code Ann. § 622.32), it is well-established that the parol evidence rule “purports to exclude testimony only when it is offered for the purpose of varying or contradicting the terms of an integrated contract; *it does not purport to exclude evidence offered for the purpose of interpreting and giving a meaning to those terms.*” *Tamm, Inc. v. Pildis*, 249 N.W.2d 823, 831 (Iowa 1976) (emphasis

⁶ The result would be the same even if South Dakota law applied to the Mortgage. Like Iowa, South Dakota also explicitly permits the use of mortgages to secure future loans and advances. See SDCL 44-1-13 (“A lien document containing a written provision securing the repayment of future advances, whether or not the lien creditor is obligated to make such future advances, has priority over all subsequent encumbrancers to the extent of all sums advanced, with interest thereon, with the same effect as if the entire sum had been advanced at the time of the creation of the lien.”).

added), quoting *Pappas v. Hauser*, 197 N.W.2d 607, 611 (Iowa 1972). In other words, “extrinsic evidence is admissible which sheds light on the situation of the parties, antecedent negotiations, attendant circumstances, and the objects the parties were striving to attain.” *Id.*, citing *Hamilton v. Wosepka*, 154 N.W.2d 164, 168 (Iowa 1967).

The analysis does not change under South Dakota law, which also requires mortgages to be in writing. *See* SDCL 44-8-1; SDCL 53-8-2. The South Dakota Supreme Court has repeatedly held that “parol evidence is admissible to explain a written contract that is uncertain or ambiguous.” *Habeck v. Sampson*, 221 N.W.2d 483, 486-487 (S.D. 1974) (citations omitted); *Jensen v. Pure Plant Food Int’l, Ltd.*, 274 N.W.2d 261, 263–64 (S.D. 1979)

To the extent that the identification of the secured obligations is not clear from the plain language of Section 2(b), Bruce Prins’ deposition testimony establishes that the Mortgage secured all then-existing obligations to the Mealys and subsequent advances by the Mealys and Investment Enterprises to the Prinses.

E. At a Minimum, the Mortgage Validly Secures the Future Advances That Investment Enterprises, Which was Identified as the “Mortgagee,” Made to the Prinses.

The Mortgage named on the Mortgage is Investment Enterprises. At a minimum, the Mortgage remains effective at least with respect to the future advances made by Investment Enterprises to the Prinses. The Trial Court erred in holding the Mortgage was invalid with respect to six Notes for which Investment Enterprises was the Obligee, which were attached to the Complaint as Exhibits II, JJ, PP, WW, XX, and BBB.

i. A Mortgage May Be Based Exclusively On Future Advances.

It has been repeatedly held, by those courts that have considered the issue, that a mortgage remains effective and valid even if it secures only anticipated future advances.

See, e.g., W. L. Development Corp. v. Trifort Realty, Inc., 44 N.Y.2d 489, 497, 377 N.E.2d 969, 406 N.Y.S.2d 437 (1978) (“There can be no doubt as to the validity of mortgages to secure future advances or liabilities as this has become a recognized form of security frequently used in the transaction of business.”); *Larson Cement Stone Co. v. Redlim Realty Co.*, 137 N.W.2d 241, 245 (Neb. 1965) (“The fact that there was no present debt at the time of the execution of the senior mortgage did not invalidate that mortgage. It secured future advances.”) (citations omitted); *Potwin State Bank v. J. B. Houston & Son Lumber Co.*, 327 P.2d 1091, 1103 (Kan. 1958) (holding “that a mortgage given to secure future advances is valid and will be judicially enforced”); *Landers-Morrison-Christenson Co. v. Ambassador Holding Co.*, 214 N.W. 503 (Minn. 1927) (same).

Therefore, the fact that Investment Enterprises had not yet made any loans at the time the Mortgage was executed does not invalidate the Mortgage.

ii. Consideration Was Supplied By the Collateral Agreement To Make Future Advances.

The Mortgage was supported by consideration, even if it secured only future advances. The evidence shows that Investment Enterprises and the Mealys promised to supply the future advances contemplated in the Mortgage. *See Morgan Guar. Trust Co. v. Hellenic Lines Ltd.*, 621 F. Supp. 198, 223 (S.D.N.Y. 1985) (finding “a promise to secure future advances may qualify as fair consideration ... for a mortgage”); *Southland Financial Corp. v. Oil Screw Mary Evelyn*, 248 F. Supp. 520, 521-22 (E.D. La. 1965) (finding promise to loan money was adequate consideration for mortgage). CR 778, Ex. A, at 49:11-15; *see also* CR 194. (June 27, 2000 letter from Terrence Mealy to the Prinses telling them that they should put in as the amount for the mortgage “the open end

amount equal to what you owe me now *and I suppose you better add \$25,000 or \$30,000 to it so that we will have an open end amount equal to what you may be requesting*”).

Although this promise was not contained in the Mortgage itself, well-established law holds that extrinsic evidence of a collateral agreement is admissible, particularly as evidence of consideration. *See Iowa Farm Credit Corp. v. Halligan*, 241 N.W. 475, 477 (1932) (finding parol evidence of an oral agreement regarding a deed admissible when the agreement was “part of the consideration for the transfer”); *see also Application of Roberts*, 358 F.Supp. 392, 396-97 (D.S.D. 1973). Numerous courts have considered agreements collateral to a mortgage for this purpose. *See W. L. Development Corp.*, 44 N.Y.2d at 497-98 (finding mortgage valid when it secured future payment for work to be performed under a separate construction contract); *Southland Financial Corp.*, 248 F.Supp. at 521-22 (finding mortgage supported by consideration based on affidavits attesting to promise to loan money if certain contingencies were met); *Potwin State Bank*, 327 P.2d 1091 (Kan. 1958) (finding based on extrinsic evidence that bank had agreed to make the future advances secured by the mortgage); *Landers-Morrison-Christenson Co.*, 214 N.W. 503 (Minn. 1927) (finding separate contract imposed duty to make future advances secured by mortgage).

Indeed, the Iowa Supreme Court held that an agreement to secure future advances via a mortgage need not be written in the mortgage itself, and “may be shown by parol evidence.” *See Corn Belt Trust & Savings Bank of Belle Plaine v. May*, 196 N.W. 735, 738 (Iowa 1924); *see also Langerman v. Puritan Dining Room Co.*, 21 Cal.App. 637 (1913) (considering extrinsic evidence in finding that a mortgage was intended as security for future loans).

Here, Investment Enterprises not only agreed to make future advances, but actually made those advances. The Mortgage was valid even if it secured only future advances and, at a minimum, the Trial Court erred in holding that the Mortgage was invalid with respect to the six notes for which Investment Enterprises was the Obligee.

F. The Trial Court Erred in Declining to Reform The Mortgage to Include the Mealys as Mortgagees Based on the Mutual Mistake of the Parties.

Regardless of whether Iowa law or South Dakota law is applied, the Trial Court erred in declining to reform the Mortgage to reflect the true intention of the parties, which was that Terrence Mealy and Loretta Mealy should be listed as Mortgagees along with Investment Enterprises. As noted above, Bruce Prins expressly testified at his deposition that that the Mortgage secured both “prior notes and anticipated future notes.” At the time the Mortgage was executed, Terrence Mealy and/or Loretta Mealy were obligees on all of the prior notes that existed. Bruce Prins therefore admitted that these prior notes were part of the debt covered by the Mortgage.

This is in accord with the June 27, 2000 letter that Terrence Mealy sent to the Prinses in which he told the Prinses they should put in, as the amount for the mortgage, “the open end amount *equal to what you owe me now and I suppose you better add \$25,000 or \$30,000* to it so that we will have an open end amount equal to what you may be requesting.” (Emphasis added.) CR 194. The evidence therefore shows that the omission of Terrence Mealy and Loretta Mealy from being listed as mortgagees was due to a mutual mistake of fact by the parties to the Mortgage. The Mortgage should therefore be reformed to include Terrence Mealy and Loretta Mealy as Mortgagees.

First Am. Bank v. Fobian Farms, Inc., 868 N.W.2d 201 (Iowa Ct. App. 2015) set forth the standard under Iowa law for reformation of a written instrument:

The requesting party ‘has the burden of proving by clear, satisfactory, and convincing evidence that the contract does not reflect the true intent of the parties, either because of fraud or duress, mutual mistake of fact, mistake of law, or mistake of one part and fraud or inequitable conduct on the part of the other.’ *Wellman Sav. Bank v. Adams*, 454 N.W.2d 852, 855 (Iowa 1999). ‘The person seeking reformation must also establish that the true intention of the parties which would be reflected in a reformed document constituted an undertaking that the parties had the power and capacity to perform.’ *Kendall v. Lowther*, 356 N.W.2d 181, 187 (Iowa 1984). **‘In reforming the instrument, the court does not change the agreement between the parties, but changes the drafted instrument to conform to the real agreement.’** *Wellman*, 454 N.W.2d at 855. Reformation may be ordered against a party to a deed, ‘a person in privity with a party, or a person with notice of the relevant facts.’ *Orr v. Mortvedt*, 735 N.W.2d 610, 613 (Iowa 2007). (Emphasis added.)

In *First Am. Bank*, the court upheld the lower court’s reformation of the legal description of property in a mortgage and related documents based on credibility findings as to the true intent of the parties. *Id.* (“there was a mutual mistake of fact in the expression of the contract not disputed by the parties to the deed”); *see also Hosteng Concrete & Gravel, Inc. v. Tullar*, 524 N.W.2d 445, 448 (Iowa Ct. App. 1994) (upholding reformation of a mortgage based on mutual mistake when both the mortgagor and the mortgagee believed certain land was included in the mortgage); *Jones v. T L & L, Inc.*, No. 99-0236, 1999 WL 1255782, at *2 (Iowa Ct. App. Dec. 27, 1999) (upholding reformation due to mutual mistake).

In *Wellman Sav. Bank v. Adams*, 454 N.W.2d 852, 853 (Iowa 1990) a mother signed a guaranty that by its express terms only applied to discounted notes for which her son was the obligor. However, none of the notes that her son executed were discounted notes. The Iowa Supreme Court upheld the trial court’s determination that the language referring to discounted notes should be deleted from the guaranty instrument, finding that the insertion of the terms relating to discounted notes was the result of a mutual mistake. *Id.* at 855. Here, similarly, there are at a minimum disputed issues of material fact as to

whether the Mortgage should be reformed based on mutual mistake to include Terrence Mealy and Loretta Mealy as mortgagees.

Reformation is also appropriate in these circumstances under South Dakota law.

SDCL 21-11-1 provides:

When through fraud or mutual mistake of the parties, or a mistake of one party which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value.

In addition, SDCL 21-11-3 provides that “In revising a written instrument, the court may inquire what the instrument was intended to mean, and what were intended to be its legal consequences, and is not confined to the inquiry what the language of the instrument was intended to be.”

In *BAC Home Loans Servicing, LP v. Trancynger*, 847 N.W.2d 137, 144 (S.D. 2014), for example, the court relied on extrinsic evidence to reform a mortgage by changing the legal description. At the time the relevant mortgage was signed, there was no legal description attached. *Id.* at 133-34. The borrowers argued that because there was no legal description, the circuit court erred in reforming the mortgage and improperly created a lien on the real estate that had not previously existed. *Id.* at 134. This Court disagreed and affirmed the reformation of the mortgage, relying on the borrower’s testimony in open court as to what property he intended to mortgage. *Id.*; *see also Tossini v. Donahoe*, 117 N.W. 148, 149 (S.D. 1908) (contemplating that reformation may be proven through parol evidence).

Bruce Prins’ sworn testimony, as well as the parties’ contemporaneous communications, establish that the notes payable to Terrence Mealy and Loretta Mealy

were intended to be included in the debt covered by the Mortgage. At a minimum, therefore, a genuine issue of material fact exists as to whether Terrence Mealy and Loretta Mealy were omitted from the Mortgage due to a mutual mistake of fact.

G. The Trial Court Erred in Holding that the 2009 Subordination Agreement Did Not Revive the Debt Contained in the 48 Notes.

Under SDCL 15-2-29, a written acknowledgment of debt evidences a new or continuing contract that takes the case out of the bar of the statute of limitations. SDCL 15-2-29 provides:

No acknowledgment or promise is sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of this chapter, unless the same be contained in some writing signed by the party to be charged thereby; but this section shall not alter the effect of any payment of principal or interest.

In order for the written acknowledgment to remove the bar of the statute of limitations, it “must be consistent with a promise to pay, unqualified, clear, plain, unambiguous, and so distinct in its extent and form as to preclude hesitation as to the debtor's meaning, and so as to enable the court to apply its terms as the debtor intended they should be applied.” *Wipf v. Blake*, 28 N.W.2d 881, 882 (S.D. 1947). Furthermore, “the implication of a promise from an acknowledgment of the existence of the debt is not warranted if there be anything in the terms of the writing which tend to repel such an inference or leave it in doubt.” *Id.*

By executing the Subordination Agreement, the Prinses made an unqualified, clear, plain, and unambiguous acknowledgment of the debt to the Mealys and Investment Enterprises. The purpose of the 2009 Subordination Agreement was to subordinate the Mortgage to a mortgage that Dacotah Bank was intending to make on the Prinses’ property. The operative section of the Subordination Agreement provides:

NOW THEREFORE THE PARTIES HERETO COVENANT AND
AGREE AS FOLLOWS:

1. *Subordination.* Investment Enterprises, Inc. hereby covenants, consents, and agrees with Dacotah Bank that the mortgage held by Investment Enterprises, Inc. dated September 21, 2009 is and shall continue to be subject and subordinate in lien to the mortgage about to be made by Dacotah Bank

APP 7. Under the law, a mortgage is merely security for a debt and does not exist independently of the debt. *Kalen v. Gelderman*, 278 N.W. 165, 169 (S.D. 1938). Because of this, reference to the Mortgage is an acknowledgement of the debt it secures. By its plain terms, Section 2(b) of the Mortgage secured all of the notes between the parties, both those preceding the Mortgage and the subsequent advances of funds. The Subordination Agreement therefore is “consistent with a promise to pay, unqualified, clear, plain, [and] unambiguous.” *Wipf v. Blake* at 882. As such, it removes the bar of the statute of limitations for the forty-eight Notes.

In holding otherwise, the Trial Court erroneously focused not on the operative section of the Subordination Agreement, but instead on its opening recitals. The prefatory section of the Subordination Agreement states that the “parties recite and declare that”:

WHEREAS Investment Enterprises, Inc. is the owner and holder of a certain note for Three Hundred Twenty-five Thousand Dollars (\$325,000) and interest, secured by a certain mortgage for such sum and interest made by Investment Enterprises, Inc. to Mortgagor, dated the 21st day of September, 2000 . . .

The Trial Court held that because the Subordination Agreement references a specific note for \$325,000 and no such specific note exists among the notes, there is an ambiguity that casts doubt on what debt is being described. *Id.* Consequently, the Trial Court held that the Subordination Agreement did not revive the statute of limitations for the forty-eight notes. *Id.*

The Trial Court erred in focusing on the recitals in the Subordination Agreement instead of the operative part of the agreement. The reference in one “WHEREAS” clause of the Subordination Agreement to a “certain note” for \$325,000 is not a part of the agreement and does not have any legal significance. Courts routinely disregard a recital clause when there is a discrepancy between it and the operative part of the agreement. *See Constr. Mortg. Inv’rs Co. v. Farr*, No. A09-1960, 2010 WL 3119443, at *1 (Minn. Ct. App. Aug. 10, 2010) (giving effect to the operative language of a personal guaranty and holding that “[r]ecitals are not a part of the contract and are not legally binding”); *In re Taxes, Aiea Dairy, Ltd.*, 46 Haw. 292, 305, 380 P.2d 156, 163 (1963) (the “recital is negated by the operative provisions of the contract . . . [because the] recital cannot be made the basis of a legal and binding obligation between the parties”); *Pulaski v. Riland*, 199 Md. 426, 86 A.2d 907 (1952) (a court must look at the operative part of agreement, and not mere recitals therein, to determine what the parties actually did by entering into the agreement); *see also McDonald v. Mississippi Power Co.*, 732 So. 2d 893, 898 (Miss. 1999); *In re Creger*, 403 B.R. 381, 385 (Bankr. W.D. Va. 2009).

It is the operating part of the Subordination Agreement that sets forth the terms of the agreement. That section clearly and unambiguously acknowledges the Mortgage, and therefore the debt owed under the notes. Because of this, the 2009 Subordination Agreement revived the forty-eight notes from being time-barred. In the alternative, if this Court declines to reform the Mortgage, the notes that have Investment Enterprises as the obligee were revived by the Subordination Agreement.

H. The Trial Court Also Erred Because There Are Genuine Issues of Material Fact Regarding Whether Defendants' Post-Default Conduct Prevents Them From Relying on the Statute of Limitations.

Even if the Subordination Agreement did not revise the time-barred Notes, the Trial Court's ruling was erroneous. For the partial summary judgment hearing in 2015 and the hearing on the motion to reconsider in 2017, Plaintiffs submitted evidence establishing a genuine issue of material fact as to whether Defendants' post default conduct precluded them from relying on the statute of limitations defense. The statute of limitations is a "personal defense." *Work v. Allgier*, 2018 S.D. 56, ¶ 23. ____ N.W.2d _____. Because of this, "the defendant by his conduct may be estopped from setting it up." *Id.*, quoting *Kroeger v. Farmer's Mut'l Ins. Co.*, 218 N.W. 17 (S.D. 1928). In this case, Defendants' conduct of:

- (1) acknowledging the debt over the course of many years and continued statements they intended to repay the debt;
- (2) entering into the Mortgage and Subordination Agreement;
- (3) statements to the Mealys' bankers; and
- (4) Bruce Prins' statements to Patrick Mealy that constituted a promise to pay if not an actual payment on the debt;

creates a genuine issue of material fact as to whether Defendants waived and/or are estopped from asserting the statute of limitations as a defense.

This Court's recent decision in *Work v. Allgier*, 2018 S.D. 56 is directly on point. In *Work*, the defendant executed a promissory note for \$230,000 that called for periodic payments. *Id.* at ¶ 2. After the defendant failed to make a payment in December 2010, the parties discussed alternate ways to satisfy the debt. *Id.* at ¶ 4. These discussions continued

until 2014 or 2015, and included emails between the parties discussing a potential new agreement and attempts to resolve the default on the note. *Id.* This Court held that this evidence established a genuine issue of material fact as to whether the defendant's conduct waived his rights to rely on the statute of limitations defense. *Id.* at ¶ 27.

Here, the Prinses executed the first Note, which was for \$5,000.00 on April 28, 1999, with payment due one year from the date of execution. CR 2, at Ex. B. After executing this Note, Defendants continuously acknowledged the debt, and requested and received additional loans. For example, there is correspondence over the years between the parties acknowledging the debt. CR 190-200. This includes an April 25, 2006, letter from Mealy to Bruce Prins with a check for \$35,000 indicating "Because the debt is becoming so extensive, we should do a new mortgage and new description on real estate. Would you figure up what is owed and let me know?" CR 199-200. As described above, the Prinses also executed the Mortgage and the Subordination Agreement, further acknowledging the debt.

In addition, Plaintiffs submitted the affidavits of Plaintiffs' bankers, Stein and Holthe. CR 201, 205. They attested to a June of 2014 conversation in which Bruce Prins "acknowledged the debts he owed under the promissory notes," and made numerous statements that he would pay the debt such as . . . "I'm not going to run away from it" . . . "I intend to pay the debt" and "I'm not going to cheat anyone out of the money." CR 201 ¶¶ 4-5. Moreover, Plaintiffs also submitted the affidavits Patrick Mealy and Mark Motz, which attested to a conversation with Bruce Prins in February 2015. CR 207, 209. During that conversation, Bruce Prins said he was handing over the contents of the lodge, the lodge business, the LLC name of Prairie Sky Guest & Game Ranch, the buffalo on

the property and all other content on the property as part payment for the debt. CR 207 ¶¶ 3-7.

The evidence submitted by Plaintiffs both at the summary judgment stage and as a result of the motion to reconsider⁷ raise a genuine issue of material fact as to whether Defendants, by their own affirmative acts, waived their rights to rely on the statute of limitations defense. *See Work*, 2018 S.D. 56, ¶ 27.

II. The Trial Court Committed Reversible Error in Giving the Missing Witness Instruction Regarding Tim Frasier.

A. Standard of Review.

The standard of review for a trial court's decision to grant or deny a particular instruction is abuse of discretion. *Vetter v. Cam Wal Elec. Co-op., Inc.*, 2006 S.D. 21, ¶ 10, 711 N.W.2d 612, 615. Because "no court has discretion to give incorrect, misleading, conflicting, or confusing instructions," to do so constitutes reversible error "if it is shown not only that the instructions were erroneous, but also that they were prejudicial." *Vetter*, 2006 S.D. 21, ¶ 10. "Erroneous instructions are prejudicial under SDCL 15-6-61 when in all probability they produced some effect upon the verdict and were harmful to the substantial rights of a party." *Id.*

B. The Trial Court Erred in Giving the Missing Witness Instruction.

The Trial Court erred in giving the instruction because: (i) Frasier's testimony regarding buffalo ownership was barred, and therefore he was not a "missing" witness; (ii) Frasier's testimony was equally available to Defendants, who could have sought to introduce his deposition testimony at trial; and (iii) Defendants' attorney elicited the

⁷ At the hearing in regard to the Motion to Reconsider the Partial Summary Judgment granted to Defendants in 2015, the Trial Court acknowledged consideration of the additional evidence that was then available but ruled that the additional evidence did not alter its earlier decision on the matter. TR HEARING 08-24-17 39: 8-22.

testimony from Patrick Mealy, knowing what it would be, and it would therefore be inequitable to permit Defendants to engineer an adverse inference in this manner.

Under South Dakota law, if a party fails to produce a witness within his power to produce, it is permissible in certain circumstance for the jury to infer that testimony of the witness would not have been favorable to that party. *City of Rapid City v. Brown*, 252 N.W.2d 323, 325 (S.D. 1977). However, the “inference of unfavorable evidence is negated . . . when the uncalled witness is equally available to both parties.” *Id.*; see also *State v. McGarrett*, 535 N.W.2d 765, 770 (S.D. 1995).

As an initial matter, Frasier was not a “missing” witness, but rather a barred witness. The Trial Court granted Defendants’ motion in limine and barred Frasier from testifying regarding the percentage ownership of buffalo. Because this was Frasier’s primary opinion, Plaintiffs decided not to call him as a witness and did not include Frasier on their witness list. In so doing, Plaintiffs were not trying to suppress unfavorable evidence and no missing witness instruction should have been given.

The instruction was also erroneous because Frasier’s testimony was equally available to both parties. Defendants took Frasier’s deposition, and Defendants originally included his deposition transcript as one of their rebuttal exhibits. TR 699:24-700:11. Defendants therefore could have introduced the deposition transcript at trial. SDCL 15-6-32(a) provides that “any part or all of a deposition, so far as admissible under the rules of evidence . . . may be used against any party who was present or represented at the taking of the deposition” This includes situations where “the witness is out of the state, unless it appears that the absence of the witness was procured by the party offering

the deposition.” SDCL 15-6-32(a)(3)(B). *See also Magbuhat v. Kovarik*, 382 N.W.2d 43, 44 (S.D. 1986).

In addition, although Frasier resides in another jurisdiction, Defendants could have – but did not – sought to secure his attendance at trial by service of a notice to Plaintiffs, or by order of the Trial Court. Because Frasier’s testimony was thus equally available to both parties, the “inference of unfavorable evidence [was] negated,” and the missing witness instruction was erroneous. *City of Rapid City*, 252 N.W.2d at 325.

Finally, the missing witness instruction was improper and fundamentally unfair in these circumstances. Defendants had succeeded in barring Frasier’s opinion as to the percentage ownership of the buffalo herd. Despite this, Defendants’ counsel specifically asked Patrick Mealy about whether the Mealys had someone analyze the percentage ownership of the herd and thereby elicited the testimony about Frasier. TR 535:9-24. Moreover, Defendants’ counsel knew that Patrick Mealy’s testimony regarding Frasier’s opinion, while colloquial, was accurate since Frasier opined that Defendants’ position on the percentage ownership was incorrect. Frasier’s testimony on the percentage ownership therefore would have been favorable to Plaintiffs if he had been permitted to testify as to his opinion. Given these circumstances, the Trial Court erred in instructing the jury that they could infer that Frasier’s testimony would not have been favorable to Plaintiffs.

C. The Missing Witness Instruction Prejudiced Plaintiffs.

The missing witness instruction prejudiced Plaintiffs because it produced an effect on the verdict and was harmful to Plaintiffs’ substantial rights. In all probability it resulted in the jury finding against Plaintiffs on their conversion claim. There were two undisputed facts at trial regarding the buffalo: (1) Plaintiffs owned some percentage of

the buffalo herd; and (2) Bruce Prins sold over a million dollars of the jointly owned buffalo and did not pay a cent of the proceeds to Plaintiffs. Despite these two undisputed facts, the jury found that Defendants did not convert Plaintiffs' buffalo or the proceeds of the buffalo sales.

In reaching this determination, the jury was in all probability swayed by the missing witness instruction. The instruction permitted Defendants' counsel to argue at closing that the jury could assume the "buffalo expert would have been bad for them if they had brought him here and that's why they didn't bring him here." TR 742:1-5. Defendants' counsel made this argument even though he knew that Frasier's testimony had been barred (at his own request) and that, if allowed, the opinion would have been favorable to Plaintiffs.

This was not just argument by counsel. It is one thing for counsel in his summation to point to the absence of a particular witness. It is quite another when the Trial Court puts the weight of its authority behind such a summation by telling the jury it may draw an adverse inference from the person's absence. Because of the instruction, counsel's statements had the Court's blessing and thus had greatly enhanced force and persuasiveness. Plaintiffs were therefore prejudiced by the instruction. *See Vetter*, 2006 S.D. 21, ¶ 10 ("Erroneous instructions are prejudicial under SDCL 15-6-61 when in all probability they produced some effect upon the verdict and were harmful to the substantial rights of a party").

This conclusion is buttressed by the abundant evidence, including multiple contemporary writings by Bruce Prins, establishing that the Mealys owed 75 percent of the herd. At trial, Bruce Prins tried to flip the numbers by claiming that the Prinses

actually were the ones that owned 75 percent of the herd. In taking this position, Bruce Prins was not only contradicted by his own contemporary writings, but was also impeached by deposition testimony in which he admitted that Mealys were 75 percent owners. Furthermore, all Bruce Prins could point to was his self-serving post-litigation computation and a purported statement by Terrence Mealy, who is deceased and could not testify. The abundance of Plaintiffs' evidence leads to the conclusion that the improper missing witness instruction is what resulted in the jury's denial of the conversion claim.

Finally, the jury did find in Plaintiffs' favor on their claim for unjust enrichment, but only awarded Plaintiffs \$135,000. To the extent the jury took the buffalo into consideration regarding the unjust enrichment claim, the amount awarded is substantially less than it should have been - even if the jury determined that Mealys were only 25 percent owners of the herd. This further supports a finding of prejudice to Plaintiffs. The Trial Court therefore abused its discretion in giving the missing witness instruction and the case should be remanded so that Plaintiffs are able to re-try their conversion claim.

III. The Special Verdict Form, and the Trial Court's Judgment, Regarding Prejudgment Interest for the Contract Claim Were Contrary to the Law.

A. Standard of Review.

The decision of a trial court on whether to use a special verdict form is subject to an abuse of discretion standard of review. *Miller v. Hernandez*, 520 N.W.2d 266, 269-70 (S.D. 1994). Although the standard of review is abuse of discretion, that does not empower the trial court to commit an error of law. *Credit Collection Servs., Inc. v. Pesicka*, 2006 S.D. 81, ¶5, 721 N.W.2d 474, 476 ("by definition, a decision based on an error of law is an abuse of discretion.").

B. Prejudgment Interest Award Should Have Been Calculated Per the Notes.

Over Plaintiffs' objections, the Trial Court submitted a Special Verdict Form that asked the jury to identify the starting date from which prejudgment interest on the Notes should be calculated. The jury determined that the starting date should be January 2, 2008. APP 37. The Trial Court entered its Judgment, in which it accepted – again, over Plaintiffs' objection – the jury's determination that prejudgment interest on the Notes should be calculated beginning on January 2, 2008. The Special Verdict Form is contrary to the law, and the Judgment should be revised on this issue because under the terms of the Notes interest began to accrue on the date of execution.

SDCL 21-1-13.1 states in pertinent part:

....If there is a question of fact as to when the loss or damage occurred, prejudgment interest shall commence on the date specified in the verdict or decision Prejudgment interest on damages arising from a contract shall be at the contract rate, if so provided in the contract;

(emphasis added). By the express terms of 21-1-13.1, the date specified in the verdict is only applicable if there is a question of fact when the loss or damage occurred.

Here, there is no such question of fact because the payment terms of the Notes control the date the damage occurred. All of the Notes specified a contract interest rate, and also specified that interest would begin accruing on a yearly basis starting from the date of execution. CR 2, Exs. B through EEE. Plaintiffs' proposed Special Verdict Form did not include a question regarding prejudgment interest because that was controlled by the contracts. Plaintiffs' Special Verdict Form should have been adopted by the Trial Court. APP 29-35. CR 2054. In addition, Plaintiffs' proposed judgment, rejected by the

Trial Court, was based on the dates and terms of the Notes and was the correct calculation. CR 2242-2244; CR 2138. APP 44-46.

CONCLUSION

Based upon the law, facts and argument presented, Plaintiffs request this Court to enter the following Opinions:

1. The Trial Court's Decision granting partial summary judgment on November 23, 2015, its related Order of December 1, 2015 and its reaffirmance on September 26, 2017 were in error because Plaintiffs raised a material question of fact in regard to: (i) whether the Subordination Agreement constituted a written acknowledgment of the debt thereby restarting the statute of limitations; and (ii) whether Defendants' post default conduct constituted a waiver of their right to assert the statute of limitations. For both reasons, partial summary judgment in favor of the Defendants on 48 of the 55 total notes – barring Plaintiffs from collecting \$991,000 of the more than \$1.1 million in principal loaned to Defendants - should be reversed and the case remanded to allow Plaintiffs the ability to have a trial on the merits as to those 48 notes.

2. As a matter of law, this Court should direct the Trial Court to reform the Mortgage to reflect the undisputed intent of the parties as demonstrated by the record below – that the Mortgage was for the benefit of both the Mealys and Investment Enterprises *and* that the Mortgage covered both monies already loaned and loans made in the future.

3. The verdict on Plaintiffs' conversion claim related to the buffalo sale proceeds should be reversed and remanded for a new trial on the merits because the judgment was in all probability adversely effected by the improper and prejudicial

missing witness instruction. It is undisputed that Plaintiffs owned 25-75% of the herd, but received zero compensation from the more than \$1 million in buffalo sales Prins received between 2010 and 2015.

4. Lastly, the judgment should be revised on the issue of prejudgment interest and the case remanded for entry of an award that conforms to the terms of the notes.

Dated this 2nd day of August, 2018.

SIEGEL, BARNETT & SCHUTZ, L.L.P.

/s/ Reed Rasmussen

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CERTIFICATE OF COMPLIANCE

The undersigned attorney hereby certifies that this Brief complies with the type volume limitation of SDCL 15-26A-66(2). Based upon the word and character count of the word processing program used to prepare this Brief, the body of the Brief contains 9,602 words and 48,880 characters (not including spaces).

SIEGEL, BARNETT & SCHUTZ, L.L.P.

/s/ Reed Rasmussen

CERTIFICATE OF SERVICE

The undersigned, attorneys for Plaintiffs/Appellants, hereby certifies that on the 2nd day of August, 2018, a true and correct copy of the foregoing BRIEF OF APPELLANTS LORETTA B. MEALY, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF TERRENCE L. MEALY AND INVESTMENT ENTERPRISES, INC. was served by electronic transmission on the following:

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Dated this 2nd day of August, 2018.

SIEGEL, BARNETT & SCHUTZ, L.L.P.

/s/ Reed Rasmussen

APPENDIX

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5. Taxes. Mortgages shall pay such installment of all taxes and special assessments of every kind, now or hereafter levied against the Mortgaged Property before the same become delinquent, without notice or demand, and shall deliver to Mortgagee proof of such payment within fifteen (15) days after the date in which such tax or assessment becomes delinquent.

6. Liens. Mortgagee shall not create, incur or suffer to exist any lien, encumbrance, security interest or charge on the Mortgaged Property or any part thereof which might or could be held to be equal or prior to the lien of this Mortgage, other than the lien of current and future taxes and installments of special assessments with respect to which no penalty is yet payable. Mortgagee shall pay, when due, the claims of all persons supplying labor or materials to or in connection with the Mortgaged Property.

7. Compliance with Laws. Mortgagee shall comply with all present and future statutes, laws, rules, orders, regulations and ordinances affecting the Mortgaged Property, any part thereof or the use thereof.

8. Permitted Contests. Mortgagee shall not be required to (i) pay any tax, assessment or other charge referred to in paragraph 5 hereof, (ii) discharge or remove any lien, encumbrance or charge referred to in paragraph 6 hereof, or (iii) comply with any statute, law, rule, regulation or ordinance referred to in paragraph 7 hereof, so long as Mortgagee shall contest, in good faith, the validity, amount or the validity thereof, the amount of damages sought thereby or the extent of Mortgagee's liability therefor, by appropriate proceedings which shall operate during the pendency thereof to prevent (A) the collection of, or other satisfaction upon the tax, assessment, charge or lien, encumbrance or charge so contested, (B) the sale, foreclosure or loss of the Mortgaged Property or any part thereof, and (C) any interference with the use or occupancy of the Mortgaged Property or any part thereof. Mortgagee shall give prompt written notice to Mortgagee of the commencement of any contest referred to in this paragraph 8.

9. Use of Property. Mortgagee shall take good care of the Mortgaged Property; shall keep the Buildings and Personal Property now or later placed upon the Mortgaged Property in good and reasonable repair and shall not incur, destroy or remove either the Buildings or Personal Property during the term of this Mortgage. Mortgagee shall not make any material alteration to the Mortgaged Property without the prior written consent of Mortgagee.

10. Insurance.

a. Manner to be Insured. Mortgagee, at their sole cost and expense, shall maintain insurance as follows:

i. If this is a Construction Mortgage, during the period of construction, Mortgagee will maintain builder's risk insurance, written on the so-called "builder's risk-completed value basis", in an amount equal to 100% of the insurable value of the Mortgaged Property at the date of completion, and with coverage available on the so-called "all risk", non-reporting form of policy; provided that, to the extent that any contractor for such construction shall provide a duplicate insurance policy of builder's risk policy or certificate of insurance showing that the same coverage as is herein required is being carried by such contractor and adequately protects the interest of Mortgagee and Mortgagee with respect to the Mortgaged Property or a part thereof, Mortgagee shall not be required to maintain separate coverage. The insurance provided for by this subparagraph (i) with respect to the Mortgaged Property or any part thereof shall not be required while the Mortgaged Property or part thereof is so insured. Mortgagee's interest shall be protected in accordance with a standard mortgagee clause.

ii. If this is a Construction Mortgage, during the period of construction, Mortgagee will maintain comprehensive general liability insurance (including operations, contingent liability, operations of subcontractors, complete operations and contracted liability insurance) against bodily injury and property damage in amounts satisfactory to Mortgagee. If this is not a Construction Mortgage, or upon completion of construction, Mortgagee will maintain comprehensive general public liability insurance and property damage liability insurance in amounts satisfactory to Mortgagee to protect Mortgagee from claims (including all costs and expenses of defending the same) for personal injury, sickness, disease or death or for damage or injury to or destruction of property (including loss of use thereof) occurring in, on or about the Mortgaged Property.

iii. If this is not a Construction Mortgage, or upon completion of construction, Mortgagee will maintain insurance on the Buildings and other improvements now existing or hereafter erected on the Land and on the Personal Property included in the Mortgaged Property against loss by fire, extended coverage perils and such other hazards as Mortgagee may from time to time require, such insurance to have a "Replacement Cost" endorsement attached thereto, with the amount of the insurance at least equal to the balance of the Obligation. At Mortgagee's option, such policy may have a coinsurance clause of not less than 90% of replacement cost provided the policy contains an appropriate form of cost escalation endorsement. Mortgagee will at their sole cost and expense, from time to time, and at any time at the request of Mortgagee, provide Mortgagee with evidence satisfactory to Mortgagee of the replacement cost of Mortgaged Property.

iv. If this is a Construction Mortgage, during the period of construction, Mortgagee will maintain worker's compensation insurance with respect to all employees of Mortgagee and each contractor; and, if this is not a Construction Mortgage, or upon completion of construction, Mortgagee will maintain worker's compensation insurance with respect to all employees of Mortgagee.

v. At all times, Mortgagee will maintain such other insurance as Mortgagee may reasonably require.

b. Policy Provisions. All insurance policies and renewals thereof maintained by Mortgagee pursuant to this Mortgage shall be written by an insurance carrier satisfactory to Mortgagee, contain a mortgagee clause in form of and in form acceptable to Mortgagee, contain an agreement of the insurer that it will not amend, modify or cancel the policy except after thirty (30) days prior written notice to Mortgagee, and be reasonably satisfactory to Mortgagee in all other respects.

c. Delivery of Policy or Certificate. If requested by Mortgagee, Mortgagee will deliver to Mortgagee original policies satisfactory to Mortgagee evidencing the insurance which is required under this Mortgage, and Mortgagee shall promptly furnish to Mortgagee all renewal notices and, upon request of Mortgagee, evidence of payment thereof. At least ten (10) days prior to the expiration date of a required policy, Mortgagee shall deliver to Mortgagee a renewal policy in form satisfactory to Mortgagee.

d. Assignment of Policy. If the Mortgaged Property is sold at a foreclosure sale or if Mortgagee shall acquire title to the Mortgaged Property, Mortgagee shall have all of the right, title and interest of Mortgagee in and to any insurance policies required hereunder, and the unearned premiums thereon, and in and to the proceeds thereof resulting from any damage to the Mortgaged Property prior to such sale or acquisition.

e. Notice of Damage or Destruction Affecting Loss. If the Mortgaged Property or any part thereof shall be damaged or destroyed by fire or other casualty, Mortgagee will, within five (5) calendar days after the occurrence of such damage or destruction, give by first class mail notice thereof to the insurance carrier and to Mortgagee and will not adjust any damage or loss which is estimated by Mortgagee in good faith, to exceed \$20,000 unless Mortgagee shall have joined in or concurred with such adjustment; but if there has been no adjustment of any such damage or loss within four (4) months from the date of occurrence thereof and if an Event of Loss shall exist at the end of such four (4) month period or at any time thereafter, Mortgagee may then make proof of loss, adjust and settle any claim under the policies, and appear in and prosecute any action arising from such policies. In connection therewith, Mortgagee do hereby irrevocably authorize, empower and appoint Mortgagee as attorney-in-fact for Mortgagee (which appointment is coupled with an interest) to do any and all of the foregoing in the name and on behalf of Mortgagee.

f. Application of Insurance Proceeds. All sums paid under any insurance policy required by this Mortgage shall be paid to Mortgagee, which shall, at its option, apply the same (after first deducting therefrom Mortgagee's expenses incurred in collecting the same including but not limited to reasonable attorney's fees) to the reduction of the Obligation or to the payment of the restoration, repair, replacement or rebuilding of Mortgaged Property that is damaged or destroyed in such manner as Mortgagee shall determine and pursuant to the reduction of the Obligation. Any application of insurance proceeds to principal of the Obligation shall not extend or postpone the due date of the installments payable under the Obligation or change the amount of such installments.

g. Reimbursement of Mortgagee's Expenses. Mortgagee shall promptly reimburse Mortgagee upon demand for all of Mortgagee's expenses incurred in connection with the collection of the insurance proceeds, including but not limited to reasonable attorney's fees, and all such expenses shall be additional amounts secured by this Mortgage.

h. Inspection. Mortgagee, and its agents, shall have the right at all reasonable times, to enter upon the Mortgaged Property for the purpose of inspecting the Mortgaged Property or any part thereof. Mortgagee shall, however, have no duty to make such inspection. Any inspection of the Mortgaged Property by Mortgagee shall be entirely for its benefit and Mortgagee shall in no way rely or claim reliance thereon.

12. Protection of Mortgagee's Security. Subject to the rights of Mortgagee under paragraph 8 hereof, if Mortgagee fail to perform any of the covenants and agreements contained in this Mortgage or if any action or proceeding is commenced which affects the Mortgaged Property or the interest of the Mortgagee therein, or the title thereto, then Mortgagee, at Mortgagee's option, may perform such covenants and agreements, defend against or investigate such action or proceeding, and take such other action as Mortgagee deems necessary to protect Mortgagee's interest. Any amounts or expenses incurred or incurred by Mortgagee in good faith pursuant to this paragraph 12 with interest thereon at the rate of _____ % per annum, shall become an Obligation of Mortgagee secured by this Mortgage. Such amounts advanced or disbursed by Mortgagee hereunder shall be immediately due and payable by Mortgagee unless Mortgagee and Mortgagee agree in writing to other terms of repayment. Mortgagee shall, at its option, be subrogated to the lien of any mortgage or other lien discharged in whole or in part by the Obligations or by Mortgagee under the provisions hereof, and any such subrogation rights shall be additional and cumulative security for this Mortgage. Nothing contained in this paragraph shall require Mortgagee to incur any expense or do any act heretofore, and Mortgagee shall not be liable to Mortgagee for any damage or claims arising out of action taken by Mortgagee pursuant to this paragraph.

13. Reimbursement. Mortgagee shall give Mortgagee prompt notice of any action, actual or threatened, in contemplation or execution thereof and hereby assign, transfer and set over to Mortgagee the entire proceeds of any award or claim for damages for all or any part of the Mortgaged Property taken or damaged under the power of eminent domain or condemnation. Mortgagee is hereby authorized to intervene in any such action in the name of Mortgagee, to compromise and settle any such action or claim, and to accept and receive from the condemning authorities and give proper receipts and acquittances for such proceeds. Any expenses incurred by Mortgagee in intervening in such action or compromise and settling such action or claim, or satisfying such proceeds shall be subrogated to Mortgagee first out of the proceeds. The remaining proceeds or any part thereof shall be applied to reduction of the portion of the Obligations then most promptly to be paid, whether due or not, or to the satisfaction or repaid of the Mortgaged Property. The choice of application to be solely at the discretion of Mortgagee.

14. Future Pledge. From the date of its recording, this Mortgage shall be effective as a future pledge with respect to the Personal Property and for this purpose the name and address of the debtor is the name and address of Mortgagee as set forth in paragraph 20 hereof and the name and address of the secured party is the name and address of the Mortgagee as set forth in paragraph 20 hereof.

15. Events of Default. Each of the following circumstances shall constitute an event of default hereunder ("Event of Default"):

- a. Mortgagee shall default in the due observance or performance of or breach any other covenant, condition or agreement on its part to be observed or performed pursuant to the terms of this Mortgage.
- b. Mortgagee shall make an assignment for the benefit of the creditors, or a petition shall be filed by or against Mortgagee under the United States Bankruptcy Code or Mortgagee shall seek or consent to or acquiesce in the appointment of any trustee, receiver or liquidator of a material part of its properties or of the Mortgaged Property or shall not, within sixty (60) days after the appointment of a trustee, receiver or liquidator of any material part of its properties or of the Mortgaged Property, have such appointment vacated.
- c. A judgment, writ of replevin or attachment or execution, or similar process shall be entered and become a lien on or be issued or levied against the Mortgaged Property or any part thereof which is not satisfied, vacated or fully complied within thirty (30) days after its entry, issue or levy.
- d. An event of default, however defined, shall occur under any other mortgage, assignment or other security documents constituting a lien on the Mortgaged Property or any part thereof.

16. Acceleration/Foreclosure. Upon the occurrence of any Event of Default and at any time thereafter while such Event of Default exists, Mortgagee may, at its option, after such notice as may be required by law, exercise one or more of the following rights and remedies (and any other rights and remedies available to it):

- a. Mortgagee may declare immediately due and payable all Obligations secured by this Mortgage, and the same shall thereupon be immediately due and payable, without further notice or demand.
- b. Mortgagee shall have and may exercise with respect to the Personal Property, all the rights and remedies accorded upon default to a secured party under the Uniform Commercial Code. If notice to Mortgagee of intended disposition of such property is required by law in a particular instance, such notice shall be deemed commercially reasonable if given to Mortgagee at least ten (10) days prior to the date of intended disposition.
- c. Mortgagee may (and is hereby authorized and empowered to) foreclose this Mortgage in accordance with the law of the State of Iowa, and at any time after the commencement of an action to foreclose, or during the period of redemption, the court having jurisdiction of the case shall at the request of Mortgagee appoint a receiver to take immediate possession of the Mortgaged Property and of the Revenues and Income accruing therefrom, and to rent or sublease the same as he may deem best for the benefit of all parties concerned, and such receiver shall be liable to Mortgagee only for the net profits, after application of costs, interest and profits upon the costs and expenses of the receivership and foreclosure and upon the Obligations.

17. Redemption. It is agreed that if this Mortgage covers less than ten (10) acres of land, and in the event of the foreclosure of this Mortgage and sale of the property by sheriff's sale in such foreclosure proceedings, the first of one year for redemption from said sale provided by the statute of the State of Iowa shall be reduced to six (6) months provided the Mortgagee, in such action files an election to waive any deficiency judgment against Mortgagee within sixty days of the foreclosure proceedings; all in the event that the right of redemption shall be available to the Mortgagee, and the time periods in Sections 626.6, 626.15 and 626.19 of the Iowa Code shall be reduced to four (4) months.

It is further agreed that the period of redemption after a foreclosure of this Mortgage shall be reduced to thirty (30) days if all of the three following conditions exist: (1) The real estate is less than ten (10) acres in area; (2) the Court finds affirmatively that the said real estate has been abandoned by the owner and those persons personally liable under this Mortgage at the time of such foreclosure; and (3) Mortgagee in such action files an election to waive any deficiency judgment against Mortgagee or their successors in interest in such action. If the redemption period is so reduced, Mortgagee or their successors in interest in the action shall have the absolute right to redeem for the first thirty (30) days after such sale, and the time provided for redemption by creditors as provided in Sections 626.6, 626.15 and 626.19 of the Iowa Code shall be reduced to forty (40) days. Entry of appearance by plaintiff or default entry by or on behalf of Mortgagee shall be a presumption that the property is not abandoned. Any such redemption period shall be consistent with all of the provisions of Chapter 626 of the Iowa Code. This paragraph shall not be construed to limit or otherwise affect any other redemption provisions contained in Chapter 626 of the Iowa Code.

18. Attorney's Fees. Mortgagee shall pay on demand all costs and expenses incurred by Mortgagee in enforcing or protecting its rights and remedies hereunder, including, but not limited to, reasonable attorneys' fees and legal costs.

19. Enforcement of Mortgage. Mortgagee shall have the right to enforce its rights and remedies hereunder by any means or otherwise authorized by law or equity and to obtain a writ of or quia non or other process or remedy in writing signed by Mortgagee. All such rights and remedies provided for herein by which Mortgagee or the holder of the Obligations may have advantage, at law or in equity, shall be distinct, separate and cumulative and may be exercised concurrently, independently or successively in any order whatsoever, and as often as the occasion hereafter arises.

20. Notices. All notices required to be given hereunder shall be in writing and deemed given when personally delivered or deposited in the United States mail, postage prepaid, sent certified or registered, addressed as follows:

a. If to Mortgagee, to:
Bruce and Corrine Prine
RR 3 Box 192
Sisseton, South Dakota 57262
b. If to Mortgagee, to:
Investment Enterprises, Inc.
301 East Second Street
Rapid City, SD 57701-2109

or to such other address or person as hereafter designated in writing by the applicable party in the manner provided in this paragraph for the giving of notices.

21. Severability. In the event any portion of this Mortgage shall, for any reason, be held to be invalid, illegal or unenforceable in whole or in part, the remaining provisions shall not be affected thereby and shall continue to be valid and enforceable and if, for any reason, a court finds that any provision of this Mortgage is invalid, illegal, or unenforceable as written, but that by limiting such provision it would become valid, legal and enforceable then such provision shall be deemed to be written, construed and enforced as so limited.

22. Further Assurances. At any time and from time to time until payment in full of the Obligations, Mortgagee will, at the request of Mortgages, promptly execute and deliver to Mortgages such additional instruments as may be reasonably required to further evidence the tenor of this Mortgage and to further protect the security interest of Mortgages with respect to the Mortgaged Property, including, but not limited to, additional security agreements, financing statements and continuation statements. Any expenses incurred by Mortgagee in connection with the preparation of any such instruments shall become additional Obligations of Mortgages assumed by the Mortgage. Such amounts shall be immediately due and payable by Mortgagee to Mortgagee.

23. Successors and Assigns bound. Names, Gender, Age, and Residence. The rights, covenants and agreements contained herein shall be binding upon and inure to the benefit of the respective legal representatives, successors and assigns of the parties. Words and phrases contained herein, including acknowledgment hereof, shall be construed as in the singular or plural number, and as masculine, feminine or neuter gender according to the context. The capitals and headings of the paragraphs of this Mortgage are for convenience only and are not to be used to interpret or define the provisions hereof.

24. Governing Law. This Mortgage shall be governed by and construed in accordance with the laws of the State of Iowa.

25. Release of Rights of Owner, Homestead and Distributive Share. Each of the undersigned hereby relinquishes all rights of dower, homestead and distributive share in and to the Mortgage Property and waives all rights of exemption as to any of the Mortgaged Property.

26. Acknowledgment of Receipt of Copies of Debt Instrument. Mortgagee hereby acknowledges the receipt of a copy of this Mortgage together with a copy of each promissory note secured hereby.

27. Additional Provisions. Add Addendum Page.

Dated: 9-21-60
Bruce Prine
Corrine Prine, Mortgagee

I UNDERSTAND THAT HOMESTEAD PROPERTY IS IN MANY CASES PROTECTED FROM THE CLAIMS OF CREDITORS AND EXEMPT FROM JUDICIAL SALE; AND THAT BY SIGNING THIS MORTGAGE, I VOLUNTARILY GIVE UP MY RIGHT TO THIS PROTECTION FOR THIS MORTGAGED PROPERTY WITH RESPECT TO CLAIMS BASED UPON THIS MORTGAGE.

Dated: 9-21-60
Bruce Prine
Corrine Prine

STATE OF SOUTH DAKOTA
COUNTY OF MEADOW } ss:

On this 21 day of Sept., 1960, before me, the undersigned, a Notary Public, personally appeared Bruce Prine and Corrine Prine to me known to be the identical persons named in and who executed the foregoing instrument, and acknowledged that they executed the same as their voluntary act and deed.

My Commission Expires
August 14, 1961

Notary Public

Lots Two (2), Three (3) and Four (4); Southwest Quarter of Northwest Quarter (SW $\frac{1}{4}$ NW $\frac{1}{4}$); Northwest Quarter of Southwest Quarter (NW $\frac{1}{4}$ SW $\frac{1}{4}$) and Southeast Quarter (SE $\frac{1}{4}$), all in Section Four (4), Township One Hundred Twenty-five North (125N), Range Fifty-two (52);

Northeast Quarter of Southeast Quarter (NE $\frac{1}{4}$ SE $\frac{1}{4}$) of section Five (5), Township One Hundred Twenty-five North (125N), Range Fifty-two (52); and

West Half of Northeast Quarter (WN $\frac{1}{2}$ NE $\frac{1}{4}$); West Half of Southeast Quarter (W $\frac{1}{2}$ SE $\frac{1}{4}$); Northeast Quarter of Southeast Quarter (NE $\frac{1}{4}$ SE $\frac{1}{4}$); and Southeast Quarter of Southeast Quarter (SE $\frac{1}{4}$ SE $\frac{1}{4}$) of Section Thirty-two (32), Township One Hundred Twenty-six North (126N), Range Fifty-two (52)

all West of the 5th P.M., Roberts County, State of South Dakota

PRINS 000034

SUBORDINATION AGREEMENT

This agreement is made and entered into between and among Bruce W. Prins and Cyrrine J. Prins, husband and wife of 44370 109th Street, Yebian, South Dakota 57270, hereinafter "Mortgagor"; Dacotah Bank of Sisseton, 321 Veterans Avenue, Sisseton, South Dakota 57262; and Investment Enterprises, Inc. of 301 East Second Street, Muscatine, Iowa 52761.

The parties recite and declare that:

WHEREAS Investment Enterprises, Inc. is the owner and holder of a certain note for Three Hundred Twenty-five Thousand Dollars (\$325,000.00) and interest, secured by a certain mortgage for such sum and interest made by Investment Enterprises, Inc. to Mortgagor, dated the 21st day of September, 2000, and recorded in at the Roberts County Register of Deeds, in Book 204 of mortgages, pages 934-938, and covering the following described real property located in Roberts County, South Dakota:

Lots Two (2), Three (3) and Four (4); Southwest Quarter of Northwest Quarter (SW $\frac{1}{4}$ NW $\frac{1}{4}$); Northwest Quarter of the Southwest Quarter (NW $\frac{1}{4}$ SW $\frac{1}{4}$) and Southeast Quarter (SE $\frac{1}{4}$), all in Section Four (4) Township One Hundred Twenty-five North (125N), Range Fifty-two (52), West of the 5th P.M., Roberts County, South Dakota.

Northeast Quarter of Southeast Quarter (NE $\frac{1}{4}$ SE $\frac{1}{4}$) of Section Five (5), Township One Hundred Twenty-five North (125N), Range Fifty-two (52), West of the 5th P.M., Roberts County, South Dakota.

West Half of the Northeast Quarter (WN $\frac{1}{2}$ NE $\frac{1}{4}$); West Half of Southeast Quarter (W $\frac{1}{2}$ SE $\frac{1}{4}$); Northeast Quarter of Southeast Quarter (NE $\frac{1}{4}$ SE $\frac{1}{4}$); and Southeast Quarter of Southeast Quarter (SE $\frac{1}{4}$ SE $\frac{1}{4}$) of Section Thirty-two (32), Township One Hundred Twenty-five North (125N), Range Fifty-two (52) West of the 5th P.M., Roberts County, South Dakota.

WHEREAS Dacotah Bank has a Collateral Real Estate Mortgage for One Hundred Eleven Thousand Dollars (\$11,000.00) and interest, on the above described real property located in Roberts County, South Dakota dated the 13th day of May, 1999, and recorded the 13th day of May, 1999 at 11:55 o'clock a.m. at the Roberts County Register of Deeds, in Book 199 of mortgages, page 226 with Addendum to Collateral Real Estate Mortgage for the purpose of confirming the effectiveness of the loan dated the 10th day of May, 2004 and recorded on the 11th day of May, 2004 at 10:10 o'clock a.m. at the Roberts County Register of Deeds, in Book 220 of mortgages, page 557.

WHEREAS the parties hereto acknowledge that Dacotah Bank's Collateral Real Estate Mortgage and Addendum thereto has priority over the Investment Enterprises, Inc. mortgage dated September 21, 2000.

112,940
State of South Dakota, County of Roberts

Filed this 13th day of July, 2009 at 1:50

O'Clock P. M. Book 250 Page 615-618

By Carol Matlock

Register of Deeds

Deputy

Fees \$ 26.⁰⁰

Book 250 Page 615

WHEREAS Dacotah Bank is going to lend Mortgagee money amounts in combination with the amount due and owing Dacotah Bank under the Collateral Real Estate Mortgage and Addendum thereto not to exceed Five Hundred Thousand Dollars (\$500,000.00), and interest.

WHEREAS to induce Dacotah Bank to loan Mortgagee the additional money it is necessary that the mortgage held by Investment Enterprises, Inc. dated September 21, 2000 addressed herein be subordinated to the lien of the mortgage about to be made by Dacotah Bank to Mortgagee for amounts in combination with the amount due and owing Dacotah Bank under the Collateral Real Estate Mortgage and Addendum thereto not to exceed Five Hundred Thousand Dollars (\$500,000.00), and interest.

WHEREAS this subordination shall relate to all existing amounts due and owing to Dacotah Bank and all new, rewrites and/or additions as it relates to the new mortgage and Collateral Real Estate Mortgage and Addendum thereto not to exceed Five Hundred Thousand Dollars (\$500,000.00), and interest.

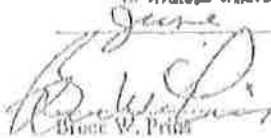
NOW THEREFORE THE PARTIES HERETO COVENANT AND AGREE AS FOLLOWS:

1. *Subordination.* Investment Enterprises, Inc. hereby covenants, consents, and agrees with Dacotah Bank that the mortgage held by Investment Enterprises, Inc. dated September 21, 2000 is and shall continue to be subject and subordinate in lien to the mortgage about to be made by Dacotah Bank and the Collateral Real Estate Mortgage and Addendum thereto in amounts not to exceed Five Hundred Thousand Dollars (\$500,000.00), and interest.
2. *Consideration.* In consideration of Investment Enterprises, Inc. so subordinating the mortgage held by him to the existing amounts due and owing to Dacotah Bank and all new, rewrites and/or additions as it relates to the new mortgage and the Collateral Real Estate Mortgage and Addendum thereto totaling up to Five Hundred Thousand Dollars (\$500,000.00), Dacotah Bank shall make the aforesaid loan. Investment Enterprises, Inc. specifically recognizes the consideration set forth herein as adequate consideration for its agreement that its lien shall be subsequent and subordinate to Dacotah Bank new mortgage and the Collateral Real Estate Mortgage and Addendum thereto totaling up to Five Hundred Thousand Dollars (\$500,000.00).
3. *Authority.* The parties hereto acknowledge that Kevin Wegelaupt has authority to sign for Dacotah Bank, Sisseton, South Dakota as its President and that Terrence L. Meely has authority to sign for Investment Enterprises, Inc. as its President.
4. *Legal Counsel.* The parties hereto acknowledge that they have the right and privilege of retaining their own independent legal counsel to assist them in the negotiation, preparation and execution of this Agreement and that this Agreement is made and entered into freely and voluntarily by all parties, each having had the opportunity to obtain the counsel and advice of his or her own and independent attorney, and being free from any duress or influence on the part of the other.

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5. **Binding Effect.** This agreement shall be binding upon and inure to the benefit of the respective heirs, legal representatives, successors, and assigns of the parties herein.

In witness whereof, the parties have executed this agreement on the 10th day of June, 2009.


Bruce W. Prins

DACOTAH BANK

By: 
Kevin Wechsung

STATE of SOUTH DAKOTA)

COUNTY of ROBERTS)

On this the 10th day of July, 2009, before me, the undersigned officer, personally appeared Bruce W. Prins and Corinne J. Prins, husband and wife, known to me or satisfactorily proven to be the persons whose name are subscribed to the within instrument and who acknowledged to me that they executed the foregoing instrument for the purposes therein contained.

I hereunto set my hand and official seal.




Andrea Nelson
Notary Public - South Dakota
My commission expires: 8-28-13

COUNTY of ROBERTS)

COUNTY of ROBERTS)

On this the 10th day of July, 2009, before me, the undersigned officer, personally appeared Kevin Wechsung, who acknowledged himself to be the President of Dacotah Bank & Trust, and that he, as such Officer, being authorized to do so, executed the foregoing instrument for the purposes therein contained, by signing the name of the Dacotah Bank by himself as President of Dacotah Bank.

I hereunto set my hand and official seal.




Andrea Nelson
Notary Public - South Dakota
My commission expires: 8-28-13

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ROBERTS COUNTY

PAGE 05/05

STATE of Texas)
COUNTY of Muscatine)

On this the 16th day of June, 2009, before me, the undersigned officer, personally appeared Terrence L. Mealy, who acknowledged himself to be the President of Investment Enterprises, Inc., and that he, as such Officer, being authorized so to do, executed the foregoing instrument for the purposes therein contained, by signing the name of the Investment Enterprises, Inc.

In witness whereof, I hereunto set my hand and official seal.



Lorrie Peterson
Notary Public
My commission expires: 6/16/2011

PREPARED BY:

ERIN C. CAMERON
ATTORNEY AT LAW
610 VETERANS AVE.
SISSETON SD 57262
(605) 698-3401

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<p style="text-align: center;">FILED CINDY MAROHL NOV 23 2015 Roberts County Clerk of Courts Sieston, SD</p>		<p style="text-align: center;">IN CIRCUIT COURT</p>
<p>STATE OF SOUTH DAKOTA</p>	<p style="text-align: center;">FIFTH JUDICIAL CIRCUIT</p>	
<p>COUNTY OF ROBERTS</p>		
<p>LORETTA B. MEALY, Individually and as Personal Representative of the ESTATE OF TERRENCE L. MEALY, and INVESTMENT ENTERPRISES, INC.,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">v.</p> <p>BRUCE PRINS AND CORRINE PRINS, and PRAIRIE SKY GUEST & GAME RANCH, LLC,</p> <p style="text-align: center;">Defendants.</p>	<p style="text-align: center;">CIV. 15-21 MEMORANDUM DECISION</p>	

A motions hearing for partial summary judgment was held on August 24, 2015 in the above entitled matter. At the hearing, Plaintiffs appeared through counsel, Julie Dvorak, while one of the named Defendants, Bruce Prins, appeared personally and with counsel, Lee Schoenbeck. Defendants sought partial summary judgment on forty-eight promissory notes and the September 21, 2000 mortgage. Prior to the hearing, both parties submitted briefs, affidavits,¹ and statements of undisputed material facts to the Court. At the end of argument, the Court reserved ruling on both claims of partial summary judgment. This memorandum decision constitutes the Court's ruling on those issues.

STATEMENT OF FACTS

Bruce and Corrine Prins² ("Defendants") own and operate Prairie Sky Guest and Game Ranch, LLC in Marshall County, South Dakota. In 1999, Defendants executed a number of

¹ While this motion was pending, Plaintiffs filed a Motion Regarding Buffalo Sale Proceeds, brief in support of the motion, and an accompanying affidavit in support of the motion that contained Defendants' answers to interrogatories dated May 20, 2015. Defendants responded with a brief in opposition and affidavit.

² Bruce and Corrine Prins are residents of Roberts County, South Dakota.

promissory notes for their business. Over the course of nine years, Defendants had executed a total of fifty-five promissory notes. Some of the promissory notes were made payable to Terrence Mealy,³ Terrance and Loretta Mealy, Terrence or Loretta Mealy, and finally to Investment Enterprises, Inc. The pertinent information from the promissory notes is listed in the table below.

	DATE	AMOUNT	EXHIBIT	NOTE TYPE	OBLIGOR	OBLIGEE
1	04/28/1999	\$5,000	B	Time	Bruce and Corrine Prins	Terrence or Loretta Mealy
2	06/09/1999	\$7,000	C	Time	Bruce and Corrine Prins	Terrence or Loretta Mealy
3	07/26/1999	\$10,000	D	Time	Bruce and Corrine Prins	Terrence and Loretta Mealy
4	08/10/1999	\$8,000	E	Time	Bruce and Corrine Prins	Terrence or Loretta Mealy
5	08/28/1999	\$10,000	F	Time	Bruce and Corrine Prins	Terrence or Loretta Mealy
6	09/24/1999	\$12,000	G	Time	Bruce and Corrine Prins	Terrence or Loretta Mealy
7	10/06/1999	\$7,000	H	Time	Bruce and Corrine Prins	Terrence or Loretta Mealy
8	11/11/1999	\$15,000	I	Time	Bruce and Corrine Prins	Terrence or Loretta Mealy
9	11/29/1999	\$5,000	J	Time	Corrine Prins	Terrence or Loretta Mealy
10	12/21/1999	\$9,000	K	Time	Bruce and Corrine Prins	Terrence or Loretta Mealy
11	01/10/2000	\$35,000	L	Time	Bruce and Corrine Prins	Terrence or Loretta Mealy
12	02/10/2000	\$6,000	M	Time	Bruce and Corrine Prins	Terrence or Loretta Mealy
13	02/25/2000	\$8,000	N	Time	Bruce and Corrine Prins	Terrence or Loretta Mealy
14	04/08/2000	\$35,000	O	Time	Bruce and Corrine Prins	Terrence or Loretta Mealy
15	05/12/2000	\$9,500	P	Time	Bruce and Corrine Prins	Terrence or Loretta Mealy
16	05/12/2000	\$16,000	Q	Time	Bruce and Corrine Prins	Terrence or Loretta Mealy
17	06/27/2000	\$18,000	R	Time	Bruce and	Terrence or Loretta

³ Terrence Mealy was an attorney before passing away in 2011.

18	09/22/2000	\$15,000	S	Time	Corrine Prins Bruce and Corrine Prins	Mealy Terrence or Loretta Mealy
19	11/30/2000	\$9,5000	T	Time	Bruce and Corrine Prins	Terrence or Loretta Mealy
20	12/28/2000	\$25,000	U	Time	Bruce and Corrine Prins	Terrence or Loretta Mealy
21	02/28/2001	\$25,000	V	Time	Bruce and Corrine Prins	Terrence or Loretta Mealy
22	04/14/2001	\$15,000	W	Time	Bruce and Corrine Prins	Terrence or Loretta Mealy
23	09/08/2001	\$15,000	X	Time	Bruce and Corrine Prins	Terrence or Loretta Mealy
24	01/12/2002	\$17,000	Y	Time	Bruce and Corrine Prins	Terrence or Loretta Mealy
25	02/07/2002	\$15,000	Z	Time	Bruce and Corrine Prins	Terrence or Loretta Mealy
26	03/12/2002	\$25,000	AA	Time	Bruce and Corrine Prins	Terrence Mealy
27	04/15/2002	\$20,000	BB	Demand	Bruce and Corrine Prins	Terrence Mealy
28	06/26/2002	\$5,000	CC	Time	Bruce and Corrine Prins	Terrence Mealy
29	09/11/2002	\$8,000	DD	Time	Bruce and Corrine Prins	Terrence and Loretta Mealy
30	09/11/2002	\$27,000	EE	Time	Bruce and Corrine Prins	Terrence and Loretta Mealy
31	12/30/2002	\$30,000	FF	Time	Bruce and Corrine Prins	Terrence Mealy
32	02/07/2003	\$12,000	GG	Time	Bruce and Corrine Prins	Terrence and Loretta Mealy
33	03/14/2003	\$26,000	HH	Time	Bruce and Corrine Prins	Terrence and Loretta Mealy
34	06/06/2003	\$35,000	II	Time	Bruce and Corrine Prins	Investment Enterprises, Inc.
35	09/23/2003	\$39,000	JJ	Time	Bruce and Corrine Prins	Investment Enterprises, Inc.
36	01/02/2004	\$38,000	KK	Time	Bruce and Corrine Prins	Terrence and Loretta Mealy
37	03/05/2004	\$26,000	LL	Time	Bruce and Corrine Prins	Terrence and Loretta Mealy
38	04/05/2004	\$27,000	MM	Time	Bruce and Corrine Prins	Terrence Mealy
39	07/16/2004	\$18,000	NN	Demand	Bruce and Corrine Prins	Terrence Mealy

40	09/01/2004	\$20,000	OO	Time	Bruce and Corrine Prins	Terrence Mealy
41	12/29/2004	\$44,000	PP	Demand	Bruce and Corrine Prins	Investment Enterprises, Inc.
42	07/06/2005	\$20,000	QQ	Time	Bruce and Corrine Prins	Terrence and Loretta Mealy
43	08/08/2005	\$25,000	RR	Time	Bruce and Corrine Prins	Terrence and Loretta Mealy
44	09/22/2005	\$25,000	TT	Time	Bruce and Corrine Prins	Terrence and Loretta Mealy
45	12/27/2005	\$45,000	UU	Time	Bruce and Corrine Prins	Terrence and Loretta Mealy
46	03/30/2006	\$35,000	WW	Time	Bruce and Corrine Prins	Investment Enterprises, Inc.
47	04/26/2006	\$35,000	XX	Time	Bruce and Corrine Prins	Investment Enterprises, Inc.
48	12/20/2006	\$54,000	BBB	Time	Bruce and Corrine Prins	Investment Enterprises, Inc.

Loretta Mealy, both individually and as personal representative, and Investment Enterprises, Inc. ("Plaintiffs") assert some of these promissory notes were secured by an open-ended mortgage dated September 21, 2000 ("2000 Mortgage"). The 2000 mortgage was prepared by Terrence Mealy and was for \$325,000.00. In pertinent part, the obligations section of the mortgage provides:

2. Obligations. This Mortgage secures the following (hereinafter referred to as the "Obligations"): a. The payment of the loan made by Mortgagee to Bruce Prins & Corrine Prins/husband and wife advanced by a promissory notes "date _____, 19____ in this principal amount \$ _____ with a due date of _____, any renewals, extensions, modifications or refinancing thereof with and any promissory notes issued in substitution therefor. . . .

Nine years later, Defendants signed a subordination agreement with Investment Enterprises, Inc. Terrence Mealy signed on behalf of Investment Enterprises, Inc. The agreement's recitation and declaration section referred to a specific promissory note for \$325,000.00. Specifically, it reads:

"Whereas Investment Enterprises, Inc., is the owner and holder of a certain note for Three Hundred Twenty-five Thousand Dollars (\$325,000.00) and interest[.]"

Plaintiffs filed a complaint on March 3, 2015 alleging six counts: (1) breach of contract, (2) conversion, (3) unjust enrichment, (4) constructive trust, (5) accounting, and (6) injunctive relief. Plaintiffs allege that no payment has been made on forty-eight of the fifty-five promissory notes. Despite this allegation, Plaintiffs contend defendants made a partial payment on February 25, 2015. This alleged partial payment is based on an affidavit recalling a conversation between Bruce Prins and Patrick Mealy, Terrence and Loretta Mealy's son.

ISSUES

Whether Defendants are entitled to summary judgment as a matter of law on the forty-eight promissory notes and the 2000 mortgage because the promissory notes and mortgage are unenforceable.

ANALYSIS AND DECISION

SDCL 15-6-56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In reviewing a grant of summary judgment, the Court "determine[s] whether the moving party has demonstrated the absence of any genuine issue of material fact and entitlement to judgment on the merits as a matter of law." *Stern Oil Co., Inc. v. Brown*, 2012 S.D. 56, ¶ 8, 817 N.W.2d 395, 398 (quoting *Tolle v. Lev*, 2011 S.D. 65, ¶ 11, 804 N.W.2d 440, 440). The Court, while conducting its review, must view all reasonable inferences drawn from the facts in favor of the non-moving party. *Id.* However, "the party challenging the summary judgment must substantiate his allegations with sufficient probative evidence that would permit a finding in his favor on more than mere speculation, conjecture, or fantasy." *Id.*

The opposing party, when facing a motion for summary judgment, “must ‘be diligent in resisting [the motion], and mere general allegations and denials which do not set forth specific facts will not prevent the issuance of a judgment.’” *Citibank South Dakota, N.A. v. Schmidt*, 2008 S.D. 1, ¶ 8, 744 N.W.2d 829, 832 (alteration in original) (quoting *Bordeaux v. Shannon County Schools*, 2005 S.D. 117, ¶ 14, 707 N.W.2d 123, 127) (quoting *Hughes-Johnson Co. v. Dakota Midland Hosp.*, 195 N.W.2d 519, 521 (S.D. 1972)). An “entry of summary judgment is mandated against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Hasr v. Wentzlaff*, 2012 S.D. 50, ¶ 11, 816 N.W.2d 96, 101 (quoting *W. Consol. Coop. v. Pew*, 2011 S.D. 9, ¶ 21, 795 N.W.2d 390, 396).

Furthermore, when summary judgment is predicated on a statute of limitations defense, “[t]he burden of proof is upon the movant to show clearly that there is no issue of material fact and that he is entitled to judgment as a matter of law.” *Brandt v. County of Pennington*, 2013 S.D. 22, ¶ 8, 827 N.W.2d 871, 874 (citations omitted). Once the defendant “asserts the statute of limitations as a bar to the action and presumptively establishes the defense by showing the case was brought beyond the statutory period, the burden shifts to the plaintiff to establish the existence of material facts in avoidance of the statute of limitations.” *Id.* In South Dakota, “[i]t is well settled that summary judgment is proper on statute of limitation issues only when application of the law is in question, and not when there are remaining issues of fact.” *Id.* Normally, “a statute of limitations question is left for the jury; however, deciding what constitutes accrual of a cause of action is a question of law[.]” *Id.*

I. Forty-Eight Promissory Notes

Two types of promissory notes are at issue in this case: notes payable at a definite time (“time notes”), and notes payable on demand (“demand notes”). SDCL 57A-3-118(a)(b). As the

name indicates, time notes are deemed such because payment is due at fixed date or dates or a readily ascertainable time from the date of the promise. SDCL 57A-3-108(b). Demand notes, similarly descriptive in name, are created when the note states payment "on demand or sight, or otherwise indicates that it is payable at the will of the holder, or it does not state any time of payment." SDCL 57A-3-108(a). Although the law is clear, there are times when a promissory note has characteristics of both a time and demand note. When this occurs, the Legislature has counseled that the promissory note is "payable on demand until the fixed date and, if demand for payment is not made before that date, [it] becomes payable at a definite time on the fixed date." SDCL 57A-3-108(c).

Here, the overwhelming majority of promissory notes are time notes. Indeed, forty-five⁴ of forty-eight total promissory notes at issue are time notes, thus leaving only three⁵ demand notes. This in turn has an effect on the statute of limitations. Time notes enjoy a six year statute of limitations, SDCL 57A-3-118(a), while demand notes get an extra four years if no demand for payment is made or the obligor fails to pay interest or principal for a period of ten continuous years, SDCL 57A-3-118(b). All of the promissory notes at issue—whether time or demand—were issued prior to December 21, 2006. Under South Dakota law, then, all the time notes were barred by December 21, 2012. The remaining three demand notes, the last of which expired on December 30, 2014, are similarly barred by the statute limitations.

Whether the running of a statute of limitation bars an action is a question of law for the Court to determine. *Brandt*, 2013 S.D. 22, ¶ 8, 827 N.W.2d at 874. The Court, having reviewed all of the information provided, is therefore persuaded that Defendants have presumptively established that all forty-eight promissory notes—time and demand—were brought beyond the

⁴ The following promissory notes are time notes: B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, CC, TT, WW, XX, S, T, U, V, W, X, Y, Z, AA, DD, EE, FF, GG, HH, II, JJ, KK, LL, MM, OO, QQ, RR, UU, and BBB.

⁵ The three demand notes are: BB, NN, and PP.

applicable statutory period found in SDCL 57A-3-108(a) and (b) prior to the commencement of this lawsuit on March 6, 2015. *See id.* As a result, the burden has shifted to the Plaintiffs to “establish the existence of material facts in avoidance of the statute of limitations.” *Id.* In an attempt to meet their burden, Plaintiffs make three arguments. First, that Iowa law, not South Dakota law, provides the appropriate statute of limitations. Second, that a subordination agreement from 2009 reaffirmed the debt in a note worth \$325,000.00. Finally, that Defendants made a partial payment on February 25, 2015, thereby negating any possible use of statute of limitations defense. Each is addressed in turn below.

a. Whether Iowa or South Dakota law provides the applicable statute of limitations for the forty-eight promissory notes.

Iowa, like South Dakota, differentiates between a time note and demand note. *See* Iowa Code § 554.3104. Unlike South Dakota, however, Iowa applies a ten year statute of limitations for both time and demand notes. Iowa Code § 614.4(5). An application of Iowa’s statute of limitations would therefore bar forty-one of the forty-eight promissory notes, while only preserving seven time notes. As such, this Court must determine whether Iowa law or South Dakota law applies to the remaining seven time notes: QQ, RR, TT, UU, WW, XX, and BBB.

Iowa and South Dakota have both relied on the Restatement (Second) of Conflict of Laws (“Restatement”) to solve conflict of laws issues. *See, e.g., Stockmen’s Livestock Exchange v. Thompson*, 520 N.W.2d 255, 257 (S.D. 1994) (“South Dakota applies the provisions of the Restatement (Second) of Conflict of Laws in order to resolve questions about which state’s laws govern in a particular factual situation.”); *Cameron v. Hardisty*, 407 N.W.2d 595, 596 (Iowa 1987) (noting Iowa’s approach in determining which jurisdiction’s statutes of limitation apply is consistent with the general rule set forth in the Restatement § 142). The general rule regarding statute of limitations in the Restatement provides:

(1) An action will not be maintained if it is barred by the statute of limitations of the forum, including a provision borrowing the statute of limitations of another state.

(2) An action will be maintained if it is not barred by the statute of limitations of the forum, even though it would be barred by the statute of limitations of another state, except as stated in § 143.

Restatement (Second) of Conflict of Laws § 142.

In the application of the general rule, it is evident that this suit cannot be maintained. First, Plaintiffs chose South Dakota as the forum, which has a six year statute of limitations for time notes, SDCL 57A-3-118(a). More than six years has elapsed on the remaining seven time notes: QQ, RR, TT, UU, WW, XX, and BBB. Thus, the time notes are barred from prosecution by SDCL 57A-3-118(a). This conclusion is consistent with how Iowa courts apply the Restatement's general rule. *Harris v. Clinton Corn Processing Co.*, 360 N.W.2d 812, 814 (Iowa 1985); *Cameron*, 407 N.W.2d at 596. Second, South Dakota's borrowing statute only applies to wrongful death actions and is therefore inapplicable to this case. SDCL 21-5-4; *see also Fritzmeier et. al., v. Blimpie Midwest/Krause Gentle Corp.*, 2001 WL 35828831.

Furthermore, statutes of limitation are not substantive law. Instead, statutes of limitation are usually considered procedural or remedial. As Justice Jackson so eloquently put it:

Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate.

Chase Securities Corp. v. Donaldson, 325 U.S. 304, 314 (1945) (internal citation and footnote omitted) (emphasis added). The South Dakota Supreme Court followed Justice Jackson's words when it announced that "[s]tatutes of limitations are remedial, not substantive." *Lyons v. Lederle*

Laboratories, A Div. of American Cyanamid Co., 440 N.W.2d 769, 770 (S.D. 1989). Similarly, the Iowa Supreme Court "view[s] statutes of limitation as being procedural rather than substantive." *Cameron v. Hardisty*, 407 N.W.2d 595, 596 (Iowa 1987) (citing *Harris*, 360 N.W.2d at 814).

The Court, based on the above analysis, agrees with the Defendants that South Dakota law applies. Plaintiffs' remaining seven time notes are barred by SDCL 57A-3-118(a). Thus, all forty-eight promissory notes in dispute are barred by the statutes of limitation. See SDCL 57A-3-118(a)(b).

b. Whether the debt contained in the forty-eight promissory notes was revived by a subordination agreement signed in 2009 for \$325,000.00.

SDCL 15-2-29 governs the requirements for an acknowledgment of debt to be effective.

It provides:

No acknowledgment or promise is sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of this chapter, unless the same be contained in some writing signed by the party to be charged thereby; but this section shall not alter the effect of any payment of principal or interest.

SDCL 15-2-29. Further, "the implication of a promise from an acknowledgment of the existence of the debt is not warranted if there be anything in the terms of the writing which tend to repel such an inference or leave it in doubt." *Wipf v. Blake*, 28 N.W.2d 881, 882 (S.D. 1947). The acknowledgment "must be consistent with a promise to pay, unqualified, clear, plain, unambiguous, and so distinct in its extent and form as to preclude hesitation as to the debtor's meaning, and so as to enable the court to apply its terms as the debtor intended they should be applied." *Id.*

In determining whether an acknowledgment meets the standards set forth by statute and caselaw, the South Dakota Supreme Court has formulated a guide for trial courts to follow. *Id.* First, the Court must look at whether there is an admission of the debt in question. *Id.* Second, if

there is an admission of the debt, is that admission "narrowed by any qualification which rebuts the presumption of a promise, or subject to any condition on the fulfillment of which the implied promise is dependent[.]" *Id.* Third, "if there is a condition, has it been satisfied[.]" *Id.*

Although at first blush it appears that Defendants acknowledged the debt by signing the subordination agreement thereby satisfying the first question, that conclusion cannot stand upon further inspection. The subordination agreement references a specific note worth \$325,000.00. Specifically, the agreement reads: "Whereas Investment Enterprises, Inc., is the owner and holder of a certain note for Three Hundred Twenty-five Thousand Dollars (\$325,000.00) and interest[.]" No specific note for \$325,000.00 exists among the forty-eight promissory notes in dispute. This creates an ambiguity in the very terms of the agreement that casts doubt on what debt is being described. *Id.* Thus, hesitation as to the debtor's meaning is in question, which prevents this Court from apply[ing the agreement's] terms as the debtor intended they should be applied." *Id.* Therefore, the statute of limitations on the forty-eight promissory notes was not revived by the execution of the subordination agreement signed by the parties in 2009.

c. Whether Defendants made a partial payment on any of the disputed debts contained in the 48 promissory notes, thereby negating a statute of limitations defense.

The last clause in SDCL 15-2-29 preserves the common law principle that "a partial payment of debt may, under certain circumstances, constitute such an acknowledgment of a larger debt as will raise an implication of a new promise to pay the balance and set the statute running anew." *F.M. Slagle & Co. v. Bushnell*, 16 N.W.2d 914, 919 (S.D. 1944) An acknowledgment, however, must be in writing and signed by the party to be charged. SDCL 15-2-29. Furthermore, there cannot be any ambiguity as to the identification of the debt to which the payment is made. *Slagle*, 16 N.W.2d at 919.

Plaintiffs filed an affidavit by Patrick Mealy, the son of Terrence and Loretta Mealy, in opposition to the motion for partial summary judgment. The affidavit contains Patrick Mealy's recollection of an alleged conversation between Bruce Prins and himself that took place on February 25, 2015.⁶ One line recites, "Bruce indicated that he was handing over the contents of the lodge, the lodge business, the LLC name of Prairie Sky Guest & Game Ranch and all other content on the property as a payment of past interest that was due on the promissory notes."

Contrary to Plaintiffs' contention, this statement does not constitute a payment. Plaintiffs' reliance on *Taylor v. Ashdown*, 244 N.W. 541 (S.D. 1932), is misplaced as it is easily distinguishable. In that case, Robert S. Taylor ("Taylor") executed a single promissory note dated March 1, 1920 to the Ashdowns: Alfred, Blanche, Cora, R.B., Sadie, and Walter. The promissory note was payable on or before March 1, 1925. *Id.* Walter voluntarily paid the interest on the note every year until March 1, 1930. *Id.* (emphasis added). Moreover, Walter made two payments on the note's principal. *Id.* (emphasis added). The first payment was on March 8, 1924, and the second was on March 8, 1926. *Id.*

At trial when Walter testified about the second principal payment to Taylor, he said: "I was only able to pay him this \$200 and it was not very much but that was the best I could do and when I paid him interest during the several years, I told [Taylor] substantially the same thing." *Id.* at 542. The South Dakota Supreme Court held that these payments were to be applied to the note in question and had the same effect as an express acknowledgment of the debt. *Id.* (emphasis added). Thus, the payments tolled the statute of limitations. *Id.*

⁶ Plaintiffs filed their complaint less than a week later on March 3, 2015. The complaint contained no assertion of any partial payment by Defendants. Nor did it even mention the conversation between Patrick Mealy and Bruce Prins. Instead, the complaint alleged that no payments had been made on the promissory notes. In South Dakota, "eleventh-hour" affidavits to avoid summary judgment are looked on with disapproval when they attempt to change previous testimony to create a material fact. *DFA Dairy Financing Services, L.P. v. Lawson Special Trust*, 2010 S.D. 34, ¶ 21, 781 N.W.2d 664, 670. The complaint is not a sworn complaint, so it cannot constitute previous testimony. Therefore, the fact that Plaintiffs submitted this affidavit in direct contradiction to their complaint is immaterial to the analysis.

In contrast, there is no indication here on what specific promissory notes this alleged interest payment was made. The only information pertaining to the alleged payment is ambiguous and vague. Indeed, it could be any one of the fifty-five notes executed by the Defendants and made payable to the Plaintiffs. Seven of these promissory notes are not in dispute. Nor is there testimony, under oath, from the Defendants directly identifying what specific note the alleged payment was intended to satisfy. Furthermore, there is no documentation, accounting, or writing that supports a payment was made by the Defendants to the Plaintiffs.

When this assertion is viewed in the light most favorable to the Plaintiffs, it just establishes that Bruce Prins made an *oral* promise to pay past interest due on *the promissory notes*. This is insufficient to survive summary judgment for two reasons. First, the “[w]ords and phrases in a statute must be given their plain meaning and effect.” *In re Taliaferro*, 2014 S.D. 82, ¶ 6; 856 N.W.2d at 806-07. In this case, the plain language of SDCL 15-2-29 requires a writing signed by the person to be bound for an acknowledgment to be effective. No writing exists. Consequently, Bruce Prins’ oral promise cannot constitute a legally effective acknowledgment that binds Defendants, thereby reviving the statute of limitations.

Second, the phrase “*the promissory notes*” is a general statement that fails to specify what promissory note or notes the alleged payment was to be applied. *See Slagle*, 16 N.W.2d at 919. This ambiguity is also fatal. Unlike *Taylor*, where there was testimony from the debtor that specifically identified what promissory note the payment was meant to apply, Plaintiffs do not have any testimony by Defendants regarding how the alleged payment was to be applied. Moreover, there are fifty-four more promissory notes in this case as compared to *Taylor*. These two salient facts, which evidence a debtor’s intent to pay the balance of the debt, are not present in this case. *See Taylor*, 244 N.W. at 542. There is no way of deciphering whether the alleged

payment would have applied towards the interest on one or all of the forty-eight promissory notes in dispute, or whether it would have gone towards Defendants' other promissory notes not in dispute. Therefore, the statute of limitations cannot be revived.

II. 2000 Mortgage

A mortgage is "[a] lien against property that is granted to secure an obligation (such as a debt) and that is extinguished upon payment or performance according to stipulated terms." Black's Law Dictionary 1026 (7th ed. 1999). The Legislature has explained that "[a] mortgage of real property can be created . . . only by writing, executed with the formalities in the case of a grant of real property." SDCL 44-8-1. These formalities include that the mortgage be in writing and that it be signed by the party to be bound. See SDCL 43-25-1. As the definition alludes, a mortgage must also secure a debt. See *Adrian v. McKinnie*, 2002 S.D. 10, ¶ 11, 639 N.W.2d 529, 533. This is an essential element. *Myers v. Eich*, 2006 S.D. 69, ¶ 21, 720 N.W.2d 76, 83. Moreover, "a mortgage is merely incident to the debt it secures." *Kalen v. Gelderman*, 278 N.W. 165, 169 (S.D. 1938) (citing *Barbour v. Finke*, 201 N.W. 711 (S.D. 1924)). Consequently, a mortgage without a debt is a nullity. *FTBK Investor II LLC v. Genesis Holding, LLC*, 7 N.Y.S.3d 825, 834 (N.Y. Sup. Ct. 2014) (citing *U.S. Bank Nat'l Ass'n v. Dellarmo*, 942 N.Y.S.2d 122, 124 (N.Y. App. Div. 2012)).

In this case, there is no question that the 2000 mortgage does not secure a debt. Indeed, the obligations section—where the secured debt is supposed to be listed—does not list a single promissory note, let alone any of the forty-eight promissory notes in dispute. Instead, the only information inserted in this section is Defendants' names and relationship to each other. The section, in pertinent part, provides:

2. Obligations. This Mortgage secures the following (hereinafter referred to as the "Obligations"): a. The payment of the loan made by Mortgagee to Bruce Prins & Corrine Prins/husband and wife

advanced by a promissory notes "dated _____, 19____
in this principal amount \$_____ with a due date
of _____, any renewals, extensions, modifications or
refinancing thereof with and any promissory notes issued in
substitution therefor. . . .

Because no debt is secured by the 2000 mortgage, it is a nullity. *FTBK Investor II LLC*, 7 N.Y.S.3d at 834; *Dellarmo*, 942 N.Y.S.2d at 124.

Although the 2000 mortgage does not secure a debt, Plaintiffs urge, through their responsive brief, for the Court to reform the mortgage to list the intended mortgagee. Plaintiffs contend the intended mortgagee is Investment Enterprises, Inc. However, Investment Enterprises, Inc. is already listed as the mortgagee in the 2000 mortgage. The issue with the 2000 mortgage is its failure to secure a debt. Perhaps recognizing this salient fact, Plaintiffs, immediately after requesting the Court to reform the mortgage by listing the correct mortgagee, argue that the promissory notes⁷ had been transferred from Terrence and Loretta Mealy to Investment Enterprises, Inc. Plaintiffs assert the transfer establishes the debt to be secured for the 2000 mortgage.

Reformation is appropriate "when the minds of the parties have met on the terms of the contract they intended but the writing fails to express that intention." *Hines v. Hines*, 2014 S.D. 32, ¶ 11, 851 N.W.2d 184, 187 (quoting *Enchanted World Doll Museum v. Bushkohl*, 398 N.W.2d 149, 152 (S.D. 1986)). When a court grants reformation, it does not create a contract; rather, it merely revises an already existing contract to reflect what the parties intended. *Id.* "A contract may be reformed when there is 'fraud or mutual mistake of the parties, or a mistake of one party which the other at the time knew or suspected[.]'" *Id.* (quoting SDCL 21-11-1). However, it is presumed that the "writing accurately reflects the intent of the parties." *Enchanted World Doll Museum*, 398 N.W.2d at 152. Therefore, the party "seeking reformation must prove

⁷ Plaintiffs do not identify which promissory notes were transferred. However, the following promissory notes were executed before September 21, 2000: B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, and R.

their case “by clear and convincing evidence.” *Hines*, 2014 S.D. 32, ¶ 11, 851 N.W.2d at 187 (quoting *World Doll Museum*, 398 N.W.2d at 152).

Plaintiffs have not met their burden to establish their case for reformation by clear and convincing evidence. First, this Court would have to actually write the mortgage to make it enforceable. As discussed above, the obligations section of the mortgage is not filled out, with the exception of the Defendants’ names and relationship to each other. This means the Court would have to: (1) insert specific promissory notes and their date of execution; (2) insert the amount of the promissory notes; and (3) insert the due date of the promissory notes.

Second, there is a dearth of evidence in the record provided to the Court that supports Plaintiffs’ position that some promissory notes were transferred from Terrence and Loretta Mealy to Investment Enterprises, Inc. In fact, all of the promissory notes prior to the 2000 mortgage—executed on September 21, 2000—and up to June 6, 2003 are payable to Terrence Mealy, Terrance and Loretta Mealy, and Terrence or Loretta Mealy. None of these notes possess any indication of being transferred and thereby being made payable to Investment Enterprises, Inc. Therefore, the Court would have to again make a material alteration to the mortgage to make it enforceable, *i.e.*, change the mortgagee to Terrence Mealy from Investment Enterprises, Inc. Furthermore, the Court would also have to supply specific promissory notes and their dates of execution, the amount of the promissory notes, and the due date for the promissory notes.

The Court, based on the above analysis, cannot grant reformation in this case because to do so would amount to creating a contract, not merely just revising an existing contract. See *Hines*, 2014 S.D. 32, ¶ 11, 851 N.W.2d at 187.

CONCLUSION

Defendants are entitled to summary judgment as a matter of law on the forty-eight promissory notes. The Defendants presumptively established that the statute of limitations has

run on all forty-eight promissory notes in dispute. As such, the burden shifted to Plaintiffs to establish the existence of material facts in avoidance of the statute of limitations. Plaintiffs offered no persuasive argument that established the existence of material facts that would revive the statute of limitations. First, because Plaintiffs chose South Dakota as the forum to pursue this action, they are bound by its statute of limitations. Second, the subordination agreement referenced a specific promissory note worth \$325,000.00 that is not present among the forty-eight promissory notes in dispute. Thus, there is a hesitation that calls into doubt what debt was referenced in the subordination agreement. Third, the alleged partial payment was not in writing and signed by the Defendants as is required by SDCL 15-2-29. Moreover, the alleged partial payment was inherently ambiguous as to what specific promissory note or notes it was to be applied.

Defendants are also entitled to summary judgment as a matter of law on the 2000 mortgage. The 2000 mortgage fails to secure a debt, an essential element of a mortgage. In an attempt to secure a debt, Plaintiffs unconvincingly argue that reformation of the 2000 mortgage is appropriate. To overcome the presumption that the writing reflects the parties' intent, Plaintiffs must prove their case for reformation by clear and convincing evidence. Plaintiffs fail for two reasons. First, any reformation of the 2000 mortgage would amount to a creation of a new mortgage. The Court would have to supply specific promissory notes and their date of execution, the amount of the promissory notes, and the due date for the promissory notes. Second, there is a lack of evidence in the record establishing promissory notes were transferred from Terrence and Loretta Mealy to Investment Enterprises, Inc. In the absence of a transfer, the Court, to make the 2000 mortgage enforceable, would therefore have to change the mortgagee to Terrence Mealy. This would also necessitate supplying specific promissory notes and their date of execution, the

amount of the promissory notes, and the due date for the promissory notes. As such, the Court would be creating a contract, not revising an existing contract.

Thus, Defendants' motion for partial summary judgment on the forty-eight promissory notes and the 2000 mortgage is granted. Counsel for Defendants shall submit an Order consistent with this Memorandum Decision. In addition, Defendants shall, unless waived by Plaintiffs, prepare Findings of Fact and Conclusions incorporating this Memorandum Decision by reference.

DATED this 23rd day of November, 2015 at Sisseton, South Dakota.

BY THE COURT:


Jon S. Hemmer
Circuit Judge

ATTEST:


Cindy Marshe
Clerk of Courts



Instruction No. 20

If a party has the power to produce a witness but fails to do so, you may infer that the testimony of that witness would not have been favorable to that party. This rule applies only if you find the following facts:

- (1) The party, with exercise of reasonable diligence, could have produced the witness; and
- (2) A reasonable person in the same circumstances would have produced the witness if the party believed the testimony of the witness would be favorable; and
- (3) No reasonable excuse exists for the failure of the party to produce the witness; and
- (4) The witness was not equally available to the adverse party or parties.

STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF ROBERTS

FIFTH JUDICIAL CIRCUIT

LORETTA B. MEALY, Individually and
as Personal Representative of the ESTATE
OF TERRENCE L. MEALY, and
INVESTMENT ENTERPRISES, INC.,

54CIV15-000021

Plaintiffs,

SPECIAL VERDICT FORM

vs.

BRUCE PRINS and CORRINE PRINS,
and PRAIRIE SKY GUEST & GAME
RANCH, LLC,

Defendants.

FILED

NOV 20 2017

SOUTH DAKOTA DISTRICT JUDICIAL SYSTEM
FIFTH CIRCUIT CLERK OF COURT

By: *[Signature]*

We, the jury, duly impaneled in the above-entitled action and sworn to try the issues, find
as follows with respect to the issues we are to address:

Question 1.

With respect to the contract claim concerning the enforceable promissory notes, did
Defendants breach the following promissory notes:

3/1/06, \$35,000 (Exhibit 9);

6/26/06, \$20,000 (Exhibit 10);

7/3/06, \$16,000 (Exhibit 11);

9/1/06, \$15,000 (Exhibit 12);

2/28/07, \$28,000 (Exhibit 13);

6/5/07, \$25,000 (Exhibit 14);

Denied
Law & J. Hemmes
Circuit Court Judge
11-20-17

1/2/08, \$57,000 (Exhibit 15);

Yes No

If "Yes," answer the next question. If "No," go to Question 3.

Question 2.

If you found the enforceable promissory notes were breached, do you find that any of these affirmative defenses prevent their enforcement:

Yes No

<input type="checkbox"/>	<input type="checkbox"/>	(a) Waiver
<input type="checkbox"/>	<input type="checkbox"/>	(b) Estoppel
<input type="checkbox"/>	<input type="checkbox"/>	(c) Laches
<input type="checkbox"/>	<input type="checkbox"/>	(d) Fraud

After Question 2, answer the next question.

Question 3.

With respect to the Plaintiffs' claim that the Defendants committed conversion, do you find (Remember, with conversion, you are identifying the party who has something of value they shouldn't have.):

Defendants owe Plaintiffs proceeds from the sale of the buffalo?

Yes No

If "No," go to Question 7. If "Yes," answer the next question.

Question 4.

State the amount Defendants owe Plaintiffs for the conversion of buffalo sales?

\$ _____

After Question 4, answer the next question.

Question 5.

Do you find that the Plaintiffs are entitled to prejudgment interest for the conversion claim concerning buffalo sales?

Yes

No

If "No," go to Question 7. If "Yes," answer the next question.

Question 6.

On what date (fill in date) _____ and on what amount do you find the Plaintiffs are entitled to pre-judgment interest?

\$ _____

After Question 6, answer the next question.

Question 7.

State what percentage of the buffalo herd is owned by each of the parties:

Plaintiffs _____% Defendants _____%

After Question 7, answer the next question.

Question 8.

With respect to the Defendants' claim that the Plaintiffs committed conversion, do you find (Remember, with conversion, you are identifying the party who has something of value they shouldn't have.):

Did Plaintiffs convert the property reflected in Exhibits TT and UU (other than those items on Exhibit TT by which there is a checkmark)?

Yes No

After Question 8, answer the next question.

Question 9.

Did the Plaintiffs infringe on the Defendants' Federally registered trademark?

Yes No

After Question 9, answer the next question.

Question 10.

Did the Plaintiffs infringe on the Defendants' www.prairieskyranch.com domain name?

Yes No

After Question 10, answer the next question.

Question 11.

Did the Plaintiffs infringe on the Defendants' state trademarks?

Yes No

If you answered "Yes" to any of Questions 8-10, then go to Question 12. If you answered "No" to all of Questions 13-15, go to Question 15.

Question 12.

If you entered "Yes" to any of Questions 8-10, enter the amount of nominal damages sustained by the Defendants as a result. Nominal damages are defined as a trifling sum awarded to a party in an action where there is no substantial loss or injury to be compensated.

\$ _____

After Question 12, answer the next question.

Question 13.

Do you find that the Defendants are entitled to pre-judgment interest?

Yes No

If "No," go to Question 15. If "Yes," answer the next question.

Question 14.

On what date (fill in date) _____ and on what amount do you find the Defendants are entitled to pre-judgment interest?

\$ _____

After Question 14, answer the next question.

Question 15.

With respect to unjust enrichment, do you find that either party is entitled to recover damages because the other party was unjustly enriched, and if so, which party (only one party can recover damages for unjust enrichment):

Neither Party Plaintiffs Defendants

If you checked "Neither Party," the foreperson should date and sign the Verdict Form and notify the bailiff. If you checked either "Plaintiffs" or "Defendants," answer the next question.

Question 16.

In what amount do you find that the party in Question 3 is entitled to damages for unjust enrichment?

If you found for the Plaintiffs, DO NOT include any damages to Plaintiffs that occur prior to March 6, 2005. If you found the Promissory Notes identified in Question 1 were breached and that no affirmative defenses in Question 2 were applicable, then DO NOT include those damages within the award for unjust enrichment. In addition, you should not award Plaintiffs any damages for unjust enrichment included in damages awarded for conversion under Question 4.

\$ _____

If you found for the Defendants, DO NOT include any damages to Defendants that occurred prior to April 20, 2005. You should not award any damages to Defendants for unjust enrichment for any damages you awarded under Questions 12 through 14.

\$ _____

After Question 16, answer the next question.

Question 17.

Do you find the party to whom you awarded damages in Question 16 is entitled to pre-judgment interest?

Yes No

If "No," the foreperson should date and sign the Verdict Form and notify the bailiff. If "Yes," answer the next question.

Question 18.

On what date (fill in date) _____ and on what amount do you find the party is entitled to pre-judgment interest?

\$ _____

The forsperson should date and sign the Verdict Form and notify the bailiff.

Dated this ____ day of November, 2017.

Foreperson

STATE OF SOUTH DAKOTA)
)
COUNTY OF ROBERTS)
)

IN CIRCUIT COURT
FIFTH JUDICIAL CIRCUIT

LORETTA B. MEALY, Individually and
as Personal Representative of the ESTATE OF
TERRENCE L. MEALY, and
INVESTMENT ENTERPRISES, INC.,

Plaintiffs,

v.

BRUCE PRINS and CORRINE PRINS,
and PRAIRIE SKY GUEST & GAME
RANCH, LLC,

Defendants.

54Civ. 15-21

SPECIAL VERDICT FORM

FILED

NOV 20 2017

SOUTH DAKOTA UNITED JUDICIAL SYSTEM
5TH CIRCUIT CLERK OF COURT

By

We, the jury, duly impaneled in the above-entitled action and sworn to try the issues, find as follows with respect to the issues we are to address:

Question 1.

With respect to the contract claim concerning the promissory notes, do you find:

 X (a) They are enforceable promissory notes.

or

 (b) They are contributions to a joint venture.

If you checked 1(b), then skip to Question 6. If you checked 1(a), answer the next question.

Question 2.

If you found that there were enforceable promissory notes, do you find that any of these affirmative defenses prevent their enforcement:

Yes	No	
<u> </u>	<u>X</u>	(a) Waiver
<u> </u>	<u>X</u>	(b) Estoppel
<u> </u>	<u>X</u>	(c) Laches
<u> </u>	<u>X</u>	(d) Fraud

If you checked "Yes" for any of 2(a) through 2(d), then skip to Question 6. If you checked "No" for each of 2(a) through 2(d), then go to the next question.

Question 3.

What amount do you find for the Plaintiffs on this contract claim?

\$ 196,000

After Question 3, answer the next question.

Question 4.

Do you find the Plaintiffs are entitled to pre-judgment interest?

Yes	No
<u>X</u>	<u> </u>

If "No," go to Question 6. If "Yes," go to next question.

Question 5.

On what date (fill in date) 01/02/08 and in what amount of the contract claim do you find the Plaintiffs are entitled to pre-judgment interest?

\$ 196,000

After Question 5, answer the next question.

Question 6.

With respect to unjust enrichment, do you find that either party was unjustly enriched, and if so, which party:

Neither Party Plaintiffs Defendants

X

If you checked "Neither Party," then skip to Question 10. If you checked either "Plaintiffs" or "Defendants," then go to the next question.

Question 7.

In what amount did you find that the party in Question 6 was unjustly enriched?

If you found for the Plaintiffs, DO NOT include any damages to Plaintiffs that occur prior to March 6, 2005, and if you awarded any monies under Question No. 3 above, DO NOT include those again on this line.

\$ 135,000

If you found for the Defendants, DO NOT include any damages to Defendants that occurred prior to April 20, 2005.

\$ Ø

After Question 7, answer the next question.

Question 8.

Do you find that party is entitled to pre-judgment interest?

Yes No

 X

If "No," go to Question 10. If "Yes," go to the next question.

Question 9.

On what date (fill in date) _____ and in what amount of the unjust enrichment do you find the party is entitled to pre-judgment interest?

\$ _____

After Question 9, answer the next question.

Question 10.

With respect to the Plaintiffs' claim that the Defendants committed conversion, do you find (Remember, with conversion, you are identifying the party who has something of value they shouldn't have, and should pay it back.):

(a) Defendants converted funds from the sale of the buffalo?

Yes

No

_____ X

(b) Possession of buffalo that belonged to Plaintiffs?

Yes

No

_____ X

If you found "No" to both (a) and (b), then go to Question 14. If you found "Yes" to either (a) or (b), then answer the next Question.

Question 11.

In what amount did you find that the Defendants committed conversion? (DO NOT include any monies that you may have awarded under Questions 3 and 7 above.)

(a) Buffalo sales \$ _____

(b) Retention of Plaintiffs' buffalo \$ _____

After Question 11, answer the next question.

Question 12.

Do you find that the Plaintiffs are entitled to pre-judgment interest for the conversion claims?

Yes

No

If "No," go to Question 14. If "Yes," go to the next question.

Question 13.

On what date (fill in date) _____ and in what amount of the converted property do you find the Plaintiffs are entitled to pre-judgment interest?

\$ _____

After Question 13, answer the next question.

Question 14.

With respect to the Defendants' claim that the Plaintiffs committed conversion, do you find (Remember, with conversion, you are identifying the party who has something of value they shouldn't have, and should pay it back.):

- (a) Plaintiffs converted Defendants' personal property reflected in Exhibit TT (other than those items by which there is a checkmark)?

Yes

No

X

- (b) Plaintiffs converted Defendants' business property reflected in Exhibit UU?

Yes

No

X

- (c) Plaintiffs converted Defendants' trademark?

Yes

No

X

If you found "No" to (a) through (c), then go to Question 18. If you found "Yes" to either (b) or (c), then answer the next question.

Question 15.

In what amount do you find that the Plaintiffs committed conversion (DO NOT include any monies you may have awarded to Defendants in Question 7 above):

(b) Defendants' business property reflected in Exhibit UU

\$ 135,000 11-20-11

(c) Defendants' trademarks

\$ \$0.00

After Question 15, answer the next question.

Question 16.

Do you find that the Defendants are entitled to pre-judgment interest?

Yes No
_____ X

If "No," go to Question 18. If "Yes," go to the next question.

Question 17.

On what date (fill in date) _____ and in what amount do you find the Defendants are entitled to pre-judgment interest?

\$ _____

After Question 17, answer the next question.

Question 18.

Did the Plaintiffs infringe on the Defendants' Federally registered trademark?

Yes No
_____ X

After Question 18, answer the next question.

Question 19.

Did the Plaintiffs infringe on the Defendants' www.prairieskyranch.com domain name?

Yes	No
_____	<u> X </u>

After Question 19, answer the next question.

Question 20.

Did the Plaintiffs infringe on the Defendants' state trademarks?

Yes	No
_____	<u> X </u>

If you answered "Yes" to any of Questions 18-20, then go to Question 21. If you answered "No" to all of Questions 18-20, then the foreperson should date and sign the Verdict Form and notify the bailiff.

Question 21.

If you entered "Yes" to any of Questions 18-20, enter the amount of damages sustained by the Defendants as a result (DO NOT include any amounts you may have awarded under Question 7 or 15(c) above).

\$ _____

After Question 21, answer the next question.

Question 22.

Do you find that the Defendants are entitled to pre-judgment interest?

Yes	No
_____	_____

If "No," the foreperson should date and sign the Verdict Form and notify the bailiff. If "Yes," then go to the next question.

Question 23.

On what date (fill in date) 20 Nov 2017 ^W and in what amount do you find the Defendants are entitled to pre-judgment interest?

\$ _____

The foreperson should date and sign the Verdict Form and notify the bailiff.

Dated this 20 day of November, 2017.

Al Warkaf
Foreperson

Denied: 03/01/2018

/s/ Jon S. Flemmer

STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF ROBERTS

FIFTH JUDICIAL CIRCUIT

* * * * *

LORETTA B. MEALY, Individually and
as Personal Representative of the ESTATE
OF TERRENCE L. MEALY, and
INVESTMENT ENTERPRISES, INC.,

54CIV15-000021

Plaintiffs,

JUDGMENT

VS.

BRUCE PRINS and CORRINE PRINS,
and PRAIRIE SKY GUEST & GAME
RANCH, LLC,

Defendants.

* * * * *

The above-captioned matter came before the Circuit Court, Honorable Jon S. Flemmer presiding, for a jury trial on November 15-17, 20, 2017. Plaintiffs were represented by their attorneys Reed Rasmussen and Michael J. Scotti. Defendants were represented by their attorneys Lee Schoenbeck and Shawn M. Nichols. The issues in this matter were duly tried, and the jury rendered its verdict on November 20, 2017. The parties stipulated pursuant to SDCL 15-6-39(c) that the equitable issues not triable of right by a jury, would be tried with an advisory jury. The Court hereby adopts all of the jury's findings in regard to those equitable issues set forth specifically in the Special Verdict Form dated November 20, 2017. Based thereon,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment is entered as follows:

1. The following promissory notes between Plaintiffs and Defendants are enforceable and were not contributions to a joint venture:

- (a) Promissory note dated March 2, 2006 in the amount of \$35,000.
- (b) Promissory note dated June 26, 2006 in the amount of \$20,000.
- (c) Promissory note dated July 3, 2006 in the amount of \$16,000.
- (d) Promissory note dated September 1, 2006 in the amount of \$15,000.
- (e) Promissory note dated February 28, 2007 in the amount of \$28,000.
- (f) Promissory note dated June 5, 2007 in the amount of \$25,000.
- (g) Promissory note dated January 2, 2008 in the amount of \$57,000.

Total: \$196,000.

2. None of the following affirmative defenses raised by Defendants were proven by Defendants: (a) waiver; (b) estoppel; (c) laches; or (d) fraud.

3. Plaintiffs are entitled to the contractual interest rate set forth in each of the notes from the date of each note.

4. The Defendants were unjustly enriched in the amount of \$135,000. Therefore, Plaintiffs are entitled to an additional \$135,000 in money damages from Defendants.

5. Plaintiffs are not entitled to prejudgment interest on the \$135,000 unjust enrichment award.

6. The Defendants did not commit conversion in regard to Plaintiffs' buffalo or the funds from the sale of those buffalo.

7. In regard to Defendants' claim that Plaintiffs committed conversion:

- (a) Plaintiffs did not convert Defendants' personal property reflected in Exhibit TT.
- (b) Plaintiffs did convert Defendants' business property reflected in Exhibit UU.
- (c) Plaintiffs did not convert Defendants' trademark or other intellectual property.
- (d) The value of the property converted by Plaintiffs reflected in Exhibit UU is \$135,000.

8. Defendants are not entitled to prejudgment interest on the monetary damage award in their conversion claim.

9. The two claims against each other, each for \$135,000, offset each other.

10. Plaintiffs did not infringe on the Defendants' federally registered trademark.

11. Plaintiffs did not infringe on the Defendants' www.prairieskyranch.com domain name.

12. Plaintiffs did not infringe on the Defendants' state trademarks.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that Judgment is entered against Defendants, in favor of Plaintiffs, as follows:

13. A monetary judgment is entered against Defendants, Bruce and Corrine Prins, jointly and severally, in favor of Plaintiffs in the sum of One Hundred Ninety-Six Thousand Dollars (\$196,000.00), plus prejudgment interest of One Hundred Seventy-Five Thousand Six Hundred Thirty-One Dollars and sixty-nine cents (\$175,631.69) through November 20, 2017.

Additional prejudgment interest is incurred at the daily rate of \$46.17 per day from November 21 until this Judgment is signed.

BY THE COURT:

Circuit Court Judge

ATTEST:

Clerk

Deputy

(Court Seal)

STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF ROBERTS

FIFTH JUDICIAL CIRCUIT

* * * * *

LORETTA B. MEALY, Individually and * 54CIV15-000021
as Personal Representative of the ESTATE *
OF TERRENCE L. MEALY, and *
INVESTMENT ENTERPRISES, INC., *

Plaintiffs,

JUDGMENT

vs.

BRUCE PRINS and CORRINE PRINS,
and PRAIRIE SKY GUEST & GAME
RANCH, LLC,

Defendants.

* * * * *

The above-captioned matter came before the Circuit Court, Honorable Jon S. Flenner presiding, for a jury trial on November 15-17 and 20, 2017. Plaintiffs were represented by their attorneys Reed Rasmussen and Michael J. Scotti. Defendants were represented by their attorneys Lee Schoenbeck and Shawn M. Nichols. The issues in this matter were duly tried, and the jury rendered its verdict on November 20, 2017. The parties stipulated, pursuant to SDCL 15-6-39(c), that the equitable issues not triable of right by a jury, would be tried with an advisory jury. The Court hereby adopts all of the jury's findings in regard to those equitable issues set forth specifically in the Special Verdict Form dated November 20, 2017. Based thereon,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment is entered as follows:

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- (d) Promissory note dated September 1, 2006 in the amount of \$15,000.
- (e) Promissory note dated February 28, 2007 in the amount of \$28,000.
- (f) Promissory note dated June 5, 2007 in the amount of \$25,000.
- (g) Promissory note dated January 2, 2008 in the amount of \$57,000.

Total: \$196,000.

Filed on: 03/08/2018 Roberts

County, South Dakota 54CIV15-000021

2. None of the following affirmative defenses raised by Defendants were proven by Defendants: (a) waiver; (b) estoppel; (c) laches; or (d) fraud.

3. Plaintiffs are entitled to the contractual interest rate set forth in each of the notes from and after January 2, 2008.

4. As of November 20, 2017, the prejudgment interest owed by Defendants totaled \$159,407.83, with a daily accrual rate of \$44.19 thereafter.

5. As of February 1, 2018, the total amount owing, with interest, equaled \$358,589.51.

6. On February 1, 2018, Defendants tendered to Plaintiffs a check in the sum of \$221,439.08, thereby reducing the balance owed to \$137,150.43, with a daily accrual rate of \$30.91 per day thereafter.

7. The Defendants were unjustly enriched in the amount of \$135,000. Therefore, Plaintiffs are entitled to an additional \$135,000 in money damages from Defendants.

8. Plaintiffs are not entitled to prejudgment interest on the \$135,000 unjust enrichment award.

9. The Defendants did not commit conversion in regard to Plaintiffs' buffalo or the funds from the sale of those buffalo.

10. In regard to Defendants' claim that Plaintiffs committed conversion:

- (a) Plaintiffs did not convert Defendants' personal property reflected in Exhibit TT.
- (b) Plaintiffs did convert Defendants' business property reflected in Exhibit UU.
- (c) Plaintiffs did not convert or infringe upon Defendants' trademark.
- (d) Defendants are entitled to \$135,000 of money damages from the Plaintiffs.

11. Defendants are not entitled to prejudgment interest on the monetary damage award in their conversion claim.

12. The awards to each party for \$135,000 offset each other.

13. Plaintiffs did not infringe on the Defendants' federally registered trademark.

14. Plaintiffs did not infringe on the Defendants' www.prairieskyranch.com domain name.

15. Plaintiffs did not infringe on the Defendants' state trademarks.

Based on the foregoing,

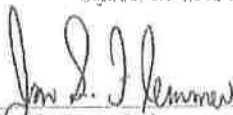
IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that Judgment is entered against Defendants, in favor of Plaintiffs, as follows:

A monetary judgment is entered against Defendants, Bruce and Corrine Prins, jointly and severally, in favor of Plaintiffs in the sum of One Hundred Thirty-Seven Thousand One Hundred Fifty Dollars and Forty-three Cents (\$137,150.43) with interest accruing at the daily rate of \$30.91 from February 1, 2018.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiffs are awarded costs in the sum of \$6,660.11.

BY THE COURT:

Signed: 3/7/2018 6:01:12 PM


Circuit Court Judge

Attest:
Guy, Brenda
Clerk/Deputy



STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
	ss:	
COUNTY OF ROBERTS)	FIFTH JUDICIAL CIRCUIT

LORETTA B. MEALY, Individually and)	
as Personal Representative of the)	
ESTATE OF TERRENCE L. MEALY, and)	54 Civ. 15-21
INVESTMENT ENTERPRISES, INC.,)	
)	PARTIAL SUMMARY JUDGMENT
Plaintiffs,)	
)	
v.)	
)	
BRUCE PRINS and CORRINE PRINS,)	
and PRAIRIE SKY GUEST & GAME)	
RANCH, LLC,)	
)	
Defendants.)	

Defendants' Motion for Partial Summary Judgment was heard before this Court on August 24, 2015, and the Defendant, Bruce Prins, having appeared personally and with counsel, Lee Schoenbeck, and the Plaintiffs having appeared through counsel, Julie Dvorak, and the Court having reviewed the filings and listened to the arguments of counsel, hereby issues the following partial summary judgment.

IT IS ORDERED, ADJUDGED, AND DECREED that the following forty-eight promissory notes are unenforceable as a matter of law, having been barred by the Statute of Limitations:

Schedule of Promissory Notes

Date	Amount	Ex. # (attached to the Complaint)
4/28/99	5,000.00	B
6/9/99	7,000.00	C
7/26/99	10,000.00	D
8/10/99	8,000.00	E

Date	Amount	Ex. # (attached to the Complaint)
8/28/99	10,000.00	F
9/24/99	12,000.00	G
10/6/99	7,000.00	H
11/11/99	15,000.00	I
11/29/99	5,000.00	J
12/21/99	9,000.00	K
1/10/00	35,000.00	L
2/10/00	6,000.00	M
2/25/00	8,000.00	N
4/8/00	35,000.00	O
5/12/00	9,500.00	P
5/12/00	16,000.00	Q
6/27/00	18,000.00	R
9/22/00	15,000.00	S
11/30/00	9,500.00	T
12/28/00	25,000.00	U
2/28/01	25,000.00	V
4/14/01	15,000.00	W
9/8/01	15,000.00	X
1/12/02	17,000.00	Y
2/7/02	15,000.00	Z
3/12/02	25,000.00	AA
4/15/02	20,000.00	BB
6/26/02	5,000.00	CC
9/11/02	8,000.00	DD
9/11/02	27,000.00	EE
12/30/02	30,000.00	FF
2/7/03	12,000.00	GG
3/14/03	26,000.00	HH
6/6/03	35,000.00	II
9/23/03	39,000.00	JJ
1/2/04	38,000.00	KK
3/5/04	26,000.00	LL
4/5/04	27,000.00	MM
7/16/04	18,000.00	NN
9/1/04	20,000.00	OO
12/29/04	44,000.00	PP
7/06/05	20,000.00	QQ
8/08/05	25,000.00	RR
9/22/05	25,000.00	TT
12/27/05	45,000.00	UU
3/30/06	35,000.00	WW
4/26/06	35,000.00	XX

Date	Amount	Ex. # (attached to the Complaint)
12/20/06	54,000.00	BBB

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the document entitled Mortgage, attached as Exhibit A to Plaintiffs' Complaint, which purports to be a mortgage between Investment Enterprises, Inc., an Iowa corporation, as Mortgagee, and Bruce Prins and Corrine Prins, husband and wife, as Mortgagors, and dated at September 21, 2000, and recorded on July 10, 2001, at 1:40 p.m., in the Roberts County Register of Deeds office, on Book 204, pages 954-958, of Mortgages, and purporting to encumber the real property set forth below, is void, unenforceable, and shall be cancelled on the public record:

Lots Two (2), Three (3), and Four (4), Southwest Quarter of Northwest Quarter (SW1/4NW1/4), Northwest Quarter of Southwest Quarter (NW1/4SW1/4), and Southeast Quarter (SE1/4), all in Section Four (4), Township One Hundred Twenty-five North (125N), Range Fifty-two (52).

Northeast Quarter of Southeast Quarter (NE1/4SE1/4), of Section Five (5), Township One Hundred Twenty-five North (125N), Range Fifty-two (52), and

West Half of Northeast Quarter (W1/2NE1/4), West Half of Southeast Quarter (W1/2SE1/4), Northeast Quarter of Southeast Quarter (NE1/4SE1/4), and Southeast Quarter of Southeast Quarter (SE1/4SE1/4) of Section Thirty-two (32), Township One Hundred Twenty-six North (126N), Range Fifty-two (52).

all West of the 5th P.M., Roberts County, State of South Dakota.

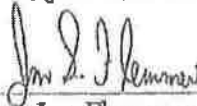
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the

Memorandum Decision of the Court, dated November 23, 2015, is incorporated herein by this reference.

Dated: _____

BY THE COURT

Signed: 11/30/2016 10:21:00 AM



Hon. Jon Flemmer
Circuit Court Judge

ATTEST:

Attest:
Cindy Marohl, Clerk/Deputy

Clerk/Deputy



IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

No. 28588

**LORETTA B. MEALY, Individually and as Personal
Representative of the ESTATE OF TERRENCE L. MEALY,
and INVESTMENT ENTERPRISES, INC.**

Plaintiffs and Appellants,

vs.

**BRUCE PRINS and CORRINE PRINS, and
PRAIRIE SKY GUEST & GAME RANCH, LLC,**

Defendants and Appellees.

Appeal from the Circuit Court, Fifth Judicial Circuit
Roberts County, South Dakota

HONORABLE Jon S. Flemmer
Presiding Judge

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PRELIMINARY STATEMENT

Appellees, Bruce Prins and Corrine Prins will be referred to by their first names, “Bruce” and “Corrine,” or collectively as “Prinses,” and references to Appellee, Prairie Sky Guest & Game Ranch, LLC, will be by “Prairie Sky.” Appellant, Loretta B. Mealy, individually and as personal representative of the Estate of Terrence L. Mealy, will be referred to by her first name, “Loretta”; references to Terrance Mealy will be by use of his first name, “Terrance” or “Terry”; and collective references by use of “Terrance and Loretta Mealy” or “Mealys.” Appellant, Investment Enterprises, Inc., will be referred to as “Investment Enterprises.” The Appellants collectively will be referred to as “Plaintiffs.” References to the trial transcript will be designated as (“TT ____”) followed by the appropriate page number; and the trial exhibits will be designated as (“T.EX. ____”) followed by the exhibit number. The settled record will be designated as (“SR ____”) followed by the appropriate page number. The Appendix for this brief will be referred to as (“App. ____”) followed by the appropriate page number. References to the Brief of Appellants will be by “Appellants’ Brief” followed by the appropriate page number.

JURISDICTIONAL STATEMENT

The Circuit Court’s Memorandum Decision, Partial Summary Judgment, and related Order were filed on November 23, 2015, and December 1, 2015, respectively (App. 1-22), and reaffirmed on September 26, 2017 (SR 1126-1127). The Circuit Court entered its final Judgment, following a jury trial, on March 8, 2018. (App. 31-33.) Plaintiffs filed a Notice of Appeal on April 6, 2018. (SR

2262-2263.) Defendants filed a Notice of Review on April 20, 2018. Jurisdiction exists in accordance with SDCL 15-26A-3(1).

STATEMENT OF LEGAL ISSUES

- 1. Under South Dakota law, did the statute of limitations bar recovery on the Promissory Notes created between 1999 and 2006?**

The Trial Court held that the statute of limitations barred recovery on the Promissory Notes created between 1999 and 2006.

Lang v. Burns, 97 N.W.2d 863 (S.D. 1959);
Wipf v. Blake, 28 N.W.2d 881 (S.D. 1947); and
Work v. Allgier, 2018 S.D. 56, 915 N.W.2d 859.

- 2. Is the issue of Mortgage enforceability moot?**

The Trial Court held that the Mortgage was not enforceable.

Burns v. Burns, 11 N.W.2d 461 (Iowa 1943);
Hass v. Wentzlaff, 2012 S.D. 50, 816 N.W.2d 96;
Wipf v. Blake, 28 N.W.2d 881 (S.D. 1947); and

- 3. Did the Trial Court commit prejudicial error when it gave the pattern jury instruction on a missing witness because two of Plaintiffs' experts referred to during the jury trial did not testify?**

The Trial Court allowed a missing witness instruction based on the unavailability of two of Plaintiffs' experts.

City of Rapid City v. Brown, 252 N.W.2d 323 (S.D. 1977);
State v. McGarret, 535 N.W.2d 765 (S.D. 1995);
Vetter v. Cam Wal Elec. Co-op., Inc., 2006 S.D. 21, 711 N.W.2d 612; and

- 4. Did the Trial Court abuse its discretion regarding the prejudgment interest on Plaintiffs' contract claim?**

The Trial Court used a prejudgment interest calculation found in Prinses' Special Verdict Form.

Grynberg v. Citation Oil & Gas Corp., 1997 S.D. 121, 573 N.W.2d 493;
Lang v. Burns, 97 N.W.2d 863 (S.D. 1959);
Mortweet v. Eliason, 335 N.W.2d 812 (S.D. 1983).

5. Did the Trial Court err in allowing evidence of the time-barred notes to be considered as part of Plaintiffs' unjust enrichment claim?

The Trial Court allowed evidence of time-barred notes to be considered as part of Plaintiffs' unjust enrichment claim.

Detmers v. Costner, 2012 S.D. 35, 814 N.W.2d 146;
Granite Buick GMC, Inc. v. Ray, 2014 S.D. 78, 856 N.W.2d 799; and
Johnson v. Larson, 2010 S.D. 20, 779 N.W.2d 412.

STATEMENT OF THE CASE

This appeal originated from a suit Plaintiffs commenced on March 3, 2015, against the Prinses. (SR 2-17.) The Complaint alleged a claim for breach of contract, conversion, and unjust enrichment. The Complaint alleged that the Prinses failed to repay money loaned to them by the Plaintiffs through fifty-five Promissory Notes. Plaintiffs also alleged that the Prinses exercised control over or seriously interfered with Plaintiffs' interests in a buffalo herd. Lastly, the unjust enrichment claim was brought for both the alleged mishandling of buffalo sales by the Prinses and the alleged loan proceeds provided to the Prinses by the Plaintiffs.

On January 11, 2016, the Prinses filed an Amended Answer and Counterclaim. (SR 343-356.) The Prinses' Amended Counterclaim alleged claims of conversion, misappropriation of business opportunity, unjust enrichment, and claims relating to trademark infringement. (SR 347-353.)

On August 10, 2015, the Prinses moved for partial summary judgment because: (1) the statute of limitations barred recovery on forty-eight of fifty-five Notes; and (2) the Mortgage was unenforceable. (SR 91-93.) The Trial Court granted the Motion for Partial Summary Judgment, finding that: (1) the Promissory Notes were unenforceable as a matter of law, having been barred by

the statute of limitations; and (2) that the Mortgage was void and unenforceable. (App. 19-22.)

On November 15, 2017, a jury trial was held. On November 20, 2017, the jury returned its Verdict, finding: (1) for Plaintiffs on the breach of contract claim for the seven Notes that were not barred by the statute of limitations, and awarded \$196,000 plus prejudgment interest; (2) for Plaintiffs on the unjust enrichment claim, and awarded \$135,000; (3) for the Prinses on the Plaintiffs' claim for conversion relating to the buffalo herd; and (4) for the Prinses on part of their conversion of property claim, and awarded \$135,000. (App. 23-30.)

On March 7, 2018, a Judgment was entered on the jury verdict (App. 31-33), and on March 15, 2018, a "full and complete satisfaction of the Judgment" was executed by Plaintiffs' counsel and filed (App. 36).

STATEMENT OF THE FACTS

I. History.

Terry Mealy was an attorney in Cherokee, Iowa. (TT pp. 162:1-3.) Terry spent his life acquiring many different businesses. (TT pp. 162:8-22.) His skill and prowess made him a successful businessman with substantial real estate holding. (TT pp. 162:23-163:1.)

Terry acquired Duck Creek Ranch in a debt workout. (TT pp. 95:4-16.) The ranch is located in the hills above Veblen, South Dakota, and Terry Mealy owned it for several years and rented it out for pasture land. (TT pp. 96:8-12.) Eventually, Terry Mealy's representative, Danny Smeins, contacted Bruce and Corrine Prins and asked if they would be interested in taking a look at it. (TT pp. 407-8.) Bruce and Corrine presented a proposal to Terry Mealy that involved

them working for him, T.Ex. FFF (App. 103) and TT pp. 364-5, because they didn't have the capital to do this. Terry Mealy made a different proposal that involved them having a right of first refusal. (T.Ex. GGG (App. 104-107.) The parties never formalized their agreement on the operation of the ranch and hospitality business. (TT pp. 365; 183:8-14.)

Bruce and Corrine Prins moved on to the property in 1999 and started cleaning it up. (TT pp. 358-9.) Prinses and Mealys ran the hospitality and ranch as one business, with one checking account. (TT pp. 356-9.) Bruce and Corrine Prins did the work, put the money into improving the property (TT pp. 407), and opened up a business that they named Prairie Sky Ranch. (TT pp. 394-5.) From 1999 through 2008, Bruce and Corrine provided the labor and worked the lodging business, ranch, and established a buffalo herd. (TT pp. 359-64.)

II. Financing Prairie Sky Ranch.

A. The Notes and the Mortgage.

Bruce and Corrine Prins didn't have the money to do the work on the property that was owned by Terry Mealy, so Terry Mealy put the money in. (TT pp. 261:24-262:6.) Each time Terry Mealy put money into the business, he had Bruce and Corrine Prins sign a Promissory Note, starting in 1999. (TT pp. 366.) From 1999 through 2008, there were fifty-five times where Terry Mealy put money into the business and had Bruce and Corrine Prins sign notes. (T.Exs. V & W, App. 99-102.) The notes included time notes and demand notes. (T.Exs. V & W, App. 99-102.) At no time were there ever any collection efforts made by Terry Mealy on any of the notes, and the statute of limitations ran on forty-eight of the fifty-five notes by December 30, 2014. (TT pp. 532; T.Ex. W, App. 102.) Of the Notes that the statute of limitations ran on, forty-two of them were held by

Terrence Mealy, Loretta Mealy, or both Terrence and Loretta Mealy. (T.Ex. V, App. 99-101.)

During the early years of the Prinses and Terry Mealy's business relationship, the Prinses executed a Mortgage. (App. 38-42.) The parties to the Mortgage, the Prinses and Investment Enterprises, executed the Mortgage on September 21, 2000. (App. 38-42.) Investment Enterprises was a corporation owned by Mealys. (TT pp. 94:16-24.) Section 2(a) of the Mortgage provided:

Obligations. This Mortgage secures the following...:

a. The payment of the loan made by Mortgagee to Bruce Prins & Corrine Prins/ husband and wife evidenced by a promissory notes dated _____, 19__ in the principal amount of \$_____ with a due date of _____, any renewals, extensions, modifications or refinancing thereof and any promissory notes issued in substitution therefor;....

(App. 38.)

The Mortgage provides that it "shall be governed by and construed in accordance with the laws of the State of Iowa." (App. 41.)

B. The Subordination Agreement.

In 2008, Terry Mealy hit some difficult financial circumstances, and could no longer provide his share of the upkeep for this endeavor. (TT pp. 368.) At that point in time, Bruce and Corrine Prins borrowed money from Dacotah Bank to keep the business going. (TT pp. 368-9.) When funds were borrowed from Dacotah Bank, Investment Enterprises, Inc. had to sign a Subordination Agreement, prioritizing Investment Enterprises, Inc.'s Mortgage behind Dacotah Bank. (App. 43-46.) The Subordination Agreement states:

WHEREAS Investment Enterprises, Inc. is the owner and holder of a certain note for Three Hundred Twenty-five Thousand Dollars (\$325,000.00) and interest secured by a certain mortgage for such sum and interest made by

Investment Enterprises, Inc. to Mortgagor, dated the 21st day of September, 2000,....

(App. 43; SR 185.)

Additionally, the Subordination Agreement reads:

1. Subordination. Investment Enterprises, Inc., hereby covenants, consents, and agrees with Dacotah Bank that the mortgage held by Investment Enterprises, Inc. dated September 21, 2000 is and shall continue to be subject and subordinate to the mortgage about to be made by Dacotah Bank....

(App. 44; SR 186.)

Page 2 of the Subordination Agreement indicates that the purpose for the agreement was to induce Dacotah Bank to put money into Prairie Sky by utilizing the Prins ranch as collateral.

After 2008, the business operation of the ranch and lodge were funded by Bruce and Corrine Prins borrowing from Dacotah Bank, and from the sale of buffalo. (TT pp. 368-70.)

C. Terry Mealy's financial oversight of Prairie Sky.

Each year, Bruce Prins had an accountant, Collette Hull, prepare financial statements (T.Exs. E-T, App. 59-98), which he provided to Terry Mealy. (TT pp. 367-8, 370-1.) The funds Terry Mealy contributed were listed by Prinses as management fees, and not as debts or promissory notes. (TT pp. 367-8; 171:5-7.) The Dacotah Bank loan was listed under debts. (TT pp. 170:9-13; T.Ex. O, App. 87-88) Ranch labor and buffalo sales are line-items on the Prairie Sky Financial Statement. (T.Exs. E-T, App. 59-98; TT pp. 374.) Bruce and Corrine Prins viewed the Note proceeds as management fees and reported them on their income tax return each year. (TT pp. 368.)

There were no collection efforts of the old debt by Terry Mealy, or anybody on his behalf, prior to the commencement of the lawsuit. (TT pp. 532; 174:3-10.) Terry Mealy passed away on February 17, 2011. (TT pp. 92:6-8.) In 2014 and 2015, the Mealys approached Bruce Prins about the debt, and he would not sign an acknowledgement of the old debt. (TT pp. 527-8.)

III. The buffalo herd.

Bruce and Corrine Prins had an initial buffalo herd they brought to Prairie Sky Ranch for guests to see. (TT pp. 358.) Eventually, Terry Mealy wanted to also have buffalo, so Bruce started acquiring buffalo for both he and Terry. (TT pp. 384-9; T.Ex. A, App. 49-58.) Annually, starting in 2002, the buffalo were rounded up, counted, and when the market permitted—some were sold. (TT pp. 385:6-10.) In the early years, Terry Mealy took his money back from the sale of the buffalo (TT pp. 390-1), while Bruce Prins didn't sell his buffalo and allowed his percentage of the herd to grow (TT pp. 391-2). The parties never did a complete history and accounting, summarizing the purchase and sale of buffalo, until the lawsuit was commenced. (TT pp. 383:10-23.)

After the lawsuit commenced, Bruce Prins prepared a document titled “Prins: Buffalo Production” that walked through each year's purchases, sales, and buffalo ownership, and cross referenced the document that supported each transaction. (TT pp. 373-6; T.Ex. A, App. 49-58.) This document showed that Terry Mealy had taken the proceeds from the sale of many of his animals (TT pp. 369), and that after 2008, the Prinses used those proceeds to supplement the ranch and lodging business. (App. 52-58.) By the end of 2014, the last year when a complete record was available, Bruce Prins owned 62% of the buffalo herd. (T.Ex. A, App. 57; TT pp. 392:5-7.)

At the time of the lawsuit, about half the buffalo herd was located at the Prairie Sky Ranch, and the other half was at the Rocking P Ranch, which is owned by Bruce and Corrine Prins. (TT pp. 374:6-11.) The Rocking P Ranch was used for the buffalo herd because it had twice as many usable acres; since Prairie Sky had a leafy spurge problem. (TT pp. 363:4-8.) No rental payments were made to Bruce and Corrine Prins for the use of their ranch. (TT pp. 175:16-21.)

At trial, Plaintiffs did not call any witnesses to contradict the documentation that walked through the history of the buffalo ownership. The Plaintiffs did comment that other experts disapproved or would disapprove of Bruce Prins' analysis. First, Loretta Mealy said Bruce gave them a calculation about "his interpretation of ownership of the animals, but [the Plaintiffs] did not have a forensic accountant" review it. (TT 206:2-207:7.) Second, Patrick Mealy, the Vice-President of the corporation, testified at trial that he had an expert who called Bruce Prins' analysis "horse pucky." (TT pp. 534-5.)

When there were production sales of buffalo in the fall after 2008, the proceeds were used to pay the operating notes at Dacotah Bank. (TT pp. 380-92.) The Mealys knew that the round-up and production sale took place each year. (T.Ex. 91, App. 108-110; TT pp. 168:23-169:4, pp. 521-2, pp. 539:22-540:10.)

IV. Prairie Sky's change in value.

Through the course of the sixteen years that the Mealys and Prinses were in business together, Bruce Prins found tracts of real estate that would improve the Prairie Sky Ranch, and negotiated deals for the purchase of those tracts. (TT pp. 407.) Prairie Sky went from 640 acres to 1,300 acres at the time of the lawsuit. (TT pp. 96:16-18; 293:12-15.) The initial purchase of Prairie Sky was

\$670,000. (TT pp. 602:6-7.) The value of the ranch land by the time of the lawsuit was \$3.9 million, which does not include any of the buildings and improvements made by the Prinses. (TT pp. 603:16-19.)

Prairie Sky's buildings and land were improved from a state of neglect that existed before the Prinses oversaw its operation. (TT pp. 161:13-15.) Improvement of the property by Bruce Prins included regular maintenance, replacing fence, and creating habitat through planting of trees. (TT pp. 361:3-364:7.) Specifically, the Prinses paid for and worked to plant thousands of trees on the property. (TT pp. 363:19-364:9.) Through the Prinses' work, Prairie Sky was transformed into a completely rebuilt and re-landscaped ranch. (TT pp. 407:10-18.)

Bruce and Corrine Prins had a large amount of inventory and personal property located at the ranch at the time the lawsuit was commenced. Mealys kept all of those assets; the inventory alone was valued at \$169,199 (T.Ex. UU.), which does not include the value of the Prinses' personal property. (TT pp. 192:12-194:4.)

STANDARD OF REVIEW

Legal issues 1 and 2 fall under the standard of review for summary judgment, described below.

“This Court reviews entry of summary judgment de novo.” *Hass v. Wentzlaff*, 2012 S.D. 50, ¶ 11, 816 N.W.2d 96, 101 (citing *Adrian v. Vonk*, 2011 S.D. 84, ¶ 8, 807 N.W.2d 119, 122). On appeal, this Court “determine[s] only whether a genuine issue of material fact exists and whether the law was correctly applied. *Id.* (citing *Saathoff v. Kuhlman*, 2009 S.D. 17, ¶ 11, 763 N.W.2d 800, 804). If there is any legal basis to support the court's ruling, this Court must

affirm. *Plato v. State Bank of Alcester*, 1996 S.D. 133, ¶ 3, 555 N.W.2d 365, 366 (citation omitted); *see also Hass*, ¶ 11, 816 N.W.2d at 101 (“If there exists any basis which supports the ruling of the trial court, affirmance of a summary judgment is proper.”).

Legal issues 3, 4, and 5 were not decided by summary judgment. The standard of review for each of these issues are addressed specifically in their respective sections.

ARGUMENT

I. The South Dakota Statute of Limitations bars recovery on the Promissory Notes created between 1999 and 2006.

A. Statute of Limitations are important.

Statute of limitations hold an important place in our justice system because it is “unjust to leave open indefinitely exposure to outdated lawsuits.” *Strassburg v. Citizens State Bank*, 1998 S.D. 72, ¶ 8, 581 N.W.2d 510, 514 (quoting *Wood v. Carpenter*, 101 U.S. 135, 139 (1879)). As this Court noted in *Strassburg*, the statute of limitations “protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.”

Those concerns are present in this case where an important witness, Terry Mealy, the party who negotiated every one of Plaintiffs’ Notes and did not choose to treat them as debts for years, has passed away. The first alleged Promissory Note is nineteen years old. Memories have undoubtedly faded. An action on the forty-eight alleged Promissory Notes is rightly barred by the statute of limitations.

The Promissory Notes provide that they are controlled by Iowa law, and Iowa law says that the statute of limitations in the forum where the action is commenced controls. *Great Rivers Co-op of Se. Iowa v. Farmland Indus., Inc.*, 934 F. Supp. 302, 305-06 (S.D. Iowa 1996) *aff'd sub nom. Great Rivers Co-op. of Se. Iowa v. Farmland Indus., Inc.*, 120 F.3d 893 (8th Cir. 1997).

Forty-five of the Notes are “notes payable at a definite time,” which are referred to as “time notes,” and for those the statute of limitations is six years, pursuant to SDCL 57A-3-118. The time notes on the list of forty-eight notes attached to Plaintiffs’ Complaint are identified as Exhibits B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z, AA, CC, DD, EE, FF, GG, HH, II, JJ, KK, LL, MM, OO, QQ, RR, TT, UU, WW, XX, and BBB. (SR 23-48, 50-60, 62, 64-65, 67-68, 70-71.) The statute of limitations ran on these time notes between April 29, 2005, to December 21, 2012.

Three of the Notes attached to Plaintiffs’ Complaint, Exhibits BB, NN, and PP, are demand notes, and the statute of limitations for demand notes is ten years. SDCL 57A-3-118(b). (SR 49, 61, 63.) The ten-year statute of limitations ran on these demand notes between April 16, 2012, to December 30, 2014.

The lawsuit was not commenced until March 3, 2015, well after the statute of limitations ran on these forty-eight Notes.

B. There was no appropriate acknowledgement that would waive the Statute of Limitations as to each of the forty-eight Notes.

SDCL 15-2-29 allows for revival of a contract, barred by the statute of limitations, when there is a signed writing acknowledging the debt by the party enforcing the statute of limitations defense. (SDCL 15-2-29.) However, the signed writing of acknowledgement of the debt “must be consistent with a

promise to pay, ***unqualified, clear, plain, unambiguous, and so distinct in its extent and form as to preclude hesitation*** as to the debtor's meaning, and so as to enable the court to apply its terms as the debtor intended they should be applied." *Wipf v. Blake*, 28 N.W.2d 881, 882 (S.D. 1947) (emphasis added). Additionally, "the implication of a promise from an acknowledgement of the existence of the debt is not warranted if there be ***anything in the terms of the writing which tend to repel such an inference or leave it in doubt.***" *Id.* (emphasis added). Lastly, looking at the entirety of the written acknowledgement, the "expressions [within the written document] evince a willingness on defendant's part to ***make a new contract to pay the debt.***" *Id.* at 883 (emphasis added).

Plaintiffs argue that the following language of the Subordination Agreement revives all forty-eight Notes, and meets the requirements of *Wipf*:

1. *Subordination.* Investment Enterprises, Inc. hereby covenants, consents, and agrees with Dacotah Bank that the mortgage held by Investment Enterprises, Inc. dated September 21, 2009 is and shall continue to be subject and subordinate to the mortgage about to be made by Dacotah Bank...

(App. 44, SR 186.)

This argument fails for several reasons.

1. **Terrence and Loretty Mealy are not named in the Mortgage or Subordination Agreement, but are the named party on forty-two of the forty-eight notes.**

Forty-two of the forty-eight Notes have the names of either Terrance Mealy, or Terrance and Loretta Mealy. (App. 47-48.) The Subordination Agreement does not mention Terrance Mealy or Loretta Mealy any place on the

face of the document. (App. 43.) Likewise, the Mortgage does not include Terrance Mealy or Loretta Mealy on the face of the document. (App. 38.)

Wipf requires “unqualified, clear, unambiguous” intentions to “make a new contract to pay the debt” that does not “leave it in doubt.” *Id.*, at 882. The Subordination Agreement, which references the Mortgage that does not contain the names of Terrance or Loretta Mealy, does not reflect any intention to revive notes with Terrance and Loretta Mealy as the named parties.

2. Neither the Mortgage or Subordination Agreement mentions any of the forty-eight Notes.

The Subordination Agreement, relied upon by Plaintiffs to revive all of the forty-eight Notes, does not mention any of the Notes—it mentions the Mortgage. Plaintiffs argument is that by mentioning the Mortgage, the forty-eight Promissory Notes are implicitly revived. (Appellants’ Brief pp. 24.) However, the Mortgage itself does not mention any of the forty-eight Notes. (App. 38-42.) It has a blank line where the debt would be described. (App. 38.) The Mortgage reads:

- a. The payment of the loan made by Mortgage to Bruce Prins & Corrine Prins/husband and wife advanced by a promissory notes dated _____, 19__ in the principal amount of \$_____ with a due date of _____, any renewals, extensions, modifications or refinancing thereof and any promissory notes issued in substitution therefor;

(App. 38 ¶ 2(a).)

Again, under the *Wipf* requirements, the Subordination Agreement, that does not mention the forty-eight Notes, cannot revive those same Notes. Plaintiffs reliance on the Subordination Agreement’s mention of the Mortgage

also fails the *Wipf* requirements, because the Mortgage also fails to mention any of the forty-eight Notes.

3. The Subordination Agreement is for a different debt.

The Subordination Agreement adds to the ambiguity by reflecting a very different debt:

WHEREAS Investment Enterprises, Inc. is the owner and holder of a certain note for Three Hundred Twenty-five Thousand Dollars (\$325,000) and interest, secured by a certain mortgage for such sum and interest made by Investment Enterprises, Inc. to Mortgagor, dated the 21st day of September 2000...

(App. 43; SR 185.)

This language creates ambiguity and leaves any inference of a promise to pay any of the Notes in doubt, because it refers to a “certain note for \$325,000.” There is no note within the forty-eight Notes barred by the statute of limitations in the amount of \$325,000, and no combination of the forty-eight Notes added together total \$325,000. This language is not “distinct in its extent and form as to preclude hesitation” when the amount on the Subordination Agreement does not match any particular Note held by the Plaintiffs nor any combination of the Notes. This lack of congruence creates ambiguity and doubt, which this Court has not ignored in prior rulings. *Wipf*, 28 N.W.2d at 882.

4. *Wipf* requires a consideration of the “whole” document, and does not allow excluding the “recitals.”

Rather than addressing why the \$325,000 language creates ambiguity and doubt, Plaintiffs urge the Court to ignore the language because it was within the recitals of the document, and instead to focus on language from the “operative part of the agreement.” (Appellants’ Brief pp. 25) Plaintiffs then cite to various foreign case law that “disregards a recital clause” when it is contrary to an

operative section. *Id.* Plaintiffs' argument picks and chooses which language they believe is legally binding, but this argument and their foreign case law is contrary to the South Dakota law established in *Wipf*. *Wipf* specifically requires that the review be of the "writing as a whole." *Wipf*, at 883.

5. A Subordination Agreement is made to subordinate loans, not create or acknowledge a debt.

The Subordination Agreement is not "consistent with a promise to pay" the debt. Rather, within the Subordination Agreement, the reference to the Mortgage was done only to ensure that Dacotah Bank would lend funds to the Prinses. In *Wipf*, the debtor wrote to the creditor: "I received your letter and I am planning on making a settlement on this note as soon as I get the funds I will let you know as soon as I am in a position to do this." *Id.* at 881. The *Wipf* Court found that because the debtor conditioned his promise to pay, there could be no inference of a promise to pay from the acknowledgment of the debt. *Id.* at 883. The Prinses made no such promise to pay in the Subordination Agreement, and only referenced the Mortgage in the context of receiving funding from Dacotah Bank. Following the rationale behind *Wipf*, a subordination agreement does not "evinced a willingness on defendant's part to make a new contract to pay the debt." *Id.*

C. Plaintiffs cannot on appeal for the first time raise the affirmative defense of waiver or estoppel, when they didn't do so in opposing the motion for summary judgment.

Besides the legal argument of acknowledgement that is addressed above, on pages 26-28 of Appellants' Brief, they have constructed an argument involving *Work v. Allgier*, 2018 S.D. 56, 915 N.W.2d 859. *Work* is a decision about the

applicability of a statute of limitations in a debt collection situation, but there is a significant difference between *Work* and this matter before the Court. In *Work*, the creditor opposed the applicability of the defense of a statute of limitations based upon waiver and estoppel. *Id.*, at ¶ 23-27, 865-6. In the record before this Appellate Court, the Court will see that these Plaintiffs did not raise those defenses at the hearing for summary judgment. At the hearing for summary judgment, the Plaintiffs argued the Iowa ten-year statute of limitations (Plaintiffs' Brief pp. 4-5, SR 169-70) and partial payment (Plaintiffs' Brief pp. 5, 7; SR 170, 172). Each of these are legal arguments, neither of which the Plaintiffs are asserting in this appeal.

"This court has said on countless occasions that an issue may not be raised for the first time on appeal. Thus, an issue not presented at the trial court level will not be reviewed at the appellate level." *Mortweet v. Eliason*, 335 N.W.2d 812, 813 (S.D. 1983) (citations omitted). The Court has also articulated its rationale behind this rule:

A trial judge is entitled to be advised of the grounds on which he is asked to rule. Unless this is done it cannot be said that the trial court passed on the ground of which review is being sought. If undisclosed grounds, including afterthoughts, can be reviewed on appeal, the virtue of preparation for trial would be compromised.

Lang v. Burns, 97 N.W.2d 863, 866 (S.D. 1959).

Plaintiffs attempt to "side-step" this inadequacy by pointing out that they had submitted evidence of alleged inequitable behavior. However, a review of the record shows this evidence was submitted in support of other legal theories, and the act of submitting evidence is not enough to preserve an issue for appeal because it does not advise the trial court "of the grounds on which he is asked to rule." *Id.*

Therefore, the Trial Court correctly concluded that the forty-eight Notes are barred by the statute of limitations, and the Trial Court should be affirmed by this Court.

II. The enforceability of the Mortgage is moot.

The enforceability of the Mortgage is moot because all the debts secured by the Mortgage are barred by the statute of limitations or have been paid in full. An issue is moot when no controversy exists that can be remedied by the court. *Matter of Woodruff*, 1997 S.D. 95, ¶ 10, 567 N.W.2d 226, 228. Here, no controversy or Mortgage exists because no debt exists; as described below, under Iowa law, a mortgage survives only by the debt it secures.

A. Iowa law controls.

The Prinses agree with Plaintiffs' assertion that Iowa law controls the validity of the Mortgage, due to the Mortgage's choice of law provision. (Appellants' Brief pp. 14) South Dakota law clearly allows choice of law provisions that control substantive law and do not violate public policy. *Dunes Hosp., L.L.C. v. Country Kitchen Int'l, Inc.*, 2001 S.D. 36, ¶ 10, 623 N.W.2d 484, 488. Iowa's law on what constitutes a mortgage is substantive law that does not violate any specific public policy of South Dakota.

Iowa law finds a mortgage to be valid if there is debt secured by the mortgage. *Burns v. Burns*, 11 N.W.2d 461, 463. In *Burns*, the Iowa Supreme Court articulated the following:

Statements that the mortgage is extinguished when the debt is barred by the statute of limitations mean the condition of the mortgage is the same as that of the debt which it secures. If the debt is unenforceable, the mortgage is in the same situation.

Id. (emphasis added)¹.

B. All the debts secured by the Mortgage have been satisfied.

The Mortgage between Prinses and Plaintiffs is not enforceable because the statute of limitations barred forty-eight of the fifty-five Notes, and the remaining seven Notes have been paid in full. (App. 19-22, 36.) The jury found for the Plaintiffs on the seven Notes that were not time-barred, and Judgment was entered on those Notes for \$196,000 of principal, and \$162,589.51 of interest, for a total of \$358,589.51 on March 7, 2018. (App. 31-33.) Prinses paid \$221,439.08 on February 1, 2018, and paid the remaining \$137,150.43 on March 15, 2018, evidenced by Plaintiffs' filing a Satisfaction of Judgment, which reads in full:

Plaintiffs through their counsel Reed Rasmussen, hereby acknowledge full and complete satisfaction of the Judgment filed March 8, 2018 in connection with this matter.

(App. 36.)

All the debts secured by the Mortgage have been satisfied or barred, and there is no controversy remaining for this Court to decide with respect to the Mortgage.

C. The ambiguous Mortgage is satisfied by its own terms.

The Mortgage attached to Plaintiffs' Brief as Appendix pages 1-5 has Bates-stamp numbers identified as "PRINS 00030-34," indicating that it's the document the Prinses had in their possession and produced in discovery. As

¹ South Dakota law differs from Iowa in light of this Court's recent ruling in *Work v. Allgier*, 2018 S.D. 56, 915 N.W.2d 859, but Iowa law controls for purposes of interpreting this Mortgage.

indicated above, the provision in paragraph 2(a) for the identification of specific notes is blank in that document, but there is also a blank in the introduction to the Mortgage, where it says:

NOTICE: This Mortgage secures credit in the amount of \$_____. Loans and advances up to this amount, together with interest are senior to indebtedness to other creditors under subsequently recorded or filed mortgages and liens.

There is also a different version of the same Mortgage, which is the version recorded a year after the Mortgage was signed, where the recording party has filled in the blank on the total amount that the Mortgage can secure, and on that Mortgage (cf. SR 108-112 and App. 38-42) the total amount that Mortgage can secure is \$325,000. The provision for the specific identification of notes remains blank.

On March 15, 2018, the Plaintiffs admitted full payment of \$358,589.51, which included principle and interest on Investment Enterprises, Inc.'s Notes. This amount is in excess of the amount collateralized by the Mortgage, and satisfied the mortgage debt in full.

Plaintiffs have argued to the Court that it should enforce the “dragnet clause” under Iowa law. Under Iowa law, the dragnet clause is “not favored” and is “strictly construed against the mortgagee.” *Decorah State Bank vs. Zidlicky*, 426 N.W.2d 388-390 (Iowa 1988). The Iowa Supreme Court has viewed the dragnet clause as “suspect” and as “adhesion contracts” and the lender should be held to reasonable limits on these provisions. *Id.* Payment in full of the amount of the debt allegedly secured would seem to be a reasonable limitation.

D. Brief response to Plaintiffs' other arguments.

Plaintiffs' appeal brief spends several pages arguing that the Mortgage is enforceable under several different theories: (1) the Mortgage validly secured all past and future Notes; (2) extrinsic evidence confirms the Mortgage secured all past and future debt; (3) a mortgage may be based exclusively on future advances; (4) consideration was supplied by a collateral agreement to make future advances; and (5) the Subordination Agreement revived the forty-eight Notes. (Appellants' Brief pp. 14-20, 23-25.)

As noted previously, argument (5) was addressed in Section I. of this Brief. Arguments (1) through (4) are of no consequence. The fact that the Mortgage may have at one time secured debt under one of these theories does not change the present state of the debt as either paid in full or barred by the statute of limitations. These arguments do not defeat the clear principle in *Burns*, "the condition of the mortgage is the same as that of the debt which it secures." *Burns*, 11 N.W.2d at 463.

Regarding the Mortgage, the Plaintiffs also argue that the Trial Court erred by not reforming the Mortgage to include Terrence Mealy and Loretta Mealy as mortgagees. (Appellants' Brief pp. 20-23.) There are two problems with this argument. First, if you have to change the name of the mortgagee, because the one on the document is inaccurate, then by definition, you would not have a debt that would meet the requirements of *Wipf v. Blake*. Secondly, even if you change the name of the mortgagee on the Mortgage, all of the debts would either be barred by the statute of limitations or paid in full. Under either circumstance, the Mortgage no longer exists.

III. The Trial Court did not commit prejudicial error when it gave the missing witness instruction.

A. Standard of Review

“Under our standard of review, we construe jury instructions as a whole to learn if they provided a full and correct statement of the law.” *State v. Frazier*, 2001 SD 19, ¶ 35, 622 N.W.2d 246, 259 (citations omitted). If, as a whole, the instructions misled, conflicted, or confused, then reversible error occurred. *State v. Moschell*, 2004 SD 35, ¶ 54, 677 N.W.2d 551, 567 (citations omitted). The party charging that an instruction was given in error has the dual burden of showing that the instruction was erroneous and prejudicial. *Id.* An erroneous instruction is prejudicial if in all probability it produced some effect upon the verdict and is harmful to the substantial rights of the party assigning it. *Vetter v. Cam Wal Elec. Co-op., Inc.*, 2006 S.D. 21, ¶ 10, 711 N.W.2d 612, 615. A bare assertion that an instruction created prejudice will not suffice. *Wheeldon v. Madison*, 374 N.W.2d 367, 372 (S.D.1985).

B. The Trial Court did not err in giving the Missing Witness Instruction.

In South Dakota, a trial court may use the missing witness instruction² if the party that did not produce a mentioned witness had the “sole power to

² The missing witness instruction states:

Instruction No. 20:

If a party has the power to produce a witness but fails to do so, you may infer that the testimony of that witness would not have been favorable to that party. This rule applies only if you find the following facts:

- (1) The party, with exercise of reasonable diligence, could have produced the witness; and

produce” the witness or the witness was under “a party’s control.” *State v. McGarret*, 535 N.W.2d 765, 770 (S.D. 1995). Further, the “inference of unfavorable evidence is negated...when the uncalled witness is equally available to both parties.” *City of Rapid City v. Brown*, 252 N.W.2d 323, 325 (S.D. 1977).

The Trial Court allowed the instruction because the Plaintiffs’ witnesses referred to a forensic accountant and a buffalo consultant who did not testify.

First, the Trial Court held:

I do recall [Patrick] Mealy’s testimony and his statement about what the expert had to say. And, obviously, the expert did not testify. I don’t believe the Court said he couldn’t testify. I said he couldn’t testify about a portion of his report. But that didn’t prohibit all testimony from him.

(TT pp. 659:19-24).

Patrick Mealy’s (“Patrick”) testimony referred to Plaintiffs’ buffalo expert, Tim Frasier (“Frasier”), saying that Frasier found Bruce Prins’ numbers on the buffalo herd were “horse pucky.” (TT pp.535:9-24) The Prinses’ counsel did not solicit Patrick’s comment on what Frasier thought of Bruce’s buffalo numbers. (TT pp. 535:15-20) The Prinses’ counsel merely asked if Patrick had anybody look at Bruce’s buffalo herd numbers. From there, Patrick offered Frasier’s opinion of the buffalo numbers in strong and prejudicial terms. (TT pp. 535:15-20) Further, the Trial Court did not allow Frasier to testify on the percentage of

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- (2) A reasonable person in the same circumstances would have produced the witness if the party believed the testimony of the witness would be favorable;
and
 - (3) No reasonable excuse exists for the failure of the party to produce the witness;
and
 - (4) The witness was not equally available to the adverse party or parties.

(App. 37; TT pp. 700:12-19; S.D. Civ. Jury Instr. 1-30-100.)

buffalo ownership, but Frasier was free to testify to his opinions on any other matters concerning the buffalo. (SR 1822-1824.).

The Trial Court did not err in allowing the missing witness instruction regarding the testimony about Frasier. Plaintiffs' witness, Patrick, decided to interject a prejudicial comment about Bruce Prins' buffalo numbers. This prejudicial comment was made when Frasier, living in Texas, was no longer under the subpoena power of the court. *State v. Crawford*, 2007 S.D. 20, ¶ 20 n.5, 729 N.W.2d 346, 351 n.5. Without any subpoena power, the availability of Frasier was under the "sole power" of Plaintiffs. *McGarret*, 535 N.W.2d at 770.

There is no South Dakota case law defining when a witness is under a "party's control." *Id.* It is reasonable to conclude that Frasier was under Plaintiffs' control, as a paid expert of Plaintiffs, and no longer being under the subpoena power of the court.

The Trial Court held that Loretta's testimony was a basis for the missing witness instruction: "And I believe that issue may also arise in reference to ***[Loretta's] testimony about not hiring a forensic accountant or having an accountant review the buffalo numbers.***" (TT pp. 700:14-17, emphasis added). Appellants' Brief does not mention the Trial Court's additional reliance upon Loretta's testimony as support for using the missing witness instruction. (Appellants' Brief pp. 28-30.)

Loretta's testimony regarding the forensic accountant was her effort to rebut the numbers produced by Bruce on the percentage of ownership of the buffalo herd. (TT 206:1-207:2.) Specifically, Loretta's responses indicated that the numbers put forth by Bruce may not be accurate because she never had a

forensic accountant examine “his interpretations” and computations. (TT 206:1-207:2)

The Trial Court’s ruling allowing the missing witness instruction was correct because of Loretta’s references to a forensic accountant. Her testimony created an illusion that a forensic accountant would have had numbers that did not match Bruce’s numbers. This imaginary forensic accountant was not available to the Prinses, because Loretta never received an opinion from a forensic accountant. The Prinses had no adequate way to protect themselves from the inference created by Loretta’s testimony.

The missing witness instruction is available to parties in litigation for just this reason: a witness attempts to use the unavailability of a witness to create an impression favorable to their position, even though the unavailable witness may have “exposed facts unfavorable to the party.” *City of Rapid City vs. Brown*, 252 N.W.2d 323, 325 (S.D. 1977). The Trial Court did not err because the instruction corrected the inference Loretta attempted to create by referring to a nonexistent and unavailable witness.

C. The missing witness instruction was not prejudicial.

Even if this Court finds the giving of the missing witness instruction to be erroneous, it was not prejudicial to Plaintiffs. The missing witness instruction did not “in all probability sway the jury” for several reasons. See *Vetter*, 2006 S.D. at ¶ 10.

First, Plaintiffs had opportunity to completely address the instruction in their closing and they did. (TT pp. 753:16-754:3) Plaintiffs tried to leverage the missing witness instruction in their favor by pointing out how the instruction could apply to witnesses of the Prinses. (TT pp. 753:16-754:3) The ability of

Plaintiffs to address the instruction in closing argument, and point the finger at the Prinses' witnesses, directly contradicts Plaintiffs' argument that the Trial Court "put the weight of its authority" behind only the argument put forth by the Prinses' counsel. (Appellants' Brief pp. 31.) The Trial Court did not endorse the Prinses' view of the witnesses or Plaintiffs' view, rather it gave the jury an instruction that allowed them, as the fact finders, to decide which testimony they believed.

Second, the Prinses' counsel made clear the jury had a choice to find that Frasier or the forensic accountant would have been bad for Plaintiffs: "Instruction 20 says ***if you can assume*** that that [sic] forensic accountant and that buffalo expert would have been bad..." (TT pp. 742:1-4). The language used by the Prinses' counsel, and the missing witness instruction itself, highlight that this instruction is a choice left to the jury and is not a direct instruction requiring the jury to do anything. (App. 37.)

Third, there is an abundance of evidence to support the findings of the jury, regardless of the inferences that arise from the missing witness instruction. Specifically, the Prinses' evidence included multiple reasons and justifications for the jury's resolution of the unjust enrichment claim and rejection of the conversion claim: (1) Bruce's buffalo records and testimony explaining them (T.Ex. A, App. 49-58; TT pp. 373-6); (2) the use of the Prinses' land to graze the buffalo (TT pp. 175:16-21); (3) the substantial improvements in the physical attributes of the property (TT pp. 407:10-18); (4) the increase in value of the property (TT pp. 603:16-19); and (5) the various actions and inactions of the Plaintiffs (TT pp. 192:12-194:4).

Plaintiffs' argument that "the abundance of Plaintiffs' evidence leads to the conclusion that the improper witness instruction is what resulted in the jury's denial of the conversion claim," is unsupported, as the Prinses had a wealth of evidence to support the jury's findings as well.

After weighing the evidence of both parties, it is absurd to believe that a generally applicable missing witness instruction, that could apply to either party's inability to call certain witnesses, would "in all probability" sway the jury.

IV. The Trial Court did not abuse its discretion regarding prejudgment interest for the contract claim.

A. Standard of Review

This Court reviews the Trial Court's use of a special verdict form under an abuse of discretion standard. *Miller v. Hernandez*, 520 N.W.2d 266, 269-270 (S.D. 1994).

"This court has said on countless occasions that an issue may not be raised for the first time on appeal. Thus, an issue not presented at the trial court level will not be reviewed at the appellate level." *Mortweet*, 335 N.W.2d at 813 (citations omitted). Further, the trial court must be advised on the grounds of the objection. *Lang*, 97 N.W.2d at 866. "If undisclosed grounds, including afterthoughts, can be reviewed on appeal, the virtue of preparation for trial would be compromised." *Id.*

B. The Plaintiffs did not properly object to the prejudgment interest calculation in the Special Verdict Form.

Plaintiffs failed to make a specific objection to the prejudgment interest calculation for the contracts in the Special Verdict Form. (TT pp. 700:20-706:6.) Throughout the parties' and the Trial Court's discussion of the Special Verdict

Form, Plaintiffs specifically objected to the joint venture decision being the first question, the absence of a question on the percentage of the buffalo herd, and the joint venture question not categorized under fraud. (TT pp. 702:4-706:6.)

Plaintiffs also spoke about the contracts, without mentioning the issue of prejudgment interest, stating: “We thought it was important to list the exact contracts because each—every contract is different in terms of amounts.” (TT pp. 703:3-5.)

Based on these discussions, Plaintiffs did not make the Trial Court aware of their objection to the prejudgment interest used in the Prinses’ Special Verdict Form. The Trial Court did not have the opportunity to rule on prejudgment interest when the issue was not presented to it. This Court should not allow Plaintiffs to bring this issue for review; doing so, would take away from the “virtue of preparation for trial.” *Lang*, 97 N.W.2d at 866.

Although Plaintiffs’ proposed Special Verdict Form included their version of prejudgment interest, the Plaintiffs’ specific objections to the Prinses’ Special Verdict Form would reasonably impress upon the Trial Court that those were the issues before the court. An issue raised for the first time on appeal is not allowed, and it is not the Trial Court’s responsibility to search for issues which counsel did not present. See *Lang*, 97 N.W.2d at 866; *Kappenmann v. Kappenmann*, 479 N.W.2d 520, 525 (S.D. 1992).

After the jury completed the Special Verdict Form, Plaintiffs eventually filed an objection to the Prinses’ proposed Judgment and argued the prejudgment interest was incorrectly set. (SR 2138-2140.) Plaintiffs did not make this argument at the time the parties and the Trial Court were discussing the Special Verdict Form’s contents, as clearly required by South Dakota law. In

Grynberg v. Citation Oil & Gas Corp., 1997 S.D. 121, ¶ 32, 573 N.W.2d 493, 503-504, this Court held:

“Verdict forms to be submitted to the jury should be treated in the same manner as jury instructions to be submitted.... Similarly, at [the] instruction conference parties should object to any errors of commission or omission in the verdict forms to be submitted to the jury.” *Hiway 20 Term., Inc., v. Tri-County Agri-Supply, Inc.*, 235 Neb. 207, 454 N.W.2d 671, 675 (1990). By failing to raise an objection to the verdict form which would alert the trial court to the claimed error, [a party] has failed to preserve this issue for appeal.

(citations omitted).

Therefore, Plaintiffs submitting their proposed Judgment, and filing an objection to the Prinses’ proposed Judgment did not erase Plaintiffs’ failure to raise an objection to the prejudgment interest before the jury received the Special Verdict Form.

V. The Trial Court erred in allowing evidence of the time-barred Notes to be considered in support of Plaintiffs’ unjust enrichment claim.

The Trial Court should not have considered forty-eight time-barred Notes when it determined Plaintiffs’ unjust enrichment claim. This is a question of law, which is reviewed de novo. *Detmers v. Costner*, 2012 S.D. 35, ¶ 9, 814 N.W.2d 146, 149.

“The equitable remedy of unjust enrichment is unwarranted when the rights of the parties are controlled by an express contract.” *Johnson v. Larson*, 2010 S.D. 20, ¶ 8, 779 N.W.2d 412, 416. Unjust enrichment and contracts are not compatible, because unjust enrichment involves an “involuntary or nonconsensual transfer” and contracts include “voluntary and consensual” transfers. *Id.* A trial court should not use contracts as evidence for unjust

enrichment claims; because where there is a contract, the law does not allow room for equity. *Id.*

The Trial Court erred in accepting the advisory jury's verdict on unjust enrichment because the advisory jury based their verdict upon the evidence of the forty-eight time-barred Notes. (App. 34-35.) Plaintiffs' closing argument on the unjust enrichment claim given to the advisory jury was based entirely upon the forty-eight time-barred Notes. (TT pp. 721:4-722:5). Plaintiffs asked for \$295,000 of time-barred Notes as unjust enrichment, and argued no other basis for unjust enrichment. The jury had to decide whether or not to award unjust enrichment damages to Plaintiffs or Defendants, and using the \$295,000 for Plaintiffs resulted in a jury award tipping for Plaintiffs in the amount of \$135,000 for unjust enrichment. (App. 23-30.)

The Trial Court adopted the advisory jury's findings. (SR 2247-2248.) If the Trial Court was not adopting the advisory jury's findings, it would have had to supply its own factual findings and conclusions of law. See *Granite Buick GMC, Inc. v. Ray*, 2014 S.D. 78, ¶ 15, 856 N.W.2d 799, 805.

The substitution of an unjust enrichment claim for notes that the statute of limitations had barred is contrary to South Dakota law. The Trial Court's adoption of the advisory jury's findings, based on this substitution method by the Plaintiffs, should be reversed as a matter of law.

When the \$295,000 is deducted from the Plaintiffs' claim, it is clear that at a minimum the jury would not have made any award to Plaintiffs. This Court should vacate the \$135,000 award for the Plaintiffs on unjust enrichment. Alternatively, the matter should be remanded for determination of how much unjust enrichment should have been awarded to Prinses; or if the \$295,000 of

impermissible damages is backed out of the analysis, this Court should revise the unjust enrichment judgment to an award to the Prinses in the amount of \$160,000.

CONCLUSION

All forty-eight Notes barred by the statute of limitations were not revived by the Subordination Agreement. The Subordination Agreement does not revive the Notes because it fails to meet any of the fundamental *Wipf* requirements. Without these Notes, and because the Notes not barred have been paid, the Mortgage is no longer secured by any debt. Under Iowa law, without any debt, the Mortgage does not survive.

The missing witness instruction was not error because Plaintiffs' buffalo expert was under their control and outside the subpoena power of the Court; their imaginary forensic accountant may have exposed unfavorable facts; and the generally applicable missing witness instruction did not prejudice Plaintiffs.

The prejudgment interest was not objected to by Plaintiffs during the settling of the Special Verdict Form; they are not allowed to argue an issue for the first time on appeal.

The Trial Court erred by allowing the time-barred notes to be used as the basis for Plaintiffs' unjust enrichment claim. The Trial Court accepted the advisory jury's conclusions, as evidenced by the Trial Court not supplying its own findings and conclusions.

DATED this 17th day of September, 2018.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements set forth in SDCL 15-26A-66(b)(4). This brief was prepared using Microsoft Word 2013, with 12 point Georgia font. This brief contains 8,011 words, excluding table of contents, table of authorities, jurisdictional statement, statement of legal issues, and certificate of counsel. I relied on the word count feature in Microsoft Word 2013 to prepare this certificate.

DATED this 17th day of September, 2018.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the 17th day of September, 2018, I electronically served a true and correct copy of the foregoing *Appellees' Brief* via electronic means on the following:

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3.	Special Verdict form (11/20/18)	APP. 23-30	SR 2063-2070
4.	Judgment (3/7/18)	APP. 31-33	SR 2249-2251
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<div>FILED CINDY MAROHL NOV 23 2015 Roberts County Clerk of Courts Sisseton, SD</div>		IN CIRCUIT COURT
STATE OF SOUTH DAKOTA		FIFTH JUDICIAL CIRCUIT
COUNTY OF ROBERTS		
LORETTA B. MEALY, Individually and as Personal Representative of the ESTATE OF TERRENCE L. MEALY, and INVESTMENT ENTERPRISES, INC., Plaintiffs, v. BRUCE PRINS AND CORRINE PRINS, and PRAIRIE SKY GUEST & GAME RANCH, LLC, Defendants.		CIV. 15-21 MEMORANDUM DECISION

A motions hearing for partial summary judgment was held on August 24, 2015 in the above entitled matter. At the hearing, Plaintiffs appeared through counsel, Julie Dvorak, while one of the named Defendants, Bruce Prins, appeared personally and with counsel, Lee Schoenbeck. Defendants sought partial summary judgment on forty-eight promissory notes and the September 21, 2000 mortgage. Prior to the hearing, both parties submitted briefs, affidavits,¹ and statements of undisputed material facts to the Court. At the end of argument, the Court reserved ruling on both claims of partial summary judgment. This memorandum decision constitutes the Court's ruling on those issues.

STATEMENT OF FACTS

Bruce and Corrine Prins² ("Defendants") own and operate Prairie Sky Guest and Game Ranch, LLC in Marshall County, South Dakota. In 1999, Defendants executed a number of

¹ While this motion was pending, Plaintiffs filed a Motion Regarding Buffalo Sale Proceeds, brief in support of the motion, and an accompanying affidavit in support of the motion that contained Defendants' answers to interrogatories dated May 20, 2015. Defendants responded with a brief in opposition and affidavit.

² Bruce and Corrine Prins are residents of Roberts County, South Dakota.

promissory notes for their business. Over the course of nine years, Defendants had executed a total of fifty-five promissory notes. Some of the promissory notes were made payable to Terrence Mealy,³ Terrance and Loretta Mealy, Terrence or Loretta Mealy, and finally to Investment Enterprises, Inc. The pertinent information from the promissory notes is listed in the table below.

	DATE	AMOUNT	EXHIBIT	NOTE TYPE	OBLIGOR	OBLIGEE
1	04/28/1999	\$5,000	B	Time	Bruce and Corrine Prins	Terrence or Loretta Mealy
2	06/09/1999	\$7,000	C	Time	Bruce and Corrine Prins	Terrence or Loretta Mealy
3	07/26/1999	\$10,000	D	Time	Bruce and Corrine Prins	Terrence and Loretta Mealy
4	08/10/1999	\$8,000	E	Time	Bruce and Corrine Prins	Terrence or Loretta Mealy
5	08/28/1999	\$10,000	F	Time	Bruce and Corrine Prins	Terrence or Loretta Mealy
6	09/24/1999	\$12,000	G	Time	Bruce and Corrine Prins	Terrence or Loretta Mealy
7	10/06/1999	\$7,000	H	Time	Bruce and Corrine Prins	Terrence or Loretta Mealy
8	11/11/1999	\$15,000	I	Time	Bruce and Corrine Prins	Terrence or Loretta Mealy
9	11/29/1999	\$5,000	J	Time	Corrine Prins	Terrence or Loretta Mealy
10	12/21/1999	\$9,000	K	Time	Bruce and Corrine Prins	Terrence or Loretta Mealy
11	01/10/2000	\$35,000	L	Time	Bruce and Corrine Prins	Terrence or Loretta Mealy
12	02/10/2000	\$6,000	M	Time	Bruce and Corrine Prins	Terrence or Loretta Mealy
13	02/25/2000	\$8,000	N	Time	Bruce and Corrine Prins	Terrence or Loretta Mealy
14	04/08/2000	\$35,000	O	Time	Bruce and Corrine Prins	Terrence or Loretta Mealy
15	05/12/2000	\$9,500	P	Time	Bruce and Corrine Prins	Terrence or Loretta Mealy
16	05/12/2000	\$16,000	Q	Time	Bruce and Corrine Prins	Terrence or Loretta Mealy
17	06/27/2000	\$18,000	R	Time	Bruce and	Terrence or Loretta

³ Terrence Mealy was an attorney before passing away in 2011.

					Corrine Prins	Mealy
18	09/22/2000	\$15,000	S	Time	Bruce and Corrine Prins	Terrence or Loretta Mealy
19	11/30/2000	\$9,5000	T	Time	Bruce and Corrine Prins	Terrence or Loretta Mealy
20	12/28/2000	\$25,000	U	Time	Bruce and Corrine Prins	Terrence or Loretta Mealy
21	02/28/2001	\$25,000	V	Time	Bruce and Corrine Prins	Terrence or Loretta Mealy
22	04/14/2001	\$15,000	W	Time	Bruce and Corrine Prins	Terrence or Loretta Mealy
23	09/08/2001	\$15,000	X	Time	Bruce and Corrine Prins	Terrence or Loretta Mealy
24	01/12/2002	\$17,000	Y	Time	Bruce and Corrine Prins	Terrence or Loretta Mealy
25	02/07/2002	\$15,000	Z	Time	Bruce and Corrine Prins	Terrence or Loretta Mealy
26	03/12/2002	\$25,000	AA	Time	Bruce and Corrine Prins	Terrence Mealy
27	04/15/2002	\$20,000	BB	Demand	Bruce and Corrine Prins	Terrence Mealy
28	06/26/2002	\$5,000	CC	Time	Bruce and Corrine Prins	Terrence Mealy
29	09/11/2002	\$8,000	DD	Time	Bruce and Corrine Prins	Terrence and Loretta Mealy
30	09/11/2002	\$27,000	EE	Time	Bruce and Corrine Prins	Terrence and Loretta Mealy
31	12/30/2002	\$30,000	FF	Time	Bruce and Corrine Prins	Terrence Mealy
32	02/07/2003	\$12,000	GG	Time	Bruce and Corrine Prins	Terrence and Loretta Mealy
33	03/14/2003	\$26,000	HH	Time	Bruce and Corrine Prins	Terrence and Loretta Mealy
34	06/06/2003	\$35,000	II	Time	Bruce and Corrine Prins	Investment Enterprises, Inc.
35	09/23/2003	\$39,000	JJ	Time	Bruce and Corrine Prins	Investment Enterprises, Inc.
36	01/02/2004	\$38,000	KK	Time	Bruce and Corrine Prins	Terrence and Loretta Mealy
37	03/05/2004	\$26,000	LL	Time	Bruce and Corrine Prins	Terrence and Loretta Mealy
38	04/05/2004	\$27,000	MM	Time	Bruce and Corrine Prins	Terrence Mealy
39	07/16/2004	\$18,000	NN	Demand	Bruce and Corrine Prins	Terrence Mealy

40	09/01/2004	\$20,000	OO	Time	Bruce and Corrine Prins	Terrence Mealy
41	12/29/2004	\$44,000	PP	Demand	Bruce and Corrine Prins	Investment Enterprises, Inc.
42	07/06/2005	\$20,000	QQ	Time	Bruce and Corrine Prins	Terrence and Loretta Mealy
43	08/08/2005	\$25,000	RR	Time	Bruce and Corrine Prins	Terrence and Loretta Mealy
44	09/22/2005	\$25,000	TT	Time	Bruce and Corrine Prins	Terrence and Loretta Mealy
45	12/27/2005	\$45,000	UU	Time	Bruce and Corrine Prins	Terrence and Loretta Mealy
46	03/30/2006	\$35,000	WW	Time	Bruce and Corrine Prins	Investment Enterprises, Inc.
47	04/26/2006	\$35,000	XX	Time	Bruce and Corrine Prins	Investment Enterprises, Inc.
48	12/20/2006	\$54,000	BBB	Time	Bruce and Corrine Prins	Investment Enterprises, Inc.

Loretta Mealy, both individually and as personal representative, and Investment Enterprises, Inc. ("Plaintiffs") assert some of these promissory notes were secured by an open-ended mortgage dated September 21, 2000 ("2000 Mortgage"). The 2000 mortgage was prepared by Terrence Mealy and was for \$325,000.00. In pertinent part, the obligations section of the mortgage provides:

2. Obligations. This Mortgage secures the following (hereinafter referred to as the "Obligations"): a. The payment of the loan made by Mortgagee to Bruce Prins & Corrine Prins/husband and wife advanced by a promissory notes "date _____, 19____ in this principal amount \$ _____ with a due date of _____, any renewals, extensions, modifications or refinancing thereof with and any promissory notes issued in substitution therefor. . . .

Nine years later, Defendants signed a subordination agreement with Investment Enterprises, Inc. Terrence Mealy signed on behalf of Investment Enterprises, Inc. The agreement's recitation and declaration section referred to a specific promissory note for \$325,000.00. Specifically, it reads:

“Whereas Investment Enterprises, Inc., is the owner and holder of a certain note for Three Hundred Twenty-five Thousand Dollars (\$325,000.00) and interest[.]”

Plaintiffs filed a complaint on March 3, 2015 alleging six counts: (1) breach of contract, (2) conversion, (3) unjust enrichment, (4) constructive trust, (5) accounting, and (6) injunctive relief. Plaintiffs allege that no payment has been made on forty-eight of the fifty-five promissory notes. Despite this allegation, Plaintiffs contend defendants made a partial payment on February 25, 2015. This alleged partial payment is based on an affidavit recalling a conversation between Bruce Prins and Patrick Mealy, Terrence and Loretta Mealy’s son.

ISSUES

Whether Defendants are entitled to summary judgment as a matter of law on the forty-eight promissory notes and the 2000 mortgage because the promissory notes and mortgage are unenforceable.

ANALYSIS AND DECISION

SDCL 15-6-56(c) provides that summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” In reviewing a grant of summary judgment, the Court “determine[s] whether the moving party has demonstrated the absence of any genuine issue of material fact and entitlement to judgment on the merits as a matter of law.” *Stern Oil Co., Inc. v. Brown*, 2012 S.D. 56, ¶ 8, 817 N.W.2d 395, 398 (quoting *Tolle v. Lev*, 2011 S.D. 65, ¶ 11, 804 N.W.2d 440, 440). The Court, while conducting its review, must view all reasonable inferences drawn from the facts in favor of the non-moving party. *Id.* However, “the party challenging the summary judgment must substantiate his allegations with sufficient probative evidence that would permit a finding in his favor on more than mere speculation, conjecture, or fantasy.” *Id.*

The opposing party, when facing a motion for summary judgment, “must ‘be diligent in resisting [the motion], and mere general allegations and denials which do not set forth specific facts will not prevent the issuance of a judgment.’” *Citibank South Dakota, N.A. v. Schmidt*, 2008 S.D. 1, ¶ 8, 744 N.W.2d 829, 832 (alteration in original) (quoting *Bordeaux v. Shannon County Schools*, 2005 S.D. 117, ¶ 14, 707 N.W.2d 123, 127) (quoting *Hughes-Johnson Co. v. Dakota Midland Hosp.*, 195 N.W.2d 519, 521 (S.D. 1972)). An “entry of summary judgment is mandated against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Hass v. Wentzlaff*, 2012 S.D. 50, ¶ 11, 816 N.W.2d 96, 101 (quoting *W. Consol. Coop. v. Pew*, 2011 S.D. 9, ¶ 21, 795 N.W.2d 390, 396).

Furthermore, when summary judgment is predicated on a statute of limitations defense, “[t]he burden of proof is upon the movant to show clearly that there is no issue of material fact and that he is entitled to judgment as a matter of law.” *Brandt v. County of Pennington*, 2013 S.D. 22, ¶ 8, 827 N.W.2d 871, 874 (citations omitted). Once the defendant “asserts the statute of limitations as a bar to the action and presumptively establishes the defense by showing the case was brought beyond the statutory period, the burden shifts to the plaintiff to establish the existence of material facts in avoidance of the statute of limitations.” *Id.* In South Dakota, “[i]t is well settled that summary judgment is proper on statute of limitation issues only when application of the law is in question, and not when there are remaining issues of fact.” *Id.* Normally, “a statute of limitations question is left for the jury; however, deciding what constitutes accrual of a cause of action is a question of law[.]” *Id.*

I. Forty-Eight Promissory Notes

Two types of promissory notes are at issue in this case: notes payable at a definite time (“time notes”), and notes payable on demand (“demand notes”). SDCL 57A-3-118(a)(b). As the

name indicates, time notes are deemed such because payment is due at fixed date or dates or a readily ascertainable time from the date of the promise. SDCL 57A-3-108(b). Demand notes, similarly descriptive in name, are created when the note states payment “on demand or sight, or otherwise indicates that it is payable at the will of the holder, or it does not state any time of payment.” SDCL 57A-3-108(a). Although the law is clear, there are times when a promissory note has characteristics of both a time and demand note. When this occurs, the Legislature has counseled that the promissory note is “payable on demand until the fixed date and, if demand for payment is not made before that date, [it] becomes payable at a definite time on the fixed date.” SDCL 57A-3-108(c).

Here, the overwhelming majority of promissory notes are time notes. Indeed, forty-five⁴ of forty-eight total promissory notes at issue are time notes, thus leaving only three⁵ demand notes. This in turn has an effect on the statute of limitations. Time notes enjoy a six year statute of limitations, SDCL 57A-3-118(a), while demand notes get an extra four years if no demand for payment is made or the obligor fails to pay interest or principal for a period of ten continuous years. SDCL 57A-3-118(b). All of the promissory notes at issue—whether time or demand—were issued prior to December 21, 2006. Under South Dakota law, then, all the time notes were barred by December 21, 2012. The remaining three demand notes, the last of which expired on December 30, 2014, are similarly barred by the statute limitations.

Whether the running of a statute of limitation bars an action is a question of law for the Court to determine. *Brandt*, 2013 S.D. 22, ¶ 8, 827 N.W.2d at 874. The Court, having reviewed all of the information provided, is therefore persuaded that Defendants have presumptively established that all forty-eight promissory notes—time and demand—were brought beyond the

⁴ The following promissory notes are time notes: B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, CC, TT, WW, XX, S, T, U, V, W, X, Y, Z, AA, DD, EE, FF, GG, HH, II, JJ, KK, LL, MM, OO, QQ, RR, UU, and BBB.

⁵ The three demand notes are: BB, NN, and PP.

applicable statutory period found in SDCL 57A-3-108(a) and (b) prior to the commencement of this lawsuit on March 6, 2015. *See id.* As a result, the burden has shifted to the Plaintiffs to “establish the existence of material facts in avoidance of the statute of limitations.” *Id.* In an attempt to meet their burden, Plaintiffs make three arguments. First, that Iowa law, not South Dakota law, provides the appropriate statute of limitations. Second, that a subordination agreement from 2009 reaffirmed the debt in a note worth \$325,000.00. Finally, that Defendants made a partial payment on February 25, 2015, thereby negating any possible use of statute of limitations defense. Each is addressed in turn below.

a. Whether Iowa or South Dakota law provides the applicable statute of limitations for the forty-eight promissory notes.

Iowa, like South Dakota, differentiates between a time note and demand note. *See* Iowa Code § 554.3104. Unlike South Dakota, however, Iowa applies a ten year statute of limitations for both time and demand notes. Iowa Code § 614.1(5). An application of Iowa’s statute of limitations would therefore bar forty-one of the forty-eight promissory notes, while only preserving seven time notes. As such, this Court must determine whether Iowa law or South Dakota law applies to the remaining seven time notes: QQ, RR, TT, UU, WW, XX, and BBB.

Iowa and South Dakota have both relied on the Restatement (Second) of Conflict of Laws (“Restatement”) to solve conflict of laws issues. *See, e.g., Stockmen’s Livestock Exchange v. Thompson*, 520 N.W.2d 255, 257 (S.D. 1994) (“South Dakota applies the provisions of the Restatement (Second) of Conflict of Laws in order to resolve questions about which state’s laws govern in a particular factual situation.”); *Cameron v. Hardisty*, 407 N.W.2d 595, 596 (Iowa 1987) (noting Iowa’s approach in determining which jurisdiction’s statutes of limitation apply is consistent with the general rule set forth in the Restatement § 142). The general rule regarding statute of limitations in the Restatement provides:

- (1) An action will not be maintained if it is barred by the statute of limitations of the forum, including a provision borrowing the statute of limitations of another state.
- (2) An action will be maintained if it is not barred by the statute of limitations of the forum, even though it would be barred by the statute of limitations of another state, except as stated in § 143.

Restatement (Second) of Conflict of Laws § 142.

In the application of the general rule, it is evident that this suit cannot be maintained. First, Plaintiffs chose South Dakota as the forum, which has a six year statute of limitations for time notes. SDCL 57A-3-118(a). More than six years has elapsed on the remaining seven time notes: QQ, RR, TT, UU, WW, XX, and BBB. Thus, the time notes are barred from prosecution by SDCL 57A-3-118(a). This conclusion is consistent with how Iowa courts apply the Restatement's general rule. *Harris v. Clinton Corn Processing Co.*, 360 N.W.2d 812, 814 (Iowa 1985); *Cameron*, 407 N.W.2d at 596. Second, South Dakota's borrowing statute only applies to wrongful death actions and is therefore inapplicable to this case. SDCL 21-5-4; *see also Fritzmeier et. al., v. Blimpie Midwest/Krause Gentle Corp.*, 2001 WL 35828831.

Furthermore, statutes of limitation are not substantive law. Instead, statutes of limitation are usually considered procedural or remedial. As Justice Jackson so eloquently put it:

Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the *privilege to litigate*.

Chase Securities Corp. v. Donaldson, 325 U.S. 304, 314 (1945) (internal citation and footnote omitted) (emphasis added). The South Dakota Supreme Court followed Justice Jackson's words when it announced that "[s]tatutes of limitations are remedial, not substantive." *Lyons v. Lederle*

Laboratories, A Div. of American Cyanamid Co., 440 N.W.2d 769, 770 (S.D. 1989). Similarly, the Iowa Supreme Court “view[s] statutes of limitation as being procedural rather than substantive.” *Cameron v. Hardisty*, 407 N.W.2d 595, 596 (Iowa 1987) (citing *Harris*, 360 N.W.2d at 814).

The Court, based on the above analysis, agrees with the Defendants that South Dakota law applies. Plaintiffs’ remaining seven time notes are barred by SDCL 57A-3-118(a). Thus, all forty-eight promissory notes in dispute are barred by the statutes of limitation. *See* SDCL 57A-3-118(a)(b).

b. Whether the debt contained in the forty-eight promissory notes was revived by a subordination agreement signed in 2009 for \$325,000.00.

SDCL 15-2-29 governs the requirements for an acknowledgment of debt to be effective.

It provides:

No acknowledgment or promise is sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of this chapter, unless the same be contained in some writing signed by the party to be charged thereby; but this section shall not alter the effect of any payment of principal or interest.

SDCL 15-2-29. Further, “the implication of a promise from an acknowledgment of the existence of the debt is not warranted if there be anything in the terms of the writing which tend to repel such an inference or leave it in doubt.” *Wipf v. Blake*, 28 N.W.2d 881, 882 (S.D. 1947). The acknowledgment “must be consistent with a promise to pay, unqualified, clear, plain, unambiguous, and so distinct in its extent and form as to preclude hesitation as to the debtor’s meaning, and so as to enable the court to apply its terms as the debtor intended they should be applied.” *Id.*

In determining whether an acknowledgment meets the standards set forth by statute and caselaw, the South Dakota Supreme Court has formulated a guide for trial courts to follow. *Id.* First, the Court must look at whether there is an admission of the debt in question. *Id.* Second, if

there is an admission of the debt, is that admission “narrowed by any qualification which rebuts the presumption of a promise, or subject to any condition on the fulfillment of which the implied promise is dependent[.]” *Id.* Third, “if there is a condition, has it been satisfied[.]” *Id.*

Although at first blush it appears that Defendants acknowledged the debt by signing the subordination agreement thereby satisfying the first question, that conclusion cannot stand upon further inspection. The subordination agreement references a specific note worth \$325,000.00. Specifically, the agreement reads: “Whereas Investment Enterprises, Inc., is the owner and holder of a certain note for Three Hundred Twenty-five Thousand Dollars (\$325,000.00) and interest[.]” No specific note for \$325,000.00 exists among the forty-eight promissory notes in dispute. This creates an ambiguity in the very terms of the agreement that casts doubt on what debt is being described. *Id.* Thus, hesitation as to the debtor’s meaning is in question, which prevents this Court from apply[ing the agreement’s] terms as the debtor intended they should be applied.” *Id.* Therefore, the statute of limitations on the forty-eight promissory notes was not revived by the execution of the subordination agreement signed by the parties in 2009.

c. Whether Defendants made a partial payment on any of the disputed debts contained in the 48 promissory notes, thereby negating a statute of limitations defense.

The last clause in SDCL 15-2-29 preserves the common law principle that “a partial payment of debt may, under certain circumstances, constitute such an acknowledgment of a larger debt as will raise an implication of a new promise to pay the balance and set the statute running anew.” *F.M. Slagle & Co. v. Bushnell*, 16 N.W.2d 914, 919 (S.D. 1944) An acknowledgment, however, must be in writing and signed by the party to be charged. SDCL 15-2-29. Furthermore, there cannot be any ambiguity as to the identification of the debt to which the payment is made. *Slagle*, 16 N.W.2d at 919.

Plaintiffs filed an affidavit by Patrick Mealy, the son of Terrence and Loretta Mealy, in opposition to the motion for partial summary judgment. The affidavit contains Patrick Mealy's recollection of an alleged conversation between Bruce Prins and himself that took place on February 25, 2015.⁶ One line recites, "Bruce indicated that he was handing over the contents of the lodge, the lodge business, the LLC name of Prairie Sky Guest & Game Ranch and all other content on the property as a payment of past interest that was due on the promissory notes."

Contrary to Plaintiffs contention, this statement does not constitute a payment. Plaintiffs' reliance on *Taylor v. Ashdown*, 244 N.W. 541 (S.D. 1932), is misplaced as it is easily distinguishable. In that case, Robert S. Taylor ("Taylor") executed a single promissory note dated March 1, 1920 to the Ashdowns: Alfred, Blanche, Cora, R.B., Sadie, and Walter. The promissory note was payable on or before March 1, 1925. *Id.* Walter voluntarily paid the interest on *the note* every year until March 1, 1930. *Id.* (emphasis added). Moreover, Walter made two payments on *the note's* principal. *Id.* (emphasis added). The first payment was on March 8, 1924, and the second was on March 8, 1926. *Id.*

At trial when Walter testified about the second principal payment to Taylor, he said: "I was only able to pay him this \$200 and it was not very much but that was the best I could do and when I paid him interest during the several years, I told [Taylor] substantially the same thing." *Id.* at 542. The South Dakota Supreme Court held that these payments were to be applied to *the note in question* and had the same effect as an express acknowledgment of the debt. *Id.* (emphasis added). Thus, the payments tolled the statute of limitations. *Id.*

⁶ Plaintiffs filed their complaint less than a week later on March 3, 2015. The complaint contained no assertion of any partial payment by Defendants. Nor did it even mention the conversation between Patrick Mealy and Bruce Prins. Instead, the complaint alleged that no payments had been made on the promissory notes. In South Dakota, "eleventh-hour" affidavits to avoid summary judgment are looked on with disapproval when they attempt to change previous testimony to create a material fact. *DFA Dairy Financing Services, L.P. v. Lawson Special Trust*, 2010 S.D. 34, ¶ 21, 781 N.W.2d 664, 670. The complaint is not a sworn complaint, so it cannot constitute previous testimony. Therefore, the fact that Plaintiffs submitted this affidavit in direct contradiction to their complaint is immaterial to the analysis.

In contrast, there is no indication here on what specific promissory notes this alleged interest payment was made. The only information pertaining to the alleged payment is ambiguous and vague. Indeed, it could be any one of the fifty-five notes executed by the Defendants and made payable to the Plaintiffs. Seven of these promissory notes are not in dispute. Nor is there testimony, under oath, from the Defendants directly identifying what specific note the alleged payment was intended to satisfy. Furthermore, there is no documentation, accounting, or writing that supports a payment was made by the Defendants to the Plaintiffs.

When this assertion is viewed in the light most favorable to the Plaintiffs, it just establishes that Bruce Prins made an *oral* promise to pay past interest due on *the promissory notes*. This is insufficient to survive summary judgment for two reasons. First, the “[w]ords and phrases in a statute must be given their plain meaning and effect.” *In re Taliaferro*, 2014 S.D. 82, ¶ 6, 856 N.W.2d at 806-07. In this case, the plain language of SDCL 15-2-29 requires a writing signed by the person to be bound for an acknowledgment to be effective. No writing exists. Consequently, Bruce Prins’ oral promise cannot constitute a legally effective acknowledgment that binds Defendants, thereby reviving the statute of limitations.

Second, the phrase “*the promissory notes*” is a general statement that fails to specify what promissory note or notes the alleged payment was to be applied. *See Slagle*, 16 N.W.2d at 919. This ambiguity is also fatal. Unlike *Taylor*, where there was testimony from the debtor that specifically identified what promissory note the payment was meant to apply, Plaintiffs do not have any testimony by Defendants regarding how the alleged payment was to be applied. Moreover, there are fifty-four more promissory notes in this case as compared to *Taylor*. These two salient facts, which evidence a debtor’s intent to pay the balance of the debt, are not present in this case. *See Taylor*, 244 N.W. at 542. There is no way of deciphering whether the alleged

payment would have applied towards the interest on one or all of the forty-eight promissory notes in dispute, or whether it would have gone towards Defendants' other promissory notes not in dispute. Therefore, the statute of limitations cannot be revived.

II. 2000 Mortgage

A mortgage is “[a] lien against property that is granted to secure an obligation (such as a debt) and that is extinguished upon payment or performance according to stipulated terms.” Black’s Law Dictionary 1026 (7th ed. 1999). The Legislature has explained that “[a] mortgage of real property can be created . . . only by writing, executed with the formalities in the case of a grant of real property.” SDCL 44-8-1. These formalities include that the mortgage be in writing and that it be signed by the party to be bound. *See* SDCL 43-25-1. As the definition alludes, a mortgage must also secure a debt. *See Adrian v. McKinnie*, 2002 S.D. 10, ¶ 11, 639 N.W.2d 529, 533. This is an essential element. *Myers v. Eich*, 2006 S.D. 69, ¶ 21, 720 N.W.2d 76, 83. Moreover, “a mortgage is merely incident to the debt it secures.” *Kalen v. Gelderman*, 278 N.W. 165, 169 (S.D. 1938) (citing *Barbour v. Finke*, 201 N.W. 711 (S.D. 1924)). Consequently, a mortgage without a debt is a nullity. *FTBK Investor II LLC v. Genesis Holding, LLC*, 7 N.Y.S.3d 825, 834 (N.Y. Sup. Ct. 2014) (citing *U.S. Bank Nat’l Ass’n v. Dellarmo*, 942 N.Y.S.2d 122, 124 (N.Y. App. Div. 2012)).

In this case, there is no question that the 2000 mortgage does not secure a debt. Indeed, the obligations section—where the secured debt is supposed to be listed—does not list a single promissory note, let alone any of the forty-eight promissory notes in dispute. Instead, the only information inserted in this section is Defendants’ names and relationship to each other. The section, in pertinent part, provides:

2. Obligations. This Mortgage secures the following (hereinafter referred to as the “Obligations”): a. The payment of the loan made by Mortgagee to Bruce Prins & Corrine Prins/husband and wife

advanced by a promissory notes “dated _____, 19____
in this principal amount \$ _____ with a due date
of _____, any renewals, extensions, modifications or
refinancing thereof with and any promissory notes issued in
substitution therefor. . . .

Because no debt is secured by the 2000 mortgage, it is a nullity. *FTBK Investor II LLC*, 7 N.Y.S.3d at 834; *Dellarmo*, 942 N.Y.S.2d at 124.

Although the 2000 mortgage does not secure a debt, Plaintiffs urge, through their responsive brief, for the Court to reform the mortgage to list the intended mortgagee. Plaintiffs contend the intended mortgagee is Investment Enterprises, Inc. However, Investment Enterprises, Inc. is already listed as the mortgagee in the 2000 mortgage. The issue with the 2000 mortgage is its failure to secure a debt. Perhaps recognizing this salient fact, Plaintiffs, immediately after requesting the Court to reform the mortgage by listing the correct mortgagee, argue that the promissory notes⁷ had been transferred from Terrence and Loretta Mealy to Investment Enterprises, Inc. Plaintiffs assert the transfer establishes the debt to be secured for the 2000 mortgage.

Reformation is appropriate “when the minds of the parties have met on the terms of the contract they intended but the writing fails to express that intention.” *Hines v. Hines*, 2014 S.D. 32, ¶ 11, 851 N.W.2d 184, 187 (quoting *Enchanted World Doll Museum v. Bushkohl*, 398 N.W.2d 149, 152 (S.D. 1986)). When a court grants reformation, it does not create a contract; rather, it merely revises an already existing contract to reflect what the parties intended. *Id.* “A contract may be reformed when there is ‘fraud or mutual mistake of the parties, or a mistake of one party which the other at the time knew or suspected[.]’” *Id.* (quoting SDCL 21-11-1). However, it is presumed that the “writing accurately reflects the intent of the parties.” *Enchanted World Doll Museum*, 398 N.W.2d at 152. Therefore, the party “seeking reformation must prove

⁷ Plaintiffs do not identify which promissory notes were transferred. However, the following promissory notes were executed before September 21, 2000: B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, and R.

their case ‘by clear and convincing evidence.’” *Hines*, 2014 S.D. 32, ¶ 11, 851 N.W.2d at 187 (quoting *World Doll Museum*, 398 N.W.2d at 152).

Plaintiffs have not met their burden to establish their case for reformation by clear and convincing evidence. First, this Court would have to actually write the mortgage to make it enforceable. As discussed above, the obligations section of the mortgage is not filled out, with the exception of the Defendants’ names and relationship to each other. This means the Court would have to: (1) insert specific promissory notes and their date of execution; (2) insert the amount of the promissory notes; and (3) insert the due date of the promissory notes.

Second, there is a dearth of evidence in the record provided to the Court that supports Plaintiffs’ position that some promissory notes were transferred from Terrence and Loretta Mealy to Investment Enterprises, Inc. In fact, all of the promissory notes prior to the 2000 mortgage—executed on September 21, 2000—and up to June 6, 2003 are payable to Terrence Mealy, Terrance and Loretta Mealy, and Terrence or Loretta Mealy. None of these notes possess any indication of being transferred and thereby being made payable to Investment Enterprises, Inc. Therefore, the Court would have to again make a material alteration to the mortgage to make it enforceable, *i.e.*, change the mortgagee to Terrence Mealy from Investment Enterprises, Inc. Furthermore, the Court would also have to supply specific promissory notes and their dates of execution, the amount of the promissory notes, and the due date for the promissory notes.

The Court, based on the above analysis, cannot grant reformation in this case because to do so would amount to creating a contract, not merely just revising an existing contract. *See Hines*, 2014 S.D. 32, ¶ 11, 851 N.W.2d at 187.

CONCLUSION

Defendants are entitled to summary judgment as a matter of law on the forty-eight promissory notes. The Defendants presumptively established that the statute of limitations has

run on all forty-eight promissory notes in dispute. As such, the burden shifted to Plaintiffs to establish the existence of material facts in avoidance of the statute of limitations. Plaintiffs offered no persuasive argument that established the existence of material facts that would revive the statute of limitations. First, because Plaintiffs chose South Dakota as the forum to pursue this action, they are bound by its statute of limitations. Second, the subordination agreement referenced a specific promissory note worth \$325,000.00 that is not present among the forty-eight promissory notes in dispute. Thus, there is a hesitation that calls into doubt what debt was referenced in the subordination agreement. Third, the alleged partial payment was not in writing and signed by the Defendants as is required by SDCL 15-2-29. Moreover, the alleged partial payment was inherently ambiguous as to what specific promissory note or notes it was to be applied.

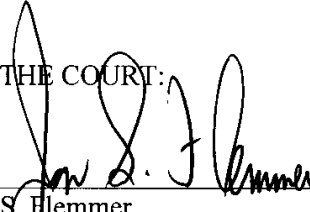
Defendants are also entitled to summary judgment as a matter of law on the 2000 mortgage. The 2000 mortgage fails to secure a debt, an essential element of a mortgage. In an attempt to secure a debt, Plaintiffs unconvincingly argue that reformation of the 2000 mortgage is appropriate. To overcome the presumption that the writing reflects the parties' intent, Plaintiffs must prove their case for reformation by clear and convincing evidence. Plaintiffs fail for two reasons. First, any reformation of the 2000 mortgage would amount to a creation of a new mortgage. The Court would have to supply specific promissory notes and their date of execution, the amount of the promissory notes, and the due date for the promissory notes. Second, there is a lack of evidence in the record establishing promissory notes were transferred from Terrence and Loretta Mealy to Investment Enterprises, Inc. In the absence of a transfer, the Court, to make the 2000 mortgage enforceable, would therefore have to change the mortgagee to Terrence Mealy. This would also necessitate supplying specific promissory notes and their date of execution, the

amount of the promissory notes, and the due date for the promissory notes. As such, the Court would be creating a contract, not revising an existing contract.

Thus, Defendants' motion for partial summary judgment on the forty-eight promissory notes and the 2000 mortgage is granted. Counsel for Defendants shall submit an Order consistent with this Memorandum Decision. In addition, Defendants shall, unless waived by Plaintiffs, prepare Findings of Fact and Conclusions incorporating this Memorandum Decision by reference.

DATED this 23rd day of November, 2015 at Sisseton, South Dakota.

BY THE COURT:



Jon S. Flemmer
Circuit Judge

ATTEST:



Cindy Marohle
Clerk of Courts



STATE OF SOUTH DAKOTA)
 ss:
COUNTY OF ROBERTS) FIFTH JUDICIAL CIRCUIT

LORETTA B. MEALY, Individually and
as Personal Representative of the
ESTATE OF TERRENCE L. MEALY, and
INVESTMENT ENTERPRISES, INC.,

Plaintiffs,

v.

BRUCE PRINS and CORRINE PRINS,
and PRAIRIE SKY GUEST & GAME
RANCH, LLC,

Defendants.

Defendants' Motion for Partial Summary Judgment was heard before this Court on August 24, 2015, and the Defendant, Bruce Prins, having appeared personally and with counsel, Lee Schoenbeck, and the Plaintiffs having appeared through counsel, Julie Dvorak, and the Court having reviewed the filings and listened to the arguments of counsel, hereby issues the following partial summary judgment.

IT IS ORDERED, ADJUDGED, AND DECREED that the following forty-eight promissory notes are unenforceable as a matter of law, having been barred by the Statute of Limitations:

Schedule of Promissory Notes

Date	Amount	Ex. # (attached to the <i>Complaint</i>)
4/28/99	5,000.00	B
6/9/99	7,000.00	C
7/26/99	10,000.00	D
8/10/99	8,000.00	E

Date	Amount	Ex. # (attached to the <i>Complaint</i>)
8/28/99	10,000.00	F
9/24/99	12,000.00	G
10/6/99	7,000.00	H
11/11/99	15,000.00	I
11/29/99	5,000.00	J
12/21/99	9,000.00	K
1/10/00	35,000.00	L
2/10/00	6,000.00	M
2/25/00	8,000.00	N
4/8/00	35,000.00	O
5/12/00	9,500.00	P
5/12/00	16,000.00	Q
6/27/00	18,000.00	R
9/22/00	15,000.00	S
11/30/00	9,500.00	T
12/28/00	25,000.00	U
2/28/01	25,000.00	V
4/14/01	15,000.00	W
9/8/01	15,000.00	X
1/12/02	17,000.00	Y
2/7/02	15,000.00	Z
3/12/02	25,000.00	AA
4/15/02	20,000.00	BB
6/26/02	5,000.00	CC
9/11/02	8,000.00	DD
9/11/02	27,000.00	EE
12/30/02	30,000.00	FF
2/7/03	12,000.00	GG
3/14/03	26,000.00	HH
6/6/03	35,000.00	II
9/23/03	39,000.00	JJ
1/2/04	38,000.00	KK
3/5/04	26,000.00	LL
4/5/04	27,000.00	MM
7/16/04	18,000.00	NN
9/1/04	20,000.00	OO
12/29/04	44,000.00	PP
7/06/05	20,000.00	QQ
8/08/05	25,000.00	RR
9/22/05	25,000.00	TT
12/27/05	45,000.00	UU
3/30/06	35,000.00	WW
4/26/06	35,000.00	XX

Date	Amount	Ex. # (attached to the <i>Complaint</i>)
12/20/06	54,000.00	BBB

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the document entitled Mortgage, attached as Exhibit A to Plaintiffs' Complaint, which purports to be a mortgage between Investment Enterprises, Inc., an Iowa corporation, as Mortgagee, and Bruce Prins and Corrine Prins, husband and wife, as Mortgagors, and dated at September 21, 2000, and recorded on July 10, 2001, at 1:40 p.m., in the Roberts County Register of Deeds office, on Book 204, pages 954-958, of Mortgages, and purporting to encumber the real property set forth below, is void, unenforceable, and shall be cancelled on the public record:

Lots Two (2), Three (3), and Four (4), Southwest Quarter of Northwest Quarter (SW $\frac{1}{4}$ NW $\frac{1}{4}$), Northwest Quarter of Southwest Quarter (NW $\frac{1}{4}$ SW $\frac{1}{4}$), and Southeast Quarter (SE $\frac{1}{4}$), all in Section Four (4), Township One Hundred Twenty-five North (125N), Range Fifty-two (52).

Northeast Quarter of Southeast Quarter (NE $\frac{1}{4}$ SE $\frac{1}{4}$), of Section Five (5), Township One Hundred Twenty-five North (125N), Range Fifty-two (52), and

West Half of Northeast Quarter (W $\frac{1}{2}$ NE $\frac{1}{4}$), West Half of Southeast Quarter (W $\frac{1}{2}$ SE $\frac{1}{4}$), Northeast Quarter of Southeast Quarter (NE $\frac{1}{4}$ SE $\frac{1}{4}$), and Southeast Quarter of Southeast Quarter (SE $\frac{1}{4}$ SE $\frac{1}{4}$) of Section Thirty-two (32), Township One Hundred Twenty-six North (126N), Range Fifty-two (52).

all West of the 5th P.M., Roberts County, State of South Dakota.

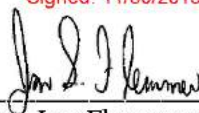
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the

Memorandum Decision of the Court, dated November 23, 2015, is incorporated herein by this reference.

Dated: _____

BY THE COURT

Signed: 11/30/2015 10:21:00 AM



Hon. Jon Flemmer
Circuit Court Judge

ATTEST:

Attest:
Cindy Marohl, Clerk/Deputy

Clerk/Deputy



STATE OF SOUTH DAKOTA

)

IN CIRCUIT COURT

SS:

COUNTY OF ROBERTS

)

FIFTH JUDICIAL CIRCUIT

LORETTA B. MEALY, Individually and
as Personal Representative of the ESTATE OF
TERRENCE L. MEALY, and
INVESTMENT ENTERPRISES, INC.,

54Civ. 15-21

v.

**BRUCE PRINS and CORRINE PRINS,
and PRAIRIE SKY GUEST & GAME
RANCH, LLC,**

SPECIAL VERDICT FORM

FILED

NO: 2 0 2017

**SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
5TH CIRCUIT CLERK OF COURT**

By _____ AG

We, the jury, duly impaneled in the above-entitled action and sworn to try the issues, find as follows with respect to the issues we are to address:

Question 1.

With respect to the contract claim concerning the promissory notes, do you find:

X (a) They are enforceable promissory notes.

or

_____ (b) They are contributions to a joint venture.

If you checked 1(b), then skip to Question 6. If you checked 1(a), answer the next question.

Question 2.

If you found that there were enforceable promissory notes, do you find that any of these affirmative defenses prevent their enforcement:

Yes	No	
_____	<u>X</u>	(a) Waiver
_____	<u>X</u>	(b) Estoppel
_____	<u>X</u>	(c) Laches
_____	<u>X</u>	(d) Fraud

If you checked "Yes" for any of 2(a) through 2(d), then skip to Question 6. If you checked "No" for each of 2(a) through 2(d), then go to the next question.

Question 3.

What amount do you find for the Plaintiffs on this contract claim?

\$ 196,000

After Question 3, answer the next question.

Question 4.

Do you find the Plaintiffs are entitled to pre-judgment interest?

Yes	No
<u>X</u>	_____

If "No," go to Question 6. If "Yes," go to next question.

Question 5.

On what date (fill in date) 01/02/08 and in what amount of the contract claim do you find the Plaintiffs are entitled to pre-judgment interest?

\$ 196,000

After Question 5, answer the next question.

Question 6.

With respect to unjust enrichment, do you find that either party was unjustly enriched, and if so, which party:

Neither Party	Plaintiffs	Defendants
_____	_____	<u> X </u>

If you checked "Neither Party," then skip to Question 10. If you checked either "Plaintiffs" or "Defendants," then go to the next question.

Question 7.

In what amount did you find that the party in Question 6 was unjustly enriched?

If you found for the Plaintiffs, DO NOT include any damages to Plaintiffs that occur prior to March 6, 2005, and if you awarded any monies under Question No. 3 above, DO NOT include those again on this line.

\$ 135,000

If you found for the Defendants, DO NOT include any damages to Defendants that occurred prior to April 20, 2005.

\$ Ø

After Question 7, answer the next question.

Question 8.

Do you find that party is entitled to pre-judgment interest?

Yes	No
_____	<u> X </u>

If "No," go to Question 10. If "Yes," go to the next question.

Question 9.

On what date (fill in date) _____ and in what amount of the unjust enrichment do you find the party is entitled to pre-judgment interest?

\$ _____

After Question 9, answer the next question.

Question 10.

With respect to the Plaintiffs' claim that the Defendants committed conversion, do you find (Remember, with conversion, you are identifying the party who has something of value they shouldn't have, and should pay it back.):

(a) Defendants converted funds from the sale of the buffalo?

Yes	No
_____	<u>X</u>

(b) Possession of buffalo that belonged to Plaintiffs?

Yes	No
_____	<u>X</u>

If you found "No" to both (a) and (b), then go to Question 14. If you found "Yes" to either (a) or (b), then answer the next Question.

Question 11.

In what amount did you find that the Defendants committed conversion? (DO NOT include any monies that you may have awarded under Questions 3 and 7 above.)

(a) Buffalo sales \$ _____

(b) Retention of Plaintiffs' buffalo \$ _____

After Question 11, answer the next question.

Question 12.

Do you find that the Plaintiffs are entitled to pre-judgment interest for the conversion claims?

Yes **No**

If "No," go to Question 14. If "Yes," go to the next question.

Question 13.

On what date (fill in date) _____ and in what amount of the converted property do you find the Plaintiffs are entitled to pre-judgment interest?

\$ _____

After Question 13, answer the next question.

Question 14.

With respect to the Defendants' claim that the Plaintiffs committed conversion, do you find (Remember, with conversion, you are identifying the party who has something of value they shouldn't have, and should pay it back.):

- (a) Plaintiffs converted Defendants' personal property reflected in Exhibit TT (other than those items by which there is a checkmark)?

Yes **No**

_____ X

- (b) Plaintiffs converted Defendants' business property reflected in Exhibit UU?

Yes **No**

 X _____

- (c) Plaintiffs converted Defendants' trademark?

Yes **No**

_____ X

If you found "No" to (a) through (c), then go to Question 18. If you found "Yes" to either (b) or (c), then answer the next question.

Question 15.

In what amount do you find that the Plaintiffs committed conversion (DO NOT include any monies you may have awarded to Defendants in Question 7 above):

(b) Defendants' business property reflected in Exhibit UU

\$ 135,000.00 11-20-11

(c) Defendants' trademarks

\$ 0.00

After Question 15, answer the next question.

Question 16.

Do you find that the Defendants are entitled to pre-judgment interest?

Yes

No

X

If "No," go to Question 18. If "Yes," go to the next question.

Question 17.

On what date (fill in date) _____ and in what amount do you find the Defendants are entitled to pre-judgment interest?

\$ _____

After Question 17, answer the next question.

Question 18.

Did the Plaintiffs infringe on the Defendants' Federally registered trademark?

Yes

No

X

After Question 18, answer the next question.

Question 19.

Did the Plaintiffs infringe on the Defendants' www.prairieskyranch.com domain name?

Yes	No
_____	<u>X</u>

After Question 19, answer the next question.

Question 20.

Did the Plaintiffs infringe on the Defendants' state trademarks?

Yes	No
_____	<u>X</u>

If you answered "Yes" to any of Questions 18-20, then go to Question 21. If you answered "No" to all of Questions 18-20, then the foreperson should date and sign the Verdict Form and notify the bailiff.

Question 21.

If you entered "Yes" to any of Questions 18-20, enter the amount of damages sustained by the Defendants as a result (DO NOT include any amounts you may have awarded under Question 7 or 15(c) above).

\$ _____

After Question 21, answer the next question.

Question 22.

Do you find that the Defendants are entitled to pre-judgment interest?

Yes	No
_____	_____

If "No," the foreperson should date and sign the Verdict Form and notify the bailiff. If "Yes," then go to the next question.

Question 23.

On what date (fill in date) 20 Nov 2017 and in what amount do
you find the Defendants are entitled to pre-judgment interest?

\$ _____

The foreperson should date and sign the Verdict Form and notify the bailiff.

Dated this 20 day of November, 2017.


Foreperson

STATE OF SOUTH DAKOTA
COUNTY OF ROBERTS

IN CIRCUIT COURT
FIFTH JUDICIAL CIRCUIT

* * * * *

LORETTA B. MEALY, Individually and * 54CIV15-000021
as Personal Representative of the ESTATE *
OF TERRENCE L. MEALY, and *
INVESTMENT ENTERPRISES, INC., *

Plaintiffs, JUDGMENT *

vs. *

BRUCE PRINS and CORRINE PRINS, *
and PRAIRIE SKY GUEST & GAME *
RANCH, LLC, *

Defendants. *

* * * * *

The above-captioned matter came before the Circuit Court, Honorable Jon S. Flemmer presiding, for a jury trial on November 15-17 and 20, 2017. Plaintiffs were represented by their attorneys Reed Rasmussen and Michael J. Scotti. Defendants were represented by their attorneys Lee Schoenbeck and Shawn M. Nichols. The issues in this matter were duly tried, and the jury rendered its verdict on November 20, 2017. The parties stipulated, pursuant to SDCL 15-6-39(c), that the equitable issues not triable of right by a jury, would be tried with an advisory jury. The Court hereby adopts all of the jury's findings in regard to those equitable issues set forth specifically in the Special Verdict Form dated November 20, 2017. Based thereon,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment is entered as follows:

1. The following promissory notes between Plaintiffs and Defendants are enforceable and were not contributions to a joint venture:
- (a) Promissory note dated March 2, 2006 in the amount of \$35,000.
 - (b) Promissory note dated June 26, 2006 in the amount of \$20,000.
 - (c) Promissory note dated July 3, 2006 in the amount of \$16,000.
 - (d) Promissory note dated September 1, 2006 in the amount of \$15,000.
 - (e) Promissory note dated February 28, 2007 in the amount of \$28,000.
 - (f) Promissory note dated June 5, 2007 in the amount of \$25,000
 - (g) Promissory note dated January 2, 2008 in the amount of \$57,000.
- Total: \$196,000.

2. None of the following affirmative defenses raised by Defendants were proven by Defendants: (a) waiver; (b) estoppel; (c) laches; or (d) fraud.

3. Plaintiffs are entitled to the contractual interest rate set forth in each of the notes from and after January 2, 2008.

4. As of November 20, 2017, the prejudgment interest owed by Defendants totaled \$159,407.83, with a daily accrual rate of \$44.19 thereafter.

5. As of February 1, 2018, the total amount owing, with interest, equaled \$358,589.51.

6. On February 1, 2018, Defendants tendered to Plaintiffs a check in the sum of \$221,439.08, thereby reducing the balance owed to \$137,150.43, with a daily accrual rate of \$30.91 per day thereafter.

7. The Defendants were unjustly enriched in the amount of \$135,000. Therefore, Plaintiffs are entitled to an additional \$135,000 in money damages from Defendants.

8. Plaintiffs are not entitled to prejudgment interest on the \$135,000 unjust enrichment award.

9. The Defendants did not commit conversion in regard to Plaintiffs' buffalo or the funds from the sale of those buffalo.

10. In regard to Defendants' claim that Plaintiffs committed conversion:

- (a) Plaintiffs did not convert Defendants' personal property reflected in Exhibit TT.
- (b) Plaintiffs did convert Defendants' business property reflected in Exhibit UU.
- (c) Plaintiffs did not convert or infringe upon Defendants' trademark.
- (d) Defendants are entitled to \$135,000 of money damages from the Plaintiffs.

11. Defendants are not entitled to prejudgment interest on the monetary damage award in their conversion claim.

12. The awards to each party for \$135,000 offset each other.

13. Plaintiffs did not infringe on the Defendants' federally registered trademark.

14. Plaintiffs did not infringe on the Defendants' www.prairieskyranch.com domain name.

15. Plaintiffs did not infringe on the Defendants' state trademarks.

Based on the foregoing,

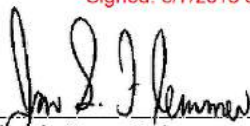
IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that Judgment is entered against Defendants, in favor of Plaintiffs, as follows:

A monetary judgment is entered against Defendants, Bruce and Corrine Prins, jointly and severally, in favor of Plaintiffs in the sum of One Hundred Thirty-Seven Thousand One Hundred Fifty Dollars and Forty-three Cents (\$137,150.43) with interest accruing at the daily rate of \$30.91 from February 1, 2018.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiffs are awarded costs in the sum of \$6,660.11.

BY THE COURT:

Signed: 3/7/2018 6:09:12 PM



Circuit Court Judge

Attest:
Guy, Brenda
Clerk/Deputy



STATE OF SOUTH DAKOTA
COUNTY OF ROBERTS

IN CIRCUIT COURT
FIFTH JUDICIAL CIRCUIT

* * * * *

LORETTA B. MEALY, Individually and * 54CIV15-000021
as Personal Representative of the ESTATE *
OF TERRENCE L. MEALY, and *
INVESTMENT ENTERPRISES, INC., *

Plaintiffs, * ORDER REGARDING
vs. * POST-TRIAL MOTIONS

BRUCE PRINS and CORRINE PRINS, *
and PRAIRIE SKY GUEST & GAME *
RANCH, LLC, *

Defendants. *

* * * * *

This matter came before the Court on March 1, 2018, for a hearing on Defendants' Motion on Advisory Verdict, Plaintiffs' Application for Taxation of Costs and Disbursements and Defendants' Application for Taxation of Costs and Disbursements. Plaintiffs appeared through their attorneys Michael J. Scotti and Reed Rasmussen. Defendants appeared through Bruce Prins and their attorney, Lee Schoenbeck.

Regarding the Motion on Advisory Verdict, the jury returned an award in favor of Plaintiffs for unjust enrichment in the sum of \$135,000. Defendants objected to this award and requested that the Court order that neither side was entitled to damages for unjust enrichment. Upon consideration of the evidence heard by the Court at trial, the pleadings submitted by the parties and the arguments of counsel,

IT IS HEREBY ORDERED that Defendants' Motion is denied.

IT IS FURTHER ORDERED that the Court accepts the advisory jury's verdict in awarding Plaintiffs damages for unjust enrichment in the sum of \$135,000.

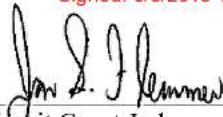
Both sides filed Applications for the Taxation of Costs and Disbursements. Both sides objected to the other side's Application. The Court finds Plaintiffs to be the prevailing party and further, finds no cause to deny or reduce an award of costs and disbursements based upon either SDCL 15-17-52 or 15-17-53.

Plaintiffs originally sought costs and disbursements in the sum of \$7,682.39. Defendants objected to certain costs which Plaintiffs agreed could be deducted. Based on Defendants' objections,

IT IS HEREBY ORDERED that Plaintiffs are hereby awarded costs in the sum of \$6,660.11.

BY THE COURT:

Signed: 3/8/2018 11:37:34 AM



Circuit Court Judge

Attest:
Guy, Brenda
Clerk/Deputy



STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF ROBERTS

FIFTH JUDICIAL CIRCUIT

* * * * *

LORETTA B. MEALY, Individually and
as Personal Representative of the ESTATE
OF TERRENCE L. MEALY, and
INVESTMENT ENTERPRISES, INC.,

* 54CIV15-000021

*

*

Plaintiffs,

*

SATISFACTION OF JUDGMENT

vs.

*

BRUCE PRINS and CORRINE PRINS,
and PRAIRIE SKY GUEST & GAME
RANCH, LLC,

*

*

Defendants.

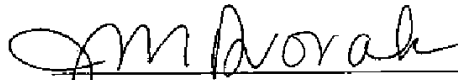
*

* * * * *

Plaintiffs through their counsel Reed Rasmussen, hereby acknowledge full and complete satisfaction of the Judgment filed March 8, 2018 in connection with this matter.

Dated this 15 day of March, 2018.

SIEGEL, BARNETT & SCHUTZ, L.L.P.



Reed Rasmussen
rrasmussen@sbslaw.net

Julie Dvorak
jdvorak@sbslaw.net
P.O. Box 490
Aberdeen, SD 57402-0490
Telephone: (605) 225-5420
Facsimile No: (605) 226-1911

Michael J. Scotti III
mjscotti@ralaw.com
Roetzel & Andress LLP
30 N. LaSalle Street, Suite 2800
Chicago, IL 60602
Telephone No. (312) 582-1605
Facsimile No. (312) 580-1201

Attorneys for Plaintiffs

Instruction No. 20

If a party has the power to produce a witness but fails to do so, you may infer that the testimony of that witness would not have been favorable to that party. This rule applies only if you find the following facts:

- (1) The party, with exercise of reasonable diligence, could have produced the witness; and
- (2) A reasonable person in the same circumstances would have produced the witness if the party believed the testimony of the witness would be favorable; and
- (3) No reasonable excuse exists for the failure of the party to produce the witness; and
- (4) The witness was not equally available to the adverse party or parties.

Preparer Information Terrence L. Mealy 301 East Second Street, Muscatine IA 52761 319-263-0804
Individual's Name Street Address City Phone

**MORTGAGE**
(Open-End)SPACE ABOVE THIS LINE
FOR RECORDER

THIS MORTGAGE ("Mortgage") encumbers both real and personal property, contains an after-acquired property clause and secures present and future loans and advances.

NOTICE: This Mortgage secures credit in the amount of \$ _____. Loans and advances up to this amount, together with interest are senior to indebtedness to other creditors under subsequently recorded or filed mortgages and liens.

- ☐ If this box is checked, this Mortgage also constitutes a Construction Mortgage as defined in the Iowa Code.
☐ If this box is checked, this Mortgage is a Purchase Money Mortgage as defined in the Iowa Code.

THIS Mortgage is made between

Bruce Prins and Corrine Prins, husband and wife,

("Mortgagors") and Investment Enterprises, Inc., an Iowa Corporation ("Mortgagee").

1. Grant of Mortgage and Security Interest. Mortgagors hereby sell, convey and mortgage unto Mortgagee, and grant a security interest to Mortgagee in the following described property:

- a. Land and Buildings. All of Mortgagors' right, title and interest in and to the following described real estate situated in
Roberts County, South Dakota (the "Land");

See Exhibit "A" attached hereto which is incorporated herein by this reference.

and all buildings, structures and improvements now standing or at any time hereafter constructed or placed upon the Land (the "Buildings"), including all hereditaments, easements, appurtenances, riparian rights, mineral rights, water rights, rights in and to the lands lying in streets, alleys and roads adjoining the land, estates and other rights and interests now or hereafter belonging to or in any way pertaining to the Land.

b. Personal Property. All fixtures and other personal property integrally belonging to, or hereafter becoming an integral part of the Land or Buildings, whether attached or detached, including but not limited to, light fixtures, shades, rods, blinds, Venetian blinds, awnings, storm windows, screens, linoleum, water softeners, automatic heating and air-conditioning equipment and all proceeds, products, increase, issue, accessions, attachments, accessories, parts, additions, repairs, replacements and substitutes of, to, and for the foregoing (the "Personal Property").

c. Revenues and Income. All rents, issues, profits, leases, condemnation awards and insurance proceeds now or hereafter arising from the ownership, occupancy or use of the Land, Buildings and Personal Property, or any part thereof (the "Revenues and Income").

TO HAVE AND TO HOLD the Land, Buildings, Personal Property and Revenues and Income (collectively called the "Mortgaged Property"), together with all privileges, hereditaments thereunto now or hereafter belonging, or in any way appertaining and the products and proceeds thereof, unto Mortgagee, its successors and assigns.

2. Obligations. This Mortgage secures the following (hereinafter collectively referred to as the "Obligations"):

- a. The payment of the loan made by Mortgagee to Bruce Prins & Corrine Prins/ husband and wife evidenced by a promissory notes dated _____, 19____ in the principal amount of \$ _____ with a due date of _____, any renewals, extensions, modifications or refinancing thereof and any promissory notes issued in substitution therefor; and

b. All other obligations of Mortgagors to Mortgagee, now existing or hereafter arising, whether direct or indirect, contingent or absolute and whether as maker or surety, including, but not limited to, future advances and amounts advanced and expenses incurred by Mortgagee pursuant to this Mortgage.

c.

THIS PARAGRAPH SHALL NOT CONSTITUTE A COMMITMENT TO MAKE ADDITIONAL LOANS IN ANY AMOUNT.

3. Representations and Warranties of Mortgagors. Mortgagors represent, warrant and covenant to Mortgagee that (i) Mortgagors hold clear title to the Mortgaged Property and title in fee simple in the Land; (ii) Mortgagors have the right, power and authority to execute this Mortgage and to mortgage, and grant a security interest in the Mortgaged Property; (iii) the Mortgaged Property is free and clear of all liens and encumbrances, except for real estate taxes not yet delinquent and except as otherwise stated in subparagraph 1a. herein; (iv) Mortgagors will warrant and defend title to the Mortgaged Property and the lien and priority of this Mortgage against all claims and demands of all persons, whether now existing or hereafter arising; and (v) all buildings and improvements now or hereafter located on the Land are, or will be, located entirely within the boundaries of the Land.

4. Payment and Performance of the Obligations. Mortgagors will pay all amounts payable under the Obligations in accordance with the terms of the Obligations when and as due and will timely perform all other obligations of Mortgagors under the Obligations. The provisions of the Obligations are hereby incorporated by reference into this Mortgage as if fully set forth herein.

5. **Taxes.** Mortgagors shall pay each installment of all taxes and special assessments of every kind, now or hereafter levied against the Mortgaged Property before the same become delinquent, without notice or demand, and shall deliver to Mortgagee proof of such payment within fifteen (15) days after the date in which such tax or assessment becomes delinquent.

6. **Liens.** Mortgagors shall not create, incur or suffer to exist any lien, encumbrance, security interest or charge on the Mortgaged Property or any part thereof which might or could be held to be equal or prior to the lien of this Mortgage, other than the lien of current real estate taxes and installments of special assessments with respect to which no penalty is yet payable. Mortgagors shall pay, when due, the claims of all persons supplying labor or materials to or in connection with the Mortgaged Property.

7. **Compliance with Laws.** Mortgagors shall comply with all present and future statutes, laws, rules, orders, regulations and ordinances affecting the Mortgaged Property, any part thereof or the use thereof.

8. **Permitted Contests.** Mortgagors shall not be required to (i) pay any tax, assessment or other charge referred to in paragraph 5 hereof, (ii) discharge or remove any lien, encumbrance or charge referred to in paragraph 6 hereof, or (iii) comply with any statute, law, rule, regulation or ordinance referred to in paragraph 7 hereof, so long as Mortgagors shall contest, in good faith, the existence, amount or the validity thereof, the amount of damages caused thereby or the extent of Mortgagors' liability therefor, by appropriate proceedings which shall operate during the pendency thereof to prevent (A) the collection of, or other realization upon the tax, assessment, charge or lien, encumbrances or charge so contested, (B) the sale, forfeiture or loss of the Mortgaged Property or any part thereof, and (C) any interference with the use or occupancy of the Mortgaged Property or any part thereof. Mortgagors shall give prompt written notice to Mortgagee of the commencement of any contest referred to in this paragraph 8.

9. **Care of Property.** Mortgagors shall take good care of the Mortgaged Property; shall keep the Buildings and Personal Property now or later placed upon the Mortgaged Property in good and reasonable repair and shall not injure, destroy or remove either the Buildings or Personal Property during the term of this Mortgage. Mortgagors shall not make any material alteration to the Mortgaged Property without the prior written consent of Mortgagee.

10. **Insurance.**

a. **Risks to be Insured.** Mortgagors, at their sole cost and expense, shall maintain insurance as follows:

i. If this is a Construction Mortgage, during the period of construction, Mortgagors will maintain builder's risk insurance, written on the so-called "builder's risk-completed value basis", in an amount equal to 100% of the insurable value of the Mortgaged Property at the date of completion, and with coverage available on the so-called "all risk", non-reporting form of policy; provided that, to the extent that any contractor for such construction shall provide a duplicate insurance policy or builder's risk policy or certificate of insurance showing that the same coverage as is herein required is being carried by such contractor and adequately protects the interest of Mortgagee and Mortgagors with respect to the Mortgaged Property or a part thereof, Mortgagee shall not be required to maintain separate coverage. The insurance provided for by this subparagraph (i) with respect to the Mortgaged Property or such part thereof shall not be required while the Mortgaged Property or part thereof is so insured. Mortgagee's interest shall be protected in accordance with a standard mortgagee clause.

ii. If this is a Construction Mortgage, during the period of construction, Mortgagors will maintain comprehensive general liability insurance (including operations, contingent liability, operations of subcontractors, complete operations and contractual liability insurance) against bodily injury and property damage in amounts satisfactory to Mortgagee. If this is not a Construction Mortgage, or upon completion of construction, Mortgagors will maintain comprehensive general public liability insurance and property damage liability insurance in amounts satisfactory to Mortgagee to protect Mortgagors from claims (including all costs and expenses of defending the same) for personal injury, sickness, disease or death or for damage or injury to or destruction of property (including loss of use thereof) occurring in, on or about the Mortgaged Property.

iii. If this is not a Construction Mortgage, or upon completion of construction, Mortgagors will maintain insurance on the Buildings and other improvements now existing or hereafter erected on the Land and on the Personal Property included in the Mortgaged Property against loss by fire, extended coverage perils and such other hazards as Mortgagee may from time to time require, such insurance to have a "Replacement Cost" endorsement attached thereto, with the amount of the insurance at least equal to the balance of the Obligations. At Mortgagors' option, such policy may have a coinsurance clause of not less than 90% of replacement cost provided the policy contains an appropriate form of cost escalation endorsement. Mortgagors will at their sole cost and expense, from time to time, and at any time at the request of Mortgagee, provide Mortgagee with evidence satisfactory to Mortgagee of the replacement cost of Mortgaged Property.

iv. If this is a Construction Mortgage, during the period of construction, Mortgagors will maintain worker's compensation insurance with respect to all employees of Mortgagors and each contractor; and, if this is not a Construction Mortgage, or upon completion of construction, Mortgagors will maintain worker's compensation insurance with respect to all employees of Mortgagors.

v. At all times, Mortgagors will maintain such other insurance as Mortgagee may reasonably require.

b. **Policy Provisions.** All insurance policies and renewals thereof maintained by Mortgagors pursuant to this Mortgage shall be written by an insurance carrier satisfactory to Mortgagee, contain a mortgagee clause in favor of and in form acceptable to Mortgagee, contain an agreement of the insurer that it will not amend, modify or cancel the policy except after thirty (30) days prior written notice to Mortgagee, and be reasonably satisfactory to Mortgagee in all other respects.

c. **Delivery of Policy or Certificate.** If requested by Mortgagee, Mortgagors will deliver to Mortgagee original policies satisfactory to Mortgagee evidencing the insurance which is required under this Mortgage, and Mortgagors shall promptly furnish to Mortgagee all renewal notices and, upon request of Mortgagee, evidence of payment thereof. At least ten (10) days prior to the expiration date of a required policy, Mortgagors shall deliver to Mortgagee a renewal policy in form satisfactory to Mortgagee.

d. **Assignment of Policy.** If the Mortgaged Property is sold at a foreclosure sale or if Mortgagee shall acquire title to the Mortgaged Property, Mortgagee shall have all of the right, title and interest of Mortgagors in and to any insurance policies required hereunder, and the unearned premiums thereon, and in and to the proceeds thereof resulting from any damage to the Mortgaged Property prior to such sale or acquisition.

e. **Notice of Damage or Destruction; Adjusting Loss.** If the Mortgaged Property or any part thereof shall be damaged or destroyed by fire or other casualty, Mortgagors will, within five (5) calendar days after the occurrence of such damage or destruction, give written notice thereof to the insurance carrier and to Mortgagee and will not adjust any damage or loss which is estimated by Mortgagors in good faith to exceed \$25,000 unless Mortgagee shall have joined in or concurred with such adjustment; but if there has been no adjustment of any such damage or loss within four (4) months from the date of occurrence thereof and if an Event of Default shall exist at the end of such four (4) month period or at any time thereafter, Mortgagee may alone make proof of loss, adjust and compromise any claim under the policies, and appear in and prosecute any action arising from such policies. In connection therewith, Mortgagors do hereby irrevocably authorize, empower and appoint Mortgagee as attorney-in-fact for Mortgagor (which appointment is coupled with an interest) to do any and all of the foregoing in the name and on behalf of Mortgagors.

f. **Application of Insurance Proceeds.** All sums paid under any insurance policy required by this Mortgage shall be paid to Mortgagee, which shall, at its option, apply the same (after first deducting therefrom Mortgagee's expenses incurred in collecting the same including but not limited to reasonable attorney's fees) to the reduction of the Obligations or to the payment of the restoration, repair, replacement or rebuilding of Mortgaged Property that is damaged or destroyed in such manner as Mortgagee shall determine and secondly to the reduction of the Obligations. Any application of insurance proceeds to principal of the Obligations shall not extend or postpone the due date of the installments payable under the Obligations or change the amount of such installments.

g. **Reimbursement of Mortgagee's Expenses.** Mortgagors shall promptly reimburse Mortgagee upon demand for all of Mortgagee's expenses incurred in connection with the collection of the insurance proceeds, including but not limited to reasonable attorneys' fees, and all such expenses shall be additional amounts secured by this Mortgage.

11. **Inspection.** Mortgagee, and its agents, shall have the right at all reasonable times, to enter upon the Mortgaged Property for the purpose of inspecting the Mortgaged Property or any part thereof. Mortgagee shall, however, have no duty to make such inspection. Any inspection of the Mortgaged Property by Mortgagee shall be entirely for its benefit and Mortgagors shall in no way rely or claim reliance thereon.

12. **Protection of Mortgagee's Security.** Subject to the rights of Mortgagors under paragraph 8 hereof, if Mortgagors fail to perform any of the covenants and agreements contained in this Mortgage or if any action or proceeding is commenced which affects the Mortgaged Property or the interest of the Mortgagee therein, or the title thereto, then Mortgagee, at Mortgagee's option, may perform such covenants and agreements, defend against or investigate such action or proceeding, and take such other action as Mortgagee deems necessary to protect Mortgagee's interest. Any amounts or expenses disbursed or incurred by Mortgagee in good faith pursuant to this paragraph 12 with interest thereon at the rate of _____ % per annum, shall become an Obligation of Mortgagors secured by this Mortgage. Such amounts advanced or disbursed by Mortgagee hereunder shall be immediately due and payable by Mortgagors unless Mortgagors and Mortgagee agree in writing to other terms of repayment. Mortgagee shall, at its option, be subrogated to the lien of any mortgage or other lien discharged in whole or in part by the Obligations or by Mortgagee under the provisions hereof, and any such subrogation rights shall be additional and cumulative security for this Mortgage. Nothing contained in this paragraph shall require Mortgagee to incur any expense or do any act hereunder, and Mortgagee shall not be liable to Mortgagors for any damage or claims arising out of action taken by Mortgagee pursuant to this paragraph.

13. **Condemnation.** Mortgagors shall give Mortgagee prompt notice of any action, actual or threatened, in condemnation or eminent domain and hereby assign, transfer and set over to Mortgagee the entire proceeds of any award or claim for damages for all or any part of the Mortgaged Property taken or damaged under the power of eminent domain or condemnation. Mortgagee is hereby authorized to intervene in any such action in the names of Mortgagors, to compromise and settle any such action or claim, and to collect and receive from the condemning authorities and give proper receipts and acquittances for such proceeds. Any expenses incurred by Mortgagee in intervening in such action or compromising and settling such action or claim, or collecting such proceeds shall be reimbursed to Mortgagee first out of the proceeds. The remaining proceeds or any part thereof shall be applied to reduction of that portion of the Obligations then most remotely to be paid, whether due or not, or to the restoration or repair of the Mortgaged Property, the choice of application to be solely at the discretion of Mortgagee.

14. **Fixture Filing.** From the date of its recording, this Mortgage shall be effective as a financing statement filed as a fixture filing with respect to the Personal Property and for this purpose the name and address of the debtor is the name and address of Mortgagors as set forth in paragraph 20 herein and the name and address of the secured party is the name and address of the Mortgagee as set forth in paragraph 20 herein.

15. **Events of Default.** Each of the following occurrences shall constitute an event of default hereunder ("Event of Default"):

- a. Mortgagors shall default in the due observance or performance of or breach its agreement contained in paragraph 4 hereof or shall default in the due observance or performance of or breach any other covenant, condition or agreement on its part to be observed or performed pursuant to the terms of this Mortgage.
- b. Mortgagors shall make an assignment for the benefits of its creditors, or a petition shall be filed by or against Mortgagors under the United States Bankruptcy Code or Mortgagors shall seek or consent to or acquiesce in the appointment of any trustee, receiver or liquidator of a material part of its properties or of the Mortgaged Property or shall not, within thirty (30) days after the appointment of a trustee, receiver or liquidator of any material part of its properties or of the Mortgaged Property, have such appointment vacated.
- c. A judgment, writ or warrant of attachment or execution, or similar process shall be entered and become a lien on or be issued or levied against the Mortgaged Property or any part thereof which is not released, vacated or fully bonded within thirty (30) days after its entry, issue or levy.
- d. An event of default, however defined, shall occur under any other mortgage, assignment or other security document constituting a lien on the Mortgaged Property or any part thereof.
- e.

16. **Acceleration; Foreclosure.** Upon the occurrence of any Event of Default and at any time thereafter while such Event of Default exists, Mortgagee may, at its option, after such notice as may be required by law, exercise one or more of the following rights and remedies (and any other rights and remedies available to it):

- a. Mortgagee may declare immediately due and payable all Obligations secured by this Mortgage, and the same shall thereupon be immediately due and payable, without further notice or demand.
- b. Mortgagee shall have and may exercise with respect to the Personal Property, all the rights and remedies accorded upon default to a secured party under the Iowa Uniform Commercial Code. If notice to Mortgagors of intended disposition of such property is required by law in a particular instance, such notice shall be deemed commercially reasonable if given to Mortgagors at least ten (10) days prior to the date of intended disposition.
- c. Mortgagee may (and is hereby authorized and empowered to) foreclose this Mortgage in accordance with the law of the State of Iowa, and at any time after the commencement of an action in foreclosure, or during the period of redemption, the court having jurisdiction of the case shall at the request of Mortgagee appoint a receiver to take immediate possession of the Mortgaged Property and of the Revenues and Income accruing therefrom, and to rent or cultivate the same as he may deem best for the interest of all parties concerned, and such receiver shall be liable to account to Mortgagors only for the net profits, after application of rents, issues and profits upon the costs and expenses of the receivership and foreclosure and upon the Obligations.

17. **Redemption.** It is agreed that if this Mortgage covers less than ten (10) acres of land, and in the event of the foreclosure of this Mortgage and sale of the property by sheriff's sale in such foreclosure proceedings, the time of one year for redemption from said sale provided by the statutes of the State of Iowa shall be reduced to six (6) months provided the Mortgagee, in such action files an election to waive any deficiency judgment against Mortgagors which may arise out of the foreclosure proceedings; all to be consistent with the provisions of Chapter 628 of the Iowa Code. If the redemption period is so reduced, for the first three (3) months after sale such right of redemption shall be exclusive to the Mortgagor, and the time periods in Sections 628.5, 628.15 and 628.16 of the Iowa Code shall be reduced to four (4) months.

It is further agreed that the period of redemption after a foreclosure of this Mortgage shall be reduced to sixty (60) days if all of the three following contingencies develop: (1) The real estate is less than ten (10) acres in size; (2) the Court finds affirmatively that the said real estate has been abandoned by the owners and those persons personally liable under this Mortgage at the time of such foreclosure; and (3) Mortgagee in such action files an election to waive any deficiency judgment against Mortgagors or their successors in interest in such action. If the redemption period is so reduced, Mortgagors or their successors in interest or the owner shall have the exclusive right to redeem for the first thirty (30) days after such sale, and the time provided for redemption by creditors as provided in Sections 628.5, 628.15 and 628.16 of the Iowa Code shall be reduced to forty (40) days. Entry of appearance by pleading or docket entry by or on behalf of Mortgagors shall be a presumption that the property is not abandoned. Any such redemption period shall be consistent with all of the provisions of Chapter 628 of the Iowa Code. This paragraph shall not be construed to limit or otherwise affect any other redemption provisions contained in Chapter 628 of the Iowa Code.

18. **Attorneys' Fees.** Mortgagors shall pay on demand all costs and expenses incurred by Mortgagee in enforcing or protecting its rights and remedies hereunder, including, but not limited to, reasonable attorneys' fees and legal expenses.

19. **Forbearance not a Waiver, Rights and Remedies Cumulative.** No delay by Mortgagee in exercising any right or remedy provided herein or otherwise afforded by law or equity shall be deemed a waiver of or preclude the exercise of such right or remedy, and no waiver by Mortgagee of any particular provisions of this Mortgage shall be deemed effective unless in writing signed by Mortgagee. All such rights and remedies provided for herein or which Mortgagee or the holder of the Obligations may have otherwise, at law or in equity, shall be distinct, separate and cumulative and may be exercised concurrently, independently or successively in any order whatsoever, and as often as the occasion therefor arises.

20. Notices. All notices required to be given hereunder shall be in writing and deemed given when personally delivered or deposited in the United States mail, postage prepaid, sent certified or registered, addressed as follows:

a. If to Mortgagors, to:

Bruce and Corrine Prins
RR 3 Box 192
Sisseton, South Dakota 57262

b. If to Mortgagee, to:

Investment Enterprises, Inc.
301 East Second Street
Muscatine IA 52761-4109

or to such other address or person as hereafter designated in writing by the applicable party in the manner provided in this paragraph for the giving of notices.

21. Severability. In the event any portion of this Mortgage shall, for any reason, be held to be invalid, illegal or unenforceable in whole or in part, the remaining provisions shall not be affected thereby and shall continue to be valid and enforceable and if, for any reason, a court finds that any provision of this Mortgage is invalid, illegal, or unenforceable as written, but that by limiting such provision it would become valid, legal and enforceable then such provision shall be deemed to be written, construed and enforced as so limited.

22. Further Assurances. At any time and from time to time until payment in full of the Obligations, Mortgagors will, at the request of Mortgagee, promptly execute and deliver to Mortgagee such additional Instruments as may be reasonably required to further evidence the lien of this Mortgage and to further protect the security interest of Mortgagee with respect to the Mortgaged Property, including, but not limited to, additional security agreements, financing statements and continuation statements. Any expenses incurred by Mortgagee in connection with the recordation of any such instruments shall become additional Obligations of Mortgagors secured by this Mortgage. Such amounts shall be immediately due and payable by Mortgagors to Mortgagee.

23. Successors and Assigns bound; Number; Gender; Agents; Captions. The rights, covenants and agreements contained herein shall be binding upon and inure to the benefit of the respective legal representatives, successors and assigns of the parties. Words and phrases contained herein, including acknowledgment hereof, shall be construed as in the singular or plural number, and as masculine, feminine or neuter gender according to the contexts. The captions and headings of the paragraphs of this Mortgage are for convenience only and are not to be used to interpret or define the provisions hereof.

24. Governing Law. This Mortgage shall be governed by and construed in accordance with the laws of the State of Iowa.

25. Release of Rights of Dower, Homestead and Distributive Share. Each of the undersigned hereby relinquishes all rights of dower, homestead and distributive share in and to the Mortgaged Property and waives all rights of exemption as to any of the Mortgaged Property.

26. Acknowledgment of Receipt of Copies of Debt Instrument. Mortgagors hereby acknowledge the receipt of a copy of this Mortgage together with a copy of each promissory note secured hereby.

27. Additional Provisions. Add Addendum Page.

Dated: 9-21-00

Bruce Prins
Bruce Prins

Corrine Prins
Corrine Prins

, Mortgagors

I UNDERSTAND THAT HOMESTEAD PROPERTY IS IN MANY CASES PROTECTED FROM THE CLAIMS OF CREDITORS AND EXEMPT FROM JUDICIAL SALE; AND THAT BY SIGNING THIS MORTGAGE, I VOLUNTARILY GIVE UP MY RIGHT TO THIS PROTECTION FOR THIS MORTGAGED PROPERTY WITH RESPECT TO CLAIMS BASED UPON THIS MORTGAGE.

Dated: 9-21-00

Bruce Prins
Bruce Prins

Dated: 9-21-00

Corrine Prins
Corrine Prins

STATE OF SOUTH DAKOTA

COUNTY OF Marshall

SS:

On this 01 day of Sept. before me, the undersigned, a Notary Public, personally appeared

Bruce Prins and Corrine Prins

to me known to be the identical persons named in and who executed the foregoing instrument, and acknowledged that they executed the same as their voluntary act and deed.

Notary Public
Notary Public

My Commission Expires
Aug 14, 2004

Notary Public

Lots Two (2), Three (3) and Four (4); Southwest Quarter of Northwest Quarter (SW $\frac{1}{4}$ NW $\frac{1}{4}$); Northwest Quarter of Southwest Quarter (NW $\frac{1}{4}$ SW $\frac{1}{4}$) and Southeast Quarter (SE $\frac{1}{4}$), all in Section Four (4), Township One Hundred Twenty-five North (125N), Range Fifty-two (52);

Northeast Quarter of Southeast Quarter (NE $\frac{1}{4}$ SE $\frac{1}{4}$) of Section Five (5), Township One Hundred Twenty-five North (125N), Range Fifty-two (52); and

West Half of Northeast Quarter (W $\frac{1}{2}$ NE $\frac{1}{4}$); West Half of Southeast Quarter (W $\frac{1}{2}$ SE $\frac{1}{4}$); Northeast Quarter of Southeast Quarter (NE $\frac{1}{4}$ SE $\frac{1}{4}$); and Southeast Quarter of Southeast Quarter (SE $\frac{1}{4}$ SE $\frac{1}{4}$) of Section Thirty-two (32), Township One Hundred Twenty-six North (126N), Range Fifty-two (52)

all West of the 5th P.M., Roberts County, State of South Dakota

SUBORDINATION AGREEMENT

This agreement is made and entered into between and among Bruce W. Prins and Corrine J. Prins, husband and wife of 44370 109th Street, Veblen, South Dakota 57270, hereinafter "Mortgagor"; Dacotah Bank of Sisseton, 321 Veterans Avenue, Sisseton, South Dakota 57262; and Investment Enterprises, Inc. of 301 East Second Street, Muscatine, Iowa 52761.

The parties recite and declare that:

WHEREAS Investment Enterprises, Inc. is the owner and holder of a certain note for Three Hundred Twenty-five Thousand Dollars (\$325,000.00) and interest, secured by a certain mortgage for such sum and interest made by Investment Enterprises, Inc. to Mortgagor, dated the 21st day of September, 2000, and recorded in at the Roberts County Register of Deeds, in Book 204 of mortgages, pages 954-958, and covering the following described real property located in Roberts County, South Dakota:

Lots Two (2), Three (3) and Four (4); Southwest Quarter of Northwest Quarter (SW $\frac{1}{4}$ NW $\frac{1}{4}$); Northwest Quarter of the Southwest Quarter (NW $\frac{1}{4}$ SW $\frac{1}{4}$) and Southeast Quarter (SE $\frac{1}{4}$), all in Section Four (4) Township One Hundred Twenty-five North (125N), Range Fifty-two (52), West of the 5th P.M., Roberts County, South Dakota.

Northeast Quarter of Southeast Quarter (NE $\frac{1}{4}$ SE $\frac{1}{4}$) of Section Five (5), Township One Hundred Twenty-five North (125N), Range Fifty-two (52), West of the 5th P.M., Roberts County, South Dakota

West Half of the Northeast Quarter (W $\frac{1}{2}$ NE $\frac{1}{4}$); West Half of Southeast Quarter (W $\frac{1}{2}$ SE $\frac{1}{4}$); Northeast Quarter of Southeast Quarter (NE $\frac{1}{4}$ SE $\frac{1}{4}$); and Southeast Quarter of Southeast Quarter (SE $\frac{1}{4}$ SE $\frac{1}{4}$) of Section Thirty-two (32), Township One Hundred Twenty-six North (126N), Range Fifty-two (52) West of the 5th P.M., Roberts County, South Dakota.

WHEREAS Dacotah Bank has a Collateral Real Estate Mortgage for One Hundred Eleven Thousand Dollars (\$11,000.00) and interest, on the above described real property located in Roberts County, South Dakota dated the 13th day of May, 1999, and recorded the 13th day of May, 1999 at 11:55 o'clock a.m. at the Roberts County Register of Deeds, in Book 199 of mortgages, page 220 with Addendum to Collateral Real Estate Mortgage for the purpose of continuing the effectiveness of the lien stated the 10th day of May, 2004 and recorded on the 1st day of May, 2004 at 10:16 o'clock a.m. at the Roberts County Register of Deeds, in Book 220 of Mortgages, page 337.

WHEREAS the parties hereto acknowledge that Dacotah Bank's Collateral Real Estate Mortgage and Addendum thereto has priority over the Investment Enterprises, Inc. mortgage dated September 21, 2000.

112,940
State of South Dakota, County of Roberts
Filed this 13th Day of July, 2009 At 1:50
O'Clock P. M. Book 250 Page 615-618
By Carol Martenson
Register of Deeds Deputy
Fees \$ 26.⁰⁰

250 615

WHEREAS Dacotah Bank is going to lend Mortgagor money amounts in combination with the amount due and owing Dacotah Bank under the Collateral Real Estate Mortgage and Addendum thereto not to exceed Five Hundred Thousand Dollars (\$500,000.00), and interest.

WHEREAS to induce Dacotah Bank to loan Mortgagor the additional money it is necessary that the mortgage held by Investment Enterprises, Inc. dated September 21, 2000 addressed herein be subordinated to the lien of the mortgage about to be made by Dacotah Bank to Mortgagor for amounts in combination with the amount due and owing Dacotah Bank under the Collateral Real Estate Mortgage and Addendum thereto not to exceed Five Hundred Thousand Dollars (\$500,000.00), and interest.

WHEREAS this subordination shall relate to all existing amounts due and owing to Dacotah Bank and all new, rewrites and/or additions as it relates to the new mortgage and Collateral Real Estate Mortgage and Addendum thereto not to exceed Five Hundred Thousand Dollars (\$500,000.00), and interest.

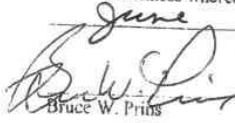
NOW THEREFORE THE PARTIES HERETO COVENANT AND AGREE AS FOLLOWS:

1. *Subordination.* Investment Enterprises, Inc. hereby covenants, consents, and agrees with Dacotah Bank that the mortgage held by Investment Enterprises, Inc. dated September 21, 2000 is and shall continue to be subject and subordinate in lien to the mortgage about to be made by Dacotah Bank and the Collateral Real Estate Mortgage and Addendum thereto in amounts not to exceed Five Hundred Thousand Dollars (\$500,000.00), and interest.
2. *Consideration.* In consideration of Investment Enterprises, Inc. so subordinating the mortgage held by him to the existing amounts due and owing to Dacotah Bank and all new, rewrites and/or additions as it relates to the new mortgage and the Collateral Real Estate Mortgage and Addendum thereto totaling up to Five Hundred Thousand Dollars (\$500,000.00), Dacotah Bank shall make the aforesaid loan. Investment Enterprises, Inc. specifically recognizes the consideration set forth herein as adequate consideration for its agreement that its lien shall be subsequent and subordinate to Dacotah Bank new mortgage and the Collateral Real Estate Mortgage and Addendum thereto totaling up to Five Hundred Thousand Dollars (\$500,000.00).
3. *Authority.* The parties hereto acknowledge that Kevin Wegchaupt has authority to sign for Dacotah Bank, Sisseton, South Dakota as its President and that Terrence L. Mealy has authority to sign for Investment Enterprises, Inc. as its President.
4. *Legal Counsel.* The parties hereto acknowledge that they have the right and privilege of retaining their own independent legal counsel to assist them in the negotiation, preparation and execution of this Agreement and that this Agreement is made and entered into freely and voluntarily by all parties, each having had the opportunity to obtain the counsel and advice of his or her own and independent attorney, and being free from any duress or influence on the part of the other.

Printed 250 Pages 616

5. *Binding Effect.* This agreement shall be binding upon and inure to the benefit of the respective heirs, legal representatives, successors, and assigns of the parties hereto.

In witness whereof, the parties have executed this agreement on the 10th day of June, 2009.


Bruce W. Prins

DACOTAH BANK

By: 
Kevin Wegehaupt

STATE of SOUTH DAKOTA)

COUNTY of ROBERTS)

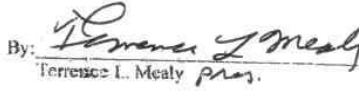
On This the 9th day of July, 2009, before me, the undersigned officer, personally appeared Bruce W. Prins and Corrine J. Prins, husband and wife, known to me or satisfactorily proven to be the persons whose name are subscribed to the within instrument and who acknowledged to me that they executed the foregoing instrument for the purposes therein contained.

In witness whereof, I hereunto set my hand and official seal.




Corrine J. Prins

INVESTMENT ENTERPRISES, INC.

By: 
Terrence L. Mealy


Notary Public - South Dakota
My commission expires: 3-28-13

COUNTY of ROBERTS)

On this the 1st day of July, 2009, before me, the undersigned officer, personally appeared Kevin Wegehaupt, who acknowledged himself to be the President of Dacotah Bank & Assn. and that he, as such Officer, being authorized so to do, executed the foregoing instrument for the purposes therein contained, by signing the name of the Dacotah Bank by himself as President of Dacotah Bank.

In witness whereof, I hereunto set my hand and official seal.




Notary Public - South Dakota
My commission expires: 3-28-13

250-611

STATE of Iowa)
COUNTY of Muscatine)

On this the 10th day of June 2009, before me, the undersigned officer, personally appeared Terrence L. Mealy, who acknowledged himself to be the President of Investment Enterprises, Inc., and that he, as such Officer, being authorized so to do, executed the foregoing instrument for the purposes therein contained, by signing the name of the Investment Enterprises, Inc.

In witness whereof, I hereunto set my hand and official seal.



Lorrie Peterson
Notary Public
My commission expires: 6/10/2011

PREPARED BY:

ERIN C. CAMERON
ATTORNEY AT LAW
610 VETERANS AVE.
SISSETON SD 57262
(605) 698-3401

250 618

SCHEDULE OF PROMISSORY NOTES

Date	Amount	Ex. # (attached to the <i>Complaint</i>)
4/28/99	5,000.00	B
6/9/99	7,000.00	C
7/26/99	10,000.00	D
8/10/99	8,000.00	E
8/28/99	10,000.00	F
9/24/99	12,000.00	G
10/6/99	7,000.00	H
11/11/99	15,000.00	I
11/29/99	5,000.00	J
12/21/99	9,000.00	K
1/10/00	35,000.00	L
2/10/00	6,000.00	M
2/25/00	8,000.00	N
4/8/00	35,000.00	O
5/12/00	9,500.00	P
5/12/00	16,000.00	Q
6/27/00	18,000.00	R
9/22/00	15,000.00	S
11/30/00	9,500.00	T
12/28/00	25,000.00	U
2/28/01	25,000.00	V
4/14/01	15,000.00	W
9/8/01	15,000.00	X
1/12/02	17,000.00	Y
2/7/02	15,000.00	Z
3/12/02	25,000.00	AA
4/15/02	20,000.00	BB
6/26/02	5,000.00	CC
9/11/02	8,000.00	DD
9/11/02	27,000.00	EE
12/30/02	30,000.00	FF
2/7/03	12,000.00	GG
3/14/03	26,000.00	HH
6/6/03	35,000.00	II
9/23/03	39,000.00	JJ
1/2/04	38,000.00	KK
3/5/04	26,000.00	LL
4/5/04	27,000.00	MM

Date	Amount	Ex. # (attached to the <i>Complaint</i>)
7/16/04	18,000.00	NN
9/1/04	20,000.00	OO
12/29/04	44,000.00	PP
7/06/05	20,000.00	QQ
8/08/05	25,000.00	RR
9/22/05	25,000.00	TT
12/27/05	45,000.00	UU
3/30/06	35,000.00	WW
4/26/06	35,000.00	XX
12/20/06	54,000.00	BBB

PRINS: BUFFALO PRODUCTION

YEAR	EXPLANATION	PRINS	MEALY
2000	Changes due to purchase, birth, death, sale, poaching, or shoot:	33	7
<p>P moved 30 cows and 3 bulls to Prairie Sky. 2/12/00: M bought 7 heifers. (PRINS 379)</p> <p>P's 30 cows would have had calves, and there would have been death loss for both parties.</p> <p>No inventory was taken at the end of 2000.</p>			
2001	Changes due to purchase, birth, death, sale, poaching, or shoot:		
<p>M bought 9 heifer calves.</p> <p>P's 30 cows would have had calves, and both parties would have had death losses.</p> <p>There was no inventory.</p>			
2002	Changes due to purchase, birth, death, sale, poaching, or shoot:		
<p>2/16/02: M bought 30 heifer calves. 8/12/02 P bought 19 two-year old pregnant cows and 13 heifers. (PRINS 400)</p> <p>P's initial 30 cows had 12 calves. We also know from the inventory that P's 5 young bulls survived from P's 2001 crop. The total number of animals at the end of 2002, is 111. P has the 65 he's purchased, plus the 17 production, for a total of 82. M has purchased 45. Applying a 10% death loss to each total, results in 111 animals.</p>			
	2002 Inventory: 86 females, 5 old bulls, 5 young bulls, 3 bulls for slaughter, and 12 calves (PRINS 401-402)	72	39
2003	Changes due to purchase, birth, death, sale, poaching, or shoot:		
<p>2/11/03: M bought 55 bred cows. (PRINS 407) 3/13/03: M purchased 2 bulls. (PRINS 410)</p> <p>In 2003, P had 49 cows that could produce calves, and M had 62. Given that there are 90 calves, it's an 81% calf crop. P would get 40 calves, and M</p>			

YEAR	EXPLANATION	PRINS	MEALY
	would get 50 calves. 3 animals were butchered, and based on adding up the prior years' animals with the production, and deducting the butchers, it appears that there were 5 death losses. The death losses would be allocated 43% (3 animals) to P, and 57% (5 animals) to M.		
	2003 Inventory: 12/5/03: 250 head. (PRINS 414) 148 cows, 90 calves, 6 bulls for slaughter, and 6 herd bulls.	109	141
2004	Changes due to purchase, birth, death, sale, poaching, or shoot: Calves were counted May 15, 2004, and there were 83 head: 39 bulls and 44 heifers. This would indicate a death loss of 7 calves. (PRINS 419-420) 139 cows produced 78 calves, for a calf crop of 56%. The 139 cows would include the prior years' 49 producing cows that P had, and 62 producing cows that M had, and now 14 more of P's cows would be producing for 63 cows, and 9 more of M's cows would be producing for 71 cows, which equals 134 cows. Obviously the death loss has to be adjusted in reverse here, and those 5 extra cows to get to 139 would be allocated 3 to M and 2 to P, for a total of 65 cows owned by P, and 74 cows owned by M. Applying the 56% to the calf crop, P's 65 cows would have produced 37 calves, and M's 74 cows would have produced 41 calves. If you add 37 calves to P's 109 animals, he has 146. If you add 41 calves to M's 141, he has 182. The total is 328, which is more than the inventory of 305. To account for death loss and any butchering, there are 23 animals that need to be prorated between P and M based on their respective percentages, so P is reduced by 10, and M is reduced by 13.		
	2004 Inventory: 11/16/04: 139 cows, 8 bulls, 42 yearling heifers, 38 yearling bulls, 78 calves, for a total of 305.	136	169
2005	Changes due to purchase, birth, death, sale, poaching, or shoot: 3/24/15: M bought 10 bulls (PRINS 436). Inventory of 412 in October. (PRINS 445) M's 74 cows wouldn't change, but P's mature cows that calved in 2001, would have resulted in a calf crop that would now be producing cows. Since		

YEAR	EXPLANATION	PRINS	MEALY
	<p>they were mature cows, the assumption is that they would have produced at the rate of 81% (see above), which would have resulted in 24 cows in 2001. The total number of cows now producing for P would be 65 plus 24 for 89. The total number of cows would be P's 89 and M's 74 for 163. 163 cows produced 113 calves (rate of 69%), would have produced 62 calves for P, and 51 calves for M. Prior year, plus T's purchases, plus the calves, result in 198 for P, and 230 for M, but the 428 total is more than the inventory, so the loss of 16 animals must be prorated, with P's total being reduced by 7, and M's total being reduced by 9.</p>		
	<p>2005 Inventory:</p> <p>November 2005, 210 females, 13 herd bulls, 43 yearling bulls, 8 meat bulls, 113 calves, 25 two-year old bulls for a total of 412.</p>	191	221
2006	<p>Changes due to purchase, birth, death, sale, poaching, or shoot:</p> <p>Sold 22 for M in spring (PRINS 447 & 454). Checks went to Terry (PRINS 455-462).</p> <p>From the prior year, P had 190, M had 222, but 22 of his are sold reducing him to 200.</p> <p>For the number of the cows, you need to take the 2005 and add P's 2002 12 calves that would now be producing cows. P would have 111 cows, and M would have 74 cows. The 175 cows produced 120 calves. The 69% calf crop would be allocated 69 to P and 51 to M.</p> <p>The number of animals would total 510, but the inventory showed only 468, and the 42 other animals would be allocated on a prorated basis between P's 259 (51%) and M's 251 (49%), with each party's number being reduced by 21.</p>		
	<p>2006 Inventory:</p> <p>11/15/06: Inventory of 468 (PRINS 468).</p> <p>24 herd bulls, 252 cows, 31 two-year old bulls, 41 open cows, 120 calves, total 468.</p>	238	230
2007	<p>Changes due to purchase, birth, death, sale, poaching, or shoot:</p> <p>In spring, 32 open cows sold and 75% of proceeds went to M (PRINS 476-479; PRINS 517). 24 are reduced from M and 8 from P.</p>		

YEAR	EXPLANATION	PRINS	MEALY
	<p>The 99 calves would have been produced by the 2006 cows, with the addition of 50% of the 2003 calf crop (assuming 50% were bulls) to the cow numbers, the cows would be divided: with P having 111 plus 20 new ones, for a total of 131, and M having 74 cows, plus 25 new ones for a total of 99, less open cows sold in spring equals M has 75 and P has 123 cows to possibly calve. The total cow number of 198 produced 99 calves, for a birth rate of 50 %. 62 calves would be added to P's inventory, and 37 added to M's inventory.</p> <p>P's 2006 numbers, less the deduction for the 8 sold, and with the 62 calves, results in an account of 292. M's 230 2006 number, less the 24 sold, and with the addition of 37 calves, results in 243. The total of 535 is more than the 481 in the round up inventory, so the prorated adjustment results in the reduction of P's numbers by 30 to 262. M's 243 is adjusted by 24, to get to 219.</p> <p>In fall, after the round up inventory, 43 bulls were sold to North Star, and 31 open cows to Western, and M got 75%, and P got 25%, consequently, M's number of animals has to be reduced by 56, and P's number of animals has to be reduced by 18.</p>		
	<p>2007 Inventory (less 74 animals at fall sale):</p> <p>11/21/07: 99 calves, 169 females (137 pregnant cows, 32 open three-year old cows), 12 herd bulls, 56 meat bulls (three-year old), 31 open cows, 114 yearling bulls and females, for a total of 481. (PRINS 275)</p>	244	163
2008	<p>Changes due to purchase, birth, death, sale, poaching, or shoot:</p> <p>There were 407 animals at the end of 2007, 113 calves in 2008, which results in a total of 520 animals, but the inventory is 498, so an adjustment of 22 animals has to be made to account for the difference. 60% of those adjustments are charged to P, and 40% to M, so P's 2007 numbers are reduced by 13 to 231, and M's 163 are reduced by 9 to 154.</p> <p>The 113 calves need to be allocated based upon the number of cows each party has. The 2007 cow numbers need to be adjusted by both the sales of open cows and by the 2004 calves that are now producing.</p> <p>The fall of 2007 sale of 31 open cows, which are allocated 75% to M based upon funds he received, 25% to P. M's number of cows are reduced by 23, and P's number of cows are reduced by 8, to get to a cow herd available to calve at 52 for M, and 115 for P. Then, the 2004 calf crop, assuming 50% were bulls, resulted in P's cow herd increasing by 18, and M's cow herd increasing by 20, for a total 2008 available cow herd of 72 cows for M, and 153 for P.</p>		

YEAR	EXPLANATION	PRINS	MEALY
	<p>M gets 35% of the 113 calves, or 40, and P gets 65% of the 113 calves, or 73 of the calves.</p> <p>2008 is the last year Terry Mealy contributed to the buffalo expenses at Prairie Sky.</p>		
	<p>2008 Inventory:</p> <p>11/25/08: 113 calves, 46 two-year old bulls, 17 open cows, 21 herd bulls, 29 open three-year old cows, 173 pregnant cows, 99 yearling bulls and cows, for a total of 498. (PRINS 516, 539)</p>	304	194
2009	<p>Changes due to purchase, birth, death, sale, poaching, or shoot:</p> <p>After the 2008 roundup, in the spring of 2009, sold 40 bulls and 17 open cows with the proceeds to Prairie Sky. Terry was apprised of this on 4/29/09. (PRINS 539) Terry no longer wanted to make cash contributions, so buffalo sale proceeds were used instead to fund the total Prairie Sky operation.</p> <p>The 152 calves need to be allocated based upon the percentage of producing cows owned by each party. Mealy started with 72, 25 of his 2005 calf crop would now be producing, for a cow base of 97 cows. Prins began with 153 cows, and has 31 cows allocated from the 2005 calf crop, for a total producing cow base of 184 cows. The 152 calves would be allocated 35% to Mealy (53 calves), and 65% to Prins (99 calves).</p> <p>Using the 2008 inventory numbers, and reducing by the 2009 sales (using each parties' percentage ownership from the 2008 inventory), and adding back the 2009 calf crop allocation, the total number of animals should be 593. The actual inventory is 562, so that 31 animals need to be allocated based upon the percentages of the herd, with Prins being allocated 62% of the reduction (or 19), and Mealy being allocated 38% of the reduction (or 12).</p>		
	<p>2009 Inventory:</p> <p>11/17/09: 164 bred cows, 36 heifers, 20 bulls, 152 calves, 45 open cows, 41 bulls, and 104 yearlings, for a total of 562 animals. (PRINS 542-543, the cardboard didn't copy)</p>	349	213
2010	<p>Changes due to purchase, birth, death, sale, poaching, or shoot:</p> <p>In the spring, sold 54 yearling bulls and 39 females. (PRINS 559)</p> <p>155 calves need to be allocated based upon the percentage of producing cows owned by each party. Mealy started with 97 cows, and Prins started</p>		

YEAR	EXPLANATION	PRINS	MEALY
	<p>with 184 cows. There were no open cow sales in the spring of 2010, and the 2006 production would now be in the cow herd. 120 calves in 2006, assuming 50% female, and using the parties' allocation from 2006, would result in Mealy having 26 new producing cows, and Prins having 35 new producing cows. Mealy would now have 123 producing cows, and Prins would have 219 producing cows. 36% of the production would belong to Mealy, and 64% of the production would belong to Prins, resulting in 60 calves being allocated to Mealy, and 95 calves being allocated to Prins.</p> <p>Using the 2009 inventory numbers of 349 animals for Prins, and 213 for Mealy, adding Prins' 95 calves, and Mealy's 60 calves, and assigning the 93 animals sold on a prorated reduction using the prior year's ownership, the number for Mealy would be 238, and the number for Prins would be 386. The total under this model of 624 is 82 animals more than the actual inventory of 542, so the difference has to be allocated based upon each parties' total numbers, with Prins' 386 reduced by 62% (or 51 animals), and Mealy's 238 reduced by 38 % (or 31 animals).</p>		
	<p>2010 Inventory:</p> <p>155 calves, 86 yearling bulls, 115 two-year old heifers, 22 herd bulls, 1 cow, 17 open cows, 146 pregnant cows. 542 animals. (PRINS 588)</p> <p>Inventory is based upon actual day count, although Bruce believes that the counting process wasn't done accurately this year. (PRINS 588)</p>	335	207
2011	<p>Changes due to purchase, birth, death, sale, poaching or shoot:</p> <p>No purchases, sold 72 bull calves, 65 yearling bulls in the spring. 72 open cows sold in December.</p> <p>174 calves need to be allocated based upon the percentage of producing cows owned by each party. Mealy starting with 123 cows, and Prins starting with 219 cows. There were no open cow sales in the spring of 2011, and the 2007 production would now be in the cow herd. 99 calves in 2007, assuming 50% female, would result in Mealy having an additional 18 cows, and Prins having an additional 31 cows, resulting in Mealy having 141 (or 36%), and Prins having 250 cows (or 64%). The crop of 174 calves would be allocated 111 to Prins, and 63 to Mealy.</p> <p>137 animals sold in the spring reduce the parties' herd numbers by their pro rata share, reducing Mealy's numbers by 38% (or 52 animals), and Prins numbers by 62% (or 85 animals). Using the 2010 inventory numbers of 335 animals for Prins, and 207 for Mealy, adding Prins' 111 calves, and Mealy's 63 calves, and assigning 137 animals from the spring sale as a reduction, the number for Mealy would be 218, and the number for Prins would be 361.</p>		

YEAR	EXPLANATION	PRINS	MEALY
	<p>The total number of the model of 579 is 25 animals more than the actual inventory of 554, so the difference has to be allocated by each parties' total numbers, with Mealy's reduced by 9 animals to 209 animals, and Prins reduced by 16 animals to 345 animals.</p> <p>Noteworthy is that the 25 animal adjustment is at least in part explained by 9 animals that died in the pens during the roundup, with the balance being due to butchering, death loss, and poaching.</p> <p>In the fall, 72 open cows were sold, and allocating them on a prorated basis, based upon the fall roundup numbers, they would reduce Prins' total numbers by 45, and Mealy's total numbers by 27.</p>		
	<p>2011 Inventory – after fall sale: *9 buffalo died in the pens during the roundup.</p> <p>554 animals (PRINS 661).</p> <p>97 bred cows, 51 three-year old cows, 36 herd bulls, 76 open cows, 120 two and three-year old heifers, 174 calves.</p> <p>The 72 open cows were sold in the fall, and thus reduced the inventory to 482 animals.</p>	300	182
2012	<p>Changes due to purchase, birth, death, sale, poaching, or shoot:</p> <p>No purchases.</p> <p>1/9/12: Sold 103 mostly bull calves to Elmer Beechy for \$124,720. (PRINS 684)</p> <p>In the fall, Prins sold 10 of his cows to Phillip.</p> <p>1/18/12: Bruce emails Lory describing how they are selling animals. (PRINS 687-688)</p> <p>To account for the spring animal sales, Prins' pro rata allocation of the Beechy sales is a reduction of 64 animals, and Mealy's is a reduction of 39 animals, leaving Prins with 236 animals, and Mealy with 143 animals after the spring sales.</p> <p>99 calves need to be allocated based on the percentage of producing cows owed by each party. Mealy's started with 141 cows, had 27 reduced as a result of the fall 2011 sale, and 20 added back for the 2008 calves that are now producing, for a total of 134 cows. Prins had 250 cows, reduced by 45 for the fall sale, with 36 added back for the 2008 calves that are now producing, leaving 241 cows. Of the 99 calves in the 2012 production, 64% of the calves or 60 animals go to Prins, 36% or 36 animals go to Mealy.</p>		

YEAR	EXPLANATION	PRINS	MEALY
	<p>Total number of animals under this model starting with the base after the spring sale, and adding the calf production, would leave Prins with 236 plus 63 for a total of 299, Mealy with 143 plus 36 for a total of 179, for a total herd of 478 animals. The total in this instance is less than the inventory, leaving 20 animals that need to be added back. They need to added back on a pro rata basis between Mealy and Prins, with Mealy getting 7 and Prins getting 13.</p> <p>Of the 10 cows Bruce sold to Phillip in the fall need to be transferred at this point.</p>		
	2012 Inventory:	PHILLIP	
	<p>149 bred cows, 7 open cows, 32 herd bulls, 211 females, and 99 calves.</p> <p>12/3/12 roundup: 498 buffalo. (PRINS 699-701)</p>	10	301
2013	<p>Changes due to purchase, birth, death, sale, poaching, or shoot:</p> <p>No purchases.</p> <p>4/25/13 – sold 19 mixed calves for \$15,870. (PRINS 704-706)</p> <p>5/2/13 – sold 73 mixed calves for \$83,260. (PRINS 705-706)</p> <p>12/1/13: 175 animals were sold at Prairie Sky Ranch buffalo auction sale for \$205,030. (PRINS 713, 719)</p> <p>All funds to Prairie Sky for operations.</p> <p>Holding the ratio of distribution of calves steady at 64% of the cows going to Prins, and 36% of the cows belonging to Mealy, the 157 calves would be divided 100 to Prins (8 of his have been allocated to Phillip), and 57 to Mealy.</p> <p>For the 92 yearlings sold in the spring – using Mealy and Prins ratios from 2012 – 62% of the 92 (57 animals) would be reduced from Prins, and 38% (35 animals) from Mealy.</p> <p>Using the prior year's numbers, and adding the calf production, and reducing by the spring sale, the model shows Prins with 336, Mealy with 209, and Phillip with 18, for a total of 563 animals, which requires an adjustment of 16 animals. Using the parties pro rata ownership, and charging all of Phillip's reduction to Prins, 37% or 6 animals would be reduced for Mealy, and 10 animals would be reduced for Prins.</p>		
	2013 Roundup Inventory:	PHILLIP	
	<p>547 animals: 157 calves, 354 cows, 36 bulls. (PRINS 696, 723)</p>	18	326

YEAR	EXPLANATION		PRINS	MEALY
	In the fall sale, 175 animals were sold, which included 2 of Phillip's cows, and all 8 of his calves. The other 165 animals would be allocated based on the parties' percentages, reducing Prins 326 head by 62% of the 165 animals (or 102 animals). Mealy's 205 animals would be reduced by 38% of the 165 animals (or 63 animals).			
	2013 Inventory – After fall production sale:	PHILLIP		
	Sale of 175 animals, including 10 belonging to Phillip.	8	224	140
2014	Changes due to purchase, birth, death, sale, poaching, or shoot: No purchases. 11/30/14: Sold 173 buffalo for \$299,500, which went to Prairie Sky. (PRINS 730-742) Holding the ratio of distribution of calves stay at 64% of cows going to Prins, and 36% of the cows belonging to Mealy, the 168 calves would be divided 101 to Prins (7 of his are allocated to Phillip), and 60 to Mealy. Using the prior year's numbers, and adding the calf production, the model shows Prins with 336, Mealy with 200, and Phillip with 15, for a total of 551, which requires an adjustment of 29 animals. Using the parties' pro rata ownership, Prins would be reduced by 19 animals, and Mealy would be reduced by 10 animals. In the fall sale, 173 animals were sold, which included 7 of Phillips. The other 166 animals would be allocated based on the parties' percentage, reducing Prins' 317 head by 105, and Mealy's 190 animals by 61.			
	2014 Inventory:	Phillip		
	168 calves, 321 cows, 33 bulls, for a total of 522. (PRINS 748)	15	317	190
	2014 Inventory - After fall production sale:			
	Sale of 173 animals, including 7 belonging to Phillip.	8	212	129

YEAR	EXPLANATION	PRINS	MEALY
2015	Changes due to purchase, birth, death, sale, poaching, or shoot:		
	<p>Prins purchased 13 bulls, which Mealy took possession of when he took the herd located at the Prairie Sky Ranch.</p> <p>We do not have the 2015 inventory numbers for the part of the herd at Prairie Sky Ranch, or the sales results from the Prairie Sky herd.</p> <p>At the fall production sale, after the roundup, the Rocking P sold 162 animals for \$258,141.23, which funds went to Dacotah Bank.</p>		
	Rocking P 2015 Inventory:		
	180 cows, 26 bulls, 92 calves, for total of 298 animals. (PRINS 3003)		
2016	Changes due to purchase, birth, death, sale, poaching, or shoot:		
	2016 Inventory:	Phillip	

Date:
12/21, 2000

PRAIRIE SKY GUEST AND GAME RANCH

Page: 1

Profit and Loss Statement

For the period December 1, 1999 to December 31, 1999

	Current Period Amount	Year To Date Amount
INCOME		
MANAGEMENT FUNDS	\$14,000.00	\$88,000.00
LODGING\MEALS\SERVICES	\$1,499.03	\$4,372.88
GIFT SHOP	\$224.95	\$364.67
OTHER	\$.00	\$.00
HOUSE RENT	\$.00	\$1,350.00
	-----	-----
TOTAL INCOME	\$15,723.98	\$94,087.55
	-----	-----
GROSS INCOME	\$15,723.98	\$94,087.55
OPERATING EXPENSES		
ADVERTISING & P/R	\$3,205.14	\$15,166.28
BAD CHECKS \ REDEPOSITS	\$.00	\$.00
BANK SERVICE CHARGES	\$30.00	\$135.00
DEPRECIATION EXPENSE	\$9,895.00	\$9,895.00
FEED	\$829.99	\$829.99
GAS \ FUEL	\$.00	\$856.47
GIFT SHOP EXPENSE	\$.00	\$268.85
INSURANCE	\$1,312.50	\$4,534.75
LAUNDRY & CLEANING	\$12.48	\$579.65
LEGAL & PROFESSIONAL SERVICES	\$572.40	\$752.60
LIVESTOCK EXPENSE	\$.00	\$.00
OTHER INTEREST	(\$35.53)	\$.00
OFFICE EXPENSE	\$72.14	\$642.68
RENT	\$112.50	\$1,462.50
REPAIRS & MAINTENANCE	\$324.03	\$6,670.00
SUPPLIES - HUNTING	\$.00	\$5,338.86
SUPPLIES - KITCHEN	\$284.07	\$2,244.77
SUPPLIES - OTHER	\$147.84	\$2,739.71
SUPPLIES - HORSES	\$.00	\$.00
SUPPLIES - SNOWMOBILES	\$.00	\$.00
TAXES	\$.00	\$.00
TAXES - PAYROLL (FICA/FUTA)	\$230.48	\$1,059.39
TRAVEL & ENTERTAINMENT	\$.00	\$150.00
UTILITIES & TELEPHONE	\$1,609.56	\$5,615.12
VEHICLE EXPENSE	\$1,245.41	\$1,723.46
WAGES - EMPLOYEES	\$3,013.00	\$13,165.50
WAGES - CONTRACTED	\$.00	\$4,813.20
MISCELLANEOUS EXPENSE	\$.00	\$800.00
	-----	-----
TOTAL OPERATING EXPENSES	\$22,861.01	\$79,443.78
	-----	-----
NET INCOME FROM OPERATIONS	(\$7,137.03)	\$14,643.77
OTHER INCOME		
INTEREST	\$.00	\$.00
MISCELLANEOUS INCOME	\$.00	\$.00
	-----	-----
TOTAL OTHER INCOME	\$.00	\$.00
	-----	-----

Date:
APR 21, 2000

PRAIRIE SKY GUEST AND GAME RANCH

Page: }

Profit and Loss Statement

For the period December 1, 1999 to December 31, 1999

	Current Period Amount	Year To Date Amount
NET PROFIT AFTER TAXES	(\$7,137.03)	\$14,643.77

Date: AL 12/21, 2000

PRAIRIE SKY GUEST AND GAME RANCH

Page: 1)

Balance Sheet

As of December 31, 1999

CURRENT ASSETS

CHECKING ACCOUNT - DACOTAH
SAVINGS ACCT - DACOTAH
PETTY CASH

\$592.99
\$.00
\$.00

TOTAL CASH

\$592.99

EXCHANGE ACCOUNT

\$.00

TOTAL CURRENT ASSETS

\$592.99

FIXED ASSETS

FURNITURE & EQUIPMENT
HUNTING DOGS ETC.
ACCUMULATED DEPREC-FURN & EQ

\$7,395.21
\$2,500.00
(\$9,895.00)

TOTAL FIXED ASSETS

\$.21

TOTAL ASSETS

\$593.20

LIABILITIES

SALES TAX PAYABLE
FICA TAX W/H & PAYABLE
INCOME TAX W/H & PAYABLE
PAYROLL CATCH ALL PAYABLE
NOTE PAYABLE - DACOTAH

\$134.56
\$230.50
\$124.22
\$230.48
\$.00

TOTAL LIABILITIES

\$719.76

OWNERS EQUITY

RETAINED EARNINGS
DRAW
NET PROFIT / (LOSS)

(\$14,770.33)
\$.00
\$14,643.77

TOTAL EQUITY

(\$126.56)

TOTAL LIABILITIES & EQUITY

\$593.20

Dat)
Mar 31, 2001

PRAIRIE SKY GUEST AND GAME RANCH

Page: 1

Profit and Loss Statement

For the period December 1, 2000 to December 31, 2000

	Current Period Amount	Year To Date Amount
INCOME		
MANAGEMENT FUNDS	\$1,144.20	\$162,000.00
LODGING\MEALS\SERVICES	\$3,230.37	\$68,609.72
GIFT SHOP	\$.00	\$3,000.77
OTHER	(\$912.75)	\$2,746.20
RESALE ITEMS NO TAX	\$.00	\$84.00
HOUSE RENT	\$225.00	\$.00
PASTURE RENT	\$11,500.00	\$23,000.00
TOTAL INCOME	\$15,186.82	\$259,440.69
GROSS INCOME	\$15,186.82	\$259,440.69
OPERATING EXPENSES		
ADVERTISING & P/R	\$2,660.00	\$36,008.50
BAD CHECKS \ REDEPOSITS	\$.00	\$.00
BANK SERVICE CHARGES	\$45.00	\$1,222.04
DEPRECIATION EXPENSE	\$23,867.00	\$23,867.00
FEED	\$137.28	\$8,384.80
FERTILIZER & CHEMICAL	\$.00	\$1,368.06
GAS \ FUEL	\$1,104.44	\$6,699.86
GIFT SHOP EXPENSE	\$666.75	\$4,325.09
INSURANCE	\$1,281.00	\$7,329.75
LAUNDRY & CLEANING	\$22.88	\$206.55
LEGAL & PROFESSIONAL SERVICES	(\$415.20)	\$1,606.10
LIVESTOCK EXPENSE	(\$5,660.00)	\$1,125.91
OTHER INTEREST	\$406.00	\$797.16
OFFICE EXPENSE	(\$169.96)	\$962.46
RENT	\$4,950.00	\$25,750.00
REPAIRS & MAINTENANCE	(\$2,073.71)	\$7,898.23
SUPPLIES - HUNTING	(\$1,031.00)	\$17,392.07
SUPPLIES - KITCHEN	\$842.03	\$13,445.68
SUPPLIES - OTHER	(\$2,663.62)	\$2,797.46
SUPPLIES - HORSES	\$.00	\$224.46
SUPPLIES - SNOWMOBILES	\$606.00	\$606.00
TAXES	\$.00	\$.00
TAXES - PAYROLL (FICA/FUTA)	\$201.81	\$3,858.45
TRAVEL & ENTERTAINMENT	\$.00	\$5,807.69
UTILITIES & TELEPHONE	\$1,283.96	\$14,405.71
VEHICLE EXPENSE	\$436.10	\$5,575.97
WAGES - EMPLOYEES	\$2,639.07	\$38,022.32
WAGES - CONTRACTED	(\$500.00)	\$2,112.05
MISCELLANEOUS EXPENSE	(\$5,833.63)	\$223.40
TOTAL OPERATING EXPENSES	\$22,802.20	\$232,022.77
NET INCOME FROM OPERATIONS	(\$7,615.38)	\$27,417.92
OTHER INCOME		
INTEREST	\$.00	\$.00
MISCELLANEOUS INCOME	(\$11,481.33)	\$258.67

Da)
Mar 31, 2001

PRAIRIE SKY GUEST AND GAME RANCH

Page: 2

Profit and Loss Statement

For the period December 1, 2000 to December 31, 2000

	Current Period Amount	Year To Date Amount
TOTAL OTHER INCOME	\$11,481.33	(\$258.67)
NET PROFIT AFTER TAXES	(\$19,096.71)	\$27,676.59

Dat)
Mar 31, 2001

PRAIRIE SKY GUEST AND GAME RANCH

Page: 1

Balance Sheet

As of December 31, 2000

CURRENT ASSETS

CHECKING ACCOUNT - DACOTAH	(\$5,998.78)
SAVINGS ACCT - DACOTAH	\$.00
PETTY CASH	\$.00

TOTAL CASH	-----	(\$5,998.78)
------------	-------	--------------

EXCHANGE ACCOUNT	-----	(\$217.76)
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TOTAL CURRENT ASSETS	-----	(\$6,216.54)
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FIXED ASSETS

FURNITURE & EQUIPMENT	\$48,871.90
HUNTING DOGS \ HORSES ETC.	\$15,005.00
ACCUMULATED DEPREC-FURN & EQ	(\$33,762.00)

TOTAL FIXED ASSETS	-----	\$30,114.90
--------------------	-------	-------------

TOTAL ASSETS	-----	\$23,898.36
--------------	-------	-------------

LIABILITIES

SALES TAX PAYABLE	\$129.36
FICA TAX W/H & PAYABLE	\$201.90
INCOME TAX W/H & PAYABLE	\$145.00
PAYROLL CATCH ALL PAYABLE	\$201.90
NOTE PAYABLE - DACOTAH	\$22,000.00
NOTE PAYABLE - MBNA	\$10,000.00

TOTAL LIABILITIES	-----	\$32,678.16
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OWNERS EQUITY

RETAINED EARNINGS	(\$126.56)
DRAW	(\$36,329.83)
NET PROFIT / (LOSS)	\$27,676.59

TOTAL EQUITY	-----	(\$8,779.80)
--------------	-------	--------------

TOTAL LIABILITIES & EQUITY	-----	\$23,898.36
----------------------------	-------	-------------

Date:
Apr 26, 2002

PRAIRIE SKY GUEST AND GAME RANCH

Page: 1

Profit and Loss Statement

For the period December 1, 2001 to December 31, 2001

	Current Period Amount	Year To Date Amount
INCOME		
MANAGEMENT FUNDS	\$30,000.00	\$140,000.00
LODGING\MEALS\SERVICES	\$871.53	\$108,420.24
HORSE BACK	\$.00	\$.00
HUNTING	\$.00	\$.00
SNOWMOBLIE	\$.00	\$.00
OUTSIDE MEALS	\$.00	\$.00
GIFT SHOP	\$70.00	\$652.11
OTHER	\$515.99	(\$2,263.86)
RESALE ITEMS NO TAX	\$.00	\$.00
HOUSE RENT	\$.00	\$.00
PASTURE RENT	\$.00	\$.00
TOTAL INCOME	\$31,457.52	\$246,808.49
GROSS INCOME	\$31,457.52	\$246,808.49
OPERATING EXPENSES		
ADVERTISING & P/R	\$1,429.50	\$41,886.44
BAD CHECKS \ REDEPOSITS	\$.00	\$.00
BANK SERVICE CHARGES	\$100.73	\$1,321.29
DEPRECIATION EXPENSE	\$23,271.00	\$23,271.00
FEED	\$125.21	\$2,257.37
FERTILIZER/CHEMICAL/CRP EXP	\$.00	\$2,864.60
GAS \ FUEL	\$721.29	\$7,682.73
GIFT SHOP EXPENSE	\$28.62	\$1,681.40
INSURANCE	\$1,714.50	\$10,967.55
LAUNDRY & CLEANING	\$22.88	\$327.56
LEGAL & PROFESSIONAL SERVICES	\$150.00	\$1,508.22
LICENSES	\$55.00	\$4,940.40
LIVESTOCK EXPENSE	\$169.00	\$169.00
OTHER INTEREST	\$1,142.64	\$4,065.66
OFFICE EXPENSE	\$124.57	\$1,744.41
RENT	\$225.00	\$3,800.00
REPAIRS & MAINTENANCE	\$228.41	\$6,241.81
SUPPLIES - HUNTING	\$2,505.01	\$15,139.28
SUPPLIES - KITCHEN	\$796.35	\$17,195.49
SUPPLIES - OTHER	\$742.82	\$6,199.97
SUPPLIES - HORSES	\$.00	\$81.20
SUPPLIES - SNOWMOBILES	\$400.32	\$500.32
TAXES	\$.00	\$.00
TAXES - PAYROLL (FICA/FUTA)	\$217.96	\$3,212.33
TRAVEL & ENTERTAINMENT	\$.00	\$2,716.30
UTILITIES & TELEPHONE	\$1,095.97	\$17,928.76
VEHICLE EXPENSE	\$507.22	\$6,511.79
WAGES - EMPLOYEES	\$2,849.11	\$35,926.30
WAGES - CONTRACTED	\$120.00	\$10,329.32
MISCELLANEOUS EXPENSE	\$100.80	\$1,256.12
TOTAL OPERATING EXPENSES	\$38,843.91	\$231,726.62

Date:
Aug 26, 2002

PRAIRIE SKY GUEST AND GAME RANCH

Page: 2

Profit and Loss Statement

For the period December 1, 2001 to December 31, 2001

	Current Period Amount	Year To Date Amount
NET INCOME FROM OPERATIONS	(\$7,386.39)	\$15,081.87
OTHER INCOME		
INTEREST	\$.00	\$.00
MISCELLANEOUS INCOME	\$.00	\$375.00
	-----	-----
TOTAL OTHER INCOME	\$.00	(\$375.00)
	-----	-----
NET PROFIT AFTER TAXES	(\$7,386.39)	\$15,456.87

Date:
Ar 26, 2002

PRAIRIE SKY GUEST AND GAME RANCH

Page: 1

Balance Sheet

As of December 31, 2001

CURRENT ASSETS

CHECKING ACCOUNT - DACOTAH	\$1,282.91	
SAVINGS ACCT - DACOTAH	\$.00	
PETTY CASH	\$200.00	

TOTAL CASH	\$1,482.91	
EXCHANGE ACCOUNT	(\$1,876.50)	

TOTAL CURRENT ASSETS		(\$393.59)

FIXED ASSETS

FURNITURE & EQUIPMENT	\$60,220.79	
HUNTING DOGS \ HORSES ETC.	\$11,481.00	
ACCUMULATED DEPREC-FURN & EQ	(\$55,199.00)	

TOTAL FIXED ASSETS	\$16,502.79	

TOTAL ASSETS		\$16,109.20
		=====

LIABILITIES

SALES TAX PAYABLE	\$47.14	
FICA TAX W/H & PAYABLE	\$217.95	
INCOME TAX W/H & PAYABLE	\$122.00	
PAYROLL CATCH ALL PAYABLE	\$218.06	
NOTE PAYABLE - DACOTAH	\$35,600.78	
NOTE PAYABLE - MBNA	\$4,518.00	

TOTAL LIABILITIES		\$40,723.93

OWNERS EQUITY

RETAINED EARNINGS	(\$40,071.60)	
DRAW	\$.00	
NET PROFIT / (LOSS)	\$15,456.87	

TOTAL EQUITY		(\$24,614.73)

TOTAL LIABILITIES & EQUITY		\$16,109.20
		=====

Date:
Apr 02, 2003

PRAIRIE SKY GUEST AND GAME RANCH

Page: 1

Profit and Loss Statement

For the period December 1, 2002 to December 31, 2002

	Current Period Amount	Year To Date Amount
INCOME		
MANAGEMENT FUNDS	\$.00	\$120,500.00
LODGING\MEALS\SERVICES	\$1,808.57	\$17,516.44
HORSE BACK	\$.00	\$11,012.65
HUNTING	\$571.43	\$66,582.90
SNOWMOBLIE	\$.00	\$1,238.00
OUTSIDE MEALS	\$.00	\$13,042.44
TURKEY HUNTS	\$.00	\$3,438.91
GIFT SHOP	\$19.05	\$1,763.57
OTHER	\$.00	\$.00
RESALE ITEMS NO TAX	\$.00	\$.00
HOUSE RENT	\$.00	\$.00
PASTURE RENT	\$.00	\$7,650.00
TOTAL INCOME	\$2,399.05	\$242,744.91
GROSS INCOME	\$2,399.05	\$242,744.91
OPERATING EXPENSES		
ADVERTISING & P/R	\$2,747.63	\$42,873.03
BAD CHECKS \ REDEPOSITS	\$.00	\$.00
BANK SERVICE CHARGES	\$51.47	\$1,519.59
DEPRECIATION EXPENSE	\$18,093.00	\$18,093.00
FEED	\$218.38	\$1,958.48
FERTILIZER/CHEMICAL/CRP EXP	\$.00	\$600.00
GAS \ FUEL	\$647.12	\$6,414.69
GIFT SHOP EXPENSE	\$.00	\$1,113.28
INSURANCE	\$449.00	\$9,485.22
LAUNDRY & CLEANING	\$23.10	\$358.64
LEGAL & PROFESSIONAL SERVICES	\$169.60	\$1,657.99
LICENSES	\$55.00	\$6,901.89
LIVESTOCK EXPENSE	\$.00	\$672.36
OTHER INTEREST	\$1,950.88	\$3,480.67
OFFICE EXPENSE	\$108.88	\$888.46
RENT	\$225.00	\$4,700.00
REPAIRS & MAINTENANCE	\$873.57	\$6,191.69
SUPPLIES - HUNTING	\$438.55	\$14,284.37
SUPPLIES - KITCHEN	\$9.90	\$11,959.32
SUPPLIES - OTHER	\$210.10	\$3,959.80
SUPPLIES - HORSES	\$.00	\$.00
SUPPLIES - SNOWMOBILES	\$80.00	\$175.00
TAXES	\$.00	\$.00
TAXES - PAYROLL (FICA/FUTA)	\$339.58	\$4,289.65
TAXES - SALES	\$.00	\$.00
TRAVEL & ENTERTAINMENT	\$115.64	\$4,149.61
UTILITIES & TELEPHONE	\$1,252.28	\$14,958.06
VEHICLE EXPENSE	\$973.03	\$7,766.46
WAGES - EMPLOYEES	\$4,438.84	\$51,972.21

Date:
Apr 02, 2003

PRAIRIE SKY GUEST AND GAME RANCH
Profit and Loss Statement

Page: 2

For the period December 1, 2002 to December 31, 2002

	Current Period Amount	Year To Date Amount
WAGES - CONTRACTED	\$861.64	\$10,724.84
MISCELLANEOUS EXPENSE	\$62.40	\$2,098.85
	-----	-----
TOTAL OPERATING EXPENSES	\$34,394.59	\$233,247.16
	-----	-----
NET INCOME FROM OPERATIONS	(\$31,995.54)	\$9,497.75
OTHER INCOME		
INTEREST	\$.00	\$.00
MISCELLANEOUS INCOME	\$.00	\$2,029.84
	-----	-----
TOTAL OTHER INCOME	\$.00	(\$2,029.84)
	-----	-----
NET PROFIT AFTER TAXES	(\$31,995.54)	\$11,527.59

Date:
Apr 02, 2003

PRAIRIE SKY GUEST AND GAME RANCH

Page: 1

Balance Sheet

As of December 31, 2002

CURRENT ASSETS

CHECKING ACCOUNT - DACOTAH	(\$5,252.55)
SAVINGS ACCT - DACOTAH	\$.00
PETTY CASH	\$200.00

TOTAL CASH	(\$5,052.55)
EXCHANGE ACCOUNT	(\$1,500.00)

TOTAL CURRENT ASSETS	(\$6,552.55)

FIXED ASSETS

FURNITURE & EQUIPMENT	\$76,775.06
HUNTING DOGS \ HORSES ETC.	\$26,531.80
ACCUMULATED DEPREC-FURN & EQ	(\$72,117.00)

TOTAL FIXED ASSETS	\$31,189.86

TOTAL ASSETS	\$24,637.31
	=====

LIABILITIES

SALES TAX PAYABLE	\$123.51
FICA TAX W/H & PAYABLE	\$339.58
INCOME TAX W/H & PAYABLE	\$154.00
PAYROLL CATCH ALL PAYABLE	\$339.68
NOTE PAYABLE - DACOTAH	\$53,719.63
NOTE PAYABLE - MBNA	(\$5,016.00)

TOTAL LIABILITIES	\$49,660.40

OWNERS EQUITY

RETAINED EARNINGS	(\$36,550.68)
DRAW	\$.00
NET PROFIT / (LOSS)	\$11,527.59

TOTAL EQUITY	(\$25,023.09)

TOTAL LIABILITIES & EQUITY	\$24,637.31
	=====

Date:
May 11, 2004

PRAIRIE SKY GUEST AND GAME RANCH

Page: 1

Profit and Loss Statement

For the period December 1, 2003 to December 31, 2003

	Current Period Amount	Year To Date Amount
INCOME		
MANAGEMENT FUNDS	\$.00	\$142,000.00
LODGING\MEALS\SERVICES	\$886.35	\$13,706.45
HORSE BACK	\$.00	\$24,705.59
HUNTING	\$.00	\$55,191.46
SNOWMOBLIE	\$.00	\$.00
OUTSIDE MEALS	\$.00	\$17,376.95
TURKEY HUNTS	\$.00	\$15,602.50
GIFT SHOP	\$.00	\$1,404.24
OTHER	\$.00	\$71.77
RESALE ITEMS NO TAX	\$.00	\$.00
HOUSE RENT	(\$700.00)	\$.00
PASTURE RENT	\$.00	\$.00
BUFFALO MEAT/HUNTS	\$.00	\$.00
TOTAL INCOME	\$186.35	\$270,058.96
GROSS INCOME	\$186.35	\$270,058.96
OPERATING EXPENSES		
ADVERTISING & P/R	\$2,911.95	\$38,049.43
BAD CHECKS \ REDEPOSITS	\$.00	\$.00
BANK SERVICE CHARGES	(\$24.93)	\$1,974.05
DEPRECIATION EXPENSE	\$21,376.00	\$21,376.00
FEED	\$145.97	\$1,922.94
FERTILIZER/CHEMICAL/CRP EXP	\$.00	\$946.33
GAS \ FUEL	\$709.33	\$6,639.00
GIFT SHOP EXPENSE	\$.00	\$2,078.14
INSURANCE	\$1,939.97	\$16,385.50
LAUNDRY & CLEANING	\$.00	\$46.20
LEGAL & PROFESSIONAL SERVICES	\$.00	\$350.00
LICENSES	\$393.10	\$7,613.70
LIVESTOCK EXPENSE	(\$1,486.48)	(\$869.18)
OTHER INTEREST	\$953.25	\$4,510.89
OFFICE EXPENSE	\$495.63	\$3,302.59
RENT	(\$700.00)	\$2,975.00
REPAIRS & MAINTENANCE	\$626.25	\$6,547.99
SUPPLIES - HUNTING	\$306.00	\$13,081.82
SUPPLIES - KITCHEN	\$493.54	\$15,124.33
SUPPLIES - OTHER	\$29.64	\$1,608.26
SUPPLIES - HORSES	\$.00	\$.00
SUPPLIES - SNOWMOBILES	(\$268.00)	(\$268.00)
TAXES	\$.00	\$.00
TAXES - PAYROLL (FICA/FUTA)	\$218.01	\$4,929.61
TAXES - SALES	\$118.10	\$6,122.94
TRAVEL & ENTERTAINMENT	\$.00	\$10,673.43
UTILITIES & TELEPHONE	\$1,529.91	\$15,982.52
VEHICLE EXPENSE	\$782.29	\$12,895.68

Date:
May 11, 2004

PRAIRIE SKY GUEST AND GAME RANCH
Profit and Loss Statement

Page: 2

For the period December 1, 2003 to December 31, 2003

	Current Period Amount	Year To Date Amount
WAGES - EMPLOYEES	\$2,849.42	\$56,423.81
WAGES - CONTRACTED	\$.00	\$9,953.62
MISCELLANEOUS EXPENSE	\$250.00	\$1,725.02
	-----	-----
TOTAL OPERATING EXPENSES	\$33,648.95	\$262,101.62
	-----	-----
NET INCOME FROM OPERATIONS	(\$33,462.60)	\$7,957.34
OTHER INCOME		
INTEREST	\$.00	\$.00
MISCELLANEOUS INCOME	\$30.00	\$8,107.67
	-----	-----
TOTAL OTHER INCOME	(\$30.00)	(\$8,107.67)
	-----	-----
NET PROFIT AFTER TAXES	(\$33,432.60)	\$16,065.01

Date:
May 11, 2004

PRAIRIE SKY GUEST AND GAME RANCH

Page: 1

Balance Sheet

As of December 31, 2003

CURRENT ASSETS

CHECKING ACCOUNT - DACOTAH	(\$19,847.97)
SAVINGS ACCT - DACOTAH	\$.00
PETTY CASH	\$200.00

TOTAL CASH	-----	(\$19,647.97)
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EXCHANGE ACCOUNT	-----	(\$1,500.00)
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TOTAL CURRENT ASSETS	-----	(\$21,147.97)
----------------------	-------	---------------

FIXED ASSETS

FURNITURE & EQUIPMENT	\$92,732.61
HUNTING DOGS \ HORSES ETC.	\$27,850.80
ACCUMULATED DEPREC-FURN & EQ	(\$87,157.00)

TOTAL FIXED ASSETS	-----	\$33,426.41
--------------------	-------	-------------

TOTAL ASSETS	-----	\$12,278.44
--------------	-------	-------------

LIABILITIES

SALES TAX PAYABLE	\$3.56
FICA TAX W/H & PAYABLE	\$217.99
INCOME TAX W/H & PAYABLE	\$99.65
PAYROLL CATCH ALL PAYABLE	\$218.50
NOTE PAYABLE - DACOTAH	\$35,318.09
NOTE PAYABLE - MBNA	(\$9,773.00)

TOTAL LIABILITIES	-----	\$26,084.79
-------------------	-------	-------------

OWNERS EQUITY

RETAINED EARNINGS	(\$29,871.36)
DRAW	\$.00
NET PROFIT / (LOSS)	\$16,065.01

TOTAL EQUITY	-----	(\$13,806.35)
--------------	-------	---------------

TOTAL LIABILITIES & EQUITY	-----	\$12,278.44
----------------------------	-------	-------------

Date:
Feb 16, 2005

PRAIRIE SKY GUEST AND GAME RANCH

Page: 1

Profit and Loss Statement

For the period December 1, 2004 to December 31, 2004

	Current Period Amount	Year To Date Amount
INCOME		
MANAGEMENT FUNDS	\$.00	\$144,000.00
LODGING\MEALS\SERVICES	\$.00	\$16,122.75
HORSE BACK	\$.00	\$20,502.35
HUNTING	\$.00	\$135,899.05
SNOWMOBLIE	\$.00	\$.00
OUTSIDE MEALS	\$.00	\$23,225.77
TURKEY HUNTS	\$.00	\$9,552.01
GIFT SHOP	\$582.00	\$1,200.76
OTHER	\$.00	\$121.71
RESALE ITEMS NO TAX	\$.00	\$.00
HOUSE RENT	\$.00	\$.00
PASTURE RENT	\$.00	\$8,000.00
BUFFALO MEAT/HUNTS	\$.00	\$1,421.44
TOTAL INCOME	\$582.00	\$360,045.84
GROSS INCOME	\$582.00	\$360,045.84
OPERATING EXPENSES		
ADVERTISING & P/R	(\$970.00)	\$22,206.53
BAD CHECKS \ REDEPOSITS	\$.00	(\$30.00)
BANK SERVICE CHARGES	\$420.81	\$3,174.10
DEPRECIATION EXPENSE	\$37,406.00	\$37,406.00
FEED	\$597.80	\$4,564.70
FERTILIZER/CHEMICAL/CRP EXP	\$.00	\$2,785.33
GAS \ FUEL	\$555.75	\$6,377.19
GIFT SHOP EXPENSE	\$.00	\$1,560.16
INSURANCE	\$.00	\$13,002.03
LAUNDRY & CLEANING	\$.00	\$.00
LEGAL & PROFESSIONAL SERVICES	\$.00	\$.00
LICENSES	\$474.05	\$16,977.05
LIVESTOCK EXPENSE	(\$36.92)	\$1,606.39
OTHER INTEREST	\$.00	\$2,409.22
OFFICE EXPENSE	\$1,324.25	\$4,832.38
RENT	\$225.00	\$6,547.00
REPAIRS & MAINTENANCE	\$963.95	\$8,247.49
SUPPLIES - HUNTING	\$932.64	\$19,275.88
SUPPLIES - KITCHEN	\$182.90	\$21,993.35
SUPPLIES - OTHER	\$.00	\$1,965.66
SUPPLIES - HORSES	\$.00	\$2,469.79
SUPPLIES - SNOWMOBILES	\$.00	\$.00
TAXES	\$.00	\$.00
TAXES - PAYROLL (FICA/FUTA)	\$171.69	\$4,849.54
TAXES - SALES	\$1,100.78	\$9,792.24
TRAVEL & ENTERTAINMENT	\$.00	\$13,302.04
UTILITIES & TELEPHONE	\$1,382.06	\$20,085.86
VEHICLE EXPENSE	\$689.90	\$8,527.93

Date:
Feb 16, 2005

PRAIRIE SKY GUEST AND GAME RANCH

Page: 2

Profit and Loss Statement

For the period December 1, 2004 to December 31, 2004

	Current Period Amount	Year To Date Amount
WAGES - EMPLOYEES	\$2,244.10	\$56,177.60
WAGES - CONTRACTED	\$217.20	\$16,783.37
MISCELLANEOUS EXPENSE	\$41.34	\$10,162.94
	-----	-----
TOTAL OPERATING EXPENSES	\$47,923.30	\$317,051.77
	-----	-----
NET INCOME FROM OPERATIONS	(\$47,341.30)	\$42,994.07
OTHER INCOME		
INTEREST	\$.00	\$.00
MISCELLANEOUS INCOME	\$1,000.00	\$7,267.01
	-----	-----
TOTAL OTHER INCOME	(\$1,000.00)	(\$7,267.01)
	-----	-----
NET PROFIT AFTER TAXES	(\$46,341.30)	\$50,261.08

Date:
Feb 16, 2005

PRAIRIE SKY GUEST AND GAME RANCH

Page: 1

Balance Sheet

As of December 31, 2004

CURRENT ASSETS

CHECKING ACCOUNT - DACOTAH	(\$4,227.05)
SAVINGS ACCT - DACOTAH	\$.00
PETTY CASH	\$200.00

TOTAL CASH	(\$4,027.05)
EXCHANGE ACCOUNT	(\$1,500.00)

TOTAL CURRENT ASSETS	(\$5,527.05)

FIXED ASSETS

FURNITURE & EQUIPMENT	\$100,332.59
HUNTING DOGS \ HORSES ETC.	\$47,005.80
ACCUMULATED DEPREC-FURN & EQ	(\$124,563.00)

TOTAL FIXED ASSETS	\$22,775.39

TOTAL ASSETS	\$17,248.34
	=====

LIABILITIES

SALES TAX PAYABLE	\$3.56
FICA TAX W/H & PAYABLE	\$171.69
INCOME TAX W/H & PAYABLE	\$64.00
PAYROLL CATCH ALL PAYABLE	\$172.18
NOTE PAYABLE - DACOTAH	\$22,652.56
NOTE PAYABLE - MBNA	(\$20,670.38)

TOTAL LIABILITIES	\$2,393.61

OWNERS EQUITY

RETAINED EARNINGS	(\$35,406.35)
DRAW	\$.00
NET PROFIT / (LOSS)	\$50,261.08

TOTAL EQUITY	\$14,854.73

TOTAL LIABILITIES & EQUITY	\$17,248.34
	=====

Date:
Mar 16, 2006

PRAIRIE SKY GUEST AND GAME RANCH

Page: 1

Profit and Loss Statement

For the period December 1, 2005 to December 31, 2005

	Current Period Amount	Year To Date Amount
INCOME		
MANAGEMENT FUNDS	\$.00	\$114,000.00
LODGING\MEALS\SERVICES	\$3,609.85	\$25,193.71
HORSE BACK	\$.00	\$28,737.44
HUNTING	\$4,345.95	\$104,281.56
SNOWMOBLIE	\$.00	\$.00
OUTSIDE MEALS	\$35.00	\$17,609.95
TURKEY HUNTS	\$.00	\$34,198.80
GIFT SHOP	\$.00	\$214.73
OTHER	\$.00	\$.00
RESALE ITEMS NO TAX	\$.00	\$.00
HOUSE RENT	\$.00	\$.00
PASTURE RENT	\$.00	\$.00
BUFFALO MEAT/HUNTS	\$102.00	\$244.96
TOTAL INCOME	\$8,092.80	\$324,481.15
GROSS INCOME	\$8,092.80	\$324,481.15
OPERATING EXPENSES		
ADVERTISING & P/R	\$459.00	\$21,362.46
BAD CHECKS \ REDEPOSITS	\$.00	\$.00
BANK SERVICE CHARGES	\$90.01	\$3,000.77
DEPRECIATION EXPENSE	\$10,229.00	\$10,229.00
FEED	\$411.52	\$2,030.17
FERTILIZER/CHEMICAL/CRP EXP	\$.00	\$2,224.10
GAS \ FUEL	\$158.40	\$11,882.72
GIFT SHOP EXPENSE	\$.00	\$2,017.22
INSURANCE	\$8,001.00	\$11,627.00
LAUNDRY & CLEANING	\$.00	\$.00
LEGAL & PROFESSIONAL SERVICES	\$.00	\$850.46
LICENSES	\$770.00	\$16,608.00
LIVESTOCK EXPENSE	\$.00	(\$63.66)
OTHER INTEREST	\$.00	\$1,922.98
OFFICE EXPENSE	\$529.13	\$4,638.08
RENT	\$225.00	\$5,350.00
REPAIRS & MAINTENANCE	\$1,495.24	\$11,800.12
SUPPLIES - HUNTING	\$.00	\$18,939.32
SUPPLIES - KITCHEN	\$.00	\$26,170.08
SUPPLIES - OTHER	(\$985.13)	\$7,396.93
SUPPLIES - HORSES	\$.00	\$387.36
SUPPLIES - SNOWMOBILES	\$.00	\$.00
TAXES	\$.00	\$.00
TAXES - PAYROLL (FICA/FUTA)	\$306.00	\$7,286.04
TAXES - SALES	\$1,204.33	\$9,487.12
TRAVEL & ENTERTAINMENT	\$.00	\$4,220.62
UTILITIES & TELEPHONE	\$1,478.38	\$19,119.99
VEHICLE EXPENSE	\$603.80	\$10,575.31

Date:
Mar 16, 2006

PRAIRIE SKY GUEST AND GAME RANCH
Profit and Loss Statement

Page: 2

For the period December 1, 2005 to December 31, 2005

	Current Period Amount	Year To Date Amount
WAGES - EMPLOYEES	\$4,000.00	\$83,841.75
WAGES - CONTRACTED	\$.00	\$14,379.56
MISCELLANEOUS EXPENSE	(\$3,600.00)	\$1,510.00
	-----	-----
TOTAL OPERATING EXPENSES	\$25,375.68	\$308,793.50
	-----	-----
NET INCOME FROM OPERATIONS	(\$17,282.88)	\$15,687.65
OTHER INCOME		
INTEREST	\$455.13	\$.00
MISCELLANEOUS INCOME	(\$3,600.00)	\$774.09
ASSETS SOLD (HORSES ETC.)	\$.00	\$11,651.71
LESS COST OF ASSETS SOLD	\$.00	\$10,680.00
	-----	-----
TOTAL OTHER INCOME	\$3,144.87	(\$1,745.80)
	-----	-----
NET PROFIT AFTER TAXES	(\$20,427.75)	\$17,433.45

Date:
Mar 16, 2006

PRAIRIE SKY GUEST AND GAME RANCH

Page: 1

Balance Sheet

As of December 31, 2005

CURRENT ASSETS

CHECKING ACCOUNT - DACOTAH	(\$1,284.69)
SAVINGS ACCT - DACOTAH	\$.00
PETTY CASH	\$200.00

TOTAL CASH	(\$1,084.69)
EXCHANGE ACCOUNT	(\$1,200.00)
MANAGEMENT EXCHANGE ACCOUNT	\$.00

TOTAL CURRENT ASSETS	(\$2,284.69)

FIXED ASSETS

FURNITURE & EQUIPMENT	\$132,084.37
HUNTING DOGS \ HORSES ETC.	\$47,005.80
ACCUMULATED DEPREC-FURN & EQ	(\$134,792.00)

TOTAL FIXED ASSETS	\$44,298.17

TOTAL ASSETS	\$42,013.48
	=====

LIABILITIES

SALES TAX PAYABLE	\$.00
FICA TAX W/H & PAYABLE	\$306.00
INCOME TAX W/H & PAYABLE	\$900.00
PAYROLL CATCH ALL PAYABLE	\$306.49
NOTE PAYABLE - DACOTAH	\$56,884.29
NOTE PAYABLE - MBNA	(\$43,008.17)
LOAN	\$.00

TOTAL LIABILITIES	\$15,388.61

OWNERS EQUITY

RETAINED EARNINGS	\$9,191.42
DRAW	\$.00
NET PROFIT / (LOSS)	\$17,433.45

TOTAL EQUITY	\$26,624.87

TOTAL LIABILITIES & EQUITY	\$42,013.48
	=====

Date:
Apr 09, 2007

PRAIRIE SKY GUEST AND GAME RANCH

Page: 1

Profit and Loss Statement

For the period December 1, 2006 to December 31, 2006

	Current Period Amount	Year To Date Amount
INCOME		
MANAGEMENT FUNDS	\$225.75	\$202,225.75
LODGING\MEALS\SERVICES	\$2,229.85	\$20,493.17
HORSE BACK	\$.00	\$34,295.17
HUNTING	\$6,419.32	\$195,115.66
SNOWMOBLIE	\$.00	\$222.60
OUTSIDE MEALS	\$1,917.12	\$32,028.05
TURKEY HUNTS	\$.00	\$18,572.25
GIFT SHOP	\$.00	\$3,888.41
OTHER	\$.00	\$.00
RESALE ITEMS NO TAX	\$.00	\$.00
HOUSE RENT	\$.00	\$.00
PASTURE RENT	\$.00	\$.00
BUFFALO MEAT/HUNTS	\$2,675.68	\$6,114.02
TOTAL INCOME	\$13,467.72	\$512,955.08
GROSS INCOME	\$13,467.72	\$512,955.08
OPERATING EXPENSES		
ADVERTISING & P/R	\$241.95	\$26,190.25
BAD CHECKS \ REDEPOSITS	\$.00	\$.00
BANK SERVICE CHARGES	\$1,958.42	\$7,338.78
DEPRECIATION EXPENSE	\$88,655.00	\$88,655.00
FEED	\$754.63	\$3,190.81
FERTILIZER/CHEMICAL/CRP EXP	\$.00	\$445.39
GAS \ FUEL	\$784.34	\$11,597.30
GIFT SHOP EXPENSE	\$220.00	\$6,852.75
INSURANCE	\$.00	\$12,025.00
LAUNDRY & CLEANING	\$.00	\$.00
LEGAL & PROFESSIONAL SERVICES	\$.00	\$1,581.44
LICENSES	\$760.00	\$24,721.00
LIVESTOCK EXPENSE	\$.00	\$2,863.70
OTHER INTEREST	\$6,034.66	\$11,430.20
OFFICE EXPENSE	\$253.80	\$4,390.10
RENT	\$225.00	\$6,000.00
REPAIRS & MAINTENANCE	\$8,282.94	\$37,885.27
SUPPLIES - HUNTING	\$750.00	\$25,898.35
SUPPLIES - KITCHEN	\$627.86	\$29,437.25
SUPPLIES - OTHER	\$.00	\$2,106.53
SUPPLIES - HORSES	\$.00	\$913.93
SUPPLIES - SNOWMOBILES	\$.00	\$.00
TAXES	(\$5,325.13)	\$.00
TAXES - PAYROLL (FICA/FUTA)	\$494.49	\$8,412.95
TAXES - SALES	\$5,928.92	\$15,456.48
TRAVEL & ENTERTAINMENT	\$.00	\$4,368.97
UTILITIES & TELEPHONE	\$1,679.30	\$27,331.76
VEHICLE EXPENSE	\$1,199.91	\$10,641.93

Date:
Apr 09, 2007

PRAIRIE SKY GUEST AND GAME RANCH
Profit and Loss Statement

Page: 2

For the period December 1, 2006 to December 31, 2006

	Current Period Amount	Year To Date Amount
WAGES - EMPLOYEES	\$6,464.00	\$97,074.75
WAGES - CONTRACTED	\$900.00	\$18,248.26
MISCELLANEOUS EXPENSE	(\$4,800.00)	\$1,902.64
	-----	-----
TOTAL OPERATING EXPENSES	\$116,090.09	\$486,960.79
	-----	-----
NET INCOME FROM OPERATIONS	(\$102,622.37)	\$25,994.29
OTHER INCOME		
INTEREST	\$.00	\$.00
MISCELLANEOUS INCOME	(\$5,459.74)	\$9,741.91
ASSETS SOLD (HORSES ETC.)	\$.00	\$406.56
LESS COST OF ASSETS SOLD	\$.00	\$.00
	-----	-----
TOTAL OTHER INCOME	\$5,459.74	(\$10,148.47)
	-----	-----
NET PROFIT AFTER TAXES	(\$108,082.11)	\$36,142.76

Date:
Apr 09, 2007

PRAIRIE SKY GUEST AND GAME RANCH

Page: 1

Balance Sheet

As of December 31, 2006

CURRENT ASSETS

CHECKING ACCOUNT - DACOTAH	\$6,984.84
SAVINGS ACCT - DACOTAH	\$.00
PETTY CASH	\$200.00

TOTAL CASH	\$7,184.84
EXCHANGE ACCOUNT	(\$1,700.00)
MANAGEMENT EXCHANGE ACCOUNT	\$.00

TOTAL CURRENT ASSETS	\$5,484.84

FIXED ASSETS

EQUIPMENT & IMPROVMENTS	\$59,375.48
FURNITURE & EQUIPMENT	\$177,134.75
HUNTING DOGS \ HORSES ETC.	\$51,255.80
ACCUMULATED DEPREC-FURN & EQ	(\$223,447.00)

TOTAL FIXED ASSETS	\$64,319.03

TOTAL ASSETS	\$69,803.87
	=====

LIABILITIES

SALES TAX PAYABLE	(\$271.88)
FICA TAX W/H & PAYABLE	\$494.49
INCOME TAX W/H & PAYABLE	\$983.00
PAYROLL CATCH ALL PAYABLE	\$494.98
NOTE PAYABLE - DACOTAH	\$96,191.94
NOTE PAYABLE - MBNA	(\$57,051.67)
LOAN	\$.00

TOTAL LIABILITIES	\$40,840.86

OWNERS EQUITY

RETAINED EARNINGS	(\$7,179.75)
DRAW	\$.00
NET PROFIT / (LOSS)	\$36,142.76

TOTAL EQUITY	\$28,963.01

TOTAL LIABILITIES & EQUITY	\$69,803.87
	=====

3:20 PM
03/04/08
Cash Basis

PRAIRIE SKY GUEST AND GAME RANCH
Profit & Loss YTD Comparison
December 2007

	<u>Dec 07</u>	<u>Jan - Dec 07</u>
Ordinary Income/Expense		
Income		
5100 • MANAGEMENT FUNDS	-20,035.00	107,000.00
5150 • LODGING/MEALS/SERVICES	0.00	38,068.48
5160 • HORSE BACK	0.00	62,199.84
5170 • HUNTING	0.00	192,831.12
5190 • OUTSIDE MEALS	1,318.91	38,783.68
5200 • TURKEY HUNTS	425.00	17,804.00
5300 • GIFT SHOP	335.30	2,639.93
5600 • OTHER	0.00	380.00
5760 • BUFFALO MEAT/HUNTS	6,852.21	11,004.45
Total Income	-11,103.58	470,691.50
Expense		
6100 • ADVERTISING & P/R	3,204.17	52,144.65
6110 • BAD CHECKS \ REDEPOSITS	0.00	230.00
6120 • BANK SERVICE CHARGES	633.36	6,870.87
6160 • FEED	-19,619.81	5,625.14
6170 • FERTILIZER/CHEMICAL/CRP EXP	1,410.00	905.00
6180 • GAS \ FUEL	-726.08	19,678.94
6200 • GIFT SHOP EXPENSE	4,586.74	12,911.53
6220 • INSURANCE	0.00	11,038.00
6240 • LEGAL & PROFESSIONAL SERVICES	-1,183.03	1,027.77
6245 • LICENSES	1,830.00	20,385.45
6250 • LIVESTOCK EXPENSES	1,540.76	2,481.59
6310 • OTHER INTEREST	0.00	7,041.40
6320 • OFFICE EXPENSE	-128.59	6,751.18
6330 • RENT	975.00	4,450.00
6340 • REPAIRS & MAINTENANCE	2,447.62	30,738.67
6345 • SUPPLIES - HUNTING	-7,771.25	28,427.50
6350 • SUPPLIES - KITCHEN	-953.46	37,491.45
6355 • SUPPLIES - OTHER	1,578.70	2,639.40
6356 • SUPPLIES - HORSES	983.08	1,657.00
6370 • TAXES - PAYROLL (FICA/FUTA)	645.52	10,347.14
6380 • TAXES - SALES	2,722.99	17,413.53
6500 • TRAVEL & ENTERTAINMENT	2,438.70	4,489.03
6510 • UTILITIES & TELEPHONE	108.00	23,220.01
6550 • VEHICLE EXPENSE	859.83	8,293.67
6600 • WAGES - EMPLOYEES	8,048.16	116,890.44
6620 • WAGES - CONTRACTED	-5,437.25	20,831.50
6700 • MISCELLANEOUS EXPENSE	-30,419.03	7,697.11
Total Expense	-32,395.87	461,657.97
Net Ordinary Income	21,292.29	9,033.53
Other Income/Expense		
Other Income		
7010 • INTEREST	0.00	-638.91
7020 • MISCELLANEOUS INCOME	-26,942.00	7,318.05
7030 • ASSETS SOLD (HORSES ETC.)	0.00	294.17
Total Other Income	-26,942.00	6,973.31
Net Other Income	-26,942.00	6,973.31
Net Income	-5,649.71	16,006.84

3:20 PM
03/04/08
Cash Basis

PRAIRIE SKY GUEST AND GAME RANCH
Balance Sheet
As of December 31, 2007

	<u>Dec 31, 07</u>
ASSETS	
Current Assets	
Checking/Savings	
1010 · CHECKING ACCT - DACOTAH	-4,840.73
Total Checking/Savings	<u>-4,840.73</u>
Other Current Assets	
1110 · PETTY CASH	670.00
Total Other Current Assets	<u>670.00</u>
Total Current Assets	<u>-4,170.73</u>
Fixed Assets	
1600 · EQUIPMENT & IMPROVMENTS	59,375.48
1630 · FURNITURE & EQUIPMENT	198,980.75
1850 · HUNTING DOGS \ HORSES ETC.	64,795.17
1730 · - LESS ACCUM DEPR - FURN & EQ	-223,447.00
Total Fixed Assets	<u>99,704.40</u>
TOTAL ASSETS	<u>95,533.67</u>
LIABILITIES & EQUITY	
Liabilities	
Current Liabilities	
Other Current Liabilities	
2020 · SALES TAX PAYABLE	-395.02
2030 · FICA TAX W/H & PYBLE	615.68
2040 · INCOME TAX W/H & PYBLE	927.00
2090 · PAYROLL CATCH ALL PYBLE	1,226.65
Total Other Current Liabilities	<u>2,374.31</u>
Total Current Liabilities	<u>2,374.31</u>
Long Term Liabilities	
2200 · NOTE PAYBLE - DACOTAH	103,442.89
2300 · NOTE PAYABLE - MBNA	-63,130.00
Total Long Term Liabilities	<u>40,312.89</u>
Total Liabilities	<u>42,687.20</u>
Equity	
3400 · DRAW	7,876.62
3900 · RETAINED EARNINGS	28,963.01
Net Income	16,006.84
Total Equity	<u>52,846.47</u>
TOTAL LIABILITIES & EQUITY	<u>95,533.67</u>

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01/07/09

Cash Basis

PRAIRIE SKY GUEST AND GAME RANCH
Profit & Loss YTD Comparison
 December 2008

	Dec 08	Jan - Dec 08
Ordinary Income/Expense		
Income		
5100 · MANAGEMENT FUNDS	0.00	57,300.00
5150 · LODGING/MEALS/SERVICES	0.00	41,628.96
5160 · HORSE BACK	0.00	43,743.15
5170 · HUNTING	33,525.10	239,964.38
5190 · OUTSIDE MEALS	1,172.85	28,026.54
5200 · TURKEY HUNTS	0.00	20,908.90
5300 · GIFT SHOP	277.00	4,461.85
5650 · RESALE ITEMS NO TAX	0.00	5,400.00
5760 · BUFFALO MEAT/HUNTS	0.00	1,782.75
Total Income	34,974.95	443,236.53
Expense		
6100 · ADVERTISING & P/R	160.00	23,830.80
6110 · BAD CHECKS \ REDEPOSITS	0.00	44.00
6120 · BANK SERVICE CHARGES	438.27	4,062.80
6160 · FEED	35,722.01	39,370.25
6170 · FERTILIZER/CHEMICAL/CRP EXP	0.00	2,813.45
6180 · GAS \ FUEL	987.83	23,040.89
6200 · GIFT SHOP EXPENSE	0.00	6,830.75
6220 · INSURANCE	0.00	12,205.00
6240 · LEGAL & PROFESSIONAL SERVICES	0.00	1,275.10
6245 · LICENSES	3,145.00	22,063.75
6250 · LIVESTOCK EXPENSES	2,837.34	4,840.20
6310 · OTHER INTEREST	0.00	9,372.12
6320 · OFFICE EXPENSE	0.00	5,879.66
6330 · RENT	1,325.00	5,000.00
6340 · REPAIRS & MAINTENANCE	1,174.70	38,244.95
6345 · SUPPLIES - HUNTING	2,801.19	39,011.72
6350 · SUPPLIES - KITCHEN	836.95	34,134.28
6355 · SUPPLIES - OTHER	0.00	2,147.94
6356 · SUPPLIES - HORSES	0.00	1,410.15
6370 · TAXES - PAYROLL (FICA/FUTA)	572.45	13,099.20
6380 · TAXES - SALES	4,627.32	18,692.06
6500 · TRAVEL & ENTERTAINMENT	0.00	5,663.16
6510 · UTILITIES & TELEPHONE	3,257.64	27,756.84
6550 · VEHICLE EXPENSE	659.83	9,699.73
6600 · WAGES - EMPLOYEES	7,482.94	125,238.20
6620 · WAGES - CONTRACTED	3,918.00	28,258.01
6700 · MISCELLANEOUS EXPENSE	105.00	11,523.38
Total Expense	70,051.47	515,308.19
Net Ordinary Income	-35,076.52	-72,071.66
Other Income/Expense		
Other Income		
7020 · MISCELLANEOUS INCOME	1,200.00	3,987.26
7025 · BUFFALO SOLD/REIMBURSED	0.00	19,785.73
7030 · ASSETS SOLD (HORSES ETC.)	0.00	7,468.28
Total Other Income	1,200.00	31,241.27
Net Other Income	1,200.00	31,241.27
Net Income	-33,876.52	-40,830.39

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01/07/09

Cash Basis

PRAIRIE SKY GUEST AND GAME RANCH**Balance Sheet**

As of December 31, 2008

	<u>Dec 31, 08</u>
ASSETS	
Current Assets	
Checking/Savings	
1010 - CHECKING ACCT - DACOTAH	-3,574.95
Total Checking/Savings	-3,574.95
Other Current Assets	
1110 - PETTY CASH	3,147.00
1525 - EXCHANGE ACCT	-259.30
Total Other Current Assets	2,887.70
Total Current Assets	-687.25
Fixed Assets	
1600 - EQUIPMENT & IMPROVMENTS	59,375.48
1630 - FURNITURE & EQUIPMENT	209,640.75
1650 - HUNTING DOGS \ HORSES ETC.	67,647.47
1730 - - LESS ACCUM DEPR - FURN & EQ	-223,447.00
Total Fixed Assets	113,216.70
TOTAL ASSETS	<u>112,529.45</u>
LIABILITIES & EQUITY	
Liabilities	
Current Liabilities	
Other Current Liabilities	
2020 - SALES TAX PAYABLE	-271.88
2030 - FICA TAX W/H & PYBLE	572.45
2040 - INCOME TAX W/H & PYBLE	1,372.33
2090 - PAYROLL CATCH ALL PYBLE	2,632.24
Total Other Current Liabilities	4,305.14
Total Current Liabilities	4,305.14
Long Term Liabilities	
2200 - NOTE PAYABLE - DACOTAH	173,563.37
2300 - NOTE PAYABLE - MBNA	-63,130.00
Total Long Term Liabilities	110,433.37
Total Liabilities	114,738.51
Equity	
3400 - DRAW	-6,225.38
3900 - RETAINED EARNINGS	44,846.71
Net Income	-40,830.39
Total Equity	-2,209.06
TOTAL LIABILITIES & EQUITY	<u>112,529.45</u>

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02/03/10
Accrual Basis

PRAIRIE SKY GUEST & GAME RANCH LLC
Profit & Loss YTD Comparison
December 2009

	<u>Dec 09</u>	<u>Jan - Dec 09</u>
Ordinary Income/Expense		
Income		
5150 · LODGING/MEALS/SERVICES	84.00	25,051.07
5160 · HORSE BACK	0.00	40,312.74
5170 · HUNTING	1,228.55	156,263.38
5190 · OUTSIDE MEALS	0.00	30,339.17
5200 · TURKEY HUNTS	0.00	12,372.00
5300 · GIFT SHOP	0.00	1,814.75
5600 · OTHER	0.00	5.00
5650 · RESALE ITEMS NO TAX	0.00	1,500.00
5750 · PASTURE RENT	1,200.00	1,200.00
5760 · BUFFALO MEAT/HUNTS	0.00	11,848.38
Total Income	2,512.55	280,706.49
Expense		
6100 · ADVERTISING & P/R	97.21	31,436.19
6120 · BANK SERVICE CHARGES	585.28	4,027.71
6160 · FEED	33,000.00	41,825.63
6170 · FERTILIZER/CHEMICAL/CRP EXP	0.00	4,336.14
6180 · GAS \ FUEL	2,130.96	15,567.92
6200 · GIFT SHOP EXPENSE	0.00	4,248.09
6220 · INSURANCE	1,504.00	13,444.00
6240 · LEGAL & PROFESSIONAL SERVICES	386.90	4,351.29
6245 · LICENSES	1,895.00	14,537.55
6250 · LIVESTOCK EXPENSES	3,167.94	4,886.91
6320 · OFFICE EXPENSE	334.26	1,816.63
6330 · RENT	1,200.00	4,200.00
6340 · REPAIRS & MAINTENANCE	3,808.60	22,391.02
6345 · SUPPLIES - HUNTING	750.00	17,656.63
6350 · SUPPLIES - KITCHEN	509.05	34,612.23
6355 · SUPPLIES - OTHER	0.00	1,853.73
6356 · SUPPLIES - HORSES	0.00	1,349.34
6360 · TAXES	0.00	697.96
6370 · TAXES - PAYROLL (FICA/FUTA)	-3,813.25	10,749.96
6380 · TAXES - SALES	2,560.40	14,307.28
6500 · TRAVEL & ENTERTAINMENT	908.86	8,291.43
6510 · UTILITIES & TELEPHONE	1,784.14	20,748.46
6550 · VEHICLE EXPENSE	171.47	8,991.47
6600 · WAGES - EMPLOYEES	4,295.00	115,464.68
6620 · WAGES - CONTRACTED	5,408.00	14,901.30
6700 · MISCELLANEOUS EXPENSE	750.00	1,082.56
Total Expense	61,433.82	417,776.11
Net Ordinary Income	-58,921.27	-137,069.62
Other Income/Expense		
Other Income		
7020 · MISCELLANEOUS INCOME	0.00	1,575.17
7025 · BUFFALO SOLD/REIMBURSED	0.00	49,489.50
7030 · ASSETS SOLD (HORSES ETC.)	0.00	520.93
Total Other Income	0.00	51,585.60
Net Other Income	0.00	51,585.60
Net Income	-58,921.27	-85,484.02

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02/03/10
Accrual Basis

PRAIRIE SKY GUEST & GAME RANCH LLC
Balance Sheet
As of December 31, 2009

	<u>Dec 31, 09</u>
ASSETS	
Current Assets	
Checking/Savings	
1010 · CHECKING ACCT - DACOTAH	-35,713.15
Total Checking/Savings	-35,713.15
Other Current Assets	
1110 · PETTY CASH	3,147.00
1310 · INVENTORY - GIFT SHOP	12,690.00
1525 · EXCHANGE ACCT	-489.30
1530 · TIP EXCHANGE	300.00
Total Other Current Assets	15,647.70
Total Current Assets	-20,065.45
Fixed Assets	
1600 · EQUIPMENT & IMPROVMENTS	78,031.44
1630 · FURNITURE & EQUIPMENT	217,884.01
1650 · HUNTING DOGS \ HORSES ETC.	81,571.92
1730 · - LESS ACCUM DEPR - FURN & EQ	-244,718.00
Total Fixed Assets	132,769.37
TOTAL ASSETS	<u>112,703.92</u>
LIABILITIES & EQUITY	
Liabilities	
Current Liabilities	
Other Current Liabilities	
2020 · SALES TAX PAYABLE	-271.88
2030 · FICA TAX W/H & PYBLE	328.74
2090 · PAYROLL CATCH ALL PYBLE	892.35
Total Other Current Liabilities	949.21
Total Current Liabilities	949.21
Long Term Liabilities	
2200 · NOTE PAYABLE - DACOTAH	268,201.09
2300 · NOTE PAYABLE - MBNA	-63,130.00
Total Long Term Liabilities	205,071.09
Total Liabilities	206,020.30
Equity	
3400 · DRAW	-2,500.00
3900 · RETAINED EARNINGS	-5,332.36
Net Income	-85,484.02
Total Equity	-93,316.38
TOTAL LIABILITIES & EQUITY	<u>112,703.92</u>

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3/31/11

Accrual Basis

PRAIRIE SKY GUEST & GAME RANCH LLC
Profit & Loss Prev Year Comparison
 January through December 2010

	Jan - Dec 10	Jan - Dec 09	\$ Change	% Change
Ordinary Income/Expense				
Income				
5100 - LODGING/MEALS/SERVICES	29,487.84	25,051.07	4,436.77	17.7%
5160 - HORSE BACK	34,349.57	40,312.74	-5,963.17	-14.8%
5170 - HUNTING	134,962.89	168,283.38	-21,300.39	-13.6%
5190 - OUTSIDE MEALS	23,817.42	30,339.17	-6,721.75	-22.2%
5200 - TURKEY HUNTS	9,873.30	12,372.00	-2,498.70	-20.2%
5300 - GIFT SHOP	7,507.13	2,304.05	5,203.08	225.8%
5600 - OTHER	1,818.84	5.00	1,813.84	36,276.8%
5650 - RESALE ITEMS NO TAX	0.00	1,500.00	-1,500.00	-100.0%
5750 - PASTURE RENT	0.00	1,200.00	-1,200.00	-100.0%
5760 - BUFFALO MEAT/HUNTS	5,604.83	11,848.38	-6,343.55	-53.5%
Total Income	247,121.92	281,195.79	-34,073.87	-12.1%
Expense				
6100 - ADVERTISING & P/R	38,918.76	31,436.19	7,480.57	23.8%
6120 - BANK SERVICE CHARGES	2,959.88	4,027.71	-1,067.83	-26.5%
6160 - DEPRECIATION EXPENSE	25,028.00	25,870.00	156.00	0.6%
6160 - FEED	37,568.06	41,826.63	-4,258.57	-10.2%
6170 - FERTILIZER/CHEMICAL/CRP EXP	9,521.81	4,336.14	5,185.67	119.8%
6180 - GAS / FUEL	19,208.61	15,567.92	3,640.69	23.4%
6200 - GIFT SHOP EXPENSE	6,054.70	1,248.08	4,818.61	385.9%
6220 - INSURANCE	12,740.00	13,444.00	-704.00	-5.2%
6230 - LAUNDRY & CLEANING	547.12	0.00	547.12	100.0%
6240 - LEGAL & PROFESSIONAL SERVICES	9,943.46	4,351.29	5,592.19	128.5%
6248 - LICENSES	7,493.72	14,537.65	-7,043.93	-48.5%
6260 - LIVESTOCK EXPENSES	14,337.96	4,886.91	9,451.05	193.4%
6310 - OTHER INTEREST	5,275.43	11,627.90	-6,352.47	-54.6%
6320 - OFFICE EXPENSE	3,969.86	1,816.63	2,153.23	118.5%
6330 - RENT	3,200.00	4,200.00	-1,000.00	-23.8%
6340 - REPAIRS & MAINTENANCE	18,390.68	25,257.53	-6,866.85	-27.2%
6345 - SUPPLIES - HUNTING	17,520.58	13,700.58	3,819.98	27.9%
6360 - SUPPLIES - KITCHEN	28,780.82	34,981.83	-6,220.81	-17.8%
6365 - SUPPLIES - OTHER	1,058.44	1,863.73	-784.29	-42.3%
6366 - SUPPLIES - HORSES	3,207.16	2,643.74	563.42	21.3%
6360 - TAXES	269.02	697.98	-428.94	-61.5%
6370 - TAXES - PAYROLL (FICA/FUTA)	11,030.55	10,749.96	280.59	2.6%
6380 - TAXES - SALES	13,199.48	14,307.28	-1,107.80	-7.7%
6500 - TRAVEL & ENTERTAINMENT	9,772.80	8,291.43	1,481.37	17.9%
6510 - UTILITIES & TELEPHONE	17,136.16	20,748.48	-3,613.30	-17.4%
6550 - VEHICLE EXPENSE	1,763.78	8,991.47	-7,227.69	-80.4%
6600 - WAGES - EMPLOYEES	87,493.32	115,464.88	-27,971.36	-24.2%
6620 - WAGES - CONTRACTED	8,537.88	7,829.50	708.38	9.1%
6700 - MISCELLANEOUS EXPENSE	1,349.00	1,082.56	266.44	24.6%
Total Expense	417,276.04	445,776.47	-28,500.43	-6.4%
Net Ordinary Income	-170,154.12	-164,580.68	-5,573.44	-3.4%
Other Income/Expense				
Other Income				
7020 - MISCELLANEOUS INCOME	272.94	1,575.17	-1,302.23	-82.7%
7025 - BUFFALO SOLD/REIMBURSED	131,617.40	49,489.50	82,127.90	166.0%
7030 - ASSETS SOLD (HORSES ETC.)	5,809.09	520.93	5,288.16	1,015.1%
7035 - LESS COST OF ASSETS SOLD	-800.00	0.00	-800.00	-100.0%
Total Other Income	136,899.43	51,685.60	85,313.83	165.4%
Net Other Income	136,899.43	51,685.60	85,313.83	165.4%
Net Income	-33,254.69	-112,985.08	79,740.39	70.6%

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03/31/11

Accrual Basis

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PRAIRIE SKY GUEST & GAME RANCH LLC
Balance Sheet
 As of December 31, 2010

	Dec 31, 10
ASSETS	
Current Assets	
Checking/Savings	
1010 - CHECKING ACCT - DACOTAH	9,936.07
1050 - DACOTAH BANK CD	8,003.95
Total Checking/Savings	17,940.02
Other Current Assets	
1110 - PETTY CASH	3,147.00
1310 - INVENTORY - GIFT SHOP	20,569.00
Total Other Current Assets	23,716.00
Total Current Assets	41,656.02
Fixed Assets	
1500 - EQUIPMENT & IMPROVMENTS	80,572.93
1630 - FURNITURE & EQUIPMENT	229,606.22
1650 - HUNTING DOGS & HORSES ETC.	81,639.17
1730 - LESS ACCUM DEPR - FURN & EQ	-296,616.00
Total Fixed Assets	95,202.32
TOTAL ASSETS	136,858.34
LIABILITIES & EQUITY	
Liabilities	
Current Liabilities	
Other Current Liabilities	
2020 - SALES TAX PAYABLE	140.08
2030 - FICA TAX W/H & PYBLE	395.26
2040 - INCOME TAX W/H & PYBLE	171.01
2090 - PAYROLL CATCH ALL PYBLE	667.86
Total Other Current Liabilities	1,374.21
Total Current Liabilities	1,374.21
Long Term Liabilities	
2200 - NOTE PAYABLE - DACOTAH	207,609.93
Total Long Term Liabilities	207,609.93
Total Liabilities	208,984.14
Equity	
3400 - DRAW	-53,742.86
3900 - RETAINED EARNINGS	14,871.55
Net Income	-33,254.69
Total Equity	-72,125.80
TOTAL LIABILITIES & EQUITY	136,858.34



11:24 AM

01/11/12

Accrual Basis

PRAIRIE SKY GUEST & GAME RANCH LLC**Profit & Loss Prev Year Comparison**

January through December 2011

	Jan - Dec 11	Jan - Dec 10	\$ Change
Ordinary Income/Expense			
Income			
5150 • LODGING/MEALS/SERVICES	29,987.42	29,487.84	499.58
5160 • HORSE BACK	18,470.33	34,349.57	-15,879.24
5170 • HUNTING	148,691.57	134,962.99	13,728.58
5190 • OUTSIDE MEALS	34,542.75	23,617.42	10,925.33
5200 • TURKEY HUNTS	7,865.00	9,873.30	-2,008.30
5300 • GIFT SHOP	4,446.08	7,507.13	-3,061.05
5600 • OTHER	366.08	1,818.84	-1,452.76
5750 • PASTURE RENT	1,800.00	0.00	1,800.00
5760 • BUFFALO MEAT/HUNTS	3,331.16	5,504.83	-2,173.67
Total Income	249,500.39	247,121.92	2,378.47
Expense			
6100 • ADVERTISING & P/R	22,610.82	38,916.76	-16,305.94
6110 • BAD CHECKS \ REDEPOSITS	939.63	0.00	939.63
6120 • BANK SERVICE CHARGES	2,678.73	2,959.88	-281.15
6150 • DEPRECIATION EXPENSE	-1,760.64	26,028.00	-27,788.64
6160 • FEED	13,581.33	37,569.06	-23,987.73
6170 • FERTILIZER/CHEMICAL/CRP EXP	32,434.50	9,521.81	22,912.69
6180 • GAS \ FUEL	25,958.83	19,208.61	6,750.22
6200 • GIFT SHOP EXPENSE	2,795.52	6,064.70	-3,269.18
6220 • INSURANCE	19,998.00	12,740.00	7,258.00
6230 • LAUNDRY & CLEANING	345.44	547.12	-201.68
6240 • LEGAL & PROFESSIONAL SERVICES	4,385.51	9,943.48	-5,557.97
6245 • LICENSES	5,976.25	7,493.72	-1,517.47
6250 • LIVESTOCK EXPENSES	6,805.11	14,337.96	-7,532.85
6310 • OTHER INTEREST	7,865.51	5,275.43	2,590.08
6320 • OFFICE EXPENSE	2,076.46	3,969.86	-1,893.40
6330 • RENT	4,746.00	3,200.00	1,546.00
6340 • REPAIRS & MAINTENANCE	20,627.83	18,390.68	2,237.15
6345 • SUPPLIES - HUNTING	18,274.08	17,520.56	753.52
6350 • SUPPLIES - KITCHEN	33,159.07	28,760.82	4,398.25
6355 • SUPPLIES - OTHER	2,082.47	1,069.44	1,013.03
6356 • SUPPLIES - HORSES	4,761.66	3,207.16	1,554.50
6360 • TAXES	-176.08	269.02	-445.10
6370 • TAXES - PAYROLL (FICA/FUTA)	12,796.41	11,030.55	1,765.86
6380 • TAXES - SALES	13,078.43	13,199.48	-121.05
6500 • TRAVEL & ENTERTAINMENT	7,778.35	9,772.80	-1,994.45
6510 • UTILITIES & TELEPHONE	18,120.96	17,135.16	985.80
6550 • VEHICLE EXPENSE	8,065.70	1,763.78	6,301.92
6600 • WAGES - EMPLOYEES	87,003.05	87,493.32	-490.27
6620 • WAGES - CONTRACTED	13,817.00	8,537.88	5,279.12
6700 • MISCELLANEOUS EXPENSE	770.00	1,349.00	-579.00
Total Expense	391,595.93	417,276.04	-25,680.11
Net Ordinary Income	-142,095.54	-170,154.12	28,058.58
Other Income/Expense			
Other Income			
7010 • INTEREST	<-1,049.99	0.00	-1,049.99
7020 • MISCELLANEOUS INCOME	4,041.82	272.94	3,768.88
7025 • BUFFALO SOLD/REIMBURSED	190,000.06	131,617.40	58,382.66
7030 • ASSETS SOLD (HORSES ETC.)	14,429.96	5,809.09	8,620.87
7035 • LESS COST OF ASSETS SOLD	0.00	-800.00	800.00
Total Other Income	207,421.85	136,899.43	70,522.42
Net Other Income	207,421.85	136,899.43	70,522.42
Net Income	65,326.31	-33,264.69	98,591.00

12:11 PM

01/11/12

Accrual Basis

PRAIRIE SKY GUEST & GAME RANCH LLC

Balance Sheet

As of December 31, 2011

	Dec 31, 11
ASSETS	
Current Assets	
Checking/Savings	
1010 · CHECKING ACCT - DACOTAH	-2,063.87
1050 · DACOTAH BANK CD	8,003.95
1200 · INVESTMENTS	56,257.50
Total Checking/Savings	62,197.58
Other Current Assets	
1110 · PETTY CASH	3,147.00
1310 · INVENTORY - GIFT SHOP	20,589.00
1525 · EXCHANGE ACCT	-98.89
1530 · TIP EXCHANGE	273.65
Total Other Current Assets	23,890.76
Total Current Assets	86,088.34
Fixed Assets	
1600 · EQUIPMENT & IMPROVMENTS	90,251.25
1630 · FURNITURE & EQUIPMENT	230,440.11
1650 · HUNTING DOGS \ HORSES ETC.	96,939.17
1730 · - LESS ACCUM DEPR - FURN & EQ	-298,616.00
Total Fixed Assets	121,014.53
TOTAL ASSETS	207,102.87
LIABILITIES & EQUITY	
Liabilities	
Current Liabilities	
Other Current Liabilities	
2020 · SALES TAX PAYABLE	140.08
2030 · FICA TAX W/H & PYBLE	461.82
2040 · INCOME TAX W/H & PYBLE	205.98
2090 · PAYROLL CATCH ALL PYBLE	1,468.24
Total Other Current Liabilities	2,276.12
Total Current Liabilities	2,276.12
Long Term Liabilities	
2200 · NOTE PAYABLE - DACOTAH	292,444.03
Total Long Term Liabilities	292,444.03
Total Liabilities	294,720.15
Equity	
3400 · DRAW	-80,817.79
3900 · RETAINED EARNINGS	-72,125.80
Net Income	65,326.31
Total Equity	-87,617.28
TOTAL LIABILITIES & EQUITY	207,102.87

- stock

- 2011 Payable Dec
33,317.79
20,530.14 Principal
12,787.65 Int.

1:31 PM
01/04/13
Accrual Basis

PRAIRIE SKY GUEST & GAME RANCH LLC
Profit & Loss YTD Comparison
December 2012

	<u>Dec 12</u>	<u>Jan - Dec 12</u>
Ordinary Income/Expense		
Income		
6160 · LODGING/MEALS/SERVICES	844.00	29,848.82
5160 · HORSE BACK	0.00	7,638.67
5170 · HUNTING	975.88	128,717.38
5190 · OUTSIDE MEALS	0.00	30,248.46
5200 · TURKEY HUNTS	0.00	3,270.50
5300 · GIFT SHOP	1,103.47	5,141.97
5750 · PASTURE RENT	0.00	3,500.00
5760 · BUFFALO MEAT/HUNTS	0.00	292.42
Total Income	2,923.35	208,658.22
Expense		
6100 · ADVERTISING & P/R	1,450.00	25,674.43
6120 · BANK SERVICE CHARGES	465.70	2,390.21
6160 · FEED	122.96	41,314.42
6170 · FERTILIZER/CHEMICAL/CRP EXP	0.00	19,497.53
6180 · GAS \ FUEL	1,856.08	22,893.69
6200 · GIFT SHOP EXPENSE	0.00	4,427.62
6220 · INSURANCE	529.00	15,209.00
6230 · LAUNDRY & CLEANING	0.00	1,077.31
6240 · LEGAL & PROFESSIONAL SERVICES	227.90	7,644.57
6245 · LICENSES	614.00	2,471.00
6250 · LIVESTOCK EXPENSES	1,466.58	13,117.64
6310 · OTHER INTEREST	0.00	4,194.13
6320 · OFFICE EXPENSE	404.76	2,934.54
6330 · RENT	225.00	8,435.00
6340 · REPAIRS & MAINTENANCE	2,228.61	23,158.34
6345 · SUPPLIES - HUNTING	217.60	19,648.22
6350 · SUPPLIES - KITCHEN	755.15	28,683.88
6365 · SUPPLIES - OTHER	0.00	423.18
6366 · SUPPLIES - HORSES	919.95	11,479.85
6360 · TAXES	0.00	179.52
6370 · TAXES - PAYROLL (FICA/FUTA)	493.46	13,083.43
6380 · TAXES - SALES	2,395.20	10,457.51
6500 · TRAVEL & ENTERTAINMENT	11.20	8,900.34
6510 · UTILITIES & TELEPHONE	2,073.92	21,423.91
6550 · VEHICLE EXPENSE	2,275.21	9,874.41
6600 · WAGES - EMPLOYEES	5,269.72	85,973.97
6620 · WAGES - CONTRACTED	7,945.00	19,388.00
6700 · MISCELLANEOUS EXPENSE	0.00	371.45
Total Expense	31,947.00	424,327.10
Net Ordinary Income	-29,023.65	-215,668.88
Other Income/Expense		
Other Income		
6705 · HOUSE RENT	0.00	3,000.00
6710 · RENTAL HOUSE EXPENSES	0.00	-647.66
7010 · INTEREST	0.00	-1,078.53
7015 · CROPS INCOME	0.00	70,545.57
7020 · MISCELLANEOUS INCOME	0.00	1,016.90
7025 · BUFFALO SOLD/REIMBURSED	0.00	159,720.00
7030 · ASSETS SOLD (HORSES ETC.)	0.00	6,812.16
7035 · LESS COST OF ASSETS SOLD	0.00	-650.00
Total Other Income	0.00	238,718.44
Net Other Income	0.00	238,718.44
Net Income	-29,023.65	23,049.56

1:30 PM

01/04/13

Accrual Basis

PRAIRIE SKY GUEST & GAME RANCH LLC
Balance Sheet
As of December 31, 2012

	<u>Dec 31, 12</u>
ASSETS	
Current Assets	
Checking/Savings	
1010 · CHECKING ACCT - DACOTAH	4,097.67
1050 · DACOTAH BANK CD	8,003.95
1200 · INVESTMENTS	69,808.72
Total Checking/Savings	81,910.34
Other Current Assets	
1110 · PETTY CASH	1,452.43
1310 · INVENTORY - GIFT SHOP	17,808.00
1525 · EXCHANGE ACCT	106.32
1530 · TIP EXCHANGE	-1,022.19
Total Other Current Assets	18,344.56
Total Current Assets	100,254.90
Fixed Assets	
1600 · EQUIPMENT & IMPROVMENTS	118,360.53
1630 · FURNITURE & EQUIPMENT	237,808.25
1650 · HUNTING DOGS \ HORSES ETC.	101,842.28
1730 · - LESS ACCUM DEPR - FURN & EQ	-317,963.00
Total Fixed Assets	140,048.06
TOTAL ASSETS	<u>240,302.96</u>
LIABILITIES & EQUITY	
Liabilities	
Current Liabilities	
Other Current Liabilities	
2030 · FICA TAX W/H & PYBLE	413.28
2040 · INCOME TAX W/H & PYBLE	99.97
2090 · PAYROLL CATCH ALL PYBLE	1,504.67
Total Other Current Liabilities	2,017.92
Total Current Liabilities	2,017.92
Long Term Liabilities	
2200 · NOTE PAYABLE - DACOTAH	294,877.39
Total Long Term Liabilities	294,877.39
Total Liabilities	296,895.31
Equity	
3400 · DRAW	-105,400.00
3900 · RETAINED EARNINGS	25,758.09
Net Income	23,049.56
Total Equity	-56,592.35
TOTAL LIABILITIES & EQUITY	<u>240,302.96</u>

3:59 PM

01/09/14

Accrual Basis

PRAIRIE SKY GUEST & GAME RANCH LLC
Profit & Loss Prev Year Comparison
 January through December 2013

	Jan - Dec 13	Jan - Dec 12	\$ Change
Ordinary Income/Expense			
Income			
5150 • LODGING/MEALS/SERVICES	32,849.04	29,848.82	3,000.22
5160 • HORSE BACK	5,637.22	7,638.67	-2,001.45
5170 • HUNTING	179,782.71	128,717.38	51,065.33
5190 • OUTSIDE MEALS	34,282.20	30,248.46	4,013.74
5200 • TURKEY HUNTS	1,477.00	3,270.50	-1,793.50
5300 • GIFT SHOP	2,448.05	5,141.97	-2,693.92
5750 • PASTURE RENT	9,000.00	3,500.00	5,500.00
5760 • BUFFALO MEAT/HUNTS	2,162.00	292.42	1,869.58
Total Income	267,618.22	208,658.22	58,960.00
Gross Profit	267,618.22	208,658.22	58,960.00
Expense			
6100 • ADVERTISING & P/R	43,181.97	25,424.43	17,757.54
6120 • BANK SERVICE CHARGES	5,235.26	2,390.21	2,845.05
6150 • DEPRECIATION EXPENSE	0.00	26,496.00	-26,496.00
6160 • FEED	22,746.78	21,314.42	1,432.36
6170 • FERTILIZER/CHEMICAL/CRP EXP	4,633.65	19,497.53	-14,863.88
6180 • GAS \ FUEL	17,407.05	22,893.69	-5,486.64
6200 • GIFT SHOP EXPENSE	907.20	4,066.57	-3,159.37
6220 • INSURANCE	16,182.00	15,209.00	973.00
6230 • LAUNDRY & CLEANING	612.15	1,077.31	-465.16
6240 • LEGAL & PROFESSIONAL SERVICES	11,519.25	7,644.57	3,874.68
6245 • LICENSES	4,590.75	2,471.00	2,119.75
6250 • LIVESTOCK EXPENSES	6,928.57	13,117.84	-6,189.07
6310 • OTHER INTEREST	19,028.85	5,272.66	13,756.19
6320 • OFFICE EXPENSE	3,126.37	2,934.54	191.83
6330 • RENT	2,700.00	8,435.00	-5,735.00
6340 • REPAIRS & MAINTENANCE	10,269.02	26,196.18	-15,927.16
6345 • SUPPLIES - HUNTING	22,523.92	19,648.22	2,875.70
6350 • SUPPLIES - KITCHEN	26,211.99	28,683.88	-2,471.89
6355 • SUPPLIES - OTHER	1,281.23	0.00	1,281.23
6356 • SUPPLIES - HORSES	9,443.92	11,479.85	-2,035.93
6360 • TAXES	0.00	179.52	-179.52
6370 • TAXES - PAYROLL (FICA/FUTA)	12,234.07	12,700.67	-466.60
6380 • TAXES - SALES	13,634.90	10,457.51	3,177.39
6500 • TRAVEL & ENTERTAINMENT	6,600.92	10,300.34	-3,699.42
6510 • UTILITIES & TELEPHONE	25,611.65	21,328.00	4,283.65
6550 • VEHICLE EXPENSE	5,925.29	7,583.41	-1,658.12
6600 • WAGES - EMPLOYEES	81,264.29	85,973.97	-4,709.68
6620 • WAGES - CONTRACTED	14,912.75	19,388.00	-4,475.25
6700 • MISCELLANEOUS EXPENSE	479.91	371.45	108.46
Total Expense	389,193.71	432,535.57	-43,341.86
Net Ordinary Income	-121,575.49	-223,877.35	102,301.86
Other Income/Expense			
Other Income			
5705 • HOUSE RENT	0.00	3,000.00	-3,000.00
5710 • RENTAL HOUSE EXPENSES	0.00	-847.66	847.66
5711 • RENTAL HOUSE DEPRECIATION EXP	0.00	-382.00	382.00
7010 • INTEREST	-7.61	0.00	-7.61
7015 • CROPS INCOME	3,500.00	70,545.57	-67,045.57
7020 • MISCELLANEOUS INCOME	2,448.55	1,016.90	1,429.65
7025 • BUFFALO SOLD/REIMBURSED	303,167.94	103,720.00	199,447.94
7030 • ASSETS SOLD (HORSES ETC.)	15,929.35	6,812.16	9,117.19
7035 • LESS COST OF ASSETS SOLD	-25,939.50	-3,511.00	-22,428.50
Total Other Income	299,096.73	180,563.97	118,542.76
Net Other Income	299,096.73	180,563.97	118,542.76
Net Income	177,521.24	-43,323.38	220,844.62

3:50 PM
01/09/14
Accrual Basis

PRAIRIE SKY GUEST & GAME RANCH LLC
Balance Sheet
As of December 31, 2013

	<u>Dec 31, 13</u>
ASSETS	
Current Assets	
Checking/Savings	
1010 · CHECKING ACCT - DACOTAH	-14,484.26
1050 · DACOTAH BANK CD	8,003.95
1200 · INVESTMENTS	69,808.72
Total Checking/Savings	<u>63,348.41</u>
Other Current Assets	
1110 · PETTY CASH	1,900.00
1310 · INVENTORY - GIFT SHOP	18,169.05
1525 · EXCHANGE ACCT	50.00
1530 · TIP EXCHANGE	-1,005.42
Total Other Current Assets	<u>19,113.63</u>
Total Current Assets	<u>82,462.04</u>
Fixed Assets	
1600 · EQUIPMENT & IMPROVMENTS	136,471.58
1630 · FURNITURE & EQUIPMENT	245,252.66
1650 · HUNTING DOGS \ HORSES ETC.	99,249.28
1730 · - LESS ACCUM DEPR - FURN & EQ	-327,981.00
Total Fixed Assets	<u>153,012.52</u>
TOTAL ASSETS	<u><u>235,474.56</u></u>
LIABILITIES & EQUITY	
Liabilities	
Current Liabilities	
Other Current Liabilities	
2030 · FICA TAX W/H & PYBLE	184.17
2040 · INCOME TAX W/H & PYBLE	79.98
2090 · PAYROLL CATCH ALL PYBLE	1,852.29
Total Other Current Liabilities	<u>2,116.44</u>
Total Current Liabilities	<u>2,116.44</u>
Long Term Liabilities	
2200 · NOTE PAYABLE - DACOTAH	229,886.62
Total Long Term Liabilities	<u>229,886.62</u>
Total Liabilities	<u>231,803.06</u>
Equity	
3400 · DRAW	-105,300.00
3900 · RETAINED EARNINGS	-68,549.74
Net Income	177,521.24
Total Equity	<u>3,671.50</u>
TOTAL LIABILITIES & EQUITY	<u><u>235,474.56</u></u>

8:33 AM

01/23/15

Accrual Basis

PRAIRIE SKY GUEST & GAME RANCH LLC**Profit & Loss**

January through December 2014

	Jan - Dec 14
Ordinary Income/Expense	
Income	
5150 · LODGING/MEALS/SERVICES	527.50
5170 · HUNTING	3,692.50
5190 · OUTSIDE MEALS	173.00
5200 · TURKEY HUNTS	1,364.23
Total Income	5,757.23
Gross Profit	5,757.23
Expense	
6100 · ADVERTISING & P/R	309.94
6120 · BANK SERVICE CHARGES	1,163.60
6160 · FEED	2,267.45
6180 · GAS \ FUEL	2,516.87
6220 · INSURANCE	-1,226.25
6240 · LEGAL & PROFESSIONAL SERVICES	18,505.90
6245 · LICENSES	266.00
6250 · LIVESTOCK EXPENSES	1,608.09
6310 · OTHER INTEREST	9,514.55
6320 · OFFICE EXPENSE	46.00
6330 · RENT	1,350.00
6340 · REPAIRS & MAINTENANCE	4,774.91
6345 · SUPPLIES - HUNTING	192.41
6350 · SUPPLIES - KITCHEN	1,332.01
6355 · SUPPLIES - OTHER	-18.65
6356 · SUPPLIES - HORSES	277.05
6370 · TAXES - PAYROLL (FICA/FUTA)	792.93
6380 · TAXES - SALES	512.12
6500 · TRAVEL & ENTERTAINMENT	2,278.92
6510 · UTILITIES & TELEPHONE	6,746.41
6550 · VEHICLE EXPENSE	5,711.22
6600 · WAGES - EMPLOYEES	4,389.16
6620 · WAGES - CONTRACTED	5,250.58
6700 · MISCELLANEOUS EXPENSE	316.08
Total Expense	68,877.30
Net Ordinary Income	-63,120.07
Other Income/Expense	
Other Income	
7015 · CROPS INCOME	3,500.00
7020 · MISCELLANEOUS INCOME	81.15
7025 · BUFFALO SOLD/REIMBURSED	-103.46
Total Other Income	3,477.69
Net Other Income	3,477.69
Net Income	-59,642.38

9:27 AM
01/05/15
Accrual Basis

PRAIRIE SKY GUEST & GAME RANCH LLC
Balance Sheet
As of December 31, 2014

Preliminary

	<u>Dec 31, 14</u>
ASSETS	
Current Assets	
Checking/Savings	
1010 · CHECKING ACCT - DACOTAH	-4,356.04
1050 · DACOTAH BANK CD	8,003.95
1200 · INVESTMENTS	16,082.04
Total Checking/Savings	<u>19,729.95</u>
Other Current Assets	
1110 · PETTY CASH	1,900.00
1310 · INVENTORY - GIFT SHOP	14,932.00
1525 · EXCHANGE ACCT	50.00
Total Other Current Assets	<u>16,882.00</u>
Total Current Assets	<u>36,611.95</u>
Fixed Assets	
1600 · EQUIPMENT & IMPROVMENTS	134,209.80
1630 · FURNITURE & EQUIPMENT	248,059.58
1650 · HUNTING DOGS \ HORSES ETC.	107,749.28
1730 · - LESS ACCUM DEPR - FURN & EQ	-379,532.00
Total Fixed Assets	<u>108,486.66</u>
TOTAL ASSETS	<u>145,098.61</u>
LIABILITIES & EQUITY	
Liabilities	
Current Liabilities	
Other Current Liabilities	
2090 · PAYROLL CATCH ALL PYBLE	26.34
Total Other Current Liabilities	<u>26.34</u>
Total Current Liabilities	<u>26.34</u>
Long Term Liabilities	
2200 · NOTE PAYABLE - DACOTAH	371,283.15
Total Long Term Liabilities	<u>371,283.15</u>
Total Liabilities	<u>371,289.49</u>
Equity	
3400 · DRAW	-137,779.70
3900 · RETAINED EARNINGS	-24,843.21
Net Income	-63,567.97
Total Equity	<u>-226,190.88</u>
TOTAL LIABILITIES & EQUITY	<u>145,098.61</u>

**Summary of Promissory Notes
Dismissed on Summary Judgment**

Date	Amount	From	Due Date	Ex. to <i>Complaint</i>
4/28/99	5,000.00	Terrence L. Mealy or Loretta Mealy	Annually, due in one year	B
6/9/99	7,000.00	Terrence L. Mealy or Loretta B. Mealy	Annually, due in one year	C
7/26/99	10,000.00	Terrence L. Mealy and Loretta B. Mealy	Annually, due in one year	D
8/10/99	8,000.00	Terrence L. Mealy or Loretta B. Mealy	Annually, due in one year	E
8/28/99	10,000.00	Terrence L. Mealy or Loretta B. Mealy	Monthly, due in one year	F
9/24/99	12,000.00	Terrence L. Mealy or Loretta B. Mealy	Monthly, due in one year	G
10/6/99	7,000.00	Terrence L. Mealy or Loretta B. Mealy	Monthly	H
11/11/99	15,000.00	Terrence L. Mealy or Loretta B. Mealy	Monthly, due in one year	I
11/29/99	5,000.00	Terrence L. Mealy or Loretta B. Mealy	Monthly, due in one year	J
12/21/99	9,000.00	Terrence L. Mealy or Loretta B. Mealy	Monthly, due in one year	K
1/10/00	35,000.00	Terrence L. Mealy or Loretta B. Mealy	Monthly, due in one year	L
2/10/00	6,000.00	Terrence L. Mealy or Loretta B. Mealy	Monthly, due in one year	M
2/25/00	8,000.00	Terrence L. Mealy or Loretta B. Mealy	Monthly, due in one year	N
4/8/00	35,000.00	Terrence L. Mealy or Loretta B. Mealy	Monthly, due in one year	O
5/12/00	9,500.00	Terrence L. Mealy or Loretta B. Mealy	Monthly, due in one year	P
5/12/00	16,000.00	Terrence L. Mealy or Loretta B. Mealy	Monthly, due in one year	Q
6/27/00	18,000.00	Terrence L. Mealy or Loretta B. Mealy	Monthly, due in one year	R
9/22/00	15,000.00	Terrence L. Mealy or Loretta B. Mealy	Monthly, due in one year (on demand)	S
11/30/00	9,500.00	Terrence L. Mealy or Loretta B. Mealy	Monthly, due in one year (on demand)	T

Date	Amount	From	Due Date	Ex. to <i>Complaint</i>
12/28/00	25,000.00	Terrence L. Mealy or Loretta B. Mealy	Monthly, due in one year (on demand)	U
2/28/01	25,000.00	Terrence L. Mealy or Lorretta B. Mealy	Monthly/one year/demand	V
4/14/01	15,000.00	Terrence L. Mealy or Loretta B. Mealy	Monthly/one year/demand	W
9/8/01	15,000.00	Terrence L. Mealy or Loretta B. Mealy	Monthly/one year/demand	X
1/12/02	17,000.00	Terrence L. Mealy or Loretta B. Mealy	Monthly/one year/demand	Y
2/7/02	15,000.00	Terrence L. Mealy or Loretta B. Mealy	Monthly/one year/demand	Z
3/12/02	25,000.00	Terrence L. Mealy	Monthly/demand/ mortgage	AA
4/15/02	20,000.00	Terrance L. Mealy	On demand	BB
6/26/02	5,000.00	Terrence L. Mealy	Monthly, due in one year	CC
9/11/02	8,000.00	Terrence L. and Loretta B. Mealy	Monthly/one year/demand	DD
9/11/02	27,000.00	Terrence L. and Loretta B. Mealy	Monthly/one year/demand	EE
12/30/02	30,000.00	Terrence L. Mealy	Monthly/one year/demand/ mortgage reference	FF
2/7/03	12,000.00	Terrence L. and Loretta B. Mealy	Monthly/one year/demand	GG
3/14/03	26,000.00	Terrence L. and Loretta B. Mealy	Monthly/one year/demand	HH
6/6/03	35,000.00	Investment Enterprises, Inc.	Monthly/one year/demand	II
9/23/03	39,000.00	Investment Enterprises, Inc.	Monthly/one year/demand	JJ
1/2/04	38,000.00	Terrence L. and Loretta B. Mealy	Monthly/one year/demand	KK
3/5/04	26,000.00	Terrence L. Mealy	Monthly/one year/demand	LL
4/5/04	27,000.00	Terrence L. and Loretta B. Mealy	Monthly/one year/demand	MM
7/16/04	18,000.00	Terrence L. Mealy	No term in note	NN
9/1/04	20,000.00	Terrence L. Mealy	One year	OO
12/29/04	44,000.00	Terrence L. Mealy	On demand	PP

Date	Amount	From	Due Date	Ex. to <i>Complaint</i>
7/06/05	20,000.00	Investment Enterprises	Monthly/one year/demand	QQ
8/08/05	25,000.00	Terrence L. and Loretta B. Mealy	Duplicates SS Monthly/one year/demand	RR
9/22/05	25,000.00	Terrence L. and Loretta B. Mealy	Monthly	TT
12/27/05	45,000.00	Terrence L. Mealy & Loretta B. Mealy	Monthly/demand/ secured by real estate	UU
3/30/06	35,000.00	Investment Enterprises, Inc.	Monthly	WW
4/26/06	35,000.00	Investment Enterprises, Inc.	Monthly	XX
12/20/06	54,000.00	Investment Enterprises, Inc.	Monthly/demand/ mortgage	BBB

Summary of Promissory Notes

Date	Amount	From	Due Date	Ex. to <i>Complaint</i>
3/1/06	\$35,000	Investment Enterprises, Inc.	On demand, only signed by Bruce	VV
6/26/06	\$20,000	Investment Enterprises, Inc.	Demand	YY
7/3/06	16,000.00	Investment Enterprises, Inc.	Demand	ZZ
9/1/06	15,000.00	Investment Enterprises, Inc.	Demand	AAA
2/28/07	28,000.00	Investment Enterprises, Inc.	Demand	CCC
6/5/07	25,000.00	Investment Enterprises, Inc.	Demand	DDD
1/2/08	57,000.00	Investment Enterprises, Inc.	Demand	EEE

January 7, 1999

Terry Mealy
301 East 2nd
Muscatine, Iowa

Dear Terry:

I am sorry for the delay in getting back to you. After I finished talking to you, Danny called and said he has been real busy with end of the year business and he hasn't been able to contact you. I would like to outline our ideas as to how we should handle the financing of Duck Creek.

Corrine and I cannot afford to put any money into this operation. We would like to work for you or a corporation formed by you. We would devote our time and work for a minimum salary of \$10,000.00 each with a percentage of gross receipts not to exceed \$20,000.00 each for the first year. After the first year, we would re-evaluate this.

Danny's thoughts were to form a corporation and put approximately 20 acres in the corporation and issue preferred stock to you for these assets and issue common stock to you for the remainder. The corporation would then borrow the operation money to start up Duck Creek. This would also give Corrine and I a chance to purchase shares of common stock as Duck Creek grows. I am sure you and Danny can figure out how all of this is supposed to work.

We are both anxious to get started, and want to take on the challenge of making this operation work for the both of us. I feel that between all of us we can work something out. We enjoyed our visit with you and Corrine keeps asking if we can find a Chinese restaurant somewhere to eat.

Yours very truly,

Bruce & Corrine

TERRENCE L. MEALY

TERRENCE L. MEALY

LAW OFFICE

301 EAST SECOND STREET

MUSCATINE, IOWA 52761

(319) 263-0804

FAX (319) 263-0829

February 3, 1999

Mr. and Mrs. Bruce Prins
R.R. 3 Box 192
Sisseton, South Dakota 57262

RE: Duck Creek Ranch

Dear Bruce and Corrine:

I am sorry I am late in getting you some thoughts in connection with the ranch but things have been extremely busy at my office. The following are some considerations which I think we could work out. I believe it covers items which you wanted to be covered and these suggestions are not cast in stone nor should they be taken as an agreement between you and me. You may not want to agree to do some of the things which I want you to do and I may find out that some things are not practical the way I have suggested. However, to get something started I would propose the following:

Terry's Obligation

1. I would see that the cabins and main lodge are skirted and insulated as to the floor. If the main lodge can be insulated in the ceiling, that should be done also.

2. Terry would put on new doors on the main lodge and the cabins. The main lodge may only have one main entry door instead of the two at the southeast end. They should have some kind of wood covering so that it will blend in with the architecture. Also, I believe that the height of the doors are not standard. I think the height should be a standard height.

Prins' Obligation

1. Bruce might be able to be available to push insulation to the men that would be working under the cabins and order at the local lumber yard what we need to be charged to my account.

2. Bruce would give his thoughts on how to make the doors blend in. If we put metal doors on, then we may have to cover them with wood that would blend in with wood siding.

Mr. and Mrs. Bruce Prins
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3. I would provide the funds to build a barn or stable to be located at a place that we can agree upon. This barn should be expandable and I believe have a concrete floor. I would assume it would be a pole barn. The barn would have to be approved by me.

4. Stub Ryan would have to build a causeway to the cabins across the ravine. I would want this causeway to be large enough to drive a car across it and have possibly a 36" or 48" drain culvert in the center to take care of the water. It would also have to have a plastic tube inserted at some point so that wires could be poked through to the cabins across the ravine. A rope or wire would be left in the plastic tubes to enable wires to be pulled across to the cabins on the other side of the ravine.

5. A parking lot should be on the north end of the building and somehow constructed so that the cars will not drive behind the lodge. If cars are parked behind the lodge and they are started late at night or early in the morning, it could wake up the guests.

6. The house would be rented to a third party.

3. Bruce would design and obtain a bid or bids to construct the building and see that it is built according to his specifications.

4. Bruce would have to give input as to where it should be located and also ride herd on Stub Ryan to get it done. He would have to give me some kind of bid to do so.

5. Bruce would give his input as to how to build the parking lot.

6. Bruce would oversee the rental of the house and be paid

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a commission of 10% to 25% of
what is collected.

7. Rent for the first year would be 10% of gross receipts which means that if you had no business, then you would pay no rent. We would have to consider figures as to when the 10% would reduce. For example, if 10% rent were paid on the first \$100,000.00; then the rent on the next \$50,000.00 might be 7% and on the next \$50,000.00 it might be 5%.

7. You would keep track of the gross receipts and pay the appropriate percentage on the following month.

8. My family would be able to stay there one week a year should we desire to do so. This would be without charge. If this becomes a burden for you or if you think it is unfair, let me know.

9. The large refrigerator does not work. If this refrigerator can be reasonably repaired, I would pay for the cost of the repair.

9. Once the refrigerator is working, you would pay to maintain it should it require future maintenance.

You may find that as time goes on and you really build up a good business, that the kitchen area might be too small. A solution to this might be to take a portion of the dining area or to build on to the southeast side of the main lodge so that the kitchen area could be enlarged. This would be an expensive ordeal and we would have to really give this some thought before it would be done. In addition, you may find other things that need to be done that we have not discussed here. We have tried to cover some of the main issues.

It takes a lot of work to run a successful lodge but if you provide good service, good food, and a nice atmosphere, what else is there

Mr. and Mrs. Bruce Prins
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to do in your area of the country than to eat out and go on trail rides?

Please call me sometime at your convenience and give me your thoughts. I believe there may be a good opportunity for you to run a profitable business. In light of that, you should be protected by a "right of first refusal" to purchase the property in the event that I should somehow decide to sell it. A "right of first refusal" is a right to purchase the ranch at the same price that somebody else would purchase it but giving you the first preference. Also, if you would not be able to come up with the financing on the exercise of your "right of first refusal", perhaps something could be worked out that a down payment would be made by you and the rest financed by me at an interest rate that we could discuss. This would basically "insure" that you would have the first preference to purchase the ranch and also be able to finance the same.

I look forward to hearing from you.

Very truly yours,

TERRENCE L. MEALY LAW OFFICE



Terrence L. Mealy

TLM:ml



April 29, 2009

Terry Mealy
301 E. 2nd St.
Muscatine, Iowa 52761

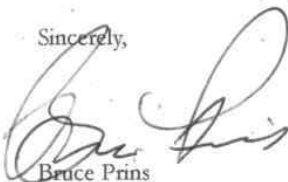
Dear Terry,

The rain is coming down in South Dakota and I am finally finishing my paper work with the bison. I received the last check for some cows on the 10th of April. We sold 40 bulls that averaged 851 pounds for \$936.65 per head (\$37466.00) and 17 cows that averaged 870 pounds for \$707.28 (\$12023.83). The bulls were sold for \$1.10 per pound and the cows at \$0.81 per pound. After all expenses have been paid we lost \$8517.97. Our Total count on 11-25-08 was 113 calves, 46 two year old bulls, 17 cull cow's, 21 herd bulls, 29 open 3 year old cows, 173 pregnant cows, and 99 yearling. bulls and cows. This gave us a total of 498 bison on the 25th of November. We sold 57 bulls and cows during the winter to Northstar Bison and our count now is 441 bison and this is not counting any new babies born this spring. We should have about 160 or more calves born this year and this will put our total count about 600 this fall. We are keeping all of the calves born in 2007 and 2008 at my ranch; this will give us more grass at Prairie Sky.

I have also enclosed with this a copy of the Prairie Sky balance sheet and P&L statement for 2008. We had a loss last year of \$40,830.00 with a gross income of \$443,236.00. It is hard to keep expenses in control.

We are looking forward to your visit the end of May; this will give us some time to visit.

Sincerely,



Bruce Prins

1:35 PM
01/07/09
Cash Basis

PRAIRIE SKY GUEST AND GAME RANCH
Balance Sheet
As of December 31, 2008

	Dec 31, 08
ASSETS	
Current Assets	
Checking/Savings	
1010 · CHECKING ACCT - DACOTAH	-3,574.95
Total Checking/Savings	-3,574.95
Other Current Assets	
1110 · PETTY CASH	3,147.00
1525 · EXCHANGE ACCT	-259.30
Total Other Current Assets	2,887.70
Total Current Assets	-687.25
Fixed Assets	
1600 · EQUIPMENT & IMPROVMENTS	59,375.48
1630 · FURNITURE & EQUIPMENT	209,640.75
1650 · HUNTING DOGS \ HORSES ETC.	67,647.47
1730 · - LESS ACCUM DEPR - FURN & EQ	-223,447.00
Total Fixed Assets	113,216.70
TOTAL ASSETS	112,529.45
LIABILITIES & EQUITY	
Liabilities	
Current Liabilities	
Other Current Liabilities	
2020 · SALES TAX PAYABLE	-271.88
2030 · FICA TAX W/H & PYBLE	572.45
2040 · INCOME TAX W/H & PYBLE	1,372.33
2090 · PAYROLL CATCH ALL PYBLE	2,632.24
Total Other Current Liabilities	4,305.14
Total Current Liabilities	4,305.14
Long Term Liabilities	
2200 · NOTE PAYABLE - DACOTAH	173,563.37
2300 · NOTE PAYABLE - MBNA	-63,130.00
Total Long Term Liabilities	110,433.37
Total Liabilities	114,738.51
Equity	
3400 · DRAW	-6,225.38
3900 · RETAINED EARNINGS	44,846.71
Net Income	-40,830.39
Total Equity	-2,209.06
TOTAL LIABILITIES & EQUITY	112,529.45

1:34 PM

01/07/09

Cash Basis

PRAIRIE SKY GUEST AND GAME RANCH
Profit & Loss YTD Comparison
 December 2008

	Dec 08	Jan - Dec 08
Ordinary Income/Expense		
Income		
5100 · MANAGEMENT FUNDS	0.00	57,300.00
5150 · LODGING/MEALS/SERVICES	0.00	41,628.96
5160 · HORSE BACK	0.00	43,743.15
5170 · HUNTING	33,525.10	239,984.38
5190 · OUTSIDE MEALS	1,172.85	28,026.54
5200 · TURKEY HUNTS	0.00	20,908.90
5300 · GIFT SHOP	277.00	4,461.85
5650 · RESALE ITEMS NO TAX	0.00	5,400.00
5760 · BUFFALO MEAT/HUNTS	0.00	1,782.75
Total Income	34,974.95	443,236.53
Expense		
6100 · ADVERTISING & P/R	160.00	23,830.60
6110 · BAD CHECKS / REDEPOSITS	0.00	44.00
6120 · BANK SERVICE CHARGES	438.27	4,062.80
6160 · FEED	35,722.01	39,370.25
6170 · FERTILIZER/CHEMICAL/CRP EXP	0.00	2,813.45
6180 · GAS / FUEL	987.83	23,040.89
6200 · GIFT SHOP EXPENSE	0.00	6,830.75
6220 · INSURANCE	0.00	12,205.00
6240 · LEGAL & PROFESSIONAL SERVICES	0.00	1,275.10
6245 · LICENSES	3,145.00	22,063.75
6250 · LIVESTOCK EXPENSES	2,837.34	4,840.20
6310 · OTHER INTEREST	0.00	9,372.12
6320 · OFFICE EXPENSE	0.00	5,679.66
6330 · RENT	1,325.00	5,000.00
6340 · REPAIRS & MAINTENANCE	1,174.70	38,244.95
6345 · SUPPLIES - HUNTING	2,801.19	39,011.72
6350 · SUPPLIES - KITCHEN	836.95	34,134.28
6355 · SUPPLIES - OTHER	0.00	2,147.94
6356 · SUPPLIES - HORSES	0.00	1,410.15
6370 · TAXES - PAYROLL (FICA/FUTA)	572.45	13,099.20
6380 · TAXES - SALES	4,627.32	18,692.06
6500 · TRAVEL & ENTERTAINMENT	0.00	5,663.16
6510 · UTILITIES & TELEPHONE	3,257.64	27,756.84
6550 · VEHICLE EXPENSE	659.83	9,699.73
6600 · WAGES - EMPLOYEES	7,482.94	125,238.20
6620 · WAGES - CONTRACTED	3,918.00	28,258.01
6700 · MISCELLANEOUS EXPENSE	105.00	11,523.38
Total Expense	70,051.47	515,308.19
Net Ordinary Income	-35,076.52	-72,071.66
Other Income/Expense		
Other Income		
7020 · MISCELLANEOUS INCOME	1,200.00	3,987.26
7025 · BUFFALO SOLD/REIMBURSED	0.00	19,785.73
7030 · ASSETS SOLD (HORSES ETC.)	0.00	7,468.28
Total Other Income	1,200.00	31,241.27
Net Other Income	1,200.00	31,241.27
Net Income	-33,876.52	-40,830.39

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 28588

LORETTA B. MEALY, Individually and as Personal Representative of the ESTATE OF
TERRENCE L. MEALY, and INVESTMENT ENTERPRISES, INC.,
Plaintiffs and Appellants,

vs.

BRUCE PRINS and CORRINE PRINS, and PRAIRIE SKY GUEST & GAME RANCH,
LLC,
Defendants and Appellees.

Appeal from the Circuit Court, Fifth Judicial Circuit
Roberts County, South Dakota

The Honorable Jon S. Flemmer
Circuit Court Judge

**REPLY BRIEF OF APPELLANTS LORETTA B. MEALY, Individually and as
Personal Representative of the ESTATE OF TERRENCE L. MEALY and
INVESTMENT ENTERPRISES, INC.**

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Notice of Appeal filed on the 6th day of April, 2018

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**REPLY BRIEF OF APPELLANTS LORETTA B. MEALY, Individually and as
Personal Representative of the ESTATE OF TERRENCE L. MEALY and
INVESTMENT ENTERPRISES, INC.**

ARGUMENT

I. The trial court committed reversible error when it granted summary judgment on 48 individual promissory notes.

A. The Statute of Limitations Is Not a Bar to Enforce the Notes.

The statute of limitations (“SOL”) is not a bar because the Prinses, on June 10, 2009, signed a Subordination Agreement (“Agreement”) which – in clear and unambiguous terms – acknowledged both the existence of a valid mortgage and a debt in favor of Investment Enterprises (“IE”). (App. 6) The acknowledgement was recorded in Roberts County to let the whole world know of this mortgage and the debt it secures. (*Id.*, pg. 1) Despite this public and unequivocal acknowledgment, the Trial Court incorrectly ruled that the Agreement did not restart the running of the SOL on the debt.

Under SDCL 15-2-29, a written “acknowledgment” of a “continuing contract” takes the contract out of the operation of the SOL. *F. M. Slagle & Co. v. Bushnell*, 70 S.D. 250, 261, 16 N.W.2d 914, 919 (1944). Here the Prinses acknowledged the continuation of a mortgage contract, inextricably tied to the debt which it secured. As required under SDCL 15-2-29, the Agreement is a writing signed by the parties to the mortgage. The only remaining question is: does the Agreement contain an “acknowledgment” of a “continuing” debt secured by the Prinses existing mortgage? The answer to this question is “yes” for the numerous reasons addressed in the Plaintiffs’ opening brief.

Defendants make five arguments to escape the obvious intent and purpose of the Agreement, the Mortgage and debt they acknowledged within that agreement:

1. Terrence and Loretta Mealy are not parties to the Agreement.

This argument ignores the fact that IE had six notes that were also wrongfully barred by the Trial Court based upon the SOL. (*See* APP 12 and 13, IE notes, identified as numbers/exhibits to the complaint as follows: 34/II, 35/JJ, 41/PP, 46/WW, 47/XX, 48/BBB for a total of \$242,000.) Because IE is a party to the Agreement and the Mortgage, Defendants' first argument does not apply to the six IE' notes. As for the notes made to the Mealys individually, Defendants' argument ignores the undisputed fact that Defendants themselves intended the Mortgage to secure the Mealy's individual notes. (CR 778, Ex. A, at 49:11-15). As admitted and acknowledged by Bruce Prins, he knew the mortgage was intended to secure both Mealy notes and Investment Enterprise notes. (CR 778, Ex. A, at 49:11-15). As a matter of law, this Court should reform the mortgage to correct this undisputed factual error. The Prinses made no argument specifically opposing reformation. Because the individual notes are debt secured by the Mortgage, based upon the mistake of fact and reformation arguments, the Agreement is an acknowledgment of the debt owed to both IE and Terrence and Loretta Mealy.

2. Agreement does not individually list the notes.

The language of the Agreement clearly and unambiguously identifies the Mortgage as the secured instrument that it takes priority over:

the subordinated debt is "secured by a certain mortgage for [\$325,000.00] and interest made by Investment Enterprises, Inc. to Mortgagor, dated the 21st day of September, 2000 and recorded in the Roberts County Register of Deeds, in Book 204 of Mortgages, pages, pages 944-958, and covering the following described real property" (APP 6).

* * * *

1. Subordination. Investment Enterprises, Inc. hereby covenants, consents, and agrees With Dacotah Bank that the mortgage held by Investment Enterprises, Inc. dated September 21, 2009 is and shall continue to be subject and subordinate in lien to the mortgage about to be made by Dacotah Bank (APP 7.)

Because the Agreement specifically referred to the Mortgage in such detail, the mortgage is essentially incorporated within the Agreement so the two must be read together. This is especially true because both documents were recorded against the same property in Roberts County.

The mortgage signed on September 21, 2000 is an “open ended” mortgage – intended to secure both past and future debt. There never was an intent to list the individual notes secured. This is clearly the case, as the parties entered into 30 notes *after the mortgage was executed*. The Trial Court’s Opinion ignored the language in the mortgage noting it was “open ended” and was to secure all past and future debt. In error, the Trial Court focused only on paragraph 2(a) of the mortgage, which had left blank a space intended to include a specific note. (App 13-15). Because the mortgage and the debt it secures are inextricably intertwined, the Agreement was an acknowledgement of the underlying debt.

Defendants’ acknowledgment of the Mortgage in these circumstances is an acknowledgment of the debt (the series of notes the Mortgage secures). *See Kalen v. Gelderman*, 278 N.W. 165, 169 (S.D. 1938) (a mortgage is merely security for a debt and does not exist independently of the debt). Therefore, the Agreement is an acknowledgment of a continuing contract - the mortgage and underlying debt - as required by SDCL 15-2-29.

3. Defendants argue the mortgage secures a “different” debt in the amount of \$325,000.

The Agreement does reference IE “is the owner and holder of a certain note for” \$325,000 being secured by the mortgage. However, this is clearly a mistake of fact as the \$325,000 is only the face amount of the mortgage, no such note exists and the sum does not represent the total debt. This is true not just from a plain reading of the Mortgage but also the clear testimony of Bruce Prins. The Agreement correctly identifies the amount of the Mortgage as \$325,000, although it mistakenly states that this amount is due to a “certain note”. Despite this mutual mistake of fact, the Agreement – when read as a whole – is a clear and unambiguous acknowledgment by Defendants of their Mortgage and the debt it secures.

4. Defendants argue the document must be read as a whole.

Plaintiffs agree the document must be read as a whole. However, this Court need not ignore a mutual mistake of fact when the Agreement mistakenly describes the Mortgage as securing a specific note, where the Mortgage it describes specifically does not describe a single note in that amount. A clear mistake of fact within the recital – which incorrectly identifies a specific note – must not undermine the purpose of the document which was to acknowledge the Defendants’ Mortgage and the open-ended debt that it secures was being subordinated to the loan Defendants obtained from Dakota Bank.

5. Defendants argue the Agreement does not acknowledge a debt.

This argument ignores the real issues addressed by the Agreement. The Agreement is an acknowledgment of a valid and continuing debt because, without a valid debt, there would be no need for the Agreement. Instead, Defendants would have simply

obtained a release of the Mortgage to satisfy Dacotah Bank's desire that its debt not be subject to the prior Mortgage.

In *Wipf v. Blake*, 28 N.W.2d 881 (S.D. 1947), this Court required an acknowledgment to be clear and unambiguous. In the Agreement, the Defendants clearly and unambiguously acknowledged a valid Mortgage and – albeit mistakenly – a debt in the form of a certain note of \$325,000. The Trial Court ignored the record, which showed no evidence of a \$325,000 note, but did show both a written agreement and oral understanding that the purpose of the Mortgage was to secure both past and future debt of IE and the Mealys individually. Therefore, the Agreement did acknowledge a debt although the document included what all parties agree was a mistake and therefore only a scrivener's error. To the extent there is a dispute as to past and future notes secured by the mortgage, that was a genuine issue of material fact to be determined by the jury.

B. The Mortgage is Enforceable.

Defendants challenge the Mortgage's dragnet clause. Contrary to what Defendants imply, Iowa courts enforce dragnet clauses in situations such as exist here. *See Libertyville Savings Bank v. McKee*, 2012 WL 2411187, at *7 (Iowa Ct. App. 2012) (dragnet clause was upheld where “evidence is clear the parties intended the mortgages as security to guarantee full payment of their debts to the bank”).

Here, the face amount of the Prinses' Mortgage was \$325,000 and Prinses ended up borrowing over \$1.8 million through over 50 individual Notes over a span of 7 years. (*See* CR 108-112.) As in *Libertyville Savings Bank*, these additional Notes, without additional security, are evidence of the intent of the parties to have the mortgage cover future debt.

The debt acknowledged by the Agreement was the debt secured by the Mortgage, which unambiguously secured all “present and future loans and advances.” The acknowledgment of the Mortgage thus was an acknowledgment of all the Notes. The \$325,000 on the face of the Mortgage has nothing to do with the amount of the debt, but instead is merely the amount of future advances that will retain priority over subsequently recorded mortgages. *See* Iowa Code Ann. § 654.12A.

Defendants’ remaining claim, that the Mortgage was satisfied, has no merit. As described above, the Agreement’s acknowledgment of the debt in 2009 means that the forty-eight Notes were improperly time-barred. That debt has not been paid.

C. Plaintiffs Properly Raise Before This Court the Issue of Waiver.

In their opening brief, Plaintiffs submitted abundant evidence of Defendants’ post-default conduct that raises a genuine issue of material fact as to whether Defendants waived their rights to rely on the SOL defense. Defendants do not dispute that these genuine issues of material fact exist. Defendants’ only argument is a technical one – that Plaintiffs failed to raise this argument below and purportedly cannot raise it now on appeal. (Resp., at 16-17.)¹ Defendants’ argument fails.

Defendants first try to distinguish this Court’s recent opinion in *Work v. Allgier*, 2018 S.D. 56, ¶ 23, 915 N.W.2d 859, by claiming that there the creditor opposed in the lower court the application of SOL based on waiver and estoppel. Defendants are wrong. Before the trial court, the creditor actually argued that the parties, by their post-default conduct, waived the acceleration clause in the promissory note, and therefore the SOL did not begin to run upon default. *See Work v. Allgier*, Circuit Court of South Dakota,

¹ Resp. refers to Defendants’ appeal Brief.

Case No. 17-596, Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment, 2017 WL 10222019. This Court disagreed and held that the limitations period began to run upon default. *Work*, 2018 S.D. 56, ¶¶ 18-22. This Court then went on to discuss whether the defendant's post-default conduct waived a right to rely on a SOL defense, which is an issue that this Court noted had not been specifically examined by the circuit court. *Id.*, ¶ 9. That is precisely the situation here, and Defendant's attempt to distinguish *Work* fails.

Moreover, while this Court generally will not address arguments not raised below, that rule is procedural and this Court has discretion to ignore it. *In re J.D.M.C.*, 2007 S.D. 97, ¶ 27, 739 N.W.2d 796, 805. Here, Plaintiffs presented the evidence of Defendants' post-default conduct to the trial court, even though Plaintiffs did not expressly couch their arguments in terms of waiver or estoppel. Moreover, the *Work* decision was not issued until after the trial below had concluded and is thus new precedent on whether a creditor on a note can oppose the applicability of the SOL based on waiver and estoppel, as shown by the fact that this Court relied on decisions from other jurisdictions in reaching its holding. *Work*, 2018 S.D. 56, ¶ 23. Genuine issues of material fact exist as to whether Defendants, by their own affirmative acts, waived their rights to rely on the SOL defense.

II. The Trial Court's Improper Missing Witness Constitutes Reversible Error.

A. The Missing Witness Instruction was Improper.

Defendants first claim that Loretta Mealy's testimony about a possible, but *non-existent* witness, could somehow support a *missing* witness instruction. In response to questions from Defendants' counsel, Loretta merely testified that there was a "possibility" that Plaintiffs could have hired a forensic accountant to analyze Bruce Prins'

buffalo numbers, but did not do so. (TR 206:15-207:2.) This testimony about a hypothetical but non-existent witness cannot be the basis for a missing witness instruction. If Defendants' argument was correct, a missing witness instruction could be used whenever a party could have hired an expert but did not do so. That is not the law.

Defendants argue that the instruction was proper because Loretta's testimony purportedly could "create an illusion that a forensic accountant would have had numbers that did not match Bruce's numbers." (Resp., p. 25.) First, that is not what Loretta testified to because she did not say anything about what the forensic accounting would have found. Second, Defendants' counsel was free to argue at closing that Plaintiffs' failure to hire a forensic accountant shows that they knew the numbers were correct. However, Defendants were not entitled to a missing witness instruction from the Trial Court about a witness that did not exist. Loretta's testimony therefore provides no basis for affirming the Trial Court's missing witness instruction.

The testimony of Patrick Mealy ("Patrick") also is no basis for a missing witness instruction. Defendants' counsel elicited the testimony from Patrick that Defendants then used to obtain the missing witness instruction. The Prinses argue that their attorney did not elicit the testimony because he only asked Patrick whether they had anyone look at the buffalo numbers, not what Frasier thought about the numbers. (Resp., at 23.) Defendants' argument rings hollow. Defendants' counsel: (i) knew Plaintiffs had only one expert (Frasier) who looked at the buffalo numbers; (ii) knew that Frasier's testimony with regard to the buffalo numbers was favorable to Plaintiffs; and (iii) knew that Frasier's testimony concerning the buffalo numbers was barred. Defendants' counsel therefore had no reason to ask Patrick about who had looked into the buffalo

herd numbers except to elicit the type of testimony that counsel actually obtained. Defendants should not be permitted to manufacture a situation where favorable expert testimony that is barred becomes an instruction to the jury that they can infer that Frasier's testimony would have been unfavorable to Plaintiffs.

The missing witness instruction was also improper because Frasier was not a "missing" witness. Instead, his testimony was equally available to both parties. In their response, Defendants dispute whether they could have subpoenaed Frasier. But Defendants do not even mention, much less dispute, Plaintiff's argument that pursuant to SDCL 15-6-32(a), Defendants could have introduced Frasier's testimony through his deposition transcript, which Defendants included as one of their trial rebuttal exhibits. Defendants therefore have conceded that Frasier's testimony was equally available to them.

B. The Missing Witness Instruction was Prejudicial to Plaintiffs.

Defendants' arguments against prejudice fail. First, Defendants claim that the Trial Court did not "put the weight of its authority" behind Defendants' counsel's closing argument because at closing Plaintiffs' counsel tried to mitigate the damage from the instruction. The fact that Plaintiffs had to attempt to mitigate damage is not an argument against the prejudicial effect of the instruction. Nothing Plaintiffs' counsel did or could say at closing would change the fact that the Trial Court put its authority behind defense counsel's summation. Plaintiffs should not have been put in that position to begin with because the instruction was improper.

Second, Defendants argue that the Trial Court merely gave the jury a choice to find that Frasier's testimony would have been bad for Plaintiffs. The instruction did

more than that. It permitted Defendants' counsel to argue at closing to the jury that "you can assume that that forensic accountant and that buffalo expert would have been bad for them if they had brought him here and that's why they didn't bring him here." (TR 742:1-5). Defendants' counsel should not have been able to make this argument to the jury with the Trial Court's backing.

Finally, Defendants wrongly claim that there was abundant evidence to support the jury's rejection of Plaintiffs' buffalo conversion claim and the low unjust enrichment award. For the buffalo conversion claim, Defendants point only to Bruce Prins' self-serving post-litigation buffalo computation, and his testimony about the computation, to argue that Defendants owned 75% of the herd. Defendants ignore the fact that at trial, Plaintiffs introduced multiple *contemporary* writings by Bruce Prins, over the course of *numerous years*, establishing that the Mealys owned 75% of the herd. (TR 424:7-431:2). Moreover, at trial Bruce Prins was not only contradicted by his own contemporary writings, but was also *impeached by deposition testimony* in this very lawsuit in which he admitted that the Mealys were 75% owners. (TR 428:13-430:22).

Tellingly, even if Bruce Prins' impeached testimony was believed by the jury, the Mealys owned 25% of a buffalo herd that generated approximately \$1.2 million in sales between 2010 and 2015. This means that at a minimum Plaintiffs were entitled to over \$300,000 of the proceeds from the buffalo sales. Despite this, the jury awarded Plaintiffs nothing on their conversion claim. This leads to the conclusion that the improper missing witness instruction is what resulted in the jury's refusal to award any money to Plaintiffs on the conversion claim.

For the unjust enrichment claim, the \$135,000 awarded to Plaintiffs is substantially less than should have been awarded even if the Mealys were only 25% owners of the herd. In arguing otherwise, Defendants reference irrelevancies. Defendants point to improvements made to the physical property (irrelevant because the Mealys paid for these improvements) (TR 261:11-263:6), and the increase in the value of the property (irrelevant because the Mealys were the sole owners of the property) (TR 259:21-260:3). Defendants also point again to Bruce Prins' post-litigation buffalo records, which are refuted by his own contemporaneous records and deposition testimony. In all likelihood Plaintiffs suffered prejudice from the missing witness instruction.

III. The Prejudgment Interest Award Was Contrary to the Law and Should be Reversed.

SDCL 21-1-13.1 sets forth a mechanical prejudgment interest calculation for contracts that is mandatory and thus not an issue for the jury in the circumstances that exist here. *See Colburn v. Hartshorn*, 2013 S.D. 92, ¶ 15, 841 N.W.2d 267 (prejudgment interest under the statute is "mandatory, not discretionary"). The Trial Court therefore abused its discretion by submitting a Special Verdict Form to the jury that was contrary to SDCL 21-1-13.1.

Defendants in their brief do not dispute that the prejudgment interest calculation violated SDCL 21-1-13.1 and was therefore improper on that ground. Instead, Defendant's sole argument is that Plaintiffs failed to make a specific objection regarding the issue of prejudgment interest during discussions with the Trial Court. (Resp. at 27-28.) Defendants' argument ignores the fact that Plaintiffs submitted a proposed Special

Verdict Form that correctly omitted the issue of prejudgment interest. (CR 2164). The Trial Court erred by instead accepting Defendants' improper form.

Moreover, Plaintiff did properly raise this issue by motion after trial when the Trial Court still could have corrected its error. Under SDCL 21-1-13.1, prejudgment interest is determined by the terms of the Notes themselves. Therefore, the starting date and amount of prejudgment interest was not an issue for the jury to determine in its role as finder of fact. The Trial Court's hands were not tied by the jury's determination – contrary to SDCL 21-1-13 – that Plaintiffs were entitled to prejudgment interest beginning on January 2, 2008 on the amount of \$196,000. The Trial Court could and should have corrected its error in submitting this issue to the jury. Its failure to do so in violation of SDCL 21-1-13.1 was an abuse of discretion.

IV. The Trial Court's Adoption of the Advisory Verdict on the Unjust Enrichment Award was Proper.

A. The Buffalo Sales Evidence Supports the Trial Court's Affirmation of the Advisory Verdict.

Defendants' cross-appeal of the Trial Court's evidentiary ruling on the unjust enrichment claim is based on the false premise that the sole basis upon which Plaintiffs' unjust enrichment claim was submitted to the jury was the time-barred notes. The jury actually was instructed that there were two independent grounds upon which they could find for Plaintiffs on the unjust enrichment claim: (i) the time-barred promissory notes; and (ii) Defendants' retention of proceeds from the sale of buffalo that Plaintiffs owned. Defendants ignore the second basis, and instead argue incorrectly that "the advisory jury based their verdict . . . entirely upon the forty-eight time-barred Notes." (Resp., at 30). Regardless, the evidence at trial supports the Trial Court's adoption of the jury's advisory verdict on either or both of these grounds.

**(i) The Jury was Instructed That It Could Find for Plaintiffs
Based on Defendants’ Retention of the Buffalo Sale Proceeds.**

Plaintiffs alleged in their Complaint that Defendants were unjustly enriched in two different ways: (i) “by way of the loan proceeds provided to them over the years” (CR 2, ¶ 80); and (ii) “by virtue of the funds generated from the sale of the buffalo.” (*Id.*, ¶ 81.) At trial, Defendants submitted proposed jury instructions on Plaintiffs’ unjust enrichment claim, which were adopted unchanged by the Court. (*See* APP 54-57, Instruction Nos. 21 and 22). These jury instructions instructed the jury that the time-barred loans and the proceeds of the buffalo sales provide two independent grounds upon which they can find for Plaintiffs on the unjust enrichment claim. In their brief, Defendants entirely ignore the retention of buffalo sales as a potential basis for the jury finding for Plaintiffs on the unjust enrichment claim.

**(ii) Plaintiffs’ Counsel Argued to the Jury That Defendants Were
Unjustly Enriched by Retaining Money from the Buffalo Sales.**

Plaintiffs’ counsel argued that Defendants were unjustly enriched under both of the theories in Plaintiffs’ Complaint. Plaintiffs’ counsel first argued that Defendants were unjustly enriched by the promissory notes that were unenforceable due to the passage of time. (*See* TR 721:12-722:7). However, Plaintiffs’ attorney proceeded to argue to the jury that Defendants’ retention of the buffalo sales was another additional ground pursuant to which they could find for Plaintiffs on the unjust enrichment claim.

Specifically, Plaintiffs’ counsel argued:

We believe that the *Defendants were unjustly enriched because* they took our loan proceeds, *they took the sales from the buffalo and they didn't pay them back and they didn't even account to us . . .*

(757: 21-758:4) (emphasis added). Plaintiffs’ counsel later reiterated to the jury that they could find that Defendants were unjustly enriched by the value of Plaintiffs’ buffalo:

Another reason it's unjust for them to keep our loan money and our buffalo is that when--the hospitality business, you know, they took some of the loan money we gave them and they paid themselves.

(761: 6-10.) This is precisely in accord with the jury instructions.

Defendants' contention in their motion that the jury based its unjust enrichment verdict solely on the time-barred promissory notes is therefore incorrect. The jury was properly advised that the buffalo sales were a ground upon which it could find for Plaintiffs on the unjust enrichment claim. In addition, there is no correlation between the \$295,000 that Defendants owed on the time-barred promissory notes and the \$135,000 that the jury awarded Plaintiffs on the unjust enrichment claim. This suggests the jury was considering other factors in reaching that verdict. As set forth below, substantial evidence supports the jury's advisory verdict based on Defendants' retention of the buffalo sale proceeds.

(iii) Defendants Retained Proceeds From the Sale of Plaintiffs' Buffalo and Were Thereby Unjustly Enriched.

The evidence at trial supports the jury's finding for Plaintiffs on the unjust enrichment claim based on Defendants' retention of all of the proceeds from the buffalo sales between the years 2011 and 2015. At trial, Bruce Prins admitted that the contemporaneous document he prepared in January of 2009, which Bruce Prins confirmed was true and correct, states that Plaintiff IE owned, at that time, 75% of the buffalo herd. (TR 286:6-19). Although Bruce Prins later attempted to backtrack on the precise percentage of the buffalo herd Plaintiffs owned, there was no dispute at trial that Plaintiffs co-owned the herd with Defendants.

The evidence at trial further established that Defendants sold buffalo every year between 2011 and 2015, and that Defendants received over \$1.2 million in proceeds from

these buffalo sales. (TR 354:20-346:8.) Bruce Prins admitted at trial that Defendants did not pay to Plaintiffs any money from the sales of the buffalo between 2011 and 2015, even though Plaintiffs owned part of the herd. (TR 328:5-17; 330:21-25; 332:23-333:5; 339:19-340:3; 342:15-343:14). Moreover, Bruce Prins testified that he used part of the buffalo sales proceeds to pay off his and his wife's personal loan with Dacotah Bank. (TR 342:21-343:14; 352:24-353:3; 354:12-355:8). Based on this evidence, the jury correctly found for Plaintiffs on their unjust enrichment claim.

B. The Evidence Also Supports a Finding that Defendants Were Unjustly Enriched by the Loan Payments That Were Unenforceable Due to the SOL.

The evidence at trial also supports a finding that Defendants were unjustly enriched by the money they received pursuant to the time-barred promissory notes. Defendants rely on one case, *Johnson v. Larson*, 2010 S.D. 20, 779 N.W.2d 412 (S.D. 2010). *Johnson*, however, only holds that where there is an “enforceable contract,” a party cannot also recover under an unjust enrichment theory. *Id.* at 418. Here, because of the passage of time there is was no “valid and enforceable contract” between the parties, and the unjust enrichment claim can be asserted.

In *Johnson*, the plaintiff sued two defendants for breach of contract and unjust enrichment, among other claims. *Id.* at 415. The jury found for defendants on the breach of contract claim, and the court then found for the plaintiff on the unjust enrichment claims. *Id.* at 415-17. On appeal, this Court held that the trial court erred when it imposed the equitable remedy of unjust enrichment because the plaintiff and that defendant had a valid and enforceable contract and the jury had previously found for the defendant on the

breach of contract claim. *Id.* at 418. Moreover, granting the unjust enrichment claim would allow for a different recovery than provided for in the contract. *Id.* at 418.

Unlike in *Johnson*, the promissory notes here were not, due to the passage of time, “valid and enforceable.” Moreover, the time-barred promissory notes were not part of Plaintiffs’ breach of contract claim at trial, so there was no possibility of duplicate damages or an award of damages that was not permitted by a contractual agreement. *Johnson* therefore does not control here.

The circumstances here differ from *Johnson* in another important respect. Two non-party bankers, Jon Holthe and Dan Stein, testified at trial in this matter that in 2014 they met with Bruce Prins as part of their investigation of the assets of the Estate of Terry Mealy. (TR 549: 2- 25; 571:21-572:22). They testified that Bruce Prins confirmed that he owed the money to the Mealys pursuant to the Promissory Notes, and that he was good for the debt and would pay it. (TR 551:7- 552:5; 573:2-574: 16). Loretta Mealy confirmed at trial that because of these assurances to the bankers, Plaintiffs delayed seeking to enforce the promissory notes until March of 2015, at which point certain of the notes were time-barred. (TR 137:23-141:10). The jury therefore could have based its verdict on these equitable circumstances, and not on the parties’ contractual agreements.

Moreover, Defendants’ argument that there was no involuntary transfer of the funds is not true. (Resp. 29-30.) Plaintiffs made the loans with the expectation that they would be paid back with interest. Defendants’ failure to pay back any of the amount they owed vitiates Plaintiffs’ consent to the transfer made pursuant to the notes. For these additional reasons, the Trial Court’s allowance of evidence regarding the time-barred Notes was proper.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant the relief Plaintiffs requested in their opening brief, and deny Defendants' cross-appeal of the Trial Court's adoption of the Advisory Verdict on the unjust enrichment claim.

Dated this 2nd day of October, 2018.

SIEGEL, BARNETT & SCHUTZ, L.L.P.

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CERTIFICATE OF COMPLIANCE

The undersigned attorney hereby certifies that this Brief complies with the type volume limitation of SDCL 15-26A-66(2). Based upon the word and character count of the word processing program used to prepare this Brief, the body of the Brief contains 4,658 words and 24,598 characters (not including spaces).

SIEGEL, BARNETT & SCHUTZ, L.L.P.

/s/ Reed Rasmussen _____

CERTIFICATE OF SERVICE

The undersigned, attorneys for Plaintiffs/Appellants, hereby certifies that on the 2nd day of October, 2018, a true and correct copy of the foregoing REPLY BRIEF OF APPELLANTS LORETTA B. MEALY, Individually and as Personal Representative of the ESTATE OF TERRENCE L. MEALY and INVESTMENT ENTERPRISES, INC., was served by electronic transmission on the following:

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Instruction No. 21

Each party claims to be entitled to damages from the other; the Plaintiffs under the Plaintiffs' complaint, and the Defendants under the counterclaim.

Plaintiffs claim that they are entitled to collect on seven promissory notes, that the Defendants converted Plaintiffs' interest in buffalo, that the Defendants were unjustly enriched by the receipt of loan funds and funds from the sale of buffalo, and that they are entitled to an accounting.

The Defendants allege that the parties were in a joint venture and the funds were contributions to a joint venture. With respect to the seven promissory notes, the Defendants allege the affirmative defenses of waiver, estoppel, laches, and fraud in the inducement.

The Defendants deny that they were unjustly enriched, and that an accounting is necessary.

By way of counterclaim, the Defendants claim to have been injured and sustained damages as a result of the Plaintiffs having converted certain personal property belonging to the Defendants, that Plaintiffs have been unjustly enriched in the value of the Prairie Sky Ranch land and properties, that Plaintiffs have infringed on Defendants' federal trademark, that the Plaintiffs engaged in unfair competition, forged or counterfeited Defendants' Prairie Sky trademark, converted the use of Defendants' www.prairieskyranch.com domain name, and wrongfully re-registered Defendants' domain name as Plaintiffs' own.

The Plaintiffs deny Defendants' claims. Additionally, Plaintiffs affirmatively allege that Defendants' claims are barred by estoppel, unclean hands, waiver, failure of consideration, fraud, release, payment, laches, and accord and satisfaction. Additionally, with respect to Defendants' trademark claims, Plaintiffs allege abandonment, acquiescence, and cancellation of the state and federal intellectual property rights.

Instruction No. 22

In civil actions, the party who has the burden of proving an issue must prove that issue by greater convincing force of the evidence.

Greater convincing force means that after weighing the evidence on both sides there is enough evidence to convince you that something is more likely true than not true. In the event that the evidence is evenly balanced so that you are unable to say that the evidence on either side of an issue has the greater convincing force, then your finding upon the issue must be against the party who has the burden of proving it.

In this action, the Plaintiffs have the burden of proving the following issues in their complaint:

- (1) That they are entitled to collect on the seven promissory notes;
- (2) That Defendants converted Plaintiffs' interest in buffalo;
- (3) That Defendants were unjustly enriched by the receipt of loan funds and funds from the sale of buffalo; and
- (4) That a constructive trust should be imposed over proceeds from the sale of buffalo.

As to these claims of the Plaintiffs described above, the Defendants have the burden of proof with respect to the affirmative defenses they have asserted:

- (1) That the parties were in a joint venture and that the funds were contributions to a joint venture;
- (2) Waiver;
- (3) Estoppel;
- (4) Laches; and
- (5) Fraud in the inducement.

In this action, the Defendants have the burden of proving the following issues in their counterclaim:

- (1) That the Plaintiffs have converted certain personal property belonging to the Defendants;

- (2) That the Plaintiffs have been unjustly enriched in the value of the Prairie Sky Ranch land and properties;
- (3) That Plaintiffs have infringed on Defendants' federal trademark;
- (4) That Plaintiffs have engaged in unfair competition;
- (5) That Plaintiffs have forged or counterfeited Defendants' Prairie Sky state trademark;
- (6) That Plaintiffs converted the use of Defendants' www.prairieskyranch.com domain name; and
- (7) That Plaintiffs' wrongfully re-registered Defendants' domain name as if Plaintiffs' owned it.

As to the affirmative defenses in the counterclaim, the Plaintiffs have the burden to prove that Defendants' claims are barred by any of the following:

- (1) Estoppel;
- (2) Unclean hands;
- (3) Waiver;
- (4) Failure of consideration;
- (5) Fraud;
- (6) Release;
- (7) Payment;
- (8) Laches; and
- (9) Accord and satisfaction.

With respect to Defendants' trademark claims, Plaintiffs have the burden of proof with respect to:

- (1) License;
- (2) Consent to use;
- (3) Abandonment;
- (4) Acquiescence; and
- (5) Cancellation.

In determining whether or not an issue has been proved by greater convincing force of the evidence, you should consider all of the evidence bearing upon that issue, regardless of who produced it.