

**IN THE SUPREME COURT  
STATE OF SOUTH DAKOTA**

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**FARM PRO SERVICES, INC.,**

**Appeal # 27706**

Plaintiffs/Appellee,

vs.

**DAVID FINNEMAN, CONNIE  
FINNEMAN, CHAD FINNEMAN,  
ARMSTRONG FARMS, VERN  
AMRSTRONG, HOPE ARMSTRONG,  
MICHAEL ARNOLDY, ANN ARNOLDY,  
WARREN ANDERSON, and ROCK  
CREEK FARMS GENERAL  
PARTNERSHIP, et al,**

Defendant/Appellants.

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APPEAL FROM THE CIRCUIT COURT  
SEVENTH JUDICIAL CIRCUIT  
PENNINGTON COUNTY, SOUTH DAKOTA

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The Honorable Craig A. Pfeifle  
Circuit Court Judge

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Notice of Appeal filed on December 21, 2015

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**APPELLANTS' BRIEF**

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James P. Hurley  
Bangs, McCullen, Butler,  
FOYE & SIMMONS, LLP  
P.O. Box 2670  
Rapid City, SD 57709-2670

*Attorneys for Appellants,  
(the Finnemans)*

Elizabeth S. Hertz &  
Vince M. Roche  
Davenport, Evans, Hurwitz & Smith  
PO Box 1030  
Sioux Falls, SD 57101-1030

*Attorneys for Appellees  
(the Arnoldys)*

Steven W. Sanford  
Caldwell, Sanford, Deibert  
& Gary, LLP  
200 East 10<sup>th</sup> St., Ste. 200  
PO Box 2498  
Sioux Falls, SD 57101-2498

*Attorneys for Appellants  
(Rock Creek Farms)*

Brian L. Utzman  
Smoot & Utzman, P.C.  
PO Box 899  
Rapid City, SD 57709-0899

*Attorneys for Appellants  
(Rock Creek Farms)*

Robert R. Schaub  
Larson, Sundall, Larson,  
Schaub & Fox  
P.O. Box 547  
Chamberlain, SD 57325

*Attorneys for Appellees  
(the Arnoldys)*

Preliminary Statement

Citations to the Record in the Clerk's Index will be (R. \_\_\_\_).

Citations to Finnemans' Appendix to this brief will (App. at \_\_\_\_).

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### Jurisdictional Statement

Defendants-Appellants David, Connie, and Chad Finneman (Finnemans) appeal from an Order granting Defendants-Appellees Ann Arnoldy and Michael Arnoldy (Arnoldys) Motion for Summary Judgment and denying Finnemans' Motion for Summary Judgment. The Order was signed on November 24, 2015, and entered November 25, 2015. The Certificate of Service states Notice of Entry of Order Granting Arnoldys' Motion for Summary Judgment was served on December 2, 2015. Finnemans' Notice of Appeal was dated and served December 18, 2015, and was filed December 21, 2015.

### Procedural Background

Defendant Rock Creek Farms (RCF) filed a Motion to Require Return of Redemption Monies. (R. 989) Arnoldys filed a reply, and U.S.A. filed a response. Finnemans filed a reply to USA's response, (R. 1002) and Arnoldys filed a response. (R. 1006) Briefs were filed. (R. 1358, 1573)

Arnoldys filed objections to Finnemans' and RCF's motions to obtain the redemption money.

The Circuit Court entered its Decision Letter dated May 6, 2015. (R. 1254)(App.A)

Arnoldys filed a Motion for Summary Judgment, Affidavit and Exhibits, and Statement of Undisputed Material Facts. (R. 1274, 1277, 1338)

RCF filed a Motion for Partial Summary Judgment, Affidavit, and Statement of Material Facts. (R. 1347, 1350)

Finnemans filed a Motion for Summary Judgment (App.C), Summary of Affidavit, Affidavit, (App.D), Exhibits, Statement of Undisputed Material Facts, and Brief. (R. 1354, 1358, 1363, 1384, 1390)

Arnoldys responded to Finnemans' Statement of Material Facts. (R. 1548) RCF filed a brief (R. 1573) and responded to Arnoldys' Statement of Material Facts. (R. 1586) Finnemans filed a Verified Response to Arnoldys' Statement of Material Facts. (R. 1647)

Arnoldys filed a response to RCF's Statement of Material Facts. (R. 1672) Arnoldys filed a Reply to Finnemans' Motion for Summary Judgment. (R. 1676)

Finnemans filed a Verified Response to Arnoldys' Reply to Finnemans' Motion for Summary Judgment and to Arnoldys' Response to Finnemans' Statement of Material Facts. (R. 1716)

Finnemans filed a Second Affidavit in support of their Motion for Summary Judgment. (R. 1975)(App.E) Finnemans filed a Supplemental Brief in Opposition to Arnoldys' Motion for Summary Judgment. (R. 2127)

Arnoldys filed a Reply to Finnemans' Second Affidavit in support of their Motion for Summary Judgment. (R. 2156) Finnemans filed a Response to the Affidavit of Ann Arnoldy. (R. 2164)

The Circuit Court sent a letter to counsel July 7, 2015. (R. 2195) Arnoldys' attorney responded to the Circuit Court's letter. (R. 2197) Finnemans' attorney responded to the Circuit Court's letter. (R. 2198) (App.F) Finnemans filed a brief addressing the *Dowling* case. (R. 2203) (App.G)

The Circuit Court filed a Memorandum Decision (R. 2220)(App.H), and entered an Order Granting Arnoldys' Motion for Summary Judgment. (R. 2237, 2239)(App.I) The Circuit Court denied RCF's Motion for Summary Judgment. (R. 2237, para.2)(App.I)

The Circuit Court denied Finnemans' Motion for Summary Judgment (R. 2237, para.3)(App.I) and denied the equitable relief requested in Finnemans' July 10, 2015, letter to the Circuit Court. (R. 2237, para.4, 2198)(App.I)

Finnemans moved for summary judgment requesting return of the redemption monies paid during their failed redemption under the doctrine of unjust enrichment. (App.C,D,E))

The Circuit Court sent a letter July 7, 2015, requesting confirmation that no request is being made for equitable relief, nor despite the reference to multiple other matters, including restitution, is there any other pending relief requested. (R. 2195) The Circuit Court requested each party send a letter confirming their acquiescence in the above.

Finnemans' counsel sent a letter July 10, 2015, (R. 2198)(App.F) in response to the Circuit Court, requested trial, and restating Finnemans' requests for equitable relief and restitution based on unjust enrichment, and referred to the Circuit Court's letter May 6, 2014, (R. 1254)(App.A), where the Circuit Court held: "Like the Court in *Way*, this Court has jurisdiction in equity to consider whether a creditor can retain both redemption payments and title to the property."

Upon considering applicable authorities the Circuit Court decided: "This Court has jurisdiction in equity to determine whether the Finnemans made a bona fide mistake in their attempt to redeem and whether Arnoldys can retain both redemption payments and title to the property." (Underline added)

The Circuit Court stated it would hold a trial to determine whether (1) Arnoldys received a benefit, (2) Arnoldys were aware that they were receiving a benefit, and (3) it would be inequitable to allow Arnoldys to retain the redemption money without paying for it.

This Court concluded it would schedule a date for a trial. But the Circuit Court did not schedule a trial.

The Circuit Court denied Finnemans' Motion for Summary Judgment stating "the circuit court subsequently found that RCF and the Finnemans had waived their right to redeem," and granted Arnoldys' Motion for Summary Judgment based upon this Court's decision in

*Dowling Family Partnership v. Midland Farms, LLC*, 2015 S.D. 50. (R. 2220, p.9)(App.I)

The Circuit Court in its memorandum decision October 20, 2015, stated that each party filed a motion for summary judgment, and each represented that no genuine issue of material facts exist. (R. 2220, p.1) That is not correct. Arnoldys, RCF, and Finnemans filed motions for summary judgment stating that on their particular issue no genuine issue of material fact exists. But after Arnoldys responded to Finnemans' motion for summary judgment, it became obvious that genuine issues of material fact existed that precluded summary judgment. Thus, Finnemans stated that genuine issues of fact existed and requested a trial. (App.F)

#### Statement Of Legal Issues

The issues presented in this appeal by Finnemans are:

1. Whether the Circuit Court erred in granting summary judgment to Arnoldys, and denying summary judgment to Finnemans, and denying Finnemans' request for trial to determine the genuine issues of material fact?

The Circuit Court granted summary judgment to Arnoldys, and denied summary judgment to Finnemans, and denied Finnemans' request for trial to determine the genuine issues of material fact.

#### Most Relevant Authority:

*Morgan v. Baldwin*, 450 N.W.2d 783 (S.D. 1990)



*Groseth International, Inc. v. Tenneco, Inc.*, 410 NW2d 159 (S.D. 1987)

*Stern Oil, Co. v. Brown*, 817 N.W.2d 395, (S.D. 2012)

*Jewson v. Mayo Clinic*, 691 F.2d 405 (8th Cir. 1982)

SDCL 15-6-56

2. Did the Trial Court err in denying Finnemans' Motion for Summary Judgment, permitting Arnoldys to become unjustly enriched by retaining and benefiting from Finnemans' and RCF's redemption money and rents, and also have possession and title to the real estate?

The Circuit Court granted summary judgment to Arnoldys, and denied summary judgment to Finnemans, and denied Finnemans' request for trial to determine the genuine issues of material fact.

Most Relevant Authority:

*Way v. Hill*, 41 S.D. 437, 171 N.W. 206 (1919)

*Hofeldt v. Mehling*, 658 N.W.2d 783, 788 (S.D. 2003)

*Johnson v. Larson*, 779 N.W.2d 412, 416 (S.D. 2010)

*Robinson v. Bailey* 361 Ill. 458, 464, 198 N.E. 217, 219-20 (1935)

3. Where Finnemans (i) made substantial partial redemption payments in good faith but in an unsuccessful effort to save their home and redeem their land and equity, (ii) Arnoldys benefited from and were aware of the benefits from Finnemans' redemption payments, (iii) Arnoldys obtained redemption payments, possession, and rents, and title to the land; and in these circumstances did the Circuit Court err in

denying Finnemans' Motion for Summary Judgment and granting Arnoldys Motion for Summary Judgment, without holding an evidentiary trial to decide from the evidence presented the genuine issues of material fact that exist for trial?

The Circuit Court granted summary judgment to Arnoldys, and denied summary judgment to Finnemans, and denied Finnemans' request for trial to determine the genuine issues of material fact.

Most Relevant Authority:

*Parker v. W Dakota Insurors, Inc.*, 605 N.W.2d 181, 187 (S.D. 2000)

*Juttelstad v. Juttelstad*, 587 N.W.2d 447, 451 (S.D. 1998)

*Action Mech., Inc. v. Deadwood Historic Pres. Comm'n*, 652 N.W.2d 742, 750 (S.D. 2000)

*Davis Mfg. & Supply Co. v. Coonskin Props., Inc.*, 687 P.2d 484, 486 (Colo. Ct. App. 1984)

4. Where Finnemans set out seven genuine issues of material fact in Finnemans' Supplemental Brief In Opposition To Arnoldys' Motion For Summary Judgment March 30, 2015 (R. 2127), and additional issues of fact in their brief addressing the *Dowling* case (R. 2203), did the Circuit Court err in denying Finnemans' Motion for Summary Judgment and granting Arnoldys Motion for Summary Judgment, without holding an evidentiary trial as Finnemans requested to decide from the evidence presented the genuine issues of material fact that exist for trial?

The Circuit Court granted summary judgment to Arnoldys, and denied summary judgment to Finnemans, and denied Finnemans' request for trial to determine the genuine issues of material fact.

Most Relevant Authority:

*Morgan v. Baldwin*, 450 N.W.2d 783 (S.D. 1990)

*Groseth International, Inc. v. Tenneco, Inc.*, 410 NW2d 159 (S.D. 1987)

*Dowling Family Partnership v. Midland Farms, LLC*, 2015 S.D. 50

*Jewson v. Mayo Clinic*, 691 F.2d 405 (8th Cir. 1982)

SDCL 15-6-56

5. Where Arnoldys claimed Finnemans waived their land owners' redemption rights in a loan agreement eleven years earlier in 2004, and (1) during the redemption period when Finnemans and RCF were ready to redeem with cash buyers to purchase part of the land and the buyers' money would pay off all debts on the land, the Circuit Court entered an order that striped Finnemans and RCF of the land owners' redemption rights based on the claimed illegal waiver in violation of SDCL 21-52-7 (land owner's final right of redemption) and in violation of SDCL 44-1-8, (all contracts in restraint of the land owner's right of redemption from a lien are void) and (2) the Circuit Court again on November 24, 2015, based its decision granting summary judgment to Arnoldys on such illegal waiver of land owners' redemption rights, and (3) in violation of the statutes SDCL 21-52-7 and SDCL 44-1-8 Arnoldys benefited from

Finnemans' and RCF's redemption payments and rents, and Arnoldys also hold title and possession of the land, and based on these facts, have Arnoldys been unfairly and unjustly enriched?

The Circuit Court granted summary judgment to Arnoldys, and denied summary judgment to Finnemans, and denied Finnemans' request for trial to determine the genuine issues of material fact.

Most Relevant Authority:

*United States v. Dennis Birchem*, 95-2519 SD (CA 8, 1996)

*Dowling Family Partnership v. Midland Farms, LLC*, 2015 S.D. 50 SDCL 44-1-8

SDCL 21-52-7

Summary Judgment Standard

This Court stated in *Morgan v. Baldwin*, 450 N.W.2d 783, 785 (S.D. 1990): The party moving for summary judgment has the burden to show that there is no genuine issue as to any material fact and that the party is entitled to judgment as a matter of law. SDCL 15-6-56(c). The evidence, including all pleadings, affidavits and deposition testimony, must be viewed in the light most favorable to the non-moving party, and reasonable doubts should be resolved against the moving party. All reasonable inferences that may be drawn from the facts must be accepted in favor of the non-moving party. *Groseth International, Inc. v. Tenneco, Inc.*, 410 NW2d 159 (S.D. 1987)); *Wilson v. Great Northern Railway Company*, 83 S.D. 207, 157 N.W.2d 19 (1968). Summary

judgment is a drastic remedy, and should not be granted unless the moving party has established the right to a judgment with such clarity as to leave no room for controversy. *Jewson v. Mayo Clinic*, 691 F.2d 405 (8th Cir. 1982).

#### Failure to Conduct a Court Trial

After Arnoldys responded to Finnemans' motion for summary judgment, it became obvious that genuine issues of material fact exist that preclude summary judgment, and require trial to determine the factual issues.

The Circuit Court stated in its memorandum decision May 6, 2014: "The parties appeared before me on March 18, 2014, and I have considered the arguments presented. For the reasons set forth below, the Court exercises its equitable jurisdiction and *will conduct a court trial to determine the issues.*" (R. 1254, p.1)(Italics added)(App.A)

The Circuit Court stated: "This Court has jurisdiction in equity to determine whether the Finnemans made a bona fide mistake in their attempt to redeem and whether Arnoldys can retain both redemption payments and title to the property. The Court *will hold a trial* to determine whether RCF proved that (1) Arnoldys received a benefit, (2) Arnoldys were aware that they were receiving a benefit, and (3) it would be inequitable to allow Arnoldys to retain the redemption money without paying for it. Counsel are directed to contact the Court within 30 days to schedule a date for court trial." (R. 1254, p.4) (Underline added)(App.A)

The Circuit Court was planning on scheduling a trial to determine the factual issues.

The Circuit Court sent a letter July 7, 2015, requesting confirmation that no request is being made for equitable relief, nor despite the reference to multiple other matters, including restitution, is there any other pending relief requested. (R. 2195) The Circuit Court requested that each party send a letter confirming their acquiescence in the above.

Finnemans' counsel sent a letter July 10, 2015, in response to the Circuit Court letter (R. 2198)(App.F) restating Finnemans' requests for equitable relief as outlined in the Circuit Court's letter May 6, 2014 (R.1254) (App.A), and Finnemans requested a trial: "The Finnemans request this Court deny summary judgment and schedule this matter for trial." (R. 2198 p.2, 4)(App.A) The letter quoted the Circuit Court: "Like the Court in *Way*, this Court has jurisdiction in equity to consider whether a creditor can retain both redemption payments and title to the property." The Circuit Court stated: "This Court has jurisdiction in equity to determine whether the Finnemans made a bona fide mistake in their attempt to redeem and whether Arnoldys can retain both redemption payments and title to the property."

This Court stated it will hold a trial to determine whether (1) Arnoldys received a benefit, (2) Arnoldys were aware that they were

receiving a benefit, and (3) it would be inequitable to allow Arnoldys to retain the redemption money without paying for it.

This Court concluded it would schedule a date for a trial. But the Circuit Court made reversible error when it did not schedule a trial, as requested by Finnemans, to determine the factual issues. The genuine issues of material fact may not be decided in summary judgment under Rule 56.

Arnoldys as the moving party in their motion for summary judgment did not demonstrate the absence of any genuine issue of material fact, and did not show entitlement to judgment on the merits as a matter of law. The Circuit Court did not view the evidence most favorably to Finnemans as the nonmoving party and did not resolve all reasonable doubts against Arnoldys as the moving party.

#### Standard Of Review

In *Dowling Family Partnership v. Midland Farms, LLC*, 2015 S.D. 50 this Court stated: "In reviewing a grant or a denial of summary judgment under SDCL 15-6-56(c), 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. We view the evidence "most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party" (citations omitted)

"Unjust enrichment is an equitable concept." *Hofeldt v. Mehling*, 2003 S.D. 25, ¶ 9, 658 N.W.2d 783, 786. "The doctrine of unclean hands-or equitable disqualification-is likewise an equitable concept." See Restatement (Third) of Restitution & Unjust Enrichment § 63 (2011). "We review equitable actions for abuse of discretion." (citations omitted) "An abuse of discretion is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable." (citations omitted) "Under an abuse of discretion standard of review, the circuit court's factual determinations are subject to a clearly erroneous standard, but we review its conclusions of law under a de novo standard."

### The Facts

The facts are set out in Finnemans' Statement of Undisputed Material Facts In Support of Finnemans' Motion for Summary Judgment. (R. 1363)

1. Finnemans have been farmers all of their adult lives. Up until the last several years they owned and operated about 16,700 acres of agricultural land, which included about 7,500 deeded acres in Pennington and Meade Counties, and about 9,200 acres they purchased on two contracts for deed: (a) They purchased about 6,950 acres in Meade County on a contract for deed from L&L Partnership in 1996 and (b) they purchased about 2,250 acres in Pennington County on a contract for deed from L&L Partnership in 1999. (R. 1390 para. 1)



2. FarmPro Services, Inc. (FarmPro) began foreclosure of its mortgage on Finnemans' land. The Sheriff's Certificate of Sale May 12, 2006, started the redemption period. (R. 503)

3. Another mortgage creditor, Rabo AgServices (Rabo) began foreclosure, the Judgment and Decree of Foreclosure was filed and began the redemption period January 15, 2010. The Judgment stated Rock Creek Farms General Partnership (RCF) was adjudged by the Circuit Court to have the owner's right of redemption under SDCL Ch. 21-52. (App.J)

However, sixteen months later on May 26, 2011, without an evidentiary hearing, the Circuit Court changed position and ordered that the redemption rights of RCF granted by the Court in the Judgment and Decree of Foreclosure January 15, 2010, would be vacated after three conditions were met. The Order Partially Vacating Judgment was filed May 26, 2011. The third condition is that the redemption rights of RCF would be vacated "after all appeals from this Order have been fully determined." (App.K)

All appeals were not fully determined until February 19, 2014. Thus, Finnemans and their general partnership RCF were entitled to receive the rents from all the land to help them make the owners redemption after the receivership ended in August 31, 2011, and until all the appeals were completed February 19, 2014.

4. L&L Partnership began foreclosure on the contracts for deed in March of 2010.

5. A receiver was appointed to handle the income from the land and make payments to creditors during the redemption period in the Rabo case, and operated from January 15, 2010, through August 31, 2011.

6. During the redemption periods Finnemans, their receiver, and RCF made partial redemption payments in good faith in a failed redemption attempt to pay the debts on the land, save the farm and the equity in the land, and save their home. (R. 1390, 1975)

7. Finnemans had valuable land but little money to redeem their land. Finnemans and Warrenn Anderson and Mark McOller formed Rock Creek Farms General Partnership. Finnemans put in the land and land equity, and Anderson and McOller put money in to pay redemption and save the land, the equity in the land, and Finnemans' home. (R. 1390) Finnemans, their receiver, and RCF made many partial redemption payments in a good faith effort to pay debts on the land, save Finnemans' farm, and home, and the equity in the land. (R. 1390 para. 3, 5, 7, 20)

8. The redemption payments made by Finnemans, their receiver, and RCF drastically reduced the amount of money Arnoldys had to pay for redemption. (R. 1390, para. 5, 6, 20)

9. The redemption payments by Finnemans, their receiver, and RCF were a huge benefit for Arnoldys that they were aware of and accepted. (R. 1390, para. 5, 6, 15, 18, 20)

10. Arnoldys knew the payments were a huge benefit and they accepted the benefits without paying for them. (R. 1390, para. 12, 16)

11. If Finnemans had walked away from their land in May, 2006 when the FarmPro redemption period began, and if they had not tried to redeem, they would not have made any of the redemption payments they made over the years. In that event, Arnoldys would have had to pay millions of dollars more to redeem by paying the remaining balance on the debts on the land without benefit of the redemption payments of \$4,363,469 made by Finnemans, their receiver, and RCF. (R. 1390, para. 20).

12. Arnoldys now have possession and hold title to the land and the valuable minerals worth millions of dollars of equity. They received a huge benefit from redemption payments of \$4,363,469, which substantially reduced the dollars Arnoldys had to pay to pay off the remaining debts and redeem the land. (R. 1390, para. 20) The balance remaining to be paid by Arnoldys was reduced to about \$6,159,000. (R. 1390, para. 18)

13. With Airport Farm valued at \$2,000 per acre and the remaining 13,650 acres valued at \$1,500 per acre, the equity in the land now held by Arnoldys is at least \$20,491,000. (R. 1390, para. 19)

14. Finnemans, their receiver, and RCF all made redemption payments to Finnemans' creditors in a good faith effort to pay down debt in the redemption periods, reduce the amount of redemption remaining to be paid by them to redeem the land, save the land equity, and save Finnemans' home from foreclosure. (R. 1390, para. 4, 6)

15. Finnemans, their receiver, and RCF in good faith made redemption payments of \$4,363,469. (R. 1390, para.20)

16. Redemption payments made by Finnemans, their receiver, and RCF benefited Arnoldys by reducing the debt that Arnoldys had to pay to redeem. Arnoldys knew of such benefits, which they accepted. (R. 1390, 1975)

17. Rent payments from the land of \$1,476,000 from August 31, 2011, to February 19, 2014, were taken by Arnoldys and used by Arnoldys for redemption. These rent payments obviously benefited Arnoldys. (R. 1390, para. 6, 15, 16, 24, 28, 29)

18. The redemption payments made by Finnemans, their receiver, and RCF of \$4,363,469, plus rents taken by Arnoldys from August 31, 2011, to February 19, 2014, of \$1,476,000, benefited Arnoldys \$5,839,469, they knew of such benefits which they accepted. (R. 1390, para. 20)

19. If Finnemans had walked away from their farm when the FarmPro redemption period began May 12, 2006, and did not paid any redemption payments during the redemption period, Arnoldys would

have had to pay substantially more money to pay debts on the land to redeem the land. (R. 1390, para. 20)

20. Redemption payments made to creditors during the redemption periods include:

- (1) Farm Credit Services of America (FCS): \$414,738.32
- (2) Rabo Ag Services (Rabo): \$153,255.00
- (3) Black Hills Federal Credit Union (BHFCU): \$99,061.99
- (4) Real Estate Taxes: \$372,784.11
- (5) CLW Financial, LLC (CLW): \$95,172.48
- (6) Mike Arnoldy to Extend the Redemption Period: \$759,337.39
- (7) L&L Partnership (L&L): \$1,190,008.95
- (8) Ann Arnoldy to Redeem FarmPro: \$1,280,000
- (9) Rent Payments From the Land: \$1,476,000
- (10) Payments listed above from Finnemans, their receiver, and RCF of \$5,840,358 reduced debt on the land, and benefited Arnoldys, by reducing the cash required for Arnoldys to take over the land and pay remaining land debt. Arnoldys were able to redeem the land for a substantially reduced amount of their own money. They were able to redeem for about \$6,195,000. (R. 1390, para. 18) Arnoldys have paid only approximately \$6,159,000 for the land and minerals worth \$26,650,000. Arnoldys have reaped an unearned windfall of approximately \$20,491,000. (R. 1390, para. 18)

### Genuine Issues Of Material Fact

Arnoldys, RCF, and Finnemans filed motions for summary judgment stating on their particular issue no genuine issue of material fact exists. But after Arnoldys responded to Finnemans' motion for summary judgment, it became obvious that genuine issues of material fact do exist precluding summary judgment.

The Circuit Court letter July 7, 2015, requested confirmation that no request is being made for equitable relief, nor despite the reference to multiple other matters, including restitution, is there any other pending relief requested. (R. 2195) The Circuit Court requested each party send a letter confirming their acquiescence in the above.

Finnemans' counsel sent a letter July 10, 2015, stating Finnemans did not agree. (R. 2198) Finnemans restated their requests for equitable relief as outlined in the Circuit Court's letter dated May 6, 2014, (R. 1254), "Like the Court in *Way*, this Court has jurisdiction in equity to consider whether a creditor can retain both redemption payments and title to the property."

"This Court has jurisdiction in equity to determine whether Finnemans made a bona fide mistake in their attempt to redeem and whether Arnoldys can retain both redemption payments and title to the property."

The Circuit Court stated it will hold a trial to determine whether (1) Arnoldys received a benefit, (2) Arnoldys were aware that they were

receiving a benefit, and (3) it would be inequitable to allow Arnoldys to retain the redemption money without paying for it. The Circuit Court concluded it would schedule a date for a trial. Finnemans requested that the Court deny summary judgment and schedule this matter for trial. ” (R. 2127, p.26)(App.F)

Finnemans set out *seven genuine issues of material fact* in Finnemans’ Supplemental Brief In Opposition To Arnoldys’ Motion For Summary Judgment. (R. 2127) Finnemans submit that the Circuit Court erred in denying Finnemans’ Motion for Summary Judgment and in granting Arnoldys Motion for Summary Judgment, without holding an evidentiary trial with discovery and cross examination to decide from the evidence presented the genuine issues of material fact.

A. First Issue: *Whether Finnemans made a bona fide mistake in their attempt to redeem and whether Arnoldys can retain both redemption payments and title to the property.*

Finnemans state in their Supplemental Brief in Opposition to Arnoldys’ Motion for Summary Judgment dated March 30, 2015, that Arnoldys raise this first factual issue. “Thus, there is a genuine issue of material fact which cannot be decided by summary judgment under Rule 56.” (R. 2127, p.5)

This Court stated in its decision dated May 6, 2014:

“This Court has jurisdiction in equity to determine *whether the Finnemans made a bona fide mistake in their attempt to redeem*

*and whether Arnoldys can retain both redemption payments and title to the property.* The Court will hold a trial to determine whether RCF proved that (1) Arnoldys received a benefit, (2) Arnoldys were aware that they were receiving a benefit, and (3) it would be inequitable to allow Arnoldys to retain the redemption money without paying for it.” (Italics added)

Arnoldys claim there is an issue of “whether Finnemans made a bona fide mistake in their attempt to redeem” by claiming that “Rock Creek/Finnemans’ failure to serve the United States in Rabo is not an invalidating mistake.” Arnoldys then continue to argue facts and law to support their position that it was impossible for such mistake to be an “invalidating mistake.” Arnoldys make it clear that this is a disputed genuine issue of material fact which cannot be decided in summary Judgment under Rule 56, but must be decided from the trial evidence subject to discovery and cross examination.

From cases cited by the Circuit Court in its decision May 7, 2014 (R. 1254), Finnemans claim the issue is whether Finnemans made a bona fide mistake in making redemption payments in the redemption periods in a good faith effort to save their farm, their equity, and their home from foreclosure.

Finnemans’ bona fide mistake was believing that South Dakota law provides land owners with the final right of redemption of their land in foreclosure under SDCL 21-52-7. Finnemans made redemption



payments to creditors with liens on their land during the redemption periods in the good faith hope of redeeming their farm, equity, and home.

Finnemans made a bona fide mistake honestly believing in good faith as owners of their land they could redeem their land and save their farm and home from foreclosure. They believed in the words of the statutes, SDCL 21-52-7 stating the owner's final right of redemption and SDCL 21-50-3 stating time to cure for the party in default. But that is not how it worked out. David Finneman states in his Affidavit (R. 1390):

1. Financial times became difficult for us, and one of our mortgage creditors, FarmPro Services, Inc. (FarmPro), began foreclosure. The Sheriff's Certificate of Sale started our redemption period May 12, 2006. (Ex. 1)

2. Another mortgage creditor, Rabo AgServices (Rabo), began foreclosure, and the redemption period began January 15, 2010. (Ex. 8) L&L Partnership began foreclosure on our contracts for deed in March 2010. A receiver was appointed to handle our income and make payments to our creditors during the redemption period in the Rabo case from January 15, 2010, through August 31, 2011. (Ex. 10).

3. The Finnemans had valuable land but little money to redeem their land. The Finnemans and Warrenn Anderson formed Rock Creek Farms General Partnership (RCF). The Finnemans put in the land, and Warrenn

Anderson put money in to pay redemption and save the equity in the land. The Finnemans and their receiver and RCF made many partial redemption payments in a good faith effort to pay the debts on the land, and save our farm, our equity, and our home. The Finnemans understand from this Court's decision of May 6, 2014, that this Court has equitable jurisdiction to determine the distribution of the redemption payments. (Ex. 11)

4. David and Connie Finneman, individually and as partners in Rock Creek Farms General Partnership, ask this Court to enforce their legal rights, because they and their receiver and RCF have made many partial redemption payments attempting in good faith to redeem their land, save their equity in their land that was earned over many years, and save their home.

5. The partial payments made in redemption by the Finnemans and their receiver and RCF have drastically reduced the amount of money the Arnoldys had to pay for redemption. This was a huge benefit for the Arnoldys that they were aware of and accepted. The Arnoldys knew these payments were a huge benefit, and they accepted the benefits without paying for them.

If we had just walked away from the land in April of 2002 when FarmPro sued in foreclosure and not have tried to redeem, we would not have made the partial redemption payments we did over the years. The Arnoldys would then have had to pay millions of dollars more to redeem by paying the remaining balance on the debts on the land without the benefit of our partial redemption payments of \$4,363,469. (para. 20).

The Arnoldys now hold title to the land and the valuable minerals with millions of dollars of equity, and they have received a huge benefit from the partial redemption payments we made, which substantially reduced the dollars the Arnoldys had to pay to pay off the remaining debts and redeem the land.

6. The Finnemans, their receiver, and their general partnership RCF, collectively the Finnemans, all made redemption payments to Finnemans' creditors in a good faith effort to pay down debt in the redemption period, reduce the amount of redemption remaining to be paid, and redeem their land and home from foreclosure. Finnemans in good faith made redemption payments of \$4,363,469. (Para. 20)

Arnoldys argue that Finnemans' payments to their land creditors during the redemption periods do not constitute redemption payments. But that is what redemption payments are: Payments to creditors to redeem liens on the land to save their farm, their equity, and home from foreclosure. They tried the best they could with financial help from Anderson through RCF and cash buyers of part of their land to save part of their farm, their equity, and home, but they were not successful.

Arnoldys dispute that Finnemans made a bona fide mistake in paying money to creditors during the redemption period in a good faith effort to redeem their farm and home. Thus, there is a genuine issue of material fact which cannot be decided, as the Circuit Court did, by summary judgment under Rule 56.

B. Second, Third, and Fourth Issues: *Whether Arnoldys received a benefit they were aware of from the redemption payments by Finnemans and RCF, making it inequitable to allow Arnoldys to retain the redemption money without paying for it.*

As to the second, third, and fourth factual issues raised by Arnoldys the Finnemans stated: "Thus, there exist three more genuine issues of material fact that cannot be decided in summary judgment but must be decided from the evidence presented at trial." (R. 2127, p.6)

As this Court stated in its decision dated May 6, 2014, there are three more issues: whether (1) Arnoldys received a benefit, (2) Arnoldys

were aware that they were receiving a benefit, and (3) it would be inequitable to allow Arnoldys to retain the redemption money without paying for it. (R. 1254)

Finnemans state the obvious that the redemption payments they and RCF made to creditors during the redemption period benefited Arnoldys. (R. 1390, 1975) Finnemans/RCF redemption payments substantially reduced the amount of money Arnoldys had to pay to get title to the land. Arnoldys argue they received no benefit from the payments made by Finnemans/Rock Creek during the redemption period. Thus, there exist three more genuine issues of material fact that cannot be decided in summary judgment, as the Circuit Court did, but must be decided from the evidence presented at trial.

C. Fifth Issue: *Whether Finnemans and RCF made good faith redemption payments to creditors without fraud and deceit.*

As to this issue Finnemans stated: “Arnoldys’ arguments involve statements of fact that are disputed. Where such statements of fact are material to the May 6, 2014 decision of this Court, these genuine issues of material fact preclude granting summary judgment.” (R. 2127, p.18; 1254) Arnoldys’ arguments as to fraud and deceit are factually false and unsupported.

Arnoldys continue to raise an issue claiming that Finnemans/RCF did not make good faith redemption payments without fraud and deceit. Arnoldys argue in their brief in support of motion for summary judgment

July 9, 2014, that Finnemans/RCF are not entitled to equitable relief because they lacked good faith and were fraudulent in connection with the Mahoney redemption and use of fraudulent judgments. Arnoldys make the same arguments in numbers 5, 6, 11, and 12 of Supplemental Response to Rock Creek's Interrogatories and Requests for Production February 26, 2015. Recently in their Supplemental Brief in Support of Motion for Summary Judgment, March 12, 2015, Arnoldys again argue fraud, stating there is still a "factual dispute" about some of the circumstances surrounding the Mahoney redemption. A "factual dispute" of course precludes summary judgment under Rule 56.

Arnoldys' arguments and unsupported claims of bad faith, fraud and deceit are without factual basis, and ignore the decision of the Supreme Court in *Arnoldy v. Mahoney*, 2010 S.D. 89, 791 N.W.2d 645. The Supreme Court disagreed with the Circuit Court and reversed, stating in part:

"Questions of fraud and deceit are generally questions of fact and as such are to be determined by the jury." (citations omitted) "[W]hen there is a reasonable doubt on whether a genuine issue of material fact exists; the doubt should be resolved against the movant." "We have also held that "cases of fraud and deceit require a higher degree of specificity in order to avert summary judgment." *Schwaiger v. Mitchell Radiology Assocs., P.C.*, 2002 S.D. 97, 114, 652 N.W.2d 372, 378 (citing *Bruske v. Hille*, 1997 S.D. 108, 111, 567 N.W.2d 872, 876 (stating specific material

facts must be presented in order to prevent summary judgment on fraud and deceit claims))”

The Supreme Court further stated: “If Arnoldys have evidence to substantiate their claim that the judgments are invalid, *this issue will need to be presented to a jury. We do not decide that the confessed judgments are facially fraudulent.* The facts leading up to the confessions of the judgments that would resolve factual disputes regarding the validity of the confessions are not sufficiently established in the record. *A jury will have to determine such facts.*” (Italics added)

D. Sixth Issue: *Whether Finnemans have standing to make a motion for summary judgment.* Arnoldys again raise factual issues that precludes entering summary judgement in their Reply to Finnemans’ Motion for Summary Judgment. Factual issues must be determined upon the evidence presented at trial with discovery and cross examination, not in a summary judgment proceeding from affidavits and arguments as the Circuit Court did here under Rule 56.

Finnemans have standing to make their motion for summary judgment. Arnoldys argue Finnemans have no standing in this matter because they assigned all of their interest in the land to RCF. Yes, Finnemans transferred their land to their general partnership RCF subject to the debts, but Finnemans retained a 66 2/3% partnership interest in RCF and their share of equity of \$2,000,000 in their land.

Also, they did not transfer 200 acres of the 1999 contract for deed to RCF. (R. 1975)

Arnoldys' standing argument is without merit. For many years Finnemans owned and paid taxes and operated about 16,700 acres of agricultural land. Financial times became difficult for them, and one of their mortgage creditors, FarmPro Services, Inc. (FarmPro), began foreclosure. The Sheriff's Certificate of Sale started the redemption period May 12, 2006. (R. 1390, para.2) Finnemans had valuable land but little money to redeem their land. Finnemans and Anderson and McColler formed Rock Creek Farms General Partnership. Finnemans put in the land and equity, and the investors put money in to pay redemption to creditors, save the land and equity and Finnemans' home. In their agreement May 10, 2007, the partners agreed that Finnemans share of the equity was \$2,000,000, and Finnemans owned 66 2/3% of RCF. Since then, the equity of Finnemans and RCF has increased because Finnemans, their receiver, and RCF made many redemption payments of over \$4,363,469 which reduced the land debts and increased equity (R. 1390, para. 20), and the value of the land increased over the years which increased equity. The U.S. Farmland Price Change Map 2005 to 2013 shows South Dakota farmland prices increased 224% from 2005 to 2013. (R. 1390)

Finnemans show recent comparable sales that indicate a minimum of \$1,500 per acre for 13,650 acres and \$2,000 per acre for the 3,050



acres of Airport Farm, for a current value of the land of \$26,650,000. (R. 1390, para. 17)

Arnoldys state: “The Finnemans claim that they are partners in Rock Creek Farms. However, as the South Dakota Supreme Court has recognized, the Finnemans dissociated from the partnership in 2010.” Their argument is factually not correct. The Supreme Court did not state that “Finnemans dissociated from the partnership in 2010.” The Supreme Court stated in note 3 “In May 2010, a Statement of Dissociation was filed with the South Dakota Secretary of State that stated Finnemans were no longer partners in RCF.” *L&L P'ship v. Rock Creek Farms, Finnemans, et al.*, 2014 S.D. 9 n.3. The Supreme Court did not state “the Finnemans dissociated from the partnership in 2010.” The fact is the investors stated a desire to dissociate, but Finnemans did not dissociate from the partnership. The statement of dissociation was prepared, signed, and filed by investors Anderson and McColler. Finnemans did not sign the statement and had no knowledge of it. Finneman and Anderson continued to discuss and orally agree on partnership matters, Finneman continued to receive the bank statements for RCF, the CPA for RCF continued to discuss RCF's matters with Finneman, and IRS continued to send correspondence to “Rock Creek Farms General Partnership, David M. Finneman General Partner.” Finnemans and Anderson through RCF worked together to redeem from L&L the 9,000 acres and the 200 acres. (R. 1975) Finnemans paid in

\$16,500 and Warrenn Anderson paid in \$840,303.99 to redeem the 9,200 acres of contract for deed land.

Arnoldys' standing argument raises several factual issues. The statement of dissociation refers to SDCL 48-7A-601(2), but the statement of dissociation does not state that the partnership was ever dissolved or is winding up its business as permitted by SDCL 48-7A-805. There has been no settlement of accounts and contributions among partners as required by SDCL 48-7A-807. Finnemans have not waived their right to have the partnership's business wound up and the partnership properly terminated. Finnemans were not dissociated from the partnership because there was no winding up of the partnership business under SDCL 48-7A-801, and the partnership did not cause Finnemans' interest in the partnership to be purchased for a buyout price as required by SDCL 48-7A-701.

Arnoldys' arguments involve statements of fact that are disputed. These genuine issues of material fact precluded granting summary judgment for Arnoldys.

Finnemans are a real party in interest under SDCL 15-6-17. The Supreme Court held in *Vander Vorste v. Northwestern National Bank*, 138 N.W.2d 411 (S.D. 1965) that real party in interest requirements for standing are met if one has a real, actual, material, or substantial interest in the subject matter of the action. Citing 67 C.J.S. Parties § 10b. Finnemans satisfy this requirement. The land involved was owned

for decades by Finnemans, they formed the general partnership RCF with investors, they transferred the land to RCF subject to the debts and ownership interest of Finnemans, it was agreed that Finnemans' share of the net equity in the land was \$2,000,000, and Finnemans retained 662/3% ownership in RCF. Finnemans, their receiver, and RCF made redemption payments to Finnemans' land creditors in a good faith effort to pay down debt in the redemption periods, reduce the amount of redemption remaining to be paid, and redeem the land, save the equity, and save Finnemans' home from foreclosure. (R. 1390, para. 7) During the redemption periods Finnemans, their receiver, and RCF made redemption payments of over \$4,363,469. (R. 1390, para. 7-14, 20; 1363, para. 21-28) Such payments were applied to land debts, reducing judgments and liens against the land remaining unsatisfied. Such redemption payments substantially reduced the amount of redemption required for Finnemans and RCF to make the owners' final right of redemption. This was a substantial benefit for Arnoldys because it substantially reduced the amount they had to pay to get title to the land.

In accordance with this Court's decision (App.A), Finnemans' Statement of Undisputed Material Facts (R. 1363), Affidavit of David Finneman (R. 1390), and Second Affidavit of David Finneman (R. 1975), show that: (a) Arnoldys received a benefit from redemption payments made by Finnemans, their receiver, and RCF in a good faith unsuccessful attempt at redemption, (b) Arnoldys received a benefit from the rents that

Arnoldys took that should have been paid to RCF during the redemption periods, (c) Arnoldys were aware they were receiving such benefits, (d) Arnoldys were able to redeem the land for substantially less money because of the redemption payments made by Finnemans, their receiver, and RCF, and thereby obtain title to the land, and (e) it would be inequitable to allow Arnoldys to retain title to the land, and also retain the redemption payments, and the rents, without paying Finnemans and RCF for the same. Thus, Finnemans and RCF's request for return of the redemption moneys or return of the land title should be granted.

Under the Circuit Court's decision May 6, 2014 (R. 1254) and facts material thereto, Finnemans have a real, actual, material, or substantial interest in the subject matter of the action. *Vander Vorste v. Northwestern National Bank*, 138 N.W.2d 411 (S.D. 1965). The facts show (a) Arnoldys received a benefit from the redemption payments made in good faith by Finnemans, their receiver, and RCF in an unsuccessful good faith attempt at redemption, and (b) Arnoldys received a benefit from the rents that Arnoldys took that should have been paid to RCF, and (c) Arnoldys were aware they were receiving such benefits, then (d) it is inequitable and unjust to allow Arnoldys to retain title to the land, and also retain the redemption payments and the rents without paying Finnemans and RCF for the same. (R. 1254)

Finnemans submit they have standing because they have a real, actual, material, or substantial interest in the subject matter of the

action. Finnemans submit that equity and fairness should not permit Arnoldys to accept the redemption payments and rents without reimbursing Finnemans and RCF for such amounts plus prejudgment interest at the legal rate. Without such reimbursement Finnemans and RCF will suffer substantial injury, and Arnoldys will receive a substantial unearned windfall. Arnoldys should not be allowed to benefit from the redemption payments and the rents, and also claim title to the land.

E.     Seventh Issue: *Whether Arnoldys Violated the L&L Judgment of Foreclosure as to redemption of the 200 acres.*

Finnemans believe they had the legal right to redeem the 200 acres as stated in paragraphs 8 and 9 of the L&L Judgment of Foreclosure. If they are correct they had the right to redeem, the Warranty Deed from L&L to Arnoldys April 7, 1014, should be vacated and a Warranty Deed to the 200 acres should be issued to Finnemans.” This is also a factual issue to be resolved at trial, not in a summary judgment as the Circuit Court did in violation of Rule 56. (R. 2127, p.26)

Finnemans state in their Supplemental Brief in Opposition to Arnoldys’ Motion for Summary Judgment: “Genuine issues of material fact exist which preclude summary judgment. Finnemans request that this Court deny summary judgment and schedule this matter for trial. ” (R. 2127, p.26)

### The Dowling Case

*Dowling Family Partnership v. Midland Farms, LLC*, 2015 S.D. 50 involved claims of unjust enrichment and request for restitution. When Finnemans and RCF were making redemption payments, the *Dowling* case had not yet been decided, and guidance from that decision was not yet available. The Circuit Court followed the cases available at the time in the District Court's decision dated May 6, 2014. (R. 1258) (App.A)

In *Dowling* Midland Farms requested restitution from Dowling Partnerships. (Dowlings) Midland asserted that Dowlings were unjustly enriched by receiving proceeds from a crop planted at the partial expense of third party Clement. Dowlings asserted Midland had unclean hands because Midland breached the lease agreement with Dowlings and should not be granted equitable relief of restitution.

The Court decided Midland conferred a benefit on Dowlings, and Dowlings received the proceeds from the crop planted by Clement without paying the costs of planting the crop. But the value of the benefit to Dowlings was in dispute. Over two thirds of the crop acres did not go to harvest. The Court noted numerous discrepancies with the claimed crop input costs, and rejected Midland's accounting of Clement's input costs as a measure of the benefit received by Dowlings.

The facts of the instant case are different from *Dowling*, that involved crop inputs of questionable monetary value and breach of contract. In the instant case (i) the value of the benefit received by

Arnoldys is not subject to dispute because it was cash redemption payments and cash rent with known cash dollar value, not the questionable monetary value of the crop and crop inputs involved in *Dowling*, and (ii) here there was no breach of contract or breach of lease.

Finnemans, their receiver, and RCF made cash payments during the redemption periods to land creditors in an honest good faith effort as land owner to redeem the land by paying the debt on the land. The redemption payments are a benefit to Arnoldys, and they were aware of and accepted the benefits. Also, Arnoldys received cash rent off the land during the redemption period. In contrast to *Dowling*, in this case the cash redemption payments and cash rent were paid in cash with a known fixed dollar value, and such amounts were all recorded and are not in dispute.

In contrast to *Dowling*, Finnemans have not breached a contract or lease or otherwise had unclean hands that would preclude Finnemans from being granted the equitable relief of restitution as requested.

The cash redemption payments made by Finnemans and RCF are set out in the Affidavits in Support of Finnemans' Motion for Summary Judgment. (R. 1390, 1975)(App.D, E) Finnemans and RCF made substantial redemption payments to Finnemans' land creditors to reduce the debt remaining for Finnemans and RCF to pay the "Owner's final right of redemption" pursuant to SDCL 21-52-7. But Arnoldys unfairly and unjustly ended up with all such cash benefits, and also title to the

land. Arnoldys have been unjustly enriched by such cash payments and title to the valuable land. The Circuit Court should be reversed, and Arnoldys should be required to return the cash redemption payments and rent, or return the title to the land.

### Argument

In *Dowling*, the Court determined there was a benefit to Dowlings because (i) Clement's planting spared Dowlings the expense of planting the crop, (ii) planting by Clement reduced expenses Dowlings needed to spend on the crop, and (iii) Dowlings could not deny they received a benefit from crop proceeds they did not pay the cost to plant.

Similarly in our case, (i) every dollar paid by Finnemans and RCF to Finnemans' land creditors was a benefit to Arnoldys, because (ii) the redemption payments made by Finnemans and RCF reduced the dollar amount Arnoldys had to pay to pay off the remaining debts against the land, and (iii) Arnoldys cannot deny they received a benefit from the redemption payments made by Finnemans and RCF that spared Arnoldys from having to pay such amounts to Finnemans' creditors to clear title to the land.

The Circuit Court stated the issues in its decision May 6, 2014, whether (1) Arnoldys received a benefit, (2) Arnoldys were aware that they were receiving a benefit, and (3) it would be inequitable to allow Arnoldys to retain the redemption money without paying for it. (App.A) The facts show that all three issues are clearly answered in the affirmative.



### No Assumption Of Risk

In *Dowling*, there was litigation pending that created a known risk. The Supreme Court stated the decision to plant was made while litigation regarding the right to possession of the land was pending. “A party that acts on the basis of such a calculation may be said to have assumed the risk that the calculation, depending as it does on a comparison of unknowns, will be revealed to be wrong.”

In contrast, RCF and Finnemans did not take a risk involved in pending litigation because there was no pending litigation. The litigation was concluded with the judgment of foreclosure January 10, 2010, and all that remained was the statutory process of redemption.

As owner of the land Finnemans and RCF relied in good faith on our South Dakota redemption statutes in making redemption payments during the redemption period. Finnemans and RCF relied on SDCL 21-52-7: “Owner's final right of redemption.” The words of this statute are very clear. “The *owner*, his grantee, or successor in interest *shall at all times have the final right to redeem* after any and all redemptions as hereinafter provided shall have been made; and that right may be exercised by the *owner, his grantee, or his successor in interest* within fifteen days after the expiration of all other rights to redeem.” (Italics added)

Finnemans and RCF reasonably did not believe they were assuming any risk in making the statutory owner’s right of redemption

payments during the redemption period in a good faith effort to redeem the land, save the equity, and save Finnemans' home by paying down the debt on the land, which would make their owners' final right of redemption easier to make.

RCF made the land owners' statutory redemption in the FarmPro case as authorized by the statutes SDCL Ch. 21-52. The Sheriff issued an owner's Certificate of Redemption to RCF. In the FarmPro case the statutes and the Circuit Court correctly protected the land owner's final right of redemption.

#### Land Owner's Rights Were Not Protected In The Rabo Case

Finnemans and RCF reasonably relied upon SDCL 21-52-7 to protect their owner's final right of redemption. This is a time honored statute passed by the South Dakota legislature in 1949. Finnemans and RCF made no calculations of risk as was present in *Dowling*. Finnemans and RCF reasonably did not foresee any risk in making the land owner's redemption payments in a good faith effort to redeem the land, save the equity, and save Finnemans' home by paying down debt on the land.

In *Rabo* the legal process did not work as intended by the legislature. The *Rabo* litigation concluded with the Judgment and Decree of Foreclosure signed by Judge Delaney on January 10, 2010. All that remained was the statutory process of redemption. The Judgment and Decree of Foreclosure in paragraph 10 provides "*Defendant Rock Creek Farms is determined and adjudged to have the owner's right of redemption*

*for a period of one year and other redemption rights under SDCL Chapter 21-52.” (App.J)*

Reasonably relying on the Judgment and Decree of Foreclosure signed by Judge Delaney January 10, 2010, and relying on SDCL 21-52-7, Finnemans and RCF made substantial redemption payments within the redemption periods to pay Finnemans’ land creditors in a good faith effort to save the land, the equity, and Finnemans’ home by paying down debts on the land. (R. 1390, 1975) This was thought to be an honorable and right thing to do as legally authorized by statutes.

The cash buyers required a procedure through the Circuit Court whereby they would obtain clear title to the land they were ready and able to purchase. RCF filed a motion to determine amounts necessary to redeem, approve the buyers’ purchase, provide for satisfaction of judgments and liens, appoint a trustee to handle the purchase money and closing, and shorten the time for hearing, and a memorandum in support of the motion. Arnoldys filed a response resisting the motion.

Arnoldys filed a motion for Rule 60(b) relief requesting that the Circuit Court strip Finnemans and RCF of their land owner’s statutory right of redemption set out sixteen months before in the Judgment and Decree of Foreclosure signed by Judge Delaney January 10, 2010. (App.J)

Arnoldys wrongly argued that Finnemans waived their redemption rights in a clause in a Loan Restructure Agreement ten years earlier

October 13, 2004. The Loan Restructure Agreement provides a waiver of redemption rights in paragraph 12, which violates SDCL 44-1-8.

The problem with Arnoldys' argument is that a South Dakota statute clearly mandates that the owner's final right of redemption cannot be waived by contract. SDCL 44-1-8 commands that "*all contracts in restraint of the right of redemption from a lien are void.*"

The statute commands: "SDCL 44-1-8. *Forfeiture of property to satisfy obligation secured by lien or restraint of right of redemption void. All contracts for forfeiture of property subject to a lien in satisfaction of the obligation secured thereby and all contracts in restraint of the right of redemption from a lien are void.*"

This statute renders the entire Loan Restructure Agreement void. The statute declares: " *all contracts in restraint of the right of redemption from a lien are void.*"

In *United States v. Dennis Birchem*, (CA 8, 1996) 95-2519 SD the Eighth Circuit Court of Appeals recognized that South Dakota "state law prohibits the use of redemption waiver clauses, see SDCL 44-1-8." *Birchem* involved a federal FHA loan and federal law allows waiver of state redemption rights. But the Loan Restructure Agreement in this case provides in paragraph 11 that "South Dakota law applies to this Agreement.." South Dakota law prohibits the use of redemption waiver clauses. SDCL 44-1-8 mandates that "All contracts for forfeiture of property subject to a lien in satisfaction of the obligation secured thereby

*and all contracts in restraint of the right of redemption from a lien are void.”*

On May 26, 2011, Finnemans and RCF were ready to make the owner’s right of final redemption. They had the buyers lined up with cash to buy part of the land, and the money would pay off all Finnemans’ debt, and thereby save Finnemans’ equity in the unsold land and save their home by paying all the debt on the land.

But Finnemans and Rock Creek Farms did not foresee that on May 26, 2011, during the redemption period, and before the owner’s redemption period ended, while Finnemans and RCF still had the time and the buyers’ cash and the right to redeem, they reasonably did not foresee that Judge Delaney would ignore the statutes and strip their owner’s redemption rights from RCF by entering the Order Partially Vacating the Judgment May 26, 2011. (App.K) Arnoldys’ argument and the Circuit Court’s decision to strip the land owners’ legally protected redemption rights were based on an illegal waiver of redemption clause in the Loan Restructure Agreement in violation of SDCL 21-52-7 and SDCL 44-1-8. This was not a risk they could have reasonably foreseen.

The Court entered the Order Partially Vacating the Judgment during the redemption period before the owner’s redemption period ended, and while Finnemans and Rock Creek still had the time, the buyers’ cash, and the right to redeem as owner of the land.

The Circuit Court stripped the land owner of the statutory right to redeem the land in foreclosure without due process of law. There was no discovery and no evidentiary trial on the issue of waiver of redemption rights. The decision of the Circuit Court is arbitrary or unreasonable and must be reversed.

Finnemans and Rock Creek Farms were apparently mistaken in making redemption payments in good faith relying on the owner's right of redemption stated in the Judgment and Decree of Foreclosure January 15, 2010, and relying on SDCL 21-52-7 the owner's final right of redemption.

Based on Arnoldy's wrongful waiver argument the Circuit Court entered the Order Partially Vacating Judgment May 26, 2011, and stripped Finnemans and RCF of the land owner's right of redemption. (App.K) Without an evidentiary hearing the Circuit Court summarily decided Finnemans had waived their right of redemption in an illegal clause in a loan restructure agreement ten years before on October 13, 2004. Arnoldys' waiver argument and the resulting Order Partially Vacating Judgment are in direct violation of SDCL 44-1-8, where our legislature commands "*all contracts in restraint of the right of redemption from a lien are void.*" SDCL 44-1-8 is a time honored statute first passed by the South Dakota legislature in 1877. But it was not honored in this case. Arnoldys received the redemption payments, rent from the land,

land equity, and title the land *illegally* in violation of SDCL 21-52-7 and SDCL 44-1-8. Arnoldys were *unfairly and unjustly* enriched.

### Arnoldys Are Unjustly Enriched

In *Dowling*, the Supreme Court decided Dowlings received a benefit and had been enriched, but because there was an adequate legal justification for Dowlings' retention of that benefit, Dowlings had not been unjustly enriched. The Supreme Court held that Midland failed to establish that Dowlings had been *unjustly* enriched.

The instant case is factually different than *Dowling*. The evidence presented by Finnemans must be viewed in the light most favorable to the non-moving party (Finnemans), and reasonable doubts must be resolved against the moving party (Arnoldys). All reasonable inferences drawn from the facts must be accepted in favor of the non-moving party (Finnemans). The Circuit Court violated these rules.

Finnemans' evidence and law show that Arnoldys are unfairly and *unjustly* enriched. They were allowed to strip the land owners' rights of Finneman and RCF in violation of SDCL 21-52-7 based on an illegal waiver clause in a loan agreement that is illegal and void under SDCL 44-1-8. There was no evidentiary trial subject to discovery and cross examination for the Circuit Court to properly determine the factual issues. The Circuit Court wrongly decided the factual issues in favor of Arnoldys in a summary judgment procedure in violation of SDCL 15-6-

56. Summary judgment is not the proper method to dispose of factual questions. *Stern Oil, Co. v. Brown*, 817 N.W.2d 395, 2012 S.D. 56.

Finnemans and RCF had an unconditional and absolute statutory owner's final right of redemption under SDCL 21-52-7. Finnemans were owners with Anderson in RCF. This statute commands that the *owner shall at all times have the final right to redeem*. SDCL 44-1-8 commands that "*all contracts* for forfeiture of property subject to a lien in satisfaction of the obligations secured thereby and *all contracts* in restraint of the right of redemption from a lien *are void*."

The general rule is that the law abhors a forfeiture. *Thunderstick Lodge, Inc. v. Reuer*, 1998 S.D. 110, 585 N.W.2d 819, citing *BankWest v. Groseclose*, (S.D. 1995) 95 SDO 442, 535 N.W.2d 860 (S.D. 1995), citing *Ford v. Hofer*, 79 S.D. 257, 261, 111 N.W.2d 214, 216 (1961).

"Forfeitures are considered as odious in the law, and are not favored by the courts. Courts of equity will seize upon slight circumstances to relieve a party therefrom." *Id.*

Finnemans and RCF were not assuming any risk in making the statutory owner's right of redemption and owner's final redemption payment in a good faith effort to redeem the land, save the equity and save Finnemans' home by paying off the debts on the land.

### Conclusion

Based on the foregoing, Finnemans request that the decision of the Circuit Court be reversed, that Arnoldys be declared liable to return



promptly to Finnemans and RCF all redemption monies paid by Finnemans, their receiver, and RCF, and if Arnoldys fail to promptly do so, then Arnoldys shall return title to the land to Finnemans and RCF.

Respectfully submitted this 4<sup>th</sup> day of March, 2016

BANGS, McCULLEN, BUTLER,  
FOYE & SIMMONS, L.L.P.

BY: /s/ **James P. Hurley**  
James P. Hurley  
P.O. Box 2670  
Rapid City, SD 57709-2670  
[jhurley@bangsmccullen.com](mailto:jhurley@bangsmccullen.com)  
Attorneys for Defendants-Appellants

**CERTIFICATE OF COMPLIANCE**

Pursuant to SDCL § 15-26A-66(b)(4), Appellants' counsel states that the foregoing brief is typed in proportionally spaced typeface in Bookman Old School 12 point. The word processor used to prepare this brief indicated that there are a total of 9,509 words in the body of the brief.

**/s/James P. Hurley**  
James P. Hurley

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on March 4, 2016, the foregoing *Appellants' Brief* was filed electronically with the South Dakota Supreme Court and that the original and two copies of the same were filed by mailing the same to:

**Shirley Jameson-Fergel**

Clerk, South Dakota Supreme Court  
500 East Capitol  
Pierre, SD 57501-5070  
[SCClerkBriefs@uds.state.sd.us](mailto:SCClerkBriefs@uds.state.sd.us)

and two true and correct copies of the same were provided by U.S. Mail to:

Elizabeth S. Hertz  
Vince M. Roche  
Davenport, Evans, Hurwitz & Smith  
P.O. Box 1030  
Sioux Falls, SD 57101-1030

Robert R. Schaub  
Larson, Sundall, Larson  
Schaub & Fox  
P.O. Box 547  
Chamberlain, SD 57325

Steven W. Sanford  
Cadwell Sanford Deibert & Garry  
200 East 10<sup>th</sup> Street, Suite 200  
PO Box 2498  
0899  
Sioux Falls, SD 57101-2498

Brian L. Utzman  
Smoot & Utzman, P.C.  
P.O. Box 899  
Rapid City, SD 57709-

Jay A. Alderman, DSA  
Pennington County State Attorney's Office  
300 Kansas City Street, #400  
Rapid City, SD 57701

Stephanie C. Bengford  
US Attorney's Office  
PO Box 238  
Sioux Falls, SD 57101

Armstrong Farms  
Vern Armstrong  
Hope Armstrong  
28868 Puckett Street  
Pierre, SD 57501

Stan Anker  
Anker Law Group  
1301 W. Omaha St., Ste. 207  
Rapid City, SD 57701

Haven L. Stuck  
Lynn, Jackson, Shultz  
& Lebrun  
P.O. Box 8250  
Rapid City, SD 57709

**/s/ James P. Hurley**

James P. Hurley

**APPENDIX**

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**Seventh Judicial Circuit Court**

**PO Box 230**

**Rapid City SD 57709-0230**

**(605) 394-2571**

---

**CIRCUIT JUDGES**

Jeff W. Davis, Presiding Judge  
Wally Eklund  
Robert Gusinsky  
Janine M. Kern  
Robert A. Mandel  
Craig A. Pfeifle  
Thomas L. Trimble

**MAGISTRATE JUDGES**

Scott M. Bogue  
Heidi L. Linnegren  
Shawn J. Pahlke

**COURT ADMINISTRATOR**

Kristi K. Erdman

**STAFF ATTORNEY**

Marya Tellinghuisen

May 6, 2014

**Robert R. Schaub**

Schaub Law Office, P.C.  
P.O. Box 547  
Chamberlain, SD 57325

**Brian L. Utzman**

Smoot & Utzman, P.C.  
14 St. Joseph Street, Ste. No. 200C  
P.O. Box 899  
Rapid City, SD 57709-0899

**RE:** FarmPro Servs., Inc. v. David Finneman, Connie Finneman, and Chad Finneman  
(Civ. 02-533)

Counsel:

I have reviewed Rock Creek Farms' ("RCF") Motion for Return of Redemption Monies and Brief in Support, Respondents' Brief in Opposition, and Petitioner's Reply Brief. The parties appeared before me on March 18, 2014, and I have considered the arguments presented. For the reasons set forth below, the Court exercises its equitable jurisdiction and will conduct a court trial to determine the issues.

**BACKGROUND**

The facts that may be relevant to Rock Creek Farms' ("RCF") Motion for Return of Redemption Monies are set forth in detail in the following published opinions: *Arnoldy v. Mahoney (Arnoldy I)*, 2010 S.D. 89, 791 N.W.2d 645; *Rabo Agrifinance, Inc. v. Rock Creek Farms (Rabo I)*, 2012 S.D. 20, 813 N.W.2d 122; *Rabo Agrifinance, Inc. v. Rock Creek Farms (Rabo II)*, 2013 S.D. 64, 836 N.W.2d 631; *L & L P'ship v. Rock Creek Farms*, 2014 S.D. 9, 843 N.W.2d 697, 705. No further recitation is needed for purposes of this motion.

**ANALYSIS**

First, the Court must determine whether it has equitable jurisdiction to determine the distribution of redemption payments. A foreclosure action is unquestionably equitable in nature, and "a court in equity has the power and the right to grant full and complete legal and equitable

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APP. 1

relief." *Alma Group, L.L.C. v. Weiss*, 2000 S.D. 108, ¶ 12, 616 N.W.2d 96, 99 (citing *First W. Bank, Sturgis v. Livestock Yards*, 466 N.W.2d 853, 856 (S.D. 1991); *Lounsberry v. Kelly*, 32 S.D. 160, 142 N.W. 180 (1913); *Am. Fed. Sav. & Loan Ass'n of Madison v. Mid-America Serv. Corp.*, 329 N.W.2d 124, 126 (S.D. 1983)). The rationale of this broad power is explained in *Application of Rudd*:

To safeguard the public from the social and economic dislocations which would result from widespread transfer of title and possession of real property to mortgagees through foreclosures precipitated by drought and the depression, the courts were clothed with power by the act to examine the circumstances of each particular case in the light of the emergency and the public purposes to be served by the act, and to grant equitable relief. In other words, it became the function of the courts to apply an equitable remedy to an equitable situation.

68 S.D. 287, 290, 1 N.W.2d 869, 870 (1942) (citing *Clark v. Hass et al.*, 129 Neb. 112, 260 N.W. 792). Although courts have broad remedial powers in a foreclosure action, courts are not empowered to enlarge or restrict the right of redemption set by statute. *VanGorp v. Sieff*, 2001 S.D. 45, ¶ 14, 624 N.W.2d 712, 715; *Rist v. Hartvigsen*, 70 S.D. 571, 576, 19 N.W.2d 830, 832 (1945) (citing 3 Wiltsie, Mortgage Foreclosure [sic], 5th Ed., 1660, § 1060; *Stocker v. Puckett*, 17 S.D. 267, 96 N.W. 91 (1903); *Way v. Hill*, 41 S.D. 437, 171 N.W. 206 (1919)). The inability of an equity court to extend the period of redemption or to prescribe a mode of exercising the right of redemption "does not deprive courts of their equitable jurisdiction and power to control the legal rights of both creditor and redemptioner under settled rules of equity jurisprudence applicable in cases of excusable mistake in attempts in good faith to exercise legal rights, or where acts of the parties give rise to an estoppel against the exercise or denial of such rights." *Way*, 41 S.D. 437, 171 N.W. at 207 (citing *Loomis v. Nat. Supply Co.*, 99 Kan. 279, 161 Pac. 627); see also 33 C.J.S. Executions § 441.

In this case, Petitioners are neither seeking to extend the period of redemption nor exercise their redemption rights in a manner not provided by statute. Petitioners acknowledge that RCF cannot redeem the land subject to the foreclosure actions. Instead, Petitioners ask the court to enforce their legal rights because they claim to have attempted in good faith to redeem the land. This Court has jurisdiction in equity to determine whether Petitioners made a *bona fide* mistake in their attempt to redeem.

In *Way v. Hill*, the plaintiff initiated an action for accounting after making partial payments in an attempt to redeem certain property. 41 S.D. 437, 171 N.W. at 206. The defendants retained the partial payments, and the South Dakota Supreme Court sought to determine "whether in a court of equity an execution creditor will be permitted to accept and retain partial payments on redemption, deny the debtor's right to redeem, and claim a deed under the execution sale." *Id.* at 207. Because the Defendant's appealed a denial of their motion to dismiss, the Court reviewed the pleadings and held that "the complaint does disclose facts which show that it would be inequitable and wholly unconscionable to permit the defendants to interpose the statutory period of redemption as a bar to the right to redeem, permit them to obtain title to the real property through the sheriff's deed, and at the same time retain payments made upon redemption." *Id.* Although the Court in *Way* did not conclude that a foreclosing creditor



can retain unsuccessful redemption payments, the Court considered the issue along with the issues of the owners' right to redemption and estoppel. By even considering the issues, the South Dakota Supreme Court asserted subject matter jurisdiction in equity. Like the Court in *Way*, this Court has jurisdiction in equity to consider whether a creditor can retain both redemption payments and title to the property.

In addition, the Court must consider what procedure to use to determine the issues before the Court. Petitioners urge the Court to return the monies under the doctrine of unjust enrichment. "A person who has been unjustly enriched at the expense of another is required to make restitution to the other." *Hofeldt v. Mehling*, 2003 S.D. 25, ¶ 15, 658 N.W.2d 783, 788 (quoting Restatement of Restitution § 1 (1937)). Unjust enrichment occurs "when one confers a benefit upon another who accepts or acquiesces in that benefit, making it inequitable to retain that benefit without paying." *Id.* (citing *Parker v. W. Dakota Insurors, Inc.*, 2000 SD 14, ¶ 17, 605 N.W.2d 181, 187; *Juttelstad v. Juttelstad*, 1998 SD 121, ¶ 19, 587 N.W.2d 447, 451). To prevail on a claim for unjust enrichment, the claimant must prove that the recipient of a benefit was aware he was receiving a benefit, and it would be inequitable to allow the recipient to retain the benefit without paying for it. *Id.* ¶ 16 (citing *Action Mech., Inc. v. Deadwood Historic Pres. Comm'n*, 2002 SD 121, ¶ 21, 652 N.W.2d 742, 750; *Juttelstad*, 1998 SD 121, ¶ 19, 587 N.W.2d at 451; *Bollinger v. Eldredge*, 524 N.W.2d 118, 122-23 (S.D. 1994)); *Johnson v. Larson*, 2010 S.D. 20, ¶ 11, 779 N.W.2d 412, 416. Unjust enrichment contemplates an involuntary or nonconsensual transfer, unjustly enriching one party. The equitable remedy of restitution is imposed because the transfer lacks an adequate legal basis. *Johnson*, 2010 S.D. 20, ¶ 8, 779 N.W.2d at 416. The remedy of unjust enrichment may issue in an unsuccessful redemption attempt. See *Davis Mfg. & Supply Co. v. Coonskin Props., Inc.*, 687 P.2d 484, 486 (Colo. Ct. App. 1984) (citing *Rice v. Hilty*, 38 Colo. App. 338, 559 P.2d 725 (1976)).

Thus, to support the unjust enrichment claim, RCF must prove that (1) Arnoldys received a benefit, (2) Arnoldys were aware that they were receiving a benefit, and (3) it would be inequitable to allow Arnoldys to retain the redemption money without paying for it. This Court must hold a court trial to determine whether RCF has met its burden on these elements.

The Supreme Court of Illinois considered a factually similar issue in *Robinson v. Bailey*, 361 Ill. 458, 464, 198 N.E. 217, 219-20 (1935). In *Robinson*, judgment creditors executed on debtors' real property. Debtors confessed judgment to their daughter on a promissory note. The daughter redeemed. Creditors counterclaimed that the promissory note was fraudulent, and the court entered a decree on their counterclaim for redemptioner's failure to answer. The sheriff ultimately issued a deed to the creditors. Redemptioner then moved to vacate the decree because they were not issued a summons on the counterclaim, and the court vacated the decree. The redemptioner's money remained in the sheriff's possession, and the title to the real estate remained in the creditors' possession. The parties then agreed to a distribution of the redemption monies. The court ordered that the creditors re-convey the property to the redemptioner, and the creditors appealed. The Supreme Court of Illinois held that equity would not permit the creditors to accept the redemption money and claim title to the real estate. *Id.* 361 Ill. at 464, 198 N.E. at 219-20 (citing *Hilton v. Meier*, 257 Ill. 500, 100 N. E. 962 (1913)).



Although the redemption in *Robinson* was effective in the end, the case is similar to the case at hand because the sheriff acted pursuant to a judicial decree that was later vacated. In *Robinson*, the sheriff conveyed real estate in a good faith, but the conveyance could not stand when the court later vacated its decision. In the case at hand, if this Court finds that the sheriff accepted redemption money in good faith but that a subsequent vacation of judgment altered the legal effect of the redemption, the acceptance of redemption money cannot stand. Equity will require that the money be returned. However, this Court needs to determine whether RCF attempted to redeem in good faith. Evidence must be presented on these issues.

### CONCLUSION

This Court has jurisdiction in equity to determine whether the Finnemans made a bona fide mistake in their attempt to redeem and whether Arnoldys can retain both redemption payments and title to the property. The Court will hold a trial to determine whether RCF proved that (1) Arnoldys received a benefit, (2) Arnoldys were aware that they were receiving a benefit, and (3) it would be inequitable to allow Arnoldys to retain the redemption money without paying for it. Counsel are directed to contact the Court within 30 days to schedule a date for court trial.

Very Truly Yours,



Craig A. Pfeifle  
Circuit Court Judge  
Seventh Judicial Circuit

cc: James P. Hurley ✓  
Stan H. Anker & Stanton A. Anker  
Jay Alderman & Patrick Grode

ATTEST: Ranae Truman, Clerk of Courts

By: \_\_\_\_\_, Deputy  
(SEAL)

**RAPID CITY**

Charles L. Riter  
Allen G. Nelson  
James P. Hurley  
Michael M. Hickey  
Jerry L. Hoyer  
Rod Schlanger  
Daniel J. Duffy  
Jeffrey G. Hurd  
John H. Ratoffe  
Jens G. Westergaard  
Steven K. Nolan  
Gregory J. Hrandson  
Eric J. Pickar  
Sarah E. Baron-Henry  
Jacob M. Quinsley  
Kathleen Frankman  
Benjamin D. Trone  
Mark E. Marshall  
— Of Counsel —

**SIOUX FALLS**

Victoria M. Duell  
Kathryn H. Morrison

*Attorneys also admitted in  
Nebraska, North Dakota,  
Minnesota and Missouri*

**RAPID CITY**

First Interstate Gateway  
333 West Boulevard  
Suite 400  
P.O. Box 2670  
Rapid City, South Dakota  
57709-2670  
P: (605) 343-1040  
F: (605) 343-1503

**SIOUX FALLS**

5919 S. Remington Place  
Suite 100  
P.O. Box 88208  
Sioux Falls, South Dakota  
57109-8208  
(605) 339-6800  
(605) 339-6801



**BANGS McCULLEN**  
— LAW FIRM —

**Reply to Rapid City Office**

Writer's e-mail address: [jhurley@bangsmccullen.com](mailto:jhurley@bangsmccullen.com)

September 10, 2014

**HAND DELIVERED**

Honorable Craig Pfeifle  
Circuit Court Judge  
315 St. Joseph St.  
Rapid City, SD 57701

Re: FarmPro vs. Finneman  
Civ. #02-533

Dear Judge Pfeifle:

I enclose regarding the above matter courtesy copies of the following:

1. David and Connie Finnemans' Motion for Summary Judgment and Notice of Hearing Thereon.
2. David and Connie Finnemans' Brief in Support of Their Motion for Summary Judgment.
3. Finnemans' Statement of Undisputed Material Facts in Support of Finnemans' Motion for Summary Judgment.
4. Summary of Affidavit of David Finneman in Support of Finnemans' Motion for Summary Judgment.
5. Affidavit of David Finneman in Support of Finnemans' Motion for Summary Judgment.

If you have any questions or comments, do not hesitate to call or write.  
Thank you.

Sincerely,

BANGS, MCCULLEN, BUTLER,  
FOYE & SIMMONS, L.L.P.

James P. Hurley

JPH:dme

Enc.

cc: David and Connie Finneman  
Brian L. Utzman  
Steve Sanford  
Robert R. Schaub  
Stan H. and Stanton A. Anker  
Jay Alderman  
John Mairose  
Vince M. Roche and Elizabeth S. Hertz

**INDEX OF FINNEMANS' SUMMARY JUDGMENT DOCUMENTS**

<b>NO.</b>	<b>DESCRIPTION</b>
A.	David and Connie Finnemans' Motion for Summary Judgment and Notice of Hearing Thereon
B.	David and Connie Finnemans' Brief in Support of Their Motion for Summary Judgment
C.	Summary of Affidavit of David Finneman
D.	Affidavit of David Finnemans in Support of Finnemans' Motion for Summary Judgment
E.	Index of Exhibits
F.	David and Connie Finnemans' Statement of Undisputed Material Facts

STATE OF SOUTH DAKOTA :  
SS  
COUNTY OF PENNINGTON :

IN CIRCUIT COURT  
SEVENTH JUDICIAL CIRCUIT

FARMPRO SERVICES, INC.,  
Plaintiff,

Civ. No. 02-533

vs.

DAVID FINNEMAN, CONNIE  
FINNEMAN, AND CHAD  
FINNEMAN,  
Defendants.

DAVID AND CONNIE FINNEMANS'  
MOTION FOR SUMMARY  
JUDGMENT AND NOTICE OF  
HEARING THEREON

David and Connie Finneman file this Motion for Summary Judgment pursuant to SDCL 15-6-56, and respectfully move this Court for an Order granting summary judgment in their favor for the reason there is no genuine issue of material fact and they are entitled to judgment as a matter of law.

This Motion is also in support of the Motion for Return of Redemption Monies filed by Rock Creek Farms General Partnership.

This Motion for Summary Judgment is supported by the Affidavit of David Finneman and attached Exhibits, Finnemans' Statement of Undisputed Material Facts, and Finnemans' Brief in support thereof.

Dated this 10 day of September, 2014.

BANGS, McCULLEN, BUTLER,  
FOYE & SIMMONS, L.L.P.

BY: /s/James P. Hurley  
JAMES P. HURLEY  
Attorneys for Defendants  
333 West Blvd, Ste. 400;  
P.O. Box 2670  
Rapid City, SD 57709-2670  
(605) 343-1040 (phone)  
(605) 343-1503 (fax)  
[jhurley@bangsmccullen.com](mailto:jhurley@bangsmccullen.com)

**NOTICE OF HEARING**

TO: PARTIES ABOVE NAMED AND THEIR ATTORNEYS OF RECORD

YOU AND EACH OF YOU are hereby notified that the David and Connie Finneman' Motion for Summary Judgment in the above-captioned matter will come on for hearing before the Honorable Craig A. Pfeifle, Circuit Court Judge, at the Pennington County Courthouse in Rapid City, South Dakota, on Thursday, September 25, 2014, at the hour of 4:00 p.m., or as soon thereafter as counsel may be heard.

Dated this 10 day of September, 2014.

BANGS, McCULLEN, BUTLER,  
FOYE & SIMMONS, L.L.P.

BY: /s/James P. Hurley

JAMES P. HURLEY  
Attorneys for Defendants  
333 West Blvd, Ste. 400;  
P.O. Box 2670  
Rapid City, SD 57709-2670  
(605) 343-1040 (phone)  
(605) 343-1503 (fax)  
jhurley@bangsmccullen.com



### CERTIFICATE OF SERVICE

The undersigned hereby certifies that David and Connie Finnemans' Motion for Summary Judgment and Notice of Hearing Thereon was electronically filed through South Dakota's Odyssey File and Serve Portal and served upon the following individuals in the manner stated below:

Brian L. Utzman  
Attorney at Law  
P.O. Box 899  
Rapid City, SD 57709  
[blutzman@rushmore.com](mailto:blutzman@rushmore.com)

- ☒ U.S. Mail
- ☐ Odyssey File & Serve Portal
- ☐ Hand Delivery
- ☐ Facsimile Transmission
- ☐ Email

Steve Sanford  
Attorney at Law  
P.O. Box 2498  
Sioux Falls, SD 57101-2498  
[ssanford@cadlaw.com](mailto:ssanford@cadlaw.com)

- ☐ U.S. Mail
- ☒ Odyssey File & Serve Portal
- ☐ Hand Delivery
- ☐ Facsimile Transmission
- ☐ Email

Robert Schaub  
Attorney at Law  
P.O. Box 547  
Chamberlain, SD 57325  
[robertschaub@hotmail.com](mailto:robertschaub@hotmail.com)

- ☒ U.S. Mail
- ☐ Odyssey File & Serve Portal
- ☐ Hand Delivery
- ☐ Facsimile Transmission
- ☐ Email

Stan H. and Stanton A. Anker  
Attorneys at Law  
1301 W. Omaha St., #207  
Rapid City, SD 57701  
[sanker@ankerlawgroup.com](mailto:sanker@ankerlawgroup.com)  
[Stanton@ankerlawgroup.com](mailto:Stanton@ankerlawgroup.com)

- ☒ U.S. Mail (Stan H. Anker)
- ☒ Odyssey File & Serve Portal (Stanton A. Anker)
- ☐ Hand Delivery
- ☐ Facsimile Transmission
- ☐ Email

Jay Alderman  
Pennington County State's Attorney  
300 Kansas City St., #400  
Rapid City, SD 57701  
[jaya@co.pennington.sd.us](mailto:jaya@co.pennington.sd.us)

- ☒ U.S. Mail
- ☐ Odyssey File & Serve Portal
- ☐ Hand Delivery
- ☐ Facsimile Transmission
- ☐ Email

John Mairose  
Attorney at Law  
2640 Jackson Blvd., #3  
Rapid City, SD 57702  
[mairoselaw@msn.com](mailto:mairoselaw@msn.com)

- ☒ U.S. Mail
- ☐ Odyssey File & Serve Portal
- ☐ Hand Delivery
- ☐ Facsimile Transmission
- ☐ Email

Vince M. Roche  
Elizabeth S. Hertz  
Attorneys at Law  
P.O. Box 1030  
Sioux Falls, SD 57101-1030  
[vroche@dehs.com](mailto:vroche@dehs.com)  
[ehertz@dehs.com](mailto:ehertz@dehs.com)

- ☒ U.S. Mail (Vince M. Roche)
- ☒ Odyssey File & Serve Portal  
(Elizabeth S. Hertz)
- ☐ Hand Delivery
- ☐ Facsimile Transmission
- ☐ Email

Dated this 10 day of September, 2014.

/s/ James P. Hurley  
JAMES P. HURLEY

IN CIRCUIT COURT  
SEVENTH JUDICIAL CIRCUIT

Civ. No. 02-533

AFFIDAVIT OF  
DAVID FINNEMAN IN SUPPORT  
OF FINNEMANS' MOTION FOR  
SUMMARY JUDGMENT

1. I am married to Connie Finneman, and we have been farmers all of our adult lives. Up until the last several years we owned and operated about 16,700 acres of agricultural land, which included about 7,500 deeded acres in Meade County and Pennington County, and about 9,200 acres of land we purchased on two contracts for deed: (a) We purchased about 6,950 acres in Meade County on a contract for deed from L&L Partnership in 1996 and (b) we purchased about 2,250 acres in Meade County on a contract for deed from L&L



Partnership in 1999. I will sometimes refer to my wife and me as the Finnemans.

2. Financial times became difficult for us, and one of our mortgage creditors, FarmPro Services, Inc. (FarmPro), began foreclosure. The Sheriff's Certificate of Sale started our redemption period May 12, 2006. (Ex. 1) Another mortgage creditor, Rabo AgServices (Rabo), began foreclosure, and the redemption period began January 15, 2010. (Ex. 8) L&L Partnership began foreclosure on our contracts for deed in March 2010. A receiver was appointed to handle our income and make payments to our creditors during the redemption period in the Rabo case from January 15, 2010, through August 31, 2011. (Ex. 10)

3. The Finnemans had valuable land but little money to redeem their land. The Finnemans and Warrenn Anderson formed Rock Creek Farms General Partnership (RCF). The Finnemans put in the land, and Warrenn Anderson put money in to pay redemption and save the equity in the land. The Finnemans and their receiver and RCF made many partial redemption payments in a good faith effort to pay the debts on the land, and save our farm, our equity, and our home. The Finnemans understand from this Court's decision of May 6, 2014, that this Court has equitable jurisdiction to determine the distribution of the redemption payments. (Ex. 11)

4. David and Connie Finneman, individually and as partners in Rock Creek Farms General Partnership, ask this Court to enforce their legal rights, because they and their receiver and RCF have made many partial redemption

payments attempting in good faith to redeem their land, save their equity in their land that was earned over many years, and save their home.

5. The partial payments made in redemption by the Finnemans and their receiver and RCF have drastically reduced the amount of money the Arnoldys had to pay for redemption. This was a huge benefit for the Arnoldys that they were aware of and accepted. The Arnoldys knew these payments were a huge benefit, and they accepted the benefits without paying for them.

If we had just walked away from the land in April of 2002 when FarmPro sued in foreclosure and not have tried to redeem, we would not have made the partial redemption payments we did over the years. The Arnoldys would then have had to pay millions of dollars more to redeem by paying the remaining balance on the debts on the land without the benefit of our partial redemption payments of \$4,363,469. (Para. 20).

The Arnoldys now hold title to the land and the valuable minerals with millions of dollars of equity, and they have received a huge benefit from the partial redemption payments we made, which substantially reduced the dollars the Arnoldys had to pay to pay off the remaining debts and redeem the land.

6. The Finnemans and their receiver and their general partnership RCF, collectively the Finnemans, all made redemption payments to Finnemans' creditors in a good faith effort to pay down debt in the redemption period, reduce the amount of redemption remaining to be paid, and redeem their land and home from foreclosure. The Finnemans in good faith made partial redemption payments of \$4,363,469. (Para. 20)

These partial redemption payments benefited the Arnoldys. See paragraphs below and Finnemans' Statement of Undisputed Material Facts (SMF).

In addition, Finnemans' and Rock Creek's rent payments of \$1,476,000 were taken by Arnoldys and used by the Arnoldys for redemption. These payments obviously benefited the Arnoldys also. See paragraphs below and Finnemans' SMF. Our partial redemption payments and rents taken by Arnoldys total \$5,839,469. (Para. 20)

The Finnemans' partial redemption payments of \$4,363,469 plus the rent taken by the Arnoldys of \$1,476,000 (pp. 10, 11, 12, para. 15) benefited the Arnoldys in the amount of \$5,839,469. (Para. 20)

If the Finnemans had just walked away when the FarmPro redemption period began May 12, 2006 (see Ex. 1), and did not pay any partial redemption payments during the redemption period, the Arnoldys would have had to pay substantially more money to pay the debts on the land to redeem the land.

7. Partial Redemption Payments made by the Finnemans to Farm Credit Services of America (FCS):

Payments made by the Finnemans and their receiver to FCS that held a first mortgage on the 7,500 acres of deeded land are as follows (Exs. 10, 13):

DATE	EXHIBIT	AMOUNT
4.03.2006	Ex. 13, 73	\$ 24,978.62
4.03.2006	Ex. 4, 73	\$ 35,000.00
5.14.2007	Ex. 4, 73	\$ 22,226.81
5.14.2007	Ex. 4, 73	\$ 35,000.00

DATE	EXHIBIT	AMOUNT
5.14.2007	Ex. 4, 73	\$ 572.20
5.14.2007	Ex. 4, 65	\$ 7,524.93
7.11.2007	Ex. 4, 65	\$ 87.31
5.15.2008	Ex. 13, 73	\$ 35,000.00
5.15.2008	Ex. 13, 73	\$ 19,334.48
5.15.2008	Ex. 13, 73	\$ 543.34
7.17.2008	Ex. 13, 73	\$ 56.43
6.30.2009	Ex. 13, 73	\$ 1,000.00
8.14.2009	Ex. 13, 73	\$ 20,083.76
8.14.2009	Ex. 13, 73	\$ 35,000.00
4.23.2010	Ex. 10, item 105	\$ 53,251.66
2.25.2011	Ex. 10, item 140	\$ 48,797.52
7.13.2011	Ex. 10, item 173	\$ 76,281.26
		<u>\$414,738.32</u>

8. Partial Redemption Payments made by Finnemans to Rabo Ag Services (Rabo):

Partial Redemption Payments made by Finnemans to Rabo, that held a second mortgage on the 7,500 acres of deeded land, are as follows (Exs. 2, 6, and 7):

DATE	EXHIBIT	AMOUNT
7.17.2006	Ex. 2, Ck. #0101	\$ 50,275.00
9.28.2007	Ex. 7, Ck. #0114	\$ 51,480.00
9.29.2008	Ex. 6, Ck. #0239	\$ <u>51,500.00</u>
		<u>\$153,255.00</u>

9. Partial Redemption Payments made by Finnemans to Black Hills

Federal Credit Union (BHFCU):

Partial Redemption Payments made by the Finnemans to BHFCU that held a first mortgage on the Finnemans' farm home and ten acres are as follows (Ex. 12):

DATE	PAYMENT TYPE	AMOUNT
2006	Principal	\$ 4,618.61
	Interest	\$ 3,305.35
	Taxes & Insurance	\$ 2,598.50
2007	Principal	\$ 6,128.68
	Interest	\$ 4,004.60
	Taxes & Insurance	\$ 81.94
2008	Principal	\$ 6,131.76
	Interest	\$ 3,382.08
2009	Taxes & Insurance	\$ 6,545.68
	Interest	\$ 3,714.16
	Taxes & Insurance	\$14,139.90
2010	Principal	\$ 5,026.07
	Interest	\$ 3,414.65
2011	Principal	\$ 6,775.47
	Interest	\$ 2,383.41
	Taxes & Insurance	\$ 4,353.64
2012	Principal	\$ 5,603.86
	Interest	\$ 1,207.00
2013	Principal	\$ 5,698.91
	Interest	\$ 1,179.13
2014	Principal	\$ 3,372.80
	Interest	\$ 638.15
	Taxes & Insurance	\$ 2,984.20
7.28.14 ck. 7228		\$ 886.62
8.28.14 ck. 7218		\$ 886.82
		<u>\$99,061.99</u>

10. Partial Redemption Payments by Finnemans for Real Estate Taxes:

Partial Redemption Payments made by Finnemans for real estate taxes paid to Meade County and Pennington County are as follows (Ex. 4):

DATE	EXHIBIT	AMOUNT
5.12.2006	Ex. 5, p. 3	\$ 58,000.00
1.12.2010	Ex. 10, item 102, p. 1	\$ 27,368.98
4.29.2010	Ex. 10, item 109, p. 1	\$ 22,630.71
4.29.2010	Ex. 10, item 110, p. 1	\$ 20,105.77
2.22.2011	Ex. 10, item 139, p. 2	\$ 10,564.89
7.12.2011	Ex. 10, item 167, p. 3	\$ 21,720.83
7.12.2011	Ex. 10, item 168, p. 3	\$ 10,276.37
10.25.2010	Ex. 10, item 124, p. 2	\$ 8,942.96
10.26.2010	Ex. 10, item 125, p. 2	\$ 20,105.77
2.22.2011	Ex. 10, item 138, p. 2	\$ 21,720.83
11.01.2007	Ex. 4	\$ 51,347.00
12.01.2008	Estimated	\$ 50,000.00
12.01.2009	Estimated	\$ 50,000.00
		<u>\$372,784.11</u>

11. Partial Redemption Payments made by Finnemans to CLW

Financial, LLC (CLW):

Partial Redemption Payments made by Finnemans to CLW that took out Rabo Ag Services (Rabo) on the second mortgage on 7,500 deeded acres are:

DATE	EXHIBIT	AMOUNT
11.03.2010	Ex. 10, item 129, p. 2	\$62,825.00
3.08.2011	Ex. 10, item 143, p. 2	\$22,347.48
3.08.2011	Ex. 10, item 144, p. 2	<u>\$10,000.00</u>
		<u>\$95,172.48</u>

12. Partial Redemption Payments made by Finnemans to Arnoldys:

Partial Redemption Payments of \$759,337.39 were paid by Finnemans to Mike Arnoldy, and he accepted such payments. Such payments were made to extend the redemption period in the FarmPro Services, Inc. (FarmPro) foreclosure that held third mortgage on 7,500 deeded acres, as follows:

DATE	EXHIBIT	AMOUNT
5.10.2007	Ex. 5, p. 3	\$358,450.00
5.10.2007	Ex. 5, p. 4	\$216,139.00
5.10.2007	Ex. 5, p. 4	<u>\$184,748.39</u>
		<u>\$759,337.39</u>

13. Partial Redemption Payments made by Finnemans to L&L

Partnership (L&L):

Partial Redemption Payments by Finnemans as Contract for Deed buyers to (L&L) as CFD sellers that owned 9,200 acres subject to Finnemans' 1996 and 1999 Contracts for Deed are as follows:

DATE	EXHIBIT	AMOUNT
11.03.2004	The building on CFD land, Ex. 14	\$ 8,000.00
9.26.2006	Ex. 3	\$ 47,000.00
4.29.2010	Ex. 10, item 111, p. 1	\$ 75,000.00
11.03.2010	Ex. 10, item 128, p. 2	\$ 87,175.00
3.08.2011	Ex. 10, item 142, p. 2	\$ 96,569.00
7.13.2011	Ex. 10, item 172, p. 3	\$ 105,846.75
1.03.2006	Ex. 9, item 54, p. 1, 1996	\$ 24,178.79
1.05.2006	Ex. 9, item 55, p. 1, 1996	\$ 23,962.17
7.01.2006	Ex. 9, item 56, p. 1, 1996	\$ 48,971.47



DATE	EXHIBIT	AMOUNT
1.04.2007	Ex. 9, item 57, p. 1, 1996	\$ 48,359.55
7.09.2007	Ex. 9, item 58, p. 1, 1996	\$ 47,855.33
1.23.2008	Ex. 9, item 60, p. 1, 1996	\$ 47,121.94
7.02.2008	Ex. 9, item 62, p. 1, 1996	\$ 46,503.13
1.05.2009	Ex. 9, item 63, p. 2, 1996	\$ 45,604.84
7.13.2009	Ex. 9, item 64, p. 2, 1996	\$ 46,584.95
4.29.2010	Ex. 9, item 68, p. 2, 1996	\$ 62,759.27
11.03.2010	Ex. 9, item 69, p. 2, 1996	\$ 72,947.19
3.08.2011	Ex. 9, item 70, p. 2, 1996	\$ 80,808.41
7.13.2011	Ex. 9, item 71, p. 2, 1996	\$ 88,571.52
1.03.2006	Ex. 9, item 28, p. 1, 1999	\$ 4,715.90
1.05.2006	Ex. 9, item 29, p. 1, 1999	\$ 4,673.64
7.01.2006	Ex. 9, item 30, p. 1, 1999	\$ 9,551.53
9.26.2006	Ex. 9, item 31, p. 1, 1999, \$47,000 accounted for in Ex. 12 above	\$ .00
1.04.2007	Ex. 9, item 32, p. 1, 1999	\$ 9,432.18
7.09.2007	Ex. 9, item 33, p. 1, 1999	\$ 9,333.83
1.23.2008	Ex. 9, item 34, p. 1, 1999	\$ 9,190.79
7.02.2008	Ex. 9, item 35, p. 1, 1999	\$ 9,070.10
1.05.2009	Ex. 9, item 36, p. 1, 1999	\$ 8,894.89
7.13.2009	Ex. 9, item 37, p. 1, 1999	\$ 9,086.05
4.29.2010	Ex. 9, item 38, p. 1, 1999	\$ 12,240.73
		<u>\$1,190,008.95</u>



14. Partial Redemption Payment made by Rock Creek Farms to Arnoldy:

Partial Redemption Payment made by RCF General Partnership to Ann Arnoldy to redeem from the FarmPro mortgage foreclosure.

DATE	EXHIBIT	AMOUNT
9.12.2008	Ex. 5, p. 8	<u>\$1,280,000.00</u>

15. Rent Payments From the Land:

After the receivership ended the Finnemans and their general partnership RCF were entitled as owners of the land to the rent from the land to make redemption of their land. The receivership was completed in August 31, 2011. (Ex. 10) This Court ruled on January 15, 2010 that RCF was adjudged to have the owner's rights to redemption under SDCL Chapter 21-52. This Court then ruled on May 26, 2011, that Rock Creek's right of redemption would be vacated upon three conditions. The third condition was that RCF's right of redemption would not be vacated until "after all appeals from this Order have been fully determined." (Ex. 8) Thus, RCF was to receive the rent from the land to make redemption until all appeals were fully determined on February 20, 2014. (Ex. 8)

The Arnoldys took all the rents paid for 2012 and 2013 on the 7,500 acres of deeded land, and took the rents paid for 2012, 2013, and the first half of 2014 on the 9,000 acres of contract for deed land. If the Finnemans and RCF received the rent they would have used the rent payments as their receiver did

to continue to pay redemption payments to creditors and thereby reduce the amount remaining to be paid to redeem their land.

15A. Rent paid on the 7,500 acres of deeded land taken by the Arnoldys that helped them make redemption should have been paid to the Finnemans or RCF until all appeals were decided:

DATE	AMOUNT
January 2012, rents paid	\$144,000.00
July 2012, rents paid	\$144,000.00
January 2013, rents paid	\$144,000.00
July 2013, rents paid	<u>\$144,000.00</u>
Rent from 7,500 acres was taken by the Arnoldys which helped them make redemption. The rent amounts are estimates because the Finnemans do not have the exact amounts of rent received by the Arnoldys.	<u>\$576,000.00</u>

15B. Rent from the 9,000 acres of contract for deed land that the Arnoldys took that helped them make redemption which should have been paid to RCF until all appeals were decided (Ex. 8):

DATE	AMOUNT
January 2012, rents paid	\$180,000.00
July 2012, rents paid	\$180,000.00
January 2013, rents paid	\$180,000.00
July 2013, rents paid	\$180,000.00
January 2014, rents paid	<u>\$180,000.00</u>
Rents from 9,000 acres: The rent amounts are estimates because the Finnemans do not have the exact amounts received by Ann Arnoldy.	<u>\$900,000.00</u>

15C. RCF was entitled to receive the rents on the land to help make the owner's redemption after the receivership ended in August 31, 2011, and until all the appeals were completed February 19, 2014. (Ex. 8) However, the Arnoldys took the rents for 2012 and 2013 on the 7,500 acre deeded lands, and took the rents for 2012, 2013, and the first half of 2014 on the 9,000 acres of contract for deed land, and the Arnoldys used the rent to make redemption. The total rents that should have been paid to RCF to help make redemption until all appeals were fully decided, but were taken by the Arnoldys and used for to make redemption, are as follows:

$\$576,000 \text{ plus } \$900,000 = \$1,476,000$

16. The Arnoldys Received Substantial Benefits:

The Arnoldys received and accepted the substantial partial redemption payments made by Finnemans and their receiver and RCF. Such payments were real monetary benefits to the Arnoldys. The partial redemption payments made by the Finnemans and their receiver and RCF clearly made redemption much easier for the Arnoldys, because the amount of redemption the Arnoldys had to pay was substantially reduced by the partial redemption payments made by the Finnemans and their receiver and RCF.

Plus, the Arnoldys took a real monetary benefit in the form of the rents that should have been paid to RCF from the termination of the receivership August 31, 2011, (Ex. 10) until all appeals had been fully determined February 19, 2014. (Ex. 8) The Arnoldys used the rents to pay the reduced

remaining redemption amount after all of the payments made by the Finnemans and their receiver and RCF had been deducted.

As a result of the substantial benefits received, that is (a) the partial redemption payments made by the Finnemans and their receiver and their general partner RCF of \$4,363,469 (Para. 20), and (b) the rents received by the Arnoldys of \$1,476,000 (Para. 15), the Arnoldys were able to redeem the land for a substantially reduced amount of their own money. They were able to redeem for about \$6,159,000. (Para. 18) The Arnoldys therefore reaped a huge unearned windfall of equity in the land. The value of the land is at least \$18,966,000 computed at \$1,500 per acre for the 16,700 acres of land. (Ex. 16)

With the value of the Airport Farm at \$2,000 per acre, the unearned windfall of equity in the land is increased to at least \$20,491,000. The Arnoldys have clearly reaped a huge unearned windfall of at the expense of the Finnemans and their general partnership RCF. (Para. 27)

17. Value of the Land: The value of the 16,700 acres of land and minerals at \$1,500 per acre is based on comparable sales. (Ex. 16)

17A. In February of 2014 approximately 440 acres of 90% tillable land located 30 miles east of Rapid City in Pennington County were sold by Scot Eisenbraun for \$637,362 or \$1,449 per acre. (Ex. 16)

17B. In November of 2013 approximately 880 acres of 50% tillable and 50% grass land located 10 miles north of Wall in Pennington County were sold by Frank Anderson for \$1,250,000 or \$1,420 per acre. (Ex. 16)

17C. In February of 2014 approximately 320 acres of 85% tillable land located 40 miles east of Rapid City in Pennington County were sold by Bart Cheney for \$687,638 or \$1,450 per acre. (Ex. 16)

17D. In April of 2014 approximately 440 acres of 90% tillable land located 30 miles east of Rapid City in Pennington County were sold by Scot Eisenbraun for \$637,362 or \$1,449 per acre. (Ex. 16)

17E. In April of 2014 approximately 320 acres of 85% tillable land located 10 miles north of Quinn in Pennington County were sold by Kelly Girls Partnership for \$624,000 or \$1,950 per acre. (Ex. 16)

17F. In 2014 approximately 80 acres of tillable land located adjoins on the *east* side of Airport Farm near Rapid City in Pennington County were sold by Dan and Donna Tank for \$160,000 or \$2,000 per acre. (Ex. 16)

17G. Land adjoining the *west* side of Airport Farm in Pennington County was purchased by Rapid City for \$1,188,628 or \$8,739 per acre. The City of Rapid City purchased 136 acres of the Wally Byam site for \$1,186,600 or \$8,743 per acre. (Ex. 16)

17H. The comparable sales (Ex. 16) show that the value of the 16,750 acres of land and minerals is at least \$1,500 per acre as shown below:

LAND NAME	AMOUNT
Airport Farm 3,050 acres @ \$1,500 per acre	\$ 4,575,000.00
Colgan Farm 4,500 acres @ \$1,500 per acre	\$ 6,750,000.00
Elms Springs Farm 6,950 @ \$1,500 per acre	\$10,425,000.00
Red Barn and Owanka 2,250 acres @ 1,500 per acre	\$ <u>3,375,000.00</u>

LAND NAME	AMOUNT
Value of 16,700 acres of land and minerals. This value is approximate based on comparable sales. A more complete valuation study would have to be done by an appraisal.	<u>\$25,125,000.00</u>
With the value of the 3,050 acres of Airport Farm at \$2,000 per acre the value of the 16,700 acres is:	<u>\$26,650,000.00</u>

18. The Amount Arnoldys Paid to Redeem: The amount the Arnoldys paid for redemption of the land and minerals and three judgments are as follows (approximate amounts):

PAYEE	AMOUNT
Rabo/CLW	\$3,600,000.00
L&L Partnership	\$ 856,500.00
U.S.A., (Ex. 17)	\$1,246,246.00
Paid for three judgments	\$ 402,500.00
2012 real estate taxes (estimated based on past years)	\$ 50,000.00
2013 real estate taxes (estimated based on past years)	\$ 50,000.00
Total The amounts are estimates because the Finnemans do not have the exact amounts paid by Arnoldys.	<u>\$6,159,000.00</u>

19. The Arnoldys reaped a substantial unearned windfall:

	AMOUNT
Land and minerals value at \$1,500 per acre	\$25,125,000.00
Minus amounts Arnoldys paid for redemption (para. 18 above)	<u>(\$6,159,000).00</u>
The Equity of the Finnemans and RCF is A substantial unearned windfall reaped by Ann Arnoldy.	<u>\$18,966,000.00</u>
With the Airport Farm 3,050 acres value at \$2,000 per acre and the rest of the 13,650 acres at \$1,500 per acre, the Arnoldys reaped a huge unearned windfall of at least \$20,491,000 at the expense of the Finnemans and their general partnership RCF. (Para. 16)	\$20,491,000

20. Finnemans' Partial Redemption Payments:

The Finnemans, and their receiver and RCF (collectively the Finnemans), all made partial redemption payments to Finnemans' creditors in a good faith effort to pay down land debt, reduce the amount of redemption remaining to be paid, and redeem their land and equity from foreclosure. The Finnemans in good faith made the following partial redemption payments of \$4,363,469 (Para 20), plus the Finnemans' and RCF' rent payments taken by Arnoldy of \$1,476,000 (Para. 15), total \$5,839,469. The Finnemans' partial redemption payments of \$4,363,469 plus the rent taken by the Arnoldys of \$1,476,000 benefited the Arnoldys in the amount of \$5,839,469:

PAYEE	EXHIBIT	AMOUNT
Redemption payments by Finnemans to FCS	Ex. 13	\$ 414,738
Redemption payments by Finnemans to Rabo	Ex. 2, 6, 7	\$ 153,255
Redemption payments by Finnemans to BHFCU	Ex. 12	\$ 98,175
Redemption payments by Finnemans for taxes	Ex. 4, 10	\$ 372,784
Redemption payments by Finnemans to CLW	Ex. 10	\$ 95,172
Redemption payments by Finnemans to Arnoldy	Ex. 5	\$ 759,337
Redemption payments by Finnemans to L&L Partnership	Exs. 3, 9, 10, 14	\$1,190,008
Redemption payment made by RCF to Arnoldy to redeem from FarmPro	Ex. 5	\$1,280,000
Partial Redemption Payments by Finnemans, and their receiver and RCF		<u>\$4,363,469</u>
Plus, Finnemans' and RCF' rent received by Arnoldys		\$1,476,000
Benefits received by Arnoldys from Finnemans' partial redemption payments and rents taken by Arnoldys		<u>\$5,839,469</u>



21. The Finnemans request that prejudgment interest at 10% be calculated by a CPA on the benefits received by the Arnoldys. Prejudgment interest must be added to the above amounts as authorized by SDCL 21-1-13.1 (Ex. 15). The Finnemans request that the Arnoldys be required to pay the amount of such benefits plus prejudgment interest to the Finnemans and their general partnership RCF.

22. We paid and our receiver paid our money from crops and rent income and RCF paid redemption money to pay to our creditors to make partial redemption payments of \$4,363,469 on our land debts and stop interest accrual. (Para. 20) If we had walked away from foreclosure and not tried to redeem by paying partial redemption payments, the Arnoldys would have had to pay the debts and the interest accrued on the debts that we paid. Thus, the Arnoldys have clearly received a huge benefit from our partial redemption payments of \$4,363,469 and our rents of \$1,476,000. The Arnoldys have been unjustly enriched at our expense.

23. After the receivership ended August 31, 2011 (Ex. 10), the Finnemans and their general partnership RCF were entitled as owners of the land to the rent from the land to make redemption of their land until the appeals were fully determined. This Court ruled that the provision in the prior Judgment and Decree of Foreclosure of January 15, 2010, concerning the owner's redemption rights of RCF were not vacated until the conditions set out in paragraph 6 of the Order Partially Vacating Judgment and Decree of Foreclosure May 26, 2011, have been accomplished. The third condition is



"after all appeals from this Order have been fully determined." (Ex. 8) All appeals were not fully determined until February 19, 2014. (Ex. 8) Thus, the rents should have come to RCF after the receiver ended August 31, 2011, and until all appeals were fully determined February 19, 2014.

24. The Arnoldys (a) took the rents paid for 2012 and 2013 on the 7,500 acres of deeded land, and (b) took the rents paid for 2012, 2013, and the first half of 2014 on the 9,000 acres of contract for deed land before all appeals had been fully determined on February 19, 2014. (Ex. 8) If the Finnemans and RCF had received the rent we would have used the rent payments as the receiver did to continue to make redemption payments to creditors and thereby reduce the amount remaining to be paid to redeem the land.

Rent of \$567,000 paid on the 7,500 acres of deeded land taken by the Arnoldys was obviously a benefit that helped the Arnoldys make redemption. Such rent should have been paid to the Finnemans or RCF until all appeals were fully determined February 19, 2014. (Ex. 8)

Rent of about \$900,000 from the 9,000 acres of contract for deed land that the Arnoldys took that also helped them make redemption should have been paid to the Finnemans or RCF until all appeals fully determined February 19, 2014. (Ex. 8)

The Finnemans and their general partnership RCF were entitled to receive the rents of \$4,363,469 (Para. 15) on the land to help them make the owner's redemption after the receivership ended in August 31, 2011, (Ex. 10) and until all appeals were fully determined on February 19, 2014. (Ex. 8)

However, the Arnoldys took the rents of \$576,000 plus \$900,000 for a total of \$1,476,000 (Para. 15) and used our rent to help them make redemption.

25. The Arnoldys received substantial monetary benefits. Ann Arnoldy and Mike Arnoldy received the benefits of the partial redemption payments of \$4,363,469 made by the Finnemans and their receiver and Rock Creek. (Para. 20) Obviously such benefits made redemption much easier for the Arnoldys because the amount of redemption they had to pay was substantially reduced by such payments, plus they had our rent payments of \$1,476,000 to use to pay the remaining redemption amount that was reduced by the our partial redemption payments. (Ex. 15) They used our rents to make redemption.

26. As a result of the substantial benefits received, that is the partial redemption payments made by the Finnemans and their receiver and their general partner RCF and our rents received by the Arnoldys, the Arnoldys were able to redeem the land for a substantially reduced amount of money. The Arnoldys therefore received a huge unearned windfall at the expense of the Finnemans and their general partnership RCF.

27. Our land is valuable. I believe the value of our 16,700 acres of land and minerals is worth at least \$1,500 per acre including the potential for wind, energy, development, mining, and gravel. This value is based on comparable sales. (Ex. 16) The 16,700 acres at \$1,500 per acre is worth at least \$25,050,000.

I believe the value is actually higher because the location value of the Airport Farm of 3,050 acres is increased by encroaching urban development

from Rapid City, the minerals, and gravel, and is worth at least \$2,000 per acre, not \$1,500 per acre. Airport Farm is within the three mile development jurisdiction of Rapid City and borders the Rapid City Regional Airport on the north and east. This raises the value of the 16,700 acres \$1,525,000 to \$26,575,000. (3,050 ac. x \$2,000/ac. = \$1,525,000)

This value of \$2,000 per acre for the Airport Farm is supported by recent sales of comparable land. Land on the east of Airport Farm sold for \$2,000 an acre. Dan and Donna Tank sold 80 acres for \$160,000 (Ex. 16F), and land on the west sold for \$8,734 per acre. The City of Rapid City purchased 136 acres of the Wally Byam site for \$1,186,600 or \$8,743 per acre. (Ex. 16D) If there is a dispute as to the value of the Airport Farm or any of the 16,700 acres of land, minerals and gravel, the value will need to be determined by a Court approved appraiser. I have followed the value of tillable land in the area for years.

Following are comparable sales that I used to determine the value of the land.

27A. In February of 2014 approximately 440 acres of 90% tillable land located 30 miles east of Rapid City in Pennington County were sold by Scot Eisenbraun for \$637,362 or \$1,449 per acre.

27B. In November of 2013 approximately 880 acres of 50% tillable and 50% grass land located 10 miles north of Wall in Pennington County were sold by Frank Anderson at public auction for \$1,250,000 or \$1,420 per acre.

27C. In February of 2014 approximately 474 acres of 85% tillable land located 40 miles east of Rapid City in Pennington County were sold by Bart Cheney for \$687,638 or \$1,450 per acre.

27D. Land adjoining the west side of Airport Farm in Pennington County was purchased by the Rapid City for \$1,188,628 or \$8,739 per acre. The City of Rapid City purchased 136 acres of the Wally Byam site for \$1,186,600 or \$8,743 per acre.

27E. In April of 2014 approximately 320 acres of 85% tillable land located 10 miles north of Quinn in Pennington County were sold by Kelly Girls Partnership at public auction for \$624,000 or \$1,950 per acre.

27F. In 2014 approximately 80 acres of tillable land adjoining on the east side of Airport Farm near Rapid City in Pennington County were sold by Dan and Donna Tank for \$160,000 or \$2,000 per acre.

27G. In March of 2014 approximately 160 acres of 78% tillable land located 10 miles north of Wasta in Meade County were sold by Greg Krebsbach for \$240,000 or \$1,500 per acre.

27H. In March of 2014 approximately 1,553 acres of 85% tillable land located along Highway 34 North of Philip in Haakon County were sold by 7 Blackfoot Company at public auction for \$2,748,000 or \$1,770 per acre.

27I. In April of 2014 approximately 2,866 acres of 85% tillable land located along Highway 34 North of Philip in Haakon County in Pennington County were sold by 7 Blackfoot Company at public auction for \$4,567,990 or \$1,594 per acre.

27J. In March of 2014 600 acres of tillable land located along Highway 34 North of Philip in Haakon County in were sold by 7 Blackfoot Company at public auction for \$1,200,000 or \$2,000 per acre.

27K. The comparable sales (Ex. 16) show that the value of the 16,750 acres of land and minerals owned by the Finnemans is at least \$1,500 per acre. (Ex. 16; Para. 16 above)

28. The amount the Arnoldys paid for redemption of the land and minerals and three judgments was approximately \$6,205,246. (Ex. 17) With the 16,700 acres valued at \$1,500 per acre, the Arnoldys have reaped a substantial unearned windfall of \$18,966,000. The land and minerals are worth about \$25,125,000, minus the amount Arnoldys paid for redemption of about \$6,159,000 (Para. 18 above), which shows the Arnoldys reaped an unearned windfall of \$18,966,000. With Airport Farm valued at \$2,000 per acre and the remaining 13,650 acres valued at \$1,500 per acre, the Arnoldys reaped an even greater unearned windfall of \$20,491,000.

Even if Arnoldys pay us back the money we spent for redemption plus prejudgment interest, the Arnoldys will still have our equity of about ten million dollars.

29. The Finnemans made substantial partial redemption payments. The Finnemans and their receiver and their general partnership RCF all made payments to Finnemans' creditors in a good faith effort to pay down land debt, reduce the remaining amount of redemption, and redeem their land, their equity, and their home from foreclosure.

30. The Finnemans and their receiver and RCF in good faith made partial redemption payments of \$4,363,469 (Para. 20), plus RCF's rent

payments taken by the Arnoldys of \$1,476,000 (Ex. 15), total benefits of \$5,839,469 to the Arnoldys. (Para. 18)

31. Finnemans' Statement of Undisputed Material Facts and this Affidavit are submitted to prove that: (a) Arnoldys received a huge benefit from the *partial redemption payments* made in good faith by Finnemans and their receiver and RCF in an unsuccessful attempt at redemption, (b) Arnoldys received a huge benefit from *the rents* that Arnoldys took that should have been paid to RCF, (c) Arnoldys were aware that they were receiving such benefits, and (d) it would be inequitable to allow Arnoldys to retain title to the land, and retain our redemption payments and our rents without paying us for the same.

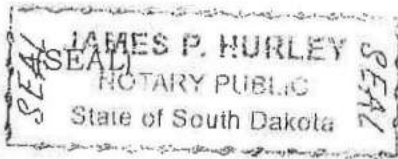
32. I believe that equity and fairness should not permit the Arnoldys to accept our partial redemption payments and our rents without reimbursing us for such amounts plus prejudgment interest. The Arnoldys should not be allowed to keep our redemption payments and our rents, and also claim title to the land.

33. The Finnemans request that this Court require the Arnoldys to reimburse the Finnemans and RCF for all of our partial redemption payments and the rents Arnoldys took plus prejudgment interest, and if the Arnoldys do not pay such amounts the Arnoldys should be required to turn title to the land back to Finnemans and RCF so we can redeem the land within a reasonable time by paying off the debts on the land.

Dated this 10 day of September, 2014.

David Finneman  
DAVID FINNEMAN

Subscribed and sworn to before me this 10 day of September, 2014.



James P. Hurley  
NOTARY PUBLIC

My Commission Expires: October 6, 2018

### CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Affidavit of David Finneman in Support of Finnemans' Motion for Summary Judgment was electronically filed through South Dakota's Odyssey File and Serve Portal and served upon the following individuals in the manner stated below:

Brian L. Utzman  
Attorney at Law  
P.O. Box 899  
Rapid City, SD 57709  
[blutzman@rushmore.com](mailto:blutzman@rushmore.com)

- ☒ U.S. Mail
- ☐ Odyssey File & Serve Portal
- ☐ Hand Delivery
- ☐ Facsimile Transmission
- ☐ Email

Steve Sanford  
Attorney at Law  
P.O. Box 2498  
Sioux Falls, SD 57101-2498  
[ssanford@cadlaw.com](mailto:ssanford@cadlaw.com)

- ☐ U.S. Mail
- ☒ Odyssey File & Serve Portal
- ☐ Hand Delivery
- ☐ Facsimile Transmission
- ☐ Email

Robert Schaub  
Attorney at Law  
P.O. Box 547  
Chamberlain, SD 57325  
[robertschaub@hotmail.com](mailto:robertschaub@hotmail.com)

- ☒ U.S. Mail
- ☐ Odyssey File & Serve Portal
- ☐ Hand Delivery
- ☐ Facsimile Transmission
- ☐ Email

Stan H. and Stanton A. Anker  
Attorneys at Law  
1301 W. Omaha St., #207  
Rapid City, SD 57701  
[sanker@ankerlawgroup.com](mailto:sanker@ankerlawgroup.com)  
[Stanton@ankerlawgroup.com](mailto:Stanton@ankerlawgroup.com)

- ☒ U.S. Mail (Stan H. Anker)
- ☒ Odyssey File & Serve Portal (Stanton A. Anker)
- ☐ Hand Delivery
- ☐ Facsimile Transmission
- ☐ Email

Jay Alderman  
Pennington County State's Attorney  
300 Kansas City St., #400  
Rapid City, SD 57701  
[jaya@co.pennington.sd.us](mailto:jaya@co.pennington.sd.us)

- ☒ U.S. Mail
- ☐ Odyssey File & Serve Portal
- ☐ Hand Delivery
- ☐ Facsimile Transmission
- ☐ Email

John Mairose  
Attorney at Law  
2640 Jackson Blvd., #3  
Rapid City, SD 57702  
[mairoselaw@msn.com](mailto:mairoselaw@msn.com)

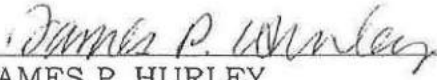
- ☒ U.S. Mail
- ☐ Odyssey File & Serve Portal
- ☐ Hand Delivery
- ☐ Facsimile Transmission
- ☐ Email



Vince M. Roche  
Elizabeth S. Hertz  
Attorneys at Law  
P.O. Box 1030  
Sioux Falls, SD 57101-1030  
[vroche@dehs.com](mailto:vroche@dehs.com)  
[ehertz@dehs.com](mailto:ehertz@dehs.com)

- ☒ U.S. Mail (Vince M. Roche)
- ☒ Odyssey File & Serve Portal  
(Elizabeth S. Hertz)
- ☐ Hand Delivery
- ☐ Facsimile Transmission
- ☐ Email

Dated this 10 day of September, 2014.

  
JAMES P. HURLEY

# INDEX OF EXHIBITS

EXHIBIT NO.	DESCRIPTION
1.	Sheriff's <u>Certificate of Sale</u> , May 12, 2006, in FarmPro v. Finneman, Civ. 02-533.
2.	Check No. 0101, July 17, 2006, Finnemans paid to <u>Rabo AgServices</u> \$50,275.
3.	Check No. 0103, September 26, 2006, Finnemans paid \$47,000 to <u>L&amp;L Partnership</u> as required by the Contract for Deed.
4.	2007 <u>real estate taxes</u> paid by Finnemans to <u>Meade County</u> and <u>Pennington County</u> .
5.	<u>Certificate of Redemption</u> , September 16, 2008, by Rock Creek Farms General Partnership, successor in interest to the described property David and Connie Finneman and receipt for \$1,280,000.
6.	Check No. 0239, September 29, 2008, that Finnemans paid <u>Rabo AgServices</u> \$51,500.
7.	Check No. 0114, September 28, 2009, Finnemans paid to <u>Ag Services of America</u> , predecessor of <u>Rabo AgServices</u> \$51,480.
8.	<u>Judgment and Decree of Foreclosure</u> in Rabo v. Finneman, et al, Civ. 09-1211, January 15, 2010.
9.	<u>Accounting of Ketel Thorstenson</u> , LLP, August 4, 2011, shows payments by Finnemans to <u>L&amp;L Partnership</u> on the 1996 and the 1999 contracts for deed.
10.	<u>Final Accounting of the Receiver</u> for David and Connie Finneman and Rock Creek Farms. August 24, 2011.
11.	Decision of this Court in this case, May 6, 2014.
12.	Payment Records of <u>Black Hills Federal Credit Union</u> plus check No. 7228, July 28, 2014, Finnemans paid BHFCU \$886.62, plus check No. 7218, August 28, 2014, Finnemans paid to BHFCU \$886.82.
13.	Payment Records of <u>Farm Credit Services</u> of America.
14.	Finnemans paid \$8,000 to <u>L&amp;L Partnership</u> for payment of the 40' x 60' red metal building as required by the Contract for Deed.

EXHIBIT NO.	DESCRIPTION
15.	SDCL 21-1-13.1. Prejudgment Interest statute.
16.	Comparable sales of agricultural land.
17.	Amounts Paid by Arnoldys to US \$1,246,246.49 April 23, 2012.
18.	Arnoldys' Notice of Redemption, March 18, 2011.

STATE OF SOUTH DAKOTA :  
SS  
COUNTY OF PENNINGTON :

IN CIRCUIT COURT  
SEVENTH JUDICIAL CIRCUIT

FARMPRO SERVICES, INC.,  
  
Plaintiff,  
  
vs.  
  
DAVID FINNEMAN, CONNIE  
FINNEMAN, AND CHAD  
FINNEMAN,  
  
Defendants.

Civ. No. 02-533

SECOND AFFIDAVIT OF  
DAVID FINNEMAN IN SUPPORT  
OF FINNEMANS' MOTION FOR  
SUMMARY JUDGMENT

Comes now David Finneman upon his oath, and makes this Second Affidavit in support of the Motion for Summary Judgment filed by David and Connie Finneman (the Finnemans) pursuant to SDCL 15-6-56.

This Affidavit supplements the Affidavit of David Finneman in Support of Finnemans' Motion for Summary Judgment dated September 10, 2014, which is incorporated herein, and supports the Motion for Summary Judgment filed by Rock Creek Farms General Partnership (RCF) for Return of Redemption Monies. I will sometimes refer to myself in this Affidavit David Finneman.

1. The 200 Acre Piece of Land.

My wife and I (the Finnemans) owned and operated about 16,700 acres of agricultural land. Of those acres about 7,500 were owned in fee simple and about 9,200 were purchased via contract for deed from L&L Partnership (L&L). Finnemans encumbered their interest in the land, except the 200 acres of the contract for deed property, with two mortgages: one to Rabo Agrifinance, Inc. (Rabo), and an inferior mortgage to FarmPro Services, Inc. (FarmPro). In May

2007, subject to the mortgages and liens of record, Finnemans transferred via quit claim deed their interests in their property to RCF, except the 200 acres of the contract for deed property. RCF is a South Dakota general partnership that includes the Finnemans and other outside investors as partners. The Finnemans put their land into RCF, and the outside investors put cash into RCF to pay off mortgages and liens to save Finnemans' land and home from foreclosure.

The 200 acres is described as Lot 4 and the Southeast Quarter of Section Thirty (30, Township One (1) North, Range Twelve (12) East, of the BHM Pennington County, South Dakota (about 199.08 acres) The 200 acre parcel was not mortgaged to Rabo or FarmPro.

The Sheriff's Certificate of Sale dated May 12, 2006, shows that the Finnemans' land subject to the FarmPro judgment dated January 21, 2003, was sold at the Sheriff's sale. But the 200 acres was not included in the FarmPro judgment, and therefore the 200 acres was not sold by the Sheriff. The Notice of Sheriff's sale dated April 12, 2006, does not include the 200 acres for sale by the Sheriff. (Ex. 1)

The Certificate of Redemption dated May 4, 2007, shows that the redemption by Michael Arnoldy did not include the 200 acres. (Ex. 2)

The Quit Claim Deeds dated May 24, 2007, and August 18, 2008, show that Finnemans did not transfer the 200 acres to Rock Creek Farms. (Ex. 3)

The Notice of Redemption of Real Property dated May 7, 2008, shows that the 200 acres were not involved in the redemption by Daniel Mahoney. (Ex. 4)

The Sheriff's Certificate of Sale in the Rabo case dated April 12, 2010, and the Amended Sheriff's Report of Sale dated April 20, 2010, shows that the Rabo mortgage was not on the 200 acres, that the Rabo judgment dated January, 15, 2010, was not on the 200 acres, and that the Sheriff did not sell the 200 acres at the Rabo Sheriff's sale on April 12, 2010. (Ex. 5)

The Sheriff's Certificate of Redemption dated July 8, 2008, in the FarmPro case, shows that the FarmPro mortgage was not on the 200 acres, and that Ann Arnoldy did not redeem the 200 acres. (Ex. 6)

The Sheriff's Certificate of Redemption dated September 16, 2008, shows that Ann Arnoldy did not redeem the 200 acres. (Ex. 7)

The Notice of Redemption dated March 11, 2011, in the FarmPro case shows that neither CLW Financial, LLC nor Ann Arnoldy redeemed the 200 acres. (Ex. 8)

The Sheriff's Deed dated June 2, 2011, shows that the Sheriff's Deed did not transfer to Ann Arnoldy the 200 acres. (Ex. 9)

The Judgment of Foreclosure dated April 19, 2012, in the L&L case shows in paragraph 10 that L&L is entitled to foreclose, subject to the redemptive rights set out in the Judgment of Foreclosure. (Ex. 10) The Finnemans were granted redemptive rights to the 200 acres by Judge Anderson in paragraphs 8 and 9 of the L&L Judgment of Foreclosure. (Ex. 10)

The L&L Judgment of Foreclosure shows in paragraph 4 that Ann Arnoldy did not succeed to the interest of the Finnemans or Rock Creek Farms in the 200 acres.

The L&L Judgment of Foreclosure in paragraph 6 provides that Ann Arnoldy does not have the right to redeem the 200 acres.

Paragraphs 8 and 9 of the L&L Judgment of Foreclosure provide that the Finnemans and Rock Creek Farms Partnership as an interested party may redeem the 200 acres described as Lot 4 and the Southeast Quarter of Section Thirty, Township One North, Range Twelve East of the BHM, Pennington County, South Dakota, within ten days after notice of entry of the Judgment of Foreclosure April 26, 2012, which was received May 7, 2012. (Ex. 10)

The Supreme Court in *L&L P'ship v. Rock Creek Farms, Finnemans, et al.*, 2014 S.D. 9 stated in paragraph 6 that the Rabo mortgage did not include the 200 acres, and in footnote 7 stated "Arnoldy was only substituted for RCF. Finnemans retained interest in the litigation as holders of the right to cure the default to the 200 acres not mortgaged to Rabo."

The L&L Judgment of Foreclosure granted Finnemans ten days to redeem in accordance with SDCL 21-50-3 which provides the party or parties in default not less than ten days to redeem. The L&L Judgment of Foreclosure specifically refers to SDCL 21-50-3 in paragraph 14. (Ex. 10)

The Finnemans timely tendered to L&L \$16,500 on April 11, 2012, and Rock Creek Farms Partnership timely tendered to L&L \$840,303.99 on April 12, 2012, for full payment of \$856,803.99 as required by paragraphs 8 and 9 of the Judgment of Foreclosure for redemption of the 200 acres of the L&L contract for deed and the 9,000 acres. Copies were sent as notice of redemption to the Arnoldys, Mahoney, United States, and the Pennington County Sheriff.



(Ex. 11) L&L acknowledged receiving the full payment in redemption from Finnemans and RCF. (Ex. 12)

Such payment satisfied in full the requirements of the Judgment of Foreclosure as to redemption of the 200 acres. The Judgment of Foreclosure stated in paragraph 13 "Simultaneous upon payment of the redemption amounts, the Plaintiffs shall execute and deliver a warranty deed to the redeeming party; and deliver a satisfaction of Mortgage from Laidlaw Family Partnership that was recorded in Meade County on November 13, 1997, in Book 69, Page 5370." The Finnemans did not receive a warranty deed or a satisfaction of mortgage from L&L as required by the Judgment of Foreclosure. A warranty deed and satisfaction of mortgage should have been sent by L&L to the Finnemans for the 200 acres in response to the payment of \$90,806.02 as provided by paragraphs 8 and 9 and 13 of the Judgment of Foreclosure.

(Ex. 10)

Such payment satisfied in full the final redemption of the 200 acres by the contract for deed vendee and owner Finnemans and their successor in interest RCF. Such redemption of the 200 acres was final redemption by the party in default and owner under SDCL 21-52-7 and SDCL 2-50-3. (Ex. 12) Because Finnemans and RCF had redeemed the 200 acres, no other later redemption was permitted by the L&L Judgment of Foreclosure or by the statutes. (Ex. 12)

But L&L Partnership and the Arnoldys obviously entered into some agreement to ignore the redemption to the 200 acres by the Finnemans and



RCF. Fifteen days after the Finnemans and RCF redeemed on April 11 and 12, 2012, Ann Arnoldy tendered to L&L \$769,259.18 on April 27, 2012, and then tendered \$91,701.64 on May 18, 2012. (Ex. 13) Their payment of \$769,259.18 was not to redeem the 200 acres. Their payment of \$91,701.64 on May 18, 2012, was to redeem the 200 acres, and states on the check memo "L&L 200 acres." The Arnoldys' check to redeem the 200 acres was not dated or delivered to L&L Partnership until May 18, 2012. The Finnemans and RCF had already redeemed the 200 acres 36 days before the Arnoldys tendered their payment of \$91,701.64 to redeem the 200 acres. (Ex. 15)

L&L admitted receiving full and timely payment in redemption upon tender of \$856,803.99 from the Finnemans and RCF on April 11 and 12, 2012, which included payment of \$90,806.02 to redeem the 200 acres. (Ex. 13) But L&L must have made some agreement with the Arnoldys. They ignored the prior redemption of the Finnemans and RCF, and accepted the money tendered by the Arnoldys 36 days after the Finnemans and RCF had timely redeemed in full the 200 acres.

L&L signed a Warranty Deed to the 200 acres to Ann Arnoldy and Michael Arnoldy dated January 14, 2014, that was filed in Pennington County on April 7, 2014. The Warranty Deed shows the transfer fee of \$600 was paid. The Warranty Deed was signed by Robert Laidlaw and Marvin Lutz. (Ex. 17)

L&L signed a Warranty Deed Warranty Deed filed April 07, 2014, in Meade County, from L&L Partnership to Ann Arnoldy and Michael Arnoldy for the contract for deed land in Meade County. The Warranty Deed shows a

transfer fee of \$1,800 paid. It was signed by Robert Laidlaw and Marvin Lutz.  
(Ex. 18)

This conduct of L&L Partnership and the Arnoldys violated Finnemans property rights in redemption of the 200 acres, violated this Court's Judgment of Foreclosure (Ex. 10), and violated the Supreme Court's decision in *L&L P'ship v. Rock Creek Farms, Finnemans, et al.*, 2014 S.D. 9.

The 200 acres is worth \$1,500 per acre for a market value of \$300,000. Through some agreement between L&L and the Arnoldys, L&L and Arnoldys ignored the Finnemans' redemption rights granted by this Court's Judgment of Foreclosure (Ex. 10) and allowed Arnoldys to redeem the 200 acres for only \$91,701.64. (Ex. 15) The Finnemans feel that the Arnoldys made a bold and unjust enrichment for themselves of over \$200,000. ( $\$300,000 - \$91,701.64 = \$208,298.36$ )

The deed transferring the 200 acres to Arnoldys lacks an adequate legal basis. The Arnoldys are aware of the value of real estate. Michael Arnoldy farms a lot of land, and Michael and Ann Arnoldy own a lot of land. They were aware they were receiving a huge benefit of over \$200,000 by taking the 200 acres for only \$91,701.64. The Arnoldys had no right to redeem the 200 acres because the Finnemans and RCF had already redeemed the 200 acres as they were permitted to do by the Judgment of Foreclosure. L&L Partnership and the Arnoldys all knew that the Finnemans and RCF had redeemed the 200 acres. This conduct of L&L and the Arnoldys unjustly enriched the Arnoldys.

The Finnemans believed in good faith they had the legal right to redeem the 200 acres as stated in the L&L Judgment of Foreclosure. (Paragraphs 8 and 9 of Ex. 10) Relying on that good faith belief they have prepared the 200 acres and planted a crop for 2015 harvest. If they are correct that they had the right to redeem, the Warranty Deed from L&L to Arnoldys April 7, 1014, (Ex. 15) should be vacated and a Warranty Deed to the 200 acres should be issued to the Finnemans.

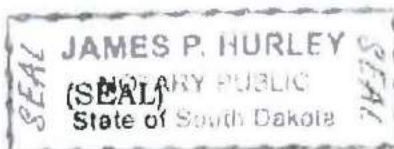
2. Partial Payments in Redemption to BHFCU.

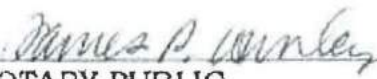
Attached is Exhibit 16 which supplements Exhibit 12 to the previously filed Affidavit of David Finneman in Support of Finnemans' Motion for Summary Judgment dated September 14, 2014. Exhibit 16 is entitled: Partial Redemption Payments made by Finnemans to Black Hills Federal Credit Union (BHFCU) through March 2010.

Dated this 27 day of March, 2015.

  
\_\_\_\_\_  
DAVID FINNEMAN

Subscribed and sworn to before me this 27 day of March, 2015.



  
\_\_\_\_\_  
NOTARY PUBLIC  
My Commission Expires: October 6, 2018



A Member-Owned, Not-For-Profit Cooperative

P.O. Box 1420, Rapid City, SD 57709-1420

January 13, 2016

CONNIE S FINNEMAN  
DAVID M FINNEMAN  
15006 LONG VIEW RD  
RAPID CITY SD 57703-9013

Dear Member

RE: Mortgage Status  
Mortgage on property at 15006 Long View Rd  
Rapid City, SD 57703-9013

At this time your loan balance is \$47,579.91. Black Hills Federal Credit Union has not received a payoff or a request for a payoff.

The next payment is due for January 1<sup>st</sup>, 2016.

Elda H  
Mortgage Servicing Specialist  
605-718-6165

Black Hills Federal Credit Union  
 225 Main Street, PO Box 1420  
 Rapid City SD 57709-1420  
 (605)343-0891 x:6679  
 Toll: (800)482-2428 x:6679

CONNIE S & DAVID M FINNEMAN  
 15006 LONGVIEW RD  
 RAPID CITY SD 57703-9013

Starting Balances	
Deferred Principal Balance:	.00
Principal:	53,493.32
Tax & Insurance:	1,073.67
Unapplied:	.00
Current Balances	
Principal:	47,579.91
Tax & Insurance:	1,110.07
Unapplied:	.00
Subsidy:	.00
Late Charge:	.00
Returned Check Charge:	.00
Miscellaneous Fees:	.00
Loss Draft:	.00
Property Address	
15006 LONGVIEW RD RAPID CITY SD 57701	

Page 1 Loan Activity Report January 08, 2016

Loan # 5018700

Tran Code	Due Date/ Date Paid	Amount Paid	Interest Paid	Principal/ Curtailement	T&I Paid	Misc Ins	Late Chrg/ Ret Chk Chrg	Subsidy/ FCL Fee	Unapplied Amount	Misc Fee/ Loss Draft	Principal Bal/ Tax&Ins Bal
ITI	01/01/15	.02	.00	.00	.02	.00	.00	.00	.00	.00	53,493.32
	01/02/15			.00			.00	.00		.00	1,073.69
REG	01/01/15	858.17	83.58	489.37	285.22	.00	.00	.00	.00	.00	53,003.95
	01/30/15			.00			.00	.00		.00	1,358.91
CUR	02/01/15	4.83	.00	.00	.00	.00	.00	.00	.00	.00	52,999.12
	01/30/15			4.83			.00	.00		.00	1,358.91
ITI	02/01/15	.06	.00	.00	.06	.00	.00	.00	.00	.00	52,999.12
	02/02/15			.00			.00	.00		.00	1,358.97
ITI	03/01/15	.06	.00	.00	.06	.00	.00	.00	.00	.00	52,999.12
	03/01/15			.00			.00	.00		.00	1,359.03
REG	02/01/15	944.12	82.81	490.14	285.22	.00	85.95	.00	.00	.00	52,508.98
	03/04/15			.00			.00	.00		.00	1,644.25
REG	03/01/15	858.17	82.05	490.90	285.22	.00	.00	.00	.00	.00	52,018.08
	03/31/15			.00			.00	.00		.00	1,929.47
LTC	04/01/15	28.65	.00	.00	.00	.00	28.65	.00	.00	.00	52,018.08
	03/31/15			.00			.00	.00		.00	1,929.47
CUR	04/01/15	28.65	.00	.00	.00	.00	.00	.00	.00	.00	51,989.43
	03/31/15			28.65			.00	.00		.00	1,929.47
ITI	04/01/15	.08	.00	.00	.08	.00	.00	.00	.00	.00	51,989.43
	04/01/15			.00			.00	.00		.00	1,929.55
DIS	04/01/15	-994.69	.00	.00	-994.69	.00	.00	.00	.00	.00	51,989.43
	04/21/15			.00			.00	.00		.00	934.86
ADJ	04/01/15	.00	.00	-28.65	.00	.00	28.65	.00	.00	.00	52,018.08
	04/30/15			.00			.00	.00		.00	934.86
REG	04/01/15	883.74	81.28	491.67	285.22	.00	25.57	.00	.00	.00	51,526.41
	04/30/15			.00			.00	.00		.00	1,220.08
TI	05/01/15	.08	.00	.00	.08	.00	.00	.00	.00	.00	51,526.41
	05/01/15			.00			.00	.00		.00	1,220.16
REG	05/01/15	883.92	80.51	492.44	279.24	.00	31.73	.00	.00	.00	51,033.97
	05/29/15			.00			.00	.00		.00	1,499.40
TI	05/31/15	.06	.00	.00	.06	.00	.00	.00	.00	.00	51,033.97
	06/01/15			.00			.00	.00		.00	1,499.46
REC	06/01/15	886.89	85.06	490.65	279.24	.00	.00	.00	31.94	.00	50,543.32
	06/30/15			.00			.00	.00		.00	1,778.78
TI	07/01/15	.08	.00	.00	.08	.00	.00	.00	.00	.00	50,543.32
	07/01/15			.00			.00	.00		.00	1,778.78

APP 48

Loan # 5018700

Tran Code	Due Date/ Date Paid	Amount Paid	Interest Paid	Principal/ Curtailment	T&I Paid	Misc Ins	Late Chrg/ Ret Chk Chrg	Subsidy/ FCL Fee	Unapplied Amount	Misc Fee/ Loss Draft	Principal Bal/ Tax&Ins Bal
ITI	08/01/15	.09	.00	.00	.09	.00	.00	.00	.00	.00	50,543.32
	08/01/15			.00			.00	.00		.00	1,778.87
REG	07/01/15	1,706.75	84.24	491.47	279.24	.00	28.79	.00	823.01	.00	50,051.85
	08/14/15			.00			.00	.00		.00	2,058.11
REG	08/01/15	.00	83.42	492.29	279.24	.00	.00	.00	-854.95	.00	49,559.56
	08/14/15			.00			.00	.00		.00	2,337.35
ITI	09/01/15	.11	.00	.00	.11	.00	.00	.00	.00	.00	49,559.56
	09/01/15			.00			.00	.00		.00	2,337.46
ITI	10/01/15	.12	.00	.00	.12	.00	.00	.00	.00	.00	49,559.56
	10/01/15			.00			.00	.00		.00	2,337.58
REG	09/01/15	886.00	82.60	493.11	279.24	.00	28.79	.00	.00	.00	49,064.19
	10/07/15			2.26			.00	.00		.00	2,616.82
DIS	10/01/15	-994.69	.00	.00	-994.69	.00	.00	.00	.00	.00	49,064.19
	10/29/15			.00			.00	.00		.00	1,622.13
ITI	11/01/15	.13	.00	.00	.13	.00	.00	.00	.00	.00	49,064.19
	11/01/15			.00			.00	.00		.00	1,622.26
REG	10/01/15	863.00	81.77	493.94	279.24	.00	8.05	.00	.00	.00	48,570.25
	11/05/15			.00			.00	.00		.00	1,901.50
DIS	11/01/15	-1,350.00	.00	.00	-1,350.00	.00	.00	.00	.00	.00	48,570.25
	11/12/15			.00			.00	.00		.00	551.50
REG	11/01/15	854.95	80.95	494.76	279.24	.00	.00	.00	.00	.00	48,075.49
	11/30/15			.00			.00	.00		.00	830.74
LTC	12/01/15	28.79	.00	.00	.00	.00	28.79	.00	.00	.00	48,075.49
	11/30/15			.00			.00	.00		.00	830.74
CUR	12/01/15	20.74	.00	.00	.00	.00	.00	.00	.00	.00	48,054.75
	11/30/15			20.74			.00	.00		.00	830.74
AL	12/01/15	.00	.00	-20.74	.00	.00	20.74	.00	.00	.00	48,075.49
	11/30/15			.00			.00	.00		.00	830.74
ITI	12/01/15	.05	.00	.00	.05	.00	.00	.00	.00	.00	48,075.49
	12/01/15			.00			.00	.00		.00	830.79
REG	12/01/15	883.74	80.13	495.58	279.24	.00	28.79	.00	.00	.00	47,579.91
	12/31/15			.00			.00	.00		.00	1,110.03
<b>Totals:</b>		<u>7,282.67</u>	<u>988.40</u>	<u>5,856.93</u>	<u>36.36</u>	<u>0.00</u>	<u>344.50</u>	<u>0.00</u>	<u>0.00</u>	<u>0.00</u>	
				<u>56.48</u>			<u>0.00</u>	<u>0.00</u>		<u>0.00</u>	



#### RAPID CITY

Charles L. Riter  
Allen G. Nelson  
James P. Hurley  
Michael M. Hickey  
Terry L. Hofer  
Rod Schlauger  
Daniel F. Duffy  
Jeffrey G. Hurd  
John H. Raforth  
Terry G. Westergaard  
Steven R. Nolan  
Gregory J. Erlandson  
Eric J. Pickar  
Sarah E. Baron Houy  
Jacob M. Quasney  
Kara L. Frankman  
Benjamin D. Tronnes  
Mark F. Marshall  
*Of Counsel*

#### SIOUX FALLS

Victoria M. Duehr  
Kathryn H. Morrison

*Attorneys also admitted in  
Nebraska, North Dakota,  
Minnesota and Missouri*



## BANGS McCULLEN

— LAW FIRM —

### Reply to Rapid City Office

Writer's e-mail address: [jhurley@bangsmccullen.com](mailto:jhurley@bangsmccullen.com)

July 10, 2015

The Honorable Craig A. Pfeifle  
Presiding Judge  
Seventh Judicial Circuit Court  
PO Box 230  
Rapid City, SD 57709-0230

Re: FarmPro Servs., Inc. v. David Finneman, Connie Finneman, and  
Chad Finneman (Civ. 02-533)

Dear Judge Pfeifle:

I represent David and Connie Finneman and their interest in Rock Creek Farms (the Fennemans). This letter is in response to the Court's letter dated July 7, 2015.

Reading through the pleadings the Fennemans have tried to limit their pleadings to equitable relief and unjust enrichment as set out in this Court's well reasoned Memorandum Decision dated May 6, 2014. This Court noted "In *Way v. Hill*, the plaintiff initiated an action for accounting after making partial payments in an attempt to redeem certain property."

Upon considering the *Way* case this Court held: "Like the Court in *Way*, this Court has jurisdiction in equity to consider whether a creditor can retain both redemption payments and title to the property.

Upon considering the applicable authorities this Court decided: "This Court has jurisdiction in equity to determine whether the Fennemans made a bona fide mistake in their attempt to redeem and whether Arnoldys can retain both redemption payments and title to the property." This Court stated it will hold a trial to determine whether (1) Arnoldys received a benefit, (2) Arnoldys were aware that they were receiving a benefit, and (3) it would be inequitable to allow Arnoldys to retain the redemption money without paying for it.

This Court concluded it would schedule a date for a trial.

#### RAPID CITY

First Interstate Gateway  
333 West Boulevard  
Suite 400  
P.O. Box 2670  
Rapid City, South Dakota  
57709-2670  
P. (605) 343-1040  
F. (605) 343-1503

#### SIOUX FALLS

5919 S. Remington Place  
Suite 100  
P.O. Box 88208  
Sioux Falls, South Dakota  
57109-8208  
P. (605) 339-6800  
F. (605) 339-6801



It is hoped that a listing of the Finnemans' pleadings and requests for relief will be helpful to the Court. As set out below the Finnemans request that this Court deny summary judgment and schedule this matter for trial.

### *The Finnemans' Pleadings*

The Finnemans filed their Motion for Summary Judgment, Affidavit of David Finneman and Exhibits, Brief in Support of their Motion for Summary Judgment, and Statement of Undisputed Facts, all dated September 10, 2014.

The Finnemans Verified Response dated September 18, 2014, was filed disputing Arnoldys' Statement of Undisputed Material Facts.

The Finnemans filed their Verified Response to Arnoldys' Reply to Finnemans' Motion for Summary Judgment and Statement of Material Facts dated September 22, 2014.

The Finnemans filed their Supplemental Brief in Opposition to Arnoldys' Motion for Summary Judgment dated March 30, 2015.

David Finneman filed his Second Affidavit dated March 27, 2015, in Support of Finnemans' Motion for Summary Judgment.

In their Brief in Support of their Motion for Summary Judgment the Finnemans stated that Finnemans and RCF have made many partial redemption payments in the redemption period in substantial dollar amounts in a good faith effort to pay the debts against the land and save their farm and their home. This Court has equitable jurisdiction to determine the distribution of redemption payments.

This Court of equity has the jurisdiction and power to determine if the Arnoldys will be permitted to accept and benefit from the substantial partial payments made by the Finnemans on redemption, deny the debtor's right to redeem, and also claim the deed to the land.

The partial payments made in redemption by RCF and the Finnemans drastically reduced the amount of money the Arnoldys had to pay to redeem the land. The Arnoldys have benefited from the redemption payments made by the Finnemans and they also have title to the land and the minerals, with millions of dollars of equity. The Arnoldys have been unjustly enriched.



Because of the substantial redemption payments made by Finnemans and RCF, the Arnoldys have reaped millions of dollars of unearned windfall. Like our Supreme Court instructed in *Way*, this Court has jurisdiction in equity to consider whether the Arnoldys can retain both the debtors' redemption payments and title to the valuable property.

If the Finnemans had not made any of the partial redemption payments they made over the years the Arnoldys would have had to pay millions of dollars more to redeem by paying the remaining balance on the debts on the land without the benefit of the partial redemption payments of \$4,363,469 made by the Finnemans, their receiver, and RCF.

The Arnoldys now hold title to the land and the valuable minerals in the land worth millions of dollars of equity. They also have received a huge benefit from the partial redemption payments of \$4,363,469, which substantially reduced the dollars the Arnoldys had to pay to pay off the remaining debts and redeem the land. (Aff. David Finneman, para. 20) The balance remaining to be paid by the Arnoldys was reduced to about \$6,159,000. (Aff. David Finneman, para. 18.)

With the land valued at \$1,500 per acre, the equity held by the Arnoldys in the land is at least \$18,966,000. With the Airport Farm valued at \$2,000 per acre and the remaining 13,650 acres valued at \$1,500 per acre, the equity in the land now held by the Arnoldys is at least \$20,491,000. (Aff. David Finneman, para. 19).

The Finnemans and their receiver and their general partnership RCF made redemption payments of \$4,363,469 to Finnemans' creditors in a good faith effort to pay down debt in the redemption period, reduce the amount of redemption remaining to be paid, and redeem the land and Finnemans' home from foreclosure. (Aff. David Finneman, paras. 4, 6)

The many partial redemption payments made by Finnemans and their receiver and their general partnership RCF benefited the Arnoldys by reducing the amount of debt that the Arnoldys had to pay to redeem, the Arnoldys knew of such benefits, and they accepted such benefits. (Aff. David Finneman, para. 20) (Ex. 18)

Rent payments from the land of \$1,476,000 from August 31, 2011, to February 19, 2014, were taken by the Arnoldys and used by the Arnoldys for redemption. These rent payments also obviously benefited the Arnoldys. (Aff. David Finneman, paras. 6, 15, 16, 24, 28, 29)



The partial redemption payments made by the Finnemans and their receiver and their general partnership RCF and the rents from the land taken by the Arnoldys from August 31, 2011, to February 19, 2014, total \$5,839,469. (Aff. David Finneman, para. 20)

The partial redemption payments made by Finnemans and their receiver and their general partnership RCF of \$4,363,469, plus the rents taken by the Arnoldys from August 31, 2011, to February 19, 2014, of \$1,476,000, benefited the Arnoldys in the amount of \$5,839,469. The Arnoldys knew of such benefits, and they accepted such benefits. (Aff. of Finneman, para. 20) (Ex. 18)

In the Second Affidavit of David Finneman dated March 27, 2015, the Finnemans request that this Court award them title to the 200 acres. They explain the 200 acres was not mortgaged to Rabo or FarmPro. The redemptions by Mike Arnoldy and Dan Mahoney did not include the 200 acres, and this land was not sold by the Sheriff. The Sheriff's Deed did not transfer the 200 acres to Ann Arnoldy. The Finnemans and RCF redeemed the 200 acres. The Finnemans should have had title to the 200 acres, but L and L entered into some agreement with the Arnoldys and Ann Arnoldy ended up with title to the 200 acres.

#### *Finnemans' Request Equitable and Other Relief*

1. In the Summary of Affidavit of David Finneman, and in the Affidavit of David Finneman at paragraph 33 the Finnemans request that this Court require that Arnoldys reimburse Finnemans and RCF within a reasonable time for all their partial redemption payments and the rents that Arnoldys took, plus prejudgment interest. If the Arnoldys do not pay such amounts the Arnoldys should be required to turn title to the land back to Finnemans and RCF so they can redeem the land within a reasonable time by paying off the debts on the land.

2. In the Second Affidavit of David Finneman at page 8 the Finnemans request that this Court award the 200 acres to the Finnemans.

3. The Finnemans conclude on page 26 of their Supplemental Brief in Opposition to Arnoldy's Motion of Summary Judgment, that genuine issues of material fact exist which preclude summary judgment. The Finnemans request that this Court deny summary and schedule this matter for trial.

If the Court has any questions or comments do not hesitate to call or write.

Sincerely,

BANGS, MCCULLEN, BUTLER,  
FOYE & SIMMONS, L.L.P.

A handwritten signature in cursive script, appearing to read "Jim Hurley".

James P. Hurley

CC: Vince Roche  
Alex M. Hagen  
Brian Utzman  
Robert Schaub  
Stan H. Anker  
Jay Alderman  
John H. Mairose

STATE OF SOUTH DAKOTA :  
COUNTY OF PENNINGTON : SS

IN CIRCUIT COURT  
SEVENTH JUDICIAL CIRCUIT

FARMPRO SERVICES, INC., )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
DAVID FINNEMAN, CONNIE )  
FINNEMAN, AND CHAD )  
FINNEMAN, )  
 )  
Defendants. )

51CIV02-000533

FINNEMANS' BRIEF  
ADDRESSING THE DOWLING  
CASE

Come now David and Connie Finneman (the Finnemans) and submit their Brief addressing the case *Dowling Family Partnership v. Midland Farms, LLC*, 2015 S.D. 50. The *Dowling* case was provided to the Court by counsel for the Arnoldys. It is hoped that this response may be helpful to the Court.

In the *Dowling* case, Midland Farms requested restitution from the Dowling Partnerships. Midland asserted that the Dowling Partnerships were unjustly enriched by receiving the proceeds from a winter wheat crop planted at the partial expense of a third party Clement. The Partnerships asserted that Midland breached a lease agreement with the Partnerships and should not be granted equitable relief.

The Court decided that Midland conferred a benefit on the Partnerships that received the proceeds from the winter wheat crop planted by Clement without paying the costs of planting the crop. The Court, however, noted numerous discrepancies with the claimed crop input costs, and rejected Midland's accounting of Clement's input costs as a measure of benefit received by the Partnerships.

In our case however, the value of the benefit received by the Arnoldys is not subject to dispute. The benefit received by the Arnoldys is in cash with a known set value, not the value of claimed crop inputs with disputed value.

51CIV02-000533

Finnemans' Brief Addressing the Dowling Case

Page 1 of 7



Unlike the *Dowling* case that involved crop inputs of questionable value, the value of the cash paid by Finnemans and Rock Creek in a good faith effort to redeem is payments in cash with a known fixed value, which is not in dispute.

Unlike crop inputs with questionable value, cash redemption payments made by the Finnemans and Rock Creek have a known fixed value. The cash redemption payments of the Finnemans and Rock Creek are set out in the Affidavit of David Finneman in Support of Finnemans' Motion for Summary Judgment September 11, 2014. See the Summary attached. The Finnemans and Rock Creek Farms made those substantial redemption payments to the creditors of the Finnemans pursuant to SDCL 21-52-7 "Owner's final right of redemption."

In *Dowling*, the Court determined (i) that Clement's planting spared the Partnerships the expense of planting the crop, (ii) the planting by Clement reduced the expenses the Partnerships needed to spend on the crop, and (iii) the Partnerships could not deny they received a benefit from the winter wheat crop they did not plant. Similarly in our case, every dollar paid by Finnemans and Rock Creek Farms to the Finnemans' creditors was a benefit to the Arnoldys, because it reduced the dollar amount the Arnoldys had to pay to pay off the remaining debts against the land. The Arnoldys cannot deny they received a benefit from the redemption payments made by the Finnemans and Rock Creek Farms that spared the Arnoldys from having to pay such amounts to Finnemans' creditors to clear title to the land.

In *Dowling*, there was litigation pending that created a known risk. In *FarmPro vs. Finneman et al*, however, the litigation was over. The litigation was concluded with a judgment of foreclosure and all that remained was the statutory process of redemption. As the owner of the land the Finnemans and Rock Creek Farms, relied in good faith on our South Dakota redemption statutes.

SDCL 21-52-7 provides: "Owner's final right of redemption--Time allowed after expiration of other redemption periods. The owner, his grantee, or

successor in interest *shall at all times have the final right to redeem* after any and all redemptions as hereinafter provided shall have been made; and that right may be exercised by the owner, his grantee, or his successor in interest within fifteen days after the expiration of all other rights to redeem.” (Italics added)

The words of this statute are very clear. The owner of the land or his grantee may redeem the land during the redemption period, and shall at all times have the final right to redeem after any and all other redemptions have been made; and that right may be exercised by the owner or his grantee within fifteen days after the expiration of all other rights to redeem.

In *FarmPro vs. Finneman et al*, on September 12, 2008, Rock Creek Farms made the owners’ statutory final redemption as authorized by SDCL 21-52-7. The sum of \$1,280,000 was paid to the Sheriff to redeem. The Sheriff issued an owner’s Certificate of Redemption for such payment. When such redemption was made there was no other litigation pending. The Arnoldys have received title to the land, and should not be allowed to also receive the redemption payment of \$1,280,000.

Rock Creek Farms had an unconditional and absolute statutory owner’s final right of redemption under SDCL 21-52-7. This statute commands that the *owner shall at all times have the final right to redeem*. Thus, Rock Creek did not assume any risk in making the statutory owner’s right of final redemption payment in a good faith effort to redeem the land, save the equity, and save Finnemans’ home.

Similarly in *Rabo Agrifinance, Inc. v. David M. Finneman; Connie S. Finneman; Rock Creek Farms, et al*, Civ. No. 09-1211, the litigation was over. The litigation was concluded with the Judgment and Decree of Foreclosure signed by Judge Delaney on January 10, 2010, and all that remained was the statutory process of redemption. The Judgment and Decree of Foreclosure in paragraph 10 provides “Defendant Rock Creek Farms is determined and



adjudged to have the owner's right of redemption for a period of one year and other redemption rights under SDCL Chapter 21-52."

As the owner of the land the Finnemans and Rock Creek Farms relied in good faith on the Judgment and Decree of Foreclosure and on our South Dakota redemption statutes, particularly SDCL 21-52-7, the owner's final right of redemption. The owner's final right of redemption cannot be waived by contract. SDCL 48-1-8 commands that "all contracts in restraint of the right of redemption from a lien are void."

The redemption payments made by the Finnemans and Rock Creek Farms are shown on the Affidavit of David Finneman in Support of Finnemans' Motion for Summary Judgment dated September 10, 2014.

The Finnemans and Rock Creek Farms made substantial redemption payments within the redemption periods to pay Finnemans' creditors, to save the substantial equity in the land, and to save the Finnemans' home. They foresaw no risk in making these substantial redemption payments because the Judgment and Decree of Foreclosure entered by Judge Delaney January 15, 2010, provided the owners right of redemption, they were the owners of the land, and SDCL 21-52-7 clearly provides the that the land owner has the owner's final right of redemption.

On May 26, 2011, the Finnemans and Rock Creek Farms had the buyers lined up to buy part of the land and pay off all of the Finnemans' debt with the proceeds, and thereby save the Finnemans' equity in the land. But the Finnemans and Rock Creek Farms did not foresee that on May 26, 2011, during the redemption period, and before the owner's redemption period ended, while Finnemans and Rock Creek still had the time and the right to redeem, they did not foresee that Judge Delaney would ignore the statutes and strip the owner's redemption rights from Rock Creek Farms, in the Order Partially Vacating the Judgment that the Court entered during the redemption period, and before the owner's redemption period ended, while Finnemans and Rock Creek still had the time and the right to redeem.

The Finnemans and Rock Creek Farms were apparently mistaken in making redemption payments in good faith relying on the Judgment and Decree of Foreclosure dated January 15, 2010, and relying on SDCL 21-52-7, the owner's final right of redemption, because after granting Rock Creek Farms the owners right of final redemption, during the redemption period and before the owner's redemption period ended and while Finnemans and Rock Creek still had the time and the right to redeem, Judge Delaney stripped away the owners right of redemption in violation of SDCL 44-1-8, which commands that "all contracts in restraint of the right of redemption from a lien are void."

As discussed above, the instant case is factually different than the case *Dowling Family Partnership v. Midland Farms, LLC*, 2015 S.D. 50. Thus, the *Dowling* case does not apply to our case.

Date this 3<sup>rd</sup> day of September, 2015

BANGS, McCULLEN, BUTLER,  
FOYE & SIMMONS, L.L.P.

BY: James P. Hurley  
JAMES P. HURLEY  
Attorneys for Defendant  
333 West Blvd., Suite 400; P.O. Box 2670  
Rapid City, SD 57709-2670  
(605) 343-1040 (phone)  
(605) 343-1503 (fax)  
Email: [jhurley@bangsmccullen.com](mailto:jhurley@bangsmccullen.com)



### CERTIFICATE OF SERVICE

The undersigned hereby certifies that Finnemans' Brief Addressing the Dowling Case, was electronically filed through South Dakota's Odyssey File and Serve Portal and served upon the following individuals in the manner stated below:

Brian L. Utzman  
Attorney at Law  
P.O. Box 899  
Rapid City, SD 57709  
[blutzman@rushmore.com](mailto:blutzman@rushmore.com)

☐ U.S. Mail  
☒ Odyssey File & Serve Portal  
☐ Hand Delivery  
☐ Facsimile Transmission  
☒ E-Mail

Steve Sanford  
Alex Hagen  
Attorneys at Law  
P.O. Box 2498  
Sioux Falls, SD 57101-2498  
[ssanford@cadlaw.com](mailto:ssanford@cadlaw.com)  
[ahagen@cadlaw.com](mailto:ahagen@cadlaw.com)

☐ U.S. Mail  
☒ Odyssey File & Serve Portal  
☐ Hand Delivery  
☐ Facsimile Transmission  
☒ E-Mail

Robert Schaub  
Attorney at Law  
P.O. Box 547  
Chamberlain, SD 57325  
[RobertRSchaub@hotmail.com](mailto:RobertRSchaub@hotmail.com)

☐ U.S. Mail  
☒ Odyssey File & Serve Portal  
☐ Hand Delivery  
☐ Facsimile Transmission  
☒ E-Mail

Stan H. and Stanton A. Anker  
Attorneys at Law  
1301 W. Omaha St., #207  
Rapid City, SD 57701  
[sanker@ankerlawgroup.com](mailto:sanker@ankerlawgroup.com)  
[stanton@ankerlawgroup.com](mailto:stanton@ankerlawgroup.com)

☐ U.S. Mail  
☒ Odyssey File & Serve Portal  
☐ Hand Delivery  
☐ Facsimile Transmission  
☒ E-Mail

Jay Alderman  
Pennington County State's Attorney  
300 Kansas City St., #400  
Rapid City, SD 57701  
[jaya@co.pennington.sd.us](mailto:jaya@co.pennington.sd.us)

☐ U.S. Mail  
☒ Odyssey File & Serve Portal  
☐ Hand Delivery  
☐ Facsimile Transmission  
☒ E-Mail

John H. Mairose  
Attorney at Law  
2640 Jackson Blvd., #3  
Rapid City, SD 57702  
[mairoselaw@msn.com](mailto:mairoselaw@msn.com)

☐ U.S. Mail  
☒ Odyssey File & Serve Portal  
☐ Hand Delivery  
☐ Facsimile Transmission  
☒ E-Mail

Vince M. Roche  
Elizabeth S. Hertz  
Attorneys at Law  
P.O. Box 1030  
Sioux Falls, SD 57101-1030  
[vroche@dehs.com](mailto:vroche@dehs.com)  
[ehertz@dehs.com](mailto:ehertz@dehs.com)

☐ U.S. Mail  
☒ Odyssey File & Serve Portal  
☐ Hand Delivery  
☐ Facsimile Transmission  
☒ E-Mail

Dated this 3<sup>rd</sup> day of September, 2015.

  
\_\_\_\_\_  
JAMES P. HURLEY

STATE OF SOUTH DAKOTA :  
SS  
COUNTY OF PENNINGTON :

IN CIRCUIT COURT  
SEVENTH JUDICIAL CIRCUIT

FARMPRO SERVICES, INC.,

Plaintiff,

vs.

DAVID FINNEMAN, CONNIE  
FINNEMAN, AND CHAD  
FINNEMAN,

Defendants.

Civ. No. 02-533

SUMMARY OF  
AFFIDAVIT OF  
DAVID FINNEMAN IN SUPPORT  
OF FINNEMANS' MOTION FOR  
SUMMARY JUDGMENT

Comes now David Finneman upon his oath, upon his personal knowledge, information, and belief, and makes this Summary of the Affidavit of David Finneman (Aff. David Finneman) in support of the Motion for Summary Judgment filed by David and Connie Finneman (the Finnemans) pursuant to SDCL 15-6-56.

1. Partial Redemption Payments:

The Finnemans and their receiver and their general partnership Rock Creek Farms (RCF) all made redemption payments to the Finnemans' creditors in a good faith effort to pay down debt in the redemption period, reduce the amount of redemption remaining to be paid, save their equity in the land, and redeem their farmland and home from foreclosure. The Finnemans in good faith made partial redemption payments of \$4,363,469. (Aff. David Finneman, para. 20)

2. Arnoldys Benefited From Partial Redemption Payments:

The Arnoldys received and accepted the substantial partial redemption payments made in good faith by Finnemans and their receiver and RCF of \$4,363,469. Such payments were real monetary benefits to the Arnoldys because the amount of redemption the Arnoldys had to pay was substantially reduced by the partial redemption payments made by the Finnemans and their receiver and RCF. (Ex. 18)

3. Rent Payments:

RCF was entitled to receive the rents on the land to help make the owner's redemption after the receivership ended in August 31, 2011, and until all the appeals were completed February 19, 2014. (Ex. 8) But the rent payments for this period of time of \$1,476,000 were taken by the Arnoldys and used by the Arnoldys for redemption. (Aff. David Finneman, para. 15)

4. Arnoldys Benefited From Rent Payments:

The rent payments taken by the Arnoldys of \$1,476,000 benefited the Arnoldys because they used the rent payments to make redemption. The Arnoldys used the rents to pay the reduced remaining redemption amount after all of the partial redemption payments made by the Finnemans and their receiver and RCF had been deducted. (Ex. 18)

5. Arnoldys' Unearned Windfall:

As a result of the substantial benefits received, that is (a) the partial redemption payments made by the Finnemans and their receiver and their general partner RCF of \$4,363,469 (Aff. David Finneman, para. 20), and (b) the



rents received by the Arnoldys of \$1,476,000 (Aff. of David Finneman, para. 15), the Arnoldys were able to redeem the land for a substantially reduced amount of their own money. They were able to redeem for about \$6,159,000. (Aff. David Finneman, para. 20)

In addition to benefiting from our partial redemption payments and rent payments, the Arnoldys reaped a huge unearned windfall of equity in the land.

6. Equity:

Even if the Arnoldys pay us back the partial redemption payments of \$4,363,469 (Aff. David Finneman, para. 20), and the rents received by the Arnoldys of \$1,476,000 (Aff. David Finneman, para. 15), the Arnoldys will still have huge equity in the land.


The value of the land is at least \$18,966,000 computed at \$1,500 per acre for the 16,700 acres of land (Ex. 16), and with the value of the Airport Farm at \$2,000 per acre, and the remaining acres at \$1,500 per acre, the unearned windfall of equity in the land is at least \$20,491,000. The Arnoldys have clearly reaped a huge unearned windfall of at the expense of the Finnemans and their general partnership RCF. (Aff. David Finneman, para. 27)

7. Request:

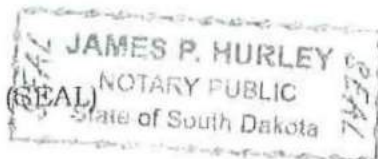
The Finnemans request that this Court require the Arnoldys to reimburse the Finnemans and RCF within a reasonable time for all of our partial redemption payments and the rents Arnoldys took, plus prejudgment interest, and if the Arnoldys do not pay such amounts the Arnoldys should be

required to turn title to the land back to Finnemans and RCF so we can redeem  
the land within a reasonable time by paying off the debts on the land.

Dated this 10 day of September, 2014.

  
\_\_\_\_\_  
DAVID FINNEMAN

Subscribed and sworn to before me this 10 day of September, 2014.



  
\_\_\_\_\_  
NOTARY PUBLIC

My Commission Expires: October 6, 2018

### CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Summary of Affidavit of David Finneman in Support of Finnemans' Motion for Summary Judgment was electronically filed through South Dakota's Odyssey File and Serve Portal and served upon the following individuals in the manner stated below:

Brian L. Utzman  
Attorney at Law  
P.O. Box 899  
Rapid City, SD 57709  
[blutzman@rushmore.com](mailto:blutzman@rushmore.com)

- ☒ U.S. Mail
- ☐ Odyssey File & Serve Portal
- ☐ Hand Delivery
- ☐ Facsimile Transmission
- ☐ Email

Steve Sanford  
Attorney at Law  
P.O. Box 2498  
Sioux Falls, SD 57101-2498  
[ssanford@cadlaw.com](mailto:ssanford@cadlaw.com)

- ☐ U.S. Mail
- ☒ Odyssey File & Serve Portal
- ☐ Hand Delivery
- ☐ Facsimile Transmission
- ☐ Email

Robert Schaub  
Attorney at Law  
P.O. Box 547  
Chamberlain, SD 57325  
[robertschaub@hotmail.com](mailto:robertschaub@hotmail.com)

- ☒ U.S. Mail
- ☐ Odyssey File & Serve Portal
- ☐ Hand Delivery
- ☐ Facsimile Transmission
- ☐ Email

Stan H. and Stanton A. Anker  
Attorneys at Law  
1301 W. Omaha St., #207  
Rapid City, SD 57701  
[sanker@ankerlawgroup.com](mailto:sanker@ankerlawgroup.com)  
[Stanton@ankerlawgroup.com](mailto:Stanton@ankerlawgroup.com)

- ☒ U.S. Mail (Stan H. Anker)
- ☒ Odyssey File & Serve Portal (Stanton A. Anker)
- ☐ Hand Delivery
- ☐ Facsimile Transmission
- ☐ Email

Jay Alderman  
Pennington County State's Attorney  
300 Kansas City St., #400  
Rapid City, SD 57701  
[jaya@co.pennington.sd.us](mailto:jaya@co.pennington.sd.us)

- ☒ U.S. Mail
- ☐ Odyssey File & Serve Portal
- ☐ Hand Delivery
- ☐ Facsimile Transmission
- ☐ Email

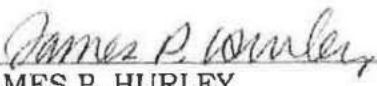
John Mairose  
Attorney at Law  
2640 Jackson Blvd., #3  
Rapid City, SD 57702  
[mairoselaw@msn.com](mailto:mairoselaw@msn.com)

- ☒ U.S. Mail
- ☐ Odyssey File & Serve Portal
- ☐ Hand Delivery
- ☐ Facsimile Transmission
- ☐ Email

Vince M. Roche  
Elizabeth S. Hertz  
Attorneys at Law  
P.O. Box 1030  
Sioux Falls, SD 57101-1030  
[vroche@dehs.com](mailto:vroche@dehs.com)  
[chertz@dehs.com](mailto:chertz@dehs.com)

- ☒ U.S. Mail (Vince M. Roche)
- ☒ Odyssey File & Serve Portal  
(Elizabeth S. Hertz)
- ☐ Hand Delivery
- ☐ Facsimile Transmission
- ☐ Email

Dated this 10 day of September, 2014.

  
JAMES P. HURLEY



## Seventh Judicial Circuit Court

P.O. Box 230  
Rapid City SD 57709-0230  
(605) 394-2571

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### CIRCUIT JUDGES

Craig A. Pfeifle, Presiding Judge  
Matthew Brown  
Jeff W. Davis  
Wally Eklund  
Robert Gusinsky  
Heidi L. Linngren  
Robert A. Mandel  
Jane Wipf Pfeifle

### MAGISTRATE JUDGES

Scott M. Bogue  
  
Todd J. Hyronimus  
Bernard Schuchmann

### COURT ADMINISTRATOR

Kristi K. Erdman

### STAFF ATTORNEY

Marya Tellinghuisen

October 20, 2015

Steven W. Sanford  
Alex M. Hagen  
P.O. Box 2498  
Sioux Falls, SD 57101

Vince Roche  
Elizabeth Hertz  
P.O. Box 1030  
Sioux Falls, SD 57101

**Re:** *FarmPro Servs., Inc. v. David Finneman, Connie Finneman, and Chad Finneman* (Civ. 02-533)

Counsel,

This case has been the subject of a large number of contested hearings. From each, and including the cross motions for summary judgment, I have received and thoroughly reviewed extensive pleadings. I have considered the arguments presented by all parties involved. For the reasons set forth below, the Court GRANTS Arnoldys' Motion for Summary Judgment.

### Background

As noted above, these cases have been extensively litigated, and have resulted in several appellate opinions. For purposes of these cross motions, I have reviewed and rely upon all prior pleadings and opinions, but feel it

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warranted to set forth a recitation of case activity specifically considered as part of my opinion herein.

On April 29, 1996, the Finnemans entered into a contract for deed with L&L Partnership ("L&L") for 6,950 acres. On October 13, 1999, the Finnemans entered into a second contract for deed with L&L for 2,250 acres. The Finnemans owned another 7,500 acres in fee simple. In total, the Finnemans owned 16,700 acres of farmland. Of the 16,700 acres, the Finnemans encumbered all but 200 acres of the contracts for deed property with mortgages to Rabo Agrifinance, Inc. ("Rabo") and FarmPro Services, Inc. ("FarmPro"). In an effort to stave off foreclosure, Finnemans transferred their interest in all of the property by quit-claim deed to Rock Creek Farms ("RCF") in May of 2007. RCF was an entity formed by the Finnemans and an outside investor, Warren Anderson.

In 2000, FarmPro had commenced foreclosure on its mortgage on the Finnemans' land. FarmPro received a final judgment in 2003 for \$1,080,681.02 plus interest, and executions were made on the judgment in 2006. FarmPro purchased the land at a sheriff's sale on May 10, 2006 for \$1,439,130.30 and signed its certificate of sale to Dr. Lee Ahrlin (Ahrlin). In April of 2007, Michael and Ann Arnoldy (Arnoldys), siblings, purchased an assignments of a judgments against the Finnemans. On May 4, 2007, the Arnoldys used these judgments to secure the foreclosed land from Ahrlin for \$1,765,232.50 and an additional \$2,000 as a contingency.

On May 10, 2007, Anderson paid the Sheriff \$822,000 to extend the owners' redemption period for one year pursuant to SDCL 21-52-13. During the extension period, Michael Arnoldy held a Certificate Redemption, which was the prevailing interest in the land. RCF and the Finnemans then purported to exercise their owner's right of redemption.

On May 8, 2008, David Finneman confessed judgment to Kenco, Inc. d/b/a Warne Chemical and Equipment, Co. (Kenco) for \$622,558.84. An acquaintance of the Finnemans, Daniel Mahoney, (who had introduced the Finnemans to RCF partner Anderson) purchased the judgment for \$10,000 on May 7, 2008. David Finneman also confessed judgment to Doug Kroeplin Ag Services, Inc. (Kroeplin) for \$254,731.59, which Mahoney purchased for \$5,000 on May 7, 2008. Also on May 7, 2008, Mahoney deposited \$1,219,734.29 with the Sheriff plus a \$2,000 contingency to redeem from Michael Arnoldy using the Kenco and Kroeplin judgments. Michael refused to accept the redemption payment in order to preserve his right to contest the validity of the Kenco and Kroeplin judgments. Mahoney received and held a certificate of redemption.

After Mahoney redeemed, Ann Arnoldy redeemed from Mahoney in July 2008, using two judgments she had purchased against Finnemans in favor of U.S. Bank Corporation Equipment Finance, Inc., and Pioneer Garage, Inc. Ann paid the Sheriff \$1,244,570.43, and the Sheriff paid Mahoney with Ann's money. Mahoney accepted the money, and the Sheriff issued Ann a certificate of redemption. The Finnemans purported to exercise their owners' right of

redemption on September 12, 2008 by RCF for \$1,280,000.00 which included an \$11,220.10 contingency. RCF received a certificate of redemption. The Arnoldys filed a declaratory judgment action in October 2008 contesting the validity of the Kenco and Kroeplin judgments.

In July of 2009, Rabo commenced a foreclosure action on its mortgage granted by Finnemans on approximately 17,000 of acres of farmland. Rabo commenced its action against Finnemans, RCF, and all parties who had or may have had an ownership or leasehold interest in the land. A sheriff's sale was held in April of 2010. The circuit court granted the right of redemption to Ann Arnoldy. Ann redeemed from an assignee of the purchaser of the sheriff's certificate and received a sheriff's deed on June 2, 2011, to the property covered by the Rabo mortgage, including all but 200 acres of the contracts for deed land. RCF never redeemed the property in the Rabo foreclosure, and the circuit court subsequently found that RCF and the Finnemans had waived their right to redeem.

In March of 2010, L&L commenced its foreclosure proceedings on the contracts for deed. The circuit court in the L&L foreclosure granted Ann Arnoldy equitable ownership of the real estate described in the contracts for deed and the right to cure the contracts for deed default under SDCL 21-50-3.

### **Summary Judgment Standards**

The standard for summary judgment is well settled. Summary judgment is appropriate where the "pleadings, depositions, answers to interrogatories,

and admissions on file, together with 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.” S.D.C.L. § 15-6-56(c). All reasonable inferences drawn from the facts must be viewed in favor of the non-moving party. *Morgan v. Baldwin*, 450 N.W.2d 783, 785 (S.D. 1990). The party moving for summary judgment has the burden of proving the absence of any genuine issue of material fact and that they are entitled to judgment as a matter of law. *Discover Bank v. Stanley*, 2008 S.D. 111, ¶ 16, 757 N.W.2d 756, 761. “The party resisting summary judgment is required to ‘show that [it] will be able to place sufficient evidence in the record at trial to support findings on all the elements on which they have the burden of proof.’” *Tolle v. Lev*, 2011 S.D. 65, ¶22, 804 N.W.2d 440, 446 (quoting *Lawrence County v. Miller*, 2010 S.D. 60, ¶ 14, 786 N.W.2d 360, 367). The nonmoving party must present specific facts showing that a genuine, material issue for trial exists. *Brandt v. County of Pennington*, 2013 S.D. 22, ¶7, 827 N.W.2d 871, 874. Each party filed a summary judgment motion, and each represented that no genuine issue of material fact exists. Each party has indicated that the issue is a legal one to be determined by the Court based upon existing facts.

### **Analysis**

The sole issue before this Court on the cross-motions for Summary Judgment can be expressed as competing requests for a judicial determination of whether the Arnoldys or Rock Creek Farms is entitled to the \$1,219,734.29



check deposited by Daniel Mahoney with the Pennington County Sheriff on May 8, 2008.<sup>1</sup> Redemption is the right to repay the amount paid for real property or any interest thereon, sold on foreclosure of a real estate mortgage or on special or general execution against the property of a judgment debtor, or upon the foreclosure of any lien upon such real property other than a lien for taxes or special assessment. S.D.C.L. § 21-52-1. "There is no constitutional right to redemption. Any redemption rights are creatures of statute." *In re Zirpel*, 53 B.R. 422, 425 (Bankr. D.S.D. 1985); See also *VanGorp v. Sieff*, 2001 S.D. 45, ¶ 14, 624 N.W.2d 712, 715. "A redemption by the mortgagor or his successor in interest terminates the effect of the sale and restores to him, free of the incumbrance of the mortgage foreclosed, his property... and leaves the property subject to junior liens." *Rist v. Andersen*, 70 S.D. 579, 582, 19 N.W.2d 833, 835 (1945).

"[A] sheriff's deed resulting from a regular foreclosure under a power of sale conveys a title free and clear of liens or encumbrances junior to the mortgage thus enforced." *Kruse v. State*, 73 S.D. 49, 55, 38 N.W.2d 925, 928 (1949). However, holders of junior liens can protect their interest by buying land at the sheriff's sale or by buying the certificate of sale from the auction purchaser, which is the right of redemption. S.D.C.L. § 21-52-5. Redemption is

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<sup>1</sup> I sent correspondence to the parties on July 7, 2015 to verify that all parties agreed this was the issue to be determined by the Court based the arguments asserted in the cross motions by each party, as the pleadings were lengthy and somewhat unclear. RCF and the Arnolds agreed I had correctly outlined the issue; the Finnemans responded with a prayer for relief based on theories of unjust enrichment and other equitable relief, citing no authority therefore and which were referenced only in an affidavit. I will not consider theories for relief which were raised by solely by affidavit in this fashion and were not presented nor have any basis in any motion pleading.

“the right to repay the amount paid for real property or any interest thereon, sold on foreclosure of a real estate mortgage or on special or general execution against the property of a judgment debtor, or upon the foreclosure of any lien upon such real property other than a lien for taxes or special assessment.”

S.D.C.L. § 21-52-1. When a junior lienholder redeems, he reimburses the certificate of sale holder the sum of the sheriff's auction price, post-auction interest, and money spent to preserve his interest in such property. S.D.C.L. § 21-52-14. If the purchaser is the holder of a lien other than that under which sale was made, which is superior to the lien of the redemption, the redemptioner shall likewise pay the amount of the additional lien. S.D.C.L. § 21-52-14. Holders of junior liens may redeem from a prior redemptioner, making payments as required in S.D.C.L. § 21-52-14, and paying in addition the amounts of any liens senior to their own, on which successive prior redemptions have been made. S.D.C.L. § 21-52-19. Redemptions need not redeem in the order of priority of their liens. *Id.* If a junior lienholder redeems, he is not required to pay off any junior lien-holders who fail to redeem. S.D.C.L. § 21-52-20. However, a redemptioner shall pay to the junior lien-holder who has made redemption the amount paid by him to make redemption and interest. *Id.*

On May 7, 2008, Mahoney deposited \$1,219,734.29 with the Sheriff to redeem from Michael Arnoldy using the Kencó and Kroeplin judgments. Michael refused to accept the redemption payment in order to preserve his

right to contest the validity of the Kenco and Kroeplin judgments. Because Mahoney was redeeming from Michael, Michael had the right to accept the money Mahoney tendered. Regardless of Michael's intentional decision to refuse the money, Mahoney received and held a certificate of redemption.

When Ann redeemed from Mahoney on July 3, 2008, she tendered \$1,244,570.43 in order to exercise that right of redemption. Mahoney accepted Ann's payment. Through Ann's payment, Mahoney and RCF were reimbursed for expenses for not getting the land through the Mahoney redemption. On September 12, 2008, RCF purported to exercise the owner's right of redemption by paying \$1,268,779.88 to Ann, and RCF subsequently received a certificate of redemption. The money being held by the Pennington County Sheriff's Office is the \$1,219,734.29 deposited by Mahoney.

The Finneman's farmland was subject to numerous mortgages. In July of 2009, Rabo commenced a foreclosure action on its mortgage on approximately 17,000 of acres of farmland. The Rabo mortgage was of a higher priority than the previously foreclosed upon and redeemed FarmPro mortgage. Under South Dakota law, regardless of whether or not RCF properly redeemed on the FarmPro mortgage on September 12, 2008, the Rabo mortgage foreclosure ended whatever junior liens were still on the property in question. There is no dispute that Ann Arnoldy successfully redeemed in the Rabo foreclosure proceeding, and is now the title owner of the land. RCF never redeemed the



property in the Rabo foreclosure, and RCF and the Finnemans ultimately waived their right to redeem.

Under South Dakota law, Mahoney and RCF took a calculated risk when it paid to redeem in the FarmPro mortgage, namely, that its redemption would be subject to a subsequent redemption in the foreclosure of a higher priority mortgage. Specifically, RCF (or Mahoney) could redeem land in the FarmPro foreclosure only to lose it by a later foreclosure of a higher priority lien. RCF's ownership claims were extinguished by Rabo's foreclosure and their failure to redeem in the Rabo foreclosure. *See generally Warren v. Slaybaugh*, 60 N.D. 609, 235 N.W. 689, 692 (1931). A claimant bears the risk of loss when it "has consciously assumed the risk by deciding to act in the face of a recognized uncertainty[.]" *Dowling Family P'ship v. Midland Farms*, 2015 S.D. 50, ¶ 25 (citing Restatement (Third) of Restitution & Unjust Enrichment § 5(3)(b) (2011)). "[A] party that acts on the basis of such a calculation may be said to have assumed the risk that the calculation, depending as it does on a comparison of unknowns, will be revealed to be wrong." *Id.* at ¶ 27 (citing Restatement (Third) of Restitution & Unjust Enrichment § 5 cmt. b(2) (2011)). RCF's calculated risk and decision to redeem in the FarmPro proceeding provides no basis for claiming a right to the \$1,219,734.29 deposited by Mahoney. As the person from whom Mahoney sought to redeem from, Michael Arnoldy had a right to accept the payment when it deposited in 2008, and he retains that right today.

### Conclusion

Based on the foregoing reasons, Arnoldys' Motion for Summary Judgment is hereby GRANTED; the other motions are DENIED. The \$1,219,734.29 check currently being held by the Pennington County Sheriff shall be released to Michael Arnoldy. Counsel for the Arnoldys is directed to prepare an Order consistent with this memorandum decision.

Very Truly Yours,



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Craig A. Pfeifle  
Circuit Court Judge  
Seventh Judicial Circuit

CC: James P. Hurley ✓  
Brian Utzman  
Robert Schaub  
Stan H. Anker & Stanton A. Anker  
Jay Alderman  
John H. Mairose

STATE OF SOUTH DAKOTA )  
: SS  
COUNTY OF PENNINGTON )

IN CIRCUIT COURT  
SEVENTH JUDICIAL CIRCUIT

FARMPRO SERVICES, INC.,

Plaintiff,

vs.

DAVID FINNEMAN et al.,

Defendants.

CIV. 02-533

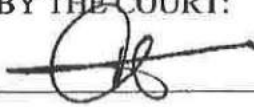
**ORDER GRANTING ARNOLDYS'  
MOTION FOR SUMMARY JUDGMENT**

Ann Arnoldy and Michael Arnoldy, Rock Creek Farms, and David and Connie Finneman filed cross-motions for summary judgment in the above-captioned matter. For the reasons stated in the Court's opinion letter dated October 20, 2015, which is incorporated herein by reference, and based upon the filings, records, and proceedings, the Court HEREBY ORDERS:

1. The motion for summary judgment by Ann Arnoldy and Michael Arnoldy is GRANTED;
2. The motion for summary judgment by Rock Creek Farms is DENIED;
3. The motion for summary judgment by David Finneman and Connie Finneman is DENIED;
4. The requests for equitable relief made in the Finnemans' July 10, 2015 letter to the Court are DENIED; and
5. The Pennington County Sheriff's office is authorized to release to Michael Arnoldy the \$1,219,734.29 currently in its possession.

Dated at Rapid City, South Dakota, this 24 day of November, 2015.

BY THE COURT:

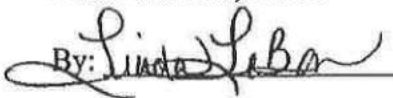


Hon. Craig A. Pfeifle  
Circuit Court Judge

ATTEST:



Ranae Truman, Clerk

By: , Deputy



Pennington County, SD  
FILED  
IN CIRCUIT COURT

NOV 25 2015

Ranae Truman, Clerk of Courts

By: , Deputy

STATE OF SOUTH DAKOTA   )  
  ) SS  
COUNTY OF PENNINGTON   )

IN CIRCUIT COURT  
SEVENTH JUDICIAL CIRCUIT

RABO AGRIFINANCE, INC. FKA  
AG SERVICES OF AMERICA, INC.  
AND RABO AGSERVICES, INC.,

Civil No. 09-1211

Plaintiff,

v.

**JUDGMENT AND DECREE  
OF FORECLOSURE**

DAVID M. FINNEMAN; CONNIE S.  
FINNEMAN; ROCK CREEK FARMS,  
SUCCESSORS IN INTEREST TO DAVID  
M. FINNEMAN AND CONNIE S. FINNEMAN,  
DBA AIRPORT FARMS; FARM CREDIT  
SERVICES OF AMERICA FKA FARM  
CREDIT SERVICES OF THE MIDLANDS,  
FCLA; BLACK HILLS FEDERAL CREDIT  
UNION; LUTZ/LAIDLAW PARTNERSHIP;  
AXA EQUITABLE LIFE INSURANCE  
COMPANY; LAIDLAW FAMILY  
PARTNERSHIP; TOM J. WIPF; AMY WIPF;  
JOHNNY JAY WIPF, DBA WIPF FARMS;  
JOANN WIPF; CEN-DAK LEASING OF  
NORTH DAKOTA, INC; SHEEHAN MACK  
SALES AND EQUIPMENT, INC.; MICHAEL  
ARNOLDY; ANN ARNOLDY; FARM  
CAPITAL COMPANY, LLC; DANIEL R.  
MAHONEY; PORTFOLIO RECOVERY  
ASSOCIATES, LLC; PFISTER HYBRID  
CORN CO.; KAUP SEED & FERTILIZER,  
INC.; JOYCE M. WOLKEN; CHARLES W.  
WOLKEN; STAN ANDERSON; DENNIS  
ANDERSON; KENT KJERSTAD; WILLIAM  
J. HUBER; KENDA K. HUBER; YU BLU SNI,  
LLC; U.S. BANCORP EQUIPMENT FINANCE,  
INC.; KENCO INC. DBA WARNE CHEMICAL  
& EQUIPMENT COMPANY, INC.; DOUG  
KROEPLIN AG SERVICES, INC; CREDICO,  
INC. DBA CREDIT COLLECTIONS BUREAU;  
SCOT D. EISENBRAUN; MELODY EISENBRAUN;  
BART CHENEY; HAL OBERLANDER, KEI  
OBERLANDER; RAY S. OLSEN; PATRICK X.  
TRASK; ROSE MARY TRASK; PENNINGTON

COUNTY, SOUTH DAKOTA; MEADE COUNTY,  
SOUTH DAKOTA; AND THE  
UNITED STATES OF AMERICA,

Defendants.

The Court having this day granted Plaintiff's Motion for Judgment on the  
Pleadings, and for cause shown;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Plaintiff shall have and recover judgment on the promissory notes attached to Plaintiff's Complaint from Defendant Note Makers in the sum of Two Million Four Hundred Thirty-Three Thousand Two Hundred Eight and 56/100ths Dollars (\$2,433,208.56) plus interest to the date of this Judgment in the amount of Eight Hundred Thirty-Eight Thousand Three Hundred Sixteen and 64/100ths Dollars (\$838,316.64) for a total of Three Million Two Hundred Seventy-One Thousand Five Hundred Twenty-five and 20/100ths Dollars (\$3,271,525.20).
2. Plaintiff has incurred costs, disbursements and attorney's fees in this action accruing from October 13, 2004 through the present in the amount of One Hundred Twenty Thousand Six Hundred Ninety-Two and 90/100ths Dollars (\$120,692.90), which shall be included in the Judgment amount hereof.
3. Interest shall accrue after this Judgment on the Mortgage debt at the rate of 12% per annum to the date of the Sheriff's sale. There shall be added to the amount of this Judgment all sums reasonably expended by Plaintiff for the protection of its interests in, or for protection and preservation of, the Mortgaged Property, and all other amounts

allowed by law, including without limitation, attorney fees, excepting only to the extent such amounts are already included in the amount of this Judgment.

4. The amount owed Plaintiff as above-described is secured by certain Collateral Real Estate Mortgages, copies of which are attached to Plaintiff's Complaint as Exhibits C, E, G and I (the "Mortgages") upon the following described real property in Pennington County, South Dakota and Meade County, South Dakota as set forth and attached to Plaintiff's Complaint as Exhibits L, M, N, O, P and Q (the "Mortgaged Property") and attached hereto, which Mortgages are valid and lawful liens and mortgages upon the Mortgaged Property enforceable according to their terms.

5. The Mortgaged Property shall be sold at public auction in the manner prescribed by SDCL Chapter 21-47 and 15-19 by the Sheriff of Pennington County, South Dakota, subject only to the following:

- (a) Real estate taxes remaining unpaid which may constitute a lien thereon;
- (b) Defendant Farm Credit Services Mortgage executed by David M. Finneman and Connie S. Finneman to Farm Credit to secure indebtedness of Seven Hundred Thousand Dollars (\$700,000.00) dated December 14, 1993 and recorded in Meade County on December 28, 1993 in Book 470, pp. 800-802 and recorded in Pennington County on January 3, 1994 in Book 53, Page 4169. Said lien is superior to Rabo's interests only with regard to the property set forth as (Exhibit L and Q) attached hereto.
- (c) Defendant Lutz/Laidlaw Partnership's lien against the real property herein, by virtue of its ownership of the property set forth in Exhibits M, N, and O attached hereto, which was sold to David M. and Connie S. Finneman on a contract for deed dated April 23, 1996.
- (d) Defendant Equitable's Mortgage executed by Lutz/Laidlaw Partnership to Equitable to secure indebtedness of One Million Seven Hundred Thousand



Dollars (\$1,700,000) dated March 16, 1995 and recorded in Pennington County on March 16, 1995 in Book 58, p. 645. Said lien is superior to Rabo's interests only with regard to the property set forth in (Exhibits M and N) attached hereto.

- (e) Defendant Equitable's Mortgage executed by Lutz Laidlaw Partnership to the Equitable Life Assurance Society of the United States to secure indebtedness of One Million Seven Hundred Thousand Dollars (\$1,700,000) recorded in Meade County on March 16, 1995 in Book 481, Page 709-714. Said lien is superior to Rabo's interests only with regard to the property set forth in (Exhibit O) attached hereto.
- (f) Defendant Laidlaw Family Partnership's Mortgage executed by Lutz Laidlaw Partnership, a South Dakota general partnership, to Laidlaw Family Partnership, a California Limited Partnership, to secure an indebtedness of One Million Two Hundred Twenty Thousand Dollars (\$1,220,000) dated November 13, 1997, recorded in Pennington County on November 13, 1997 in Book 69, p. 5370. Said lien is superior to Rabo's interests only with regard to the property set forth in (Exhibits M and N) attached hereto.
- (g) Defendant Black Hills Federal Credit Union's Mortgage executed by David M. Finneman and Connie S. Finneman to Black Hills Federal Credit Union to secure an indebtedness of One Hundred Eight Thousand Dollars (\$108,000) dated April 7, 1998 recorded in Pennington County, South Dakota on April 10, 1998 in Book 72, p. 3425. Said lien is superior to Rabo's interests only with regard to the property set forth in (Exhibit P) attached hereto.

With the above-described sole exceptions, the rights of Plaintiff in and to the Mortgaged Property by virtue of the Mortgages are prior and superior to the claims, liens, encumbrances and interests of any other party hereto.

6. The Mortgaged Property consists of several separate and distinct parcels and shall be sold at public auction by the Sheriff of Pennington County in parcels. It being expressly determined by the Court that the provisions of SDCL 15-19-11 are applicable, so that parcels in Meade and Pennington Counties may be sold by the Sheriff of



Pennington County. Pursuant to SDCL 15-19-15, Defendant Rock Creek Farms may, by written notice served on the Sheriff or other person making such sales, before the time of such sales, or personally at the time and place of sale, direct the order in which such parcels of the Mortgaged Property shall be sold, and the Sheriff or such other person making the sale shall offer the parcels accordingly. In the event, however, such designation is not made pursuant to SDCL 15-19-15, Plaintiff shall determine and designate the order in which the parcels are sold at such public auction.

7. Plaintiff may be a purchaser at the Sheriff's sale of any or all of the parcels by bidding at such sale for each parcel all or a portion of the debt secured by the Mortgages; provided, however, that the sum of Plaintiff's bids for all parcels shall not be less than the amount of this Judgment, together with interest accrued to the date of such sale.

8. Upon completion of the foregoing Sheriff's sale, the debt secured by the Mortgages shall be deemed fully paid and satisfied; provided, however, that, pursuant to SDCL 21-47-17, neither this Judgment nor such Sheriff's sale shall be considered a satisfaction of the assignment of rents agreement under the Mortgages.

9. The proceeds of the Sheriff's sale shall be applied in the order set forth in applicable statutes.

10. All Defendants, except those hereby adjudged to have superior interests, liens or encumbrances as described in ¶5 above, are hereby barred and foreclosed from any estate, interest, lien or other claim upon the Mortgaged Property, excepting only their statutory rights of redemption, it being adjudged and determined hereby that such

Defendants' rights of redemption are governed by SDCL Chapter 21-52, and, in the case of the United States of America, under 28 U.S.C. §2410. In particular, and notwithstanding any contrary or other provisions of the Mortgage or any related agreements, Defendant Rock Creek Farms is determined and adjudged to have the owner's right of redemption for a period of one year and other redemption rights under SDCL Chapter 21-52.

11. Plaintiff shall have the right hereafter to determine whether the receiver shall continue under previous Order of the Court or shall be terminated. In any event, as to any parcel purchased at the Sheriff's sale other than by Plaintiff, such receivership shall be terminated as to such parcel, and Defendant Rock Creek Farms shall be entitled to possession of such parcel and the rents, issues and profits therefrom until expiration of all periods of redemption.

Dated: 15 Jan, 2010

BY THE COURT:

By [Signature]  
Circuit Court Judge

ATTEST:

Ranae Truman, Clerk

By [Signature]  
Deputy Clerk  
(SEAL)

State of South Dakota } Seventh Judicial  
County of Pennington } Circuit Court  
I hereby certify that the foregoing instrument  
is a true and correct copy of the original as  
the same appears on record in my office this

JAN 15 2010

RANAE L. TRUMAN  
Clerk of Courts, Pennington County

By [Signature] Deputy

1:30pm  
Pennington County, SD  
FILED  
IN CIRCUIT COURT

JAN 15 2010

[Signature] Truman, Clerk of Courts  
Deputy

STATE OF SOUTH DAKOTA :  
COUNTY OF PENNINGTON :SS

IN CIRCUIT COURT  
SEVENTH JUDICIAL CIRCUIT

RABO AGRIFINANCE INC, et al.

Plaintiffs,  
vs.

DAVID M. FINNEMAN, et al.  
Defendants.

Civ. No. 09-1211

**Order Partially Vacating Judgment and  
Decree of Foreclosure and Order Granting  
Motion for Judgment on the Pleadings**

The Court having this day granted Arnoldys Motion to Partially Vacate Judgment and Decree of Foreclosure and Order Granting Motion for Judgment on the Pleadings, and for cause shown;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. The last sentence in paragraph 10 of the Judgment and Decree of Foreclosure is hereby stricken and vacated and is replaced with the following: Defendants David M. Finneman and Connie S. Finneman and Rock Creek Farms, successor in interest to David M. Finneman and Connie S. Finneman, are determined and adjudged to have waived all redemption rights under SDCL Chapter 21-52, pursuant to the terms of the loan restructure agreement (Rabo's Complaint, Exhibit K) and pursuant to the terms of the Stipulation as to Dismissal of Counterclaims Filed by Rock Creek Farms, David M. Finneman and Connie S. Finneman dated December 7, 2009 and Order Enforcing Stipulation as to Dismissal of the Counterclaims.
2. Added as the last sentence in paragraph 10 of the Judgment and Decree of Foreclosure is the following sentence: Michael Arnoldy is determined



and adjudged to have the owner's right of redemption for a period of one year under SDCL Chapter 21-52.

3. The words, "in the form submitted by Plaintiff" that appear on page two of the Order Granting Motion for Judgment on the Pleadings are hereby stricken and vacated.
4. The words, "in the form submitted" that appear on page three of the Order Granting Motion for Judgment on the Pleadings are hereby stricken and vacated.
5. The prior Judgment and Decree of Foreclosure and Order Granting Motion for Judgment on the Pleadings are attached and indicate the words that have been stricken and vacated.
6. The Judgment and Decree of Foreclosure is partially vacated upon the condition that the US Government's one-million dollar conviction lien against David M. Finneman and Connie Finneman be satisfied after Ann Arnoldy or Michael Arnoldy receive a deed to the foreclosed land from the Sheriff of Pennington County and after all appeals from this Order have been fully determined.

Dated at Rapid City, South Dakota, this 7<sup>th</sup> day of May, 2011


BY THE COURT:

(SEAL OF COURT)

  
Circuit Court Judge

ATTEST:

Ranae Truman, Clerk

by   
Deputy

State of South Dakota } Seventh Judicial  
County of Pennington } Circuit Court  
I hereby certify that the foregoing instrument  
is a true and correct copy of the original as  
the same appears on record in my office this

JUN - 7 2011

RANA L. TRUMAN  
Clerk of Courts, Pennington County

By  Deputy

Pennington County, SD  
FILED  
IN CIRCUIT COURT

MAY 26 2011 2:36

Ranae Truman, Clerk of Court  
By  Deputy

IN CIRCUIT COURT  
SEVENTH JUDICIAL CIRCUIT

Civil No. 09-1211

## JUDGMENT AND DECREE OF FORECLOSURE

v.

APP. 88

COUNTY, SOUTH DAKOTA; MEADE COUNTY,  
SOUTH DAKOTA; AND THE  
UNITED STATES OF AMERICA,

Defendants.

The Court having this day granted Plaintiff's Motion for Judgment on the Pleadings, and for cause shown;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Plaintiff shall have and recover judgment on the promissory notes attached to Plaintiff's Complaint from Defendant Note Makers in the sum of Two Million Four Hundred Thirty-Three Thousand Two Hundred Eight and 56/100ths Dollars (\$2,433,208.56) plus interest to the date of this Judgment in the amount of Eight Hundred Thirty-Eight Thousand Three Hundred Sixteen and 64/100ths Dollars (\$838,316.64) for a total of Three Million Two Hundred Seventy-One Thousand Five Hundred Twenty-five and 20/100ths Dollars (\$3,271,525.20).
2. Plaintiff has incurred costs, disbursements and attorney's fees in this action accruing from October 13, 2004 through the present in the amount of One Hundred Twenty Thousand Six Hundred Ninety-Two and 90/100ths Dollars (\$120,692.90), which shall be included in the Judgment amount hereof.
3. Interest shall accrue after this Judgment on the Mortgage debt at the rate of 12% per annum to the date of the Sheriff's sale. There shall be added to the amount of this Judgment all sums reasonably expended by Plaintiff for the protection of its interests in, or for protection and preservation of, the Mortgaged Property, and all other amounts

allowed by law, including without limitation, attorney fees, excepting only to the extent such amounts are already included in the amount of this Judgment.

4. The amount owed Plaintiff as above-described is secured by certain Collateral Real Estate Mortgages, copies of which are attached to Plaintiff's Complaint as Exhibits C, E, G and I (the "Mortgages") upon the following described real property in Pennington County, South Dakota and Meade County, South Dakota as set forth and attached to Plaintiff's Complaint as Exhibits L, M, N, O, P and Q (the "Mortgaged Property") and attached hereto, which Mortgages are valid and lawful liens and mortgages upon the Mortgaged Property enforceable according to their terms.

5. The Mortgaged Property shall be sold at public auction in the manner prescribed by SDCL Chapter 21-47 and 15-19 by the Sheriff of Pennington County, South Dakota, subject only to the following:

- (a) Real estate taxes remaining unpaid which may constitute a lien thereon;
- (b) Defendant Farm Credit Services Mortgage executed by David M. Finneman and Connie S. Finneman to Farm Credit to secure indebtedness of Seven Hundred Thousand Dollars (\$700,000.00) dated December 14, 1993 and recorded in Meade County on December 28, 1993 in Book 470, pp. 800-802 and recorded in Pennington County on January 3, 1994 in Book 53, Page 4169. Said lien is superior to Rabo's interests only with regard to the property set forth as (Exhibit L and Q) attached hereto.
- (c) Defendant Lutz/Laidlaw Partnership's lien against the real property herein, by virtue of its ownership of the property set forth in Exhibits M, N, and O attached hereto, which was sold to David M. and Connie S. Finneman on a contract for deed dated April 23, 1996.
- (d) Defendant Equitable's Mortgage executed by Lutz/Laidlaw Partnership to Equitable to secure indebtedness of One Million Seven Hundred Thousand

Dollars (\$1,700,000) dated March 16, 1995 and recorded in Pennington County on March 16, 1995 in Book 58, p. 645. Said lien is superior to Rabo's interests only with regard to the property set forth in (Exhibits M and N) attached hereto.

- (e) Defendant Equitable's Mortgage executed by Lutz Laidlaw Partnership to the Equitable Life Assurance Society of the United States to secure indebtedness of One Million Seven Hundred Thousand Dollars (\$1,700,000) recorded in Meade County on March 16, 1995 in Book 481, Page 709-714. Said lien is superior to Rabo's interests only with regard to the property set forth in (Exhibit O) attached hereto.
- (f) Defendant Laidlaw Family Partnership's Mortgage executed by Lutz Laidlaw Partnership, a South Dakota general partnership, to Laidlaw Family Partnership, a California Limited Partnership, to secure an indebtedness of One Million Two Hundred Twenty Thousand Dollars (\$1,220,000) dated November 13, 1997, recorded in Pennington County on November 13, 1997 in Book 69, p. 5370. Said lien is superior to Rabo's interests only with regard to the property set forth in (Exhibits M and N) attached hereto.
- (g) Defendant Black Hills Federal Credit Union's Mortgage executed by David M. Finneman and Connie S. Finneman to Black Hills Federal Credit Union to secure an indebtedness of One Hundred Eight Thousand Dollars (\$108,000) dated April 7, 1998 recorded in Pennington County, South Dakota on April 10, 1998 in Book 72, p. 3425. Said lien is superior to Rabo's interests only with regard to the property set forth in (Exhibit P) attached hereto.

With the above-described sole exceptions, the rights of Plaintiff in and to the Mortgaged Property by virtue of the Mortgages are prior and superior to the claims, liens, encumbrances and interests of any other party hereto.

6. The Mortgaged Property consists of several separate and distinct parcels and shall be sold at public auction by the Sheriff of Pennington County in parcels. It being expressly determined by the Court that the provisions of SDCL 15-19-11 are applicable, so that parcels in Meade and Pennington Counties may be sold by the Sheriff of



Pennington County. Pursuant to SDCL 15-19-15, Defendant Rock Creek Farms may, by written notice served on the Sheriff or other person making such sales, before the time of such sales, or personally at the time and place of sale, direct the order in which such parcels of the Mortgaged Property shall be sold, and the Sheriff or such other person making the sale shall offer the parcels accordingly. In the event, however, such designation is not made pursuant to SDCL 15-19-15, Plaintiff shall determine and designate the order in which the parcels are sold at such public auction.

7. Plaintiff may be a purchaser at the Sheriff's sale of any or all of the parcels by bidding at such sale for each parcel all or a portion of the debt secured by the Mortgages; provided, however, that the sum of Plaintiff's bids for all parcels shall not be less than the amount of this Judgment, together with interest accrued to the date of such sale.

8. Upon completion of the foregoing Sheriff's sale, the debt secured by the Mortgages shall be deemed fully paid and satisfied; provided, however, that, pursuant to SDCL 21-47-17, neither this Judgment nor such Sheriff's sale shall be considered a satisfaction of the assignment of rents agreement under the Mortgages.

9. The proceeds of the Sheriff's sale shall be applied in the order set forth in applicable statutes.

10. All Defendants, except those hereby adjudged to have superior interests, liens or encumbrances as described in ¶5 above, are hereby barred and foreclosed from any estate, interest, lien or other claim upon the Mortgaged Property, excepting only their statutory rights of redemption, it being adjudged and determined hereby that such

Defendants' rights of redemption are governed by SDCL Chapter 21-52, and, in the case of the United States of America, under 28 U.S.C. §2410. ~~In particular, and~~

~~notwithstanding any contrary provision of the Mortgage or any related~~

~~agreements, Defendant Rock Creek Farms is determined to~~

~~exercise its right of redemption for a period of one year and its right to~~

~~SDCL Chapter 21-52.~~

11. Plaintiff shall have the right hereafter to determine whether the receiver shall continue under previous Order of the Court or shall be terminated. In any event, as to any parcel purchased at the Sheriff's sale other than by Plaintiff, such receivership shall be terminated as to such parcel, and Defendant Rock Creek Farms shall be entitled to possession of such parcel and the rents, issues and profits therefrom until expiration of all periods of redemption.

Dated: 15 Jan, 2010

BY THE COURT:

By [Signature]  
Circuit Court Judge

ATTEST:

Ranae Truman, Clerk

By [Signature]  
Deputy Clerk

(SEAL)

State of South Dakota } Seventh Judicial  
County of Pennington } Circuit Court  
I hereby certify that the foregoing instrument  
is a true and correct copy of the original as  
the same appears on record in my office this

JAN 15 2010

RANA E. L. TRUMAN  
Clerk of Courts, Pennington County

By [Signature] Deputy

1:30pm  
Pennington County, SD  
FILED  
IN CIRCUIT COURT

JAN 15 2010 APP. 93

[Signature] Truman, Clerk of Courts  
Deputy

**IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA**

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**No. 27706**

---

FARM PRO SERVICES, INC.,

Plaintiffs/Appellee,

vs.

DAVID FINNEMAN, CONNIE FINNEMAN, CHAD FINNEMAN, ARMSTRONG  
FARMS, VERN ARMSTRONG, HOPE ARMSTRONG, MICHAEL ARNOLDY, ANN  
ARNOLDY, WARRENN ANDERSON, and ROCK CREEK FARMS GENERAL  
PARTNERSHIP, et al.,

Defendants/Appellants.

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Appeal from the Circuit Court  
Seventh Judicial Circuit  
Pennington County, South Dakota

The Honorable Craig A. Pfeifle, Circuit Court Judge

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**APPELLEES' BRIEF**

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James P. Hurley  
Bangs, McCullen, Butler,  
Foye & Simmons, LLP  
PO Box 2670  
Rapid City, SD 57709-2670  
Telephone: (605) 343-1040

Elizabeth S. Hertz  
Vince M. Roche  
Davenport, Evans, Hurwitz & Smith, L.L.P.  
206 West 14<sup>th</sup> Street  
PO Box 1030  
Sioux Falls, SD 57101-1030  
Telephone: (605) 336-2880

*Attorneys for Appellants (the Finnemans)*

*Attorneys for Appellees (the Arnoldys)*

Notice of Appeal filed December 21, 2015

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## **STATEMENT OF THE ISSUES**

**1. Whether the trial court erred in refusing to consider claims raised by affidavit and letter.**

The trial court held that it would not consider a prayer for relief that was made via a letter and an affidavit.

*Berns v. EMI Pub., Inc.*, No. 95-cv-8130, 1999 WL 1029711 (S.D.N.Y. Nov. 12, 1999)  
*Gilmour v. Gates, McDonald and Co.*, 382 F.3d 1312 (11th Cir. 2004)  
*Shanahan v. City of Chicago*, 82 F.3d 776 (7th Cir. 1991)

**2. Whether the Mahoney Payment belongs to Michael Arnoldy or RCF/Finnemans.**

The trial court held that RCF took a calculated risk by redeeming in the FarmPro proceeding, and that Michael Arnoldy retains the right to accept the Mahoney Payment.

*Dowling Family Partnership v. Midland Farms*, 2015 SD 50, 865 N.W.2d 854  
RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 5  
*Myers v. Eich*, 2006 SD 69, 720 N.W.2d 76

**3. Whether Finnemans may seek restitution for paying their own debts.**

The trial court held that the disposition of the Mahoney Payment was the only issue and declined to award restitution to Finnemans.

*Cuevas v. Barraza*, 277 P.3d 337, 344 (Idaho 2012)  
*Hofeldt v. Mehling*, 2003 SD 25, 658 N.W.2d 783  
*Way v. Hill*, 171 N.W.2d 206 (S.D. 1919)

**4. Whether the trial court ignored issues of material fact meriting trial.**

The trial court held that the disposition of the Mahoney Payment was the only issue, and declined to consider the issues of fraud, standing, and the 200 acres Arnoldys obtained from L&L

*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)



## **PRELIMINARY STATEMENT**

Citations to the Record in the Clerk's Index will be in the format of: (R.\_\_\_\_) followed by the appropriate page or paragraph number(s). Appellant Rock Creek Farms will be referred to as "RCF." Appellants David Finneman and Connie Finneman will be referred to, collectively, as "Finnemans." Appellees Ann Arnoldy and Michael Arnoldy will be referred to collectively as "Arnoldys." If the facts require a specific reference to an individual appellee, that individual's first name will be used.

## **STATEMENT OF FACTS**

This is the sixth time that the dispute between Finnemans, RCF, and Arnoldys has been before this Court, and the fifth time that Finnemans and RCF have appealed an adverse judgment. As a consequence, most of the operative facts may be found in the Court's previous opinions; for those facts that have no direct bearing on the circuit court's decision, Arnoldys cite to those decisions and the record established therein. At issue in this case is the disposition of certain monies held by the Pennington County Sheriff's office.

David and Connie Finneman were the owners of 16,700 acres of farmland in Pennington and Meade Counties. *L&L Partnership v. Rock Creek Farms*, 2014 SD 9 ¶ 2, 843 N.W.2d 697, 700. They owned 7,500 acres in fee simple, while the remaining 9,200 had been purchased via contract for deed from L&L Partnership ("L&L"). *Id.* Finnemans mortgaged all of the land except for 200 acres of the contract for deed property to Rabo Agrifinance, Inc. ("Rabo") and FarmPro Services, Inc. ("FarmPro"); the Rabo mortgage was senior to the FarmPro mortgage. *Id.*

In 2000, FarmPro commenced foreclosure proceedings against land owned by the Finnemans. In May of 2006, FarmPro purchased the property at the execution sale for \$1,439,130.31. (R. 154-156). The certificate of sale was assigned to Lee Ahrlin, who held a number of judgments senior to the FarmPro lien but inferior to the Rabo mortgage and the L&L contracts for deed. (R. 159).

On May 4, 2007, Michael Arnoldy, who held a judgment against the Finnemans, redeemed the property from Ahrlin, paying \$1,765,232.50 plus a \$2,000 contingency. (R. 160-164). On May 10, 2007, Warren Anderson, an associate of the Finnemans, paid \$822,000 to extend the redemption period and keep possession of the land for an additional year pursuant to SDCL§ 21-52-13. (R. 165). Anderson and the Finnemans had formed a general partnership, RCF, which now held the Finnemans' interest in the land.

On May 6, 2008, David Finneman purported to confess judgment to two creditors, Kenco, Inc. and Kroeplin Ag Services, Inc., for \$622,558.84 and \$254,731.59, respectively. *Arnoldy v. Mahoney*, 2010 SD 89 ¶ 4, 791 N.W.2d 645, 649. The trial court in a later declaratory judgment action concerning this redemption found that both debts were more than six years old, putting them beyond the statute of limitations set out in SDCL § 15-2-13(1). *Id.* at ¶ 10 n. 4, 791 N.W.2d at 651. Daniel Mahoney, another associate of the Finnemans, bought both judgments the next day. Using money provided by RCF, Mahoney deposited \$1,219,734.29 plus a \$2,000 contingency with the Pennington County sheriff to redeem from Michael. (R. 168). Michael refused to accept the redemption payment; the money, which is henceforth referred to as the Mahoney Payment, remains in the custody of the sheriff's office. However, Mahoney received a

certificate of redemption. Ann, who also held judgments against the Finnemans, then redeemed from Mahoney on July 3, 2008, thereby reimbursing Mahoney/RCF for the Mahoney Payment. (R. 171). On September 12, 2008, RCF redeemed from Ann, receiving a certificate of redemption. (R. 191).

Arnoldys filed a declaratory judgment action based on the fraud surrounding the Mahoney redemption in October of 2008. *Arnoldy* at ¶ 6, 791 N.W.2d at 650. The circuit court granted summary judgment in favor of Arnoldys in January of 2010, but this decision was reversed on appeal due to the trial court's failure to follow the proper procedure for in camera review of documents protected by the attorney-client privilege. *Id.*

While the declaratory judgment action was pending, Rabo foreclosed on the property. *Rabo Agrifinance, Inc. v. Rock Creek Farms*, 2013 SD 64 ¶ 4, 836 N.W.2d 631, 634 (“*Rabo II*”). In its foreclosure proceedings, Rabo asserted that Finnemans had agreed to waive all redemption rights under a loan restructure agreement. *Id.* Rabo further requested that the court “enter an order waiving all redemption rights held by Defendants David M. Finneman and Connie S. Finneman and Rock Creek Farms, successors in interest to David M. Finneman and Connie S. Finneman pursuant to the terms of the loan restructure agreement.” *Id.*

Rabo moved for judgment on the pleadings in late 2009. *Id.* at ¶ 5. Judge Delaney granted the motion in January of 2010 and entered a judgment and decree of foreclosure that, contrary to the pleadings, granted an owner's right of redemption to RCF. *Id.* In March of 2011, Ann redeemed the property from an assignee of the

purchaser of the sheriff's certificate in the Rabo action. *Rabo Agrifinance, Inc. v. Rock Creek Farms*, 2012 SD 20 ¶ 3, 813 N.W.2d 122, 124 (“*Rabo I*”).

In May of 2011, after RCF claimed the Rabo judgment as res judicata in Arnoldys' declaratory judgment action, Arnoldys filed a 60(b) motion in the Rabo proceeding. *Rabo II* at ¶ 7, 836 N.W.2d at 635. On May 26, 2011, Judge Delaney entered an order that granted Arnoldys' motion and vacated the portion of the January 2010 judgment that granted redemption rights to RCF. *Id.* Based on this order and her redemption, Ann received a sheriff's deed to all the property covered by the Rabo mortgage in June of 2011. *L&L* at ¶ 6, 843 N.W.2d at 701. RCF and Finnemans appealed to this Court, but the appeal was denied due to their failure to serve the United States, a party defendant. *See Rabo I*. RCF's subsequent 60(b) motion in the Rabo action was also denied, as was its appeal of that denial to this Court. *See Rabo II*.

In March of 2010, while *Arnoldy I* was on appeal, L&L foreclosed on the contracts for deed. *L&L* at ¶ 7, 843 N.W.2d at 701. After this Court issued its opinion in *Rabo I*, the trial court in the L&L proceeding held that Ann had both equitable ownership of the contract for deed real estate and the right to cure the default under the contracts. *L&L* at ¶ 9, 843 N.W.2d at 701. RCF and Finnemans appealed this judgment. This Court affirmed the L&L court's decision, settling once and for all the ownership of the land. The opinion notes that the affirmance of the circuit court's decision on equitable title “forecloses any substantive rights RCF has in future litigation.” *Id.* at ¶ 24, 843 N.W.2d at 705.

RCF and the Arnoldys then returned to the FarmPro court to determine the disposition of the Mahoney Payment. RCF argued that it was entitled to the money as a

down payment on a much larger equitable award that it deserved for losing title to the land, while Arnoldys argued that Michael retained the right to the Mahoney Payment.

In May of 2014, the FarmPro court held that it had equitable jurisdiction to determine whether the Finnemans/RCF had made a mistake that justified the return of the redemption payments made in this matter. Arnoldys then filed a second motion for summary judgment, arguing that RCF's actions in the FarmPro foreclosure did not constitute an invalidating mistake that could be redressed in equity.

Finnemans and RCF filed cross motions for summary judgment. Finnemans' motion and brief did not specify the relief they were seeking or even if they were asking the Mahoney Payment to be given to themselves or to RCF. Finnemans insist that they are still partners in RCF, and that the statement of dissociation acknowledged by this Court in L&L was apparently prepared without their knowledge. Curiously, RCF's discovery responses included an agreement signed by both David and Connie Finneman and prepared and notarized by Mr. Hurley, which assigns all of Finnemans' interests in RCF to Warrenn Anderson and Mark McColler. (R. 2160-61). However, because the trial court did not rule on the standing issue, and, in any event, the partnership dispute is between Finnemans and RCF, Arnoldys will not address this non sequitur in any detail.

On July 7, 2015, Judge Pfeifle sent a letter to the parties "to ensure that...the issue to be decided by the Court [was limited] to whether Arnoldys or Rock Creek Farms is entitled to the \$1,219,734.29 check deposited by Daniel Mahoney with the Pennington County Sheriff on May 8, 2008." Counsel for Arnoldys and RCF affirmed that this was the only issue. Counsel for Finnemans, however, sent a letter laying out a request for various relief, including damages for so-called "redemption payments," an award of the

200 acres of L&L contract for deed land that had not been mortgaged to FarmPro or Rabo, and rent that Arnoldys had collected from the point that Ann received the sheriff's deed in 2011 to 2014.

Three months later, the circuit court granted Arnoldys' summary judgment motion and held that the Mahoney Payment would be released to Michael. Finnemans' motion for summary judgment was denied. The court declined to consider the theories for relief that were raised in the letter and affidavit. This appeal follows.

### **ARGUMENT**

Insofar as it can be understood from their brief, Finnemans' argument appears to be that summary judgment on the disposition of the Mahoney Payment was inappropriate because there were issues of material fact related to their vague and unpleaded equitable claims, in which they seek damages for having made payments on their own debts from 2004 to 2011. In effect, Finnemans seek to use this appeal as yet another chance to get their arguments concerning Judge Delaney's 2011 decision in the Rabo matter before this Court, in the hopes of securing monetary compensation for their loss of the land.

However, the only issue in this case is whether the trial court was correct in holding that certain money in the custody of the Pennington County Sheriff should be released to Michael Arnoldy rather than RCF. When the actual issues that were properly before the trial court are considered, it is clear that the court did not err in granting Arnoldys' summary judgment motion and ordering the release of the Mahoney Payment to Michael.

## **I. The trial court did not err in refusing to consider claims raised by affidavit**

The Finnemans' arguments on appeal ignore the trial court's stated reason for refusing to consider their demands for equitable relief: the fact that these claims were made in an affidavit and a letter. At no point did Finnemans actually plead any of these claims. Insofar as they were raised, it was via affidavit and in a letter from Finnemans' counsel to Judge Pfeifle.

Numerous courts have held that plaintiffs cannot amend the complaint via arguments in opposition to a motion for summary judgment. *Gilmour v. Gates, McDonald and Co.*, 382 F.3d 1312, 1315 (11th Cir. 2004); *Shanahan v. City of Chicago*, 82 F.3d 776, 781 (7th Cir. 1991); *Fisher v. Metropolitan Life Ins. Co.*, 895 F.2d 1073, 1078 (5th Cir. 1990). Similarly, it is inappropriate to request relief in an affidavit. *See, e.g., Berns v. EMI Pub., Inc.*, No. 95-cv-8130, 1999 WL 1029711 (S.D.N.Y. Nov. 12, 1999) (declining to grant relief requested in an affidavit). The letter and the vague statements concerning equity in the affidavit were nothing more than a last-ditch attempt to avoid summary judgment. The trial court did not err in refusing to consider the Finnemans' procedurally inappropriate claims.

## **II. The money held by the sheriff belongs to Michael Arnoldy**

Rather than focus on the issues before the trial court, Finnemans attempt to conflate their vague and unpleaded equitable claims with the issue that the trial court actually decided. It is unclear on appeal, as it was before the trial court, if Finnemans are claiming that the Mahoney Payment should be remitted to them or to RCF.

The trial court's opinion makes it abundantly clear that the sole issue is the disposition of the Mahoney Payment, and whether RCF made a mistake by redeeming



during the FarmPro foreclosure in 2008. This was the proper analysis. Obviously, this proceeding concerns the FarmPro foreclosure, and the money in dispute was deposited with the Pennington County Sheriff during the redemption period. Therefore, it is the events in this proceeding that control its disposition; the Finnemans should not be able to confuse the issue by labeling their various debt payments as “redemptions.” A review of the record and the relevant case law demonstrates that Michael Arnoldy, not RCF, and certainly not Finnemans personally, is the only party entitled to the Mahoney Payment.

**A. Finnemans/RCF did not make an invalidating mistake in the FarmPro proceeding**

Insofar as Finnemans actually address the events in the FarmPro proceeding, they claim that they and RCF made a “bona fide” mistake in believing that they would ultimately obtain clear title to the land. However, equity does not speak in terms of bona fide mistakes. The issue is not merely whether the party seeking restitution made an error in good faith, but whether that error is of the type that justifies invalidating the transaction. Consequently, this Court and the Restatement have used the term ‘invalidating mistake’ to describe the type of mistake that is relevant to the law of restitution. *See Dowling Family Partnership v. Midland Farms, LLC*, 2015 SD 50 ¶ 25, 865 N.W.2d 854, 864; Restatement (Third) of Restitution and Unjust Enrichment § 5 cmt. a.

The Restatement makes it clear that an error in judgment is not an invalidating mistake, regardless of the severity of its consequences:

“Faulty prediction will not support a claim in restitution, and invalidating mistake is to be distinguished from the error in judgment that is visible in hindsight. Subsequent information may reveal a course of action to have been ‘mistaken,’ in the sense that someone made a poor choice, but the

mistake that consists merely in the failure to identify a preferable course of action will not invalidate either an agreement or a transfer...The result of [an invalidating] mistake is a transaction that in some material respect is unintended, as opposed to one that is merely ill-advised.” RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 5 cmt. c.

“A venture voluntarily entered into, with known risks and with the expectation of a profit, cannot be compensated for via a claim for unjust enrichment. When a person enters into a potentially risky venture, it is simply not unjust for him to bear the adverse consequences of the risk, given that he surely would have accepted the beneficial consequences had they materialized.” *Howard v. Turnbull*, 316 S.W.3d 431, 438 (Mo. App. 2010).

“A claimant bears the risk of loss when it has consciously assumed the risk by deciding to act in the face of a recognized uncertainty.” *Dowling* at ¶ 25, 865 N.W.2d at 864. “A party that acts on the basis of...a calculation may be said to have assumed the risk that the calculation, depending as it does on a comparison of unknowns, will be revealed to be wrong.” *Id.* at ¶ 27. RCF/Finnemans assumed two risks in redeeming from Ann: the risk of foreclosure of a senior lien, and the risk that the Arnolds’ challenge to the Mahoney scheme would prove successful.

RCF/Finnemans knew that Rabo, among others, had liens against the property that were senior to FarmPro’s. They knew that any interest they might acquire in the FarmPro proceeding was not an absolute right to the land and could be wiped out by the foreclosure of another lien. That is exactly what happened. Ann acquired a sheriff’s deed in the Rabo foreclosure, thereby eliminating all junior interests.

Quite simply, a senior interest is “a matter which the redemptioner should have considered before it parted with the money...If the matter turned out very differently

from what was expected, the miscalculation is not such a mistake, either of fact or of law within the meaning of the equitable doctrine as entitles the disappointed party to any relief.” *Copper Belle Mining Co. of West Virginia v. Gleeson*, 134 P. 285, 287 (Ariz. 1913) (redemptioner who redeemed property with knowledge that debtor’s title was defective was not entitled to equitable relief). Any ‘mistake’ that Finnemans/RCF made in assuming that Rabo – or any of the other creditors – would not foreclose is not cognizable in equity. *See McDonald v. Miners and Merchants State Bank, Inc.*, 310 N.W.2d 591, 593 (S.D. 1981) (holding that a mistake as to the future actions of a third party did not entitle the plaintiff to rescind an agreement).

Finnemans’ argument appears to be that their/RCF’s actions in the FarmPro proceeding qualify as an invalidating mistake because they had the owner’s right of redemption and did not believe they were taking a risk at all. However, the right to redeem does not guarantee the ability to do so. Finnemans are asserting that they would have been able to find the funds to pay off L&L, Rabo, and all of the junior creditors; since both L&L and Rabo foreclosed on the property for nonpayment, and Arnoldys had a claim on the land, this is unlikely. In fact, RCF admitted during the Rabo proceeding that it was not feasible for it to redeem.<sup>1</sup>

Moreover, Finnemans had waived their right of redemption in the Rabo proceeding as part of a loan restructure agreement. Finnemans, like RCF, argue that this waiver should be ignored because SDCL § 44-1-8 meant that the agreement with Rabo

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<sup>1</sup> During the Rabo proceeding, RCF requested special relief to assure potential buyers that they would be immune to Arnoldys’ claims to the land. RCF admitted that, without this relief, it would be unable to sell the land or redeem: “[I]t is not feasible for RCF to exercise its owner’s right of redemption, to sell the property, and to assure marketable title...” Rabo R. 1270. Judge Delaney denied this request.

was void. While § 44-1-8 states that contracts in restraint of the right of redemption from a lien are void, it does not prevent mortgagors from later waiving that right in exchange for fair and adequate consideration. *See Myers v. Eich*, 2006 SD 69 ¶¶ 31-34, 720 N.W.2d 76, 86. The statute merely codifies the longstanding principle that a mortgagor cannot alienate the right of redemption at the time of the mortgage; it does not prevent a mortgagor from giving up the right in a subsequent transaction. *Guam Hakubotan, Inc. v. Furusawa Inv. Corp.*, 947 F.2d 398, 401 (9th Cir. 1991) (considering application of similar statute).

As the Minnesota Supreme Court said, “[i]t firmly is established that a mortgagor may not, at the time of, nor as a part of, the mortgage transaction, bargain away his equity of redemption...However, it is settled equally well that a mortgagor may bargain away, sell, or convey to the mortgagee his equity of redemption subsequent to the time that he executed the mortgage.” *O’Connor v. Schwan*, 251 N.W. 180, 181 (Minn. 1933). *See also Gould v. McKillip*, 99 P.2d 67, 72 (Wyo. 1940). Finnemans waived their right of redemption as part of a loan restructuring agreement with Rabo; having received valuable consideration for the waiver, they cannot claim it is void.

Further, although Finnemans repeatedly claim that Judge Delaney wrongfully stripped its rights of redemption, the Rabo court simply enforced Rabo’s motion for judgment on the pleadings. RCF/Finnemans did not oppose this motion, even though Rabo’s complaint requested a judgment denying Finnemans’ and RCF’s right to redeem. (Rabo R. 34).

Finnemans also assumed the risk that the Arnoldys’ challenge to the Mahoney scheme would be successful. Again, David Finneman confessed judgment on two debts

that were uncollectable due to the statute of limitations. Mahoney then redeemed on the basis of those debts; as RCF has since admitted, Mahoney was acting as a straw man using RCF money. Finnemans knew of these issues, and knew that the subsequent attempt to redeem from Ann would be untimely but for the Mahoney redemption. Nor may Finnemans claim that this was an inchoate risk, since the Arnoldys had not yet filed suit when RCF redeemed from Ann; Michael had already notified them that a challenge was coming when he refused to accept the Mahoney Payment in 2008. (R. 693).

Finnemans/RCF knew that they were taking a chance by putting money into the FarmPro proceeding. In a February 19, 2008 letter to counsel for the Finnemans, an attorney representing RCF investor Anderson described the investments as “a calculated risk” and “gambling with [Anderson’s] money.” (R. 1691-92). Finnemans knew that the certificate of redemption that RCF received when it redeemed from Ann in FarmPro was an encumbered interest that could be lost if another creditor foreclosed. They did not need to know the exact circumstances under which the risk of loss would materialize, only that it was possible. Put simply, the law of unjust enrichment does not act to unravel wagers that ultimately prove unsuccessful.

**B. Michael Arnoldy is the only person with a right to the Mahoney Payment**

Because RCF/Finnemans had no right to rescind their redemption after losing the land in a later foreclosure, the only person with a right to the Mahoney Payment is Michael Arnoldy. Leaving aside, as the circuit court did, the questionable legality of the Mahoney scheme, the events that occurred in the FarmPro redemption period are relatively straightforward. Michael Arnoldy redeemed from another creditor. RCF then funded Mahoney to redeem from Michael, thereby preventing Michael from obtaining

possession and a sheriff's deed. Although Michael rejected the Mahoney Payment, that did not prevent Mahoney from taking the certificate of redemption. Ann redeemed from Mahoney; as the trial court noted, this redemption reimbursed RCF for the Mahoney Payment. RCF then redeemed from Ann, receiving a certificate of redemption and possession of the land in exchange for its payment. The only person who didn't get value for money or money for value in this series of redemptions was Michael.

Michael had the right to accept the Mahoney Payment in 2008. *See* SDCL § 21-52-19. However, as the case law cited by RCF demonstrates, Michael arguably would have lost his right to challenge the Mahoney scheme if he had exercised this right. *See Robinson v. Bailey*, 198 N.E. 217, 220 (Ill. 1935) (holding that acceptance of redemption money prevented appellants from challenging the validity of the redemption and the resulting deed). The fact that he and his sister would later become the owners of the property through the foreclosure of senior liens did not deprive him of the ability to accept the payment in the FarmPro proceeding. Michael, not RCF or Finnemans, has the only valid claim to the Mahoney Payment.

### **III. The Finnemans are not entitled to restitution for paying off their own debts**

Finnemans' argument for equitable relief for payments made outside of the FarmPro proceeding rests on a misreading of this Court's opinion in *Way v. Hill*, 171 N.W.2d 206 (S.D. 1919). *Way* does not stand for the proposition that judgment debtors who lose the land to creditors are entitled to be reimbursed for what they invested in the property, and it cannot be used to force Arnoldys to reimburse Finnemans for making payments to third-party creditors.

*Way* was an action by a debtor who was attempting to pay off the final amount due on a judgment against her and redeem property upon which the defendant creditors had foreclosed. *Id.* at 206. After the execution sale, the creditors accepted partial payments of the debt from the plaintiff during the redemption period, but claimed that the final payment was beyond the limitations period and wished to retain both the property and the partial payments. *Id.* at 207. In upholding the trial court’s overruling of the defendants’ demurrer, this Court noted that the facts in the complaint suggested that it would be inequitable for the foreclosing creditors to retain both the land and the numerous payments they had accepted after the executions sale. *Id.* As Judge Pfeifle correctly noted, *Way* does not actually hold that the partial payments had to be returned.

Finnemans claim that their payment of real estate taxes and their various other debts on the property was actually a series of “redemption payments” under *Way*. However, aside from the previously discussed redemptions in the FarmPro proceeding, the payments to which Finnemans point were not made as part of a foreclosure action; they were nothing more than routine payments of outstanding debts. Several of the creditors identified by Finnemans never even foreclosed on the property, and in the case of Rabo and L&L, the foreclosures happened after the alleged ‘redemption’ payments were made. In fact, Finnemans go so far as to claim their payment of real estate taxes in the years 2006 to 2011 as “redemption payments” meriting reimbursement. The analogy to *Way*, where foreclosing creditors accepted money from the debtor after the execution sale, simply does not hold. Finnemans did not make the identified payments to redeem their property from foreclosure; they were paying off their own obligations, and nothing more.

Moreover, Arnoldys were not unjustly enriched by Finnemans' payments of their own debts and taxes. Unlike the debtors in *Way*, Finnemans/RCF made payments to third parties. Other courts that have addressed this issue have held that the payment made for the payor's own benefit and in pursuit of his own financial advantage does not enrich a third party who later becomes the owner of the property. *Cuevas v. Barraza*, 277 P.3d 337, 344 (Idaho 2012) (later purchaser not unjustly enriched by failed purchaser's down payment or improvements to the property); *JB Contracting, Inc. v. Bierman*, 147 S.W.3d 814, 820 (Mo. App. 2004) (lessor not unjustly enriched by plaintiff's securing of financing for project on land, even when financing used for improvements).

When the payors' "sole motivation in making the payment was to protect their own interests" there can be no claim for unjust enrichment. *Clark v. Daby*, 300 A.D.2d 732, 733 (N.Y. App. Div. 2002) (lenders who had paid property tax in foreclosure were not entitled to unjust enrichment claim against borrower because they paid the taxes to protect their own investment.). To the extent that Finnemans and RCF made payments on their debts, it was to protect their own interest in the property; Finnemans cannot claim unjust enrichment on this basis.

The fact that the Finnemans were paying their own debts also means that Arnoldys' retention of any benefit could not be inequitable. "A person is enriched if he has received a benefit. A person is unjustly enriched if the retention of the benefit would be **unjust**." *Hofeldt v. Mehling*, 2003 SD 25 ¶ 15, 658 N.W.2d 783, 788 (emphasis in original). In determining whether retention of a benefit is unjust, the inquiry focuses on whether "circumstances are such that equitably the beneficiary should restore to the benefactor the benefit or its value." *Id.* at ¶ 18. The enjoyment of an asset lawfully



obtained through foreclosure cannot be characterized as unjust. *Thompkins v. Lil' Joe Records, Inc.*, 476 F.3d 1294, 1314 (11th Cir. 2007).

In paying off their debts, RCF/Finnemans were not benefitting the Arnoldys. Instead, they were protecting their own interests. The Finnemans should not be reimbursed for paying back their own loans simply because they were unable to secure the land they had repeatedly encumbered; their vague arguments concerning these payments are legally unsupported and not grounds upon which to reverse the circuit court's decision.

#### **IV. Finnemans fail to identify any issues of material fact that merit trial**

In addition to the arguments addressed above, the Finnemans list a number of alleged factual disputes that they claim should have prevented the circuit court from granting summary judgment. Specifically, Finnemans claim there were factual disputes related to fraud and deceit, standing, and the 200 acres that Arnoldys obtained from L&L. However, this argument ignores the fact that the circuit court's decision was independent of all of these issues.

"The mere existence of **some** alleged factual dispute...will not defeat an otherwise properly supported motion for summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original). Instead, genuine issues of material fact that preclude summary judgment are those "disputes over facts that might affect the outcome of the suit." *Id.* at 248.

The circuit court did not grant summary judgment based on the fraudulent nature of the Mahoney scheme, Finnemans' lack of standing, or the ownership of the 200 acres. Instead, its holding is that RCF did not make an invalidating mistake when it redeemed

the property from Ann in the FarmPro proceeding. Therefore, these so-called factual disputes did not affect the outcome.

Additionally, Finnemans' claim related to the ownership of the 200 acres is irrelevant to the summary judgment motion because it was never pleaded. Finnemans' failure to plead this claim is made even more troublesome by the fact that this land was not covered by the FarmPro lien that was the basis for this action. Quite simply, the issue of ownership was not before the circuit court, and Judge Pfeifle did not err in refusing to consider it.

### **CONCLUSION**

Ultimately, Finnemans' procedurally inapposite claims of unjust enrichment are nothing but a third attempt to get this Court to reconsider its decision in *Rabo I* and give them compensation. As Judge Pfeifle recognized, the only remaining issue in this action was the disposition of the Mahoney Payment; since RCF/Finnemans did not make an invalidating mistake in the FarmPro proceeding, they had no right to claim the money. The Circuit Court's decision should be affirmed.

Dated at Sioux Falls, South Dakota, this \_\_\_\_\_ day of April, 2016.

DAVENPORT, EVANS, HURWITZ &  
SMITH, L.L.P.

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Elizabeth S. Hertz  
Vince M. Roche  
206 West 14<sup>th</sup> Street  
PO Box 1030  
Sioux Falls, SD 57101-1030  
Telephone: (605) 336-2880  
Facsimile: (605) 335-3639

AND

Robert R. Schaub  
Schaub Law Office, PC  
PO Box 547  
Chamberlain, SD 57325  
Telephone: (605) 734-6515  
*Attorneys for Appellees (the Arnoldys)*

**IN THE SUPREME COURT  
STATE OF SOUTH DAKOTA**

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**FARM PRO SERVICES, INC.,**

Plaintiffs/Appellee,

**Appeal # 27706**

**VS.**

**DAVID FINNEMAN, CONNIE  
FINNEMAN, CHAD FINNEMAN,  
ARMSTRONG FARMS, VERN  
ARMSTRONG, HOPE ARMSTRONG,  
MICHAEL ARNOLDY, ANN ARNOLDY,  
WARREN ANDERSON and ROCK  
CREEK FARMS GENERAL  
PARTNERSHIP, ET AL,**

Defendants/Appellants.

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APPEAL FROM THE CIRCUIT COURT  
SEVENTH JUDICIAL CIRCUIT  
PENNINGTON COUNTY, SOUTH DAKOTA

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The Honorable Craig A. Pfeifle  
Circuit Court Judge

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Notice of Appeal filed on December 21, 2015

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**APPELLANTS' REPLY BRIEF**

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James P. Hurley  
BANGS, McCULLEN, BUTLER,  
FOYE & SIMMONS, LLP  
P.O. Box 2670  
Rapid City, SD 57709-2670

*Attorneys for Appellants,  
(the Finnemans)*

Elizabeth S. Hertz &  
Vince M. Roche  
DAVENPORT, EVANS,  
HURWITZ & SMITH, L.L.P.  
P.O. Box 1030  
Sioux Falls, SD 57101-1030

*Attorneys for Appellees  
(the Arnoldys)*

Steven W. Sanford  
Caldwell, Sanford, Deibert  
& Gary, LLP  
200 East 10<sup>th</sup> St., Ste. 200  
P.O. Box 2498  
Sioux falls, SD 57101-2498

*Attorneys for Appellants  
(Rock Creek Farms)*

Brian L. Utzman  
Smoot & Utzman, P.C.  
P.O. Box 899  
Rapid City, SD 57709-0899

*Attorneys for Appellants  
(Rock Creek Farms)*

Robert R. Schaub  
Larson, Sundall, Larson  
Schaub & Fox  
P.O. Box 547  
Chamberlain, SD 57325

*Attorneys for Appellees  
(the Arnoldys)*

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## **ARGUMENT**

A. **The trial court erred in refusing to consider Finnemans' equitable claims.**

The trial court erred in denying the **Finnemans' motion for summary judgment**, requested under the doctrine of unjust enrichment for return of the redemption money they paid on their **failed redemption**, and erred in granting **Arnoldys' motion for summary judgment** where genuine issues of material fact exist that preclude granting summary judgment.

Arnoldys argue that the trial court could not recognize **Finnemans' request for equitable relief under unjust enrichment** because their claims were only raised in a letter and an affidavit. Arnoldys claim that at no point did Finnemans plead any claim for equitable relief. This argument is without merit.

Rock Creek Farms (RCF) filed a Motion to Require Return of Redemption Monies. (R. 989) Arnoldys had knowledge of the **equitable claims of Finnemans' and their general partnership RCF**, when Finnemans and RCF filed a motion based on unjust **enrichment**. Arnoldys filed an objection to **"their claim of unjust enrichment."** (R.1168). The trial court recognized Finnemans' issue of unjust enrichment. The trial court stated in its memorandum decision

**May 6, 2014:** “The parties appeared before me on March 18, 2014, and I have considered the arguments presented. For the reasons set forth below, the Court exercises its equitable jurisdiction and will conduct a court trial to **determine the issues.**” (R. 1254, p.1)

The trial court decided “This Court has jurisdiction in equity to determine whether the Finnemans made a bona fide mistake in their attempt to redeem and whether Arnoldys can retain both redemption payments and title to the property. (Underline added) To support the unjust enrichment claim Finnemans and RCF must prove that (1) Arnoldys received a benefit, (2) Arnoldys were aware that they were receiving a benefit, and (3) it would be inequitable to allow Arnoldys to retain the redemption money without paying for it. Equity will not permit the creditors to accept the redemption money and claim title to the real estate.

Under this Court’s decision May 6, 2014, concerning unjust enrichment and the facts material thereto, Finnemans have a real, actual, material, or substantial interest in the subject matter of the action. *Vander Vorste v. Northwestern National Bank*, 138 N.W.2d 411 (S.D. 1965). This is because (a) Arnoldys received a benefit from the *partial redemption payments* made in good faith by Finnemans

and their receiver and RCF in an unsuccessful attempt at redemption, and (b) Arnoldys received a benefit from the rents from the land Arnoldys took that should have been paid to RCF after the receivership ended, and (c) Arnoldys were aware that they were receiving such benefits, then (d) under unjust enrichment it is inequitable to allow Arnoldys to retain title to the land, and retain the redemption payments and the rents without paying Finnemans and RCF for the same.

Finnemans submit that they have standing because they have a real, actual, material, or substantial interest in the subject matter of the action. They submit that under unjust enrichment equity and fairness should not permit Arnoldys to accept the redemption payments and rents without reimbursing Finnemans and RCF for such amounts plus prejudgment interest. Without such reimbursement Finnemans and RCF will suffer substantial injury, and Arnoldys will receive a substantial unearned windfall. Arnoldys should not be allowed to benefit from the redemption payments and the rents, and also claim title to the land.

Arnoldys filed a Motion for Summary Judgment, Affidavit and Exhibits, and Statement of Undisputed Material Facts. (R. 1274, 1277,

1338), and RCF filed a Motion for Partial Summary Judgment, and Statement of Undisputed Facts. (R.1347, 1350)

**Based on the trial court's decision on unjust enrichment,** Finnemans filed a Motion for Summary Judgment, Brief in Support of their Motion for Summary Judgment, Statement of Undisputed Material Facts, Summary of Affidavit and Affidavit of David Finneman. (R.1354, 1358, 1363, 1384) It is clear from these documents what Finnemans were requesting. In their Summary of Affidavit in Support of their Motion for Summary Judgment they **stated: "Finnemans request that this Court require Arnoldys to reimburse Finnemans and RCF for all of our partial redemption payments and the rents Arnoldys took plus prejudgment interest, and if the Arnoldys do not pay such amounts Arnoldys should be required to turn title to the land back to Finnemans and RCF so we can redeem the land within a reasonable time by paying off the debts on the land."** (R.1384, p.7, para.7)

In their Motion for Summary Judgment Finnemans stated **"This Motion is also in support of the Return of Redemption Monies filed by Rock Creek Farms General Partnership."** (R.1354)

In Finnemans' Verified Response to Arnoldys' Reply to Finnemans' Motion for Summary Judgment and Arnoldys' Response to Finnemans' Statement of Undisputed Material Facts, the Finnemans' again state their request for Summary Judgment under unjust enrichment: "The Finnemans request that this Court require the Arnoldys to *reimburse the Finnemans and RCF* for all of our partial redemption payments and the rents Arnoldys took plus prejudgment interest, and if the Arnoldys do not pay such amounts the Arnoldys should be required to turn title to the land back to Finnemans and RCF so we can redeem the land within a reasonable time by paying off the debts on the land." (R.1716)

Finnemans submit it is clear from their filings what they are requesting under unjust enrichment. The grounds for their Motion For Summary Judgment under unjust enrichment are set out in

**Finnemans' Brief in Support of Their Motion for Summary Judgment:**

1. David and Connie Finneman and RCF have made many partial redemption payments in substantial dollar amounts in a good faith effort to pay the debts against the land and save their farm and their home. This Court has equitable jurisdiction to determine the distribution of redemption payments.
2. A foreclosure action is unquestionably equitable in nature, and **"a court in equity has the power and the right to grant full and complete legal and equitable**

relief.” *Alma Group, L.L.C. v. Weiss*, 2000 S.D. 108, ¶ 12, 616 N.W.2d 96, 99.

3. David and Connie Finneman individually and as partners in RCF ask this Court to enforce their legal rights, because they have attempted in good faith to make redemption payments to redeem their farm and their home.

4. As the South Dakota Supreme Court determined in *Way v. Hill*, 41 S.D. 437, 171 N.W. 206 (1919), a court of equity has the jurisdiction and power to determine if a creditor such as the Arnoldys will be permitted to accept and benefit from the substantial partial payments made **on redemption, deny the debtor’s right to redeem, and claim a deed under the execution sale.”** *Id.* at 207.

5. The partial payments made in redemption by Finnemans and RCF have drastically reduced the amount of money the Arnoldys had to pay for redemption. The Arnoldys now hold title to the land and the minerals with millions of dollars of equity.

6. Because of the substantial redemption payments made by the Finnemans and RCF, the Arnoldys have reaped millions of dollars of unearned windfall. Like our Supreme Court instructed in *Way*, this Court has jurisdiction in equity to consider whether a creditor can **retain both the debtors’ redemption payments** and title to the property.

(R.1716)

In response to a letter from the trial court July 7, 2015, (R.2195)

**Finnemans’ counsel sent a letter back to the trial court July 10, 2015.**

**The letter explained the Finnemans’ pleadings and requested trial. The**

letter stated:

**It is hoped that a listing of the Finnemans' pleadings** and requests for relief will be helpful to the Court. As set out below the Finnemans request that this Court deny summary judgment and schedule this matter for trial.

### ***The Finnemans' Pleadings***

The Finnemans filed their Motion for Summary Judgment, Affidavit of David Finneman and Exhibits, Brief in Support of their Motion for Summary Judgment, and Statement of Undisputed Facts, all dated September 10, 2014.

The Finnemans Verified Response dated September **18, 2014, was filed disputing Arnoldys' Statement of Undisputed Material Facts.**

The Finnemans filed their Verified Response to **Arnoldys' Reply to Finnemans' Motion for Summary Judgment and Statement of Material Facts** dated September 22, 2014.

The Finnemans filed their Supplemental Brief in **Opposition to Arnoldys' Motion for Summary Judgment** dated March 30, 2015.

David Finneman filed his Second Affidavit dated **March 27, 2015, in Support of Finnemans' Motion for Summary Judgment.**

In their Brief in Support of their Motion for Summary Judgment the Finnemans stated that Finnemans and RCF have made many partial redemption payments in the redemption period in substantial dollar amounts in a good faith effort to pay the debts against the land and save their farm and their home. This Court has equitable jurisdiction to determine the distribution of redemption payments.

This Court of equity has the jurisdiction and power to determine if the Arnoldys will be permitted to accept and benefit from the substantial partial payments made **by the Finnemans on redemption, deny the debtor's** right to redeem, and also claim the deed to the land.

The partial payments made in redemption by RCF and the Finnemans drastically reduced the amount of money the Arnoldys had to pay to redeem the land. The Arnoldys have benefited from the redemption payments made by the Finnemans and they also have title to the land and the minerals, with millions of dollars of equity. The Arnoldys have been unjustly enriched.

Because of the substantial redemption payments made by Finnemans and RCF, the Arnoldys have reaped millions of dollars of unearned windfall. Like our Supreme Court instructed in **Way**, this Court has jurisdiction in equity to consider whether the Arnoldys **can retain both the debtors' redemption payments and** title to the valuable property.

If the Finnemans had not made any of the partial redemption payments they made over the years the Arnoldys would have had to pay millions of dollars more to redeem by paying the remaining balance on the debts on the land without the benefit of the partial redemption payments of \$4,363,469 made by the Finnemans, their receiver, and RCF.

The Arnoldys now hold title to the land and the valuable minerals in the land worth millions of dollars of equity. They also have received a huge benefit from the partial redemption payments of \$4,363,469, which substantially reduced the dollars the Arnoldys had to pay to pay off the remaining debts and redeem the land. (Aff. David Finneman, para. 20) The balance remaining to be paid by the Arnoldys was reduced to about \$6,159,000. (Aff. David Finneman, para. 18.)



With the land valued at \$1,500 per acre, the equity held by the Arnoldys in the land is at least \$18,966,000. With the Airport Farm valued at \$2,000 per acre and the remaining 13,650 acres valued at \$1,500 per acre, the equity in the land now held by the Arnoldys is at least \$20,491,000. (Aff. David Finneman, para. 19).

The Finnemans and their receiver and their general partnership RCF made redemption payments of \$4,363,469 to Finnemans' **creditors in a good faith effort** to pay down debt in the redemption period, reduce the amount of redemption remaining to be paid, and **redeem the land and Finnemans' home from** foreclosure. (Aff. David Finneman, paras. 4, 6)

The many partial redemption payments made by Finnemans and their receiver and their general partnership RCF benefited the Arnoldys by reducing the amount of debt that the Arnoldys had to pay to redeem, the Arnoldys knew of such benefits, and they accepted such benefits. (Aff. David Finneman, para. 20) (Ex. 18)

Rent payments from the land of \$1,476,000 from August 31, 2011, to February 19, 2014, were taken by the Arnoldys and used by the Arnoldys for redemption. These rent payments also obviously benefited the Arnoldys. (Aff. David Finneman, paras. 6, 15, 16, 24, 28, 29)

The partial redemption payments made by the Finnemans and their receiver and their general partnership RCF and the rents from the land taken by the Arnoldys from August 31, 2011, to February 19, 2014, total \$5,839,469. (Aff. David Finneman, para. 20)

The partial redemption payments made by Finnemans and their receiver and their general partnership RCF of \$4,363,469, plus the rents taken by the Arnoldys from August 31, 2011, to February 19, 2014, of \$1,476,000, benefited the Arnoldys in the amount of

\$5,839,469. The Arnoldys knew of such benefits, and they accepted such benefits. (Aff. of Finneman, para. 20) (Ex. 18)

In the Second Affidavit of David Finneman dated March 27, 2015, the Finnemans request that this Court award them title to the 200 acres. They explain the 200 acres was not mortgaged to Rabo or FarmPro. The redemptions by Mike Arnoldy and Dan Mahoney did not include the 200 acres, and this land was not sold by the **Sheriff. The Sheriff's Deed did not transfer** the 200 acres to Ann Arnoldy. The Finnemans and RCF redeemed the 200 acres. The Finnemans should have had title to the 200 acres, but L and L entered into some agreement with the Arnoldys and Ann Arnoldy ended up with title to the 200 acres.

### ***Finnemans' Request Equitable and Other Relief***

1. In the Summary of Affidavit of David Finneman, and in the Affidavit of David Finneman at paragraph 33 the Finnemans request that this Court require that Arnoldys reimburse Finnemans and RCF within a reasonable time for all their partial redemption payments and the rents that Arnoldys took, plus prejudgment interest. If the Arnoldys do not pay such amounts the Arnoldys should be required to turn title to the land back to Finnemans and RCF so they can redeem the land within a reasonable time by paying off the debts on the land.

2. In the Second Affidavit of David Finneman at page 8 the Finnemans request that this Court award the 200 acres to the Finnemans.

3. The Finnemans conclude on page 26 of their **Supplemental Brief in Opposition to Arnoldy's Motion of Summary Judgment**, that genuine issues of material fact exist which preclude summary judgment. The

Finnemans request that this Court deny summary and schedule this matter for trial.

If the Court has any questions or comments do not hesitate to call or write.

B. The money held by the Sheriff is not the sole issue.

The equitable claims made by the Finnemans are detailed and **specific and set out in Finnemans' Affidavit in Support of Summary Judgment.** (R.1358) The redemption periods began in February of 2006, in FarmPro and January 15, 2010, in Rabo. During the redemption periods Finnemans, their receiver, and RCF made partial redemption payments of \$4,363,469. (Aff. Finneman, para. 7-14, 20; **Finnemans' SUMF** para. 21-28) These payments were made during the redemption period in a good faith attempt to save the land and **the equity and the Finnemans' home. Clearly they were partial** redemption payments that benefited Arnoldys because Arnoldys were able to redeem for far less money because of the partial redemption payments made by Finnemans, their receiver, and RCF. Arnoldys benefited from the partial redemption payments and hold title to the land. These are facts are material to the legal authorities and issues set out by the trial court in its decision of May 6, 2014.

South Dakota law makes a clear distinction between payments made by the mortgagor to secured creditors ***before*** foreclosure, and redemption payments made ***after*** foreclosure sale. ***Rist v.***

***Hartvigsen***, 19 N.W.2d 830 (S.D. 1945) This difference is made clear in SDCL Ch. 21-52. Redemption is the right to repay the amount paid for real property or any interest thereon, sold on foreclosure of a real estate mortgage. SDCL 21-52-1. All of the payments made by Finnemans, their receiver, and RCF listed as redemption payments we made ***after*** the foreclosure sale during the redemption period in cases of ***FarmPro***, ***Rabo***, and ***L&L Partnership***. (Aff. D. Finneman, para. 7-14, 20; Finnemans' **SUMF**, para. 21-28) Thus, all such payments were partial redemption payments made in good faith to reduce the remaining amount to be paid for redemption. All such partial redemption payments benefited Arnoldys because they were able to redeem for less money because of the redemption payments made by Finnemans, their receiver, and RCF, and thereby obtain title to the land.

C. Finnemans made a good faith mistake making redemption payments relying on SDCL 21-52-7.

Finnemans, their receiver, and RCF made substantial redemption payments to creditors secured by liens on the land in a

good faith landowner's effort to save the land, save the equity in the land, and save Finnemans' home. They made redemption payments to reduce the land debt and reduce their final owner's redemption payment. In making redemption payments Finnemans, their receiver, and RCF did not assume a known and certain risk, as was done in *Dowling Family P'ship V. Midland Farms, LLC*, 2015 S.D. 50, where **Clement Farms planted the crop over Dowling's objection** while litigation between them was pending. Here, there was no risk because in South Dakota the owner of the land, Finnemans and RCF, always have had the statutory right of final redemption under SDCL 21-52-7. This statute has remained unchanged and reliable for decades. There **was no risk in relying on the Owner's Final Right of Redemption** under this time honored statute. Under this South Dakota law, property owners and judgment debtors may protect their interest by redeeming their property following redemption sale, with the owner **or owner's successor having the final right to redeem under SDCL 21-52-7. *Donovan v. Farmer's Home Admin.***, 19 F.3d 1267 (S.D. 1994). But that is not how it worked in this case. RCF attempted to redeem. Finnemans and RCF had buyers ready, willing, and able to provide the money to redeem. (App. 1.) The buyers were found by Finnemans

to make redemption, but they were not allowed to do so by the Circuit Court. **The buyers' money would have allowed payment of the federal judgment ten months earlier than Arnoldys paid it in April 2012. But the law was derailed. The trial court in the Rabo case stripped RCF of its owner's redemption rights fifteen months after redemption rights had been granted to RCF. Finnemans and RCF were shocked.** Finnemans and RCF certainly did not knowingly take a risk that their **owner's right of final redemption mandated by SDCL 21-52-7 would be stripped out from under them. Their landowner's rights have been** violated. The trial court erred again by refusing and denying Finnemans and RCF the equitable remedy of unjust enrichment, upon some imagined future and uncertain risk. This sets a terrible president for landowners in this situation in the future. The trial **court's grant of summary judgment must be reversed. The landowner's right of final redemption must be honored in South** Dakota.

The trial court erred in its Memorandum Decision (R.2220 at p.9) where it determined that Finnemans and RCF had waived their **owner's right of final redemption. But SDCL 44-1-8 mandates that "all contracts in restraint of the right of redemption from a lien are**

**void.” This statute voids the entire contract that purports to have the land owner waive redemption rights. Judge Delaney wrongly determined that Finnemans had waived their **owners’ redemption** rights in a loan agreement with Ag Services of America, Inc. (ASA) ignoring the fact that its predecessor Rabo **agreed that RCF would have the owner’s right of final redemption.****

D. Finnemans have identified genuine issues of fact.

Finnemans identified seven genuine issues of fact that prevent the trial court granting Arnoldys summary judgment. These factual **issues are set out in Finnemans’ Appellants’ Brief pages 20 to 34.**

Finnemans requested that the trial court schedule trial to determine the factual issues from the evidence presented. The trial court erred **when it ignored Finnemans’ request for trial.**

E. Under the trial courts rulings Arnoldys are unjustly enriched.

In his affidavit in support of Finnemans’ **Motion for Summary Judgment** David Finneman states in paragraphs 28-32 on pages 22 and 23 as follows:

28. The amount Arnoldys paid for redemption of the land and minerals and three judgments was approximately \$6,205,246. (Ex. 17) With the 16,700 acres valued at \$1,500 per acre, Arnoldys have reaped a substantial unearned windfall of \$18,966,000. The land and minerals are worth about \$25,125,000, minus the

amount Arnoldys paid for redemption of about \$6,159,000 (Para. 18 above), which shows Arnoldys reaped an unearned windfall of \$18,966,000. With Airport Farm valued at \$2,000 per acre and the remaining 13,650 acres valued at \$1,500 per acre, the Arnoldys reaped an even greater unearned windfall of \$20,491,000.

Even if Arnoldys pay us back the money we spent for redemption plus prejudgment interest, the Arnoldys will still have our equity of about ten million dollars.

29. Finnemans made substantial partial redemption payments. Finnemans and their receiver and their general partnership RCF all made payments to **Finnemans' creditors in a good faith effort to pay down** land debt, reduce the remaining amount of redemption, and redeem their land, their equity, and their home from foreclosure.

30. Finnemans and their receiver and RCF in good faith made partial redemption payments of \$4,363,469 (Para. 20), **plus RCF's rent payments taken by Arnoldys of** \$1,476,000 (Ex. 15), total benefits of \$5,839,469 to Arnoldys. (Para. 18)

31. **Finnemans' Statement of Undisputed Material Facts** and this Affidavit are submitted to prove that:

(a) Arnoldys received a huge benefit from the ***partial redemption payments*** made in good faith by Finnemans and their receiver and RCF in an unsuccessful attempt at redemption, (b) Arnoldys received a huge benefit from ***the rents*** that Arnoldys took that should have been paid to RCF, (c) Arnoldys were aware that they were receiving such benefits, and (d) it would be inequitable to allow Arnoldys to retain title to the land, and retain our redemption payments and our rents without paying us for the same.



32. I believe that equity and fairness should not permit Arnoldys to accept our partial redemption payments and our rents without reimbursing us for such amounts plus prejudgment interest. Arnoldys should not be allowed to keep our redemption payments and our rents, and also claim title to the land.

33. *Finnemans request that this Court require Arnoldys to reimburse Finnemans and RCF for all of our partial redemption payments and the rents Arnoldys took plus prejudgment interest, and if Arnoldys do not pay such amounts Arnoldys should be required to turn title to the land back to Finnemans and RCF so we can redeem the land within a reasonable time by paying off the debts on the land.* (Italics added)

F. Arnoldys were allowed to take title to 9,200 acres that Finnemans and RCF had redeemed.

Finnemans and Anderson through RCF worked together to redeem from L&L the 9,000 acres and the 200 acres. (R. 1975)

Finnemans paid in \$16,500 and Warren Anderson paid in \$840,303.99 to redeem the 9,200 acres of contract for deed land.

In the Second Affidavit of David Finneman dated March 27, 2015, Finnemans request that this Court award them title to the 200 acres. They explain the 200 acres was not mortgaged to Rabo or FarmPro. The redemptions by Arnoldy and Mahoney did not include **the 200 acres, and this land was not sold by the Sheriff. The Sheriff's** Deed did not transfer the 200 acres to Ann Arnoldy. Finnemans and RCF redeemed the 200 acres. Finnemans should have had title to the

200 acres, but L and L entered into some secret agreement with Arnoldys and Ann Arnoldy wrongly ended up with title to the 200 acres for a cheap price. (R.1975)

Also the 9,000 acres were redeemed by Finnemans and RCF, but L and L entered into some secret agreement with Arnoldys and Ann Arnoldy wrongly ended up with title and possession to the 9,000 acres for a cheap price.

Arnoldys have ended up with a huge windfall at the expense of Finnemans and RCF.

G. Judgments against Finnemans on the land now held by Arnoldys.

Arnoldys now have title and possession of over 16,000 acres of land that is subject to judgments against Finnemans. If Finnemans or RCF had been allowed to redeem their land, as redeeming land owners they would have continued to make payments to the creditors with judgment liens on the land. All judgment liens would have stayed in place on the land and been paid over time. But now Arnoldys have title and they believe they do not have to pay the judgments, and can strip the judgments off the land. Arnoldys want Finnemans off the land. Finnemans will be homeless, landless, with no income, and with judgments to pay that Arnoldys have striped off

the land. In this situation the striped judgments cannot be paid by Finnemans, and Arnoldys will not pay them. This is not a good result for the judgment creditors. Equity demands in the best interests of the judgment creditors that if Arnoldys get to keep the land Arnoldys should be required to pay off the judgments on the land.

H. Summary of the Issues.

**Arnoldys were allowed to strip the land owners' final right of redemption of Finnemans and RCF in violation of SDCL 21-52-7, based on an illegal waiver clause in a loan agreement that is illegal and void under SDCL 44-1-8.**

There was no evidentiary trial subject to discovery and cross examination for the trial court to properly determine the factual issues. The trial court wrongly decided the factual issues in favor of Arnoldys in a summary judgment procedure in violation of SDCL 15-6-56. Summary judgment is not the proper method to dispose of factual questions. *Stern Oil, Co. v. Brown*, 817 N.W.2d 395, (S.D. 2012)

Finnemans and RCF had an unconditional and absolute **statutory owner's final right of redemption under SDCL 21-52-7.**

Finnemans were owners with RCF. This statute commands that the *owner shall at all times have the final right to redeem.*

SDCL 44-1-8 commands that “*all contracts* for forfeiture of property subject to a lien in satisfaction of the obligations secured thereby and *all contracts* in restraint of the right of redemption from a lien *are void.*”

The general rule is that the law abhors a forfeiture.

*Thunderstick Lodge, Inc. v. Reuer*, 1998 S.D. 110, 585 N.W.2d 819, citing *BankWest v. Groseclose*, 535 N.W.2d 860 (S.D. 1995), citing *Ford v. Hofer*, 111 N.W.2d 214, 216 (1961). “**Forfeitures are** considered as odious in the law, and are not favored by the courts. Courts of equity will seize upon slight circumstances to relieve a party **therefrom.**” *Id.*

Finnemans and RCF were not assuming any risk in making the **statutory owner’s right of redemption and owner’s final redemption** payments in a good faith effort to redeem the land, save the equity, **and save Finnemans’ home by paying off the debts on the land.**

The trial court erred in **denying Finnemans’ motion for** summary judgment, requested under the doctrine of unjust enrichment for return of the redemption money they paid on their

**failed redemption, and erred in granting Arnoldys' motion for**  
summary judgment where genuine issues of material fact exist that  
preclude granting summary judgment.

**The decision of the trial court violated the land owner's rights**  
under SDCL 21-52-7 and SDCL 44-1-8. The decision of the trial court  
**must be reversed to restore South Dakota landowner's faith in the law**  
of foreclosure and redemption.

#### Conclusion

Based on the foregoing, Finnemans request that the decision of  
the Circuit Court be reversed, that Arnoldys be declared liable to  
return promptly to Finnemans and RCF all redemption monies paid  
by the Finnemans, their receiver, and RCF, and if Arnoldys fail to  
promptly do so, then Arnoldys shall return title to the land to  
Finnemans and RCF.

Respectfully submitted this 3<sup>rd</sup> day of May, 2016.

BANGS, McCULLEN, BUTLER,  
FOYE & SIMMONS, L.L.P.

BY: /s/ James P. Hurley  
James P. Hurley  
P.O. Box 2670  
Rapid City, SD 57709-2670  
[jhurley@bangsmccullen.com](mailto:jhurley@bangsmccullen.com)  
*Attorneys for Defendants/ Appellants*

## **CERTIFICATE OF COMPLIANCE**

Pursuant to SDCL § 15-26A-66(b)(4), Appellants' counsel states that the foregoing brief is typed in proportionally spaced typeface in Georgia 14 point. The word processor used to prepare this brief indicated that there are a total of 4,632 words in the body of the brief.

/s/ *James P. Hurley*

James P. Hurley

## **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that May 3, 2016, the foregoing *Appellants' Reply Brief* was filed electronically with the South Dakota Supreme Court and that the original and two copies of the same were filed by mailing the same to:

**Shirley Jameson-Fergel**  
Clerk, South Dakota Supreme Court  
500 East Capitol  
Pierre, SD 57501-5070  
[SCClerkBriefs@uds.state.sd.us](mailto:SCClerkBriefs@uds.state.sd.us)

and a true and correct copy of *Appellants' Reply Brief* was provided by electronic mail as follows, to:

**ELIZABETH S. HERTZ &**  
VINCE M. ROCHE  
Davenport, Evans, Hurwitz & Smith, L.L.P.  
P.O. Box 1030  
Sioux Falls, SD 57101-1030  
[ehertz@dehs.com](mailto:ehertz@dehs.com)  
[vroche@dehs.com](mailto:vroche@dehs.com)  
*ATTORNEYS FOR APPELLEES/PLAINTIFFS*

**STEVEN W. SANFORD**  
Cadwell Sanford Deibert & Garry  
200 East 10<sup>th</sup> Street, Suite 200  
P.O. Box 2498-0899  
Sioux Falls, SD 57101-2498  
[ssanford@cadlaw.com](mailto:ssanford@cadlaw.com)

**JAY A. ALDERMAN, DSA**  
Pennington County State Attorney's Office  
300 Kansas City Street, #400  
Rapid City, SD 57701  
[jay@pennco.org](mailto:jay@pennco.org)

**ROBERT R. SCHAUB**  
Larson, Sundall, Larson, Schaub & Fox  
P.O. Box 547  
Chamberlain, SD 57325  
[robertschaub@hotmail.com](mailto:robertschaub@hotmail.com)

**BRIAN L. UTZMAN**  
Smoot & Utzman, P.C.  
P.O. Box 899  
Rapid City, SD 57709  
[blutzman@rushmore.com](mailto:blutzman@rushmore.com)

**STEPHANIE C. BENGFORD**  
US Attorney's Office  
PO Box 238  
Sioux Falls, SD 57101  
[stephanie.bengford@usdoj.gov](mailto:stephanie.bengford@usdoj.gov)

**STAN ANKER**  
Anker Law Group  
1301 W. Omaha St., Ste. 207  
Rapid City, SD 57701  
[sanker@ankerlawgroup.com](mailto:sanker@ankerlawgroup.com)

**HAVEN L. STUCK**  
Lynn, Jackson, Shultz & Lebrun  
P.O. Box 8250  
Rapid City, SD 57709  
[hstuck@lynnjackson.com](mailto:hstuck@lynnjackson.com)



and a true and correct copy of *Appellants' Reply Brief* was provided  
by First Class U.S. Mail as follows, to:

**ARMSTRONG FARMS**  
**VERN ARMSTRONG**  
**HOPE ARMSTRONG**  
28868 Puckett Street  
Pierre, SD 57501

/s/ *James P. Hurley*

James P. Hurley

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Civil

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IN THE  
SUPREME COURT  
OF THE STATE OF SOUTH DAKOTA

In re:

FARMPRO SERVICES, INC.

Plaintiff-Appellee,

vs.

DAVID M. FINNEMAN, CONNIE S. FINNEMAN, CHAD FINNEMAN,  
ARMSTRONG FARMS, VERN ARMSTRONG, HOPE ARMSTRONG,  
MICHAEL ARNOLDY, ANN ARNOLDY,  
WARRENN ANDERSON, and ROCK CREEK FARMS GENERAL PARTNERSHIP

Defendants-Appellants.

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ON APPEAL FROM THE  
SEVENTH JUDICIAL CIRCUIT COURT  
PENNINGTON COUNTY, SOUTH DAKOTA,  
HONORABLE CRAIG A. PFEIFLE  
CIRCUIT COURT JUDGE PRESIDING  
Court File No. CIV02-533

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**OPENING BRIEF OF  
APPELLANTS WARRENN ANDERSON AND  
ROCK CREEK FARMS GENERAL PARTNERSHIP**

---

Brian L. Utzman  
Smoot & Utzman, P.C.  
Attorney for Warrenn Anderson,  
individually and as a Limited Partner of  
Rock Creek Farms Limited Partnership  
PO Box 899  
Rapid City, SD 57709-0899

Steven W. Sanford Cadwell Sanford  
Deibert & Garry LLP Attorney for  
Warrenn Anderson, individually and as a  
Limited Partner of Rock Creek Farms  
Limited Partnership  
PO Box 2498 Sioux Falls, SD  
57101-2498

Notice of Appeal filed on December 8, 2015

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## **JURISDICTIONAL STATEMENT**

Appellants-Defendants Rock Creek Farms General Partnership, hereinafter referred to as either “Rock Creek Farms” or “RCF,” and Warrenn Anderson (“Anderson”), individually and as the general partner of Rock Creek Farms, appeal to this Court the Honorable Craig A. Pfeifle’s, hereinafter referred to as either the “Trial Court” or the “FarmPro Court,” Order granting summary judgment to Appellees-Defendants Michael Arnoldy and Ann Arnoldy, hereinafter referred to collectively as “Arnoldys.” The Trial Court granted Arnoldys’ motion for summary judgment on November 24, 2015. Rec. Vol. 6. The Trial Court incorporated by reference its Decision Letter, dated October 20, 2015 into its Order granting summary judgment. The Trial Court denied Rock Creek Farms’ request for the return of the redemption monies that it paid to Ann Arnoldy to make owner’s final right of redemption. Rec. Vol. 6. The Trial Court’s Order Granting Summary Judgment is a final appealable order; it directed that the redemption monies with the Pennington County Sheriff be released to Michael Arnoldy. That portion of the Trial Court’s Order has been stayed pending this Appeal. A Notice of Entry of the Trial Court’s Order Granting Arnoldys’ motion for summary judgment was filed on December 2, 2015.<sup>1</sup> RCF and Anderson filed their Notice of Appeal on December 8, 2015.<sup>2</sup>

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<sup>1</sup>The Certificate of Service contained in the Notice of Entry has an inaccurate date of March 2, 2015.

<sup>2</sup>On December 18, 2015, the Pennington County Clerk of Courts rejected RCF’s and

In granting Arnoldys summary judgment, the Trial Court relied upon this Court's decision in *Dowling Family P'ship v. Midland Farms, LLC*, 2015 S.D. 50. For reasons stated in the Argument portion of this Opening Brief, the Trial Court restricted the application of doctrine of unjust enrichment to a much greater extent than this Court did so in *Dowling*, Id.

## STATEMENT OF LEGAL ISSUES

Rock Creek Farms raises the following issues in this Appeal:

I. Should redemption monies be returned when an attempt to redeem fails?

The Trial Court did not address the legal doctrine of restitution in its Decision Letter, dated October 20, 2015. The Trial Court focused exclusively upon the doctrine of unjust enrichment.

List of the most relevant cases and statutory provisions:

- a) *Way v. Hill*, 41 S.D. 437, 171 NW2d 206 (1919);
  - b) *Davis Mfr & Supply Co. v. Coonskin Properties*, 646 P.2d 940 (Colo. App. 1982);
  - c) *Abrams v. Porter*, 920 P.2d 386, 128 Idaho 869 (Idaho, 1996); and
  - d) *East Jersey Sav. and Loan Ass'n v. Shatto*, 544 A.2d 899, 226 N.J.Super. 473 (N.J. Super. Ch., 1987).
- II. Can future, unknown or uncertain risks bar equitable relief under the doctrine of unjust enrichment?

The Trial Court determined that Rock Creek Farms took a calculated risk when it

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Anderson's Notice of Appeal because it added an additional party. RCF's and Anderson's Notice of Appeal was re-filed on December 18, 2015. It was accepted by the Pennington County Clerk of Courts on December 21, 2015. The Trial Court in its Order Granting RCF's and Anderson's Motion for Stay and Determination of Officer or Receiver to Hold the Redemption Monies and Application/Motion to Determine the Required Number of Copies of Transcripts, dated January 25, 2016 - Rec. Vol. 6, determined who the parties to this appeal are.

redeemed because its redemption could be subject to a subsequent redemption in the foreclosure of a higher priority mortgage, even though Rock Creek Farms, as the owner, has at all times the final statutory right of redemption.

List of the most relevant cases and statutory provisions:

- a) *Dowling Family P'ship v. Midland Farms, LLC*, 2015 S.D.50;
- b) *Hofeldt v. Mehling*, 2003 S.D. 25, ¶ 15, 658 N.W.2d 783; and
- c) SDCL § 21-52-7.

III. Did the Trial Court properly determine that Rock Creek Farms waived its right of redemption in a subsequent mortgage foreclosure action?

The Trial Court stated that Rock Creek Farms waived its right of redemption in the Rabo foreclosure action, which rights, under South Dakota law, cannot be waived.

List of the most relevant cases and statutory provisions:

- a) SDCL § 44-1-8; and
- b) *U.S. v. Birchem*, 100 F.3d 607 (C.A.8 (S.D.), 1996).

IV. Did the Trial court err in restricting RCF's ability to conduct discovery?

The Trial Court denied, for the most part, RCF's motion to compel discovery.

List of the most relevant cases and statutory provisions:

- a) *Public Entity Pool for Liability v. Score*, 2003 S.D. 17, ¶20, 658 NW2d 64;
- b) *Supreme Court, Inc. v. Master Blaster, Inc.*, 2009 S.D. 20, ¶ 14, 764 NW2d 474; and
- c) SDCL § 15-6-26(b)(1).

V. Do genuine issues of material fact exist which preclude summary judgment?

The Trial Court granted Arnoldys summary judgment even though genuine issues of material fact exist.

List of the most relevant cases and statutory provisions:

- a) *Stern Oil Co., Inc. v. Brown*, 2012 S.D. 56, ¶8, 817 N.W.2d 395; and
- b) SDRCP 56(c).

## **STATEMENT OF THE CASE AND FACTS**

### **Statement of the Case**

The procedural history of this case, and the related cases, has taken a long and winding road with tragic results for both RCF and Anderson. The details of FarmPro's collection action, the Sheriff's sale, and the redemption process are delineated in the Statement of Facts portion of this brief. Several separate legal proceedings have been filed concerning these agricultural lands in addition to the FarmPro Case, to-wit:

- a) *Michael Arnoldy and Ann Arnoldy v. David Finneman, et. al.*, filed in the Circuit Court for the Seventh Judicial Circuit, Pennington County, South Dakota, File No. CIV08-1845 hereinafter referred to as the "Arnoldy Dec. Action" or "Arnoldy Court";
- b) *Rabo AgriFinance, Inc., et. al. v. David M. Finneman, et. al.*, filed in the Circuit Court for the Seventh Judicial Circuit, Pennington County, South Dakota, File No. CIV09-1211, hereinafter referred to as either the "Rabo Case" or the "Rabo Court";
- c) *L & L P'ship, et. al. v. David M. Finneman, et. al.*, filed in the Circuit Court for the Seventh Judicial Circuit, Pennington County, South Dakota, File No. CIV10-316, hereinafter referred to as either the "L&L Case" or the "L&L Court"; and
- d) *David M. Finneman, et. al. v. L & L Partnership, et. al.*, filed in the Circuit Court for the Seventh Judicial Circuit, Pennington County, South Dakota, File No. CIV09-742, hereinafter referred to as the "Finneman Dec. Action".

Several Appeals to this Court have been filed concerning these agricultural lands, to-wit:

- a) *Arnoldy v. Mahoney*, 2010 S.D. 89, 791 N.W.2d 645 (Opinion Filed Dec. 1, 2010), hereinafter referred to as "Arnoldy I";
- b) *Rabo Agrifinance, Inc. v. Rock Creek Farms*, 2012 S.D. 20, 813 N.W.2d 122 (Opinion Filed Mar. 14, 2012 - dismissed), hereinafter referred to as "Rabo I";

- c) *L&L P'ship v. Rock Creek Farms, Finnemans, et al.*, 2014 S.D. 9, 843 N.W.2d 697 (Opinion Filed Feb. 19, 2014), hereinafter referred to as the “L&L Appeal”;
- d) *Arnoldy v. Finneman*, Appeal No. 26031 (dismissed as moot), hereinafter referred to as “Arnoldy II”; and
- e) *Rabo Agrifinance, Inc., et al. v. Rock Creek Farms, Finnemans, et al.*, 2013 S.D. 64, 836 N.W.2d 631 (Opinion Filed Aug. 21, 2013), hereinafter referred to as “Rabo II”.

After the Rabo II opinion was issued by this Court, Rock Creek Farms filed, on March 19, 2012, its motion for return of the redemption monies it paid, because RCF’s attempt to redeem had failed and RCF lost all of its ownership interest in these agricultural lands. Rec. p 244.<sup>3</sup> RCF seeks return of the redemption monies it paid to Ann Arnoldy when RCF exercised its owners right of final redemption on September 12, 2008. At the time that RCF redeemed these agricultural lands from the FarmPro foreclosure sale, no litigation was pending concerning its ability to do so. Each related case will be discussed in the order referenced supra.

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<sup>3</sup>“Rec.” refers to the record of this case compiled by the Pennington County Clerk of Courts.

**Arnoldy Dec. Action:** The Complaint in the Arnoldy Dec. Action was filed on October 1, 2008, after a Certificate of Redemption was issued to RCF on September 12, 2008. Arnoldy Dec. Action Rec., pp 2-7<sup>4</sup>. On January 22, 2010, the Honorable A. Peter Fuller entered summary judgment in the Arnoldy Dec. Action in Arnoldys' favor determining that the judgements RCF used to redeem were void. Arnoldy Dec. Action Rec., p 1399. This Court, on December 1, 2010, reversed the Arnoldy Court's order granting summary judgment in Arnoldy I. After Judge Fuller resigned, the Honorable James W. Anderson, granted Rock Creek Farms' summary judgment. Arnoldys filed the Arnoldy II appeal, which has been dismissed by this Court as moot.

**Rabo Case:** Rabo filed its foreclosure action on July 20, 2009. Rabo Rec. pp 190-209<sup>5</sup>. The Rabo Court, on January 15, 2010, entered a judgment on the pleadings based upon an agreement between Rabo, RCF and Finnemans. Rabo Rec. pp 886-888. As part of this agreement, Rabo gave up its argument that RCF's predecessors in interest had waived their rights to redemption. The Judgment and Decree of Foreclosure entered on January 15, 2010. Rabo Rec. pp 889-894. This order granted RCF redemption rights as owner of these agricultural lands. Rabo Rec. p 894. The foreclosure sale was held on April 12, 2010. The Sheriff's Certificate of Sale was filed on April 12, 2010. Rabo Rec. pp 999-1005. The Certificate of Sale was assigned by Rabo to CLW Financial, LLC, on June 30, 2010. Rabo Rec. pp 1057-1058. On March 18, 2011, Ann Arnoldy

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<sup>4</sup>"Arnoldy Dec. Action Rec." refers to the record of the Arnoldy Dec. Action compiled by the Pennington County Clerk of Courts.

<sup>5</sup>"Rabo Rec." refers to the record of Rabo Case compiled by the Pennington County Clerk of Courts.

redeemed. Rabo Rec. pp 1215-1216. RCF redemption rights, as owner, would have expired on June 1, 2011.

**Rabo Case Continued:** On May 12, 2011, approximately fifteen (15) months after the judgment of foreclosure entered, Arnoldys moved under SDRCP 60(b) for relief from the judgment granting Rock Creek Farms owner's final right of redemption. Rabo Rec. pp 1218-1222. On May 26, 2011, Rabo Court granted Arnoldys' Rule 60(b) motion and entered an order partially vacating its judgment of foreclosure and stripping Rock Creek Farms of its redemption rights. Rabo Rec. pp 1314-1321. The Rabo Court did so prior to the expiration of Rock Creek Farms redemption rights on June 1, 2011. Rock Creek Farms had buyers who would have advanced monies as part of the sales transaction to make redemption. On May 19, 2011, Rock Creek Farms filed a motion to determine redemption amounts and to appoint a referee. Rabo Rec. pp 1268-1272. The Rabo Court denied this motion. Rock Creek filed the Rabo I appeal. This Court dismissed this appeal because the United States of America ("USA") was not served with a copy of the Notice of Appeal, even though USA failed to redeem from the Rabo foreclosure sale, which resulted in its restitutional lien being stripped. As part of the Rabo Court granting Arnoldys' Rule 60(b) relief, the Rabo Court adopted Arnoldys' agreement to pay the USA's restitution judgment in full even though USA did not redeem and Arnoldys had no legal obligation to do so. RCF filed its own Rule 60(b) motion in the Rabo Case on May 10, 2012. Rabo Rec. pp 1666-1669. This motion was denied. The Rabo Court concluded that a Rule 60(b) motion cannot be used to seek relief from an unfavorable result on appeal. Mtn Hrg Tr. July 24, 2012, p 17, l. 7-15. This Court

affirmed the Rabo Court's decision in Rabo II.

**L&L Case:** On March 1, 2010, L&L filed a strict foreclosure action concerning two contracts for deed entered into between L&L and the Finnemans. L&L Rec. pp 3-15<sup>6</sup>. The L&L Case was tried on July 25, 2011. Prior to trial, Ann Arnoldy moved, on July 12, 2011, the Trial Court "... pursuant to SDCL § 15-6-25(c), for the substitution of Ann Arnoldy for CLW. L&L Rec. pp 188-189. This motion was withdrawn at trial. L&L Tr. p 9, 1. 17-23<sup>7</sup>. The L&L Court did not consider this motion post-trial. The L&L Court granted Ann Arnoldy the right to redeem, which she did do. L&L Rec. pp 830-841 (p 840). RCF tendered \$840,303.99 to redeem to L&L's counsel on April 12, 2012. Rock Creek Farms' tender of these redemption monies was ignored. RCF filed its Notice of Appeal on June 1, 2012, in the L&L Appeal. L&L Rec. pp 688-691. RCF argued in the L&L Appeal that only it had the right to cure the default in these contracts for deed. In the L&L Appeal, this Court affirmed the L&L Court's decision, holding that cure rights can be involuntarily assigned because equitable title can be mortgaged and involuntarily transferred. *L&L P'ship* 2014 S.D. at 9, ¶15.

**Finneman Dec. Action:** On April 16, 2009, the Finneman Dec. Action was filed. Finneman Dec. Action Rec. p 2. The Finneman Dec. Action has been held in abeyance. Arnoldys filed a motion to intervene in this action on February 18, 2016.

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<sup>6</sup>"L&L Rec." refers to the record of the L&L Case compiled by the Pennington County Clerk of Courts.

<sup>7</sup>"L&L Tr." means the transcript of the L&L Court Trial held on July 25, 2011, prepared by Court Reporter Cynthia M. Weichmann.



All of Rock Creek Farms' attempts to redeem these agricultural lands from the various foreclosure sales have failed. Rock Creek Farms no longer has any ownership interest in these agricultural lands. In March, 2012, RCF filed a Motion to Require the Return of Redemption Monies. Rec. p 244. Rock Creek Farms sought the return of the redemption monies that it paid under the legal doctrines of unjust enrichment and restitution. The FarmPro Court, in its Decision Letter, dated October 20, 2015, ignored RCF's claim for restitution. The FarmPro Court determined that, ". . . [t]hrough Ann's payment, Mahoney and RCF were reimbursed for expenses for not getting the land through Mahoney's redemption. Mahoney and RCF were made whole by Ann Arnoldy's redemption." Rock Creek Farms redeemed from Ann Arnoldy on September 12, 2008, by paying her \$1,280,000.00. Rec. p 191. Ann Arnoldy accepted these redemption monies. RCF's restitution claim is against Ann Arnoldy for \$1,280,000.00 that RCF paid to Ann Arnoldy plus a portion of the \$880,000.00 that RCF paid Michael Arnoldy to extend the redemption period for one year. Rec. pp 160;164. Michael Arnoldy accepted the \$880,000.00 paid him to extend the redemption time period. The monies being held by the Pennington County Sheriff of \$1,219,734.29 should be treated as a down payment on the redemption monies paid by RCF under the equitable doctrines of restitution and unjust enrichment. Arnoldys' counsel has stated that Michael Arnoldy and Ann Arnoldy are acting in concert and that they should be treated by the FarmPro Court as one and the same person, so the 'common interest doctrine' does not apply. Mtn Hrg Tr. February 12, 2015, pp 8-9, l. 22-18.

The FarmPro Court granted Arnoldys' summary judgment and ordered that the

monies held by the Pennington County Sheriff, in the amount of \$1,219,734.29, be released to Michael Arnoldy. The FarmPro Court greatly expanded this Court's restriction of the equitable remedy of unjust enrichment in *Dowling Family P'ship*, 2015 S.D. at 50, and reasoned that, "... RCF took a calculated risk when it paid to redeem the FarmPro mortgage, namely that its redemption would be subject to a subsequent redemption in the foreclosure of a higher priority mortgage." For the reasons stated in the Argument portion of this Opening Brief, this legal determination is without merit. The FarmPro Court also determined that RCF and Finnemans waived their rights to redeem. As stated in the Argument portion of this Opening Brief, this determination is also without merit. Rock Creek Farms filed a Motion to Stay that portion of the FarmPro Court's decision ordering that the monies being held by the Pennington County Sheriff be released to Michael Arnoldy pending the outcome of this appeal. That motion has been granted by the FarmPro Court.

### **Statement of the Facts**

The redemption of these agricultural lands from several sales has also taken a long and winding road. On May 9, 2002, FarmPro Services, Inc. ("FarmPro"), commenced a collection action against David Finneman, Connie Finneman, Chad Finneman (hereinafter referred to collectively as the "Finnemans"), Armstrong Farms, Vern Armstrong and Hope Armstrong. Rec. pp 2-7. Finnemans and Armstrong Farms were the signatories to a promissory note, dated May 30, 2000. Rec. pp 2-7. Hope and Vern Armstrong guaranteed payment of the note. Rec. pp 2-7. A stipulation for entry of judgment was entered into between FarmPro and the Finnemans on January 3, 2003. Rec.

p 55. The Sheriff's sale occurred on May 10, 2006. The Sheriff's Return on Sale was filed on May 12, 2006. Rec. pp 154-156. FarmPro bid \$1,439,130.31 at the Sheriff's sale. Rec. pp 154-156. FarmPro assigned its Certificate of Sale to Lee Ahrlin ("Ahrlin") on May 10, 2006. Rec. p 159. On May 4, 2007, Michael Arnoldy used the Daimler Chrysler and Farmers Union Oil judgments, which he took an assignment of, to redeem from Ahrlin by paying the Pennington County Sheriff \$1,767,232.00. Rec. pp 160;164. On May 10, 2007, Rock Creek Farms used monies obtained from Warrenn Anderson to pay the Pennington County Sheriff \$822,000.00 to extend the redemption period for one year. Rec. p 165. Michael Arnoldy received and retained these redemption monies, except for the portion used to pay the property taxes owed on these agricultural lands. On May 7, 2008, Daniel Mahoney ("Mahoney"), who was Warrenn Anderson's straw man, used monies obtained from Warrenn Anderson to pay Michael Arnoldy an additional \$1,221,734.29 to redeem from Michael Arnoldy. Rec. p 168. Mahoney used the Kenco and Kroeplin judgments assigned to him to make redemption. Rec. p 168. On July 3, 2008, Ann Arnoldy paid the Sheriff \$1,254,570.43 to redeem from Mahoney. Rec. p 171. Ann Arnoldy used the Pioneer Garage and US Bancorp Judgments assigned to her to redeem. Rec. p 171. On September 12, 2008, Rock Creek Farms redeemed from Ann Arnoldy by paying the Pennington County Sheriff \$1,280,000.00. Rec. p 191. Ann Arnoldy accepted these redemption monies. The Pennington County Sheriff issued Rock Creek Farms an Owner's Certificate of Redemption on September 12, 2008. Rec. p 191.

Ann Arnoldy now owns 16,600 acres of agricultural lands as a result of being

allowed to redeem from the Rabo foreclosure sale and the L&L foreclosure sale and the issuance of a Sheriff's Deed. These lands were the subject of many mortgages, liens, and judgments. In an effort to save their family farm from foreclosure, the Finnemans deeded these lands to RCF, which funded the redemptions described supra. All of RCF's appeals involve RCF's attempt to redeem these lands and pay all creditors; and in opposition, the Arnoldys' attempt to prevent redemption and to own these agricultural lands for dramatically less than its value. Having been unsuccessful in its repeated attempts to redeem and having paid the Pennington County Sheriff \$1,280,000.00 to make redemption from Ann Arnoldy, RCF now seeks to recover the redemption monies paid to Ann Arnoldy, which she has accepted and retained, and to recover part of the monies paid to extend the redemption time period for one (1) year.

Finnemans, and to a lesser extent RCF, paid secured debts and property taxes for many years on these lands. Finnemans made a Four Hundred Thousand Dollar (\$400,000.00) down payment on the 1996 contract. L&L Tr. p 13, l. 23. Finnemans and the receiver appointed in the Rabo Case paid L&L Partnership \$2,116,486.05 under the 1996 Contract. L&L Rec. p 511. Finnemans and the receiver paid the L&L Partnership \$885,573.05 under the 1999 Contract. L&L P'ship Rec. pp 308-310; 513-514. Finnemans paid at least Three Million Dollars (\$3,000,000.00) to other creditors that had a security interest in these lands as well. On June 2, 2011, the Pennington County Sheriff issued a deed conveying all of these agricultural lands to Ann Arnoldy. Michael Arnoldy is apparently either farming or leasing out these agricultural lands. Ann Arnoldy is currently practicing law with her and Michael Arnoldy's

attorney, Robert Schaub; she is not a farmer.

## **ARGUMENT**

### **I. Standard of Review.**

The Standard of Review for granting a summary judgment motion is well settled.

It is:

Our standard of review on summary judgment requires this Court to determine 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. *United Building Centers v. Ochs*, 2010 S.D. 30, ¶10, 781 N.W.2d 79. The circuit court's conclusions of law are reviewed de novo. *United Building Centers*, 2010 S.D. at 30, ¶10. However, all facts and favorable inferences from those facts must be viewed in a light most favorable to the nonmoving party. *United Building Centers*, 2010 S.D. at 30, ¶10. We will affirm the circuit court's ruling on a motion for summary judgment when any basis exists to support its ruling. *United Building Centers*, 2010 S.D. at 30, ¶10; citing *Dakota Plains Ag Ctr., LLC v. Smithey*, 2009 S.D. 78, ¶14, 772 N.W.2d 170, 178. Questions of law are reviewed 'de novo with no deference given to the conclusions of law of the circuit court.' *Citibank v. SD Dept of Revenue*, 2015 S.D. 67, ¶33; citing *Dakota Truck Underwriters*, 2004 S.D. 120, ¶ 15, 689 N.W.2d 196, 201. Where relevant facts are undisputed and the district court denied equitable relief, the trial court's decision is reviewed de novo. See, *Citibank*, 2015 S.D. at 67, ¶33.

The Trial Court granted Arnoldys summary judgment based upon its tremendous expansion of this Court's restriction of the equitable doctrine of unjust enrichment by limiting the doctrine to not only risks assumed at the time the benefit was conveyed, but to future, unknown and uncertain risks as well. Since the applicability of a legal doctrine is a question of law, the Trial Court's further restrictions of the equitable remedy of unjust enrichment should be reviewed de novo standard of review rather than under the abuse of discretion standard of review. See, *Citibank*, 2015 S.D. at 67, ¶33. When either standard of review is applied here, the Trial Court's err in unduly restricting the

equitable remedy of unjust enrichment should be reversed.

A trial court's decision concerning evidentiary issues, are reviewed under the abuse of discretion standard. *Papke v. Harbert*, 2007 S.D. 87, ¶81, 738 N.W.2d 510.

## **II. Redemption Monies must Be Returned When a Redemption Fails.**

Equity compels that redemption monies be returned whenever a redemption fails.

Legal authority was provided to the Trial Court which held unequivocally that redemption monies must be returned whenever a redemption failed. In *Abrams v. Porter*, 920 P.2d 386, 128 Idaho 869 (Idaho 1996), the Idaho Supreme Court held that the monies paid to redeem must be returned to the redemptioner when redemption rights had not been validly assigned, which caused the redemption attempt to fail. In *East Jersey Sav. and Loan Ass'n v. Shatto*, 544 A.2d 899, 226 N.J.Super. 473 (N.J. Super. Ch., 1987), redemption monies were returned to the redemptioners even though they filed a groundless objection to the Sheriff's Sale to procure additional time to redeem. In *Davis Mfr & Supply Co. v. Coonskin Properties*, 646 P.2d 940 (Colo. App. 1982), a Colorado Appellant Court put the parties in the same position that they were before the redemption failed and required that the party attempting to redeem receive the monies it paid to redeem, plus eight percent (8%) interest, under the equitable remedy of restitution.

The Trial Court in its Decision Letter, dated May 6, 2014, cited the case of *Way v. Hill*, 41 S.D. 437, 171 NW2d 206 (1919). In *Way, Id.*, this Court held that:

Even an equity court has no power to extend the period of redemption . . . , but this rule does not deprive courts of their equitable jurisdiction and power to control the legal rights of both creditor and redemptioner . . . [I]t would be inequitable and wholly unconscionable to permit the defendants

to interpose the statutory period of redemption as a bar to the right to redeem, permit them to obtain title to the real property through the sheriff's deed, and at the same time retain payments made upon redemption.

The Trial Court also cited the case of *Robinson v. Bailey*, 361 Ill. 458, 464, 198 NE2d 217, 219-220 (1935), in its Decision Letter, dated May 6, 2014, for the proposition that equity would not permit creditors to both accept redemption monies and claim title to the real estate.

None of the courts in these redemption cases allocated risk in determining whether to return the redemption monies paid. These courts all determined that equity compels return of the redemption monies when redemptioners' redemption attempt failed. The facts of *Davis Mfr & Supply*, Id. are quite similar to the facts in this case and the result should be the same. RCF should receive the monies that RCF paid to Ann Arnoldy in its failed attempt to redeem these agricultural lands from the FarmPro foreclosure sale and a portion of the monies RCF paid to extend the redemption time period.

The Trial Court in its Decision Letter, dated May 6, 2014, determined that:

[i]n the case at hand, if this Court finds the Sheriff accepted the redemption money in good faith, but that a subsequent vacation of judgment altered the legal effect of redemption, the acceptance of the redemption money cannot stand. Equity will require that the money be returned. All this Court needs to determine is if RCF attempted to redeem in good faith. Evidence must be presented on these issues.

The Trial Court 'got it right' in its first Decision Letter where it was going to apply the equitable remedies of restitution and unjust enrichment after it held a trial to determine if RCF satisfied the elements of unjust enrichment. The Trial Court 'got it wrong' in

expanding this Court's holding in *Dowling Family P'ship*, 2015 S.D. at 50, to exclude restitution based upon future, unknown and uncertain risks.

The doctrines of unjust enrichment and restitution are separate and distinct equitable remedies. Restitution is a broader remedy than unjust enrichment.

Restitution is defined in Black's Law Dictionary, 5<sup>th</sup> Ed., 1981, as: . . . [r]estoration of anything to its rightful owner; the act of making good or giving equivalent for any loss, damage, or injury and indemnification. *State v. Barnett*, 110 Vt. 221, 3A. 2d 521, 525, 526. Our legislature has required restitution, “. . . [i]f any judgment . . . shall at any time thereafter be reversed . . . restitution must be made by the judgment creditor of the money for which such real property was sold, with lawful interest thereon from the day of sale.” SDCL § 15-19-18. The equitable principal behind this statute is very similar to the equitable remedy of restitution being sought by RCF here. Restitution is also required when materials have been used without the owner's knowledge to form a new product. SDCL § 43-34-9. Restitution is also required when a seller justifiably withholds delivery of goods under certain circumstances. SDCL § 57A-2-718. This Court has utilized the doctrine of implied contract or quasi contract to accomplish restitution. *Bollinger v. Eldredge*, 94 SDO 711, 524 N.W.2d 118 (S.D. 1994). Risk analysis is not a component of any of these restitution remedies whether provided for by statute or decisions of this Court.

**III. Neither Future, Unknown nor Uncertain Risks Should Bar Equitable Relief Under the Doctrine of Unjust Enrichment or Restitution.**

The elements of unjust enrichment are well settled. This Court has recently



reiterated said elements as:

Unjust enrichment occurs ‘ . . . when one confers a benefit upon another who accepts or acquiesces in that benefit, making it inequitable to retain that benefit without paying.’ *Dowling Family P’ship v. Midland Farms, LLC*, 2015 S.D. 50, ¶10; citing *Hofeldt v. Mehling*, 2003 S.D. 25, ¶ 15, 658 N.W.2d 783 . . . The Restatement of Restitution declares that, ‘ . . . [a] person who has been unjustly enriched at the expense of another is required to make restitution to the other.’ Restatement of Restitution § 1 (1937). The comment to this section explains that, ‘ . . . [a] person is enriched if he has received a benefit. A person is unjustly enriched if the retention of the benefit would be unjust.’ Restatement of Restitution § 1 (1937). *Hofeldt*, 2003 S.D. 25, ¶15; citing *Parker v. Western Dakota Insurors, Inc.*, 2000 S.D. 14, ¶17, 605 N.W.2d 181, 187.

This Court in, *Dowling Family P’ship*, 2015 S.D. at 50, held that no unjust enrichment occurs when a party bestows a benefit in the face of a known and certain risk. The known and certain risk in *Dowling*, Id., was pending litigation at the time the benefit was conferred. The facts here are significantly different from *Dowling Family P’ship*, 2015 S.D. at 50. In *Dowling*, Id., this Court held that the Dowling Family Partnership had been enriched by Clement Farms planted the crop. This Court held further that Midland Farms had assumed the risk of its action, so Dowling Family Partnership was not unjustly enriched. Clement Farms planted the crop over the Dowling Family Partnership’s objection while litigation between them was pending.

Contrary to the Trial Court’s finding, RCF did not take a calculated risk when it redeemed from Ann Arnoldy because an owner always has the statutory right of final redemption. SDCL § 21-52-7. Here, Rock Creek Farms on September 16, 2008, redeemed from Ann Arnoldy by paying her \$1,280,000.00. Rec. p 191. Ann Arnoldy accepted and retained the redemption monies of \$1,280,000.00. Notwithstanding her doing so, the Arnoldy Dec. Action was filed on October 1, 2008. In contrast to *Dowling*

*Family P'ship*, 2015 S.D. at 50, no litigation was pending when Rock Creek Farms redeemed. Moreover, because Rock Creek Farms had an unconditional and absolute final right of redemption, under SDCL § 21-52-7, it did not assume any risk in redeeming. Even though the Honorable John J. Delaney, Sr., did so in the Rabo Case, an owner's right of final redemption cannot be waived contractually. South Dakota law, particularly SDCL § 44-1-8, provides that, ". . . [a]ll contracts in restraint of the right of redemption from a lien are void." For all of these reasons, Rock Creek Farms did not assume any risk in exercising its owner's right of final redemption. *Dowling Family P'ship*, 2015 S.D. at 50 is clearly distinguishable from this case. The FarmPro Court has effectively eviscerated the equitable remedy of unjust enrichment by expanding this Court's risk analysis to future, unknown and uncertain risks. The FarmPro Court held that, ". . . RCF took a calculated risk when it paid to redeem in the FarmPro mortgage, namely, that its redemption would be subject to a subsequent redemption in the foreclosure of a higher priority mortgage." The FarmPro Court precluded return of the redemption monies RCF paid based upon future, unknown and uncertain risks. It erred in doing so.

Even if *Dowling Family P'ship*, 2015 S.D. at 50 was not distinguishable from this case, the Trial Court greatly expanded this Court's restriction of the doctrine of unjust enrichment in *Dowling Family P'ship*, 2015 S.D. at 50, by applying risk analysis to future and uncertain risks. In *Dowling Family P'ship*, 2015 S.D. at 50, the risk taken by Clement Farms, in planting the crop over Dowling Family Partnership's objection while litigation between them was pending, was evaluated at the time that the benefit was

conferred. The Rabo Court looked at events occurring almost three (3) years in the future in evaluating the claimed risk. The Rabo Court stripped RCF of its redemption rights 32 months after RCF redeemed from the FarmPro sale (from September 12, 2008 to May 26, 2011). Rabo Rec. pp 1218-1222. RCF certainly did not knowingly take a risk that its rights of owners' final redemption would be stripped in a subsequent foreclosure action, in violation of SDCL § 44-1-8, almost three (3) years in the future from the date it redeemed from the FarmPro sale and conferred the benefit to Ann Arnoldy. RCF clearly could not have foreseen this unlawful result when it redeemed. This Court should not restrict further the equitable remedy of unjust enrichment by determining that future, unknown or uncertain risk precludes recovery of a benefit conferred (redemption monies paid) under the doctrine of unjust enrichment. This Court would effectively eviscerate the unjust enrichment by affirming the Trial Court's risk analysis.

The Trial Court erred in determining that, "... RCF never redeemed the property in the Rabo foreclosure and RCF and Finnemans ultimately waived their right to redeem." RCF certainly attempted to redeem. The Rabo Court stripped RCF of its redemption rights fifteen (15) months after those rights had been granted to RCF. Rabo Rec. pp 1218-1222. Rock Creek Farms had buyers lined up who would have provided the monies necessary to redeem from the Rabo foreclosure. The Trial Court compounded this error by denying RCF the equitable remedy of unjust enrichment based upon a future and uncertain risk. This Court has not allowed the doctrine of unjust enrichment to be restricted in this manner. For this reason alone, the Trial Court granting summary judgment should be reversed.

**IV. The Trial Court Erred in Determining that Rock Creek Farms Waived its Rights of Redemption in a Subsequent Mortgage Foreclosure Action.**

The Trial Court stated in its Decision Letter, dated October 20, 2015, p 9, that RCF waived its rights of redemption in the Rabo Case. The Trial Court erred in making this determination. South Dakota law, specifically SDCL § 44-1-8, clearly and expressly precludes contractual waiver of rights to redemption. SDCL § 44-1-8 reads, “. . . all contracts in restraint of the right of redemption from a lien are void.” This statute voids the entire contract which restrains redemption rights. Judge Delaney, based upon a Rule 60(b) motion made approximately 15 months after the FarmPro Court had granted RCF rights of redemption, determined that Finnemans had waived their rights of redemption in a Confidential Loan Restructure Agreement they entered into with Ag Services of America, Inc. (“ASA”). The Rabo Court also ignored Rabo’s willingness to grant Rock Creek Farms redemption rights as part of its negotiations for Rock Creek Farms to take an assignment of its mortgage. The Rabo Court clearly erred in determining that RCF waived its redemption rights. The 8<sup>th</sup> Circuit Court of Appeals in *U.S. v. Birchem*, 100 F.3d 607 (C.A.8 (S.D.), 1996), cited SDCL § 44-1-8 for the proposition that South Dakota law prohibits the use of redemption waiver clauses in a mortgage. The Trial Court compounded the Rabo Court’s error in determining that RCF and Finnemans ultimately waived their right to redeem. Decision Ltr 10/20/15, p 9.

RCF has taken a hellish beating in all of these cases and in all of these appeals. Arnoldys own these agricultural lands worth millions of dollars. The Trial Court adds insult to injury by allowing Arnoldys to maintain ownership of these agricultural lands

and to keep the redemption monies paid to Ann Arnoldy to redeem from the FarmPro sale and the monies paid to Michael Arnoldy to extend the redemption time period, which they accepted and retained, except for the monies used to pay property taxes owed. The Trial Court cites South Dakota legal precedent which would not allow this in its first Decision Letter, dated May 6, 2014. This Court should not allow this to happen for the reasons stated herein.

**V. The Trial Court Erred in Restricting RCF's Ability to Conduct Discovery.**

The Trial Court unduly restricted RCF's ability to conduct discovery, even though the scope of discovery is very broad. A party "... may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. It is not grounds for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." SDCL § 15-6-26(b)(1); *Public Entity Pool for Liability v. Score*, 2003 S.D. 17, ¶20, 658 NW2d 64. This Court has defined relevance as, "... evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *St. John v. Peterson*, 2015 S.D. 41, ¶15; citing SDCL § 19-12-1. The purpose of pre-trial discovery is to allow the parties to obtain the fullest possible knowledge of the issues and facts before trial. *Supreme Court, Inc. v. Master Blaster, Inc.*, 2009 S.D. 20, ¶ 14, 764 NW2d 474.

The Trial Court failed to compel Arnoldys to respond to RCF's discovery except for a few Interrogatories. Mtn Hrg Tr. February 12, 2015, p 12, l. 1-21. The Trial Court followed the pattern set in these related cases in doing so. In the Arnoldy Dec.

Action, both Michael Arnoldy and Ann Arnoldy ignored Notices of Deposition served upon them with impunity. The Arnoldy Court determined that discovery was not necessary to the

issues to be decided in the summary judgment motions. Arnoldy Dec. Action Rec.

p 1021. The Trial Court did not compel Arnoldys to answer the following Interrogatories:

- No. 13 concerning persons with knowledge of facts supporting Arnoldys' position at Trial;

**Relevancy:** facts which would support Arnoldy's position at trial are by definition relevant, as facts supporting Arnoldys' position at trial would be facts of consequence to the determination of the action. This information is also necessary to allow RCF to prepare for trial.

- No. 2 concerning consideration given to them for redemption monies tendered by Arnoldys in these cases.

**Relevancy:** consideration paid to Arnoldys by a third party is pertinent to the doctrine of unclean hands. The doctrine of unclean hands requires that, ". . .[a] party seeking equity must act fairly and in good faith." *Halls v. White*, 2006 S.D. 47, 715 N.W.2d 577; citing *Action Mech., Inc. v. Deadwood Historic Pres. Comm'n*, 2002 S.D. 121, ¶26, 652 N.W.2d 742, 751. RCF should be able to determine the identity of those persons or entities who are funding Arnoldys' redemption of these lands. Those individuals may have information relevant to the issues in this case. This information may also show bias or undue influence.

- No. 8 concerning Rock Creek Farms receipt of anything of value from a third party in obtaining the redemption certificate from the FarmPro sale.

**Relevancy:** this information would allow RCF to defend Arnoldys' contentions made under the doctrine of unclean hands. Arnoldys have trumpeted loudly and repeatedly that RCF has acted with 'unclean hands.'

- No. 1 (2<sup>nd</sup> set) concerning Arnoldys' acquisition of judgments against Finnemans, the amount paid to acquire the judgments, and the source of funds used for payment.

**Relevancy:** same as No. 2.

No. 3 (2<sup>nd</sup> set) concerning agreements with third parties regarding Arnoldys' efforts to acquire these agricultural lands.

**Relevancy:** same as No. 2.

The Trial Court did not compel Arnoldys to disclose the identity of documents that supported Arnoldys' position at Trial. Such documents are relevant for the reasons stated supra. These Interrogatories are relevant to the issues framed by the Trial Court concerning RCF's recovery of the redemption monies paid based upon the doctrines of restitution and unjust enrichment. RCF contends that Arnoldys have acted with 'unclean hands,' but have been unable to determine this with any definitiveness because all of RCF's discovery requests concerning Arnoldys being in cahoots with third parties have been precluded. The Trial Court erred in doing so.

The Trial Court erred in failing to decide RCF's motion to compel discovery when it determined in its Decision Letter, dated May 6, 2014, that a trial was necessary. Moreover, the discovery pleadings demonstrate the existence of genuine issues of material facts which preclude summary judgment.

**VI. Genuine Issues of Material Fact Exist Which Preclude Summary**

**Judgment.**

The Trial Court in its Decision Letter, dated May 6, 2014, determined that equity will require that the redemption money be returned if RCF attempted to redeem in good faith. The Trial Court determined that evidence must be presented on this issues. The Trial Court in its Decision Letter, dated May 6, 2014, indicated that the Trial Court

will hold a trial to determine whether RCF proved that, “. . . (1) that Arnoldys received a benefit; (2) Arnoldys were aware that they were receiving a benefit; and (3) it would be inequitable to allow Arnoldys to retain the redemption monies.” These are all genuine issues of material fact, which preclude summary judgment. See, *Stern Oil Co., Inc. v. Brown*, 2012 S.D. 56, ¶8, 817 N.W.2d 395. Moreover, the Trial Court granting summary judgment was premature when RCF did not have a full opportunity to conduct discovery. RCF’s discovery demand demonstrates the existence of genuine issues of material fact. See, *Bucklin Constr. v. McCormick Constr.*, 2013 S.D. 57, ¶32, 835 N.W.2d 862. This error also justifies reversal and remand.

### **CONCLUSION**

Equity compels that redemption monies be returned whenever a redemption fails. The Trial Court ignored the legal precedent cited to it which all held that redemption monies be returned whenever a redemption fails. The Trial Court also ignored the legal precedent that it cited in its Decision Letter, dated May 6, 2014, of *Way v. Hill*, 41 S.D. 437, 171 NW2d, where this Court determined that it would be inequitable and wholly unconscionable to permit the defendants to obtain title to the real property and at the same time retain redemption monies paid. Allocation of risk was not a consideration in these cases. Allocation of risk is not a consideration in the equitable doctrine of restitution generally.

The Trial Court expanded greatly, without any supporting legal authority, this Court’s restriction of the doctrine of unjust enrichment in the *Dowling Family P’ship*, 2015 S.D. at 50, case. The Trial Court did expanding risk analysis from known risks at



the time the benefit was conferred to unknown and uncertain risks come to light approximately three years in the future. The Trial Court erred in determining that RCF and Finnemans ultimately waived their right to redeem, which is precluded explicitly by SDCL § 44-1-8. The Trial Court also erred by granting summary judgment before it allowed unfettered discovery. The Trial Court, in its Decision Letter, dated May 6, 2014, stated that a trial was necessary. The Trial Court also erred by granting summary judgment when genuine issues of material fact exist. For all of these reasons, RCF respectfully requests that this Court reverse the Trial Court's decision granting summary judgment and remand with instructions to direct the Trial Court to return the redemption monies RCF paid to Ann Arnoldy and a portion of the monies RCF paid to Michael Arnoldy to extend the redemption time period. The monies that are currently held by the Pennington County Sheriff should be a down payment on the monies owed to RCF.

### **REQUEST FOR ORAL ARGUMENTS**

Rock Creek Farms respectfully requests that oral arguments be held in this appeal.

### **CERTIFICATION OF VOLUME LIMITATIONS**

The undersigned counsel certifies that this Opening Brief was prepared using a Corel-WordPerfect -Version 10 - word processing software. This brief complies with the type-volume limitations imposed by SDCL § 15-26A-66(b)(2). The Opening Brief of Appellants Warrenn Anderson and Rock Creek Farms General Partnership contains 6,313

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words and 32,062 characters. The above-mentioned word processing system was used to count the number of words and characters in this Opening Brief.

Dated this 3<sup>rd</sup> day of March, 2016.

SMOOT & UTZMAN, P.C.  
14 St. Joseph Street, Suite 200C  
P.O. Box 899  
Rapid City, SD 57709-0899

--and—

CADWELL SANFORD DEIBERT

&

GARRY LLP  
200 E. 10<sup>th</sup> Street, Suite 200  
P.O. Box 2498  
Sioux Falls, SD 57101-2498

BY: /s/ Brian L. Utzman

Brian L. Utzman

*Attorneys for Rock Creek Farms*

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing **Opening Brief of Appellants Warrenn Anderson and Rock Creek Farms General Partnership** upon the person(s) designated herein, on the date shown below, by either electronic mail or First Class mail, to-wit:

Elizabeth S. Hertz  
Vince M. Roche  
Davenport, Evans, Hurwitz & Smith  
PO Box 1030  
Sioux Falls, SD 57101-1030

Robert R. Schaub  
Larson, Sundall, Larson,  
Schaub & Fox  
PO Box 547  
Chamberlain, SD 57325

James P. Hurley  
Bangs, McCullen, Butler,  
Foye & Simmons, LLP  
PO Box 2670  
Rapid City, SD 57709-2670

Steven W. Sanford  
Cadwell Sanford Deibert & Garry  
200 East 10<sup>th</sup> Street, Suite 200  
PO Box 2498  
Sioux Falls, SD 57101-2498

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

Dated this 3<sup>rd</sup> day of March, 2016.

Utzman

Jay A. Alderman, DSA  
Pennington County State Attorney's Office  
300 Kansas City Street, Suite 400  
Rapid City, SD 57701

Stephanie C. Bengford  
US Attorney's Office  
PO Box 238  
Sioux Falls, SD 57101

Armstrong Farms  
Vern Armstrong  
Hope Armstrong  
3341 Airport Road  
Pierre, SD 57501

Haven L. Stuck  
Lynn, Jackson, Shultz & Lebrun  
PO Box 8250  
Rapid City, SD 57709-8250

/s/ Brian L.

Brian L. Utzman

## **APPENDIX**

Order Granting Summary Judgment .....	App. No. 1
Decision Letter of October 20, 2015.....	App. No. 2
Decision Letter of May 6, 2014 .....	App. No. 3

STATE OF SOUTH DAKOTA )  
  : SS  
COUNTY OF PENNINGTON )

IN CIRCUIT COURT  
  
SEVENTH JUDICIAL CIRCUIT

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FARMPRO SERVICES, INC.,

Plaintiff,

vs.

DAVID FINNEMAN et al.,

Defendants.

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CIV. 02-533

**ORDER GRANTING ARNOLDYS'  
MOTION FOR SUMMARY JUDGMENT**

Ann Arnoldy and Michael Arnoldy, Rock Creek Farms, and David and Connie Finneman filed cross-motions for summary judgment in the above-captioned matter. For the reasons stated in the Court's opinion letter dated October 20, 2015, which is incorporated herein by reference, and based upon the filings, records, and proceedings, the Court HEREBY ORDERS:

1. The motion for summary judgment by Ann Arnoldy and Michael Arnoldy is GRANTED;
2. The motion for summary judgment by Rock Creek Farms is DENIED;
3. The motion for summary judgment by David Finneman and Connie Finneman is DENIED;
4. The requests for equitable relief made in the Finnemans' July 10, 2015 letter to the Court are DENIED; and
5. The Pennington County Sheriff's office is authorized to release to Michael Arnoldy the \$1,219,734.29 currently in its possession.

Dated at Rapid City, South Dakota, this 24 day of November, 2015.

BY THE COURT:

[Signature]

Hon. Craig A. Pfeifle  
Circuit Court Judge

ATTEST:

[Signature]

Ranae Truman, Clerk

By: [Signature], Deputy



Pennington County, SD

FILED  
IN CIRCUIT COURT

NOV 25 2015

Ranae Truman, Clerk of Courts

By: [Signature] Deputy

## Seventh Judicial Circuit Court

P.O. Box 230  
Rapid City SD 57709-0230  
(605) 394-2571

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### CIRCUIT JUDGES

Craig A. Pfeifle, Presiding Judge  
Matthew Brown  
Jeff W. Davis  
Wally Eklund  
Robert Gusinsky  
Heidi L. Linngren  
Robert A. Mandel  
Jane Wipf Pfeifle

### MAGISTRATE JUDGES

Scott M. Bogue  
  
Todd J. Hyronimus  
Bernard Schuchmann

### COURT ADMINISTRATOR

Kristi K. Erdman

### STAFF ATTORNEY

Marya Tellinghuisen

October 20, 2015

Steven W. Sanford  
✓ Alex M. Hagen  
✓ P.O. Box 2498  
Sioux Falls, SD 57101

Vince Roche  
Elizabeth Hertz  
P.O. Box 1030  
Sioux Falls, SD 57101

**Re:** *FarmPro Servs., Inc. v. David Finneman, Connie Finneman, and Chad Finneman* (Civ. 02-533)

Counsel,

This case has been the subject of a large number of contested hearings. From each, and including the cross motions for summary judgment, I have received and thoroughly reviewed extensive pleadings. I have considered the arguments presented by all parties involved. For the reasons set forth below, the Court GRANTS Arnoldys' Motion for Summary Judgment.

### Background

As noted above, these cases have been extensively litigated, and have resulted in several appellate opinions. For purposes of these cross motions, I have reviewed and rely upon all prior pleadings and opinions, but feel it



warranted to set forth a recitation of case activity specifically considered as part of my opinion herein.

On April 29, 1996, the Finnemans entered into a contract for deed with L&L Partnership ("L&L") for 6,950 acres. On October 13, 1999, the Finnemans entered into a second contract for deed with L&L for 2,250 acres. The Finnemans owned another 7,500 acres in fee simple. In total, the Finnemans owned 16,700 acres of farmland. Of the 16,700 acres, the Finnemans encumbered all but 200 acres of the contracts for deed property with mortgages to Rabo Agrifinance, Inc. ("Rabo") and FarmPro Services, Inc. ("FarmPro"). In an effort to stave off foreclosure, Finnemans transferred their interest in all of the property by quit-claim deed to Rock Creek Farms ("RCF") in May of 2007. RCF was an entity formed by the Finnemans and an outside investor, Warren Anderson.

In 2000, FarmPro had commenced foreclosure on its mortgage on the Finnemans' land. FarmPro received a final judgment in 2003 for \$1,080,681.02 plus interest, and executions were made on the judgment in 2006. FarmPro purchased the land at a sheriff's sale on May 10, 2006 for \$1,439,130.30 and signed its certificate of sale to Dr. Lee Ahrlin (Ahrlin). In April of 2007, Michael and Ann Arnoldy (Arnoldys), siblings, purchased an assignments of a judgments against the Finnemans. On May 4, 2007, the Arnoldys used these judgments to secure the foreclosed land from Ahrlin for \$1,765,232.50 and an additional \$2,000 as a contingency.

On May 10, 2007, Anderson paid the Sheriff \$822,000 to extend the owners' redemption period for one year pursuant to SDCL 21-52-13. During the extension period, Michael Arnoldy held a Certificate Redemption, which was the prevailing interest in the land. RCF and the Finnemans then purported to exercise their owner's right of redemption.

On May 8, 2008, David Finneman confessed judgment to Kenco, Inc. d/b/a Warne Chemical and Equipment, Co. (Kenco) for \$622,558.84. An acquaintance of the Finnemans, Daniel Mahoney, (who had introduced the Finnemans to RCF partner Anderson) purchased the judgment for \$10,000 on May 7, 2008. David Finneman also confessed judgment to Doug Kroeplin Ag Services, Inc. (Kroeplin) for \$254,731.59, which Mahoney purchased for \$5,000 on May 7, 2008. Also on May 7, 2008, Mahoney deposited \$1,219,734.29 with the Sheriff plus a \$2,000 contingency to redeem from Michael Arnoldy using the Kenco and Kroeplin judgments. Michael refused to accept the redemption payment in order to preserve his right to contest the validity of the Kenco and Kroeplin judgments. Mahoney received and held a certificate of redemption.

After Mahoney redeemed, Ann Arnoldy redeemed from Mahoney in July 2008, using two judgments she had purchased against Finnemans in favor of U.S. Bank Corporation Equipment Finance, Inc., and Pioneer Garage, Inc. Ann paid the Sheriff \$1,244,570.43, and the Sheriff paid Mahoney with Ann's money. Mahoney accepted the money, and the Sheriff issued Ann a certificate of redemption. The Finnemans purported to exercise their owners' right of

redemption on September 12, 2008 by RCF for \$1,280,000.00 which included an \$11,220.10 contingency. RCF received a certificate of redemption. The Arnoldys filed a declaratory judgment action in October 2008 contesting the validity of the Kenco and Kroeplin judgments.

In July of 2009, Rabo commenced a foreclosure action on its mortgage granted by Finnemans on approximately 17,000 of acres of farmland. Rabo commenced its action against Finnemans, RCF, and all parties who had or may have had an ownership or leasehold interest in the land. A sheriff's sale was held in April of 2010. The circuit court granted the right of redemption to Ann Arnoldy. Ann redeemed from an assignee of the purchaser of the sheriff's certificate and received a sheriff's deed on June 2, 2011, to the property covered by the Rabo mortgage, including all but 200 acres of the contracts for deed land. RCF never redeemed the property in the Rabo foreclosure, and the circuit court subsequently found that RCF and the Finnemans had waived their right to redeem.

In March of 2010, L&L commenced its foreclosure proceedings on the contracts for deed. The circuit court in the L&L foreclosure granted Ann Arnoldy equitable ownership of the real estate described in the contracts for deed and the right to cure the contracts for deed default under SDCL 21-50-3.

### **Summary Judgment Standards**

The standard for summary judgment is well settled. Summary judgment is appropriate where the "pleadings, depositions, answers to interrogatories,

and admissions on file, together with 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.” S.D.C.L. § 15-6-56(c). All reasonable inferences drawn from the facts must be viewed in favor of the non-moving party. *Morgan v. Baldwin*, 450 N.W.2d 783, 785 (S.D. 1990). The party moving for summary judgment has the burden of proving the absence of any genuine issue of material fact and that they are entitled to judgment as a matter of law. *Discover Bank v. Stanley*, 2008 S.D. 111, ¶ 16, 757 N.W.2d 756, 761. “The party resisting summary judgment is required to ‘show that [it] will be able to place sufficient evidence in the record at trial to support findings on all the elements on which they have the burden of proof.’” *Tolle v. Lev*, 2011 S.D. 65, ¶22, 804 N.W.2d 440, 446 (quoting *Lawrence County v. Miller*, 2010 S.D. 60, ¶ 14, 786 N.W.2d 360, 367). The nonmoving party must present specific facts showing that a genuine, material issue for trial exists. *Brandt v. County of Pennington*, 2013 S.D. 22, ¶7, 827 N.W.2d 871, 874. Each party filed a summary judgment motion, and each represented that no genuine issue of material fact exists. Each party has indicated that the issue is a legal one to be determined by the Court based upon existing facts.

### **Analysis**

The sole issue before this Court on the cross-motions for Summary Judgment can be expressed as competing requests for a judicial determination of whether the Arnoldys or Rock Creek Farms is entitled to the \$1,219,734.29

check deposited by Daniel Mahoney with the Pennington County Sheriff on May 8, 2008.<sup>1</sup> Redemption is the right to repay the amount paid for real property or any interest thereon, sold on foreclosure of a real estate mortgage or on special or general execution against the property of a judgment debtor, or upon the foreclosure of any lien upon such real property other than a lien for taxes or special assessment. S.D.C.L. § 21-52-1. "There is no constitutional right to redemption. Any redemption rights are creatures of statute." *In re Zirpel*, 53 B.R. 422, 425 (Bankr. D.S.D. 1985); See also *VanGorp v. Sieff*, 2001 S.D. 45, ¶ 14, 624 N.W.2d 712, 715. "A redemption by the mortgagor or his successor in interest terminates the effect of the sale and restores to him, free of the incumbrance of the mortgage foreclosed, his property... and leaves the property subject to junior liens." *Rist v. Andersen*, 70 S.D. 579, 582, 19 N.W.2d 833, 835 (1945).

"[A] sheriff's deed resulting from a regular foreclosure under a power of sale conveys a title free and clear of liens or encumbrances junior to the mortgage thus enforced." *Kruse v. State*, 73 S.D. 49, 55, 38 N.W.2d 925, 928 (1949). However, holders of junior liens can protect their interest by buying land at the sheriff's sale or by buying the certificate of sale from the auction purchaser, which is the right of redemption. S.D.C.L. § 21-52-5. Redemption is

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<sup>1</sup> I sent correspondence to the parties on July 7, 2015 to verify that all parties agreed this was the issue to be determined by the Court based the arguments asserted in the cross motions by each party, as the pleadings were lengthy and somewhat unclear. RCF and the Arnolds agreed I had correctly outlined the issue; the Finnemans responded with a prayer for relief based on theories of unjust enrichment and other equitable relief, citing no authority therefore and which were referenced only in an affidavit. I will not consider theories for relief which were raised by solely by affidavit in this fashion and were not presented nor have any basis in any motion pleading.

“the right to repay the amount paid for real property or any interest thereon, sold on foreclosure of a real estate mortgage or on special or general execution against the property of a judgment debtor, or upon the foreclosure of any lien upon such real property other than a lien for taxes or special assessment.”

S.D.C.L. § 21-52-1. When a junior lienholder redeems, he reimburses the certificate of sale holder the sum of the sheriff's auction price, post-auction interest, and money spent to preserve his interest in such property. S.D.C.L. § 21-52-14. If the purchaser is the holder of a lien other than that under which sale was made, which is superior to the lien of the redemption, the redemptioner shall likewise pay the amount of the additional lien. S.D.C.L. § 21-52-14. Holders of junior liens may redeem from a prior redemptioner, making payments as required in S.D.C.L. § 21-52-14, and paying in addition the amounts of any liens senior to their own, on which successive prior redemptions have been made. S.D.C.L. § 21-52-19. Redemptions need not redeem in the order of priority of their liens. *Id.* If a junior lienholder redeems, he is not required to pay off any junior lien-holders who fail to redeem. S.D.C.L. § 21-52-20. However, a redemptioner shall pay to the junior lien-holder who has made redemption the amount paid by him to make redemption and interest. *Id.*

On May 7, 2008, Mahoney deposited \$1,219,734.29 with the Sheriff to redeem from Michael Arnoldy using the Kenco and Kroeplin judgments. Michael refused to accept the redemption payment in order to preserve his

right to contest the validity of the Kenco and Kroeplin judgments. Because Mahoney was redeeming from Michael, Michael had the right to accept the money Mahoney tendered. Regardless of Michael's intentional decision to refuse the money, Mahoney received and held a certificate of redemption.

When Ann redeemed from Mahoney on July 3, 2008, she tendered \$1,244,570.43 in order to exercise that right of redemption. Mahoney accepted Ann's payment. Through Ann's payment, Mahoney and RCF were reimbursed for expenses for not getting the land through the Mahoney redemption. On September 12, 2008, RCF purported to exercise the owner's right of redemption by paying \$1,268,779.88 to Ann, and RCF subsequently received a certificate of redemption. The money being held by the Pennington County Sheriff's Office is the \$1,219,734.29 deposited by Mahoney.

The Finneman's farmland was subject to numerous mortgages. In July of 2009, Rabo commenced a foreclosure action on its mortgage on approximately 17,000 of acres of farmland. The Rabo mortgage was of a higher priority than the previously foreclosed upon and redeemed FarmPro mortgage. Under South Dakota law, regardless of whether or not RCF properly redeemed on the FarmPro mortgage on September 12, 2008, the Rabo mortgage foreclosure ended whatever junior liens were still on the property in question. There is no dispute that Ann Arnoldy successfully redeemed in the Rabo foreclosure proceeding, and is now the title owner of the land. RCF never redeemed the



property in the Rabo foreclosure, and RCF and the Finnemans ultimately waived their right to redeem.

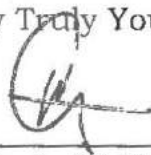
Under South Dakota law, Mahoney and RCF took a calculated risk when it paid to redeem in the FarmPro mortgage, namely, that its redemption would be subject to a subsequent redemption in the foreclosure of a higher priority mortgage. Specifically, RCF (or Mahoney) could redeem land in the FarmPro foreclosure only to lose it by a later foreclosure of a higher priority lien. RCF's ownership claims were extinguished by Rabo's foreclosure and their failure to redeem in the Rabo foreclosure. *See generally Warren v. Slaybaugh*, 60 N.D. 609, 235 N.W. 689, 692 (1931). A claimant bears the risk of loss when it "has consciously assumed the risk by deciding to act in the face of a recognized uncertainty[.]" *Dowling Family P'ship v. Midland Farms*, 2015 S.D. 50, ¶ 25 (*citing* Restatement (Third) of Restitution & Unjust Enrichment § 5(3)(b) (2011)). "[A] party that acts on the basis of such a calculation may be said to have assumed the risk that the calculation, depending as it does on a comparison of unknowns, will be revealed to be wrong." *Id.* at ¶ 27 (*citing* Restatement (Third) of Restitution & Unjust Enrichment § 5 cmt. b(2) (2011)). RCF's calculated risk and decision to redeem in the FarmPro proceeding provides no basis for claiming a right to the \$1,219,734.29 deposited by Mahoney. As the person from whom Mahoney sought to redeem from, Michael Arnoldy had a right to accept the payment when it deposited in 2008, and he retains that right today.



### **Conclusion**

Based on the foregoing reasons, Arnoldys' Motion for Summary Judgment is hereby GRANTED; the other motions are DENIED. The \$1,219,734.29 check currently being held by the Pennington County Sheriff shall be released to Michael Arnoldy. Counsel for the Arnoldys is directed to prepare an Order consistent with this memorandum decision.

Very Truly Yours,



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Craig A. Pfeifle  
Circuit Court Judge  
Seventh Judicial Circuit

CC: James P. Hurley  
Brian Utzman  
Robert Schaub  
Stan H. Anker & Stanton A. Anker  
Jay Alderman  
John H. Mairose

**Seventh Judicial Circuit Court**  
**PO Box 230**  
**Rapid City SD 57709-0230**  
**(605) 394-2571**

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Wally Eklund  
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Heidi L. Linngren  
Shawn J. Pahlke

**COURT ADMINISTRATOR**

Kristi K. Erdman

**STAFF ATTORNEY**

Marya Tellinghuisen

May 6, 2014

**Robert R. Schaub**

Schaub Law Office, P.C.  
P.O. Box 547  
Chamberlain, SD 57325

**Brian L. Utzman**

Smoot & Utzman, P.C.  
✓ 14 St. Joseph Street, Ste. No. 200C  
P.O. Box 899  
Rapid City, SD 57709-0899

**RE:** FarmPro Servs., Inc. v. David Finneman, Connie Finneman, and Chad Finneman  
(Civ. 02-533)

Counsel:

I have reviewed Rock Creek Farms' ("RCF") Motion for Return of Redemption Monies and Brief in Support, Respondents' Brief in Opposition, and Petitioner's Reply Brief. The parties appeared before me on March 18, 2014, and I have considered the arguments presented. For the reasons set forth below, the Court exercises its equitable jurisdiction and will conduct a court trial to determine the issues.

**BACKGROUND**

The facts that may be relevant to Rock Creek Farms' ("RCF") Motion for Return of Redemption Monies are set forth in detail in the following published opinions: *Arnoldy v. Mahoney (Arnoldy I)*, 2010 S.D. 89, 791 N.W.2d 645; *Rabo Agrifinance, Inc. v. Rock Creek Farms (Rabo I)*, 2012 S.D. 20, 813 N.W.2d 122; *Rabo Agrifinance, Inc. v. Rock Creek Farms (Rabo II)*, 2013 S.D. 64, 836 N.W.2d 631; *L & L P'ship v. Rock Creek Farms*, 2014 S.D. 9, 843 N.W.2d 697, 705. No further recitation is needed for purposes of this motion.

**ANALYSIS**

First, the Court must determine whether it has equitable jurisdiction to determine the distribution of redemption payments. A foreclosure action is unquestionably equitable in nature, and "a court in equity has the power and the right to grant full and complete legal and equitable

relief.” *Alma Group, L.L.C. v. Weiss*, 2000 S.D. 108, ¶ 12, 616 N.W.2d 96, 99 (citing *First W. Bank, Sturgis v. Livestock Yards*, 466 N.W.2d 853, 856 (S.D. 1991); *Lounsberry v. Kelly*, 32 S.D. 160, 142 N.W. 180 (1913); *Am. Fed. Sav. & Loan Ass’n of Madison v. Mid-America Serv. Corp.*, 329 N.W.2d 124, 126 (S.D. 1983)). The rationale of this broad power is explained in *Application of Rudd*:

To safeguard the public from the social and economic dislocations which would result from widespread transfer of title and possession of real property to mortgagees through foreclosures precipitated by drought and the depression, the courts were clothed with power by the act to examine the circumstances of each particular case in the light of the emergency and the public purposes to be served by the act, and to grant equitable relief. In other words, it became the function of the courts to apply an equitable remedy to an equitable situation.

68 S.D. 287, 290, 1 N.W.2d 869, 870 (1942) (citing *Clark v. Hass et al.*, 129 Neb. 112, 260 N.W. 792). Although courts have broad remedial powers in a foreclosure action, courts are not empowered to enlarge or restrict the right of redemption set by statute. *VanGorp v. Sieff*, 2001 S.D. 45, ¶ 14, 624 N.W.2d 712, 715; *Rist v. Hartvigsen*, 70 S.D. 571, 576, 19 N.W.2d 830, 832 (1945) (citing 3 Wiltsie, *Mortgage Foreclosure* [sic], 5th Ed., 1660, § 1060; *Stocker v. Puckett*, 17 S.D. 267, 96 N.W. 91 (1903); *Way v. Hill*, 41 S.D. 437, 171 N.W. 206 (1919)). The inability of an equity court to extend the period of redemption or to prescribe a mode of exercising the right of redemption “does not deprive courts of their equitable jurisdiction and power to control the legal rights of both creditor and redemptioner under settled rules of equity jurisprudence applicable in cases of excusable mistake in attempts in good faith to exercise legal rights, or where acts of the parties give rise to an estoppel against the exercise or denial of such rights.” *Way*, 41 S.D. 437, 171 N.W. at 207 (citing *Loomis v. Nat. Supply Co.*, 99 Kan. 279, 161 Pac. 627); see also 33 C.J.S. Executions § 441.

In this case, Petitioners are neither seeking to extend the period of redemption nor exercise their redemption rights in a manner not provided by statute. Petitioners acknowledge that RCF cannot redeem the land subject to the foreclosure actions. Instead, Petitioners ask the court to enforce their legal rights because they claim to have attempted in good faith to redeem the land. This Court has jurisdiction in equity to determine whether Petitioners made a *bona fide* mistake in their attempt to redeem.

In *Way v. Hill*, the plaintiff initiated an action for accounting after making partial payments in an attempt to redeem certain property. 41 S.D. 437, 171 N.W. at 206. The defendants retained the partial payments, and the South Dakota Supreme Court sought to determine “whether in a court of equity an execution creditor will be permitted to accept and retain partial payments on redemption, deny the debtor’s right to redeem, and claim a deed under the execution sale.” *Id.* at 207. Because the Defendant’s appealed a denial of their motion to dismiss, the Court reviewed the pleadings and held that “the complaint does disclose facts which show that it would be inequitable and wholly unconscionable to permit the defendants to interpose the statutory period of redemption as a bar to the right to redeem, permit them to obtain title to the real property through the sheriff’s deed, and at the same time retain payments made upon redemption.” *Id.* Although the Court in *Way* did not conclude that a foreclosing creditor

can retain unsuccessful redemption payments, the Court considered the issue along with the issues of the owners' right to redemption and estoppel. By even considering the issues, the South Dakota Supreme Court asserted subject matter jurisdiction in equity. Like the Court in *Way*, this Court has jurisdiction in equity to consider whether a creditor can retain both redemption payments and title to the property.

In addition, the Court must consider what procedure to use to determine the issues before the Court. Petitioners urge the Court to return the monies under the doctrine of unjust enrichment. "A person who has been unjustly enriched at the expense of another is required to make restitution to the other." *Hofeldt v. Mehling*, 2003 S.D. 25, ¶ 15, 658 N.W.2d 783, 788 (quoting Restatement of Restitution § 1 (1937)). Unjust enrichment occurs "when one confers a benefit upon another who accepts or acquiesces in that benefit, making it inequitable to retain that benefit without paying." *Id.* (citing *Parker v. W. Dakota Insurors, Inc.*, 2000 SD 14, ¶ 17, 605 N.W.2d 181, 187; *Juttelstad v. Juttelstad*, 1998 SD 121, ¶ 19, 587 N.W.2d 447, 451). To prevail on a claim for unjust enrichment, the claimant must prove that the recipient of a benefit was aware he was receiving a benefit, and it would be inequitable to allow the recipient to retain the benefit without paying for it. *Id.* ¶ 16 (citing *Action Mech., Inc. v. Deadwood Historic Pres. Comm'n*, 2002 SD 121, ¶ 21, 652 N.W.2d 742, 750; *Juttelstad*, 1998 SD 121, ¶ 19, 587 N.W.2d at 451; *Bollinger v. Eldredge*, 524 N.W.2d 118, 122-23 (S.D. 1994)); *Johnson v. Larson*, 2010 S.D. 20, ¶ 11, 779 N.W.2d 412, 416. Unjust enrichment contemplates an involuntary or nonconsensual transfer, unjustly enriching one party. The equitable remedy of restitution is imposed because the transfer lacks an adequate legal basis. *Johnson*, 2010 S.D. 20, ¶ 8, 779 N.W.2d at 416. The remedy of unjust enrichment may issue in an unsuccessful redemption attempt. See *Davis Mfg. & Supply Co. v. Coonskin Props., Inc.*, 687 P.2d 484, 486 (Colo. Ct. App. 1984) (citing *Rice v. Hilty*, 38 Colo. App. 338, 559 P.2d 725 (1976)).

Thus, to support the unjust enrichment claim, RCF must prove that (1) Arnoldys received a benefit, (2) Arnoldys were aware that they were receiving a benefit, and (3) it would be inequitable to allow Arnoldys to retain the redemption money without paying for it. This Court must hold a court trial to determine whether RCF has met its burden on these elements.

The Supreme Court of Illinois considered a factually similar issue in *Robinson v. Bailey*. 361 Ill. 458, 464, 198 N.E. 217, 219-20 (1935). In *Robinson*, judgment creditors executed on debtors' real property. Debtors confessed judgment to their daughter on a promissory note. The daughter redeemed. Creditors counterclaimed that the promissory note was fraudulent, and the court entered a decree on their counterclaim for redemptioner's failure to answer. The sheriff ultimately issued a deed to the creditors. Redemptioner then moved to vacate the decree because they were not issued a summons on the counterclaim, and the court vacated the decree. The redemptioner's money remained in the sheriff's possession, and the title to the real estate remained in the creditors' possession. The parties then agreed to a distribution of the redemption monies. The court ordered that the creditors re-convey the property to the redemptioner, and the creditors appealed. The Supreme Court of Illinois held that equity would not permit the creditors to accept the redemption money and claim title to the real estate. *Id.* 361 Ill. at 464, 198 N.E. at 219-20 (citing *Hilton v. Meier*, 257 Ill. 500, 100 N.E. 962 (1913)).

Although the redemption in *Robinson* was effective in the end, the case is similar to the case at hand because the sheriff acted pursuant to a judicial decree that was later vacated. In *Robinson*, the sheriff conveyed real estate in a good faith, but the conveyance could not stand when the court later vacated its decision. In the case at hand, if this Court finds that the sheriff accepted redemption money in good faith but that a subsequent vacation of judgment altered the legal effect of the redemption, the acceptance of redemption money cannot stand. Equity will require that the money be returned. However, this Court needs to determine whether RCF attempted to redeem in good faith. Evidence must be presented on these issues.

### CONCLUSION

This Court has jurisdiction in equity to determine whether the Finnemans made a bona fide mistake in their attempt to redeem and whether Arnoldys can retain both redemption payments and title to the property. The Court will hold a trial to determine whether RCF proved that (1) Arnoldys received a benefit, (2) Arnoldys were aware that they were receiving a benefit, and (3) it would be inequitable to allow Arnoldys to retain the redemption money without paying for it. Counsel are directed to contact the Court within 30 days to schedule a date for court trial.

Very Truly Yours,



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Craig A. Pfeifle  
Circuit Court Judge  
Seventh Judicial Circuit

cc: James P. Hurley  
Stan H. Anker & Stanton A. Anker  
Jay Alderman & Patrick Grode

ATTEST: Ranae Truman, Clerk of Courts

By: \_\_\_\_\_, Deputy  
(SEAL)

**IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA**

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**No. 27695**

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FARM PRO SERVICES, INC.,

Plaintiffs/Appellee,

vs.

DAVID FINNEMAN, CONNIE FINNEMAN, CHAD FINNEMAN, ARMSTRONG  
FARMS, VERN ARMSTRONG, HOPE ARMSTRONG, MICHAEL ARNOLDY, ANN  
ARNOLDY, WARRENN ANDERSON, and ROCK CREEK FARMS GENERAL  
PARTNERSHIP, et al.,

Defendants/Appellants.

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Appeal from the Circuit Court  
Seventh Judicial Circuit  
Pennington County, South Dakota

The Honorable Craig A. Pfeifle, Circuit Court Judge

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**APPELLEES' BRIEF**

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Brain L. Utzman  
Smoot & Utzman, P.C.  
P.O. Box 899  
Rapid City, SD 57709  
Telephone: (605) 341-5080

Steven W. Sanford  
Cadwell Sanford Deibert & Garry LLP  
P.O. Box 2498  
Sioux Falls, SD 57101  
Telephone: (605) 336-0828  
*Attorneys for Appellants*  
*(Warren Anderson)*

Elizabeth S. Hertz  
Vince M. Roche  
Davenport, Evans, Hurwitz & Smith, L.L.P.  
206 West 14<sup>th</sup> Street  
PO Box 1030  
Sioux Falls, SD 57101-1030  
Telephone: (605) 336-2880  
*Attorneys for Appellees (the Arnoldys)*

Notice of Appeal filed December 8, 2015

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## **STATEMENT OF THE ISSUES**

### **1. Whether RCF's redemption from Ann Arnoldy in the FarmPro proceeding failed.**

The trial court held that RCF successfully redeemed from Ann and received a certificate of redemption in the FarmPro proceeding, only to later lose the land in the Rabo foreclosure.

*Way v. Hill*, 171 N.W. 206 (S.D. 1919)  
RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 18  
*Donovan v. Farmers Home Admin.*, 19 F.3d 1267 (8th Cir. 1994)

### **2. Whether RCF made a mistake that entitles it to restitution.**

The trial court held that RCF took a calculated risk by redeeming in the FarmPro proceeding.

*Dowling Family Partnership v. Midland Farms*, 2015 SD 50, 865 N.W.2d 854  
RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 5  
*Myers v. Eich*, 2006 SD 69, 720 N.W.2d 76

### **3. Whether the Mahoney Payment belongs to Michael Arnoldy**

The trial court held that Michael Arnoldy had the right to accept the Mahoney Payment in 2008 and retains that right today.

SDCL § 21-52-19

### **4. Whether RCF is entitled to further discovery**

The trial court denied RCF's motion to compel the disputed discovery and granted summary judgment on the grounds that RCF did not make an invalidating mistake when it redeemed in the FarmPro proceeding.

*Mueller v. Cedar Shore Resort, Inc.*, 2002 SD 38, 643 N.W.2d 56  
SDCL § 15-26A-4

## **PRELIMINARY STATEMENT**

Citations to the Record in the Clerk's Index will be in the format of: (R. \_\_) followed by the appropriate page or paragraph number(s). Appellant Rock Creek Farms will be referred to as "RCF." Appellants David Finneman and Connie Finneman will be referred to, collectively, as "Finnemans." Appellees Ann Arnoldy and Michael Arnoldy will be referred to collectively as "Arnoldys." If the facts require a specific reference to an individual appellee, that individual's first name will be used.

## **STATEMENT OF FACTS**

This is the sixth time that the dispute between Finnemans, RCF, and Arnoldys has been before this Court, and the fifth time that RCF and Finnemans have appealed an adverse judgment. As a consequence, most of the operative facts may be found in the Court's previous opinions; for those facts that have no direct bearing on the circuit court's decision, Arnoldys cite to those decisions and the record established therein. At issue in this case is the disposition of certain monies held by the Pennington County Sheriff's office.

David and Connie Finneman were the owners of 16,700 acres of farmland in Pennington and Meade Counties. *L&L Partnership v. Rock Creek Farms*, 2014 SD 9 ¶ 2, 843 N.W.2d 697, 700. They owned 7,500 acres in fee simple, while the remaining 9,200 had been purchased via contract for deed from L&L Partnership ("L&L"). *Id.* Finnemans mortgaged all of the land except for 200 acres of the contract for deed property to Rabo Agrifinance, Inc. ("Rabo") and FarmPro Services, Inc. ("FarmPro"); the Rabo mortgage was senior to the FarmPro mortgage. *Id.*

In 2000, FarmPro commenced foreclosure proceedings against land owned by the Finnemans. In May of 2006, FarmPro purchased the property at the execution sale for \$1,439,130.31. (R. 154-156). The certificate of sale was assigned to Lee Ahrlin, who held a number of judgments senior to the FarmPro lien but inferior to the Rabo mortgage and the L&L contracts for deed. (R. 159).

On May 4, 2007, Michael Arnoldy, who held a judgment against the Finnemans, redeemed the property from Ahrlin, paying \$1,765,232.50 plus a \$2,000 contingency. (R. 160-164). On May 10, 2007, Warren Anderson, an associate of the Finnemans, paid \$822,000 to extend the redemption period and keep possession of the land for an additional year pursuant to SDCL§ 21-52-13. (R. 165). Anderson and the Finnemans had formed a general partnership, RCF, which now held the Finnemans' interest in the land.

On May 6, 2008, David Finneman purported to confess judgment to two creditors, Kenco, Inc. and Kroeplin Ag Services, Inc., for \$622,558.84 and \$254,731.59, respectively. *Arnoldy v. Mahoney*, 2010 SD 89 ¶ 4, 791 N.W.2d 645, 649. The trial court in a later declaratory judgment action concerning this redemption found that both debts were more than six years old, putting them beyond the statute of limitations set out in SDCL § 15-2-13(1). *Id.* at ¶ 10 n. 4, 791 N.W.2d at 651. Daniel Mahoney, another associate of the Finnemans, bought both judgments the next day. Using money provided by RCF, Mahoney deposited \$1,219,734.29 plus a \$2,000 contingency with the Pennington County sheriff to redeem from Michael. (R. 168). Michael refused to accept the redemption payment; the money, which is henceforth referred to as the Mahoney Payment, remains in the custody of the sheriff's office. However, Mahoney received a

certificate of redemption, thereby preventing Michael from obtaining possession and a sheriff's deed. Ann, who also held judgments against the Finnemans, then redeemed from Mahoney on July 3, 2008, thereby reimbursing Mahoney/RCF for the Mahoney Payment. (R. 171). On September 12, 2008, RCF redeemed from Ann, receiving a certificate of redemption. (R. 191).

Arnoldys filed a declaratory judgment action based on the fraud surrounding the Mahoney redemption in October of 2008. *Arnoldy* at ¶ 6, 791 N.W.2d at 650. The circuit court granted summary judgment in favor of Arnoldys in January of 2010, but this decision was reversed on appeal due to the trial court's failure to follow the proper procedure for in camera review of documents protected by the attorney-client privilege. *Id.*

While the declaratory judgment action was pending, Rabo foreclosed on the property. *Rabo Agrifinance, Inc. v. Rock Creek Farms*, 2013 S.D. 64 ¶ 4, 836 N.W.2d 631, 634 ("*Rabo II*"). In its foreclosure proceedings, Rabo asserted that Finnemans had agreed to waive all redemption rights under a loan restructure agreement. *Id.* Rabo further requested that the court "enter an order waiving all redemption rights held by Defendants David M. Finneman and Connie S. Finneman and Rock Creek Farms, successors in interest to David M. Finneman and Connie S. Finneman pursuant to the terms of the loan restructure agreement." *Id.*

Rabo moved for judgment on the pleadings in late 2009. *Id.* at ¶ 5. Judge Delaney granted the motion in January of 2010 and entered a judgment and decree of foreclosure that, contrary to the pleadings, granted an owner's right of redemption to RCF. *Id.* In March of 2011, Ann redeemed the property from an assignee of the

purchaser of the sheriff's certificate in the Rabo action. *Rabo Agrifinance, Inc. v. Rock Creek Farms*, 2012 SD 20 ¶ 3, 813 N.W.2d 122, 124 (“*Rabo I*”).

In May of 2011, after RCF claimed the Rabo judgment as res judicata in Arnoldys' declaratory judgment action, Arnoldys filed a 60(b) motion in the Rabo proceeding. *Rabo II* at ¶ 7, 836 N.W.2d at 635. On May 26, 2011, Judge Delaney entered an order that granted Arnoldys' motion and vacated the portion of the January 2010 judgment that granted redemption rights to RCF. *Id.* Based on this order and her redemption, Ann received a sheriff's deed to all the property covered by the Rabo mortgage in June of 2011. *L&L* at ¶ 6, 843 N.W.2d at 701. RCF and Finnemans appealed to this Court, but the appeal was denied due to their failure to serve the United States, a party defendant. *See Rabo I*. RCF's subsequent 60(b) motion in the Rabo action was also denied, as was its appeal of that denial to this Court. *See Rabo II*.

In March of 2010, while *Arnoldy* was on appeal, L&L foreclosed on the contracts for deed. *L&L* at ¶ 7, 843 N.W.2d at 701. After this Court issued its opinion in *Rabo I*, the trial court in the L&L proceeding held that Ann had both equitable ownership of the contract for deed real estate and the right to cure the default under the contracts. *L&L* at ¶ 9, 843 N.W.2d at 701. RCF and Finnemans appealed this judgment. This Court affirmed the L&L court's decision, settling once and for all the ownership of the land. The opinion notes that the affirmance of the circuit court's decision on equitable title “forecloses any substantive rights RCF has in future litigation.” *Id.* at ¶ 24, 843 N.W.2d at 705.

RCF and the Arnoldys then returned to the FarmPro court to determine the disposition of the Mahoney Payment. RCF argued that it was entitled to the money as a

down payment on a much larger equitable award that it deserved for losing title to the land, while Arnoldys argued that Michael retained the right to the Mahoney Payment.

In May of 2014, the FarmPro court held that it had equitable jurisdiction to determine whether the Finnemans/RCF had made a mistake that justified the return of the redemption payments made in this matter. Arnoldys then filed a second motion for summary judgment, arguing that RCF's actions in the FarmPro foreclosure did not constitute an invalidating mistake that could be redressed in equity. RCF filed a cross-motion for summary judgment. The circuit court found in favor of Arnoldys and held that the Mahoney Payment would be released to Michael. RCF now appeals.

### **ARGUMENT**

RCF wants the Mahoney Payment, not as a refund for its funding of Mahoney but as a down payment on a much larger equitable judgment that it believes it deserves after having lost title to the land. In support of this claim, RCF attempts to resurrect the same general fairness arguments it raised in *Rabo I*, *Rabo II*, and *L&L*. However, the circuit court correctly held that RCF is not entitled to restitution. RCF secured an interest in the land during the FarmPro proceeding, and then lost that interest through the foreclosure of a senior lien. RCF is not entitled to a refund of its redemption payment, or any other form of restitution.

#### **I. RCF's redemption did not fail**

RCF argues that it should receive the Mahoney Payment as restitution for the money it paid to redeem from Ann because this redemption was a failure. However, RCF's redemption did **not** fail. When RCF redeemed from Ann, it duly received a certificate of redemption and continued to retain possession. It then lost this interest in the Rabo foreclosure.

When RCF redeemed from Ann, it was not purchasing an unassailable interest; the rights it received could be lost in the foreclosure of a different lien. Foreclosure, by definition, wipes out the debtor's equity in the mortgaged property, regardless of what the debtor has invested along the way. By demanding a refund of its redemption money in FarmPro, RCF is effectively asking Arnoldys, as owners of a superior interest, to reimburse it for paying off a junior lien.

The fact that RCF is seeking restitution in this proceeding for an interest lost in a separate foreclosure action is why this case is different from those cited in its brief. In the cases cited by RCF, the redemptioners were given refunds after an appellate court on direct appeal determined that they had no right to redeem. *See Abrams v. Porter*, 920 P.2d 386, 391 (Idaho 1996); *East Jersey Savings and Loan Ass'n v. Shatto*, 544 A.2d 899, 902-03 (N.J. Super. Ct. Ch. Div. 1987); *Davis Mfg. & Supply Co. v. Coonskin Properties, Inc.*, 687 P.2d 484, 485-86 (Colo. App. 1984); *Davis Mfg. & Supply Co. v. Coonskin Properties, Inc.*, 646 P.2d 940, 942 (Colo. App. 1982).

In the *Davis* litigation, for example, the party that received reimbursement had originally been allowed to redeem because the court made a mistake as to the redemption period and consequently concluded that the party's redemption was valid. *See* 646 P.2d at 944, 687 P.2d at 485-86. The unlawful redemptioner lost its interest in the land when the redemption period error was rectified on appeal and the improper certificate of redemption was revoked. *Id.* The *Davis* decision is unremarkable; it is well established that a transfer of property in compliance with or otherwise in consequence of a judgment that is subsequently reversed gives rise to a claim for unjust enrichment. *See*



RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 18. The restitution claim “remed[ies] the misapplication of legal process.” *Id.* at cmt. e.

RCF, however, lost its interest in the land when Rabo foreclosed on a senior lien that was not the subject of the FarmPro proceeding. There has never been any appellate court judgment saying that RCF could not redeem in FarmPro, or that RCF’s redemption or certificate of redemption were invalid. While RCF ultimately failed to become the undisputed owner of the land, it was not because its redemption in FarmPro failed. It was because Rabo foreclosed.

*Way v. Hill*, 171 N.W.2d 206 (S.D. 1919), similarly fails to support RCF’s position. *Way* was an action by a debtor who was attempting to pay off the final amount due on a judgment against her and redeem property upon which the defendant creditors had foreclosed. *Id.* at 206. After the execution sale, the creditors accepted partial payments of the debt from the plaintiff during the redemption period, but claimed that the final payment was beyond the limitations period and wished to retain both the property and the partial payments. *Id.* at 207. In upholding the trial court’s overruling of the defendants’ demurrer, this Court noted that the facts in the complaint suggested that it would be inequitable for the foreclosing creditors to retain both the land and the numerous payments they had accepted after the executions sale. *Id.* As Judge Pfeifle correctly noted in his May 6, 2014 opinion, *Way* does not actually hold that the partial payments had to be returned.

RCF, unlike the plaintiff in *Way*, received something in exchange for the payment it wishes to rescind: a certificate of redemption and the right to continued possession of the encumbered land. It retained its interest in the land until losing it several years later

in the Rabo proceeding. RCF is not entitled to the Mahoney Payment under the reasoning in *Way*.

By demanding restitution of the money it paid to obtain the certificate of redemption, RCF is effectively asking the possessors of a senior interest to repay it for satisfying the junior FarmPro lien. This is the opposite of what the law mandates. See *L&L* at ¶ 17, 843 N.W.2d at 703 (“If the mortgagor does not redeem, a sheriff’s deed resulting from the foreclosure sale conveys a title free and clear of junior liens.”). If RCF’s claim is valid, then buyers at foreclosure sales would have to repay the debtor for any junior liens that had been satisfied, on the grounds that the debtor was being deprived of the benefit of his expenditure. The laws “were designed to protect the redemption rights of various parties, not to relieve the judgment debtor from the payment of his just debts.” *Donovan v. Farmers Home Admin.*, 19 F.3d 1267, 1269 (8th Cir. 1994). Giving RCF restitution for the payment of its just debts would allow RCF’s claim to swallow the law.

## **II. RCF did not make a mistake justifying restitution**

“A person who is unjustly enriched at the expense of another is subject to liability in restitution.” RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1.<sup>1</sup> “Unjust enrichment occurs when one confers a benefit upon another who accepts or acquiesces in that benefit, making it inequitable to retain that benefit without paying.” *Dowling Family Partnership v. Midland Farms*, 2015 SD 50 ¶ 19, 865 N.W.2d 854, 862 (quotations omitted). However, the mere existence of a benefit is not sufficient; one who unconditionally confers a benefit “without mistake, coercion or

request...is not entitled to restitution.” *Id.* at ¶ 24, 865 N.W.2d at 864 (quotations omitted).

The Restatement makes it clear that an error in judgment is not an invalidating mistake, regardless of the severity of its consequences:

“Faulty prediction will not support a claim in restitution, and invalidating mistake is to be distinguished from the error in judgment that is visible in hindsight. Subsequent information may reveal a course of action to have been ‘mistaken,’ in the sense that someone made a poor choice, but the mistake that consists merely in the failure to identify a preferable course of action will not invalidate either an agreement or a transfer...The result of [an invalidating] mistake is a transaction that in some material respect is unintended, as opposed to one that is merely ill-advised.” RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 5 cmt. c.

RCF’s payment of redemption money to Ann was not an unintended transfer. RCF paid Ann and obtained a certificate of redemption and the right to continued possession of the encumbered land. While its belief that it would eventually get clear title to the land proved to be mistaken, this was nothing more than an “error in judgment that is visible in hindsight” of the type that the Restatement explicitly exempts from its definition of invalidating mistake. The circuit court correctly concluded that RCF did not make an invalidating mistake when it redeemed the property from Ann.

**A. The trial court’s ruling is consistent with *Dowling***

RCF asserts that the doctrine of invalidating mistake allows for restitution to a party that sustained a loss due to a “future, unknown, and uncertain” risk. However, both *Dowling* and the Restatement speak in terms of risk, uncertainty and unknowns in defining the types of mistakes that will not support an award of restitution. “A claimant bears the risk of loss when it has consciously assumed the risk by deciding to act in the

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<sup>1</sup> RCF appears to be confused about the interplay of restitution and unjust enrichment, asserting that they are separate and distinct equitable remedies. (RCF’s Br. at 15).

face of a recognized uncertainty.” ¶ 25, 865 N.W.2d at 864 (emphasis added). “A party that acts on the basis of...a calculation may be said to have assumed the risk that the calculation, depending as it does on a comparison of unknowns, will be revealed to be wrong.” *Id.* at ¶ 27 (emphasis added). Further, a risk, by definition, depends on future events; otherwise, it would be a fact.

Denying restitution for the occurrence of a less-than-certain event does not, as RCF claims, ‘eviscerate’ the doctrine of unjust enrichment. In fact, it is entirely consistent with it. As this Court has held, “[a]n enrichment is unjust if it lacks an adequate legal basis...Broadly speaking, an ineffective transaction for these purposes is one that is nonconsensual.” *Dowling* at ¶ 24, 865 N.W.2d at 864 (emphasis in original, quotations omitted). Significantly, there must be something about the transaction that makes it involuntary in some sense. As the Restatement notes, an invalidating mistake is one that results in a “transaction that in some material respect is unintended, as opposed to one that is merely ill-advised.” RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 5 cmt. c. RCF’s conscious decision to proceed was not involuntary merely because it considered the risk to be relatively small.

**B. RCF’s redemption from Ann was a calculated risk**

A claimant cannot seek restitution for a benefit mistakenly conferred when the claimant “has consciously assumed the risk by deciding to act in the face of a recognized uncertainty.” *Dowling* at ¶ 25, 865 N.W.2d at 864. “Faulty prediction will not support a claim in restitution, and invalidating mistake is to be distinguished from the error in judgment that is visible in hindsight.” Restatement (Third) of Restitution and Unjust Enrichment § 5 cmt. c. “A venture voluntarily entered into, with known risks and with

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However, as the Restatement makes clear, restitution is a remedy for unjust enrichment.

the expectation of a profit, cannot be compensated for via a claim for unjust enrichment. When a person enters into a potentially risky venture, it is simply not unjust for him to bear the adverse consequences of the risk, given that he surely would have accepted the beneficial consequences had they materialized.” *Howard v. Turnbull*, 316 S.W.3d 431, 438 (Mo. App. 2010). RCF assumed two risks when it redeemed the property from Ann: the risk of foreclosure of a senior lien, and the risk that Arnoldys’ challenge to the Mahoney scheme would prove successful.

RCF knew that Rabo, among others, had liens against the property that were senior to FarmPro’s. It knew that any interest it might acquire in the FarmPro proceeding was not an absolute right to the land and could be wiped out by the foreclosure of another lien. That is exactly what happened. Ann acquired a sheriff’s deed in the Rabo foreclosure, thereby eliminating all junior interests.

Quite simply, a senior interest is “a matter which the redemptioner should have considered before it parted with the money...If the matter turned out very differently from what was expected, the miscalculation is not such a mistake, either of fact or of law within the meaning of the equitable doctrine as entitles the disappointed party to any relief.” *Copper Belle Mining Co. of West Virginia v. Gleeson*, 134 P. 285, 287 (Ariz. 1913) (redemptioner who redeemed property with knowledge that debtor’s title was defective was not entitled to equitable relief). Any ‘mistake’ that RCF made in assuming that Rabo – or any of the other creditors – would not foreclose is not cognizable in equity. *See McDonald v. Miners and Merchants State Bank, Inc.*, 310 N.W.2d 591, 593 (S.D. 1981) (holding that a mistake as to the future actions of a third party did not entitle the plaintiff to rescind an agreement).

RCF asserts that the foreclosure of other liens was not a risk it should have been concerned about because it could have redeemed the land from foreclosure but for the events that overtook it. However, the right to redeem does not guarantee the ability to do so. RCF is claiming that it would have been able to find the funds to pay off L&L, Rabo, and, given the fact that it held rights through the Finnemans, all of the junior creditors as well. Because both L&L and Rabo foreclosed on the property for nonpayment, and Arnoldys had a claim on the land, this is unlikely. In fact, RCF admitted during the Rabo proceeding that it was not feasible for it to redeem.<sup>2</sup>

Moreover, RCF neglects to mention that Finnemans had waived their right of redemption in Rabo as part of a loan restructure agreement. RCF argues that this waiver should be ignored because SDCL § 44-1-8 meant the agreement with Rabo was void. There are two problems with this argument. First, RCF did not make this argument to the circuit court. “The failure to present an issue to the circuit court constitutes a bar to review on appeal.” *Halbersma v. Halbersma*, 2009 SD 98 ¶ 21, 775 N.W.2d 210, 218. Secondly, even if RCF had preserved the issue for review, its argument is misguided.

While § 44-1-8 states that contracts in restraint of the right of redemption from a lien are void, it does not prevent mortgagors from later waiving that right in exchange for fair and adequate consideration. *See Myers v. Eich*, 2006 SD 69 ¶¶ 31-34, 720 N.W.2d 76, 86. The statute merely codifies the longstanding principle that a mortgagor cannot alienate the right of redemption at the time of the mortgage; it does not prevent a

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<sup>2</sup> During the Rabo proceeding, RCF requested special relief to assure potential buyers that they would be immune to Arnoldys’ claims to the land. RCF admitted that, without this relief, it would be unable to sell the land or redeem: “[I]t is not feasible for RCF to exercise its owner’s right of redemption, to sell the property, and to assure marketable title...” Rabo R. 1270. Judge Delaney denied this request.

mortgagor from giving up the right in a subsequent transaction. *Guam Hakubotan, Inc. v. Furusawa Inv. Corp.*, 947 F.2d 398, 401 (9th Cir. 1991) (considering application of similar statute).

As the Minnesota Supreme Court said, “[i]t firmly is established that a mortgagor may not, at the time of, nor as a part of, the mortgage transaction, bargain away his equity of redemption...However, it is settled equally well that a mortgagor may bargain away, sell, or convey to the mortgagee his equity of redemption subsequent to the time that he executed the mortgage.” *O’Connor v. Schwan*, 251 N.W. 180, 181 (Minn. 1933). *See also Gould v. McKillip*, 99 P.2d 67, 72 (Wyo. 1940). RCF’s predecessors in interest waived the right of redemption as part of a loan restructuring agreement; having received valuable consideration for the waiver, Finnemans/RCF cannot claim it is void.

Further, although RCF repeatedly claims that Judge Delaney wrongfully stripped its rights of redemption, the Rabo court simply enforced Rabo’s motion for judgment on the pleadings. RCF did not oppose this motion, even though Rabo’s complaint requested a judgment denying Finnemans’ and RCF’s right to redeem. (Rabo R. 34). *See also* Reply Brief of Appellees Michael Arnoldy and Ann Arnoldy, 2013 WL 6837381 pp. 2-6.

RCF also assumed the risk that the Arnoldys’ challenge to the Mahoney scheme would be successful. Again, David Finneman confessed judgment on two debts that were uncollectable due to the statute of limitations. Mahoney then redeemed on the basis of those debts; as RCF has since admitted, Mahoney was acting as a straw man using RCF money. RCF knew of these issues, and knew that its subsequent attempt to redeem from Ann would be untimely but for the Mahoney redemption. Nor may RCF claim that this was an inchoate risk, since the Arnoldys had not yet filed suit when RCF redeemed from

Ann; Michael had already notified them that a challenge was coming when he refused to accept the money that is currently in dispute. (R. 693).

RCF knew that it was taking a chance by putting money into the FarmPro proceeding. In a February 19, 2008 letter to counsel for the Finnemans, an attorney representing RCF investor Anderson described the investments as “a calculated risk” and “gambling with [Anderson’s] money.” (R. 1691-92). RCF knew that the certificate of redemption it received when it redeemed from Ann in FarmPro was a conditional interest in heavily encumbered land that could be lost. It did not need to know the exact circumstances under which the risk of loss would materialize, only that it was possible. Put simply, the law of unjust enrichment does not act to unravel wagers that ultimately prove unsuccessful.

### **III. Michael is the only person with a right to the Mahoney Payment**

Because RCF had no right to rescind its redemption after losing the land in a later foreclosure, the only person with a right to the Mahoney Payment is Michael Arnoldy. Leaving aside, as the circuit court did, the questionable legality of the Mahoney scheme, the events that occurred in the FarmPro redemption period are relatively straightforward. Michael Arnoldy redeemed from another creditor. RCF then funded Mahoney to redeem from Michael, thereby preventing Michael from obtaining possession and a sheriff’s deed. Although Michael rejected the Mahoney Payment, that did not prevent Mahoney from taking the certificate of redemption. Ann redeemed from Mahoney; as the trial court noted, this redemption reimbursed RCF for the Mahoney Payment. RCF then redeemed from Ann, receiving a certificate of redemption and continued possession in exchange for its payment. The only person who didn’t get value for money or money for value in this series of redemptions was Michael.



Michael had the right to accept the Mahoney Payment in 2008. *See* SDCL § 21-52-19. However, as the case law cited by RCF demonstrates, Michael arguably would have lost his right to challenge the Mahoney scheme if he had exercised this right. *See Robinson v. Bailey*, 198 N.E. 217, 220 (Ill. 1935) (holding that acceptance of redemption money prevented appellants from challenging the validity of the redemption and the resulting deed). The fact that he and his sister would later become the owners of the property through the foreclosure of senior liens did not deprive him of the ability to accept the payment in the FarmPro proceeding. Michael, not RCF, has the only valid claim to the Mahoney Payment.

**IV. RCF is not entitled to reversal based on the court's refusal to compel discovery**

Finally, RCF may not seek reversal of the circuit court's order based on the fact that its motion to compel was denied. First, the circuit court's denial of the motion to compel was not included in RCF's notice of appeal. When an appellant fails to include an order in its notice of appeal, any arguments related to that order are not properly before this Court. *Mueller v. Cedar Shore Resort, Inc.*, 2002 SD 38 ¶ 33, 643 N.W.2d 56, 67; SDCL § 15-26A-4. By not appealing the trial court's denial of additional discovery, RCF has waived its argument.

RCF asserts it needed discovery that was "pertinent to the doctrine of unclean hands." RCF Br. at 22. However, the circuit court did not even reach the issue of unclean hands, concluding instead that RCF did not make a mistake justifying restitution. Michael was not claiming the Mahoney Payment under a theory of equity; as the circuit court noted, Michael was merely exercising the right to accept the Mahoney Payment that

he had had when it was deposited in 2008. RCF was not entitled to more discovery, and more discovery would have made no difference to the result.

It is unclear why the existence of a third party investor would have been problematic. However, this is not an issue the circuit court or this Court needs to consider. Arnoldys have told RCF repeatedly that there were no third-party investors funding their redemptions. Their responses to RCF's discovery requests made this eminently clear; further discovery on this issue would not have changed the result. RCF's complaint is not that Arnoldys did not answer the question, but that it did not like the answer.

### **CONCLUSION**

Ultimately, RCF's argument is that it should be entitled to some compensation for losing the land. However, foreclosure, by definition, results in the debtor's loss of its equity and investment. RCF knew that it was taking a risk when it redeemed in the FarmPro proceeding; the fact that this risk materialized does not render the redemption an invalidating mistake. The circuit court's judgment should be affirmed.

Dated at Sioux Falls, South Dakota, this \_\_\_\_\_ day of April, 2016.

DAVENPORT, EVANS, HURWITZ &  
SMITH, L.L.P.

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Elizabeth S. Hertz  
Vince M. Roche  
206 West 14<sup>th</sup> Street  
PO Box 1030  
Sioux Falls, SD 57101-1030  
Telephone: (605) 336-2880  
Facsimile: (605) 335-3639

AND

Robert R. Schaub  
Schaub Law Office, PC  
PO Box 547  
Chamberlain, SD 57325  
Telephone: (605) 734-6515  
*Attorneys for Appellees*

Appeal No. SC No. 27695  
Civil

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IN THE  
SUPREME COURT  
OF THE STATE OF SOUTH DAKOTA

In re:

FARMPRO SERVICES, INC.

Plaintiff-Appellee,

vs.

DAVID M. FINNEMAN, CONNIE S. FINNEMAN, CHAD FINNEMAN,  
ARMSTRONG FARMS, VERN ARMSTRONG, HOPE ARMSTRONG,  
MICHAEL ARNOLDY, ANN ARNOLDY,  
WARRENN ANDERSON, and ROCK CREEK FARMS GENERAL PARTNERSHIP

Defendants-Appellants.

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ON APPEAL FROM THE  
SEVENTH JUDICIAL CIRCUIT COURT  
PENNINGTON COUNTY, SOUTH DAKOTA,  
HONORABLE CRAIG A. PFEIFLE  
CIRCUIT COURT JUDGE PRESIDING  
Court File No. CIV02-533

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**REPLY BRIEF OF APPELLANTS**  
**ROCK CREEK FARMS GENERAL PARTNERSHIP AND**  
**WARRENN ANDERSON AND**

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Brian L. Utzman  
Smoot & Utzman, P.C.  
Attorney for Warrenn Anderson,  
individually and as a Limited Partner of  
Rock Creek Farms Limited Partnership  
PO Box 899  
Rapid City, SD 57709-0899

Steven W. Sanford Cadwell Sanford  
Deibert & Garry LLP Attorney for  
Warrenn Anderson, individually and as a  
Limited Partner of Rock Creek Farms  
Limited Partnership  
PO Box 2498 Sioux Falls, SD 57101-  
2498

Notice of Appeal filed on December 8, 2015

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## **PRELIMINARY STATEMENT**

Arnoldys' Appellee Brief is devoid of any legal authority supporting their desire to keep both 16,700 acres of agricultural land in Pennington and Meade Counties worth millions of dollars more than what Ann Arnoldy paid to redeem and the millions of dollars that RCF paid Ann Arnoldy to redeem and Michael Arnoldy to extend the redemption time period. Contrary to Arnoldys' contention, RCF is not attempting to recover the redemption monies that Daniel Mahoney paid to Michael Arnoldy; RCF is seeking restitution of the monies that it paid Ann Arnoldy to redeem and the monies that it paid Michael Arnoldy to extend the time period to redeem.<sup>1</sup>

## **RESPONSE TO ARNOLDYS' STATEMENT OF FACTS**

RCF cannot take issue with Arnoldys' Statement of the Case because Arnoldys' Appellee Brief does not contain a Statement of the Case as required by SDCL § 15-26A-61 and SDCL § 15-26A-60(5). RCF does take issue with some of the assertions set out in Arnoldys' Statement of the Facts, including Arnoldys' reference to Rabo's Motion for

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<sup>1</sup>As delineated in RCF' Opening Brief, Appellant-Defendant Rock Creek Farms General Partnership is hereinafter referred to as "RCF." Appellant-Defendant Warrenn Anderson, as a general partner of RCF or as an individual, is hereinafter referred to as "Anderson." Michael Arnoldy and Ann Arnoldy are referred to collectively as "Arnoldys." David Finneman and Connie Finneman are referred to collectively as "Finnemans." Rabo AgriFinance, Inc., is hereinafter referred to as "Rabo." The Rabo AgriFinance, Inc., et. al. v. David M. Finneman, et. al. foreclosure case, filed in Circuit Court, Seventh Judicial Circuit, Pennington County, South Dakota, File No. CIV09-1211, is hereinafter referred to as either the "Rabo Case" or the "Rabo Court." "Rabo Rec." refers to the record in the Rabo Case. The *L&L P'ship v. RCF, Finnemans, et al.*, 2014 S.D. 9, 843 NW2d 697 appeal to this Court is hereinafter referred to as the "L&L Appeal."

Judgment on the Pleadings because it omits relevant facts. RCF and Rabo negotiated the terms of a proposed order for a judgment on the pleadings. As part of that negotiation process, Rabo agreed to give RCF redemption rights in the proposed order Rabo submitted to the Rabo Court. The order granting judgment on the pleadings was, in essence, a stipulated judgment.

RCF is not seeking compensation for losing title to these agricultural lands. RCF is seeking restitution of the redemption monies it paid to Ann Arnoldy, of \$1,280,000.00, and the monies that it paid to Michael Arnoldy, which he accepted, of \$822,000.00 to extend the time period to redeem. Rabo Rec. pp. 165; 191. RCF is entitled to the return of these monies under general principles of equity, restitution, and/or unjust enrichment.

## **ARGUMENT**

### **I. Standard of Review.**

Arnoldys do not take issue with RCF's recitation of the applicable standard of review. The Trial Court's unwarranted restriction of the equitable remedy of unjust enrichment to encompass unknown, unforeseen, and uncertain risks should therefore be reviewed under the *de novo* standard of review, rather than under the abuse of discretion standard of review.

### **II. Equity Compels That the Redemption Monies RCF Paid in a Failed Redemption be Returned to RCF.**

Arnoldys' claim that they are entitled to keep both these agricultural lands worth millions of dollars more than what they paid to redeem and the millions of dollars RCF paid Arnoldys because RCF received a useless Certificate of Redemption, if sustained,

would be abhorrent to the principles of equity. RCF's receipt of a Certificate of

Redemption is not an effective redemption because RCF no longer owns these agricultural lands. An effective redemption restores a mortgagor's, or a contract vendee's, interest in land that has been foreclosed upon. SDCL § 21-52-24. Where there has been an effective redemption by the owner, the effect of the foreclosure sale is terminated. SDCL § 21-52-24. A redemption restores the property to the mortgagor, free of the incumbrance of the mortgage that was foreclosed. *Rist v. Andersen*, 70 S.D. 579, 19 NW2d 833 (1945); *Donovan v. Farmers Home Admin.* 19 F3d 1267 (1994, CA8 SD). RCF's ownership of these agricultural lands has not been restored to it by its receipt of a Certificate of Redemption that has no value whatsoever. Mere possession of land is not equivalent to redemption, as Arnoldys suggest. A landowner may retain possession of land in a foreclosure until the redemption period expires even if the owner does not attempt to redeem. SDCL § 21-47-13. Contrary to Arnoldys' contention, RCF's redemption has failed.

Arnoldys cite no legal authority whatsoever for the proposition that they are entitled to keep both these agricultural lands and the redemption monies paid to them. No such legal authority is known to exist. RCF paid Ann Arnoldy \$1,280,000.00 to redeem, which monies she accepted and retained. Rec. p. 191. RCF paid Michael Arnoldy \$822,000.00 to extend RCF's time to redeem, which monies he accepted and retained. Rec. p. 165. Arnoldys only attempt to distinguish the cases cited by RCF, whereby the courts demanded that redemption monies be refunded in a failed redemption,

by stating that these cases do not involve a subsequent foreclosure action. There was a subsequent sale in *Way v. Hill*, 41 S.D. 437, 171 NW 206 (1919). More importantly, the principals of equity underlying those decisions requiring that the redemption monies be returned is the same notwithstanding a subsequent foreclosure action.

Contrary to Arnoldys' contention, RCF's redemption monies should be returned to it either under a court's broad equitable powers, the doctrine of restitution, or the doctrine of unjust enrichment, all of which are separate equitable doctrines. This Court in *Way v. Hill*, 41 S.D. 437, 171 NW 206 (1919), stated:

. . . an equity court has no power to extend the period of redemption . . . this rule does not deprive courts of their equitable jurisdiction and power to control the legal rights of both creditor and redemptioner under settled rules of equity jurisprudence applicable in cases of excusable mistake in attempts in good faith to exercise legal rights.

This Court has held that it is a general principle of equity that one party shall not be enriched at the expense of another party. *Kohl v. Amundson*, 2001 S.D. 4, 620 NW2d 606, ¶10; citing *A.G. Edwards & Sons, Inc. v. Northwest Realty Co.*, 340 NW2d 187 (S.D. 1983). The enriched party may be required to make restitution of the value of the enrichment unless the enriched party has innocently changed its position to such a degree restitution would be inequitable. *A.G. Edwards*, 340 NW2d at 187. Enrichment can be unjust if it is a result of money paid by mistake. *Juttelstad v. Juttelstad*, 1998 S.D. 121, 587 NW2d 447, ¶22; citing *A.G. Edwards*, 340 NW2d at 187; citing 66 Am.Jur.2d Restitution and Implied Contracts, §§ 3, 8, 118 (1973). Contribution and indemnity are equitable remedies to secure restitution. *Degen v. Bayman*, 86 S.D. 598, 200 NW2d 134 (1972). This Court has also used broad principles of equity to provide restitution to a

lender by creating an equitable lien, when a collateral real estate mortgage has

inadvertently lapsed, to insure that the lender is not completely barred from a remedy.

*Stabler v. First State Bank of Roscoe Dakota Corp.*, 2015 S.D. 44, ¶27.

Other courts have also taken a broad view of their ability to use equitable powers in the context of restitution. An Oregon Appellant Court in *Kerr v. Miller*, 977 P2d 438, 159 Or.App. 613 (Or. App., 1999), refused to limit the equitable doctrine of restitution to “. . . only narrowly prescribed circumstances.” The court determined that restitution is flexible and broad which permit a court to serve equity as the circumstances warrant. The doctrine of unjust enrichment is discussed infra.

Arnoldys acknowledge, as they must, that other courts have used equitable powers to require the return of redemption monies when a redemption has failed. The court in *Abrams v. Porter*, 920 P2d 386, 128 Idaho 869 (Idaho 1996), required that the redemption monies be returned in an unsuccessful redemption using its broad equitable powers. In doing so, the court did not engage in risk analysis. Similarly, the Superior Court of New Jersey in *East Jersey Sav. and Loan Ass'n v. Shatto*, 544 A2d 899, 226 N.J.Super. 473 (N.J. Super. Ch., 1987), ordered that redemption monies be returned, even though the party attempting to redeem filed a groundless objection to the Sheriff’s sale. Once again, the court did not engage in risk analysis in determining that equity compels the return of redemption monies. Similarly, in *Davis Mfr & Supply Co. v. Coonskin Properties*, 646 P2d 940 (Colo. App. 1982), a Colorado Appellant Court, under the equitable remedy of restitution, maintained the position that the parties were in before the failed redemption

by requiring that the party attempting to redeem receive the monies it paid to redeem plus eight percent (8%) interest. The same result should occur here.

Arnoldys state that the *Davis Mfr & Supply Co., Id.*, decision is unremarkable because restitution is warranted when a party loses money when a judgment is overturned. The rationale compelling restitution of redemption monies in a failed redemption is the same as the rationale requiring restitution if a judgment is reversed. Under these circumstances, SDCL § 15-19-18 requires restitution of the monies paid plus interest. Other courts have held similarly that, if a plaintiff has derived any benefit from the reversed judgment, he must make a full restitution to defendant. *Schoonover v. Osborne*, 117 Iowa 427, 90 NW 844 (Iowa, 1902). Arnoldys argue that RCF's redemption has not failed because RCF received what turned out to be, through no fault of RCF, 's a worthless Certificate of Redemption.

Arnoldys' attempt to distinguish this Court's decision in *Way, Id.*, by arguing that the payments made were not refunded is misleading. The *Way, Id.*, case involved an appeal of an order overruling a demurrer to the plaintiff's complaint. Because this Court made a clear determination of the equities involved, the trial court was bound to refund the payments made on remand.

Contrary to Arnoldys' contention, RCF is not asking that Arnoldys pay off the junior lien in demanding restitution of the redemption monies that RCF paid. Arnoldys apparently desire to get into a dance at another party's expense. A redemptioner must always pay the amount bid at the Sheriff's sale to redeem; this is the most fundamental requirement of a redemption. SDCL § 21-52-14; *Federal Land Bank of Omaha v.*

*Carlson*, 422 NW2d 99 (S.D. 1988). The fact that this judgment was an inferior lien to a mortgage foreclosed upon in a subsequent foreclosure action is of no import. If Ann Arnoldy had not redeemed, she would not have received her gigantic windfall.

Contrary to Arnoldys' contention, restitution of RCF's redemption monies would not result in buyers at foreclosure sales being required to re-pay landowners for junior liens that they satisfied. Arnoldys are trying to foist a red herring upon this Court by arguing this. Arnoldys' cite no authority for this proposition, because none exists. South Dakota law clearly defines what someone must pay to redeem. SDCL § 21-52-14. RCF and Finnemans have paid millions of dollars towards the debts against these lands, which RCF is not trying to recover. RCF is therefore not seeking restitution for payment of RCF's just debts as Arnoldys suggest. South Dakota law clearly required that Arnoldys pay the amount FarmPro bid at the Sheriff sale to redeem. In reality, Arnoldys argue that RCF should pay them the amount they were obligated to pay to redeem.

Contrary to Arnoldys' contention, if RCF had been allowed to redeem from the FarmPro foreclosure sale, RCF would have paid off all debts. RCF was finalizing sale documents with several potential buyers for these lands when the Rabo Court stripped it of its redemption rights. RCF filed a motion for court supervision of the redemption and sale process, which the Rabo Court denied. Rabo Rec. pp. 1268-1272. The purpose of our redemption statutes is to satisfy as many of the debts against the property as possible.

*Fox v. Nelson*, 30 N.D. 589, 153 NW 395 (N.D., 1915). RCF would have gladly furthered this purpose.



**III. RCF is Also Entitled to Restitution of the Redemption Monies it Paid Under the Equitable Doctrine of Unjust Enrichment.**

Contrary to Arnoldys' contention, all of the elements of RCF's unjust enrichment claim have been satisfied here. Arnoldys do not contend that they have not received a benefit when RCF paid them redemption monies and monies to extend the redemption time period. Rec. p. 191; Rec. p. 165. Nor could they do so under this Court's definition of enrichment, which is:

[w]hether a defendant has been enriched is not an analysis altogether separate from whether the defendant has received a benefit. The word benefit "denotes any form of advantage." Restatement (First) of Restitution § 1 (1937).

*Dowling Family P'ship v. Midland Farms, LLC*, 2015 S.D. 50, ¶21, 865 NW2d 854. The first element of an unjust enrichment claim is therefore satisfied. Arnoldys knew that they received a benefit when RCF redeemed. RCF gave Ann Arnoldy notice of its intent to redeem. Rec. p. 183. The Sheriff issued a Certificate of Redemption. Rec. p. 191. The second element of an unjust enrichment claim is therefore also satisfied. *Dowling*, Id., ¶23.

The final element of an unjust enrichment claim is also met because Arnoldys' retention of the redemption monies they received would be unjust. *Dowling*, Id., ¶24. In *Dowling*, Id., this Court stated, ". . . the relevant inquiry is whether the circumstances are such that equitably the beneficiary should restore to the benefactor the benefit or its value." *Dowling*, 2015 S.D. at 50, ¶24; citing *Hofeldt v. Mehling*, 2003 S.D. 25, ¶18, 658

NW2d 783, 788. This Court stated further in *Dowling*, Id., ¶ 24, that, “. . . the initial question of whether or not a defendant has been unjustly enriched is necessarily focused on the nature of the transfer itself. An enrichment is unjust if it results from a transaction that the law treats as ineffective to work a conclusive alteration in ownership rights.” Certainly RCF’s payment of redemption monies to Ann Arnoldy did not work a conclusive alteration of RCF’s ownership rights in these agricultural lands. RCF has received nothing from its redemption beyond its right to retain ownership of these agricultural lands before the Rabo Court, in a subsequent foreclosure action, stripped RCF of its rights to redeem and thereby stripping RCF of its ownership of these lands. RCF, being stripped of its redemption rights was certainly non-consensual. RCF has fought hard to retain ownership of these lands through redemption and attempted redemption to no avail. Arnoldys’ contention that their retention of the redemption monies would not be unjust because RCF has assumed risk in exercising its statutory right of owner’s final redemption is without merit. RCF had an unequivocal statutory right to redeem. The only condition placed upon a landowner’s right of redemption is that it be done timely. SDCL § 21-52-7; see, *VanCorp v. Sieff*, 2001 S.D. 45, ¶14, 624 NW2d 712. Arnoldys do not argue that RCF failed to redeem from Ann Arnoldy within the time period allowed.

RCF could not have foreseen, nor did RCF assume a known risk, that it would lose its owner’s final right of redemption in a subsequent foreclosure proceeding. The only ‘mistake’ that occurred was RCF being stripped of its redemption rights by the Rabo Court fifteen (15) months after those rights had been granted to it by the Rabo Court. Rabo Rec. pp. 889-894; 1314-1321. The Rabo Court held that Finnemans had waived

their rights of redemption *sui sponte* even though it knew that Rabo, RCF and Finnemans had negotiated a proposed order that granted RCF's redemption rights because it adopted Rabo's, RCF's and Finnemans' agreement dismissing their counterclaims. Rabo Rec. Sealed Doc. B. It is black letter contract law that a party may waive a contractual right. *Wirt v. Parker School District #60-4*, 2004 S.D. 127, 689 NW2d 901; citing *Flugge v. Flugge*, 2004 S.D. 76, 681 NW2d 837. Arnoldys, in their Rule 60(b) motion, did not argue that Finnemans had waived their redemption rights; they argued fraud and deprivation of their due process rights. Rabo Rec. pp. 1218-1219.

Arnoldys' contention that it was a mistake, miscalculation, or error in judgment for RCF to not consider a senior lienholder's interest in these lands is also without merit. Arnoldys ignore RCF's statutory right to redeem in successive foreclosure sales. The landowner always has the final right of redemption under South Dakota law. SDCL § 21-52-7 states that, "... [t]he owner ... shall at all times have the final right to redeem after any and all redemptions ... shall have been made." SDCL § 21-52-7; *VanGorp v. Sieff*, 2001 S.D. 45, ¶8, ¶14, 624 NW2d 712. RCF was ready, willing, and able to redeem from any subsequent foreclosure sales. RCF knew that it would be obligated to pay all of the debts against these agricultural lands and fully intended to do so. The fact that RCF intended to sell these agricultural lands to garner the monies necessary to make redemption and pay all of the debts owed against these lands does not impact RCF's right to redeem, nor does it adjust the equities underlying its restitution claim. Arnoldys cite no authority to the contrary. As indicated previously, the only mistake or unforeseen circumstance that occurred here was the Rabo Court stripping RCF of its rights of

redemption.

Arnoldys state that an invalidating mistake is one that results in a transaction, and in some material respects, is unintended as opposed to one that is merely ill-advised. Arnoldys cite Restatement (Third) of Restitution and Unjust Enrichment § 5 cmt. c. for this proposition. RCF certainly did not intend for its redemption rights to be stripped from it. RCF's action were not ill-advised; RCF redeemed in the FarmPro foreclosure sale and attempted to redeem in the Rabo foreclosure sale. Arnoldys fail to identify with any specificity what RCF mistake was. Arnoldys do not argue that RCF was not entitled to redeem, that RCF paid an insufficient amount of monies to redeem, or the litigation was pending at the time RCF redeemed. Arnoldys merely argue that RCF knew Michael Arnoldy was refusing to accept Mahoney's redemption payment. In any risk analysis, RCF should not be bound by Michael Arnoldy's subjective intent, especially when Michael Arnoldy accepted the monies from RCF to extend the redemption time period. Rec. p. 165. This argument is many steps removed from the type of risk assumption that would eliminate an invalidating mistake. Moreover, Arnoldys have not cited to the record, as required, to support this contention. Arnoldys have not referenced any documents or correspondence to either Finnemans or RCF indicating that they were challenging RCF's right to redeem. Even if Arnoldys' contention had factual support, it would not be the type of risk that this Court determined in *Dowling*, Id., that was an assumption of the risk.

Contrary to Arnoldys' suggestion, this Court's risk analysis in *Dowling*, 2015 S.D. at 50, ¶25, does not apply to unforeseeable, uncertain, and unknown risks occurring in the

future. The circumstances under which RCF redeemed is quite different from the circumstances under which Clement Farms planted the crop in question. In *Dowling*, Id. at 50, ¶25, Midland did not claim that it was coerced into reimbursing Clement Farms or that Dowling Partnerships requested that Midland pay Clement; Dowling Partnerships made their opposition to Clement planting the crop unequivocally known. *Dowling*, Id. at 50, ¶25. This Court in *Dowling*, Id. at 50, ¶25, focused upon the risks surrounding Midland's payment to Clement at the time that the crops were planted, which risk was known, certain, and foreseeable at that time. In *Dowling*, Id., ¶26, this Court relied upon the Wisconsin Supreme Court decision in *Meeme Mutual Home Protection Fire Insurance Co. v. Lorfeld*, 216 NW 507 (Wis. 1927) as an exemplar of the assumption of risk in the unjust enrichment context. In *Meeme*, Id., the insurance company settled an insurance claim knowing that the fire might have been of incendiary origin. At the time RCF redeemed, it did not assume any risk because it had the statutory right to redeem, under SDCL § 21-52-7, and no litigation challenging its right of redemption was pending at the time RCF redeemed.<sup>2</sup> A potential or inchoate risk is quite different than a known risk existing at the time the benefit was conferred. For these reasons, an invalidating mistake occurred as described in Restatement (Third) of Restitution and Unjust Enrichment § 5(2)(b) (2011).

Clearly, RCF did not make an error in judgment under these circumstances that

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<sup>2</sup> RCF would not have assumed a known risk even if Arnoldys had filed their declaratory judgment action challenging Mahoney's redemption at the time RCF redeemed because Arnoldys cite no legal authority, nor is any legal authority known to exist which would invalidate an owner's right of final redemption if a prior redemption is invalidated.

was visible in hindsight, or otherwise, as Arnoldys contend. RCF attempted to redeem, but it's redemption rights were stripped from it against its will. Similarly, RCF did not make a poor choice when it was stripped of its redemption rights. Logic compels that one cannot make a poor choice without an opportunity to choose. RCF did not choose to have its redemption rights taken away; the Rabo Court stripped them from it. In short, RCF took an unjustified beating in the Rabo Case. Due to Arnoldys' greed, they would have RCF take another unjustified beating here based upon unforeseen, uncertain and unknown risks.

Arnoldys' reliance on *Howard v. Turnbull*, 316 SW3d 431 (Mo. App., 2010) is misplaced. RCF did not enter into a risky business venture as plaintiff did in *Howard*, Id., when he loaned money in a housing development project. Here, RCF timely redeemed in an attempt to retain ownership of agricultural lands sold at a foreclosure sale.<sup>3</sup>

Arnoldys' reliance upon *McDonald v. Miners & Merchants Bank, Inc.*, 310 NW2d 591 (S.D., 1981) is also misplaced. *McDonald*, Id., is a contract rescission case. This Court did not allow rescission of the contract when the appellant believed mistakenly that a third party would execute a corrective deed in the future. This Court determined that SDCL § 53-4-9 does not contemplate the existence of a mistake based upon a foreseeable risks. It was not foreseeable that RCF would be stripped of its redemption rights.

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<sup>3</sup>Arnoldys have often argued that RCF's redemption would be untimely if Mahoney's redemption was deemed to be invalid. This contention is without any legal support; this contention also ignores the simple fact that Ann Arnoldy's redemption would then have been untimely and of no effect.

Arnoldys' reliance on *Copper Belle Mining Co. v. Gleeson*, 14 Ariz. 548, 553, 134 P. 285, 287 (1913) is misplaced because the case is distinguishable. In *Copper Belle Mining*, Id., the redemptioner knew that debtors' title was defective. No title issues existed here, nor did RCF know that it would be stripped of its redemption rights.

Contrary to Arnoldys' contention, denying RCF's claim for restitution based upon uncertain, unknown, and unforeseen future risks would eviscerate the doctrine of unjust enrichment. Because business transactions and everyday life are replete with uncertain, unknown and unforeseen future risks, there would be virtually no enrichment that would constitute an unjust enrichment if these risks preclude restitution under the doctrine of unjust enrichment.

Arnoldys delve into their declaratory judgment case in an attempt to cast RCF in a negative light. Mahoney was justified in taking an assignment of judgments for the sole purpose of redeeming property from a foreclosure sale. The court in *Becker v. Friend*, 200 Ill. 75, 65 NE 683 (1902) held that:

A debtor may confess a judgment expressly for the purpose of enabling the judgment creditor to redeem, if there is a bona fide indebtedness existing and due to such creditor. . . .

There was a bona fide indebtedness when the confessed judgments were entered. The debts were owed by Finneman for services rendered by the creditors.

Because Arnoldys have been unjustly enriched, RCF is entitled to restitution of the redemption monies that it paid to Ann Arnoldy, rather than Mahoney's redemption monies, and the monies RCF paid to Michael Arnoldy, which he accepted, of \$822,000.00 to extend the redemption period for one (1) year, less that portion of

\$822,000.00 that Michael Arnoldy used to pay property taxes. The Trial Court noted correctly the redemption monies reimbursed RCF for the Mahoney payment; but it did not reimburse RCF for either the monies paid to Ann Arnoldy to redeem or the monies paid to Michael Arnoldy to extend the redemption time period. Arnoldys' statement that the only person who did not get value in this series of redemption is Michael is ludicrous. Michael's sister, Ann Arnoldy, received agricultural lands worth millions of dollars more than what she paid to redeem in the Rabo and L&L foreclosure proceedings plus the \$1,280,000.00 redemption monies from RCF. Rabo Rec. p. 165. Arnoldys have taken the position in open court that Michael Arnoldy and Ann Arnoldy are acting in unity.

**IV. RCF Is Also Entitled to Reversal Based Upon the Trial Court Restricting RCF's Ability to Conduct Discovery.**

Arnoldys argue incorrectly that this issue is not properly before this Court because its Notice of Appeal did not include the discovery order. Arnoldys are attempting to mislead this Court in making this argument, because no written discovery order was entered by the Trial Court. The Trial Court only made oral pronouncements on the discovery sought by RCF. Arnoldys' reliance on *Mueller v. Cedar Shore Resort, Inc.*, 2002 S.D. 38, 642 NW2d 56 is therefore misplaced.

RCF's discovery was necessary to address the doctrine of unclean hands and the proposition that one seeking equity must do equity.<sup>4</sup> Contrary to Arnoldys' contention,

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<sup>4</sup> This Court applied the doctrine of unclean hands recently to preclude a bank from obtaining an equitable lien when it defrauded the plaintiff; this Court held that defendants do not have the clean hands necessary to assert an argument on an equitable lien. *Stabler v. First State Bank of Roscoe Dakota Corp.*, 2015 S.D. 44, ¶27.



RCF's complaint was that Arnoldys did not answer the discovery questions asked, rather than the answer it received. Arnoldys objected to each and every Interrogatory RCF propounded upon them in both sets of RCF's Interrogatories, except for one Interrogatory. It is also RCF's complaint that the Trial Court unduly restricted RCF's ability to conduct discovery. Contrary to Arnoldys' contention, the fact that the Trial Court granted summary judgment to Arnoldys does not eliminate this error.

**V. Genuine Issues of Material Facts Exist Which Precludes Summary Judgment.**

Arnoldys ignore completely RCF's contention that genuine issues of material facts exist. For this reason alone, the Trial Court's erred in granting summary judgment mandating reversal. Trial Court determined initially that evidence must be presented on whether RCF attempted to redeem in good faith. The Trial Court compounded its error by granting summary judgment when Arnoldys were not entitled to summary judgment as a matter of law for the reasons indicated supra.

**CONCLUSION**

Contrary to Arnoldys' contention, restitution and unjust enrichment are separate legal concepts. This Court and many other courts have utilized their authority to fashion relief under broad concepts of equity when determining that the redemption monies must be refunded in a failed redemption attempt. Arnoldys fail to cite any legal authority which would allow them to keep both the redemption monies and these agricultural lands. Arnoldys' Appellee Brief focused almost exclusively on the doctrine of unjust enrichment, arguing that RCF's redemption did not fail because it received a Certificate

of Redemption. Receiving a Certificate of Redemption is far different from an effective redemption, because RCF no longer owns these agricultural lands. Contrary to Arnoldys' contention, RCF did not act in the face of a known or foreseeable risk. RCF knew that senior liens existed and that it would have to redeem from any subsequent foreclosure of those liens. RCF was ready, willing, and able to do so; it attempted to do so. The unforeseen event which occurred years after RCF redeemed from the FarmPro sale was the Rabo Court stripping RCF of its redemption rights, *sui sponte*, fifteen (15) months after it granted RCF redemption rights. In short, RCF is entitled to restitution of the redemption monies it paid to Arnoldys under either the Trial Court's broad equitable authority, the doctrine of restitution, or the doctrine of unjust enrichment. The Trial Court erred in holding otherwise. For that reason, the Trial Court's judgment should be reversed with instructions to determine if RCF made a good faith attempt to redeem after holding a trial.

### **REQUEST FOR ORAL ARGUMENTS**

RCF respectfully requests that oral arguments be held in this appeal.

### **CERTIFICATION OF VOLUME LIMITATIONS**

The undersigned counsel certifies that this Reply Brief was prepared using a Corel-WordPerfect -Version 10 - word processing software. This brief complies with the type-volume limitations imposed by SDCL § 15-26A-66(b)(2). This Reply Brief contains 4,777 words and 24,673 characters. The above-mentioned word processing system was

used to count the number of words and characters in this Reply Brief.

Dated this 6<sup>th</sup> day of May, 2016.

\_\_\_\_\_/s/ Brian L. Utzman\_\_\_\_\_  
Brian L. Utzman  
Smoot & Utzman, P.C.  
14 St. Joseph Street, Suite 200C  
P.O. Box 899  
Rapid City, SD 57709-0899

--and--

CADWELL SANFORD DEIBERT  
& GARRY LLP  
200 E. 10<sup>th</sup> Street, Suite 200  
P.O. Box 2498  
Sioux Falls, SD 57101-2498  
**Attorneys for RCF**

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing **Reply Brief of Appellants Warrenn Anderson and Rock Creek Farms** upon the person(s) designated herein, on the date shown below, by either electronic mail or First Class mail, to-wit:

Elizabeth S. Hertz  
Vince M. Roche  
Davenport, Evans, Hurwitz & Smith  
PO Box 1030  
Sioux Falls, SD 57101-1030

Robert R. Schaub  
Larson, Sundall, Larson,  
Schaub & Fox  
PO Box 547  
Chamberlain, SD 57325

James P. Hurley  
Bangs, McCullen, Butler,  
Foye & Simmons, LLP  
PO Box 2670  
Rapid City, SD 57709-2670

Steven W. Sanford  
Cadwell Sanford Deibert & Garry  
200 East 10<sup>th</sup> Street, Suite 200  
PO Box 2498  
Sioux Falls, SD 57101-2498

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

Dated this 6<sup>th</sup> day of May, 2016.

Jay A. Alderman, DSA  
Pennington County State Attorney's Office  
300 Kansas City Street, Suite 400  
Rapid City, SD 57701

Stephanie C. Bengford  
US Attorney's Office  
PO Box 238  
Sioux Falls, SD 57101

Armstrong Farms  
Vern Armstrong  
Hope Armstrong  
3341 Airport Road  
Pierre, SD 57501

Haven L. Stuck  
Lynn, Jackson, Shultz & Lebrun  
PO Box 8250  
Rapid City, SD 57709-8250

/s/ Brian L. Utzman  
Brian L. Utzman